

**The impact of the UK's post-Brexit
divergence from the Digital Single
Market Directive**

Daniel Leung*

* Contact at: Daniel.Leung@warwick.ac.uk

Introduction

The Digital Single Market Directive¹ (the “DSM Directive”) is a directive which introduces substantial reforms to copyright law in the EU. The Directive, *inter alia*, introduces new exceptions to copyright law,² creates a new “press publishers right”,³ repeals safe harbour protection for online content-sharing service providers (“OCSSPs”),⁴ and introduces new remuneration rights for authors and performers.⁵

Despite mass protest, the DSM Directive was controversially passed into law.⁶ Since its passage, the various provisions of the

¹ 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 L130/92 (DSM Directive).

² DSM Directive, art 3-7.

³ DSM Directive, art 15; Pamela Samuelson, ‘Legally Speaking Europe’s Controversial Digital Copyright Directive Finalized ’(2019) 62(11) Communications of the ACM 24, 26.

⁴ DSM Directive, art 17.

⁵ DSM Directive, art 18-23; Ted Shapiro, ‘Remuneration provisions in the DSM Copyright Directive and the audiovisual industry in the EU: the elusive quest for fairness ’(2020) 42(12) European Intellectual Property Review 778, 778-9.

⁶ Till Kreutzer, ‘The EU Copyright Directive and its potential impact on cultural diversity on the internet ’(2020) 42(11) European Intellectual Property Law Review 715, 715; Michelle Kaminsky, ‘EU’s Copyright Directive Passes Despite Widespread Protests - - But It’s Not Law Yet ’*Forbes* (26 March 2019)

Directive have been continually criticised in academia, with Article 17 (the repeal of safe harbour) drawing particular ire.⁷ In light of this, the UK government has announced that it will not implement the DSM Directive and thereby diverge from it.⁸

As Shapiro and Hansson argued, one of the reasons for the divisiveness of the Directive was the fact that rightholders were being “pitted [...] against each other” in a zero-sum game.⁹ Different stakeholders were left to fight for the “tidbits” of new rights and protections, producing “winners” and “losers” of the Directive.¹⁰ While I agree with this analysis, in this article, I will argue why divergence from the Directive will actually lead to negligible benefits, if at all, for the purported beneficiaries of divergence (the “winners” of non-implementation): the UK’s

<<https://www.forbes.com/sites/michellekaminsky/2019/03/26/eu-copyright-directive-passes-despite-widespread-protests-but-its-not-law-yet/>> accessed 30 April 2021.

⁷ See Julia Reda, ‘Article 17 of the Copyright Directive: a prohibited general monitoring obligation’ (2021) 43(4) *European Intellectual Property Review* 215; Nathan Guzé, ‘Net Neutrality and the European Union’s Copyright Directive for the Digital Single Market’ (2019) 43(1) *Loyola of Los Angeles International and Comparative Law Review* 63; Thomas Spoerri, ‘On Upload-Filters and other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market’ (2019) 10(2) *Journal of Intellectual Property, Information Technology and Electronic Commerce Law* 173.

⁸ Yin Harn Lee, ‘United Kingdom Copyright Decisions and Post-Brexit Copyright Developments 2020’ (2021) 52(3) *International Review of Intellectual Property & Competition Law* 319, 326.

⁹ Ted Shapiro and Sunniva Hansson, ‘The DSM Copyright Directive - EU copyright will indeed never be the same’ (2019) 41(7) *European Intellectual Property Review* 404, 404.

¹⁰ *ibid*; See Guzé (n 7) 90-5.

OCSSP start-ups, small content creators, and internet users. On the flip side, non-implementation represents a lost opportunity for the “losers”, the UK’s music industry and news publishers, who will lose out on the opportunity to receive greater, and arguably fairer, remuneration.

To do this, first I will give the background by discussing the main contentious provisions of the DSM Directive and engage with the relevant criticisms of them. Next, I will examine the legality of divergence with respect to the EU-UK Trade and Cooperation Agreement.¹¹ And finally, I will conduct a cost-benefit analysis of divergence for the relevant stakeholders in the UK.

2. The DSM Directive

2.1. Article 15 — Press publisher’s right

Article 15, referred to as the “link tax”¹² or “press publisher’s right”¹³, gives press publishers the new right to charge information society service providers (“ISSPs”), such as search engines and news aggregators, for the use of their news articles.¹⁴ This right, which lasts for two years, does not apply to “private or non-commercial uses”, “acts of hyperlinking”, and “use of individual words or very short extracts of a press publication”.¹⁵

¹¹ Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part (TCA).

¹² See Maryna Manteghi, ‘The link tax under the EU Copyright

Directive: seeking a balance of interests in the digital age’ (2021) 43(3) European Intellectual Property Review 145.

¹³ See Samuelson (n 3) 26.

¹⁴ DSM Directive, art 15(1); Samuelson (n 3) 26; Manteghi (n 12) 145.

¹⁵ DSM Directive, art 15(1), 15(4); Samuelson (n 3) 26; Manteghi (n 12) 145.

Proponents of Article 15 (and its related right of fair compensation in Article 16) argue it reverses the CJEU's decision in *Hewlett-Packard*¹⁶ and re-establishes press publishers as rightholders under EU law so that they are entitled, rightly in their opinion, to a fair share of compensation.¹⁷

Opponents such as Manteghi, on the other hand, argue that the vague wording of the Article (e.g. "private or non-commercial use" is not defined, nor are "individual words or very short extracts") would lead to a "possible inconsistency in the interpretation of art.15" which would "lead to a fragmentation in the application of this provision and disagreement between publishers and users".¹⁸ Others have raised concerns about the possible impediment of "the free flow of news and other information vital to a democratic society" as ISSPs would be deterred from sharing news articles to avoid licensing costs, which would exacerbate the issue of "fake news" being spread on the internet as a substitute.¹⁹

The reality of Article 15's implementation is more nuanced though. While opponents can point to the failures of implementation of similar press publisher's rights such as in Spain (where Google stopped its news service entirely) and in Germany (where news publishers lost so much revenue that many chose to publish their articles for free to restore traffic on their sites),²⁰ proponents can equally point to successful examples of implementation such as in France where French

¹⁶ Case C-527/13 *Hewlett-Packard Belgium SPRL v Reprobel SCRL* [2016] Bus LR 73.

¹⁷ Shapiro and Hansson (n 9) 409.

¹⁸ Manteghi (n 12) 146.

¹⁹ Samuelson (n 3) 26; Manteghi (n 12) 146.

²⁰ Manteghi (n 12) 146.

news publishers were the first in the EU to reach a licensing agreement with Google.²¹

2.2. Article 17 — Repeal of safe harbour

Previously in the EU (and which still is the case under UK law), OCSSPs such as YouTube had “safe harbour” protection under the E-Commerce Directive.²² Safe harbour protection shielded OCSSPs from secondary liability if their users uploaded copyright infringing material on their platforms as long as they were not aware of the specific infringing activities of their users and complied with “notice-and-takedown” procedures.²³

Article 17 controversially repeals this safe harbour protection for OCSSPs and replaces it with a new liability regime.²⁴ Under this regime as outlined in Article 17(4), OCSSPs would be held directly liable for infringements by their users, unless they fulfilled three requirements:²⁵

1. They sought to license the protected material with their “best efforts”;²⁶

²¹ Manteghi (n 12) 146-7; Timothy B Lee, ‘Google agrees to pay French news sites to send them traffic’ *Ars Technica* (21 January 2021) <<https://arstechnica.com/tech-policy/2021/01/google-agrees-to-pay-french-news-sites-to-send-them-traffic/>> accessed 19 February 2021.

²² Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1 (E-Commerce Directive), art 14(1); Samuelson (n 3) 24.

²³ Zsuzsa Detrekoi, ‘EU Copyright Directive: sounding the death knell for domestic video-sharing platforms’ (2020) 25(4) *Communications Law* 231, 232; Samuelson (n 3) 24.

²⁴ DSM Directive, art 17(3), 17(4); Shapiro and Hansson (n 9) 409, 411-2.

²⁵ DSM Directive, art 17(1); Shapiro and Hansson (n 9) 409, 411-2.

²⁶ DSM Directive, art 17(4)(a); Shapiro and Hansson (n 9) 411-2; Samuelson (n 3) 26-7.

2. They used their “best efforts” to “ensure the unavailability” of protected material (sometimes referred to as a “notice-and-staydown” obligation) and,²⁷
3. They continued to comply with takedown notices.²⁸

This new liability regime has been heavily criticised. Notably, many have pointed out that the “notice-and-staydown” obligation under Article 17(4)(b) amounts to a de facto requirement for content filters.²⁹ This reliance on content filters is particularly concerning as they are notorious for, inter alia, producing a high level of false positives,³⁰ being unable to distinguish infringement from fair use,³¹ and being extremely expensive to develop or license.³²

The use of content filters is so problematic, Shapiro and Hansson describe Article 17 as having “internal conflicts” where its own provisions actively contradict each other.³³ For example, despite Article 17(8) requiring that the “application of this Article shall not lead to any general monitoring obligation”, the content

²⁷ DSM Directive, art 17(4)(b); Shapiro and Hansson (n 9) 412; see also Annemarie Bridy, ‘The Price of Closing the Value Gap: How the Music Industry Hacked EU Copyright Reform ’(2020) 22 *Vanderbilt Journal of Entertainment & Technology Law* 323, 353-5.

²⁸ DSM Directive, art 17(4)(c); Shapiro and Hansson (n 9) 412.

²⁹ See Reda (n 7) 215; Guzé (n 7) 85-6; Spoerri (n 7) 177; Bridy (n 27) 351; Samuelson (n 3) 24.

³⁰ See Toni Lester and Dessilava Pachamanova, ‘The Dilemma of False Positives: Making Content ID Algorithms More Conducive to Fostering Innovative Fair Use in Music Creation ’(2017) 24 *UCLA Entertainment Law Review* 51; Ben Depoorter and Robert Kirt Walker, ‘Copyright False Positives ’(2013) 89 *Notre Dame Law Review* 319, 333.

³¹ *ibid* 56-7; Guzé (n 7) 87-8; Spoerri (n 7) 182-3; Bridy (n 27) 346-7; Samuelson (n 3) 25.

³² Spoerri (n 7) 180-2; Bridy (n 27) 349-51.

³³ Shapiro and Hansson (n 9) 413.

filter mandate arguably leads to one.³⁴ Likewise, the guarantee under Article 17(7) that fair use exceptions are protected has been described as “aspirational window dressing” that is difficult to enforce in practice.³⁵

Supporters of Article 17 would counter these assertions by arguing that the new liability regime is needed to plug the “value gap”.³⁶ The argument, as supported by UK musicians and music industry leaders, is that safe harbour provisions are being abused by OCSSPs.³⁷ As OCSSPs are shielded from liability, there is no incentive for them to seek to license the songs that are posted on their platforms. As a consequence, when they do (e.g. YouTube with Content ID), OCSSPs are able to set “bargain basement terms” on a take it or leave it basis, with the threat of leaving musicians without any remuneration if they decline.³⁸ This in turn has led to the “value gap” where musicians are not being paid their fair share.³⁹ While the concept of the “value gap” (along with its commonly accompanied statistic that for every penny paid by Spotify, YouTube pays 0.05p)⁴⁰ is heavily contested,⁴¹ it remains a fact that OCSSPs do indeed have an

³⁴ DSM Directive, art 17(8); Reda (n 7) 215-6; Shapiro and Hansson (n 9) 413.

³⁵ Samuelson (n 3) 25; Bridy (n 27) 356; Shapiro and Hansson (n 9) 412.

³⁶ Daniel L Lawrence, ‘Addressing the Value Gap in the Age of Digital Music Streaming’ (2019) 52 *Vanderbilt Journal of Transnational Law* 511, 540-1.

³⁷ *ibid*; Digital, Culture, Media and Sport Committee, Oral evidence: Economics of music streaming (HC 2019-21, 868) (DCMS Committee) Q423, 499.

³⁸ Lawrence (n 36) 532; DCMS Committee (n 37) Q616-7.

³⁹ Lawrence (n 36) 542; IFPI, ‘Global Music Report 2017’ (IFPI, 2017) <https://www.musikindustrie.de/fileadmin/bvmi/upload/06_Publikationen/GMR/GMR2017_press.pdf> accessed 23 April 2021, 25.

⁴⁰ DCMS Committee (n 37) Q421; IFPI, ‘Global Music Report 2017’ (n 39) 25; Lawrence (n 36) 517.

⁴¹ Bridy (n 27) 326-7, 331-2; DCMS Committee (n 37) Q537, 541, 563.

unfair bargaining advantage due to safe harbour protection, which also poses other issues such as music streaming services having to compete in “an unlevel playing field”.⁴² Such a comparison cannot be called “apples-to-oranges”⁴³ because music streaming services and OCSSPs are indeed in competition with one another;⁴⁴ whether or not the purposes of the platforms are different is immaterial to this fact.

All in all, while Article 17 does indeed have critical flaws, the UK’s non-implementation of it will leave the “value gap” unresolved. As I will argue later in this article, the cost of lost opportunity outweighs the actual benefits.

2.3. Articles 18-23 — Remuneration provisions

Articles 18-23 (Chapter 3) of the Directive establishes new remuneration rights for authors and performers.⁴⁵ The stated purpose of the remuneration rights is to protect “[a]uthors and performers [who] tend to be in the weaker contractual position when they grant a licence or transfer their rights”.⁴⁶

Article 18 introduces the right for authors to “receive appropriate and proportionate remuneration”.⁴⁷ Article 19 introduces a “transparency obligation” where authors have the right to information about the exploitation of their works including merchandise revenue.⁴⁸ Article 20 provides for a “contract adjustment mechanism” (also known as the “best seller” clause) where authors have the right to essentially rewrite their contracts

⁴² DCMS Committee (n 37) Q616-7; IFPI, ‘Global Music Report 2017’ (n 39) 25.

⁴³ Bridy (n 27) 327.

⁴⁴ Lawrence (n 36) 515-7; DCMS Committee (n 37) Q598.

⁴⁵ Shapiro (n 5) 778-9.

⁴⁶ DSM Directive, recital 72; Shapiro (n 5) 779.

⁴⁷ DSM Directive, art 18(1); Shapiro (n 5) 780.

⁴⁸ DSM Directive, art 19; Shapiro (n 5) 781.

if the remuneration they get is “disproportionately low” and can claim “additional, appropriate and fair remuneration” as a result.⁴⁹ Article 21 allows for authors to use alternative dispute resolution (ADR) instead of the courts.⁵⁰ Article 22 gives authors the “right of revocation” where authors can revoke exclusivity rights if their work is not being exploited.⁵¹ And finally, Article 23 establishes that the transparency obligation, the contract adjustment mechanism, and the right to use ADR are mandatory and not waivable by contract.⁵²

Proponents of these remuneration provisions, such as Kretschmer and Giblin, argue that they are necessary in a world where “primary creators are being squashed” in a “global struggle between technology giants and large right holders”.⁵³ The ability to amend contractual terms offers much needed protection to authors and performers and can act as “an important safety valve”.⁵⁴ In contrast, critics like Shapiro argue that the provisions are a “blow to contractual freedom in the content sector” which would “undermine the ability of the EU film and TV industry to compete internationally”.⁵⁵ Shapiro also argues that this level of unprecedented legislative intervention in contracts would be completely alien to the UK’s common law copyright framework.⁵⁶

⁴⁹ DSM Directive, art 20; Shapiro (n 5) 782-3.

⁵⁰ DSM Directive, art 21; Shapiro (n 5) 783.

⁵¹ DSM Directive, art 22; Shapiro (n 5) 783; Martin Kretschmer and Rebecca Giblin, ‘Getting creators paid: one more chance for copyright law’ (2021) 43(5) *European Intellectual Property Review* 279, 279.

⁵² DSM Directive, art 23(1); Shapiro (n 5) 785.

⁵³ Kretschmer and Giblin (n 51), 279.

⁵⁴ *ibid* 281.

⁵⁵ Shapiro (n 5) 779; Shapiro and Hansson (n 9) 414.

⁵⁶ Shapiro (n 5) 779.

Overall, non-implementation of Chapter 3 of the Directive, in theory, allows the UK's media companies (and other exploiters of creative works) to remain competitive in the international stage due to its continued respect of contractual freedom. But it would also mean that content creators, especially smaller ones, will lose out on these new rights, as will be explained later in the article.

3. Legality of divergence

Determining the legality of the UK's decision to diverge from the DSM Directive, especially in respect of the EU-UK Trade and Cooperation Agreement (TCA), is important in evaluating its impact, for if it were contrary to its provisions, the UK could be susceptible to retaliatory measures (and would therefore drastically increase the cost of divergence).⁵⁷

Intellectual property law, which includes copyright law, is not subject to "level playing field" rules.⁵⁸ This means that there is no obligation for UK copyright law to roughly mirror EU copyright law so that divergences (such as non-implementation of the DSM Directive) do not give the UK unfair advantages in trade and investment (and if it was determined as such, the EU would be able to take so-called "rebalancing measures").⁵⁹ Instead, it is subject to the minimum standards under Part II, Title V of the TCA, which act as a floor, not a ceiling.⁶⁰

⁵⁷ Stefano Fella, *The UK-EU Trade and Cooperation Agreement: governance and dispute settlement* (House of Commons Library Briefing Paper CBP-9139, 2021) <<https://commonslibrary.parliament.uk/research-briefings/cbp-9139/>> accessed 22 April 2021, 30-4.

⁵⁸ See TCA, art 1-8.

⁵⁹ Fella (n 57) 8.

⁶⁰ TCA, art IP.2.2.

Nothing under Title V of the TCA precludes the UK from diverging from the DSM Directive. This is because Title V primarily serves to reaffirm both the UK's and the EU's commitment to complying with the TRIPS Agreement (and nothing within the TRIPS Agreement mandates the need for the reforms under the DSM Directive).⁶¹

Title V also reaffirms the UK's commitment to other international intellectual property agreements,⁶² notably the WIPO Copyright Treaty (WCT).⁶³ While the UK's decision to diverge is consistent with the WCT, it can be argued that the EU's decision to adopt the Directive is inconsistent with it, thus also breaching Title V of the TCA.

Lawrence, for example, argues that Article 8 of the WCT, which provides for the "communication to the public" right, allows for ISSPs (and by extension, OCSSPs) to receive safe harbour protection.⁶⁴ In order to facilitate reform of safe harbour provisions worldwide, he advocates for amending Article 8 of the WCT.⁶⁵ By jumping the gun and unilaterally repealing safe harbour for OCSSPs, it can be argued that the EU acted inconsistently by not respecting the WCT-agreed interpretation that "mere provision of physical facilities [...] does not in itself amount to communication".⁶⁶

Meanwhile, Shapiro and Hansson float the idea that the "super-UGC [user generated content] exception" under Article 17(7), which mandates that fair use of copyrighted material be respected, could be inconsistent with the three-step test for

⁶¹ TCA, art IP.2.1.

⁶² TCA, art IP.4.1(d).

⁶³ WIPO Copyright Treaty (WCT) (1996) 2186 UNTS 121 (WCT).

⁶⁴ Lawrence (n 36) 527.

⁶⁵ *ibid* 539.

⁶⁶ Lawrence (n 36) 527; Agreed Statements concerning the WIPO Copyright Treaty adopted by the Diplomatic Conference on December 20, 1996, art 8.

copyright limitations and exceptions under the WCT.⁶⁷ If that were the case, then the DSM Directive would also fall afoul of Article IP.15 of the TCA which codifies this three-step test.⁶⁸

For the purposes of my evaluation below however, I will assume that the DSM Directive is consistent with the WCT and TCA and that it remains as EU law.

4. A cost-benefit analysis of divergence

4.1. The purported “winners”

4.1.1. OCSSP start-ups

One of the recurring criticisms of Article 17 is how unkind the new liability regime is towards new start-ups. Content filters, which are de facto required, cost a huge amount of money to develop or license (the latter of which is more likely to be the case). For example, Audible Magic, a US-based company with a borderline monopoly on content filters for third-parties, charges medium sized OCSSPs between \$10,000 and \$50,000 USD a month for the use of their filters.⁶⁹ SoundCloud, who chose to develop their own filters, spent €5 million building their own and hired 7 dedicated employees to manage it (out of a total team of 300).⁷⁰ Not only would start-ups not be able to afford these high licensing fees or development costs, their ability to attract investments would also be hampered.⁷¹

The Directive does try to address this by exempting small businesses from the “notice-and-staydown” obligation (i.e. the content filter requirement),⁷² but the way small businesses have

⁶⁷ Shapiro and Hansson (n 9) 413; WCT, art 10.

⁶⁸ TCA, art IP.15.

⁶⁹ Spoerri (n 7) 180.

⁷⁰ *ibid.*

⁷¹ *ibid* 181-2.

⁷² DSM Directive, art 17(6).

been defined in the legislation is so restrictive that Bridy argued it is “too narrow to be meaningful”.⁷³ For example, she notes that it took YouTube less than 2 years to have more than 70 million unique monthly visitors — the exception only allows a maximum of 5 million.⁷⁴

With small European-based OCSSPs already fighting for their survival,⁷⁵ some like Reda project that the UK’s non-implementation “would make the UK more attractive for running platform businesses”.⁷⁶ There are two reasons why I believe this will not be the case.

Firstly, as Erickson astutely pointed out, the UK’s divergence from the DSM Directive does not, on its own, turn the UK into “some kind of haven for tech companies”.⁷⁷ Non-implementation is a retention of the status quo (safe harbour protection for OCSSPs) — a status quo that is also present in many non-EU countries like the United States.⁷⁸ Divergence on its own is therefore not some innovative new step that will attract technological investment into the UK — that would require a more substantially ambitious regulatory overhaul or

⁷³ Bridy (n 27) 355.

⁷⁴ *ibid* 355-6.

⁷⁵ See Detrekoi (n 23) 237.

⁷⁶ Will Bedingfield, ‘Here’s why the UK is (finally) dumping Article 13 for good’ *Wired* (28 January 2020) <<https://www.wired.co.uk/article/uk-article-13-copyright-brexite>> accessed 19 February 2021.

⁷⁷ *ibid*.

⁷⁸ Lucius Klobucnik and Thomas Y Lu, ‘Noticeably different?’

Consequences of the DSM Directive’s OCSSP liability regime on DSPs active in the EU and the US’ (2020) 15(10) *Journal of Intellectual Property Law & Practice* 811, 815.

some other incentives like higher investment spending (both of which would need to respect the relevant rules under the TCA).

More importantly, however, is the fact that while UK-based OCSSPs could choose not to use content filters if they cater solely to UK (and non-EU) customers, if these OCSSPs ever want to cater to the European market, they will have to abide by the provisions of the DSM Directive. Start-ups could theoretically take the step of blocking European traffic, like how other companies had done in lieu of GDPR compliance in 2018.⁷⁹ But they will be in direct competition with larger OCSSPs, like YouTube, Facebook, and SoundCloud, who can afford to cater to the European market (and gain an even bigger market share as they will no longer be competing with start-ups, both UK and non-UK based). Therefore, the fears that these large OCSSPs would play an increasingly dominating role to the detriment of start-ups would not be alleviated by the UK's decision to retain safe harbour. The concerns that UK start-ups would get priced out are still very much real after divergence.

4.1.2. Small content creators and internet users

Small content creators rely on fair use. Musicians, for example, regularly borrow and build on the works of previous composers to create new “innovative music” — a practice that was done even by Beethoven and Mozart.⁸⁰ If small content creators were unable to build on works of the past, “creators of the past [would have] veto power over creators of the present”.⁸¹ And so protecting fair use is imperative—not just because of its reliance

⁷⁹ Rebecca Sentance, ‘GDPR: Which websites are blocking visitors

from the EU?’ (Econsultancy, 31 May 2018)

<<https://econsultancy.com/gdpr-which-websites-are-blocking-visitors-from-the-eu-2/>> accessed 2 May 2021; see also Anu Bradford, *The Brussels Effect: How the European Union Rules the World* (OUP 2020) 165.

⁸⁰ Lester and Pachamanova (n 30) 56.

⁸¹ Bridy (n 27) 346.

by small content creators—but because it is an outlet of free expression by internet users.⁸²

Arguably we could go one step further and argue that the internet as a whole relies on widespread copyright infringement.⁸³ As Kreutzer points out, “the internet is rich in content that is either illegal or has an unclear legal status under copyright law.”⁸⁴ But it’s precisely this environment which contributes to its “cultural diversity”.⁸⁵ Rightholders are willing to turn a blind eye to these regular infringements because the cost of lost remuneration comes with the benefit of “significant advertising effects” from fan remixes, tributes, and memes going viral and contributing to a vibrant fan culture.⁸⁶

The issue with content filters, as mentioned before, is that they are unable to distinguish actual infringements from fair use. And so, one might reasonably be hopeful that UK divergence from the DSM Directive would protect fair use (or “fair dealing” in UK legal terms) as there would be no content filter mandate. Furthermore, the lack of content filters would mean that rightholders would retain the right to be tolerant of innocent infringements which help contribute to the “common good” of a “diverse online culture”.⁸⁷

⁸² *ibid* 345; Paul Keller, ‘CJEU hearing in the Polish challenge to Article 17: Not even the supporters of the provision agree on how it should work’ (Kluwer Copyright Blog, 11 November 2020) <<http://copyrightblog.kluweriplaw.com/2020/11/11/cjeu-hearing-in-the-polish-challenge-to-article-17-not-even-the-supporters-of-the-provision-agree-on-how-it-should-work/>> accessed 19 February 2021.

⁸³ Kreutzer (n 6) 717.

⁸⁴ *ibid.*

⁸⁵ *ibid.*

⁸⁶ *ibid.*

⁸⁷ *ibid.*

The reality of divergence unfortunately is not this rosy. While the UK will not have a content filter mandate, the lack of one does not preclude its use. YouTube will still use its Content ID system whether or not it has safe harbour protection. So all of its associated problems, such as erroneously putting claims on original music which use royalty free audio loops (on the basis that a different creator used them), would still exist for any musicians that rely on YouTube, for example.⁸⁸

Moreover, the EU's position as a global regulator, especially in the digital economy, means that it has the potential to make companies change their internal policies globally.⁸⁹ This happens because companies desire to have universal rules applicable to as many jurisdictions as possible for technical and economic reasons.⁹⁰ As such, the so-called "Brussels Effect"⁹¹ would essentially push OCSSPs to use content filters in the UK even without being made to. Hence the issues from content filters for small content creators and internet users in the UK will remain unresolved even with the UK's divergence.

4.2. The "losers"

4.2.1. The music industry

4.2.1.1. The "value gap"

Music streaming revenues in the UK in 2020 grew by 15.4% from 2019, generating a total of £736.5 million.⁹² Due to the COVID-19 pandemic, many people moved to streaming services leading to it accounting for 80% of total UK music consumption

⁸⁸ Lester and Pachamanova (n 30) 60.

⁸⁹ Bradford (n 79) 164.

⁹⁰ *ibid* 164-5.

⁹¹ *ibid* 164.

⁹² BPI, 'BPI publishes its yearbook "All About The Music 2021"' (BPI, 15 April 2021) <<https://www.bpi.co.uk/news-analysis/bpi-publishes-its-yearbook-all-about-the-music-2021/>> accessed 30 April 2021.

that year.⁹³ But the revenue from streaming was not paid equally by online platforms — a substantial part of that revenue was paid for by subscription-based services (e.g. Spotify and Apple Music) as opposed to OCSSPs which run on an ad-based model.⁹⁴

As mentioned prior, the concept of the “value gap”, while endorsed by the UK music industry and prominent UK musicians like Paul McCartney,⁹⁵ is heavily contested. Bridy argues that comparing Spotify to YouTube is like comparing “apples-to-oranges”.⁹⁶ As Spotify is a “closed system”, it has control over who can post what content.⁹⁷ “No random subscriber in Paris—France or Texas—can upload a cat video to Spotify at three o’clock in the morning on a Sunday”.⁹⁸ Therefore, Spotify does not need safe harbour protection like YouTube which opens itself to liability risks by having an open system where anyone can upload anything.⁹⁹

Her argument better justifies why the “value gap” exists as opposed to refuting the concept itself, which Bridy argues is merely a “slogan that music industry trade groups created”.¹⁰⁰ The fact that music streaming services pay more than OCSSPs is still very much true — even if the specific statistics are disputed.

And so, UK divergence from the DSM Directive means that this “value gap” will remain unplugged as OCSSPs will be able to rely

⁹³ *ibid.*

⁹⁴ IFPI, ‘Global Music Report 2021 ’(IFPI, 2021) <https://www.ifpi.org/wp-content/uploads/2020/03/GMR2021_STATE_OF_THE_INDUSTRY.pdf> accessed 24 April 2021, 13.

⁹⁵ IFPI, ‘Global Music Report 2017 ’(n 39) 25.

⁹⁶ Bridy (n 27) 327.

⁹⁷ *ibid.*

⁹⁸ *ibid.*

⁹⁹ *ibid* 327-8.

¹⁰⁰ *ibid* 326.

on safe harbour provisions to negotiate for licensing deals that skew heavily towards their favour. And to make matters worse, as Elena Segal of Apple Music UK argues, these licensing deals also affect the price at which subscription-based music streaming services can charge, since charging too high would lead to people to move to ad-based OCSSPs.¹⁰¹ Thus, the “unlevel playing field” acts to the further detriment of the music industry as music streaming services are unable to increase their remuneration for music artists.¹⁰²

4.2.1.2. Remuneration rights

Divergence also means that musicians lose out on the Chapter 3 remuneration rights. In particular, the emphasis of the remuneration provisions within the DSM Directive on collective bargaining agreements means that musicians, especially less established ones, would not be able to benefit from having a legal framework which incentivises their adoption.¹⁰³

Arguably, UK-based musicians would not be precluded from exercising such rights for their music exploited in the EU.¹⁰⁴ But as Shapiro pointed out, this could lead to conflict of law issues, especially in regards to the contract adjustment right which could see UK musicians be held for breach of contract if the exercise of such a right is not recognised.¹⁰⁵

But not adopting the remuneration rights is not as clear cut as the “value gap” issue. Shapiro argues that such rights would make media industries less competitive globally,¹⁰⁶ and so non-implementation can be equally argued to be beneficial to the music industry as it will keep English law’s respect for freedom of contract.

¹⁰¹ DCMS Committee (n 37) Q598.

¹⁰² *ibid* Q616.

¹⁰³ Shapiro (n 5) 779.

¹⁰⁴ *ibid* 785.

¹⁰⁵ *ibid*.

¹⁰⁶ *ibid* 779.

4.2.2. News publishers

As discussed prior, implementation of a press publisher's right has had mixed results. On one side, you have French publishers successfully negotiating a licensing deal with Google;¹⁰⁷ and on the other, you have Google threatening to withdraw from Australia completely over its mere suggestion.¹⁰⁸

If the UK were to implement such a right, I doubt Google would withdraw from the UK, considering its market is substantially larger than Australia's.¹⁰⁹

The question is whether the right would actually benefit news publishers—and the answer is we do not know (at least from the current evidence that we have). If the right turns out to actually decrease traffic in news sites (and therefore revenue), news publishers can simply waive the right and publish for free like in Germany.¹¹⁰ There would be no benefit overall, but there would neither be any permanent loss. In contrast, if the UK follows a more hardball approach like in France and manages to get ISSPs to negotiate licences under that right, press publishers would certainly benefit from it.

Therefore, even though there is a chance for such an implementation to fail, the UK's divergence from the DSM Directive represents a lost opportunity for press publishers to

¹⁰⁷ Manteghi (n 12) 146-7; Timothy B Lee, 'Google agrees to pay French news sites to send them traffic' (n 21).

¹⁰⁸ Timothy B Lee, 'Google: We'll shut down Australian search before we pay news sites for links' *Ars Technica* (22 January 2021) <<https://arstechnica.com/tech-policy/2021/01/google-threatens-to-shut-down-australian-search-over-link-tax-proposal/>> accessed 19 February 2021.

¹⁰⁹ Australia vs. United Kingdom 'Index Mundi, 2017) <<https://www.indexmundi.com/factbook/compare/australia.united-kingdom/economy>> accessed 2 May 2021.

¹¹⁰ Manteghi (n 12) 146.

earn possible further remuneration, as failure would not incur any permanent losses for the publishers anyways.

5. Conclusion

The UK's divergence from the DSM Directive will bring at most, negligible benefits to the stakeholders that were meant to be its beneficiaries. This is because even though the Directive is critically flawed, especially with respect to Article 17, the regulatory and market influence of the EU will set content filters as the global standard for OCSSPs, leading to the so-called "Brussels Effect".¹¹¹ The UK's divergence will not, on its own, preclude the use of content filters by large OCSSPs, and so all of the downsides of content filters from its unaffordable pricing for start-ups to its chilling effect on freedom of expression will remain in place.

But divergence would not necessarily incur direct costs either. Non-implementation of the Directive is fully compliant with the TCA and international intellectual property law agreements (whereas the converse, the EU's passage of the Directive, cannot be confidently said to be compliant). Instead, the cost of divergence is the lost opportunities for the UK music industry to plug the "value gap" by capitalising on what is already inevitable — the widespread adoption of content filters by OCSSPs. News publishers would also lose out on the potential for further remuneration with a press publisher's right, even if said remuneration is uncertain.

¹¹¹ Bradford (n 79) 164-5.

Bibliography

EU cases

Case C-527/13 Hewlett-Packard Belgium SPRL v Reprobel SCRL
[2016] Bus LR 73

EU legislation

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 L130/92

Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market [2000] OJ L178/1

International treaties

Trade and Cooperation Agreement between the European Union and the European Atomic Energy Community, of the one part, and the United Kingdom of Great Britain and Northern Ireland, of the other part

WIPO Copyright Treaty (WCT) (1996) 2186 UNTS 121

International declarations

Agreed Statements concerning the WIPO Copyright Treaty adopted by the Diplomatic Conference on December 20, 1996

Books

Bradford A, *The Brussels Effect: How the European Union Rules the World* (OUP 2020)

Parliamentary reports

Digital, Culture, Media and Sport Committee, Oral evidence: Economics of music streaming (HC 2019-21, 868)

Parliamentary briefing papers

Stefano Fella, *The UK-EU Trade and Cooperation Agreement: governance and dispute settlement* (House of Commons Library Briefing Paper CBP-9139, 2021)
<<https://commonslibrary.parliament.uk/research-briefings/cbp-9139/>> accessed 22 April 2021

Journal articles

- Bridy A, 'The Price of Closing the Value Gap: How the Music Industry Hacked EU Copyright Reform '(2020) 22 *Vanderbilt Journal of Entertainment & Technology Law* 323
- Depoorter B and Walker R K, 'Copyright False Positives '(2013) 89 *Notre Dame Law Review* 319
- Detrekoi Z, 'EU Copyright Directive: sounding the death knell for domestic video-sharing platforms '(2020) 25(4) *Communications Law* 231
- Guzé N, 'Net Neutrality and the European Union's Copyright Directive for the Digital Single Market '(2019) 43(1) *Loyola of Los Angeles International and Comparative Law Review* 63
- Klobucnik L and Lu T Y, 'Noticeably different? Consequences of the DSM Directive's OCSSP liability regime on DSPs active in the EU and the US '(2020) 15(10) *Journal of Intellectual Property Law & Practice* 811
- Kretschmer M and Giblin R, 'Getting creators paid: one more chance for copyright law '(2021) 43(5) *European Intellectual Property Review* 279
- Kreutzer T, 'The EU Copyright Directive and its potential impact on cultural diversity on the internet '(2020) 42(11) *European Intellectual Property Law Review* 715
- Lawrence D L, 'Addressing the Value Gap in the Age of Digital Music Streaming '(2019) 52 *Vanderbilt Journal of Transnational Law* 511
- Lee Y H, 'United Kingdom Copyright Decisions and Post-Brexit Copyright Developments 2020 '(2021) 52(3) *International Review of Intellectual Property & Competition Law* 319
- Lester T and Pachamanova D, 'The Dilemma of False Positives: Making Content ID Algorithms More Conducive to Fostering

- Innovative Fair Use in Music Creation '(2017) 24 UCLA Entertainment Law Review 51
- Manteghi M, 'The link tax under the EU Copyright Directive: seeking a balance of interests in the digital age '(2021) 43(3) European Intellectual Property Review 145
- Reda J, 'Article 17 of the Copyright Directive: a prohibited general monitoring obligation '(2021) 43(4) European Intellectual Property Review 215
- Samuelson P, 'Legally Speaking Europe's Controversial Digital Copyright Directive Finalized '(2019) 62(11) Communications of the ACM 24
- Shapiro T, 'Remuneration provisions in the DSM Copyright Directive and the audiovisual industry in the EU: the elusive quest for fairness '(2020) 42(12) European Intellectual Property Review 778
- Shapiro T and Hansson S, 'The DSM Copyright Directive - EU copyright will indeed never be the same '(2019) 41(7) European Intellectual Property Review 404
- Spoerri T, 'On Upload-Filters and other Competitive Advantages for Big Tech Companies under Article 17 of the Directive on Copyright in the Digital Single Market '(2019) 10(2) Journal of Intellectual Property, Information Technology and Electronic Commerce Law 173
- News articles**
- Bedingfield W, 'Here's why the UK is (finally) dumping Article 13 for good 'Wired (28 January 2020)
<<https://www.wired.co.uk/article/uk-article-13-copyright-brexit>> accessed 19 February 2021
- Kaminsky M, 'EU's Copyright Directive Passes Despite Widespread Protests - - But It's Not Law Yet' Forbes (26 March 2019)
<<https://www.forbes.com/sites/michellekaminsky/2019/03/26/>>

[eus-copyright-directive-passes-despite-widespread-protests-but-its-not-law-yet/](#) accessed 30 April 2021

Lee T B, 'Google agrees to pay French news sites to send them traffic ' Ars Technica (21 January 2021) <<https://arstechnica.com/tech-policy/2021/01/google-agrees-to-pay-french-news-sites-to-send-them-traffic/>> accessed 19 February 2021

Lee T B, 'Google: We'll shut down Australian search before we pay news sites for links 'Ars Technica (22 January 2021) <<https://arstechnica.com/tech-policy/2021/01/google-threatens-to-shut-down-australian-search-over-link-tax-proposal/>> accessed 19 February 2021

Magazines and websites

— —, 'Australia vs. United Kingdom '(Index Mundi, 2017) <<https://www.indexmundi.com/factbook/compare/australia.united-kingdom/economy>> accessed 2 May 2021

BPI, 'BPI publishes its yearbook "All About The Music 2021 "'(BPI, 15 April 2021) <<https://www.bpi.co.uk/news-analysis/bpi-publishes-its-yearbook-all-about-the-music-2021/>> accessed 30 April 2021

IFPI, 'Global Music Report 2017 '(IFPI, 2017) <https://www.musikindustrie.de/fileadmin/bvmi/upload/06_Publikationen/GMR/GMR2017_press.pdf> accessed 23 April 2021

IFPI, 'Global Music Report 2021 '(IFPI, 2021) <https://www.ifpi.org/wp-content/uploads/2020/03/GMR2021_STATE_OF_THE_INDUSTRY.pdf> accessed 24 April 2021

Keller P, 'CJEU hearing in the Polish challenge to Article 17: Not even the supporters of the provision agree on how it should work ' (Kluwer Copyright Blog, 11 November 2020) <<http://copyrightblog.kluweriplaw.com/2020/11/11/cjeu-hearing-in-the-polish-challenge-to-article-17-not-even-the-supporters-of-the-provision-agree-on-how-it-should-work/>> accessed 19 February 2021

Sentance R, 'GDPR: Which websites are blocking visitors from the

EU?' (Econsultancy, 31 May 2018)

<<https://econsultancy.com/gdpr-which-websites-are-blocking-visitors-from-the-eu-2/>> accessed 2 May 2021