REPUBLIC OF TURKEY
ANKARA UNIVERSITY
GRADUATE SCHOOL OF SOCIAL SCIENCES
DEPARTMENT OF INTELLECTUAL PROPERTY RIGHTS,
TECHNOLOGY POLICIES AND INNOVATION MANAGEMENT

COMPARATIVE ANALYSIS OF THE LIABILITY OF ONLINE CONTENT-SHARING SERVICE PROVIDERS IN TURKISH AND EUROPEAN UNION COPYRIGHT LAW

L.L.M Thesis

Alara NAÇAR

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MASTER THESIS

Thesis Supervisor
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Date of the Thesis Defense

23.05.2022

DECLARATION

REPUBLIC OF TURKEY

ANKARA UNIVERSITY

Directorship of the Graduate School of Social Sciences

I hereby declare that all information in my master's thesis titled "Comparative Analysis of the Liability of Online Content-Sharing Service Providers in Turkish and European Union Copyright Law (Ankara 2022)" which has been prepared under the supervision of Assist. Prof. Dr. Selin ÖZDEN MERHACI has been gathered and submitted in compliance with academic rules and ethical conduct principles and as required by these rules and principles, I have fully indicated and cited all sources that are not original to this work. I also declare that, I have acted according to scientific research and ethical rules during my study process and that if it is proven otherwise, I will accept all legal consequences.

Date:

Name, Surname, Signature

Alara NAÇAR

LIST OF ABBREVIATIONS

AG	: Advocate General
Art.	: Article(s)
Berne	: Berne Convention for the Protection of Literary and Artistic Works
CJEU	: Court of Justice of the European Union
CDSMD	: EU Directive 2019/790 on copyright and related rights in the Digital Single Market
DRM	: Digital Rights Management
DSM	: Digital Single Market
E.	: Case Number
ECJ	: European Court of Justice
ed. (eds.)	: editor (editors)
edn.	: Edition
EU	: European Union
ff.	: and the following
GCEU	: General Court of the European Union
HP	: Hosting (Service) Provider
ICT	: Information and Communication Technologies
ISP	: Internet Service Providers
ISS	: Information Society Service
IP	: Intellectual Property
IPR	: Intellectual Property Rights
K.	: Decision Number
LIAW	: Turkish Law No. 5846 on Intellectual and Artistic Works
No.	: Number

p.	: page
para(s)	: Paragraph(s)
pp.	: Pages
OCSSPs	: Online Content-Sharing Service Providers
subpar(s).	: Subparagraph(s)
T.	: Date
TRIPs	: Agreement on Trade-Related Aspects of Intellectual Property Rights
TURKPATENT	: Turkish Patent and Trademark Office
v	: versus
vol.	: Volume
WIPO	: World Intellectual Property Office
WTO	: World Trade Organization
Y.	: Year
TCoC	: Turkish Court of Cassation

I. INTRODUCTION

The Internet changed our lives in many ways throughout the years since its establishment. It can be used for almost everything nowadays, from shopping to research to communication. It is a big hub for data and information, and it enables people to access unlimited information easily, as all they need is a connection and a device. It changed our way of thinking, our perspective and definitely created tons of employment opportunities and new fields of study by the new concepts it brought, such as e-commerce or digital rights management. The traditional sales methods, so called "brick-and-mortar" companies, are challenged by the shopping web sites[1]. Everyone with a credit/debit card open to the Internet can now buy almost everything online, just by scrolling down, checking and clicking a button after deciding what to buy. It is that easy, convenient and time saving (which is of course debatable).

Not only e-commerce or online shopping, but also for writers, artists, creators of almost everything, the Internet is full of opportunities to share their creations online and reach more people a lot easier in a shorter time. When a work is digitised, due to the advancement of technology, the quality of work does not deteriorate and it looks (or sounds) the same. The digital version can be copied and shared very easily[2]. Especially by using social media, people reach out to people all around the world any time without any boundaries, without any distance and are able to share literally everything[3].

Although it seems very convenient and advantageous, the online world has its

[1] "In 2020, over two billion people purchased goods or services online, and during the same year, e-retail sales surpassed 4.2 trillion U.S. dollars worldwide." Daniela Coppola, 'E-Commerce Worldwide - Statistics & Facts' (Statista, 2021) <https://www.statista.com/topics/871/online-shopping/> accessed 2 February 2022.

[2] Lâle Ayhan İzmirli, *Avrupa Birliği Ve Türk Hukuklarına Göre İnternet Ortamında Fikri Mülkiyet Haklarının İhlali ve Korunması* (Seçkin 2012) 29.

[3] Mustafa Ateş, 'Sosyal Medya Aktörlerinin Telif Hakkı İhlalinden Doğan Hukuki Sorumlulukları', *Fikir ve Sanat Hukukuna Dair Makalelerim* (Adalet 2016) 46.

drawbacks and disadvantages. The ones that relate to this study are regarding copyright. Since it is very easy now to reach millions or even billions just by one click, the infringement of copyrighted works became far easier in that vein[4]. By putting copycat versions of designer clothes on sale, by selling fake paintings, by using a substantial part of a music piece in a commercial video, by posting a photograph without authorisation and many more acts may constitute copyright infringement. Sometimes it is clearer to determine who is liable for such infringement. The infringers are usually the ones who directly perform the acts such as uploading the video or putting the illegal item on sale and getting paid in exchange, and they are to be held liable. However, are not the ones, who create opportunities for those infringers to infringe copyright by giving them means, also to blame? Does facilitating the infringement count?

In this study, we will try to analyse the liability of "*online content-sharing service providers*" (OCSSPs) in social media regarding copyright infringement within the framework of Turkish and European Union (EU) law. We deliberately leave the matters related to i) the related rights, ii) the industrial property rights, iii) infringement in ways possible in the platforms of social media other than in Facebook, YouTube, Twitter and Instagram, and iv) the liability of their users, outside the framework of this study. Overall, in this study, first we will try to give the definition of copyright, the rights of the authors, and copyright exceptions to the extent that they accord with the scope of this study. Later on, the Internet and its relation to the copyright will be introduced to the readers and afterwards, the legal framework regarding the OCSSPs in the EU and Turkey will be described. Then, possibilities of online copyright infringement will be examined limited to the selected platforms of social media. Lastly, their liability in Turkish and EU laws

[4] Levent Yavuz, Türkay Alıca and Fethi Merdivan, *Fikir ve Sanat Eserleri Kanunu Yorumu* (2nd edn, Seçkin 2013) 58.

on the matter will be examined. We will also humbly try to give suggestions for the Turkish law regarding the issue based on this study at the end.

II. THE KEY CONCEPT OF COPYRIGHT AND CERTAIN RELATED CONCEPTS

Intellectual Property Rights (IPR) are granted to the authors of new and original creations generated by human minds, and create sort of legal monopolies granted and recognised by the States that afford absolute and exclusive rights to their holders. The general categories of IPR are as follows: patent, utility model, geographical indications, traditional knowledge, copyright, design, trademark, plant varieties and integrated circuits[5]. There is also know-how or trade secret, which corresponds to the confidential information usually protected by unfair competition rules[6]. The requirements for or scope of protection as well as the definition change according to the respective category of the IPR. In any case, during the period of protection granted by any IPR category, third parties cannot use or exploit the creation without the right owner's authorisation[7].

The concept of IPR within the meaning explained above may be categorised into two main types: industrial property rights and intellectual and artistic rights a.k.a. copyright. This study concerns only copyright, and therefore the concept of copyright will hereby be discussed whereas the industrial property rights will be excluded. In this study, we will use "copyright" for the author's intellectual rights deriving from their original work.

Social media is one of the easiest ways to publish, reach and infringe copyrighted

[5] Fırat Öztan, *Fikir Ve Sanat Eserleri Hukuku* (Turhan 2008) 12; Ünal Tekinalp, *Fikrî Mülkiyet Hukuku* (5th edn, Vedat 2012) 1-4; Savaş Bozbel, *Fikri Mülkiyet Hukuku* (Oniki Levha 2015) 3-5; İlhami Güneş, *Uygulamada Fikir Ve Sanat Eserleri Hukuku* (2nd edn, Seçkin 2015) 28-29.
[6] Güneş (n 5) 31-32.
[7] Öztan (n 5) 10-11; Güneş (n 5) 28-29; Annette Kur and Thomas Dreier, *European Intellectual Property Law* (Edward Elgar 2013) 2-3.

work. Here, we will analyse copyright in social media by explaining the types of works protected on social media, the rights affected by it, the ways to infringe those rights, the legal framework and liable persons.

A) Definition and Legal Framework of Copyright

Copyright amounts to the protection for the original expressions of ideas. It is significant to point out that copyright protection does not cover ideas *per se*, therefore, any idea has to be expressed for being eligible to copyright. Its subject matter is the original intellectual work, which is an expression that bears its author's characteristics and reflects its author's creativity. It reflects the individuality or the creative contribution of its author in its original expression[8].

Copyright, as one of the intellectual property rights, is mentioned and set forth in different international agreements, regional and national legislation. In Europe, in particular in the UK and France for instance, copyright arose in the eighteenth century in order to incentivise creativity and dissemination of knowledge[9]. Generally, it can be said that copyright is the right that protects the original works created by the human mind and provides exclusive moral and economic rights to the work.

Universal Declaration of Human Rights[10] article 27 stipulates the protection of moral and pecuniary interests arising from being an author of any artistic, literary or

[8] Öztan (n 5) 81-82; Tekinalp (n 5) 103-105; Bozbel (n 5) 27; Güneş (n 5) 55-60; Yavuz, Alıca and Merdivan (n 4) 64-65; Ayhan İzmirli (n 2) 107-108.

[9] Hasan Kadir Yılmaztekin, 'Rethinking Copyright from the 'Capabilities' Perspective In The Post-Trips Era: How Can Human Rights Enhance Cultural Participation?' (PhD, University of Exeter 2017) 12; The Statute of Anne 1710 in the UK is deemed to be the first modern copyright law, which specifically gives the authors of books a right of printing, and also in France there were decrees granting authors right of reproduction towards the end of 1700s. The difference between those two countries was that French copyright law is considered to give more importance to the author's rights, as they were deemed sacred and supreme. Graham Dutfield and Uma Suthersanen, *Global Intellectual Property Law* (Edward Elgar 2008) 69-70.

[10] 'Universal Declaration of Human Rights' (*Ohchr.org*, 1948) <https://www.ohchr.org/EN/UDHR/Documents/UDHR_Translations/eng.pdf> accessed 11 October 2020.

scientific creation. Thus, copyright is actually considered as a fundamental right[11]. Also, in the EU copyright framework, particularly under the "EU Charter of Fundamental Rights" (Charter) article 17, IP including copyright "is protected within the right to property"[12]. It is the same way in Turkish Constitution under article 35.

Nevertheless, the "Berne Convention for the Protection of Literary and Artistic Works"[13] (Berne) has a heavy hand on copyright protection since it is deemed as the first international instrument regarding copyright. It actually determines the minimum protection requirements and the contracting parties may set standards that are above. The Berne article 2 states that artistic and literary works mean any scientific, artistic and literary production in any form of expression such as, *inter alia*, books, lectures, music, cinema, painting, photograph, architecture and so on. It is not an exhaustive list, only exemplary and it is actually left to the Contracting States[14]. In the second part of the article 2 it is also stated that the requirement of fixing the expression in a tangible form in order to protect the work is up to the Contracting States to legislate. Turkey is a Contracting State, and even though the EU is not a party, it is still obligated under the WIPO Copyright Treaty Article 1(4)[15] to comply with Articles 1-21 of the Berne. In civil law tradition, which includes the European Union and Turkey, the requirement of fixation is not sought[16].

[11] Bozbel (n 5) 17.
[12] In 2007 Lisbon Reform Treaty made the EU Charter of Fundamental Rights a primary source of EU law, on the same level as the Treaties. Still, this fundamental IP protection is not absolute, as it must be balanced with other fundamental rights and freedoms, such as freedom of expression and of information, right to private life, and freedom to conduct a business. See in Eleonora Rosati, '30 Years of EU Copyright Law (Preface)', The Routledge Handbook of EU Copyright Law (Routledge (Taylor&Francis) 2021) xi.
[13] Berne Convention for the Protection of Literary and Artistic Works 1886 <https://wipolex.wipo.int/en/text/283693> accessed 11 October 2020.
[14] İzmirli (n 2) 109; Dutfield and Suthersanen (n 9) 78; Tanya Aplin, 'Subject Matter', *Research Handbook on the Future of EU Copyright* (Edward Elgar 2009) 49-50.
[15] The European Union is a party to the WIPO Copyright Treaty, which Directive 2001/29 is intended to implement.
[16] In that regard, Güneş states that fixation is required for practical reasons. Although he states that the work must be perceptible with human senses (Güneş (n 5) 62), we consider that this does not mean the work has to be permanently fixed to a medium. The work must be expressed and go beyond just an idea.

Moreover, under the Berne article 7, the period of protection is set to the author's life and additional 50 years post mortem, as minimum. It is important to point out that the idea/expression contradiction draws the line of copyright protection, because the ideas are not protected and free to be used by the public, as well as the works that fell into public domain or that are not original in the first place. Furthermore, sometimes even protected works can be used in certain cases stipulated in the laws[17]. The Berne is not a unified or harmonised law to be enforced directly in the sense that the work is to be protected by the laws of the state of origin. However, the principle of national treatment requires that works from one Contracting State shall be granted the same protection in other Contracting States as their own nationals[18]. Some of the provisions are of mandatory nature such as the article listing the categories of works or the article regulating the right of adaptation but some are left to the Contracting States to legislate their requirements or limits such as article 9 (right of reproduction)[19].

Furthermore, there is World Trade Organization's "Agreement on Trade-Related Aspects of Intellectual Property Rights" (TRIPs) as a framework agreement also setting the minimum standards for IPR protection, and it actually increased those of before and even brought new rights such as rental rights[20]. The Member States may set higher standards by national laws but they shall not contravene with the provisions of the TRIPs. They have to abide by the minimum requirements brought by it[21]. TRIPs art. 9 stipulates that the Contracting States shall follow the Berne of 1971 articles 1-21 and its Appendix. However, it specifically excluded moral rights by excluding the Berne article 6*bis*. In the

[17] Yılmaztekin (n 9) 14.
[18] Öztan (n 5) 39-40; Bozbel (n 5) 20; Tekinalp (n 5) 68; 'Summary of The Berne Convention for The Protection of Literary and Artistic Works (1886)' (*Wipo.int*, 2021) <https://www.wipo.int/treaties/en/ip/berne/summary_berne.html> accessed 8 June 2021.
[19] Tekinalp (n 5) 65.
[20] Yılmaztekin (n 9) 23-24.
[21] Bozbel (n 5) 23-24.

same article part 2, the extent of copyright protection is limited to expressions, whereas the ideas, mathematical concepts, procedures or methods of operation as such are out of copyright protection. The importance of TRIPs regarding copyright is that it includes some provisions, so called "Berne-Plus", aimed to regulate the effects of technological advancement on the concept of copyright[22].

There is another important international treaty that deals with copyright, especially copyright in digital environment: "WIPO Copyright Treaty" (WCT)[23]. It is a special agreement as per the Berne[24] and it demands compliance of Berne articles 1-21 and its Appendix. It includes the rights related to storage and transmittal of works digitally, limitations and exceptions thereof, and technological measures to be taken regarding copyright protection[25]. The main reason for introduction of WCT is the response to the digital agenda and the doubts of the authors thereof. One of the most critical topics regarding the digital agenda is "the communication to the public or making available rights". The WCT introduced the latter, which gives the authors the right to determine whether to allow or prohibit the public to access their work at anytime and anywhere they want. Second important topic is the protection against "circumvention of effective technological measures" undertaken by authors[26]. In any case, it is one of the two treaties that were adopted under the so-called "WIPO Internet Treaties", the other one being the "WIPO Performances and Producers of Phonograms Treaty" (WPPT)[27].

[22] Alıca, Yavuz and Merdivan (n 4) 41-42; Tekinalp (n 5) 82.
[23] WIPO Copyright Treaty 1996 <https://wipolex.wipo.int/en/text/295157> accessed 11 October 2020.
[24] Under the Berne Convention article 20, "The Governments of the countries of the Union reserve the right to enter into special agreements among themselves, insofar as such agreements grant to authors more extensive rights than those granted by the Convention, or contain other provisions not contrary to this Convention. The provisions of existing agreements which satisfy these conditions shall remain applicable." and the WCT is a special agreement in that sense. Alıca, Yavuz and Merdivan (n 4) 43; Tekinalp (n 5) 69.
[25] Anne Flanagan and Sypros Maniatis, *Intellectual Property on The Internet* (University of London Press 2008) 79-80; Jane C. Ginsburg, 'Overview of Copyright Law' (*Ssrn.com*, 2016) <https://ssrn.com/abstract=2811179> accessed 2 February 2022, 27-28.
[26] Alıca, Yavuz and Merdivan (n 4) 43.
[27] Yılmaztekin (n 9) 28.

WPPT is about the economic and moral rights of performers such as actors and singers for their aural performances and economic rights of phonogram producers, especially in the digital realm[28].

After those, the "Council Directive 2001/29/EC in Copyright in the Information Society"[29] (InfoSoc Directive) was adopted for harmonising existent rights in the EU, such as right to distribution and reproduction, and due to the new digital world also for bringing new rights to the new technological stage. For instance, the right of communication to the public as well as the right of making available to the public, which may also be considered as a part of the first, were introduced[30]. The newest legislation on copyright in the EU is the "EU Directive 2019/790 on copyright and related rights in the Digital Single Market" (CDSMD)[31]. Its aim is, among others, to accommodate copyright exceptions in the digital area and regulate content use in the public domain. Also, it provides a fair and well-operated marketplace by providing rules for online service providers that allows users to upload contents related to copyright. Although it also has a goal to harmonise copyright laws of the EU States, this aim has yet to be accomplished. Since it is a directive and not a regulation, it does not have a direct effect or application but it has to be transposed to national laws. With that said, it would not be wrong to assume that there still be differences between national laws albeit small, and it is even considered that without an EU regulation on the matter the harmonisation of copyright will never be fully and completely achieved[32].

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[28] 'Summary of the WIPO Performances and Phonograms Treaty (WPPT) (1996)' (*Wipo.int*, 2020) <https://www.wipo.int/treaties/en/ip/wppt/summary_wppt.html>, accessed 28 November 2020.
[29] Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society 2001.
[30] Yılmaztekin (n 9) 29.
[31] 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 (Text with EEA relevance.) 2019.
[32] Marianne Levin, 'The Cofemel Revolution', *The Routledge Handbook of EU Copyright Law* (Routledge (Taylor&Francis) 2021) 91.

Lastly, "Turkish Law No. 5846 of 5 December 1951 on Intellectual and Artistic Works" (LIAW)[33], aims the establishment and protection of the authors' rights on their creations of artistic and intellectual works and the enforcement as well as sanctions, in the event of any violation of rules and procedures set therein. In its article 1/B with the title "Definitions", a work is defined as "any intellectual or artistic product bearing the characteristic of its author, which is deemed a scientific and literary or musical work or work of fine arts or cinematographic work". Based on this, it can be said that there are three requirements for an intellectual product to be regarded as work and protected by copyright: i) being included in one of the categories stipulated in the Law no. 5846, ii) bearing the characteristics of its author, iii) lending itself to disposal and being perceptible by third parties[34]. Copyright protection arises at the moment the work is created, automatically. There is no requirement or obligation of any kind of notification or registration[35].

B) Types of Works Protected by Copyright

In Turkish intellectual property law, the types of works qualified for copyright protection are regulated as *numerus clausus* and there is an exhaustive list in the LIAW. On the other hand, in the EU law for copyright, there is no strict harmonisation yet, but it is the goal. The EU States are expected to transpose the latest CDSMD into their national laws and realise the harmonisation as much as possible.

Generally, it can be said that in social media, the most common types of content

[33] In this study, we benefit from the translation of the Turkish Law of the Intellectual and Artistic Works made by Prof. Dr. Gül Okutan Nilsson and Prof. Dr. Feyzan Hayal Şehirali Çelik, available online: https://www.telifhaklari.gov.tr/resources/uploads/2015/10/26/Law%20on%20Intellectual%20and%20Artistic%20Works%20No.5846.pdf. We would like to take this opportunity to thank the esteemed professors for their time and effort put in such valuable work.
[34] Temel Nal, Rauf Karasu and Cahit Suluk, *Fikri Mülkiyet Hukuku* (4th edn, Seçkin 2020) 40; Tekinalp (n 5) 103; Ernst Hirsch, *Fikir ve Sanat Hukuku* (Ar 1948) 130 ff; Yavuz, Alıca and Merdivan (n 4) 63 ff.; Ayhan İzmirli (n 2) 107-109; Güneş (n 5) 58-59.
[35] Nal, Karasu and Suluk (n 34) 40; Tekinalp (n 5) 12; Merdivan, Yavuz and Alıca (n 4) 243.

include photos, videos, music and writings. We will see their status as works in both legal systems below.

1. Scope of Copyright and the Works Protected Thereby in the EU

The copyright law sources in the EU States consist of international treaties, EU legislation and their respective national law. The EU copyright law (*acquis*) consists of 11 directives and 2 regulations[36]. There is always an intent and effort for copyright harmonisation in the EU. The definition of work and criteria thereof are left to the

[36] 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; Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) 2006; Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art 2001; Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission 1993; Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version) (Text with EEA relevance) 2009; DIRECTIVE 2004/48/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 29 April 2004 on the enforcement of intellectual property rights (Text with EEA relevance) 2004; Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases 1996; Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights 2011; Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works 2012; Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market 2014; Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society 2017; Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled 2017; Regulation (EU) 2017/1128 of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market 2017; 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 (Text with EEA relevance.) 2019; Directive (EU) 2019/789 of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC (Text with EEA relevance.) 2019. Additionally, the 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 and the Directive 98/84/EC of the European Parliament and of the Council of 20 November 1998 on the legal protection of services based on, or consisting of, conditional access 1998 also contain provisions relevant to the exercise and the enforcement of copyright. See more in 'The EU Copyright Legislation' (*Shaping Europe's digital future*, 2021) <https://digital-strategy.ec.europa.eu/en/policies/copyright-legislation> accessed 30 May 2021.

Member States to determine. Most Member States has an "open list approach", where there is no strict classification of what might be a work when it comes to the subject matter of copyright and it is non-exhaustive[37]. The rights vested in the creators of original works as well as the threshold of protection in each Member State may differ based on their national laws and legal traditions[38]. Regardless, although copyright law in the EU is left to the national laws, national laws are converging step by step by way of international instruments and EU legislation harmonising the rights of authors[39].

Many of the EU directives mentioned before show the Member States' obligations as per the Berne, Rome Convention, and TRIPS, as well as WCT and WPPT. Furthermore, plenty of provisions of EU law are contemplated in free-trade agreements[40]. In light of above, it is considered within the meaning of this study that the main legal documents regulating aspects of the EU copyright so far are the E-Commerce Directive (2000), InfoSoc Directive (2001) and CDSM Directive (2019), which are to harmonise copyright provisions within the EU and to adapt copyright law to technological advancements[41].

Alongside the legislation, since the CJEU interprets the legal instruments, it can be said that the CJEU (kind of) makes law to a degree that it can be either as using its discretion in the not harmonised parts of the law or as affecting the Commission for the following legislations. Surely, the Court is bound by the existing provisions and the objectives of the EU, as well as the principle of proportionality when interpreting. Hence, the Court so far has ruled on various aspects of the not harmonised EU copyright law, for

[37] Aplin (n 14) 74-75.
[38] Aplin (n 14) 55-57.
[39] 'Copyright Law in the EU: Salient Features of Copyright Law Across the EU Member States' (*Europarl.europa.eu*, 2018) <https://www.europarl.europa.eu/RegData/etudes/STUD/2018/625126/EPRS_STU(2018)625126_EN.pdf > accessed 10 August 2021, 2; Ayhan İzmirli (n 2) 63-64; Kur and Dreier (n 7) 243-245.
[40] European Parliament (n 39) 2.
[41] European Parliament (n 39) 2.

instance the definition on the most essential element, "work". As is known, the decisions of the CJEU are of binding nature, or at least followed and referenced by it[42].

The CJEU's *Infopaq I* decision[43] is considered to be important for bringing a general definition of the requirement of originality for copyright protection in an attempt to harmonize it[44] and its *Levola Hengelo* decision[45] is particularly important as it is rendered by the Grand Chamber[46]. The CJEU defined the concept of work in its *Levola Hengelo* decision, where it stated that, under the articles 2 to 4 of InfoSoc Directive Member States should provide for exclusive rights of authors regarding their works. However, the InfoSoc Directive does not clearly express the scope of work, but for a uniform EU law practice, "an autonomous and uniform interpretation throughout the European Union" must be provided[47]. The Court found that only the products sorted as a work within InfoSoc Directive can be a subject of copyright protection. Hence, for being regarded as a work and benefitting copyright protection, there are two cumulative requirements considered by the Court as follows: the subject matter "must be original in the sense that it is the author's own intellectual creation" and "is the expression of the author's own intellectual creation"[48]. The Court considered that a definition may be made by modelling on the Berne article 2(1), which states that every production regarding art, literature and science is included in the literary and artistic works independently of its form of expression. In accordance with this, for the CJEU, a work pursuant to the InfoSoc Directive indicates that "the subject matter protected by copyright must be expressed in

[42] Ana Ramalho, 'The Competence and Rationale of EU Copyright Harmonization', *The Routledge Handbook of EU Copyright Law* (Routledge (Taylor&Francis) 2021) 11-15.
[43] Judgment of the Court (Fourth Chamber) of 16 July 2009, *Infopaq International A/S v Danske Dagblades Forening*, C-5/08, ECLI:EU:C:2009:465.
[44] "protected by copyright only if they original in the sense that they are their author's own intellectual creation" in *Infopaq I*, C-5/08, ECLI:EU:C:2009:465, paras. 35-37; Kur and Dreier (n 7) 291.
[45] Judgement of the CJEU (Grand Chamber) on 13 November 2018, *Levola Hengelo BV v Smilde Foods BV*, C-310/17, ECLI:EU:C:2018:899.
[46] Levin (n 32) 91-95.
[47] *Levola Hengelo*, C-310/17, ECLI:EU:C:2018:899, para. 33.
[48] *Levola Hengelo*, C-310/17, ECLI:EU:C:2018:899, paras. 34-37.

a manner which makes it identifiable with sufficient precision and objectivity, even though that expression is not necessarily in permanent form"[49]. The Court justified this with the need of the relevant authorities and the individuals to identify the subject matter of copyright protection in a clear and precise way for making sure that author's exclusive rights are duly protected. Also, it is required to eliminate subjectivity and ensure legal certainty[50].

Fundamentally, copyright is considered to be found in artistic and literary works, which are an author's intellectual creations. The EU law requires the works to be original for copyright protection, from the point of requiring "author's own intellectual creation". This means, a work must be a reflection of its author's personality as well as be a product of "creative and artistic work". Also, material fixation is not required. It is sufficient that the expression of a work is responsive to clear and objective human sensation. In Berne, which is the basis of the EU copyright protection, artistic and literary works are defined in a broad way to include "every production in the literary, scientific and artistic domain, whatever may be the mode or form of its expression". Furthermore, it states that derivative products may also be protected by copyright, provided that they will not prejudice to original works' copyright[51].

The European understanding of subject matter of copyright to have "sufficient expressive unity and stability" was also confirmed in *Cofemel* decision[52] of the CJEU regarding clothing design, where the issue concerning the scope of copyright protected "work" was assessed after *Levola Hengelo* case. In this case, jean and t-shirt designs were

[49] *Levola Hengelo*, C-310/17, ECLI:EU:C:2018:899, paras. 38-40.
[50] *Levola Hengelo*, C-310/17, ECLI:EU:C:2018:899, para. 41.
[51] Justine Pila, 'Authorial Works Protectable by Copyright', *The Routledge Handbook of EU Copyright Law* (Routledge (Taylor&Francis) 2021) 65-67.
[52] Judgement of the CJEU (Third Chamber) on 12 September 2019, *Cofemel – Sociedade de Vestuário SA v. G-Star Raw*, C-683/17, ECLI:EU:C:2019:721.

claimed as copyright protected works because "they generate a specific and aesthetically significant visual effect". The Court decided that aesthetics is a subjective sensation and it does not identify the subject matter sufficiently precise and objective, which is among the requirements for copyright protection set in the *Levola Hengelo* decision mentioned above. Also, although it was stated in *Cofemel* that aesthetic considerations can have a role in creativity, the CJEU found that an aesthetic design does not automatically correspond to an intellectual creation bearing the characteristics of its author -a work- thus the requirement of originality is not necessarily met just because the design has an aesthetic effect[53]. It is important because as regards to works of applied art or design, clothing in this case, the CJEU ruled that in the EU law aesthetics is not decisive for copyright protection[54]. Whereas, on the contrary, works of fine arts including textiles and fashion design are required to have aesthetic value under Turkish copyright law (LIAW article 4(4)).

The requirement of originality is assessed by a two-step test created by European case law, which consists of the questions as follows: first, whether the work is "of free and creative choices" of its author in its creation and second, whether the work is the creation of its author's own intellect that reflects their personality[55]. It is true that in case the shape is "solely dictated by its technical function", copyright protection is not possible because there is no originality. In CJEU's eyes[56], for attributing copyright protection to a product it is still important to determine if the author expresses own creativity in an original way through "free and creative choices" in the shape of the product and if this way the product is a reflection of its author's personality[57]. Therefore, it is not decisive if

[53] *Cofemel*, C-683/17, ECLI:EU:C:2019:721, paras. 53-55; Pila (n 51) 69.
[54] Levin (n 32) 86.
[55] Pila (n 51) 71.
[56] Judgement of the CJEU (Fifth Chamber) on 11 June 2020, *SI and Brompton Bicycle Ltd v Chedech / Get2Get*, C-833/18, ECLI:EU:C:2020:461.
[57] *Brompton*, C-833/18, ECLI:EU:C:2020:461, paras. 28-34.

there is also functionality as long as there is original expression[58]. In other words, as understood from *Infopaq I*, *Levola Hengelo*, *Cofemel* and *Brompton* cases, the only requirement for copyright protection in the EU is the originality as formulated by the CJEU. What matters is the original form of expression reflecting the author's own intellectual creation rather than the content, value or purpose[59].

Consequently, it can be said that any original intellectual product constituting its author's own intellectual creation that is expressed objectively clearly and precisely might be considered as a work in the EU[60]. Contrary to Turkish copyright law explained below, the types of works are not *numerus clausus* and each case should be considered in its own particulars with the general cumulative two requirements mentioned above[61]. The threshold of creativity required for copyright protection is usually considered low, and the intellectual product is not required to have artistic merit or commercial value. It does not have to be a product of a heavy labour as it can very well be of instant inspiration, much as a product of a plenty of time spent on[62].

However, exclusive rights granted to authors are explicitly stated in the EU legislation, which are mainly the economic rights of "reproduction, adaptation, communication to the public, distribution"; moral rights of "attribution and integrity (or prevention of modification)". Protection lasts lifetime plus 70 years post mortem[63].

2. Scope of Copyright and the Works Protected Thereby in Turkey

[58] Levin (n 32) 87.
[59] Levin (n 32) 92.
[60] Pila (n 51) 71.
[61] The requirements of "original subject matter being its author's own intellectual creation reflecting their personality" and "the subject matter to be expressed in a clearly identifiable way with sufficient precision and objectivity"; Levin (n 32) 92-93.
[62] Ginsburg (n 25) 4; Paul Torremans, *Holyoak and Torremans Intellectual Property Law* (7th edn, OUP 2013) 200.
[63] Article 1 of the EU Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version).

Turkish copyright law, which is actually called "the law of intellectual and artistic works" in Turkey, includes and regulates all the rules pertaining to the works, authors' or owners' rights and protection. In time, the scope of protection has widened from the core of literary works, music and art to scientific works, cinema and software. Although the rights granted to the authors or owners of different kinds of works are in principle the same, due to the innovation and development, and especially the advent of the Internet, the copyright law had to adapt itself and now has a larger spectrum in terms of scope of protection. Surely, the limits to the protection must be determined in order to provide legal certainty. It is also important to point out the personal nature of copyright, as the work reflects the personality of the authors because it bears their characteristics[64].

As explained above under II.A., LIAW defines the work as "any intellectual or artistic product bearing the characteristic of its author, which is deemed a scientific and literary or musical work or work of fine arts or cinematographic work" in article 1/B. A work shall have the characteristics of its author as well as be under the categories listed in the law. It is considered that the characteristic is in the expression or style that reflects its author's creativity and personal intellectual effort. It is also considered that the subject matter must be an outcome of the author's personal creating and it should not have a high threshold of creativity. The subject matter is not required to be an entirely new intellectual product, or be very rare to be regarded as a work. It depends on the type of work and it should be considered separately for each individual case. The duration of copyright protection in terms of economic rights is the author's life and the additional 70 years (post mortem)[65]. After the author's death, the legal heirs[66] may exercise these rights for 70

[64] Tekinalp (n 5) 8-10.
[65] LIAW article 27.
[66] Turkish Law No. 5846 Art. 19: "If an author has not determined the manner in which the authorities granted to him by the first paragraphs of Articles 14 and 15 are to be exercised or has not left this matter to another person, these rights shall be exercised after his death by the executor, or, if no executor has been

years. If the owner of the economic rights is a legal entity, then the duration of protection is 70 years from the date of release (of the work). On the contrary, the moral rights cannot be subject to legal transaction including transfer and they are forever; there is no limited period of time that the moral rights are to be protected. Only the power to use can be transferred to someone, which does not mean the transfer of the rights[67]. For the copyright protection to come into existence, there is no need for any process or a registration. The mere creation of the work commences the copyright protection immediately, provided that the work has the requirements set forth by the law. Therefore, in order to be an author and having the work protected by copyright, legal capacity is not required[68].

Turkish Law No. 5846 regulates the work types that can be protected by copyright with an exhaustive list (*numerus clausus*)[69]. It is under the articles of 2-6; as article 2 sets out the literary and scientific works, article 3 the musical works, article 4 works of fine arts, article 5 cinematographic works, and lastly article 6 the adaptations and collections. Only the categories of works stated in the law can be protected by copyright. We would like to briefly explain the categories as follows.

a) Literary and Scientific Works

Under the article 2 of the LIAW, there are literary and scientific works having three subcategories within: (i) "works that are expressed by language and in writing and computer programs", (ii) "all types of dances, choreographic works and theatrical works without dialogue", (iii) "all types of technical and scientific photographic works, maps, plans, projects, drawings, architectural designs etc. that lack aesthetic quality".

appointed, successively by the surviving spouse, his children, his testamentary heirs, his parents, his siblings."

[67] Merdivan, Alıca and Yavuz (n 4) 237-238.

[68] Tekinalp (n 5) 12.

[69] Öztan (n 5) 107; Tekinalp (n 5) 36; Güneş (n 5) 63.

Subsequently, works expressed by language in any form are the works that an intellectual product is presented with words, writing, formula, letters, numbers or figures. It does not matter which language is used to express the intellectual creation, it can very well be in Esperanto or sign language or even hieroglyphics[70]. The language or symbols that constitute the work do not even have to be understood by all[71]. It is not important that the intellectual product is fixed in a written form, it can be also spoken, but it is important that it is somehow expressed; because the ideas are not protected[72]. Although the title of the category is literary and scientific works, it does not matter if the topic is related to literature and science, provided that it bears the characteristics of its author and has integrity. Any intellectual product that has originality and expressed by language is protected under the law and included in literary and scientific works category. For scientific works, the subject matter of protection is the gathering and usage of materials, the systematic, structure, style and the expression of the ideas, as well as the references in the work[73].

As for the computer programs or software, the protection is of utmost importance, since the digital age makes almost everything possible by using computer programs and the possibility of infringement of the computer programs are very high, especially given their usually high license fees that might also be necessary because of their costly development procedure. Therefore, in line with Bern Convention, TRIPS and EU regulations[74], computer programs are protected under Turkish law no. 5846 article 2(1)

[70] Öztan (n 5) 81-82; Tekinalp (n 5) 109.
[71] Bozbel (n 5) 33.
[72] According to the LIAW, the form or method or device of which the work is fixed does not matter. The fixation may be either with words, numbers, notes, sound or image, with or without graphical means, physically written or printed or carved or magnetically etc. It is only important that the work is expressed and not just stayed as an idea. Yavuz, Alıca and Merdivan (n 4) 53; Bozbel (n 5) 33-34; Ayhan İzmirli (n 2) 110.
[73] Yavuz, Alıca and Merdivan (n 4) 105-107; Öztan (n 5) 81-82; Tekinalp (n 5) 119-120; Güneş (n 5) 65-66.
[74] In line with the Council Directive 91/250/EEC of 14 May 1991 on the legal protection of computer programs 1991, p. 42–46, see in Bozbel (n 5) 37-38.

and 2(2) within the category of literary and scientific works since 1995 (as well as in articles 1/B, g, h; 22 and 38). This includes the program flow, user interfaces and preparatory designs for software provided that they will result in a computer program[75]. Surely, the subject matter has to have a certain characteristic for being regarded as a work[76].

Secondly, the category of "all types of choreographic works, dances and theatrical works without dialogue", includes performances of gestures and body movements to express mental content, as a dance with choreography or improvisation. There is no requirement here for fixation of the movements into a film or in writing. The performance itself is enough for the copyright protection to arise[77]. However, naturally, in order for this type of works to be protected they need to be created as an outcome of an effort and it has to bear originality. If they occur randomly and do not bear any characteristics, they shall not be protected by copyright[78].

For the third category under article 2, which is "all types of technical and scientific photographic works, projects, drawings, maps, plans, and architectural designs", the important nuance is that these works do not contain any aesthetic value. The subject matter here is the scientific or technical depiction, such as a construction plan or a city map, or a furniture photo. It is sufficient to offer protection if the original depiction is suitable for informing or teaching about a technical or scientific topic. The motive or purpose of the author does not matter, only their characteristic on the work would be taken into account[79]. The architectural plans and projects on the other hand are the two- or three-dimensional designs or drawings forming the outer and inner elements of a

[75] Yavuz, Alıca and Merdivan (n 4) 108.
[76] Ayhan İzmirli (n 2) 121; Güneş (n 5) 66-67.
[77] Öztan (n 5) 81-82; Tekinalp (n 5) 120.
[78] Yavuz, Alıca and Merdivan (n 4) 111; Bozbel (n 5) 34.
[79] Öztan (n 5) 81-82; Tekinalp (n 5) 123-124; Bozbel (n 5) 34-35.

building that depict the structure created according to the scientific and technical principles by the architects. The concept of originality or the characteristics of the author regarding the architectural plans and projects is of scientific and technical quality[80].

b) Musical Works

Under LIAW article 3, musical works are protected. Musical works are defined as including "all kinds of musical compositions both with and without lyrics". It is not important how the sound is obtained or what it is derived from. It can be an electronic sound or a natural one, be bound to a rhythm or not; the requirement here is that it is original and bears its author's characteristics and that it is not random. Therefore, the form is also important, as it corresponds to the arrangement of the sounds, their connection, rhythm and the structure of the music piece. Of course, the protection cannot be extended to the creation methods of the music or the general rules and principles of music such as accords or vocal scales. In every individual case, it is important to determine whether the music or the music piece has integrity and individualism. The scope of protection or its threshold for the musical works is defined according to the degree of individual creativity[81].

In case the musical work is with lyrics, the composition or melody and lyrics are protected together as the musical work. Besides, provided that the lyrics bear its author's characteristics and it is original, it should also be protected as literary work under article 2 separately. The author (lyrics) and the composer (melody) in a song can be different people, as well as it can be the same. The protection can be either together or separate. In case the authors are different, then there is co-authorship, and the authors are protected

[80] Bozbel (n 5) 35-36.
[81] Bozbel (n 5) 41-42; Öztan (n 5) 128-132; Tekinalp (n 5) 124; Ayhan İzmirli (n 2) 111; Güneş (n 5) 74.

separately[82]. Surely, in case there are no lyrics then the author of the musical work is the composer. It also does not matter for the original musical work to be protected whether there are notes, or it is performed with any instruments or only by the voice of a human. The subject matter of protection here is actually the substance that is expressed by the music, not the style or genre itself[83].

c) Works of Fine Arts

Third category set forth in LIAW for copyright protected works are the works of fine arts. Under its article 4, works of fine arts are listed as follows, provided that they have aesthetic value: *"Oil paintings or watercolours, all types of drawings, patterns, pastels, engravings, artistic scripts and gildings, works drawn or fixed on metal, stone, wood or other material by engraving, carving, ornamental inlay or similar methods, calligraphy, silk screen printing; sculptures, reliefs and carvings; architectural works; handicraft and minor works of art, miniatures and works of ornamentation, textiles, fashion designs; photographic works and slides; graphic works; cartoons; all kinds of personifications."* It can be seen from the semicolons that the law sub-categorised this category. This list is not exhaustive, it is possible to include more provided that they meet the requirements of this article[84]. Also, sketches, designs, models, drawings and similar works may be used as designs and protected by the law thereof. In the article 4, it is also stipulated that such use does not affect their status as the work of art protected by copyright. For instance, considering that graphic works consist of, mostly, designs, they might also constitute trademarks. In theory, since the logos are ordered by the company for the designer to create it, the designer would not have any economic rights. However, it must be accepted that the designer maintains their moral rights. In any case, there is

[82] Tekinalp (n 5) 122.
[83] Tekinalp (n 5) 124.
[84] Güneş (n 5) 75-76.

cumulative protection when the work qualifies for more than one IPR[85].

The most important feature of this category of work is that a work of fine art has to have an aesthetic value. It means that the work should be liked, be beautiful, be one of a kind and unique. Surely, it is not possible for a work to be liked or to be found beautiful by everyone[86]. In any case, if the work does not bear any aesthetic quality, then it is not categorised as a work of fine art but at least as a work of another category (provided that it is covered) or maybe as a design, if it has the necessary requirements[87]. It is also noteworthy that the form or material of the work does not matter. It can be made on a paper or a metal or it can be digital, whereas it can be made of stone or of wood or even of food such as chocolate[88].

d) Cinematographic Works

Fourth category of work that is brought in the law later than the first three is the cinematographic works. After the enhancement of popularity of cinema and its development, as well as its complex structure and the fact that there are usually (and naturally) a number of people who make them happen with their different contributions, there has been a need for a category of protection created just for cinema separately. Article 5 of LIAW was amended in 2001 and as it can be seen from its wording, there are certain requirements for a work to be classified as cinematographic, as follows: i) "a series of related moving images", ii) that "can be shown by using electronic or mechanical or similar devices", iii) which "bear the characteristics of their creators/owners". Also, a director and a scriptwriter are a must, although they can be the same person[89]. The topic,

[85] Tekinalp (n 5) 125-126.
[86] Bozbel (n 5) 44.
[87] Tekinalp (n 5) 126.
[88] Bozbel (n 5) 44-45; Ayhan İzmirli (n 2) 112-113.
[89] Tekinalp (n 5) 127; Ayhan İzmirli (n 2) 115; Güneş (n 5) 84-85; Mustafa Ateş, 'Fikir ve Sanat Hukukunda Sinema Eseri ve Eser Sahipliği', *Fikir ve Sanat Hukukuna Dair Makalelerim* (Adalet 2016) 249.

subject or the content of the work is actually irrelevant as the legislator only gave examples in the article[90]. Also, the series of related moving images do not have to have any sound, the protection is given whether there is sound or not. On the other hand, the legislator tried to have an open mind regarding the advancement of technology and therefore, the device of showing or the material that the movie is fixed also do not have to be of a certain kind[91], as long as the related series of images can be fixed and shown afterwards.

It is considered that the term "audio-visual works" is now supplanting the term "cinematic works". New regulations seem to try to include that term, so as to create a broader category for intent to cover both present technology such as known cinema and possible upcoming related work types created by new technologies[92].

e) Adaptations and Collections

The last category to be explained is the category of adaptations and collections because by the LIAW article 6 the adaptations and collections are also deemed to be protected as works. There is a list in the said article with the definition of *"Intellectual and artistic products created by benefiting from another work but that are not independent of such work are adaptations"*, however, the list is not exhaustive but only exemplary[93] as it says these are among the *"the main types"*: converting literary and scientific or musical works or works of fine arts into cinematic works, or into a form that enables broadcasting; translations; making a collection of the works of an author either as a whole or according to a particular plan; annotation or comment to the work of a third party; any modification of a computer program; databases (It is noted that the protection

[90] Bozbel (n 5) 45; Ateş (n 89) 247.
[91] Tekinalp (n 5) 128; Ayhan İzmirli (n 2) 114-115.
[92] Bozbel (n 5) 46; Ateş (n 89) 247.
[93] Bozbel (n 5) 49.

of database cannot be extended to its content individually and separately). It is considered that the adaptations are made by conversion of a work to another in the same category, with the exception of cinematic works. This means, except adaptation into cinema, conversion between different categories of the works in law would not be defined as adaptations but rather as a new independent work. Additionally, the mere performance of a work such as reading a poem or playing music is not considered as adaptation, as well. The reason is that the performer stayed with the work and did not create a new work; only expressed it again[94].

The following paragraph of article 6 states that the adaptations also must bear the characteristics of the adaptor and they are to be created without prejudice to the rights of the original work's author, to be protected under copyright law and deemed as work. For being able to use economic and moral rights on the adaptation, it is required to obtain the authorisation of the original work's author with regards to the adaptation right in accordance with the requirements set forth under LIAW article 52[95]. This means that although the adaptation can be qualified as a work and protected by copyright in case it bears the characteristics of its adaptor, it can constitute copyright infringement. The fact that the adaptation itself is a new work protectable by copyright does not justify the violation or infringement. Also, it is important to note that not just adaptations but collections also need to bear the characteristics of its creator in order to be protected as a work[96]. For using an adaptation, it is required to obtain authorisation from both the original author and the adaptor[97].

The fact that a work is merely put on the digital environment, such as a book being

[94] Bozbel (n 5) 49; Öztan (n 5) 167, 172.
[95] Pelin Karaaslan, 'Sosyal Medyada Kullanılan Caps'lerin Telif Hukuku Boyutu Ve Yasal Düzenlemelerin Yeterliliği' (2020) 24 Ankara Hacı Bayram Veli Üniversitesi Hukuk Fakültesi Dergisi 46.
[96] Öztan (n 5) 158; Ayhan İzmirli (n 2) 117-118.
[97] Öztan (n 5) 159.

scanned and digitised, does not mean that the former work is being adapted. Unless the later version bears a different creative feature that gives it its author's characteristic, we cannot consider it being an adaptation[98].

C) Rights of the Author or the Copyright Owner

National copyright systems of the EU States comprise of two particular legal traditions as common law in Ireland, Malta and Cyprus (and formerly, before Brexit, the United Kingdom) and civil law in continental Europe. The continental law is based on the authors' rights law[99]. In principle, it is inspired by the French "droit d'auteur" that emerged after the French Revolution. This type of system is characterised by the moral and economic rights vested in the author. In continental law system, it is possible to transfer economic rights[100], as opposed to moral rights that are non-transferrable and also cannot be waived[101]. On the other hand, in the common law system, economic rights predominate and for instance, moral rights may be waived. It can be safely said that the rules still depend on the national law and copyright is a difficult matter to fully harmonise due to the different understanding of author's rights[102].

As a part of the civil law system or so-called continental law system, the author has economic rights (such as, *inter alia*, right of reproduction or communication to the public and making available rights) and moral rights (mainly authority to disclose the work to the public, designate the name and prohibition of modification), as explained

[98] Ayhan İzmirli (n 2) 118-119.
[99] Torremans (n 62) 254; Kur and Dreier (n 7) 242; Willem Grosheide, 'Moral Rights', *Research Handbook on the Future of EU Copyright* (Edward Elgar 2009) 242-243.
[100] The economic rights are transferable, as well as they can be licensed, be subject of legal transactions and descend. Whereas, moral rights cannot be transferred and be subject to legal transactions, and also cannot descend. Merdivan, Yavuz and Alıca (n 4) 233-237.
[101] Dutch legislation is considered as an exception, as in the Netherlands, the authors may agree to partially waive their moral rights. European Parliament (n 39) 4.
[102] European Parliament (n 39) 3-4; Dr. N. Helberger, E.H. Jannsen, N.A.N.M van Eijk, C.J Angelopoulos, J.V.J van Hoboken, 'Legal Aspects of UCC' (*SSRN*, 2009) <https://ssrn.com/abstract=1499333> accessed 25 February 2022, 7; Dutfield and Suthersanen (n 9) 76.

below.

1. Author's Economic Rights on the Internet

Economic rights of authors in general grants the authors the authority to exploit their work economically, determine the manner of such exploitation as well as preventing third parties from exploiting their work[103]. They are mainly the rights of "reproduction, adaptation, distribution, public performance, broadcasting, translation and communication to the public"[104]; and not all can be used or infringed on the Internet. For instance, due to its nature, the distribution right only concerns the hard copies. We will briefly explain the rights pertaining to OCSSPs.

a) Turkish Legal Framework

In Turkish law, the author's rights are determined as *numerus clausus,* and they come into existence separately each time for each and every work[105]. The limit is on the number of the rights but not on their scope, as they can be extended to the new technological developments where possible[106]. Each economic right is exclusive and independent[107]. In this study, we would like to mention the ones closely related to the Internet and the use of social media.

First, we would like to briefly explain the adaptation right. It involves creating a new work by benefiting from an existing work. This right grants the author an authority to independently exploit the adaptation[108]. Here, a new work is created from another type of work by giving characteristic and creative effort. Since adaptations are also protected as works, the adaptor enjoys author's rights on the new work. It is significant to note that

[103] Ayhan İzmirli (n 2) 140; Merdivan, Yavuz and Alıca (n 4) 232.
[104] WIPO (n 18).
[105] Merdivan, Yavuz and Alıca (n 4) 231.
[106] Tekinalp (n 5) 180.
[107] Güneş (n 5) 116-117.
[108] Ayhan İzmirli (n 2) 141; Güneş (n 5) 126-128.

the right of adaptation can only be exercised for the particular type of work that is granted for and it is required to receive authorisation of the authors of both the original work and the adaptation for adapting the adaptation (again)[109]. Although the translation right is particularly mentioned in Berne, in Turkish law it is not regulated separately. Therefore, in Turkey, the authority to decide whether to allow a work to be translated into other languages is considered within the right of adaptation[110].

One of the first, oldest, most basic and principle economic rights is the reproduction right, since copyright literally stemmed from the idea of protecting the works from copying[111]. Since copying became increasingly easier and common throughout the years due to the technological developments, the right of reproduction did not lose its significance, on the contrary, it maybe even became more important because it became way easier to cause infringement this way[112]. Accordingly, the reproduction methods listed in the LIAW are not exhaustive and the reproduction within the meaning of its article 22 can occur in any way or form, directly or indirectly, as a whole or in part[113]. Reproduction stands for producing utilisable copies from a work in any manner such as saving to another medium or transmitting to another platform. The point is if the reproduced copy is as good in terms of fulfilling the need without referring to the original work, it must be accepted that it constitutes the act of reproduction, even if there is only one copy[114].

Downloading a work certainly constitutes reproduction, whereas hyperlinking in principle does not[115]. It is also considered that putting a work on the Internet constitutes

[109] Ayhan İzmirli (n 2) 141-142; Tekinalp (n 5) 182-183; Bozbel (n 5) 74-75; Güneş (n 5) 127-128.
[110] Ayhan İzmirli (n 2) 143.
[111] Ayhan İzmirli (n 2) 143; Tekinalp (n 5) 184; Güneş (n 5) 119.
[112] Ayhan İzmirli (n 2) 144.
[113] Ayhan İzmirli (n 2) 144; Tekinalp (n 5) 184-185; Öztan (n 5) 355-359; Güneş (n 5) 119.
[114] Ateş (n 3) 72-73; Güneş (n 5) 120.
[115] Tekinalp (n 5) 184-185; Ansgar Ohly, 'Economic Rights', *Research Handbook on the Future of EU Copyright* (Edward Elgar 2009) 218; Ali Demirbaş, 'Telif Hukukunda İnternet Linki ve Avrupa Adalet

reproduction and since it allows countless of reproduction, the digital copy would infringe the author's exclusive right[116]. An important distinction in reproduction may be between caching and user-shared data or copies without license. In the computer world, a cache is defined as "a high-speed data storage layer", which stores the subset of data transiently, for serving data faster in the future by accessing its primary storage location. So, caching allows the efficient reuse of formerly recovered or estimated data[117]. Caching is a required action of the website being saved to the cache of the computer, in order for the website to be displayed. In other words, it is technically necessary and a prerequisite of the functioning of the Internet. Therefore, it is only fair that caching is not considered as infringement to the reproduction right. Whereas, contrary to the fact that caching occurs technically, transiently and without the intention of copying, the copies made and shared by the users without authorisation or use of copies of unlicensed works is constant, has an element of knowing the illegality of the action and an intention to be a part of such illegality, and it concerns the reproduction right[118].

Regarding right of performance, it can be said that there should be a public performance of a work. It is possible to either perform the work on a stage or play a song to a crowd on the street or else. This right covers, inter alia, playing (music), exhibiting (works), performing, telling (a story)[119]. Performance is actually presenting the work to the public in a way that it appeals to human senses, except publishing. It can be done directly without any transmission device or indirectly with a transmission device, and it

Mahkemesinin Svensson ve Bestwater Kararları' (2018) 5 İstanbul Medipol Üniversitesi Hukuk Fakültesi Dergisi 174; Tekin Memiş, 'Fikri Hukuk Bakımından Link ve Frame Kavramı' (2011) 22 Milletlerarası Hukuk ve Milletlerarası Özel Hukuk Bülteni 406-407.

[116] Ateş (n 3) 71-73.

[117] 'Caching Overview' (*Amazon.com.tr*, 2021) <https://aws.amazon.com/tr/caching/> accessed 25 November 2021.

[118] Ayhan İzmirli (n 2) 144-145; Tekinalp (n 5) 185.

[119] Tekinalp (n 5) 193.

occurs momentarily. It is not principally stored[120]. It is considered that communication to the public and making available rights are a special type of right of performance or at least they can be considered related depending on the act, provided that there is conveyance of the performance from one place to another to an indefinite number of public[121].

At first the communication to the public right was implemented in Turkish law as the communication via radio and other similar technical means to transfer signs, sound or image in 1951 until 2001. Due to the technological developments and new international instruments, the related provision (article 25) was altered into an umbrella right as "the right to communicate a work to public by devices enabling the transmission of signs, sounds and/or images" in 2001 and a special provision of additional article 4 allowing the notice and takedown procedure in 2004. Therefore, irrespective of the means to communicate, communication of a work to an indefinite number of public would concern this right but the case law on the matter is important as to determine which acts would constitute infringement[122].

Overall, in article 25 of the LIAW, it is stated "communicate the original of a work or its copies to public by way of broadcasting by organizations that broadcast by wire or wireless means such as radio and television, satellite or cable, or by devices enabling the transmission of signs, sounds and/or images including digital transmission, or by way of re-broadcasting by other broadcasting organisations that obtain the work from such broadcasts", so that any communication either by broadcasting or digital transmission over the Internet is covered by the exclusive right and also stated "the sale

[120] Güneş (n 5) 131-132.
[121] Ayhan İzmirli (n 2) 149-152; Tekinalp (n 5) 194; Güneş (n 5) 132.
[122] Fatoş Altunç, 'Sosyal Medya Üzerinden Umuma İletim – Genel Çerçeve', *Dijital Alanda Telif Hakları-Telif Haklarında Güncel Gelişmeler (Telif Hakları Sempozyum Bildirileri)* (İletişim Stratejileri Ajansı 2020) 47-48.

or other distribution or supply of the work or its reproduced copies to the public by wire or wireless devices and the communication of the work to the public by providing access to it at a time and place chosen by natural persons", to include the making available to the public. Therefore, it is accepted that putting a work on the Internet by other than the author may be regarded as a part of said right provided that it is unauthorised. Public would be an indefinite number of people that are outside the scope of family and colleagues from work that would reasonably know the work as a matter of course. "Communication to the public" is presenting the work to the end user[123]. Actually, regarding the communication on the Internet and social media, it is considered that the making available right is more corresponding, since it provides access for a user-selected time and place[124].

It is noteworthy that the distribution of works is different from the communication to the public and under LIAW art. 25(3), the latter should not prejudice the right of distribution. For instance, the authorisation for both rights should be received separately as one would not suffice for another[125].

b) European Legal Framework

Rights of adaptation, reproduction, performance and communication to the public are also recognised in the EU law and are not very different from their reflection in the Turkish law. In addition to the explanations made above regarding such exclusive rights, we would like to continue from the reproduction as even in the Berne, it was stipulated very broadly that reproduction of a work may be in any way or shape[126]. Later on, InfoSoc Directive article 2 also included reproductions of any form or way, direct or indirect, as

[123] Tekinalp (n 5) 194, Ayhan İzmirli (n 2) 151; Ateş (n 3) 74; Güneş (n 5) 133.
[124] Bozbel (n 5) 94-96.
[125] Bozbel (n 5) 87.
[126] Caterina Sganga, 'The Right of Reproduction', *The Routledge Handbook of EU Copyright Law* (Routledge (Taylor&Francis) 2021) 124-126; Durfield and Suthersanen (n 9) 88.

well as temporary or permanent, thus covering the digitalisation and storage of works[127]. It can be said that the reproduction right of the authors is mostly harmonised and has common grounds for all the Member States and generally more undisputed in its basics[128]. In addition, it is noteworthy that since adaptation of works involves the work somehow as a whole or in part, in some national jurisdictions the right of adaptation is not considered independently and separately, but under the right of reproduction, such as in France[129]. On the other hand, the exception and limitation set forth in its article 5(1) for reproduction right, which is the only mandatory one for the Member States, covers the transient (for a very short time) and incidental temporary acts of reproduction dependent to and fundamental for a technological operation, without having any independent meaning, purpose or economic importance, such as caching[130]. In addition, their only purpose must be "to enable a transmission in a network between third parties by an intermediary, or a lawful use of a work or other subject-matter to be made" for being exempted from reproduction right vested in the author[131]. Five conditions stated in said article for exemption are cumulative[132]. InfoSoc Directive art. 5(2) includes more exceptions to reproduction right, which are optional, such as private or educational use[133]. Due to their optional nature, Member States have various national applications and the rights have an uneven scope throughout the EU, which is now tried to be smoother with

[127] Sganga (n 126) 129.
[128] Ohly (n 115) 214.
[129] Ginsburg (n 25) 17.
[130] In *Public Relations Consultants Association Ltd v Newspaper Licensing Agency Ltd* (C-360/13) case, the CJEU decided that viewing websites, which includes making copies of the websites on the user's computer screen and in the internet cache of that computer's hard disk, does not require the authorisation of relevant right holders and instead, it is an activity that falls within the exception of temporary copies foreseen in art.5(1) of the InfoSoc Directive; Eleonora Rosati, 'What Does The European Commission Make Of The EU Copyright Acquis When It Pleads Before The CJEU? The Legal Service's Observations in Digital/Online Cases' (2020) 45 European Law Review <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3455387> accessed 3 February 2022, 83; Ginsburg (n 25) 14.
[131] Sganga (n 126) 130-131; Ayhan İzmirli (n 2) 84.
[132] *Infopaq I*, C-5/08, paras. 54-55; Sganga, (n 126) 136-137.
[133] Kur and Dreier (n 7) 271.

the CDSMD. Also, new mandatory exceptions foreseen in CDSMD would be applied for the right of reproduction as well, with regards to data and text mining for scientific purposes, online teaching and digitisation regarding preserving collections[134]. Additionally, E-Commerce Directive article 13 states that "automatic, intermediate and temporary storage of that information, performed for the sole purpose of making more efficient the information's onward transmission" does not create liability for the Internet Service Providers (ISP), particularly when there is no modification of the information or interference by the provider[135].

After the Berne, which naturally did not mention Internet, and in an attempt of harmonisation with the TRIPS, which did not clearly deal with Internet, the WCT had a digital agenda and one of the topics was spreading works over the Internet[136]. It was considered that the existing reproduction right in the Berne was wide enough also for digital reproduction and therefore, it was not changed for the better in the WCT or TRIPs[137]. It is clear that the digital storage of a work in electronic media or a digital copy of a work is a reproduction under the Berne article 9, but reproduction right was not enough for covering all acts of communication on the Internet[138]. In conclusion, scope of communication to the public right was reformed and a special right for the digital era within that scope was created, which is the "making available right" in art. 6(1) of WCT. This right vest the authors an exclusive right for authorising any communication and making available of the author's work to the public by any means anywhere and anytime that the public chooses[139]. In the EU law, this right was first regulated under InfoSoc Directive art. 3 and CJEU case law determines its main principles. Although there is no

[134] Sganga (n 126) 133-134.
[135] Ayhan İzmirli (n 2) 147.
[136] Altunç (122) 46; Ayhan İzmirli (n 2) 151.
[137] Sganga (n 126) 127.
[138] Altunç (n 122) 46-47.
[139] Flanagan and Maniatis (n 25) 79-80.

complete definition for the scope of the right, it is considered that it should be interpreted as it covers any communication or transmission to public in any place different than the origin. In that sense, since the public is in a different place than the work originates, it is different from public performance right, where the communication is made to the public at the same time and place[140]. Naturally, broadcasting and online transmission is within the scope of article 3. In order to be regarded as a part of said right, the act shall be (i) a communication (ii) to a public[141]. The public, to which the work is communicated, should be reasonably numerous[142]. However, it is not important if the communicated public actually uses the work. Another criterion is that the communication is made to "a new public", which was not taken into account by the right holder before when giving authorisation, or it is made by new technical means ("*Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA"* case, C-306/05[143]; *Svensson* case, C-466/12). On the other hand, another criterion is making profit or knowing the illegality of the content (*GS Media* case, C-160/15)[144]. However, it is also important to point out that the interpretation whether the act amounts to "communication to the public" must be made individually under the special circumstances of each case[145].

Making available right characterises in enabling public access to the work at any time and any place that the public choose, which actually means on demand. For instance, television services or streaming without the option of accessing it other than the time and place it is actually on would be regarded as communication to the public, whereas, video-

[140] Ohly (n 115) 225; Ginsburg (n 25) 18.
[141] Christina Angelopoulos, 'Primary and Accessory Liability in EU Copyright Law', *The Routledge Handbook of EU Copyright Law* (Routledge (Taylor&Francis) 2021) 195; Jane Ginsburg and Alain Strowel, 'Copyright Liability for Hyperlinking' *Research Handbook on Intellectual Property and Digital Technologies* (Edward Elgar 2020) 221.
[142] Angelopoulos (n 141) 198.
[143] Judgment of the Court (Third Chamber) of 7 December 2006, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA.*, C-306/05, ECLI:EU:C:2006:764.
[144] Altunç (n 122) 49-50.
[145] Angelopoulos (n 141) 196.

on-demand services or video or music uploading and accessing through social media would be making available as it is user-initiated and it offers the users individual control over accessing the work[146].

2. Author's Moral Rights on the Internet

It depends on the legal system to consider which types of moral rights exist and how to treat them. In civil law system moral rights are non-transferrable and they also cannot be waived[147]. The main idea on moral rights is that they are established from the spiritual connection between the author and the creation[148]. The principal moral rights, as it can be said that they are generally accepted, are "right of identification as author" and "right of integrity of a work". On the other hand, in the common law system, economic rights transcend. A certain harmonisation of these systems commenced at the Berne, because it internationally recognised "the right of identification" and "the right of integrity" under "right to claim authorship" and "right to object to certain modifications and other derogatory actions", respectively[149]. Notwithstanding, those are incorporated as granted rights and may be waived or transferred in common law systems (British and Irish law for instance)[150]. As it can be seen clearly, moral rights still are one of the areas in which national law presents great difference, besides the works excluded from copyright protection and its exceptions[151].

a) European Legal Framework

First of all, according to the EU InfoSoc Directive; national laws, Berne, WCT

[146] Angelopoulos (n 141) 195-196.
[147] Dutch legislation is considered as an exception, as in the Netherlands, the authors may agree to partially waive their moral rights. European Parliament (n 38) 4; Dutfield and Suthersanen (n 9) 89; Grosheide (n 99) 261.
[148] Ayhan İzmirli (n 2) 135; Merdivan, Yavuz and Alıca (n 4) 233; Torremans (n 62) 266.
[149] Consequently, those two moral rights have been incorporated into British and Irish laws. European Parliament (n 39) 4.
[150] European Parliament (n 39) 3-4; Torremans (n 62) 265-266; Ginsburg (n 25) 14.
[151] European Parliament (n 39) 3-4.

and WPPT should be exercised when it comes to moral rights. Moral rights are not stipulated in detail once again in the Directive, instead, it is left to the EU States to regulate moral rights in accordance with the said legal instruments, with a passive approach[152]. In the Berne article 6*bis*, it is explicitly stated that the moral rights are independent from economic rights, the right to claim authorship of work and to challenge any deformation or modification including any disparaging action regarding the work with prejudice to author's reputation or honour shall remain even after economic rights are transferred and even after author's death. WCT also states that the Berne Convention would be applied regarding moral rights.

Right of identification or attribution (or paternity right), grants the author the right to have the authorship of the work and "be recognised in clear and unambiguous fashion". It is, again, broad as it covers not only giving the name but also choosing not to put their name on the work, as well as using a pseudonym. On the other hand, right of integrity gives the author right and authority to interfere with any kind of change, modification or alteration on the work, including additions or deletions[153]. These rights, as mentioned above, are covered in Berne and therefore, they are the most commonly accepted moral rights of minimum standard[154]. However, in different jurisdictions of the EU Member States, it is possible that there are more types of moral rights accepted, such as French and German copyright laws. In addition to the attribution, publication right is also recognised to determine to make the work available to the public for the first time (same as the right of disclosure explained below), as well as a different right called withdrawal and repentance. Such right gives the authors the authority to decide on the future reproduction or representation of the work after being public. Lastly, French copyright

[152] Ayhan İzmirli (n 2) 86; Jacques de Werra, 'The moral right of integrity', *Research Handbook on the Future of EU Copyright* (Edward Elgar 2009) 270.
[153] Dutfield and Suthersanen (n 9) 90-91; Ginsburg (n 25) 13.
[154] De Werra (n 152) 268.

law includes a "right to respect", resembling the right to prohibit modification in Turkish law, as the purpose is to protect both the author's and work's reputation and honour by preventing modifications. On the other hand, as another example, German law sees the moral rights as a part of personality rights[155]. German moral rights are also similar to both French and Turkish laws, as it covers rights of disclosure, attribution, opposing modifications or distortions or alterations and right of withdrawal (in case of changing opinion regarding the holder of the rights for exploitation). There is one additional right that is similar to the Turkish right granted in LIAW article 17, which will not be explained because of its irrelevance to the social media, which is so-called "right of access" in German law allowing the author to request the work back temporarily from the possessor[156]. Consequently, it can be said that especially in terms of moral rights, there seems to be different approaches and although there is a core set of moral rights, some national laws may impose more depending on their perception.

b) Turkish Legal Framework

Turkish IP law stipulates that the author holds the moral rights of "authority to disclose the work to the public", "designate the name" as well as "prohibition of modification and rights of the author against persons who own or possess a work"[157], as again *numerus clausus*. The protection granted through moral rights does not expire[158]. These rights cannot be waived or transferred, also they are nonhereditary[159]. Still, it is possible to transfer the authority to use the moral rights, which would be different from transferring the ownership of the rights[160]. It can be clearly seen that the amount and scope

[155] Grosheide (n 99) 261.
[156] Grosheide (n 99) 262-263.
[157] LIAW articles 14-17.
[158] Ayhan İzmirli (n 2) 135.
[159] Güneş (n 5) 136.
[160] Merdivan, Yavuz and Alıca (n 4) 233-239.

of moral rights are more extensive here. LIAW imposes more in favour of the authors in that sense.

We would like to briefly explain the moral rights in general as follows: first, the "authority to disclose the work to the public" is the power of authors to decide the time and manner of disclosure of their work to public for the first time as well as giving information about the contents of the work. It can be done in any way. The public represents people outside the author's close circle of friends and family, mainly an indefinite number of people. It is considered that disclosure to the public is a one-time-act. Once a work is disclosed to the public, there is no turning back, as it leaves the author's privacy and becomes work-made-public[161]. A work is regarded as disclosed to the public only if it was done so with its author's consent. Also, it cannot be in a way that would harm the author's reputation and honour under LIAW article 14(3). Surely, a work can be publicly disclosed via the Internet and social media[162]. Disclosing a work on the Internet, which has not yet been published by the author or with his authorisation would infringe said right[163].

[161] Merdivan, Yavuz and Alıca (n 4) 261-263, 278. It is important to mention that the Turkish Court of Cassation found in its several decisions that the right to disclose the work to the public does not end or exhaust after first disclosure and at each unauthorised disclosure it is possible to enforce this right. For instance, in its decision on 28.02.2008, it is stated that the principle of exhaustion in IP rights cannot be applied to the moral rights and therefore, even if the work had been disclosed to the public before, in case it is disclosed to the public by a third party again by way of infringement to the economic rights of reproduction, distribution etc., it will constitute infringement to the right of disclosure as well and gives the author the right to ask for non-pecuniary damages (Judgement of the Turkish Court of Cassation (11. Civil Chamber) of 28 February 2008, E.2007/576, K. 2008/2298). Also, in its other decision rendered in 2007, the Court found that although disclosure to the public is a one-time act, this way the work is being made public and becomes a subject matter of protection of intellectual property law. The purpose of an author's moral rights is to protect and encourage intellectual creativity. In that sense, the right to disclose the work to the public will continue after the work is made public and in case of infringement of economic rights such as reproduction and distribution, it gives the author to ask for moral damages alongside monetary damages. The Court stated that accepting the opposite of this view would result in protection of piracy, instead of the author (Judgement of the Turkish Court of Cassation (11. Civil Chamber) of 25 April 2007, E.2006/3297, K. 2007/6264). Accepting the Court of Cassation's view is more favourable for the authors. This way, the author may ask for, inter alia, non-pecuniary damages and there is no need for the act to harm the author's reputation; Merdivan, Yavuz and Alıca (n 4) 263-266; Güneş (n 5) 139-141.

[162] Ayhan İzmirli (n 2) 136; Tekinalp (n 5) 164-168; Bozbel (n 5) 101-104; Merdivan, Yavuz and Alıca (n 4) 263, 274.

[163] Ateş (n 3) 71.

Secondly, the authority to designate a name gives the authors the right to determine to state (or not state) their name while disclosing it to the public, as well as to use only their initials or a pseudonym. This right covers the mentioning of name anywhere the work is used, not only on the work itself. This means, it also includes the right to be represented as the author and the authority to prohibit others to make it look like they created the work[164]. In principle, the work is deemed as belonging to the person whose name is on the work and unless the author does not claim authorship, not mentioning the author's name would constitute the infringement of the right (or authority) to designate a name. Also, whenever a work is put on the Internet without the name of its author, it is possible to infringe this right[165]. This can occur particularly in cases of hyperlinking[166].

The last one to explain with regards to the moral rights on the Internet is the right to prohibit modification. Hereunder it is not possible to modify the work or make any alteration, addition or removal without the authorisation of the author. These actions were meant as exemplary, modification in the work may also happen through any other action[167]. The reason is that a work comprises a whole with its content and style, and the characteristic of its author does not present itself only in the entirety of the work but also in every part or detail. Therefore, any modification in a work may result in disrupting its integrity and thus, the work may lose its author's characteristic, or it may even damage the author's honour or reputation[168]. However, in LIAW article 16 there is an exception. It is possible for a person adapting, disclosing to the public, reproducing, publishing, performing or otherwise distributing a work in any legally permitted way to make

[164] Tekinalp (n 5) 168-170; Öztan (n 5) 305-306; Merdivan, Yavuz and Alıca (n 4) 346-347; Güneş (n 5) 141-142.
[165] Merdivan, Yavuz and Alıca (n 4) 362; Ateş (n 3) 71.
[166] Ayhan İzmirli (n 2) 137-138.
[167] For instance, changing the style of expression, adding certain texts in a movie, destroying a work of fine art, covering a part of a painting with paint, adding music to a silent movie, colouring a black and white film would be examples for modifications. See more in Merdivan, Yavuz and Alıca (n 4) 453-455.
[168] Merdivan, Yavuz and Alıca (n 4) 450-452; Güneş (n 5) 145-146.

modifications that "are deemed indispensable due to the technique of adaptation, reproduction, performance or publication", without acquiring special authorisation. Even if there is a written and unconditional authorisation from the author, it is still possible to prevent any alteration prejudicing his honour and reputation or damaging the characteristics of the work[169].

D) Digital Rights Management

"Digital Rights Management" (DRM) is defined as protecting, monitoring and restricting the intellectual property rights over the digital media or data with regards to the chosen technique, by using electronic means[170]. It has the function of providing right holders the means to protect their rights by valid requests. It resembles the watermarking practice in the printed works, as it has the same goal. Hereby, the information regarding the copyrighted work is encrypted in the digital work, which determines the licensing terms. It gives the user the chance to see the terms and conditions, the rights to be used. When the user chooses to engage in licensing, the license fee is conveyed to the right holder, which makes the operation more secure[171].

WIPO Copyright Treaty article 12(2) defines the term "rights management information" as "information which identifies the work, the author of the work, the owner of any right in the work, or information about the terms and conditions of use of the work, and any numbers or codes that represent such information, when any of these items of information is attached to a copy of a work or appears in connection with the communication of a work to the public" and in its paragraph 1 it states that effective and

[169] Ayhan İzmirli (n 2) 138-139; Tekinalp (n 5) 171-172; Öztan (n 5) 315-333; Bozbel (n 5) 108; Merdivan, Yavuz and Alıca (n 4) 461-466.
[170] Ayhan İzmirli (n 2) 31; 'Sayısal Haklar Yönetimi (DRM)' (*Bilgitoplumu.gov.tr*, 2006) <http://www.bilgitoplumu.gov.tr/wp-content/uploads/2014/04/Eylem20_Sayisal_Haklar_Yonetimi.pdf> accessed 4 August 2021, 12.
[171] Ayhan İzmirli (n 2) 31.

adequate remedies should be legally provided against persons knowing or can reasonably know that they "induce, enable, facilitate or conceal an infringement of any right covered by this Treaty or the Berne Convention". Besides, in InfoSoc Directive, subject of DRM is mentioned accordingly[172]. Under the article, "rights-management information" is described as information identifying the work provided by the right holder. Contracting States are to provide suitable legal protection against aware acts of removing or modification of relevant electronic information, as well as distributing, broadcasting or communication of works without authorisation.

DRM consists of two essential elements: identification of the IP rights and restriction of use. It is crucial to identify the IP rights on the work in question and their owners, as well as the time of creation. The method of identification also bears importance, which must be a pre-determined and standardised method on the media where the works are. On the other hand, the restriction of use is a measure set by the right holder that may constitute blocking access to a content as a whole or in part (time-wise or completeness-wise or continuity-wise) or prevention of copying and altering the content[173].

There are DRM organizations such as Creative Commons or CORAL, as well as international projects such as IMPRIMATUR, MUSE or RightsWatch in different areas[174]. As they are explained in their respective parts of this study, the OCSSPs, especially YouTube and Facebook, also have their own extensive digital rights management and copyright protection tools to help prevent infringement on their platforms.

[172] Article 7 of the InfoSoc Directive with the title of "Obligations concerning rights-management information".
[173] Ayhan İzmirli (n 2) 31-32; Kültür ve Turizm Bakanlığı (n 170) 13-14.
[174] Kültür ve Turizm Bakanlığı (n 170) 17-22.

E) Non-fungible Tokens (NFTs)

Due to the rapid advancement of technology, it is inevitable that new kinds of works emerge. Some say that non-fungible tokens (NFTs) can be considered as a new type of art; some say it is some kind of a platform, which is actually a part of Ethereum blockchain and holds information. It actually can be anything such as an image, music, or even a tweet[175]. Since it is extremely new, it is still in process to be understood. Although not directly within the scope of this study, we wanted to at least paint it with a broad brush and therefore included the NFTs to this study, because it emerged from the digital realm and it might sometimes include digital art forms concerning copyright, so somehow related.

First, it is important to define the concept of non-fungible tokens (NFTs). Fungible means *"moveable perishable goods of a sort that may be estimated by number or weight, such as grain, wine, etc.*"[176] and thus, on the contrary, non-fungible means unique and not interchangeable or not possible to replace. Non-fungible token is defined as *"a unique digital identifier that cannot be copied, substituted, or subdivided, that is recorded in a blockchain, and that is used to certify authenticity and ownership (as of a specific digital asset and specific rights relating to it)"*[177]. So, an NFT is a digital asset representing objects such as, shoes, bags, music, videos, video game items, GIFs or other kind of art or it simply anything digital available for trading on blockchain. Due to blockchain technology, it is possible to authenticate the NFT and verify its ownership

[175] An NFT version of Jack Dorsey's (CEO of Twitter) first tweet saying "*just setting up my twttr*" was sold for 2.9 million US dollars at an auction and the buyer considered the tweet as the Mona Lisa painting of tweets. See more in Kevin Shalvey, 'Twitter CEO Jack Dorsey's First Tweet Sold For $2.9 Million On Sunday. The Buyer Said It's The Mona Lisa of Tweets.' (*Business Insider*, 2021) <https://www.businessinsider.com/twitter-ceo-jack-dorsey-sell-first-tweet-nft-sunday-2021-3> accessed 17 April 2021.

[176] Definition of 'fungible' in Collins Dictionary <https://www.collinsdictionary.com/dictionary/english/fungible> accessed 1 June 2021.

[177] Definition of 'non-fungible token' in Merriam-Webster Dictionary <https://www.merriam-webster.com/dictionary/non-fungible%20token> accessed 1 June 2021.

through metadata that is kept on a digital ledger or on a host website[178]. It is also important to note that mostly the buyer only purchase the metadata of the digitised work or subject matter at issue (a code or a link) but not the actual work itself[179]. For instance, it is possible to digitise a painting and turn it into an NFT, and when someone buys it, he/she will be the owner of only that NFT but not the painting as a work of art in real life. Consequently, NFTs can include works as a subject matter and be related to copyright, but an NFT is not necessarily a work or protected by copyright. It is merely a kind of certificate or a verification of ownership of a digital asset. Surely, unless the requirements for copyright protection are met, it would not be possible to apply copyright rules to NFTs, which can constitute a form of for example a musical work or a digital work of art, but we cannot define them as a new type of work.

NFTs can either be created digitally or converted from real life to the virtual world. They may be purchased and sold online, paying by crypto-currency, and it is done via blockchain technology, through a smart contract. Blockchain is a distributed, decentralised public ledger recording transactions on a peer-to-peer network[180]. In principle, NFTs are held on the Ethereum blockchain, although it is also possible for the other blockchains to hold. It can be said that NFTs are currently a rising star; more than $174 million has been spent on NFTs in the recent 2-3 years. In nature, NFTs are unique, one-of-a-kind or at least limited in number, which is strange in a digital environment

[178] Mitchell Clark, 'Nfts, Explained' (*The Verge*, 2021) <https://www.theverge.com/22310188/nft-explainer-what-is-blockchain-crypto-art-faq> accessed 1 June 2021; Daniel Daniele, 'NFTs' nifty copyright issues' (*Social Media Law Bulletin*, 2021) <https://www.socialmedialawbulletin.com/2021/05/nfts-nifty-copyright-issues/> accessed 7 February 2022; Pınar Çağlayan Aksoy, Zehra Özkan Üner, 'NFTs and copyright: challenges and opportunities' (2021) 16 Journal of Intellectual Property Law & Practice 10 <https://doi.org/10.1093/jiplp/jpab104> 3-4.

[179] Andres Guadamuz, 'Non-fungible tokens (NFTs and copyright)' (*WIPO Magazine*, 2021) <https://www.wipo.int/wipo_magazine/en/2021/04/article_0007.html> accessed 9 February 2022.

[180] Blockchain is defined as "a digital database containing information (such as records of financial transactions) that can be simultaneously used and shared within a large decentralized, publicly accessible network" in Merriam-Webster Dictionary <https://www.merriam-webster.com/dictionary/blockchain> accessed 1 June 2021; Çağlayan Aksoy and Özkan Üner (n 178) 2, 4.

where copying or reproduction is extremely easy and common. NFTs allow the owners to have or hold the original version of the digital piece, and even though it is copied, the owner of the original one is recorded in the blockchain and can be identified. It is like a rare art piece; due to its uniqueness or limited quantity its value and price might increase in time and due to demand. However, it depends on the other buyers and how much they would want to give in exchange[181]. It is also controversial whether there can be copyright infringement even though the NFT includes a work. This is because it is considered that since an NFT is only a code or a link, it might not constitute an act of reproduction of the work and therefore, no infringement on such right. It is considered possible to infringe the communication to the public right by sharing the link in some cases, but there are a lot of aspects to be considered[182].

As said, there are a lot of problems and uncertainties regarding the NFTs – such its nature, ownership, and unpredicted costs. It is said that an NFT can be basically just a link to a work of art, which is stored on another platform, then what happens if the platform vanishes and thus the work? In terms of copyright, it should also be checked first whether the NFT is a work, and the seller is really the author or the owner of that work, in order to properly obtain its rights. It is possible that the author has not transferred the economic rights arising from copyright, the work used as a core of the NFT was taken without authorisation. Another issue is the author's moral rights. Since moral rights stays forever on the author, the buyer of the NFT cannot alter the work or tarnish it[183].

[181] Robyn Conti and John Schmidt, 'What You Need to Know About Non-Fungible Tokens (Nfts)' (*Forbes Advisor*, 2021) <https://www.forbes.com/advisor/investing/nft-non-fungible-token/> accessed 1 June 2021.
[182] Guadamuz (n 179); Çağlayan Aksoy and Özkan Üner (n 178) 7-9.
[183] Georgina Adam, 'But is it legal? The baffling world of NFT copyright and ownership issues' (*The Art Newspaper*, 2021) <https://www.theartnewspaper.com/analysis/but-is-it-legal-the-baffling-world-of-nft-copyright-and-ownership-questions> accessed 10 June 2021; Daniel Daniele, 'NFTs' nifty copyright issues' (*Social Media Law Bulletin*, 2021) < https://www.socialmedialawbulletin.com/2021/05/nfts-nifty-copyright-issues/> accessed 7 February 2022; Çağlayan Aksoy and Özkan Üner (n 178) 9-10.

One of the most famous examples is the NFT of digital artist Mike Winklemann, or widely known as "Beeple", consisting of 5,000 daily drawings called "EVERYDAYS: The First 5000 Days,". It was sold by an auction at Christie's for a record price of $69.3 million. However, copyright ownership of the art piece itself is not included in this transaction[184]. As another example, from Turkey, one of the well-known companies for alcoholic drinks Mey|Diageo[185] bought the first NFT involving the alcoholic drink raki, as it depicts Elon Musk drinking raki on Mars[186]. NFTs are getting more and more attention and their number is increasing every day. With the rise of the NFT marketplace platforms such as OpenSea or Nifty Gateway or Binance NFT as well as the use of cryptocurrencies and the people including artists and buyers to learn and utilise them seems to make NFTs worth talking in the forthcoming times. The liability of intermediaries, the operators of the marketplaces, can also be questioned in cases of IP infringements but we consider that it is out of scope of this study and therefore, we will not analyse the issue further.

III. HISTORY OF THE INTERNET AND ITS RELATION TO THE COPYRIGHT

A) Creation and Development of the Internet

In a nutshell, the Internet, which is actually the most developed form of the international collective computer networks[187] was primarily created in the 1970s in the

[184] Conti and Schmidt (n 181); Çağlayan Aksoy and Özkan Üner (n 178) 5.
[185] "Established in 2004 after the privatization of the Tekel's alcoholic drinks division, Mey operates as two separate companies in Turkey, one involved in manufacture and the other responsible for sales and marketing. Mey's product portfolio includes Yeni Raki, Tekirdağ Raki, İstanblue and Binboa Votkas, Kayra, Terra and Buzbağ Wines. Since 2011, Mey has been working under the umbrella of Diageo, an alcoholic beverage manufacturer trading in close to 180 countries with offices in 80 countries." See in Mey Diaego's website <https://mey.com.tr/en-us/about-us/Pages/our-company.aspx> accessed 1 June 2021.
[186] The work was created by Cenk Güngör and sold for 0.54 ETH (11.937 TRY), 'Mey, dünyanın ilk rakı NFT'sini 12 bin liraya satın aldı', (*T24*, 2021) <https://t24.com.tr/haber/mey-dunyanin-ilk-raki-nft-sini-12-bin-liraya-satin-aldi,955730> accessed 1 June 2021.
[187] Ayhan İzmirli (n 2) 23; Yavuz, Alıca and Merdivan (n 4) 59; Tamer Soysal, 'İnternet Servis Sağlayıcılarının Hukuki Sorumlulukları' (2005) 61 TBB Dergisi 305.

US in order to link research networks from the US to Europe, and it is actually a system architecture linking computer networks everywhere. However, as late as in the 1990s the Internet became available for public use. It is considered that in almost only 30 years, more than half of the world has become having Internet access[188]. The speed of the development and spreading rate is enormous. A small indication for this can be shown from the example of the traffic of the Internet protocol (IP) globally growing from approximately 100 gigabytes *in a day* in 1992 to 45.000 gigabytes *in every second* in 2017[189].

First efforts on the path to find the Internet commenced in the 1950s in the US. The purpose of such initiative was to find a way to a safe communication between the institutions regarding the national security and military matters and information[190]. Initially there were two initiatives supported by Defence Advanced Research Projects Agency (DARPA) (although its current name is DARPA, it was called Advanced Research Projects Agency – ARPA back then[191]) in the US as ground based and satellite-based packet networks. Packet[192] means a data unit transferred over computer networks and the Internet is actually a packet network based on a protocol without connection called the Internet Protocol (IP). Actually, there are two significant types of packet networks: without connection and connection-oriented[193]. A packet, the unit of information, has overhead information attached thereto, which is called the header. This header has the characteristic to identify the packet, in order for the packet to be conveyed

[188] <https://www.britannica.com/technology/Internet/Foundation-of-the-Internet> accessed 23 April 2021.
[189] Murat Topcu, 'Endüstriyel Ekonomiden Dijital Ekonomiye Dönüşüm', *Dijital Dönüşüm Ekonomik ve Toplumsal Boyutlarıyla* (1st edn, Gazi Kitabevi 2020) <https://ws1.turcademy.com/ww/webviewer.php?doc=42470> accessed 1 November 2020.
[190] Ali Fuat Özbakır, *Sosyal Medyada ve Internette Hukuki Sorumluluk* (Adalet 2019) 31.
[191] Özbakır (n 190) 31; Soysal (n 187) 305-306.
[192] <https://dictionary.cambridge.org/dictionary/english/packet> accessed 23 April 2021.
[193] Joseph E. Berthold, 'Sonet And ATM', *Optical Fiber Telecommunications IIIA* (3rd edn, Elsevier 1997) 19-20.

to the right place. It also controls any error and prevents any misdelivery. Even if any mistake occurs, the header allows transferring the information again. The header of IP packets has the entire information and delivery address and is competent to convey the information to anyone anywhere online[194].

In 1965, ARPA researchers found the first connection or network via phone line, which was a signal for the establishment of the first wide area network. Later on, in 1969, ARPANET ("Advanced Research Project Agency Network")[195] was created between the University of California, Stanford Research Institute and University of Utah at once and ARPANET is actually the first network that might be considered as the ancestor of today's Internet[196]. The research program of DARPA for interlinking packet networks was called Internetting and the result of it is the "Internet"[197].

There was also a paper in 1974 describing the transmission control protocol (TCP) that allows various machines across the world to route and gather data packets including the Internet protocol. In 1980, the system was adopted by the US Department of Defence and then other institutions such as "National Science Foundation" (NSF), "National Aeronautics and Space Administration" (NASA), later on by others such as international researchers and businessmen. Without going into further technical details that are not in the scope of this study, it can be said that starting from almost fully governmentally controlled and supported, the Internet turned into a privately developed system by

[194] Berthold (n 193) 20.

[195] ARPANET (Advanced Research Projects Agency Network) was an experimental computer network, can be qualified as the "forerunner of the Internet". The Advanced Research Projects Agency (ARPA) was an arm of the U.S. Defense Department and was funded the development of the ARPANET in the late 1960s. Its initial purpose was to connect computers at Pentagon-funded research institutions over telephone lines. It is both academic and military, used for defence and sharing information especially due to the concerns in the Cold War times. Transmission-control protocol/Internet protocol (TCP/IP) was first tested on ARPANET in 1977. See more in <https://www.britannica.com/topic/ARPANET> accessed 23 April 2021.

[196] Özbakır (n 190) 32.

[197] Vint Cerf, 'A Brief History of the Internet & Related Networks' (*Internet Society*, 2020) <https://www.internetsociety.org/internet/history-internet/brief-history-internet-related-networks> accessed 20 September 2020, 1.

individuals and companies invested in the field with government custody and tolerance[198]. The Internet (as a whole) does not belong to anyone but all of its users. It is not possible to control it due to its technical nature and there is no centralised management. Everyone with an Internet access can use it to communicate each other, share and access information freely[199]. There is the "Internet Corporation for Assigned Names and Numbers" (ICANN), which is a non-profit and private organization that, *inter alia*, establishes and administers different aspects of policies with regards to the Internet domain names, assigns and controls the structure of them. One of its most important operations is the project of the "Uniform Domain Name Dispute Resolution Policy" (UDRP), which deals with the matter of dispute resolution concerning domain names[200].

The commercialisation of the Internet occurred in the 1990s especially after the invention of personal computers in the 1980s. For instance, in 1988, the "Corporation for National Research Initiatives" was allowed to test a connection between a commercial email service and the Internet, which was the first Internet connection of a commercial provider outside the research community[201]. As also mentioned above, only after 1989, the Internet became open to the public. In June 1990, the use of ARPANET was abolished and backbones in the commercial and government operations replaced such networks in the US, Europe, Japan and Pacific countries. Although a little bit later than those countries, the Internet officially came to Turkey in 1993, and the first connection was made at Middle East Technical University (METU). To be more precise, the first wide area network was established in 1986 as the Network of the Turkish Universities and

[198] <https://www.britannica.com/technology/Internet/Foundation-of-the-Internet> accessed 23 April 2021; Cerf (n 197) 2.
[199] Ayhan İzmirli (n 2) 28; Özbakır (n 190) 34, Soysal (n 187) 307.
[200] <https://www.britannica.com/technology/Internet/Foundation-of-the-Internet> accessed 23 April 2021; Özbakır (n 180) 36-37; also see more on 'Uniform Domain-Name Dispute- Resolution Policy' (*ICANN.org*, 2021) <https://www.icann.org/resources/pages/help/dndr/udrp-en> accessed 1 May 2021.
[201] <https://www.britannica.com/technology/Internet/Foundation-of-the-Internet#ref218352> accessed 23 April 2021.

Research Centres in connection with the European Academic and Research Network/Because It's Time Network. In the upcoming years, such network capacity was insufficient and thus, METU and "Turkish Scientific and Technological Research Council of Turkey" (TUBITAK) started a project to establish a new network in order to fulfil the need. First experimental connection was made in October, 1992 to the Netherlands and finally in April, 1993 the first Internet connection of Turkey was carried out to the NSFNet in the US via TCP/IP protocol from METU Information Technology Department[202]. At first, the Internet network was in between certain universities and public institutions, then after the year of 1996 it was available for commercial institutions and private users, when the TURNET project for the ISP to be able to utilise the Internet was realised[203].

Lastly, it is important to explain the World Wide Web or Web, which was created by Tim Berners-Lee and his co-workers at the "European Organization for Nuclear Research" (CERN) in 1991, is an information retrieval service of the Internet that gives users access to information or any kind of documents via hyperlinks[204]. Furthermore, so-called Web 2.0 is a concept used for the more developed and recent type of the Web with more attention to social networking, user-generated content and cloud computing. It enables the users to create, develop, assess, share content by providing web services that personalise the Internet experience[205]. This term was first used in 2004 and explained as "the web as platform.". This differentiated concept was criticised by some, especially by the creator of the Web itself, Tim Berners-Lee, saying that social networking has always

[202] 'Türkiye'de Internet' (*Internetarsivi.metu.edu.tr*, 2021) <http://www.internetarsivi.metu.edu.tr/tarihce.php> accessed 23 April 2021.
[203] Özbakır (n 190) 33-34; Nurulhude Baykan, 'Türkiye'de Internet 25 Yaşında' (2018) Tübitak Bilim Genç <https://bilimgenc.tubitak.gov.tr/makale/turkiyede-internet-25-yasinda> accessed 1 May 2021.
[204] <https://www.britannica.com/topic/World-Wide-Web> accessed 23 April 2021.
[205] Altunç (n 122) 44-45; Özbakır (n 190) 156-57.

been central to the Web anyway and it was meant to connect people[206]. It is considered that the Web made the whole world use the Internet. Technically, any computer that is compatible with TCP/IP may connect an available network[207]. However, this is not the topic of this study and therefore, it will not be further explained.

B) Certain OCSSPs in Social Media

Although the Internet makes the direct interactions simpler, there are still intermediaries that are special to the Internet. Their function on the Internet differs from physically providing the Internet to data storage or facilitating user content. Internet intermediaries are described as "bringing together or facilitating transactions between third parties on the Internet; giving access to, hosting, transmitting and indexing content or products or services of third parties on the Internet" in OECD 2010 report on the "Economic and Social Role of Internet Intermediaries". The content sharing platforms are categorised under participative networking platforms, which has various types of platforms such as social network sites or video content/photo-sharing sites[208].

First, we consider that we should define the ISP. ISP is the intermediary that takes charge in transmission of the Internet to each and every user. They are real persons or legal entities providing Internet access to the users or interceding for the electronic services to be provided to the users[209]. Therefore, in order to access the Internet as a user or virtually allow access to users for a website, ISP is required[210]. Within the frame of E-Commerce Directive, a "service provider" is a person (real or legal entity) providing an

[206] <https://www.britannica.com/topic/Web-20> accessed 24 March 2021.
[207] Ayhan İzmirli (n 2) 25-26.
[208] Giovanni Sartor, 'Providers Liability: Fom the ECommerce Diretive to the future' (2017) IP/A/IMCO/2017-07, 6-7.
[209] Ayhan İzmirli (n 2) 34.
[210] Özbakır (n 190) 28.

information society service (ISS)[211]. Under its recital 17, this corresponds to "any service normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services.". Under the term of ISP, there are certain types according to their function, such as mere conduit, caching or hosting[212].

In other respects, Content Provider is defined in the 5651 numbered law in Turkey as the real or legal persons, who create, amend or provide any kind of information demonstrated to the users on the Internet environment. In case someone communicates or makes a work available to the public in any way, then they are content providers and the content is the work. It can be either a real person or a legal entity[213]. Everyone, who has access to the Internet may create websites and it occurs via uploading content online. The website owner uploading the data would also be the content provider[214]. The law did not distinguish between the creator of original content and the person uploading someone else's content to the platform when it comes to content sharing, anyone providing any content could be qualified as content provider[215]. As for the hosting service providers or hosting providers (HP), as the name implies, they offer services to host the content uploaded by the content providers[216].

Under the CDSMD, the definition of "Online Content-Sharing Service Providers" (OCSSPs) is made in art. 2(6), as being the provider of an ISS, the main aim of which is to store, provides access to the public, organise and promote a lot of copyright-protected works uploaded by its users, for making profit. Certain providers of services, such as *"not-for-profit online encyclopaedias, not-for-profit educational and scientific*

[211] Graeme B. Dinwoodie, 'A Comparative Analysis of The Secondary Liability of Online Service Providers', *Secondary Liability of Internet Service Providers* (Springer 2017) 6.
[212] EU E-Commerce Directive articles 12-14.
[213] Article 2/1(f) of the 5651 numbered Law; Özbakır (n 190) 72-74.
[214] Yavuz, Alıca and Merdivan (n 4) 199.
[215] Ateş (n 3) 54-55.
[216] Özbakır (n 190) 75.

repositories, open source software-developing and-sharing platforms, providers of electronic communications services as defined in Directive (EU) 2018/1972, online marketplaces, business-to-business cloud services and cloud services that allow users to upload content for their own use", are not defined as "online content-sharing service providers" under CDSMD and therefore, they are out of its scope.

Social media is the digital platform that enables posts, shares, and expressions between people on the Internet, a two-way and simultaneous information sharing system[217]. It can be briefly defined as the platform providing a technological basis, in which its users produce, upload and share the content and it comprises of the means of virtual interaction[218]. Some of the biggest actors of social media are platforms such as YouTube, Facebook, Instagram and Twitter, as to their number of users[219], time spent[220]

[217] Altunç (n 122) 45; Fethi Merdivan, 'Eser Ve Bağlantılı Hak Sahiplerinin Umuma İletim Hakkı Ve Sosyal Medyada Telif Temizliği/Telif Sözleşmeleri', *Dijital Alanda Telif Hakları-Telif Haklarında Güncel Gelişmeler (Telif Hakları Sempozyum Bildirileri)* (İletişim Stratejileri Ajansı 2020) 53.

[218] Uğur Çolak, 'Sosyal Medyada Telif Hakkı İhlalleri ve Hukuki Çareler', *Dijital Alanda Telif Hakları-Telif Haklarında Güncel Gelişmeler (Telif Hakları Sempozyum Bildirileri)* (İletişim Stratejileri Ajansı 2020) 65; Zeynep Yasaman, *Türk ve Avrupa Birliği Hukukunda İnternette Marka Hakkının İhlali* (Oniki Levha 2020) 686; Ateş (n 3) 49; Özbakır (n 190) 157-158.

[219] Number of monthly active Facebook users worldwide as of 4th quarter 2020 is 2.797 million <https://www.statista.com/statistics/264810/number-of-monthly-active-facebook-users-worldwide/> accessed 6 May 2021; As of the third quarter of 2020, Twitter had 187 million monetizable daily active users worldwide, H. Tankovska, 'Countries with the most Twitter users 2021' (*Statista*, 2021) <https://www.statista.com/statistics/242606/number-of-active-twitter-users-in-selected-countries/#:~:text=Global%20Twitter%20usage,former%20U.S.%20president%20Barack%20Obama.> accessed 6 May 2021; As of 2020, there was an estimate of 2.1 billion YouTube users worldwide, H. Tankovska, 'YouTube - Statistics & Facts', (*Statista*, 2021) <https://www.statista.com/topics/2019/youtube/#dossierSummary> accessed 6 May 2021; In 2019, there were almost 815 million users of Instagram, monthly. In 2023, it is estimated that this would reach nearly 1.2 billion users, H. Tankovska, 'Instagram: number of global users 2016-2023', (*Statista*, 2021) <https://www.statista.com/statistics/183585/instagram-number-of-global-users/#statisticContainer> accessed 6 May 2021.

[220] Average Facebook user spends 38 minutes each day, whereas in 2019, Instagram users spent an average of 27 minutes per day. Also, an average user spends 11 minutes 24 seconds per day on YouTube. Taking into account its nature, the average time spent on Twitter is around 3:39 minutes each session. Overall, people spend an average of 2 hours and 24 minutes in social media platforms per day globally. See more in Gary Henderson, 'How Much Time Does the Average Person Spend on Social Media?', (*Digitalmarketing.org*, 2021) <https://www.digitalmarketing.org/blog/how-much-time-does-the-average-person-spend-on-social-media#:~:text=While%20people%20consume%201%20billion,24%20minutes%20daily%20on%20YouTube.> accessed 6 May 2021.

by their users, and their ability to even affect major events such as elections[221] or protests[222]. For that reason, and to limit the scope of this study, such four platforms and their relationship between copyright to the extent of their liability will be based. Such social media platforms revolve around free speech, freedom of expression and sharing information. Content shared on such platforms by their users may be photographs, music, videos and the like[223]. This shared content may also constitute works protected by copyright that were created by either the sharing user or others before. The role of the social media platforms here is that they enable the upload of content, as well as classifying the uploaded content according to a certain system, being more accessible via search engines and enter into license agreements regarding the contents[224]. They usually warn its users by its terms and conditions about copyright infringement and liability, and the user must accept these terms in order to be signed up to the platform and upload digital content[225]. There are ways to get clear, either by receiving licenses from the copyright owners or by falling into the categories of exceptions/exemptions specified in the law,

[221] It was presented that two-thirds of 18- to 24-year-old young people in the United States participated in social media-related political activities. Also, another research showed that when politicians responded to the citizens' comments on social media platforms, they were seen as more favourable in the Netherlands. See in Sara Douglas, Misa Maruyama, Bryan Semaan and Scott P. Robertson, 'Politics and Young Adults: The Effects of Facebook on Candidate Evaluation' (*ResearchGate*, 2014) <https://www.researchgate.net/publication/266659571_Politics_and_young_adults_the_effects_of_Facebook_on_candidate_evaluation> accessed 6 May 2021; "The association between the Internet and the rise of populists in Europe has been confirmed by Schaub & Morisi (2019), who use survey data to show that support for populists in Italy in 2013 (Five Star Movement) and in Germany in 2017 (Alternative for Germany, or AfD) was higher in municipalities with broadband coverage. … Overall, the evidence about the Internet, social media, and voting can be summarized as follows. The spread of the Internet and social media has contributed, at least in part, to the electoral success of populists in Europe and to reduced political support for the ruling parties in immature democracies and semi-autocratic regimes. There is also evidence that social media can be used to mobilize voters." Ekaterina Zhuravskaya, Maria Petrova and Ruben Enikolopov, 'Political Effects of the Internet and Social Media' (2020) 12 Annu. Rev. Econ., 418–420.

[222] "In the context of Egypt during the Arab Spring (which brought the 30-year domination of Hosni Mubarak's government to an end), Acemoglu et al. (2018) find that the number of Twitter posts with keywords related to Tahrir Square was predictive of the number of participants in the protests the next day in the plaza. Their results are consistent with the hypothesis that social media have helped coordinate street mobilizations.3 In a similar vein, Steinert-Threlkeld et al. (2015), using data for almost 14 million geolocated tweets and data on protests from 16 countries, show that increased coordination of messages on Twitter by using specific hashtags was associated with increased protests the following day during the Arab Spring." Zhuravskaya, Petrova and Enikolopov (n 221) 421.

[223] Çolak (n 218) 65-66.

[224] Altunç (n 122) 45.

[225] Ateş (n 3) 49.

such as filtering or efforts to obtain consent from the authors or even parody exceptions. We also find it important to balance fundamental rights, particularly between copyright and the freedom of expression. The European Commission issued a guideline on the CDSMD article 17. Normally, such guidelines are not binding instruments, whereas in this case it is established in the Directive itself and thus, it would be considered as binding. Under this guideline, regarding best practices it is said that the balance between fundamental rights and copyright as well as its exceptions or limitations should be considered[226]. In case the platform has license agreements with the copyright owners, the acts of users, which are the content providers, may also fall into the scope of such license agreements[227].

In any case, social media platforms, of which the main purpose is storing and making available the user uploaded image, video or music content, may be qualified as OCSSPs and be subject to the CDSMD article 17[228]. We would like to give examples of YouTube, Facebook, Instagram and Twitter on this matter.

1. YouTube

YouTube is a very widely known online video-sharing platform or website, letting anyone with an account to share videos, as well as letting anyone to watch the downloaded videos. It was established in 2005 and over one year, it increased its visitors from around 30,000 to more than 25 million per day. Later, it was purchased by Google[229].

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[226] Ramalho (n 42) 10.

[227] Henning Majid Grobe Ruse-Khan, 'İnternet Ortamındaki Telif Hakkı Uygulamalarında Yeni Gelişmeler' *Dijital Alanda Telif Hakları-Telif Haklarında Güncel Gelişmeler (Telif Hakları Sempozyum Bildirileri)* (İletişim Stratejileri Ajansı 2020) 65; Yasaman (n 218) 26-31.

[228] Jan Bernd Nordemann and Julian Waiblinger, 'Art. 17 DSMCD a class of its own? How to implement Art. 17 into the existing national copyright acts – Also a comment on the recent German Discussion Draft' (2020) German version published in GRUR (Gewerblicher Rechtsschutz und Urheberrecht) <https://ssrn.com/abstract=3649626> accessed 28 January 2022, 9; Martin Husovec and João Quintais, 'How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms' (2021) GRUR International (Issue 4/2021, forthcoming) <https://ssrn.com/abstract=3463011> accessed 30 January 2022, 6.

[229] <https://www.britannica.com/topic/YouTube> accessed 19 April 2021.

In its "about" page, YouTube states that it relies on "the four Rs" – Removing policy violating content, Reducing the dissemination of harmful misinformation, Raising up trusted sources for news and information and Rewarding trusted creators[230]. It is stated that the "first rule of copyright" is that the users should upload the videos, of which someone else holds the copyright, if they are authorised to do so[231].

By nature, YouTube deals with copyright matters all the time. It tries to allow its users to exercise their freedom of expression and of information, while protecting right holders. YouTube claims that it tries to protect the copyright owners with appropriate measures according to the portion of the work of the content uploaded to YouTube. It states that its Copyright Management Suite gives copyright owners control of their copyrighted work on YouTube. It has a Content ID matching, which is a technology for detecting potentially infringing content. This comprises four categories, as first its public DMCA web form, which is called Copyright Takedown Webform, for all users visiting YouTube. Second, the Copyright Match Tool, the tool for creators; thirdly the Content Verification Program that is especially for copyright-holding companies for more than one removal request. Lastly the Content ID, for those with scaled rights management needs such as collecting societies[232]. This works by providing reference files to YouTube and then, users of Content ID and Copyright Match Tool are notified automatically when another user uploads videos, which may contain their protected work. Moreover, Content ID users may select in advance what they would like to occur for when such videos are detected. The Content ID provides copyright owners different choices; it does not merely

[230] 'Making the YouTube safer' (*Youtube.com*, 2021) <https://www.youtube.com/intl/ALL_uk/howyoutubeworks/> accessed 15 August 2021.
[231] 'Rules and Policies - Copyright', (*Youtube.com*, 2021) <https://www.youtube.com/intl/ALL_uk/howyoutubeworks/policies/copyright/> accessed 15 August 2021.
[232] 'Overview of copyright management tools', (*YouTube Help*, 2021) <https://support.google.com/youtube/answer/9245819?hl=en&ref_topic=9282364> accessed 15 August 2021.

work as an anti-piracy tool, but also works for revenue generation. YouTube pays right owners parts coming from ad revenue of the claimed content and it is monetised through Content ID[233].

The policies, rules and the automated systems these platforms use include dispute resolution methods such as compensation regimes or legal remedies, almost like their very own judicial system. Surely, the rules or regulations or the system is valid between its users only, not everyone. It can be said that there is a strong and automatic protection for the right holders. As for the Content ID system of YouTube, the copyright holder uploads the relevant information regarding their work and when a user uploads a video including said work, YouTube automatically matches content with the reference file. This way, YouTube shares the ad revenues coming from the uploaded video with the copyright owner or the use may be removed or blocked. Most of the IP issues on YouTube are solved by its system[234].

2. Facebook and Instagram

Facebook, as probably known by many people, is an online social networking service established in 2004 that has over one billion users as of 2012[235]. It allows people with Internet access to create profiles, post photos, communicate through and share contents such as posts, photographs, messages, and videos. Profiles add profiles as friends and the shared content can even be visible by non-friends so the public in Facebook in general, if so chosen. However, the latest development on Facebook is that it changed its name to Meta[236]. Since it is very new, we choose to not analyse the consequences in detail

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[233] <https://www.youtube.com/intl/ALL_uk/howyoutubeworks/our-commitments/safeguarding-copyright/> accessed 19 April 2021.
[234] Ruse-Khan (n 227) 27-29.
[235] <https://www.britannica.com/topic/Facebook> accessed 19 April 2021.
[236] It is stated in the announcement that "Meta's focus will be to bring the metaverse to life and help people connect, find communities and grow businesses." see more in 'Introducing Meta: A Social Technology

at this stage and continue with "Facebook".

Instagram is a social media service allowing its users to publish photos and videos and share them with their followers. It has around 1 billion users. Facebook purchased Instagram in 2012, so, Instagram is a Facebook company[237]. Therefore, we would like to explain them under the same one title.

Facebook has a copyright management tool called Rights Manager that is within Facebook's Creator Studio platform. It allows people to control how, when, and where their work is shared across Instagram and Facebook. It has a wide range of those concerned, from individual unique content creators to publishing houses normally not using Facebook. Rights Manager also may be customised to meet various goals. It works in a way that at first the work is added to a reference library by the right holder. Then, the Rights Manager finds any content matching the work in Facebook and Instagram. The matching settings can be arranged such as searching certain locations. In case content matches a work, there are certain ways of actions to choose from. For instance, it is possible to monitor or block the content, or claim ownership and get credit. There is also a way of reporting infringement with IP reporting form, especially for individual infringements[238].

The goal is to take down the content before anyone sees it, ideally even before going live. Thus, there are measures of a strict set of terms of services called "Community Standards"; repeated infringer policy (termination of accounts); additional specific policies for special content such as ad policies and seller agreement (mostly against counterfeits); notice and take down procedure; proactive measures to take action such as

Company' (*Meta*, 2021) <https://about.fb.com/news/2021/10/facebook-company-is-now-meta/> accessed 5 November 2021.

[237] Sam Shead, "Facebook Owns the Four Most Downloaded Apps of the Decade" (*BBC.com*, 2019) <https://www.bbc.com/news/technology-50838013> accessed 15 August 2021.

[238] 'Rights Manager' (*Facebook*, 2021) < https://rightsmanager.fb.com> accessed 15 August 2021.

AI for identifying infringing content; IP transparency report (2-a-year); very robust IP Center and partnership and collaboration with right holders. There are also established reporting channels and forms separate for each right. In the global IP review offices, real people analyse the reports, then take down infringing content. Image search on all ad units and commerce surfaces search results[239].

3. Twitter

Twitter is a platform that provides its users service for expressing themselves and communicate with others by posts called Tweets containing text, photo, video or link. It is possible to follow people or profiles to see their updates[240]. The first tweet belonged to Twitter CEO Jack Dorsey and was sent on March 21, 2006. The platform currently has almost 400 million users[241].

Twitter has a copyright policy as well and it responds to reports of copyright infringement. These can concern allegations of unauthorised use of an image as a profile or header photo protected by copyright, or unauthorised use of an uploaded video or image protected by copyright or Tweets containing links to infringing content. It is expressly stated that "parody, newsfeed, commentary, fan account" are generally not copyright issues[242]. Regarding copyright complaint, it seems that Twitter is more inclined to resolve the matters between the user and the complainant without its intervention. The reason is that it first advises the copyright holders to consider fair use and if they still wish to continue with a complaint, it suggests first to contact the user at issue by replying

[239] Sabrina Perelman, 'Protecting IP Rights on Facebook: What You Need to Know' WIPR Insights (Online, 2021), <https://www.brighttalk.com/webcast/11637/499965> accessed 2 August 2021.
[240] 'New User FAQ' (*Twitter*, 2022) <https://help.twitter.com/en/resources/new-user-faq> accessed 20 January 2022.
[241] Brian Dean, 'How Many People Use Twitter in 2022? [New Twitter Stats]', (*Backlinko*, 2022) <https://backlinko.com/twitter-users> accessed 20 January 2022.
[242] 'Copyright Policy' (*Twitter*, 2022) <https://help.twitter.com/en/rules-and-policies/copyright-policy> accessed 20 January 2022.

the Tweet in question or sending a direct message to the user and request the removal of the content protected by copyright rather than contacting Twitter. It also warns the complainants by informing them that they might be liable for any damages such as costs and attorney fees, in case they "knowingly materially misrepresent that material or activity is infringing" [243]. It is also stated that the complaint is forwarded to the user allegedly infringing copyright, including the complainant's name and information for communication. If Twitter decides to remove the content or block access to the it, Twitter notifies the user in question and as said, it informs about the complaint alongside instructions for filing counter-notice, which is a request for reinstating the content. Reposting the removed content without filing a counter-notice may cause permanent suspension of the account. Twitter also sends Lumen[244] a redacted copy of the complaint without personal information[245]. After receiving a valid counter-notice, Twitter sends a copy to the complainant. In the event that the copyright holder does not accept that the content removal is wrong, it is possible to take legal action. However, in case Twitter does not receive any notice regarding the complainant taking legal action for preventing further infringement within 10 business days, it states that it may stop blocking access to the removed content[246].

C) The Meaning and Scope of Online Content within the Frame of the Use of Copyrighted Works on Social Media

Users have access to various online tools on the Internet to generate and distribute

[243] 'Copyright Policy' (*Twitter*, 2022) <https://help.twitter.com/en/rules-and-policies/copyright-policy> accessed 20 January 2022.
[244] Lumen is an independent research project of Berkman Klein Center for Internet & Society at Harvard University for studying cease and desist letters regarding online content; see more in 'About Us' (*Lumendatabase.org*, 2022) <https://lumendatabase.org/pages/about> accessed 20 January 2022.
[245] 'Copyright Policy' (*Twitter*, 2022) <https://help.twitter.com/en/rules-and-policies/copyright-policy> accessed 20 January 2022.
[246] 'Copyright Policy' (*Twitter*, 2022) <https://help.twitter.com/en/rules-and-policies/copyright-policy> accessed 20 January 2022.

online content, and it is possible to interact with other users and their content. It is very common now due to the development of social media and Web 2.0, it is in everyday life to scroll down content, comment, listen, read or watch[247]. Such content may include copyright protected works, whether or not it is authorised. Considering different social media platforms as explained above, first couple of types of content that comes to mind are definitely photos, videos, music and text. However, surely the scope of online content is not limited with those, although they are the most common and most related to copyright, online content can be anything that is virtual or on the Internet. The issue here would be whether or not the content would be qualified as a work and protected by copyright.

A definition of content is not explicitly given in the 5651 numbered law, whereas, the content provider was defined as "Real persons or legal entities who create, modify or provide all manner of information or data provided to users in the internet medium". From this expression, it can be understood that content corresponds to all manner of information or data. Any kind of intellectual and artistic product or expression can also be qualified as content. Surely, for earning copyright protection, it should be original and it depends on the levels of originality and its interpretation accepted in the respective states[248]. On the other hand, "digital content" was defined in the EU law by EU Directive 2019/770 on digital content, where it states that it is "data which are produced and supplied in digital form"[249].

It is said that the exponential growth of consumption of content actually created a new type of consumer, which is called prosumer. Prosumer means the consumer that is

[247] Helberger, Jannsen, van Eijk, Angelopoulos, van Hoboken (n 102) 3.
[248] Ateş (n 3) 54; Helberger, Jannsen, van Eijk, Angelopoulos, van Hoboken (n 102) 8-9.
[249] Directive (EU) 2019/770 of the European Parliament and of the Council of 20 May 2019 on certain aspects concerning contracts for the supply of digital content and digital services 2019.

also active, not only by consuming the content but also generating content (so called user-generated content or "UGC") that is available to the public. This may include the conversion of copyrighted works and it may be problematic especially if the author of the original work does not authorise such act. It must be determined what rights or obligations the platforms have in order to avoid possible copyright claims. In that sense, their terms of use on their websites are important as their copyright or content use policy can be specified. Using UGC must be subject to license obtained from the author, in cases of such as reposting or editing and communicating the work to the public again. It is possible to use open content license such as Creative Commons, which is automated and standardised[250]. We would like to further detail the legal framework on online content and its relation to copyright with regards to the OCSSPs and then the liability under the following titles.

IV. LEGAL FRAMEWORK REGARDING THE OCSSPs IN SOCIAL MEDIA

Online content sharing is mostly pertinent to the right of communication to the public, which includes "making available right". It is provided in WCT in its article 8 as an exclusive right for authorising to make the work available to the public. Before WCT, in the Berne in particular, there was not any making available right as such and the protection for different types of works was not equal[251]. The laws of states should be regulated in the direction of technological changes and developments that create new types of legal problems affecting people's rights. With the help of multilateral agreements and treaties and guidelines, the states may turn their laws towards tackling new challenges. Unfortunately, the amendment of laws is usually slower than the

[250] Isabel Espín Alba, 'Online Content Sharing Service Providers' Liability in The Directive on Copyright in The Digital Single Market' (2020) 6 UNIO – EU Law Journal, 102-103; Helberger, Jannsen, van Eijk, Angelopoulos, van Hoboken (n 102) 22.

[251] Jane C. Ginsburg, 'The (New?) Right Of Making Available to The Public' (*Papers.ssrn.com*, 2004) <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=602623> accessed 3 February 2022, 2.

technological developments. Especially now that the technological advancements occur really fast, faster than before, the laws ought to keep up.

We will lay out below the fundamental regulations in relation to social media actors, more precisely the OCSSPs and the like, within the EU and Turkey.

A) Turkish Law on Online Content Sharing

As it will be explained below, the 5651 numbered "Turkish Law on Regulation of Publications on the Internet and Combating Crimes Committed by Means of Such Publication", which was entered into force in spring 2007, is the first regulation of consequence regarding ISP. Such Law and the regulations based thereon established the legal frame of the definition, obligation and liability of the ISPs, especially for certain listed crimes and infringement types. Actually, the EU Directive no. 2000/31 was used as a reference, as a source in legislation[252]. However, since it is a special law for certain crimes, it must be accepted that in case of online IP infringements outside the scope of such certain crimes listed in the 5651 no. Law, the LIAW must be applied.

We also would like to note that in case there is an element of foreignness in the act, we take 5718 numbered Turkish International Private and Civil Procedure Law into account. In its article 23(1), the applicable law for the IPRs is determined as follows: *"The rights of intellectual property are subject to the law of state according to whose law their protection is demanded."* Thus, if the IP protection is requested in Turkey, Turkish law and LIAW, among others, will be applied. However, in case there is a contract between the platform and the user, this time under the article 28(1), the applicable law on the contracts on IP rights will be the law the parties designate. If no law is chosen, paragraph 2 states that "*the relation resulting from the contract is subject to law of the*

[252] Özbakır (n 190) 20.

work place of transferor party of the intellectual right or its usage in time of conclusion of contract and if such workplace does not exist, the law of habitual residence shall govern. In consideration of all circumstances if there is a law more tightly related to the contract, that particular law shall govern." and thus, if the right holder lives in Turkey and has a contract with an OCSSP regarding the communication of his/her work to the public, the applicable law will be Turkish law in case of a dispute arising from that contract on IP rights[253].

1. 5846 Numbered "Turkish Law on Intellectual and Artistic Works"

The concept of the Internet as we know it came to Turkey through Middle East Technical University in 1993 as explained above and later on other universities and institutions kept up with it. The right of communicating a work to the public whenever and wherever the author desires, includes giving it online access via the Internet[254]. This right exclusively belongs to the author or the right owner according to 5846 numbered LIAW articles 25(2), 80(1)(a) - 4, 80(1)(b) - 3, 80(1)(c) - 4 and 80(2)(3).

The subject matter of the shared content on the social media platforms may be literary and scientific works such as stories or poems; musical works, works of fine arts such as paintings; cinematic works such as a short film and an adaptation of such[255]. The public according to the LIAW is defined as the people using, accessing and perceiving the works who have no personal relations with its author. In social media, usually, the act of sharing content is towards the public. The acts of, inter alia, uploading/sharing, reposting, adapting, altering a work on social media usually are included in the scope of the rights and authorities to disclose the work to the public (art. 14), designate its name

[253] Merdivan (n 217) 61-62.
[254] Alıca, Yavuz and Merdivan (n 4) 1943.
[255] LIAW articles 2-6 respectively.

(art. 15), modify the work (art. 16), to adapt the work (art. 21), reproduce the work (art. 21) and communicate the work to the public and make it available (art. 25). In order for someone else's work to be shared on social media, the authorisation of its right holder is required[256]. Unless there is authorisation, the author may initiate legal proceedings regarding infringement including civil and criminal sanctions and interim injunctions such as cessation or prevention of infringement, provided that the relevant conditions under LIAW articles 66-78 are met.

We also find it important to mention that in the Draft Law for amending the LIAW, a new provision is considered for prevention of infringements on the Internet[257]. It is not clear when this Draft Law would be accepted and enter into force. In any case, in its article 27 to add article 77/B to LIAW, it is stated that the right owners whose rights under this Law is infringed on the Internet may send a notice to content provider or HP with information and documents showing the infringement via e-mail or other means. Right holder may either want the illegal content to be removed this way or by directly applying to the public prosecutor and requesting blocking access to the content. Content provider or HP shall comply with the request within 24 hours from the notice. It was also considered that the public prosecutor may decide to block access to the content upon request of the right holders until the infringing content is removed. In addition to that, if convinced that the infringement cannot be put away by blocking access to just the content, provided that it is justified, it is considered possible to block access to the entire website. Alternatively, in case the infringing content subject to the blocking decision is also put on another website, it would be possible to enforce the decision for such websites upon request of the right holders. We also find it important to mention that Draft Law envisaged

[256] Merdivan (n 217) 54-55; Ateş (n 3) 46-47.
[257] The Draft Law is available at the following link: <https://www.ratem.org/fsek-kanun-taslagi> accessed 2 February 2022.

a punishment as a judicial fine for the hosting or access providers which are not complying with the decision of removing content or blocking access to it. Lastly, in cases that there is no provision in this article, it was considered that the Law numbered 5651 would be applied to the extent that it is suitable.

In the actual law in force, additional article 4 of LIAW already states that upon request of the right holders the violated works shall be removed from the content. The right holders may reach the content provider and request the cessation of the infringement within three days. In case the infringement continues, under this provision, a request shall be made to the public prosecutor as a next step requesting that the violation related service being provided to the content provider to be suspended in three days by the relevant service provider. It seems that Draft Law is intended to be more deterrent by amending the existing law.

2. 5651 Numbered "Turkish Law on Regulation of Publications on the Internet and Combating Crimes Committed by Means of Such Publication"

The first specification attempt of law regarding the regulation of Internet and Internet actors and their liabilities in case of certain acts in Turkey is the 5651 numbered "Turkish Law on Regulation of Publications on the Internet and Combating Crimes Committed by Means of Such Publication"[258]. Although this law was enacted with the aim of regulating the measures to be taken against certain crimes committed online and their investigation methods (art. 1), it includes some provisions that might be enforced for private law issues by analogy if necessary. The reason is that the law defines some important actors of the Internet and regulates their liabilities such that in case of noncompliance, those might also be considered as grounds for tort law and factors to

[258] Özbakır (n 190) 51-52; Ateş (n 3) 46-47.

determine their fault[259].

Under its article 4, the content provider is liable for any content it provides, whereas it is not liable for the content that belongs to others and where the content provider only provides links thereto[260]. However, if it is obvious that the content provider adopts the content and aims for the user to access said content, then it is liable for the content of others under the general provisions[261]. The content provider has to provide that the alleged illegal content is removed from the platform within a reasonable amount of time, which can be interpreted as immediately or as a period allowing the removal objectively depending on the case at hand. On the other hand, the fact that the content provider removed the illegal content from the Internet does not mean in principle that the liability has been lifted up. The publishing of such content on the Internet *per se* may constitute crime or tort and the duration of its stay may increase damage[262].

HP is bound to take down illegal content, when it is warned according to the articles of 8, 9 and 9/A, in cases of certain crimes, breach of personal rights and right to privacy[263]. However, HP is not under the general obligation to monitor and control content it hosts, and to investigate whether there is illegal activity on its platform (article 5). Therefore, in principle, it is not directly liable from the third-party or user-generated content on the platform, unless the HP itself provides the illegal content or has control over the user uploaded content, as it will be deemed also as content provider in such cases. In principle, in order to hold the HP liable, it is required to first warn (or notice) the HP

[259] Alıca, Yavuz and Merdivan (n 4) 1943.
[260] According to Ateş, since it is stated "any content", copyrighted content must be also within the scope of this provision (Ateş (n 3) 86). Also, Ayhan İzmirli is of the opinion that the ISP liability in Turkish law is determined under the 5651 numbered law (Ayhan İzmirli (n 2) 208). Such interpretations may result in accepting that the 5651 numbered Law also covers copyright infringement, especially for content providers. However, it is explicitly stated in the Law that it regulates certain exhaustively listed crimes. Therefore, we consider that the interpretation must be made vigilant.
[261] Ateş (n 3) 61.
[262] Ateş (n 3) 61.
[263] Nal, Suluk and Karasu (n 34) 461; Ateş (n 3) 63.

from the illegality of the content and it must not have taken it down from the platform upon such notice[264].

Furthermore, it is important to point out that the 5651 no. Law art. 9 allows the notice-and-take down procedure or blocking the website particularly for the infringed personal rights. Thus, in each particular case the infringement of rights conferred by copyright should be examined and evaluated if they can be classified as also infringement of personal rights, so that the measures and remedies in the 5651 numbered law can be implemented thereto. Taking a look at the 5846 numbered Turkish Law on Intellectual and Artistic Works art. 14(3), it stipulates that the author may prohibit disclosing the work to the public, where the way of disclosure or publishing is in a manner that would detriment the honour and reputation of the author. Also in article 16(3), where the right of prohibiting the modification of the work is regulated, it states that the author has the right to forbid any change prejudicing his honour and reputation. It is clear that these rights might include personal rights, as they concern the honour and reputation of the author *per se.*

Consequently, the acts of infringement of the right of disclosure of the work and right of prohibition of modification of the work may be considered under infringement of personal rights to the point that they damage the author's honour and reputation and may be considered within the scope of 5651 no. Law, in the event that the act qualifies as infringement of personal rights. Overall, the 5651 numbered Law deals with liabilities of Internet actors regarding catalogue crimes, rather than their copyright liability[265].

3. 6563 Numbered "Turkish Law on Regulation of Electronic Commerce"

The purpose of the 6563 Numbered "Turkish Law on Regulation of Electronic

[264] Ateş (n 3) 62.
[265] Ateş (n 3) 60.

Commerce" (E-Commerce Law) is stated in its article 1 as regulation of basis and procedures of electronic commerce. In addition, it is stated that it covers, inter alia, the enforcement of commercial communication and liabilities of service providers and intermediaries. In its preamble, it is pointed out that the purpose was to complete the issues that are not regulated in other laws, but which are required by the information society and electronic commerce, and to regulate the matters related to ISS and electronic commerce. Also, it was explicitly stated in the preamble of article 2 that despite giving definitions of certain terms, the terms defined in other laws are not included in the E-Commerce Law to not be repeating them. The definitions of content, access and hosting providers in Law No. 5651 and the regulation of liability are also deemed valid for the implementation of the E-Commerce Law. It is stated that the definition of service provider in this article also includes the concepts of access and hosting providers stipulated in the Law No. 5651.

It is justified in the preamble as to why there are no liability provisions in the E-Commerce Law, because they were already introduced in the Law No. 5651 and were not to be repeated. It was accepted that the liability provisions established in the Law No. 5651 would continue to be valid, like the relevant definitions. However, we consider that it is difficult to comprehend the mindset of the legislator here, as the Law no. 5651 was also a *lex specialis* only to regulate the consequences of certain acts of listed crimes on the Internet. Consequently, we consider that the E-Commerce Law has no place to be applied within the scope of this study, as it does not include any particularly related provision for copyright liability.

B) EU Law on Online Content Sharing

The Berne is the first international legal tool dealing with author's rights and copyright, as mentioned above. It sets the minimum standards of protection and foresees

certain exclusive rights such as the right of reproduction and communication to the public right, however, not very broadly. Later on, the rights in the Berne were adapted to digital developments with a series of treaties such as WCT and the WPPT. These treaties were implemented by the EU via InfoSoc Directive in an attempt to harmonise rights and keep up with digital development. First of all, the WCT Article 8 completes the Berne as to the communication to the public right by including all initial and subsequent transmittal of copyrighted works to the public and making available to the public, in which the public may access to works from a place and time that is chosen by the individual[266].

The EU copyright law cannot prejudice the national laws on the "specific subject matter" of IP. The national measures hampering free movement of goods or services are allowed particularly for the aim of protection of "specific subject matter" of copyright, which confers economic and moral rights. According to territoriality principle, copyright law is applicable and enforceable only in the granted EU State. As a result, EU copyright law is not uniform. Actually, there are 27 various national laws on an individual basis, which are independent. As mentioned above, the fact that there can be 27 different and separate copyright laws in the EU might impede the establishment and operation of the internal market resulting in market fragmentation[267]. For this reason, although the intellectual property rights were not regulated directly in the EU Establishment Treaties and they were considered as exceptions to the freedom of movement, it was realised that the different practices on the matter may hinder the freedom of movement and that a common jurisprudence must be formed via directives, regulations and CJEU case law[268].

[266] Jane C. Ginsburg and Luke Ali Budiardjo, 'Liability for Providing Hyperlinks to Copyright-Infringing Content: International and Comparative Law Perspectives' (2018) 41 Columbia Journal of Law & the Arts <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3068786> accessed 3 February 2022, 156; Kur and Dreier (n 7) 270.
[267] Tatiana-Eleni Synodinou, 'Desirability of Unification of EU Copyright Law', *The Routledge Handbook of EU Copyright Law* (Routledge (Taylor&Francis) 2021) 42-43; Ayhan İzmirli (n 2) 61; Kur and Dreier (n 7) 315-316.
[268] Ayhan İzmirli (n 2) 59.

In the Article 114 of "Treaty on the Functioning of the European Union" (TFEU)[269], it is stipulated that the European Parliament and Council may act upon approximation of EU national laws for "establishment and functioning of the internal market". For this, in principle, the European Commission must propose legislation. In this context, with the reason that various national copyright laws might be in the way of cross-border trade and thereby the functioning (and establishment) of the internal market, harmonisation of the copyright laws is considered necessary. After the Treaty of Lisbon[270], the TFEU had a particular norm of competence in relation to IP. Its article 118 gives the EU legislative powers for creating EU-wide IPRs for uniform protection, which could lead to a European copyright title for all EU States, such as the concept of EU trademark[271].

EU Directives adopted so far had the main focus on reducing the differences between national copyright laws, harmonising them and providing an internal market for copyright protected goods and services. Directives, along with CJEU case law, treaties and other EU legislation, are a part of the concept called *acquis communautaire*[272]. The 'acquis' means the whole binding common rights and obligations on all EU Member countries. EU States are obliged to accept, apply and implement the "acquis" into their national laws[273]. However, since the TFEU article 288 stated that the Member States may implement the Directives in the form and method they choose to implement and mostly in the Directives there are certain provisions that may not be implemented in a strict way or even might not be implemented at all, the Member States seem to have leeway. Such

[269] Treaty on the Functioning of the European Union 2012, 47–390.
[270] Treaty of Lisbon amending the Treaty on European Union and the Treaty establishing the European Community 2007.
[271] Ramalho (n 42) 4-6; Synodinou (267) 45; Kur and Dreier (n 7) 319.
[272] Ana Ramalho, *The Competence of the European Union in Copyright Lawmaking – A Normative Perspective of EU Powers for Copyright Harmonization*, (Springer 2016) 13.
[273] 'Glossary of Summaries' (*EUR-Lex*, 2021) <https://eur-lex.europa.eu/summary/glossary/acquis.html> accessed 21 February 2021.

leeway also may result in a minimum harmonisation and may pose an obstacle before total harmonisation[274]. In this part, we will briefly explain the significant EU Directives in relation to content sharing as follows.

1. **"Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society"**

The first EU legislation related here is the "2001/29/EC Directive on the harmonisation of certain aspects of copyright and related rights in the information society" (InfoSoc Directive)[275]. It is also sometimes referred to as "Copyright Directive"[276].

In the preamble, its Recitals 4, 5, 8 to 10, 16, 23, 27, 31 and 59 stipulate that a harmonised legal framework on copyright will promote investment, growth and competition in "content provision and information technology" as well as generally industrial and cultural sectors. Due to technological development and increased creation and production, the copyright law should be adapted for response to especially new ways of exploitation. Furthermore, "the social, societal and cultural implications of the information society" require the attention to the specific qualifications of the content of products and services. It states that "any harmonisation of copyright must take as a basis a high level of protection". This way, it is possible to make sure the preservation and development of creativity in the interests of, *inter alia*, authors, industry and the public at large. Consequently, IP has been accepted as a fundamental part of property.

In recital 10, the importance of adequate intellectual property protection is pointed

[274] Ramalho (n 42) 7.
[275] Council Directive 2001/29/EC of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society 2001.
[276] For instance, inter alia, in the joint cases of C‑682/18 and C‑683/18 of the CJEU it was referred to as the Copyright Directive. However, in order for it not to be confused with the CDSM Directive in any way, we prefer to refer to this Directive as InfoSoc Directive in this study.

out for guaranteeing the availability of a reward (especially financially) to the authors and creators and providing the occasion for substantial returns on their investment. It is important to mention the recital 23, as it states that "this Directive should harmonise the right of communication to the public". It considers that communication to the public should be understood widely in a way that it involves all communication, which is also not from the place where the communication has its source. Another important detail is in the recital 27 where it says merely providing physical facilities for enabling or making a communication does not *per se* correspond to communication pursuant to this Directive. As frequently mentioned in this study, a balance between different rights must be found and exceptions and limitations to the rights designated by the EU States have to be re-evaluated within "new electronic environment" (Recital 31).

Another important recital that shows the reasoning of the Directive is number 59 as follows: *"In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, right holders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States."*

"Communication to the public right" is regulated under the article 3, which also includes making available[277]. Article 3(1) with the title "Right of communication to the

[277] João Pedro Quintais, 'Untangling the hyperlinking web: In search of the online right of communication to the public' (2018) J World Intellect Prop., 3.

public of works and right of making available to the public other subject matter", provides that the authors have the exclusive right to authorise or prohibit "*any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them."*. Whereas, article 8 provides that all proportionate, effective and dissuasive sanctions and relief shall be applied by the Member Stated provided that it can be used, if necessary, against an infringement. This includes action or damages or an injunction including seizure of materials. It should also be possible for the right owners to be able to apply for an injunction against platforms, where third parties infringe their copyright by using the services in question.

2. "Directive 2019/790 on copyright and related rights in the Digital Single Market"

The "Directive 2019/790 on copyright and related rights in the Digital Single Market" (CDSMD) with the date of April 17, 2019 had been adopted (and entered into force on June 7, 2019, so 20 days after its publication in the official journal) for an attempt to harmonise the protection of copyright and related rights within the internal market of the EU and according to its article 26, the EU Member States had until June 7, 2021 for the implementation of such Directive into their national laws. Under article 288 TFEU, it is left to the Member States to choose the methods and form as to how the implementation of the Directive is made, as long as they comply with the result to be achieved[278]. The CDSMD article 26 states that the Directive will apply to nationally protected works from the date of June 7, 2021 following its national transposition and apply to any act and right arising before that date. However, not all the Member States managed to complete the

[278] Ramalho (n 42) 7.

implementation process[279]. The most controversial article is its article 17, which is the most related to this study, and some Member States, as well as big companies are criticising it because of possible online censorship[280]. For instance, as a big critique of article 17, Poland pursued a legal action with the CJEU on the matter, asserting that the directive requires excessive monitoring by platforms and as follows, filter the UGC and remove infringing content[281].

Some writers are in dissidence as to the "nature" of the right in article 17. In that sense, a group of writers are in the opinion that article 17 includes a special or *sui generis* right, whereas others consider that article 17 does not provide a new communication to

[279] Therefore, on July 26, 2021, the European Commission announced that it requested "Austria, Belgium, Bulgaria, Cyprus, Czechia, Denmark, Estonia, Greece, Spain, Finland, France, Croatia, Ireland, Italy, Lithuania, Luxembourg, Latvia, Poland, Portugal, Romania, Sweden, Slovenia and Slovakia", 23 of the 27 Member States, to inform the Commission regarding the process of the Directive being enacted into their national laws. Since those Member States had not informed the Commission their national transposition steps (or did so partially) before, the Commission decided to initiate infringement procedures. For that reason, it started sending formal notices to such States. They have two months to respond to the notice and take the required steps before the Commission takes further legal actions. In default of a sufficient answer, the Commission may issue reasoned opinions. 'Daily News 26/07/2021', (*European Commision*, 2021) <https://ec.europa.eu/commission/presscorner/detail/en/MEX_21_3902> accessed 8 August 2021.

[280] Alex Baldwin, 'EU threatens 23 states over copyright directive delays' (*WIPR*, 2021) <https://www.worldipreview.com/news/eu-threatens-23-states-over-copyright-directive-delays-21571> accessed 8 August 2021.

[281] Action brought on 24 May 2019 before the CJEU, *Republic of Poland v European Parliament and Council of the European Union* (Case C-401/19) is decided. Poland requested the annulment of Article 17(4)(b) and Article 17(4)(c) of the CDSM Directive. Poland asserted that the provisions in question are infringing the right to freedom of expression and information. In a nutshell, Poland claims that imposing the obligation on the OCSSPs to make best efforts in order to ensure that there is no works without authorisation on their platform and the obligation to make best efforts in order to prevent the future uploads of works that the rights holders have informed them of, puts the OCSSPs in such a place that they have to put in place preventive control mechanisms, in order to avoid liability. These would threaten the core of the right to freedom of expression and information and would not be proportional or necessary, as it is required to limit a fundamental right. Advocate General of the case stated that the CDSMD is compatible with freedom of expression and information and therefore, the CJEU should reject the case. Finally, on April 26, 2022 the Court rejected Poland's claims and the action is dismissed, on the ground that the disputed article is in compliance with the freedom of expression and information. The Court considers that article 17(4), so-called "prior review and prior filtering", constitutes a limitation on the freedom of expression and of information without a disproportionate restriction. In addition, the Court reminded its earlier decision of "a filtering system which might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications, would be incompatible with the right to freedom of expression and information, guaranteed in Article 11 of the Charter, and would not respect the fair balance between that right and the right to intellectual property". Lastly, according to the decision (para. 99), Member States must take into account the balance of fundamental rights when implementing CDSMD article 17 and must be proportionate while being consistent with the provision.

the public right[282]. First, to start with the opinion that CDSMD article 17 does not bring a new rights regime, it is mainly considered that its particular feature is to regulate a special liability for OCSSPs. Other than that, it does not characterise the acts of service providers within the meaning of copyright law or the right of communication to the public more than InfoSoc Directive article 3 and CJEU case law do. In any case, the InfoSoc Directive is listed in the DSM Directive as one of the legislations that remains unaffected. The CDSMD brings special liability provisions and categories for certain concepts such as the liability and obligations of OCSSPs in article 17. Indeed, it follows that the concept of "communication and making available to the public" covered in CDSMD article 17 is the same as and will be interpreted in compliance with the InfoSoc Directive article 3, which remains valid[283]. It is argued that the fact that now CDSMD article 17 exists does not alter anything. It is merely a provision stipulating that particular platforms can undertake certain steps so that their copyright liability is mitigated in case of infringement. In any case, if the platform is not defined within the scope of OCSSPs under the CDSMD article 17, InfoSoc Directive article 3 is still to be applied[284]. Consequently, it is considered by this view that CDSMD article 17 is not sui generis right, its definition and concept with regards to exploitation right of the communication to the public is of InfoSoc Directive article 3 and the platforms under its article 2(6) actually infringe the InfoSoc Directive article 3. However, they will be subject to a special liability regime[285].

As for the other view, i.e., CSDM Directive article 17 being sui generis right, it is considered that art. 17(1) is either a "special right" to communication to the public under

[282] Eleonora Rosati, 'The legal nature of Article 17 of the Copyright DSM Directive, the (lack of) freedom of Member States, and why the German implementation proposal is not compatible with EU law', (*IPKat*, 2021) <https://ipkitten.blogspot.com/2020/08/the-legal-nature-of-article-17-of.html> accessed 31 October 2021.
[283] Rosati (n 282).
[284] Nordemann and Waiblinger (n 228) 6-7.
[285] Nordemann and Waiblinger (n 228) 21-22.

InfoSoc Directive art. 3, or it constitutes a new "*sui generis* right"[286]. As a result of the changes brought by the CDSMD art. 17, it is considered that the OCSSPs are directly liable from the user uploaded content, irrespective of whether they know the illegality of the act, which is a new regime[287]. Apparently, German legislators are also in this opinion, since they transposed the article 17 separate from the rest of the CDSMD, in an independent law, as new sui generis right and *lex specialis* to article 3 of the InfoSoc Directive[288]. We do not agree with the latter view and in our opinion, this provision only brings a new liability regime for OCSSPs but it does not alter or replace the concept of the communication to the public under InfoSoc Directive article 3. European Commission also expressed that CDSMD article 17 is a *lex specialis* to article 3 of InfoSoc Directive and article 14 of E-Commerce Directive, however, it does not bring a new right for the EU copyright law[289].

Here, we consider that it is also important to define 'value gap'. It can be defined as the big difference between the profits of the OCSSPs from the user-uploaded copyright-protected contents and the revenue of the right holders paid by such OCSSPs. It is important because this causes inequality to emerge and it is a threat to a successful digital single market in terms of culture and creativity. One of the aims of the CDSMD article 17 was to try to close this value gap by redistributing the profit through forcing OCSSPs into doing license arrangements. Its secondary aim would be to prevent re-upload of copyright protected content through automated tools or 'upload filters'. Hence, the liability exemptions shall not be applied to active online service providers that

[286] Husovec and Quintais (n 228) 5.
[287] Husovec and Quintais (n 228) 10.
[288] Nordemann and Waiblinger (n 228) 12-13.
[289] 'Communication from the Commission to the European Parliament and the Council - Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market' (European Commission, 2021) <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52021DC0288&from=EN> accessed 8 February 2022, 2.

monetise content of others by distributing and promoting them, without providing the fair share to the creators[290].

In any case, the term "online content-sharing service providers", or OCSSP in short, entered into the legal terminology by the adaption of the CDSMD. Its article 2(6)(1) provides a definition as "a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject matter uploaded by its users, which it organises and promotes for profit-making purposes". In its article 17, the CDSMD regulates the liability of the OCSSPs with regards to the user-uploaded copyrighted content on their platform. For this reason, it is the most relevant and recent provision in terms of this study. Whether or not it brings new *sui generis* right, what matters is how EU countries will implement it and how both CJEU and the national Courts will interpret it in each relevant case.

3. "Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market"

The platforms, which are defined as "online content-sharing service providers" in the CDSMD, were hosts or hosting service providers in the previous legal framework including in "Directive 2000/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market" (E-Commerce Directive)[291]. Such E-Commerce Directive aimed at coordinating the national laws on ISS, ensuring legal certainty in the single market and free movement of ISS[292]. Since

[290] Espin Alba (n 250) 103-104; Ece Gönülal, 'Dijital Tek Pazarda Telif Hakkı Ve Bağlantılı Haklar Yönergesi Ile Beraberinde Getirdiği Tartışmalar' (2019) 2 Galatasaray Üniversitesi Hukuk Fakültesi Dergisi, 795-796; Husovec and Quintais (n 228) 4.
[291] Espin Alba (n 250) 105.
[292] Pablo Asbo Baistrocchi, 'Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce' (2002) 19 Santa Clara High Tech. L.J. <http://digitalcommons.law.scu.edu/chtlj/vol19/iss1/3> 112.

CDSMD is the newer and more specialised law in terms of OCSSPs and their liabilities, it will be applied primarily. In article 17(3) of the CDSMD, it is specifically stated that for the acts of communication and making available to the public performed by OCSSPs under the CDSMD, the limitation of liability in the E-Commerce Directive would not be applied. However, the platforms, which are not in the scope of the CDSMD, are still subject to the E-Commerce Directive[293].

It was considered that mere providers of intermediary services, or hosts, did not infringe intellectual property rights because they did not reproduce or communicate works to the public. They just provide technical means for the users to carry out the acts of reproduction and communication to the public. Even the so-called intermediary-aggregators not just hosting content, but facilitating the access of it directly from their online website, in principle, are not considered liable. They do not have any editorial responsibility over the content uploaded to the platform by their users, and have no control over it, and actually it is considered that the users decide to store and make available the content on the platform. Therefore, the users shall be liable for any possible infringement of copyright, especially when there are effective procedures of receiving notifications and removal of illegal content by the intermediaries. However, the E-Commerce Directive prohibits imposing general obligations for the hosts to monitor illegal content generated by the user[294]. Surely, in case the host or intermediary is informed of or actually knows the illegality of the content, but does not remove the content immediately or block it off, it will be held liable[295]. Since there is no general monitoring obligation, the actual knowledge requirement is fulfilled by the identification of the right holder. Thus, the right holder identifies that their work (rights thereof) is

[293] Yasaman (218) 627.
[294] Baistrocchi (n 292) 126.
[295] Baistrocchi (n 292) 123.

infringed and notifies the intermediary with the reasons of removal. Then the intermediary removes the infringing content after due consideration[296]. There is no strict "notice and takedown" mechanism. The liability of the platforms is assessed according to the characteristics of the service they provide. If they have an active role in providing unlawful content and have knowledge, interference and control over the illegal content, it is considered liable as if it is the content provider[297]. Consequently, it can be said that the liability of the hosting platforms is based on fault and is indirect[298].

It is important to mention the "safe harbour" exception in E-Commerce Directive. This exception is first foreseen in this Directive and the article 12 stipulates that in case the service provider does not start the communication, does not have any authority to choose the targeted users of the illegal content and does not choose or alter the content, it is not liable. Also under article 14, it is considered that in case the HP does not have any knowledge on the unlawful activity or acts immediately to remove the illegal content upon knowledge, it would not be liable. The liability exceptions in this Directive applies to the providers of "mere conduit, caching and hosting services"[299]. In light of the above, the liability for the intermediaries arising from the copyright infringements made by their users is, so to say, minimal. For that reason, it can be said that the CDSMD article 17 was more liked by the right holders[300]. The leading hosts/intermediaries have gained a lot of power and have become really dominant in the market in time. They have earned a lot of money and developed or acquired new technologies that can identify and filter out illegal content. Therefore, with all these resources at hand, the question of whether the

[296] E-Commerce Directive article 14; Espin Alba (n 250) 106-107.
[297] Baistrocchi (n 292) 123; Kaan Gürpınar, 'İnternet Servis Sağlayıcılarının Telif Hakkı İhlallerinden Kaynaklanan Sorumluluğu – ABD, AB Ve Türk Hukuku Kapsamında İnceleme' (2014) 88 İstanbul Barosu Dergisi, 237; Alıca, Yavuz and Merdivan (n 4) 1954; Özbakır (n 190) 92.
[298] Baistrocchi (n 292) 114.
[299] E-Commerce Directive article 12-14; Yasaman (n 218) 603-604.
[300] Espin Alba (n 250) 106-108.

exemption from liability is still necessary has arisen[301].

We also find it important to mention the Digital Services Act[302] (DSA), which is proposed to amend E-Commerce Directive. The reasons and objectives of such proposal are to maintain the essence of the said Directive and protect fundamental rights online by stipulating the liability regime of digital service providers and effective battle against illegal online content, without imposing general monitoring obligation. The DSA proposal keeps the liability regime for the intermediaries in E-Commerce Directive without prejudice and since it is a regulation, it can be more effective for the goal of harmonisation. It also includes the CJEU interpretation on liability exemptions by replacing articles 12-15 and stipulates a detailed notice and action mechanism to avoid having illegal contents on the platforms. Since it is not yet valid and it is uncertain when it will enter into force, we do not analyse the DSA in this study further.

4. "Directive 2004/48/EC of The European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights"

"Directive 2004/48/EC on the enforcement of intellectual property rights" (Enforcement Directive) has the aim of providing effective means of IPR enforcement to encourage innovation and creativity as well as to increase investment[303]. It is important and taken into account by the CJEU in its decisions. In its relevant recitals (17, 22, 23) the Enforcement Directive states that any measure, procedure and remedy should be considered carefully in each case including the specific features of the case and the relevant IP rights, and intention in the infringement. It is also considered essential that provisional measures provide for termination without any delay while giving a chance for

[301] Sartor (n 208) 5.
[302] Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM/2020/825 final 2020.
[303] Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights 2004, recital 3.

defence and taking the proportionality and appropriation into account. This must actually refer to both court proceedings and other measures provided by the platform.

Enforcement Directive provides in its article 3 that any measure, procedure and remedy ensured by the EU States regarding IP rights enforcement should be "fair, equitable, effective and proportionate". Also, they should not be unreasonably costly or complicated and entail unreasonable delays. Article 11 of injunctions stated that "judicial authorities may issue against the infringer an injunction aimed at prohibiting the continuation of the infringement. Where provided for by national law, non-compliance with an injunction shall, where appropriate, be subject to a recurring penalty payment, with a view to ensuring compliance.". In that sense, it is further stated that the IPR owners should be given the opportunity to apply for injunction against intermediaries as well, in case a third party or users of the intermediary infringes IPR by using the platform provided by said intermediary (without prejudice to InfoSoc Directive art. 8 providing injunctions for intermediaries regarding copyright infringements). Enforcement Directive article 13 states that EU States should provide via judicial orders that infringer, who knowingly infringes the right holder's IP rights, to pay the damages upon application. Such damages must be appropriate to the suffering from infringement considering various factors such as economic aspects (loss of profit of right holder or unfair profits of the infringer) or also moral aspects, as well as a lump sum such as possible royalty fees. In case the infringer does not knowingly infringe the rights, it must be possible to order "recovery of profits or payment of pre-established damages". In any case, the Enforcement Directive aims to ensure effective enforcement of IPR, and it is especially important in cases of online infringement, which occurs very easily and commonly.

V. ONLINE COPYRIGHT INFRINGEMENT IN SOCIAL MEDIA

Due to the rapid advancement of technology making online copyright

infringement way easier with even high quality, everyone may infringe copyright with his or her personal computers at any time. Internet, meaning the internetworking or international network consisting of decentralised networks, includes thousands of academic, commercial, public or artistic content, most of which may be qualified as "work" and protected by copyright. By increased data transfer speed and rate, the Internet might also be called "information highway"[304]. The world is also considered as a "global village"[305]. Considering that the Internet and social media enable users to disseminate information, express ideas and nowadays even sometimes create and sell "works"[306], the balance between freedom of expression (and of information) and freedom of art or copyright must be found. Therefore, sometimes, although the act is within the frame of the rights granted to the author, it may not be considered as infringement.

Freedom of art is affiliated with the freedom of expression. It is protected under European Convention on Human Rights art. 10, which gives freedom to any expression including the art that is a form of expression. However, potentially, art may be in conflict with any legal form[307]. Though it is usually foreseen by the legislator and in obvious cases put in the law as exceptions[308]. However, art may be in any form and be on any topic, so

[304] Alıca, Yavuz and Merdivan (n 4) 1943.
[305] Mustafa Ateş, 'FSEK'in 25. Maddesine Dair Genel Bir Değerlendirme' *Fikir ve Sanat Hukukuna Dair Makalelerim* (Adalet 2016) 4.
[306] As explained above in the Non-fungible Tokens (NFTS) section no. II.B.3, the first tweet of the founder of Twitter was turned into an NFT and sold for a very high price. Also, a blockchain firm Injective Protocol reportedly destroyed Banksy's work of 2006 called Morons and turned it into an NFT. First they bought the work in exchange for 95.000 US dollars from an art gallery and then they opened a Twitter account called BurntBanksy. They burnt the work and live-streamed the process. The original work of Banksy shows an auctioneer pointing at framed paintings in a crowded auction room and a framed image next to him including the sentence of "I can't believe you morons actually buy this.". It was converted to an NFT just before it was burnt on air and then sold for 380.000 US dollars. Also, it is worth mentioning that primarily, an NFT with the Nyan Cat - depicting a cartoon cat with a Pop-tart body flying with a trail of rainbows - was sold for $600,000. See more in Cristina Criddle, 'Banksy art burned, destroyed and sold as a token in 'money-making stunt'' (*BBC.com*, 2021) <https://www.bbc.com/news/technology-56335948> accessed 10 May 2021. It is controversial whether the NFTs may be qualified as works and protected by copyright but it is a topic for another study.
[307] Felix Uhlmann and Cristina Bogduna, 'Zehn Thesen zu Kunstfreiheit und Kunstförderung' (originally in ZSR 127 (2008) I 363 ff.), (translated by Yener Ünver), *Hukuk ve Sanat*, (6th edn, Seçkin 2021) 39.
[308] For instance, Swiss Criminal Code article 197 paragraph 9 states that items or recordings as described in its former paragraphs are not regarded as pornographic if they have a cultural or scientific value that

it is better to say that depending on the conditions of the case at hand, the conflict has to be solved by balancing the interests in question and interpreting the relevant legal norm. For sure, any dispute regarding art may not be resolved by only justifying it under the freedom of art[309].

Civil and criminal sanctions may be foreseen by different legal systems based on the acts and the recipient of these sanctions may be both users and intermediaries. The liability of intermediaries may arise from their users' illegal activities, as well as their own. It is usually called secondary liability, mainly in the common law system, which is the liability arising from an act of a third party, for instance an employee or user. Intermediary is not the one initiating the illegal activity but it facilitates it[310]. In cases of unauthorised screenshot, copy, duplicate and download the copyrighted content, the right of reproduction would be infringed. Also, in the event of unauthorised translation or conversion of a type of work to another type, the right of translation or the right of adaptation may be infringed. Anyhow, there are several ways to infringe copyright online within the scope of social media. However, in order to keep this study well-coordinated and not too long, as well as not to overextend, we will focus on the infringement types of posting, hyperlinking and re-sharing, which frequently happen in social media, particularly on Facebook, YouTube, Instagram and Twitter.

A) Possible Online Copyright Infringement Types in Social Media

1. Posting

Considering the services provided by OCSSPs, posting or uploading content is certainly one of the most common actions. When a user uploads (or posts) a content

justifies their protection by law. See in Uhlmann and Bogduna (n 307) 40.
[309] Uhlmann and Bogduna (n 307) 41.
[310] Sartor (n 208) 8-9.

including a work of another without authorisation, such as a part of a musical work or a photograph or a video, it may constitute infringement of several rights depending on the circumstances. Under this title, what is meant is posting UGC for the first time on a platform, although it can include other's works, rather than reposting or resharing posts of others as a whole. Such case is analysed below under the relevant title.

In case an adaptation of someone's work is posted, it will constitute infringement to the right of adaptation, as well as to the authority to prohibit modification. Also, if the author's name is not mentioned in a content containing the work, it would constitute infringement to right to designate the name. Surely, communication to the public and making available rights are also infringed, when posting a work without consent. For instance, in 2018 the CJEU ruled that unauthorised posting of a copyright protected work constitutes an act within InfoSoc article 3(1) in *Renckhoff*[311] case. In the said case, the Court differentiated between hyperlinking and uploading, therefore departed from its *Svensson* precedent and found that there is a new public although the work was initially made available to all Internet users elsewhere by the right holder. The Court justified this decision by pointing out the contribution of hyperlinking to "sound operation" of the Internet, which is not valid for unauthorised upload of works[312]. Posting a protected work, a photograph, taken from another website without authorisation of the author (although given reference to the source) was held to constitute copyright infringement. It was found that the user had a "decisive role" in communicating the work to a public, which had not been considered by the author at the initial authorised communication, as it is not only used for in class teaching activity but also published on the school's website, available to

[311] Judgment of the CJEU (Second Chamber) of 7 August 2018, *Land Nordrhein-Westfalen v Dirk Renckhoff*, C-161/17, ECLI:EU:C:2018:634.
[312] Angelopoulos (n 131) 201.

its visitors[313]. CJEU decided that posting is an "act of communication" whereas hyperlinking is not. The reason is that contrary to hyperlinking where the author decides to remove the content from the target website and may prevent access from the link, as a result of the posting, the work remains available on the latter website although the right holder decides to remove the work from previous (source) website[314]. Additionally, otherwise the right owner also would be deprived of the chance of exploiting the work and lose the control of it[315]. Obviously, such approach benefits to authors and copyright owners more than users[316].

A different example would be the celebrities posting their own photos taken by paparazzi without permission. There are several disputes in the US on the matter, such as copyright infringement lawsuits brought against Gigi Hadid or Jennifer Lopez, where paparazzi claims that they own the copyright on the photographs they taken and since they earn money by licensing them, celebrities posting their photos on their social media accounts with millions of followers would cause the paparazzi to lose money[317]. The most significant point here is that the photos and its rights belong to the one who takes them, that person is the author (so, the paparazzi). Therefore, it is required to ask for authorisation, even if the person in the photo is the one to ask for it.

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[313] *Renckhoff*, C-161/07, para. 46; Peter Ling, 'Copyright Infringement Confirmed, but No Damages for Cordoba Photographer', (*IPKat*, 2019) <https://ipkitten.blogspot.com/2019/07/copyright-infringement-confirmed-but-no.html> accessed 3 February 2022.
[314] *Renckhoff*, C-161/07, para. 44.
[315] *Renckhoff*, C-161/07, paras. 28-30.
[316] Lucy Marlow, 'European Union: The Risks of Reposting Online Content: CJEU Rules On the Unauthorised Reposting of Copyright Protected Works on The Internet' (*Mondaq*, 2018) <https://www.mondaq.com/uk/copyright/730320/the-risks-of-reposting-online-content-cjeu-rules-on-the-unauthorised-reposting-of-copyright-protected-works-on-the-internet> accessed 23 November 2021.
[317] Daniel Daniele, 'To regram or not to regram? Legal implications of reposting content to social media' (*Social Media Law Bulletin*, 2019) <https://www.socialmedialawbulletin.com/2019/08/to-regram-or-not-to-regram-legal-implications-of-reposting-content-to-social-media/> accessed 22 November 2021; Maria Puente, 'Jennifer Lopez sued by paparazzi agency for copyright infringement' (*USA Today*, 2019) <https://www.usatoday.com/story/entertainment/celebrities/2019/10/07/jennifer-lopez-sued-paparazzi-copyright-infringement/3900908002/> accessed 23 November 2021.

2. Hyperlinking

Hyperlinks are considered as a very essential and a big part of the Internet[318]. It can be said that hyperlinks are one of the things that makes the 'World Wide Web' an actual *web*, since they literally connect the websites and contents on the Internet. Due to the nature of social media, in particular YouTube, Facebook, Instagram and Twitter, the act of hyperlinking is extremely common. Users usually refer to contents or topics that they want to point out by providing links or hyperlinks thereto, especially when there is limited space to explain the matter, such as in Twitter with the character count of maximum 280[319]. Although used a lot, it is still slightly controversial in the EU, whether hyperlinking is allowed and therefore, now and then the matter still comes before the CJEU for interpretation. As for Turkey, the matter will be assessed subsequently.

It is noteworthy that in the case of hyperlinks, it is possible to access the copyright protected works very easily and on a large scale with only one simple click. On one hand, it may indeed cause copyright violation, but on the other hand, it is also considered as a part of the right to access information and freedom of expression. Trouble here is to decide to which degree a work should be protected by copyright, where the public access to the work is considered more important and whether there should be a prevailing right to freedom of expression and information to be protected in every respective case. Since it is not always easy to find the right balance, it continues to be problematic depending on the dispute. From the CJEU's point of view[320], whether there is communication to the public and liability thereof depends on the knowledge of the link provider regarding the

[318] Rodolfo Baggio and Magda Antonioli Corigliano, 'On the Importance of Hyperlinks: A Network Science Approach' *Information and Communication Technologies in Tourism* (Springer 2009), 309.
[319] This number grew from 140 to 280 over time. See more in 'Documentation, Fundamentals, Counting characters' (*Twitter*, 2021) <https://developer.twitter.com/en/docs/counting-characters> accessed 16 March 2021.
[320] Judgment of the Court (Second Chamber) of 8 September 2016, *GS Media BV v Sanoma Media Netherlands BV and Others*, C-160/15, ECLI:EU:C:2016:644.

illegality of the content. It is possible to say that this actually makes copyright infringement being considered under tort liability[321].

Due to the Internet technology advancements since its advent, different types of links have emerged. These links differ depending on their nature and purpose. It appears that the CJEU usually does not distinguish between types of links[322] when assessing whether there is communication to the public. Definition of hyperlink corresponds to a digital bridge. According to the Collins Dictionary, a hyperlink is "*In an HTML document, a **hyperlink** is a link to another part of the document or to another document. Hyperlinks are shown as words with a line under them. [computing]"*[323]. Hyperlinking allows users to access information online. They just click on a hyperlinked text or image and they are immediately connected to new information by jumping from one website to another[324]. For instance, while reading a Tweet including a hyperlink on Twitter, the user may go to the hyperlinked page just by clicking on the given link without any need to type the address of this new desired page to their browser. It is also possible that the link includes the whole or a substantial part of the work, as the image that corresponds to the hyperlink may be a photograph or a painting for example. As far as we are concerned, there are four main forms of linking related to this study. They are simple links, deep links, embedded links and frame links. In a nutshell, a simple link is only the Internet address that leads to the homepage of the target website. Deep link is where the connection leads to a specific content in the website, rather than to the homepage of

[321] Christina Angelopoulos, 'Hyperlinks and Copyright Infringement' (2017) 76 Cambridge Law Journal, 34; The EU tort law is not based on fault, the unlawfulness of the action is more in the forefront. *See in* Paula Giliker, 'What Do We Mean by EU Tort Law?' (2018) 9 Journal of European Tort Law, 18-19.
[322] Ginsburg and Strowel (n 141) 224.
[323] See in Collins Dictionary <https://www.collinsdictionary.com/dictionary/english/hyperlink> accessed 22 November 2020.
[324] Ayhan İzmirli (n 2) 186.

such[325]. This may have importance when the website of destination loses income, if the website's ads are located on its homepage and the visitor bypasses it by directly going into the internal web page with the help of the deep link[326]. However, considering that deep linking directs the users to the content itself, from a copyright point of view, it can result in an easier and quicker way to infringe. As for the categorization, it is considered that both simple linking and deep linking constitutes hyperlinking[327]. There are also framed and embedded links: the first one shows the target website within the frame of the source website and the latter shows a file such as a song or video in the source website that is actually hosted by the target website[328]. As this study does not intend to exhaustively present or classify the types of hyperlinks, we will move further to analyse the relation of hyperlinks and copyright, and when the act of hyperlink is considered an infringement. Thus, it is worth mentioning that in framing or frame link, the website is divided into frames and this way, more than one content is displayed in the same web page without leaving it. The critical point in framing is that the internet address of the targeted content shown in the frames is usually not visible on the available page and the user might think the work belongs to the owner or provider of the available page, since there was not any new website or windows or tabs to be opened for directing to the new page[329]. Therefore, the user might not realise that there is copyright infringement via framing method, if there is any.

The relation between hyperlinks and copyright derives from the right of communication to the public, which is regulated under InfoSoc Directive article 3 in the

[325] Chris Maddern, 'A Brief History of Deep Linking' (2015) <https://techcrunch.com/2015/06/12/a-brief-history-of-deep-linking/> accessed 24 January 2021; Ayhan İzmirli (n 2) 186-187.
[326] Gerrie Ebersohn, 'Hyperlinking and Deep-Linking' (2003) 73 Juta's Bus L, 73.
[327] Ginsburg and Strowel (n 141) 217.
[328] Dawn Leung, 'What's all the Hype About Hyperlinking?: Connections in Copyright' (2020) 7 Intellectual Property Brief, 63.
[329] Demirbaş (n 115); Memiş (n 115) 396-399; Ayhan İzmirli (n 2) 189-190.

EU and article 25 of the LIAW. The question is whether providing a hyperlink constitutes an act of "communication to the public and making available" therewithal[330]. Even the right of reproduction in InfoSoc Directive article 2 or Article 22 of LIAW might come up in some cases. However, the act of hyperlinking is more about the communication, because reproduction right needs an act of copying the work to a medium and it is not common in hyperlinking[331]. At the time of drafting the WCT, hyperlinking was not considered and was not clearly stated and thus, neither it is stipulated in the InfoSoc Directive. Therefore, the interpretation was left at the discretion of the CJEU[332].

Another aspect regarding copyright and hyperlink is the CJEU findings in the *Spiegel Online* decision[333] in terms of the quotation exception set forth in InfoSoc Directive article 5(3)(d) that must be interpreted in a way the concept of quotation includes a hyperlink to a file, which is freely available on the Internet and can be downloaded independently. The reason is that the CJEU interpreted the quotation provision as it does not require "the quoted work be inextricably integrated, by way of insertions or reproductions in footnotes for example, into the subject matter citing it", and therefore, a hyperlink to the quoted work may be considered as a quotation[334].

Additionally, let us take a quick look in the CDSMD article 15, where a new limited right category is foreseen and the term hyperlinking is stated. In this article, the act of hyperlinking is explicitly regarded as the exception of press publishers' copyright protection. According to the Recital 56 of the CDSMD, the press publication is defined as it only includes "journalistic publications, published in any media, including on paper,

[330] Rosati (n 130) 80.
[331] Ginsburg and Strowel (n 141) 219; Tekinalp (n 5) 184-185.
[332] Pekka Savola, 'EU Copyright Liability for Internet Linking' (2017) 8 JIPITEC 139-140.
[333] Judgment of the CJEU (Grand Chamber) of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, C-516/17, ECLI:EU:C:2019:625.
[334] *Spiegel Online*, C-516/17, paras. 80-84.

in the context of an economic activity that constitutes a provision of services under Union law". In Recital 55, the service providers were included in the scope of press publishers provided that they publish press publications. There was a distinction made as the protection was given to the literary works and also photos and videos, whereas the scientific and academic journals were excluded from this new type of protection. Besides, the websites providing content without "the initiative, editorial responsibility and control of a service provider" were also excluded from the protection. In the Recital 57, it is stated that the granted rights are the same as the reproduction and making available to the public rights in the InfoSoc Directive and these rights cannot cover the act of hyperlinking and mere facts reporting[335]. It is noteworthy that the new rights frame granted to the press publishers actually does not affect copyright protection and author's rights (CDSMD article 15(2)), as it is a separate right concept for a duration of two years from the publication (CDSMD article 15(4)). In case of hyperlinking to an unauthorised copyrighted content, it is still possible to be held liable from copyright infringement provided that the requirements are found[336].

As per the broad definition, the CJEU first interpreted that the hyperlinking is included in communication to the public right but if there is no new public that the link is communicated, then there cannot be a liability. At this stage, in a nutshell, according to CJEU (as also will be detailed below especially in *Svensson*, (C-466/12) and *GS Media*, (C-160/15)), if hyperlink is for works that are already available online for free, then the hyperlink does not constitute copyright infringement, because all the Internet users were taken into account from the beginning with the unrestricted access[337]. However, if the

[335] 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, recitals 55-57, L 130/104.
[336] Eleonora Rosati, 'The EU Copyright Directive: the press publishers' right' (*MediaWrites*, 2019) <https://mediawrites.law/the-eu-dsm-directive-the-press-publishers-right/> accessed 19 February 2021.
[337] Rosati (n 130) 80; Eleonora Rosati, 'Linking and Copyright in the shade of *VG Bild-Kunst'* (Faculty of Law, Stockholm University Research Paper - No. 99, 2021) <

hyperlink provides circumvention of restrictions imposed for the works that are intended for a limited number of public with restricted access, such as in subscribed video on demand services, or there is profit making, then it constitutes copyright infringement because there is knowledge of the illegal act. It is considered that this applies to all types of links because the type of link was found irrelevant (*VG Bild-Kunst*, C-392/19)[338].

Hyperlinking also has another aspect than copyright. It is considered as an important part of freedom of expression and of information. Freedom of expression is set in the article 10 of "European Convention on Human Rights" (ECHR)[339]. Overall, the freedom of expression is defined really broad, including nearly each form of expressive activity, and also what interferes with the enjoyment thereof[340]. European Court of Human Rights (ECtHR) is of the opinion that the freedom of expression applies also to the expressions rendered on the Internet. The right includes free expression of opinions, views and ideas, as well as searching and accessing information without boundaries, including the creation, use and circulation of content on the Internet. Thus, it is clear that the act of hyperlinking is included in the right to freedom of expression[341]. The ECtHR evaluated the relation between hyperlinking and freedom of expression in its judgment on December 4, 2018, *Magyar Jeti ZRT v. Hungary*[342]. The dispute was a popular news site in Hungary publishing a news article about drunk football fans, who insulted Roma

https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3907820> accessed 30 May 2022, 7; Ginsburg and Budiardjo (n 266) 163; Angelopoulos (n 321) 33.

[338] 'To Link or Not to Link?' (*European IP Helpdesk*, 2021) <https://www.iprhelpdesk.eu/news/link-or-not-link> accessed 25 January 2021; Rosati (n 337) 16; Ginsburg and Strowel (n 141) 223-225.

[339] Council of Europe, European Convention on Human Rights, 1952.

[340] Toby Mendel, 'Freedom of Expression: A Guide to the Interpretation and Meaning of Article 10 of the European Convention on Human Rights' <https://rm.coe.int/CoERMPublicCommonSearchServices/DisplayDCTMContent?documentId=0900001680650af2> accessed 25 January 2021, 2.

[341] 'Recommendation CM/Rec(2014)6 of the Committee of Ministers to member States on a guide to human rights for Internet users – Explanatory Memorandum' (*Steering Committee on Media and Information Society (CDMSI) of Council of Europe*, 2014) <https://search.coe.int/cm/Pages/result_details.aspx?ObjectID=09000016805c6f85#P118_25200> accessed 29 November 2020, para.43.

[342] Judgment of the ECtHR of 4 December 2018, *Magyar Jeti ZRT v. Hungary*, no. 11257/16, ECLI:CE:ECHR:2018:1204JUD001125716.

children outside their school. The news article contained a hyperlink to a YouTube video about interviews with the leader of the Roma community and one of the children's parents[343]. In the ECtHR decision, hyperlinks were considered different from traditional publication, because they do not show content or include content communication. They simply direct users' attention to the content available somewhere else[344]. It is also important that in the dispute at hand, the hyperlink had already been made available by the original publisher without any restricted access to the public. It is noted that the company's news article only mentioned that there is an interview with the community leader and that it is available on YouTube by providing its link. There was no comment or endorsement or confirmation for neither the content and the statements nor the political party. It could not have been clear to the provider of the hyperlink that it is directed to defamatory content because at that moment there had been no judgment on whether the content was defamatory and it was not possible from the beginning to consider the statements as being illegal. The ECtHR found that hyperlink connotes to circulation of information, which necessitates objective (strict) liability and it purports that there is no balance of the parties' rights under Article 8 ("right to respect for private and family life, home and correspondence") and Article 10 ("freedom of expression"). Such objective and strict liability could have adverse impact on the information flow on the Internet by urging authors or publishers to beware from hyperlinking to content, over which they

[343] In the video, they claimed that the fans were members of the Jobbik political party and credited their actions to the party. Jobbik later sued Magyar Jeti ZRT among other media companies and the interviewed community leader for defamation. In 2014, the Hungarian High Court ruled that the community leader's statements were indeed defamatory because of their false claim of the involvement of Jobbik. It also found that the Magyar Jeti ZRT and other media had "objective liability" as they circulated such defamatory statements and their intention of doing it or the matter of good/bad faith did not matter. 'Court condemns libel verdict against a Hungarian media company, stresses importance of hyperlinks on Internet' (*European Court of Human Rights*, 2018) <file:///C:/Users/anaca/Downloads/Judgment%20%20Magyar%20Jeti%20Zrt%20v.%20Hungary%20-%20use%20of%20hyperlinks%20in%20online%20articles.pdf> accessed 10 February 2021.

[344] *Magyar Jeti ZRT v. Hungary*, no. 11257/16, para.74.

have no control[345]. Thus, this could naturally have an adverse impact on the freedom of expression and of information on the Internet[346].

The ECtHR also dealt with the relation of intellectual property with the freedom of expression in terms of copyright infringements. Sharing files on the Internet, although the files contain copyrighted works, is considered under the freedom of information in article 10 ECHR[347]. Copyright is also in the scope of protection granted by article 1 of Protocol to the ECHR[348]. However, since this right is not absolute, there is a need to find the balance between the benefit of sharing information and the benefit of the copyright owners. The CJEU concluded that in certain cases, it is possible to limit copyright protection for the sake of freedom of expression in order to find the balance[349]. As a result, we consider that ECtHR does not differ too much from CJEU. The ECtHR applies a "three-part test" when considering whether interfering in the freedom of expression breaches the ECHR according to its article 10(2), where it decides whether the act is stipulated by law, pursued a legitimate purpose, and "necessary in a democratic society"[350]. This applies to other types of possible infringements under this part, i.e. posting and reposting, when applicable.

It is also important that the providers of hyperlinks should regularly check whether the content that the hyperlinks provide access to is still freely available and legal. This

[345] *Magyar Jeti ZRT v. Hungary*, no. 11257/16, para.75.
[346] ECtHR (n 343) 3.
[347] *Neij and Sunde Kolmisoppi v. Sweden no.40397/12*. See also *Ashby Donald and others v. France*, no. 36769/08 § 34.
[348] N*eij and Sunde Kolmisoppi v. Sweden (dec.); SIA AKKA/LAA v. Latvia, §41;* Christophe Geiger and Elena Izyumenko, 'Copyright on the Human Rights' Trial: Redefining the Boundaries of Exclusivity Through Freedom of Expression' (2014) 45 IIC 322.
[349] Geiger and Izyumenko (n 348) 318; Savola (n 332) 150.
[350] Geiger and Izyumenko (n 348) 321; 'Guide on Article 10 of the European Convention of Human Rights - Freedom of Expression' (*Council of Europe/European Court of Human Rights*, 2021) <https://www.echr.coe.int/documents/guide_art_10_eng.pdf> accessed 3 February 2022, 19.

way they may stay out of trouble in case the circumstances change[351]. In light of all related decisions, which are explained below in part (IV. E.), it can be said that in *Svensson,* the CJEU focused on the public and the act is classified under the right of communication to the public in case there is a new public that the copyright owner had not considered before. However, in *GS Media,* the CJEU focused on the knowledge of link provider on the unlawful characteristics of the targeted content. So there, the provider's knowledge on the act is in the forefront[352].

There is an example from Germany for the national interpretation of the CJEU case law, where the District Court of Hamburg held pursuant to the principle set forth in *GS Media.* The matter was about providing a hyperlink to a modified photograph, where it was available to the public without the authorisation of the author of the original photograph. The Court first checked if there was consent, since there was not, the targeted content was considered unlawful. Then the Court analysed the matter from the perspective of profit making. It did not interpret the CJEU's decision in a strict sense and found that the website making profit is sufficient to regard the linking activity as "for profit" and there was no need that the link itself was making profit. Also, because the link provider was warned before about the illegality of the adaptation and did not remove the link or photo, it was noted that the provider acted with intent. Consequently, the Court decided that the hyperlink was making the work available according to § 19a German Copyright Act[353].

European Commission is of the opinion that in case the linked content is already

[351] Tobias Cohen Jehoram, 'ECJ: hyperlinks to unauthorised content may infringe copyright' (*De Brauw/Blackstone/Westbroek*, 2016) <https://www.debrauw.com/legalarticles/ecj-hyperlinks-unauthorised-content-may-infringe-copyright/> accessed 10 February 2021.
[352] Savola (n 332) 141-142; Rosati (n 337) 8.
[353] Jan Bernd Nordemann and Viktoria Kraetzig, 'Linking to illegal content can constitute a copyright infringement – CJEU Sanoma interpreted by a German Court' (*Kluwer Copyright Blog*, 2017) <http://copyrightblog.kluweriplaw.com/2017/01/10/linking-illegal-content-can-constitute-copyright-infringement-cjeu-sanoma-interpreted-german-court/> accessed 16 February 2021.

freely accessible on another website and the targeted public is the general public, it does not matter whether the content is within reach without the copyright owner's authorisation. Therefore, the awareness and knowledge of the provider of the link must not be relevant for copyright and liability arising thereof. The Commission considers that the assessment should be objective. What is important to it is whether there is a circumvention of restrictions and whether the website can be accessed freely or not[354]. The CJEU case law is not quite in the same way, as simple and reduced[355]. Although the CJEU did not classify the type of liability, considering that the knowledge of the illegality is required, it can be said that it would be indirect liability[356]. Regarding the requirement of profit making, there can be two aspects as to the entire website running for profit and the intention of profit from the hyperlink itself. The national approach differs in interpreting the requirements. Although their interpretation may differ, it can be said that the *GS Media* (also *Svensson* and *BestWater*) is frequently applied by the EU national courts. As an additional example to the German decision above, Greek Court interpreted[357] the CJEU's profit making requirement very narrowly. It seems to find the pursuit of financial gain in case of hyperlinking, where the provider is involved in the targeted unconsented transmission and makes profit from it *per se*[358]. Whereas German, Swedish and Czech Courts interpreted that requirement broader. The Swedish and German national courts applied the *GS Media* in a way that when the website providing the link has the purpose of financial gain its profit-making nature is sufficient. In case of advertisement where hyperlink is incidentally provided or it is irrelevant in making profit,

[354] Observations in *GSMedia,* C-160/15, para. 34 in Rosati (n 130) 81.
[355] Rosati (n 130) 81.
[356] Savola (n 332) 143.
[357] Decision No 1909/2017 of the Athens Court of Appeal in Eleonora Rosati, 'Athens Court of Appeal applies CJEU GS Media linking decision and interprets 'profit-making intention' restrictively' (*IPKat*, 2017) <https://ipkitten.blogspot.com/2017/11/athens-court-of-appeal-applies-cjeu-gs.html> accessed 23 February 2021.
[358] Rosati (n 357).

it is said that at least there must be a causal link. Surely, every situation and dispute must be evaluated on its own circumstances. Should there be a popular website and the hyperlink is for the attraction of users with the intention of earning advertising income, the linking activity should be considered as commercial. For instance, the Czech Court found that any advertisement on the clicked website generating revenue counts, it is not necessary that the disputed hyperlink makes money itself[359]. Nevertheless, it cannot be said that the CJEU interpreted the commercial activity in the widest possible way. The standard for caution in placing the link varies according to many criteria, such as the amount of gain, popularity of the provider or the intention and purpose of the provider. Commercial linkers are expected to have higher diligence, since they are assumed to make profit and their act is in full knowledge of the possible illegality. Still, the reasonable level of diligence and duty to check whether the link remains legal should be considered[360].

Matter of hyperlinking is also not clearly stated in LIAW, which makes it to be interpreted by the specialised courts in Turkey. Still, the Turkish Courts may benefit from the provisions in the 5651 numbered Law by analogy, where appropriate. The reason is that the 5651 numbered law article 4 states that the content provider is liable for any content they share on the Internet, but, not directly liable from a third person's content that they only provided a link to. Only if it is obvious from the format of provision that they adopt the content and would like for the users to access such content, then the content provider is liable under the general provisions. We are of the opinion that Turkish practice would be in line with the EU practice and in case the linked work is freely (with authorisation) on the Internet with a reference to the author, there should not be an infringement. However, in case there is no authorisation and no author's name,

[359] Eleonora Rosati, 'After Sweden and Germany, GS Media finds its application in the Czech Republic' (*IPKat*, 2017) <https://ipkitten.blogspot.com/2017/02/after-sweden-and-germany-gs-media-finds.html> accessed 23 February 2021.
[360] Savola (n 332) 145-148.

hyperlinking also constitutes infringement of, *inter alia*, communication and attribution rights[361].

3. Resharing (Reposting)

One of the most common acts on social media is reposting or resharing. Not only individual reposting but lately, there are even a lot of social media accounts, of which the purpose is to merely repost collected content of other users. This way, many followers can access various content from one page. In any case, reposting is very frequent and used by millions every day[362]. What is meant by reposting here is to reshare other's content without changing it at all. In case a work or a content is taken, modified, then posted, we analyse such issues above under the title "posting". Infringement via reposting can be considered as controversial, since it can come to mind that nothing is changed and it is almost like providing a link or quotation, however, it is different.

Since the reposted content belongs to other users or authors, it is important to obtain authorisation before reposting. Giving credit to the copyright holder after infringement may not be sufficient. In any case, even though the authorisation is obtained, for not infringing the right to designate the name, it is important to mention the author's name. Surely, in the event that act of reposting is within the legal exceptions, such as news reporting or quotation, there should not be any problem[363]. The issue here is that the person reposting content makes it clearly available to the public and communicates it again. The other users see it automatically, not by clicking on a link that (sometimes obviously) shows the content being somewhere else. It is problematic, it is as if the user reposting the content is the author or owner of such posts or prohibits/hinders exploitation

[361] Ayhan İzmirli (n 2) 187-189; see more in Demirbaş (n 115) 169-186, Memiş (n 115) 393-412.
[362] Daniele (n 307).
[363] Daniele (n 317).

of the author from their own work. Therefore, it must be considered that reposting without authorisation can cause infringement of author's exclusive rights, especially communication to the public and making available right.

B) Certain Exceptions to the Copyright Infringement in Social Media

As in the preamble of the CDSMD ("Recital 70"), users should be free to generate and share content "for the specific purposes of quotation, criticism, review, caricature, parody or pastiche". It is considered important specifically for finding the balance between human rights, "in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property". In addition, the exceptions and limitations are considered to be made obligatory for providing uniform EU protection and it is also important for the OCSSPs to have effective complaint and response mechanisms for supporting such uses accordingly.

Taking into account that CDSMD article 17 is a prescriptive provision, it is considered that the Member States do not have an area of freedom for transposition. This means, Member States are obliged to implement the exceptions and limitations of quotation, review, criticism, parody, caricature and pastiche of article 17 into their national laws. They cannot leave any of it behind or implement article 17 partially. Also, such concepts are autonomous and their interpretation would be uniform under the CJEU case law without any amendment from Member States. They cannot create or keep any exceptions and limitations more than allowed under EU law and in particular under InfoSoc Directive art. 5[364].

Under CDSMD art. 17(7), the matter is regulated as follows: "*The cooperation*

[364] Rosati (n 282); Judgment of the CJEU (Grand Chamber) of 29 July 2019, *Funke Medien NRW GmbH v Bundesrepublik Deutschland*, C-469/17, ECLI:EU:C:2019:623; Judgment of the CJEU (Grand Chamber) of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, C-516/17, ECLI:EU:C:2019:625.

between online content-sharing service providers and right holders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation. Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services: (a) quotation, criticism, review; (b) use for the purpose of caricature, parody or pastiche." An important point to mention regarding limitations is that there is a three-step test for assessment. It is first foreseen in Berne, then in TRIPs and InfoSoc Directive and lastly in the CDSMD. According to this test, it is required that the exceptions and limitations to copyright must be applied in particular cases of "important benefit" (1), "without conflicting with the normal exploitation of the work" (2) and "without unreasonably prejudicing any legitimate interest of the copyright holder" (3). These are cumulative and applied for economic rights. Therefore, it can be said that there is also a limitation on the limitations of copyright[365].

In Turkish IP law, LIAW sets forth the limitations between its articles 30 and 41, as inter alia, private use or news reporting. However, there is no specific provision for parody, pastiche or caricature exception. These must be evaluated in each particular case, especially under the freedom of expression. Due to its high volume and limited nature of this study, we will only explain quotation, news reporting and parody exceptions.

1. Quotation

Quotation can be defined as taking the whole or parts of the works (made public)

[365] Özge Öncü, 'Fikir ve Sanat Eserleri Hukukunda İktibas Serbestisi ve Sınırları', (PhD, University of Dokuz Eylül 2009) <https://www.telifhaklaridernegi.org/fileSource/tezler/DT-FİKİR%20VE%20SANAT%20ESERLERİ%20HUKUKUNDA%20İKTİBAS%20SERBESTİSİ%20VE%20SINIRLARI-ÖZGE%20ÖNCÜ.pdf> 9; Kur and Dreier (n 7) 308; Dutfield and Suthersanen (n 9) 94-95; Ginsburg (n 25) 23.

identically and putting it to another product by giving reference. It is important to provide the authentic and original way of the work, not adapted or changed in any way, in order to qualify it as a quotation[366]. The acceptable amount of the work taken depends on the kind of work. For instance, it is possible for a painting to be quoted fully in order to comment on it in a lecture or a scientific conference, however, in literary and musical works usually small quotation is acceptable in Turkish law[367]. In the event that there is a quotation without any reference to the author, it constitutes plagiarism. Therefore, it is also important to properly reference when quoting, to avoid any copyright infringement[368].

In any case, quotation is founded in freedom of expression and information, and it can present itself such as criticism or review[369]. Quotation is considered possible for any type of work in the EU, there is no limitation except that the quoted work must have been legally made available to the public. The use must be "in accordance with fair practice, and to the extent required by the specific purpose"[370]. However, in LIAW not all types of works are listed and specific conditions are set out, thus, it seems that only "literary and scientific works, musical works and works of fine arts" may be quoted[371].

As said, quotation is an essential exception based on freedom of speech, also found in Berne art. 10(1) as mandatory, and therefore, it is one of the most commonly accepted exception type worldwide[372]. It is one of the exceptions listed in InfoSoc Directive art. 5, and as mentioned above, by the CDSMD art. 17(7) it is made mandatory

[366] Öncü (n 365) 7.
[367] Öncü (n 365) 15.
[368] Tekinalp (n 5) 204-205.
[369] Stavroula Karapapa, 'The Quotation Exception Under EU Copyright Law - Paving the way for user rights', *The Routledge Handbook of EU Copyright Law* (Routledge (Taylor&Francis) 2021) 250.
[370] Karapapa (n 369) 253; *Spiegel Online,* C-516/17, para. 83; Dutfield and Suthersanen (n 9) 92.
[371] Öncü (n 365) 16.
[372] Karapapa (n 369) 247-250; Marie-Christine Janssens, 'The issue of exceptions: reshaping the keys to the gates in the territory of literary, musical and artistic creation', *Research Handbook on the Future of EU Copyright* (Edward Elgar 2009) 323.

for the Member States to transpose quotation exceptions. By that, it was aimed to not prevent the non-infringing works to be uploaded by the users. Therefore, the users must rely on the quotation exception when uploading the content and when the OCSSPs making available such content.

In LIAW art. 35, generally permitted quotations are listed in detail[373]. For literary or scientific works, as well as musical works only small quotations are accepted, such as a few sentences or certain elements. However, in scientific explanation of works of fine arts it is possible to reproduce and show the whole work. It is also significant to point out that the quotation must be made in a clear and apparent manner and it must be made from a work made public. Otherwise, it might constitute infringement of moral rights[374]. Also, in scientific works, it is required to mention the original passage alongside the name of the work and its author. It must be noted that freedom of quotation is a limitation on the economic rights, since the quoted work or its part might be reproduced, distributed, performed or communicated to the public with the new independent work that the quote is a part of[375]. However, it is not a limitation on moral rights, since quotation can be made only for already publicly disclosed works and it is required to acknowledge the name of the author and original work, normally moral rights should not be infringed this way. With regards to modification, it is stated in LIAW article 16(2) that the person adapting, disclosing to the public, reproducing, publishing, performing or otherwise distributing a work with the authorisation of the law or the author may make indispensable changes. In

[373] LIAW Art. 35: "Quotations of a work are permitted in the following cases:
1. Quoting a few sentences or passages of a work made public, in an independent literary or scientific work;
2. Incorporating certain elements of a published composition, at the most such as themes, patterns, passages or ideas, into an independent musical work;
3. Reproducing works of fine arts that have been made public and other published works, in a scientific work for the purpose of explaining its content and to the extent justified by such purpose;
4. Displaying works of fine arts that have been made public by projection or similar means in order to explain a subject at scientific conferences or lectures."
[374] Tekinalp (n 5) 204-205.
[375] Öncü (n 365) 18-19.

this case, it stems from the law (LIAW art. 35) and might be permissible, provided that the change is indispensable[376]. Besides, in order to benefit from this limitation in the law, provided that the requirements are met, there is no need for obtaining authorisation of the author or pay royalties. Additionally, no matter how the quotation is made, it cannot be in a way that the need for the original work no longer exists. It must be proportional and only to the extent that it is obligatory and required for achieving its purpose[377]. Furthermore, in LIAW article 67(2) it is stated that in case the author's name is not displayed or wrongly displayed on the work, it is possible for the authors to claim the cessation of infringement (in addition to the declaratory action in article 15) and make their name appear on both original and reproduced works. Under its third paragraph, this applies to cases of wrong or incomplete quotation and for giving no source as well. It is also significant to point out that plagiarism is considered a crime in Turkish law and citing from a work without reference leads up to imprisonment from six months to two years or judicial fine under LIAW article 71(3). Additionally, giving wrong or incomplete or misleading reference results in prison sentence up to six months under LIAW article 71(5).

The CJEU case law on the matter of quotation exception, which were interestingly decided on the same day[378], marks the concept by offering guidance and discussing the balance between fundamental rights, especially freedom of expression and information and copyright[379]. The CJEU pointed out that quotation exception is actually very broad and other than criticism and review, it is also possible to include "an extract from a work

[376] Öncü (n 365) 20-21.
[377] Öncü (n 365) 23; İsmail Cem Soykan, 'Fikri Mülkiyet Hukukunda Basın İktibasları' (2009) 67 IÜHFM 184-185.
[378] Judgment of the Court (Grand Chamber) of 29 July 2019, *Pelham GmbH, Moses Pelham, Martin Haas v Ralf Hütter, Florian Schneider-Esleben*, Case C-476/17, ECLI:EU:C:2019:624; *Spiegel Online*, C-516/17, ECLI:EU:C:2019:625.
[379] Karapapa (n 369) 247.

for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user" and the intention of the one who quotes is to "enter into a dialogue with the quoted work"[380]. The Court has the point of view that the quotation can be considered more of a user right deriving from a work, rather than an exemption of exclusive rights of the authors[381]. Also, it is stressed that such copyright exceptions are regulated in order to find a balance between authors' and users' rights[382].

In *Spiegel Online* decision, CJEU stated that a hyperlink to a work freely available on the Internet and can be downloaded independently must be included in quotation exception. Court interpreted the quotation exception in InfoSoc Directive article 5(3)(d) as not requiring "the quoted work be inextricably integrated, by way of insertions or reproductions in footnotes for example, into the subject matter citing it". This way, even a hyperlink to the quoted work may be considered as a quotation[383].

In *Pelham*, the Court assessed the short sound sample in terms of the right of reproduction pursuant to the InfoSoc Directive and found that the short sample of a sound of a phonogram corresponds to reproduction in part and within the exclusive rights of the producer[384]. However, the CJEU noted that in case a user takes a sound sample of a phonogram for using it in a new work in altered form, which would not be recognisable to the ear, while exercising freedom of art, such use does not constitute reproduction under InfoSoc Directive art. 2(c)[385]. The CJEU interpreted the reproduction right and the exception of quotation within copyright in terms of balance between fundamental rights,

[380] *Pelham*, C-476/17, para. 71; Karapapa (n 369) 252.
[381] Karapapa (n 369) 249.
[382] Karapapa (n 369) 255.
[383] *Spiegel Online*, C-516/17, paras. 80-84; Karapapa (n 369) 252-253.
[384] *Pelham*, C-476/17, ECLI:EU:C:2019:624, para. 29.
[385] *Pelham*, C-476/17, ECLI:EU:C:2019:624, para. 31.

including freedom of art and thus freedom of expression[386].

Court also interpreted quotation as an extract of a work and, "the user of a protected work wishing to rely on the quotation exception must therefore have the intention of entering into 'dialogue' with that work". For the reason that the use has to "have an intention of entering into dialogue" with the original work, CJEU stated that the sound sample used in the new musical work must be recognisable to the ear in order to be regarded as quotation. In case the sample cannot be identified in the new work, there cannot be any dialogue[387].

2. Reporting by the Press on Current Events

To start with the EU law, in InfoSoc Directive article 5(3)(c) this exception is stated as follows: *"reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible".*

In *Spiegel Online* decision of the CJEU, it was found that exception of reproduction for reporting on current events in InfoSoc Directive article 5(3)(c) should not be subject to the author's prior authorisation, because such a requirement would be contradictory to the goal of the exception to allow a fast dissemination of information among public, and the goal of freedom of expression and press. CJEU tried to find a harmonised definition for the exception by noting that reporting does not require analysis

[386] *Pelham*, C-476/17, ECLI:EU:C:2019:624, para. 34.
[387] *Pelham*, C-476/17, ECLI:EU:C:2019:624, para. 71-74.

in detail, and current event is of having a public "informatory interest" at the reported time, in order to justify the use and respect the proportionality[388].

Additionally, in its *Funke Medien* decision rendered the same day, the CJEU decided that in case the parliament briefings are considered as works, publishing such works in a structured way with an informative note, more links and a comment space may be regarded as "use of works … in connection with … reporting". Therefore, the publication of parliament briefings by Funke Medien would be capable of falling within the InfoSoc Directive art. 5(3)(c)[389]. The Court emphasized that the exceptions and limitations under articles 5(3)(c) and (d) InfoSoc Directive specifically favour exercising the freedom of expression by the users of copyrighted content and to freedom of the press. It is significantly noted because by these exceptions and limitations it is possible to protect the fundamental rights over the authority of the author to prevent the use of the work, at the same time ensuring the author's right to have their name indicated[390]. As a result, the Court decided that freedom of information and of the press (art. 11 of the EU Charter) cannot support a diminution of the author's exclusive rights of reproduction and of communication to the public, beyond exceptions or limitations provided for in the InfoSoc Directive article 5(2) and 3[391]. It is understood that such exceptions are already put in place in order to balance the fundamental rights and more would be considered excessive.

In Turkish law, LIAW article 36 states that *"daily news and information communicated to the public by the press or radio may be freely quoted"* and *"articles or features on social, political or economic issues of the day published in newspapers or*

[388] Sganga (n 126) 146; *Spiegel Online*, C-516/17, paras. 66-68.
[389] *Funke Medien*, C-469/17, ECLI:EU:C:2019:623, para. 75.
[390] *Funke Medien*, C-469/17, ECLI:EU:C:2019:623, para. 60.
[391] *Funke Medien*, C-469/17, ECLI:EU:C:2019:623, para. 64.

journals may be freely quoted in their original or adapted form in other newspapers or journals and may be broadcast by radio or disseminated by any other means, except where the right to quote them has been expressly reserved. Even where the right to quote is reserved, it is permitted to abridge such articles and features as a press review and to so quote, broadcast by radio or disseminate them in any other manner." However, it is expressly stated that the name, issue and date of the source such as the newspaper or the journal must be mentioned with the name of the author. The reservation on the right to quote must be explicit in order to prevent the literal quotation. Even if it is explicitly reserved, it is still possible to quote by summarising[392]. LIAW article 37 states that recording parts of a work on devices enabling the transmission regarding current events is allowed, "provided that this has the nature of news and does not exceed the limits of giving information". Such recorded parts can be reproduced, distributed, performed and broadcasted by devices such as TV and radio, unless it prejudices the legal interests of the copyright holder or conflicts the normal exploitation of the copyrighted work. We find it important to point out that use of works other than the objective of giving information about or promoting the author or the work would not be within the scope of this article. If there is no direct relation between the news and the author/work, using the work would not be justified. In addition to this, it is again important to only have the purpose of giving information and using only some parts of the work or for instance various part of an exhibition or a movie so that the readers are encouraged and still have the need and curiosity to see the whole by referring to the original[393].

Although there are such explicit provisions in the law, it can be said that in case these daily news and information are not qualified as works, and usually the mere

[392] Soykan (n 377) 199-200.
[393] Soykan (n 377) 203-204.

provision of them will not, there will be no copyright protection and therefore, sharing or using them will be free. This freedom will be important in case the news or article or the piece qualifies for work[394]. Especially, the purpose of the LIAW article 36(2) is considered to be the articles or features to be used for dissemination of news and the freedom of information of the public, rather than for creation of new works. The difference between the freedom of quotation in LIAW article 35 and LIAW article 36 is that unlike in 35, in 36(2) it is not necessary to use the work in another independent work or integrate it. This freedom is based on the freedom of information and freedom of press. Therefore, the need to receive information and news is fulfilled rather than to foster creativity and the subject of this freedom is the press. However, it is also important here not to exceed the purpose and not to remove the need to the original[395].

Lastly, also regarding news quotation plagiarism is a crime in Turkish law. There is no separation as the law says citing from a work and giving reference to a work, so article 71 shall also be applied in cases of news reporting if the source is a work. Citation from a work without reference may result in incarceration from six months to two years or judicial fine under LIAW article 71(3), and giving wrong or incomplete or misleading reference may cause prison sentence up to six months under LIAW article 71(5). Consequently, although there is a freedom recognised by law, it is important to meet the requirements.

3. Parody, Caricature or Pastiche

The exceptions and limitations (or fair use as referred in common law) as a defence to the copyright infringement claims usually considered to include parody, caricature and/or pastiche, which are common methods of expressions used usually when

[394] Öncü (n 365) 54-58; Soykan (n 377) 192.
[395] Öncü (n 365) 10-11; Soykan (n 377) 190-192, 199.

criticising. With the rise of social media, both generation and transmission of such expressions has dramatically increased.

Parody is described as "a literary or musical work in which the style of an author or work is closely imitated for comic effect or in ridicule"[396] or as "a humorous piece of writing, drama, or music which imitates the style of a well-known person or represents a familiar situation in an exaggerated way"[397]. On the other hand, caricature is described as "exaggeration by means of often ludicrous distortion of parts or characteristics"[398] or as "a caricature of someone is a drawing or description of them that exaggerates their appearance or behaviour in a humorous or critical way"[399]. Lastly, pastiche is defined as "a literary, artistic, musical, or architectural work that imitates the style of previous work"[400] and also as "something such as a piece of writing or music in which the style is copied from somewhere else, or which contains a mixture of different styles"[401]. Overall, it can be said that there is a response or reference to something existing in all of those. Their relationship with copyright usually comes from this response or reference, as they might remind people of a work already protected and sometimes this reminder is in a negative way, especially when there is criticism in it[402]. However, they are also forms of expressions and they usually fall within the freedom of expression and they are to be

[396] 'definition of parody' (*Merriem-Webster Dictionary*, 2021) <https://www.merriam-webster.com/dictionary/parody> accessed 20 June 2021.
[397] 'definition of parody' (*Collins Dictionary*, 2021) <https://www.collinsdictionary.com/dictionary/english/parody> accessed 20 June 2021.
[398] 'definition of caricature' (*Merriem-Webster Dictionary*, 2021) <https://www.merriam-webster.com/dictionary/caricature> accessed 20 June 2021.
[399] 'definition of caricature' (*Collins Dictionary*, 2021) <https://www.collinsdictionary.com/dictionary/english/caricature> accessed 20 June 2021.
[400] 'definition of pastiche' (*Merriem-Webster Dictionary*, 2021) <https://www.merriam-webster.com/dictionary/pastiche> accessed 20 June 2021
[401] 'definition of pastiche' (*Collins Dictionary*, 2021) <https://www.collinsdictionary.com/dictionary/english/pastiche> accessed 20 June 2021.
[402] Kris Erickson, 'Parody & Pastiche' *(Copyrightuser.org*, 2021) <https://www.copyrightuser.org/understand/exceptions/parody-pastiche/#:~:text=A%20parody%20will%20not%20infringe,company%20or%20a%20music%20label.> accessed 21 June 2021.

protected[403]. The key point here is, as always, to find the balance[404].

It is clear that parody, caricature and pastiche are considered as exceptions protecting the users' freedom of expression on the OCSSPs in the EU, as mentioned above in the CDSMD article 17(7). Again, there is no clear and precise legal definition as to what constitutes parody/pastiche/caricature, no requirements and no scope determined. CJEU ruled on the matter in 2014 in "*Johan Deckmyn and Another v Helena Vandersteen and Others*" (Deckmyn)[405]. The question was on the clarification of parody under the InfoSoc Directive article 5(3)(k). Said article allows EU States to have their own copyright exceptions or limitations on the rights of distribution, communication and making available to the public, reproduction for parody, caricature and/or pastiche purposes. However, there is no clear definition for these notions in the article. That is the reason the interpretation of the article is needed from the court. The issue before the CJEU was about a drawing on a calendar that was given out by Deckmyn (editor) at the reception in 2011 held in Ghent (Belgium) for celebrating the New Year. The drawing resembled a work of Mr. Vandersteen made in 1961. It is a portrayal of one of the comic book's ("De Wilde Weldoener") main character "wearing a white tunic and throwing coins to people who are trying to pick them up". Mr. Deckmyn replaced the character with the Mayor of the City of Ghent and replaced the people picking up coins with people of colour in the drawing on the calendar. Vandersteen and Others filed a lawsuit against

[403] Güneş (n 5) 64.

[404] As stated in the preamble of the Infosoc Directive Recital 31, "A fair balance of rights and interests between the different categories of rights holders, as well as between the different categories of rights holders and users of protected subject-matter must be safeguarded. The existing exceptions and limitations to the rights as set out by the Member States have to be reassessed in the light of the new electronic environment. Existing differences in the exceptions and limitations to certain restricted acts have direct negative effects on the functioning of the internal market of copyright and related rights. Such differences could well become more pronounced in view of the further development of trans border exploitation of works and cross-border activities. In order to ensure the proper functioning of the internal market, such exceptions and limitations should be defined more harmoniously. The degree of their harmonisation should be based on their impact on the smooth functioning of the internal market."

[405] CJEU Judgment of the Grand Chamber on 3 September 2014, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, C-201/13, EU:C:2014:2132.

Mr. Deckmyn claiming that the drawing in question and its communication to the public constitutes copyright violation[406]. The court of first instance ruled that there is copyright infringement. Mr. Deckmyn and the Vrijheidsfonds submitted an appeal against this decision before the referring court claiming that the drawing in question is a political cartoon within the concept of parody exception. However, Vandersteen and Others disputed that parody must meet certain criteria, such as "to fulfil a critical purpose, to show originality itself, to display humorous traits, to seek to ridicule the original work and to not borrow a greater number of formal elements from the original work than is strictly necessary in order to produce the parody", and they are not fulfilled in this case. They also alleged that it bore a discriminatory message, because in the drawing the people of colour replaced the characters picking up the coins in the original work[407]. AG Cruz Villalón stated in his opinion that "a parody is a copy and a creation together", because it is created by altering an existing work. Surely, it can be about someone rather than something[408]. He is of the opinion that a parody must have humour. He also questioned the balance of copyright (a fundamental right within "Charter of Fundamental Rights of the European Union" article 17(2)) and freedom of expression (within the Charter article 11(1)), including disturbing or upsetting expressions. As mentioned above beforehand, the freedom of expression is not unlimited (ECHR article 10(2)), and other rights such as copyright may interfere with its exercise. He stated that a parody cannot be banned only because "the author of the parodied work does not approve of it" but parodies bearing a message, which is completely contrary to the fundamental values of the European society,

[406] *Deckmyn*, C-201/13, paras. 7-9.
[407] *Deckmyn*, C-201/13, paras. 10-12.
[408] Although the AG differentiated the 'parody of' and 'parody with', the CJEU did not make any distinction between two concepts. Eleonora Rosati, 'Just a matter of laugh? Why the CJEU decision in Deckmyn is broader than parody' (2015) Common Market Law Review <https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2526835#> 5.

can be[409].

CJEU stated in its ruling that a parody has only two fundamental features, which are "evoking an existing work while being noticeably different from it" and "constituting an expression of humour or mockery"[410]. Particularly, despite the opinion of the AG, there is no need for a parody to have an original character on its own[411]. Also, in line with the AG Opinion, the CJEU found that racist or discriminatory parodies cannot be protected under the exception and the right holder has "a legitimate interest not to be associated with that kind of message"[412]. The CJEU did not expressly state what is sought for the requirement of "constituting an expression of humour or mockery", whether a humorous intent or outcome is required. However, taking into account especially the freedom of expression applying to everyone and the right to make parodies arising from such freedom is not only granted to funny people, it must be said that the humorous intent should be enough[413]. It is important to point out that the CJEU specified the autonomous but optional nature of InfoSoc Directive article 5(3)(k), as the EU States were free to determine the limits of the exception for national implementation, however, the aim is still harmonisation for proper operation of the internal market[414].

At the moment, with regards to Turkish law, there is no explicit provision on parody exception *per se*. Although it is possible to protect the parodies through freedom of expression, or maybe within the quotation exception provided that the requirements are met, it is definitely more complex without a detailed explicit provision. Whereas, the preparations and discussions regarding Draft Law for amending LIAW are ongoing since

[409] Rosati (n 408) 3-4; AG Opinion Cruz Villalón on *Deckmyn*, C-201/13, paras. 80-85.
[410] *Deckmyn*, C-201/13, para. 20.
[411] Rosati (n 408) 4.
[412] Rosati (n 408) 5; *Deckmyn*, C-201/13, paras. 29-31.
[413] Rosati (n 408) 6-7.
[414] Rosati (n 408) 8-9; *Deckmyn*, C-201/13, para. 16.

2016. Draft Law article 11 is to add a parody clause to the limitations due to the public interest part of the LIAW with the title of "Incidental Use and Use with the Purpose of Parody". This provision is contemplated to be as follows: It is free to use a publicly disclosed work with the purposes of caricature or pastiche or parody. Although not yet accepted, we consider that this amendment would be right, both in terms of being in harmony with international law, EU regulations and practices and taking the freedom of expression into account.

In light of lack of legislation on the matter, in the dissenting opinion of a decision of the Turkish Court of Cassation in 2015, it was stated that accepting there is copyright infringement without evaluating whether there is "a short use of the work with the purpose of making people smile (parody exception)" rather than exploitation of the work without authorisation would not be right. Although it is good that there was an attempt to point out parody and to accept it as an exception to copyright, this definition would be too broad for parody. It can be considered under fair use, which does not require humour or criticism like in parody. Surely, as it should be with all fair use (of the works already publicly disclosed), there should be no infringement to personal rights and honour[415].

VI. THE LIABILITY OF OCSSPs IN SOCIAL MEDIA

In the event that the work is put on the Internet, the end user is able to download, read, watch, screenshot, listen and make a copy of such work into their device at his or her pleasure. Naturally, the work being put on the Internet by the author for the attention of the end user does not usually constitute an act of communication directly. There are actors making it possible, which are responsible for different processes, called intermediaries in general. OCSSPs are also a kind of intermediary, providing space and/or

[415] Karaaslan (n 95) 56-57; Judgement of the Turkish Court of Cassation (11. Civil Chamber) of 29 September 2015, E.2014/13080, K. 2015/9632.

tools to its users to share their content. Since their actions and the implications of those actions on the copyrighted work differ, the liabilities of intermediaries shall be determined according to their involvement and function on the infringement[416].

A) Types of Liabilities Resulting from Online Copyright Infringement

In principle, it can be said that the liability is classified into two categories: primary (direct) and secondary (indirect) liability. Sometimes, depending on the gravity of the act, the line between them is too blurry and it may not be possible to strictly draw a line and classify the liability as one of them. As for the OCSSPs, it is possible to state that both types of liabilities are possible, according to the action and infringement in question[417].

An example may be given as to the case law on liability and its blurred lines. In 2010, in "*Twentieth Century Fox Film Corp v Newzbin Ltd*"[418] case in the UK, the operator of Usenet (Newzbin Ltd), which is a worldwide distributed internet discussion forum where the users may upload films and those films were split into hundreds of messages for distribution (as posting in the groups), was found liable both for communicating the copyrighted works to the public and for authorising their upload by its users, and also for entering in a common design with its users to infringe copyright. Newzbin Ltd facilitates access by categorising the content and creating easier access for its users, as well as by allowing them to download films. Century Fox Film Corp is a well-known film producer and distributor. Upon its claim, the Court assessed the case and considered that there is a small difference here as to the classification of primary or secondary liability. Under the guidance of ECJ case law on the communication to the

[416] Alıca, Yavuz and Merdivan (n 4) 1943.
[417] Turgut Kaya, *İnternet Servis Sağlayıcısının Hukuki ve Cezai Sorumluluğu,* (Seçkin 2019) 94.
[418] *Twentieth Century Fox Film Corporation and others v Newzbin Limited [2010] EWHC 608 (Ch).*

public and making available right, the UK Court considered that Newzbin was not even "remotely passive" and provided the means and ways for the claimant's films to be made available for a new public, i.e. its premium members. Accordingly, it can be said that the ISP should be careful about not facilitating copyright infringement, because they can be found liable, either directly or indirectly or both[419].

The type of liability may differ according to the act and the infringed right. For instance, there is a distinction between communicating a work to the public and merely providing physical facilities. It is crucial to differentiate between primary and secondary liability as it is considered that there is no direct infringement to the communication right where an act is only a provision of physical facilities, but Recital 27 of the InfoSoc Directive does not exclude secondary liability in such a case[420]. It is also important to distinguish the two concepts of liability and infringement. Even though an act constitutes infringement, it does not always mean that the wrongdoer is liable. The CJEU is of the opinion that in order to establish liability for the provider (secondary liability), there must be knowledge[421]. Not knowing the illegality leads to the conclusion that the provider is not liable, however, it does not make the act suddenly lawful. The act remains unlawful but the actor is not considered liable[422]. Still, it is noteworthy that for establishing that an act constitutes copyright infringement, there is no requirement for intention or deliberation of the actor[423]. In conclusion, to point out again and again, it is always important to balance the freedom of expression and of information on the Internet and the protection of the author's rights. Therefore, each case must be assessed and judged on its

[419] Dinwoodie (n 211) 16; Abby Minns, 'Twentieth Century Fox Film Corporation and others v Newzbin Limited [2010] EWHC 608 (Ch)' (*Bird&Bird*, 2010) <https://www.twobirds.com/en/news/articles/2012/twentieth-century-fox> accessed 29 May 2021.
[420] Angelopoulos (n 141) 196.
[421] Torremans (n 62) 285.
[422] Savola (n 332) 143.
[423] It was noted by Torremans that proving the causal link might be more difficult if the infringement is made unconsciously. Torremans (n 62) 271.

own merits[424].

1. Primary Liability

Primary liability often occurs when there is an unlawful act conducted at first hand. There is no one or nothing between the offender and sufferer. The act of someone causes a damage or a disadvantageous position or an infringement to others or others' rights directly[425]. Primary liability is caused by primary infringement, which is a restricted act towards the author's exclusive rights, one way or other including copying a work, which can be done in several ways such as performance or adaptation[426]. There is actually no need for further elaboration, since primary liability is very well known and generally accepted concept, especially with regards to tort law.

The harmonisation of primary liability started with InfoSoc Directive; it gives exclusive economic rights to the copyright owner. Someone can be held liable for primary infringement of said exclusive rights, if this person carries out a prohibited act[427]. Obviously, the users who upload the illegal content on the platform have primary liability but if the platform itself provides for the illegal content, it is also primarily liable. In the history, the liability of service providers was considered as secondary liability or intermediary liability. In spite of that, the EU legal framework is turning into a primary liability regime, as CDSMD article 17 creates a fault-based liability on a highly diligent OCSSP. It includes prevention of availability of unauthorised works on its website, by taking into account all relevant factors and best industry practices. Additionally, OCSSPs could still be liable if they fail to act expeditiously in removing illegal content upon substantiated notice from the right holder and fail to prevent said illegal content to be on

[424] Rosati (n 130) 81; Geiger and Izyumenko (n 348) 316; Ginsburg (n 25) 29.
[425] Tekinalp (n 5) 349.
[426] Angelopoulos (n 141) 194; Torremans (n 62) 268-269.
[427] Angelopoulos (n 141) 194.

the platform again[428]. Regarding Turkish law, since it is still notice-and-takedown regime, the liability is not directly considered as a primary liability in terms of user generated content.

2. Secondary Liability

Secondary liability (or referred to by other common terms of accessory or indirect liability) may be defined as the liability of a secondary player, acting as an accessory to, contributing to or facilitating the illegal act of the primary wrongdoer, who is someone else[429]. Essentially, it can be said that in case of secondary liability, there is responsibility arising from the damage caused by the illegal act of a third party. It is indirect or derivative. However, it may also be considered as a different category of liability of an act of third party, which derives from default of control and gaining pecuniary advantage from the act[430]. We do not want to consider this as a different category, but we want to include it into the secondary liability. Usually, the knowledge of the illegality of the act is sought for secondary liability depending on the level of active contribution to cause harm[431]. Although not within the scope of this study, only to provide an insight, it is also referred to as contributory infringement and defined as "one who, with knowledge of the infringing activity, induces, causes, or materially contributes may be held liable as a contributory infringer." under the US copyright law. Naturally, when a party benefits from the wrongdoing and is close to the primary infringer, there may be secondary liability. Also, in the US copyright law there is a concept called vicarious copyright infringement, meaning that the party "has the right and ability to supervise the infringing

[428] 'Liability of online platforms' (*European Parliamentary Research Service*, 2021) <https://www.europarl.europa.eu/RegData/etudes/STUD/2021/656318/EPRS_STU(2021)656318_EN.pdf > accessed 14 February 2022.
[429] Kaya (n 417) 94; Tekinalp (n 5) 349; Angelopoulos (n 141) 194.
[430] Tekinalp (n 5) 349.
[431] Torremans (n 62) 285; Angelopoulos (n 141) 197.

activity and also has a direct financial interest in such activities."[432].

In a nutshell, the essential nature of the acts of facilitation of others' infringements is being accessory. If the CJEU differed primary and secondary liability, the harmonisation would be more difficult, especially with respect to the liability of hyperlinking, file-sharing, storing or advertising copyrighted items. By introducing the fault or knowledge element, in particular for the exclusive rights of distribution and communication to the public, it seems that secondary liability has also emerged to be benefitted in certain cases. However, the CDSMD article 17 does not require knowledge of the illegal act, it rather focuses on the OCSSP's conduct and best effort. It can be considered as a *lex specialis* on its own, rather different from existing primary and accessory liability interpretations[433].

For instance, in case of a hyperlink, since it does not "transmit" a work, which action is necessary as suggested in InfoSoc Directive Recital 23, but only directs others to a content; it is considered that hyperlinking can only cause a secondary liability. Accordingly, in *Svensson* case the CJEU found that providing a hyperlink to a work can be qualified as an act of communication to the public. However, it is not a favourable interpretation of the scope of relevant right. By a lot of scholars, hyperlinking is not considered as an act of communication because it does not "transmit" the work, and transmission of a work is required for the communication to the public. Also, it is considered that hyperlink does not provide the work to a new public[434]. In addition, AG Wathelet also stated in his opinion in *GS Media* case that hyperlinks make it easier to locate and directly access works on different websites, and therefore, since the works are

[432] Dinwoodie (n 211) 9-10.
[433] Angelopoulos (n 141) 205-206, 212.
[434] European Copyright Society, 'Opinion on the Reference to the CJEU in Case C-466/12 Svensson' (2013) University of Cambridge Legal Studies Research Paper Series No. 6/2013 <http://ssrn.com/abstract=2220326> 2; Angelopoulos (n 141) 197.

already freely available on the Internet, hyperlinks "merely facilitate the finding of those works". The real act of making the work available is the act of initial communication towards the public, not the act of providing the hyperlink to such work. It is considered that in order to find communication to the public, the act of the provider of hyperlink must be "vital" or "indispensable" in public benefiting the work[435]. Another requirement set forth by the CJEU regarding liability of hyperlinking in the *GS Media* case, as mentioned in various place in this study, is the intention as the act of being "in full knowledge of the consequences of the action" is required[436]. Although the interpretation must be made taking into account all the relevant conditions of the case at hand, it can be said that in case of hyperlinking there is either no liability or there is utmost secondary liability for the provider of the link.

There are a number of advantages of bringing claims to the intermediaries or ISP based on secondary liability. For instance, in case of a copyright infringement made by a user, the content service provider or ISP may not only remove the infringing content that time but also the fact that the intermediary is held liable for the matter may determine the future behaviour of the intermediary. It might set up some effective prevention mechanisms in order to escape from liability in the future. That way, not only the copyright holder of the particular infringed work would benefit from the prevention mechanism for one time but also other right holders will take advantage in the future for that matter. The effect of the claim for secondary liability may be bigger than the matter at hand and even contribute to the safer Internet, economic growth and/or consumer trust[437]. It is noteworthy that, as usual, there has to be some balance between protecting the rights of right holders and avoiding over-enforcement or unlawful restriction.

[435] *GS Media*, C-160/15, paras. 54-60.
[436] Angelopoulos (n 141) 197.
[437] Dinwoodie (n 211) 17-18.

B) Liability under the Turkish Law

1. Under the "Law of Obligations"

Although there are special provisions for intellectual property rights and liability arising from the infringement thereof in Turkish law, which will be detailed below, it is always possible to refer to the general provisions if needed. General provisions to be based on in the event of a copyright infringement are the provisions of tort law regulated in the 6098 numbered Turkish Law of Obligations article 49 ff. and again the special sanctions in LIAW articles 66-70 will be applied[438]. Copyright infringement by sharing works on the Internet is no doubt a wrongful act, a tort[439]. In principle, the sufferer of a tort may ask for damages. The requirements for compensation under article 49 are as follows: a wrongful act, damage, fault (culpa) and causal connection.

Uploading works online without authorisation from the right holder meets the requirement of being a wrongful act. By publishing the works on the Internet, the rights of reproduction and communication to the public of the author are damaged and therefore, the requirement of damage is also met. The damage would be even more on the Internet, due to the countless copies easily made, disseminated and used by millions without even paying. So, the author is prevented from exploiting own work. Also, it is considered that without the HP's platform and service, the content provider cannot illegally publish the work and the damage thereby will not happen. Their acts are complementary and the HP is qualified as the co-causer of harm under the article 61. Therefore, the causal connection must also be proved, which is usually difficult in case of hosting service. As for the fault, there is no question for the content provider, but the status of HP is a bit different. It is not required that there is intention, or knowledge on the qualification of work for the

[438] Ateş (n 3) 87-88; Tekinalp (n 5) 348.
[439] Kaya (n 417) 67; Bozbel (n 5) 235; Ateş (n 3) 88.

existence of fault of the content provider. The awareness of existence of a work being put on the Internet without authorisation is important. Whereas, for tort liability of the HP and claiming damage from them, there must be knowledge of illegality and the HP must knowingly host the illegal content. In any case, it is accepted by the laws that the HP are not under the obligation of general monitoring. When the HP is sufficiently warned about the illegality of certain content and still does not take it down, it must be accepted that it knowingly hosts and gives access to the unlawful content and must be held liable[440]. Consequently, through instrumentality of tort law of article 49 ff. and under the LIAW art. 70, HP must be held liable from the damages alongside the content provider. Surely, in case the HP is also the content provider, there is no doubt that it will be liable to damages also on its own[441].

There are two types of claims of damages arising from copyright infringement, one being the pecuniary and the other being the non-pecuniary damages. In principle, there is no compulsory joinder of parties between the violator and the service provider. Therefore, it is possible to claim damages separately. However, in order to claim damages from the service provider, or even to claim the removal of illegal content from the platform, it is important to pursue notice-and-take down procedure first, to establish its fault. If the provider did not remove the content despite the notice, then it is liable, because it knows the illegality and it has fault in not preventing/stopping it. Its liability is fault-based[442].

2. Under the "Law on Intellectual and Artistic Works"

[440] Alıca, Yavuz and Merdivan (n 4) 1956-1958; Soysal (n 187) 336-337. It is considered that this liability is in principle the liability for cessation and prevention but not for damages. Unless the platform is the perpetrator, its liability to damages is limited to its earned profit according to Özbakır (n 190) 107-110, 129-130.
[441] Ateş (n 3) 88-92.
[442] Kaya (n 417) 78-81; Özbakır (n 190) 131, 137.

Although copyright infringement may be classified as tort and be subject to general provisions, the LIAW foresees the special provisions in case of copyright infringement or risk of infringement[443]. Since the LIAW is the *lex specialis* on copyright, it must be applied with priority. Unlike the general provisions, there are types of claims in the LIAW that there is no need for fault (culpa) or even damage in order to proceed[444].

It is important to analyse, whether the terms and conditions agreed before entering the social media platform that includes a non-exclusive license, is enough to make the later acts legitimate. In Turkish IP law, it is not possible to transfer the moral rights on the work. It is only possible to transfer the economic rights and the authority to use moral rights, provided that it is necessary for the exploitation of said economic rights. It is noteworthy that disposal of a work that is not yet created or completed is null and void (article 48(3)). Just because the authors shared their work in social media does not mean that they allow it to be shared again. It is required to obtain authorisation from the author, and in case it is an adaption, it is required to obtain the authorisation from both the authors of the original work and the adaptation separately[445]. Surely, in order for the creators of the adaptation to share the adaptation in social media, they also have to get consent from original work's author. According to the article 52 of LIAW, *"Contracts and disposals concerning economic rights shall be in writing and the rights constituting their subject matter shall be specified individually."* and therefore, without any written authorisation given by the right holder specifying each right, any use of the work will constitute copyright infringement[446]. We also would like to point out the fact that moral rights have to be respected, even though the author's authorisation is obtained before. In case the integrity of the work is disrupted or its author's name is not stated, whether or not there

[443] Tekinalp (n 5) 348.
[444] Bozbel (n 5) 235-236; Güneş (n 5) 149; Kaya (n 417) 96-97.
[445] Öztan (n 5) 159.
[446] Merdivan (n 217) 55-58.

is authorisation from the author, the author's moral rights are infringed[447]. For instance, it is possible for the authors to bring an action to establish their rights, in the event that the creator of the work is disputed or that another person alleges being the author of the work at issue, under article 15(3). By the ruling, both the author of the work is determined and the work is given to its original author with all of its rights[448].

Under LIAW article 54, *"A person who acquires an economic right or a license to exercise such right from a person without authority to transfer shall not be protected even if he acted in good faith. A person who, without authority, transfers an economic right or grants a license to exercise such right to another person shall be liable to pay compensation for the damages arising from the invalidity of the disposal, unless he proves that the other person was aware or should have been aware that he had no authority. In case of fault the court may order greater compensation, if equity requires. Claims arising from torts and unjust enrichment shall be reserved."*. Therefore, in case someone shares an author's work without knowing the lack of authorisation, that person will also be held liable[449]. Under LIAW articles 66-79, the civil and criminal actions are regulated. It is possible for the author or the right holder to file a lawsuit for the cessation of the infringement under article 66(1), in case there is an ongoing infringement to their economic and moral rights such as reproduction, communication to the public, performance and so on without any additional requirement. Besides, it is possible to claim damages, both for infringement of economic and moral rights[450]. It is especially significant to mention that the infringement of personal rights is not required by LIAW article 70 in order to ask for moral damages, contrary to article 52 of the Turkish Law of Obligations. Therefore, they are neither complementary nor substitutable. LIAW Article

[447] Merdivan (n 217) 59.
[448] Güneş (n 5) 150.
[449] Merdivan (n 217) 59.
[450] Tekinalp (n 5) 312.

67 regulates the civil lawsuits to be brought in case of moral rights infringement, such as request of cessation and prevention[451].

Especially, LIAW article 68 is a special provision, because under this article there is no requirement of fault for prohibiting or removing infringement[452]. It is sufficient that there is a link between the illegal result and the illegal act. The types of infringement subject to this article is not *numerus clausus*[453]. It is considered possible to hold the HP at least indirectly liable from the copyright infringement on the platform under LIAW art. 68, since it contributes or facilitates the acts of reproduction and communication to the public and the provisions of LIAW are to be applied for copyright infringements. Surely, it must be added that this indirect liability occurs in case the HP does not take down the illegal content upon notice[454]. The other special feature of this provision is that it enables the right holders to claim "compensation up to three times the amount that could have been demanded if the right had been granted by contract, or up to three times the market value" from infringers, who reproduce, adapt, perform or communicate the work to the public, without written permission of the author. Here, it is considered that the latter must be applied if there are no exemplary contracts to compare, because the royalty depends on the author and it is subjective. This remedy is intimidating for the infringers-to-be, while being encouraging for the right holders to defend their rights[455]. Additionally, unless the damage exceeds this compensation and there is fault, in principle it is not possible to claim damages under article 70(2). Unlike article 68, claiming compensation

[451] Güneş (n 5) 135; Kaya (n 417) 97.
[452] Tekinalp (n 5) 311.
[453] Tekinalp (n 5) 317.
[454] Kaya (n 417) 97; According to Ateş, it is not enough to just take LIAW additional art. 4/3 into account, since it does not bring any liability regime and the 5651 numbered Law is newer and more special as to the Internet infringements. Therefore, 5651 numbered Law must be applied to the online copyright infringements (Ateş (n 3) 95-96). However, we consider that due to its particular purpose and scope of application as a specific list of certain crimes, it must not be possible to apply 5651 numbered Law for copyright infringements. The main reason is the principle of no crimes and punishment without law, as well as the legal certainty and predictability.
[455] Güneş (n 5) 153.

according to the action for damages under article 70(2) requires the fault of the infringer[456]. The significance of article 68 is that it sort of creates a hypothetical relation of a contract between the parties and therefore, it is no longer possible to ask for cessation of infringement such as collection of infringing copies, because it is considered as if there was a contract and it bears its consequences[457].

The authors may also file a lawsuit to prevent a probable and possible infringement under article 69, in case their economic or moral rights are threatened to be violated. It is also possible for the cases where the infringement is expected to continue or reoccur. The difference of the prevention action is that there, the aim is to prevent the threat to turn into an infringement, whereas in cessation the purpose is to remove the consequences of an occurred or continuing infringement. It is possible to bring this action to anyone provided that there is a risk of infringement, including the ISP[458]. The two actions, cessation and prevention, may be brought together against anyone including the OCSSPs, if both of their conditions are met[459].

The offenses of infringement of moral and economic rights of the author are regulated and listed with their punishments in article 71(1). In article 71(2) a certain punishment is stated for the people infringing author's rights under the first paragraph of the additional article 4 and for the content provider in continuation of infringement of the work, unless the infringing act requires a more serious criminal sanction[460]. Another vital and important provision of LIAW regarding the issue at hand is the additional article 4, upon which the criminal liability of the content provider set forth in the article 71(2) is

[456] Tekinalp (n 5) 318-319.
[457] Güneş (n 5) 154.
[458] Güneş (n 5) 150-152; Özbakır (n 190) 110.
[459] Tekinalp (n 5) 325-326; Güneş (n 5) 157; Soysal (n 187) 331-332.
[460] According to Ateş, although the referral is made to the first paragraph of additional article 4, in case the hosting provider continues to provide services to the content provider despite the public prosecutor's order, does not remove the illegal content or block access to it, the hosting provider is also held criminally liable along with the content provider under LIAW article 71/1(1); Ateş (n 3) 85-86.

conditional. It is important to point out that contrary to the criminal liability, the legal/civil liability of the content provider has no additional requirement[461]. It is important to mention that the additional article 4 regulates the special process of termination of infringement, rather than the criminal or civil liabilities of Internet actors[462], as follows: *"In case where rights of authors and related rights holders granted by this Law have been violated by providers of service and content through the transmission of signs, sounds, and/or images including digital transmission, the works which are subject of the violation shall, upon the application of the right holders, be removed from the content. Natural or legal persons whose rights have been violated shall to this end initially contact the content provider and request that the violation be ceased within three days. Should the violation continue, a request shall next be made to the public prosecutor requiring that the service being provided to the content provider persisting in the violation be suspended within three days by the relevant service provider. The service being provided to the content provider shall be restored, if the violation is ceased."* It is actually an attempt to faster and more efficient way to terminate the infringement without going into years long legal battles, or at least to try beforehand. Due to the nature of Internet infringements, this is a mechanism to minimise damage that can be very extensive because the infringing content can spread very fast and very far before even getting the chance to obtain a court ruling.

3. Under the "Regulation of Publications on the Internet and Combating Crimes Committed by Means of Such Publication"

Actually, there is no direct and clear provision regulating the liability of OCSSPs in Turkish law, they are regarded as "hosting service providers". In that case, it is said

[461] Alıca, Yavuz and Merdivan (n 4) 1949.
[462] Ateş (n 3) 84-85; Soysal (n 187) 332-333.

that both liabilities are of a similar nature. Under the article 5(1) of the Law no. 5651, there is no obligation of monitoring of hosted content or of investigating whether there is an illegal act. According to the same article paragraph 2, the HP are only obliged under the articles of 8 and 9 to remove the unlawful content from the platform provided that they have been notified from it[463]. Said articles include a list of certain crimes from the Turkish Criminal Code as well as some other crimes which are not related to copyright, alongside infringement of personal rights and right to privacy. According to article 4, the content providers are responsible for every kind of content they bring into use on the Internet. However, the second paragraph states that the content providers are not responsible for the content of others that they merely provided links to. Still, they are responsible under the general provisions in case it is obvious from the form of presenting that their aim was for the users to access the content and they adopt the content they provided link to.

It is important that this Law is regulating certain crimes that are not directly in relation to IPRs and therefore, it must be used only for the purposes of definitions of internet actors, liability of content providers and liability of service providers only in case there is a copyright infringement to the extent that it also prejudices personal rights. Thus, in case there is an illegal use of a work, hence an infringement to the economic and moral rights of the author without any of the crimes mentioned in art.8 or without any infringement to the personal rights and right to privacy, the content provider shall be liable and deemed as the defendant in a possible lawsuit under the LIAW, not the 5651 numbered law[464]. The reason is the principle of no punishment without law. There is no special requirement stipulated for the legal liability of the content or service provider in

[463] Merdivan (n 217) 60.
[464] Ateş (n 3) 46-47, 68.

cases of copyright infringement other than those in the general copyright provisions[465].

C) Case Law of the Turkish Court of Cassation

Considering case-law of Turkish Court of Cassation (TCoC) related to the matter so far, there is not much to be analysed because the number is too limited[466]. Therefore, also given that the decisions are not as detailed as the CJEU's, unfortunately we cannot give a lot of information or analysis on the matter in Turkish case law. We would like to give certain examples as follows: to start with, the Court decided in 2004 that the fact that putting the work "Dictionary on Children's Names" on the Internet without the authorisation of its author infringes the author's right of communication to the public by way of making the work available to the public for their access to it at a time and place chosen by each individual. Although the service provider claimed that it does not use the work and the website belongs to the other defendant, the Court pointed out that the agreement between the defendants does not disable the liability of the service provider, it only applies to their internal relation[467]. It must be said that the reasoning is not sufficient, as it does not analyse any requirement such as whether the service provider knows the illegality or if fault is needed, to be a guide for future purposes[468].

In another decision, TCoC decided that broadcasting an author's work as someone vocalising the book over the radio by a broadcasting organisation infringes the author's economic rights of performance, reproduction and communication to the public as well as the moral right of disclosure to the public[469]. Also, it once decided that extracting a significant part of a musical work could also constitute infringement provided that the

[465] Alıca, Yavuz and Merdivan (n 4) 1949; Kaya (n 417) 96.
[466] Alıca, Yavuz and Merdivan (n 4) 1959.
[467] Judgement of the Turkish Court of Cassation (11. Civil Chamber) of 30 September 2004, E.2003/12494, K. 2004/9096 in Merdivan, Alıca and Yavuz (n 4) 1142.
[468] Alıca, Yavuz and Merdivan (n 4) 1960.
[469] Judgement of the Turkish Court of Cassation (4. Civil Chamber) of 12 November 2009, E.2009/6100, K. 2009/12735 in Merdivan, Alıca and Yavuz (n 4) 1142-1143.

copied part has an introductory nature and it is beyond inspiration[470]. In its another decision, the Court decided that using a melody without authorisation and by changing it constitutes infringement[471].

There was a case in 2012 regarding unauthorised and unpaid communication to the public by way of re-broadcasting. The Court stated that mere cable TV operator does not contribute to creation of the content of the TV transmission or has no chance to modify its content and especially is not in a place that it can know whether or not there is infringement to the author's rights, and therefore, it cannot be held liable from the interceded content with the copyright compensation under the LIAW article 68 unless it was notified regarding the infringement[472].

Perhaps the most important decision regarding online infringement is on the *gittigidiyor.com* case. It was found by the TCoC that the website operator cannot reasonably know the third-party infringement in its website due to the structure of Internet, and thus, it is required that the HP gittigidiyor.com is notified and has fault for still not removing the illegal content[473]. However, as much as the outcome is reasonable, it is not possible to agree with the reasoning of the Court, which is the lawsuit petition being considered as the notice to the platform and therefore the fault of the service provider is found. We believe that it must first be a sufficiently justified notice made to the platform regarding the illegality of the content under the additional article 4 of LIAW. If the service provider does not act upon and remove the illegal content accordingly, only then it must be found liable. If the lawsuit is to be accepted as the notice and the service

[470] Yavuz, Alıca and Merdivan (n 4) 124-127; Judgement of the Turkish Court of Cassation (11. Civil Chamber) of 6 February 2007, E.2006/695, K. 2007/3983.
[471] Güneş (n 5) 75; Judgement of the Turkish Court of Cassation (11. Civil Chamber) of 3 July 2000, E.2000/4764, K. 2007/6252.
[472] Judgement of the Turkish Court of Cassation (11. Civil Chamber) of 29 September 2012, E.2010/10171, K. 2012/14474 in Merdivan, Alıca and Yavuz (n 4) 1174-1176.
[473] Judgement of the Turkish Court of Cassation (Assembly of Civil Chambers) of 15 November 2014, E.2013/11-1138, K. 2014/16 in Alıca, Yavuz and Merdivan (n 4) 1993-2001.

provider if found liable for the illegality before the lawsuit, it means that it is liable for the acts it does not know of. This interpretation is against the nature of the service providers, functioning of the Internet and also against the law as well as their no-general-monitoring-requirement[474].

Perhaps, given that the matter was brought more before the CJEU and its style of decisions being more analysing, detailing and assessing the matter with all relevant legal texts and case law, we believe we can ascertain more principles and takeaways from the decisions of CJEU as detailed below.

D) Liability under the European Law

1. Under the InfoSoc Directive

In its Recital 59, regarding the infringement and the liability of the intermediaries, the InfoSoc Directive states as follows: *"In the digital environment, in particular, the services of intermediaries may increasingly be used by third parties for infringing activities. In many cases such intermediaries are best placed to bring such infringing activities to an end. Therefore, without prejudice to any other sanctions and remedies available, right holders should have the possibility of applying for an injunction against an intermediary who carries a third party's infringement of a protected work or other subject matter in a network. This possibility should be available even where the acts carried out by the intermediary are exempted under Article 5. The conditions and modalities relating to such injunctions should be left to the national law of the Member States."* Clearly, there is a special approach regarding the injunctions against intermediaries. The legal basis for website blocking under EU law has been InfoSoc Directive article 8(3). Under this article, an injunction can be claimed against

[474] Alıca, Yavuz and Merdivan (n 4) 1962-1964.

intermediaries, the services of which the third parties use to infringe copyright. So actually, this provision sets forth a special approach on the liability of intermediaries as it actually provides the possibility of seeking injunctions regardless of the liability or implication of the platform. Any wrongdoing or secondary liability of the intermediary is not required for obtaining an injunction. It can be considered as their duty to cooperate[475].

The requests for website blocking injunctions have been mostly regarding the right of communication to the public (article 3 InfoSoc Directive) and *UPC Telekabel* decision is a relevant important CJEU decision, laying out the opinion of the CJEU on the matter. In *UPC Telekabel*[476], two movies among many others were communicated to the public without authorisation by allowing their download or streaming at the website "kino.to". It was considered that "the internet service provider is an inevitable actor in any transmission of an infringement over the internet between one of its customers and a third party, since, in granting access to the network, it makes that transmission possible" and thus, the ISP in question qualifies as an intermediary whose services are used to infringe a copyright by a third party within the meaning of article 8(3) InfoSoc Directive and there is no requirement that there should be a specific or contractual relationship between the intermediary and infringer[477]. It was underlined by the Court that InfoSoc Directive not only aims at ceasing copyright infringement but also preventing it. Therefore, its preventive nature allows the right holders to act without any proof of actual access by the users to the work in question. In any case, the existence of the act of making available to the public does not require that the users actually access the work[478]. Again, it was noted by the Court that a balance between copyright and the freedom to conduct a

[475] Jan Bernd Nordemann, 'Website Blocking under EU Copyright Law', *The Routledge Handbook of EU Copyright Law* (Routledge (Taylor&Francis) 2021) 361-362.
[476] Judgement of the Court (Fourt Chamber) of 27 March 2014, *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH*, C-314/12, ECLI:EU:C:2014:192.
[477] *UPC Telekabel*, C-314/12, ECLI:EU:C:2014:192, paras. 32-35.
[478] *UPC Telekabel*, C-314/12, ECLI:EU:C:2014:192, paras. 37-39.

business (of ISP) and the freedom of information (of internet users) must be found in case of an injunction under article 8(3) InfoSoc Directive. In the case at issue, CJEU was of the opinion that "An injunction such as that at issue in the main proceedings constrains its addressee in a manner which restricts the free use of the resources at his disposal because it obliges him to take measures which may represent a significant cost for him, have a considerable impact on the organisation of his activities or require difficult and complex technical solutions" and therefore restricts its freedom to conduct business. However, it should be possible to take measures that the provider may choose "which are best adapted to the resources and abilities available to him and which are compatible with the other obligations and challenges which he will encounter in the exercise of his activity". It must specifically target the cessation of the third-party infringement without affecting freedom of information of the Internet users in a lawful way, i.e., must avoid over blocking. This kind of injunction may allow the prevention of liability because all reasonable and effective measures has been taken and that way the sacrifice would not be unbearable for avoiding infringement that others cause[479]. The measures must be effective enough for genuine protection of copyright, thus, prevention of unauthorised access to protected content. At least, they must be making it difficult for the users or really discourage them to access the infringing content, if not completely removing the infringement (since most of the measures such as URL blocks can be circumvented and sometimes it is not possible to achieve full blocking to the content), within the balance of fundamental rights[480].

Additionally, InfoSoc Directive article 3(1) provides "the exclusive right to authorise or prohibit any communication to the public of their works either by wire or

[479] *UPC Telekabel*, C-314/12, ECLI:EU:C:2014:192, paras. 47-56; Nordemann (n 475) 367-368.
[480] *UPC Telekabel*, C-314/12, ECLI:EU:C:2014:192, paras. 62-63; Nordemann (n 475) 368.

wireless, including the making available to the public of their works in a way that the public may access the works from a place and at a time chosen by them". Therefore, article 8 provides the sanctions and remedies that "shall be effective, proportionate and dissuasive" for the right holders to use. EU States are obliged to provide the necessary means for right holders to bring an action for their damages, as well as to apply for injunction or seizure of infringing material against intermediaries, which provide the services used by a third party while infringing copyright.

2. Under the E-Commerce Directive

E-Commerce Directive stipulates liabilities of certain Internet actors, inter alia, HP. Before the CDSMD brought the term OCSSPs into the legal world, those social media service providers might be considered under the extensive term of HP, since they also provide space to their users and store their third-party content. It can be said that every OCSSP might essentially also be a HP, whereas not every HP can be an OCSSP[481]. Although the special provisions for the scope and liability of OCSSPs are foreseen in the most recent legal instrument of CDSMD and it shall be applied for the relevant disputes in the future, we still would like to mention the relevant provisions of E-Commerce Directive briefly, since it has been applied previously and may also be considered according to the particulars of the case at issue.

In its preamble, recital 42 refers to the exemption from liability. In case the ISS provider gives access to third party content where its activity is only "technical, automatic and passive" and therefore has no knowledge or any control over possible illegality of the content, then it is exempted from liability under the E-Commerce Directive. Again, in the recital 44, it is stated that service providers of "mere conduit" and "caching" activities

[481] Gönülal (n 290) 794.

collaborating with its users for the illegal acts cannot benefit from liability exemptions. More importantly, such exemptions and limitations cannot affect any injunctions such as court orders and administrative decisions of removal of content or blocking access (Recital 45). Also, service providers benefiting from such exceptions must act immediately for the removal of content or blocking access to the illegal information upon notice or self-learning of the illegality, otherwise they may be held liable (Recital 46). It is considered that E-Commerce Directive did not provide a guideline for the EU States as to the notice and take down procedures and this results in "self-regulation"[482].

E-Commerce Directive articles 12–14 may be considered as the beginning of a certain harmonisation on secondary liability. Still, it only includes a limited scope of accessories and does not state the liability of a service provider in case of copyright infringement carried out by another person[483]. Article 14 states that HP shall not be liable from its users' illegal content if it does not know the illegality of such content, or acts rapidly upon the knowledge of illegality to remove the content or block access thereto. However, safe harbour exemption does not protect the platforms against injunction. Under article 14(3), HP's obligation to terminate or prevent infringement upon court order remains unaffected. It is important to also mention that article 15 states that there is no general obligation for the ISP to monitor content or investigate whether there is illegal activity going on. It must be made possible under article 18 to apply for measures before courts such as interim injunction to stop and prevent infringement on the platforms. Blocking websites can only be achieved in accordance with prohibition of general monitoring obligations under article 15. Otherwise, it would be against users' fundamental rights. Besides, it is important regarding the notice and take down

[482] Yılmaztekin (n 9) 215-216.
[483] Angelopoulos (n 141) 194.

procedures that the illegality of the content is duly investigated and that they do not result in over-blocking by "systematically take down materials" including the legal contents, as well as leading to hinder "free flow of information on the Internet"[484].

In its *Scarlet Extended* and *L'Oreal* decisions, the CJEU explained that measures regarding blocking should not result in imposing general monitoring obligations and they cannot consist of active monitoring activities. This would make them to monitor all user data for identification of any IP infringement and it would also be against Enforcement Directive article 3 since it would not be fair, proportionate, and it might be excessively costly[485]. It is possible to specific monitoring or filtering related to specific past infringements upon order given by relevant authorities[486].

3. Under the Enforcement Directive

Enforcement Directive regulates the enforcement of IPR within the EU. Its aim is ensuring effective means of enforcement in that sense, so that innovation and creativity are encouraged, investment increases and the internal market succeeds. It is important that the substantive law on IP as a part of the *acquis communautaire* is applied effectively in the EU[487]. Therefore, recitals 22 and 23 of the Enforcement Directive mentions providing proportional and appropriate provisional measures for expeditious termination of infringement, where it is justified that any delay would cause irrecoverable damage to the IPR owner. He must have a chance to apply for an injunction against the intermediaries, the services of which are used by its users to infringe IPR. Although it is considered that the requirements and procedures for said injunctions are left to the

[484] Yılmaztekin (n 9) 228-229.
[485] *Scarlet Extended*, C-70/10, ECLI:EU:C:2011:771, para. 36, 40; *L'Oreal*, C-324/09, ECLI:EU:C:2011:474, para. 139.
[486] Nordemann (n 475) 373-374.
[487] Corrigendum to Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights 2004, recital 3.

discretion of national laws, InfoSoc Directive article 8(3) is not to be prejudiced (article 11).

Enforcement Directive stipulates in its article 3 that the Member States should provide fair, equitable, reasonable (as to procedure, cost and time) measures, procedures and remedies for IP rights enforcement. They also need to be proportionate, effective and deterrent. InfoSoc Directive article 8(3) does not include these principles, but national courts benefit Enforcement Directive article 3 for its interpretation[488]. CJEU noted in its *L'Oreal*[489] and *Tommy Hilfiger*[490] decisions that the injunctions should not include general or permanent prohibition as to create barriers to legitimate trade[491].

4. Under the CDSM Directive

As mentioned before in part IV.B.2., the term OCSSPs and their copyright liabilities are clearly defined and regulated in the DSM Directive for the first time in its article 17. It is accepted that the OCSSP facilitating copyright containing content is a communication and/or making available to the public and thus, right holder's authorisation is required. Without such authorisation, OCSSP will be held liable, except that it demonstrates best efforts to have the authorisation of the right holder or ensure the same way to make the content unavailable, for which the right holder had provided the necessary information. Also, in any case that it acted immediately after the sufficient notification from the right holder to block access to the content or remove it from the platform, as well as making the best efforts for the prevention of future uploading of the

[488] Nordemann (n 475) 369.
[489] Judgement of the Court (Grand Chamber) of 12 July 2011, *L'Oréal SA, Lancôme parfums et beauté & Cie SNC, Laboratoire Garnier & Cie, L'Oréal (UK) Ltd v eBay International AG, eBay Europe SARL, eBay (UK) Ltd, Stephen Potts, Tracy Ratchford, Marie Ormsby, James Clarke, Joanna Clarke, Glen Fox, Rukhsana Bi*, C-324/09, ECLI:EU:C:2011:474.
[490] Judgement of the Court (Second Chamber) of 7 July 2016, *Tommy Hilfiger Licensing LLC, Urban Trends Trading BV, Rado Uhren AG, Facton Kft., Lacoste SA, Burberry Ltd v Delta Center a.s.*, C-494/15, ECLI:EU:C:2016:528.
[491] *L'Oreal*, C-324/09, ECLI:EU:C:2011:474, para. 140; *Tommy Hilfiger*, C-494/15, ECLI:EU:C:2016:528, para. 35; Nordemann (n 475) 369.

relevant illegal content, it will not be held liable. So, in paragraph 4, there is actually a sort of limitation of liability, which is subjective and must be assessed in each case, whether the OCSSP made the best effort. Therefore, in paragraph 5, some criteria were provided for the determination of the compliance of such obligation according to the proportionality principle. Hereunder, types of the OCSSPs and their user generated content, its size and audience/user, the availability and the cost of the effective means for the platform are taken into account. Considering that the social media platforms are used very frequently and the amount of content uploaded every second is huge, it is very difficult and costly to conduct constant infringement inspection[492]. In that sense, it is understandable that the lawmakers do not oblige the platforms for general monitoring.

It is noteworthy that under article 17(6), the new OCSSPs (that are available for not more than 3 years and have an annual turnover less than EUR 10 million) are subject to a more limited liability, as they only have to show the best efforts to have the right holder's authorisation and act immediately after the sufficient notification from the right holder to block access to the content or remove it from the platform. This means, they are not under the obligation to detect and remove the illegal content by using the information provided by the right holder beforehand, such as with a filtering system, according to the high industry standards. In case the approximate number of visitors are more than 5 million a month for an OCSSP (under the calculation of the previous year), then it must show that they make the best efforts for prevention of future uploading of the informed work. This is appropriate and fair, given that the new OCSSPs do not have the necessary means, both as to costs and employment, as much as the ones that are already established and far-reaching. In any case, only the infringing material must be removed and prevented, and it is important that non-infringing UGC including under exceptions and

[492] Yasaman (n 218) 603-604.

limitations must be available. Also, under paragraph 8, it is stated that there is no general monitoring obligation on the OCSSPs. As for the exceptions and limitations, article 17(7) states that UGC consisting of criticism, review and quotation, as well as the use of copyrighted work for the purposes of parody, caricature and pastiche are to be allowed.

Another important part of the provision is that in paragraph 9, it is considered that the OCSSPs should have effective and quick complaint (and relief) mechanisms for their user to request removal of the infringing material in the event of a dispute. Surely, the right holders need to substantiate and justify their requests of removal. The complaints will be processed immediately by human review. Additionally, the users shall also be afforded legal protection, and they shall be able to depend on the exceptions and limitations.

E) Case Law of the CJEU

Certainly, all of CJEU's decisions are important as they are affecting national laws, harmonising the EU law and guiding EU Member States. Although it is not quite possible for us to classify them by their importance or judge their merits, we would like to mention several CJEU decisions under this title with regards to particular exclusive rights that we consider important because of their certain aspects.

First, with regards to the reproduction right in InfoSoc Directive article 2, *Infopaq I*[493] is the first decision detailing its main features and giving a uniform and broad interpretation of it as "an autonomous concept of EU law". Another detailed interpretation could be given by the CJEU as late as seven years afterwards in *Soulier and Doke*[494]. However, we would like to only detail *Infopaq I* here. In *Infopaq I* case, the dispute was

[493] Judgment of the Court (Fourth Chamber) of 16 July 2009, *Infopaq International A/S v Danske Dagblades Forening*, C-5/08, ECLI:EU:C:2009:465.
[494] Judgment of the Court (Third Chamber) of 16 November 2016, *Marc Soulier and Sara Doke v Premier ministre and Ministre de la Culture et de la Communication*, C-301/15, ECLI:EU:C:2016:878.

between Infopaq, which operates a media business involving summaries of Danish newspaper articles, and DDF, which is a Danish newspaper association assisting its members with copyright matters. Infopaq chooses the articles by its 'data capture process' and it sends the article summaries to its customers via email. DDF realised that Infopaq commercially uses newspaper articles without the right holders' authorisation. The 'data capture process' of Infopaq includes five steps and DDF is of the opinion that four of them constitute acts of reproduction[495]. Such five steps are as follows: i) manual registration of publications to a database, ii) scanning publications, iii) digitisation of scanned files, iv) processing text file for finding a search word for reading the article easier, which also includes five words before and after the search word so extracting 11 words, v) printing cover sheet with relevant search word[496].

The CJEU first determined that parts of works can also be protected by copyright, provided that they also reflect the intellectual creation of the author by sharing the entire work's originality, and reproduction right should be interpreted broadly[497]. The Court considered that originality is achieved by selection, arrangement and combination of words expressed by the author, however, the words *per se* cannot be protected by copyright[498]. It is possible for certain sentences or text parts to convey originality and cause liability within the frame of right of reproduction. It is decided that even extracting works as short as 11 words constitutes act of reproduction pursuant to the InfoSoc Directive article 2, provided that the extracts express their authors' own intellectual creation. The data capture process includes storage and print out of parts of protected work, which is an act of reproduction[499]. It is also important to point out that printing out

[495] *Infopaq I*, C-5/08, paras. 13-16.
[496] *Infopaq I*, C-5/08, paras. 17-21.
[497] *Infopaq I*, C-5/08, paras. 38-43.
[498] Pila (n 51) 72.
[499] *Infopaq I*, C-5/08, paras. 45-51.

means reproducing the part of the work on a paper and affixing it to a medium makes it hard to disappear, since it is only possible if the paper is destroyed. In order for the act to be considered within the exception under InfoSoc Directive article 5(1), the act must be transient or incidental. Surely, the fact that the printed papers are given to users and destroying or deleting those reproductions are up to the users, it is clear that the extracts can remain a very long time and it is certainly not transient in that case. Thus, it is not exempted from the exclusive right of reproduction[500].

With regards to the communication to the public right, to start with, the CJEU stated in its *eBay* decision[501] that any measure related to service providers could not include active monitoring for prevention of future infringement of IP under E-Commerce Directive article 15(1) and the Enforcement Directive article 2(3). Also, a general monitoring obligation would be out of tune of the Enforcement Directive article 3, as it would not be proportionate and fair and not costly. Effective and proportionate injunctions against service providers may be issued[502].

In its other decisions, the CJEU found that IPR (as a part of the right to property) is a fundamental right, however, it is not understood that such right is inviolable and absolute. A balance with other fundamental rights must be found[503]. For example, the injunction or measure must not infringe the service provider's freedom to conduct business, or it must not prejudice the freedom of information of the users and protection of their personal data. It is important to mention that CJEU considers the injunction for installing a filtering system would include analysing all the content in the platform systematically, collecting and identifying its users' IP addresses (which are actually

[500] *Infopaq I*, C-5/08, paras. 67-72.
[501] Judgment of the Court (Grand Chamber) of 12 July 2011, *L'Oréal SA and Others v eBay International AG and Others*, C-324/09, ECLI:EU:C:2011:474.
[502] *L'Oreal v eBay*, C-324/09, paras. 139-141.
[503] Ateş (n 3) 103.

personal data) with regards to the illegal content. Also, the system might not recognize the illegal content and it could result in blocking also legal content, which might harm freedom of information. It was pointed out that the legality of the content might also depend on the national laws, since the exceptions may differ. Consequently, an injunction requiring installing a filtering system for contents on the platform was not found possible by the Court especially due to impossibility of the fair balance of fundamental rights[504]. In that sense, it would go counter to copyright protection, protection of personal data, freedom to conduct business and freedom of information[505]. In light of the above, it must be said that it is possible to ask for termination of infringement and prevention of possible future infringements, provided that it is temporary and restricted as for the subject and time[506].

In *Ziggo*[507], the CJEU evaluated the liability of intermediaries due to the acts of communication to the public by its users[508]. The dispute is between a Dutch foundation safeguarding the copyright holders' interests, Stichting Brein, and internet access providers Ziggo and XS4ALL. A lot of their subscribers use The Pirate Bay (TPB), an online sharing platform that indexes BitTorrent files. On the other hand, BitTorrent allows users to share files by dividing such files into segments and cancels the central server for storage. However, 'BitTorrent Client' software is needed for creating torrent files and it is not provided by TPB. The files on TPB are usually related to copyrighted works without their right holders' authorisation[509]. In this case, Stichting Brein asked for Ziggo and

[504] Judgment of the Court (Third Chamber) of 24 November 2011, *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM).,* C-70/10, ECLI:EU:C:2011:771, paras. 42-54; Judgment of the Court (Grand Chamber) on 29 January 2008, *Productores de Música de España (Promusicae) v Telefónica de España SAU.,* C-275/06, ECLI:EU:C:2008:54, paras. 61-70.
[505] Angelopoulos (n 141) 210.
[506] Yasaman (n 218) 628-630; Ateş (n 3) 80-81.
[507] Judgment of the Court (Second Chamber) of 14 June 2017, *Stichting Brein v Ziggo BV and XS4All Internet BV*, C-610/15, ECLI:EU:C:2017:456.
[508] Justin Koo, 'Right of communication to the public', *The Routledge Handbook of EU Copyright Law*, (Routledge (Taylor&Francis) 2021) 184-185.
[509] *Ziggo*, C-610/15, ECLI:EU:C:2017:456, paras. 8-12.

XS4ALL to block the IP addresses and domain names of TPB for preventing copyright infringement on the platform. It is accepted by the Court that the works are made available and have been placed online on TPB's platform by its users. However, the operators are considered to intervene "by making available and managing an online sharing platform ... with full knowledge of the consequences of their conduct, to provide access to protected works, by indexing on that platform torrent files which allow users of the platform to locate those works and to share them within the context of a peer-to-peer network." In that sense, it was considered that without the operators managing and making this platform available, the copyrighted works could not be shared by its users or it would at least be more difficult. TPB provides its users access to the unauthorised works and in making these available to the public, it has an essential role. This cannot be considered as a "mere provision of physical facilities for enabling or making a communication", because the platform was indexing metadata referring to protected works, classifying and filtering the torrent files and providing a search engine so that the users may easily locate and download the works. Besides, clearly the purpose of the operator is to profit, because it was understood by the Court that the platform derives advertising profits. Consequently, the act of platform operators was considered as an act of communication to the public[510]. Overall, in order for a platform to be held liable according to this decision is that the communication must include enough intervention of it, it has to have a sufficiently "indispensable" or "essential" role, which was amount to providing search functionalities and indexing works in this case. Besides, the platform needs to know or ought to have known about the illegality. As a result, "structurally infringing sites" like TPB in this case, are considered to directly infringe communication

[510] *Ziggo*, C-610/15, ECLI:EU:C:2017:456, paras. 36-37.

to the public right[511].

One of the latest and most relevant case law on this matter is the judgment of the CJEU (Grand Chamber) held on June 22, 2021 (joined cases C‑682/18 and C‑683/18) of "*Frank Peterson and Elsevier Inc. v Google LLC and Others*" (or YouTube and Cyando case in short)*[512]*. Due to its relevance and recency, we would like to explain this decision in a more detailed analysis. The issue at hand in C-682/18 is the unauthorised upload of performance artist Sarah Brightman's album and concert recordings on YouTube[513]. Whereas, in case C-683/18, the issue is between the publisher Elsevier and Cyando (the operator of the file-hosting and -sharing platform called Uploaded), which presents users free storage space for uploading documents irrespective of content. It is about a couple of literary works on medicine to be shared on Uploaded without authorisation of the exclusive right holder, Elsevier. Cyando does not monitor the uploads, it happens automatically. When a document is uploaded by a user, Cyando automatically provides a "download link" allowing direct access to relevant document and sends it to the uploader. In its terms and conditions, it is stated that the users shall not infringe copyright[514]. The qualification of Uploaded is a matter of question as it is not likely to be qualified as an OCSSP, for the reasons of lack of the main function of this platform as "making available large amounts of copyright-protected material to the public by default" and it is not in competition with license-based streaming services. Whereas, there is no doubt that YouTube is an OCSSP. In this case, the provisions which should be applied is InfoSoc Directive article 3 for Uploaded and CDSMD article 17 for

[511] Nordemann (n 475) 365; Ginsburg and Budiardjo (n 266) 169.
[512] Judgment of the Court (Grand Chamber) of 22 June 2021, *Frank Peterson and Elsevier Inc. v Google LLC and Others (YouTube and Cyando)*, Joined Cases C-682/18 and C-683/18, EU:C:2021:503.
[513] *YouTube and Cyando*, joined cases C‑682/18 and C‑683/18, EU:C:2021:503, paras. 18-30.
[514] *YouTube and Cyando*, joined cases C‑682/18 and C‑683/18, EU:C:2021:503, paras. 40-47.

YouTube[515].

Before the C-682/18, The Higher Regional Court of Hamburg found that YouTube was not liable for those infringements, because it did not have any active part in generating or posting the content and it also did not adopt the user content as its own. Also, according to the Higher Court, YouTube did not show any intent for being liable as a participant because of its lack of knowledge of the infringing acts. In any case, it was stated in the decision that almost 35 hours of videos are uploaded every minute on YouTube and it is an automated process without the videos being checked before shared on the platform. However, it was found liable as an "interferer", for the reason that YouTube did not fulfil its obligations of immediately deleting the disputed content or block access to it, after it was notified of the infringement of the works[516]. On the other hand, it was found that YouTube did not violate any of its obligations regarding the recordings from the concerts of the tour. Although the videos of such musical works were illegally posted on YouTube by third parties, YouTube did not have enough information on the infringement or it blocked access to the content in question in time. It was pointed out by the court that users grant YouTube a royalty free and non-exclusive license regarding the uploaded videos to use, reproduce, distribute, when they accept YouTube's terms of service. Additionally, the users thereby undertake that they hold all the rights for their videos, including any authorisation or license. YouTube also demands in its "Community Guidelines" that the users respect copyright, as well as at each download. On the other hand, YouTube has some technological measures to prevent infringement such as an "infringement notification button" and "special alert procedure" for the copyright owners to be able to have the infringing videos removed by indicating their

[515] Julia Reda and Joschka Selinger, 'YouTube/Cyando - An Important Ruling for Platform Liability - Part 1', (*Kluwer Copyright Blog*, 2021) <http://copyrightblog.kluweriplaw.com/2021/07/01/youtube-cyando-an-important-ruling-for-platform-liability-part-1/> accessed 3 November 2021.
[516] *YouTube and Cyando*, joined cases C‑682/18 and C‑683/18, EU:C:2021:503, para. 28.

URLs. YouTube also has a content-recognition software called "Content ID" where the right holder provides an audio or video reference for YouTube to identify other videos on the platform having the same content as a whole or partly. In the event that an infringement is identified, right holder will be notified. Consequently, the right holder may request the disputed content to be blocked or may authorise it and receive its advertising revenue. Last but not least, YouTube has its "Content Verification Program", with which the right holders may identify the videos infringing their rights by checking the videos off of a list. After the right holder checks the video off and it is blocked, the user who uploaded the video is notified that in case they repeat the infringement, their account will be blocked[517]. Therefore, the national court assessed that YouTube has measures set up and discharged its duties[518].

The CJEU set forth the requirements for a video-sharing platform or a file-hosting and -sharing platform to be exempted from liability under the E-Commerce Directive article 14(1) ("safe harbour") as follows: the operator must play a neutral role and its conduct must be passive, merely technical and automatic, therefore, it has to have no knowledge of illegality or should not have any control over the stored content[519]. The CJEU stated that if YouTube's role is neutral and therefore within the scope of E-Commerce Directive article 14, infringement must be notified to YouTube in a clear and precise way, in order for YouTube to be aware of the illegal act. This way, YouTube could realise there is an infringement without investigating. Under the E-Commerce Directive articles 14 and 15, an injunction for YouTube may be obtained only when YouTube actually knows the illegal act or content[520]. Consequently, the safe harbour does

[517] *YouTube and Cyando*, joined cases C‑682/18 and C‑683/18, EU:C:2021:503, paras. 29-30.
[518] *YouTube and Cyando*, joined cases C‑682/18 and C‑683/18, EU:C:2021:503, paras. 32-34.
[519] *YouTube and Cyando*, joined cases C‑682/18 and C‑683/18, EU:C:2021:503, para. 106.
[520] *YouTube and Cyando*, joined cases C‑682/18 and C‑683/18, EU:C:2021:503, para. 36.

not apply to primary liability in copyright context[521].

The CJEU stated in the *Youtube and Cyando* decision that in determining whether the content sharing platforms step in with regards to user generated illegal content with full knowledge by giving access, it is important to consider all particular factors of the case at hand to decide if its act is deliberate. Accordingly, the CJEU stated the relevant factors exemplarily as follows: "the circumstance that such an operator, despite the fact that it knows or ought to know, in a general sense, that users of its platform are making protected content available to the public illegally via its platform, refrains from putting in place the appropriate technological measures that can be expected from a reasonably diligent operator in its situation in order to counter credibly and effectively copyright infringements on that platform, and the circumstance that that operator participates in selecting protected content illegally communicated to the public, that it provides tools on its platform specifically intended for the illegal sharing of such content or that it knowingly promotes such sharing, which may be attested by the fact that that operator has adopted a financial model that encourages users of its platform illegally to communicate protected content to the public via that platform." These criteria are non-exhaustive and their way of application and weight on the decision is not clear. CJEU leaves the application of such criteria to national/referring courts to decide if there is communication to the public by YouTube and Uploaded, and only shows guidance. Still, it is significant to point out that the operator merely generally knowing that copyrighted content is on its platform is not enough for it to be considered stepping in for giving users access to a particular illegal content[522]. Surely, if the operator is sufficiently notified by the copyright owner about the illegal content on the platform and it avoids taking

[521] Reda and Selinger (n 515).
[522] Reda and Selinger (n 515).

immediate action for removal of access to the infringing content, the situation will be different[523]. The Court also mentioned that the aim of profit making is relevant, but mere providing of ISS for profit does not correspond to the aim of infringing copyright via user generated illegal content[524]. We also find it important to mention that the CJEU did not find its earlier interpretation in *GS Media* case applicable in this case, because a person providing a hyperlink while acting on their own initiative and knowing the targeted content at the time cannot be compared to the operator of a content sharing platform, which does not know particularly the user uploaded content on the platform and does not play a role more than only making that platform available, for providing public access to copyright infringing content[525].

In case C-682/18, the CJEU found that YouTube has no intervention in generating or selecting its user-uploaded content and does not monitor the content before the upload; it is done automatically. Also, YouTube explicitly informs its users in its terms of service as well as at each upload regarding the prohibition of posting copyright infringing content on the platform. In addition, in its Community Guidelines it tells its users to respect copyright. Moreover, it warns users uploading infringing videos (blocked upon notification of the right holder) about their account also to be blocked in case they repeat the infringement. Additionally, YouTube has several technological measures for prevention and termination of copyright infringements on its platform, such as a "notification button and a special alert procedure" to be able to report and make the illegal content removed; a "content verification program" for surveillance of content, as well as a "content recognition software" for simplifying the identification and detection of illegal

[523] Julia Reda and Joschka Selinger, 'YouTube/Cyando - An Important Ruling for Platform Liability - Part 2' (*Kluwer Copyright Blog*, 2021) <http://copyrightblog.kluweriplaw.com/2021/07/01/youtube-cyando-an-important-ruling-for-platform-liability-part-2/> accessed 3 November 2021.
[524] *YouTube and Cyando*, joined cases C‑682/18 and C‑683/18, EU:C:2021:503, paras. 83-86.
[525] *YouTube and Cyando*, joined cases C‑682/18 and C‑683/18, EU:C:2021:503, para. 89.

content. Consequently, the CJEU also found that YouTube has credible and effective technological measures against copyright infringements on its platform[526]. In case C-683/18, the CJEU found that Cyando, does not generate, choose or control uploaded content to its platform either. Moreover, its users are informed in the conditions of use that they are forbidden from infringing copyright through the platform. Furthermore, the user upload of copyrighted content to the platform does not allow its users to make the content available to the public directly, since it can only be exclusively accessed via a download link sent to the uploader. Also, the platform does not allow to share the said download link. Therefore, the Court found that Cyando did not provide tools particularly aiming to facilitate unlawfully sharing copyrighted content or did not promote illegal sharing. Additionally, Cyando does not participate in providing download links to third-parties. It is noted that, the main or preponderate use of Cyando's platform was to make copyrighted content available to the public unlawfully, and it would be one of the relevant factors in determining deliberate intervention of the operator. It would also be significant in the event that the operator failed to implement appropriate and reasonable technological measures to respond credibly and effectively to copyright infringements on its platform. Lastly, CJEU pointed out that the deliberate intervention of the platform operator could result from (referring court must verify) the financial system of the operator in case it is based on accessing illegal content via the platform and it encourages its users to share illegal content[527]. As a result, CJEU interpreted that the act of an operator of a "video-sharing or a file-hosting and -sharing platform", where users can unlawfully share copyrighted content, does not constitute a "communication to the public" of said content, pursuant to InfoSoc Directive article 3(1), unless it plays a role more than only making the platform available, for providing access to copyright protected content

[526] *YouTube and Cyando*, joined cases C‑682/18 and C‑683/18, EU:C:2021:503, paras. 92-94.
[527] *YouTube and Cyando*, joined cases C‑682/18 and C‑683/18, EU:C:2021:503, paras. 97-101.

illegally. It is accepted in the cases that the operator has particular knowledge on the illegality of the protected content on its platform and avoids removing it immediately, it is liable. Additionally, if the operator knows or can reasonably know that its users generally make copyrighted content available to the public unlawfully and still avoids setting up appropriate and reasonable technological measures for responding credibly and effectively against copyright infringements on its platform, even participates in choosing unlawful copyrighted content to be communicated, provides resources on its platform particularly for unlawfully sharing protected content or knowingly promotes it, the operator will be deemed to make communication to the public pursuant to InfoSoc Directive[528].

Irrespective of rights concerned, we also would like to mention the cases with regards to hyperlinking and copyright liability. Since hyperlinking constitutes an important act of communication on the Internet and OCSSPs are important actors of communication on the Internet, it is only natural that their operators' copyright liability from the acts of hyperlinking on their platform is wondered. The main decisions rendered by the CJEU are explained below.

In *Svensson*[529] case, the dispute is related to hyperlinks that are on the company Retriever Sverige AB's website allowing users to access copyrighted press articles of the applicant journalists. Therefore, the applicants requested compensation arising from the act of making available their articles without their consent. The CJEU considered that providing hyperlinks constitute making works available to the public and thus, communication to the public pursuant to InfoSoc Directive article 3(1)[530]. Nevertheless,

[528] *YouTube and Cyando*, joined cases C‑682/18 and C‑683/18, EU:C:2021:503, para. 102.
[529] Judgment of the Court (Fourth Chamber) of 13 February 2014, *Nils Svensson and Others v Retriever Sverige AB*, C-466/12, ECLI:EU:C:2014:76.
[530] *Svensson*, C-466/12, EU:C:2014:76, para. 20.

the Court decided that providing "clickable links" to copyrighted works, where they are to be accessed freely online, does not constitute communication infringing copyright. However, in case it is directed to "new public", authorisation of copyright owner is needed. CJEU pointed out that when the link allows circumvention of restricted access, which makes the copyrighted works available for non-subscribers, such link constitutes copyright infringement. Therefore, "new public" corresponds to the users that had not been considered by the copyright owner when giving authorisation for communication to the public of their work in the directed website[531].

In *GS Media*[532] case, the dispute and the question to the CJEU covered the posting of hyperlink in the website of GS Media allowing access to photos of Britt Geertruida Dekker captured for Playboy magazine. The publisher of Playboy magazine obtained the authorisation of the photographer for the publication of the photos in question exclusively and the exercise of rights. CJEU considered that hyperlink to a copyrighted work, which is freely available online, does not constitute an act of communication to the public within the meaning of InfoSoc Directive article 3(1), considering that consent of author includes all Internet users and there is no new public. Surely, in order for it to be this way, the targeted content should exist within the frame of the authorisation of the copyright owner. If not, then the hyperlink would be facilitating the infringement of the copyright and be considered under communication to the public. During the proceeding, GS Media, the European Commission along with the Portuguese, German and Slovak Governments asserted that automatic categorisation of hyperlinks as communication to the public considering the copyright owner had not consented to the work to be published online would restrict the freedom of expression and of information excessively. There has to be

[531] *Svensson*, C-466/12, EU:C:2014:76, paras. 24-32.
[532] Judgment of the Court (Second Chamber) of 8 September 2016, *GS Media BV v Sanoma Media Netherlands BV and Others*, C-160/15, ECLI:EU:C:2016:644.

a balance between effective protection of copyright and such freedom. CJEU therefore pointed out that the Internet is very important in terms of freedom of expression and of information where hyperlinks play a part in the "exchange of opinions and information", and thus to support the function of the Internet[533]. Moreover, the CJEU stated in *GS Media* that in former linking cases, *Svensson* and *Bestwater*, there were the works that had already been made available with consent of the author and in order for the hyperlink to be considered as an act of communication to the public, it must be directed towards a new public[534]. *Bestwater* decision shows that all types and forms of links were considered equally[535]. In *GS Media*, CJEU pointed out that in order for the act of hyperlinking to constitute an act of communication infringing copyright of others, the provider of hyperlink should be aware and should know (or be able to reasonably know) that the referred work is on the Internet without authorisation. In case of pursuing a financial gain or profit, the CJEU assumes that there is full knowledge of the illegality of the content[536]. This leads to the monitoring activities of the commercial hyperlink providers that they shall inquire the content they provide the hyperlink to, in order not to cause infringement[537]. Consequently, hyperlink is an act of communication, when its provider knows or ought to know that it leads to illegal content, gains profit and/or circumvents restrictions. The requirement of knowledge of the illegality of the content, to which the hyperlink directs, is a new and additional requirement made by the CJEU. If the hyperlink is given with the aim of financial profit, it is presumed that the provider knows the directed content is illegal[538].

Lastly, the CJEU rendered a decision numbered C-392/19, "*VG Bild-Kunst v*

[533] *GS Media*, C-160/15, EU:C:2016:221, para. 45.
[534] *GS Media*, C-160/15, EU:C:2016:221, paras. 37-42.
[535] Savola (n 332) 140.
[536] *GS Media*, C-160/15, EU:C:2016:221, paras. 49-51; Rosati (n 130) 81.
[537] Jehoram (n 351).
[538] Ginsburg and Strowel (n 141) 225; Angelopoulos (n 141) 201.

Stiftung Preußischer Kulturbesitz"[539], regarding hyperlink and copyright on March 9, 2021. The dispute in this case was about the ability of a licensor to impose the adoption of technological measures by the licensee preventing hyperlink, restricting linking by contract. The background of the proceedings was a dispute in Germany between the German a visual arts copyright collecting society (VG Bild-Kunst) and a German cultural heritage foundation (SPK). The latter is operator of a digital library of culture and knowledge and also a network between German cultural and scientific institutions, called "Deutsche Digitale Bibliothek" (DDB). The DDB website includes links to content on websites of participating institutions. In its website, DDB only stores thumbnails (smaller versions) of original images with the consent of their rights holders. The users can either enlarge the images by clicking on them or by clicking they can be directed to the original website of the relevant institution where the original work is situated. In this case, VG Bild-Kunst required SPK to apply effective technological measures against framing the thumbnails in DDB website, in order to sign a license agreement[540]. The CJEU again did not differentiate between the type of links, so actually it focused not on what a link does, but rather on what the copyright owner did. It stated that if the copyright owner authorised the publication of the work explicitly, without reservations or technological measures limiting access, a link to said work would not be considered under InfoSoc Directive article 3. However, if right holder imposes or sets up technological measures to restrict access to their work or the use of it, then a link circumventing said measures will be regarded as a part of application of article 3. In the end, the CJEU was clear that the right holder's consent can only be limited by adopting technological measures. Without putting such measures in place, it would be difficult for the users to realise whether the right

[539] Judgment of the Court (Grand Chamber) of 9 March 2021, *VG Bild-Kunst v Stiftung Preußischer Kulturbesitz*, C-392/19, ECLI:EU:C:2021:181.
[540] *VG Bild-Kunst*, C-392/19, ECLI:EU:C:2021:181, paras. 9-11.

owner intended for the work to be a subject of framing. This is important for ensuring legal certainty and proper operation of the Internet[541].

F) Comparison of Liability of OCSSPs in Social Media Concerning Copyright Infringement in Turkey and the EU and Suggestions for Turkish Law

As it is explained in detail above, there are similarities between Turkish and EU law with regards to liability of OCSSPs, as well as differences since the Turkish law has not been changed in at least almost 20 years. With the adoption of CDSMD and its introduction of the particular liability provision on the OCSSPs, article 17, it is clear that it is *lex specialis* and it will be applied. However, in LIAW there is no such provision particularly dealing with the liability of the OCSSPs. It is neither defined nor regulated. That we think is the biggest current difference between the two legal systems.

The OCSSPs are defined in the CDSMD and in order for the new special lability regime in article 17 to be applied, a service provider must meet all the requirements of such definition, as it must be "an information society service having the main (or one of main purposes) of storing and giving the public access to a large amount of works uploaded by its users, which the platform organises and promotes for profit". It should be its dominant function[542]. There is no such definition and a special liability regime in Turkish copyright law. Although "social network provider" was defined in 5651 numbered Law as the natural or legal persons who facilitates users to create, view or share content such as texts, images, audio, or location for social interaction purposes, this law is to be applied for certain crimes committed on the Internet, which are exhaustive and

[541] *VG Bild-Kunst*, C-392/19, ECLI:EU:C:2021:181, paras. 35-49; Eleonora Rosati, 'CJEU rules that linking can be restricted by contract, though only by using effective technological measures' (*IPKat*, 2021) <https://ipkitten.blogspot.com/2021/03/cjeu-rules-that-linking-can-be.html> accessed 3 May 2021; Alara Naçar, 'Link Vermek Telif Hakkı İhlali Oluşturur Mu?' (*IPRGezgini*, 2021) <https://iprgezgini.org/2021/03/22/link-vermek-telif-hakki-ihlali-olusturur-mu/> accessed 3 May 2021.
[542] European Commission (n 289) 4.

do not include copyright. For such contents subject to the crimes, upon notice, the social network provider has to respond in 48 hours. However, without any definition of liability provision existing in the LIAW, which is the law to be applied in cases of copyright infringement, and without any cross-reference in between two laws, there is no *lex specialis* in Turkish law for only the OCSSPs at the moment. The notice-and-takedown provision (LIAW additional article 4) seems to be the fastest and independent channel for dealing with copyright-infringing UGC on an OCSSP. Furthermore, as explained above, the other general copyright provisions in LIAW can be applied for preventing and removing infringement, as well as seeking injunctions.

One of the needs the CDSMD tries to address is the licensing problem. It requires the OCSSPs to obtain authorisation from right holders, which should also cover acts of the users that are non-commercial or not generating significant revenues. It aims to ensure legal certainty for users for when they upload protected content[543]. It is true that it was the proper way to avoid liability also before this Directive, but now it is a requirement. The criterion to avoid the liability when there is no authorisation has become either showing the best efforts to obtain authorisation or act expeditiously when receive a notice, as well as making the best efforts to prevent future infringement by the same content. In Turkish law, obtaining authorisation is still the way to avoid liability, since there is authorisation, there should be no infringement. However, since there is notice mechanism and the liability is considered as based on fault, the way to avoid liability when there is no authorisation is that the service provider acts immediately upon notice and removes infringing content. There is no other alternative such as showing to have made best efforts and so on. In any case, the best efforts are also not defined in the EU law and it is uncertain which acts would qualify as best efforts. It is considered by the European Commission

[543] European Commission (n 289) 7.

that it would be corresponding to at least engaging proactively with the easily identified and reachable right holders of a broad selection of works and particularly contacting with the collective management organisations. Considering Turkish law on the matter, the only common aspect is the requirement of acting expeditiously upon notice and removing the illegal content. Further provisions in the EU law such as best efforts to obtain authorisation or to prevent future uploads of the notified work has no counterpart in Turkish law at the moment.

Exemplary cases on the liability of the OCSSPs that could light the way for Turkish aggiornamento can be the German implementation as a mandatory EU Member States transposition and also the Ukrainian voluntary implementation of the CDSMD article 17. Starting with the German implementation, the CDSMD article 17 has been implemented as a separate legislation[544] than the rest of the Directive in an ambitious way to ensure the upload filters does not result in over-blocking. The ex-ante mechanism brought by the law tries to avoid blocking legal, non-copyright-infringing user uploads by offering the concept of "uses presumably authorised by law", which are not to be blocked by the filter automatically. However, a fair renumeration still has to be paid. The requirements to be qualified as such uses are cumulative and as follows: "The use must consist of less than 50% of the original protected work, must combine the parts of the work with other content, and must be minor (a non-commercial use of less than 15 seconds of audio or video, 160 characters of text or 125 kB of graphics) or, if it generates significant revenues or exceeds these thresholds, the user must flag it as being covered by an exception". It is not obliged to set up upload filters per se but it is required to use automated procedures. In principle, if the right holders challenge the legality of the uses

[544] The German Implementation Act entered into force on June 7, 2021, and the German Copyright Service Provider Act (Urheberrechts-Diensteanbieter-Gesetz, "UrhDaG") implementing only article 17 of the CDSM Directive independently entered into force on August 1, 2021, 'Germany', (*Bird&Bird*, 2021) <https://www.twobirds.com/en/in-focus/copyright-directive/germany> accessed 16 February 2022.

in question, the OCSSPs are required to keep providing access to the content until they review the complaints. Free, effective and expeditious complaint procedure for the users and right holders regarding blocking and the communication to the public of protected works must be put in place by OCSSPs. It must notify the involved parties immediately, allow them to comment and natural persons must decide on the complaint within one week from the notice. Though it is possible that in special cases certain "trusted right holders" may request immediate removal in the event that the use is considered to be an obvious infringement and economically harmful. If the UGC is automatically blocked and does not qualify minor use, the OCSSP is obliged to inform the user about the block request and give information about licencing, as well as to allow the user to flag the use as authorised by law. The OCSSP would be held liable for damages only if it deliberately fails to properly go through with the complaint procedure. In addition, in order to ensure objectivity and independence, the OCSSPs are not held liable for damages that may result from their decisions on the complaints. It is important to point out that the authorised uses concept does not apply to "the use of cinematographic works or videos until the end of their first public broadcast, in particular during the simultaneous broadcast of sports events, provided that the right holder requests this from the service provider". It is evident that the legislator intended to address to the right holders' criticism and claims that the authorised uses concept would be harmful to them. In any case, this exception still seems limited[545].

Secondly, as for the Ukrainian model, which is a draft law at the moment, took the CDSMD article 17 almost directly. It stipulates that OCSSPs communicates the contents to the public and authorisation from right holders is required. Lack of

[545] 'German Article 17 implementation law sets the standard for protecting user rights against overblocking' (*Communia Association*, 2021) <https://www.communia-association.org/2021/05/20/german-article-17-implementation-law-sets-the-standard-for-protecting-user-rights-against-overblocking/> accessed 16 February 2022.

authorisation amounts to the liability of the OCSSPs from the contents of its users unless it took "all possible actions" to ensure an authorisation; or to disable the exchange of the noticed illegal content; acted to cease infringement and to prevent further uploads of illegal content. The OCSSP's number of users, uploaded works, and availability and efficiency of technical means are taken into account in assessing the liability and whether the platform complied with its obligations. Also, it is stated that the right holders may send notice through their lawyers or patent attorneys and the OCSSP has 48 hours upon notice to block access to the content or send its justified decision to decline the request. There is no explicit provision to exclude the legitimate uses of works such as by quotation or parody[546]. Unlike German example of ex-ante mechanism, Ukrainian model seems to be ex-post mechanism, just like in Turkey.

All in all, having a special liability regime for the OCSSPs is actually needed considering their particular features such as their size, profit, area of influence, global nature, copyrighted content included and frequency of use. For instance, upload filters against infringing content and aiming to prevent future uploads of the same work as an infringing content without imposing a general obligation to monitor are very important albeit difficult. Therefore, although it is vague, best effort criterion can be used, provided that there is certain guidance or framework given such as with a regulation or a guideline. It seems rational to consider the existing examples and wait for the upcoming ones, and to observe the practice if they actually work. For detailed provisions, such as in the German example, it may be difficult to balance the rights and interests of the users and right holders without imposing too much on the platform and without harming the fundamental rights. Although not enough, given that it has a preventive nature, the fact

[546] Anastasiia Kyrylenko, 'Ukraine to voluntarily implement Art. 17 of the Copyright DSM Directive' (IPKat, 2022) <https://ipkitten.blogspot.com/2022/02/ukraine-to-voluntary-implement-art-17.html> accessed 16 February 2022.

that Turkish Draft Law having a judicial fine for a service provider not complying with the order to deny/block access to a website is a good step in a notice-and-takedown system. If ex-post mechanism is to be continued, it may be beneficial to regulate more on the complaint procedure and the role of the OCSSPs for increasing efficiency. In any case, it is of import to find the balance between fundamental rights of all actors (both users and copyright holders and intermediaries) and to not overstep any of them unjustly. It can be seen from various studies that notice-and-takedown mechanisms can cause problems as to remove also legal and unnecessary content beside the illegal ones, which may lead to over-blocking, censorship, restriction to freedom of expression and proper functioning of Internet by means of free flow of information, as well as it may create too much burden on the platforms[547]. Consequently, it is crucial to find a way to maintain removal of illegal content while preserving the legal content.

VII. CONCLUSION

The concept of OCSSPs is not so new. It is a sub-category of ISP or HP with particular features. Since they are very frequently and commonly used for years by a high number of people, it has become more and more important to regulate their liability explicitly. There has been EU legislation for the liability of service providers as a broader concept and there is the safe harbour provision under E-Commerce Directive. Recently, in order to also tackle the significant issue of OCSSPs, the EU introduced a new directive (CDSM Directive) for harmonisation of copyright and defined the concept for the first time in 2019. Although it is late considering the history of OCSSPs, the fact that there is still no particular liability regime in Turkish law on OCSSPs, it is definitely a good step. Surely it is yet to be achieved because all the Member States shall transpose it into their national laws and due to its controversial nature, especially of its article 17, not all the

[547] See more in detail in Yılmaztekin (n 9) 234-239.

States have implemented it yet. Said new liability regime requires the platforms to engage in licensing activities and it sets up exemption possibilities such as in case the best efforts were made to obtain such license or there is immediate takedown upon notice of the illegality. Both in E-Commerce Directive and Turkish IP law the liability depends on fault as the platform would be held liable in the event that it does not act expeditiously upon notice of the illegal content. The CJEU has been also of the opinion that the platform would only be liable in case it has deliberate intervention or control in communicating the illegal content to the public. Whereas in the CSDM Directive, it is not the only condition. The Directive characterised the activities of the OCSSPs as act of communication and making available to the public, so it might be considered as a primary liability. Thus, it can be said that the liability of OCSSPs became stricter regarding copyright and it sort of assumes from the beginning that the OCSSP is liable and it can be exempt in case it meets the requirements, contrary to the E-Commerce Directive where the exemption is assumed. CDSMD even requires a kind of monitoring activity for liability exemption for the sake of detecting illegal content that right owners have provided sufficient information to, although it does not amount to general monitoring. The aim is to prevent illegal content to be available on the platform by showing best efforts basing on the information given by rights holders. Furthermore, CDSMD requires OCSSPs to try to reduce the risks of excessive filtering and over-blocking. It obliges them to put in place immediate and effective complaint mechanisms for their users for blocking or removal of content. Complaints need to be reviewed and removal requests shall be decided by humans and without undue delay.

On the other hand, in Turkish law, the liability is still for the broad concept of ISP and there is still no special liability regime for OCSSPs in particular. They are subject to the same requirements as other HP regarding copyright, such as the requirement of

immediate takedown of the illegal content upon sufficiently justified notice from the right holder. Although there have been some attempts with the 5651 numbered law to regulate certain issues regarding disputes on the Internet, it is only on certain listed crimes that do not particularly include copyright matters. For this reason, in order to keep up with the current issues and fulfil the needs, LIAW has to be amended and include more up-to-date provisions such as the liability of the OCSSPs. Surely, it must take into account the balance between copyright and other fundamental rights, such as the freedom of expression and right to privacy of users and platforms' freedom to conduct business.

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ÖZET

Bu çalışmada, Çevrimiçi İçerik Paylaşım Hizmeti Sağlayıcılar (ÇİPHS) kavramı ve Türkiye ve Avrupa Birliği hukukundaki sorumlulukları incelenmektedir. AB, ilk defa 2019 yılında ÇİPHS karamının tanımlanması ve telif haklarının uyumlaştırılması için yeni bir yönerge çıkarmıştır. Fakat, Türk hukukunda hala ÇİPHS'lere yönelik özel bir düzenleme bulunmamaktadır. Bahsedilen yeni sorumluluk rejimine göre AB'de bu platformların eser sahiplerinden lisans alması zorunluluğu ile bu lisansların alınması için elinden geleni yapması halinde ve hukuka aykırı içeriğin ihtar üzerine derhal kaldırılması için elinden gelenin en iyisini yapması gibi durumlarda muaf olabilecekleri öngörülmüştür. Diğer yandan Türk hukukunda ise bunlar da diğer yer sağlayıcılar gibi yeterince gerekçelendirilmiş uyar-kaldır mekanizması kapsamında sorumlu tutulmaktadır. Telif hakları ve ifade özgürlüğü, kullanıcıların özel hayatının gizliliği ve platformların çalışma özgürlüğü gibi diğer temel haklar dikkate alınarak bir denge kurulması gerekmektedir. Bu çalışmada iki hukuk sistemindeki teori ve uygulama incelenmektedir.

Anahtar Kelimeler: Çevrimiçi İçerik Paylaşım Hizmeti Sağlayıcılar, Telif Hakları, Sorumluluk, Temel Haklar, Uyar-Kaldır

ABSTRACT

In this study, the concept of Online Content Sharing Service Providers (OCSSPs) and their liabilities in Turkish and EU law are examined. The EU introduced a new directive for harmonisation of copyright and defined the concept of the OCSSPs for the first time in 2019. However, there is still no particular liability regime in Turkish law on OCSSPs. Said new liability regime in the EU requires the platforms to engage in licensing activities and it sets up exemption possibilities such as in case the best efforts were made to obtain such license or there is immediate takedown upon notice of the illegality. On the other hand, in Turkish law, they are subject to the same requirements as other hosting service providers regarding copyright, within the frame of the requirement of immediate takedown of the illegal content upon sufficiently justified notice from the right holder. The balance between copyright and other fundamental rights, such as the freedom of expression and right to privacy of users and platforms' freedom to conduct business must be taken into account. The theory and practice in both laws are evaluated.

Keywords: Online Content Sharing Service Providers, Copyright, Liability, Fundamental Rights, Notice-and-Takedown