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## **TOWARDS A HARMONISED FRAMEWORK FOR COPYRIGHT ENFORCEMENT IN THE DIGITAL SINGLE MARKET: THE INTERPLAY BETWEEN DIRECTIVE 2019/790 AND DIRECTIVE 2004/48/EC**

### **Abstract**

EU copyright law has been significantly recalibrated by Directive (EU) 2019/790 (DSM Directive), which adapts substantive rules to digital uses, while enforcement mechanisms continue to rest primarily on Directive 2004/48/EC (IPRED). Although the DSM Directive has already attracted considerable academic attention, the enforcement dimension of its rules – particularly their relationship with IPRED – has received limited treatment. The article analyses how the two directives are to be read and applied together. Drawing on the texts of both directives and relevant CJEU case law, the study contends that the DSM and IPRED should be interpreted as complementary, with IPRED’s horizontal procedural toolkit applying unless expressly displaced by DSM rules. Particular attention is paid to the enforcement implications of Article 17 DSM, which changes platform liability yet does not provide a self-standing enforcement code. The analysis identifies four enforcement difficulties. First, where an online content-sharing service provider satisfies the Article 17(4) conditions and is exempt from liability, the Directive does not clarify whether it may be classified as an intermediary under IPRED. Second, the indeterminacy of the ‘best efforts’ standard determines the OCSSP’s classification under IPRED. Third, Article 17 liability makes damages under Article 13 IPRED difficult to quantify and prove, since valuation hinges on platform metrics difficult to obtain under Article 6 IPRED’s ‘specified evidence’ requirement. Fourthly, Article 17(9) introduces a mandatory internal complaint and redress mechanism for users, yet its relationship with judicial proceedings remains

uncertain, particularly as regards sequencing and admissibility. The article highlights the systemic risks of treating the DSM as an implied repeal of IPRED and proposes targeted *de lege ferenda* solutions aimed at clarifying procedural classification, specifying ‘best efforts’ through measurable, proportionate benchmarks, facilitating access to platform-held data and encouraging structured valuation benchmarks, as well as confirming that recourse to Article 17(9) is without prejudice to judicial enforcement.

### KEYWORDS

DSM Directive, IPRED, copyright enforcement, Digital Single Market, harmonisation of IP law

### SŁOWA KLUCZOWE

dyrektywa DSM, IPRED, egzekwowanie praw autorskich, jednolity rynek cyfrowy, harmonizacja prawa własności intelektualnej

## I. INTRODUCTION

Intellectual property law within the EU is evolving at pace, chiefly in response to the burgeoning digital sphere. This dynamic is illustrated by the adoption of Directive (EU) 2019/790<sup>1</sup> (hereafter the DSM Directive), whose principal aim is to align EU copyright law with contemporary technological realities. At the same time, the enforcement landscape has for many years been shaped by Directive 2004/48/EC<sup>2</sup> (hereafter IPRED), which guarantees procedural standards and provides rightsholders with a toolkit of remedies extending also to copyright. The primary difficulty arising at the intersection of these two directives concerns their mutual interaction. Specifically, to what extent should the DSM, concerned mainly with substantive copyright rules, operate alongside IPRED, the EU horizontal enforcement framework for all IP rights? Although the DSM Directive is largely substantive, it creates enforcement-relevant entitlements and duties, most notably Article 17, the special liability regime for certain online service providers). Where new rights and claims arise, so does the question of how they should be enforced and how they fit within existing procedures. Put differently:

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<sup>1</sup> 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, OJ L 130, 17 May 2019, 92–125 (DSM Directive).

<sup>2</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ L 157, 30 April 2004, 45–86 (IPRED).

does, and if so to what degree, the DSM modify or displace the application of IPRED? Academic commentary has already flagged the importance of clarifying this question.<sup>3</sup>

Resolving this issue is of considerable importance in light of the need to ensure effective responses to copyright infringements in the online environment, while simultaneously safeguarding procedural guarantees and respecting fundamental rights. A further spur to analysis is the conspicuous absence of any express reference to IPRED in the DSM. Although the DSM lists several other copyright instruments (Directives 96/9/EC, 2000/31/EC, 2001/29/EC, 2006/115/EC, 2009/24/EC, 2012/28/EU and 2014/26/EU), IPRED is not mentioned. Whether this omission is merely editorial or signals a deliberate intention to treat IPRED differently remains unclear. Therefore, this article asks whether the two directives together constitute a coherent protective mechanism – particularly for copyright enforcement – and whether provisions of the DSM affect the operation of IPRED’s existing enforcement tools and procedures. The discussion draws on the wording of both directives and on the case-law of the CJEU, which has explored the interrelationship of EU directives. Clarifying these points is crucial to ensure that copyright can be enforced effectively yet proportionately within the Digital Single Market.

The article proceeds on the assumption that the DSM and IPRED are complementary rather than mutually exclusive. In principle, IPRED continues to apply in full to situations falling within the DSM, save where the latter contains a divergent rule.<sup>4</sup> After briefly situating both instruments within the EU IP framework, the analysis turns to Article 17 in an enforcement context, considering its implications for the use of IPRED remedies (including damages) and addressing the procedural significance of the complaint and redress mechanism in Article 17(9) for access to judicial relief. It then focuses on relevant CJEU case law concerning the interaction between specific IP directives and closes with a discussion on the systemic risks arising from an interpretation of the DSM Directive as an implied repeal of IPRED.

## II. FUNCTIONS OF THE DSM AND IPRED WITHIN THE EU INTELLECTUAL PROPERTY FRAMEWORK

The DSM was designed to adapt EU copyright law to the digital reality. It adapts exceptions and limitations to the digital and cross-border environment, improves

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<sup>3</sup> Ryszard Markiewicz, *Prawo autorskie na jednolitym rynku cyfrowym. Dyrektywa Parlamentu Europejskiego i Rady (UE) 2019/790* (Wolters Kluwer 2021) 206.

<sup>4</sup> *Ibid.*

licensing practices, ensures wider access to content, and, thanks to a press publishers related right, governing certain uses of protected content by online services or fair remuneration in exploitation contracts of authors and performers, achieves a well-functioning marketplace for copyright.<sup>5</sup> It has simultaneously become one of the most contentious pieces of EU legislation. More than five million people signed a petition opposing it, and demonstrations were held in numerous European cities.<sup>6</sup> Its two most controversial provisions are Article 15 and Article 17.<sup>7</sup> The former confers a new related right on press publishers for the digital use of their publications by online services, while the latter renders online content-sharing platforms liable for copyright infringements unless they obtain licences and deploy measures to prevent unauthorised content.

By contrast, IPRED established a minimum set of measures, procedures, and remedies intended to ensure the enforcement of IP rights. It addresses the gathering and presentation of evidence, the right of information, provisional and precautionary measures, remedies on the merits, damages, and the publication of judicial decisions.<sup>8</sup> Its purpose is to guarantee a high and uniform level of protection across the EU's internal market.<sup>9</sup> As is typical of many directives, it obliges Member States to ensure that such measures are fair and equitable, not unnecessarily costly or complicated, free from unwarranted delays, and that they remain proportionate, effective, and dissuasive.<sup>10</sup> Although it contains a handful of substantive provisions, like the DSM, it is predominantly procedural in nature.<sup>11</sup> Unlike the DSM, IPRED applies to all IP rights, including previously unharmonised areas, thereby providing a horizontal enforcement platform.<sup>12</sup> It also forms part of the European

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<sup>5</sup> Eleonora Rosati, *Copyright in the Digital Single Market: Article-by-Article Commentary to the Provisions of Directive 2019/790* (Oxford University Press 2021) 13–14.

<sup>6</sup> Thomas Spoerri, 'On Upload-Filters and Other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market' (2019) 10(2) *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 173, 174.

<sup>7</sup> *Ibid.*

<sup>8</sup> Aleksandra Nowak-Gruca, 'Procesowe środki ochrony autorskich praw majątkowych na tle implementacji dyrektywy 2004/48/WE w sprawie egzekwowania praw własności intelektualnej' (2008) 1 *Zeszyty Naukowe Uniwersytetu Jagiellońskiego. Prace z Prawa Własności Intelektualnej* 53, 54.

<sup>9</sup> Gheorghe Gheorghiu, 'Orientări cu privire la anumite aspecte ale Directivei 2004/48/CE a Parlamentului European și a Consiliului privind respectarea drepturilor de proprietate intelectuală' (2024) 1 *Romanian Journal of Intellectual Property Law* 123, 125.

<sup>10</sup> Krystyna Szczepanowska-Kozłowska, 'Damages and legal costs under the Enforcement Directive in the light of rulings of the European Court of Justice' (2023) 23 *ERA Forum* 567.

<sup>11</sup> Aleksandra Nowak-Gruca (n 8) 54.

<sup>12</sup> Irini Stamatoudi and Olivier Vrans, 'The Enforcement Directive' in I Stamatoudi and P Torremans (eds), *EU Copyright Law. A Commentary* (2<sup>nd</sup> edn, Edward Elgar Publishing 2021) 383.

Commission's wider strategy to combat counterfeiting and piracy<sup>13</sup> – activities that were estimated to cost EU GDP up to €8 billion annually and the industry between €45 and €65 billion.<sup>14</sup> IPRED refers at the EU level to Council Regulation (EC) No 1383/2003<sup>15</sup> and the TRIPS Agreement internationally.<sup>16</sup>

### III. THE DSM–IPRED RELATIONSHIP IN THE TEXTS OF THE DIRECTIVES AND CJEU CASE LAW

A proper assessment of the relationship between the DSM and IPRED requires examining the provisions and preambles of both directives, supplemented by insights drawn from CJEU case law on the interaction of different IP instruments. Particular attention is given to the enforcement challenges linked to the new rights and obligations set out in Article 17 of the DSM Directive.

#### 1. GENERAL PROVISIONS AND PREAMBLES

In examining the relationship between the DSM and IPRED, some guidance may be found in Article 1 of the former, which outlines its connection with other EU directives in the field of copyright. Beyond stating its objective of further harmonisation (Article 1(1)), it declares that existing rules remain unaffected, save for the amendments made by Article 24 to Directives 96/9/EC and 2001/29/EC (Article 1(2)).<sup>17</sup> Recital 4 adds that the DSM is based upon and complements the existing Directives.<sup>18</sup> It is intended to work alongside them.<sup>19</sup> Although IPRED is

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<sup>13</sup> Helen Padley, 'EU legislation and UK implementation: the enforcement of Intellectual Property Rights Directive' (2004) 15(8) *Entertainment Law Review* N72.

<sup>14</sup> Violeta Visean, 'The Implementation of Directive 2004/48/EC in Romania' (2009) 4 *Romanian Journal of Intellectual Property Law* 140, 143.

<sup>15</sup> Council Regulation (EC) No 1383/2003 of 22 July 2003 concerning customs action against goods suspected of infringing certain intellectual property rights and the measures to be taken against goods found to have infringed such rights, OJ L 196, 2 August 2003, 7–14.

<sup>16</sup> Michal Cerny, 'Directive on the enforcement of intellectual property rights' (2005) 88(2–3) *Pravny Obzor* 187, 188.

<sup>17</sup> DSM Directive (n 1) Art 1.

<sup>18</sup> DSM Directive (n1) recital 4.

<sup>19</sup> Irini Stamatoudi and Paul Torremans, 'The Digital Single Market Directive' in I Stamatoudi and P Torremans (eds), *EU Copyright Law. A Commentary* (2<sup>nd</sup> edn, Edward Elgar Publishing 2021) 655.

not listed among the unaffected directives, this omission should not be interpreted as implying that directives not named have been repealed or altered. The absence of any mention of IPRED may simply reflect the EU legislator's underlying assumption that the DSM concerns substantive copyright law, whereas IPRED is a horizontal procedural measure with which no conflict arises. As José Celedonio has observed, IPRED should not be regarded as an autonomous IP instrument but rather as an ancillary, instrumental set of norms aligned with the legislative trends pursued by the European institutions since the mid-1980s.<sup>20</sup>

The DSM shares the same overarching objectives as the pre-existing *acquis*, including a high level of protection for rightsholders, the facilitation of the clearance of rights, and a level playing field for the exploitation of works and other protected subject matter.<sup>21</sup> Common ground is also visible in the recitals of the two directives, which articulate the rationale for their adoption. Although not legally binding, they are influential interpretative aids.<sup>22</sup> Both emphasise the importance of IP protection for the proper functioning of the internal market and warn against fragmentation (Recitals 1, 8 and 9 of IPRED; Recitals 1, 2 and 3 of the DSM). Each stresses the need to ensure a high level of protection as a driver of innovation, creativity and investment (Recital 1 of IPRED; Recital 2 of DSM). Both instruments also underline respect for fundamental rights and the maintenance of a fair balance between the interests of authors and users (Recitals 2 and 32 of IPRED; Recitals 6, 70, 84 and 85 of DSM).

Despite their differing scopes, the two directives thus pursue convergent harmonisation goals, making their mutual exclusion unwarranted. This supports the broader objective of coherence within EU IP law. Recital 2 of DSM explicitly states that a harmonised legal framework contributes to the proper functioning of the internal market.<sup>23</sup> While the DSM Directive focuses on the digital exploitation of works, it forms part of the EU *acquis* and supplements the enforcement provisions of IPRED, thereby reinforcing the cohesion of the overall framework.

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<sup>20</sup> José Antonio Gil Celedonio, 'Esa ambición desmedida: la directiva 2004/48/CE relativa al respeto de los derechos de propiedad intelectual y su compleja aplicación. El rol del observatorio europeo de las vulneraciones de los derechos de propiedad intelectual' (2024) 38(1) *Revista la Propiedad Inmaterial* 109, 119.

<sup>21</sup> Rosati (n 5) 19–20.

<sup>22</sup> Jacek Barcik, 'Pojęcie i źródła prawa Unii Europejskiej' in Jacek Barcik and Robert Grzeszczak (eds), *Prawo Unii Europejskiej* (CH Beck 2022) 265.

<sup>23</sup> DSM Directive (n 1) recital 2.

## 2. RECONCILING ARTICLE 17 DSM WITH ENFORCEMENT PRINCIPLES

While the general provisions and preambles of IPRED and the DSM clearly point to convergent objectives and a complementary relationship, specific provisions may give rise to interpretative uncertainty.<sup>24</sup> One of the most contentious, from an enforcement perspective, is Article 17 of the DSM – frequently referred to as the ‘monster provision’.<sup>25</sup> Its legal character remains contested. Some commentators regard it as a measure of ‘full harmonization’ (neither a special nor *sui generis* right)<sup>26</sup> that merely clarifies Article 3 of the InfoSoc Directive;<sup>27</sup> others view it as an exceptionally intricate *lex specialis* applicable to online content-sharing service providers (hereafter OCSSPs).<sup>28</sup> Article 17 shifts the burden of copyright liability onto OCSSPs and introduces a conditional exemption when certain criteria are met.<sup>29</sup> Article 17(1) DSM expressly provides that an OCSSP performs an act of communication to the public or an act of making available to the public when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users. Consequently, where the platform has not obtained a required authorisation and cannot rely on the conditional exemption from Article 17(4) DSM, it is liable for an unauthorised act of communication

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<sup>24</sup> Given that disputes are adjudicated primarily under national implementing provisions, any collision between the DSM Directive and IPRED is most likely to present itself as a tension between domestic transposition measures.

<sup>25</sup> Séverine Dusollier, ‘The 2019 Directive on Copyright in the Digital Single Market: Some Progress, a Few Bad Choices, and an Overall Failed Ambition’ (2020) 57(4) Common Market Law Review 979, 1008.

<sup>26</sup> Eleonora Rosati, ‘The legal nature of Article 17 of the Copyright DSM Directive, the (lack of) freedom of Member States, and why the German implementation proposal is not compatible with EU law’ (2020). The IPK at <<https://ipkitten.blogspot.com/2020/08/the-legal-nature-of-article-17-of.html>> accessed 25 September 2025.

<sup>27</sup> 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, OJ L 167, 22 June 2001, 10–19; Karina Grisse, ‘After the storm – examining the final version of Article 17 of the new Directive (EU) 2019/790’ (2019) 14(11) Journal of Intellectual Property Law and Practice 887; Michał Markiewicz, ‘Publiczne komunikowanie utworu w Internecie w prawie UE (dyrektywa 2001/29 vs dyrektywa 2019/790) – czy “istnieje” możliwy do określenia zakres tego prawa?’ (2022) 27(1) Białystok Legal Studies 173, 189–90.

<sup>28</sup> Alina Trapova, ‘From public to private enforcement: Inclusivity and copyright law’ in Carlo Sappa (ed), *Research Handbook on Intellectual Property Rights and Inclusivity* (Edward Elgar Publishing 2024) 484.

<sup>29</sup> Martin Husovec and João Pedro Quintais, ‘How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive’ (2021) 70(4) GRUR International 325, 328.

to the public. In such cases, the OCSSP is treated as a direct infringer.<sup>30</sup> Thus, it bears liability and rightholders may claim damages under IPRED.<sup>31</sup> This, in turn, raises further questions as to the proper quantification of damages in the platform context, which are addressed below.

The difficulty arises, however, once the OCSSP relies on Article 17(4) DSM and has met the ‘best efforts’ conditions.<sup>32</sup> At that point, the DSM Directive exempts the platform from liability, yet it does not explain what this exemption means for the choice of remedies and the procedural classification of the platform under IPRED. IPRED is structured around a distinction between actions brought against infringers and those against intermediaries.<sup>33</sup> Article 17(4), therefore, creates a gap: if the platform is not liable because it has complied, should it nonetheless be treated, for the purposes of IPRED, as an intermediary whose services are used by a third party to infringe an intellectual property right? The DSM Directive does not answer this question, and this uncertainty is central to the enforcement analysis. This gap is not merely theoretical. An OCSSP may argue that, as a *lex specialis*, Article 17 exhaustively determines the legal consequences of compliant conduct, leaving rightholders only with the mechanisms expressly mentioned in the DSM. By contrast, rightholders may contend that Article 17 regulates liability, but does not displace IPRED’s remedial architecture, which continues to operate as the default procedural toolkit unless expressly derogated from.

This article argues that, where the OCSSP is exempt from liability under Article 17(4) DSM, it should be treated – for enforcement purposes under IPRED – as an intermediary whose services are used by third parties to infringe. The consequence is that the rightholder should still be able to seek the measures available against intermediaries under IPRED – most notably injunctions under Article 11.

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<sup>30</sup> This distinguishes OCSSPs from intermediaries, as the latter must, in one way or another, ‘stand in between’ the infringer and its customers. See Folkert Wilman, ‘A decade of private enforcement of intellectual property rights under IPR Enforcement Directive 2004/48: where do we stand (and where might we go)?’ (2017) 42(4) *European Law Review* 509, 521.

<sup>31</sup> Miquel Peguera, ‘Is the Spanish implementation of Art. 17 CDSM compatible with EU Law?’ (2021) *Kluwer Copyright Blog* <<https://copyrightblog.kluweriplaw.com/2021/11/11/is-the-spanish-implementation-of-art-17-cdsm-compatible-with-eu-law/>> accessed 25 September 2025.

<sup>32</sup> Pursuant to Articles 17(4)(a) and (b) of the DSM Directive, OCSSPs may be exempt from liability where they have made best efforts to obtain an authorisation, and when they have 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.

<sup>33</sup> The concept of ‘intermediary’ appears in Articles 9 and 11 of IPRED, which provide that injunctions may also be sought against ‘intermediaries whose services are used by a third party to infringe an intellectual property right’. See Folkert Wilman (n 30) 520.

Several considerations support this approach. First, it ensures that rightholders are not left without effective judicial measures where infringements may still occur through the platform. Secondly, it preserves the role of IPRED as a horizontal framework for enforcement by ensuring that, where the DSM Directive removes liability, it does not remove access to the procedural remedies that remain necessary. This reading is consistent with the CJEU's interpretation of the third sentence of Article 11 IPRED in *L'Oréal v eBay*, where the Court held that national courts must be able to order an online service provider to take measures contributing not only to bringing infringements committed through its service to an end, but also to preventing further infringements.<sup>34</sup> Also, the European Commission's recommendations on combating online piracy of sports and other live events urge Member States to allow injunctions against intermediaries regardless of their lack of liability, to terminate or prevent unauthorised activities.<sup>35</sup>

*De lege ferenda*, the remaining uncertainty should be addressed by clarifying the procedural consequences of Article 17(4) DSM within the enforcement architecture. In particular, it should be made clear that exemption from liability under Article 17(4) does not entail exemption from being treated, for enforcement purposes, as an intermediary whose services are used by third parties to infringe. Accordingly, national implementing legislation (or EU level clarification) should expressly confirm that, where an OCSSP demonstrates compliance with Article 17(4), rightholders may still seek the measures available against intermediaries under IPRED. Such clarification can be framed as a rule concerning procedural classification and remedial availability, rather than as a modification of the substantive conditions laid down in Article 17(4).

Moreover, clarification of the content of the 'best efforts' standard would also be desirable, since the assessment of compliance with Article 17(4) DSM determines the platform's procedural classification under IPRED and, consequently, the scope of remedies available to rightholders. On the approach adopted in this article, where an OCSSP satisfies Article 17(4) it should, for enforcement purposes, be treated as an intermediary within the meaning of IPRED, which in turn confines the rightholder primarily to the measures available against intermediaries. Conversely, where the OCSSP cannot establish compliance with Article 17(4), it remains liable as a direct infringer under Article 17(1), thereby opening access to the broader array of remedies, including damages. In this respect, it should be noted that the European Commission has already issued guidance on Article 17

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<sup>34</sup> Case C-324/09 *L'Oréal v eBay* [2011] ECLI:EU:C:2011:474, para 131.

<sup>35</sup> Commission Recommendation of 4 May 2023 on combating online piracy of sports and other live events, C/2023/2853, OJ L 136, 24 May 2023, 83–94.

DSM, which confirms that ‘best efforts’ is an autonomous EU-law concept to be assessed on a case-by-case basis, in light of proportionality and the safeguards in Article 17(7)–(9).<sup>36</sup> Some further guidance can also be drawn from the CJEU’s reasoning. Although the *YouTube/Cyando*<sup>37</sup> judgment predates the DSM Directive, the Court stated what may count as platform diligence: in particular, it stresses the need for the deployment of technological measures expected from a reasonably diligent operator.<sup>38</sup> However, the guidance does not lay down sufficiently clear benchmarks capable of delimiting, in a predictable manner, the point at which the ‘best efforts’ conditions are satisfied in practice. *De lege ferenda*, a workable solution here would be the development of measurable compliance criteria, for instance, a quantified and proportionate tolerance threshold for erroneous blocking (illustratively, a low maximum rate), verified through regular, independent audits. Moreover, a presumption of non-compliance might arise where an OCSSP fails to produce documentation demonstrating adherence to those benchmarks, thus easing the claimant’s evidential burden.

Beyond the above problems, another enforcement issue merits attention. Once non-compliance with Article 17(4) is established and the OCSSP’s liability under Article 17(1) follows, damages actions raise difficulties primarily as to valuation and proof. Although Article 13 IPRED instructs courts to consider both rightholders’ lost profits (including hypothetical royalties) and the infringer’s unfair profits, in the platform context, translating those factors into a defensible quantum is often difficult. In particular, it may be unclear what the relevant licensing arrangement would have been, which metrics should structure the calculation (such as the period of unauthorised availability, the number of views or streams), and whether (and to what extent) platform revenues can be linked to the infringing availability (for instance, where the specific upload was monetised through advertising). These valuation difficulties are compounded by evidential asymmetry. While IPRED enables courts to order disclosure (notably Article 6), it requires the applicant to indicate ‘specified evidence’ in terms sufficiently concrete that the opposing party may identify evidence lying in its control.<sup>39</sup> In Article 17 DSM, disputes rightholders will often not know which internal metrics or analytics reports exist within the platform, making it difficult to formulate targeted requests for the very data needed to quantify harm.

<sup>36</sup> Commission, ‘Guidance on Article 17 of Directive (EU) 2019/790 on Copyright in the Digital Single Market’ COM (2021) 288 final (4 June 2021).

<sup>37</sup> C-682/18 and C-683/18, *Peterson v Google LLC, Elsevier v Cyando* [2021] ECLI:EU:C:2021:503.

<sup>38</sup> *Ibid*, para 102.

<sup>39</sup> Commission, ‘Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights’ COM (2017) 708 final (29 November 2017).

*De lege ferenda*, this could be addressed in two ways. First, it should be clarified that the ‘specified evidence’ requirement under Article 6 IPRED may be satisfied by defined categories of platform-held data needed to quantify harm (for example, period of availability, reach, territorial distribution, and – where relevant – upload-specific monetisation data), not only by document titles. Secondly, courts could be encouraged to use structured valuation benchmarks based on that data: a licence-fee proxy linked to reach and duration, complemented where appropriate by an account of profits where a sufficient link to monetisation is shown (for instance, where the relevant upload was served with advertising allocated to it).

Furthermore, article 17(9) DSM introduces a mandatory complaint and redress mechanism for users, which has no counterpart in IPRED, focusing on judicial remedies available to rightsholders. This creates a form of procedural dualism: the rightsholder may pursue judicial relief under IPRED, while users are afforded an intra-platform avenue to contest removals or disabling of access. The DSM Directive does not clarify whether recourse to Article 17(9) mechanism should operate as a precondition to judicial proceedings, nor how it should interact with IPRED-based claims in terms of timing and admissibility. *De lege ferenda*, national implementing legislation could eliminate ambiguity by stating explicitly that recourse to the Article 17(9) DSM complaint mechanism is without prejudice to judicial proceedings and is not a condition of admissibility for claims brought before courts. This approach is also consistent with a maximum-harmonisation reading of Article 17, in that it prevents Member States from introducing additional preconditions to judicial enforcement that the Directive itself does not provide for. Requiring exhaustion of the internal complaint mechanism as a condition of admissibility of a judicial proceeding would risk adding an additional hurdle that would restrict effective access to a court as a fundamental human right. In any event, the mechanism must be truly effective and expeditious, so as to prevent claims from becoming time-barred due to lengthy platform procedures.

Taken together, the foregoing points show that Article 17 DSM recalibrates liability, but does not supply a self-standing enforcement code. Accordingly, IPRED remains the default enforcement framework for DSM-related situations, and DSM provisions take precedence only where they lay down an express and genuinely specific procedural rule. Otherwise, IPRED’s general mechanisms remain in force. This approach accords with basic canons of legal interpretation and general principles of EU law, according to which what does not fall within the special liability regime of the provision shall remain subject to the general regime.<sup>40</sup>

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<sup>40</sup> Rosati (n 25).

### 3. CJEU INSIGHTS INTO THE INTERACTION OF DIRECTIVES

Although the CJEU has not yet ruled directly on the DSM–IPRED relationship, its case law on other IP directives offers valuable guidance. The Court repeatedly stresses the need for harmonious application of multiple legal instruments within the IP framework. In *L'Oréal v eBay*,<sup>41</sup> the CJEU delineated the liability of online platforms by reading IPRED together with the E-Commerce Directive.<sup>42</sup> It clearly indicated that measures provided for under Article 11 of IPRED, concerning injunctions against intermediaries, must be interpreted in light of Articles 15 and 18 of the E-Commerce Directive.<sup>43</sup> Thus, although IPRED allows imposing injunctions on platforms to prevent infringements, such measures cannot entail a prohibition on the imposition of a general monitoring obligation as set out in the E-Commerce Directive.<sup>44</sup> The Court thereby affirmed the complementary application of both directives. A similar emphasis on complementarity appears in *Scarlet Extended v SABAM*,<sup>45</sup> where the Court held that provisions of directives, including IPRED, must not contradict limitations imposed by other EU legislation. Accordingly, injunctions granted under IPRED could not contravene the limits laid down by the E-Commerce Directive. The coexistence of these instruments is further supported by the view that IPRED does not undermine the ‘spirit’ of the E-Commerce Directive, nor does it affect the liability limitations applicable to intermediaries under Articles 12 to 15.<sup>46</sup> The need for the harmonious application of IPRED alongside other EU legal instruments was also emphasised by the CJEU in *Promusicae v Telefónica de España SAU*.<sup>47</sup> In that case, the Court cited IPRED alongside Directives 2000/31, 2001/29 and 2002/58, insisting that their interpretation must strike an appropriate balance between IP protection and other fundamental rights.<sup>48</sup> Hence, the enforcement measures made available by

<sup>41</sup> Case C-324/09 *L'Oréal v eBay* [2011] ECLI:EU:C:2011:474.

<sup>42</sup> On the current regulatory context, the E-Commerce Directive has been complemented by Regulation (EU) 2022/2065 (Digital Services Act). The DSA applies without prejudice to Directive 2000/31/EC (Article 2(3) DSA) and is also without prejudice to Union law on copyright and related rights (Article 2(4)(b) DSA).

<sup>43</sup> Case C-324/09 *L'Oréal v eBay* [2011] ECLI:EU:C:2011:474, paras 133, 139.

<sup>44</sup> Birgit Clark and Maximilian Schubert, ‘Odysseus between Scylla and Charybdis? The ECJ rules in *L'Oréal v eBay*’ (2011) 6(12) *Journal of Intellectual Property Law and Practice* 880, 887.

<sup>45</sup> Case C-70/10 *Scarlet Extended v SABAM* [2011] ECLI:EU:C:2011:771, paras 34–35.

<sup>46</sup> Gábor Faludi and Gusztáv Bacher, ‘The Relationship Between the Right to Information Set Out in the Enforcement Directive and a Service Provider’s Liability Set Out in the E-Com Directive’ (2006) *Mondaq* <<https://www.mondaq.com/it-internet/35526>> accessed 25 September 2025.

<sup>47</sup> Case C-275/06 *Promusicae v Telefónica de España SAU* [2008] ECLI:EU:C:2008:54, para 70.

<sup>48</sup> For more on the consequences of this judgment, including the challenges of balancing the right to data protection against the right to intellectual property, see Maria Tzanou, ‘Balancing Funda-

IPRED must always be deployed compatibly with parallel EU rules, including those on copyright.<sup>49</sup>

This case law confirms the necessity of interpreting multiple IP directives in a consistent manner. In particular, it suggests that IPRED remains a cornerstone of EU enforcement policy, but it must be applied in conjunction with other directives (such as the DSM) that may supersede specific IPRED provisions where they establish a more specific legal regime. Enforcement measures must be interpreted so as to respect both the special rules laid down in other legislation and the fundamental-rights framework articulated by the CJEU.

A more immediate perspective on the DSM–IPRED interplay, though still indirect, emerges from the CJEU ruling in *Poland v Parliament and Council*,<sup>50</sup> which centred on Article 17 of DSM. While the Court did not refer expressly to IPRED, it emphasised the need for a fair balance between the competing rights at stake,<sup>51</sup> namely effective copyright enforcement and freedom of expression, and stressed that co-operation between OCSSPs and rightsholders must not result in the blocking of lawful content.<sup>52</sup> Consequently, any deployment of IPRED remedies must respect the constraints introduced by the DSM, particularly those safeguarding users' entitlement to lawful uses. Enforcement measures must therefore be implemented in the light of the new rules and the guarantees articulated by the CJEU, which confirms the necessity of a parallel and harmonised application of both directives.

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mental Rights: United in diversity? Some Reflections on the Recent Case Law of the European Court of Justice on Data Protection' (2010) 6 Croatian Yearbook of European Law and Policy 53, 63–66.

<sup>49</sup> A comparable approach appears outside the copyright *acquis* in Case C-492/23 *X v Russmedia Digital SRL and Inform Media Press SRL* [2025] ECLI:EU:C:2025:935, paras 130–135. The CJEU held, in substance, that the protection afforded by E-Commerce Directive cannot undermine the requirements flowing from the GDPR. Accordingly, reliance on the hosting exemption in Art 14(1) (and the prohibition of a general monitoring obligation in Art 15) cannot be used to neutralise autonomous GDPR duties, while compliance obligations under the GDPR are not, as such, to be equated with a prohibited 'general monitoring' duty. The Court further clarified that the mere fact that an operator is subject to GDPR obligations does not, in itself, preclude reliance on Arts 12–15 of E-Commerce Directive for matters other than personal data protection.

<sup>50</sup> Case C-401/19 *Poland v Parliament and Council* [2022] ECLI:EU:C:2022:297.

<sup>51</sup> Zhen Liu, 'Evaluation on the EU legal safeguards for users of the liability-encumbered OCSSP in light of CJEU and Strasbourg case laws' (2023) SSRN <<https://ssrn.com/abstract=4348969>> accessed 25 September 2025, 11.

<sup>52</sup> CJEU, case C-401/19 *Poland v Parliament and Council* [2022] ECLI:EU:C:2022:297, para 7.

#### IV. SYSTEMIC RISKS OF TREATING THE DSM AS AN IMPLIED REPEAL OF IPRED

The DSM should not be interpreted as implicitly repealing IPRED, not least in view of the systemic consequences such an interpretation would entail. Treating IPRED as inapplicable in DSM-related disputes would risk undermining the right to an effective remedy, as enshrined in Article 47 of the Charter of Fundamental Rights.<sup>53</sup> In particular, it would deprive rightholders of effective legal remedies in situations not regulated by the DSM, which in practice constitute a large share of enforcement scenarios, such as securing evidence or ordering the publication of judgments at the infringer's expense. Such a scenario would also result in unequal treatment of different categories of IP. For instance, a patent or trademark holder would continue to benefit from the full set of measures under IPRED, whereas a copyright holder (based on a mistaken interpretation of DSM as superseding IPRED) would not. Such a discrepancy lacks legal justification and would be difficult to reconcile with the horizontal logic of IPRED.

Furthermore, interpreting the DSM as an implicit repeal of IPRED, despite the absence of any formal provision, could be incompatible with EU law due to the Member States' obligation to apply binding directives. If one directive does not expressly amend or repeal another, Member States are still obliged to give effect to both. Otherwise, the binding nature of directives as to the result to be achieved (Article 288 TFEU)<sup>54</sup> would be put under strain, since Member States cannot treat a still-binding directive as functionally inoperative without a clear EU law basis. In practice, the problem would materialise at the level of national implementing rules, where courts would face uncertainty as to which procedural instruments remain available in DSM-related disputes. The CJEU has also stressed the importance of implementing and applying directives. In the *Francovich*<sup>55</sup> judgement, the Court confirmed that even failure to transpose a directive within the prescribed period constitutes a breach of EU law. It follows that systematic non-application of a directive that remains in force would be incompatible with the Member States' obligations under EU law.

Another consequence of treating IPRED as tacitly repealed and adjusting national legislation accordingly would be a potential violation of international obligations. This stems from the fact that IPRED introduced the remedies and procedures

<sup>53</sup> Charter of Fundamental Rights of the European Union, OJ C 202, 7 June 2016, 389–405.

<sup>54</sup> Consolidated Version of the Treaty on the Functioning of the European Union, OJ C 202, 7 June 2016.

<sup>55</sup> Case C-6/90 and C-9/90 *Francovich v Italian Republic* [1991], ECLI:EU:C:1991:428, para 44.

required by the TRIPS Agreement.<sup>56</sup> It has been observed that, in the field of IP enforcement, IPRED not only has its roots in TRIPS, but that its provisions are ‘virtually identical to the rules of the TRIPS Agreement’.<sup>57</sup> This is because TRIPS, in addition to providing for access to justice, damages, or provisional measures, also served as the basis for further international agreements, including IPRED.<sup>58</sup> A failure to apply IPRED could therefore result in a breach of Article 41 and subsequent provisions of TRIPS, which require the availability of effective enforcement mechanisms. Although the TRIPS enforcement provisions are formulated as broad standards rather than narrow rules,<sup>59</sup> systemic narrowing of enforcement mechanisms would increase the risk of falling short of those standards in practice.

The practical effect of concluding that the DSM displaces or overrides IPRED would be significant legal uncertainty. Courts would face considerable difficulty in determining whether the provisions implementing IPRED remain applicable in a given case or whether they are excluded by the DSM. Without a clear rule, national courts would be compelled to refer more preliminary questions to the CJEU in order to clarify the applicable legal framework. This would lead to longer proceedings and increased litigation costs, ultimately undermining confidence in the EU IP enforcement system. Moreover, if IPRED were not applied consistently, it would hamper cross-border judicial cooperation, particularly with respect to matters such as evidence preservation requests.

## V. CONCLUSIONS

Resolving the relationship between the DSM and IPRED is crucial for ensuring the effective and coherent enforcement of copyright within the EU digital market. This article has argued that the DSM Directive should be read as a specific modification of substantive copyright rules that sits atop – not outside – IPRED’s horizontal procedural baseline. That reading accords with the CJEU’s broader insistence that EU IP instruments be applied coherently and in a manner that preserves a fair balance of fundamental rights. IPRED remains the primary procedural tool ensuring the enforceability of copyright, whereas the DSM intro-

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<sup>56</sup> Stefano Barazza, ‘The Enforcement Directive and invalidation procedures: an unsurprising negative verdict’ (2013) 8(4) *Journal of Intellectual Property Law and Practice* 274, 276.

<sup>57</sup> Marcus Norrgård, ‘The role conferred on the national judge by directive 2004/48/EC on the enforcement of intellectual property rights’ (2005) 6(4) *ERA Forum* 503, 504.

<sup>58</sup> Stamatoudi and Vrins (n 12) 384.

<sup>59</sup> Jerome H Reichman, ‘Enforcing the Enforcement Procedures of the TRIPS Agreement’ (1996) 37 *Virginia Journal of International Law* 335, 344.

duces specific substantive rules tailored to the particular demands of the digital marketplace.

Against that backdrop, Article 17 exposes four concrete enforcement difficulties. First, once an OCSSP relies on Article 17(4), the Directive does not clearly explain how it should be classified within IPRED's remedial structure: if the platform is no longer liable, it is uncertain whether it should nonetheless be treated as an intermediary for the purposes of measures such as injunctions, creating a risk of an enforcement gap. Secondly, that uncertainty is amplified by the lack of precision in the 'best efforts' standard in Article 17(4), which may determine whether the platform falls on the 'infringer' or 'intermediary' side of IPRED. Thirdly, where liability of an OCSSP follows under Article 17(1), damages under Article 13 IPRED are difficult to quantify. Fourthly, Article 17(9) introduces an internal complaint and redress mechanism, but its relationship with judicial proceedings remains unclear, particularly as regards sequencing and admissibility.

These highlighted issues imply a need for *de lege ferenda* measures. It should be made explicit that compliance with Article 17(4) removes liability but does not remove the availability of injunctions against the OCSSP as an intermediary. The 'best efforts' standard should be set out in measurable terms, including a proportionate tolerance threshold for erroneous blocking, verified through regular audits. It should also be clarified that the 'specified evidence' requirement under Article 6 IPRED may be met by identifying defined categories of platform-held data necessary for damages quantification, rather than by pointing to specific internal documents, coupled with the use of structured valuation methods reflecting reach, duration and monetisation. Finally, national implementation should state expressly that recourse to the Article 17(9) mechanism is without prejudice to court proceedings and is not a precondition for bringing a claim.

In the end, the DSM Directive's silence on IPRED should not be read as sidelining it. Such a reading would weaken effective judicial protection and disrupt the horizontal coherence of EU IP enforcement. Accordingly, the two instruments should be applied together, with the DSM taking priority only where it lays down a genuinely specific rule.

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