D3.3 Interim Report on Prosumer Business Models and IP Framework

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Executive Summary

This deliverable presents the main outcome of T3.4 “Application of IP framework to prosumer business models” of the Möbius Project led by KUL between M9-M30. Hence, the primary objective pursued by KU Leuven in this deliverable is to provide an analysis of the EU copyright legal framework surrounding the initial prosumer business model scenarios presented by IMEC under T3.3 “Prosumer business models and cross-sectoral scalability”. The business model scenarios developed by IMEC under T3.3 mainly concern the creation and making available of literary content by prosumers through online platforms.

This deliverable focuses on the three main copyright implications resulting from the business modeling scenarios outlined by IMEC under T3.3. First, it addresses the issue of copyright ownership, namely determining if prosumers are entitled to benefit from the exclusive rights included in the copyright bundle when they create and make available original or fan-fiction works through online platforms. Second, it assesses the notion of copyright exploitation which refers to the use of existing copyright protected works of other authors by prosumers. Finally, it analyzes the issue of copyright liability arising from providing online platforms that facilitate the creation and making available of literary content by prosumers.

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Terminology and Acronyms

CJEU	*Court of Justice of the European Union*
DSA	*Digital Services Act*
EC	*European Commission*
EU	*European Union*
FP	*Framework Programme*
OCSSPs	*Online content-sharing service providers*
PMB	*Project Management Board*
PMP	*Project Management Plan*
STAB	*Scientific and Technical Advisory Board*
WP	*Work Package*
CDSM Directive	*Digital Single Market Directive*

1. Introduction

Among all the intellectual property rights (IPRs) relevant to the book publishing industry, copyright remains the most significant. Copyright refers to a bundle of economic and moral rights conferred on creators of original literary and artistic works such as books, music, and fine arts. These rights enable creators to be acknowledged and praised for the creation of their works. They also allow creators to control how their works are economically utilized.[1]

Copyright has grown in prominence for the publishing industry in the digital era as publishing shifts from print to digital products.[2] The internet has enabled new business models, including self-publishing by authors, user-generated content, and sponsored content.[3] By using online platforms such as Wattpad, AO3, Fanfiction.net, and Tumblr, prosumers can create and share literary content with readers worldwide. Authors can now avail their works commercially on the internet without many of the barriers present in the print environment. Furthermore, all other traditional publishing value chain members have the opportunity to transform their services to embrace new roles in the digital environment.[4] Publishers are adopting new business models as bookshops go online and libraries compete against search engines.

Authors, publishers, and policymakers must adapt to the rapid change and uncertainty associated with the digital environment. The business model scenarios, developed by IMEC under Task 3.3 “Prosumer business models and cross-sectoral scalability” of the Möbius Project, primarily aim at guiding the actors of the book publishing industry through the challenges and opportunities that digital transformation brings. However, given the significant role that copyright plays in this digital transformation, it is imperative to reflect on the copyright implications of the business models developed by IMEC for the book publishing sector. Consequently, the primary objective pursued by KU Leuven in T3.4 “Application of IP framework to prosumer business models” is to provide an analysis and evaluation of the

[1] Monica Seeber and Richard Balkwill, ‘Managing Intellectual Property in the Book Publishing Industry’ (2007) Geneva: World Intellectual Property Organization, 12 <https://www.wipo.int/publications/en/details.jsp?id=255&plang=EN > accessed 22 July 2022.
[2] World Intellectual Property Organization (WIPO) (2021). From Paper to Platform: Publishing, Intellectual Property and the Digital Revolution. Geneva: WIPO, 17 <https://www.wipo.int/publications/en/details.jsp?id=4576> accessed 22 July 2022.
[3] ibid, 79.
[4] ibid, 78.

copyright legal framework surrounding the initial prosumer business model scenarios presented by IMEC under T3.3.

In a copyright law context, three main implications of the creation and making available of literary content through emerging digital prosumer business models in the book publishing industry should be considered. First, it is essential to address the issue of copyright ownership, namely determining who is entitled to benefit from the exclusive rights granted. Second, the notion of copyright exploitation which refers to the use of exclusive rights included in copyright by third parties should be assessed. Finally, it is necessary to analyze the issue of copyright liability arising from providing online prosumer business models that facilitate the creation and making available of literary content.

This deliverable provides a theoretical interim overview of these three main implications by following a descriptive methodology based on legal doctrinal research with a specific focus on EU copyright law. This deliverable, hence, derives its findings from an extensive review of the relevant legislative sources of EU copyright law, such as EU Directives, Regulations, Decisions, and Acts, as well as the case law of the Court of Justice of the European Union (the CJEU). The analysis also covers prominent inputs from scholarly literature and the non-binding legal sources of EU Law, such as opinions, recommendations, communications, resolutions, and white and green papers. In the event that certain aspects of EU copyright law are not harmonized, examples from the national laws of selected EU Member States (the Member States) are presented. Additionally, each chapter of this deliverable provides an introductory insight into the relevant principles arising from the international copyright law, to the extent that international treaties provide guidance.

2. Copyright implications of prosumer business models in the book publishing industry

2.1. Prosumer business models scenarios presented by IMEC

In this deliverable, the primary objective pursued by KU Leuven is to provide an interim report regarding the copyright legal framework surrounding the initial prosumer business model scenarios presented by IMEC under T3.3 “Prosumer business models and cross-sectoral scalability”. For this reason, it is essential to briefly summarize IMEC’s inputs on the emerging prosumer business model scenarios in the book publishing industry before proceeding with the subsequent chapters of this deliverable. In this context, it is important to note that the business model scenarios shown below are of preliminary nature, and the eventual outcome of T.3.3 will be reported by IMEC as part of D.3.5, due by M30.

As the leader of T3.3, IMEC provided the following illustration concerning the creation and making available of literary content through prosumer business models on the internet:

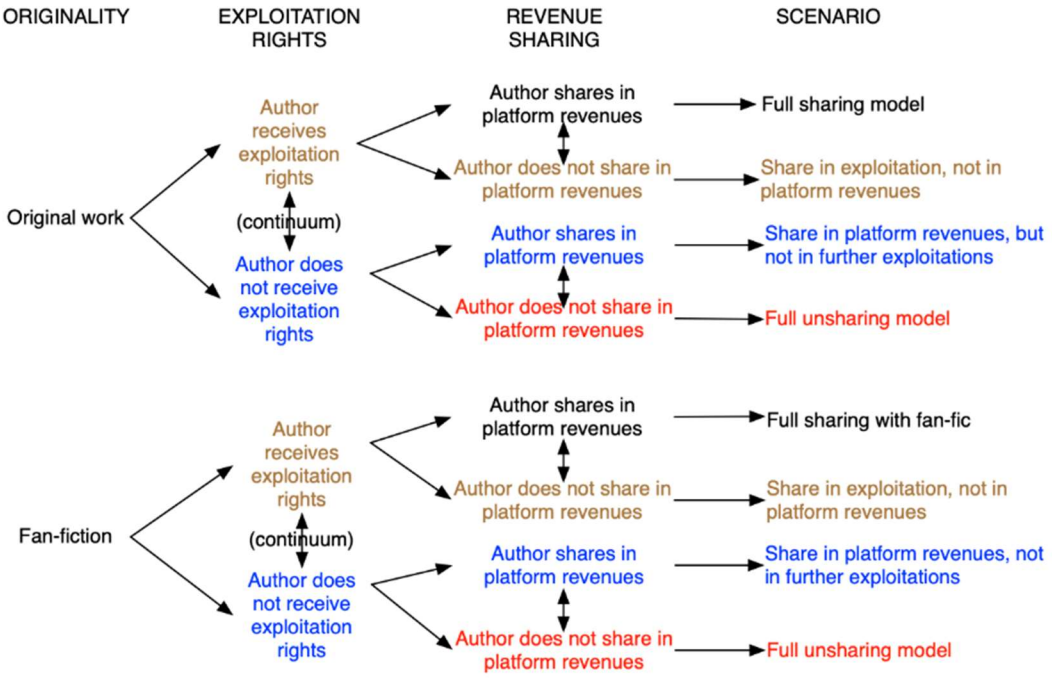

Figure 1. Prosumer Business Model Scenarios by Olivier Braet of IMEC

The illustration (Figure 1) provided by IMEC, shows the possible scenarios resulting from the creation and making available of literary content by prosumers through online platforms from a business modelling perspective. As presented in Figure 1, prosumers can create and make available original works as well as fan-fiction content through online platforms. Regarding the possible outcomes of the creation and making available of literary content by prosumers, IMEC stressed that there are three dimensions which, when combined, create the permutations of scenarios shown in Figure 1: (1) whether the prosumer creates **fan-fiction or original content** through the online platform, (2) whether the prosumer receives **exploitation rights**, (3) whether the prosumer receives **remuneration** for the exploitation of the work.

From a copyright law perspective, the three dimensions of prosumer business modelling outlined by IMEC result in three main implications that should be analyzed. First, it is essential to address the issue of copyright ownership, namely determining if prosumers are entitled to benefit from the exclusive rights included in the copyright bundle. Second, the notion of copyright exploitation which refers to the use of exclusive rights included in copyright by prosumers should be assessed. Finally, it is necessary to analyze the issue of copyright liability arising from the provision of online prosumer platforms that facilitate the creation and making available of literary content.

2.2. Basics of Copyright

Before delving deeper into the notions of copyright ownership, copyright exploitation, and copyright liability, it is necessary to provide some insight into the basics of copyright as an IPR. Copyright refers to a bundle of economic and moral rights conferred on creators of original literary and artistic works such as books, music, and fine arts. Copyright law protects only original expressions of ideas, not the ideas themselves.[5] Hence, abstract ideas towards the

[5] Monica Seeber and Richard Balkwill,'Managing Intellectual Property in the Book Publishing Industry' (2007) Geneva: World Intellectual Property Organization, 12 <https://www.wipo.int/publications/en/details.jsp?id=255&plang=EN > accessed 22 July 2022.

creation of a literary or artistic work are not eligible for copyright protection before the author expresses them with their personal choice and arrangement of words.[6]

The exclusive rights provided by copyright enable creators to monetise and to be acknowledged for the creation of their works.[7] Hence, among all the IPRs relevant to the book publishing industry, copyright remains the most significant. Publishers must secure authorization from the author of a copyright-protected manuscript to lawfully reproduce and sell the copies of that work in the EU unless they can rely on exceptions and limitations to copyright protection. Therefore, having a sound understanding of copyright is essential for the stakeholders of the book publishing industry to skillfully and strategically optimize their operations.[8]

Several international conventions, including the Berne Convention[9] and the WIPO Copyright Treaty[10], assure that copyright incentives authors and publishers to invest in creating literary and other works.[11] Harmonization of copyright norms in the EU has been of high priority to the EU Legislature, which resulted in the adoption of several Directives[12].

Principle of territoriality - The principle of territoriality, which stipulates that a country's prescriptive jurisdiction ends at its borders, is the guiding principle of copyright law.[13] In accordance with this principle, copyright and related rights are protected within the borders of

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[6] ibid, 12.
[7] ibid.
[8] ibid, 9
[9] Berne Convention for the Protection of Literary and Artistic Works (adopted 14 July 1967, entered into force 29 January 1970) 828 UNTS 221.
[10] WIPO Copyright Treaty (adopted 20 December 1996, entered into force 6 March 2002) 2186 UNTS 121.
[11] World Intellectual Property Organization (WIPO) (2021). From Paper to Platform: Publishing, Intellectual Property and the Digital Revolution. Geneva: WIPO, 12 <https://www.wipo.int/publications/en/details.jsp?id=4576> accessed 22 July 2022.
[12] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10; Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2010 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2010] OJ L 178/1 (Soon to be replaced by the Digital Services Act); Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L 195/16; Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases OJ L 77, 27.3.1996, p. 20–28; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) OJ L 376, 27.12.2006, p. 28–35.
[13] Paul Goldstein and Bernt Hugenholtz, 'International Copyright' (Oxford University Press 2019), 90.

a country and governed under its national laws. In *Lagardere*,[14] the European Court of Justice (CJEU) has expressly confirmed that copyright and related rights possess a territorial nature, even within the EU.[15] The Court, hence, held that, in accordance with international law and the EC Treaty, copyright and related rights are of "a territorial nature and, moreover, domestic law can only penalise conduct engaged in within national territory."[16]

Economic rights - Copyright is often referred to as a bundle of rights because once an original literary work is created, the author immediately becomes the sole owner of a number of moral and economic rights to authorize any of the acts covered by copyright protection.[17] The economic rights covered by copyright include the reproduction, distribution, translation, adaptation, performance, broadcasting, communication to the public, and making it available to the public of that work.[18] As regards the creation and making available of literary content by prosumers on the internet, the most relevant economic rights are the right of reproduction, the right of adaptation, the right of communication to the public, and the right of making available to the public.

The right of reproduction provides the copyright holders with the exclusive right to authorize or prohibit the production of copies of their works.[19] At the multilateral level, the right of reproduction is enshrined in Article 9(1) of the Paris Text of the Berne Convention. In accordance with this provision, "authors of literary and artistic works protected by this Convention shall have the exclusive right of authorizing the reproduction of these works, in any manner or form." At the EU level, Article 2 of the Information Society Directive[20] provides that the Member States shall provide the copyright holders with the exclusive right to authorize or

[14] Lagardère Active Broadcast v. Société pour la Perception de la rémunération équitable (SPRE) andOthers, European Court of Justice July 14, 2005, case C- 192/ 04, para. 46.
[15] Paul Goldstein and Bernt Hugenholtz, 'International Copyright' (Oxford University Press 2019), 90 (citing Lagardère Active Broadcast v. Société pour la Perception de la rémunération équitable (SPRE) and Others, European Court of Justice July 14, 2005, case C- 192/ 04, para. 46).
[16] İbid.
[17] World Intellectual Property Organization (WIPO) (2021). From Paper to Platform: Publishing, Intellectual Property and the Digital Revolution. Geneva: WIPO, 110 <https://www.wipo.int/publications/en/details.jsp?id=4576> accessed 22 July 20202.
[18] ibid.
[19] Paul Goldstein and Bernt Hugenholtz, 'International Copyright' (Oxford University Press 2019), 286.
[20] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10.

prohibit direct or indirect, temporary or permanent reproduction of their works by any means and in any form.

The right of adaptation provides the copyright holders with the exclusive right to authorize or prohibit the creation of derivative works based on their copyright-protected works. Hence, this right is highly relevant, especially in the context of the creation of fan-fiction content by prosumers on the internet. At the international level, Article 12 of the Berne Convention grants a distinct right of adaptation by providing that authors have the exclusive right to authorize the creation of derivative works based on their original works, such as adaptations, arrangements, and other modifications of their works. In the meaning of Article 12 of the Berne Convention, an adaptation can be said to mean the transformation of a work from one format to another. At the same time, arrangement implies modification within the same format, such as creating an orchestral arrangement of a popular song.[21] In some jurisdictions, the right for creating adaptations based on copyright-protected works is considered a part of the right of reproduction. As regards the right of adaptation, EU copyright law is mostly unharmonized.[22] Although the Software and Database Directives harmonize the right of adaptation for their respective subject matter, the Information Society Directive only establishes the rights of reproduction, communication, and making available to the public, and distribution without expressly mentioning a distinct right of adaptation.[23] Hence, it is subject to debate in the scholarly literature as to whether the right of reproduction provided in Article 2 of the Information Society Directive also covers the right of adaptation.[24] This debate will be further explored in the following sections.

The right of communication to the public provides the copyright holders with the exclusive right to authorize or prohibit any public transmission of their copyright-protected works through intangible means. The right of making available to the public refers to the public transmission of copyright-protected subject matter in a manner that it can be accessed from anywhere and anytime by the recipients. Hence, all the acts of making available to the public are also

[21] ibid.
[22] Jongsma, Daniel, Parody after Deckmyn. A Comparative Overview of the Approach to Parody Under Copyright Law in Belgium, France, Germany, and the Netherlands. (December 22, 2016). 48 International Review of Intellectual Property and Competition Law 652, 660.
[23] ibid.
[24] Bernt Hugenholtz and Martin Senftleben. Fair use in Europe: in search of flexibilities, Institute for Information Law/VU Centre for Law and Governance, 2011, 26.

considered an act of communication to the public. Consequently, the right of communication to the public is a wider concept that comprises the right of making available to the public. Since the rights of communication to the public and making available public cover the sharing of copyright-protected on the internet, they are of particular importance in the context of the creation of literary content by prosumers through online platforms. At the multilateral level, these two rights are defined in various forms by different sources of international copyright law.[25] Article 11 of the Berne Convention provides the authors of dramatic, dramatic-musical, and musical works with the exclusive right of authorizing (1) the public performance of their works, including such public performance by any means or process, and (2) any communication to the public of the performance of their works. Likewise, Article 14 of the Berne Convention grants the authors of literary or artistic works the exclusive right of authorizing the public performance and communication to the public by wire the cinematographic adaptations or reproductions of their works. In addition, Article 8 of the WIPO Copyright Treaty, without prejudice to Articles 11 and 14 of the Berne Convention, provides the authors of literary and artistic works "with the exclusive right of authorizing any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them".[26]

At the EU level, as a result of the inclusion of several subject-matter-specific rights in EU copyright law, the development of the communication to the public right has been fragmentary.[27] Under EU copyright law, the concept of "communication to the public" appears in four different directives.[28] Article 2 of the Satellite and Cable Retransmission Directive,[29] Article 8 of the Rental and Lending Right Directive[30] and Article 5(d) of the Database Directive[31] provide specific rights of communication to the public with respect to the subject matter that

[25] Paul Goldstein and Bernt Hugenholtz, 'International Copyright' (Oxford University Press 2019), 302.
[26] WIPO Copyright Treaty Art. 8.
[27] Justin Koo, 'The Right of Communication to the Public in EU Copyright Law' (Hart Publishing 2019), 46.
[28] ibid.
[29] Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission OJ L 248, 6.10.1993, p. 15–21.
[30] Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) OJ L 376, 27.12.2006, p. 28–35.
[31] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases OJ L 77, 27.3.1996, p. 20–28.

they concern.[32] Finally, Article 3(1) of the Information Society Directive provides the authors with the exclusive right of communication to the public, including the making available to the public of copyrighted works.[33] As regards the creation and sharing of literary content by prosumers through online platforms in the EU, the exclusive right of communication to the public provided by Article 3 (1) of the Information Society Directive is of particular relevance. Here, it should be noted that although Article 3 (1) of the Information Society Directive provides for the exclusive rights of communication to the public and making available to the public, it does not define the concept of communication to the public. Hence, the concept of communication to the public in EU copyright law is predominantly defined through the case law of the CJEU. The basic principles concerning the concept of communication to the public in the EU will be further analyzed in the subsequent chapters.

The right of distribution provides the copyright holders with the exclusive right to authorize or prohibit the distribution of their copyright-protected works and their tangible copies through sale or any other means possible. The right of distribution plays a very significant role in the traditional value chain of the book publishing industry in the analogue world since the lawful sale of the tangible copies of copyright-protected books is only possible if the publishers secured authorization from the authors. Yet, international copyright law provides minimal guidance as regards the scope of the right of distribution.[34] At the EU level, the right of distribution is harmonized through Article 4 (1) of the Information Society Directive which obliges the Member States to provide authors, in respect of the original of their works or of copies thereof, with the exclusive right to authorize or prohibit any form of distribution to the public by sale or otherwise. However, it should be underscored that the right of distribution provided for in Article 4 (1) of the Information Society Directive only covers the tangible copies of copyright-protected works that are put to sale.[35] Hence, the sale of digital copies such as e-books is not covered by the right of distribution.[36] Consequently, the right of distribution is not relevant in the context of the creation and sharing of literary content by prosumers through online platforms.

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[32] Justin Koo, 'The Right of Communication to the Public in EU Copyright Law' (Hart Publishing 2019), 46.
[33] ibid.
[34] Paul Goldstein and Bernt Hugenholtz, 'International Copyright' (Oxford University Press 2019), 288.
[35] See, Case C-263/18 *Nederlands Uitgeversverbond and Groep Algemene Uitgevers v Tom Kabinet Internet BV and Others* ECLI:EU:C:2019:1111, para. 72.
[36] ibid.

Moral Rights- Copyright ownership also provides the author with *moral rights* such as the right of paternity which refers to the right to claim authorship of the work and the right of integrity which covers the right not to permit any distortion, mutilation, or other modification of the work, which would be detrimental to the honor or reputation of the author.[37] Although moral rights are left unharmonized by the EU copyright law, they are particularly relevant in the context of using a copyright-protected work for the creation and making available of literary content through online platforms. According to Recital 19 of the Information Society Directive, moral rights remain outside the scope of the Information Society Directive and rightholders should exercise their moral rights in accordance with the legislation of their respective Member States, the Berne Convention for the Protection of Literary and Artistic Works, and the WIPO Copyright Treaty and Performances and Phonograms Treaty. As a consequence, moral rights are left outside of the scope of the exceptions and limitations provided by Article 5 of the Information Society Directive as well as the CJEU's jurisdiction. Hence, moral right infringements are assessed in accordance with the national laws of the member states on a case-by-case basis.[38] In addition, although copyright as a whole can be transferred in some of the Member States as a part of the rights clearance process, the author may retain some control over the use of the work by virtue of her moral rights which are untransferable.[39] In most Member States, however, authors are permitted to waive their moral rights under strict conditions, which means that they promise not to exercise them.

[37]Monica Seeber and Richard Balkwill, 'Managing Intellectual Property in the Book Publishing Industry' (2007) Geneva: World Intellectual Property Organization, 14 <https://www.wipo.int/publications/en/details.jsp?id=255&plang=EN > accessed 22 July 20202.
[38] Giacomo Bonetto, 'Internet memes as derivative works: copyright issues under EU law' (2018) 13 Journal of Intellectual Property Law & Practice 989,994.
[39] Alain Strowel and Bernard Vanbrabant, 'Copyright Licensing - a European view' In Research Handbook on Intellectual Property Licensing by J. de Werra (Edward Elgar 2013) 29, 35.

2.3. Copyright ownership

According to the business model scenarios outlined by IMEC, prosumers can create original as well as fan-fiction literary works by using the emerging business models in the digital environment. Such business models have already been implemented in today's world by online platforms, such as AO3, Fanfiction.net, Wattpad, and Tumblr. The creation of a literary manuscript through an online platform by prosumers first and foremost gives rise to the question of copyright ownership. Therefore, this deliverable should first clarify the notion of copyright ownership. In the following section, the notion of copyright ownership in accordance with the international and EU copyright legal framework is analyzed. This analysis essentially covers the copyright ownership of original works created by prosumers and fan fiction works created by prosumers respectively.

2.3.1. Copyright ownership of original works authored by prosumers

Initial ownership and authorship – According to international copyright law, the author of an original work created on the internet is typically considered to be the first owner of the copyright, as is the case in the analog world.[40] This principle is commonly known as the "creator doctrine."[41] Although the creator doctrine provides that the author of an original work is the first owner of the copyright, international treaties do not contain a great deal of guidance as regards the question of authorship.[42] A work's "author" is not defined by the Berne Convention, giving the liberty to contracting parties to provide such a definition.[43] However, it is suggested in the scholarly literature that the notions of "author" and "authorship" for the purposes of the Berne Convention are to be understood as referring to the natural person who created the work.[44] Establishing a general presumption of authorship, Article 15(1) of the Berne Convention

[40] Paul Goldstein and Bernt Hugenholtz, 'International Copyright' (Oxford University Press 2019), 229.
[41] ibid.
[42] ibid 228.
[43] ibid.
[44] ibid.

provides that “in the absence of proof to the contrary” the author of a copyright-protected literary or artistic work shall be regarded as the person whose name appears on the work in the usual manner.[45]

The notions of authorship and copyright ownership remain unharmonized in the EU.[46] Except for audiovisual works and computer programs, the EU Directives do not extensively address the issue of authorship.[47] Article 2 of the Software Directive[48] defines the author of a computer program as the natural person or group of natural persons who created the program or, where the legislation of the member state permits, the legal person designated as the rights holder by that legislation.[49] Like Berne Convention, the Enforcement Directive[50] also presumes that the author of the work is the “person whose name appears on the work in the usual manner”.

Due to the lack of complete harmonization, the national approaches of the Member States towards the notions of authorship and copyright ownership show some differences. Based on the civil law concept of ‘droit d’auteur’ (author’s rights) that is followed by the majority of the Member States, an author of a work is considered to be the natural person who created that work.[51] Likewise, in common law jurisdictions, the person who created a literary or artistic work is considered to be the author of it. However, according to common law principles, a legal entity taking responsibility and initiative for the creation of cinematographic works or broadcasts may also be acknowledged as the author of the work.[52]

The requirement of originality - It should be noted that copyright law protects only original expressions of ideas, not the ideas themselves.[53] Hence, abstract ideas towards the creation of a literary manuscript are not eligible for copyright protection before the author expresses

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[45] ibid.
[46] Antoon Quaedvlieg, ‘Part III: The Gaps in European Copyright Harmonization, Chapter 10: Authorship and Ownership: Authors, Entrepreneurs, and Rights’, in Tatiana-Eleni Synodinou, Codification of European Copyright Law, Information Law Series (29) (© Kluwer Law International; Kluwer Law International 2012) 195, 200.
[47] Paul Goldstein and Bernt Hugenholtz, ‘International Copyright’ (Oxford University Press 2019), 230.
[48] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs [2009] OJ L 111/16.
[49] Paul Goldstein and Bernt Hugenholtz, ‘International Copyright’ (Oxford University Press 2019), 230.
[50] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights [2004] OJ L 195/16, article 5.
[51] Scollo Lavizzari C and Viljoen R, ‘Cross-Border Copyright Licensing: Law and Practice’ (Cheltenham : Edward Elgar Publishing 2018), 71.
[52] ibid.
[53]Monica Seeber and Richard Balkwill, ‘Managing Intellectual Property in the Book Publishing Industry’ (2007) Geneva: World Intellectual Property Organization, 12 <https://www.wipo.int/publications/en/details.jsp?id=255&plang=EN > accessed 22 July 20202.

them with their personal choice and arrangement of words.[54] In the EU, a work must be original in order to qualify for copyright protection.[55] The notion of originality is fully harmonized in the EU through the case law of the CJEU.[56] Following the landmark decision of the CJEU in *Infopaq*[57] and its subsequent case law,[58] a work is considered "original" if it resembles the "author's own intellectual creation".[59] Hence, "originality" can be said to arise from the unique elements embodied in a work that resembles the author's personality or personal touch.[60]

Copyright ownership of joint works - The collaboration of two or more authors in creating a single work results in the concept of co-authorship and, hence, raises the question of co-ownership of copyright.[61] The creation and making available of joint manuscripts through the collaboration of multiple prosumers is highly common in the digital environment. Although international treaties remain silent on the notion of copyright co-ownership, the collaborating authors of an original work are usually regarded as co-authors and, thus, co-owners of the copyright in most jurisdictions.[62] It is a classic example of a joint work when two authors collaborate on a text, each contributing their own ideas and expression, along with text and editorial modifications.[63] It is generally accepted that in order for a work to qualify as joint or collaborative, each contributor must have brought their personal creative touch to that work.[64]

As regards the concept of co-authorship, the EU copyright law is completely unharmonized.[65] Hence, this concept should be assessed based on the national copyright laws of the Member States. For instance, in Italy, joint authorship can be established once two requirements have been met. First, the collaborating authors' contributions to the work must be indistinguishable

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[54] ibid.
[55] ibid, 14.
[56] Tatiana-Eleni Synodinou, Philippe Jougleux, Christiana Markou and Thalia Prastitou-Merdi, 'EU Internet Law in the Digital Single Market' (Springer Cham 2021), 183.
[57] Case C 5/08 Infopaq International A/S v Danske Dagblades Forening [2009] ECLI:EU:C:2009:465.
[58] Case C-393/09 Bezpečnostní softwarová asociace – Svaz softwarové ochrany v Ministerstvo kultury [2011] ECLI:EU:C:2010:816, para 45; Case C-145/10 Eva-Maria Painer v Standard Verlags GmbH [2012] ECLI:EU:C:2013:138, para 87.
[59] Tatiana-Eleni Synodinou, Philippe Jougleux, Christiana Markou and Thalia Prastitou-Merdi, 'EU Internet Law in the Digital Single Market' (Springer Cham 2021), 183.
[60] ibid.
[61] Thomas Margoni and Mark Perry, 'Ownership in Complex Authorship: A Comparative Study of Joint Works' (2012) 34 European Intellectual Property Review 22, 23.
[62] Paul Goldstein and Bernt Hugenholtz, 'International Copyright' (Oxford University Press 2019), 232.
[63] ibid.
[64] ibid.
[65] Antoon Quaedvlieg, 'Part III: The Gaps in European Copyright Harmonization, Chapter 10: Authorship and Ownership: Authors, Entrepreneurs, and Rights', in Tatiana-Eleni Synodinou, Codification of European Copyright Law, Information Law Series (29) (© Kluwer Law International; Kluwer Law International 2012) 195, 195.

and inseparable as a minimum condition.[66] Second, the authors must explicitly agree that the joint work is not a simple compilation of two individual pieces brought together, "but a single new entity that represents something more than the mere sum of the initial contributions, first and foremost in the mind of its authors".[67] In Germany, in order for a work to qualify as a joint work, it is required that it is not only created jointly by several persons but also the authors' individual "contributions cannot be separately exploited".[68] However, German law does not require the collaborators to contribute to the work simultaneously.[69]

2.3.2. Copyright ownership of fan-fiction works created by prosumers

One of the most important components of the business model scenarios presented by IMEC is the creation of fan-fiction works through online platforms. The term "fan-fiction work" refers to the works of creativity that are developed based on existing copyright-protected works of other authors, usually within the context of a larger fan community.[70] As such, fan-fiction works are included in the wider concept of user-generated content (UGC) that comprises all the contents that are digitally created outside of professional routines and in a context requiring a certain level of creativity, in which a preexisting work was taken as a starting point and modified in some way.[71] Online platforms, such as AO3, Fanfiction.net, and DeviantArt, enable millions of prosumers to create and share fan-fiction literary works inspired by popular novels, for instance, the Lord of the Rings and Harry Potter. To illustrate, the number of fan-fiction works created on the internet based on Harry Potter is estimated to have exceeded hundreds of thousands.[72] In most cases, prosumers create fan-fiction works as an expression of belonging to specific fan communities that are called fandoms, regardless of whether the copyright holders of the original work have granted permission for the use of their works.[73] Hence, the

[66] Thomas Margoni and Mark Perry, 'Ownership in Complex Authorship: A Comparative Study of Joint Works' (2012) 34 European Intellectual Property Review 22, 24.
[67] ibid.
[68] Paul Goldstein and Bernt Hugenholtz, 'International Copyright' (Oxford University Press 2019), 234.
[69] ibid.
[70] Raizel Liebler, 'The SAGE Handbook of Intellectual Property' (SAGE Publications Ltd 2015), 391.
[71] João Pedro Quintais, 'Copyright in the Age of Online Access: Alternative Compensation Systems in EU law, Information Law Series', Volume 40 (© Kluwer Law International; Kluwer Law International 2017), 93.
[72] Aaron Schwabach, 'The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright' (2009) 70 U Pitt L Rev 387,395.
[73] Raizel Liebler, 'The SAGE Handbook of Intellectual Property' (SAGE Publications Ltd 2015), 391.

use of online platforms by prosumers to create and give access to fan-fiction works often results in legal conflicts between platform providers, prosumers, and rightholders.[74]

Derivative works - The question of copyright ownership of fan-fiction works created by prosumers, firstly, requires gaining a thorough understanding of the notion of "derivative works". A derivative work is any work that is created by adapting or transforming an existing original into a new work of authorship.[75] Hence, a large variety of UGC and the fan-fiction works created by prosumers, such as fan-fiction stories or screenplays based on existing novels, are considered derivative works as they draw inspiration from and are based upon the original creations of other authors.

Since the creation of derivative works involves the use of an existing literary manuscript, discussing the copyright ownership of a derivative work goes hand-in-hand with the notion of copyright exploitation which refers to the use of exclusive rights by third parties. Creating derivative works based on existing copyright-protected works in the form of fan-fiction content without the consent of the rightholders would usually constitute a copyright infringement in the EU unless an exception or limitation applies. A copyright-infringing fan-fiction work cannot be eligible for copyright protection on its own. Although the majority of prosumers create fan-fiction works based on copyrighted works without the intention of making any financial gains, this would not make a difference in terms of causing copyright infringement. Hence, prosumers who create fan-fiction works based on existing copyright-protected works of other authors without securing authorization or relying on an exception or limitation shall not claim copyright ownership for their creations. However, it should be underscored that there is a difference between the lawfulness of the creation of a derivative work and the copyright eligibility of that work. Regardless of whether prosumers create fan-fiction content by lawfully using a copyright-protected work, they cannot claim ownership of the fan-fiction works unless the fan-fiction works themselves are original.

[74] Aaron Schwabach, 'The Harry Potter Lexicon and the World of Fandom: Fan Fiction, Outsider Works, and Copyright' (2009) 70 U Pitt L Rev 387,395.
[75] Stephen Fishman, 'The Copyright Handbook: What Every Writer Needs to Know' (Nolo 2021), 6.

As established in Section 1.2, the creation of derivative works based on a copyright-protected work is covered by the right of adaptation or the right of reproduction, depending on the jurisdiction. The exact boundaries between these two rights are further disputed.

The distinction between the right of adaptation and the right of reproduction - As argued in the scholarly literature, the right of reproduction and the right of adaptation can be distinguished by assuming that the former entails copying the particular shape of a work determined by the author, while the latter encompasses changes to the underlying corpus mysticum (intellectual substance) of a work.[76] International copyright law also makes a distinction between the right of reproduction and the right of adaptation.[77] At the multilateral level, the Berne Convention establishes a general right of reproduction in Article 9(1), which covers the reproduction of a protected work in any form and at any time.[78] However, Article 12 of the Berne Convention grants a right of adaptation by providing that authors have the exclusive right to authorize the creation of derivative works based on their original works such as adaptations, arrangements, and other modifications of their works.

At the EU level, it is subject to debate in the scholarly literature as to whether the right of reproduction provided in Article 2 of the Information Society Directive also covers the right of adaptation. There is a significant importance to making this distinction. In particular, if the right of reproduction, provided by Article 2 of the Information Society Directive, covered the right of adaptation, the Member States would be obliged to comply with the conditions and requirements outlined in Article 5 of the Information Society Directive when implementing exceptions or limitations concerning the right of adaptation. Prior to the recent decisions made by the CJEU, it was long argued in the scholarly literature that regulating the right of adaptation is left to the national lawmaking of the Member States.[79] It was hence asserted that the Information Society Directive can be said to cover only the literal reproduction of protected works in accordance with the distinction made by the Berne Convention and the theoretical

[76] Bernt Hugenholtz and Martin Senftleben. Fair use in Europe: in search of flexibilities, Institute for Information Law/VU Centre for Law and Governance, 2011, 26 (citing J.H. Spoor, 'De twee betekenissen van het woord 'verveelvoudigen' in de Auteurswet 1912', Weekblad voor Privaatrecht, Notaris-ambt en Registratie 105 (1974) 165, 167).
[77] Bernt Hugenholtz and Martin Senftleben. Fair use in Europe: in search of flexibilities, Institute for Information Law/VU Centre for Law and Governance, 2011, 26.
[78] ibid.
[79] Maria-Christina Janssens, Arina Gorbatyuk, Sonsoles Pajares Rivas, 'Copyright Issues on the use of images on the Internet' In Research Handbook on Intellectual Property and Cultural Heritage (Edward Elgar 2022) 191, 203.

difference between the activities of mere copying and changing the intellectual substance of a work.[80] However, Senftleben argues that the CJEU's decisions in *Painer*[81] and *Pelham*,[82] signal the harmonization of the adaptation right through the concept of partial reproduction.[83] Under this concept, when elements of a pre-existing work that is protected by copyright are incorporated into a derivative work (as is the case for the creation of fan-fiction works based on existing content), the integration of copyrighted source material inevitably results in an infringing act of partial reproduction, regardless of whether the secondary author has added any new creative elements to the work.[84] Hence, the creation of a derivative fan-fiction work based on a copyright protected work would automatically fall in the scope of the harmonized right of reproduction provided in Article 2 of the Information Society Directive and be subject to the exceptions and limitations outlined in Article 5 of the Information Society Directive.

Circumstances under which fan-fiction works can be legally created based on existing copyright protected works and made available online will be analysed in the following section.

2.4. Copyright Exploitation

2.4.1. Rights Clearance

As established above, the unauthorized use of existing copyright-protected works by prosumers for the creation and sharing of other literary content through online platforms results in copyright infringement unless an exception or limitation to copyright protection applies. The term "right clearance" refers to the process of obtaining permission to reuse the work of another author.[85] The authorization to use a copyright-protected work can be given in the form of a license or through the transfer of rights. Hence, in order to lawfully use an existing copyright-

[80] Bernt Hugenholtz and Martin Senftleben. Fair use in Europe: in search of flexibilities, Institute for Information Law/VU Centre for Law and Governance, 2011, 26.
[81] Case C-145/10 Painer v Standard Verlags [2011] ECLI:EU:C:2011:798.
[82] Case C-476/17 Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben [2019] ECLI:EU:C:2019:624
[83] Martin Senftleben, 'Flexibility Grave – Partial Reproduction Focus and Closed System Fetishism in CJEU, Pelham' (2020) 51 IIC, 751, 763. Also see, Eleonora Rosati, 'Copyright in the EU: In Search of (In)Flexibilities' (2014) 9(7) Journal of Intellectual Property Law & Practice 585, 596.
[84] Ibid.
[85] ibid, 196.

protected work, prosumers need to enter into a license or assignment agreement with the copyright holders of that work.

Licensing and assignment of copyright in the EU - In the EU, copyright licensing rules vary notably among the Member States due to the lack of notable harmonization.[86] Although the CDSM Directive provides new steps towards harmonization as regards the licensing of rights in the digital environment such as measures to ensure fair remuneration for copyright holders, the rules applicable to copyright licensing are generally defined in the contract laws of the Member States.[87] The lack of uniform contract law within the EU results in differences in contract law between the Member States, despite the fact that most of those countries follow a civil law tradition.[88]

Assignment refers to the transfer of rights in an exclusive and conclusive manner.[89] A license is an agreement between two parties that permits the use of the copyright subject matter in accordance with special terms. Licenses can be granted in the form of an exclusive or non-exclusive license.[90] The term exclusive license refers to the permission to use on an exclusive basis of one or more, but not all, of the exclusive rights of the copyright owner.[91] A non-exclusive license is a license that allows the licensee to exercise one or more of the copyright owner's rights on a non-exclusive basis, meaning that the copyright holder may also grant licenses to other parties on similar terms and of similar scope.[92] It should be noted, however, that the terms of the license can be very broad (for all rights, for the entire world, for the entire duration of the copyright, etc.), resulting in an insignificant distinction between such a "total" license and an assignment.[93] Therefore, it is sometimes difficult to distinguish between an exclusive license and an assignment.[94]

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[86] Alain Strowel and Bernard Vanbrabant, 'Copyright Licensing - a European view' In Research Handbook on Intellectual Property Licensing by J. de Werra (Edward Elgar 2013) 29, 34.
[87] Francisco Javier Cabrera Blázquez, Maja Cappello, Gilles Fontaine, Julio Talavera Milla, Sophie Valais, 'Copyright licensing rules in the EU' (2020) European Audiovisual Observatory, 23 <https://rm.coe.int/iris-plus-2020en1/16809f124b > accessed 14 August 2022.
[88] Alain Strowel and Bernard Vanbrabant, 'Copyright Licensing - a European view' In Research Handbook on Intellectual Property Licensing by J. de Werra (Edward Elgar 2013) 29, 29.
[89] ibid 34.
[90] ibid.
[91] Stephen Fishman, 'The Copyright Handbook: What Every Writer Needs to Know' (Nolo 2021), 193.
[92] ibid.
[93] Alain Strowel and Bernard Vanbrabant, 'Copyright Licensing - a European view' In Research Handbook on Intellectual Property Licensing by J. de Werra (Edward Elgar 2013) 29, 34.
[94] Stephen Fishman, 'The Copyright Handbook: What Every Writer Needs to Know' (Nolo 2021), 193.

Generally, copyright licenses are more common than copyright assignments.[95] However, in the traditional value chain of the book publishing industry, publishing contracts are also often signed in the form of an assignment that covers the transfer of the bundle of rights included within the copyright of the author to the publisher.[96] There are certain Member States, such as Germany and Austria, in which copyright may only be licensed. This means that the author will always retain some residual control over how their work is exploited, while the licensee only has the "right to use" the work in certain ways.[97]

It should be underscored that the assignment of copyright does not work in the same manner as tangible property where the buyer is no longer subject to a seller's control once the transaction has taken place.[98] Although copyright as a whole can be transferred in some of the Member States, the author still retains some control over the use of the work by virtue of her moral rights which are untransferable.[99] In most Member States, however, authors are permitted to waive their moral rights under strict conditions, which means that they promise not to exercise them.

Another distinguishing feature of copyright licensing is that the assignee or licensee usually has an obligation to exploit the work.[100] In some Member States, such as Germany and the Netherlands, the licensor or assignor retains the power to revoke the agreement if the licensee or assignee refrains from the timely and diligent exploitation of the granted rights.[101] Inspired by these precedents, Article 22 of the CDSM Directive introduced an obligation for the Member States to provide for a general "right of revocation".[102] In accordance with Article 22 (1) of the CDSM Directive, "the author or performer may revoke in whole or in part the license or the transfer of rights where there is a lack of exploitation of that work or other protected subject matter."[103] However, it should be noted that the use of the right of revocation is subject to the conditions set in paragraphs 2 to 5 of Article 22 of the CDSM Directive.

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[95] Alain Strowel and Bernard Vanbrabant, 'Copyright Licensing - a European view' In Research Handbook on Intellectual Property Licensing by J. de Werra (Edward Elgar 2013) 29, 34.
[96] ibid.
[97] ibid.
[98] ibid 35.
[99] ibid.
[100] Paul Goldstein and Bernt Hugenholtz, 'International Copyright' (Oxford University Press 2019), 249.
[101] ibid, 250 (citing Germany, Copyright Act Art. 41 and Netherlands, Copyright Act Art. 25e).
[102] ibid.
[103] ibid.

Remuneration - Recital 72 of the CDSM Directive acknowledges that authors and performers generally have a weaker contractual position when they grant licenses or transfer rights for the purpose of exploitation in return for remuneration, including through their own companies.[104] Thus, these natural persons require protection in order to fully utilize the rights harmonized by Union law.[105] Accordingly, Article 18 (1) of the CDSM Directive requires the Member States to ensure that "where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration."[106] However, in accordance with Article 18 (2) of the CDSM Directive setting up an appropriate legal mechanism to achieve this purpose is left to the discretion of the Member States.[107] In addition, Article 20 (1) of the CDSM Directive obliges the Member States to ensure that authors and performers may "claim additional, appropriate and fair remuneration" from licensees or assignees "when the remuneration originally agreed on turns out to be disproportionately low compared to all the subsequent relevant revenues derived from the exploitation of the works or performances."

Collective licensing- Licensing can be managed either by the rightholders themselves, or by a third party on behalf of them.[108] There is a common practice for some (especially in the audiovisual and music sectors) rightholders to entrust a collective management organization (CMO) with the responsibility of negotiating, licensing, and collecting fees from licensees on their behalf, especially for forms of secondary exploitation, such as retransmission rights.[109] In the book publishing industry, the advent of mass photocopying resulted in the establishment of reproduction rights organisations (RRO)s which primarily aim at administering a remuneration system for private copying activities.[110] In the print environment, licensing activities concerning physical reproductions of copyright protected manuscripts such as

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[104] Francisco Javier Cabrera Blázquez, Maja Cappello, Gilles Fontaine, Julio Talavera Milla, Sophie Valais, 'Copyright licensing rules in the EU' (2020) European Audiovisual Observatory, 23 <https://rm.coe.int/iris-plus-2020en1/16809f124b > accessed 14 August 2022.
[105] ibid.
[106] Paul Goldstein and Bernt Hugenholtz, 'International Copyright' (Oxford University Press 2019), 250
[107] Paul Goldstein and Bernt Hugenholtz, 'International Copyright' (Oxford University Press 2019), 250
[108] Francisco Javier Cabrera Blázquez, Maja Cappello, Gilles Fontaine, Julio Talavera Milla, Sophie Valais, 'Copyright licensing rules in the EU' (2020) European Audiovisual Observatory, 8 <https://rm.coe.int/iris-plus-2020en1/16809f124b > accessed 14 August 2022.
[109] İbid.
[110] World Intellectual Property Organization (WIPO) (2021). From Paper to Platform: Publishing, Intellectual Property and the Digital Revolution. Geneva: WIPO, 119 <https://www.wipo.int/publications/en/details.jsp?id=4576> accessed 22 July 2022.

photocopies are usually managed through collective licenses with the involvement of RROs.[111] However, it should be noted that the expansion of collective licenses to include digital uses has been rare in the book publishing industry.[112] Authors and publishers generally license uses of their works directly, including digital uses, given that the distribution rules for the sharing of collecting society revenues are less advantageous than the royalty agreements they could negotiate with individually negotiate with licensees.[113]

Aiming at increasing rightholders' involvement in the collective management of their rights, and at improving the functioning and accountability of CMOs, the EU Legislature adopted the Collective Rights Management Directive[114] in 2014.[115] The Directive provides certain rules that shall apply to the agreements that CMOs conclude with users and rightholders. Under Article 16 (1) of the Collective Rights Management Directive, CMOs and users that wish to exploit copyright protected works shall only conduct negotiations regarding licensing of rights in good faith. Second, in accordance with Article 16 (2) of the Directive, licensing terms between CMOs and users shall be based on objective and non- discriminatory criteria. In addition, under Articles 18 to 22 of the Collective Rights Management Directive, CMOs have transparency and reporting obligations towards rightholders, users and other CMOs.

Open licensing- For rights clearance purposes, users may also rely on open licenses, such as Creative Commons Licenses (CCLs), which are the most popular type of open license for use of existing copyright-protected works.[116] In contrast to copyright law's default rule of "All Rights Reserved", which refers to the necessity of requiring permission for every use of a work, Creative Commons seeks to facilitate an environment in which "Some Rights Reserved" or even "No Rights Reserved" become the norm.[117] There are a number of standard-form licenses developed by Creative Commons, which enable authors of literary, musical, and audiovisual

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[111] İbid.
[112] İbid.
[113] İbid.
[114] Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market [2004] OJ L 84 / 72.
[115] Francisco Javier Cabrera Blázquez, Maja Cappello, Gilles Fontaine, Julio Talavera Milla, Sophie Valais, 'Copyright licensing rules in the EU' (2020) European Audiovisual Observatory, 20 <https://rm.coe.int/iris-plus-2020en1/16809f124b > accessed 14 August 2022.
[116] Maria-Christina Janssens, Arina Gorbatyuk, Sonsoles Pajares Rivas, 'Copyright Issues on the use of images on the Internet' In Research Handbook on Intellectual Property and Cultural Heritage (Edward Elgar 2022) 191, 204.
[117] Lucie Guibault, 'Open Content Licensing: From Theory to Practice – An Introduction." In Open Content Licensing: From Theory to Practice, edited by Lucie Guibault and Christina Angelopoulos (Amsterdam University Press 2011) 7, 8.

works to permit wide dissemination and transformational use of their works without transferring or waving their copyright.[118] Hence, when authors grant far-reaching licenses to the public on a royalty-free basis through open licensing, it does not mean that they have waived their copyrights or that the works are not copyright protected at all.[119] Essentially, this means that they have chosen not to exercise their certain exclusive rights, such as the right to exclude others from using their work, the right to control its use, and the right to monetize their work.[120] That being said, a dedication known as the CC0 dedication was also developed by Creative Commons, under which authors may choose to waive all rights to their work with respect to copyright and related matters.[121]

2.4.2. Exceptions and limitations to copyright protection

Although rights clearance is the primary way of securing lawfulness for the creation of literary works based on copyright-protected works, limitations and exceptions to copyright protection also provide a certain degree of flexibility for prosumers to create and make available fan-fiction works through online platforms.[122]

In the EU, the limitations and exceptions to copyright protection are partly harmonized by Article 5 of the Information Society Directive.[123] Under Article 5 of the Information Society Directive, the Member States are provided with an exhaustive list of exceptions and limitations that they may transpose into their national laws with respect to the right of reproduction. Except for the single mandatory limitation permitting transient copying concerning digital communications, the Member States are free to choose whether or not to implement the remaining twenty optional limitations on the list.[124]

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[118] ibid.
[119] Till Kreutzer, 'User-Related Assets and Drawbacks of Open Content Licensing' In Open Content Licensing: From Theory to Practice, edited by Lucie Guibault and Christina Angelopoulos (Amsterdam University Press 2011) 107, 112.
[120] Ibid.
[121] Maria-Christina Janssens, Arina Gorbatyuk, Sonsoles Pajares Rivas, 'Copyright Issues on the use of images on the Internet' In Research Handbook on Intellectual Property and Cultural Heritage (Edward Elgar 2022) 191, 204.
[122] Ruth L. Okediji, 'Copyright Law in an Age of Limitations and Exceptions' (Cambridge University Press 2017), 278.
[123] ibid, 283.
[124] ibid, 283.

It should be noted that the Member States are not allowed to adopt any other limitations or exceptions to the right of reproduction beyond the ones that are included in the exhaustive list provided by Article 5 of the Information Society Directive. Alongside the exhaustive list provided by Article 5 of the Information Society Directive, Article 17 (7) of the recently adopted CDSM Directive requires the Member States to introduce certain exceptions and limitations to copyright protection specifically for the UGC made available by users online. Article 17 (7) of the CDSM Directive obliges the Member States to ensure that users of online content-sharing services may rely on any of the following exceptions or limitations when uploading and making available user-generated content in each Member State: (a) quotations, criticisms, reviews; (b) caricatures, parodies, and pastiche. Unlike the twenty optional exceptions and limitations outlined by Article 5 of the Information Society Directive that the Member States are free to introduce or not, the implementation of the list of exceptions provided by Article 17 (7) of the CDSM Directive concerning the making available of user-generated content online is of mandatory nature. Hence, the Member States have to transpose those exceptions and limitations into their national laws.

In addition, Article 5 (5) of the Information Society Directive also requires that any limitation implemented by the Member States at the national level must comply with the “three-step test” which originates from Article 9 (2) of the Berne Convention.[125] In accordance with the “three-step test", the exceptions and limitations provided for in accordance with Article 5 of the Information Society Directive shall (1) only be applied in certain special cases (2) which do not conflict with a normal exploitation of the work or other subject-matter and (3) do not unreasonably prejudice the legitimate interests of the rightholder.

The complex system provided in Article 5 of the Information Society Directive for exceptions and limitations to copyright protection provides more guidance towards implementing new exceptions and limitations as compared to common law approach of “fair use” which provides flexibility[126] but is also accompanied by greater uncertainty.

The parody exception - Among the exceptions and limitations to copyright protection that are provided by Article 17 (7) of the CDSM Directive and Article 5 (5) of the Information Society

[125] ibid, 285.
[126] ibid, 283 (citing Martin Senftleben, Bridging the Differences between Copyright's Legal Traditions – The Emerging EC Fair Use Doctrine, 57 J. Copyright Soc'y U.S.A. 521, 529).

Directive, the parody exception is the most relevant to the creation and making available of fan-fiction works online. Article 5(3)(k) of the Information Society Directive provides that the Member States may provide exceptions or limitations to the right of reproduction for the use of copyright-protected works for the purpose of caricature, parody, or pastiche. Despite the fact that paragraph 5(3)(k) of the Information Society Directive provides for exemptions for works that could be considered caricatures, parodies, or pastiche, it is argued in the scholarly literature that this provision allows for one exception—parody.[127] According to this view, while it is possible to highlight some of the basic characteristics of each genre, it is not possible to define each term in full.[128] Hence, the term parody maybe be considered a "multivalent" term, which encompasses satire, pastiche, and caricature, among other genres.[129] However, a definitive conclusion in this regard cannot be drawn until the CJEU addresses the definition and the scope of pastiche in its case law.

Besides the optional parody exception to the right of reproduction and right of communication to the public provided for in Article 5(3)(k) of the Information Society Directive, Article 17(7) of the recently CDSM Directive obliges the Member States to ensure that users of online content-sharing services may rely on the parody exception when uploading and making available UGC on online content-sharing services.

In *Deckymn*, the CJEU established that the concept of parody as an autonomous concept of EU law should be interpreted uniformly throughout the EU.[130] Accordingly, the Court held that a parody could be defined as a work that evokes an existing work while being noticeably different from it to constitute an expression of humor or mockery.[131] Furthermore, the Court ruled out the additional conditions that a parody may need to fulfill, such as “displaying an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work”; “being able to be reasonably attributed to a person other than the author of the original work itself”; and “relating to the original work itself or mention the source of the parodied work”.[132] It is important to note that, although the CJEU's uniform

[127] Tatiana-Eleni Synodinou, Philippe Jougleux, Christiana Markou and Thalia Prastitou-Merdi, ‘EU Internet Law in the Digital Single Market’ (Springer Cham 2021), 194.
[128] ibid (citing Jacques S (2015a) Mash-Ups and mixes: what impact have the recent copyright reforms had on the legality of sampling? SSRN Electr J https://doi.org/10.2139/ssrn.2893261).
[129] ibid.
[130] Case C-201/13 Deckmyn v Vandersteen ECLI:EU:C:2014:2132, para 14.
[131] ibid, para 20.
[132] ibid, para 21.

definition of parody seems to interact with moral rights, the ruling does not harmonize the concept of parody with respect to the exercise of moral rights in the EU. According to Recital 19 of the Information Society Directive, moral rights remain outside the scope of the Information Society Directive and rightholders should exercise their moral rights in accordance with the legislation of their respective Member States, the Berne Convention for the Protection of Literary and Artistic Works, and the WIPO Copyright Treaty and Performances and Phonograms Treaty. As a consequence, moral rights infringements fall outside of the scope of the CJEU's jurisdiction.

Fan-fiction literary works may qualify as parodies in accordance with the principles outlined by the CJEU if they differ noticeably from the existing copyright-protected work on which they are based and if they constitute an expression of mockery. However, the fulfillment of the conditions outlined by CJEU and national laws of the member states on moral rights requires a case-by-case analysis for each specific fan-fiction work.[133]

Regarding the first condition, it should be noted that the parody itself does not have to surpass the threshold of originality.[134] It is sufficient if the parody is just noticeably different from the protected work that it is based on.[135] It is argued in the scholarly literature whether there is a noticeable difference between the parody and the pre-existing protected work should be "assessed from the position of a person who is familiar with the work and who has the intellectual capacities to appreciate the parody", given that minimal yet significant differences may be noticeable to someone acquainted with the work.[136]

As regards the second condition, it is argued in the scholarly literature that the application of the parody exception may be prevented from becoming a subjective affair if the emphasis of judicial inquiry is put on the intention of the parodist to convey humor or mockery.[137] Under this view, whether or not the parodist is successful in conveying the intended mockery or humor should be of little importance.[138] Furthermore, the CJEU's interpretation should not necessarily

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[133] Giacomo Bonetto, 'Internet memes as derivative works: copyright issues under EU law' (2018) 13 Journal of Intellectual Property Law & Practice 989,994.
[134] Daniel Jongsma, 'Parody after Deckmyn. A Comparative Overview of the Approach to Parody Under Copyright Law in Belgium, France, Germany and the Netherlands' (2017) 48 International Review of Intellectual Property and Competition Law 652,662.
[135] ibid.
[136] ibid.
[137] ibid.
[138] ibid.

mean that serious parodies are exempted from the exception, given that mockery may sometimes aim to criticize instead of resulting in laughter.[139]

The quotation exception - The second most important exception to copyright protection in the context of using pre-existing works for the creation of fan-fiction content is the quotation exception. The quotation exception is the only mandatory exception provided in the Berne Convention. In accordance with Article 10 (1) of the Berne Convention, making quotations from works which have already been lawfully made available to the public shall be permissible if they comply with fair practice and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals which are presented in the form of press summaries. Hence, as signatories to the Berne Convention, the Member States of the EU are obliged to provide the quotation exception in their national laws. Under Article 5 (3) (d) of the Information Society Directive, the Member States may provide exceptions or limitations to the right of reproduction for quotations that are created with the aim of criticism or review provided that (1) "they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible", (2) "the source, including the author's name, is indicated", and (3) "that their use is in accordance with fair practice and to the extent required by the specific purpose". Article 17(7) of the recently CDSM Directive also obliges the Member States to ensure that users of online content-sharing services may rely on the quotation exception when uploading and making available UGC on online content-sharing services.

In *Painer*, the CJEU clarified the application of the quotation exception.[140] Firstly, the CJEU held that the quotation exception may still apply when the quoting work itself is not protected by copyright.[141] Second, the CJEU underscored that when applying the quotation exception a fair balance must be struck between the rights and interests of authors and the rights of users of protected subject matter.[142] The CJEU further noted that the source of the quoted work must be indicated, including its author's name, unless this proves impossible.[143] Fourth, the CJEU held that the existing work could be quoted in accordance with fair practice and only to the

[139] ibid.
[140] Case C-145/10 Painer v Standard Verlags [2011] ECLI:EU:C:2011:798.
[141] ibid, para. 130.
[142] ibid, para 132.
[143] ibid, para. 149

extent required by the specific purposes of the quotation, 'such as criticism or review'.[144] Thus, the amount of copied material is a significant factor in determining the applicability of this exception.[145]

Fan-fiction literary works may benefit from the quatation exception depending on the fulfillment of the conditions outlined by CJEU and compliance with the national laws of the member states on moral rights on a case-by-case analysis.[146]

2.5. Copyright liability

In the previous sections, the notions of authorship and copyright ownership concerning the creation of manuscripts through online platforms were outlined. The business model scenarios outlined by IMEC envision the creation of original as well as fan-fiction literary works by prosumers through online platforms. Business models that enable prosumers to create and give access to literary manuscripts on the internet can be implemented in the form of not-for-profit fan platforms such as AO3; not-for-profit online encyclopaedias, for instance, Wikipedia; and for-profit fan platforms like Fanfiction.net, Tumblr, and Wattpad. As established above, the unauthorized use of existing copyright-protected works for the creation of new literary content through online platforms results in copyright infringement unless an exception or limitation applies. The copyright-infringing activities conducted by prosumers through online platforms bring up the question of copyright liability of the providers of such platforms. In particular, major UGC-oriented fan platforms, such as AO3, Fanfiction.net, Wattpad, and Tumblr, are frequently involved in legal disputes concerning copyright liability claims brought by copyright holders. Hence, it is of significant importance to analyze the current copyright regulatory framework concerning the question of copyright liability of online platforms that facilitate the creation and sharing of literary works by prosumers online. As international copyright law provides minimal

[144] ibid, para. 120.
[145] Tatiana-Eleni Synodinou, Philippe Jougleux, Christiana Markou and Thalia Prastitou-Merdi, 'EU Internet Law in the Digital Single Market' (Springer Cham 2021), 191.
[146] Giacomo Bonetto, 'Internet memes as derivative works: copyright issues under EU law' (2018) 13 Journal of Intellectual Property Law & Practice 989,994.

harmonization as regards the copyright liability of online platforms, this analysis will be made solely in accordance with the relevant principles of EU copyright law.

Under EU copyright law, copyright infringements take place in two forms: direct infringements and indirect infringements. Direct copyright infringements occur when a third party exercises the exclusive rights of copyright holders without their consent.[147] Indirect copyright infringements occur when a third party encourages, assists, or profits from a direct infringement that is conducted by another party.[148] Accordingly, primary liability and secondary liability are imposed upon direct infringers and indirect infringers, respectively.

Until the adoption of the CDSM Directive, online platforms in the EU were subject to a knowledge-centric secondary liability regime which is shaped by the rules of the Information Society and E-Commerce Directives (soon to be complemented by the Digital Service Act (DSA)[149]), the case law of the CJEU (the recent case law of the signals a major change),[150] as well as the national laws of the Member States.[151] Following the adoption of the CDSM Directive in 2019 in an effort to adapt EU copyright law to the needs of the digital age, the copyright liability of certain online platforms is currently governed according to a multi-level approach in the EU.[152] Aimed at addressing the so-called value gap, Article 17 of the CDSM Directive introduced strict liability rules on online platforms that qualify as an online content-sharing service provider (OCSSP) for the copyright infringements committed by platform users.[153] Hence, a platform that qualifies as an OCSSP under Article 2(6) of the CDSM Directive and accompanying recitals is now subject to the *lex specialis* of Article 17 of the CDSM Directive, which sets out a special regulatory framework based on direct copyright liability.[154] Under Article 2(6) of the CDSM Directive, the definition of OCSSPs is limited to

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[147] Christina Joanna Angelopoulos, 'European Intermediary Liability in Copyright: A Tort Based Analysis' (2016) 41.
[148] Christina Joanna Angelopoulos, 'European Intermediary Liability in Copyright: A Tort Based Analysis' (2016) 41.
[149] Council of the European Union, Proposal for a Digital Services Act and amending Directive 2000/31/ EC – General approach, 18.11.2021, Council Document 13203/21.
[150] The new approach endorsed by the CJEU in its recent case law shows substantial similarity with the *lex specialis* primary liability regime introduced by Article 17 (1) of the CDSM Directive for OCSSPs, which considers providing an online content sharing platform within the meaning of Article 2 (6) of the CDSM Directive an act of communication to the public of all the contents shared on that platform. This approach will be analyzed extensively in Section 2.5.1.
[151] Alexander Peukert, Martin Husovec, Martin Kretschmer, Peter Mezei, Joa˜o Pedro Quintais, 'European Copyright Society-Comment on Copyright and the Digital Services Act Proposal' (2022) IIC 53(3) 358, 361.
[152] ibid.
[153] Tatiana-Eleni Synodinou, Philippe Jougleux, Christiana Markou and Thalia Prastitou-Merdi, 'EU Internet Law in the Digital Single Market' (Springer Cham 2021), 196.
[154] Alexander Peukert, Martin Husovec, Martin Kretschmer, Peter Mezei, Joa˜o Pedro Quintais, 'European Copyright Society-Comment on Copyright and the Digital Services Act Proposal' (2022) IIC 53(3) 358, 361.

platforms whose main purpose 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.”

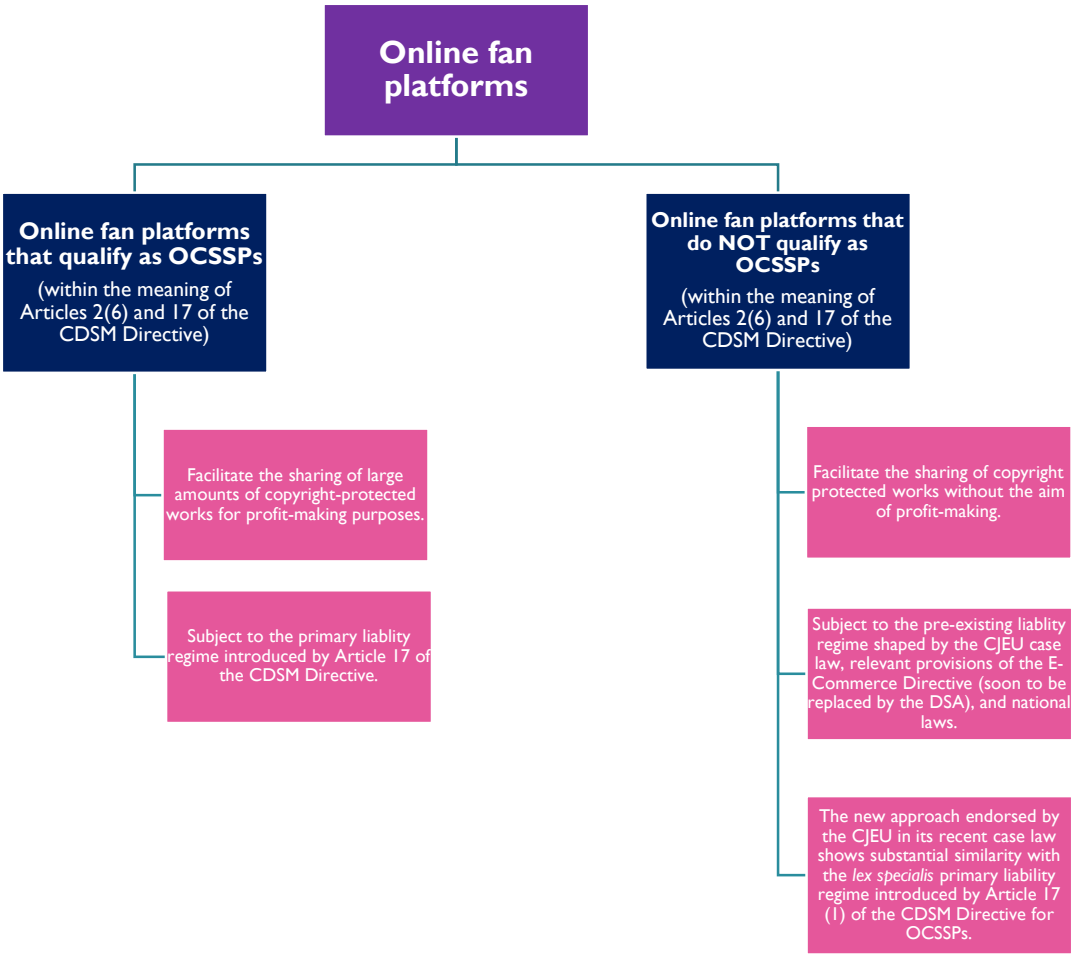

Figure 2. Copyright Liability of Online Fan Platforms

This section, firstly, provides an overview of the regulatory framework concerning the copyright liability of UGC-oriented fan platforms that remain unaffected by the CDSM Directive. Secondly, this section presents the basics of the new liability regime that is introduced by Article 17 of the CDSM Directive for the online platforms that qualify as OCCSPs under Article 2(6) of the CDSM Directive.[155]

2.5.1. The copyright liability of online fan platforms that remain unaffected by Article 17 of the CDSM Directive

In accordance with Article 2(6) of the CDSM Directive and accompanying recitals, online platforms that enable prosumers to create and give access to literary manuscripts without the aim of making financial gains are left unaffected by the new copyright liability regime introduced by Article 17 of the CDSM Directive. Those platforms include not-for-profit fan platforms like AO3 and not-for-profit online encyclopaedias such as Wikipedia. Online platforms that do not qualify as OCSSPs under the CDSM Directive are subject to the pre-existing secondary liability regime, which is shaped by the rules of the E-Commerce Directive (soon to be replaced by the DSA) and Information Society Directives, the case law of the European Court of Justice, as well as the national laws of the Member States.[156] As established above, secondary copyright liability is imposed upon online platforms when they facilitate or profit from a direct infringement that is conducted by another party.[157] Unlike primary copyright liability, the imposition of secondary copyright liability upon online platforms generally requires the fulfilment of certain conditions such as knowledge and ill-intent.

In accordance with Article 8(3) of the Information Society Directive, the Member States are obliged to provide for injunctions against intermediaries whose services are used by a third party to infringe a copyright or related right. However, the Information Society Directive does not specify the conditions under which online platforms should be held liable for copyright

[155] 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] OJ L 130/92.
[156] Alexander Peukert, Martin Husovec, Martin Kretschmer, Peter Mezei, Joa˜o Pedro Quintais, 'European Copyright Society-Comment on Copyright and the Digital Services Act Proposal' (2022) IIC 53(3) 358, 361.
[157] Christina Joanna Angelopoulos, 'European Intermediary Liability in Copyright: A Tort Based Analysis' (2016) 41.

infringements conducted by third parties. Hence, the determination of those liability conditions is left to the discretion of the Member States and the case law of the CJEU.

On the other hand, Articles 12 to 15 of the E-Commerce Directive[158] obliges the Member States to exempt online platforms from secondary copyright liability if they fulfill certain conditions. The Directive lays down those liability exemption conditions for the online platforms that conduct the activities of *'mere conduit'*[159], '*caching'*[160]*,* and *'file hostin*g'[161]. However, it should be underscored that the E-commerce Directive as it currently stands does not harmonize the conditions for holding intermediaries liable, but instead only the conditions for exempting online intermediaries from liability. Besides, the provisions of the E-Commerce Directive concerning the copyright liability of online platforms are soon to be replaced by Article 5 of the DSA. Yet, the liability exemptions outlined in Article 5 of the DSA largely correspond to those in Articles 12 to 15 of the E-Commerce Directive.[162] Among the notable adjustments are own initiative moderation, clarifications regarding the scope of recitals, and provisions regarding orders: to act against illegal content and to provide information.[163]

Given the lack of complete harmonization in the EU Acquis, the national approaches of the EU Member States towards the secondary liability of online platforms show some differences.[164]

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[158] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2010 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2010] OJ L 178/1.
[159] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2010 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2010] OJ L 178/1, art 12.
[160] ibid, art 13.
[161] ibid, art 14.
[162] João Pedro Quintais and Sebastian Felix Schwemer, 'The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright?' (2022) 13 European Journal of Risk Regulation 191, 201.
[163] Ibid (citing Alexandra Kuczerawy, "The Good Samaritan That Wasn't: Voluntary Monitoring under the (Draft) Digital Services Act" (Verfassungsblog, 12 January 2021) <https://verfassungsblog.de/good-samaritan-dsa/> (last accessed 12 August 2022). The 'Good Samaritan paradox' refers to the fact that a hosting intermediary would be disincentivized from taking precautions against infringement for fear of losing safe harbor protection. In other words, the prohibition on playing an active role as a hosting provider may lead hosting providers to avoid making all necessary efforts to assess whether the content they host is illegal in order precisely to avoid being considered as playing an active role. Separately, the proposal proposes the introduction of asymmetric due diligence obligations in Chapter III, which is a new feature compared to the E-Commerce Directive (see,Tambiama Madiega, 'Reform of the EU Liability Regime for Online Intermediaries: Background on the forthcoming Digital Services Act' (EPRS, 2020), 8).
[164] Tambiama Madiega, 'Reform of the EU Liability Regime for Online Intermediaries: Background on the forthcoming Digital Services Act' (EPRS, 2020), 8

In *Germany*, the secondary liability of online service providers is examined under the Störerhaftung doctrine.[165] According to the Störerhaftung doctrine, an online service provider can only be held secondarily liable for a copyright infringing activity conducted by users of its service if there is a causal link between its actions and the copyright infringement.[166]

In *France*, courts frequently distinguish between the notions of hébergeur (host) and éditeur (publisher), assessing the control and influence exerted by the service providers upon their customers' actions.[167] In the scholarly literature, the approach endorsed by the French copyright law regarding the secondary liability of online service providers is considered a strict reflection of the regulations brought by the E-Commerce Directive.[168]

Although national laws of the Member States concerning secondary copyright liability show relevant differences, two key elements usually play a significant role when imposing secondary liability upon online service providers for copyright infringements conducted by users of their services: 'the knowledge of the service provider'; and 'the duty of care imposed upon the service provider.[169]

Liability exemptions and the knowledge standard - Among the liability exemptions provided in Articles 12 to 15 of the E-Commerce Directive, the exemption for online file hosting platforms introduced by Article 14 of the E-Commerce Directive is the most relevant to the activities of UGC-oriented fan platforms. Article 14 (1) (a) and (b) of the E-Commerce Directive provides that, in order to become exempted from copyright liability for copyright infringing activities conducted by users, the provider of an online file hosting platform (1) must not have actual knowledge that the material or an activity using the material on the system or network is infringing,[170] and absent such actual knowledge, as regards claims for damages, (2) must not be not aware of facts or circumstances from which infringing activity is apparent.[171] Moreover,

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[165] Christina Joanna Angelopoulos, 'European Intermediary Liability in Copyright: A Tort Based Analysis' (2016), 91.
[166] ibid.
[167] ibid.
[168] ibid.
[169] Stefano Barazza, 'Secondary Liability for IP infringement: Converging Patterns and Approaches in Comparative Case Law' (2012) 7 Journal of Intellectual Property Law & Practice 879, 883.
[170] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2010 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2010] OJ L 178/1, art 14 (1)(a).
[171] ibid, art 14 (1)(a).

the provider must (3) upon acquiring such knowledge or awareness, act expeditiously to remove, or disable access to, the infringing material residing on its system or network[172]. In accordance with Article 14 (1) of the E-Commerce Directive, providers of online file hosting platforms cannot be held liable for the copyright infringing activities conducted by users if they do not have the actual knowledge or awareness of those activities. In this context, the concepts of actual knowledge and constructive knowledge hold significant importance.

It is suggested in the scholarly literature that, in accordance with the knowledge standard set by Article 14 (1) (a) of the E-Commerce Directive, actual knowledge applies when the provider of an online platform has the subjective awareness of specific copyright-infringing uses of the platform. Hence, if the platform provider knows that users are using the online platform to conduct specific copyright infringing activities, the provider is considered to have the actual knowledge of those infringements.[173] The actual knowledge of online platforms can be through notifications of rightholders or court decisions, even though the E-Commerce Directive does not expressly adopt a strict notice-based system in that regard,[174] which is now part of the DSA (article 14).

As per the scholarly literature, the term “awareness” contained in Article 14 (1) (a) of the E-Commerce Directive can be met by constructive knowledge.[175] Constructive knowledge applies to the instances where an online service provider 'should' have an objective awareness of the facts or circumstances from which a diligent operator or reasonable person would be able to infer the existence of specific copyright-infringing uses of its service.[176] The most essential element of constructive knowledge is objectiveness.[177] The objectiveness element of constructive knowledge is derived from the reasonable person standard. A reasonable person is a hypothetical person in society who exercises average care, skill, and judgment in conduct.[178]

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[172] ibid, art 14 (1)(b).
[173] Christina Joanna Angelopoulos, ‘European Intermediary Liability in Copyright: A Tort Based Analysis’ (2016) 45.
[174] ibid.
[175] ibid.
[176] ibid.
[177] ibid.
[178] Reasonable Person. (n.d.) *West's Encyclopedia of American Law, edition 2*. (2008) <https://legal-dictionary.thefreedictionary.com/Reasonable+Person. > (accessed 17 August 2022).

In *L'Oréal*,[179] the CJEU interpreted the knowledge standard introduced by the abovementioned provisions of the E-Commerce Directive. The Court held that the respective provisions must be interpreted to mean that they absolve online service providers of liability where they lack the "actual knowledge of illegal activity or information" and, as regards claims for damages, they are not "aware of facts or circumstances from which the illegal activity or information is apparent".[180] The Court added that being "aware of facts or circumstances from which the illegal activity or information is apparent" can be established "on the basis of which a diligent economic operator should have identified the illegality in question."[181] The Court also underscored that if notifications sent by rightholders to online platforms concerning allegedly illegal activities turn out to be insufficiently precise or inadequately substantiated to establish actual knowledge, such notifications must be taken into account as a factor by the national court when determining whether "the service was actually aware of facts or circumstances on the basis of which a diligent economic operator should have identified the illegality".[182] The decision of the CJEU in *L'Oréal*, hence, reinforces the opinion that the knowledge standard set by the relevant provisions of the E-Commerce Directive can be met by actual or constructive knowledge.

Liability exemptions and the duty of care - Under Article 14 (1) (b) of the E-Commerce Directive, it is undisputed that upon acquiring the actual knowledge or constructive knowledge of a copyright-infringing use of their services, online file hosting platforms must act expeditiously to eliminate that activity in order to avoid secondary liability. The question of whether providers of online file hosting platforms are obliged to prevent the future copyright-infringing uses of their platforms has been a major topic of discussion in the legal literature. In that regard, it should be noted that Article 15 of the E-Commerce Directive expressly prohibits the Member States from imposing a general monitoring obligation upon providers of online platforms covered by Articles 12-14 of the Directive to actively seek facts or circumstances indicating illegal activities conducted by users.[183] However, the prevention of future infringing uses of an online platform often requires the platform provider to set up upload filtering

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[179] Case C-324/*09 L'Ore´al SA and others v eBay International AG and others* (2011) ECLI:EU:C: 2011: 474.
[180] ibid, para. 119.
[181] ibid para. 120 and 121.
[182] ibid, para. 122.
[183] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2010 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2010] OJ L 178/1, art 15.

mechanisms that would continuously analyze, assess, and monitor the activities which are conducted by the users of that platform. In *Scarlet,* the CJEU stated that requiring OCSSPs to adopt upload filtering mechanisms that would control all the upload activities happening in the service contradicts Article 3 (1) of the Enforcement Directive, which requires that the measures protecting IPRs should not be unnecessarily complicated or costly.[184] In *Netlog*, the CJEU followed a similar approach by ruling that requiring an online service provider to install an upload filtering mechanism would not respect the requirements that a fair balance is struck between the right to IP, on the one hand, and the freedom to conduct business, the right to protection of personal data, and the freedom to receive or impart information on the other.[185]

The recent case law of the CJEU - Although online platforms that do not qualify as OCSSPs remain unaffected by the direct liability regime introduced by Article 17 of the CDSM Directive, the scope of their copyright liability might still be significantly widened by a new approach that the CJEU adopted in its recent case law. The new approach endorsed by the CJEU shows substantial similarity with the *lex specialis* primary liability regime introduced by Article 17 (1) of the CDSM Directive for OCSSPs, which considers providing an online content sharing platform within the meaning of Article 2 (6) of the CDSM Directive an act of communication to the public of all the contents shared on that platform. If providing an online platform is considered an act of communication to the public of all the contents shared by the users of that platform, the platform provider becomes primarily liable for all the copyright infringements happening on the platform, regardless of having the knowledge or ill-intent of facilitating those infringements.

[184] Case C-70/10 *Scarlet Extended SA v SABAM* (2011) ECLI:EU:C: 2011: 771, paragraphs 36 and 48.
[185] Case C-360/10 *SABAM v Netlog NV* (2012) ECLI:EU:C: 2012:85, paragraph 51.

Building on its decisions in *Svensson,*[186] *BestWater,*[187] *GS Media*[188] *and Filmspeler*[189]*,* the CJEU concluded in *Stitching Brein* that "the making available and management of an online sharing platform, such as The Pirate Bay, constitutes a 'communication to the public', within the meaning of Article 3(1) of the Information Society Directive" if the platform provider "indispensably intervenes, in full knowledge of the consequences of its action, to give users of its service access to a protected work, particularly where, in the absence of that intervention, those users would not be able to enjoy the shared work, or would be able to do so only with difficulty."[190] The Court observed that the defendant conducted such an indispensable intervention by indexing torrent files on the interface of the Pirate Bay with the full knowledge of the fact that those torrent files would allow users of the platform to locate copyright-protected works and to share them within the context of a peer-to-peer network.[191] Accordingly, the Court held that the defendant's aforementioned acts constitute an act of communication.

More recently in *Youtube*, the CJEU followed the same approach by ruling that providing an online file-hosting and -sharing platform, on which users can illegally make protected content available to the public, is considered an act of communication to the public, within the meaning of Article 3 (1) of the Information Society Directive, if platform provider contributes, beyond merely making that platform available, to giving access to such content to the public in breach

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[186] Case C-466/12 *Nils Svensson and others v Retriever Sverige AB* (2014) ECLI:EU:C: 2014: 76, paragraph 20 (the CJEU held that providing a hyperlink that allows direct access to a protected work constitutes an act of communication).

[187] Case C-348/13 *BestWater International GmbH v Michael Mebes and Stefan Potsch* (2014) ECLI:EU:C: 2014: 2315.

[188] Case C-160/15 *GS Media BV v Sanoma Media Netherlands BV and others* (2016) ECLI:EU:C: 2016: 644, paragraph 49 (The Court held as follows: "if a person knew or ought to have known that the hyperlink, he posted provides access to a work illegally placed on the internet, the provision of that link constitutes a 'communication to the public' within the meaning of Article 3(1) of Directive 2001/29." With this interpretation, the CJEU imputed a brand-new knowledge element to the notion of communication to the public for the first time. Moreover, the Court held that the person's knowledge regarding the copyright infringing nature of that activity can be presumed from his intent to make a financial profit.).

[189] Case C-527/15 Stichting Brein v Jack Frederik Wullems (Filmspeler) (2017) ECLI:EU:C: 2017: 300, paragraph 53 (The Court had the opportunity to apply its GS Media reasoning to a case where the defendant was the provider of a software that displayed ad-on hyperlinks that allow access to the copyright-protected works which were made available on the internet. The Court held as follows: "the concept of communication to the public, within the meaning of Article 3(1) of Directive 2001/29, must be interpreted as covering the sale of a multimedia player, such as that at issue in the main proceedings, on which there are pre-installed add-ons, available on the internet, containing hyperlinks to websites that are freely accessible to the public on which copyright-protected works have been made available without the consent of the right holders.".

[190] Case C610/15 *Stichting Brein v Ziggo BV and XS4ALL Internet BV (The Pirate Bay)* (2017) ECLI:EU:C: 2017: 456, paragraph, 26.

[191] ibid, 26.

of copyright.[192] Accordingly, the CJEU held that the platform provider can be said to conduct an act of communication to the public in three cases: (1) "where that provider has specific knowledge that protected content is available illegally on its platform and refrains from expeditiously deleting it or blocking access to it", (2) "where that provider, 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 provider 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".[193]

In accordance with the recent case law of the CJEU, providers of online fan platforms may now be held primarily liable for the copyright infringements committed by users even though they do not qualify as OCSSPs within the meaning of Article 2(6) of the CDSM Directive. Therefore, it would be practically impossible for online fan platform providers to rely on the liability exemption mechanism provided in Article 14 of the E-Commerce Directive. To avoid liability for the copyright infringing activities committed by users, online fan platform providers must make sure that their involvement in the copyright infringing activities happening on their platforms does not exceed the mere act of making that platform available in accordance with the reasoning provided by the court in *Youtube*.[194] Hence, providers of online fan platforms should act expeditiously to delete or block access to copyright-infringing contents once they acquired the specific knowledge of them. Second, they should put in place the appropriate technological measures that can be expected from a reasonably diligent operator in order to counter credibly and effectively copyright infringements on that platform. Third, they should refrain from participating in selecting protected content illegally communicated to the public,

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[192] Cases C-682/18 and C-683/18 *Frank Peterson v Google LLC and Others and Elsevier Inc. v Cyando AG (2021) ECLI:EU: C:2021:503, para. 102.*
[193] ibid.
[194] Cases C-682/18 and C-683/18 *Frank Peterson v Google LLC and Others and Elsevier Inc. v Cyando AG (2021) ECLI:EU: C:2021:503.*

providing tools specifically intended for the illegal sharing of such content, or knowingly promoting such sharing.

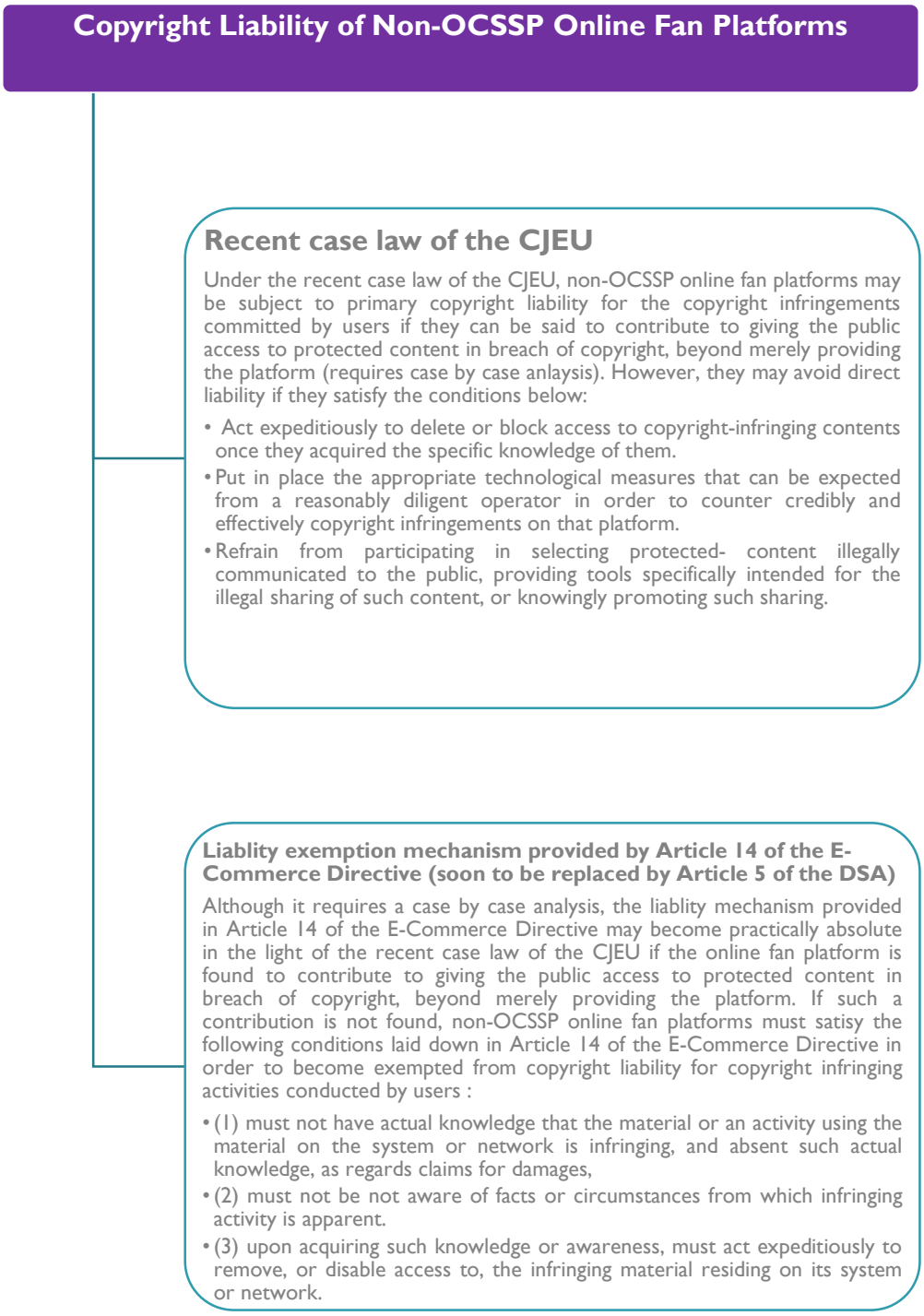

Figure 3. Copyright Liability of Non-OCSSP Online Fan Platforms

2.5.2. The copyright liability of online fan platforms that can be considered as OCSSPs under the CDSM Directive

Article 17 of the CDSM Directive substantially transformed online copyright enforcement in the EU by introducing a new copyright liability regime for a certain group of online platforms that are defined as OCSSPs. Aimed at addressing the so-called value gap, Article 17 of the CDSM Directive imposes strict liability rules on OCSSPs for the copyright infringements committed by platform users.[195] Hence, a platform that qualifies as an OCSSP under Article 2(6) of the CDSM Directive and accompanying recitals is subject to the *lex specialis* direct copyright liability regime introduced by Article 17 of the CDSM Directive.[196] Consequently, Article 17 of the CDSM Directive has a significant impact on the copyright liability of UGC-oriented fan platforms that qualify as OCSSPs in accordance with Article 2(6) of the CDSM Directive.

Business models that enable prosumers to create and give access to literary manuscripts on the internet may or may not be affected by this new liability regime depending on several factors. Under Article 2 (6) of the CDSM Directive, the definition of OCSSPs is limited to platforms whose main purpose 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." In addition, Article 2 (6) of the CDSM Directive excludes not-for-profit online encyclopaedias from the definition of OCCSPs. Hence, not-for-profit online fan platforms such as AO3 and not-for-profit online encyclopaedias such as Wikipedia remain unaffected by the new copyright liability regime introduced by Article 17 of the CDSM Directive. However, for-profit online prosumer platforms, such as Fanfiction.net, Tumblr, Wattpad, and DeviantArt, can be said to fall within the scope of the new copyright liability regime introduced by Article 17 of the CDSM Directive at first sight.

Article 17 (1) of the CDSM Directive categorizes providing an online content sharing platform as an act of communication to the public of all the contents that are shared through that service. Accordingly, the Article obliges OCSSPs to enter into license agreements with the rightholders

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[195] Giuseppe Colangelo and Mariateresa Maggiolino, 'ISPs' Copyright Liability in the EU Digital Single Market Strategy' (2018) 26 International Journal of Law and Information Technology 142, 144.
[196] Alexander Peukert, Martin Husovec, Martin Kretschmer, Peter Mezei, Joa˜o Pedro Quintais, 'European Copyright Society-Comment on Copyright and the Digital Services Act Proposal' (2022) IIC 53(3) 358, 361.

of the contents shared by internet users. As established in the previous section, if providing an online platform is considered an act of communication to the public of all the contents shared by the users of that platform, the platform provider becomes directly liable for all the copyright infringements happening on the platform, regardless of having the knowledge or ill-intent of facilitating those infringements. Hence, Article 17 (1) of the CDSM Directive establishes a *lex specialis* direct copyright liability regime for online platforms that qualify as OCSSPs in accordance with Article 2(6) of the CDSM Directive.

Article 17 (4) of the CDSM Directive introduces a liability exemption mechanism for the OCSSPs that wish to avoid liability for the copyright infringements committed by users. Article 17 (4) reads that, where no license agreement is reached, OCSSPs will face direct copyright liability for the unauthorized acts happening in their services unless they demonstrate that they have: (a) made best efforts to obtain authorization from the rightholders; (b) made best efforts to ensure the unavailability of specific works for which rightholders provided the necessary and relevant information; and (c) acted expeditiously, upon receiving a notice, to remove from their services the notified works and made best efforts to prevent their future uploads. In other words, Article 17 (4) of the CDSM Directive requires OCSSPs to conduct automated preventive monitoring of all the contents that users wish to upload with the aim of detecting and removing the copyright-infringing subject matter from their services in order to avoid direct copyright liability.

The nature of the liability exemption mechanism provided in Article 17 (4) of the CDSM Directive has drawn criticism in the scholarly literature, given that the preventive monitoring obligations imposed upon OCSSPs in Article 17 (4) (b) and (c) of the CDSM Directive may eventually turn into a highly costly general obligation to monitor all the user activities.[197] As established in the previous section, Article 15 of the E-Commerce Directive expressly prohibits the Member States from imposing a general monitoring obligation upon providers of online platforms to actively seek facts or circumstances indicating illegal activities conducted by users. In addition, the CJEU ruled in *Netlog* that requiring OCSSPs to adopt upload filtering mechanisms that would control all the upload activities happening in the service contradicts Article 3 (1) of the Enforcement Directive, which requires that the measures protecting IPRs

[197] Marisa N Sanchez, 'EU Directive on Copyright in the Digital Single Market: An Outlier in Intermediary Liability and the Death of Safe Harbor Protections' (2021) 55 USF L Rev 251, 262.

should not be unnecessarily complicated or costly.[198] Although Advocate General Saugmandsgaard took the view in his Opinion on *Poland v Parliament and Council* that the obligations imposed by Article 17 (4) should be considered as specific monitoring obligations rather than general, he observed that Article 17 of the CDSM Directive requires OCSSPs to carry out automated preventive monitoring of "all" the contents that users wish to upload in order to ex-ante detect and remove the copyright-infringing subject matter from their services as a liability exemption mechanism.[199] Even though the CJEU ruled out the ex-ante blocking of non-manifestly infringing reproductions by OCSSPs in accordance with Article 17 (7) of the CDSM Directive in *Poland v Parliament and Council*, this conclusion does not free OCSSPS of their upload filtering obligations.[200] However, fulfilling the upload filtering obligations stemming from Article 17 (4) of the CDSM Directive requires an immense qualified staff power as well as a notable financial investment in the technological infrastructure of online content-sharing services.

Given the complexity of the "best efforts obligations", it may be difficult for providers of for-profit online platforms to rely on the copyright exemption mechanism provided in Article 17(4) of the CDSM Directive. However, Article 17 (5) of the CDSM Directive, requires that in determining whether platform providers have complied with their best efforts obligations under Article 17 (4) of the CDSM Directive, the Member States shall proportionately consider factors such as (a) "the type, the audience, and the size of the service and the type of works or other subject matter uploaded by the users of the service"; and (b) "the availability of suitable and effective means and their cost for service providers". In addition, Article 17 (6) of the CDSM Directive obliges Member States to provide that providers of newly founded platforms which have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million" shall be exempt from liability even if they only comply with the obligations imposed upon them in Article 17 (4) (a) of the CDSM Directive. In other words, providers of small-size fan platforms may avoid liability for the copyright infringing activities committed by users if they act expeditiously, upon receiving a sufficiently substantiated notice,

[198] Case C-70/10 *Scarlet Extended SA v SABAM* (2011) ECLI:EU:C: 2011: 771, paragraphs 36 and 48.
[199] Opinion of AG Saugmandsgaard on Case C-401/19 Poland v Parliament and Council ECLI:EU: C:2021:613, paragraph 64.
[200] Case C-401/19 *Poland v Parliament and Council* (2022) ECLI:EU:C:2022:297, paragraphs 85 and 100.

to disable access to the notified works or other subject matter or remove those works or other subject matter from their websites.

Finally, in accordance with Article 17 (7) of the CDSM Directive, the implementation of the new liability regime “shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.” Accordingly, “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." Hence, providers of fan platforms can avoid liability for the copyright infringing contents created and shared by users of their platforms if those contents fall within the scope of the exceptions laid down in Article 17 (7) of the CDSM Directive. As established in Section 1.3.2 of this deliverable, fan-fiction works created by prosumers may be considered parodies or quotations if they fulfill certain conditions.

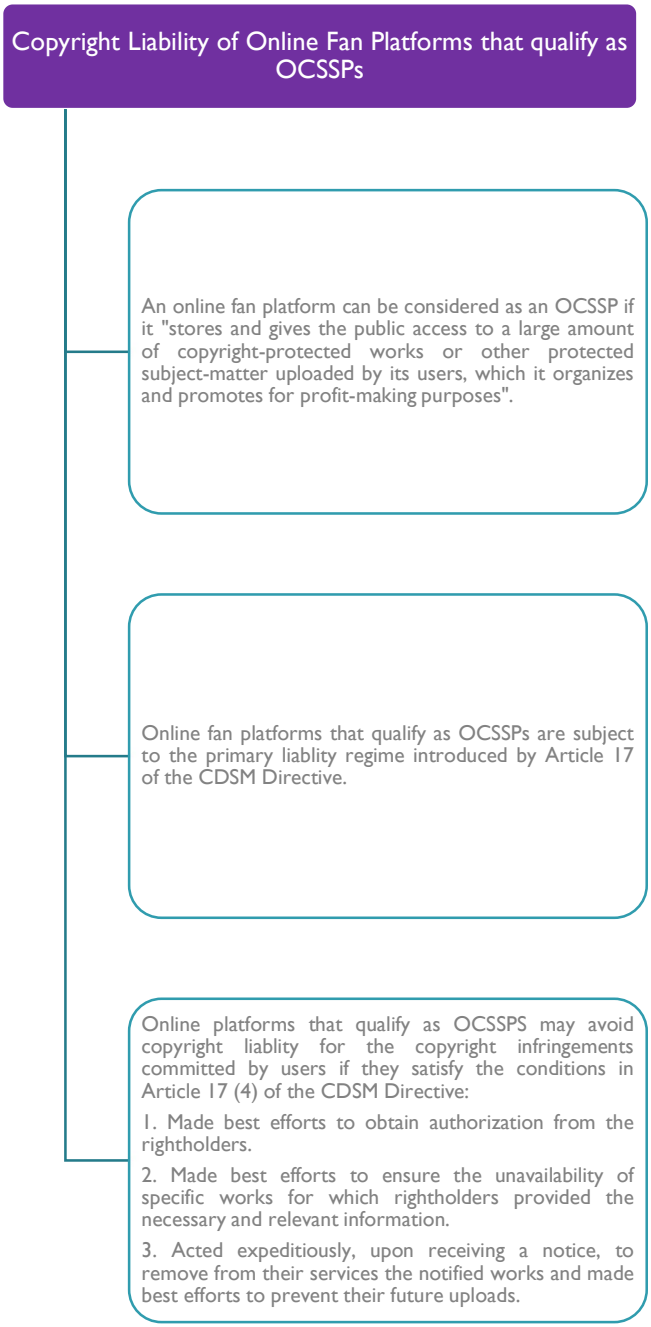

Figure 4. Copyright Liability of Online Fan Platforms that qualify as OCSSPs

3. Conclusion

The findings of this deliverable show that the creation and making available of literary content through emerging digital prosumer business models in the book publishing industry give rise to three main implications in a copyright law context. First, it brings up the issue of copyright ownership, namely determining who is entitled to benefit from the exclusive rights granted. Second, it concerns the notion of copyright exploitation which refers to the use of exclusive rights included in copyright by third parties. Finally, it is linked to the issue of copyright liability arising from providing online prosumer business models that facilitate the creation and making available of literary content.

Copyright ownership- Prosumers may create original as well as fan-fiction works through online platforms. An original work created by prosumers may become eligible for copyright protection if it resembles the "author's own intellectual creation".[201] The question of copyright ownership of fan-fiction works created by prosumers, firstly, requires gaining a thorough understanding of the notion of "derivative works". A derivative work is any work that is created by adapting or transforming an existing original into a new work of authorship.[202] Hence, a large variety of UGC and the fan-fiction works created by prosumers, such as fan-fiction stories or screenplays based on existing novels, are considered derivative works as they draw inspiration from and are based upon the original creations of other authors. Since the creation of derivative works involves the use of an existing literary manuscript, discussing the copyright ownership of a derivative work goes hand-in-hand with the notion of copyright exploitation which refers to the use of exclusive rights by third parties. Creating derivative works based on existing copyright-protected works in the form of fan-fiction content without the consent of the rightholders would usually constitute a copyright infringement in the EU unless an exception or limitation applies. A copyright-infringing fan-fiction work cannot be eligible for copyright protection on its own. However, regardless of whether prosumers create fan-fiction content by lawfully using a copyright-protected work, they cannot claim ownership of the fan-fiction works unless the fan-fiction works themselves are original.

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[201] Tatiana-Eleni Synodinou, Philippe Jougleux, Christiana Markou and Thalia Prastitou-Merdi, 'EU Internet Law in the Digital Single Market' (Springer Cham 2021), 183.
[202] Stephen Fishman, 'The Copyright Handbook: What Every Writer Needs to Know' (Nolo 2021), 6.

Copyright exploitation- The term "right clearance" refers to the process of obtaining permission to reuse the work of another author.[203] The authorization to use a copyright-protected work can be given in the form of a license or through the transfer of rights. Hence, in order to lawfully use an existing copyright-protected work, prosumers need to enter into a license or assignment agreement with the copyright holders of that work.

Although rights clearance is the primary way of securing lawfulness for the creation of literary works based on copyright-protected works, limitations and exceptions to copyright protection also provide a certain degree of flexibility for prosumers to create and make available fan-fiction works through online platforms.[204] Among the exceptions and limitations to copyright protection that are provided by Article 17 (7) of the CDSM Directive and Article 5 (5) of the Information Society Directive, the parody exception is the most relevant to the creation and making available of fan-fiction works online. In *Deckymn*, the CJEU established that the concept of parody as an autonomous concept of EU law should be interpreted uniformly throughout the EU.[205] Accordingly, the Court held that a parody could be defined as a work that evokes an existing work while being noticeably different from it to constitute an expression of humor or mockery.[206] Fan-fiction literary works may qualify as parodies in accordance with the principles outlined by the CJEU if they differ noticeably from the existing copyright-protected work on which they are based and if they constitute an expression of mockery. However, the fulfillment of the conditions outlined by CJEU and national laws of the member states on moral rights requires a case-by-case analysis for each specific fan-fiction work.[207]

The second most important exception to copyright protection in the context of using pre-existing works for the creation of fan-fiction content is the quotation exception. In accordance with Article 10 (1) of the Berne Convention, making quotations from works which have already been lawfully made available to the public shall be permissible if they comply with fair practice and their extent does not exceed that justified by the purpose, including quotations from newspaper articles and periodicals which are presented in the form of press summaries.

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[203] ibid, 196.
[204] Ruth L. Okediji, 'Copyright Law in an Age of Limitations and Exceptions' (Cambridge University Press 2017), 278.
[205] C-201/13 Deckmyn v Vandersteen ECLI:EU:C:2014:2132, para 14.
[206] ibid, para 20.
[207] Giacomo Bonetto, 'Internet memes as derivative works: copyright issues under EU law' (2018) 13 Journal of Intellectual Property Law & Practice 989,994.

Hence, as signatories to the Berne Convention, the Member States of the EU are obliged to provide the quotation exception in their national laws. Fan-fiction literary works may benefit from the quatation exception depending on the fulfillment of the conditions outlined by CJEU and compliance with the national laws of the member states on moral rights on a case-by-case analysis.[208]

Copyright liability- Until the adoption of the CDSM Directive, online fan platforms in the EU were subject to a knowledge-centric secondary liability regime which is shaped by the rules of the Information Society and E-Commerce Directives (soon to be complemented by the Digital Service Act (DSA)[209]), the case law of the CJEU, as well as the national laws of the Member States.[210] Following the adoption of the CDSM Directive in 2019 in an effort to adapt EU copyright law to the needs of the digital age, the copyright liability of certain online platforms is currently governed according to a multi-level approach in the EU.[211] Aimed at addressing the so-called value gap, Article 17 of the CDSM Directive introduced strict liability rules on online platforms that qualify as an online content-sharing service provider (OCSSP) for the copyright infringements committed by platform users.[212] Hence, online fan platforms that qualify as an OCSSP under Article 2(6) of the CDSM Directive and accompanying recitals is now subject to the *lex specialis* of Article 17 of the CDSM Directive, which sets out a special regulatory framework based on direct copyright liability.[213] Although online platforms that do not qualify as OCSSPs remain unaffected by the direct liability regime introduced by Article 17 of the CDSM Directive, the scope of their copyright liability might still be significantly widened by a new approach that the CJEU adopted in its recent case law. The new approach endorsed by the CJEU in its recent case law shows substantial similarity with the lex specialis primary liability regime introduced by Article 17 (1) of the CDSM Directive for OCSSPs, which considers

[208] Giacomo Bonetto, 'Internet memes as derivative works: copyright issues under EU law' (2018) 13 Journal of Intellectual Property Law & Practice 989,994.
[209] Council of the European Union, Proposal for a Digital Services Act and amending Directive 2000/31/ EC – General approach, 18.11.2021, Council Document 13203/21.
[210] Alexander Peukert, Martin Husovec, Martin Kretschmer, Peter Mezei, Joa˜o Pedro Quintais, 'European Copyright Society-Comment on Copyright and the Digital Services Act Proposal' (2022) IIC 53(3) 358, 361.
[211] ibid.
[212] Tatiana-Eleni Synodinou, Philippe Jougleux, Christiana Markou and Thalia Prastitou-Merdi, 'EU Internet Law in the Digital Single Market' (Springer Cham 2021), 196.
[213] Alexander Peukert, Martin Husovec, Martin Kretschmer, Peter Mezei, Joa˜o Pedro Quintais, 'European Copyright Society-Comment on Copyright and the Digital Services Act Proposal' (2022) IIC 53(3) 358, 361.

providing an online content sharing platform within the meaning of Article 2 (6) of the CDSM Directive an act of communication to the public of all the contents shared on that platform.

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