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Georgia Jenkins*

Creative reuse and artistic communication on platforms

Building a creativity-based escape mechanism for the EU copyright system

This article discusses the impact of the regulation and behaviour of platforms on users who share creative reuse online. Adopting a systems theory lens, it suggests that norms and values within the artistic system preference creative autonomy and the ability to share creativity online. Given the resulting tension with the EU copyright system, the article identifies two possible ways forward: change either through the concept of consent inside the EU copyright system, or a departure point structured outside of it using the horizontal application of fundamental rights. These two approaches are then applied to the current EU regulatory landscape, focusing on art. 17 Digital Single Market Directive and art. 14 Digital Services Act. The discussion centres upon the extent that these approaches sufficiently safeguard creativity online and future steps.

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A. Introduction

Today users do not simply consume creative content but participate in the creative process.¹ Users access and reuse works to recreate. Often part of a broader creative community, the communication of new creative works forms an integral element of creativity online. Yet creative reuses, whether referential or transformative, inherently conflict with commercial exploitation rights enforced by what this article terms ‘exploiters’. They are copyright interests whose investment gives rise to rights despite lacking a direct creative contribution.² However, the presence and reliance upon platforms to share and disseminate creativity online has complicated the EU copyright landscape, specifically the relationship between authors and exploiters. Now platforms play a crucial role to allow users to bypass traditional dissemination methods and broaden their audience exponentially.

This development has not gone unnoticed, as the introduction of art. 17 Digital Single Market (DSM) Directive³ requires platforms to ensure that all user uploads which include potentially unauthorised copyright material are taken down and stay down, in lieu of a licence. While premised on the argument that a value-gap existed between platforms and authors due to platform content monetization,⁴ these new platform obligations have a gross impact on creativity online due to the use of automated content monitoring.⁵ Though the long process of im-

1 Note that the level of creativity required of users is less than that required for copyright protection. See, LG Berlin, 2.II.2021 – 15 O 551/19 on the definition of pastiche. Also discussed in Part A.II.

2 E.g. Publishers, producers and broadcasters. See, *Guido Westkamp*, The Three-Step Test and Copyright Limitations in Europe: European Copyright Law between Approximation and National Decision Making (2008) 56 J Copyright Soc’y USA 1; *Guido Westkamp*, One of several super rights? The (subtle) impact of the digital single market on a future EU copyright Architecture, in: Kung-Chung Liu and Reto M. Hilty (eds), *Remuneration of Copyright Owners: Regulatory Challenges of New Business Models* (Springer 2017); *Jane C. Ginsburg*, The Author’s place in the Future of Copyright, in: Ruth Okediji (ed), *Copyright in an Age of Exceptions and Limitations* (Cambridge 2015).

3 Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92.

4 IFPI, *Rewarding creativity: Fixing the value gap* (IFPI, 13 December 2018) <<https://www.ifpi.org/rightsholders-unite-in-calling-for-an-effective-solution-to-the-value-gap/>> accessed 29.1.2024.

5 *Christophe Geiger* and *Bernd Justin Jütte*, Platform Liability Under Art. 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match (2021) 70 GRUR International 517; *Maxime Lambrecht*, Free Speech by Design: Algorithmic Protection of Exceptions and Limitations in the Copyright DSM Directive (2020) 11 J Intell Prop Info Tech & Elec Com L 68; *João Pedro Quintais* and *Martin Husovec*, How to license article 17 of the Copyright in the Digital Single Market Directive? Exploring the implementation options for the EU Rules on content-sharing platforms, (2021) 70 GRUR International 325; *Martin Senfleben*, Institutionalized Algorithmic Enforcement – The Pros and

plementation and interpretation has only begun, this article seeks to restructure these obligations by centring the discussion on safeguarding creativity online.

It maintains that in the face of increasing enforcement by exploiters against new dissemination models, it is fundamental that essential spaces for creativity online provided by platforms are safeguarded. This begins with a wholistic assessment of creativity, particularly online. Adopting a systems theory approach,⁶ the article unravels the obligations that authors and users hold to each other to help reconstruct the boundaries of the EU copyright system in relation to the norms inherent to the artistic system.⁷ One such norm being artistic communication, this article proposes that the ability to control the dissemination and creative discussion of a work inherently includes space for creative reuse and future artistic communication by users who are authors themselves.⁸

Such a broader approach to authorship would better reconcile authors and users as equally necessary components of creativity.⁹ A systems theory lens advocates the safeguarding of creative spaces online for users on the basis that the artistic system functions according to its own norms, namely creative autonomy.¹⁰

Cons of the EU Approach to UGC Platform Liability (2020) 14 FIU L Rev 299; *Sebastian Felix Schwemer and Jens Schovsbo*, What is Left of User Rights? – Algorithmic Copyright Enforcement and Free Speech in the Light of the Article 17 Regime, in: Paul Torremans (ed), *Intellectual Property Law and Human Rights* (Wolters Kluwer 2020).

6 *Dan Wielsch*, Private Governance of Knowledge: Societally-Crafted Intellectual Properties Regimes (2013) 20 *Indiana Journal of Global Legal Studies* 907; *Katarzyna Gracz and Primavera De Filippi*, Regulatory failure of copyright law through the lens of autopoietic systems theory (2014) 22 *International Journal of Law and Information Technology* 334; *Christoph B. Graber*, Freedom and Affordances of the Net (2017) 10 *Wash U Jurisprudence Rev* 221.

7 *Niklas Luhmann*, *Art as a Social System* (Translated by Eva M. Knodt, Stanford University Press 2000); *Katarzyna Gracz*, 'You wouldn't steal a car' vs 'Information wants to be free'. Regulatory failure of copyright law through the prism of Systems Theory (PhD, EUI 2016); *Günther Teubner, Richard Nobles, David Schiff*, *The Autonomy of Law: An Introduction to Legal Autopoiesis*, in: David Schiff and Richard Nobles (eds), *Jurisprudence* (Butterworth, London: 2003).

8 *Niva Elkin-Koren*, Copyright and its limits in the age of user-generated content, in: Eva Hemmungs Wirtén and Maria Ryman (eds), *Mashing up culture: The rise of users-generated content* (Department of ALM 2009) 16. Often referred to as user-generated content (UGC), this collaborative and cumulative creativity is underpinned by a self-regulatory nature. Commentary explains that, "[R]emixing ... is not about copying artistic works; it is about modifying, embellishing, appending, reinventing, and mashing them together with other elements. Most of all remixing is about being a producer, participating in the creative enterprise, and sharing your creations with others", see, *Don Tapscott and Anthony D. Williams*, *Wikinomics: How mass collaboration changes everything* (Portfolio: 2006) 125; *Lawrence Lessig*, *Remix: Making Art and Commerce Thrive in the Hybrid Economy* (Penguin Press 2008).

9 *Jeremy Waldron*, *From Authors to Copiers: Individual Rights and Social Values in Intellectual Property* (1992) *Chicago-Kent Law Review* 841, 877.

10 Generally, there are arguments found in *Locke*, *Kant*, and *Rawls* literature that assert that freedom of expression can be constructed as a natural right including the ability to reuse creative works to create future works for the sake of human flourishing. See, *Amy Lai*, *The Right to Parody: Comparative Analysis of Copyright and Free Speech* (Cambridge University Press 2019); *Robert Merges*, *Justifying Intellectual Property* (Harvard University Press 2011); *Adam Mossoff*, *Saving Locke from Marx: The Labor Theory of Value in Intellectual Property Theory* (2012) 29

This corresponds with the idea that creativity takes form as both collaborative and cumulative with the result that there is inherent space for creative reuse akin to a social contract between authors.¹¹ Practically, this would take the form of a departure point from enforcement of artistic communication of the EU copyright system, particularly creative reuses uploaded to platforms.

This article considers structuring the departure point from both within and outside the EU copyright system. In part A, the former is detailed through the overarching status of consent. Building from the doctrine of exhaustion, the article suggests that it is possible to authorise creative reuse on the condition of remuneration through platform monetization. In part B, the article considers whether creativity is better safeguarded online through the horizontal application of fundamental rights outside of the EU copyright system. Lastly, the article considers the extent to which recent legislative requirements reflect these approaches, with the view that an approach which strengthens platforms' obligations to creative reuse online is vital.

B. Consent to reuse and recreate on platforms within the EU copyright system

Creative autonomy is fundamental to authorship and should centre the discussion of platform liability for copyright infringement. From the creative process through to distribution and consumption of creative content, authorial control over its communication to the public is a fundamental tenant of artistic creation. Self-autonomy requires authors to shape their own life, and alongside it, how they ultimately express themselves and communicate with those around them.¹² Indeed, traditional personhood theories of copyright law justify protecting creative autonomy by respecting the relationship between an author and their work.¹³ While the romantic author has long been challenged,¹⁴ the idea that there is a significant link between creative autonomy and artistic communication

Social Philosophy and Policy 283. Not that others reject the natural law approach to copyright and state that it violates *Locke's* "No-Spoilage" Proviso. See, *Carys Craig*, *Locke, Labour and Limiting the Author's Right: A Warning against a Lockean Approach to Copyright Law* (2002) 28 *Queen's Law Journal* 1.

11 See, *Giancarlo F. Frosio*, *User patronage: The return of the gift in the "crowd society"* (2015) 5 *Michigan State Law Review* 983. *Frosio* draws upon *Gaultier's* social contract construct between authors and the public to propose that digital crowdfunding may be the answer to a balancing copyright interest in the digital age.

12 *Alexios Arvanitis* and *Konstantinos Kalliris*, *A self-determination theory account of self-authorship: Implications for law and public policy* (2017) 30 *Philosophical Psychology* 763.

13 *Martin A. Roeder*, *The Doctrine of Moral Right: A Study in the Law of Artists, Authors and Creators* (1940) 53 *Harvard Law Review* 554.

14 *Martha Woodmansee* and *Peter Jaszi*, *The Construction of Authorship: Textual Appropriation in Law and Literature* (Durham 1994).

is a helpful starting point to assess how obligations placed on platforms to enforce exploitation rights should also safeguard creativity.

This article proposes that the principle of consent can provide guidance for these obligations in a manner that balances authors, users, exploiters, and platforms' interests while simultaneously providing an essential online space for creativity. Generally, as a gatekeeper of copyright, consent has the capacity to reshape the boundaries of the copyright system to reflect creative practices. While consent is often viewed as an explicit act of authorisation, the copyright system itself also provides 'free spaces' where acts are authorised by law, residing outside the boundaries of enforcement. These are evident in the patchwork of principles within the national and CJEU jurisprudence, statutory exceptions and limitations, and more recently the influence of fundamental rights, specifically freedom of expression and art.

Traditionally, these spaces were interpreted restrictively by CJEU case law due to the standard enshrined within the Information Society Directive¹⁵ that IP rights should receive strong protection. Though some of this interpretive footing began to shift when the fair balance between copyright interests began to be emphasized,¹⁶ recent CJEU jurisprudence severely limits the external application of fundamental rights to copyright limitations and exceptions. Now the emphasis is on whether the provision's construction already considers the balance of fundamental rights. An example is the parody exception, which as an autonomous concept of EU law,¹⁷ denies the consideration of an external application of fundamental rights when construing its application.¹⁸ This leaves only situations where the provision is not entirely determined by EU law open to a broader application of fundamental rights. The discretion of national courts then appears to be on a case-by-case basis specific to the wording of the limitation or exception.

Despite this setback, this section offers a more wholistic analysis of the principle of consent within the EU copyright system. It maintains that the principle comprises a flexible nature suitable for building a creativity-based escape mechanism which would resolve the tension between the copyright system and artistic system. This calls for reflection on its structural framework, particularly on the foundational role of consent to shape the boundaries of the copyright system

15 Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L 167/10.

16 Though the latest expansion of exploitation rights, art. 17 DSM Directive, introduces specific liability for OCSSPs, alongside mandatory parody, pastiche and caricature exceptions, the CJEU's decision in 'Poland' also requires transpositions to allow a fair balance to be struck between the various fundamental rights protected by the Charter.

17 CJEU, 3.9.2014 – C-201/13 (ECLI:EU:C:2014:2132) para. 17 – Deckmyn and Vrijheidsfonds.

18 CJEU, 29.7.2019 – C-469/17 [2019], (ECLI:EU:C:2019:623) para 73–74 – Funke Medien NRW GmbH v Bundesrepublik Deutschland; CJEU, 29.7.2019 – C-516/17 [2019], (ECLI:EU:C:2019:625) para. 47–49 – Spiegel Online GmbH v Volker Beck.

specific to creative reuse. Drawing from the notion of creative autonomy, this section proposes that authorial consent should serve as the criterion for a licensing framework that allows creative reuse on the condition of authorial remuneration by platforms.

I. The limits of authorial consent

Consent is often applied within the EU copyright system as a norm-balancing exercise. The doctrine of exhaustion is one such example. Linked to notions of access and use of IP-protected goods, Community-wide exhaustion was introduced to balance the free movement of goods against national IP rights. The reliance on consent provided structural flexibility which meant that following consent to put a good on the market, the copyright holder's ability to control further distribution of that specific product disappeared. While one could expect that only explicit authorisation would give rise to exhaustion, internal market case law demonstrates that consent is slightly broader as the CJEU has generally viewed consent as a question of control over the initial distribution.¹⁹

Eventually this approach to balancing free movement against IP rights was confirmed in relation to copyright in *Musik Vertrieb* where the CJEU was asked whether national copyright legislation can prevent importation despite first sale, for the purposes of remuneration.²⁰ The CJEU held that while it was virtuous for GEMA to claim that economic rights should not be exhausted to ensure payment of royalties for sound recordings, such an approach would partition the internal market.²¹ The court emphasized the consent of the copyright owner and reflected that they had chosen to first put those products on the market in that member state, a key feature of the internal market.²² Later cases would continue to expand upon the meaning of consent through the lens of control with the *Coditel* cases confirming its use as a proportional balancing tool for conflicting norms relating to services.²³

19 CJEU, 31.10.1974 – C-15/74 (ECLI:EU:C: 1974:114) – Centrafarm BV and Adriaan De Peijper v Sterling Drug Inc; CJEU, 22.6.1976 – C-119/75 (ECLI:EU:C: 1976:94) – Terrapin v Terranova; CJEU, 14.7.1981 – C-187/80 (ECLI:EU:C: 1981:180) – Merck & Co. Inc. v Stephar BV.

20 CJEU, 20.1.1981 – joined cases C-55/80 and 57/80 (ECLI:EU:C:1981:10) – Musik-Vertrieb membran GmbH and K-tel International v GEMA ('Musik Vertrieb').

21 CJEU, 20.1.1981 – joined cases C-55/80 and 57/80 (ECLI:EU:C:1981:10) para. 18 – Musik-Vertrieb.

22 Ibid.

23 CJEU, 18.3.1980 – C-62/79 = [1980] ECR I-0881 – SA Compagnie gindrale pour la diffusion de la television, Coditel, and others v Cine Vog Films and others; CJEU, 6.10.1982 – C-262/81 = [1982] ECR I-3381 – Coditel v CinA/og FilmsI. Here, the CJEU considered the characteristics of the cinematographic industry and markets in the EU as reasonable factors to find that the exclusive licence at issue failed to prevent, restrict or distort competition.

The development of consent within internal market case law illustrates its potential as a meta exception within the EU copyright system providing a creativity-based departure point.²⁴ The emphasis on contextual factors of the initial distribution or dissemination of the work help ground the assessment of consent as a flexible and proportional balancing test. Connected to the notion of creative autonomy and artistic communication, artistic reputational harm refers to the extent to which a creative reuse impacts the author's reputation and/or the creative work itself. These contextual factors could form the basis to 'exhaust' authorial consent honouring the balance struck between the initial author and creative reuse's artistic communication. However, this comes at a cost. The question is simple: can authorial consent be implied when the creative reuse is offensive or harmful? Should authors be allowed to withdraw consent for future exploitation, regardless of its artistic intention?

CJEU jurisprudence has considered this issue to an extent. In *Spedidam*²⁵, the CJEU considered the implication of consent relating to performers' rights. Here, a French institute for conserving and promoting national audio-visual heritage, INA, marketed online video recordings and phonograms of a late musician without authorisation from their successors in title. While the court affirmed that previous case law requires authors and performers a high level of protection, consent can be implied when they perform in the audio-visual work for the purposes of broadcast and are aware of the envisaged use of the performance.²⁶ These contextual factors authorise the fixation and use of the performance. The court also noted that if consent is not implied for INA's archives, it would be impossible to exploit the collection, detrimentally impacting other copyright interests, specifically their freedom of expression.

Spedidam appears to have opened the door to a more practical assessment of authorial consent regarding creative reuse and artistic communication. This article suggests that the *Spedidam* approach is useful when considering the extent to which an author could object to creative reuse based on personality rights and unfair competition. *Deckmyn*²⁷ provides some guidance as it considers the scope of artistic reputational harm from the lens of parody in copyright law. The CJEU contemplated whether a calendar in the style of a famous comic book which displayed original characters as wearing veils and being persons of colour was discriminatory. If so, the parody exception would be unavailable. The court held

24 Beyond internal market jurisprudence, national case law on implied licences also offers support of consent as a fundamental legal principle within copyright law. See, *Georgia Jenkins, An Extended Doctrine of Implied Consent – A Digital Mediator?*, (2021) 52 IIC 706, in particular 715–6 on the German *Vorschaubilder* cases.

25 CJEU, 14.11.2019 – C-484/18 (ECLI:EU:C:2019:970) – *Société de perception et de distribution des droits des artistes-interprètes de la musique et de la danse (Spedidam)*, PG, GF v Institut national de l'audiovisuel (INA).

26 CJEU, 14.11.2019 – C-484/18 (ECLI:EU:C:2019:970) para. 37–39 – *Spedidam*.

27 CJEU, 3.9.2014 – C-201/13 (ECLI:EU:C:2014:2132) – *Deckmyn and Vrijheidsfonds*.

that as freedom of expression provides the foundation for the exception, national courts must strike a fair balance between fundamental rights which includes the legitimate interest of a copyright holder to ensure that a work is not associated with a harmful message.

This proportionality test is helpful in structuring the scope of artistic reputational harm to block implied authorial consent. Indeed, subsequent national case law such as *Le Point* and *Auf fett getrimmt* (*Fat-Cropped*) evidence courts attempting to impose limits on the possible detrimental impact on a legitimate interest in line with bolstering freedom of expression outlined in *Spedidam*.²⁸ While most national case law that balances personality rights against freedom of expression focuses on the presence of the artistic or transformative nature of the creative reuse,²⁹ a German Higher Regional Court decision in Jena, *Helene Fischer*,³⁰ focuses on the nature of the artistic harm from the performers' perspective and assesses it through the eyes of the "unbiased average consumer".³¹ A use is deemed harmful if the average consumer cannot exclude the possibility that there is a connection between the political party and the artist.³²

Such an approach is reminiscent of unfair competition law concepts in trade mark law, particularly tarnishment and unfair advantage. Both types of harm are based on an unauthorised trade mark use that causes harm to the repute of the mark. The former arises when the use involves goods or services that possess a characteristic or quality which are likely to have a negative impact on the image of the mark.³³ Often referred to as a negative image transfer, tarnishment causes consumers to think differently about a plaintiff's mark with adverse consequences.³⁴ Unfair advantage is a wider category of harm and refers to use

²⁸ Cass. Civ, 22 May 2019, no. 18–12718 – *Le Point*; BGH, GRUR 2016, 1157 – *Auf fett getrimmt* (*Fat-cropped*).

²⁹ See, 1993 TGI Paris, 15 October, 155 RIDA 225 – *Godot*; Cass. Civ, 28 May 1991, 149 RIDA 197 (1991) – *Asphalt Jungle*; 1995 CA Versailles, 10 December, 164 RIDA 256 – *Turner Entertainment Company*; Cass. Civ, 12 July 2012, nos. 11–15.165 and 11–15.188 – *La société Google France and Others v. La société Aufeminin.com and Others*; 2018 CA-Versailles, 16 March 2018, RG 15/06029 – *Malka v Klasen*; *Christophe Geiger*, *Contemporary Art on Trial – The Fundamental Right to Free Artistic Expression and the Regulation of the Use of Images by Copyright Law*, in: *Thomas Dreier and Tiziana Andina* (eds), *Digital Ethics – The Issue of Images* (Nomos, 2021); *Jonathan Griffiths*, *Not such a timid thing: The United Kingdom's Integrity Right and Freedom of Expression*, in: *Jonathan Griffiths and Uma Suthersanen* (eds), *Copyright and Free Speech* (OUP 2005); *Alan Hui and Frédéric Döhl*, *Collateral Damage: Reuse in the Arts and the New Role of Quotation Provisions in Countries with Free Use Provisions after the ECJ's Pelham*, *Funke Medien and Spiegel Online Judgments*, (2021) 52 IIC 852.

³⁰ OLG Jena, 18.3.2015 – 2 U 674/14 – *Helene Fischer*.

³¹ *Stefan Michel*, *You Can't Always Get What You Want? A Comparative Analysis of the Legal Means to Oppose the Use of Campaign Music*, (2018) 18 J. Marshall Rev. Intell. Prop. L. 169, 190.

³² *Ibid.*

³³ CJEU, 18.6.2009 – C-487/07 (ECLI:EU:C:2009:378) para. 40 – *L'Oréal / Bellure*.

³⁴ *Michael Handler*, *What Can Harm the Reputation of a Trademark: A Critical Re-Evaluation of Dilution by Tarnishment*, (2016) 106 Trademark Rep 639, 672.

which benefits from an earlier mark's reputation and prestige without compensation. It can even be invoked where there is no threat to the origin function of the mark and there is no consumer confusion.³⁵ Both types of harm have a great deal of ambiguity regarding their scope, and so the requirement that the relevant public must establish a link between the trade mark and infringing use is paramount.

The significance of a link between the unauthorised use and the initial copyright works is also clear in *Helene Fischer*. Here, the court established a link between the NPD and *Helene Fischer* because the far-right national party played the latter's song during a campaign event, causing the public to assume some type of connection between the two. The court then engaged in balancing regarding the level of harm by considering contextual factors including the relevant interests, the intensity and impact of the mutilation, the economic interests, and the level of creativity. While these parallels between *Helene Fischer* and reputational-based trade mark infringement are helpful in structuring a claim for artistic reputational harm, the use did not relate to a creative reuse. This means it is difficult to determine when mere association for example would prevent exhausting authorial consent.

Returning to the significant link concept in trade mark law, in *Rich Prada*,³⁶ the EU General Court held that the well-known fashion house, Prada, failed to prove the link between itself and a Balinese four-star hotel named Rich Prada. Prada argued that they should have a possibility of brand extension as the public is accustomed to luxury brands in diverse sectors. However, the General Court was not convinced, determining that brand extension is insufficient to prove the transfer of image from one mark to the alleged use.³⁷ A comparable argument could be made in relation to copyright and creative reuse as some would suggest that it has become the norm for artists to work creatively together.

It appears that there is doctrinal space to imply authorial consent specific to creative reuse. When consent is viewed as a meta exception, drawn from early free movement case law and Community-wide exhaustion, not only is it clear that consent is a norm-balancing exercise, but it is truly a question of control built from a proportional and balanced assessment of contextual factors. The more difficult question to answer is how to strike a balance between the initial author and the creative reuse. To which this article replies that the reconciliation of personality rights and unfair competition law concepts in trade mark law provides a helpful starting point to apply the social contract provided within the concept of creative autonomy.

35 CJEU, 18.6.2009 – C-487/07 (ECLI:EU:C:2009:378) para. 49 – L'Oréal / Bellure.

36 General Court, 5.6.2018 – T-116/16 (ECLI:EU:T:2018:328) – Prada SA / EUIPO.

37 General Court, 5.6.2018 – T-116/16 (ECLI:EU:T:2018:328) para. 54 – Prada SA / EUIPO.

II. Remunerating authors for creative reuse on platforms

Alongside the requirement for authorial consent for creative reuse, the EU copyright system has long required that the high level of protection afforded works allows them “to obtain an appropriate reward for the use of their work”³⁸. However, this criterion applies to all rightsholders, meaning that beyond authors, exploiters must be compensated. This article however proposes that creative autonomy should limit remuneration for creative reuse to authors.

Firstly, if one considers the CJEU’s interpretation of an “appropriate reward” it is evident that it is defined in relation to its reasonable economic exploitation.³⁹ For example in *UsedSoft*, the CJEU explained that the structure of the ‘licence’ went beyond what is necessary to safeguard the work as it allowed the copyright holder to control the resale of copies downloaded from the internet and to demand further remuneration on the occasion of each new sale, even though the first sale of the copy had already enabled the rightholder to obtain an appropriate remuneration.⁴⁰ The question becomes, what is reasonable in the context of creative reuse for non-author rightsholders?

One way to frame a reasonable economic exploitation is through a theory of substitution – does the reuse act as a copy, competing with the original work? The assessment should be structured to consider whether exploitation rights can prevent creative reuse based on actual harm suffered. Case law affirms this perspective as in *Reprobel* the CJEU found that:

“[T]he notion and level of fair compensation is linked to the harm resulting for the author from the reproduction of his protected work without his compensation. From that perspective, fair compensation must be rewarded as recompense for the harm suffered by that author”.⁴¹

Though the court identified that the author experienced harm from the sale of printers, publishers were not remunerated as they were not subject to any harm for the purpose of copyright exceptions. If expanded upon further, combining actual harm with the substitution theory supports the notion of creative autonomy. While there is inherent space for the communication of artistic reuse, potential harm is balanced through compensation, meaning that authors remain the only relevant copyright interest with a claim to be appropriately remunerated for creative reuse. Additionally, if the creative reuse is capable of substituting the original work, this harms both authors, and exploiters as it impacts their investment.

38 Information Society Directive, recital 10.

39 CJEU, 22.1.2015 – C-419/13 (ECLI:EU:C:2015:27) para. 31, 43 – Art & Allposters International BV/Stichting Pictoright (in relation to the work’s exploitation in a new commercial market).

40 CJEU, 3.7.2012 – C-128/11 (ECLI:EU:C:2012:407) para. 63 – *UsedSoft GmbH/Oracle International Corp.*

41 CJEU, 12.11.2015 – C-572/13 (ECLI:EU:C:2015:750) para. 36 – *Hewlett-Packard Belgium SPRL/Reprobel SCRL*.

The question of harm has somewhat been addressed in relation to both EU Commission Guidance on art. 17 DSM Directive and Advocate General *Saugmandsgaard Øe*'s opinion in *Poland*.⁴² Both reference the need to prevent non-manifestly infringing uses "staying down" during the complaint and redress mechanism. It is also indirectly supported by the CJEU in *Poland* requiring member states to transpose arts. 17(7) and 17(9) effectively, to protect the essence of freedom of expression and information that the user safeguards shield.⁴³

Though mandatory exceptions, namely parody, pastiche and caricature, provide some guidance on what types of creative reuse should not be filtered by platforms,⁴⁴ this article suggests that the theory of substitution is more effective.⁴⁵ In the Advocate General's opinion in *Pelham*, it was suggested that given sampling does not replace the original phonogram, it should not be classed as an infringing copy.⁴⁶ This reflects the German Federal Constitutional Court's finding in *Pelham* that sampling does not infringe unless the phonogram producer's economic rights are materially affected.⁴⁷

While the only threshold test provided by the CJEU is the recognizable nature of the phonogram, the latest *Pelham* CJEU referral⁴⁸ on pastiche provides an entry point for distinguishing creative reuse from mere imitation. Following the implementation of pastiche in Germany, the Berlin Regional Court defined the act as a "communicative act of stylistic imitation" which incorporates a degree of modification from the original.⁴⁹ More recently, the Hamburg Regional Higher

42 Commission, Communication on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market COM(2021) 288 final, 21; Opinion of AG *Saugmandsgaard Øe*, 15.7.2021 – C-401/19 (ECLI:EU:C:2021:613) – Republic of Poland v European Parliament, Council of the European Union

43 CJEU, 26.4.2022 – C-401/19 (ECLI:EU:C:2022:297) para. 76 – Poland / Parliament and Council.

44 There is a theoretical risk that if member states transpose it strictly, only providing these exceptions for OCSSP-related copyright infringement, and not for platforms falling outside this definition that may be liable pursuant to art. 3 Information Society Directive.

45 *Guido Westkamp*, Two Constitutional Cultures, Technological Enforcement and User Creativity: The Impending Collapse of the EU Copyright Regime?, (2022) 53 IIC 62, 72 & 75.

46 Opinion of AG *Szpunar*, 10.12.2018 – C-476/17 (EU:C:2018:1002) para. 41–49 – *Pelham*.

47 German Federal Constitutional Court, 31.5.20161 – BvR 1585/13 (ECLI:DE:BVerfG:2016:rs20160531.lbvrl58513), para. 110 – *Metall auf Metall*; also see, *Ines Duhanic*, Copy this sound! The cultural importance of sampling for hip hop music in copyright law – a copyright law analysis of the sampling decision of the German Federal Constitutional Court, (2016) JILP 932, 941; *Lionel Bently* and et al, Sound Sampling, a Permitted Use Under EU Copyright Law? Opinion of the European Copyright System in Relation to the Pending Reference before the CJEU in Case C-476/17, *Pelham GmbH v. Hütter*, (2019) 50 IIC 467, 480.

48 German Federal Court (BGH), 14.9.2023 – I ZR 74/22 – *Metall auf Metall V*.

49 LG Berlin, 02.11.2021 – 15 O 551/19, para. 40–41. Similarly to reputation-based harm, the Court requires an objective assessment by someone familiar with the original work with the requisite level of understanding to perceive the communicative or artistic discussion made by the creative reuse.

Court followed the same approach in *Pelham* when finding that the two-second sample was a pastiche.⁵⁰

This approach to creativity mirrors the substitution argument as it comprises a use, which by its very nature, fails to compete with the original and does not result in harm beyond the author. It can also serve as a guidepost for excluding exploiters from harm-based compensation claims, while bolstering authors adopting a “permitted-but-paid”⁵¹ approach through “limitation-based remuneration rights”⁵². This ensures “relatively inexpensive dissemination in furtherance of socially worthy goals”,⁵³ such as creativity online.

It follows, that authorial consent and remuneration serve as mutually inclusive points of departure from the EU copyright system. Indeed, a wider approach to creativity ensures that:

“[E]veryone – not just political, economic or cultural elites – has a fair chance to participate in the production of culture, and in the development of the ideas and meanings that constitute them and [in] the communities and subcommunities that they belong.”⁵⁴

Additionally, it reflects the fundamental relationship between self-determination and freedom of expression integral to creative autonomy, and a broader approach to authorship which is inclusive of users and community-based creativity and interaction online. When these elements are viewed holistically they arguably reflect a more practical understanding of how cultural works are created, shared, enjoyed, and inspire future creativity. It explicitly recognizes:

50 OLG Hamburg, 28.04.2022 – 5 U 48/05 para. 97 – Metall auf Metall III.

51 *Jane C. Ginsburg*, Fair Use for Free, or Permitted-but-Paid? (2014) 29 Berkeley Tech. L. J. 1383; *Christophe Geiger*, Building an Ethical Framework for Intellectual Property in the EU: Time to Revise the Charter of Fundamental Rights, in: Gustavo Ghidini and Valeria Falce (eds), Innovation law and Policy, Which Reforms for IP Law? (Edward Elgar 2022) 449; *Christoph Geiger*, Statutory Licences as Enabler of Creative Uses, in: R.M. Hilty and K.-C. Liu (eds), Remuneration of Copyright Owners (Springer 2017); *Reto M. Hilty and Sylvie Nérison*, Collective Copyright Management and Digitization: The European Experience, in: Ruth Towse (ed), Handbook on the Digital Creative Economy (Edward Elgar 2013) 222–234; *Warren Chik*, Paying it Forward: The Case for a Specific Statutory Limitation on Exclusive Rights for User-Generated Content Under Copyright Law, (2011) 11 J. Marshall Rev. Intell. Prop. L. 240. Also see, *João Pedro Quintais*, Copyright in the Age of Online Access. Alternative Compensation Systems in EU Law (Kluwer Law International 2017) 399. *Quintais* proposes an alternative compensation scheme designed to ensure access to works and fair remuneration through a statutory licensing construct dependent on non-commercial use of works online.

52 *Christophe Geiger*, Building an Ethical Framework for Intellectual Property in the EU: Time to Revise the Charter of Fundamental Rights, in: Gustavo Ghidini and Valeria Falce (eds), Innovation law and Policy, Which Reforms for IP Law? (Edward Elgar 2022) 446.

53 *Ibid* 387.

54 *Peter K. Yu*, Increased Copyright Flexibilities for User-Generated Creativity, in: Gustavo Ghidini and Valeria Falce (eds), Reforming Intellectual Property (Edward Elgar 2022) 310, citing *Jack M. Balkin*, Digital Speech and Democratic Culture: A Theory of Freedom of Expression for the Information Society, (2004) 79 New York University Law Review 1, 4–5.

“[T]he dynamic, interactive, and diffused nature of creative processes ...[by] shift[ing] the locus of creative processes from a single act of authoring ‘from thin air’ to an ongoing process with multiple participants”.⁵⁵

The question of subsequent creativity should no longer be one of whether it falls into an acceptable category, but whether authorial consent is exhausted, facilitating and supporting future creativity online through author remuneration. In this way, creative autonomy is a point of departure grounded in a systems theory approach which utilises the inherent balancing mechanism of the European copyright system, consent dependent on remuneration.

III. Conclusion

Part A has proposed that platform obligations to safeguard creativity online should be guided by the principle of consent. Using the doctrine of exhaustion as an example of norm-balancing within internal market jurisprudence, this article proposes that there is scope to authorise creative reuse online, including its subsequent communication. Drawing from the concept of creative autonomy, this section suggests that authorial control of communication is central to creativity, for both author and user. Considering this cyclical process of art and inspiration, the article has sought to identify criteria that support the artistic communication of author and user. Essentially, if the EU copyright system has the capacity to allow creative reuse, what limits should be imposed?

It is clear from *Spedidam* and *Deckmyn* that a proportional approach is required. Building from the need for a practical assessment of the circumstances, specifically knowledge of the use’s purpose, the article proposes that authorial consent is both an inherent element of creativity as well as a doctrine that comprises scope for lawful creative reuse. In response to the subjective nature of creative reuse, the article finds inspiration from *Helene Fischer* which adopted an objective test similar to tarnishment and unfair advantage concepts in EU trade mark law, focusing the extent to which a link is formed between the author and the use by the “unbiased average consumer” alongside a *Deckmyn*-like analysis of harm. It suggests that the culmination of personality rights and unfair competition law concepts provide a suitable foundation for striking a balance between the initial author and the subsequent creative reuse. One which will help assess the effectiveness of current approaches to implementing art. 17 DSM Directive within the EU copyright system in Part C.

Authorial consent also necessitates authorial remuneration. Part A has reflected on the foundational principle of the EU copyright system, that rights

55 Niva Elkin-Koren, Copyright in the Digital Ecosystem: A User Rights Approach, in: Ruth L. Oke-diji (ed), Copyright Law in the Age of Limitations and Exceptions, (Cambridge University Press: 2017) 145.

holders should receive a higher level of protection, to extend that creative autonomy should provide a limit to remuneration for creative reuse. Focusing on the reasonableness of an award for economic exploitation, the article contends that *Reprobel* indicates that remuneration should be linked to the harm experienced from creative reuse. A theory of substitution is helpful to assess this harm as arguably exploiters' investment is only impacted by competing copies,⁵⁶ it also mirrors the structure of authorial consent as its exhaustion is based on contextual factors. While there is some guidance to implement platform responsibilities in a similar approach regarding 'manifestly infringing uses', Part A concludes that focusing on types of creative reuses (e.g. parody, pastiche or quotation) is largely unhelpful as it limits the very nature of creativity. Instead, a theory of substitution helps ground the assessment of authorial remuneration because it asks the very simple question of creative contribution and subsequent harm.

This article maintains that both authorial consent and authorial remuneration are helpful criteria to guide the implementation of art. 17 DSM Directive. They are also indicative of the role and obligations that platforms should hold to authors and users, as well as creativity and the artistic system, more widely within the EU copyright system. However, given the difficulty to move the needle from an institutional perspective, this article also discusses in the following section, approaches beyond the EU copyright system that would safeguard creativity online, particularly via platforms.

C. Safeguarding creative access beyond the EU copyright system

To an extent, this article has hinted at the role and impact of exploiters within the EU copyright system. Instrumental in lobbying for expansive rights, their call for stronger rights has been referred to as the 'propertization' of copyright.⁵⁷ Supported by art. 17(2) Charter⁵⁸ with the statement that "intellectual property must be protected", constitutional propertization means that all forms of access

⁵⁶ See, *Pamela Samuelson*, The Quest for a Sound Conception of Copyright's Derivative Work Right, (2013) 101 *Georgetown Law Journal* 1505, which criticises the inability of a derivative work to substitute a copy from a US perspective.

⁵⁷ *Caterina Sganga*, Multilevel constitutionalism and the propertisation of EU copyright: at an even higher protection or a new structural limitation, in: Tuomas Mylly and Jonathan Griffiths (eds), *Global Intellectual Property Protection and the New Constitutionalism: Hedging Exclusive Rights* (OUP 2021); *Alexander Peukert*, Intellectual Property as an End in Itself, (2011) 32 *EIPR* 67, 71; *Giancarlo Frosio*, Reconciling Copyright with Cumulative Creativity. The Third Paradigm, (Elgar 2018) 187; *Jessica Litman*, What we don't see when we see copyright as property, (2018) 77 *Cambridge Law Journal* 536; *Julie E Cohen*, Copyright as Property in the Post-Industrial Economy: A Research Agenda, (2011) *Georgetown Public Law and Legal Theory Research Paper* No. 11-25; *Séverine Dusollier*, Unlimiting limitations in intellectual property', in: G. Ghidini and V. Falce (eds), *Reforming Intellectual Property* (Elgar 2022).

⁵⁸ Charter of Fundamental Rights of the European Union, OJ C 326/391.

to works are protected regardless of the link between creativity and contribution, providing the foundation for the expansion of economic rights.⁵⁹ Despite the inviolable nature of IP rights and their lacking absolute protection, as noted earlier, CJEU case law has restricted the application of fundamental rights when interpreting copyright exceptions simply requiring that national courts ensure the effectiveness of an exception.⁶⁰ Commentary responds that the same logic can be used to bolster the social function of copyright by characterizing exceptions as objective rights through freedom of expression.⁶¹

Part B builds on this assertion, expanding to consider the degree that platform obligations outside the EU copyright system can safeguard creativity online, particularly user uploads of creative reuse. The section discusses how platforms, as private entities, can or should be bound with public norms, namely fundamental rights. Fitting within a recently revitalised approach to the role of platforms online, termed digital constitutionalism⁶², the section addresses the application of human rights standards to the private sphere. It draws on German case law that supports citizens' rights to access to public forums to assert their constitutionally supported communication rights and considers whether this extends to creativity. Lastly, Part B assesses the impact of this approach on the EU copyright system, namely as a genuine counter-right to the dominance of exploiters' rights.

I. A right of access to platforms

German jurisprudence has long considered the relationship between private and public law in comprehensive detail, specifically through the doctrine of indirect effect (*Drittwirkung*). The legal concept relates to the presumption that an individual can rely on constitutional rights to sue another private individual for allegedly violating those rights. Sometimes referred to as total constitutionalism,⁶³ the doctrine of indirect effect has been described as effectively constitutionalizing the relationship between private actors. While it has Germanic roots,

59 *Sganga* [n 57]; *Séverine Dusollier*, *Sharing Access to Intellectual Property through Private Ordering*, (2007) 82 *Chicago Kent Law Review* 1391, 1393–4.

60 CJEU, 29.7.2019 – C-469/17 (ECLI:EU:C:2019:623) para 71 – *Funko Medien*; CJEU, 29.7.2019 – C-516/17 (ECLI:EU:C:2019:625) para. 55 – *Spiegel Online*.

61 *Sganga* [n 57]; *Schwemer and Schovsbo* [n 5].

62 *Giovanni De Gregorio*, *Digital Constitutionalism in Europe: Reframing Rights and Powers in the Algorithmic Society* (Cambridge University Press 2022); *Lex Gill, Dennis Redeker and Urs Gasser*, *Towards Digital Constitutionalism? Mapping Attempts to Craft an Internet Bill of Rights*, (2015) Berkman Centre Research Publication No. 2015–15.

63 *Giancarlo Frosio*, *Reforming the C-DSM Reform: A User-Based Copyright Theory for Commonplace Creativity* (2020) 51 *IIC* 709; *Oreste Pollicino and Giovanni De Gregorio*, *Constitutional Law in the Algorithmic Society*, in: Hans-W. Micklitz and et al (eds), *Constitutional Challenges in the Algorithmic Society* (Cambridge University Press 2021) 19.

commentary explain it has been adopted in many other constitutional traditions, and even “exerts a strong influence on the case law of the CJEU and ECtHR”⁶⁴.

The doctrine of indirect effect first materialised in the landmark German case, *Lüth*.⁶⁵ Here, the question, on appeal to the German Constitutional Court, was whether a producer and distributor of an anti-Semitic film, written and directed by the same person, could prohibit an activist’s call for the new film to be boycotted. The producer initially argued that the German Constitution was inapplicable as this was a private law dispute. Despite the German Constitution’s silence on the regulation of legal relationships among private individuals, the court found that it establishes an “objective ordering of values” which strengthens the application of constitutional rights and guarantees them beyond their traditional application between individuals and the state.⁶⁶

The court also introduced the notion of balancing conflicting constitutional rights by referring to it as a value-balancing exercise where notions of human dignity and human personality sit at the core of society, impacting all areas of law, both public and private.⁶⁷ While these governing principles guide constitutional interpretation, in the context of private individuals, this balancing involves the relevant constitutional rights in a diluted form.⁶⁸ Essentially it means that in private law disputes between individuals, constitutional rights, to an extent, influence private law.

Following *Lüth*, the German Constitutional Court in *Fraport* both confirmed the doctrine of effect and introduced the possibility of extending its scope in specific circumstances.⁶⁹ The case involved activists demanding access to Frankfurt Airport to protest deportations by the German government. The operator of the airport, Fraport-AG, a public company, introduced a ban against protestors entering the airport including the distribution of material. The activists argued that this ban violated fundamental rights, namely freedom of assembly and freedom of expression. The court held that though Fraport was owned predominantly by public institutions, the company was not directly bound by fundamental rights. Further, the court stated that even if Fraport was directly bound, it would only

⁶⁴ Ibid 19.

⁶⁵ BVerfGE 7, 198, 198 – *Lüth*. See also *Peter E. Quint*, Free Speech and Private Law in German Constitutional Theory, (1989) 48 Md. L. R. 247.

⁶⁶ BVerfGE 7, 198 – *Lüth*; *Peter E. Quint*, Free Speech and Private Law in German Constitutional Theory, (1989) 48 Md. L. R. 247 (261).

⁶⁷ *Edward J. Eberle*, Observations on the Development of Human Dignity and Personality in German Constitutional Law: An Overview, (2012) 33 Liverpool Law Review 201, 204.

⁶⁸ *Peter E. Quint*, The Global Constitutional Canon: Some Preliminary Thoughts (Digital Commons Maryland Law 2012) <https://digitalcommons.law.umaryland.edu/cgi/viewcontent.cgi?article=1150&context=schmooze_papers> accessed 29.1.2024.

⁶⁹ BVerfGE, 2011, 128 – *Fraport*; *Livia Fenger* and *Helena Lindemann*, The FRAPORT Case of the First Senate of the German Federal Constitutional Court and its Public Forum Doctrine: Case Note, (2014) 15 German Law Journal 1105, 1110.

extend to the use of a public space for its designated purpose which on the facts was travelling.

Fraport is significant for two reasons: Firstly, the possibility to extend the application of fundamental rights on private companies, and secondly, the integral link between the public space and its designated purpose. The latter delineates the scope of protection for individuals relying on fundamental rights to use that space. Regarding the former, commentary explains that the binding nature of fundamental rights on private companies following *Fraport* comes extremely close to the direct effect that binds the state.⁷⁰ This is said to occur when it becomes impossible for the state to provide protection for citizens to exercise their fundamental rights due to privatisation of public premises.⁷¹ Thus private law is not a safe haven from the application of fundamental rights.

There are clear parallels in *Fraport* with an obligation of platforms to safeguard creativity online beyond the EU copyright system. In *Fraport*, when weighing the airport's private rights against the right to assemble, the court focused on the term public forum, finding that these spaces are not exempt from freedom of assembly due to the doctrine of indirect effect.⁷² Instead, public forums comprise space for differing uses including communicative ones which allow public debate that cannot be prohibited.⁷³ This flexible and broad approach to the interpretation of a public space which includes the constitutional requirement for communication is helpful in structuring platform obligations to safeguard artistic communication.

This article suggests that platforms provide a primary mode of communication online for users, including authors. Given that no geographical link is needed, all that is required is for individuals to require such a communicative space, platforms undoubtedly reflect the logic of *Fraport*. Comparatively, the scope of the US public forum doctrine, considered in *Packingham v. North Carolina*⁷⁴, describes the Internet as the “modern public square” explaining that “social media allows users to gain access to information and communicate with one another about it”.⁷⁵ This argument is also mirrored by commentary contending that such an integral role within society should mean that they are bound by fundamental rights, specifically to ensure freedom of expression online.⁷⁶

⁷⁰ Ibid 1110.

⁷¹ Ibid.

⁷² Ibid 1112.

⁷³ Ibid 1112, citing *Fraport* para. 70.

⁷⁴ *Amélie P. Heldt*, Merging the social and the public: How social media platforms could be a new public forum, (2020) 46 Mitchell Hamline Law Review 997, 1015–6; *Fenger and Lindemann* [n 69] 1115, citing *Fraport* para. 98.

⁷⁵ 137 S. Ct. 1730 (2017).

⁷⁶ *András Koltay*, The protection of freedom of expression from social media platforms, (2022) 73 Mercer Law Review 523.

This flexible and broad approach to public spaces was confirmed in *Stadionverbot* and extended to include to “the opportunity of each individual to tak[e] part in societal life”⁷⁷. Here, an individual was banned permanently from a football stadium as he was suspected to have been a hooligan in the past. The German Constitutional Court found that the stadium operator must respect the fundamental right to non-discrimination pursuant to the German Constitution.⁷⁸ The court held that there needs to be a substantial reason to exclude someone from an activity relevant to life in society, such as major football games. Such an exclusion would require granting a right to appeal a (private) decision when excluding an individual from the public (sphere).⁷⁹ Some commentary suggests that *Stadionverbot* reasoning, specific to the equality guarantees within the German Constitution, could extend to social media platforms “which constitute a vital tool for many people to participate in social life”⁸⁰.

When considering platforms as public spaces essential for creativity online, access to platforms should not be restricted when such access conflicts with fundamental freedoms, specifically freedom of expression. As creative autonomy requires access to platforms to communicate creativity, platforms must safeguard authors’ fundamental rights. This approach links to the work of philosopher and social theorist Jürgen Habermas who theorised on the spaces where public opinion was shaped, terming them the “public sphere”,⁸¹ describing them as “the fundamental site of participatory democracy and a bulwark against the powers of the state and the market”⁸². Commentary explains that a platform “serves as a public sphere comparable to the 17th century coffee houses of Britain and salons of Paris from which the Habermasian idea of the public sphere originated”⁸³. Though they are algorithmically driven and centrally controlled, platforms similarly to Habermas’ spaces have “enormous power over what speech is possible, and the algorithms they deploy govern which perspectives are seen and which are buried”⁸⁴.

⁷⁷ Heldt [n 74] 1021, citing BVerfGE 148, 2018, 267 para. 1–58 – *Stadionverbot*.

⁷⁸ Heldt [n 74] 1021, citing BVerfGE 148, 2018, 267 para 41 – *Stadionverbot*.

⁷⁹ Heldt [n 74] 1021; citing BVerfGE 148, 2018, 267 para. 45, 58 – *Stadionverbot*.

⁸⁰ *Alix Schulz*, Horizontalität und the Constitutional Right to Equality– Recent Developments in the Jurisprudence of the German Federal Constitutional Court (OxHRH Blog, November 2019), <<https://ohrh.law.ox.ac.uk/horizontality-and-the-constitutional-right-to-equality-recent-developments-in-the-jurisprudence-of-the-german-federal-constitutional-court>> accessed 29.1.2024.

⁸¹ *Jillian C. York and Ethan Zuckerman*, Moderating the public sphere, in: Rikke Frank Jørgensen (ed), *Human Rights in the Age of Platforms* (The MIT Press 2019) 146.

⁸² *Jürgen Habermas*, *The structural transformation of the public spheres: An inquiry into a category of bourgeois society* (English Language ed., Cambridge MIT Press 1989); *Evan Steward and Douglas Hartmann*, *The new structural transformation of the public sphere*, (2020) 38 *Sociological theory* 170.

⁸³ *Sara Abbasi*, *Internet as a Public Space for Freedom of Expression: Myth or Reality?* (2017) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3064175> accessed 29.1.2024.

⁸⁴ *York and Zuckerman* [n 81] 148.

This section builds upon this perspective to argue that, to the degree that fundamental rights bind platforms,⁸⁵ they provide a public space which among other uses, also facilitates artistic communication.⁸⁶ It would mean that platforms have an obligation, given this public space status, to ensure that authors and users have access to platforms to effectively ensure artistic communication. Communities and sub-communities that create UGC would be able to rely on this access right to disseminate subsequent creative works. Some commentary term this obligation as a “general legal must carry dut[y]” as it appears to arise “where platforms have a dominant, ‘self-chosen’ role as a general-use oriented infrastructure for their users to take part in public and social life”.⁸⁷ Indeed, German case law on the takedown of Facebook posts seem to support this characterisation.⁸⁸ Thus, given the significance of artistic communication and the role of platforms as a gatekeeper to accessing works and communicating new creative works, there is an argument that, outside the EU copyright system, platforms should be obligated to safeguard creativity online.

The question becomes how to structure these obligations in a manner that supports creativity, reconciling the EU copyright system? Indeed, it is more likely that any attempt to prevent takedowns of creative reuse will result in the argument that such an approach is incompatible with EU copyright law, and platforms will be pressured through private ordering mechanisms with the threat of infringement. In the following section, this article proposes that platforms should safeguard these essential creative spaces online through a wider access right to incentivise the adoption of creativity-friendly content platform moderation policies.

⁸⁵ If the upload relates to an issue that is fully harmonized by EU copyright law, however, external application of fundamental rights is no longer possible. Thus, this article proposes, namely in Parts B.II and C.II, that platforms must be obligated to safeguard creativity beyond the EU copyright system.

⁸⁶ See, *Robert P. Merges*, *Locke Remixed ; -*), (2007) 40 UC Davis Law Review 101. *Merges* argues that remixing should not be given a legal right to remix. *Merges* contests the argument that remixing is necessary for the self-actualization of people living in a media-saturated world.

⁸⁷ See, *Matthias Leistner*, *European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive: Can we make the new European system a global opportunity instead of a local challenge?*, (2020) 2 ZGE / IPJ 123–214. For a US context, see, *Daphne Keller*, *Who do you sue? State and platform hybrid power over online speech*, (2019) Aegis Series Paper No 1902 1.

⁸⁸ BGH, GRUR 2020, 1318 – Facebook; OLG München, 7.1.2020 – 18 U 1491/19 – Facebook hate posts; OLG Köln 2018, O 187/18 – Deleted Facebook postings; See, *Matthias C. Kettemann* and *Anna Sophia Tiedeke*, *Back up: Can users sue platforms to reinstate deleted content?*, (2020) 9 Internet Policy Review 1; *Klaus Wiedemann*, *A matter of choice: The German Federal Supreme Court’s Interim Decision in the Abuse-of-Dominance Processings Bundeskartellamt v. Facebook* (case KVR 69/19), (2020) 51 IIC 1168.

II. A genuine counter-right to the EU copyright system

This article proposes that following the doctrine of indirect effect, platforms should be considered ‘hybrid bodies’ obligated to comply with fundamental rights standards specific to creativity.⁸⁹ The question is how to structure these standards. A systems theory approach indicates that if constitutional rights are seen as social “institutions” that support societal aims, including creativity, they are no longer negative or defensive rights, but apply to the process of societal self-regulation.⁹⁰ This section contends that UGC should be viewed as such a process which requires the horizontal application of fundamental rights to safeguard creativity.

The theory of societal constitutionalism has been used to analyse the application of fundamental rights beyond the state,⁹¹ particularly in a transnational context. It requires focusing on the fragmentation of contemporary societies in the context of creativity on platforms. This involves recognizing the interaction of layers of societal constitutions constructed from various sub-systems, namely the legal and artistic systems. Given the increasing expansion of exploiters’ rights and status within the EU copyright system and its impact on creativity online, societal constitutionalism necessitates the horizontal application of fundamental rights in a manner that supports self-regulation of UGC.

A bottom-up approach would imply that UGC needs access to platforms as a pre-condition for users’ creativity and artistic communication online, supported by freedom of expression.⁹² It also complements the contractual relationship between users and platforms. As they are reliant on users to upload content and engage in discussion with others, platforms benefit from users uploading UGC.⁹³ The fundamental right to conduct a business additionally provides support to UGC communities as it could be applied indirectly to platforms similarly

89 *Orit Fischman-Afori*, Online rulers as hybrid bodies: The case of infringing content monitoring, (2021) 23 U. Pa. J. Const. L. 351.

90 *Niklas Luhman*, Law as a Social System (OUP 2014); *Lars Viellechner*, The transnational dimension of constitutional rights: Framing and taming ‘private’ governance beyond the state, (2019) 8 Global Constitutionalism 639, 649; *Thomas Vesting*, The Autonomy of Law and the Formation of Network Standards, (2004) 5 German Law Journal 639, 651.

91 *Angelo Jr Golia* and *Gunther Teubner*, Societal Constitutionalism: Background, Theory, Debates, (2021) 15 ICL Journal 357.

92 *Christoph B Graber*, Is there potential for collective rights management at the global level?, in: *Susy Frankel and Daniel Gervais* (eds), The Evolution and Equilibrium of Copyright in the Digital Age (CUP 2014) 265.

93 *Paul M. Di Gangi* and *Molly Wasko*, The co-creation of value: Exploring user engagement in user-generated content websites, (2009) 9 Sprouts: Working Papers on Information Systems 9; *Zoe Adams* and *Henning Grosse Ruse-Khan*, Work and works on digital platforms in capitalism: conceptual and regulatory challenges for labour and copyright law, (2020) 28 International Journal of Law and Information Technology 329, 362; *Rebecca Tushnet*, Scary monsters: Hybrids, mashups and other illegitimate children, (2011) 86 Notre Dame L. Rev. 2133, 2141.

to *Fraport* and *Stadionverbot* to support their role as a public space for artistic communication.⁹⁴

The provision of this wider access right to platforms would affirm the normative expectations of creative reuse within cumulative and collaborative communities online,⁹⁵ ensuring they are reflected in the law.⁹⁶ It reflects a central tenet of system theory that, “if society evolves to changes in law, and vice versa, then law and society must co-exist in an evolving system. Each needs the other to define itself”.⁹⁷ It aptly describes the monumental shift regarding creativity online where users no longer adopt a passive role, but enthusiastically participate by creating their own remixed content. As this article will explore in Part C, this creativity currently conflicts with the law as recent EU legislative approaches find the communication of this creativity unlawful, particularly through a textual implementation of art. 17 DSM Directive. Yet a more nuanced approach to systems theory, namely societal constitutionalism, would suggest that EU copyright law requires reshaping to safeguard creativity online.⁹⁸

The mismatch between the function of exploitation rights to prevent competing uses and the justification for UGC to benefit from comprehensive safeguards amounts to the law being normatively re-ordered. This article contends, that the creation of a wider right of access would reshape the EU copyright law in a manner that reflects creativity occurring in communities and its self-regulation online, but also temper the continuing extension of the exploitation rights by strengthening user rights. Such an approach would ultimately create a more balanced environment in which EU copyright law functions to support creativity. It would allow users to upload subsequent creative uses online, sparking discussion

94 *Dorota Leczykiewics*, Horizontal effect of fundamental rights: In search of social justice or private autonomy in EU law?, in: U. Bernitz and et al (eds), *General Principles of EU Law and European Private Law* (Kluwer International 2013); *Andrea Usai*, The Freedom to Conduct a Business in the EU, its Limitations and Its Role in the European Legal Order: A New Engine for Deeper and Stronger Economic, Social and Political Integration, (2019) 14 *German Law Journal* 1867; *Marta Maroni*, An Open Internet? The Court of Justice in the European Union between Network Neutrality and Zero Rating, (2020) 17 *European Constitutional Law Review* 517.

95 Such counter rights have a trans-subjective nature as they expand beyond the individual creator and include communities and social practices. See, *Gunther Teubner*, Counter-rights: On the trans-subjective potential of subjective rights, in: Poul F. Kjaer (ed), *The Law of Political Economy: Transformation in the Function of Law* (Cambridge University Press 2020) 375.

96 *Marta Maroni*, A court's gotta do, what a court's gotta do. An analysis of the European Court of Human Rights and the liability of internet intermediaries through systems theory, (2019) Robert Schuman Centre for Advanced Studies Research Paper No. RSCAS 20, 17.

97 *Peter K. Yu*, Intellectual property, Asian philosophy and the Yin-Yang School, (2015) 7 *W.I.P.O.J.* 1,8; citing *J.B. Ruhl*, Complexity Theory as a Paradigm for the Dynamical Law-and-Society System: A Wake-Up Call for Legal Reductionism and the Modern Administrative State, (1996) 45 *Duke Law Journal* 849.

98 See, *Gunther Teubner*, *Constitutional Fragments: Societal Constitutionalism and Globalization* (OUP 2012); *Angelo Jr Golia* and *Gunther Teubner*, *Societal Constitutionalism: Background, Theory, Debates* (2021) 15 *ICL Journal* 357.

and future creation. These are features that are central within remix culture which are not addressed by the EU legislator.⁹⁹

It would ultimately rebalance what some commentary refers to as the tension between “free culture” and “permission culture” where the latter only allows “creators ... to create with permission of the powerful, or of creators from the past”¹⁰⁰. A wider right of access to platforms, for the purpose of creativity, supported by freedom of expression and the right to conduct a business, could provide the foundation to challenge the “traditional permission rule”, so long as there are mechanisms providing an economic incentive to create and an apportionment of profits¹⁰¹. This article suggests that authorial consent and authorial remuneration provides a helpful starting point for building this wider right of access.

A genuine counter-right to the EU copyright system which safeguards creative access to platforms, namely for artistic communication, should be applied to platforms. The essential creative spaces provided on platforms require the indirect application of fundamental rights to compel access for users.¹⁰² This characterization of freedom of expression as an institutional right of access protects the integrity of art against the increasing constitutional proprietization of EU copyright law and status of exploiters.¹⁰³ Such an approach to platform regulation would constitutionally guarantee and safeguard creativity online.

III. Conclusion

In response to the inability of the EU copyright system to adequately safeguard creativity online, in most part due to art. 17 DSM Directive, in Part B the argument is made that platforms should be subject to fundamental rights. Drawing from the doctrine of indirect effect, this article contends that platforms are akin to public forums where access is necessary given the essential nature of the digital space provided for creative reuse. As applied in *Stadionverbot*, for users to take part in societal life, namely creativity, access to platforms for the purpose of artistic communication is necessary.

Part B has attempted to structure this inclusive right of access to platforms through the concept of societal constitutionalism. It advocates an approach which builds from the cumulative and collaborative nature of UCG shared on platforms, a creative sub-system ordered through self-regulation relating to cre-

99 Bernd Justin Jütte, *The EU’s Trouble with Mashups: From Disabling to Enabling a Digital Art Form*, (2014) 5 JIPITEC 172.

100 Lawrence Lessig, *Free culture: How big media uses technology and the law to lock down culture and control creativity* (Penguin: 2014) 254–9.

101 Giancarlo Frosio, *Rediscovering cumulative creativity from the oral formulaic tradition to digital remix: Can I get a witness?*, (2014) 13 J. Marshall Rev. Intell. Prop. Law 341, 391.

102 Gunther Teubner, *Transnational Fundamental Rights: Horizontal Effect*, (2011) 40 Rechtsphilosophie & Rechtstheorie 19.

103 Teubner [n 102] 145.

ative reuse. The article proposes that a counter-right is needed, supported by freedom of expression and the right to conduct a business, to ensure that a core norm of UGC, access to platforms for the purpose of artistic communication, is safeguarded. Delineating a point of departure from the EU copyright system, a wider access right would account for the nature of creativity occurring online.

While it was proposed nearly two decades ago by commentary that society was on the cusp of a monumental change as “[d]igital technology could radically expand the range of “creators” who participate in the remix of culture,”¹⁰⁴ it seems that the impact of technology, particularly its regulation, is only beginning to be ascertained. Considering the gross impact that platform regulation has on creativity online, namely artistic communication, there is a clear need for the law to support the development of a counter-right to increasing proprietisation. While part B suggests that the starting point for this discussion is by adopting a bottom-up approach that preferences consent and remuneration of authors for creative reuse, the following section analyses the extent to which these concepts are implemented both inside and outside the EU copyright system.

D. Current EU regulatory landscape to safeguard creativity online

Art. 17 DSM Directive is the most recent legislative undertaking to protect copyright interests, namely exploiters, online. It introduces platform liability for user uploads infringing EU copyright law by requiring online content-sharing service providers (OCSSPs) to make “best efforts” to obtain an authorisation for such uploads, or at the very least, to ensure the unavailability of such works once right-holders give notice. Uploads must be “acted expeditiously” upon by OCSSPs to “disable access to, or to remove from their websites, the notified works or other subject matter” as well as to prevent future uploads of the same kind.

As this structure impairs creativity online, Part C begins by assessing whether member state implementation of the users’ redress and complaint system sufficiently safeguards the crucial link between creative autonomy and artistic communication discussed in Part A. The discussion centres upon France and Germany’s implementation and the preference for UGC uploads to “stay up” or “stay down” during the redress and complaint process. Given the ambiguous nature of guidance for implementation and paradoxically, the lacking flexibility,¹⁰⁵ the article shifts to assess whether there are regulatory approaches to safeguarding creativity online beyond the EU copyright system.

¹⁰⁴ Lawrence Lessig, *Free(ing) Culture for Remix*, (2004) 2004 Utah L Rev 961, 975.

¹⁰⁵ See, *Westkamp* [n 45], regarding the first German draft of transposing art. 17 DSM Directive.

The Digital Services Act (DSA)¹⁰⁶ represents a key milestone in the EU platform regulatory landscape. Adopted late in 2022, it is an EU regulation designed to modernise the e-Commerce Directive that provided safe harbours *inter alia* for platforms to escape copyright liability when users uploaded infringing copyright content. While the *lex specialis* nature of the DSA means that it applies to gaps within art. 17 DSM Directive or areas of member state discretion,¹⁰⁷ commentary contends that the new DSA rules could still potentially provide more guidance to the question of how to implement art. 17 DSM Directive.¹⁰⁸ Part C will consider whether art. 14 DSA, relating to notice-and-action, provides the building blocks for the horizontal application of fundamental rights to safeguard creativity, akin to a wider right of access for the purpose of artistic communication.

I. Working inside EU copyright law: Art. 17 DSM Directive

Given that OCSSPs' liability hinges upon making best efforts to make the correct filtering decision, OCSSPs are almost incentivised by the Directive to adopt an approach which avoids liability, by refusing user uploads until they are verified. This is only tempered with the requirements that non-infringing uploads should be uploaded, such as those covered by an exception or limitation,¹⁰⁹ and implementation should not result in a general monitoring obligation¹¹⁰. However, in the event of a dispute over filtering or blocking, platforms must provide an effective and expeditious complaint and redress mechanism for users.¹¹¹

Despite these benevolent aims,¹¹² national legislators are stuck in a complicated position: how best to balance the fundamental rights of relevant copyright interests, namely freedom of expression and the right to protect IP. This has crystallised as a choice between whether, after receiving notice from rightsholders, user uploads should “stay up” or “stay down”. In this section, this article will as-

¹⁰⁶ Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (DSA).

¹⁰⁷ João Pedro Quintais and Sebastian Felix Schwemer, The Interplay between the Digital Services Act and Sector Regulation, (2022) 13 European Journal of Risk Regulation 191, 204. João Pedro Quintais, Giovanni De Gregorio and João C. Magalhães, How platforms govern users' copyright-protected content: Exploring the power of private ordering and its implications, (2023) 48 Computer Law & Security Review 48, 11.

¹⁰⁸ Bernd Justin Jütte, Poland's challenge to Article 17 CDSM Directive fails before the CJEU, but Member States must implement fundamental rights safeguards, (2022) 17 JIPLP 639, 695.

¹⁰⁹ DSM Directive, art. 17(7).

¹¹⁰ DSM Directive, art. 17(8).

¹¹¹ DSM Directive, art. 17(9). This mechanism requires rightsholders to duly justify their reasons for requesting uploads to be removed or disabled. These complaints are to be processed without undue delay, and decisions to disable access or to remove content are subject to human review. The mechanism is also subject to out-of-court redress mechanisms.

¹¹² E.g. the impartial settlement of disputes, and safeguarding user protection (legitimate uses), the right to have recourse to efficient judicial remedies and data protection.

sess the extent to which approach sufficiently safeguards the crucial link between creative autonomy and artistic communication discussed in Part A.

The first snippet of guidance comes from the *Poland* decision.¹¹³ Here, the CJEU confirmed that the obligation for OCSSPs to review user uploads and the use of filtering technology restricts an important means of freedom of expression and the dissemination of information, online communication. However, the Court also stated that the restriction is justified according to art. 52(1) Charter. While the CJEU confirmed the vagueness of this guidance, it reasoned that it is necessary to ensure that art. 17 is adaptable to various OCSSP structures.¹¹⁴ Yet this results in considerable discretion for national legislators. In relation to creativity, though the judgement appears to construe exceptions and limitations as user rights,¹¹⁵ there is also lacking guidance on how to implement safeguards to protect freedom of expression.¹¹⁶

This can allow the erroneous flagging of legitimate content which requires blocking, causing potentially significant economic harm.¹¹⁷ *Poland* maintains that this is possible so long as the essence of freedom of expression is protected, most likely through the redress and complaint mechanism. However, too long a delay can restrict the right to an effective remedy.¹¹⁸ Art. 17 DSM Directive hints that effectiveness requires the process to be without undue delay and subject to human review. But how long must a user wait, from a proportional perspective, for a wrongful block to be removed? Or is it perhaps a more proportional outcome if, during this procedural process, the legitimate content stays up?

If art. 17 DSM Directive is transposed literally, it is likely that such a presumption will prevail because OCSSPs become tasked with deciphering the meaning of a legitimate upload. The French implementation appears to exemplify such an approach. The transposition takes its initial shape from the aptly named proposal for the law on audio-visual communication and cultural sovereignty in the digital era,¹¹⁹ allowing amendments to the French Intellectual Property Code. Drawing from the finding in *Poland* that art. 17 DSM Directive inherently includes sufficient safeguards to respect the essence of freedom of expression

113 CJEU, 26.4.2022 – C-401/19 (ECLI:EU:C:2022:297) – Poland /Parliament and Council ('Poland'). Also see, Part B on guidance from the EU Commission and the Advocate General in *Poland* on 'manifestly infringing' uses and implementing art. 17 DSM Directive.

114 CJEU, 26.4.2022 – C-401/19 (ECLI:EU:C:2022:297) para. 72–73 – Poland.

115 CJEU, 26.4.2022 – C-401/19 (ECLI:EU:C:2022:297) para. 87 – Poland.

116 CJEU, 26.4.2022 – C-401/19 (ECLI:EU:C:2022:297) para. 81 – Poland.

117 Commission, Communication on Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market COM(2021) 288 final, 22.

118 *Christophe Geiger and Bernd Justin Jütte*, Towards a virtuous legal framework for content moderation by digital platforms in the EU? The Commission's guidance on article 17 CDSM Directive in the light of the YouTube/ Cyando judgement and the AG's Opinion in C-401/19, (2021) 43 EIPR 625, 628.

119 Law n° 2021–1382 of October 25, 2021, relating to the regulation and protection of access to cultural works in the digital age.

and of information, the approach lacks any scaffolding of ‘user rights’ suggested in *Poland*.¹²⁰ It fails to consider that without oversight, these safeguards could be implemented by platforms in a way that does not allow a fair balance to be struck between relevant fundamental rights and additionally, conflicts with the principle of proportionality.¹²¹

The French position on legitimate uses, appears to be founded in the belief that there is no need for ex-ante user rights safeguards as the redress and complaint mechanism inherently balances the interests of users.¹²² In a similar vein to the *Poland* decision, those supporting the French implementation contend that temporary restrictions on freedom of expression are justified to ensure strong protection of IP rights.¹²³ However, even before the Guidance was published, tension was palpable between the EU Commission and France regarding this interpretation, as commentary explains that some view the redress and complaint mechanism as being insufficient to protect legitimate uses, instead, requiring ex-ante protection.¹²⁴ The outcome of this approach is quite simple: user uploads will most certainly “stay down” while they are verified. The French judiciary will fill the gap, only if users are able to afford appealing the administrative decision.

The German approach differs significantly by including ex ante safeguards when user uploads are flagged to “stay down”. These procedural safeguards focus on uploads that are both authorized by law¹²⁵ and those that are not manifestly

120 The text provides that platforms must not deprive users of the effective benefit of copyright exceptions already outlined in the French Intellectual Property Code. French Code de la propriété intellectuelle (version consolidée au 30 juin 2022) (‘French Intellectual Property Code’), art. L137-4(I). Notably, the French legislator has chosen not to explicitly state that parody, caricature and pastiche are mandatory exceptions, but silently elects to rely on those exceptions already forming part of French law. At minimum, OCSSPs are required to inform users through their terms and conditions that lawful use of works, such as those authorised by exceptions or limitations, are allowed to be uploaded on to OCSSPs. See, Art. L137-4(VI).

121 At minimum, OCSSPs are required to inform users through their terms and conditions that lawful use of works, such as those authorised by exceptions or limitations, are allowed to be uploaded on to OCSSPs. Otherwise, as with the construction of a complaint and redress system, OCSSPs are required to fill the gaps left by both the EU Commission, CJEU and French legislator. Art. L137-4(II)-(VI). The system must, without undue delay, decide whether to block access to uploaded works or to withdraw these works subject to oversight by a natural person.

122 Conseil Supérieur de la Propriété Littéraire et Artistique (CSPLA), ‘Second Report on Content Recognition Tools on Digital Sharing Platforms’ (29 April 2020); See, Communia Association, ‘France once more fails to demonstrate support for its interpretation of Article 17’ (4 February 2021) <<https://communia-association.org/2021/02/04/france-once-more-fails-to-demonstrate-support-for-its-interpretation-of-article-17/>> accessed 29.1.2024.

123 Ibid.

124 Ibid. Support for the French implementation appears to stem from the notion that France presents itself “as the guardian of the original intent of the directive”.

125 Urheberrechts-Diensteanbieter-Gesetz vom 31. Mai 2021 (BGBl. I S. 1204, 1215) (Act on the Copyright Liability of Online Content Sharing Service Providers) (‘Urhdag’), sections 4, 5, and 6.

infringing, contending that they should be constructed as presumably authorized by law.¹²⁶ These fall into two categories: simple or qualified blocking.¹²⁷ The first refers to the standard ‘notice and takedown’ procedure where upon receiving information from a rightholder that the upload is an unauthorised communication to the public, giving a duly substantiated notice, the upload is removed. Qualified blocking involves situations where, despite a request being made by the rightholder, it is unclear whether the upload is infringing.

The German Act divides the qualified blocking mechanism into two separate groups depending on the upload. For minor uses, the system largely reflects arts. 17(7) and 17(9) DSM Directive, where upon the upload being requested to be blocked, the user has recourse to the redress and complaint system.¹²⁸ The second group refers to circumstances where the user believes the upload is lawful. Here, the upload must meet the presumption regarding UGC which allows the user to flag it as justified due to a relevant exception.¹²⁹ The user has a 48-hour window to respond to the blocking request and flag the upload as legitimate.¹³⁰ Lastly, the presumed lawful upload “stays up” until the redress and complaint mechanism finishes, and if the upload infringes, the OCSSPs are exempt from liability for that period of verification.¹³¹

Both simple and qualified blocking require the OCSSP to substantiate complaints and notify all relevant parties, giving them an opportunity to comment.¹³² Then, the OCSSP must, within one week, decide whether the upload is infringing and should be taken down.¹³³ Such decisions are made by impartial natural persons.¹³⁴ It also includes a specific method for balancing rightholders’ interests called the ‘red button’. Here, if following the OCSSP’s review by a natural person, a ‘trusted’ rightholder can declare that the presumption of a legitimate use should be rebutted and that the upload “staying up” impairs the economic exploitation of the work.¹³⁵ Then the OCSSP must immediately

¹²⁶ UrhDag, sections 9 and 10.

¹²⁷ UrhDag, section 8.

¹²⁸ UrhDag, sections 9 and 14. Regarding UGC, the Act includes a presumption that so long as the upload contains less than half of the original copyright content, which is combined with other content, and uses the works of third parties only to a minor extent, that use is presumably authorised by law (section 9). A minor use is capped to 15 seconds of audiovisual works, 15 seconds of soundtracks, 160 characters of a text and up to 125 k byte of visual arts files (section 10). Lastly, they must not serve any commercial purposes or only serve to generate insignificant income.

¹²⁹ UrhDag, sections 9(2)(3) & 11(1).

¹³⁰ UrhDag, section 11(2).

¹³¹ UrhDag, section 12(2).

¹³² UrhDag, section 14.

¹³³ UrhDag, section 14(3).

¹³⁴ UrhDag, section 14(5).

¹³⁵ ‘Trusted’ rightholders are said to include “rightholders with larger and/or premium repertoires, qualified personnel, a case history of justified notice and takedown requests”. See,

block the work until the conclusion of the complaint procedure.¹³⁶ Additionally, so long as rightsholders notify platforms sufficiently, preventative blocking is available for time-sensitive content such as sporting events or film premieres.¹³⁷ Lastly, both the ‘red button’ and the pre-flagging of presumably lawful content are subject to one final restriction: procedural self-regulating measures against abuse.¹³⁸

This system makes rightsholders bare both the initiative and cost of the redress and complaint mechanism, specifically for when algorithmic copyright enforcement reaches its limits (i.e. parody, pastiche, quotation and caricature).¹³⁹ User uploads, traditionally residing in a weaker bargaining position against rightsholders, benefit from the presumption that the upload is legitimate until it is verified at the behest of exploiters. This presumption negates the delay on artistic communication online found in the textual implementation of 17(9) DSM Directive but also provides strong protection of rightsholders for manifestly infringing uses. Lastly, for authors, removed from the categories of rightsholders, also benefit as the German implementation, regarding these difficult to detect uploads, provides that platforms must pay the author, not the exploiter, appropriate remuneration for the communication of parody, pastiche and caricature uses of works.¹⁴⁰

The German approach tasks collective management organisations (CMOs) with managing the new lines of remuneration to authors, strengthening the collective management of rights.¹⁴¹ Commentary explain that large institutional rightsholders “will possibly be confronted with arguments to subtract the resulting additional remuneration costs for the use from the individual licensing fees”¹⁴². Indeed, the entire approach of the German implementation is directed at collective licensing,¹⁴³ as commentary notes that it would be near to impossible for “individual rightsholders with small, non-representative repertoires” to be able to obtain authorisation pursuant to art. 17(4)(a) DSM Directive.¹⁴⁴ Additionally, the shift in burden to initiate and bare financial responsibility for the complaint and redress system for non-manifestly infringing uses, should incentivise rightsholders to enter licences with OCSSPs.

Mattias Leistner, The Implementation of Art. 17 DSM Directive in Germany – A Primer with Some Comparative Remarks, (2022) 71 GRUR International 909 at 917.

136 UrhDag, section 14(4).

137 UrhDag, section 7(2).

138 UrhDag, section 18.

139 *Leistner* [n 135] 915.

140 UrhDag, ss. 5(2) & 12(1).

141 *Leistner* [n 135] 920.

142 *Ibid.*

143 See, the first German decision on DSM Directive liability, LG München I, 9.2.2024 – 42 O 10792/22 – *TikTok*.

144 *Ibid.*

This is in effect a statutory license, a requirement by the German legislator to allow creative uses so long as they are paid.¹⁴⁵ The German Act states that the author's appropriate remuneration for these uses is not waivable, can only be assigned in advance to a collecting society, and asserted by a collecting society.¹⁴⁶

Note that whether creative reuses are allowed appears to depend on whether the author has assigned this remuneration right to a collecting society before the subsequent creative use is uploaded on an OCSSP. Though this may seem a practical solution for identifying the relevant author, there are questions surrounding whether an author can refuse to assign these rights to avoid any creative reuses. While this appears to conflict with creative autonomy and artistic communication, there are also provisions within the DSM Directive requiring member states to conform with a principle of appropriate and proportionate remuneration and implement measures to ensure that when authors and performers license or transfer their exclusive rights they are remunerated to this degree.¹⁴⁷ Arguably the German implementation is an example of implementing both authorial consent and authorial remuneration through the vehicle of statutory licensing.

II. Platform obligations beyond EU copyright law: The Digital Services Act

One could view the DSA as an overarching horizontal regulatory regime for illegal content, and art. 17 DSM Directive as specifically outlining a small part of this broader picture by focusing on infringing copyright content uploaded to OCSSPs. To the extent that the DSA can fill the gaps left by both the EU Commission and the CJEU in the *Poland* decision, member states would have access to more detailed implementation guidance, arguably elevating the level of protection of authors, including users, online. It is important however, to distinguish the procedural value of the DSA from the user safeguards articulated in arts. 17(7) and 17(9) DSM Directive which appear to be stronger than those outlined in the DSA as the latter are designed, pursuant to *Poland*, to respect the essence of fundamental rights specifically freedom of expression.

If member states are to rely on the DSA to fill the procedural gaps inherent in art. 17(4)(b), this section contends that the German implementation approach

¹⁴⁵ Christina Angelopoulos and João Pedro Quintais, Fixing Copyright Reform: A Better Solution to Online Infringement, (2019) 10 JIPITEC 147, 162 at [66]; Martin Husovec and Joao Pedro Quintais, Too Small to Matter? On the Copyright Directive's bias in favour of big right-holders, in: Tuomas Mylly and Jonathan Griffiths (eds), Global Intellectual Property Protection and New Constitutionalism: Hedging Exclusive rights (OUP 2021), 27. Both suggest that art. 17 should be implemented using statutory licensing and mandatory collective management schemes.

¹⁴⁶ UhrDaG, section 5(3).

¹⁴⁷ DSM Directive, arts. 18–23. Member states are “free to use different mechanisms and take into account the principle of contractual freedom and a fair balance of rights and interests” when implementing this principle.

naturally aligns with the procedural safeguards introduced by the DSA. The DSA provides detailed procedural rules on notices and counter-notices regarding illegal content. These include provisions in notice-and-action¹⁴⁸, statement of reasons¹⁴⁹, trusted flaggers¹⁵⁰ and measures and protection against misuse¹⁵¹. The Act also envisages the creation of Digital Services Coordinators of each member state to fulfil a supervisory role regarding very large online platforms and services,¹⁵² and to certify out-of-court dispute settlement bodies¹⁵³, forming a European Board for Digital Services¹⁵⁴. Lastly, given the regulatory nature of the DSA, it may also force the hand of member states, such as France, that have implemented art. 17 DSM Directive in a textual manner, without specifying any *ex ante* procedural user safeguards, to ensure that arts. 17(7) and 17(9) DSM Directive effectively respect the essence of relevant fundamental rights.

Beyond the DSA's specific interaction with art. 17 DSM Directive, it exemplifies the indirect effect doctrine as art. 14 requires intermediaries to moderate content "transparently, proportionately and with due regard to the fundamental rights and interests of users and other stakeholders" through terms of service¹⁵⁵. For example, when a platform decides whether to take down content due to alleged copyright infringement, art. 14 would require them to consider users' interests, specifically freedom of expression.¹⁵⁶ While commentary identifies that the inclusion of 'due regard' is unhelpful,¹⁵⁷ outside art. 17 DSM Directive, it could extend to comprise the requirement for platforms to ensure access for the purpose of artistic communication of users.

Thus, to the extent that a platform restricts access to users in this regard, art. 14 DSA requires that this is done in an objective and proportionate manner which considers relevant fundamental rights. Following Part B, a bottom-up approach that draws from self-regulating creative online communities would

148 DSA, arts. 15 & 16.

149 DSA, art. 17.

150 DSA, art. 22.

151 DSA, art. 23.

152 DSA, art. 33.

153 DSA, art. 21.

154 DSA, art. 61.

155 DSA, art. 14; Joris van Hoboken, João Pedro Quintais, Naomi Appelman, Ronan Fahy, Ilaria Buri & Marlene Straub (eds), *Putting the DSA into Practice* (Verfassungsbooks 2023); João Pedro Quintais, Naomi Appelman, Ronan Ó Fathaigh, *Using Terms and Conditions to apply Fundamental Rights to Content Moderation*, (2023) 24 German Law Journal 881.

156 Martin Müller and Matthias C. Kettemann, *European Approaches to Regulation of Digital Technologies*, in: Hannes Werthner and et al (eds), *Introduction to Digital Humanism* (Springer 2024) 632.

157 Sunimal Mendis, *Copyright Enforcement on Social Media Platforms: Implications for Freedom of Expression in the Digital Public Sphere*, in: Hannes Werthner and et al (eds), *Introduction to Digital Humanism* (Springer 2024) 474; Sunimal Mendis, *The Magic Bullet That Isn't* (Verfassungsblog on Matters Constitutional, 18.5.2023) <<https://verfassungsblog.de/n-o-magic-bullet/>> accessed 30.1.2024.

integrate authorial consent and authorial remuneration as key criteria on which access to platforms for the purpose of artistic communication hinges. This approach comprises a more wholistic assessment of creativity online which better reconciles the tension between UGC and the expanding proprietisation of EU copyright law.¹⁵⁸

While the contours of art. 14 undoubtedly need refining, the blanket approach to applying users' interests and fundamental rights specific to restricting access has the capacity to pave the way for a genuine counter-right to the EU copyright system.

III. Conclusion

Part C has reflected on the extent to which both authorial consent and authorial remuneration are safeguarded by recent EU regulatory approaches. Beginning with art. 17 DSM Directive, the article found that due to considerable member state discretion on the option to allow UGC to "stay up" or "stay down" during the redress and complaint mechanism, the answer depends on the member state at hand. While France's literal transposition equates to "stay down", the German approach is more unique and outlines a list of *ex ante* safeguards for users to bolster creativity. In particular, the ability of users to flag their own content as legitimate specific to an exception, the remuneration by platforms for uses involving pastiche, caricature or parody, and the emphasis on the 'red button', all evidence a more comprehensive approach to balancing copyright interests. Specifically, the legislation provides a special carve-out for creativity that complies with the boundaries of specific exceptions while simultaneously ensuring authors are paid.¹⁵⁹

While the DSA generally has the potential to fill the procedural gaps left by art. 17 DSM Directive, it is when the legislation is viewed outside of the EU copyright system that the DSA provides insight into the horizontal application of fundamental rights to platforms and the necessary building blocks for a wider right to support creativity. If a societal constitutionalism lens is adopted it becomes clear that art. 14 DSA can expand to include a genuine counter-right that demands access to platforms for the purposes of artistic communication. Using a bottom-up approach, where the self-regulatory processes of creative communities form the norms mandating access, art. 14 has the breadth to con-

¹⁵⁸ Such an approach mirrors a turning point within the literature regarding platform liability, as commentary strengthens calls for "legal, societal, political and even moral "responsibility" of online platforms". See, *Quintais, Appelman and Ó Fathaigh* [n 155] 887; *Giancarlo Frosio & Martin Husovec*, Accountability and Responsibility of Online Intermediaries, in: Giancarlo Frosio (ed), *The Oxford Handbook of Online Intermediary Liability* (OUP 2019).

¹⁵⁹ Arguably a substitution theory approach discussed in Part A would be more inclusive of all forms of creativity not those specifically outlined as exceptions.

sider authorial consent and authorial remuneration as key criteria which deigns access for users.

Though the capability of art. 14 to encapsulate the values and norms of societal constitutions, namely the artistic system, is uncertain, this article contends that its inclusion demonstrates a key turning point in the safeguarding of creative autonomy and artistic communication relating to platforms. As demonstrated by Part C, the EU copyright system itself appears to sit at a crossroads concerning the proportional and justified approach to UGC takedowns; almost preferencing to wait for member state referrals to the CJEU to determine what the EU legislature meant when art. 17 was proposed, heavily debated, and passed. Considering these shortcomings, approaches like art. 14 DSA highlight the possibility of distancing creativity from a system characterized by propertisation and taking into account the societal values and norms of UGC by obliging platforms to respect fundamental rights.

E. Conclusion

This article has sought to restructure platform obligations to authors, users, and systemically, the artistic system, by centring the discussion on creative autonomy and artistic communication. Adopting systems theory as its lens, it has reflected that the EU copyright system currently fails the cumulative and collaborative creativity occurring on platforms due namely to the introduction of art. 17 DSM Directive. Such an approach suggests that in light of the tension between the legal and artistic systems respectively, that law and society must adapt to co-exist. This means that despite the externalisation of society from the legal system, the EU copyright system must evolve to reflect the norms of digital UGC and its dissemination online.

The first route forward is change inside the EU copyright system. This article has proposed that EU copyright law should authorise creative reuse and its subsequent communication on the condition of authorial remuneration. It identifies the doctrine of exhaustion as a helpful starting point given its use by the CJEU as a norm-balancing interpretive vehicle for tension between the free movement of goods and national IP rules. The article has emphasized the contextual assessment of consent within these cases to suggest that it form the foundation for allowing creative reuse. Authorial consent has emerged as a flexible, practical and proportional criterion which sets the boundaries for exhausting further control over a work, and in particular on the possible reputational harm that may result from creative reuse.

Such harm, it has argued, requires remuneration within certain limits. Using creative autonomy as a guiding principle, when determining the scope of remuneration, it is clear that it must be reasonable. In the context of creative reuse,

Reprobel has supported the limitation of remuneration to the notion of ‘actual harm’. This means that only authors have a claim to remuneration because exploiters, theoretically, are only harmed through competing copies of works. Additionally, the basis of their economic rights is not artistic contribution, but investment. If creative reuse is authorized by exhausting authorial consent, there should be no impact on this investment.

Despite this possibility, the likelihood that it will be interpreted by the CJEU is slim, particularly given the increasing propertisation of the EU copyright system and the status of exploiters, generally. For this reason, the article has considered a second way forward, change outside of the EU copyright system and suggested that the emphasis on constitutional support for enforcement can also be used to bolster social functions of copyright, namely creativity. The article draws upon the indirect effect doctrine to suggest that the comparable function of platforms to public spaces that provide essential spaces for communication requires the horizontal application of fundamental rights, specifically freedom of expression. It also draws on the theory of societal constitutionalism to propose that this be structured through a wider right of access for artistic communication that platforms are obligated to safeguard.

The article has concluded that there is potential both inside and outside the EU copyright system to safeguard creative autonomy through similar mechanisms to authorial consent and authorial remuneration. More directly, the German implementation of art. 17 DSM Directive, and the requirement for UGC to “stay up” during the redress and complaint process more generally, evidences a more wholistic approach to proportionally balancing copyright interests. Indeed, the pre-flagging by users as well as the red button for copyright holders demonstrates a comprehensive understanding of the creative requirement for control, substitution theory and the need for any authorisation, even in statute, to require authorial remuneration.

Art. 14 DSA demonstrates an approach more closely aligned with the indirect effect doctrine and the theory of societal constitutionalism. This means that it has the capacity to reflect norms and values of the artistic system, namely creative autonomy, and artistic communication, as it requires platforms to consider the interests and fundamental rights related to users when making a decision on content moderation. While the boundaries and substance of art. 14 DSA need to be developed and elaborated on, this article suggests that it has the potential to help re-centre the discussion on safeguarding creativity online. It further represents an external escape clause to the EU copyright system that could impact the internal structuring of the EU copyright system, itself.

While it is preferable for these changes to be founded within the EU copyright system, the increasing significance of societal constitutionalism within the digital environment, particularly platforms, demonstrates the striking need for the law to develop and adequately respond to both the growing status and influence of

platforms. In terms of creativity, the artistic system already comprises the values and norms necessary to positively impact the regulation and behaviour of platforms on users who recreate.

Zusammenfassung

Dieser Artikel erörtert die Auswirkungen der Regulierung und des Verhaltens von Plattformbetreibern auf deren Nutzer, die kreative Werknutzungen – also vorbestehende Werke in kreativ veränderter oder weiterentwickelter Form – online teilen. Unter Verwendung einer systemtheoretischen Perspektive wird dargelegt, dass Normen und Werte innerhalb des künstlerischen Systems die kreative Autonomie und die Möglichkeit, Kreativität online zu teilen, bevorzugen. Angesichts des daraus resultierenden Spannungsverhältnisses zum EU-Urheberrechtssystem werden in dem Artikel zwei mögliche Wege aufgezeigt, um diese zu lösen: Einerseits kann das Konzept der Einwilligung innerhalb des EU-Urheberrechtssystems fruchtbar gemacht werden, andererseits kann die im Ausgangspunkt außerhalb des Systems angeknüpfte horizontale Anwendung der Grundrechte weiterhelfen. Diese beiden Ansätze werden dann auf die aktuelle EU-Rechtslandschaft angewandt, wobei der Schwerpunkt auf Art. 17 der Richtlinie über den digitalen Binnenmarkt und Art. 14 des Digital Services Act liegt. Im Mittelpunkt der Diskussion stehen die Frage, inwieweit diese Ansätze die Kreativität im Internet ausreichend schützen, sowie künftige mögliche Schritte.