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How platforms govern users' copyright-protected content: Exploring the power of private ordering and its implications

João Pedro Quintais[a,*], Giovanni De Gregorio[b], João C. Magalhães[c]

[a] Institute for Information Law (IViR), University of Amsterdam, The Netherlands
[b] PLMJ Chair in Law and Technology, Católica Global School of Law, Universidade Católica Portuguesa, Lisbon, Portugal
[c] Centre for Media and Journalism Studies, University of Groningen, The Netherlands

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ABSTRACT

Online platforms provide primary points of access to information and other content in the digital age. They foster users' ability to share ideas and opinions while offering opportunities for cultural and creative industries. In Europe, ownership and use of such expressions is partly governed by a complex web of legislation, sectoral self- and co-regulatory norms. To an important degree, it is also governed by private norms defined by contractual agreements and informal relationships between users and platforms. By adopting policies usually defined as Terms of Service and Community Guidelines, platforms almost unilaterally set use, moderation and enforcement rules, structures and practices (including through algorithmic systems) that govern the access and dissemination of protected content by their users. This private governance of essential means of access, dissemination and expression to (and through) creative content is hardly equitable, though. In fact, it is an expression of how platforms control what users – including users-creators – can say and disseminate online, and how they can monetise their content.

As platform power grows, EU law is adjusting by moving towards enhancing the responsibility of platforms for content they host. One crucial example of this is Article 17 of the new Copyright Directive (2019/790), which fundamentally changes the regime and liability of "online content-sharing service providers" (OCSSPs). This complex regime, complemented by rules in the Digital Services Act, sets out a new environment for OCSSPs to design and carry out content moderation, as well as to define their contractual relationship with users, including creators. The latter relationship is characterized by significant power imbalance in favour of platforms, calling into question whether the law can and should do more to protect users-creators.

This article addresses the power of large-scale platforms in EU law over their users' copyright-protected content and its effects on the governance of that content, including

* Corresponding author.
E-mail addresses: j.p.quintais@uva.nl (J.P. Quintais), gdegregorio@ucp.pt (G. De Gregorio), j.c.vieira.magalhaes@rug.nl (J.C. Magalhães).

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on its exploitation and some of its implications for freedom of expression. Our analysis combines legal and empirical methods. We carry our doctrinal legal research to clarify the complex legal regime that governs platforms' contractual obligations to users and content moderation activities, including the space available for private ordering, with a focus on EU law. From the empirical perspective, we conducted a thematic analysis of most versions of the Terms of Services published over time by the three largest social media platforms in number of users – Facebook, Instagram and YouTube – so as to identify and examine the rules these companies have established to regulate user-generated content, and the ways in which such provisions shifted in the past two decades. In so doing, we unveil how foundational this sort of regulation has always been to platforms' functioning and how it contributes to defining a system of content exploitation.

1. Introduction

Online platforms provide primary points of access to information and other content in the digital age. They foster users' ability to share ideas and opinions while offering opportunities for cultural and creative industries. In Europe, ownership and use of such expressions is partly governed by a complex web of legislation, sectoral self- and co-regulatory, national and supranational rules. To an important degree, ownership of online content, including all manner of user-uploaded or generated content, is also governed by private norms defined by contractual agreements and informal relationships between users and platforms. By adopting policies usually defined as Terms of Service and Community Guidelines, platforms almost unilaterally set use, moderation and enforcement rules, structures and practices (including through algorithmic systems) that govern the access and dissemination of copyright-protected content by their users. This private governance of essential means of access, dissemination and expression to (and through) creative content is hardly equitable, though. In fact, it is an expression of how platforms govern what users – including user-creators[1] – can say and disseminate online.

As a factual matter, this relationship is characterized by significant power imbalance in favour of large-scale online platforms (e.g., Facebook, YouTube and Instagram), calling into question whether the law can and should do more to protect users' rights on their online expression.[2] This issue does not just impact freedom of expression and democratic values but also causes financial and reputational harms for users that rely on these platforms, sometimes as primary sources of income. Take, for instance, the example of so-called "influencers" as user-creators monetising online content who are subject to an online platform deciding on which basis their accounts or content should be kept up, removed or ranked, including for reasons of copyright infringement.[3] Despite this power, platforms do not usually provide adequate explanation or effective remedies to challenge their decisions.

As the power of platforms in this area grows, EU law is adjusting by moving towards enhancing their responsibility for third-party content they host. In the field of copyright, the primary example of this is Art 17 of the Copyright in the Digital Single Market Directive (CDSMD),[4] which fundamentally changes the regime and liability of a type of user-generated content platforms, now called "online content-sharing service providers" (OCSSPs).[5] This complex provision, to be complemented by rules in the Digital Services Act (DSA) sets out a

[1] On the concept of "user-creator", see Martin Husovec and João Quintais, 'Too Small to Matter? On the Copyright Directive's Bias in Favour of Big Right-Holders' in Tuomas Mylly and Jonathan Griffiths (eds), *Global Intellectual Property Protection and New Constitutionalism. Hedging Exclusive Rights* (OUP 2021).

[2] In the conceptual framework advanced by the Digital Services Act "online platforms" are a subset of hosting service providers. See Regulation (EU) 2022/2065 of the European Parliament and of the Council of 19 October 2022 on a Single Market For Digital Services and amending Directive 2000/31/EC (Digital Services Act) (hereafter DSA), Arts 3(g) and (i). OCSSPs are a type of online platform, subject not only to the specific rules of Art 17 CDSMD but also (at least in part) to the rules for online platforms in the DSA. See João Pedro Quintais and Sebastian Felix Schwemer, 'The Interplay between the Digital Services Act and Sector Regulation: How Special Is Copyright?' (2022) 13 European Journal of Risk Regulation 191; Alexander Peukert and others, 'European Copyright Society – Comment on Copyright and the Digital Services Act Proposal' (2022) 53 IIC - International Review of Intellectual Property and Competition Law 358.

[3] Giovanni De Gregorio and Catalina Goanta, 'The Influencer Republic: Monetizing Political Speech on Social Media' (2022) 23 German Law Journal 204; Niva Elkin-Koren, Giovanni De Gregorio and Maayan Perel, 'Social Media as Contractual Networks: A Bottom Up Check on Content Moderation' 107 Iowa Law Review 987.

[4] 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 (DSM Directive) [2019] OJ L130 (hereafter CDSMD).

[5] There is already a significant body of scholarship on Art 17 CDSMD. See *e.g.* Gerald Spindler, 'The Liability System of Art. 17 DSMD and National Implementation – Contravening Prohibition of General Monitoring Duties?' 10 JIPITEC 334; Martin Husovec and João Pedro Quintais, 'How to License Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms under the Copyright in the Digital Single Market Directive' (2021) 70 GRUR International 325; Matthias Leistner, 'European Copyright Licensing and Infringement Liability Under Art. 17 DSM-Directive Compared to Secondary Liability of Content Platforms in the U.S. – Can We Make the New European System a

new legal regime for "content moderation"[6] by platforms, as well as for their contractual relationship with users.

Against this background, this paper addresses the power of large-scale platforms in EU law over their users' copyright-protected content and its effects on the governance of that content, including on its exploitation and users' freedom of expression.[7] We focus on the regulation "of" and "by" platforms.[8] Regulation "of" platforms means legislation and soft law of a public nature applicable to online platforms such as co-regulatory instruments. For example, in EU law, it would include the rules in Art 17 CDSMD, many of the rules governing online platforms in the DSA, as well as co-regulatory instruments, such as the EU Code of Conduct on Countering Illegal Hate Speech Online and the strengthened Code of Practice on Disinformation.[9] Differently, regulation "by" platforms refers to rules, technologies and processes adopted by "platforms" proper, i.e., a form of private ordering. This type of regulation can fit into two broad categories. First, Terms of Service and similar documents (Community Guidelines, etc.) adopted by platforms, referred hereafter jointly as Terms of Service or "TOS". Some authors refer to TOS as "platform law".[10] This is the focus of our analysis.[11] Second, regulation by platforms can be carried out through technological devices or code, such as in the case of algorithmic moderation systems (e.g., for filtering of illegal content).[12,13]

Our main argument is that the EU legal framework (*regulation of*) leaves ample margin of discretion for private ordering by large-scale platforms (*regulation by*) to shape their relationship with users, particularly as it regards copyright-protected expression.[14] This power enables platforms to in practice and almost unilaterally set the rules for the upload, exploitation (including monetisation) and (to a lesser extent) content moderation in this area. As a result, in a very material sense, platforms can still "own" their datafied users' copyright-protected expression. Because the threshold for copyright protection is set by a relatively low standard of originality, this "ownership" enabled by TOS affords platforms significant power not only (directly) over commercial exploitation of protected content but also (indirectly) over users' freedom of expression. It is important to briefly elaborate on these points.

In EU law, copyright protection is recognized for authorial works, including original photographs, databases and computer programs; protection is afforded to authors.[15,16] What constitutes a work of authorship is mostly not harmonized

Global Opportunity Instead of a Local Challenge?' (2020) Zeitschrift für Geistiges Eigentum/Intellectual Property Journal (ZGE/IPJ).

[6] Art 3(t) DSA defines "content moderation" as "the activities undertaken by providers of intermediary services aimed at detecting, identifying and addressing illegal content or information incompatible with their terms and conditions, provided by recipients of the service, including measures taken that affect the availability, visibility and accessibility of that illegal content or that information, such as demotion, disabling of access to, or removal thereof, or the recipients' ability to provide that information, such as the termination or suspension of a recipient's account". For the purposes of this paper, we use rely on this definition, as applied to copyright-protected works and other subject matter.

[7] On the concept of platform governance, see Robert Gorwa, 'What Is Platform Governance?' (2019) 22 Information, Communication & Society 854.

[8] For an earlier use of these concepts, see João Pedro Quintais and others, 'Copyright Content Moderation in the EU: An Interdisciplinary Mapping Analysis' (2022) reCreating Europe Report, <https://papers.ssrn.com/abstract=4210278⟩. Following Karen Yeung and Martin Lodge, and acknowledging the contested nature of the the terms regulation regulatory governance, we "adopt a broad understanding of regulation (or regulatory governance) as intentional attempts to manage risk in order to achieve some prespecified goal". See Karen Yeung and Martin Lodge, 'Algorithmic Regulation: An Introduction', in Karen Yeung and Martin Lodge (ed), *Algorithmic Regulation* (OUP 2019).

[9] EU Code of conduct on countering illegal hate speech online (2016), <https://ec.europa.eu/info/policies/justice-and-fundamental-rights/combatting-discrimination/racism-and-xenophobia/eu-code-conduct-countering-illegal-hate-speech-online_en>; Strengthened Code of Practice on Disinformation (2022) <https://digital-strategy.ec.europa.eu/en/library/2022-strengthened-code-practice-disinformation>.

[10] David Kaye, *Speech Police: The Global Struggle to Govern the Internet* (Columbia Global Reports 2019). More broadly see *e.g.* Luca Belli and Jamila Venturini, 'Private Ordering and the Rise of Terms of Service as Cyber-Regulation' (2016) 5(4) Internet Policy Review, https://doi.org/10.14763/2016.4.441.

[11] The empirical analysis focuses on terms of service *stricto sensu*.

[12] See *e.g.* Robert Gorwa, Reuben Binns and Christian Katzenbach, 'Algorithmic Content Moderation: Technical and Political Challenges in the Automation of Platform Governance' (2020) 7(1) Big Data & Society. https://doi.org/10.1177/2053951719897945

[13] In this paper, we do not focus on this type of regulation, although we recognise that there exists an unexplored gap between what is stated in the substantive norms in TOS and how algorithmic systems actually moderate content on platforms. YouTube is a good illustration of this point. This platform has in place a sophisticated content moderation apparatus, comprising a suite of automated tools to prevent copyright infringement (e.g. ContentID, Copyright Match Tool and Web Form), which determine much of how the content may be accessed, viewed and monetized on the platform. See e.g. YouTube Copyright Transparency Report (6 December 2021) <https://blog.youtube/news-and-events/access-all-balanced-ecosystem-and-powerful-tools/>. Therefore, an analysis of YouTube's TOS can only capture part of this complexity.

[14] To be sure, this argument is also true regarding different dimensions of the platform vs user relationship, e.g. privacy, content moderation, design rules, etc. But for the purposes of this paper we limit our analysis to copyright.

[15] See *e.g.* Arts 2–4 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 (hereafter InfoSoc Directive), Art 6 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) OJ L 372, (hereafter Term Directive), Arts 1–2 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) (hereafter Computer Programs Directive).

[16] Related rights protection is recognized for a closed list of "other subject matter": fixations of performances, phonograms, films (originals and copies), and press publications. Protection is afforded to (respectively) performers, phonogram producers, producers of first fixations of films, broadcast organizations, and press publishers. See, e.g., InfoSoc Directive (n 15), Arts 2–3, and CDSMD (n 4), Art 15.

in EU legislative texts, with the exception of computer programs, photographs, databases, and (possibly) works of visual art, which require that the work be original in the sense of expressing the "author's own intellectual creation".[17] Since 2009, the Court of Justice of the European Union (CJEU) seized on the legislative language mentioned in the earlier specific subject matter Directives to gradually harmonize the concept of work of authorship, extending it to all types of works.[18] From the Court's case law it emerges that subject matter may be protected by copyright if it is original in the sense that it is "the author's own intellectual creation", meaning in addition that the author must make personal creative choices that are expressed in the subject matter.[19] The application of this test by the Court has led to a low threshold for originality, which enables a broad array of subject matter, possibly including that resulting from any minimally original selection and arrangement of subject matter.[20] For our purposes, this means that a large amount of own or third-party content uploaded by users to online platforms is likely susceptible of copyright protection.

When seen from this perspective, it becomes clear that the power of platforms to govern this content through their TOS affects not only the potential commercial exploitation of user-generated content but also users' freedom of expression online. If a significant part of user's uploaded content qualifies for copyright protection, then platforms' private rules and practices determining the availability, accessibility, visibility and removal of such content will impact on this fundamental freedom of users. Although this indirect effect of TOS on user's freedom of expression is not the core of our analysis in this paper, we return to it when considering the implications of our findings below.[21]

Our analysis combines legal and empirical methods. We carry our doctrinal legal research to clarify the complex legal regime that governs platforms' contractual obligations to users and content moderation activities, including the space available for private ordering. Our focus is on EU law that regulates large-scale platforms that host and provide access to copyright-protected content, and in particular Art 17 CDSMD and the rules introduced by DSA. From the empirical perspective, we conducted a thematic analysis of most versions of the Terms of Services, in English and in Europe, published over time by the three largest social media platforms in number of users – Facebook, Instagram and YouTube – so as to identify and examine the rules these companies have established to regulate ownership and control over user-generated content, and the ways in which such provisions shifted in the past two decades. In so doing, we unveil how foundational this sort of regulation has always been to platforms' functioning and how it contributes to defining their systems of for governing user's expressions and content exploitation.[22]

This paper proceeds as follows. After this introduction, section 2 provides a theoretical framing for the regulation "by" platforms of their users' copyright-protected content. Section 3 then addresses the regulation "of" platforms in EU law, explaining how rules in the CDSMD and the DSA apply to the relationship between platforms and users (including those that are simultaneously creators) as regards protected content, highlighting the space left available for private ordering to shape such relationship. Against this background, Section 4 presents the findings of our empirical analysis of a subset of the regulation "by" platforms, where we examine key historical versions of the TOS of three large-scale platforms: Facebook, Instagram and YouTube. Section 5 builds on the previous analysis to identify and discuss the dimensions where the power of platforms to control their relationship with users regarding their copyright-protected content matters. Section 6 offers the conclusions of our analysis.

2. Framing the regulation "by" platforms in EU law

The adoption of Art 17 CDSMD can be considered a paradigmatic example of the new role and responsibilities of online platforms in EU law, not only in providing products and services but also ensuring the enforcement of public policies online.[23] As explained in greater detailed below, Art 17 regulates online content sharing service providers (OCSSPs), a type of online platform. In essence, it imposes on these platforms direct liability for giving access to copyright-protected content uploaded by their users. At the same time, it sets out a liability exemption mechanism for these platforms which requires them to make best efforts to license user-uploaded content, as well as to deploy preventive and reactive measures to avoid copyright infringement. Such measures may include pre-emptive content filtering, notice and take down and notice and stay down mechanisms.[24] However, as we also show below, even if Art 17 defines a new framework for platforms in the field of copyright, these actors enjoy a broad margin of discretion in deciding how to comply with the rules while defining how content is uploaded, exploited and moderated in their services.

[17] Computer Programs Directive (n 15), Art 1(3); Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, Art 3(1); Term Directive (n 15), Art 6; CDSM Directive (n 4), Art 14 (on works of visual art in the public domain).

[18] Case C-05/08, Infopaq International, 16 July 2009 ECLI:EU:C:2009:465; Case C-604/10, Football Dataco, 1 March 2012 EU:C:2012:115, Case C-406/10, SAS Institute, 12 May 2012 EU:C:2010:259; Joined Cases C-403/08 and C-429/08, Football Association Premier League and Others, 4 October 2011 ECLI:EU:C:2011:631; Case C-310/17, Levola Hengelo, 13 November 2018 ECLI:EU:C:2018:899; Case C-469/17, Funke Medien, 29 July 2019 ECLI:EU:C:2019:623; Case C-683/17, Cofemel, 12 September 2019 ECLI:EU:C:2019:721.

[19] See e.g., Case C-310/17, Levola Hengelo, 13 November 2018 ECLI:EU:C:2018:899, para. 36, and Case C-683/17, Cofemel, 12 September 2019 ECLI:EU:C:2019:721, para. 29.

[20] Conversely, protection has only been explicitly rejected by the Court thus far in relation to individual words (*Infopaq*), sporting events as such (*Premier League*), and the taste of food (*Levola Hengelo*).

[21] See infra at Section 5.

[22] See Section 4 for a detailed explanation on empirical methods.

[23] Niva Elkin-Koren and Eldar Haber, 'Governance by Proxy: Cyber Challenges to Civil Liberties' (2017) 82(1) Brooklyn Law Review 105.

[24] See infra at Subsection 3.1.

This situation is primarily the result of the transatlantic evolution of the regulation of platforms in US and EU law, and especially of the broad immunities enjoyed by platforms as a result of liability exemptions or "safe harbours", on which they based their business model while attracting advertising revenues.[25] The technological evolution leading to new models for processing information and data together with a liberal constitutional approach exempting platforms from liability for third-party content uploaded to their services has allowed these actors to rely on significant freedom to set their own rules, procedures and structures, mostly driven by their business interests, including the commercial exploitation of users' copyright-protected content.

In the shadow of those liability exemptions and a generally permissive legal regime, platforms have leveraged their TOS – operationalised by their technological structures – to define the rules of the game for users, shaping what they can publish or speak online and how to use their content for business purposes. Private ordering through TOS has therefore a significant potential impact on the right to freedom of expression of platform users. This consideration holds true also for private ordering of copyright-protected content, since the low threshold of originality (at least under EU and US law) means that a large part of content uploaded by users is protected and therefore regulated by copyright law. A revealing example comes from YouTube's first ever copyright transparency report, which shows how copyright content moderation numbers are orders of magnitude higher than other types of content. For instance, during the first half of 2021, there were over 730 million unique claims or copyright removal requests made through the platform's ContentID system.[26]

TOS are instruments of contract law that share structural commonalities with the traditional model of offline boilerplate agreements.[27] TOS provide clauses based on standard contractual terms that are usually included in other agreements.[28] Users cannot exercise any negotiation power but, as an adhering party, may only decide whether or not to accept pre-established conditions. However, as Jaffe underlined in the first half of the last century, contract law could be considered as a delegation of law-making powers to private parties.[29] TOS thus compete with the traditional way in which individuals conceive legal norms and protection as an expression of public power. In other words, and within the constraints imposed by external forces (law, business interests, user expectations, etc.) platforms use TOS to unilaterally establish what users can do in their digital spaces. By relying on private freedoms to regulate the relationship with their online "communities", platforms aim to determine how content and data are governed, and how speech flows online for billions of users. [30]

From this perspective, it is arguable that TOS constitute the expression of a quasi-legislative power, especially in the context of large-scale platforms. This power is often exercised with lack of transparency and accountability, especially as regards applicable legal standards.[31] As underlined by scholars, this situation is problematic, since TOS do not ensure the same degree of protection of public safeguards.[32] To be sure, the autonomy of platforms is more limited in areas that are more heavily regulated. An important example in EU law is data protection following the adoption and entry into force of the General Data Protection Regulation (GDPR).[33] As shown in the next sections, the current push for enhanced responsibility of platforms in EU law is further decreasing this autonomy space for private ordering also in relation to copyright.[34] This trend is especially true for certain types of copyright content moderation, namely filtering and removal of content that may deserve protection under freedom of expression-based exceptions or limitations. However, outside that realm, platforms shape the rules on the use, exploitation and moderation of content uploaded by users. Such private determinations allow platforms to promote an autopoietic set of rules that competes with the safeguards defined by the law.

Besides, the exercise of quasi-legislative functions is not the only expression of platform power. Platforms can enforce contractual clauses directly without the need to rely on a public mechanism, such as a judicial order or the intervention of law enforcement authorities. For instance, the removal of copyright-protected content can be performed directly by platforms without the involvement of any public body. This technological asymmetry is the grounding difference from traditional offline boilerplates contracts. The enforcement of the latter is generally dependent on the role of the public authority in ensuring the respect of the rights and obliga-

[25] In the EU, these liability exemptions – which until the CDSMD applied to online platforms hosting copyright-protected content – were found in Arts 12 to 14 of 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, replaced by DSA (n 2) Arts 4 to 10. In the US, a specific regime tailored to copyright and including a set of safe harbours was introduced by the Digital Millennium Copyright Act (DMCA) in 17 U.S.C. section 512. See Matthew Sag, 'Internet Safe Harbors and the Transformation of Copyright Law' (2018) 93 Notre Dame Law Review 499.

[26] See YouTube Copyright Transparency Report (6 December 2021) <https://blog.youtube/news-and-events/access-all-balanced-ecosystem-and-powerful-tools/>, p. 5. For an analysis of takedown data, see Kris Erickson and Martin Kretschmer, '"This Video Is Unavailable": Analyzing Copyright Takedown of User-Generated Content on YouTube' (2018) 9 JIPITEC 75 para 1.

[27] Peter Zumbansen, 'The Law of Society: Governance Through Contract' (2007) 14(1) Indiana Journal of Global Legal Studies 191; Lee A Bygrave, *Internet Governance by Contract* (Oxford University Press 2015).

[28] Woodrow Hartzog, 'Website Design as Contract' (2011) 60(6) American University Law Review 1635.

[29] Louis Jaffe, 'Law Making by Private Groups' (1937) 51 Harvard Law Review 201.

[30] Belli and Venturini (n 10).

[31] Paul S Berman, 'Cyberspace and the State Action Debate: The Cultural Value of Applying Constitutional Norms to "Private" Regulation' (2000) 71 University of Colorado Law Review 1263.

[32] Ellen Wauters, Eva Lievens and Peggy Valcke, 'Towards a Better Protection of Social Media Users: A Legal Perspective on the Terms of Use of Social Networking Sites' (2014) 22 International Journal of Law & Information Technology 254.

[33] Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) OJ L 119/1.

[34] See Section 3.

tions which the parties have agreed upon. Here, the code – or the platform's internal systems – assumes the function of the law,[35] and the network architecture becomes a modality of regulation.[36] Platforms can directly enforce their rights through a quasi-executive function. This private enforcement is the result of an asymmetrical technological position in respect of users. It represents a form of self-regulation and disintermediation of the role of public actors not only in protecting rights and freedoms but also in ensuring their enforcement, as happens in the case of copyright.

Together with these normative and executive functions, platforms can also exercise a quasi-judicial power. This power mirrors the role of constitutional courts, namely the balancing of fundamental rights. For instance, when receiving a reference file (for filtering infringing content) or a notice (for removal of such content) from rights holders, platforms should assess both the likelihood of the uploaded content constituting copyright infringement under applicable law as well as which fundamental rights or interests (of rights holders' vs users) should prevail in the case at issue to render a decision. The same considerations apply when focusing on how the rights to privacy and data protection should be balanced with freedom of expression. This private enforcement of fundamental rights has to some extent been endorsed in the field of copyright both by the CJEU and the relevant legislation.[37] The underlying rationale is that platforms are best placed to make these decisions in a nuanced and effective manner, as compared to courts and legislators. The obvious problem is that existing rules enable the creation of a para-legal framework that incentivises platforms towards over-enforcement as a means to escape liability, posing a risk of chilling effects for the freedom of expression of users.[38] Furthermore, as argued elsewhere in relation to the regime of Art 17 CDSMD, legal solutions often favour large rights holders in a way that neglects and harms smaller creators.[39]

The complexity of this system also comes from the role of algorithmic technologies in content moderation. On the one hand, algorithms can be considered as technical instruments facilitating platforms' functionalities, such as the organisation of online content and the processing of data. However, and on the other hand, such technologies can constitute technical self-executing rules, obviating even the need for a human executive or judicial function. Humans and machines shape content moderation.[40] These systems express values and principles defining a private system of governance,[41] which extends inter alia to copyright-protected content and users' expressions in social media spaces.

Within this framework, the governance of free speech is not shared but centralised and covered by unaccountable purposes. As underlined by Hartzog, Melber and Salinger, users' rights are "non-negotiable, one-sided and deliberately opaque 'terms of service' contracts" since "[t]hese documents are not designed to protect us. They are drafted by corporations, for corporations. There are few protections for the users-the lifeblood powering social media".[42] This opaque framework of values raises questions about the constitutionalisation of self-regulation.[43] TOS contribute to shaping the boundaries of online speech in general, and of online use of copyright-protected expression in particular. Therefore, the regulation of platforms plays a critical role to address the constitutional questions raised by the power of social media.

3. Regulation "of" platforms: the rules for content-sharing platforms

The rise of social media as platforms for sharing content and expression online has presented a unique opportunity and challenge to foster freedoms and creativity in the internal market. As it was foreseen with the adoption of the e-Commerce Directive in 2000,[44] the liability exemptions or "safe-harbours" recognised for certain intermediary service providers – like hosting service providers – have contributed

[35] Reminiscent of the core argument in Lawrence Lessig, *Code and Other Laws of the Cyberspace: Version 2.0* (Basic Books 2006).

[36] Joel Reidenberg, 'Lex Informatica: The Formulation of Information Policy Rules through Technology' (1997-1998) 76 Texas Law Review 553.

[37] See Case C-314/12, UPC Telekabel Wien, 27 March 2014 ECLI:EU:C:2014:192. At legislative level, see the considerations at 3.1 below on how Art 17 places much of the responsibility for enforcement of copyright and balancing of fundamental rights in the hands of OCSSPs.

[38] For empirical work on overenforcement, see e.g. Kris Erickson and Martin Kretschmer, 'Empirical Approaches to Intermediary Liability', CREATe Working Paper 2019/6; Jennifer Urban, Joe Karaganis and Brianna Schofield, 'Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice' (2017) 64 Journal of the Copyright Society 371; Sharon Bar-Ziv & Niva Elkin-Koren, 'Behind the Scenes of Online Copyright Enforcement: Empirical Evidence on Notice & Takedown' (2017) 50 Connecticut Law Review 339; specifically in the context of YouTube and parodies, *see* Erickson and Kretschmer (n 26), and Sabine Jacques and others, 'An Empirical Study of the Use of Automated Anti-Piracy Systems and Their Consequences for Cultural Diversity' (2018) 15(2) SCRIPTed 277. For a recent overview of existing studies in this areas, see also Daphne Keller and Paddy Leerssen, 'Facts and Where to Find Them: Empirical Research on Internet Platforms and Content Moderation', in Nathaniel Persily and Joshua A. Tucker (eds), *Social Media and Democracy: The State of the Field and Prospects for Reform* (Cambridge University Press 2019).

[39] Husovec and Quintais (n 1).

[40] Ira Rubinstein and Nathan Good, 'Privacy by Design: A Counterfactual Analysis of Google and Facebook Privacy Incidents' (2013) 28 Berkeley Techology Law Journal 1333; Robert Brendan Taylor, 'Consumer-Driven Changes to Online Form Contracts' (2011-2012) 67 NYU Annual Survey of American Law 371.

[41] Frank Pasquale, *The Black Box Society. The Secret Algorithms that Control Money and Information* (Harvard University Press 2015); Tal Zarsky, 'Transparent Predictions' (2013) 4 University of Illinois Law Review 1507.

[42] Woodrow Hartzog, Ari Melber and Evan Salinger, 'Fighting Facebook: A Campaign for a People's Terms of Service' Center for Internet and Society (22 May 2013) <http://cyberlaw.stanford.edu/blog/2013/05/fighting-facebook-campaign-people%E2%809699s-terms-service>.

[43] Julia Black, 'Constitutionalising Self-Regulation' (1996) 59(1) The Modern Law Review 24.

[44] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market [2000] OJ L178/1 (hereafter e-Commerce Directive).

to the rise of new digital services, providing new possibilities for disseminating culture and expression across Europe.[45] In particular, this new environment has encouraged the rise of new cultural entrepreneurs which regularly produce content whose monetisation constitutes even their primary source of income. Nonetheless, the consolidation of online platforms, and social media in particular, has led to challenges in relation to the concentration of (private) powers in the governance of users' expression online. What users can publish or say, as well as how they can upload and use copyright-protected content, are all increasingly influenced by platforms' private ordering rules, in particular their TOS, as implemented inter alia through algorithmic systems.

This evolution is one of the justifications that has led, in the last twenty years, the EU to complement its liberal economic approach with a strategy oriented to the protection of fundamental rights and democratic values, building on the Charter of Fundamental Rights.[46] Even if internal market goals are still critical grounds for the EU, particularly when it comes to the bases to adopt new legislation, the European approach is not exclusively oriented to market goals any longer. The CDSMD and the DSA are milestones on this path, driven by the goal of limiting platform power.[47] In the framework of the Digital Single Market strategy,[48] the Commission has recognized the critical role of online platforms in providing access to information and content. These actors are now considered crucial not only for the development of the internal market but also for the protection of core EU values. They are therefore expected to provide their services with transparency and fairness so as to maintain users' trust and promote innovation.[49]

This paradigm shift at EU level has led to a reframing of the legal framework for platforms, with an increased push for their "enhanced responsibility".[50] While maintaining the general approach of the liability exemptions in the e-Commerce Directive, new and proposed legislation and soft law impose additional liability on platforms in tandem with (mostly procedural) safeguards to raise the level of transparency and accountability in the provision of their services and content moderation activities. On the one hand, the Commission has endorsed soft law measures to guide the removal of illicit content,[51] and to address online hate speech and disinformation.[52] On the other hand, several sectoral legislative instruments have been adopted to regulate platforms and tackle illegal content online.[53] In the field of copyright, this is the case of Art 17 CDSMD, our main example of regulation "of" platforms in EU law.

The adoption of the CDSMD represents the latest step of modernization in the copyright area in EU law. It recognised the importance of copyright for the internal market in the digital age. The main explicit goal of Art 17 CDSMD, as stated throughout the legislative process, was not to impose on platforms, particularly OCSSPs, direct liability for their core activities. Rather, it was to solve the so-called "value gap", meaning the alleged mismatch between the revenues of user-generated content platforms and the remuneration of rightsholders for the exploitation of their works made available on those platforms.[54] The change in the liability regime for OCSSPs, and the accompanying web of obligations imposed on them, are better understood as the consequence of a highly lobbied and controversial legislative process aimed at addressing that "value gap".[55] The result of that process, Art 17 CDSMD, is a complex and sometimes contradictory provision, which barely survived an action for annulment with the CJEU, based on its incompatibility with the fundamental right to freedom of expression.[56]

This section examines the regulation "of" online platforms that host and provide access to user-uploaded copyright-

[45] See generally on the liability exemptions and general monitoring prohibition in Arts 12-15 e-Commerce Directive, Jaani Riordan, *The Liability of Internet Intermediaries* (Oxford University Press 2016); Christina Angelopoulos, *European Intermediary Liability in Copyright: A Tort-Based Analysis* (Kluwer Law International 2016); Martin Husovec, *Injunctions against Intermediaries in the European Union: Accountable but Not Liable?* (Cambridge University Press 2017).

[46] Charter of Fundamental Rights of the European Union [2012] OJ C 326 (hereafter Charter).

[47] Giovanni De Gregorio, 'The Rise of Digital Constitutionalism in the European Union' (2020) 19 International Journal of Constitutional Law 41.

[48] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM(2015) 192 final.

[49] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Online Platforms and the Digital Single Market. Opportunities and Challenges for Europe, COM(2016) 288 final.

[50] Communication from the Commission to the European Parliament, the Council, the EESC and the Committee of the Regions 'Tackling Illegal Content Online Towards an enhanced responsibility of online platforms' COM(2017) 555 final, and Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online. See also Giancarlo Frosio and Martin Husovec, 'Accountability and Responsibility of Online Intermediaries', in Giancarlo Frosio (ed.), *The Oxford Handbook of Online Intermediary Liability* (OUP 2020).

[51] Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Online Platforms and the Digital Single Market. Opportunities and Challenges for Europe, COM(2016) 288 final; Commission Recommendation (EU) 2018/334 of 1 March 2018 on measures to effectively tackle illegal content online, C(2018) 1177 final.

[52] Code of Conduct on Online Hate Speech (n 9); Strengthened Code of Practice on Disinformation (n 9).

[53] See e.g. Directive (EU) 2018/1808 of the European Parliament and of the Council of 14 November 2018 amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) in view of changing market realities [2018] OJ L 303/69; Regulation (EU) 2021/784 of the European Parliament and of the Council of 29 April 2021 on addressing the dissemination of terrorist content online [2021] OJ L 172/79.

[54] See *e.g.* João Pedro Quintais, 'The New Copyright in the Digital Single Market Directive: A Critical Look' (2020) 42 European Intellectual Property Review 28; Christina Angelopoulos and João Pedro Quintais, 'Fixing Copyright Reform: A Better Solution to Online Infringement' (2019) 10 JIPITEC 147.

[55] Quintais (n 54).

[56] Case C-401/19, Republic of Poland v European Parliament, Council of the European Union, 26 April 2022 ECLI:EU:C:2022:297 For in depth analysis, see Quintais and others (n 9).

protected content in EU law. It looks into the legal framework that shapes how platforms must deal with such content vis-à-vis users, clarifying the margin of discretion available to regulation "by" platforms via TOS. As underlined in the next subsections, most rules relate to content moderation of copyright-protected content. But such moderation is built upon the pre-existing contractual relationship between user and platforms, which defines how users can use the platform, including as regards commercial exploitation. On these matters, however, the law has little to say. This section first provides an explanation of the special regime of Art 17 CDSMD at the centre of our analysis, followed by the directive's rules on exploitation contracts for creators, and ending with a brief highlight of potential applicable rules in the DSA.

3.1. *The special regime of Art 17 CDSMD*

Art 17 CDSMD applies to OCSSPs. These are providers of an information society service whose main purpose is to store and give the public access to a large amount of protected content by its users, provided it organises and promotes that content for profit-making purposes. The definition also contains a number of exclusions aimed at services that are either not aimed primarily at giving access to copyright-protected content and/or are primarily not for-profit.[57] While this concept is new to the copyright *acquis*, OCSSPs are not a wholly new category of service providers in a technological or business sense. Rather, this is a new legal category covering a type of provider of hosting services whose activities or functions were previously regulated in different legal instruments, such as the 2000 e-Commerce Directive (replaced by the DSA), the 2001 Copyright in the Information Society (or "InfoSoc") Directive and the 2004 Directive enforcement of intellectual property rights[58]

In simple terms, Art 17 states that OCSSPs carry out acts of communication to the public when they give access to works/subject matter uploaded by their users. As a result, these providers become directly liable for their users' uploads. They are also expressly excluded in paragraph (3) from the hosting safe harbour for copyright relevant acts, previously available to many of them under Art 14(1) e-Commerce Directive (currently Art. 6 DSA).

The provision then introduces a complex set of rules to regulate OCSSPs, including a liability exemption mechanism in paragraph (4), and a number of what can be referred to as mitigations measures and safeguards. The liability exemption mechanism is comprised of best-efforts obligations for preventive measures, including those aimed at filtering content *ex ante*, notice and stay-down and notice and takedown.[59]

These preventive measures are the types of content moderation actions regulated by Art 17. Among the mitigation measures and safeguards that art. 17 includes are the following. First, the requirements of a proportionality assessment and the identification of relevant factors for preventive measures.[60] Second, a special regime for small and new OCSSPs.[61] Third, a set of mandatory exceptions akin to user rights or freedoms that are designed as obligations of result expressly based on fundamental rights.[62] Fourth, a clarification that Art 17 does not entail general monitoring, in line with Art 15 e-Commerce Directive (now Art 8 DSA).[63] Fifth, a set of procedural safeguards, including an in-platform complaint and redress mechanism and rules on out of court redress mechanisms.[64] For our purposes, a few additional remarks are justified on the provisions on exceptions and safeguards. Art 17(7) includes a general and a specific clause on exceptions and limitations to copyright. The general clause is contained in the first sub-paragraph, which states that the preventive obligations in 4(b) and (c) should not prevent that content uploaded by users is available on OCSSPs if such an upload does not infringe copyright, including if it is covered by an exception.[23]

The second paragraph of Art 17(7) CDSM Directive includes a special regime for certain exceptions and limitations: (i) quotation, criticism, review; (ii) use for the purpose of caricature, parody or pastiche.[24] One crucial feature of this provision is that paragraph (7) translates into an obligation of result. That is to say, Member States must ensure that these exceptions are respected despite the preventive measures in Art 17(4), which are "best efforts" obligations. The different nature of the obligations, underscored by the fundamental rights-basis of paragraph (7),[65] indicates a normative hierarchy, with concrete implications for purposes of content moderation. For instance, it means that to comply with Art 17 it is insufficient to rely on *ex post* complaint and redress mechanisms.[66] It is also necessary to put in place *ex ante* safeguards that avoid the overblocking of uploaded content by filtering content technologies incapable of carrying out the contextual assessments required by Art 17(7).[67] This hierarchy and requirements are also recog-

[57] OCSSPs are defined in CDSMD (n 4), Art 2(6), with further guidance in Recitals 62 and 63.

[58] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

[59] CDSMD (n 4), Art 17(4) (b) and (c).

[60] CDSMD (n 4), Art 17 (5).

[61] CDSMD (n 4), Art 17 (6).

[62] CDSMD (n 4), Art 17 (7).

[63] CDSMD (n 4), Art. 17(8). See, on this topic, Martin Senftleben and Christina Angelopoulos, 'The Odyssey of the Prohibition on General Monitoring Obligations on the Way to the Digital Services Act: Between Article 15 of the E–Commerce Directive and Article 17 of the Directive on Copyright in the Digital Single Market' (IViR; CIPIL 2020) <https://papers.ssrn.com/abstract=3717022>.

[64] CDSMD (n 4), Art 17(9).

[65] See e.g., CDSMD (n 4), Recital 70.

[66] In particular those set out in in CDSMD (n 4), Art 17(9).

[67] See João Pedro Quintais and others, 'Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics' (2020) 10 JIPITEC 277; Martin Husovec, '(Ir)Responsible Legislature? Speech Risks under the EU's Rules on Delegated Digital Enforcement (September 17, 2021). http://dx.doi.org/10.2139/ssrn.3784149; Christophe Geiger and Bernd Justin Jütte, 'Platform Liability Under Art 17 of the Copyright in the Digital Single Market Directive, Automated Filtering and Fundamental Rights: An Impossible Match' (2021) GRUR International, Volume 70, Issue 6, pp 517–543. See also, agreeing with this interpretation, 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, COM/2021/288 final (hereafter EC Guidance Art 17 CDSMD), pp 2-3. It is on this basis that Poland filed an action for annulment

nised by the Commission's interpretative Guidance on Art 17, the Advocate General Opinion and the Court's judgement in Case C-401/19.[68]

In addition, Art 17(9) requires that OCSSPs inform users in their terms and conditions of the user's right to use works under exceptions. On this point, the Commission's Guidance merely suggests that "Member States could give recommendations on how service providers can increase users' awareness of what may constitute legitimate uses", for example through the provision of "accessible and concise information on the exceptions for users, containing as a minimum information on the mandatory exceptions provided for in Article 17".[69] This is the only reference to TOS in the provision, leaving a wide margin of discretion to platforms in governing their relationship with users.

Finally, Art 17(10) tasks the European Commission with organising stakeholder dialogues to ensure uniform application of the obligation of cooperation between OCSSPs and rights holders and to establish best practices regarding the appropriate industry standards of professional diligence. These stakeholder dialogues have resulted in the publication of a Commission Guidance on the interpretation of Art 17,[70] which was adopted as a Communication, and is therefore not binding.[71] Furthermore, as the Guidance itself states, it might have to reviewed in light of the CJEU judgement in C-401/192.[72] In fact, the AG Opinion in that case suggests that key aspects of the Guidance might not be in conformity with fundamental rights[73] And the Court's judgement, although not explicitly saying so, arguably goes in the same direction.[74]

In sum, as regards the relationship between platforms and users, Art 17 mostly sets rules for (certain types of) content moderation by platforms. These moderation actions result from the application of best efforts obligations vis-à-vis rights holders to apply preventive measures, a pre-condition for platforms to benefit from a liability exemption regarding content uploaded by users. Such measures must be applied with respect for users' rights embodied in certain freedom of expression-based exceptions. This will in principle require national laws and courts to recognize the need for platforms to adopt ex ante safeguards, since ex post complaint and redress mechanisms are insufficient to ensure the respect of user rights. Furthermore, platforms are required in their TOS to inform users that they benefit from these exceptions.

The upshot of this regime is that beyond the specific types of content moderation and information obligations described above, platforms retain a significant margin of discretion is defining the governance of copyright-protected content on their services via TOS, especially vis-à-vis users. This is particularly true for rules governing the upload and exploitation (including monetization) of content by user-creators, including "influencers",[75] in which regard Art 17 is silent. In this respect, perhaps the only relevant rules in the copyright *acquis* are those on fair remuneration in exploitation contracts of authors and performers (jointly: "creators") in the CDSMD.

3.2. *Relevance of rules on exploitation contracts for creators?*

One set of rules that may restrict the space for private ordering by platforms vis-à-vis their user-creators is found in Arts 18 to 23 CDSMD, dealing with the fair remuneration in exploitation contracts of creators.[76] In particular, these provisions may impose rules that limit platforms' power vis-à-vis user-creators in setting the terms for exploitation of uploaded content. These rules do not appear to have been designed having in mind OCSSPs as the party exploiting the works of creators. However, it is the case that user-creators that upload their content that qualifies for copyright protection typically provide the platform with broad non-exclusive licenses to use and exploit that content on their services,[77] whereas the platform may (with varying degrees clarity) provide users with different avenues for monetizing that content.[78]

against Art 17 for failure to sufficiently safeguard the right to freedom of expression of users (Case C-401/19, Poland v Parliament and Council). Arguing that the Court should invalidate Art 17 on these grounds, see Geiger and Jütte; Husovec. See also Case C-401/19, Poland v Parliament and Council, Opinion of Advocate General Saugmandsgaard Øe delivered on 15 July 2021. See generally on the topic: Dan L Burk, 'Algorithmic Fair Use' (2019) 86 University of Chicago Law Review 283; Niva Elkin-Koren, 'Contesting Algorithms: Restoring the Public Interest in Content Filtering by Artificial Intelligence' (2020) Big Data & Society 7(2). https://doi.org/10.1177/2053951720932296; Niva Elkin-Koren, 'Fair Use by Design' (2017) 64 UCLA Law Review 1084.

[68] EC Guidance Art 17 CDSMD (n 67); Opinion AG Øe in C-401/19, 15 July 2021, ECLI:EU:C:2021:613; Case C-401/19, Republic of Poland v European Parliament, Council of the European Union, 26 April 2022 ECLI:EU:C:2022:297, paras 84 – 89.

[69] EC Guidance Art 17 CDSMD (n 67), p. 26, adding: "Besides providing this information in the general terms and conditions of the service providers, this information could be given in context of the redress mechanism, to raise the awareness of users of possible exceptions or limitations that can be applicable."

[70] For early analysis of the EC Guidance Art 17 CDSMD, see João Pedro Quintais, 'Commission's Guidance on Art 17 CDSM Directive: The Authorisation Dimension' (*Kluwer Copyright Blog*, 10 June 2021) <http://copyrightblog.kluweriplaw.com/2021/06/10/commissions-guidance-on-art-17-cdsm-directive-the-authorisation-dimension/>; Felix Reda and Paul Keller, 'European Commission Back-Tracks on User Rights in Article 17 Guidance' (*Kluwer Copyright Blog*, 4 June 2021) <http://copyrightblog.kluweriplaw.com/2021/06/04/european-commission-back-tracks-on-user-rights-in-article-17-guidance/>; Geiger and Jütte (n 50).

[71] See Arts 288 and 290 of the Treaty on the Functioning of the European Union (TFEU).

[72] EC Guidance Art 17 CDSMD (n. 67).

[73] Opinion AG Øe in C-401/19, 15 July 2021, para. 222.

[74] Quintais and others (n 9) 120–126.

[75] See De Gregorio and Goanta (n 3); Catalina Goanta and Sofia Ranchordas (eds), *The Regulation of Social Media Influencers* (Edward Elgar 2020).

[76] On this regime, see generally Giulia Priora, 'Catching Sight of a Glimmer of Light: Fair Remuneration and the Emerging Distributive Rationale in the Reform of EU Copyright Law' (2020) 10 JIPITEC 330.

[77] For YouTube, see e.g., section 6 of their Terms of Service, <https://tldrlegal.com/license/youtube-terms-of-service>.

[78] See generally <https://support.google.com/youtube/answer/2490020?hl=en#zippy=%2Ci-use-my-personal-recording-of-public-concerts-events-shows-and-so-on%2Ci-used-third-party-content-under-fair-use>. And for YouTube Cre-

For our purposes, the crucial rules of the CDSMD are set out in Arts 18 and 19. Art 18 sets out a principle of appropriate and proportionate remuneration for creators that license their works/subject matter. The provision leaves Member States discretion on which mechanism to choose when implementing the principle, subject to conformity with EU law.[79] In the context of OCSSPs, this provision could in theory provide a boon for the remuneration of user-creators and avoid abusive remuneration practices by OCSSPs. But it remains unclear how it can be operationalised in practice for online platforms.[80]

Art 19 lays down a transparency obligation. According to this, creators must receive on a regular basis – taking into account the specificities of each sector – detailed information on the exploitation of their works/performances from their licensors or transferors. This includes information on modes of exploitation, revenues generated and remuneration due.[81] It is an empirical question beyond the scope of this paper whether current information practices of OCSSPs comply with this requirement for creators. But it is essential that they do in order to make effective the principle in Art 18.

The remaining provisions on fair remuneration in contracts with creators in the CDSMD seem less relevant in the context of OCSSPs. Thus, Art 20 entitles creators to a contract adjustment mechanism to claim "additional, appropriate and fair remuneration" from their counterparty (or its successors in title) if their initially agreed remuneration turns out to be disproportionately low as compared to the revenues generated by the subsequent exploitation of the works/performances by the contractual counterpart.[82] Art 21 states that disputes concerning the transparency obligation and the contract adjustment mechanism may be submitted to a voluntary alternative dispute resolution procedure.[83] Creators also have a right of revocation under Art 22.[84] But this applies to exclusive licences or transfers, and not to the non-exclusive license agreements characteristic of most relationships between uploading users and OCSSPs.[85] Finally, any contractual provision that prevents compliance with Articles 19 to 21 – transparency obligation, contractual adjustment mechanism, alternative dispute resolution – is unenforceable vis-à-vis creators.[86]

To conclude, the regime on fair remuneration in exploitation contracts of creators only marginally limits the discretion of platforms in defining their private ordering regimes vis-à-vis user-creators. The principle of appropriate and proportionate remuneration appears too vaguely defined to meaningfully restrict a platform's design of its monetisation policies. It is further unclear whether the transparency obligation significantly impacts platforms' current reporting practices to individual creators.

3.3. *The interaction with the DSA*

The final piece of the puzzle of the regulation of copyright-sharing platforms in EU law is the DSA, which is meant to overhaul of the horizontal rules on intermediary liability in the e-Commerce Directive. One crucial question about the DSA is how it influences the governance of copyright-protected content and interacts with sector-specific, *lex specialis* rules, such as Art 17 CDSMD. Both Art 17 and multiple provisions of the DSA impose obligations on how "online platforms" deal with illegal information: Art 17 targets copyright infringing content, while the DSA targets illegal content in general (including that which infringes copyright).

The DSA follows a bifurcated approach to regulating intermediaries. Whereas the rules on the liability of providers of intermediary services apply across the board to all such intermediaries, the rules on due diligence obligations for a transparent and safe online environment follow an asymmetric approach that distinguishes between different categories of *services*, from general to increasingly more specific: intermediary services, hosting services, online platforms, and very large on-

ators <https://www.youtube.com/creators/how-things-work/video-monetization/>. See also the analysis at Section 4 supra.

[79] CDSMD (n 4), Recital 73 clarifies that a lump sum payment can constitute proportionate remuneration "but it should not be the rule".

[80] The application of CDSMD (n 4), Art 18 to OCSSPs has been confirmed by Commissioner Thierry Breton in response to a parliamentary question by a MEP. See Question for written answer E-002618/2021 to the Commission, Rule 138, Alexis Georgoulis (The Left) (12 May 2021) <https://www.europarl.europa.eu/doceo/document/E-9-2021-002618_EN.html>; and E-002618/2021, Answer given by Mr Breton on behalf of the European Commission (17 August 2021) <https://www.europarl.europa.eu/doceo/document/E-9-2021-002618-ASW_EN.html>.

[81] Subject to certain conditions, additional information may be requested from sub-licensees. The transparency obligation can be limited in cases where it is deemed disproportionate. In some cases, it can be set aside if the creator's contribution to the overall work/performance is 'not significant'. Furthermore, Member States may decide that transparency rules in *collective bargaining agreements* apply instead, provided they meet the criteria set forth in this article. Finally, collective rights management organisations (hereaafter CMOs) and 'independent management entities' are not subject to this transparency obligation if they are already subject to a similar obligation under Art 18 of 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 (hereafter CRM Directive) and national laws implementing it. See also CDSMD (n 4), Recital 77 (*in fine*). CDSMD (n 4), Art 18 deals with 'Information provided to rightholders on the management of their rights'.

[82] CDSMD (n 4), Recital 78 provides some guidance on how to assess this. The mechanism does not apply to agreements concluded by CMOs or "independent management entities", as these are subject to national rules implementing the CRM Directive. *Id*., last sentence.

[83] CDSMD (n 4), Recital 79.

[84] CDSMD (n 4), Recital 80.

[85] See the examples provided in 4 below.

[86] CDSMD (n 4), Art 23. That is to say, these are mandatory provisions that cannot be derogated by contract, whether between creators and contractual counterparts, or those counterparts and third parties (e.g. in non-disclosure agreements, as noted in Recital 81. Conversely, it appears that contractual derogation from the right of revocation is possible. But see CDSMD (n 4), Art 22(5).

line platforms (VLOPs) and very large online search engines (VLOSEs).[87]

"Online platforms" are defined in the DSA as providers of "a hosting service that at the request of a recipient of the service, stores and disseminates information to the public, unless that activity is a minor and purely ancillary feature of another service or a minor functionality of the principal service and, for objective and technical reasons, cannot be used without that other service, and the integration of the feature or functionality into the other service is not a means to circumvent the applicability of this Regulation."[88] VLOPs are a type of online platform providing their services to a number of average monthly active recipients of the service in the EU equal to or higher than 45 million, and which are so designated pursuant to a specific procedure.[89] Under the DSA's asymmetric approach, VLOPs are subject to the highest number of cumulative obligations. VLOPs are also the types of large-scale OCSSPs at the centre of our examination, including the empirical analysis in this work.

As argued elsewhere, the specific rules and procedures in Art 17 for OCSSPs are likely considered *lex specialis* to the DSA.[90] This means that the DSA will apply to OCSSPs insofar as it contains: (i) rules that regulate matters not covered by Art 17 CDSMD; and (ii) specific rules on matters where Art 17 leaves margin of discretion to Member States.[91] Category (i) applies to some provisions in the liability framework rules of the DSA and most clearly to procedural obligations. The situation is harder to assess for category (ii), and it is uncertain to what extent the regulation in Art 17 CDSMD pre-empts more detailed rules in the DSA.[92]

The upshot is that a number of intermediary liability and content moderation obligations in the DSA will in principle apply to OCSSPs, in addition to those examined above for Art 17 CDSMD. For the most part however, these rules do not constrain the power of platforms in defining upload and licensing rules for copyright-protected content uploaded by users. This is true even for the general rule on "terms and conditions" in Art 14 DSA, a term which essentially overlaps with the usage of the term TOS in this work.[93] Art 14 DSA applies to all intermediary service providers; it aims to increase the transparency of TOS and bring their enforcement in direct relation to fundamental rights.[94]

Article 14 twin aims of transparency and enforcement are addressed in two sets of obligations. The first set of obligations deals with (general and specific) information and transparency obligations, which can be found in Art 14(1), (2), (3), (5) and (6) DSA. The second and crucial set of obligations is found in Art. 14(4) and deals with application and enforcement and, arguably, brings providers' TOS within the scope of EU fundamental rights. According to this, providers of information services, including online platforms, must act in a diligent, objective and proportionate manner in applying and enforcing content moderation restrictions, with due regard to the rights and legitimate interests of all parties involved, including the fundamental rights of the recipients of the service, such as the freedom of expression, freedom and pluralism of the media, and other fundamental rights and freedoms as enshrined in the Charter. Importantly, Art 14 DSA expands the scope of the obligations beyond illegal content, applying also to content which intermediaries prohibit in their TOS.[95]

These horizontal obligations for all providers of intermediary services providers have been welcomed additions to EU law. However, because the scope of Art 14 is restricted to content moderation and its obligations are somewhat vague, it is arguable that this provision will be of limited use to curtail the power of platforms in defining the terms of their relationship with users regarding the upload and subsequent exploitation of copyright-protected content.[96]

During the legislative process, the Council's version of the DSA did however introduce potentially relevant amendments for our purposes. In particular, firstly, it included "demonetisation" as one type of action taken by platforms that falls explicitly within the definition of "content moderation"; and, secondly, it required providers of hosting services to give a clear and specific statement of reasons to any affected recipients of the service of restrictions it imposes, including "suspension, termination or other restriction of monetary payments (monetisation)".[97] These amendments were taken up in the final version of the DSA.[98]

In our view, these adjustments to the final text of the DSA are beneficial: in the first place, it is now clear that platform's demonetisation actions are subject to the same rules as other

[87] For the purposes of our analysis, we focus on online platforms and will therefore not discuss search engines (and VLOSEs) further.

[88] DSA (n 2), Art 3(i).

[89] DSA (n 2), Art 33. On the complexities surrounding the assessment of average monthly active recipients for VLOPs and VLOSEs, see Pim ten Thije and Joris van Hoboken, 'Average Monthly Active Recipients in the DSA: Definition, Grey Areas, and How to Calculate?' (*DSA Observatory*, 10 October 2022) <https://dsa-observatory.eu/2022/10/10/average-monthly-active-recipients-digital-services-act-dsa-definitions-grey-areas-how-to-calculate/> accessed 23 November 2022.

[90] Quintais and Schwemer (n 2); Peukert and others (n 2).

[91] Quintais and Schwemer (n 2).

[92] Quintais and Schwemer (n 2).

[93] DSA (n 2), Art 3(u) defines 'Terms and conditions' as 'all clauses, irrespective of their name or form, which govern the contractual relationship between the provider of intermediary services and the recipients of the service'.

[94] DSA (n 2), Art 14 applies not only to illegal content but also to harmful content, as defined in the TOS of an intermediary.

[95] João Pedro Quintais, Naomi Appelman and Ronan Fahy, 'Using Terms and Conditions to Apply Fundamental Rights to Content Moderation' (2023) German Law Journal (forthcoming).

[96] For an in depth exploration of the potential operationalization of DSA (n 2), Art 14, without however making reference to its application to copyright-protected content, see Quintais, Appelman and Fahy (n 95).

[97] See Council of the European Union, Proposal for a Digital Services Act and amending Directive 2000/31/EC – General approach, 18.11.2021, Council Document 13203/21, Arts 2(p) and 15(1)(b). See also supporting Recital 42 (… "The monetisation via advertising revenue of content provided by the recipient of the service can be restricted by suspending or terminating the monetary payment or revenue associated to that content. Irrespective of available recourses to challenge the decision of the provider of hosting services provider, the recipient of the service should always have a right to initiate proceedings before a court in accordance with the national law"]

[98] See DSA (n 2), Art 3(t) for the updated definition of 'content moderation' and Art 17(1) DSA on the regime for the statement of reasons.

content moderation restrictions; in the second place, the new regime could improve the transparency of platform's decisions impacting demonetisation, including those commonly know as "shadow banning".[99] To what extent these provisions might apply to copyright-protected content on online platforms is however unknown at this st age.

In sum, the DSA imposes additional obligations on platforms vis-à-vis users regarding content moderation activities. Some of these obligations will also apply to OCSSPs, especially those large-scale platforms that qualify as VLOPs (e.g., Facebook, YouTube, Instagram). That is to say, the DSA reinforces the regulation "of" such platforms, restricting the space available to private ordering via TOS. Nonetheless, this important additional layer of obligations mostly refers to content moderation activities, including procedural safeguards. The DSA rules do not clearly extend to upload and exploitation of copyright-protected content on platforms, with the potential exception of obligations that relate to demonetisation as a type of content moderation restriction. As such, regulation of that content is mostly left to sectoral rules, like the CDSMD. As already stressed, however, such sectoral rules are also largely absent or lacking.

4. *Empirical analysis of regulation "by" platforms: three case studies*

Considering the analysis above, this section focuses on a subset of regulation "by" platforms through empirical research. Our aim is not to be exhaustive but rather to provide an original perspective and illustration of how platforms have over time used the margin of discretion afforded by the legislative framework to shape the rules that govern their relationship with users and the content they host. Within the limits of our methods and data, the picture that emerges demonstrates how private ordering is carried out by platforms and the power dynamics between platforms and their users in this respect. We first explain our empirical methods and then present the findings of our analysis of key historical versions of the TOS of three large-scale OCSSPs/VLOPs, which we use as illustrative case studies: Facebook, Instagram and YouTube.

4.1. Methods

Our empirical analysis comprises data collection and analysis on the TOS of three large-scale online platforms, that qualify both as OCSSPs and VLOPs.[100] Regarding data collection, using Internet Archive's WayBack Machine, we sought to identify and gather all unique versions[101] of TOS ever published by the three platforms selected.[102] To ensure that the size of our collection would remain manageable, our final selection contained only the versions that were in place at the end of each year's semesters. Following these criteria, our sample comprises a total of 32 documents: 21 from Facebook, since 2004; 3 from Instagram, since 2011; and 8 from YouTube, since 2005.

We then used the qualitative text analysis software NVivo to carry out a thematic analysis[103] of all documents. Our goal was to identify, from the ground up, which *licencing rules* the policies contained, and how they changed over time. Therefore, the first step of our analysis involved finding and separating the TOS's excerpts that explicitly discussed *ownership of content posted by users, and, in particular, licences*. We then inductively worked to identify the licencing rules contained in these excerpts and classify the texts accordingly. This second step demanded more interpretation. TOS's provisions are neither uniformly communicated across documents/platforms nor always explicitly spelled out. Therefore, we did a line-by-line reading of all documents so as to manually draft rules that could accurately convey the normative provisions contained in the original texts. This was an iterative process, whereby we kept honing the exact language of the rules and re-coding the documents as we advanced into the dataset. We finally arrived at a set of 12 rules, which we treat here as our key themes (see our codebook in the Appendix).

After identifying these rules and coding the documents, we developed two other themes that we could use to further categorise such provisions, functioning as more precise analytical entry points into the data. We found two broad categories particularly useful. Firstly, what we call *normative types*, which include rights, obligations, and procedures. *Rights* refer to what either users or platforms *can* but might not necessarily do – e.g., the fundamental rule according to which the platform allows people to use the platform's proprietary technology ("users can use the platform"). *Obligations* are described as mandatory provisions. A key obligation is the one that forces users to grant licences over their content to the platform. Finally, *procedures* seem to describe what happens in the relationship between platforms and users, regardless of anyone's wishes. Consider for instance the rule according to which all licences between platform and users end when users delete their account or content, couched in the documents we read as an unavoidable fact of platforms' functioning. Secondly, we also classified these rules according to their main beneficiary. *Pro-platform rules* include platforms' rights and some users' obligations; *pro-user rules* include users' rights and platforms' obligations. Other rules do not appear to unequally benefit neither platforms nor users. We classified these as *neutral*. In

[99] See Council of the European Union (n 97), Rec. 42 ("Restriction of visibility may consist in demotion in ranking or in recommender systems, as well as in limiting accessibility by one or more recipients of the service or blocking the user from an online community without the user knowing it ('shadow banning')"). For a detailed analysis of the concept of shadow banning, including in the context of the DSA, see Paddy Leerssen, 'An end to shadow banning? Transparency rights in the Digital Services Act between content moderation and curation', Computer Law & Security Review, Volume 48, 2023.

[100] On these legal qualifications, see Subsections 3.1 and 3.3 above.

[101] By 'unique version' we mean versions whereby platforms changed previous rules or introduced new rules. Cosmetic textual changes, which did not alter the normative meaning of the policy, were ignored.

[102] We focussd on versions in English published for European users.

[103] Jennifer Fereday and Eimear Muir-Cochrane, 'Demonstrating Rigor Using Thematic Analysis: A Hybrid Approach of Inductive and Deductive Coding and Theme Development' (2006) 5 International Journal of Qualitative Methods 80.

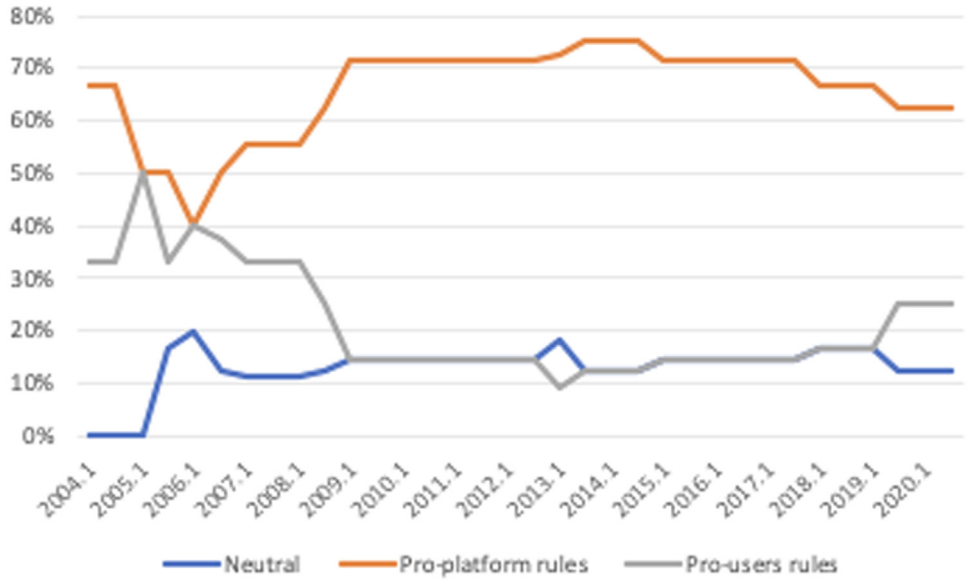


Fig. 1 – Proportion of licensing rules in Facebook's TOS, per kind of beneficiary, 2004–2020. Source: Authors.

assessing main beneficiaries, we did not take into consideration systemic or dispersed benefits but rather the type of individual actor whose interests appear to be *directly* protected by the policy.[104]

After finalising the coding of the text, we used NVivo to export the findings into a spreadsheet, where the data was further treated. To understand the evolution of platforms' licensing rules over time, we tabulated the presence/absence of rules over time and calculated the prevalence of themes for each platform. While not typical, the use of descriptive statistics to explore the results of a qualitative thematic analysis is neither new nor epistemologically problematic.[105] This longitudinal analysis also involved the quantification of the mentions to each rule on the TOS we examined. By looking into the prevalence of mentions, we could also assess the discursive emphasis that platforms have given to different rules – a proxy for which rules platforms consider to be most important. Importantly, this part of our research is mainly descriptive. That is, we document and unpack the evolution of those three platforms' licensing rules but do not investigate the reasons behind these changes and continuities.

Below we present the results of our thematic analysis through charts, tables, and illustrative excerpts of different versions of platforms' TOS.

4.2. *Findings*

4.2.1. *Facebook*

As Fig. 1 shows, Facebook's relative proportion of licensing rules have been overwhelmingly advantageous to the company since their launch, in 2004. With the exception of the first semester of 2006, pro-platform provisions have always been overrepresented in their TOS. In fact, for eight years (between 2009 and 2017), they have constituted more than 70% of all licensing rules. Since then, the chasm between pro-user and pro-platform's rules has narrowed – but only slightly. Fig. 2, which presents the evolution of *mentions* to these rules, indicates that, discursively, the contrast has been even clearer, as the 2006 equalization and the recent narrowing process appear to be less intense.

Fig. 3, which breaks down the relative presence of rules into normative types (procedures, platform's rights, users' rights, and users' obligations) offers a more detailed picture of this process. If the prevalence of user's rights decreased considerably between 2005 and 2009 and remained essentially the same ever since, the percentage of platforms' rights increased sharply during the same period, remaining then mostly unchanged. The absolute number of user's obligations remained the same since 2004 (one) but its proportion experienced some variations, largely due the introduction and deletion of other rules. The only rule of this kind that Facebook has ever instituted is the central provision according to which users' must grant platforms a licence over their content. Fig. 4, which depicts the evolution of the percentage of mentions to rules of different normative types, suggests that the normative and the discursive components have been largely aligned – although the rhetorical emphasis given to platforms' rights is a bit more pronounced than the normative focus on this type of rule.

[104] Examples cited in the Appendix are meant to clarify this point.
[105] For an analysis which used a similar mixed approach to examine online content, see Tianze Sun and others, 'Reactions on Twitter towards Australia's Proposed Import Restriction on Nicotine Vaping Products: A Thematic Analysis' (2021) 45 Australian and New Zealand Journal of Public Health 543.

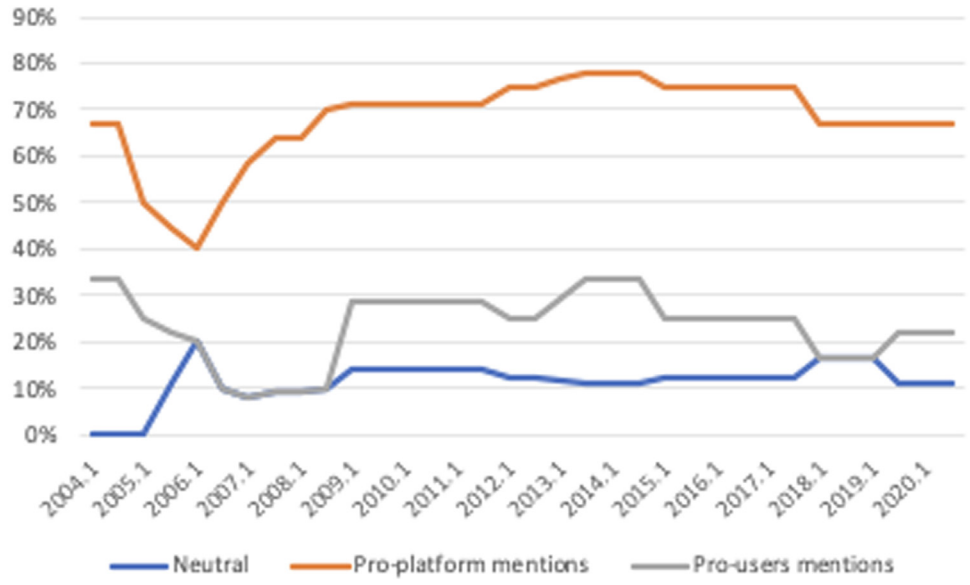


Fig. 2 – Proportion of mentions to licensing rules in Facebook's TOS, per kind of beneficiary, 2004–2020. Source: Authors.

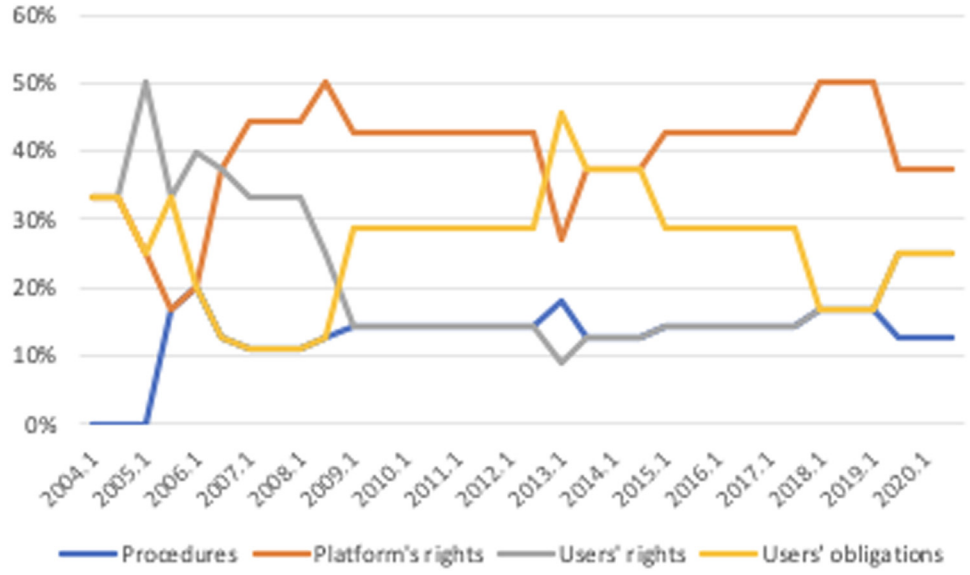


Fig. 3 – Proportion of licensing rules in Facebook's TOS, per normative type, 2004–2020. Source: Authors.

Which exact licensing rules Facebook has had throughout their history can be seen on Table 1. It lists all the nine rules that the platform has adopted in its first 16 years to regulate content ownership.

In their first year, Facebook's licencing rules were particularly skewed towards their own interests. While Facebook has always retained all rights over their own products, users had to grant an "irrevocable, perpetual, non-exclusive, fully paid, worldwide license" to the company so as to enable they to "use, copy, perform, display, and distribute such information and content and to prepare derivative works of, or incorporate into other works, such information and content, and to grant and authorize sublicenses of the foregoing".[106] Two elements of that initial document stand out: the open-ended, "perpetual" nature of the license, and the fact that the platform at no moment acknowledged that users retained their rights over their own content. From a discursive point of view, this absence matters. Ordinary people are often not aware of the law, and some users might have assumed that they indeed had no rights over their own content. While it is impossible to know the exact consequences of this assumption, it could have dissuaded users from protesting against the misuse of their content, both in-platfomr and in courts, for instance.

[106] Facebook, 'Terms of Use' (*Terms of Use*, 2004) <https://web.archive.org/web/20040611104410/http://www.thefacebook.com/terms.php>.

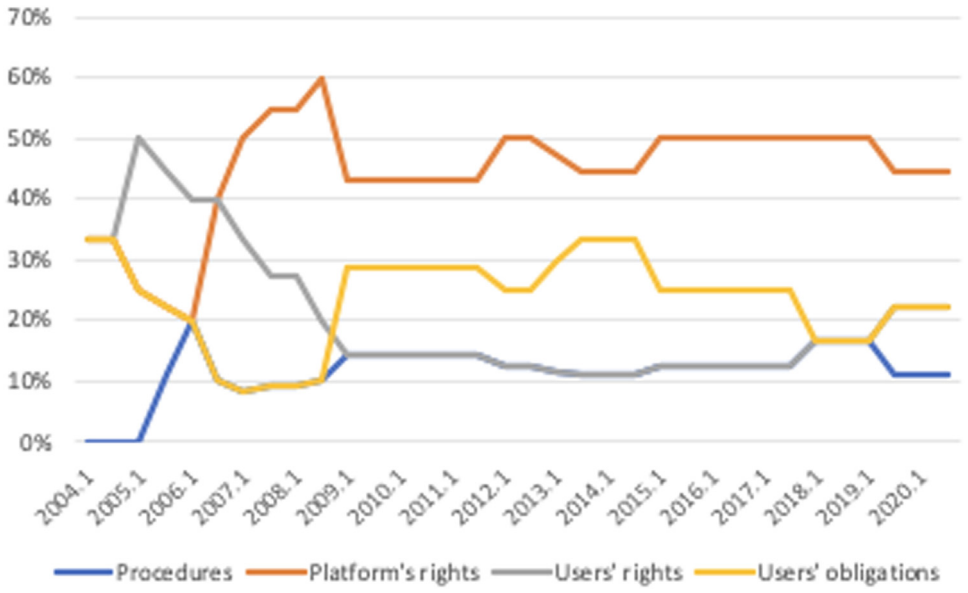


Fig. 4 – Proportion of licensing rules in Facebook's TOS, per normative type, 2004–2020. Source: Authors.

Table 1 – Presence/absence of licencing rules found in Facebook's TOS between 2004 and 2020. Source: Authors.

	2004.1	2020.2
Procedures		
All licences end when users delete account or content		
Platform's rights		
The platform can retain copies of users' deleted content		
The platform can retain copyright over own products		
The platform can retain licences over user comments		
The platform can revoke users' license without providing a reason		
Users' rights		
Users can retain copies of others' content for personal use		
Users can retain copyright over their content		
Users can use the platform		
Users' obligations		
Users must grant licence over their content to the platform		

Then, in 2005, the company introduced two new rules that partially altered this scenario. One, they effectively ended the perpetuity of the licences by establishing that all licences would end when users deleted their content.[107] They also published a rule according to which users had the right to retain a copy of other users' content for non-commercial purposes – a provision that would eventually disappear from their TOS in 2008. If the inclusion of these rules was in principle beneficial to users, other changes in the text helped expand Facebook's control over users' content. Namely, in 2005, the platform's licence started covering not only what had been posted by the user in a "public area" of the platform[108] but anything that was posted in "any part of the Web site".[109] The TOS also expanded what Facebook was allowed to do with user content, adding the possibility to "reformat, translate, excerpt (in whole or in part)".[110]

It was only in 2006, two years after the launch of the platform, that the explicit rule according to which users can retain copyright over their own content was introduced, regardless of the nature of the licence given to the company – a provision that is still part of Facebook's normative framework. Meanwhile, the company broadened again the scope of their license. Firstly, by stating that they were entitled to retain copyright over all comments and feedback users posted;

[107] The expression "perpetual" would only be deleted in a 2009 version, though.
[108] Facebook (n 106).
[109] Facebook, 'Terms of Use' (*Terms of Use*, 2005) <https://web.archive.org/web/20050831142915/http://www.thefacebook.com/terms.php>.
[110] Facebook (n 109).

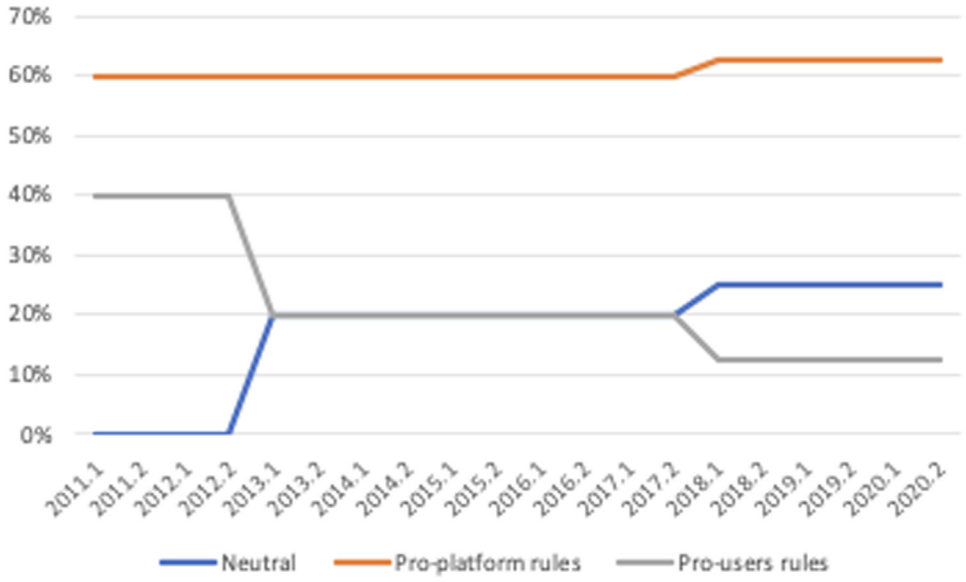


Fig. 5 – Proportion of licensing rules in Instagram's TOS, per kind of beneficiary, 2004–2020. Source: Authors.

secondly, by establishing that they could revoke individuals' license to use the platform "at any time without notice and with or without cause"[111] – a provision that would also remain in place until 2008. Finally, in 2007, they published a provision that rendered the very possibility of effectively deleting content uncertain. Per this rule, users had to "acknowledge that the Company may retain archived copies of your User Content", regardless of individuals manually removing them via interface functionalities.

Since 2009, their broad normative framework experienced little change. Some modifications in the policy text are relevant, though. A key – if subtle – modification was the deletion, in 2020, of the term "royalty free" from the description of the licence granted by users to the company. This might be related to Facebook's ramping up its monetisation program, which of course pays royalties to its members.

Other changes seem to be related to the algorithmic reading of users' content for advertisement purposes – something that the vagueness of the omnipresent term "use" always made possible but not necessarily explicit. In 2013, Facebook added the following language: "You give us permission to use your . . . content . . . in connection with commercial, sponsored, or related content (such as a brand you like) served or enhanced by us".[112] While the expression "in connection" is too broad to afford any definite conclusion, this provision appeared to make clear that the platform's licence over users content enables Facebook to use algorithmic systems to analyse one's post so as to automatically associate it with, say, the content of an ad. This provision would disappear in 2015. In a 2019 version, however, they introduced a novel justification for their licence, saying that it was implemented "solely for the purposes of providing and improving our Products and services".[113] "Improving" their products might mean, essentially, anything – including the sort of algorithmic analysis that the 2013 provision had made explicit.

4.2.2. *Instagram*

As with Facebook, Instagram's licencing policies have always tilted towards the platform's interests – even if not as intensely as Facebook. Differently from Facebook, however, Instagram's normative framework has been slightly less complex (a total of 7 rules, against Facebook's 9) and much more stable.

Figs. 5 and 6 evidence this difference. Fig. 5 shows that the percentage of pro-platform rules in Instagram's TOS has never been below 60% and has actually increased slightly in 2018. The proportion of pro-user provisions, in contrast, has decreased steadily: from 40% in 2011 to 20% in 2013, and then to 13% in 2018. Fig. 6, Table 2 suggests that the discursive emphasis is largely aligned with the normative developments.

These insights can be further understood by the data presented in Figs. 7 and 8. The widening gap between users and platforms can be credited to two movements, which are as normative (Fig. 7) as they are discursive (Fig. 8): the decrease in the proportion of users' rights, and the moderate increase in the percentage of users' obligations, both affected by the introduction of a procedure in 2013.

These numbers are somewhat useful but since Instagram's licencing rules have been considerably stable, we can simply look at Table 2 to understand more clearly what has happened to the platform in the past decade.

Initially, Instagram had a fairly basic set of licencing rules, arguably less unequal than that of Facebook's early regime.

[111] Facebook, 'Terms of Use' (*Terms of Use*, 2006) <https://web.archive.org/web/20061230091603/https://www.facebook.com/terms.php>.

[112] Facebook, 'Statement of Rights and Responsibilities' (*Statement of Rights and Responsibilities*, 2013) <https://web.archive.org/web/20140116004723/https://www.facebook.com/terms.php>.

[113] Facebook, 'Terms of Service' (*Terms of Service*, 2019) <https://web.archive.org/web/20191231023923/https://www.facebook.com/terms.php>.

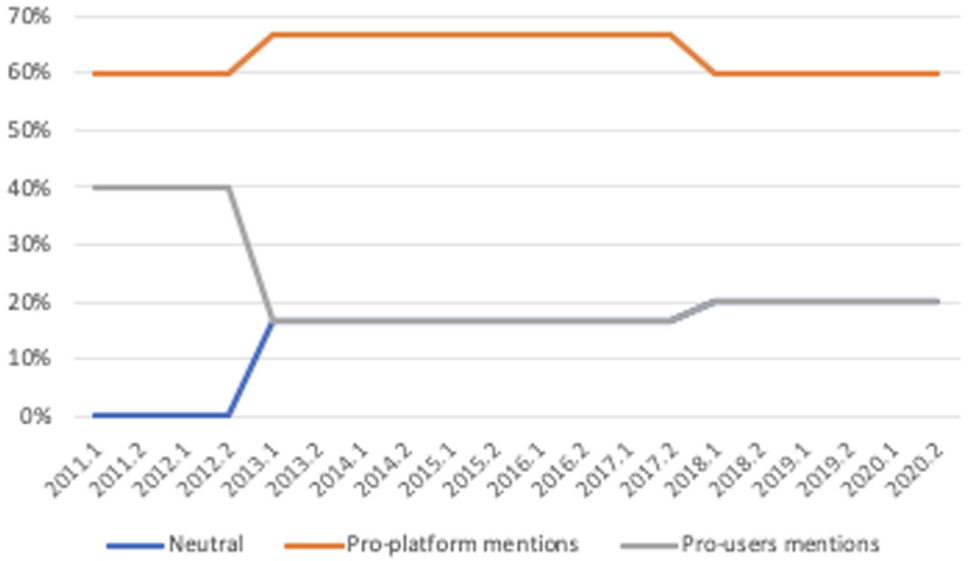


Fig. 6 – Proportion of mentions to licensing rules in Instagram's TOS, per kind of beneficiary, 2011–2020. Source: Authors.

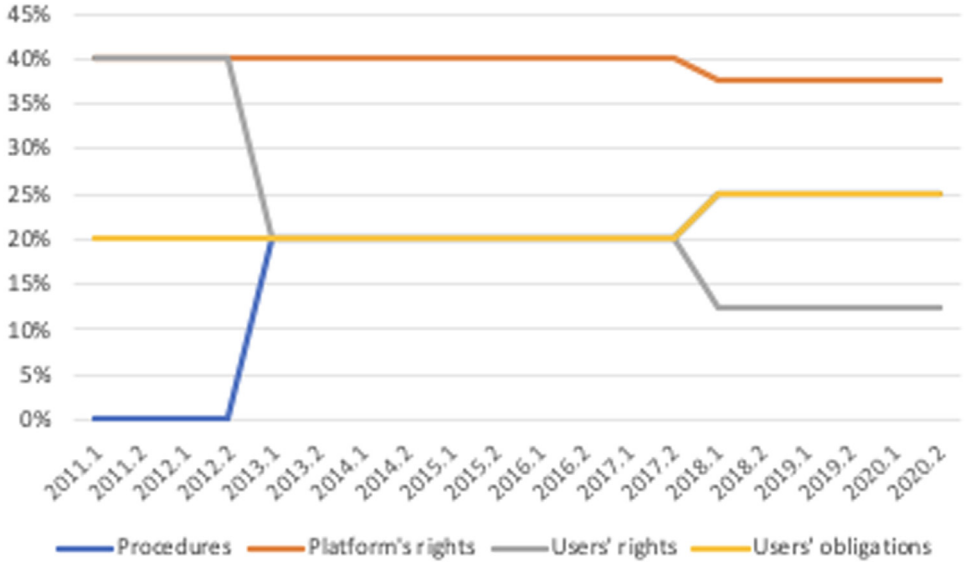


Fig. 7 – Proportion of licensing rules in Instagram's TOS, per normative type, 2011–2020. Source: Authors.

Table 2 – Presence/absence of licencing rules found in Instagram's TOS between 2011 and 2020. Source: Authors.

	2011.1																			2020.2
Procedures																				
All licences end when users delete account or content																				
Platform's rights																				
The platform can retain copies of users' deleted content																				
The platform can retain copyright over own products																				
The platform can retain licences over user comments																				
Users' rights																				
Users can retain copyright over their content																				
Users can use the platform																				
Users' obligations																				
Users must grant licence over their content to the platform																				

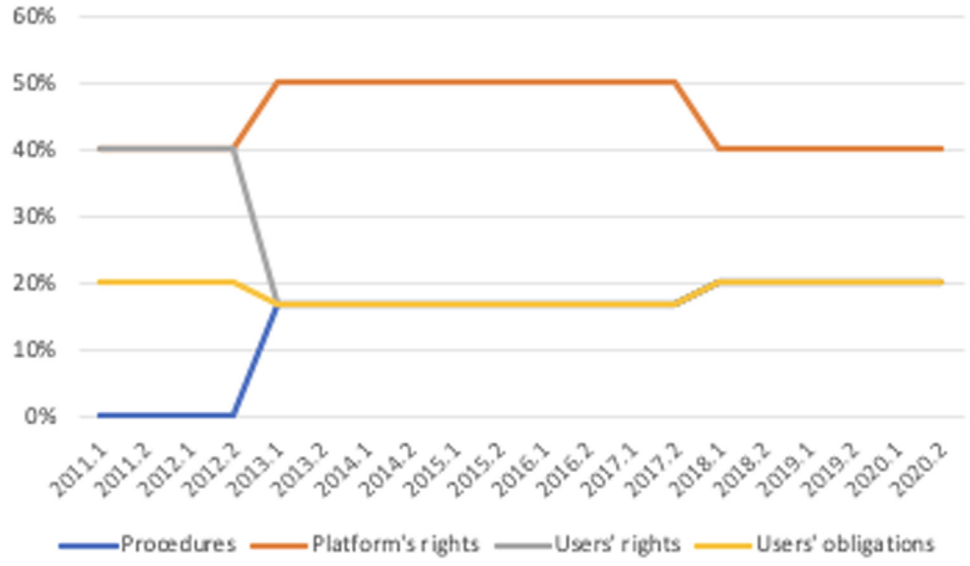


Fig. 8 – Proportion of mentions to licensing rules in Instagram's TOS, per normative type, 2011–2020. Source: Authors.

Users could use the service in exchange for granting to the company a "non-exclusive, fully paid and royalty-free, worldwide, *limited* license to use, modify, delete from, add to, publicly perform, publicly display, reproduce and translate such Content, including without limitation distributing part or all of the Site in any media formats through any media channels, except *Content not shared publicly ("private") will not be distributed* outside the Instagram Services".[114] Launched six years after Facebook, and when social media platforms were already a central social space, Instagram's first TOS appears, thus, to avoid much of the gross inequality that marked the initial rules of that other platform. There were no provisions about the perpetuity of the licence, or which erased the differences between private and public content, for instance. Still, an explicit rule about the end of the license would only be introduced in 2013. Furthermore, the provision according to which the platform can retain copies of users' deleted content was there from the beginning – but qualified by the platform need to "comply with certain legal obligations".[115]

In 2018, Instagram implemented some consequential changes in their rules. One the one hand, the company expanded their control over users' actions by stating that they would also appropriate users' feedback and comments – something that Facebook had done much earlier (see section above). On the other hand, the license users have to grant to the platform started to be described in broader terms as "a nonexclusive, transferable, sub-licensable, worldwide".[116] Missing in this phrasing are the previous qualifications of the licence as "fully paid" and "royalty free", potentially allowing for the possibility that users could be remunerated for their content.

4.2.3. *YouTube*

YouTube's licencing rules history is more complex (10 provisions, in total) and, to some extent, less detrimental to users than those of Facebook and Instagram. Fig. 9 suggests that, while pro-platform's licencing rules were dominant from 2005 to 2017, this dominance was never particularly acute: these kinds of rules never represented more than half of YouTube's licencing provisions.

This relatively modest discrepancy has been further diluted since 2018 and was inverted in 2020. In that year, a plurality of the platform's rules (44%) could be considered as pro-users, twice as much as the proportion of pro-platform's provisions (22%). This normative change appears to have been preceded by a clear discursive focus. As showed by Fig. 10, the percentage of mentions to pro-user rules has been dominant since the second semester of 2007; the proportion of mentions to pro-platforms' provisions decreased from half of the total mentions in the start 2007 to less than 30% by the end of 2020.

The evolution in the relative percentage of normative types (Fig. 11) helps clarify these movements, pointing to a sort of balance between various kinds of rules. Contrary to what we observed with Facebook and Instagram, the proportion of users' rights, platform's rights and users' obligations have been remarkably similar since 2007, and only differentiated in 2019, with the introduction of a platform's obligation. Fig. 12 gives substance to the above findings on the discursive focus on users. It suggests that most of mentions have concerned users' rights and, to a lesser extent, their obligations. Mentions to the rights of the platform, so important in Facebook and Instagram's TOS, never amounted to more than 25% in YouTube's policies.

Table 3 indicates some of the particularities of YouTube's licencing regime. Among the three platforms we examined, they seem to be the only one to have recognized an obligation

[114] Instagram, 'Terms of Use' (*Terms of Use*, 2011) <https://web.archive.org/web/20110418202908/http://instagram.com/legal/terms>.
[115] Instagram (n 114).
[116] Instagram, 'Terms of Use' (*Terms of Use*, 2018) <https://help.instagram.com/581066165581870>.

Fig. 9 – Proportion of licensing rules in YouTube's TOS, per kind of beneficiary, 2005–2020. Source: Authors.

Fig. 10 – Proportion of mentions to licensing rules in YouTube's TOS, per kind of beneficiary, 2005–2020. Source: Authors.

on themselves. In 2019, YouTube stated that "some software used in our Service may be offered under an open-source licence. There may be provisions in an open-source licence that expressly override some of these terms. If so, we will make that open source licence available to you". While this is a conditional rule, it is the only instance we could find in the documents we read of a provision that broadened users' rights over a platform. Another unique element of YouTube's normative framework concerns their explicit provision according to which users must grant licences not only to the company but to their peers – something that in Facebook and Instagram's cases is much murkier.

However, the text of the policies is not as friendly to users as these numbers may indicate. From 2006 to 2010, for instance, YouTube established that the platform needed a licence to "use" *all* intellectual property rights over user's content. Per the original text, users had to "authorize YouTube to use all patent, trademark, trade secret, copyright or other proprietary rights in and to any and all User Submissions to enable inclusion and use of the User Submissions in the manner contemplated by the Website".[117] Another noteworthy expansion of their licence occurred in 2007, when their TOS stated that user's permission should allow the company to "perform the User Submissions in connection with" the business of not only YouTube's but also their "*affiliates*".[118] This shift was likely associated with the acquisition of the platform by Google, in

[117] YouTube, 'Terms of Use' (*Terms of Use*, 2006) <https://web.archive.org/web/20060410020756/http://youtube.com/t/terms>.
[118] YouTube, 'Terms of Use' (*Terms of Use*, 2007) <https://web.archive.org/web/20070926221623/http://www.youtube.com/t/terms>.

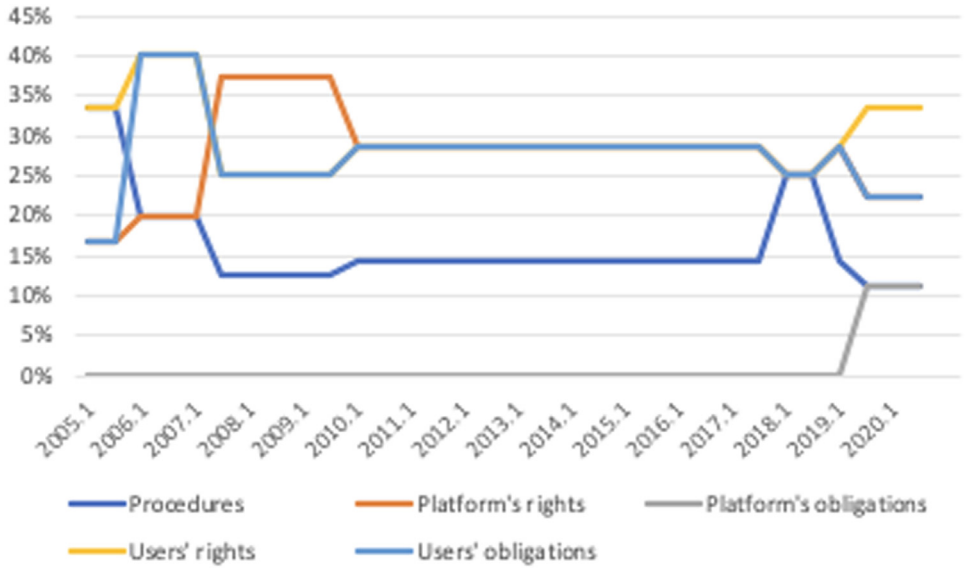


Fig. 11 – Proportion of licensing rules in YouTube's TOS, per normative type, 2005–2020. Source: Authors.

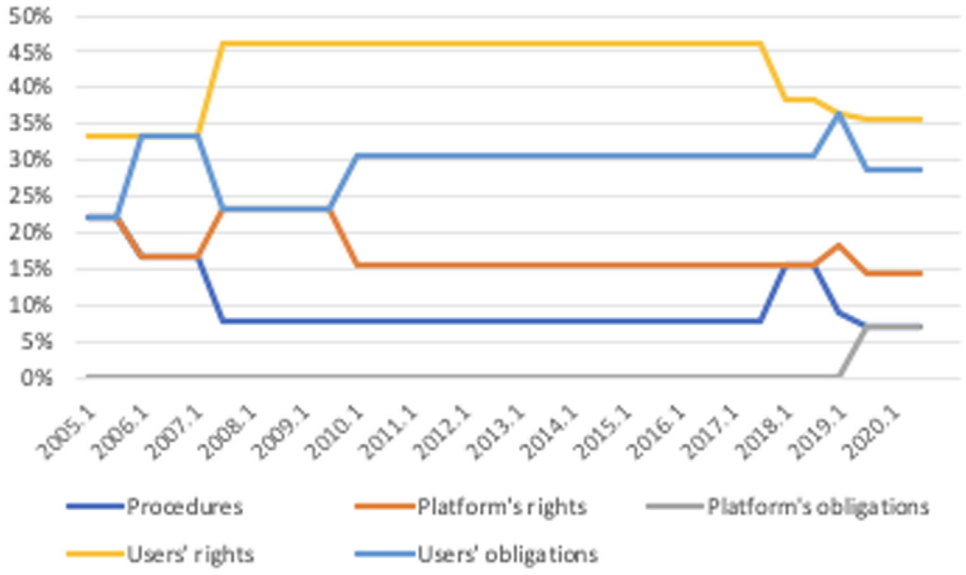


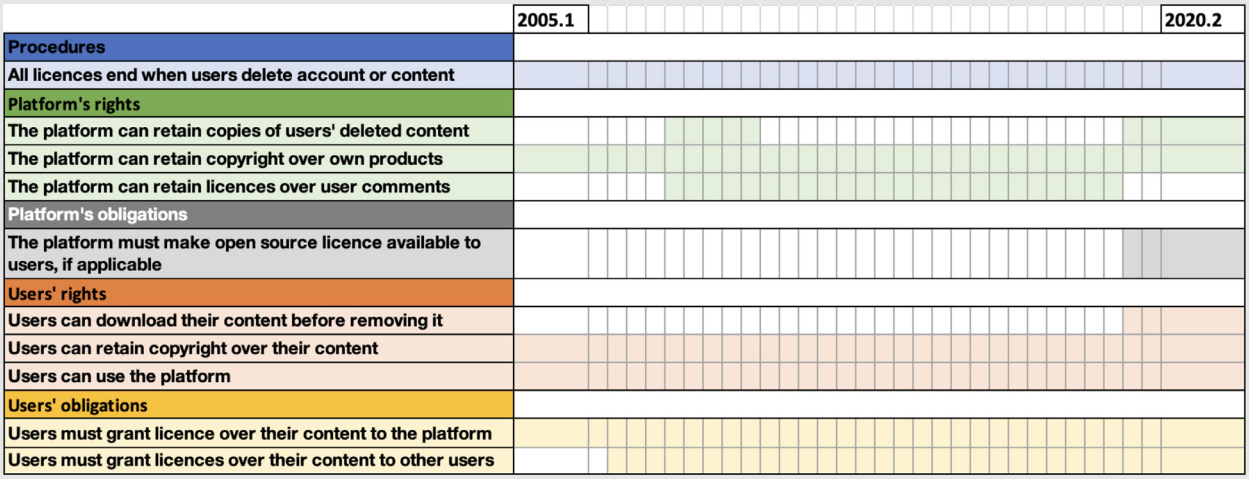
Fig. 12 – Proportion of mentions to licensing rules in YouTube's TOS, per normative type, 2005–2020. Source: Authors.

November 2006. In ruling that the content could be used by their "affiliates", the platform's policy made normatively possible for e.g., Google Search to show snippets of videos uploaded to YouTube. A version of their Terms of Service published in 2010 would impose some restrictions on the platform's power by deleting said mention to intellectual property rights, substituting "successors" and "affiliates" "YouTube business" and adding (largely rhetorically) the term "limited" to their license.

Yet, the version of their licence over users' content which was in place at the end of 2020 remained (as with Facebook and Instagram's) extraordinarily broad and vague. It read: "you [user] grant to YouTube a worldwide, non-exclusive, royalty-free, transferable, sublicensable licence to use that Content (including to reproduce, distribute, modify, display and perform it) for the purpose of operating, promoting, and improving the Service".[119] One of the most interesting aspects of this wording is that is the only document we analysed in which the semantic preponderance of the term "use" is made crystal-clear. As this excerpt suggests, all cited actions ("to reproduce, distribute, modify . . .") that mirror exclusive rights under copyright are just some of the *possible* ways in which platforms

[119] YouTube, 'Terms of Service' (*Terms of Service*, 2019) <https://www.youtube.com/static?gl=IE&template=terms>.

Table 3 – Presence/absence of licencing rules found in YouTube's TOS between 2005 and 2020. Source: Authors.



can "use" content uploaded by users. It is also noteworthy that, in contrast to what happened to Facebook and Instagram's licences, the expression "royalty-free" remains in place.

It is interesting to contrast our findings with those reported in YouTube's latest (at time of writing) copyright transparency report, containing data from the first semester of 2022.[120] As described therein, ContentID is one of three tools of YouTube's Copyright Management Suite, together with the webform and the Copyright Match tool. The aim of all these tools is "to prevent the reupload of matching content".[121] However, the tools are not equally available to all users. Whereas the webform is open to all users, Copyright Match is available to those that are members of the YouTube Partner Program or "demonstrate short history of takedowns", and ContentID is only available to users with a "[d]emonstrated need of scaled tool, understanding of copyright, and resources to manage complex automated matching system…".[122] ContentID thus aims at serving the needs of users that are large copyright holders, so-called "enterprise partners" like "movie studios, record labels, and collecting societies".[123] For smaller, independent creators, such as those user-creators mentioned in our analysis, the tool is only partly available (if at all) through intermediary service providers that will manage their rights through the system.[124] This is an important point, since ContentID is the only tool in YouTube's Copyright Management Suite that allows users the option to monetize matched content, in addition to tracking and blocking it.[125] In fact, YouTube reports that rights holders using the tool opted to monetize 90% of claims on ContentID during the period reported.[126]

To be sure, the prevalence of monetisation over blocking on ContentID is a positive development for rights holders, from the perspective of remuneration, as well as for the general public accessing content on the platform, from the perspective of their access to culture and information.[127] However, it is also true that ContentID is mostly beneficial to large rights holders and only indirectly to smaller, independent creators. To give a sense of scale, there are about 9000 ContentID users – the "smallest number of users" of any YouTube Tool – which however amount to "over 98% of all copyright actions on YouTube".[128] In contrast, there are 2 billion users of the webform tool and around 2.5 million users of the Copyright Match tool, the vast majority of which appear to be ineligible to monetize the content they upload.[129]It is therefore unclear how smaller, independent user-creators may benefit from YouTube's monetisation tools for their own content. Furthermore, although the system includes safeguards, smaller creators appear to be in a difficult position to monetize their "transformative" uses containing third-party content (e.g. samples, remixes and mash-ups), even where these might benefit from freedom of expression-based user rights under Art 17(7) CDSMD, namely the exceptions for quotation, criticism, review, and use for the purpose of caricature, parody or pastiche.[130] This is because ContentID enables large rightsholders to claim monetization for segments of an upload that match a reference file they provided, whilst leaving the uploader with the burden to argue for the applicability of an exception through counternotices.[131] But even if up-

[120] YouTube, 'YouTube Copyright Transparency Report H1 2022' (YouTube 2022) Copyright Transparency Report <https://storage.googleapis.com/transparencyreport/report-downloads/pdf-report-22_2022-1-1_2022-6-30_en_v1.pdf>. (noting that YouTube paid USD 7.5 Billion of Ad revenue "to rightsholders as of December 2021 from content claimed and monetized through Content ID").
[121] YouTube (n 120) 1.
[122] YouTube (n 120) 1.
[123] YouTube (n 120) 3.
[124] YouTube (n 120) 3.
[125] YouTube (n 120) 3.
[126] YouTube (n 120) 3.
[127] YouTube (n 120) 1.
[128] YouTube (n 120) 4–5.
[129] YouTube (n 120) 5.
[130] See Subsection 3.1.
[131] After the implementation date of the CDSMD and the Court's judgement in Case C-401/19, this outcome is arguably incompatible with EU law, since Member States must ensure that uploads

loaders are successful in such a counternotification – an option seldom used in practice as per YouTube's own data[132] – it is not clear how the smaller creator originally uploading the content may monetize it. In sum, despite the positive developments surrounding increased monetization possibilities on YouTube, this additional lever of control over content favours almost exclusively larger enterprise rights holders rather than smaller, independent users-creators. Furthermore, such monetisation takes place in an environment tightly controlled by the platforms' rules and (algorithmic) practices, for instance as regards eligibility and access criteria, counternotice process, rules on abuse, modalities and levels of monetization.[133]

5. Controlling users' expression and content through copyright and TOS?

The analysis in this article shows a clear trend towards increased regulation of large-scale online platforms that host copyright-protected content in EU law. These platforms are not only subject to general rules on intermediary liability and due diligence obligations in the DSA but also to the sector-specific rules in the EU *acquis*. For coyright-protected content, the most relevant of such rules are those governing OCSSPs in Art 17 CDSMD and, as far as exploitation contracts with user-creators are concerned, those in Arts 18 ff. CDSMD. However, these provisions focus on moderation of illegal content by platforms, including copyright infringing content by OCSSPs, and on exploitation contracts outside user-generated content platforms. For the most part, they do not tackle the underlying contractual relationship between users and platforms, on the basis of which platforms build and operate their business models, and carry out moderation for all content they host.[134]

As a result, there is ample space available for private ordering of platforms' relationship with users, of which platforms have taken advantage. In particular, platforms may more or less freely shape what user-uploaded content they host, how it can be commercially exploited or monetised, and more broadly how they moderate content that is not copyright infringing. Platforms also have *some* margin of discretion in the moderation of copyright infringing content, subject to the restrictions imposed by law. The source of this power of platforms is their contractual relationship with users, manifested in platforms' TOS and operationalised in their human and technical (including algorithmic) structures and practices. Thus, as instruments of private governance, TOS play a crucial rule in increasing the influence platforms hold over their users' activity and online expression as manifested in the content they upload or post.

Our analysis points to two important dimensions where the power of platforms to control their relationship with users regarding their copyright-protected content matters. The first, which is the focus of our empirical analysis in this article, refers to the control over and commercialisation of users-creators' content. The second dimension, which we have not empirically tested but flows from the first, is the impact rules on control over content and monetisation might have on the freedom of expression of users. Both dimensions can potentially translate into harms for creators and the public that use online platforms. Neither dimension is properly recognized by EU copyright law, which mostly focuses on balancing the protection of rights holders with the freedom of expression of users in the context of preventive and reactive measures deployed by platforms, such as filtering and blocking of copyright infringing content.[135]

At a first and more direct level, platforms can almost unilaterally impose rules on the commercial exploitation and monetization of uploaded content to their users. It is an organising principle of platforms' business models that they need to obtain control over their user's uploaded content in order to function. From a legal standpoint and as regards copyright-protected content, this means obtaining – or rather *imposing* via TOS – a broad license from/on their users. As underlined, large OCSSP/VLOPs design these licenses in broad and vague terms around the notion of "use", including almost any type of act and mode of exploitation covered by copyright and arguably even beyond it (e.g., datafication of uploaded content to train datasets, enhancing microtargeting, etc.), whether on the same platform or on different websites.

Recent changes in the CDSMD only laterally touch on this point: Art 17 by imposing direct liability on OCSSPs and explicitly pushing them towards licensing user-uploaded content, especially from large "enterprise" rights holders ;[136] Arts 18 *et seqs* by imposing certain rules on appropriate and fair remuneration of creators, which are however difficult to apply to OCSSPs. The upshot is that a new and growing class of user-creators (e.g., influencers), which depends on large-scale OCSSPs for their income, is left-out in the cold. Platforms are in complete control of what, as our empirical research suggests, is a deeply unbalanced relationship. This power of platforms is manifested by the ability to set and unilaterally adjust the rules for exploitation of the content uploaded by users, including via what could be *lato senso* understood as moderation actions: content removal, account suspension/removal, demonetisation, de-ranking, changes in algorithmic remuneration rules, etc. They are further free, from the perspective of copyright law, to determine how their monetisation programs function, which users-creators are eligible, and how they are remunerated, not just as a matter of contractual rules (in their TOS) but also as a matter of how such monetisation is

that qualify as uses privileged by the user rights in CDSMD (n 4), Art 17(7) cannot be blocked by OCSSPs. On this topic, see Quintais and others (n 9); Tito Rendas, 'Are Copyright-Permitted Uses "Exceptions", "Limitations" or "User Rights"? The Special Case of Article 17 CDSM Directive' (2022) 17 Journal of Intellectual Property Law & Practice 54; H. Grosse Ruse-Khan, 'Automated Copyright Enforcement Online: From Blocking to Monetization of User-Generated Content' (2020). Bruun et al (eds.), "Transition and Coherence in Intellectual Property Law" (Cambridge University Press, 2021).

[132] YouTube (n 120) 10. (putting the percentage of disputed claims in ContentID at 0.5%).

[133] For a description of some of these dimensions, often with little transparency, see YouTube (n 120).

[134] CDSMD (n 4), Arts 18ff do address exploitation contracts with creators but their applicability and effectiveness in the context of OCSSPs in unclear. See Subsection 3.2.

[135] See supra at Subsection 3.1.

[136] Quintais (n 54); Husovec and Quintais (n 1).

managed by their algorithms, e.g. as regards visibility and demonetisation. There appear to be no effective checks on this power of platforms in EU copyright law. In this respect, only in regimes external to copyright users-creators are likely to find assistance. As noted in our analysis, if its accepted that the DSA applies complementarily to OCSSPs despite the *lex specialis* of Art 17 CDSMD, the inclusion of content visibility actions and demonetisation in the concept of "content moderation" in the DSA, as well as its regime on "terms and conditions", might prove helpful for creators in the future.[137] However, the interaction between these legal regimes is still unclear at this stage.

The instrumental nature of the TOS for subsequent content moderation activities points to a second and related dimension of this TOS-driven power of platforms: the potential implications for freedom of expression of platforms' control over users' content, including for commercial exploitation purposes. As noted, this dimension was not the object of our empirical research in the three case studies examined in Section 4. However, it is our view that these two dimensions are primarily interconnected, and it is important to reflect on them.

As anticipated by our theoretical framing, the low threshold of originality that marks the gateway for copyright protection means that much of the content hosted by platforms is protectible. This overlapping of users' expression with protected content means that copyright law operates as a type of speech regulation. This is clear from the balancing of rules on freedom of expression-based exceptions or user rights[138] vs preventive measures in the internal system of Art 17 CDSMD.[139] However, it is less obvious as regards other types of moderation actions over copyright-protected content that are mostly unregulated in the copyright *acquis*, especially as regards visibility and monetisation. In this context, TOS function as building blocks upon which content moderation rules operate, and together with the practices and algorithmic systems of platforms have a significant impact on how creative content is disseminated. From a broad perspective, the possibility for users to produce and publish content on online platforms is primarily shaped by the private governance of online content moderation by platform providers. Users' creative expressions are not only commodified and potentially commercially exploited but also shaped and limited by business purposes, primarily focused on profit maximisation. In doing so, under the guise of establishing private rules to govern copyright-protected content on their services, platforms shape and exercise significant control on users' ability to publish content and, therefore, their freedom of expression.

With few exceptions, the historical unequal nature of this contractual relationship allows platforms to dictate terms under which users can engage with the content hosted on these platforms. Given the expressive and cultural value of this content, and the fact that platform's moderation activities are predominantly aligned with their business interests, it is appropriate to ask whether this is a desirable outcome from the perspective of copyright law and policy in particular, and freedom of expression in general.

6. Conclusions

This article combines legal and empirical analysis to study the power of large-scale platforms over their users' copyright-protected content and its effects on the governance of that content, including on its exploitation and users' freedom of expression. We examine the regulation "of" online platforms that host and provide access to user-uploaded copyright-protected content in EU law. These legal rules shape how platforms must deal with such content vis-à-vis users, clarifying the margin of discretion available to regulation "by" platforms via TOS. Most existing rules in EU law relate to discrete aspects of content moderation of copyright-protected content. Relevant provisions in this respect can be found in Art 17 (on the liability of OCSSPs) and 18 *et seqs* (on exploitation contracts for creators) of the CDSMD, as well in the DSA. However, such moderation is built upon the pre-existing contractual relationship between users and platforms, which defines how users can use the platform, including as regards commercial exploitation. On these matters, we conclude, EU law allows a wide berth for platforms to establish the rules of the game and thereby govern their relationship with users and the content they host.

In order to understand how the regulation by platform influences users' rights, in particular control and monetisation of user's content, our empirical analysis comprises data collection and analysis on the TOS of three large-scale online platforms that qualify both as OCSSPs and VLOPs: Facebook, Instagram and YouTube. The analysis aims to provide a new perspective and evidence-based illustration on how platforms have over time used the afore-mentioned margin of discretion afforded by the legislative framework. The analysis suggests that the history of these three platforms is marked by a constant and deep inequity between companies and users as to who controls and benefits from the content circulating in their services. For essentially their entire existences, Facebook, Instagram and YouTube's normative frameworks have instituted that, in exchange for the right to limitedly use their platforms, individuals had no option but to grant to companies a very broad licence over the texts, videos and images they posted on these services. This is not to say that this aspect of the user/platforms' formal relationship has remained static or that users have no rights whatsoever, much less that no differences between the platforms we examined exist. Indeed, there appears to exist a tendency towards softening said inequality – a shift that has failed, however, to establish a level playing field. Even where the normative or discursive balance between pro-platform and pro-user licence rules is fairer, as it apparently is the case with YouTube recently, that founding discrepancy remains in place. Our analysis further suggests that as regards monetisation of user-uploaded content, platforms exercise significant control over which users are allowed to benefit from this possibility (typically reserved to large "enterprise" rightsholders), and under which conditions and modalities. Crucially, smaller, independent users-creator

[137] See supra at Subsection 3.3

[138] See Case C-401/19, Republic of Poland v European Parliament, Council of the European Union, 26 April 2022 ECLI:EU:C:2022:297, paras 87-88.

[139] See Subsection 3.1.

have lesser control over their content, and fewer opportunities to monetise it.

In sum, despite recent legislative changes aimed at curbing the power of big platforms and enhancing their responsibility for illegal content, we conclude that EU law leaves ample space for the regulation "by" platforms of the user-uploaded protected content they host, allowing them to large extent to control and determine the commercial exploitation of their users' copyright-protected content. Because the threshold for copyright protection is relatively low in EU law, this also means that platforms power extends to a significant part of users' expressions. Within that space of discretion for the regulation "by" platforms, we highlight two particular problems areas arising from an unequal TOS-enabled relationship between platforms and users. The first, which is directly related to our empirical research, relates to the remuneration of user-creators, and the significant power platforms have over monetisation of user-creators' copyright-protected content and expression. Our empirical research illustrates how large-scale platforms have used that margin so far, providing a good indication of how they will continue to do so in the future if left unchecked. Our legal analysis indicates the shortcomings of the current legal framework to address this issue, noting however that the DSA has the potential to improve the situation. The second and related problem, which in our view results from the first, is how this unequal relationship might negatively affect the freedom of expression of users-creators. Further doctrinal and empirical research is required to better understand these dynamics, as well as to characterise and quantify the resulting harms for creators and society.

Declaration of Competing Interest

The authors declare that they have no known competing financial interests or personal relationships that could have appeared to influence the work reported in this paper.

Data availability

Data will be made available on request.

Appendix

Thematic analysis codebook

1. All licences end when users delete account or content

Normative type: Procedure
Main beneficiary: Neutral

Example: "The above licenses granted by you in Content terminate when you remove or delete your Content from the Website." (YouTube's Terms of Service, January 22, 2019)

2. The platform can retain copyright over own products

Normative type: Platforms' rights
Main beneficiary: Platforms (pro-platform rule)

Example: "If you use content covered by intellectual property rights that we have and make available in our Products (for example, images, designs, videos or sounds that we provide, which you add to content that you create or share on Facebook), we retain all rights to that content." (Facebook's Terms of Service, December 12, 2020)

3. The platform can retain copies of users' deleted content

Normative type: Platforms' rights
Main beneficiary: Platforms (pro-platform rule)

Example: "Content you delete may persist for a limited period of time in backup copies and will still be visible where others have shared it." (Instagram's Terms of Service, April 19, 2018)

4. The platform can retain licences over user comments

Normative type: Platforms' rights
Main beneficiary: Platforms (pro-platform rule)

Example: "The above licenses granted by you in textual comments you submit as Content are perpetual and irrevocable." (YouTube's Terms of Services, January 22, 2019)

5. The platform can revoke users' licence without providing a reason

Normative type: Platforms' rights
Main beneficiary: Platforms (pro-platform rule)

Example: "This license is revocable at any time without notice and with or without cause." (Facebook's Terms of Service, September 23, 2008).

6. Users must grant licences for other users

Normative type: Users' obligations
Main beneficiary: Neutral

Example: "You also grant each other user of the Service a worldwide, non-exclusive, royalty-free licence to access your Content through the Service, and to use that Content (including to reproduce, distribute, modify, display, and perform it) only as enabled by a feature of the Service." (YouTube's Terms of Service, July 22, 2019)

7. Users must grant licenses over their content for the platform

Normative type: Users' obligations
Main beneficiary: Platforms (pro-platform rule)

Example: "However, to provide our services we need you to give us some legal permissions (known as a 'license') to use this content. This is solely for the purposes of providing and improving our Products and services as described in Section 1 above. Specifically, when you share, post, or upload content that is covered by intellectual property rights on or in connec-

tion with our Products, you grant us a non-exclusive, transferable, sublicensable, royalty-free, and worldwide license to host, use, distribute, modify, run, copy, publicly perform or display, translate, and create derivative works of your content (consistent with your privacy and application settings)." (Facebook's Terms of Service, July 31, 2019)

8. Users can use the platform

Normative type: Users' rights
Main beneficiary: Users (pro-user rule)

Example: "You may access and use the Service as made available to you, as long as you comply with this Agreement and the law. You may view or listen to Content for your personal, non-commercial use. You may also show YouTube videos through the embeddable YouTube player . . . Unless that software is governed by additional terms which provide a licence, YouTube gives you a personal, worldwide, royalty-free, non-assignable and non-exclusive licence to use the software provided to you by YouTube as part of the Service. This licence is for the sole purpose of enabling you to use and enjoy the benefit of the Service as provided by YouTube, in the manner permitted by this Agreement. You are not allowed to copy, modify, distribute, sell, or lease any part of the software, or to reverse-engineer or attempt to extract the source code of that software, unless laws prohibit these restrictions or you have YouTube's written permission." (YouTube's Terms of Service, July 22, 2019)

9. Users can retain copyright over their content

Normative type: Users' rights
Main beneficiary: Users (pro-user rule)

Example: "We do not claim ownership of your content that you post on or through the Service." (Instagram's Terms of Service, April 19, 2018).

10. Users can download their content before removing it

Normative type: Users' rights
Main beneficiary: Users (pro-user rule)

Example: "You also have the option to make a copy of your Content before removing it." (YouTube's Terms of Service, July 22, 2019)

11. Users can retain copies of others' content for personal use

Normative type: Users' rights
Main beneficiary: Users (pro-user rule)

Example: "[Y]ou are granted a limited license . . . to download or print a copy of any portion of the Site Content to which you have properly gained access solely for your personal, non-commercial use, provided that you keep all copyright or other proprietary notices intact (Facebook's Terms of Service, June 7, 2008)

12. The platform must make open-source licences available to users, if applicable

Normative type: Platform's obligations
Main beneficiary: Platforms

Example: "Some software used in our Service may be offered under an open source licence. There may be provisions in an open source licence that expressly override some of these terms. If so, we will make that open source licence available to you." (YouTube's Terms of Service, July 22, 2019)