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# Copyright and democratic discourse in virtual public spaces: Challenges for EU platform governance

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**Keywords:** Copyright, Democracy, Virtual reality, Public sphere, Platform governance

**Abstract:** This paper explores how the emergence of virtual public spaces (VPSs) challenges the existing EU legal framework on platform governance as regards the maintenance of copyright's fair balance in the online public sphere. Key questions include: How do immersive, persistent, and interoperable VPSs fit within the EU legal framework on platform governance that has been designed for non-immersive social media platforms? Can VPSs be designated as online content-sharing service providers (OCSSPs) under Article 17 DSM Directive [2019]? How can the existing governance strategy that relies on the existence of an identifiable entity who can exert centralised control over content governance and copyright enforcement deal with VPSs that deploy decentralised and distributed governance models? The paper concludes by briefly reflecting on possible legal and governance strategies that may be deployed to enable the maintenance of copyright's fair balance on VPSs and ensure their ability to serve as online spaces that foster robust democratic discourse.

This paper is part of **Governing the metaverse through the lens of the public sphere**, a special issue of *Internet Policy Review* guest-edited by Annelieke A.M. Mooij and Sunimal Mendis.

## Introduction

Virtual worlds comprise interconnected virtual ecosystems and self-contained digital spaces that deploy immersive technologies such as virtual reality (VR), augmented reality (AR), and mixed reality (MR) – collectively encapsulated under the umbrella term "extended reality" (XR) and commonly referred to as the "metaverse" in popular terminology. Virtual worlds can be characterised by their immersiveness (highly realistic, interactive environments), persistence (constantly evolving to enable a continuous virtual existence), and interoperability (ability of different virtual worlds to seamlessly interact and integrate with each other) (Ball, 2022). Accordingly, the Oxford English dictionary defines the metaverse as "A (hypothetical) virtual reality environment in which users interact with one another's avatars and their surroundings in an immersive way" (Oxford University Press, n.d.). When they are intended for public use (as indicated by their technological design and terms of service) and serve as an infrastructure for facilitating public discourse (e.g., Decentraland, Meta Horizons, Roblox) they can be designated as virtual public spaces (VPSs) that have the potential to become the next stage in the evolution of the online public sphere.

As per the Habermasian vision of the public sphere, this means that they have the potential to become essential infrastructures for democratic discourse (Habermas, 1989). Thus, it is imperative that VPSs are governed in a manner that enables the fostering of robust democratic discourse. This *inter alia* necessitates the safeguarding of the public's communicative rights and freedoms to dialogically interact and engage with copyright protected content for purposes of commentary and critique as reflected in the creation and sharing of user-generated content (UGC). Therefore, it is critical to ensure that the regulation and enforcement of copyright law on VPSs is carried out in a manner that can preserve the critical "fair balance" between the rights and interests of those who invest in the creation and dissemination of copyright protected content (i.e., copyright owners and entities that invest in the sustenance of creative eco-systems and value chains) and the rights and freedoms of users to use and engage with copyright protected content in ways that foster robust democratic discourse.

The objective of this paper is to explore the capacity of the existing EU legal

framework on platform governance to ensure the maintenance of this fair balance on VPSs. Thus, the paper focuses on the *lex specialis* regime for copyright enforcement on online content-sharing service provider platforms (OCSSPs) under Article 17 of the EU Copyright in the Digital Single Market Directive (DSM) [2019][1]that aims to maintain copyright's fair balance on social media platforms (digital public spaces). The EU Digital Services Act (DSA) [2022][2]is referred to as relevant for the application of Article 17 DSM. The paper engages in this exploration by investigating the feasibility of accommodating VPSs under the existing classification of OCSSPs under Article 17 DSM. It then evaluates the efficacy of the current framework – designed for non-immersive social media platforms with a centralised model of governance – to deal with immersive VPSs that deploy decentralised and distributed governance models. The paper concludes by briefly reflecting on possible legal and governance strategies that may be deployed to enable the maintenance of copyright's fair balance on virtual worlds and ensure their ability to serve as online spaces that foster robust democratic discourse.

# Copyright's fair balance and democratic discourse in the public sphere

## Conceptualisations of democratic discourse

According to Habermas, the public sphere consists of communicational spaces where members of the public come together to engage in discussion and discourse on common public affairs leading to the shaping of free public opinion (Habermas, 1989). Thus, within the ideal of deliberative democracy, the public sphere has a critical function in advancing the democratic process by fostering rational, critical public discourse that guides democratic decision-making (Dahlgren, 2005), a process I refer to as "democratic discourse" (Mendis, 2024a; Netanel, 1996). Accordingly, communicational spaces (both online and offline) that form components of the public sphere constitute essential infrastructures for democratic discourse.

Democratic discourse serves as a dialogical process within which the public can engage in a collective exploration and analysis of issues of common interest with the aim of understanding how such issues should be addressed in a way that furthers the public interest (Bohman, 1996). The precise notion of democratic dis-

1. Directive 2019/790/EU of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC [2019] OJ L 130/92 ("DSM").
2. Regulation 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC [2022] OJ L 277 ("DSA").

course has been conceptualised in slightly different, albeit related, ways across diverse theoretical and disciplinary contexts. Nevertheless, across these different conceptualisations, rational-autonomy and inclusivity emerge as two core-values which must be safeguarded for democratic discourse to flourish. Inclusivity refers to equal opportunities to express and receive diverse viewpoints (particularly as regards marginalised groups) and rational autonomy refers to the capacity of the participants to engage in reasoned dialogue free from manipulation or coercion in a manner that enables the public to contest political, cultural, social, and economic power.

The importance of rational autonomy is highlighted in Habermas' conceptualisation of democratic discourse as rational and critical discourse that is autonomous and free from manipulation and coercion from State or Corporate power (Habermas, 1989). Similarly, Pettit's notion of contestatory democracy conceptualises democratic discourse as reasoned public discourse that is free from State domination and which enables citizens to exert contestatory control over government decision-making (Pettit, 1999). Other scholars have expanded Pettit's concept of contestation to encompass dominance arising in non-State contexts such as dominant cultural and religious narratives (Laborde, 2008), plutocratic influence and moneyed elites (Lovett, 2010), and corporate narratives that legitimise specific favoured ideologies and manipulate public discourse (Nyberg and Murray, 2023).

Pettit notes that the exercise of contestatory control necessitates that the public discourse is inclusive in the sense that "[…] there will be a voice available to people in every part of the community for expressing their contestations" (Pettit, 1999, p. 195), thus resulting in a wide range of discourses, identities, and perspectives being represented. According to Benhabib, this requires that participation in the deliberative process should be governed by the norms of equality and symmetry so that all have the same chance to initiate speech acts, to question, and to open debate (Benhabib, 1966, pp. 69—70). Fraser and Young highlight the importance of such participatory parity in ensuring that multiple publics, and particularly marginalised groups, have equal opportunity to contribute to the discourse as peers (Fraser, 1990; Young, 2000).

It is noteworthy that in EU jurisprudence rational-autonomy and inclusivity have been recognised as essential conditions for ensuring the freedom of expression particularly in cases related to media regulation. In the context of media pluralism, the Court of Justice of the European Union (CJEU) has recognised inclusivity as an overriding requirement of public interest capable of justifying restrictions on market freedoms[3]and has underscored the importance of ensuring public access to a

plurality of information sources.[4]Similarly, European Court of Human Rights (ECtHR) case law affirms that restrictions on paid political advertising are necessary and legitimate to prevent wealthy actors from dominating public debate, thereby recognising that democratic discourse requires the prevention of disproportionate influence by those with greater resources in order to safeguard the public's rational-autonomy.[5]

## Shift to the online public sphere and to digital public spaces

Habermas' notion of the traditional public sphere encompassed physical spaces that are open to the public (e.g., parks, townhalls) and legacy media (e.g., television, radio, and newspapers). The advent of online social media platforms resulted in a substantial portion of the public discourse being shifted to the online sphere, thereby giving rise to the online public sphere (Schäfer, 2016). In comparison with the traditional public sphere, the online public sphere enables the public to transcend geographic boundaries and thereby facilitates discourse among a broader (temporally and spatially dispersed) public, free of physical constraints. To copyright owners, the online public sphere offers greater scope for the production, dissemination, and monetisation of creative content by granting them access to new creative infrastructures and eco-systems (e.g., TikTok) and new models for content monetisation (e.g., YouTube's ContentID system). At the same time, it offers the public greater opportunities for dialogic interaction with copyright protected content in ways that foster democratic discourse. For example, social media platforms provide the infrastructure and digital tools for supporting remix-culture (Lessig, 2009) which refers to the constant recycling and repurposing of material and immaterial things into new expression (Navas, 2018). A core component of remix-culture is user-generated content (UGC) which involves the creative re-use and re-interpretation of existing creative content (including copyright protected content) by social media users for purposes of social commentary and critique (e.g. parodies, commentaries) via memes, GIFs, sampling, mashups etc. For the purposes of this paper, UGC is defined as the re-use of existing creative content in transformative ways for creating new meaning. It is differentiated from user-copied content (UCC) which merely concerns the copying of existing content without any form of modification (Gervais, 2009).

3. Judgment of 13 December 2007, *United Pan-Europe Communications Belgium and Others,* Case C-250/06, EU:C:2007:783.

4. Judgement of 26 June 1997, *Familiapress v Heinrich Bauer Verlag*. Case C-368/95, EU:C:1997:325.

5. Animal Defenders International v. The United Kingdom, No. 48876/08 (ECtHR 22 April 2013). *See also* ECtHR decision in Associazione Politica Nazionale Lista Marco Pannella v. Italy, No.20002/13 (ECtHR 27 December 2012).

UGC is considered a particularly powerful tool for amplifying marginalised voices and fostering pluralistic meaning-making via collaborative creation models such as fanfiction (Salter and Blodgett, 2021). Transformative re-use of creative content via parodies and commentaries enables the public to dissect contemporary narratives to create new meaning (Peverini, 2017) and thereby to contest dominant ideologies and agendas promoted by powerful entities (Conti, 2017). Thus, as observed by the CJEU in the *Poland v Council*[6] case, such "User-generated expressive activity on the Internet provides an unprecedented platform for the exercise of freedom of expression"[7] and thereby for fostering inclusivity and rational-autonomy in democratic discourse. Thus, it is necessary to ensure that the social media platforms on which UGC is created and shared are governed in a manner that safeguards freedom of expression and these core values.

In comparison with two-dimensional social media platforms (digital public spaces) that primarily enable communication via pre-edited linear content (e.g., sharing a meme, reposting a video), VPSs afford the possibility of real-time (synchronous), multi-modal, and interactive communication. The pervasiveness afforded by Augmented Reality (AR) and Mixed Reality (MR) technologies enables the merging of the virtual world with the physical world. For copyright owners, this offers new opportunities for dissemination (live virtual performances and exhibitions) and monetisation (e.g., blockchain-based micro-licensing, assetisation via non-fungible tokens). For the public, it offers new ways of engaging with creative content via UGC and thereby promotes powerful new forms of creative discourse (e.g., live co-creation and ephemeral intervention). For instance, on social media platforms any person who wishes to re-interpret a painting for purposes of critique and commentary would need to reproduce the painting to effect modifications and post the re-interpreted (modified) image on the platform. In the virtual world it would be possible to effect these modifications on the actual virtual artifact so that others can not only see the modifications in real-time but even change and build upon them in a way that enhances the potential for dynamic public discourse.

## Copyright's fair balance and democratic discourse in the online (digital) public sphere

When UGC involves the re-use of copyright protected content (either in whole or in part) this impinges on the copyright's owner's exclusive rights to reproduction[8] and

6. Judgment of 26 April 2022, *Republic of Poland v European Parliament, Council of the European Union*, Case C-401/19, EU:C:2022:297 ("Poland v Council").

7. Poland v Council, ibid, para 46.

communication (and making available) to the public[9]giving rise to a tension between the rights of copyright owners and the communicative rights and freedoms of the public to actively engage with copyright protected creative and cultural content.

Copyright's fair balance refers to the need to resolve this tension in a way that can adequately safeguard the rights and interests of copyright owners, the public, and all other relevant stakeholders. Copyright exceptions to parody[10]and quotation[11]that aim to promote the public's ability to dialogically interact with copyright protected content are considered central to achieving this fair balance and most UGC often fall within the scope of these exceptions. In a series of cases, the CJEU[12]has recognised the importance of these specific exceptions to safeguarding users' fundamental rights (e.g., freedom of expression[13], freedom of the arts[14], etc.) and has thereby invested them with the character of user rights as opposed to mere user privileges. This requires that these exceptions are interpreted in a manner that can achieve a fair balance between the relevant fundamental rights of users and the fundamental right to property of copyright owners[15]as per the General Limitations clause and proportionality principle enshrined in Article 52(1) CFR (Husovec, 2019; Tuenissen, 2018). Thus, in EU copyright law, the achievement of copyright's fair balance is commonly framed as a balancing act between the fundamental rights of copyright owners and users.

The communicational theory of copyright law, that is based on a democratic conceptualisation of copyright's function, offers a broader and more sophisticated framework for achieving copyright's fair balance. As per the communicational theo-

8. Article 2 of the Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] OJ L167/10 ("EU Copyright Directive").
9. Article 3 of the EU Copyright Directive.
10. EU Copyright Directive, ibid, Article 5(3)(k).
11. EU Copyright Directive, ibid, Article 5(3)(d).
12. Judgment of 3 September 2014, *Johan Deckmyn and Vrijheidsfonds VZW v Helena Vandersteen and Others*, C-201/13, EU:C:2014:2132 (*"Deckmyn")*; Judgment of 29 juli 2019, *Funke Medien NRW GmbH v Bundesrepublik Deutschland,* C-469/17, EU:C: 2019:623 ("Funke Medien"); Judgment of 29 July 2019, *Pelham GmbH and Others v Ralf Hütter and Florian Schneider-Esleben,* C-476/17, EU:C:2019:624 ("Pelham"); Judgment of 29 July 2019, *Spiegel Online GmbH v Volker Beck*, C-516/17, EU:C: 2019:625 ("Spiegel Online").
13. Article 11 CFR.
14. Article 13 CFR.
15. Article 17(2) of the Charter of Fundamental Rights of the European Union [2012] OJ C 326/391 ("CFR").

ry, copyright law has a critical role in promoting robust, democratic discourse in the public sphere by fostering the discursive foundations for democratic culture and civic association (Mendis, 2024b; Netanel, 1996). Fulfilling this goal requires the achievement of a fair balance between the three democracy-enhancing functions of copyright law: the sustenance of creator incentives to engage in the creation and dissemination of creative content (production function), the sustenance of creative eco-systems and markets (structural function), and safeguarding the public's rights and freedoms to use and enjoy this creative content in socially valuable ways (expressive function) (Mendis, 2024b).

While the production and structural functions are focused on ensuring the continuous supply of a rich and diverse body of creative content to society, the expressive function guarantees the public's ability to re-use and re-interpret (dialogically interact with) copyright protected content in ways that foster democratic discourse. It is rooted in the idea that 'culture' is the realm in which dialogue occurs, and that copyright law forms part of the legal framework that facilitates this dialogue (Barron, 2011, p. 4). This *inter alia* requires the safeguarding of users' communicative rights to rely on legally granted exceptions and limitations, such as the exceptions for parody and quotation that enable such dialogic interaction. When these three functions of copyright law work in a harmonious and balanced manner it ensures that the public can not only access and use a rich and diverse body of creative content that can nourish discourse but that they can also actively engage with that content in a manner that upholds the core values of inclusivity and rational-autonomy.

The Court of Justice of the European Union (CJEU)'s determination in the *Deckmyn*[16]case illustrates this balancing act. The case concerned the modification of an image from a popular comic book by a politician (Johan Deckmyn) in a manner that was discriminatory of immigrants (with possible xenophobic undertones), which Deckmyn claimed came within the parody exception. The CJEU was called upon to clarify the interpretation of the parody exception. The CJEU enunciated that the "interpretation of the concept of parody must […] enable the effectiveness of the exception […] to be safeguarded and its purpose to be observed"[17]and that this required an interpretation which could strike a fair balance between the author's moral right to integrity (to prevent distortion of the intended artistic message), Deckmyn's right to re-use the image for purposes of political critique and commentary in the exercise of his freedom of expression *and* the public interest.

16. Deckmyn, ibid note 6.

17. Deckmyn, ibid note 6, para 23.

[18]Rather than limiting this inquiry to a balancing of copyright and the freedom of expression, the CJEU went further and noted that given the discriminatory nature of the purported parody, the national court should also assess whether it could impinge upon the fundamental right to non-discrimination (Article 21(1) CFR). The CJEU determined that if this were the case, the author also had a legitimate interest in ensuring that his work is not associated with such a discriminatory message.[19]Thus, the CJEU not only sought to balance the competing rights of the copyright owner and user but also calibrated this with the broader public interest in preventing speech which could incite intolerance and discrimination (Jacques, 2015). Thus, the *Deckmyn* case provides an excellent illustration as to how copyright's fair balance could contribute towards promoting democratic discourse by fostering an inclusive public sphere.

## EU's two-pronged legal strategy for preserving copyright's fair balance in the online (digital) public sphere

The traditional public sphere typically comprises publicly owned physical spaces (e.g., town-halls, parks) that are managed or controlled by a public authority (such as a municipal council) and legacy media that could be subject to public or private ownership. Privately-owned physical spaces that are accessible to the public (e.g., shopping malls and cafes) *could* in some instances be classified as components of the public sphere, when they are deemed to serve a public function as exemplified in the national laws of different countries.[20]

However, even when subject to private ownership, these physical spaces and legacy media are largely territorially bounded which makes it possible for the State to directly regulate the discourse taking place on them via national laws (e.g., media law, laws relating to public order) and regulatory mechanisms (e.g., broadcast licenses and rules on content). In the EU, these national laws and regulations must comply with public law including fundamental rights protected by the national constitution and public law values such as due process obligations. In addition, as per Article 51 CFR, public authorities who regulate these spaces (e.g., municipal

18. Deckmyn, ibid note 6, para 25.

19. Deckmyn, ibid note 6, para 31.

20. For example, in the US courts have expanded the public forum doctrine to private property in the US [*Marsh v. Alabama*, 326 U.S. 501 (1946); *Pruneyard Shopping Center v. Robins*, 447 U.S. 74 (1980)]. In, *Appleby and Others v. United Kingdom* App No 44306/98 (ECtHR, 6 May 2003) the ECtHR recognised that a privately-owned space could be designated a public forum when it is the only viable space for public communication.

council, media regulator) are directly bound by the fundamental rights set out in the CFR in implementing EU law. Thus, when the regulation of public discourse by a public authority involves the implementation or execution of EU law (including EU copyright law), they are required to achieve a fair and proportionate balance between the diverse fundamental rights of the parties as required under Article 52(1) CFR. In addition, when acting within the scope of EU law, public authorities must act in pursuit of general interests of the EU[21](e.g., democracy) and exercise their administrative discretion in a manner consistent with the objectives of EU law[22](as opposed to arbitrary private preferences). This too obliges public authorities to ensure that in implementing and executing EU copyright law in the public sphere, their actions serve the public interest objective of fostering robust democratic discourse.

In contrast, the digital public sphere typically comprises online spaces owned by transnational corporations that transcend geographic boundaries. As the owner of the communicational space (i.e., the infrastructural resource), the platform provider has broad power and discretion to determine and adjudicate upon content governance and copyright enforcement via contractual terms of service and content moderation. Thus, the power to determine and execute the balancing of rights and interests is transferred from public authorities to private actors. These private actors are not directly bound by fundamental rights or due process obligations (Frosio, 2026; Senftleben, 2023; Mendis, 2023) and are likely to prioritise corporate agendas and profit-making over the fostering of democratic discourse, thereby raising risks for copyright's fair balance. For instance, the platform provider's power (dominance) could be (and sometimes is) abused in a manner that undermines the rational-autonomy and inclusivity of the discourse by either suppressing UGC that does not accord with the platform provider's corporate interests or amplifying content that does (Gauthier et al., 2026).

As discussed below, the EU seeks to minimise these risks by deploying a two-pronged governance strategy which is reflected in the general platform governance framework under the DSA and the *lex specialis* regime under Article 17 DSM.

1. **Intermediary liability for copyright infringement:** At the first level, platform providers are co-erced and co-opted to engage in self-regulation of the platform's internal governance (i.e., terms of service, content moderation)

21. Judgment of 17 December 1970, *Internationale Handelsgesellschaft*, Case C 11-70, EU:C:1970:114.

22. Judgment of 3 September 2020, *Vereniging tot Behoud van Natuurmonumenten in Nederland,* Case C-817/18 P, EU:C:2020:637; Judgment of 8 June 2023, *Prestige and Limousine SL,* Case C-50/21, EU:C:2023:448.

to prevent copyright infringement via the imputation of liability for copyright infringement arising from UGC (and is therefore materially committed by users).

2. **Positive governance obligations:** At the second level, platforms are imposed with positive obligations to ensure that their internal governance mechanisms for preventing copyright infringement (e.g., terms of service and content moderation) are calibrated in a manner that adequately safeguards the rights and interests of users.

## Intermediary liability for copyright infringement

Platform providers who qualify as online hosting service providers (OSPs)[23] are typically imputed secondary (indirect) liability for copyright infringement arising from UGC under national laws. However, Article 6 DSA offers OSPs a harmonised safe-harbour from secondary liability if they can show that they have not played an active role in the transmission of information so as to give them knowledge of, or control over the infringing content (passive/active distinction) and having obtained such knowledge have acted expeditiously to stop the infringement from continuing.[24] In past years, the increased risks of copyright infringement on online content-sharing platforms and the need to better safeguard the rights and interests of copyright owners have resulted in the narrowing of safe-harbour protection and in some cases even triggered the imposition of primary (direct) liability for copyright infringement on OSPs for content shared by users (Frosio and Mendis, 2020). Thus, in *YouTube/Cyando*[25], the CJEU determined that where video-sharing or file-hosting platforms were considered to engage in a deliberate intervention in the sharing of copyright infringing content they could be imputed with primary liability. The CJEU indicated a non-exhaustive list of criteria which, if fulfilled, could allow a national court to construe the existence of such a deliberate intervention. This *inter alia* includes an inquiry as to whether the platform provider has put in place appropriate technological measures to credibly and effectively counter copyright infringement.[26]

The *lex specialis* regime for copyright enforcement under the DSM goes even fur-

23. Article 3(g)(iii) DSA defines OSPs as providers of hosting services which consist of the storage of information provided by, and at the request of, a recipient of the service. DSA, ibid, note 2.

24. Judgment of 23 March 2010, *Google France SARL v. Louis Vuitton Malletier SA,* Joined cases C-236/08-C-238/08, EU:C:2010:159 and Judgment of 23 March 2010, *L'Oréal SA v. eBay International AG,* Case C-324/09, EU:C:2011:474.

25. Judgment of 22 June 2021, *Frank Peterson v Google LLC (YouTube) and Elsevier Inc. v Cyando AG,* Joined cases C-682/18 and C-683/18, EU:C:2021:503 ("Youtube/Cyando").

26. Ibid, para 102.

ther by qualifying social media platforms as a special type of OSP entitled online-content sharing service provider platforms OCSSPs). OCSSPs are imputed primary liability for copyright infringement resulting from UGC (Article 17(1) DSM) and denied protection under the Article 6 DSA safe harbour (Article 17(3) DSA)). Under Article 17(4) DSM, an OCSSP can avoid primary liability for UGC if it demonstrates that it made best efforts to obtain the authorisation (license) of the copyright owner for the communication/making available of the copyright protected content via the platform [Article 17(4)(a) DSM] and furthermore, engaged in preventive content moderation by making best efforts to; take-down infringing content upon receiving notice from the copyright owner [Article 17(4)(b) DSM] and, to prevent their future upload (stay-down) [Article 17(4)(c) DSM].

This heightened degree of liability is justified on the grounds that it is necessary for guaranteeing fair remuneration to copyright owners and sustaining licensing. However, there is a risk that this could compel OCSSPs to engage in ex-ante copyright enforcement with the aid of algorithmic content moderation systems and undermine users' ability to engage in public discourse via UGC (Senftleben, 2023; Mendis and Frosio, 2020). The positive governance obligations discussed below are therefore aimed at ensuring that users' communicative rights and freedoms are adequately safeguarded by platforms in engaging in content moderation for the purpose of averting the heightened degree of liability.

## Positive governance obligations

Articles 17(7) and 17(9) DSM require platform providers to ensure that content moderation (carried out in fulfilment of the obligations set out in Article 17(4)(b) and (c) DSM) will not result in the suppression of legitimate uses of copyright protected content. Article 17(7) DSM specifically requires OCSSPs to ensure that content moderation shall not prevent the sharing of non-infringing UGC including uses of copyright protected content that are covered by an exception or limitation. It further obliges Member States to preserve the communicative rights of users to benefit from the exceptions to parody and quotation which as exemplified above are crucial for maintaining copyright's fair balance and preserving users' freedom of expression. Article 17(9) also requires the OCSSP to put in place effective and expeditious complaints and redress mechanisms whereby users may challenge wrongful removal of their UGC (such as on the basis that these come under the exceptions for parody and quotation as guaranteed in Article 17(7)).

Thus, Article 17 DSM aims to preserve copyright's fair balance on OCSSP platforms by providing explicit protection for users' communicative freedoms including the

freedom of expression. In the *Poland v Council* case, [27] the CJEU was called upon to determine whether the preventive monitoring and filtering obligations set out in Articles 17(4)(b) and (c) DSM should be annulled on the grounds that they undermine the freedom of expression by compelling OCSSPs to deploy ex-ante automated filtering tools that could prevent lawful uses of copyright protected content as permitted by exceptions to quotation and parody. The CJEU observed that the preventive monitoring obligations could indeed limit users' freedom of expression but that such limitation was proportionate for the purpose of safeguarding the fundamental right to copyright thereby making it compliant with Article 52(1) CFR *inter alia* on the basis that Articles 17(7) and Article 17(9) DSM serve to adequately safeguard user rights by establishing clear and precise limits on the measures they are permitted to implement in fulfilling the obligations under Articles 17(4)(b) and (c) DSM and ensure that they do not disproportionately restrict users' freedom of expression.[28]

The DSA imposes similar obligations on OSPs and establishes an EU-level governance and oversight framework to monitor compliance with these obligations. Although Article 17 DSM is a *lex specialis,* it is highly likely that the DSA positive governance obligations will apply to OCSSPs engaged in content moderation for the purpose of copyright enforcement (Quintais et al., 2023). Thus, the DSA can be considered to impose an additional layer of democratic oversight aimed at ensuring that OCSSPs' platform power (i.e., dominance) is executed in a manner that could contribute to the achievement of copyright's fair balance (Quintais and Schwemer, 2022; Frosio, 2026). The DSA attempts to permeate the private sphere of the digital platform with public law norms and values (Mendis, 2023). Article 14 DSA requires platforms to have "due regard" to the rights and legitimate interests of all parties involved – including fundamental rights such as the freedom of expression – in applying or enforcing any restrictions (e.g., content moderation systems) in relation to the use of their service. Very-large-online-platforms (VLOPs) that have large numbers of users (all major social media platforms), are required to engage in periodic risk assessments on how their internal governance mechanisms could impact on the fundamental rights (Article 33 DSA) and, if a risk is identified, deploy effective, proportionate measures to mitigate those risks (Article 35 DSA). In addition, the DSA places obligations on platform providers to give reasons for removal of content (Article 17 DSA), to provide an effective internal complaint-handling system (Articles 20) and an out-of-court dispute settlement system (21

27. Poland v Council, ibid note 6.

28. Poland v Council, ibid note 5, paras. 78, 80 and 85.

DSA) which would complement the safeguards provided in Article 17(7) and 17(9) DSM.

While many shortcomings exist (Mendis, 2023; Quintais et al., 2023) Article 17 DSM demonstrates a progressive approach to platform governance. By combining licensing and content moderation obligations (aimed at protecting copyright owner's interest) and safeguards to ensure users' ability to rely on copyright exceptions, it aims (at least in theory) to maintain copyright's fair balance on social media platforms.

The enhanced opportunities for real-time (synchronous), multi-modal, and interactive communication afforded by virtual worlds for production, dissemination, exploitation, and engagement with copyright protected content could, as discussed below, exacerbate existing challenges (and introduce new challenges) for maintaining copyright's fair balance in the online public sphere. But to what extent can this framework prove relevant to VPSs?

## Achieving copyright's fair balance in the online (virtual) public sphere.

At present it is possible to identify two fundamental obstacles in relation to ensuring the application of Article 17 DSM to copyright enforcement in VPSs. These are discussed below.

### Classification of a VPS as an OCSSP?

As per Article 2(6) DSM, an OCSSP is defined as a special type of OSP of which the "[…] 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". To qualify as an OCSSP, an OSP must therefore, store and give the public access to a large amount of *user-uploaded copyright protected content* and organise and promote this content for profit-making purposes.

An early report on EU intermediary liability observes that operators of virtual worlds such as Second Life and World of Warcraft will not fit within the categories of intermediaries recognised by EU law "as storage-related facilities only constitute a small part of the service offering" which also includes "software to build characters and environments, chat facilities, programming tools, currency exchange, etc." (Van Eecke, 2009, p. 35). However, it notes that, "Some courts may, however, sub-divide the service into various sub-services […]." (Van Eecke, 2009, p.

35). This is in accordance with the EU Commission Guidance on Article 17 DSM which stipulates that when an online platform provides more than one service, care should be taken to consider each service separately to determine which service providers fall within the scope of Article 17 or not.[29]For instance, when UGC content is shared on the YouTube platform, YouTube's role is that of an OCSSP. However, as regards content provided on YouTube TV, YouTube's role is that of an on-demand content provider (streaming service).

However, in the case of a VPS, it is possible that different services provided by the VPS provider are enmeshed in complex ways that make it unrealistic to assess them separately. This may be especially true of VPSs that offer MR technologies enabling the blending of the physical and virtual. Imagine that a VPS provider obtains a license to create and provide a virtual version of an exhibition of Rembrandt's paintings that is taking place at the Rijksmuseum, Amsterdam (all paintings being out-of-copyright protection). On the VPS, users can interact with the virtual paintings and modify them (e.g., by adding new characters and objects into the paintings) and sell these modified versions to other users of the platform. They are also able to curate their own virtual exhibitions (by making a selection of specific virtual paintings), provide commentaries and share them with other users of the VPS. By using an MR headset, visitors to the physical exhibition (at the Rijksmuseum) can see the modifications made by users on the VPS superimposed on the physical painting. In this instance, given the entanglement of content provided by the VPS provider and content (modifications) contributed by users (UGC) should the VPS provider be considered a content provider (similar to YouTube TV) or an OSP who stores and disseminates UGC to the public (similar to the YouTube platform)? If it can qualify as an OSP, could it also qualify as an OCSSP? Article 2(6) DSM expressly excludes online marketplaces (e.g., eBay, Amazon) from qualifying as OCSSPs. Would the entanglement of the services facilitated by the VPS (i.e., dissemination of UGC and an online-marketplace for user-modified paintings) prevent its classification as an OCSSP?

Kinikoglu argues that, if the main purpose of an online marketplace is to store and give the public access to a large amount of *copyright-protected works* then its provider should be classified as an OCSSP. He therefore argues that *Second Life's* online marketplace which has the aim of facilitating the licensing of copyright-protected virtual items created by users, should be considered an OCSSP

29. European Commission. (2021). Guidance on Article 17 of Directive 2019/790 on Copyright in the Digital Single Market: Communication from the Commission to the European Parliament and the Council (COM (2021) 288 final), p. 5.

(Kinikoglu, 2023). While imaginative, this reasoning goes against Article 17 DSM's policy rationale which is to ensure effective copyright enforcement on platforms that enable the sharing of UGC in which third parties (i.e., parties other than the platform provider or the user uploading that content) owns copyright. This is evident in its implicit goal of bridging the alleged value-gap (i.e., disparity in copyright-licensing revenue) that exists between streaming services (e.g., Spotify) and OCSSP platforms that provide the same content (Bridy, 2020).

While VPSs store and communicate copyright-protected content (e.g., virtual games) to the public, in many instances such content is created and uploaded by users who are usually the copyright owners. While the risks of copyright infringement of third-party owned copyright content exist (e.g., the unauthorised sharing of the *Pokemon: Brick Bronze* game on Roblox[30]), this, by itself, does not justify them being equated to online services that are designed to facilitate the sharing of third-party copyright-protected content. Extending the Article 17 DSM regime to these virtual worlds would subject these VPSs to heightened legal liability for copyright infringement (i.e., primary liability) which could impose an unnecessary burden on the VPS provider.

Classification as OCSSP would *inter alia* require them to comply with the obligations in Articles 17(4(b) and (c) DSM to make best efforts in compliance with prevailing industry standards to act expeditiously to take-down and prevent the future upload of copyright infringing content. The potential for real-time, synchronous, and multi-modal communication offered by immersive technologies would make this challenging for VPS providers. The possibility of 'burying' infringing content within spatial and interactive layers enables infringing content to be interwoven into user-behaviour and the environment of the VPS. This could make it difficult for current automated content moderation systems to accurately identify and take-down infringing content and prevent their future upload. However, it is possible that emerging technologies such as metadata technologies, digital watermarking and AI-assisted monitoring could assist in this regard (Qureshi and Megías Jiménez, 2021). In addition, blockchain-based provenance tracking systems (e.g., NFTs) and smart contracts could assist in verifying copyright ownership and licensing. However, over-reliance on automated copyright enforcement would once again increase the risks of over-enforcement and wrongful take-down of non-infringing UGC that comes within the scope of copyright exceptions. Given the real-time, interactive communication taking place on VSPs, if upload filters wrongfully

30. Firaja_FirestormX2. (2018, April 21). *Pokemon Brick Bronze has been taken down for copyright* [Online forum post]. Reddit. https://www.reddit.com/r/pokemon/comments/8ds3fm/comment/dxpk6u1/

suppress lawful, non-infringing uses of copyright protected content, the harm caused to users' communicative freedoms and democratic discourse could be much greater than on social media platforms and the harm may not be adequately rectified by ex-post remedies such as dispute resolution.

## Absence of an identifiable intermediary with centralised control?

The EU's current governance strategy hinges on the existence of an identifiable entity (i.e., "provider" of an online service) that functions as an intermediary in the transmission (communication and making available) of copyright protected content to the public. This is *inter alia* reflected in the obligation set out in Article 11 DSA, requiring all intermediary services including OSPs (and by extension OCSSPs) to establish a single point of contact for direct communication with regulatory authorities and users.

This "provider" is also assumed to have the capacity to determine and execute the internal governance mechanisms that regulate what content can be shared on the platform and how users can engage with that content. They are also assumed to have the ability to monitor what content is shared and how users engage with it for the purpose of identifying potential copyright infringement and to take effective measures to prevent such infringement[31]. Accordingly, the EU's current platform governance strategy (including as regards copyright enforcement), relies on the existence of an identifiable intermediary with the capacity to exert centralised control at two levels.

1. **Control over governance:** Capacity to control which content is shared on the platform and how users interact and engage with that content (e.g., obtaining licenses for user-uploaded copyright protected content, determining permissible and non-permissible forms of use via the terms of service determined by the platform owner), how disputes are resolved etc.
2. **Control over copyright enforcement:** Capacity to obtain/receive knowledge of copyright infringement and to take action to prevent copyright infringement, typically via the implementation of content moderation systems.

The technological architecture of a virtual world plays an instrumental role in determining the capacity of the VPS provider to exert control at both these levels. At present, many VPSs (e.g., Roblox, Meta Horizon Worlds) deploy a centralised technological architecture whereby the virtual world is operated by a single entity

31. Judgment of 15 September 2016, *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH*, Case C- 484/14, EU:C:2016:689 ("McFadden") para 63.

(typically a corporate) who has the capacity to exercise full control over the network servers. This enables them to maintain centralised control over content hosted on the servers and user interaction with that content, thereby making it possible to implement a centralised governance model as pre-supposed by the existing platform governance strategy.

However, certain virtual worlds (e.g., Decentraland, Sandbox) deploy decentralised technological architectures operating on the blockchain that give rise to a complex governance model combining smart contracts and community control via blockchain voting. For example, on Decentraland, the non-profit Decentraland Foundation provides the virtual world's technical infrastructure and security. However, its overall administration is carried out by a community-based Decentralised Autonomous Organisation (DAO) which controls major smart contracts and platform policies including content moderation under a consensus-based governance model (involving voting on the blockchain) (Willson, 2024). The capacity of individual users to claim private ownership over virtual real estate (referred to as "LAND") and to determine what content is used and shared on them can result in further fragmentation of ownership and control of the VPS.

This leads to control over governance and enforcement not only being decentralised but also distributed among a multiplicity of actors with distinct and sometimes overlapping powers and responsibilities. For instance, if infringing content is flagged, the Decentralised Autonomous Organisation (DAO) can vote to hide or delist the content from the virtual world thereby making it invisible from the "official" user experience (control over governance). However, the power to enforce the DAO's decision lies with the Catalyst node operators who control the servers that pin and deliver that content (control over enforcement). If they abide by the DAO's decision they can delist the content on the virtual world. In this instance, therefore, control over governance and enforcement in the virtual world is bifurcated between the DAO and the Catalyst node operators. On the other hand, since UGC is typically stored on decentralised distribution systems such as the Interplanetary File System (IPFS) and in some cases on BitTorrent, it is not possible for the node operators to actually delete the digital file in which the infringing content is stored. Thus, it could be possible for tech-savvy users to run a node that pins the infringing content and serve it to clients on the VPS who request it. Such possibility for rogue hosting can weaken the control exerted by the DAO and Catalyst node operators and thereby undermine democratic discourse by effectively removing a centralised entity who could be held accountable for maintaining copyright's fair balance.

Even if the DAO was able to exert effective control over Catalyst node operators to secure copyright enforcement, it is uncertain whether it would exert such control in a manner that could achieve copyright's fair balance. Firstly, the DAO is not a democratic or representative form of governance. Rather, it is a plutocratic governance process based on wealth and power. Membership in the DAO and voting power is obtained by holding MANA (cryptocurrency) or assets such as LAND (ownership of virtual land parcels). Voting power is based on the extent of the virtual wealth, for example, 1 MANA= 1 vote; 1 LAND = 2,000 votes (Anderson, 2025). Furthermore, decision-making by the DAO does not entail a formal adjudication process nor are members of the DAO bound to safeguard fundamental rights or due process. While Decentraland's DAO does have its own community norms, these only serve as soft law. Thus, voting can take place according to the members' personal preferences. Thus, the issue of dominance via moneyed elites raised in Section 2.1. above and its impact on rational-autonomy and inclusivity. This gives rise to the real risk of the democratic discourse taking place on the VPS being manipulated by the plutocratic elite of the DAO in a way that furthers their own personal ideologies and interests. If the DAO is able to determine what content stays up and what content is taken down, what would be the repercussions for copyright's fair balance?

To illustrate, consider the real-life dispute concerning the statues of the "Charging Bull" and the "Fearless Girl" in the US. The statue of the Charging Bull was placed in a public space outside Wall Street by its creator (di Modica) as a symbol of the rising market and is an icon of capitalist power and optimism (Marshall, 2017). Some years later, another artist (Visbal) placed a new statue called the "Fearless Girl" in front of the "Charging Bull", depicting a young girl in a defiant pose staring-down the bull. Visbal claimed that the "Fearless Girl" signified female empowerment in the male dominated financial world and a call for greater gender diversity on corporate boards. The placement of the two statues vis-à-vis resulted in a forced artistic interaction that gave rise to a vibrant public debate with many members of the public (including the Mayor of New York) expressing their own personal opinions on this artistic discourse (Calder, 2017). Di Modica objected to this forced artistic interaction claiming that it infringed his moral right to artistic integrity by transforming the Charging Bull's positive connotation of power and optimism into a negative message of sexism and male domination (Marshall, 2017). Since then, both statues have become popular artifacts for protest art and are frequently modified by members of the public to comment on matters of public interest (e.g., dressing the "Fearless Girl" in a bullet-proof vest to protest school-shootings). The resolution of this dispute involved many complexities which will

not be discussed here. However, if one imagines that this dispute took place in Amsterdam (instead of New York), the Municipal Council of Amsterdam would have been obliged to carefully balance Di Modica's fundamental moral right to integrity to oppose any distortion, mutilation of the work (as enshrined in Article 25 (d) of the Dutch Copyright Act[32]) against Visbal's freedom of expression to critique his artistic message. In addition, it would have been obliged to ensure that this fair balance would promote democratic discourse in the public sphere. Now imagine that this dispute took place on Decentraland in relation to virtual statues placed on the VPS. If a majority of the DAO's members objected to the message of female empowerment and the critique of male dominance conveyed by the "Fearless Girl", they could successfully vote to remove the statue, regardless of the impact on the creator's freedom of expression and the impact on democratic discourse.

As virtual worlds proliferate it is likely that many more of them adopt decentralised and distributed governance models (Li, 2025). In this scenario, who should be the regulatory target of the EU's platform governance strategy in order to preserve the copyright's fair balance and foster democratic discourse on VPSs? The Decentraland Foundation would not prove an efficacious regulatory target given their limited degree of control over content governance and copyright enforcement. On the other hand, if the DAO is to be the regulatory target, then the question arises whether they could/should be imputed with intermediary liability as a single entity or if liability should be imputed to the individual members. In the US case, *Sarcuni et al v bZx DAO, et al,.*[33]a DAO of a decentralised financial (DeFi) platform was deemed to have the legal character of a general partnership (as opposed to a corporate entity) that has no separate legal existence from its members. This meant that individual members were held jointly and severally liable for decisions taken by the DAO. This creates several legal challenges such as the practical challenges of enforcing a finding of liability against a geographically dispersed group of persons many of whom may also be operating on the basis of anonymity.

## The way forward

The distinction between social media platforms and VPS can be likened to that between legacy media (e.g. TV, radio, newspaper) and physical public spaces (e.g., a town-square or shopping mall). While social media platforms (similar to legacy media) provide infrastructures for discourse via the sharing of text, music, and au-

32. Dutch Copyright Act (Auteurswet), Stb. 1912, 308 (Netherlands).

33. US District Court for the Southern District of California decision in *Sarcuni et al v bZx DAO, et al, Case No: 22-cv-618-LAB-DEB*.

dio-visual content, VPS (similar to a public square) provide infrastructures for discourse via multi-modal and interactive communication that integrate three-dimensional objects, avatars, haptics, and gestures as well as text, music, and audio-visual content. Thus, the current EU legal framework for governing discourse on the online public sphere that has been designed for non-immersive social media platforms does not have the capacity to effectively address the complex nature of the discourse taking place on a VPS.

Since VPSs do not fit comfortably within the category of OCSSPs it may be appropriate to designate their providers as a new form of online service, "virtual public infrastructure providers" (VIPs) that come within the regulatory framework of the DSA. It may be possible to designate VIPs as the virtual counterparts of private-sector entities who provide and maintain public spaces – so called privately owned public spaces (POPS). As Lee notes, "POPS are by definition hybrid spaces. They are owned and managed by private developers. [however], they must be open to the public and are required to follow certain regulations, not only to allow but also to encourage public use" (Lee, 2022, p. 368). The publicness of the virtual infrastructures provided by them and their importance for fostering democratic discourse would justify the VIPs being subject to specific obligations in relation to preserving copyright's fair balance and fostering democratic discourse.

For instance, VIPs who offer their virtual infrastructure in the EU, could be imposed with positive obligations to comply with a charter (akin to a constitution) containing basic norms that govern the VPS and its users (and DAOs in the case of decentralised VPS). This could be akin to a regulator-imposed 'soft law' code of conduct similar to the EU Code of Practice on Disinformation [2018].[34]It is noteworthy that the Article 45 DSA also encourages the adoption and compliance with voluntary codes of conduct and that VLOPs may use adherence to these codes as part of DSA risk mitigation. Thus, codes of conduct could be a useful device by which VIPs could be incentivised to comply with basic norms, for instance, by considering compliance as grounds for providing them safe-harbour protection under Article 6 DSA. These could include norms requiring the promotion of fundamental values of the EU as set out in Article 2 of the EU Treaty[35]including democracy and the fundamental right to copyright, freedom of expression and freedom of the arts by ensuring that users' communicative freedoms to create and share non-infringing UGC. In the context of decentralised VPS, the VIP would serve as a point of contact

34. European Commission. (2018, September 26). *Code of practice on disinformation*. European Commission.

35. Treaty on European Union (Consolidated Version) [2012] OJ C 326/50.

for EU regulatory authorities and a channel for overseeing the governance of VPSs. For instance, it could be imposed with obligations to monitor decisions taken by the DAO in order to ensure compliance with the Charter and to report instances of non-compliance (and measures taken to ensure compliance) to the European Board for Digital Services (established under Article 61 DSA). In doing so, the VIPs' role could be similar to Facebook's Oversight Board or the Wikimedia Foundation.

The DAO itself can be imputed with secondary liability for copyright infringement in accordance with the national legal frameworks of EU Member States when it has failed to comply with the conditions for benefitting from the safe-harbour exception provided to OSPs under Article 6 DSA (i.e., by failing to vote to delist or hide copyright infringing content upon obtaining knowledge or awareness). It is noteworthy that the State of Utah (US)[36]permits a DAO to be treated as the legal equivalent of a domestic limited liability company. Such legal recognition can facilitate oversight by imposing transparency obligations (e.g., public access to DAOs decision-making processes) and mechanisms for dispute resolution. For the members of the DAO, such legal recognition would hold the attraction of screening them from individual liability for decisions taken collectively by the DAO.

Helberger, Pierson, and Poell's framework of cooperative responsibility for the realisation of public values in societal sectors centred on online platforms can also serve as a source of inspiration for fostering democratic discourse on VPSs (Helberger et al., 2018). This framework comprises four steps and they could be adapted to the specific context of VPSs in the following manner: (1) the definition of the public values to be safeguarded and promoted within the VPS, (2) a thorough understanding and acceptance by multiple stakeholders (e.g., VPS provider, DAOs, content creators, content users etc.) of their role in the realisation of these values, (3) the establishment of an institutional framework that would enable a continuous multi-stakeholder process of public deliberation in which agreement can be reached as to how these public values could be promoted within the VPS, (4) translating and embedding the public values and outcomes of the deliberation process within the VPSs governance processes including the VPS's terms of service, content moderation systems, and technological tools and architecture.

Given the rapid development and proliferation of XR technologies and virtual worlds, the day when VPSs become default communicative spaces for public discourse may be closer than we imagine. Ensuring that they function as spaces for

36. Utah Decentralized Autonomous Organizations Act (the "Utah DAO Act" or the "Act"). Utah Code Ann. §48-5-101 et seq.

robust democratic engagement will require a coordinated effort by multiple stakeholders and a sustained period of learning and experimentation before effective governance strategies emerge. It is therefore timely that legal scholars and policymakers initiate this process without delay, so we may be well-equipped to embrace our virtual future.

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