## Historical Perspective

The issue of liability and responsibility of platforms was first expressly addressed by the Romanian legislator when the provisions of Directive 31/2000 on e-commerce[[1]](#footnote-1) were transposed into local law by means of Law no. 365/2002 regarding electronic commerce (“e-commerce Law”).[[2]](#footnote-2) These provisions concerned not platforms named as such, but rather the whole class of “intermediary service providers”.

Romanian courts, ruling at a time before the Digital Services Act (“DSA”),[[3]](#footnote-3) held that platforms make available to third parties, online, a space for the storage and publication of information.[[4]](#footnote-4) In that particular case, a simple website offering users the possibility of publishing adverts for the sale of hand watches was considered to qualify as a platform and as a “hosting” service provider under the e-commerce law classification.

A very similar definition for a platform was, however, accepted by a Romanian court in a decision issued after the entry into force of the DSA and, also, in respect of Facebook, which corresponds more to our current understanding of a “platform”. The court there accepted a definition to the effect that online platforms are a space where users can post online user-generated content.[[5]](#footnote-5) Even if the court ruling did not concern an infringement of intellectual property rights or unfair competition, but rather the alleged infringement of personality rights, the difference would not substantiate a difference in the understanding of what a platform under the DSA is.

It would therefore appear that the understanding of platforms as intermediaries and, as such, as service providers under the e-commerce framework, allows a presumption that the decisions of Romanian courts made in application of the provisions of the e-commerce Law are still relevant and indicative of the Romanian courts’ understanding and interpretation of the similar regime under the DSA, thereby providing good guidance as to how the courts would likely interpret the provisions of the DSA.

Specific reference to the liability of platforms for intellectual property rights infringements was inserted in Romanian law upon transposition of Directive 2004/48[[6]](#footnote-6) by adopting Emergency Government Ordinance 100/2005 (“IPR Enforcement Ordinance”),[[7]](#footnote-7) in what concerns industrial property rights and by prompting the transposition of art. 8(3) of Directive 2001/29[[8]](#footnote-8) with the amendment of Law 8/1996 concerning copyright (“Copyright Law”).[[9]](#footnote-9) The text as transposed (both in the Copyright Law and in the IPR Enforcement Ordinance) seems to have only allowed provisional measures to be instituted against the “intermediary whose services are being used by a third party in order to infringe” an intellectual property right, thereby not allowing that a permanent injunction be issued against such intermediary. The courts have, however, established that permanent injunctions against intermediaries are available as well under the law.[[10]](#footnote-10)

After the adoption of the New Romanian Code of Civil Procedure,[[11]](#footnote-11) the Trademarks Law,[[12]](#footnote-12) the Patent Law,[[13]](#footnote-13) and the Law concerning Models and Designs[[14]](#footnote-14) were all amended[[15]](#footnote-15) to expressly include provisions allowing provisional measures to be issued against intermediaries whose services are being used by third parties to infringe a right to a trademark, to a patent or to a registered design.

The law for the combating of unfair competition (“UC Law”)[[16]](#footnote-16) does not, however, contain any reference to the possibility of enforcing against an intermediary. Neither is there any case law where unfair competition rules were applied towards an intermediary as such. While there have been cases where the courts have analysed the liability under the unfair competition rules regime of a provider of online services (e.g. the administrator of a website), the test was aimed at verifying whether the respondent has infringed the norms of fair competition himself, and not as a provider of services to third party infringers.

After the adoption of the DSA,[[17]](#footnote-17) the Romanian Parliament adopted Law 50/2024[[18]](#footnote-18) which repealed the national regime of the safe harbour for intermediary services providers, thus keeping only the regime provided by DSA applicable onwards in Romania.

No case law concerning the liability of platforms or intermediaries for the infringement of intellectual property rights under the new regime created by the DSA has been published in Romania, therefore the only guidance available comes from the cases decided under the previously applicable rules, adapted, where necessary, to the particularities of the new regime.

Meanwhile, the vast majority of claims against platforms involving the application of the DSA have concerned claims made by the platforms themselves against takedown orders issued by the Romanian Electoral Commission for content which was deemed to infringe the electoral law and thus qualify as “illegal” under the DSA.

## Legal Basis for Liability and Responsibility

The legal basis for the liability and responsibility of platforms for the infringement of intellectual property rights by their users has been the protection for right-holders provided for in the laws protecting the various IPRs (Copyright Law, Trademark Law, Patent Law, Designs Law) and the IPR Enforcement Ordinance, with the safe harbour in the e-commerce Law acting as a possible exception to liability, subject to the meeting of the conditions provided therein.

The Romanian courts seem to have started from the imperative grounded in EU law of ensuring a high degree of protection for intellectual property rights and, consequently, interpreted “intermediary” broadly. Thus, the Bucharest Tribunal found that the concept of intermediary all intermediaries whose services are used by a third party to infringe an intellectual property right. The Court refers to Case C-557/07, in which the Court clarified that the concept of intermediary also includes access providers who merely provide users with access to the internet without offering services such as in particular, email, FTP or file-sharing services, and without exercising de facto or de jure control over the service used.[[19]](#footnote-19)

In a decision of the Bucharest Tribunal, confirmed on appeal by the Bucharest Court of Appeals,[[20]](#footnote-20) the court extended the scope of platforms to include the simple provision of a website on which adverts for the sale of hand watches are placed by third party users and further held that the fact that the administrator of the platform was also directly involved in the grouping of adverts (by the alphabetical sorting by brand name and the classification by types of customers) confirms the respondent’s liability for trademark infringement and also removes the application of the safe harbour for passive providers of hosting services (under the then-applicable regime provided by the e-commerce Law).

The Bucharest Court of Appeals further extended the liability to a director general of an online publication/platform, even if he was not the owner of the publication. The court held that “The fact that the appellant-defendant is not the owner of the online publication on the website www.puterea24.ro or the respective platform is irrelevant as long as he appears in the contact section of the respective press agency with the title ‘general manager’, and his involvement in the counterfeiting of the claimant’s trademarks or the unauthorised reproduction of his alleged works can easily be presumed”.[[21]](#footnote-21)

The liability of the platforms was held by the courts[[22]](#footnote-22) to be a direct liability for IPR infringement but courts have distinguished between the liability of the user who infringes the IPR directly and the liability of the platform as intermediary who provides the digital infrastructure on which the respective user infringes the IPR.

While courts have struggled somewhat with establishing the characteristics of the liability of intermediaries, most aspects have, eventually, been clarified. The liability of platforms is direct and not accessorial because Romanian courts are now unanimous in finding that there is no need for a pre-existing decision acknowledging the infringing character of the platform user’s conduct, before the right-holders can claim against the platform. This appears to remain true irrespective of the type of procedure initiated by the right-holder, i.e. preliminary relief proceedings or final injunctive relief proceedings. However, a prima facie appearance of infringement by the user of the platform needs to be proven by the plaintiff in order to succeed against the platform.

The Bucharest Tribunal has, however, held that a claim for damages against the platform could only be initiated where the platform disobeyed a measure imposed upon it by a public authority as provided by art. 17(2) of the E-commerce Law. Thus, injunctive relief, both on a preliminary and on a final basis, can be claimed for by the right-holder against the platform directly, with no prior procedures necessary, but a claim for damages against the platform requires that the platform has been subjected to specific measures by a public authority and the platform subsequently disregarded, in whole or in part, these measures.

The courts in Romania have also specifically indicated that the decision on the claim against the platform is not ostensible to the users. Thus, the Bucharest Tribunal has expressly held that the users, who are the platform’s customers, remain unaffected by the decision and retain their own right to claim against both the right-holder plaintiff and against the respondent platform.

The High Court has held that,[[23]](#footnote-23) in establishing the type of direct liability of the platform, its status as an ‘active’ or ‘passive’ provider, in the sense of the E-commerce Law would need to be first assessed. This is because even if in both cases the rules for civil liability under tort apply, the ‘passive’ provider is liable for the actions of another – it’s users – while the ‘active’ provider answers for its own actions. If the safe harbour provisions in the E-commerce Law can pre-empt liability in the case of the ‘passive’ provider, they can’t do so where the provider is ‘active’.

Therefore, platforms can be called to stand in court in claims brought against them by right-holders, for their own infringing actions or their actions in facilitating infringement by others and, even in the latter case where their actions are indeed connected to the specific activities of their apparently infringing users, without the need for the user’s activities to have been priorly found by a court to be infringing and without prejudice to the users’ right to sue for reinstatement of their content or access should they prove that their use is, in fact, non-infringing.

Liability of the platforms for IPR infringement was almost exclusively sought under civil law, not criminal law. The one case that we are aware of[[24]](#footnote-24) was one where administrators of a local internet service provider which provided access to the internet via a cable infrastructure that it had put together in a neighbourhood were criminally pursued for copyright infringement as they had within that network also allowed access to a file-sharing service where copyright-protected works were made available to users without the license of the right-holders. The court acquitted the defendants finding that, although the copyright infringement was proven, their actions lacked the degree of social danger required for such to lead to a criminal conviction. Civil damages were awarded.

One court has held[[25]](#footnote-25) that civil liability of platforms should be tested following the general rules for liability for tort, but by reference only to the platform’s own actions and not to the allegedly infringing acts of the platform’s users. Thus, the platform was held to have infringed the IPRs of the right-holders as an intermediary which provided services facilitating infringement but not to have infringed the right-holders’ reproduction and public communication rights in their works, which could only be assessed by reference to the actions of the users of the platform and not the platform itself.

A similar conclusion was reached also by a panel from a different division of the Bucharest Court of Appeals,[[26]](#footnote-26) still applying the general rules for tort liability in respect of the platform, but also holding that exemption clauses in its terms and conditions or contractual obligations towards its users did not exempt it from civil liability towards the IPR-holders.

## Monitoring Obligations

Most decisions of the Romanian courts agree that, under the old regime consisting of the E-commerce Law, platforms which were deemed ‘passive’ or ‘neutral’ providers of services could be exempt from liability for IPR infringement if, upon notification by the right-holders of the illegal nature of the information provided or its potentially damaging character, the platform quickly eliminates or blocks access to such information.

The High Court has used[[27]](#footnote-27) the definition of ‘passive’ providers of services used by the CJEU in *L’Oreal v eBay*,[[28]](#footnote-28) holding that, in order to qualify, a provider must not make any intervention on the information but must offer its users only a technical support by the making available to the users of a virtual space wherein information accessible to the public can be posted and therefore does not organize, manage, amends or assists with the optimization of its presentation or the promotion of information hosted.

As the DSA replaced the safe-harbour rules formerly contained in the E-commerce Law, the liability and duties of platforms are now determined by the DSA itself including in cases when Romanian law is applicable.

The DSA provides for “liability privileges” which are also applicable in Romania. Intermediaries are not liable for user-generated IP infringements if they remain passive and act swiftly once notified, but face obligations to set up accessible procedures and maintain transparency.

Romanian courts had already applied similar principles before the DSA, under the e-commerce Law. A key example is Decision 404/2015,[[29]](#footnote-29) in which the Bucharest Court of Appeals addresses the liability of an online intermediary, operator of a website, for IPR infringement, specifically the unauthorized use and promotion of registered trademarks and counterfeit products by third parties on its platform. The defendant argued that it merely provides an online platform for third-party offers, does not sell or hold the products, and that all responsibility for respecting right-holders’ IPRs lies with the suppliers, as stipulated in the website’s terms and conditions and contracts. The court held that the online intermediary was liable for trademark infringement because it facilitated the promotion and sale of counterfeit goods even after notice. The court rejected reliance on contractual disclaimers or terms of use as shields against third-party claims and highlighted that "intent is not required", negligence or failure to act upon notification is sufficient for liability. Romanian case-law therefore seems to interpret “facilitation” broadly: once notified, platforms must act, and contractual disclaimers will not shield them.

Under the provisions of the E-commerce Law, the benefit of the safe harbour was not dependent upon the implementation of an active monitoring mechanism. In fact, the methodological norms adopted by the Romanian Government for the implementation of the E-commerce Law specifically indicated that the providers covered by the safe-harbour “do not have the obligation to monitor the information they transmit or store and neither the obligation to actively search for data regarding apparently illegal activities or information.”[[30]](#footnote-30) Court decisions subsequently confirmed that no obligation for a general monitoring of information exists or that it such could be imposed upon a platform under the E-commerce Law.

With the entry into force of the DSA, the principle remains that platforms are not subject to a general obligation to monitor the information they transmit or store, nor to actively seek facts or circumstances indicating illegal activity (Article 8 DSA). However, under the DSA's “Good Samaritan” rule (Article 7 DSA), platforms are allowed and even encouraged to take proactive steps against potentially infringing content without automatically forfeiting their safe harbour protections.

Nevertheless, in Romanian case-law (such as Decision 876/2016 of the Bucharest Court of Appeals),[[31]](#footnote-31) the courts have considered the extent to which a platform should have monitored content that was previously flagged as infringing, especially when the content was explicitly labelled by users of the respective platform as a “replica”. The court suggested that, once notified, the platform had a heightened responsibility to monitor and act on similar content, even if a general monitoring obligation did not exist.

Romanian law, as previously structured under e-commerce Law, did not contain explicit provisions regarding algorithmic content monitoring or the use of automated tools to influence user experience. The focus was on notice-and-takedown procedures and the absence of a general monitoring obligation.

The DSA introduces more nuanced obligations. While it maintains the prohibition of general monitoring obligations, it does regulate the use of algorithmic systems, especially for very large online platforms (VLOPs). The DSA requires transparency regarding content moderation policies, including the use of automated means (Articles 14 and 17 DSA). Platforms must inform users about significant changes in the way content is presented, especially if algorithmic systems are used to recommend or prioritise content. Furthermore, the DSA imposes risk assessment and mitigation obligations on VLOPs, particularly regarding the impact of their algorithms on fundamental rights and the dissemination of illegal content.

## Mechanisms in cases of infringement

Under the regime of the E-commerce Law, the Methodological Norm provided that all providers of services within the scope of the Law must implement a procedure by which any person can file complaints and notices regarding apparently illegal activities or apparently illegal information undertaken by or provided by the users of the services.[[32]](#footnote-32)

The Norm provides that such procedure must be free for those using it, must also be available by electronic means, must be published on the provider’s website and must ensure that complaints and notices are received by the provider no longer than 48 hours after being posted.[[33]](#footnote-33)

Romanian courts have held that intermediaries such as platforms lose the benefit of the safe harbour when they become aware of the apparently illegal activity or information undertaken or provided by the users and do not swiftly remove or block access to that activity or information. Courts have indicated[[34]](#footnote-34) that a provider is deemed to have been made aware of such upon receiving a sufficiently precise and substantiated communication such as one capable of bringing to the attention of a diligent professional the unlawful nature of the activity or information. Being served with the statement of claim of the right-holders holding it liable for its users’ activity was also held to count as proper notice which, if ignored, can lead to the safe harbour no longer applying. Not every single instance of infringement must be indicated for the provider to take action against it, courts expecting the provider, once notified, to search himself for acts of possible infringement similar to the ones notified by the right-holder and to take appropriate action in respect of all.

In the same decision as mentioned above, the Bucharest Court of Appeals held that the lower court correctly applied the CJEU ruling in *SABAM v. Netlog*,[[35]](#footnote-35) which held that EU Directives 2000/31/EC, 2001/29/EC, and 2004/48/EC, interpreted in light of fundamental rights, prohibit national courts from ordering a hosting provider to install, at its own expense and indefinitely, a preventive filtering system applying to all users in order to detect files containing protected works. Although the claimants argued that their request was limited to specific websites, the initial claim was drafted broadly and without time limits, making the SABAM ruling applicable. The contention that SABAM concerned internet access providers rather than hosting services was also rejected, since Netlog itself was a hosting provider. Therefore, the first-instance court was right to rely on the CJEU’s reasoning and dismiss the claim for imposing such a filtering obligation. However, if we were to interpret this decision per a contrario, we could argue that a claim to apply a filtering system which is limited based on certain websites or users might be acceptable.

Although in several cases courts have emphasized the need for the takedown to be made ‘fast’ after receipt of notice, decisions have not included clear criteria to determine whether a response is fast or not but have tried to apply common sense to determine whether the two (notice and reaction) could be considered linked in time. Where the mechanism is not working as required the provider can’t claim protection under the safe harbour and, consequently, he will not be shielded from liability.

This means that the platform can be held liable for damages calculated, where infringement if IPRs is concerned, as provided in the Copyright Law or the Enforcement Ordinance. Thus, right-holders can claim for actual losses, clawback illegal profits made by the infringer, and moral damages. A line of case-law developed in the Romanian courts in the sense that the first two are alternative options and cannot cumulate. Therefore, the right-holder plaintiff can choose which of the two methods for the calculation of damages should be used by the court, i.e. losses of the right-holder or profits of the infringer.

The Romanian Government has also adopted[[36]](#footnote-36) a procedure for the granting of trusted flagger status which was used to grant such status to two NGOs in Romania, one to deal with issues concerning the protection of minors and the mother, more generally, with illegal speech.

The grant is made pursuant to an application process initiated by the person wishing to the awarded this status. The application form needs to be complete and provide evidence that the applicant meets the criteria provided for in art. 22(2) of the DSA. In order to do so, the Procedure requires that the applicant prove that it has within its structure natural persons with responsibilities regarding the detection, identification, and notification of each type of illegal content specified in the form, as well as regarding the coordination of these activities, who possess the necessary legal and technical expertise and experience to enable the applicant to detect, identify, and notify illegal content. Moreover, the applicant must demonstrate knowledge of the legislation applicable to each type of illegal content specified in the form, including national legislation and, where applicable, the languages of each country where it intends to notify illegal content; that he uses digital technologies, particularly with regard to the monitoring of online platforms; that he has the necessary scientific expertise or collaborates with external experts when the content to be assessed is of a scientific nature; that he makes decisions independently of any online platform provider, and no member of the staff of an online platform provider is involved in the applicant’s decision-making; that he has a transparent financing system that ensures its independence from any online platform provider in its activity as a trusted flagger; that he prohibits persons directly or indirectly involved in the activity of notifying illegal content from being part of the staff of an online platform provider (or of a consultancy firm working for an online platform provider); that he has sufficient resources (human, technical, financial) to regularly detect, identify, and notify the type or types of illegal content specified in the standard form; that he sends precise notifications and undertakes to respect the rights of active recipients of online platforms, including their fundamental rights and safety; that he maintains an up-to-date website that allows active recipients of online platforms to electronically submit a notice regarding the presence of potentially illegal content on an online platform together with the necessary supporting information; and that he allows the exchange of information with active recipients of online platforms and with online platform providers through electronic means.

Once granted the trusted flagger status, the notifications submitted by this flagger need to be prioritized and also need to be analyzed and decided upon without unjustified delay, not doing so being a contravention under Romanian law.[[37]](#footnote-37) In the pre-DSA regime, the Bucharest Tribunal did not accept the argument proposed by the respondent platform that it could not act on the notification until the notifier provided evidence of ownership of the trademark allegedly infringed, in order to avoid the wrongful removal of lawful content, instead holding that action should have been taken based on the notification alone.[[38]](#footnote-38)

Romanian courts, including the High Court, have pointed out that takedown or access blocking orders issued against the platform are not ostensible towards the users of the platforms, thus enabling them to claim against either the platform or/and the right-holder for reinstatement of the content/access. The decisions thus seem to suggest that interested users can file their own claims with no res judicata effects stemming from the injunctive relief decisions issued against the platforms barring or limiting them, thereby providing users with an effective avenue for review of the measures taken by the platform. This was considered a balanced approach, meeting the requirements of proportionality under the test for the restraining of fundamental rights, such as the freedom of expression.

While it seems to be clearly accepted that courts should be open to analyzing such claims and, upon examining them, review the proportionality of the measures limiting the rights, especially the fundamental rights of the parties, it is less clear what the position of the platform should be when asked by the users to review such a takedown and/or access blocking measure it has implemented upon being notified by the right-holder.

The fact that courts seem to converge in their decisions on the conclusion that platforms should implement the measures requested by the right-holder upon, at most, a prima facie review of the rights held and their infringement by the platform user complained of, seems to indicate that a review of that position upon appeal by the user would not be possible. This would however seem to be at odds with a decision of the Bucharest Tribunal,[[39]](#footnote-39) dismissing such a claim by the user against the right-holder on the grounds that it was the platform (in that case Youtube) who decided to block or remove content based on its own terms and conditions, not the user who reports it. Moreover, the user is excluded from liability under tort because that would require an illicit act, which merely using the mechanisms provided by the platform cannot be unless abuse or intent to cause harm is additionally proven.

Thus, an apparently minor matter raises important questions on the application of the requirements of the European Convention of Human Rights (ECHR) as interpreted by the European Court of Human Rights (ECtHR) concerning whether a private entity, such as a platform, maybe headquartered in a state outside the territorial scope of the ECHR, can be required to undertake, possibly after an adversarial procedure, a lawfulness and proportionality test and balance the claims and rights of the right-holder and the measures sought against the fundamental rights of the user. Generally, courts have considered that only they can undertake such procedures and can perform the proportionality test in respect of the limitations to the fundamental rights involved.

## Fundamental Rights

Romanian law, in line with EU law and the ECHR, incorporates several safeguards to ensure that the enforcement of intellectual property rights is balanced against fundamental rights such as freedom of expression, the right to information, and the right to a fair trial. Courts are the fora normally required to perform a proportionality assessment when granting or enforcing measures that may restrict fundamental rights in the context of IPR enforcement. Following both national and EU jurisprudence, courts must ensure that any measure taken to enforce IPRs (such as website blocking, content takedown, or injunctions) is proportionate to the legitimate aim pursued and does not unduly restrict fundamental rights.

Even though not specifically dealing with IPRs or UC claims, the Cluj Tribunal, when considering a request for provisional relief in a takedown request against Meta under the provisions of the Romanian Civil Code dealing with the protection of personal and moral rights, but also taking stock of the DSA, balanced the protection of privacy under art. 8 ECHR with the protection of freedom of expression under art. 10 ECHR, finding, in that case, that, due to the public nature of the plaintiff’s position, the plaintiff was not prima facie entitled to such provisional relief.[[40]](#footnote-40) The decision would seem to support an expectation that, when dealing with claims against online platforms falling within the scope of the DSA, the courts would also take into account the effect of protection of fundamental rights under the ECHR.

This would all lead to the conclusion that only courts are supposed to balance the protection of fundamental rights against the measures sought by right-holders, with the platforms only required to act expeditiously in taking down the allegedly infringing content or blocking access thereto.

However, a decision by the Pitești Court of Appeals,[[41]](#footnote-41) currently under appeal before the High Court, proposes that the analysis of proportionality by reference to the fundamental rights protected under art. 7, 8 and 10 of the ECHR should have been performed by the platform, Google, upon being notified with a takedown request, its error in so doing, and in requesting that the infringing character of the content be proven by means of prior court decisions or that plaintiff had started claims against the author or editor of the content, being held by the court as an indication of Google’s failure to respect the obligations incumbent upon it as a platform.

In a dispute before the Bucharest Tribunal the defendants,[[42]](#footnote-42) major internet providers who were requested to permanently block certain websites and their future online locations, upon notification, argued that the measure requested by the right-holders infringed the platform’s users’ fundamental rights of was disproportionate by reference to the IPRs infringed. Respondents claimed the measures requested were discriminatory and distorted competition in the market because the sought measures excluded mobile internet connections from the scope of the request, thus making a very important but unjustified difference between the different internet service providers and between the clients of such providers. Moreover, the defendants argued that the measure to block future locations would unduly restrict the freedom to conduct business, users’ right to be informed, and the website owners’ right to impart information. These arguments were not dealt with by the court because following these arguments, the claimants amended their statement of claim and dropped the head of claim regarding the blocking of future online locations of websites upon request.

The court only dealt with the overall proportionality of the access blocking measures sought and held that, as long as the users of the platform are not parties to the proceedings, the decision is not ostensible upon them, and strangely, that therefore the decision can’t damage them in any way – even if the decision ordered the provider to block access to their websites – since they can always claim against the platform using their contract as legal basis for such.

On a similar note, in a different decision,[[43]](#footnote-43) the Bucharest Tribunal held that although EU law allows right-holders to seek measures against intermediaries whose services are used to infringe intellectual property rights, such measures must respect proportionality and be in balance with the protection of the fundamental rights of third parties. In this case, the defendant was only one of many internet service providers, and blocking measures solely against it would be discriminatory and ineffective, since users could easily migrate to other providers. Therefore, in this case, the court accepted the discrimination argument invoked by the defendant internet services providers and denied provisional relief.

## Conclusions

In short, the current responsibilities and/or obligations of online platforms in Romania would seem to be bordering obsequiousness towards right-holders, with courts leaning significantly with the interpretations of law in favour of the right-holders, probably identified in most cases as the more feeble party of the two.

This trend would seem to have been developed under the regime of the old safe harbours in the E-commerce Law and inertia would likely keep the scales the same for quite a while under the DSA as well. This entails a wide understanding of intermediaries, a fairly narrow understanding of the scope of ‘passive’ or ‘neutral’ provider and, consequently, a limited scope for the safe harbour. Moreover, liability is tested simply, by reference to the general civil rules, and never requires a prior finding that the end use complained of is, indeed, infringing, nor of a definitive and clear indication of the location and/or scope of the infringing content complained of.

Nonetheless, the wide margin of court discretion seems to be clearly bordered by the lack of a general obligation to monitor content uploaded and/or accessed by users and by the lack of procedural means to act where the contact details or identities of the infringers are unknown and, therefore, can’t be properly served the statement of claim.

While the DSA is fully in effect in Romania and the Government has adopted at least some of the necessary secondary legislation needed for it to function, there will likely be some time before the courts review their prior practice and realign their views by reference to this new instrument. It will be interesting to see what completely new elements, such as the trusted flaggers, will bring to this end.

The increasing reliance on automated content filtering systems by online platforms raises concerns particularly in relation to lawful uses under exceptions to copyright because these systems are limited in their ability to recognise nuanced legal exceptions that require contextual analysis, thus creating a risk of over-removal. Such over-removal may generate a chilling effect.

It will be interesting to see whether the safeguards in the DSA meant to address this, such as the requirement that automated moderation tools be sufficiently reliable and minimize errors, that there is sufficient disclosure of the purposes, accuracy, error rates, and safeguards of such technologies, that decisions be grounded and contestable and that humans be involved at least in an oversight capacity, will eventually function.

These safeguards aim to balance the interests of copyright holders with users’ fundamental rights, ensuring that lawful expression is not disproportionately curtailed.

In our view, automated systems may serve as useful flagging mechanisms, but ultimate determinations on fair dealing or parody or other lawful exceptions must rest with human oversight. Although the EU legislative framework demonstrates awareness of these issues, further refinements may be necessary, such as independent dispute resolution mechanisms or clearer statutory guidance on algorithmic accountability, to ensure lawful uses are not unduly suppressed.

1. 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, OJ 2000 L 178, pp. 1-16. [↑](#footnote-ref-1)
2. Law no. 365/2002 regarding electronic commerce, M. Of. 483/05.07.2002. [↑](#footnote-ref-2)
3. European Parliament and Council Regulation 2065/2022 of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ 2022 L 277, pp. 1-102. [↑](#footnote-ref-3)
4. Bucharest Court of Appeals (4th civ. div.), decision 876/2016 of 16.11.2016, confirming on appeal decision 314/2015 of 06.03.2015 of the Bucharest Tribunal (4th civ. div.). [↑](#footnote-ref-4)
5. Cluj Tribunal (civ. div.), decision 512/2024 of 06.09.2024. [↑](#footnote-ref-5)
6. Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, OJ 2004 L 157, pp. 45-86. [↑](#footnote-ref-6)
7. Emergency Government Ordinance no. 100/2005 concerning the enforcement of industrial property rights, M. Of. 643/20.07.2005. [↑](#footnote-ref-7)
8. 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, OJ 2001 L 167, pp. 10-19. [↑](#footnote-ref-8)
9. Law no. 8/1996 concerning copyright and related rights, M. Of. 20/26.03.1996. [↑](#footnote-ref-9)
10. For example, Bucharest Tribunal (4th civ. div.), decision 2229/2018 of 05.11.2018. [↑](#footnote-ref-10)
11. Law no. 134/2010 concerning the Code of Civil Procedure, M. Of. 485/15.07.2010. [↑](#footnote-ref-11)
12. Law no. 84/1998 concerning Trademarks and Geographical Indications, M. Of. 161/23.04.1998. [↑](#footnote-ref-12)
13. Law no. 64/1991 concerning Patents for Inventions, M. Of. 212/21.10.1991. [↑](#footnote-ref-13)
14. Law no. 129/1992 concerning the Protection for Designs and Models, M. Of. 1/08.01.1993 [↑](#footnote-ref-14)
15. Law no. 76/2012 for the implementation of Law no. 134/2010 concerning the Code of Civil Procedure, M. Of. 365/30.05.2012. [↑](#footnote-ref-15)
16. Law no. 10/1991 for the combating of unfair competition, M. Of. 24/30.01.1991. [↑](#footnote-ref-16)
17. European Parliament and Council Regulation 2065/2022 of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act), OJ 2022 L 277, pp. 1-102. [↑](#footnote-ref-17)
18. Law no. 50/2024 concerning the establishing of certain measures for the implementation of Regulation (EU) 2022/2065 of the European Parliament and the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) and for the amendment of Law no. 365/2002 regarding electronic commerce, M. Of. 232/19.03.2024. [↑](#footnote-ref-18)
19. Bucharest Tribunal (4th civ. div.), decision 2229/2018 of 05.11.2018. [↑](#footnote-ref-19)
20. Bucharest Tribunal (4th civ. div.), decision 314/2015 of 06.03.2015, confirmed on appeal by Bucharest Court of Appeals (4 civ. div.), decision 876/2016 of 16.11.2016. [↑](#footnote-ref-20)
21. Bucharest Court of Appeals (4th civ. div.), decision 869/2021 of 02.06.2021. [↑](#footnote-ref-21)
22. For example, Bucharest Tribunal (4th civ. div.), decision 2229/2018 of 05.11.2018. [↑](#footnote-ref-22)
23. High Court of Cassation and Justice (1st civ. div.), decision 1610/2015 of 12.06.2015. [↑](#footnote-ref-23)
24. Ploiești Court of Appeals (crim. and fam. div.), decision 16/2012 of 01.02.2012. [↑](#footnote-ref-24)
25. Bucharest Court of Appeals (9th civ. div.), decision 234/2013 of 05.12.2013. [↑](#footnote-ref-25)
26. Bucharest Court of Appeals (4th civ. div.), decision 404/2015 of 23.09.2015. [↑](#footnote-ref-26)
27. High Court of Cassation and Justice (1st civ. div.), decision 1610/2015 of 12.06.2015. [↑](#footnote-ref-27)
28. CJEU, case C-324/03, *L’Oreal SA et al. v eBay International AG et al.*, ECLI:EU:C:2011:474, pt. 112. [↑](#footnote-ref-28)
29. Bucharest Court of Appeals (4th civ. div.), decision 404/2015 of 23.09.2015. [↑](#footnote-ref-29)
30. Art. 11(1) of the Methodological Norm for the Implementation of Law no. 365/2002 concerning e-commerce, adopted by means of Romanian Government Decision 1308/2002 concerning the approval of the Methodological Norm for the Implementation of Law no. 365/2002 concerning e-commerce, M. Of. 877/05.12.2002. [↑](#footnote-ref-30)
31. Bucharest Court of Appeals (4th civ. div.), decision 876/2016 of 16.11.2016. [↑](#footnote-ref-31)
32. Art. 11(3) of the Methodological Norm for the Implementation of Law no. 365/2002 concerning e-commerce, adopted by means of Romanian Government Decision 1308/2002 concerning the approval of the Methodological Norm for the Implementation of Law no. 365/2002 concerning e-commerce, M. Of. 877/05.12.2002. [↑](#footnote-ref-32)
33. Id., art. 11(3)-11(5). [↑](#footnote-ref-33)
34. For example, Bucharest Court of Appeals (9th civ. div.), decision 234/2013 of 05.12.2013. [↑](#footnote-ref-34)
35. CJEU, case C-360/10, Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV, ECLI:EU:C:2012:85. [↑](#footnote-ref-35)
36. National Authority for Administration and Regulation of Communications decision no. 336/2024 concerning the Procedure for Granting of Trusted Flagger Status. [↑](#footnote-ref-36)
37. Art. 32(1) pt. 29 of Law no. 50/2024 concerning the establishing of certain measures for the implementation of Regulation (EU) 2022/2065 of the European Parliament and the Council of 19 October 2022 on a Single Market for Digital Services and amending Directive 2000/31/EC (Digital Services Act) and for the amendment of Law no. 365/2002 regarding electronic commerce, M. Of. 232/19.03.2024. [↑](#footnote-ref-37)
38. Bucharest Tribunal (4th civ. div.), decision 689/2014 of 10.16.2014. [↑](#footnote-ref-38)
39. Bucharest Tribunal (5th civ. div.), decision 1167/2021 of 26.07.2021. [↑](#footnote-ref-39)
40. Cluj Tribunal (civ. div.), in Decision 512/2024 of 06.09.2024. [↑](#footnote-ref-40)
41. Pitești Court of Appeals (1st civ. div.), decision 1785/2025 of 30.04.2025. [↑](#footnote-ref-41)
42. Bucharest Tribunal (4th civ. div.), decision 2229/2018 of 05.11.2018. [↑](#footnote-ref-42)
43. Bucharest Tribunal (5th civ. div.), decision 1239/2016 of 31.10.2016. [↑](#footnote-ref-43)