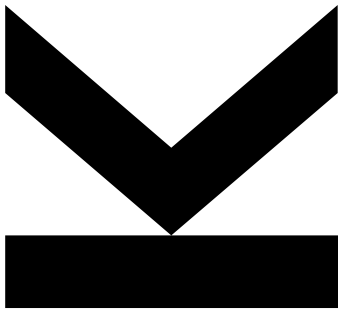


Liability, Upload Filters and Transparency – How the EU tackles challenges posed by Online Platforms



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Overview

1. Introduction to the course and to legal challenges posed by online platforms

2. Liability of platform providers for copyright infringing uploads

3. Upload Filters and approaches to mitigating risks of overblocking

4. Liability of platform providers for trademark infringements

5. Transparency of rankings and search results

Organisational Matters

- Meeting 1: **Monday 20.11.2023, 16:00–17:40, 041**
- Meeting 2: **Tuesday 21.11.2023, 16:00–17:40, 041**
- Meeting 3: **Tuesday 21.11.2023, 18:00–19:40, 041**
- Meeting 4: **Wednesday 22.11.2023, 16:00–17:40, 041**
- Meeting 5: **Wednesday 22.11.2023, 18:00–19:40, 041**
 - Exam: 8-10 Multiple/Single-Choice Questions, 25min

1. Introduction to Legal Challenges posed by Online Platforms



Online Platforms

- Alibaba AliExpress
- Amazon Store
- Apple AppStore
- Booking.com
- Facebook
- Google Play
- Google Maps
- Google Shopping
- Instagram
- LinkedIn
- Pinterest
- Snapchat
- TikTok
- Twitter
- Wikipedia
- YouTube
- Zalando
- Bing
- Google Search

European Commission: https://ec.europa.eu/commission/presscorner/detail/en/IP_23_2413

Online Platforms: Background

Online platforms have dramatically changed the digital economy over the last two decades and bring many benefits in today's digital society. They play a prominent role in the creation of 'digital value' that underpins future economic growth in the EU and consequently are of major importance to the effective functioning of the digital single market.

Online platforms play a key role in innovation and growth in the Digital Single Market. They have revolutionised access to information and have made many markets more efficient by better connecting buyers and sellers of services and goods. While there are some online platforms that reach historic numbers of users across the world, and that expand continuously into new areas of the economy, there are also still many opportunities for competitive European platforms to emerge. Effectively stimulating innovation in these areas, while adequately protecting the legitimate interests of consumers and other users, is perhaps the most important challenge the EU faces today in terms of securing its future competitiveness in the world.

European Commission, [COM\(2016\) 288 final](#)

Online Platforms: Characteristics

Online platforms share some important and specific characteristics. In particular:

- they have the ability to **create and shape new markets**, to challenge traditional ones, and to organise new forms of participation or conducting business based on collecting, processing, and editing large amounts of data;
- they operate in **multisided markets** but with **varying degrees of control over direct interactions between groups of users**;
- they benefit from ‘network effects’, where, broadly speaking, the value of the service increases with the number of users;
- they often rely on information and communications technologies to reach their users, instantly and effortlessly;
- they play a key role in digital value creation, notably by capturing significant value (including through data accumulation), facilitating new business ventures, and creating new strategic dependencies.

European Commission, [COM\(2016\) 288 final](#)

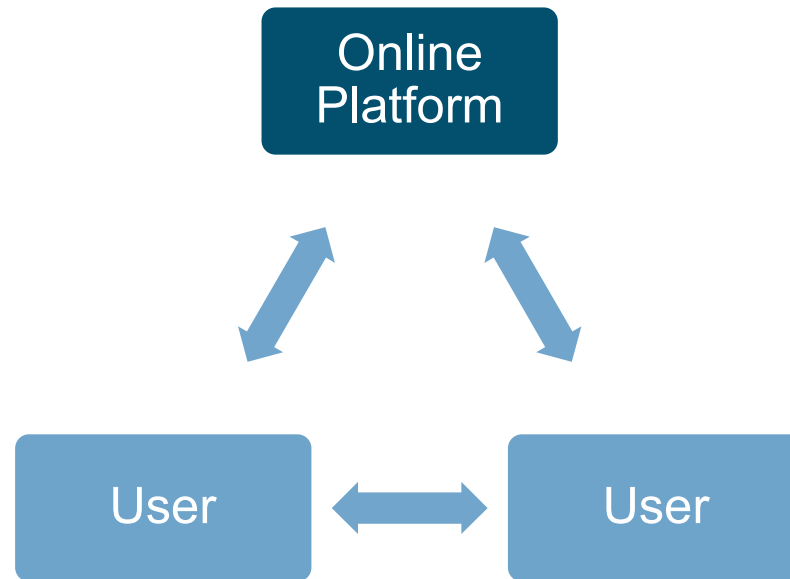
Online-Platforms: Challenges (Liability)

As of July 2015, more than 400 hours of video content was uploaded to YouTube every minute.²⁸ In their replies to the public consultation, **rights holders** across several content sectors (music, images, press publishing and broadcasting) claimed that their content is used by some online platforms without authorisation or through licensing agreements that, in their view, contain **unfair terms**.

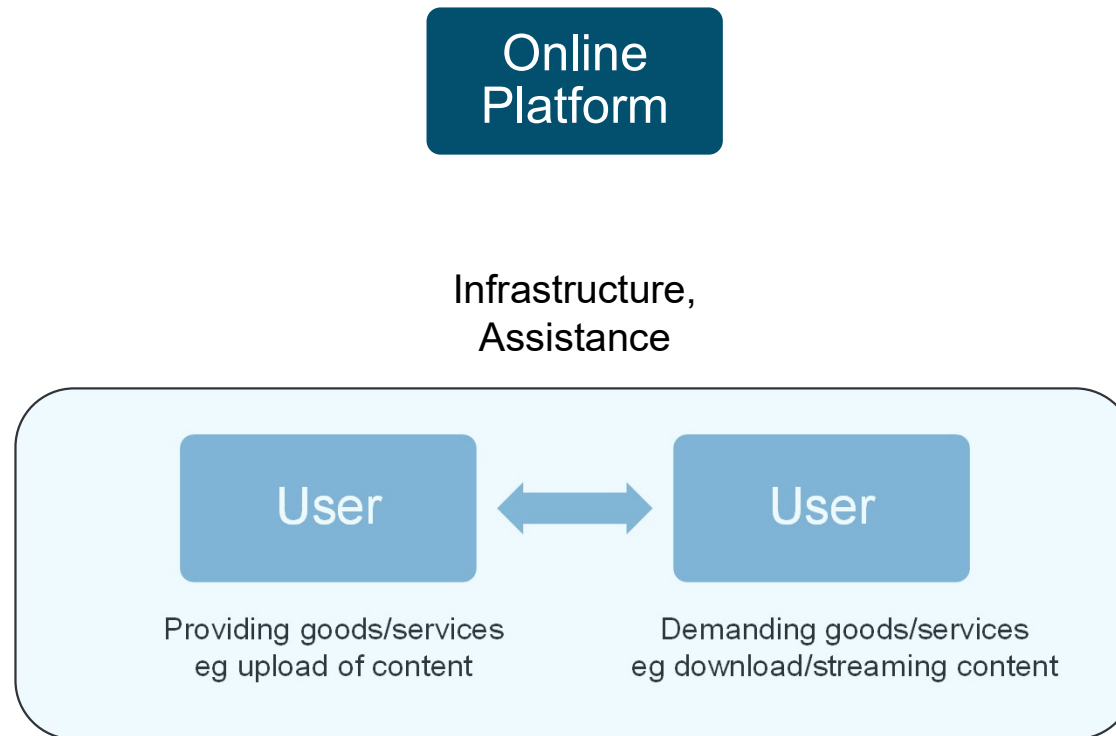
The **present liability regime for intermediary service providers**, as set out in the **e-Commerce Directive**, was **designed at a time when online platforms did not have the characteristics and scale they have today**. However, it did create a **technology-neutral regulatory environment** that has considerably facilitated their scaling-up. This is in part due to the harmonisation of the **exemption of certain types of online platforms from liability for illegal content and activities**, in respect of which they have **neither control nor knowledge**.²⁹ While certain concerns were raised on liability issues the consultation showed broad support for the existing principles of the e-Commerce Directive.³⁰

European Commission, [COM\(2016\) 288 final](#)

Online-Platforms: Challenges (Liability)



Online-Platforms: Challenges (Liability)



Online Platforms: Challenges (Transparency)

Greater transparency is also needed for users to understand how the information presented to them is filtered, shaped or personalised, especially when this information forms the basis of purchasing decisions or influences their participation in civic or democratic life. If consumers are properly informed of the nature of the products that they view or consume online, this assists the efficient functioning of markets and consumer welfare.



European Commission, [COM\(2016\) 288 final](#)

2. Liability of Platform Providers for Copyright infringing Uploads



2.1. User Uploads as Copyright Infringements



User Uploads on Online Platforms

■ Copyright protected subject matter in user uploads

- Sharing third-party content (music, films etc)
- Transformative uses
 - Remixes, Cover versions, background music, memes etc

■ Copyright Protection

- Art 2 Berne Convention: Literary and artistic works
 - “shall include **every production in the literary, scientific and artistic domain**, whatever may be the mode or form of its expression, such as [...]”
 - “In view of the foregoing, a **portrait photograph** can [...] be **protected by copyright** if, which it is for the national court to determine in each case, such photograph is **an intellectual creation of the author reflecting his personality** and expressing his **free and creative choices** in the production of that photograph.” [\[CJEU C-145/10, Painer\]](#)

User Uploads on Online Platforms

Article 2 Info-Dir: Reproduction right

Member States shall provide for the **exclusive right to authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part:**

Article 3 Info-Dir: Right of communication to the public /making available to the public

1. Member States shall provide authors with the **exclusive right to authorise or prohibit 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 them from a place and at a time individually chosen by them.**
3. The rights referred to in paragraphs 1 and 2 **shall not be exhausted** by any act of communication to the public or making available to the public as set out in this Article.

Permissibility of User Uploads

Limitations & Exceptions

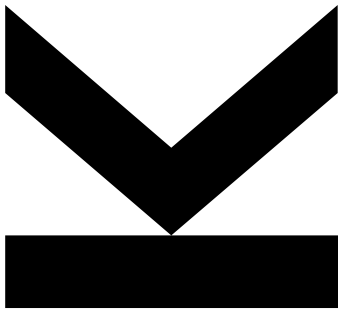
- Art 5(2)(b) Info-Directive: **Private Copies**
- Art 5(3)(d) Info-Directive: **Quotations**
- Art 5(3)(h) Info-Directive: **Freedom of Panorama**
- Art 5(3)(i): **Incidental Inclusion**
- Art 17(7) DSM-Directive: **quotation, criticism, review; caricature, parody or pastiche**

Contract

- Licence
 - Exclusive
 - Non-exclusive
 - Open Content Licences (eg Creative Commons)



2.2. Liability of Platform Providers



Platform Liability: Foundations

Liability?

- **National Law**
- **EU: Primary Liability**
 - Art 3 Info-Dir,
 - Art 17(1) DSM-Dir,
 - Art 6 EU-TM-Reg
- **EU: Intermediary Liability**
 - Art 8(3) Info-Dir,
 - Art 11 Enforcement-Dir

Exemption of Liability?

- **Safe harbour (Hosting Provider)**
 - Art 6 DSA
 - ex Art 14 EC-Dir

"It is therefore in the context of national law that the conditions under which such liability arises must be sought, it being understood, however, that, by virtue of Articles 12 to 15 of Directive 2000/31, certain situations cannot give rise to liability on the part of intermediary service providers"

CJEU *L'Oréal v eBay*

Art 6 DSA: Safe Harbour

Article 6

Hosting

1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, the service provider shall not be liable for the information stored at the request of a recipient of the service, on condition that the provider:
 - (a) does not have actual knowledge of illegal activity or illegal content and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or illegal content is apparent; or
 - (b) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the illegal content.
2. Paragraph 1 shall not apply where the recipient of the service is acting under the authority or the control of the provider.
3. Paragraph 1 shall not apply with respect to the liability under consumer protection law of online platforms that allow consumers to conclude distance contracts with traders, where such an online platform presents the specific item of information or otherwise enables the specific transaction at issue in a way that would lead an average consumer to believe that the information, or the product or service that is the object of the transaction, is provided either by the online platform itself or by a recipient of the service who is acting under its authority or control.
4. This Article shall not affect the possibility for a judicial or administrative authority, in accordance with a Member State's legal system, to require the service provider to terminate or prevent an infringement.

Art 6 DSA: Safe Harbour

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 - (b) upon **obtaining such knowledge** or awareness, **acts expeditiously to remove or to disable access to the illegal content**.
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4. This Article shall not affect the possibility for a judicial or administrative authority, in accordance with a Member State's legal system, to require the service provider to terminate or prevent an infringement.

Art 6 DSA: Safe Harbour

▪ Scope

▪ **Hosting services** (yes) vs content provider (no)

- Cloud computing services, webhosting services, filehosting services, e-mail services, discussion forums, social networks etc

▪ **Neutral role** vs active role

▪ **No specific knowledge** of infringements [CJEU *YouTube/Cyando*]

▪ Consequence

▪ Liability exemption („**safe harbour**“) for hosting services

- But: Art 2(4)(b) DSA → Art 17 DSM-Dir (special exemption of liability for online content sharing service providers)

▪ **Prior notice requirement**

▪ „**Notice and take/stay down**“

- Expeditious removal/blocking access

Art 6 DSA: Safe Harbour

- **Facebook Ireland** provides the services of a **host provider**
- In that respect, it should be recalled that [the safe harbour provision] is intended to exempt the host provider from liability where it satisfies **one of the two conditions**, that is to say,
 - **not having knowledge** of the illegal activity or information, or
 - acting expeditiously to **remove or to disable access** to that information as soon as it becomes **aware** of it
- A host provider **may be the addressee** of **injunctions** adopted on the basis of the national law (→ Art 6 (4) DSA!)
 - Austria/Germany: Injunctions also require prior notice

[\[CJEU *Glawischnig-Piesczek v Facebook Ireland*\]](#)

CJEU C-291/13 *Papasavvas*

- The limitations of civil liability are capable of applying in the context of proceedings between individuals relating to **civil liability for defamation**, where the conditions referred to in those articles are satisfied
- The limitations of civil liability do not apply to the case of a **newspaper publishing company** which operates a **website** on which the **online version of a newspaper** is posted, that company being, moreover, remunerated by income generated by commercial advertisements posted on that website, since it has **knowledge of the information** posted and exercises **control** over that information, whether or not access to that website is free of charge

[\[CJEU C-291/13 *Papasavvas*\]](#)

CJEU C-324/09 *L'Oréal v eBay*

- The safe harbour provision (Art 14 e-Commerce-Directive) seeks to **restrict** the **situations** in which intermediary providers of information society services **may be held liable** pursuant to the applicable **national law**. It is therefore in the context of national law that the conditions under which such liability arises must be sought, it being understood, however, that certain situations cannot give rise to liability on the part of intermediary service providers.
- An internet service consisting in **facilitating relations between sellers and buyers of goods** is, in principle, an **information society services**
 - services provided at a **distance** by **means of electronic equipment** for the processing and storage of data, at the **individual request** of a recipient of services and, normally, for **remuneration**
- Online marketplaces such as eBay **store** (on in its servers) **data supplied by customers**

[\[CJEU C-324/09 *L'Oréal v eBay*\]](#)

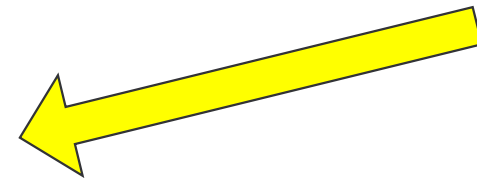
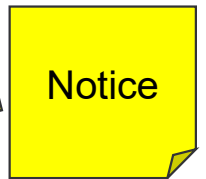
CJEU C-324/09 *L'Oréal v eBay*

- However, the fact that an online marketplace includes the storage of information provided by its customer-sellers **is not in itself a sufficient ground** for concluding that that service falls, in all situations, under the **safe harbour privilege**
- In order for an internet service provider to fall within the safe harbour privilege, it is essential that the provider be an intermediary provider that provides that service **neutrally** by a **merely technical and automatic processing of the data** provided by its customers
- That is not the case where the service provider plays an **active role** of such a kind as to give it knowledge of, or control over, those data

[\[CJEU C-324/09 *L'Oréal v eBay*\]](#)

Art 6 DSA: Safe Harbour

- PROTECTION under Art 6 DSA (= no liability)
- if a platform provider has no specific knowledge about infringements (neutral role)
- OR
- if it has specific knowledge and removes / blocks expeditiously



Art 6 DSA: Safe Harbour

- NO protection under Art 6 DSA (= liability possible)
- if platform = **active role** (knowledge)
- OR
- **No expeditious removal / blocking after notice**

Art 6 DSA: Safe Harbour

- NO protection under Art 6 DSA (= liability possible)

Inapplicability of safe harbor
does not per se constitute
liability (Rec 17 DSA)

→ Liability requires a
foundation

- Art 3 Info-Dir?
- Art 8(3) Info-Dir?

2.3. Liability of Platforms as Intermediaries



Liability of Platforms as Intermediaries

Art 6 DSA (Safe Harbour, Hosting)

1. No liability of hosting providers if

(a) no actual knowledge of illegal content and

(b) after obtaining such knowledge acts expeditiously to remove or to disable access to the illegal content.

3. But: Possibility of requiring the provider to terminate or prevent an infringement

Art 8 InfoSoc-Directive

3. Member States shall ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right.

Art 8 DSA

No general obligation to monitor the information which providers of intermediary services transmit or store, nor actively to seek facts or circumstances indicating illegal activity shall be imposed on those providers.

Liability of Platforms as Intermediaries

- „**Notice-and-take-down**“
 - Prior notice requirement (before injunctions can be obtained)?
 - Not required by EU law [CJEU *YouTube/Cyando* para 130 and 143]
 - AUT: Sec § 81a UrhG, GER: „Interferers‘ liability“
- „**Notice-and-stay-down**“
 - prevent further infringements of that kind [BGH *YouTube II*; CJEU *L'Oréal v eBay*; CJEU *Glawischnig v Facebook*]
- **Restrictions** of a notice-and-take/stay-down regime
 - Burden to detect and to initiate proceedings = rightholders
 - No further (financial) claims if platform expeditiously blocks access after notice
 - Revenues before take-down?

→ „Value Gap“?

Value Gap?

The second issue concerns the allocation of revenues for the use of copyright-protected content. New forms of online content distribution have emerged that may make copyright-protected content uploaded by end-users widely available. While these services are attracting a growing audience and gain economic benefits from the content distribution, there is a growing concern as to whether the value generated by some of these new forms of online content distribution is fairly shared between distributors and rights holders. The Commission intends to address this through sector-specific regulation in the area of copyright. The Commission will also aim to address the issue of fair remuneration of creators in their relations with other parties using their content, including online platforms.³² In the context of the evaluation and modernisation of the enforcement of intellectual property rights the Commission will assess the role intermediaries can play in the protection of intellectual property rights, including in relation to counterfeit goods, and will consider amending the specific legal framework for enforcement. The Commission will also continue to engage with platforms in setting up and applying voluntary cooperation mechanisms aimed at depriving those engaging in commercial infringements of intellectual property rights of the revenue streams emanating from their illegal activities, in line with a "follow the money" approach.

European Commission, [COM\(2016\) 288 final](#)

2.4. Primary Liability of Platforms: Art 3 Info-Dir



Art 3 Info-Dir

- (1) Member States shall provide authors with the **exclusive right to authorise or prohibit 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** them **from a place and at a time individually chosen by them**.

- If users upload protected works on platforms, **who** is making these works available?
 - User (yes)
 - also platform (?)

Art 3 Info-Dir

- “Filmspeler” multimedia player
- Pre-installing **add-ons** that enable access to protected works that are published on streaming sites without consent of rightholders

- **Providing such a multimedia player = Art 3 (1) Info-Dir**
 - Full knowledge of the consequences of the conduct
 - without add-ons the purchasers would find it difficult to benefit from those protected works

[\[CJEU *Filmspeler*\]](#)

Art 3 Info-Dir

▪ File-sharing platform „The Pirate Bay“

- Making available and management of a sharing platform which, by means of **indexation of metadata** relating to protected works and the provision of a **search engine**, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network
- The works are provided not by the platform operators but by its users

▪ Provider of Filesharing Platform?

- *“By its first question, the referring court asks, in essence, whether the **concept of ‘communication to the public’**, within the meaning of **Article 3(1) of Directive 2001/29**, should be interpreted as **covering, in circumstances such as those at issue in the main proceedings, the making available and management, on the internet, of a sharing platform which, by means of indexation of metadata relating to protected works and the provision of a search engine, allows users of that platform to locate those works and to share them in the context of a peer-to-peer network.**”*

[\[CJEU The Pirate Bay\]](#)

Art 3 Info-Dir

- CJEU: Providers of TPB → Art 3 (1) Info-Dir
 - Intervene with full knowledge of the consequences of their conduct to provide access to protected works
 - Indexing torrent files (categories), search engine, delete faulty torrent files and actively filter some content (essential role)
 - otherwise works could not be shared or sharing would be more complex

[\[CJEU *The Pirate Bay*\]](#)

Art 3 Info-Dir

- CJEU *Filmspeler*

- CJEU *The Pirate Bay*
 - index
 - search engine

- **YouTube → ???**

CJEU *YouTube*


- ***Does the making available right (Art 3 Info-Dir) apply to the platform provider?***
 - CJEU *The Pirate Bay* → YouTube?

- ***Does the safe harbour (Art 6 DSA, ex Art 14 EC-Dir) apply to the platform provider?***
 - CJEU *L'Oréal/eBay* → YouTube?

- ***Requirements for obtaining an injunction against an intermediary (Art 8 (3) Info-Dir)?***
 - GER (“Störerhaftung”) / AUT (§ 81 (1a) UrhG)
 - Injunction only after previous notice = „Notice-and-Take/Stay-Down“

[\[CJEU *YouTube/Cyando*\]](#)

CJEU *YouTube*: Making Available Right

- Upload (user) 
- Platform
 - **Indispensable role** of the platform yes, but not enough
 - **Deliberate intervention?**
 - Mere provision of physical facilities does not in itself amount to communication (Rec 27 Info-Dir)
 - The act of intervening **in full knowledge of the consequences** of doing so, with the aim of giving the public access to protected works

CJEU *YouTube*: Making Available Right

- The operator of a video-sharing platform or a file-hosting and -sharing platform, on which users can illegally make protected content available to the public, **does not make a ‘communication to the public’** of that content **unless it contributes, beyond merely making that platform available**, to giving access to such content to the public in breach of copyright.

CJEU *YouTube*: Making Available Right IF Provider

Platform+

participates in selecting protected content illegally communicated to the public

has **specific knowledge** of infringing content

- and **refrains from expeditiously deleting/blocking**
- Commercial platforms → no presumption of knowledge [≠ CJEU *GS Media*]

knows or ought to know, in a general sense (**'general knowledge'**) that users make protected content available

- and **refrains from applying appropriate technological measures**
- Art 17: "best efforts"

provides **tools** on its platform **specifically intended for the illegal sharing of such content**

knowingly promotes illegal sharing, e.g. by adopting a **financial model** that **encourages** users to illegally upload works

YouTube...

Content

- does **not intervene** in the **creation or selection** of content uploaded
- does **not view or monitor** that content before it is uploaded (“uploaded automatically”)

Information

- clearly **informs** users, in its terms of service and every time a file is uploaded, that it is forbidden to post protected content on that platform in breach of copyright

Warning

- calls upon its users, in its **‘Community guidelines’**, to respect copyright
- If a video is blocked due to a report by the rightholder, the user who has uploaded it is **warned** that his or her account will be blocked in the event of repeated infringements

Technological Measures

- **notification button** and a **special alert procedure** for reporting and arranging for illegal content to be removed
- a **content verification program**

Not (directly) facilitating infringing uses

- **Rankings/categories/recommended videos** not intended to facilitate illegal sharing
- **financial model** not based on illegal content
- **Purpose/principal use** not illegal sharing of protected content

CJEU *YouTube*: Art 6 DSA (Art 14 EC-Dir)

▪ Active role of the platform?

▪ Platform+ → exclusion from safe harbour [CJEU *YouTube* para 107]

- YouTube: assisting by optimizing the presentation/promoting the content? [CJEU *L'Oréal/eBay*]

▪ Knowledge?

▪ Exclusion from safe harbour only through 'specific knowledge'

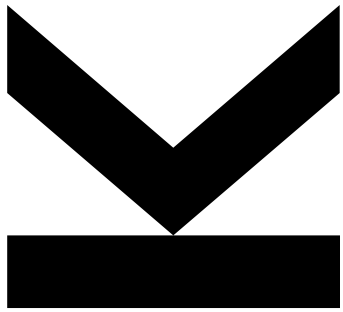
▪ Notification must contain **sufficient information**

▪ 'general knowledge' and refraining from putting in place appropriate technological measures may constitute communication to the public, but no loss of safe harbor?

▪ No specific knowledge through

- application of technological measures
- automated indexation, search function, recommended videos

2.5. Primary Liability of Platforms: Art 17 DSM-Dir



Art 17 DSM-Dir: Scope

- Art 2 (6) DSM-Dir “**online content-sharing service provider**”
 - provider of an **information society service**
 - the main or one of the **main purposes** is to **store** and **give the public access** to a **large amount** of copyright-protected works or other protected subject matter **uploaded by its users**
 - which it **organises** and **promotes for profit-making purposes**

Art 17 DSM-Dir: Scope

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 - the main or one of the **main purposes** is to **store** and **give the public access** to a **large amount** of copyright-protected works or other protected subject matter **uploaded by its users**
 - which it **organises** and **promotes for profit-making purposes**
- **Excluded** → Art 3 InfoSoc-Dir
 - not-for-profit online encyclopedias
 - not-for-profit educational and scientific repositories
 - open source software-developing and-sharing platforms
 - providers of electronic communications services
 - online marketplaces
 - business-to-business cloud services
 - cloud services that allow users to upload content for their own use

Size

Purpose

Purpose

Social networks?

Rec 62 DSM-Dir: „play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences.“

Art 17 DSM-Dir: Consequence

- (1) OCSSP **performs an act of communication to the public or an act of making available to the public** for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users
 - = Art 3 InfoSoc-Dir or right sui generis?
- (1) OCSSP **shall obtain an authorisation** from the rightholders referred to in Art 3 (1) and (2) InfoSoc-Dir
 - = OCSSPs commit an **own act of making available**
 - = OCSSPs are **responsible for concluding license agreements**
 - (2) that authorisation shall also cover acts carried out by users (not acting on a commercial basis or no significant revenues)
 - = **otherwise: primary liability** (not only injunctions)

2.6. Liability of Platform Providers for Copyright infringing Uploads: Wrap-up



Provisions and Structure

- Art 3 Info-Dir
- Art 8(3) Info-Dir
- Art 17 DSM-Dir
- Art 6 DSA (ex Art 14 EC-Dir)

Provisions and Structure

- Art 3 Info-Dir
- Art 8(3) Info-Dir
- Art 17 DSM-Dir
- Art 6 DSA (ex Art 14 EC-Dir)
- **Claims against platform providers**
 - *Are platform providers subject to claims?*
 - *What can be demanded from platform providers?*
- **Safe Harbour**
 - *Are platform providers exempted from liability?*
 - Condition 1: no active role
 - Condition 2: upon (specific) knowledge → expeditious removing/blocking

Provisions and Structure

- Art 3 Info-Dir
 - Art 8(3) Info-Dir
 - Art 17 DSM-Dir
 - Art 17(1) DSM-Dir
 - Art 17(4) DSM-Dir
 - Art 6 DSA (ex Art 14 EC-Dir)
- **Claims against platform providers**
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-

Online Content Sharing Service Providers (Art 2(6) DSM-Dir)

- **Claims against platform providers**

- *Are platform providers subject to claims?*
- *What can be demanded from platform providers?*

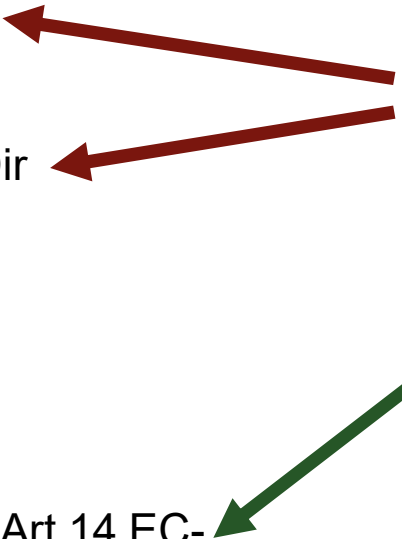
- **Art 17 DSM-Dir**

- Art 17(1) DSM-Dir
- Art 17(4) DSM-Dir

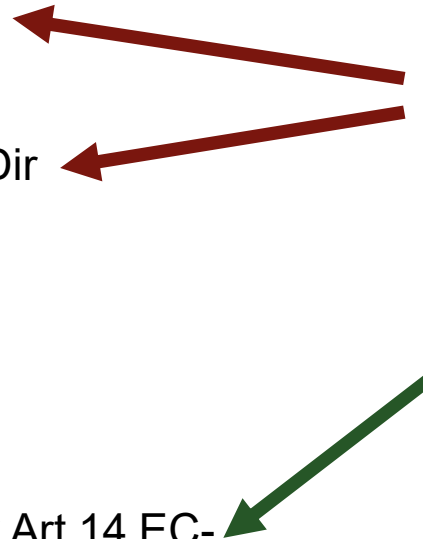
- **Safe Harbour**

- *Are platform providers exempted from liability?*
 - Condition 1: no active role
 - Condition 2: upon (specific) knowledge → expeditious action

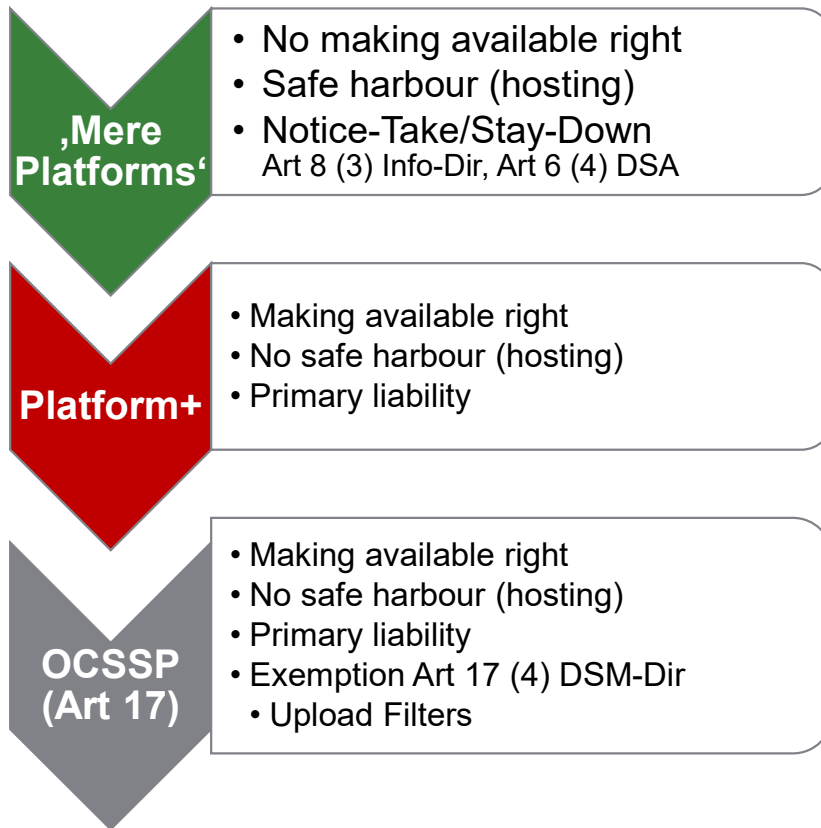
All other Platforms

- Art 3 Info-Dir
 - Art 8(3) Info-Dir
 - Art 6 DSA (ex Art 14 EC-Dir)
 - **Claims against platform providers**
 - *Are platform providers subject to claims?*
 - *What can be demanded from platform providers?*
 - **Safe Harbour**
 - *Are platform providers exempted from liability?*
 - Condition 1: no active role
 - Condition 2: upon (specific) knowledge → expeditious action
- 

All other Platforms

- Art 3 Info-Dir
 - Art 8(3) Info-Dir
 - Art 6 DSA (ex Art 14 EC-Dir)
 - **All other platforms not covered by Art 2(6) DSM-Dir =**
 - **No large amount** of copyright-protected works
 - **No profit-making purpose**
 - **No purpose** to store and **give access to the public**
 - eg not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, providers of electronic communications services (Directive (EU) 2018/1972), online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use
 - Platforms the main purpose of which is to engage in or to facilitate **copyright piracy** (Rec 62 DSM-Dir)
- 

Scope of Platform Liability (Copyright)



↓
**General knowledge
without appropriate
technological
measures**

↓
**Specific Knowledge
(after notice) and no
expeditious
deleting/blocking**

‘Illegal platforms‘
tools for illegal sharing
knowingly promoting illegal
sharing (financial model)

3. Upload Filters and Approaches to Mitigating Risks of Overblocking



Art 17 DSM-Dir

(1) OCSSP → making available right

(4) if no authorization = liable, unless:

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

3.1. Permissibility of Upload Filters

The Case CJEU *Poland v EU Parliament/Council*



CJEU *Poland v EU Parliament/Council*

▪ **Republic of Poland requested**

- Annulment of Art 17(4)(b) and (c) last sentence DSM-Dir
- alternatively, annulment of Art 17 DSM-Dir in its entirety
- Violation of Art 11 CFR

▪ **CJEU**

- Exchange of information via the internet (platforms) = **Art 11 CFR**
- Special liability rule of Art 17 (4) DSM-RL = **limitation** Art 11 CFR
 - Prior control and filtering of uploaded content
- Examination on the basis of the **requirements of Art 52 (1) CFR**
- **Not precluding** examination of conformity with fundamental rights with regard to
 - National implementation
 - Measures taken by the platforms

CJEU *Poland v EU Parliament/Council*

- „**All efforts**“ Art 17(4)(b) DSM-Dir
 - Additional obligation already before infringements („ex ante“, „preventive“)
 - (de facto) obligation to check uploaded content in advance, provided that information or references are received
 - Tools for automatic detection and filtering (proportionality)

- **Art 17 DSM-Dir → Art 11 CFR**
 - Legal basis of the restriction?
 - Problem: "all efforts" → no further details on specific measures
 - Openly formulated restrictions are generally permissible
 - Art 11 CFR vs Art 16 CFR vs Art 17(2) CFR : maybe even need for platform to be able to choose concrete measures

CJEU Poland v EU Parliament/Council

legitimate
objective

Appropriate,
required, least
onerous

Disadvantages
not
disproportionate
to objectives

Clear and
precise rules

Sufficient
guarantees

CJEU Poland v EU Parliament/Council

Appropriate,
required,
least onerous

Reactive duties less
burdensome but not
as effective

CJEU *Poland v EU Parliament/Council*

Disadvantages
not
disproportionate
to objectives

Clear and
precise rules

Sufficient
guarantees

Filter obligation only after
receipt of information
(reference file)

Inadmissibility of filter
systems that do not
sufficiently differentiate

Mandatory exceptions
("rights") for quotations,
parodies, caricatures,
pastiche
+ Information in ToS

No general duty of
supervision
→ No obligation to
independently assess
illegality

Non-interference with
uses permitted under
copyright law (obligation
to success)

procedural guarantees
(complaints procedure,
out-of-court dispute
resolution)

CJEU *Poland v EU Parliament/Council*

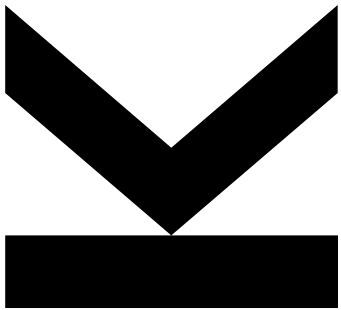
Best efforts to "filter"

- Art 17(4)(b), (c) DSM-Dir

**Obligation to success
lawful uses**

- Art 17(7), (9) DSM-Dir

3.2. Distinguishing lawful and infringing uses



3.3. Safeguards against „over-blocking“



Lawful uses

Legal standing of copyright exceptions	Copyright exceptions as „user rights“ [CJEU <i>Poland/Parliament and Council</i>]
Legal restrictions of filtering	Prohibition of "over-blocking" as obligation of result [Art 17 DSM-Dir, CJEU <i>Poland/Parliament and Council</i>]
	AUT/GER: Small snippets, „pre-flagging“
	Diligence, objectivity and proportionality, fundamental rights [Art 14 (4) DSA]
Accompanying safeguards	Transparency [Art 17 DSM-Dir+ DSA]
	Complaint and redress mechanism (internal) [Art 17 DSM-Dir+ DSA]
	Out-of-court dispute settlement [Art 17 DSM-Dir+ DSA]
	Measures and protection against misuse [DSA]
	Supervision [DSA]

Copyright Exceptions as „User Rights“: Background

- **CJEU *Eugen Umler*** para. 43 et seq; **CJEU *Spiegel Online v. Volker Beck*** para. 54; **CJEU *Funke Medien*** para. 70
 - Art 5 (2) (c) (n) InfoSoc-Directive, Art 5 (3) (c) second case, (d) InfoSoc-Directive
 - Context: guaranteeing the “robustness” of exceptions
 - Exceptions not becoming “ineffective” (interpretation)
 - No strict interpretation
- **AG Saugmandsgaard Øe Opinion, *Poland v. Parliament/Council***, para. 161; **CJEU *Poland v. European Parliament/European Council*** para. 87
 - Art 17 (7) DSM-Directive
 - Context: mandatory nature; fundamental rights

*“It follows that the EU legislature has expressly recognised that users of sharing services have **subjective rights under copyright law.**”*
[AG Saugmandsgaard Øe Opinion para. 161]

Copyright Exceptions as „User Rights“: Terminology

- **Exception** = freedom (privilege)
 - defensive

- **Right** = more than freedom?
 - offensive?

Copyright Exceptions as „User Rights“

▪ Enforcement against Rightholder?

- ~~Publish unpublished works?~~
- Streamline admissible uses (quotation, parodies)?
 - ~~Provide „open formats“? (.pdf → .doc)~~
 - ~~Provide high resolution versions?~~
 - Removal of TPM
 - Not using/enforcing contractual restrictions

*“Those **users** now have the **right**, which is enforceable against the providers of those services and rightholders, to make legitimate use, on those services, of protected subject matter, including the right to rely on exceptions and limitations to copyright and related rights.”*

[AG Saugmandsgaard Øe Opinion para. 161]

Copyright Exceptions as „User Rights“

- Enforcement against Platform?
 - Claim that citations/parodies are made available?
 - Content policy? Terms of services?
 - *Examples: Cat videos? Parodies related to war? Duration restrictions of TikTok?*
 - Private autonomy vs. anti-trust / must-carry obligation

“To that extent, Article 17(7) of Directive 2019/790 **limits the freedom of sharing service providers to conduct a business** in order to ensure **freedom of expression** for users. Nevertheless, those providers **remain free to remove content which falls within the scope of exceptions or limitations on grounds other than copyright issues**, for example if it is insulting or contravenes their **nudity policy**. **That provision does not therefore impose on those providers, as such, an obligation to disseminate (‘must carry’) such content.**”

[AG Saugmandsgaard Øe Opinion footnote 202]

Copyright Exceptions as „User Rights“: DSA

Art 17 (1) DSA

Providers of hosting services shall provide a **clear and specific statement of reasons** to any affected recipients of the service for any of the following **restrictions** imposed on the **ground** that the information provided by the recipient of the service is **illegal content** or **incompatible** with their **terms and conditions**:

- **Reason = “copyright”**
 - “**user rights**” = probably **enforceable claim** to make parody or quotation available [AG Saugmandsgaard Øe fn 202]
- **No reason**
 - violation of Art 17 DSA
- **Reason = “other”** (ToS, Content Policy, ...)

Art 14 (4) DSA

Providers of intermediary services shall act in a **diligent, objective** and **proportionate manner** in applying and enforcing the **restrictions** referred to in paragraph 1 [= content moderation], with **due regard** to the **rights and legitimate interests** of all parties involved, including the **fundamental rights** of the **recipients** of the service, such as the **freedom of expression**, freedom and pluralism of the media, and other fundamental rights and freedoms as enshrined in the Charter.

= **must carry** obligation vs obligation to **equal treatment**?

Lawful uses

Legal standing of copyright exceptions

Copyright exceptions as „user rights“ [CJEU *Poland/Parliament and Council*]

Legal restrictions of filtering

Prohibition of "over-blocking" as obligation of result [Art 17 DSM-Dir, CJEU *Poland/Parliament and Council*]

AUT/GER: Small snippets, „pre-flagging“

Diligence, objectivity and proportionality, fundamental rights [Art 14 (4) DSA]

Transparency [Art 17 DSM-Dir+ DSA]

Accompanying safeguards

Complaint and redress mechanism (internal) [Art 17 DSM-Dir+ DSA]

Out-of-court dispute settlement [Art 17 DSM-Dir+ DSA]

Measures and protection against misuse [DSA]

Supervision [DSA]

Lawful uses

Legal standing of copyright exceptions

Copyright exceptions as „user rights“ [CJEU *Poland/Parliament and Council*]

Legal restrictions of filtering

Prohibition of "over-blocking" as obligation of result [Art 17 DSM-Dir, CJEU *Poland/Parliament and Council*]

AUT/GER: Small snippets, „pre-flagging“

Diligence, objectivity and proportionality, fundamental rights [Art 14 (4) DSA]

Accompanying safeguards

Transparency [Art 17 DSM-Dir+ DSA]

Complaint and redress mechanism (internal) [Art 17 DSM-Dir+ DSA]

Out-of-court dispute settlement [Art 17 DSM-Dir+ DSA]

Measures and protection against misuse [DSA]

Supervision [DSA]

4. Liability of Platform Providers for Trademark Infringements



Trademark Law: Foundations

Article 9

Rights conferred by an EU trade mark

1. The registration of an EU trade mark shall confer on the proprietor **exclusive rights** therein.
2. Without prejudice to the rights of proprietors acquired before the filing date or the priority date of the EU trade mark, the proprietor of that EU trade mark shall be **entitled to prevent all third parties not having his consent from using in the course of trade, in relation to goods or services,** any sign where:
 - (a) the sign is identical with the EU trade mark and is used in relation to goods or services which are identical with those for which the EU trade mark is registered;
 - (b) the sign is identical with, or similar to, the EU trade mark and is used in relation to goods or services which are identical with, or similar to, the goods or services for which the EU trade mark is registered, if there exists a likelihood of confusion on the part of the public; the likelihood of confusion includes the likelihood of association between the sign and the trade mark;
 - (c) the sign is identical with, or similar to, the EU trade mark irrespective of whether it is used in relation to goods or services which are identical with, similar to or not similar to those for which the EU trade mark is registered, where the latter has a reputation in the Union and where use of that sign without due cause takes unfair advantage of, or is detrimental to, the distinctive character or the repute of the EU trade mark.

Trademark Law: Foundations

3. The following, in particular, may be prohibited under paragraph 2:
- (a) affixing the sign to the goods or to the packaging of those goods;
 - (b) offering the goods, putting them on the market, or stocking them for those purposes under the sign, or offering or supplying services thereunder;
 - (c) importing or exporting the goods under the sign;
 - (d) using the sign as a trade or company name or part of a trade or company name;
 - (e) using the sign on business papers and in advertising;
 - (f) using the sign in comparative advertising in a manner that is contrary to Directive 2006/114/EC.

CJEU *L'Oréal v eBay*

- Art 9(2) EU-Trademark-Reg
 - The proprietor of that EU trade mark shall be entitled to **prevent all third parties** not having his consent **from using** [the trademark] **in the course of trade, in relation to goods or services**
- **If a TM is used in an offer on an online marketplace → is the operator of that online marketplace using the TM?**
 - CJEU: *“it follows that the use of signs identical with or similar to trade marks in offers for sale displayed on an online marketplace is **made by the sellers** who are customers of the operator of that marketplace **and not by that operator itself**”*
- **Operator = intermediary = hosting provider's safe harbour**
 - *“Inasmuch as it enables that use to be made by its customers, the role of the online marketplace operator [...] must be examined from the point of view [...] the ‘liability of intermediary service providers’ in electronic commerce and comprises Articles 12 to 15 of that directive”*
 - **Injunctions** (after notice)

[\[CJEU *L'Oréal v eBay*\]](#)

CJEU *L'Oréal v eBay*

▪ Neutral role

- The mere fact that the operator of an online marketplace stores offers for sale on its server **sets the terms of its service**, is **remunerated** for that service and **provides general information** to its customers cannot have the effect of denying it the exemptions from liability
- → safe harbour applicable
- → after a sufficiently precise and adequately substantiated notice → Take/staydown

▪ Active role

- If the operator of an online market place provides **further assistance**, eg by **optimising the presentation of the offers for sale** or **promotes those offers**
- → Excluded from exemption from liability (no safe harbour)

[\[CJEU C-324/09 L'Oréal v eBay\]](#)

CJEU *Google France v Louis Vuitton*

▪ Internet referencing service

- **Storage of information (keywords) supplied by an advertiser**
- **Hosting provider: active role or neutral role?**
 - With the help of software which it [Google] has developed, Google processes the **data entered by advertisers** and the resulting display of the ads is made under conditions which Google controls
 - Thus, Google **determines the order of display** according to, inter alia, the remuneration paid by the advertisers.
 - The mere facts that the referencing service is subject to payment, that Google sets the payment terms or that it provides general information to its clients **cannot have the effect of depriving it from the liability exemption**
 - That service provider **cannot be held liable** for the data which it has stored at the request of an advertiser, **unless**, having obtained **knowledge** of the unlawful nature of those data or of that advertiser's activities, **it failed to act expeditiously to remove or to disable access to the data concerned**
 - But: the role played by Google in the **establishment or selection of the keywords is relevant** → pre-selected key words?

[\[CJEU Google France v Louis Vuitton\]](#)

CJEU *Coty v Amazon*

- *“By its question, the referring court asks, in essence, whether Article 9(2)(b) of Regulation No 207/2009 and Article 9(3)(b) of Regulation 2017/1001 must be interpreted as meaning that a person who, on behalf of a third party, stores goods which infringe trade mark rights, without being aware of that infringement, must be regarded as stocking those goods in order to offer them or put them on the market for the purposes of those provisions, if that person does not itself pursue those aims.”*

[\[CJEU *Coty v Amazon*\]](#)

CJEU *Coty v Amazon*

- EU-TM-Dir: **No definition** of “using”
- *“the expression ‘using’ involves **active behaviour and direct or indirect control** of the act constituting the use.”*
- *“only a third party who has **direct or indirect control** of the act constituting the use is effectively **able to stop** that use and therefore comply with that prohibition”*
- *“The fact of **creating the technical conditions** necessary for the use of a sign and being paid for that service does **not** mean that the party offering the service itself uses the sign”*
- *“Article 9(2)(b) of Regulation No 207/2009 and Article 9(3)(b) of Regulation 2017/1001 must be interpreted as meaning that a **person** who, **on behalf of a third party, stores** goods which infringe trade mark rights, **without being aware** of that infringement, must be regarded as **not stocking those goods in order to offer them** or put them on the market for the purposes of those provisions, **if that person does not itself pursue those aims**”*

[\[CJEU *Coty v Amazon*\]](#)

CJEU *Louboutin v Amazon*

- *“Mr Louboutin is a French designer of luxury footwear and handbags whose best-known goods are high-heeled women’s shoes. Since the mid-1990s, he has added to his high-heeled shoes an outer sole in a **red colour** (Pantone 18-1663TP)”*
- *“That colour, **applied to the sole of a high-heeled shoe** [...] has been **registered as an EU trade mark** since 10 May 2016”*
- *“Amazon operates websites selling various **goods which it offers both directly, in its own name and on its own behalf, and indirectly, by also providing a sales platform for third-party sellers.**”*
 - Shipping either by those sellers or by Amazon, which then stocks those goods in its distribution centres and ships them to purchasers from its own warehouses.
- *“Those websites regularly display advertisements for red-soled shoes which, according to Mr Louboutin, relate to goods which **have been placed on the market without his consent**”*

[\[CJEU *Louboutin v Amazon*\]](#)

CJEU *Louboutin v Amazon*

- **IF** third-party sellers offer on a marketplace goods bearing a TM (without the consent of the proprietor of the TM)
- **Question** = whether the operator of a hybrid online marketplace (own offerings + offerings of third parties), as well as the third-party seller, uses the TM according to Article 9(2)(a) of Regulation 2017/1001 and may thus be held liable for infringing third-party offerings
- **Because:** the operator...
 - publishes offers on its website in a **uniform manner**,
 - displays at the same time **advertisements** relating to the goods which it sells in its own name and goods offered by third-party sellers
 - displays its **own logo** on all those advertisements,
 - offers third-party sellers, for the marketing of their goods, **additional services** (support in the presentation of their advertisements, stocking and shipping);
 - Relevance of the perception of the user?

[\[CJEU *Louboutin v Amazon*\]](#)

CJEU *Louboutin v Amazon*

- EU-TM-Directive: **No definition** of “using”
 - Required = **active behaviour** and **direct or indirect control**
 - Merely creating the **technical conditions** necessary for the use of a TM and being paid for that service = **not enough**
- Differences to CJEU *L'Oréal v eBay*, *Coty v Amazon*
 - Now also **own offers relevant** (hybrid model)
- **Operator of an online marketplace** (hybrid model) = **using a TM** itself if
 - a well-informed and reasonably observant **user**
 - **establishes a link** between the services of that operator and the TM,
 - in particular where such a user may have the **impression** that that operator itself is marketing, in its own name and on its own account, the goods offered by third-parties
 - uniform method of presenting the offers, advertising own offers and third-party offers, placing the logo on all advertisements, offering third-party sellers additional services (storing and shipping)

[\[CJEU *Louboutin v Amazon*\]](#)

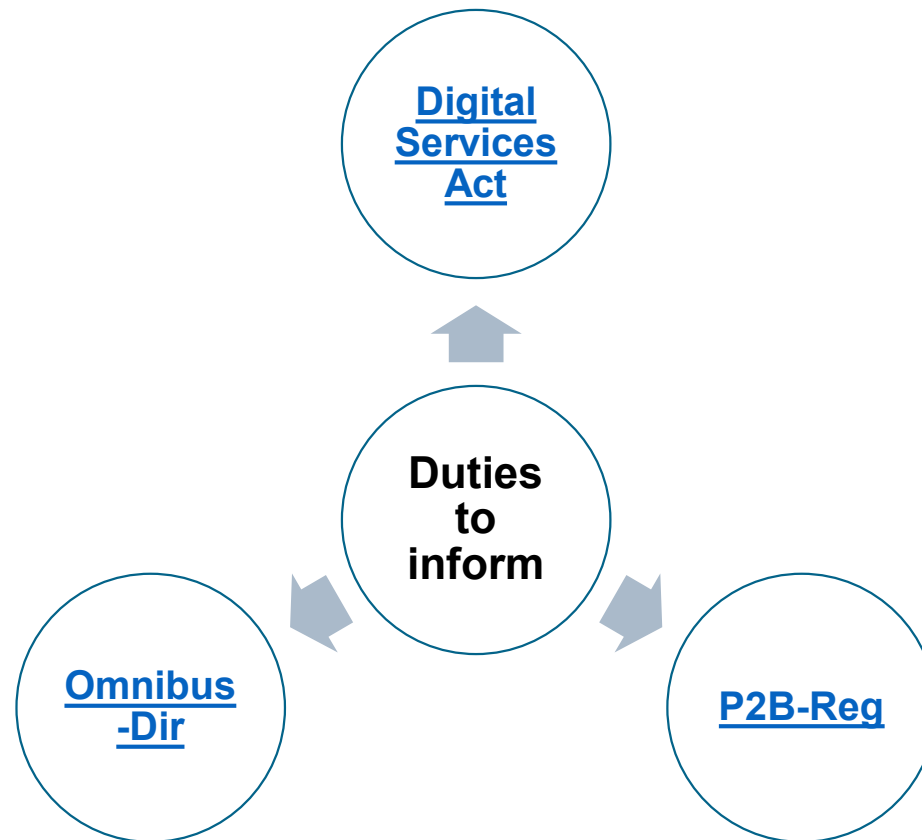
5. Transparency on Online Platforms



Challenges regarding transparency

- Platforms as intermediaries
 - Online marketplaces
 - Comparison platforms
 - Search engines
- Transparency as foundation of competition based on performance
 - Free informed choice
 - Protection against misleading, likelihood of confusion
 - Specific challenges of the platform economy
- High relevance of rankings
- Intransparency of ranking algorithms
- Suggestive power of rankings (“neutral” platform)

Transparency in the EU legal framework



Digital Services Act

■ Information obligations

Content moderation

- Art 14 DSA: Terms and conditions
- Art 15 DSA: information on content moderation by intermediary services
- Art 17 DSA: Statement of reason
- Art 24 DSA: additional information on content moderation by online platforms
- Art 42 DSA: additional information by VLOPs and VLOSEs

Advertising

- Art 26 DSA: information on advertising on online platforms
- Art 39 DSA: additional advertising transparency for VLOPs and VLOSEs

Recommender systems

- Art 27 DSA: recommender system transparency on online platforms

Traders

- Art 30(7) DSA: online platforms allowing consumers to conclude distance contracts with traders

Illegal products

- Art 32 DSA: online platform allowing consumers to conclude distance contracts with traders

Omnibus-Dir

▪ Information obligations

Ranking

- Art 3(4)(b) Omnibus-Dir
- Art 4(5) Omnibus-Dir

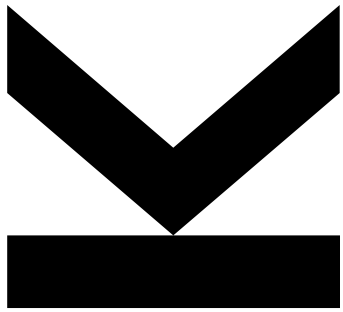
Paid advertisements/paid upgrading in search results

- Art 3(7)(a) Omnibus-Dir

Reviews

- Information: Art 3(4)(c) Omnibus-Dir
- Prohibition: Art 3(7)(b) Omnibus-Dir

5.1. Transparency regarding Rankings



Ranking parameters: Art 3(4)(b) Omnibus-Dir

- When providing **consumers** with the **possibility to search for products** offered by **different traders or by consumers** on the basis of a **query** in the form of a **keyword, phrase or other input, irrespective of where transactions are ultimately concluded, general information, made available in a specific section of the online interface that is directly and easily accessible from the page where the query results are presented, on the main parameters determining the ranking of products** presented to the consumer as a **result of the search query and the relative importance of those parameters**, as opposed to other parameters, shall be regarded as material. This paragraph does not apply to providers of online search engines as defined in point (6) of Article 2 of Regulation (EU) 2019/1150 of the European Parliament and of the Council.

Ranking parameters: Art 3(4)(b) Omnibus-Dir

Applicability

Online platforms with **search function** for **consumers**

possibility to **search for products** offered by **different traders or by consumers**

on the basis of a **query** in the form of a **keyword, phrase** or **other input**,

irrespective of where transactions are ultimately concluded,

Not: search engines (→ Art 5 (2) P2B-Reg)

Consequence

general information on the main parameters determining the ranking of products presented to the consumer as a **result of the search query** and the **relative importance of those parameters** as opposed to other parameters

Availability in a **specific section of the online interface directly and easily accessible from the page where the query results are presented**

Ranking parameters: Art 3(4)(b) Omnibus-Dir

- Search for products "**offered by different traders or by consumers**"
 - Yes: online marketplaces, comparison platforms [Recital 21 Omnibus-Dir], voice assistants [Guidelines UCP-Dir, 92], probably also social networks
 - No: Webshops (exclusively own products) and online search engines (→ Art 5 (2) P2B-Reg) [Rec 21 Omnibus-Dir; crit]
- **Search function**
 - Not: Rankings without search input e.g. suggestions on start page [Guidelines UCP-Dir, 91], "other users have also bought" etc
- Restriction to **search by consumers**
 - Search by traders → Art 5 P2B-Reg

Ranking parameters: Art 3(4)(b) Omnibus-Dir

▪ Information about

▪ Main parameters and

▪ Relative weighting of these parameters compared to other parameters

- = general criteria, processes and specific signals (of ranking algorithms), adjustment and downgrading mechanisms [Rec 22 Omnibus-Dir]
- Not: trade secrets, exact weighting, detailed functioning of ranking methods, algorithms [Rec 23 Omnibus-Dir, Guidelines UCP-Dir, 91, Guidelines P2B-Reg, 9]
- Which providers were included in the ranking?

▪ Type of information

▪ General information

- Abstract, no individual adaptation to individual search queries [Rec 23 Omnibus-Dir]
- Clear (concise) and understandable for consumers, no explanatory statement (≠ Art 5 P2B-eg)
- Not sufficient: „AI“ [Guidelines P2B-Reg, 9]

▪ Place of information

- Immediate and easy accessibility on the search results page (≠ Art 5 P2B-Reg)

Ranking parameters: Art 5 P2B-Reg

- (1) Providers of **online intermediation services**
 - **main ranking parameters** and **reasons for the relative importance** as opposed to other parameters
 - **in their terms and conditions**
- (2) Providers of **online search engines**
 - **main ranking parameters** and **relative importance** of those main parameters
 - **easily and publicly available description** (plain and intelligible language)
- (3) possibility to **influence ranking** against any **direct or indirect remuneration paid by business users or corporate website users** to the respective provider → **description** of those possibilities and **effects**
- (5) The descriptions referred to in paragraphs 1, 2 and 3 shall be **sufficient to enable the business users or corporate website users** to obtain an **adequate understanding** of whether, and if so how and to what extent, the **ranking mechanism takes account of**:
 - characteristics of the goods and services offered to consumers, relevance of those characteristics, design characteristics of the website (online search engines)

Our default ranking and sorting options

Our search results are also a recommendation system. They show all the Accommodations (hotels, apartments, etc.) that match your search. If you like, you can use filters to narrow down your results.

To see all the booking options an Accommodation offers, just click it.

When you first get your search results, they'll be sorted ('ordered') by 'Our top picks' (called 'Popularity' on our app):

- To appear high up on the page, an Accommodation needs to do well in each of these three areas:
 - **Click-through rate.** How many people click on it
 - **Gross bookings.** How many bookings are made with that Accommodation
 - **Net bookings.** How many bookings are made with that Accommodation, minus how many are cancelled.
- As you can imagine, those numbers depend on lots of factors, including review scores, availability, policies, pricing, quality of content (e.g. photos) and other features.
- An Accommodation's ranking can also be influenced by other things - for example, how much commission they pay us on Bookings, how quickly they usually pay it, whether they're part of our Genius programme or Preferred Partner(+) Programme, and in certain places*, whether we organise their payments.
- Any information we've gathered based on how you interact with our Platform (including what you tell us) will also be a factor.

Source: [Booking.com](https://www.booking.com)

Rankings: Art 3(7)(a) Omnibus-Dir (Overview)

- **Paid advertisements/paid upgrading in search results**
 - Providing **search results** in response to a **consumer's online search query**
 - **without clearly disclosing**
 - any **paid advertisement** or **payment specifically for achieving higher ranking** of products **within the search results**

Rankings: Art 3(7)(a) Omnibus-Dir (Details)

▪ Providers of online search functions

- eg online marketplaces, search engines and comparison platforms [Rec 20 Omnibus-Dir]
- Voice assistants, social networks

▪ Online search queries by a consumer

- Not: search queries by traders; but: Art 5 (3) P2B-Reg
- Not: advertisement/rankings without search queries [cf Guidelines UCP-Dir, 91]

▪ Paid advertising

- Display of offers, which would not otherwise have been displayed according to search criteria, in the first place or within the real search results [Guidelines UCP-Dir, 92]
- Payment for inclusion of search results in the ranking

▪ Payments for improvements of ranking of a product within search results

- Improvement of the ranking by means of pre-placement, visual highlighting of the placement [Rec 18 et seq Omnibus-Dir]

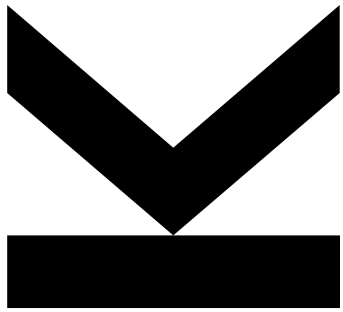
Rankings: Art 3(7)(a) Omnibus-Dir (Details)

- **No prohibition of paid improvements of ranking, but disclosure requirement**
- **Clarity**
 - Information in a short, easily accessible and comprehensible manner and in direct connection with the respective better ranked search results [ErIRV MoRUG II 11]
 - Highlighting of products that
 - only appear in the search results due to paid advertising or
 - were ranked higher in the search results due to payments
 - Highlighting: eg advertising, ad/vertisement, not: sponsored [Guidelines UCP-Dir, 93]
 - Probably not required: disclosure of the extent of the ranking improvement (but Art 5 (3) P2B-Reg)

Art 27 DSA

- (1) Providers of **online platforms** that use **recommender systems**
 - in their **terms and conditions** (plain and intelligible language)
 - **main parameters + any options to modify or influence** those main parameters
- (2) The **main parameters** referred to in paragraph 1 shall explain **why certain information is suggested** to the recipient of the service. They shall include, at least:
 - (a) the criteria which are most significant in determining the information suggested
 - (b) the reasons for the relative importance of those parameters.
- (3) If **several options** are available pursuant to paragraph 1 for recommender systems → obligation to provide a functionality that allows the recipient to select and to modify at any time the preferred option (directly and easily accessible from the specific section of the online platform's online interface where the information is being prioritized)

5.2. Transparency regarding Reviews



Art 3(4)(c) Omnibus-Dir (Overview)

- Where a **trader** provides **access to consumer reviews** of products,
- **information** about **whether and how** the trader **ensures** that the published reviews originate from **consumers who have actually used or purchased the product** shall be regarded as material

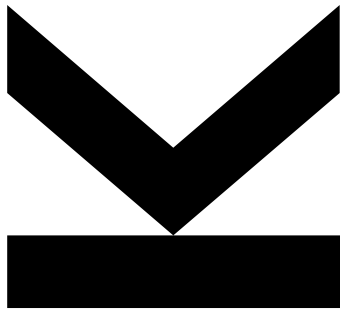
Art 3(4)(c) Omnibus-Dir (Details)

- **Making consumer reviews of products accessible**
 - Also: **reference** to ratings of an external rating platform [Guidelines UCP-Dir, 94]
 - **Product review** = also characteristics and performance of the supplier?
 - Yes: if characteristics and performance "in offering or selling" the products (eg quality, reliability, speed of delivery)
 - No: social responsibility, employment conditions, taxation, market leadership, ethical aspects
- **Information on verification**
 - **Authenticity** = reviewer has actually used/acquired the rated product
 - "**Whether**" and "**How**" verification takes place before evaluation is made available
 - Not: verification if the rating itself is accurate
- **Information on handling of reviews** [Rec 47 Omnibus-Dir; Guidelines UCP-Dir, 94]
 - Are all (+/-) published? Calculation of average? Sponsorship?, Influence through contractual relationship with suppliers)?

Prohibition

- Art 3 (7) (b) Omnibus-Dir
 - It is **prohibited** to
 - **state** that reviews of a product are submitted by **consumers who have actually used or purchased the product**
 - **without taking reasonable and proportionate steps to check that they originate** from such consumers
- Art 3 (7) (c) Omnibus-Dir
 - It is **prohibited** to
 - **submit or commission** another legal or natural person **to submit false consumer reviews or endorsements**, or
 - **misrepresenting consumer reviews or social endorsements**, in order to promote products

5.3. Transparency regarding Advertisements

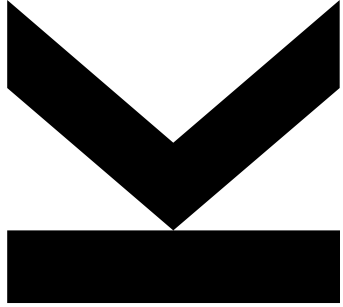


Art 26 DSA

(1) Providers of **online platforms that present advertisements on their online interfaces** shall ensure that, **for each specific advertisement** presented to each individual recipient, the recipients of the service are able to **identify**, in a **clear, concise and unambiguous manner** and in real time, the following:

- (a) that the **information is an advertisement**, including through prominent markings, which might follow standards pursuant to Article 44;
- (b) the natural or legal person **on whose behalf** the advertisement is presented;
- (c) the natural or legal person **who paid** for the advertisement if that person is different from the natural or legal person referred to in point (b);
- (d) meaningful information directly and easily accessible from the advertisement about the **main parameters** used to **determine** the recipient to whom the advertisement is presented and, where applicable, about how to **change** those parameters

5.4. Transparency regarding the Identity of Traders



Art 30 DSA

- (1) Providers of **online platforms allowing consumers to conclude distance contracts with traders** shall ensure that **traders can only use those online platforms** to promote messages on or to offer products or services to consumers located in the Union if, prior to the use of their services for those purposes, **they have obtained the following information**, where applicable to the trader:
 - (a) the **name, address, telephone number** and **email address** of the trader
 - (b) a **copy of the identification document** of the trader
 - (c) the **payment account details of the trader**
 - ...
- (2) obligation to **verify** the provided information
- (5) **storage** obligation (until 6 months after the end of the contractual relationship)
- (7) **obligation to provide this information to the recipients of the service** in a **clear, easily accessible and comprehensible manner**. That information shall be **available** at least on the online platform's **online interface** where the information on the product or service is presented