

TO FILTER, OR NOT TO FILTER?
THAT IS THE QUESTION IN EU COPYRIGHT
REFORM[♦]

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ABSTRACT

This article discusses the proposed introduction in EU law of an obligation for hosting providers to conclude licencing agreements with copyright holders and ensure they are taking effective technological measures, such as Content ID technologies, to prevent copyright infringement on online platforms. This proposal is included in Article 13 and accompanying Recitals of the European Commission's Draft Directive on Copyright in the Digital Single Market of September 14, 2016, which forms an important part of the ongoing EU copyright reform. This article highlights the shortcomings of this proposed reform, which may fall short in terms of clarity, consistency with the EU acquis, appropriacy and proportionality. In doing so, the article discusses recent CJEU case law, such as GSMedia, Ziggo and Filmspeler, which all struggle with the notion of communication to the public in the digital environment. The case law highlights systemic inconsistencies between the traditional knowledge-and-take-down, negligence-based intermediary liability system and the introduction of filtering and monitoring obligations. The article examines the appropriacy of filtering and monitoring measures within a fundamental rights perspective by considering proportionality between property rights' enforcement and competing fundamental rights, such as freedom of expression, and freedom of business and privacy. The critical review of the proposed reform serves as an opportunity to briefly advance an alternative proposal seeking a more pragmatic engagement with

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technological change through an arrangement enforcing a liability rule or an apportionment of profits and producing value for creators out of platform economy's virality, while limiting negative externalities on users' rights.

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INTRODUCTION

So-called intermediary liability regimes were introduced almost two decades ago on a fundamental assumption: that online providers were excluded from the general obligation to monitor the information they transmitted or stored, and from the general obligation to actively seek facts or circumstances indicating illegal activity.¹ That general principle served as an umbrella safeguard for online providers to avoid online filtering and intermediaries' policing obligations.² In addition, the eCommerce Directive obliged EU Member States to provide online intermediaries, including both access and hosting providers, with exemptions to liability for wrongful activities committed by their users.

¹ See 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 O.J. (L 178) 1, 13, art. 15.

² *Id.* at arts. 12–14.

Similar legal arrangements were introduced in multiple jurisdictions.³ After initial hesitation and failed proposals to hold intermediaries fully liable for infringements occurring throughout their networks,⁴ liability exemptions were finally enacted. The exemptions were enacted under the assumption that online service providers should not be encumbered by liability concerns in order to promote the emerging Internet market, a possible free speech friendly environment. However, to borrow and paraphrase the words of the immortal bard,

there's a ghost returning from the grave
that lingers in Europe today
and wonders whether to filter or not to filter
as part of a copyright reform that is on the way

With its Digital Single Market Strategy (DSMS), the European Commission has been considering narrowing the eCommerce Directive's horizontal liability limitations through a "fit for purpose" regulatory environment for platforms and intermediaries.⁵ In particular, a copyright reform proposal is under discussion before the EU Parliament and is looking to impose filtering and monitoring obligations on certain online platforms ("the Proposal").⁶

³ See *eg.*, Communications Decency Act of 1996, 47 U.S.C. § 230(c) (1998) (exempting intermediaries from liability for the speech they carry); The Digital Millennium Copyright Act of 1998, 17 U.S.C. § 512 (2010) [hereinafter DMCA] (introducing specific intermediary liability safe harbors for copyright infringement); [Federal Law on Amending Certain Legislative Acts of the Russian Federation on Issues of Protecting Intellectual Rights in Information-Telecommunication Networks], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2013, No. 187; [Provisions of the Supreme People's Court on Several Issues Concerning the Application of Law in Hearing Civil Disputes Involving Infringement of the Right of Dissemination on Information Networks] (promulgated by the 1561st Session of the Jud. Comm. of the Sup. People's Ct., Dec. 17, 2012, effective Jan. 1, 2013), CLI.3.19.1740(EN) (China); Copyright Modernization Act, S.C. 2012, c 20, § 31.1 (Can.); [Federal Law on Information, Informational Technologies and Protection of Information], SOBRANIE ZAKONODATEL'STVA ROSSIISKOI FEDERATSII [SZ RF] [Russian Federation Collection of Legislation] 2006, No. 149; *Copyright Legislation Amendment Act 2004* (Cth) sch 1 (Austl.).

⁴ See Bruce Lehman, *Intellectual Property and the National Information Infrastructure: The Report of the Working Group on Intellectual Property Rights* 114–124 (1995) (noting "the best policy is to hold the service provider liable Service providers reap rewards for infringing activity. It is difficult to argue that they should not bear the responsibilities."); see also James Boyle, *Intellectual Property Two Pasts and A Future* by prof. James Boyle, YOUTUBE (Aug. 20, 2014), https://www.youtube.com/watch?v=gFDA-G_VqHo.

⁵ See *Commission of the European Communities, 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*, § 3.3, COM (2015) 192 final (May 6, 2015).

⁶ *Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market*, at 13, COM (2016) 593 final (Sept. 14, 2016) [hereinafter DSM Directive Proposal]. Please note that there are several proposed amendments from parliamentary

The DSMS announced that steps are going to be taken “towards a connected digital single market” and mentioned plans to reform EU copyright.⁷ Through a variety of policy interventions, the DSMS wishes to move the EU from twenty-eight national markets to a single one by “bringing down barriers to unlock online opportunities.”⁸ Along with e-commerce rules, telecom rules, cross-border sales,⁹ and interoperability and standardization, the DSMS tackles copyright reform¹⁰ and the role of online intermediaries.¹¹ The DSMS copyright-related actions focus on three main issues: (lack of) cross-border access to content and its portability, text and data mining for non-commercial and commercial purposes alike, and civil enforcement and the role of ISPs. In particular, the Commission noted that:

[a]n effective and balanced civil enforcement system against commercial scale infringements of copyright is central to investment in innovation and job creation. In addition *the rules applicable to activities of online intermediaries in relation to copyright protected works require clarification*, given in particular the growing involvement of these intermediaries in content distribution. Measures to safeguard fair remuneration of creators also need to be considered in order to encourage the future generation of content.¹²

Committees to the draft proposal as issued by the Commission. While this article focuses on the Commission’s proposal, the proposed amendments will not be directly discussed. They may however, be mentioned. So far, the Committee on the Internal Market and Consumer Protection (IMCO) approved an opinion. *See Opinion for the Committee on Legal Affairs on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market*, COM (2016) 593 final (June 14, 2017). The Culture and Education Committee (CULT) has approved its final opinion, which is still to be published. *See Draft opinion on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market*, COM (2016) 593 final (Feb. 6, 2017). The Committee on Legal Affairs (JURI) also released a draft opinion and will vote on its amendments later this year. *See Draft opinion on the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market*, COM (2016) 593 final (Mar. 10, 2017) [hereinafter “JURI Draft Opinion”].

⁷ *See Commission of the European Communities, 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*, *supra* note 5, at 3.

⁸ *See Digital Single Market*, EUROPEAN COMM’N PRIORITY, http://ec.europa.eu/priorities/digital-single-market_en (last visited Mar. 4, 2018).

⁹ *See Proposal for a Regulation of the European Parliament and of the Council on addressing geo-blocking and other forms of discrimination based on customers’ nationality, place of residence or place of establishment within the internal market and amending Regulation*, COM (2016) 289 final (May 25, 2016) (preventing geo-blocking and other forms of discrimination).

¹⁰ Regrettably, the Strategy does not tackle the issue of digital exhaustion.

¹¹ The DSMS copyright related policy actions followed a draft report by MEP Julia Reda on the implementation of the InfoSoc Directive. *See Report on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonization of certain aspects of copyright and related rights in the information society*, 2014/2256(INI) (June 24, 2015) (rapporteur Julia Reda).

¹² *Commission of the European Communities, Communication from the Commission to the European Parliament, The Council, the European Economic and Social Committee and the*

As a result, the European Commission proposed the introduction of enhanced obligations that websites and other Internet intermediaries should follow when dealing with unlawful third-party content.¹³ In particular, the ongoing discussion specifically refers to a subset of those intermediaries deemed “online platforms” and concentrates on “whether to require intermediaries to exercise greater responsibility and due diligence in the way they manage their networks and systems—a duty of care.”¹⁴

The introduction of new obligations for online intermediaries as part of the most recent EU copyright reform proposal results from a number of policy actions that followed in the footsteps of the DSMS. First, the Commission released a new Communication, *Towards a Modern, More European Copyright Framework*.¹⁵ This Communication anticipated policy and legislative actions to adapt exceptions to digital and cross-border environments.¹⁶ It sought clarifications in the domain of exclusive rights, including issues related to linking and considered whether any action specific to news aggregators was

Committee of the Regions: A Digital Single Market Strategy for Europe, supra note 5, at § 2.4.

¹³ *Id.* at § 3.3.2 (noting that “[r]ecent events have added to the public debate on whether to enhance the overall level of protection from illegal material on the Internet.”).

¹⁴ *Id.*; see also Council Directive 2001/29, art. 10–19, 2001 O.J. (L 167) (EC); Council Directive 2000/31, 2000 O.J. (L 178) (EC), at ¶ 48 (previously establishing that “[t]his Directive does not affect the possibility for Member States of requiring service providers, who host information provided by recipients of their service, to *apply duties of care*, which can reasonably be expected from them and which are specified by national law, in order to detect and prevent certain types of illegal activities.”) (emphasis added). Accordingly, the implementation of some forms of “duty of care” for online intermediaries has been repeatedly put forward as a policy goal for European national jurisdictions. The German coalition agreement, for example, emphasized that “internet service providers should take more responsibility” for copyright mass infringements. See *Deutschlands Zukunft gestalten—Koalitionsvertrag zwischen CDU, CSU und SPD*, 18 LEGISLATURPERIODE (Dec. 17, 2013), at 93 [hereinafter German Coalition Agreement]. In particular, the grand coalition plans to “improve enforcement towards platforms whose business model is mainly based on the infringement of copyright” by ensuring “that such service providers no longer enjoy the general liability privilege as so-called hosting provider and in particular no longer receive advertising revenues.” See *id.* at 93; see also *Telemediengesetz [TMG] [Telemedia Act]*, Feb. 29, 2007, ELEKTRONISCHER BUNDESANZEIGER [EBANZ] at 179, § 7, 10 (Ger.) (providing the general liability privilege insulating information service providers from copyright infringement claims for the acts of their users; Bundesgerichtshof [BGH] [Federal Court of Justice] Aug. 15, 2013, I ZR 80/12, <http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=pm&Datum=2013&Sort=3&anz=142&pos=0&nr=65241&linked=urt&Blank=1&file=dokument.pdf> (finding that under the TMA, host providers are already ineligible for the liability privilege if their business model is mainly based on copyright infringement) [hereinafter GEMA v. RapidShare].

¹⁵ See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Towards a Modern, More European Copyright Framework*, COM (2015) 260 final (Dec. 9, 2015).

¹⁶ *Id.* at § 3; see also *Proposal for a Regulation of the European Parliament and the Council on Ensuring the Cross-border Portability of Online Content Services in the Internal Market*, COM (2015) 627 final (Dec. 9, 2015); cf. Christophe Geiger, Giancarlo Frosio & Oleksandr Bulayenko, *Opinion of the CEIPI on the European Commission’s Proposal to Reform Copyright Limitations and Exceptions in the European Union* (Ctr. for Int’l Intellectual Prop. Studies Research Paper Series, Research Paper No. 2017-09, 2017).

needed.¹⁷ Also, the Communication dealt with upcoming enforcement strategies, including “follow the money” strategies, commercial-scale infringements, application of provisional and precautionary measures, injunctions and their cross-border effect, and notice and action mechanisms, in particular the issue of action remaining effective over time—the “take down and stay down” principle.¹⁸

Meanwhile, the Commission also launched a public consultation on the evaluation and modernization of the legal framework for the enforcement of intellectual property rights.¹⁹ According to this Consultation, provisions established by the Enforcement Directive, such as the right of information, legal actions, damages and costs, and provisional and precautionary measures and injunctions, may soon be revisited.²⁰ Also, the Commission launched a public consultation on the role and responsibilities of online intermediaries and platforms, a term which includes a broad range of websites and online services.²¹ In particular, Section 3 of the Consultation, *Tackling Illegal Content Online and the Liability of Online Intermediaries*, discussed critical changes of the regulatory environment for intermediaries. It included *inter alia* questions about whether there should be imposed specific duties of care for certain intermediaries.²²

A consensus emerged from the consultation that the existing regime is considered fit for purpose.²³ Therefore, the Commission

¹⁷ See *Communication*, *supra* note 15, at 7–10; see Giancarlo Frosio, *Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy*, 112 NORTHWESTERN U. L. REV. 19 (2017); Christophe Geiger, Oleksandr Bulayenko, and Giancarlo Frosio, *The Introduction of a Neighbouring Right for Press Publisher at EU Level: The Unneeded (and Unwanted) Reform*, 39 EUROPEAN INTEL. PROP. REV. 202 (2017); Christophe Geiger, Oleksandr Bulayenko, and Giancarlo Frosio, *Reaction of CEIPI to the European Commission’s Proposal on Neighbouring Rights for Press Publishers*, 39 EUROPEAN INTEL. PROP. REV. 202 (2017).

¹⁸ See *Communication*, *supra* note 15, at § 5.

¹⁹ See *Public Consultation on the Evaluation and Modernisation of the Legal Framework for the Enforcement of Intellectual Property Rights*, EUROPEAN COMMISSION (Dec. 7, 2015), https://ec.europa.eu/growth/content/public-consultation-evaluation-and-modernisation-ipr-enforcement-framework-0_en [hereinafter European Commission, Public Consultation on Modernization of Enforcement of IPRs].

²⁰ See Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights, 2004 O.J. (L 195) arts. 3, 8, 9, 11, 13, 14 [hereinafter Enforcement Directive].

²¹ See *Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy*, EUROPEAN COMMISSION (Sep. 24, 2015), <https://ec.europa.eu/digital-single-market/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud> [hereinafter European Commission, Public Consultation on Online Intermediaries].

²² *Id.*

²³ See *Synopsis Report on the Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and the Collaborative Economy*, EUROPEAN COMMISSION (May 25, 2016), <https://ec.europa.eu/digital-single-market/en/news/full-report-results-public-consultation-regulatory-environment-platforms-online-intermediaries>.

published a *Communication on Online Platforms and the Digital Single Market*, which endorsed the plan of maintaining the existing intermediary liability regime.²⁴ However, the Commission stressed that “a number of specific issues relating to illegal and harmful content and activities online have been identified that need to be addressed”²⁵ In this context, the Commission aims to launch a “sectorial legislation . . . and problem-driven approach.”²⁶ This sectorial action will target *inter alia* copyright-protected content.²⁷ This may happen through a mix of legislative interventions, such as by updating the copyright regulations and by promoting voluntary self-regulatory actions.²⁸ In particular, the OP&DSM Communication anticipated modifications in the balance of copyright in favor of rightsholders as the Commission aimed to achieve a fairer allocation of value generated by the distribution of copyright-protected content by online platforms.²⁹ The Commission presented this platform-sensitive update of the EU copyright policy in a proposal for a Directive on Copyright in the Digital Single Market,³⁰ which is part of a larger package which aims to modernize EU copyright rules and achieve a fully functioning Digital Single Market.³¹ While the reform has been discussed before the Parliament, the Commission issued an additional Communication that continues to pursue an “enhanced responsibility of online platforms.”³² According to this last Communication, online intermediaries have a duty to provide a safe online environment to users by sanitizing it from illegal content promptly and proactively.³³

The draft directive aims—*inter alia*—to close a so-called “value gap” which is an alleged unfair distribution of revenues generated from the online use of copyright-protected works between the industry actors

²⁴ See *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*, at 9, COM (2016) 288 final (May 25, 2016).

²⁵ *Id.* at 8.

²⁶ *Id.* at 9.

²⁷ *Id.*

²⁸ *Id.*

²⁹ *Id.* (emphasis added).

³⁰ See DSM Directive Proposal, *supra* note 6.

³¹ See *Modernisation of the EU Copyright Rules*, EUROPEAN COMMISSION (Sept. 14, 2016), <http://bit.ly/DSMcopyright16>; see also *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Promoting a Fair, Efficient and Competitive European Copyright-based Economy in the Digital Single Market*, COM (2016) 592 final (Sept. 14, 2016) [hereinafter DSM Communication] (released in parallel with the DSM Directive Proposal).

³² See *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling Illegal Content Online, Towards an Enhanced Responsibility of Online Platforms*, COM (2017) 555 final (Sept. 28, 2017).

³³ *Id.* at §§ 3, 3.3.1.

along the value chain.³⁴ Rightholders would most likely complain that, because of liability exemptions, no monitoring obligations, and the notice and take-down regime, they have no ability to monetize the exchange of protected content on user-generated content and ad-funded platforms such as YouTube, Dailymotion and Vimeo. Rather than entering into licensing agreements, UGC platforms can offer to remove infringing content upon notice, or possibly implement voluntary measures as YouTube Content ID. In turn, according to rightholders, other subscription-funded platforms, such as Spotify and Netflix, sell content to users who would be willing to pay less in licensing fees in order to remain competitive with UGC platforms.³⁵

To the end of closing the “value gap,” the proposed reform includes—at Art. 13 and Recitals 37–39—a provision that would impact platform operations. It requires intermediaries “that store and provide to the public access to large amounts of works . . . uploaded by their users”

(1) “to take appropriate and proportionate measures to ensure the functioning of agreements concluded with rightholders” for the use of their works;³⁶

(2) or “prevent the availability on their services of” [such] works, including “the use of effective content identification technologies;”³⁷

(3) to “provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works;”³⁸ and

(4) “put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures”³⁹ “Meanwhile, Member States shall facilitate “stakeholder dialogues to define best practices, such as appropriate and proportionate content recognition technologies.”⁴⁰

The policy goal of redistributing resources to creators for uses of their works in the platform economy would, undeniably, be a worthy

³⁴ See DSM Communication, *supra* note 31, at 7.

³⁵ See Martin Husovec, *EC Proposes Stay-down & Expanded Obligation to License UGC Services*, HUTKO’S TECH. L. BLOG (Sept. 1, 2016), <http://www.husovec.eu/2016/09/ec-proposes-stay-down-expanded.html> (making an interesting point by noting that “[i]f hosts see notice-and-takedown as a real alternative to negotiations with right holders, perhaps it indicates that the music is not so indispensable for the online service. Right holders can expose services without such agreements to more enforcement, and so if the music would be so crucial, notorious take-downs would destroy its business.”).

³⁶ See DSM Directive Proposal, *supra* note 6, at art. 13(1).

³⁷ *Id.*

³⁸ *Id.*

³⁹ *Id.* at art. 13(2).

⁴⁰ *Id.* at art. 13(3).

one. After all, the goal of our copyright system is for creators to allow the European public to enjoy creative content in all ways made possible by digital technology. To that end, the promotion of agreements between creators and information society service providers should be pursued. Furthermore, narrow and specific duties of care to detect and prevent infringing activities should be within the scope of EU law. However, the means the Proposal would like to deploy to reach its goals, together with the shaky empirical foundations of the notion of value gap, finds little support and justification within the EU legal system. The Proposal lacks in clarity, consistency and adequacy for a number of reasons as highlighted in the next few pages.

I. CLARITY

A paramount issue with the Proposal is its terminology. Some of the wording lacks clarity and would make it hard to predict the implications of the implementation of the Proposal. As worded, the Proposal may alter the construction of EU law. At a minimum, it would lead to conclusions that are not pacifically granted. In particular, Recital 38 of the Proposal, read together with Article 13, might cause some interpretive headaches:

Where information society service providers store and *provide access to the public* to [large amounts of] copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of *communication to the public*, they are obliged to conclude licensing agreements with rightholders, unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC In respect of Article 14, it is necessary to verify whether the service provider plays an active role, including by optimizing the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor.⁴¹

A. *On the Notion of Information Society Service Providers*

Which platforms are required to enter into revenue-share agreements with rightholders and collective societies or prevent access to protected works from their services through filtering? Does the Proposal imply that sharing platforms like YouTube, Dailymotion or Soundcloud do not qualify as passive hosts?⁴² Indeed, this is the interpretation that will be sought by rightholders, if this reform comes into effect. In response to the draft reform, a music industry

⁴¹ *Id.* at Recital 38(1) (emphasis added).

⁴² See Eleonora Rosati, *Why a Reform of Hosting Providers' Safe Harbour is Unnecessary Under EU Copyright Law* (CREATe, Working Paper No. 2016/11).

representative clarified:

PRS for Music welcomes the Commission's recognition of the critical 'transfer of value' issue and we acknowledge the clear intention to redress the current imbalance of interests between user upload platforms and rightsholders. The law must clearly establish that those user upload platforms that provide search and other functionality, *as distinct from being mere hosts of content*, require a license from rightsholders. The European Commission's proposed new copyright Directive provides the framework for this essential legal clarity.⁴³

The Proposal would impose a number of obligations, namely those at (1)–(4) above, to certain categories of intermediaries. The nature of these intermediaries would be defined in Article 13 and especially in Recital 38. The new Proposal would apply to active hosting providers. First, the Proposal refers only to those who “store *and* provide access” to protected works. As a result, its scope is restricted to hosting providers. If these hosting providers are not eligible for the liability exemption given to hosting providers in Article 14 of the eCommerce Directive, they will be obliged to conclude licensing agreements with rightholders. Second, for the liability exemption not to apply, the Proposal assumes that hosting providers must play an active role. In defining an active hosting provider, the Proposal states that the hosting provider must go “beyond the mere provision of physical facilities.”⁴⁴ Then, the Proposal redeploys the language in *L'Oréal v. eBay* by noting that “it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject matter or promoting them, irrespective of the nature of the means used therefore.”⁴⁵ In referring to *L'Oréal*, the Proposal implies that not all active hosts should be excluded from the application of the hosting exemption. According to *L'Oréal*, Article 14 of the Directive applies to hosting providers if they don't play an active role and do not have knowledge or control of the stored data.⁴⁶ Therefore, a hosting provider can still be protected even if it is not completely

⁴³ See Robert Ashcroft, *Comment, PRS for Music Chief Executive Responds to EU Copyright Reform Plans*, PRS FOR MUSIC (Sept. 14, 2016), <https://www.prsformusic.com/press/2016/prs-for-music-chief-executive-responds-to-eu-copyright-reform>.

⁴⁴ DSM Directive Proposal, *supra* note 6, at Recital 38 (emphasis added).

⁴⁵ *Id.*; see also Case C-324/09, *L'Oréal SA and Others v. eBay International AG and Others*, 2010 E.C.R. I-02417, at ¶ 116.

⁴⁶ See *L'Oréal SA*, 2010 E.C.R. I-02417, at § 112-116; see also Patrick Van Eecke, *Online Service Providers and Liability: A Plea for a Balanced Approach*, 48 COMMON MARKET L. REV. 1455 (2011) (supporting a “storage but no knowledge” test and a restrictive interpretation of the requirement that intermediaries' activities are of a mere technical, automatic, and passive nature—based on Recital 42 of the E-commerce Directive—which would not extend to hosting providers, therefore as long as an active hosts does not have knowledge or control over the data which is being stored it could still be protected under Article 14 of the Directive 2001/29/EC).

passive.⁴⁷

The proposal raises several concerns that make it difficult to construe its full scope. First, the targeted providers are those that store and provide access to a *large amount* of copyright protected works uploaded by their users. It is quite a no brainer that the construction of the notion of “large amount” here might be a challenging interpretative conundrum.⁴⁸ Apparently, a standard based on an indefinite quantitative measurement may prove to be a poor policy choice. Presently, the scope of the new provision’s application is impossible to determine. *In passim*, it should be noted that paragraph 1 of Recital 38 does not refer to large amounts of work. However, other text in the Recitals and Article 13 do so. This may be an oversight or it may be relevant in construing the category of intermediaries subject to the obligation of concluding licensing agreements. It could also be critical in redefining the notion of communication to the public and whether it applies to works to which intermediaries and platforms provide access to the public as to be discussed later.

Second, the Recitals consistently mention that the obligations apply to intermediaries storing and providing public access to “copyright protected” works, while Article 13 drops the mention to infringing works altogether. On one side, this is an inconsistency that needs clarification. On the other, this different wording does matter, especially in connection with the notion of large amounts. Apparently, Article 13 would impose its obligations on intermediaries storing and providing public access to large amount of works, regardless of whether they are copyright protected or not. The notion of large amounts would be construed looking at the totality of the content stored on the provider’s system, rather than the infringing content. Hence, Article 13’s obligations would cover intermediaries, such as Wikimedia, that might store only minimum amounts of infringing content—thus inconsequential to the supposed overreaching reform goal of closing the value gap.

Third, the notion of “providing access to the public” to content needs clarification as it makes its first appearance in European intermediary liability theory. Apparently, in order to trigger the new obligations, intermediaries must provide the public with access to content by playing an active role according to the standards defined in *L’Oreal*. The intermediaries should do this by optimizing the presentation of the uploaded works or by promoting the content. This

⁴⁷ See *L’Oreal SA*, 2010 E.C.R. I-02417, at ¶ 115.

⁴⁸ See Christina Angelopoulos, *EU Copyright Reform: Outside the Safe Harbours, Intermediary Liability Capsizes into Incoherence*, KLUWER COPYRIGHT BLOG (Oct. 6, 2016), <http://kluwercopyrightblog.com/2016/10/06/eu-copyright-reform-outside-safe-harbours-intermediary-liability-capsizes-incoherence>.

conclusion could be drawn from Recital 38, which clarifies that the new obligation covers only the intermediaries described above, and not those exempted from liability by Article 14 of the eCommerce Directive.⁴⁹ In addition, the notion of “to the public” should follow the jurisprudence interpreting “communication and making available to the public.”⁵⁰

B. *On Communication to the Public, Direct, and Secondary Liability*

There is another point that has been taking the center stage in the debate surrounding the DSM Draft Directive’s proposal, especially due to recent activism of the CJEU that might be aligning its jurisprudence to positions held by the Commission in the proposal. The Proposal implies that if hosting providers do not merely provide physical facilities, “*thereby*” they perform an act of communication to the public.⁵¹ The Commission reinforced this statement elsewhere. Calling for closing the value gap, the Communication on Online Platforms and the Digital Single Market noted that a rebalancing is needed because “[n]ew forms of online content distribution have emerged that may *make* copyright-protected content uploaded by end-users widely *available*.”⁵² The Commission characterizes platforms as actively “making available” content uploaded by end-users or performing an act of communication to the public. The reasons for this characterization are quite apparent. If platforms communicate to the public, they can be obliged to enter into licensing agreements, rather than monetizing agreements on a voluntary basis. However, characterizing hosting providers as “communicating to the public” is a bold statement that has never been an obvious conclusion under EU law.⁵³

First, the apparent implication that, unless liability exemptions apply, intermediaries storing and providing public access to protected works would be communicating to the public comes as a novelty.

⁴⁹ See DSM Directive Proposal, *supra* note 6, at Recital 38.

⁵⁰ See *e.g.*, Case C-306/05, *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA*, ECLI:EU:C:2006:764, ¶ 37-42 (stating that the term ‘public’ (1) refers to an indeterminate number of potential recipients (2) implies, moreover, a fairly large number of persons (3) accounts must be given to the cumulative effects of making works available to potential audiences, and (4) the work must be communicated to a ‘new public’, that is to say, to a public which was not taken into account by the authors of the protected works when they authorized their use by the communication to the original public); Case C-117/15, *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v. Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA)*, ECLI:EU:C:2016:379, ¶ 40-45.

⁵¹ See DSM Directive Proposal, *supra* note 6, at Recital 38.

⁵² See *Communication*, *supra* note 24, at 8 (emphasis added).

⁵³ See Angelopoulos, *supra* note 48 (noting that “[f]or a nonchalant statement hidden in a recital, this is quite the dramatic development of EU copyright law”); Christina Angelopoulos, *Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market*, CENTRE FOR INTELLECTUAL PROPERTY AND INFORMATION LAW (Jan. 2017), at 19–33, https://juliareda.eu/wp-content/uploads/2017/03/angelopoulos_platforms_copyright_study.pdf.

Actually, there is no direct relation between liability and exemptions, which function as an extra-layer of protection intended to harmonize at the EU level conditions to limit intermediary liability.⁵⁴ The inapplicability of the exemptions does not imply that information society service providers would be liable.

In addition, the construction of EU law included in the Proposal would make hosting providers directly liable, rather than secondarily liable. Communication to the public, according to Article 3 of the Infococ Directive, includes making a work available to the public “in such a way that members of the public may access [it] . . . from a place and at a time individually chosen by them.”⁵⁵ The Proposal acknowledges the ECJ clarified that the “mere provision of physical facilities . . . does not in itself amount to communication” to the public.⁵⁶ Traditionally, the European Court of Justice emphasized the *indispensable* role of the user. In order to have a communication to the public, the user must, in full knowledge of the consequences of its actions, give access to the protected work to an additional public so that, absent that *indispensable* intervention, the ‘new’ public is unable to enjoy the works.⁵⁷ Again, the ECJ stated that communication to the public does occur when content may be accessed by the public “only as a result of the deliberate intervention of that operator.”⁵⁸ As end-users physically upload the work, they alone can carry out that necessary indispensable deliberate intervention enabling the new public to enjoy the protected work. In this respect, online hosting providers could traditionally be distinguished from those users whose role ECJ jurisprudence found indispensable in communicating to the public. In *Football Association Premier League*, the ECJ found that a pub owner communicated to the public “when he intentionally transmit[ted] broadcast works, via a television screen and speakers, to the customers present in that establishment.”⁵⁹ In *Raphael Hotels and Phonographic Performance*, communication to the public was made by hotel operators installing a TV set or a CD player in a hotel room and enabling the transmission of the signal to the guests.⁶⁰ *Airfield NV* and *TVCatchup* concerned broadcasting made available via satellite or over the Internet by a satellite package provider and an internet TV broadcasting service

⁵⁴ *Id.*

⁵⁵ See Directive 2001/29, *supra* note 14, at Recital 53.

⁵⁶ See SGAE, ECLI:EU:C:2006:764, at ¶ 27.

⁵⁷ See *id.* at ¶ 42; Joined Cases 403/08 & 429/08, *Football Association Premier League and Others v. QC Leisure and Others & Karen Murphy v. Media Protection Services Ltd*, 2011 E.C.R. I-9083, at ¶ 195.

⁵⁸ See *Phonographic Performance (Ireland) Limited v. Ireland* [2012] IR 141, at ¶ 40 (Ir.).

⁵⁹ See *Summaries of Important Judgments*, EUROPEAN COMMISSION (May 2012), http://ec.europa.eu/dgs/legal_service/arrets/08c403_en.pdf.

⁶⁰ See *Phonographic Performance*, *supra* note 58, at ¶ 66–69; SGAE, ECLI:EU:C:2006:764, at ¶ 17.

respectively.⁶¹ In these scenarios, the intervention of the users is necessary as they deliberately decide to transmit the content to their customers. Apparently, this is not the case with online hosting providers, regardless of whether they are active or passive. Hosting providers do not deliberately decide to transmit content. They offer a platform where content is hosted. They have no role in deciding what reaches the platform's end-users. They do not make any material deliberation regarding the content that should reach the end-users. It is the end-users themselves that make that deliberation.

However, recent CJEU case law has been transitioning to a looser standard, focusing on the *essential*, rather than the indispensable role of the user.⁶² This, in turn, would make it easier to construe hosting providers as communicating to the public. Recent CJEU case law qualified this notion of essential intervention by extending it to circumstances not only where, absent that intervention, customers would not be able to access the work but also where they “would be able to do so only with difficulty.”⁶³ In particular, *Ziggo* concludes that, without the operators of the platform “ThePirateBay” (TPB) making the platform available and managing it, the users could not share the works or, “at the very least, sharing them on the internet would prove to be more complex.”⁶⁴

At the national level, intermediaries have been held directly liable for their users' copyright infringement, but only in residual circumstances when their involvement in the infringement is so substantial that they have been found to have communicated the works themselves, rather than being used by others to perform the communication.⁶⁵ This line of argument might still distinguish *Ziggo*

⁶¹ See Joined Cases 431 & 432/09, *Airfield NV, Canal Digitaal BV v. Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam) and Airfield NV v. Agicoa Belgium BVBA*, 2011 E.C.R. I-9363; Case C-607/11, *ITV Broadcasting v. TV Catchup*, 2013 E.C.R. I-147.

⁶² See Case C-527/15, *Stichting Brein v. Jack Frederik Wullems*, 2017 E.C.R. I-938, at ¶ 32 (finding communication to the public the sale of a multimedia player with pre-installed adds on, available on the internet, containing hyperlinks to freely accessible website making infringing materials available); Case C-610/15, *Stichting Brein v. Ziggo BV & XS4ALL Internet BV*, 2017 E.C.R. I-99, at ¶ 37.

⁶³ See *Ziggo*, 2017 E.C.R. I-99, at ¶ 26.

⁶⁴ *Id.* at ¶ 36.

⁶⁵ Standards have varied greatly from jurisdiction to jurisdiction. See Angelopoulos, *supra* note 53, at 23–30; see e.g., France (implementing rather low standards to find intermediaries' directly liable). In the UK, there is clear distinction between primary and secondary infringement, which makes a high bar for finding intermediaries directly liable. See *Twentieth Century Fox Film Corp. v. Newzbin Ltd.* [2010] EWHC (Ch) [125] (Eng.) (finding an indexing website used for the illegal exchange of copyrighted movies directly liable for having communicated works to the public because it had “intervened in a highly material way to make the claimants' films available to a new audience, that is to say its premium members . . . [have] done so “by providing a sophisticated technical and editorial system which allows its premium members to download all the component messages of the film of their choice upon pressing a button, and so avoid days of (potentially futile) effort in *seeking* to gather those messages together for themselves”).

and *Wullems* from cases involving UGC platforms targeted by the upcoming reform.⁶⁶ In *Ziggo*, the TPB provided a vast array of functions, such as indexing, categorization, deletion and filtering, that obviously set the platform apart from any mere provision of physical facilities and trespass into conduct intentionally aimed at *facilitating* infringement.⁶⁷ In both cases, the CJEU found a specific design to induce copyright infringement, including advertisement or operators' comments on blogs and forums encouraging users to access and download infringing content.⁶⁸ It found that both technologies were primarily designed to infringe copyright, considering, for example, that most of the files shared on the TPB platform infringe copyright.⁶⁹

Absent all these cumulative circumstances, traditionally, intermediaries have been held secondarily liable, rather than primarily. In most EU jurisdictions, secondary liability requires highly demanding conditions that are derived from miscellaneous doctrines of tort law,⁷⁰ such as the doctrines of joint tortfeasance, authorization, inducement, common design, contributory liability, vicarious liability, or extra-

Ass'n Premier League Ltd. v. British Sky Broadcasting Ltd. & Others [2013] EWHC (Ch) (Eng.) (finding that in the case of a link aggregator of unlawfully streamed sport events (i) the aggregation of a large number of streams; (ii) the indexing of those streams for the convenience of the users; (iii) the provision of a simple link to click in order to have access to the stream; and (iv) the fact that the stream is presented in FirstRow's frame or window makes the site directly liable for the communication).

⁶⁶ In particular, the similarities of the CJEU *Ziggo* decision and the UK case law mentioned above are striking. In *FAPL*, the Court found that even if FirstRow was not a direct infringer, it would be jointly liable with the operators of the user generated content (UGC) websites that host the embedded streams and with the third-party streamers who digitally capture the streams and do the embedding. See *Football Ass'n Premier League*, [2013] EWHC (Ch), at §§ 43–44. In previous rulings, UK courts have already held that “two or more persons may participate in a common design to infringe [copyright] rendering them jointly liable.” See *Newzbin*, [2010] EWHC (Ch) [125], at § 103. The Advocate General deploys a matching argument later upheld by the CJEU: in a situation like *TPC*, the intervention of their operators “meets the conditions of being necessary and deliberate, laid down in the case-law of the Court” and those operators should therefore “also be considered, simultaneously and jointly with the users of the network, as originating the making available to the public of works that are shared on the network without the consent of the copyright holders, if they are aware of that illegality and do not take action to make access to such works impossible.” *Case C-610/15, Stichting Brein v. Ziggo BV & XS4ALL Internet BV*, 2017 E.C.R. I-99, at ¶ 53 (Opinion of Advocate General Szpunar).

⁶⁷ See *Ziggo*, 2017 E.C.R. I-99, at ¶ 38.

⁶⁸ See *Wullems*, 2017 E.C.R. I-938, at ¶¶ 18, 50; *Ziggo*, 2017 E.C.R. I-99, at ¶ 45; cf. *MGM Studios, Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005).

⁶⁹ See *Ziggo*, 2017 E.C.R. I-99, at ¶ 23.

⁷⁰ See *Kamiel Koelman & Bernt Hugenholtz, Online Service Provider Liability for Copyright Infringement*, WIPO (1999), at 5–8; see also *BÜRGERLICHES GESETZBUCH [BGB] [Civil Code]*, § 830 (Ger.) (governing joint tortfeasance, which is usually found by the German Supreme Court only if third parties have knowingly and intentionally, combined with the primary wrongdoer to bring about the infringement, induced them to infringe or helped them in their infringement. Generally, intermediaries do not qualify, as they lack the essential mental element).

contractual liability.⁷¹ In contrast, according to the Proposal,

⁷¹ There is no case law and harmonized regulation on secondary liability for copyright infringement at the EU level. Each Member State has deployed differing and miscellaneous standards. See CHRISTINA ANGELOPOULOS, EUROPEAN INTERMEDIARY LIABILITY IN COPYRIGHT. A TORT-BASED ANALYSIS (2016); Tatiana-Eleni Synodinou, *Intermediaries' Liability for Online Copyright Infringement in the EU: Evolutions and Confusions*, 31 COMPUTER L. & SECURITY REV. 57, 57–67 (2015); Christina Angelopoulos, *Beyond the Safe Harbors: Harmonising Substantive Intermediary Liability for Copyright Infringement in Europe*, 3 INTEL. PROP. Q. 254 (2013); Mari Männiko, *Intermediary Service Providers' Liability Exemptions: Where Can We Draw the Line?*, in REGULATING ETECHNOLOGIES IN THE EUROPEAN UNION: NORMATIVE REALITIES AND TRENDS (Tanel Kerikmäe ed., 2014) (noting that comparative analysis show that the present legislation is too general and gives too much room for interpretation); see Van Eecke, *supra* note 46 at 1455–1461 (2011); Broder Kleinschmidt, *An International Comparison of ISP's Liabilities for Unlawful Third Party Content*, 18 INT'L J. OF L. & INFO. TECH. 332, 345–353 (2010). In France, for example, general tort law principles have been relied upon to expand liability to additional actors rather than the material infringer. Extra-contractual liability obliges to repair damages caused with fault or negligence (*responsabilité délictuelle* and *quasi-délictuelle*). Traditionally, intermediaries were placed under a duty to take all necessary measures to prevent infringement of others' rights in order to avoid liability. Later, the *Cour de Cassation* found the general duty, which derailed into a judicially made notice and stay-down system, was uncompliant with the prohibition of general monitoring under EU law. Therefore, copyright holders must now monitor the content of websites themselves and notify intermediaries for each new infringement of protected content. Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., July 12, 2012, Bull. Civ. I, No. 100831 (Fr.); Cour de cassation [Cass.] [supreme court for judicial matters] 1e civ., Jul. 12, 2012, Bull. civ. I, No. 828 (Fr.); ANDRE LUCAS, HENRI JACQUES LUCAS AND AGNES LUCAS-SCHLOETTER, *TRAITE DE LA PROPRIETE LITTERAIRE ET ARTISTIQUE* 901 (2012); Angelopoulos, *supra* note 48, at § 2. In UK law, intermediaries would be generally held liable for the infringements of their users if they have either authorized those infringements, procured or induced them, or acted pursuant to a common design with its users to achieve them. See Copyright, Designs and Patent Act §16 (1988) (stating that a copyright in a work is also infringed by any person “who without the license of the copyright owner does, or authorises another to do, any of the acts restricted”). Claimants bringing suits against secondary infringers have to prove an additional mental element, i.e. that the defendant knew or had reason to believe that he was dealing with infringing copies, providing the means for making infringing copies or that the performances for which he had permitted the use of premises or had provided necessary apparatus was infringing. See *Dramatico Entertainment Ltd. v. British Sky Broadcasting Ltd.*, [2012] EWHC 268 (Ch); Sophie Stalla-Bourdillon, *Liability Exemptions Wanted! Internet Intermediaries' Liability under UK Law*, 7 J. OF INT'L COM. L. & TECH. 289, 293–299 (2012); Angelopoulos, *supra* note 48, at § 1; Paul S. Davis, *Accessory Liability: Protecting Intellectual Property Rights*, 4 IPQ 390 (2011). In Germany, intermediary liability in copyright is almost invariably handled through the doctrine of *Störerhaftung*—as an alternative to joint tortfeasance for which intermediaries hardly qualify. This doctrine, which is embedded in BGB, §1004, grants a permanent injunctive relief to the proprietor against anybody who has caused an interference. *Störer* means interferer with the property, unless it would be unreasonable to burden the interferer with a duty to examine whether his behavior could interfere with the (intellectual) property of a third person. See BGH, Mar. 11, 2004, I ZR 304/01, <https://www.beckmannundnord.de/bghrolex.html>; Broder Kleinschmidt, *An International Comparison of ISP's Liabilities for Unlawful Third Party Content*, 18 INT'L J. OF L. & INFO. TECH. 332, 346–347 (2010); Angelopoulos, *supra* note 48, at § 3. Again, a recent Spanish copyright reform expanded intermediary liability by introducing, *inter alia*, doctrines of secondary liability—inducement, contributory and vicarious liability—in the Spanish legal system. See Real Decreto Legislativo (RDL) 1/1996, de 12 de abril, por el que se aprueba el texto refundido de la Ley de Propiedad Intelectual, regularizando, aclarando y armonizando las disposiciones legales vigentes sobre la materia, BOE-A-1996-8930, art. 138, as amended by Ley 21/2014, de 4 de noviembre, BOE-A-2014-11404 (Spain) (imposing liability, unless the intermediary is sheltered by the Directive 2001/29/EC's exemptions, on anyone who either knowingly induces the infringement, or knowing or having reason to know about the

intermediary services would be assumed to be infringing and directly liable for infringements materially committed by others. Obviously, recent CJEU case law reinforces the position upheld by the Proposal,⁷² still it remains over-inclusive and stretches too far beyond the notion of communication to the public.

Finally, as anticipated, an additional textual issue should be mentioned. Recital 38(1) does not mention “large amounts” of copyright protected works. This is the sole instance in the Proposal in which intermediaries are not qualified as storing and providing public access to large amounts of works. The lack of mention of “large amounts” in Recital 38(1) might imply that the novel construction of communication to the public that has been apparently delineated in that Recital should apply to intermediaries at large, rather than to the narrower category of those which are subject to the obligations of this proposed reform.

II. CONSISTENCY

Inconsistency with the EU *acquis*, or lack of systemic coordination, might irretrievably plague the Proposal. Systemic inconsistencies do emerge insofar as the Proposal imposes on intermediaries the implementation of effective content recognition technologies to prevent the availability of infringing content and “in order to ensure the functioning of any licensing agreement.”⁷³ The Proposal hints at technologies such as YouTube’s Content ID or other automatic infringement assessment systems. Apparently, the Proposal would force hosting providers to develop and deploy filtering systems, therefore *de facto* monitoring their networks. The promotion of automated filtering emerges as a primary goal on the EU Commission agenda, on a mandatory and voluntary basis.⁷⁴ According to the recent

infringement cooperates to it, or having a direct economic interest in the results of the infringement has the ability to control the infringer’s conduct).

⁷² See Eleonora Rosati, *The CJEU Pirate Bay Judgment and its Impact on the Liability of Online Platforms*, EIPR (forthcoming), https://papers.ssrn.com/abstract_id=3006591 (noting that “[i]n relation to the current EU policy discussion of the so called ‘value gap proposal’, the judgment reinforces the position of the European Commission, especially the basic idea that the making available, by a hosting provider, of third-party uploaded copyright content may fall within the scope of the right of communication to the public”).

⁷³ DSM Directive Proposal, *supra* note 6, at Recital 38.

⁷⁴ These EU proposals follow in the footsteps of a well-established path in recent global intermediary liability policy. Recent case law has imposed proactive monitor obligations on intermediaries for copyright infringement. Cour d’Appel [CA][regional court of appeal] Paris, Nov. 28, 2013, APC et al v. Google, Microsoft, Yahoo!, Bouygues et Al (imposing on search engines an obligation to proactively expunge their search results from any link to the illegal movie streaming website Allostreaming and affiliated enterprises); R.J.T., Ap. Civ. No. 1306157, 24.03.2014 (Braz) (imposing on YouTube a proactive monitoring obligation and a strict liability standard for infringement of Dafra’s copyright in a commercial dubbed by an anonymous user with comments tarnishing Dafra’s reputation); GEMA v. RapidShare (finding that, under the

Communication, “Tackling Illegal Content Online—Towards an enhanced responsibility of online platforms,” hosting providers would be called to adopt effective voluntary “proactive measures to detect and remove illegal content online”⁷⁵ and are encouraged to do so by using automatic detection and filtering technologies.⁷⁶

A. *On Monitoring Obligations and eCommerce Directive*

At first glance, the introduction of any filtering technology—which would *de facto* impose general monitoring obligations as in order to filter unwanted content, all content must be monitored⁷⁷—would inevitably call into question necessary coordination with the

TMA, host providers are already ineligible for the liability privilege if their business model is mainly based on copyright infringement); *Zhong Qin Wen v. Baidu*, 2014 Beijing Higher People’s Court (finding that it was reasonable for Baidu to exercise a duty to monitor and examine the legal status of an uploaded work once it has been viewed or downloaded more than a certain times). Actually, the emerging enforcement of proactive monitoring obligations has been spanning the entire spectrum of intermediary liability subject matters: intellectual property, privacy, defamation, and hate/dangerous speech. *See Google v. Mosley*, TGI Paris, November 6, 2013 (France); *Max Mosley v. Google Inc.*, 324 O 264/11 (Hamburg District Court, 24 January 2014), available at <http://openjur.de/u/674344.html>; *Mosley v. Google* [2015] EWHC 59 (QB) (United Kingdom) (courts in France, Germany, and the UK imposing proactive monitoring obligations to search engines, which were ordered to expunge the Internet from pictures infringing the privacy rights of Max Mosley, former president of Formula 1, caught on camera to have sex with prostitutes wearing Nazi paraphernalia); *Rolex v. eBay* (a.k.a. *Internetversteigerung II*), I ZR 35/04 (BGH, 19 April 2007) (Germany); *Rolex v. Ricardo* (a.k.a. *Internetversteigerung III*), Case I ZR 73/05 (BGH, April 30, 2008) (Germany) (in the so-called Internet Auction cases I-III, the German Federal Court of Justice, *Bundesgerichtshof*, repeatedly decided that notified trade mark infringements oblige internet auction platforms such as eBay to investigate future offerings, manually or through software filters, in order to avoid trade mark infringement); *Delfi AS v. Estonia* No 64569/09 (ECtHR, June 16, 2015) (finding compliant with ECHR a decision imposing monitoring obligation on a news web portal for defamatory users’ comments). In this context, however, notable exceptions, such as the landmark *Belen* case in Argentina, highlight also a fragmented international response to intermediary liability. *See Rodriguez M. Belen v. Google*, R.522.XLIX. (Supreme Court, October 29, 2014) (Argentina) (ejecting filtering obligations to prevent infringing links from appearing in search engines’ results in the future in a case brought a well-known public figures for violation of her copyright, honor and privacy). *See also* Giancarlo Frosio, *The Death of No-Monitoring Obligations: A Story of Untameable Monsters*, 8 JIPTEC (forthcoming 2017), available at https://papers.ssrn.com/abstract_id=2980786.

⁷⁵ *Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, Tackling Illegal Content Online, Towards an Enhanced Responsibility of Online Platforms*, *supra* note 32, at § 3.3.1 (noting that adopting such voluntary proactive measures does not lead the online platform to automatically lose the hosting liability exemption provided by the eCommerce Directive).

⁷⁶ *Id.* at § 3.3.2.

⁷⁷ *See C-360/10 Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v. Netlog NV*, 2012 E.C.R. 85, at § 36–38 (noting that “it is common ground that implementation of that filtering system would require . . . active observation of files stored by users with the hosting service provider and would involve almost all of the information thus stored and all of the service users of that provider . . . [i]n the light of the foregoing, it must be held that the injunction imposed on the hosting service provider requiring it to install the contested filtering system would oblige it to actively monitor almost all the data relating to all of its service users in order to prevent any future infringement of intellectual-property rights”).

eCommerce Directive.⁷⁸ In this respect, the proposed reform might go beyond the scope of copyright review, trespassing into the domain of the eCommerce regulation. Article 13 of the Proposal would contradict the intermediary liability exemption regime—in particular the no-monitoring obligation set out in Article 15 of the eCommerce Directive.⁷⁹ The eCommerce Directive prohibits *general* monitoring obligations, although it allows national law to provide for monitoring obligations “in a specific case.”⁸⁰ The eCommerce Directive also acknowledges that a Member State can impose duties of care on hosting providers “in order to detect and prevent certain types of illegal activities.”⁸¹ However, their scope should not extend to anything close to general monitoring obligations, if any meaning should be given to the previous statement in Recital 47 that only specific monitoring obligations are allowed. Also, duties of care should “reasonably be expected from the service [they] provide,” the Directive states, and no general monitoring obligation can fulfill such an expectation as they are explicitly banned by the Directive itself. In order to distinguish general from specific monitoring obligation, it should be considered that (1) as an exception, specific monitoring obligations must be interpreted narrowly, (2) both the scope of the possible infringements and the amount of infringements that can be reasonably expected to be identified, must be sufficiently narrow, and (3) it must be obvious which materials constitutes an infringement.⁸² As Van Eecke noted

[i]f [clear criteria] are not defined, or only vague criteria are defined by the court (e.g. “remove all illegal videos”), or if criteria are defined that would oblige the hosting provider to necessarily investigate each and every video on its systems (e.g. “remove all racist videos”), or if the service provider were required also to remove all variations in the future (e.g. “remove this video, but also all other videos that belong to the same repertory”), a general monitoring obligation would be imposed.⁸³

The proposed obligation in Article 13 would doubtless fall within the general category, rather than the specific.

Ça va sans dire, the Proposal conflicts openly with consistent, and unambiguous, European jurisprudence. The European Court of Justice reinforced multiple times the position that there is no room for general proactive monitoring and filtering mechanisms under EU law.⁸⁴ In the

⁷⁸ See Angelopoulos, *supra* note 53, at 33–38.

⁷⁹ *Id.* at art. 34–38.

⁸⁰ See Directive 2001/29/EC, *supra* note 14, at art. 14(3) and Recital 47.

⁸¹ *Id.* at Recital 48.

⁸² See Van Eecke, *supra* note 71, at 1486–87.

⁸³ *Id.* at 1487.

⁸⁴ See Case C-70/10, *Scarlet Extended SA v. Société belge des auteurs, compositeurs et éditeurs*

SABAM cases as well as *L'Oréal*, the court decided over the appropriateness and proportionality of injunctions issued under the Enforcement Directive and concluded plainly that the eCommerce Directive limits conflicting measures that can be taken under other intellectual property legislation.⁸⁵ In *Netlog*, the Court decided the matter with specific reference to hosting providers. *Netlog*'s language unmistakably covers the Proposal in Article 13. According to the ECJ, European law must be interpreted as precluding to require a hosting provider to install a system for filtering: (1) information which is stored on its servers by its service users; (2) which applies indiscriminately to all of those users; (3) as a preventative measure; (4) exclusively at its expense; and (5) for an unlimited period, (6) which is capable of identifying electronic files containing musical, cinematographic or audio-visual works.⁸⁶

According to the CJEU, room for proactive monitoring obligations seems extremely limited within the EU legal framework. In *L'Oréal v. eBay*, the ECJ did not discuss whether knowledge of a current infringement would require the hosting provider to prevent similar infringements in the future. Instead, the Court clarifies that any measure imposed on a hosting provider must be effective and dissuasive,⁸⁷ fair, proportionate and not excessively costly,⁸⁸ must not create barriers to legitimate trade⁸⁹ and, above all, must not boil down to a general monitoring obligation.⁹⁰ The ECJ therefore seems to conclude that, "with respect to an injunction to prevent future infringements, all these criteria will only be simultaneously met in very specific situations."⁹¹ Some aid in construing the ECJ position might come from the Advocate General Jääskinen Opinion. The Advocate General explicitly excluded both negligence and future infringements qualifying as actual knowledge:

[i]t also seems to me that legally 'knowledge' may refer only to past and/or present but not to the future . . . [and] the requirement of actual knowledge seems to exclude construed knowledge. It is not enough that the service provider ought to have known or has good reasons to suspect illegal activity.⁹²

SCRL (*SABAM*), 2011 E.C.R. I-11959 (re-stating the principles in favor of access providers); *Netlog NV*, 2012 E.C.R. 85 (confirming the principle in favor of hosting providers).

⁸⁵ See *L'Oréal SA*, 2010 E.C.R. I-02417, at § 139; *Scarlet*, 2011 E.C.R. I-11959, at § 40; *Netlog NV*, 2012 E.C.R. 85, at § 52.

⁸⁶ See *Netlog NV*, 2012 E.C.R. 85, at §§ 26, 52.

⁸⁷ *L'Oréal SA*, 2010 E.C.R. I-02417, at § 136.

⁸⁸ *Id.* at § 139.

⁸⁹ *Id.* at § 140.

⁹⁰ *Id.* at § 139.

⁹¹ Van Eecke, *supra* note 46, at 1476–78.

⁹² Case C-324/09, *L'Oréal SA and Others v. eBay International AG and Others*, 2010 E.C.R. at

Accordingly, the fact that a trademark has been infringed by a first user, does not imply that the hosting provider would have actual knowledge of a second user's infringement of the same trademark. Similarly, the fact that a user is found to infringe a trademark, does not imply that the hosting provider can be deemed to have actual knowledge of the same user infringing a trademark for the second time.⁹³ The only situation in which the Advocate General would envisage "actual knowledge" would be in case of "double identity," i.e. the situation when the same user infringes the same trademark in the same way within a short period of time.⁹⁴ From the Advocate General's cautious wording in this regard, it is clear that such double identity circumstances are exceptional.

In addition, the Proposal mentions that these filtering obligations should also apply when the providers "are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC."⁹⁵ This statement is hardly intelligible, if the filtering obligation is imposed "to ensure the functioning of any licencing agreement."⁹⁶ Licencing agreement obligations would only fall upon those active hosting providers, which are not covered by the liability exemption set out by Article 14 of the eCommerce Directive.⁹⁷ If hosting providers are eligible for the liability exemption, they do not have to conclude revenue-share agreements, therefore they cannot be imposed filtering obligations to ensure the functioning of agreements that they are under no obligation to conclude.

Perhaps the real target of this misfired reference to the hosting exemption in Article 14, was the no-monitoring obligation principle. An earlier draft of the Proposal extended the application of the filtering obligation also "when, in accordance with Article 15 of Directive 2000/31/EC, the online service providers do not have a general obligation to monitor the information which they transmit or store or to actively seek facts or circumstances indicating illegal activity."⁹⁸ The new wording might confirm that there is definitely no consensus in reforming the no monitoring obligation principle.⁹⁹ Still, the Commission would like to introduce a provision that would impose

§162–63, Opinion of AG Jääskinen.

⁹³ *Id.* at § 166.

⁹⁴ *Id.* at § 167.

⁹⁵ DSM Directive Proposal, *supra* note 6, at Recital 38.

⁹⁶ *Id.*

⁹⁷ *Id.* at 38–39.

⁹⁸ See Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, at 20, COM (2016); Husovec, *supra* note 35 (the draft is embedded in the blog post) (emphasis added).

⁹⁹ *Synopsis Report on the Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy*, *supra* note 23, at 2.

proactive monitoring obligations and, therefore, can hardly coexist with the arrangement included in the eCommerce Directive.

Finally, this Proposal would bring about an even more marked systemic inconsistency within EU law. As such, the proposal would deploy a *de facto* strict liability regime, rather than a negligence-based regime. At present, the eCommerce intermediary liability regime can be categorized as a negligence regime based on actual or constructive knowledge.¹⁰⁰ The hosting exemption works according to a knowledge-and-take-down regime.¹⁰¹ Upon knowledge of the infringement occurring through its services, the intermediary must act expeditiously to remove the infringing materials. If the Proposal is approved, hosting providers must take appropriate and proportionate measures, such as effective content recognition technologies, to ensure protection of copyrighted works and prevent the availability of infringing materials on their networks. Actually, monitoring obligations would create a legal presumption of knowledge on platforms. By monitoring, platforms must apparently know about the availability of any infringing materials on their networks, therefore they will be liable if that availability persists. Whether platforms actually know or not, they will be liable, if availability of infringing files occurs on their networks as that will imply that they have taken measures that finally did not prove effective enough. Apparently, ineffective prevention, as such, of the availability of infringing content on platforms' networks would make platforms liable. Thus, absent a knowledge-and-take-down regime, platforms will respond for copyright infringement, whether primary or secondary,¹⁰² according to a *de facto* strict liability criterion, namely the availability as such of infringing works on their networks.¹⁰³

¹⁰⁰ See Pablo Baistrocchi, *Liability of Intermediary Service Providers in the EU Directive on Electronic Commerce*, 19 SANTA CLARA HIGH TECH. L.J. 111, 114 (2003).

¹⁰¹ See Directive 2001/29/EC, *supra* note 14, at art. 14.

¹⁰² As explained earlier, a possible interpretation of Recital 38 would construe platforms' liability as direct rather than secondary.

¹⁰³ Obviously, one might fairly argue here that platforms' liability does not descend from third-party copyright infringement, but rather, from the violation of the standalone obligation of taking measures to prevent the availability of infringing works. In this respect, platforms' primary liability for direct infringement of the new monitoring obligation would be actually negligence-based. This might matter a lot as hosting providers might be deemed liable for not implementing measures regardless if copyright infringement occurs. In this respect, hosting providers might be requested to implement measures that prevent the availability of works regardless their privileged use status. The current wording of the proposed Article 13 makes this construction likely by referring to preventing the availability of "works or other subject-matter identified by rightholders through the cooperation with the service providers," rather than *copyright protected* works or other subject matters. DSM Directive Proposal, *supra* note 6, at 43. However, the proposal might be harder to decipher in this respect. According to Recital 38, intermediaries do have an obligation to conclude licensing agreements and should take measures to ensure the functioning of those agreements. *Id.* at 22. Prevention of copyright infringement does ensure the functioning of the agreements. Thus, hosting providers should take measures to prevent copyright infringement to ensure the functioning of the licensing agreements. So, by ineffectively taking

The Proposal would make knowledge-and-take-down irrelevant for copyright purposes, tearing apart the fundamental setup of the eCommerce Directive, which, however, will be still in full force. What will happen when intermediaries come before a court claiming that, there is no liability as they are not negligent according to the eCommerce Directive, while rightsholders claim that intermediaries are liable as they should have filtered out infringing content regardless of any knowledge according to the Copyright in the Digital Single Market Directive? This is not to say that the Commission cannot introduce proactive monitoring regime if it wishes to do so and finds the necessary consensus—although, as to be explained,¹⁰⁴ this might be a poor policy choice. However, doing so solely through copyright regulation will be at odds with other portions of EU law, especially in light of the fact that the CJEU specifically recognized that monitoring obligations to prevent copyright infringement would be in violation of the eCommerce Directive. In addition, regardless of whether this reform shall be implemented with or without amending the eCommerce Directive, this proposed provision oddly conflicts with the bold statement made in the OP & DSM Communication that “[t]he Commission will maintain the existing intermediary liability regime.”¹⁰⁵

B. *On Redress Mechanism and a Missing Notice and Take-Down Regime*

The second paragraph of Article 13 would also state that “Member States shall ensure that the service providers referred to in paragraph 1 put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1.”¹⁰⁶ This obligation to implement a redress mechanism for filtering measures needs clarification and might again trigger internal inconsistencies. First, a redress mechanism that resembles so closely a counter-notice would be expected to follow a notice. However, this is not the case, as Article 13 calls for the setup of a proactive filtering mechanism that does not seek any individualized notice for infringing works but rather some other identification mechanism¹⁰⁷—perhaps agreed in advance between rightsholders and hosting providers.

measures to prevent the availability of infringing works on their networks, hosting providers would be liable for their obligation to conclude and ensure functioning of licensing agreements. As that functioning depends on preventing third-party copyright infringement, an argument can be made that providers’ liability steams from those third-party torts. If the proposal is approved as it stands, this teleological interpretation might be preferred in light of the purpose of the provision.

¹⁰⁴ See discussion *infra* Part III.B.

¹⁰⁵ Communication, *supra* note 24, at 9.

¹⁰⁶ DSM Directive Proposal, *supra* note 6, at art. 13(2).

¹⁰⁷ *Id.*

But, is this really the case? How would filtering measures work in practice? Should intermediaries filter everything under the sun? Should they proactively monitor what has been originally the subject of a notice? Should they apply recognition technologies only to a pre-existing black list of protected works? This might be the case—at least guessing a possible meaning of the reference in Article 13 to works ‘identified by rightholders through the cooperation with the service provider,’ whose availability should be prevented.¹⁰⁸ Who will provide that list? Who will update it? How? Little—or better nothing—is known at the moment. The proposal does not develop further on how this redress mechanism should work in practice. In particular, it does not provide for the development of best practices or standardization for complaints, while it does so for filtering mechanisms.¹⁰⁹ Most likely, the final arrangement of this redress system might result from voluntary efforts and best practices promoted by the industry alone and might resemble closely a sectorial notice-and-take down system. Finally, this proposal would set up a counter-notice mechanism for filtering absent an EU-wide legislatively mandated horizontal notice-and-take-down and counter-notice system.¹¹⁰ Rather—for sake of systemic consistency—EU law should set up first the long-awaited notice-and-take-down system under the eCommerce Directive framework.¹¹¹

However, this is apparently not an option on the Commission agenda. As mentioned in the OP&DSM Communication, EU-wide notice-and-action procedures will be postponed for now as the Commission will first assess the impact of on-going reforms.¹¹² In the future, a couple of alternatives might be looming ahead according to

¹⁰⁸ *Id.* at Art. 13(1); see also JURI Draft Opinion, *supra* note 6, at 22, 40 (A leaked draft report to the Parliament from the Directive rapporteur, MEP Therese Comodini Cachia, tried to clarify this point by redrafting Article 13 so that for the purpose of taking “appropriate and proportionate measures to ensure the functioning of agreements concluded with rightholders for the use of their works,” “rightholders should provide service providers with accurately identified works or subject-matter over which they” enjoy rights.) (emphasis omitted).

¹⁰⁹ DSM Directive Proposal, *supra* note 6, at art. 13(3); see also Husovec, *supra* note 35.

¹¹⁰ See Directive 2001/29/EC, *supra* note 14, at art. 12 (foreseeing the possibility of the introduction of a complete notice-and-take-down procedure). Leaked draft Proposal for a Directive of the European Parliament and of the Council on procedures for notifying and acting on illegal content hosted by online intermediary service providers (“Directive on notice-and-action procedures”) [...] (2013) XXX draft (proposing a horizontal notice-and-action mechanism for hosting providers and later floated by the Commission); see also Aleksandra Kuczerawy, *Intermediary Liability & Freedom of Expression: Recent Developments in the EU Notice & Action Initiative*, 31 *COMPUTER L. & SECURITY REV.* 46 (2015).

¹¹¹ See Open Letter from European Research Centres, to Members of the European Parliament and the Council of the European Union, *EU Copyright Reform Proposals Unfit for the Digital Age*, CREATE (Feb. 24, 2017), http://www.create.ac.uk/wp-content/uploads/2017/02/OpenLetter_EU_Copyright_Reform_24_02_2017.pdf. (suggesting the introduction of a horizontal notice-and-action framework for hosting providers instead of the current Article 13); Angelopoulos, *supra* note 48, (suggesting the introduction of a horizontal notice-and-action framework for hosting providers instead of the current Article 13).

¹¹² See Communication, *supra* note 24, at 9.

previous consultations and communications. First, a sectorial and problem-driven approach might also be implemented for notice-and-action procedures with a special emphasis on different requirements regarding the content of the notice.¹¹³ According to the results to the Consultation on Online Intermediaries, respondents agree that different categories of illegal content require different policy approaches as regards notice-and-action procedures, especially for infringements of intellectual property rights, child abuse content and racist and xenophobic speech.¹¹⁴ Second, the Enforcement Directive might also be amended to explicitly establish that national courts must be allowed to order intermediaries to take measures aimed not only at ending infringements already committed using their services, but also at preventing further infringements. In that respect, according to the Consultation on Modernization of IPRs' Enforcement, the Directive should establish criteria on how "take down and stay down" should be undertaken without establishing a general monitoring obligation.¹¹⁵ The Communication *Tackling Illegal Content Online* reinforces this point on the agenda by endorsing "automatic stay-down procedures" to fingerprint and filter out content which has been already identified and assessed as illegal.¹¹⁶ However, how this can be done without general monitoring remains to be seen, as already discussed at length earlier.¹¹⁷

C. On Monitoring Obligations and Fundamental Rights

As stated by multiple authorities,¹¹⁸ general filtering and

¹¹³ See *Public Consultation on Online Intermediaries*, *supra* note 21. It cannot be foreseen which categories may receive special treatment. However, the Public Consultation on Online Intermediaries mentions the following categories: "Illegal offer of goods and services (e.g. illegal arms, fake medicines, dangerous products, unauthorised gambling services etc.);" "Illegal promotion of goods and services;" "Content facilitating phishing, pharming or hacking;" "Infringements of intellectual property rights (e.g. copyright and related rights, trademarks);" "Infringement of consumer protection rules, such as fraudulent or misleading offers;" "Infringement of safety and security requirements;" "Racist and xenophobic speech;" "Homophobic and other kinds of hate speech;" "Child abuse content;" "Terrorism-related content (e.g. content inciting the commitment of terrorist offences and training material);" and "Defamation." *Id.*; see also German Coalition Agreement, *supra* note 14, at 133 (stipulating different liability levels for different kind of hosting providers).

¹¹⁴ See *Brief Result of the Consultation on Online Intermediaries*, *supra* note 23.

¹¹⁵ See *Public Consultation on Modernisation of Enforcement of IPRs*, *supra* note 19, at C.2.3.

¹¹⁶ See Communication, *supra* note 32, at § 5.2.

¹¹⁷ See discussion *supra* Part II.A.

¹¹⁸ See *Netlog NV*, 2012 E.C.R. 85, at § 36–38; see also Angelopoulos, *supra* note 48; Stefan Kulk & Frederik J. Zuiderveen Borgesius, *Filtering for Copyright Enforcement in Europe after the Sabam Cases*, 34 EUR. INTELL. PROP. REV. 791, 791–94 (2012); Darren Meale, *SABAM v Scarlet: of course blanket filtering of the internet is unlawful, but this isn't the end of the story*, 34 EUR. INTELL. PROP. REV. 429, 432 (2012); Andrea Montanari, *Prime Impressioni sul Caso SABAM c. Netlog NV: gli Internet Service Provider e la Tutela del Diritto D'autore On Line*, 4 DIRITTO DEL COMMERCIO INTERNAZIONALE 1074 (2012); Evangelia Psychogiopoulou, *Copyright enforcement, human rights protection and the responsibilities of internet service providers after Scarlet*, 34 EUR. INTELL. PROP. REV. 552, 555 (2012).

monitoring obligations would be inconsistent with the Charter of Fundamental Rights of the European Union.¹¹⁹ In the SABAM cases, the Court explained that filtering measures—and monitoring obligations—would fail to strike a ‘fair balance’ between copyright and other fundamental rights.¹²⁰ In particular, they would undermine users’ freedom of expression and right to privacy¹²¹ and the provider’s freedom to conduct a business.¹²² The extent to which filtering and monitoring obligations do clash with rights of users and intermediaries—and therefore their inappropriacy as a policy option—will be the subject of consideration in the next section.

III. APPROPRIACY AND PROPORTIONALITY

The numerous systemic inconsistencies that the reform will bring about—together with obscure textual references—reflect also on the appropriacy and proportionality of the reform. Actually, most arguments challenging the appropriacy of filtering and monitoring obligations have been plainly spelled out by the European jurisprudence itself, discussing the impossible coexistence between these measures and multiple fundamental rights. Also, the overall goal of the reform might finally be fundamentally inappropriate. The lack of empirical support to the notion of value gap challenges its appropriacy and proportionality.

A. *On Filtering/Monitoring and Fundamental Rights*

A major concern with the proposal is whether these content recognition technologies would be “appropriate and proportionate” for the task as the proposal would suggest.¹²³ Apparently, they are not. As mentioned, these technologies—and the filtering and monitoring obligations that they bring about—would fail to strike a fair balance between copyright and other fundamental rights. This very point has been made explicitly clear by consistent jurisprudence of the ECJ that highlighted how the deployment of these technologies would be inappropriate by disproportionately favoring property rights against other fundamental rights.

1. On Freedom of Information, Exceptions and Limitations, and Public Domain

Users’ freedom to receive and impart information would be struck by the proposal. Actually, automatic infringement assessment systems

¹¹⁹ See Charter of Fundamental Rights of the European Union, 2012 O.J. (C 326) 391.

¹²⁰ See *Netlog NV*, 2012 E.C.R 85, at § 51.

¹²¹ See EU Charter, *supra* note 119, at art. 8, 11.

¹²² *Id.* at art. 16.

¹²³ See DSM Directive Proposal, *supra* note 6, at art. 13(1).

might undermine the enjoyment of users' exceptions and limitations.¹²⁴ DRM effects on exceptions and limitations have been highlighted in copious literature.¹²⁵ Similar conclusions apply to this scenario. Automated systems cannot replace human judgment that should flag a certain use as fair or falling within the scope of an exception or limitation. Also, complexities regarding the public domain status of certain works might escape the discerning capacity of content recognition technologies. At the present level of technological sophistication, false positives might cause relevant chilling effects and negatively impact users' fundamental right to freedom of expression. In the own word of the European Court of Justice, these measures

could potentially undermine freedom of information, since that system might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications. Indeed, it is not contested that the reply to the question whether a transmission is lawful also depends on the application of statutory exceptions to copyright which vary from one Member State to another. In addition, in some Member States certain works fall within the public domain or may be posted online free of charge by the authors concerned.¹²⁶

In this regard, it is worth noting an additional possible inconsistency that this reform might create. Recital 46 of the eCommerce Directive explicitly requires the hosting provider to respect the principle of freedom of expression when deciding about a take-down request.¹²⁷ As respect of freedom of expression cannot be guaranteed by the adoption of automated filtering technologies, hosting providers would be non-compliant with this obligation stemming from the eCommerce Directive, while filtering in compliance with the proposed directive.

In addition—besides mentioned EU law systemic

¹²⁴ See, e.g., Leron Solomon, *Fair Users or Content Abusers? The Automatic Flagging of Non-Infringing Videos by Content ID on YouTube*, 44 HOFSTRA L. REV. 237, 239 (2015); Corinne Hui Yun Tan, *Lawrence Lessig v Liberation Music Pty Ltd - YouTube's Hand (or Bots) in the Overzealous Enforcement of Copyright*, 36 EUR. INTEL. PROP. REV. 347, 347–51 (2014); Justyna Zygmunt, *To teach a machine a sense of art – problems with automated methods of fighting copyright infringements on the example of YouTube Content ID*, MACHINE ETHICS & MACHINE LAW: E-PROCEEDINGS (2016); Zoë Carpou, *Robots, Pirates, and the Rise of the Automated Takedown Regime: Using the DMCA to Fight Piracy and Protect End-Users*, 39 COLUM. J. L. & ARTS 551, 564–82 (2016).

¹²⁵ See GIANCARLO F. FROSIO, COMMUNIA FINAL REPORT 99–103, 135–41 (2011). <http://www.communia-project.eu/final-report> (report prepared for the European Commission on behalf of the COMMUNIA Network and the NEXA Center on the digital public domain, discussing most of the relevant literature and major threats that technological protection measures pose for fair dealings, privileged and fair uses).

¹²⁶ *Netlog NV*, 2012 E.C.R 85, at § 50.

¹²⁷ See Directive 2001/29/EC, *supra* note 14, at Recital 46.

inconsistencies—introducing a strict liability system for online intermediaries’ activities may itself be an inappropriate and disproportionate policy choice as it will upset the delicate balance of copyright protection with other fundamental users’ rights. In *Google v. Louis Vuitton*, the Advocate General of the CJEU pointed at the fact that general rules of civil liability (based on negligence)—rather than strict liability IP law rules—suit the governance of the activities of Internet intermediaries best. His argument—crafted in the context of trademark infringement online—would apply *mutatis mutandis* to copyright as well:

Liability rules are more appropriate, since they do not fundamentally change the decentralised nature of the internet by giving trade mark proprietors general—and virtually absolute—control over the use in cyberspace of keywords which correspond to their trade marks. Instead of being able to prevent, through trade mark protection, any possible use—including, *as has been observed, many lawful and even desirable uses*—trade mark proprietors would have to point to specific instances giving rise to Google’s liability in the context of illegal damage to their trademarks.¹²⁸

According to this argument a negligence-based system would better serve the delicate balance between protection of copyright, access to information, and freedom of expression that the online intermediary liability conundrum entails. As long as filtering and monitoring obligations undermine the knowledge and take-down mechanism in place, they will, by default, cause chilling effects over freedom of information. As Van Eecke mentioned, “the notice-and-take-down procedure is one of the essential mechanisms through which the eCommerce Directive achieves a balance between the interests of rightholders, online intermediaries and users.”¹²⁹ Although imperfect as it is, a notice an-take-down mechanism embeds a fundamental safeguard for freedom of information as long as it forces intermediaries to actually consider the infringing nature of the materials before coming down with a final decision whether to take them down.

2. On Protection of Personal Data

The unqualified deployment of filtering and monitoring obligations may also impinge also on the service users’ right to protection of personal data. In the SABAM cases, the ECJ has

¹²⁸ Joined Cases C-236, 237 & 238/08, *Google France, S.A.R.L. & Google Inc. v. Louis Vuitton Malletier SA, Viaticum S.A., Luteciel S.A.R.L., v. Centre Bational de Recherche en Relations Humaines (CNRRH) S.A.R.L., Pierre-Alexis Thonet, Bruno Raboin, Tiger, a franchisee of Unicis*, ECLI:EU:C:2009:569, § 123 (Advocate General Opinion).

¹²⁹ Van Eecke, *supra* note 46, at 1479–80.

authoritatively already outlined the inappropriacy of these measures against fundamental rights in this scenario as well. As the ECJ concluded,

requiring installation of the contested filtering system would involve the identification, systematic analysis and processing of information connected with the profiles created on the social network by its users. The information connected with those profiles is protected personal data because, in principle, it allows those users to be identified.¹³⁰

Admittedly, the *Netlog*'s Court does not fully explain how exactly such processing constituted a limitation of the right to data protection, or why, if it did constitute such a limitation, the Data Protection Directive would not legitimize the processing of personal data by Netlog.¹³¹ However, the ECJ has overcome its traditional reluctance in getting involved in any actual balancing of conflicting rights and established for the first time—in *Scarlet* and *Netlog*—a “fundamental right to the protection of personal data, which is not fairly balanced with copyright holders’ rights when a mechanism requiring the systematic processing of personal data is imposed in the name of the protection of intellectual property.”¹³² According to the European Court of Human Rights, secrecy of communication or the right to respect for private life¹³³ could be also impinged upon by filtering technologies, according to the European Court of Human Rights, which tends to be critical of systems to intercept communications, especially when those systems monitor content of communications.¹³⁴

3. On Freedom of Business and European Innovation

Finally, among the tsunamis of negative reactions and unfulfilled expectations,¹³⁵ residual critiques point at the negative externalities on

¹³⁰ *Netlog NV*, 2012 E.C.R 85, at § 49.

¹³¹ Gloria González Fuster, *Balancing Intellectual Property against Data Protection: a New Right's Wavering Weight*, 14 IDP 34, 44 (2012) (quotations omitted); see also Kulk & Borgesius, *supra* note 118, at 793–94.

¹³² González Fuster, *supra* note 131, at 37; see also L. Ferola, *Diritto D'autore vs. Diritto alla Riservatezza: alla Ricerca di un Equo Bilanciamento nella Rete. I casi Peppermint, FAPAV e Scarlet*, in I DIRITTI NELLA «RETE» DELLA RETE 67 (F. Pizzetti ed., UTET 2011).

¹³³ See Charter, *supra* note 119, at art. 7.

¹³⁴ See Kulk & Borgesius, *supra* note 118, at 793–794.

¹³⁵ See Caroline De Cock, *EC Failed to #FixCopyright: Stop 'RoboCopyright' and Ancillary Copyright & Start to Focus on Users and Creators*, COPYRIGHT FOR CREATIVITY (Sept. 14, 2016), <http://copyright4creativity.eu/2016/09/14/ec-failed-to-fixcopyright-stop-robocopyright-and-ancillary-copyright-start-to-focus-on-users-and-creators>; Alberto Bellan, Wikimedia, *EDRI, and others call for EU Copyright Package to uphold DSM fundamental principles*, IPKAT (Sept. 13, 2016), <http://ipkitten.blogspot.fr/2016/09/wikimedia-edri-and-others-call-for-eu.html>. Quite understandably, consistent negative reactions came from multiple voices in the Silicon Valley and the United States. See, e.g., Jeremy Malcom, *European Copyright Leak Exposes Plans to Force the Internet to Subsidize Publishers*, ELECTRONIC FRONTIER FOUNDATION: DEEPLINKS BLOG (Aug. 26, 2016), <https://www EFF.org/deep links/2016/08/european-copyright-leak-exposes-plans->

innovation that this new regime would have. No monitoring obligations remove barriers to innovation by making cheaper for platforms to enter and compete in the market. This proposal would force intermediaries to develop and deploy costly technology to cope with EU law, therefore backing up property owners' attempts to leverage their hold-out power to block progress. These anti-competitive behaviors have repeatedly applied to property at large,¹³⁶ but surfaced especially often throughout the history of copyright.¹³⁷ The ECJ emphasized the economic impact on internet service provider (ISP) of filtering and monitoring obligations. The ECJ assumed that monitoring all the electronic communications made through the network, without any limitation in time, directed to all future infringements of existing and yet to create works "would result in a serious infringement of the freedom of the hosting service provider to conduct its business."¹³⁸ Hosting providers' freedom of business would be disproportionately affected since an obligation to adopt filtering technologies would require the ISP to install a complicated, costly and permanent system at its own expense.¹³⁹ In addition, according to the ECJ, this obligation would be contrary to Article 3 of the Enforcement Directive, providing that "procedures and remedies necessary to ensure the enforcement of the intellectual property rights . . . shall not be unnecessarily complicated or

force-internet-subsidize-publishers; David Meyer, *Why Europe's New Copyright Proposals Are Bad News for the Internet*, FORTUNE (Sept. 14, 2016), <http://fortune.com/2016/09/14/europe-copyright-google>; Natasha Lomas, *EU digital copyright reform proposals slammed as regressive*, TECHCRUNCH (Sept. 14, 2016), <https://techcrunch.com/2016/09/14/eu-digital-copyright-reform-proposals-slammed-as-regressive/>; Cory Doctorow, *The EU tried to craft a sane 21st century copyright and failed miserably*, BOINGBOING (Sept. 14, 2016, 10:34 AM), <https://boingboing.net/2016/09/14/the-eu-tried-to-craft-a-sane-2.html>.

¹³⁶ See Carol Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711, 749–50, 752 (1986) (discussing how large public projects such as highways or railroads are vulnerable to the hold-out power of single property owners).

¹³⁷ See Hannibal Travis, *Building Universal Digital Libraries: An Agenda for Copyright Reform*, 33 PEPP. L. REV. 761, 786–792 (2006) (sketching a quick history of hold outs on cultural technological advancements); *White-Smith Music Publ'g Co. v. Apollo Co.*, 209 U.S. 1 (1908) (piano rolls); *Fortnightly Corp. v. United Artists Television, Inc.*, 392 U.S. 390 (1968) (cable television); *Amstrad Consumer Electronics Plc v. British Phonographic Industry Ltd.* [1986] AC 159 (UK) (tape recorders); *Sony Corp. of Am. v. Universal City Studios, Inc.*, 464 U.S. 417, 429 (1984) (VHS recorder); *Twentieth Century Music Corp. v. Aiken*, 422 U.S. 151 (1975) (radio); *A&M Records, Inc. v. Napster, Inc.*, 239 F.3d 1004 (9th Cir. 2001) (peer to peer software); *Metro-Goldwyn-Mayer Studios Inc. v. Grokster, Ltd.*, 545 U.S. 913 (2005) (peer to peer software); *UMG Recordings, Inc. v. MP3.com, Inc.*, 92 F.Supp.2d 349 (S.D.N.Y. 2000) (mp3 music format); *Perfect 10, Inc. v. Amazon.com, Inc.*, 508 F.3d 1146 (9th Cir. 2007) (search engines and digital thumbnails); Bundesgerichtshof [BGH] [Federal Court of Justice] Apr. 29, 2010, *Vorschaubilder*, I ZR 69/08 (Ger.) (ruling that Google Image Search does not infringe copyright); *Capitol Records, LLC v. ReDigi Inc.*, 934 F.Supp.2d 640 (S.D.N.Y. 2013) (holding that users do not have the right to resell digital music on ReDigi, even though it features an innovative cloud service technology that verifies the legitimacy of a digital music file before it can be uploaded for storage).

¹³⁸ *Netlog NV*, 2012 E.C.R. 85, at § 46.

¹³⁹ *Id.*

costly [and] shall be applied in such a manner as to avoid the creation of barriers to legitimate trade.”¹⁴⁰

Whether technology is too costly—therefore limiting market incentives for present market players—might be up to debate as shown by the *Allostreaming* case in France and the *Dafra* case in Brazil.¹⁴¹ In both cases, Google’s so-called “technical defense” was refuted by the courts on the basis of expert-testimony reports to the contrary.¹⁴² YouTube Content ID alternatives—such as Audible Magic, which is claimed to be a cheap solution—are widely available on the market.¹⁴³ However, the proposed legislation might have unforeseen effects that would favor established market players, rather than competition in the online content market. In fact, negative externalities upon innovation will hit harder new market entrants, which will have to bear additional costs and do not own any proprietary recognition technology. In particular, the European tech industry will be at a disadvantage as it should licence filtering technologies either from Google/YouTube—which might rather keep it for its exclusive use—or other US companies such as Audible Magic. As most established market players are US-based, this proposal might once again be a bad trade-off for European companies—and push the Digital Single Market further away, rather than promoting it.

B. *On Empirical Evidence and the Value-Gap*

There is finally an overarching concern with the appropriateness of this reform that would question its fundamental goal. As mentioned, the introduction of Article 13 would be justified by the necessity of closing the so-called “value gap.”¹⁴⁴ The idea of a “value gap” echoes a discourse almost exclusively fabricated by the music and entertainment industry. Apparently, this rhetorical device was coined for the first time in music industry global reports and never used elsewhere.¹⁴⁵ Being a partisan fabrication, this rhetoric seems scarcely concerned with empirical evidence. The Draft Directive’s Impact Assessment admits it quite plainly:

economic impacts are mostly assessed from a qualitative point of view, considering how the different policy options would affect the negotiations between those creating or investing in the creation of content and those distributing such content online. The limited

¹⁴⁰ See Enforcement Directive, *supra* note 20, at art. 3.

¹⁴¹ See APC, *supra* note 74; Dafra, *supra* note 74.

¹⁴² *Id.*

¹⁴³ See AUDIBLE MAGIC, <http://www.audiblemagic.com> (last visited Nov. 15, 2017).

¹⁴⁴ See discussion *supra* Introduction.

¹⁴⁵ See Husovec, *supra* note 35.

availability of data in this area . . . did not allow to elaborate a quantitative analysis of the impacts of the different policy options.¹⁴⁶

And, again, the European Copyright Society reinforced this point by noting: “we are disappointed to *see* that the proposals are not grounded in any solid scientific (in particular, economic) evidence.”¹⁴⁷ Actually, there is no clear evidence on the effects of copyright infringement in the digital environment, the scale of it, the nature of it, or the effectiveness of more aggressive enforcement strategies. In an authoritative report commissioned by the UK government, *Digital Opportunity. A Review of Intellectual Property and Growth* (hereinafter the Hargreaves Report), Professor Ian Hargreaves noted:

The question is: in a digital world, where copying and distribution are more or less free, what does an effective regime look like? No one doubts that a great deal of copyright piracy is taking place, *but reliable data about scale and trends is surprisingly scarce*. Estimates of the scale of illegal digital downloads in the UK ranges between 13 per cent and 65 per cent in two studies published last year. *A detailed survey of UK and international data finds that very little of it is supported by transparent research criteria*. Meanwhile sales and profitability levels in most creative business sectors appear to be holding up reasonably well. We conclude that many creative businesses are experiencing turbulence from digital copyright infringement, *but that at the level of the whole economy, measurable impacts are not as stark as is sometimes suggested*.¹⁴⁸

The Hargreaves Report hints at a key question of the debate over digital piracy. Copyright policies to tackle piracy should be based on hard and transparent evidence.

Actually, in contrast, a Report commissioned by the European Commission—and delivered in May 2015 but released only recently by a Pirate Party’s MEP gaining access to the Report following a document request¹⁴⁹—showed that there is no “robust statistical evidence of displacement of sales by online copyright infringements.”¹⁵⁰ Instead, at

¹⁴⁶ Commission Staff Working Document, *Impact Assessment on the modernisation of EU copyright rules*, COM (2016) 301 final (Sept. 14, 2016), PART 1/3, 136.

¹⁴⁷ *General Opinion on the EU Copyright Reform Package*, EUR. COPYRIGHT SOC’Y 5 (Jan. 24 2017), <https://europeancopyrightsocietydotorg.files.wordpress.com/2015/12/ecs-opinion-on-eu-copyright-reform-def.pdf>.

¹⁴⁸ IAN HARGREAVES, *DIGITAL OPPORTUNITY: A REVIEW OF INTELLECTUAL PROPERTY AND GROWTH* 6 (May 2011) (emphasis added); *see also* Joe Karaganis, *Rethinking Piracy*, in *MEDIA PIRACY IN EMERGING ECONOMIES* 1, 4–11 (Joe Karaganis ed., Social Science Research Council 2011) (making the same argument).

¹⁴⁹ *See* Julia Reda, *What the Commission found out about copyright infringement but ‘forgot’ to tell us*, JULIA REDA (Sept. 20, 2017), <https://juliareda.eu/2017/09/secret-copyright-infringement-study>.

¹⁵⁰ MARTIN VAN DER ENDE, JOOST POORT, ROBERT HAFFNER, PATRICK DE BAS, ANASTASIA YAGAFAROVA, SOPHIE ROHLFS & HARRY VAN TIL, *ESTIMATING DISPLACEMENT RATES OF*

least in the case of video games, “the estimated effect of illegal online transactions on sales is positive—implying that illegal consumption leads to increased legal consumption.”¹⁵¹ In sum, the Report concludes:

the main contribution to the existing literature is the finding on displacement rates for recent top films and the lack of a robust (positive) displacement rate for films / TV-series in general, music, books and games despite the carefully developed questionnaire and the application of econometric analysis.¹⁵²

Crafting important pieces of a reform that should promote the European Digital Single Market on the assumption of a “value gap” to close might be the result of tunnel vision and a contradiction in terms. It does endorse a rhetorical approach that would be apparently looking backwards, rather than forward. The Internet, digitization, platform and sharing economies might be an opportunity for creators, rather than the opposite. The Commission—in setting up its reformation process, goals, and vision—might have chosen the alternative path of emphasizing the “added value” of technological innovation, rather than the “value gap.” To this end, clear empirical evidence should have been carefully reviewed to consider whether creators—and the creative market as a whole—have been slowly withering or instead flourishing. So far, independent empirical evidence supporting the present enforcement strategy was never provided. Contrary evidence that might emphasize positive externalities for creativity of the Internet, digitization, and platforms was equally never considered. Yet, this evidence is plenty. Evidence suggests to a certain degree of consistency that there is in fact an added value to promote, rather than a value gap to close.¹⁵³ Empirical studies have shown that in the digital environment, the sky is raising, rather than falling, as far as creative industries are concerned.¹⁵⁴ As the economist Joel Waldfogel has recently argued:

COPYRIGHTED CONTENT IN THE EU: FINAL REPORT 7 (European Commission, 2015).

¹⁵¹ *Id.* at 15.

¹⁵² *Id.* at 8.

¹⁵³ See Giancarlo F. Frosio, *Digital piracy debunked: a short note on digital threats and intermediary liability*, 5 INTERNET POL’Y REV. (2016), <https://policyreview.info/articles/analysis/digital-piracy-debunked-short-note-digital-threats-and-intermediary-liability>.

¹⁵⁴ See Michael Masnick & Michael Ho, *The Sky is Rising: A Detailed Look at the State of the Entertainment Industry*, FLOOR 64 3 (Jan. 2012), <https://www.documentcloud.org/documents/562830-the-sky-is-rising.html> (noting that the market for music, films, videos, video games, and books has been booming through the last decade with the value of the worldwide entertainment industry growing of nearly fifty percent, employment in the U.S. entertainment sector rising by nearly twenty percent, the amount of new content being produced worldwide growing at a tremendous rate in any area of the entertainment industry and, finally, more importantly, the total U.S. household spending that went to entertainment growing of fifteen percent); see also Joel Waldfogel, *Is the Sky Falling? The quality of new recorded music since Napster*, VOXEU.ORG (Nov. 14, 2011), <http://www.voxeu.org/index.php?q=node/7274>.

Yet despite the sharp revenue reductions for recorded music, as well as threats to revenue in some other traditional media industries, other aspects of digitization have had the offsetting effects of reducing the costs of bringing new products to market in music, movies, books, and television. On balance, digitization has increased the number of new products that are created and made available to consumers. Moreover, given the unpredictable nature of product quality, growth in new products has given rise to substantial increases in the quality of the best products and therefore the benefit of these new products to consumers.¹⁵⁵

Piracy has been construed by some as an innovation policy, forcing the market to adapt to user needs.¹⁵⁶ And, the market did in fact adapt, offering new and more affordable ways to enjoy creativity. Overlooking this empirical evidence—or at least moving forward without an impact statement that would consider all evidence and possible narratives—might result into a reform that will prove obsolete before being implemented, and possibly detrimental for the Digital Single Market, rather than beneficial.¹⁵⁷

CONCLUSION

As part of its recent proposal to adapt copyright to the Digital Single Market (“DSM”), the European Commission would like to introduce a set of new obligations for information society service providers to deal with certain uses of protected content by online services. As such, redistributing resources to creators—by promoting functioning licensing agreements—would be a laudable goal. Also, narrow and specific duties of care to detect and prevent infringing activities would be within the scope of EU law. However, the means to reach these goals as deployed in the Commission’s proposal—together with the shaky empirical foundations of the notion of value gap—can find little support and justification within the EU legal system. In addition to clarity concerns specific to these proposals, the introduction

¹⁵⁵ Joel Waldfoegel, *How Digitization Has Created a Golden Age of Music, Movies, Books, and Television* 31 J. OF ECON. PERSPECTIVES 195, 195 (2017).

¹⁵⁶ See ADRIAN JOHNS, *PIRACY: THE INTELLECTUAL PROPERTY WARS FROM GUTENBERG TO GATES* (U. of Chicago Press, 2010).

¹⁵⁷ Scholarly projects have been trying to establish a body of evidence that allows better decision making in the contested copyright policy field. See Theo Koutmeridis, Kris Erickson & Martin Kretschmer, *The Copyright Evidence Wiki: Empirical Evidence for Copyright Policy*, COPYRIGHT EVIDENCE WIKI, www.copyrightevidence.org/evidence-wiki/index.php/Copyright_Evidence (last visited Mar. 29, 2018). The EU Parliament might have taken notice of the necessity to legislate about copyright law on the basis of clear empirical evidence by dedicating the sixth edition of the EUhackathon challenge to visualizing empirical evidence for copyright reform. As part of this challenge, a number of software developers have been called to develop tools to visualize copyright empirical evidence. See EUHACKATHON, <http://2016.euhackathon.eu> (last visited Nov. 15, 2017).

of monitoring obligations for online intermediaries would raise more general critiques in terms of consistency with other portions of the *EU acquis* as well as critiques with regard to the proposal's appropriacy and proportionality.

First, the wording in this proposal lacks clarity and makes it hard to predict the implications of the Proposal's implementation. In particular, (1) the notion of large amounts of works that the targeted providers are supposed to store and provide access to—and the scope of application of the new provision—becomes impossible to determine; (2) the notion of works in Article 13 must be qualified as copyright-protected works, otherwise the category of online services covered by the provision would expand to include a large amount of works, including unprotected works stored or to which public access is provided; (3) Recital 38(1) would imply that intermediaries storing and providing public access to protected works would be communicating to the public, thus making hosting providers directly liable, rather than secondarily liable for any intellectual property rights infringement as commonly understood.

Second, introducing an obligation for intermediaries to develop and deploy filtering systems—therefore *de facto* monitoring their networks—would create systemic inconsistencies. In particular, the proposal would (1) contradict the present intermediary liability exemption regime—in particular the general no-monitoring obligation set out in Article 15 of the eCommerce Directive; (2) conflict openly with consistent—and unambiguous—jurisprudence of the European Court of Justice, confirming that there is no room for general proactive monitoring and filtering mechanisms under EU law; (3) deploy a strict liability regime, rather than a negligence-based regime, making knowledge and take-down irrelevant for copyright purposes, thereby *de facto* tearing apart the eCommerce Directive, which will be however still in full force; (4) set up a redress mechanism for filtering absent an EU-wide legislatively mandated notice-and-take-down system; and (5) be inconsistent with the EU Charter of Fundamental Rights.

Third, the numerous systemic inconsistencies that the proposal would bring about also reflect on the appropriacy and proportionality of the introduction of filtering obligations. Consistent jurisprudence of the ECJ highlighted that the deployment of filtering and monitoring technologies is inappropriate for disproportionately favoring property rights against other fundamental rights, including (1) users' freedom to receive and impart information, as automated infringement assessment system cannot distinguish adequately between unlawful content and lawful content, especially in the case of exceptions and limitations and public domain works; (2) users' right to protection of personal data, as filtering system would involve the identification, systematic analysis,

and processing of information connected with the profiles created on the social network by its users; (3) hosting providers' freedom of business, as an obligation to adopt filtering technologies would require the ISP to install a complicated, costly, and permanent system at its own expense. The notion of value gap—and the present reform package—is apparently based on content industry assumptions, rather than independent empirical evidence. Moving forward without an impact statement that would consider all evidence and possible narratives—may result into a reform that will prove obsolete before being implemented, possibly detrimental for the Digital Single Market.

The directive proposal has been submitted for review to the EU Parliament and the Council. There is still room for adjustment, which would be very much welcome. The reform endorses a reaction to the platform economy, which may solely be based on content industry assumptions, rather than independent empirical evidence. Absent empirical justification, a reform that would upset deeply traditional notions governing copyright and intermediary liability policy can hardly be “fit for purpose.”¹⁵⁸ The textual confusion and incoherence, the systemic inconsistencies and the inappropriacy of the measures that will bring about make this reform, in its present form a bad-trade off. However, it is not beyond repair. Once references to “communication to the public”¹⁵⁹ and “content recognition technologies”¹⁶⁰ are expunged from the text and other textual misunderstandings fixed as well, Recitals 37–39 and Article 13 of the proposal could serve as a level playing field to promote monetization agreements between creators and online services.

Rather than imposing filtering and monitoring obligations on hosting providers that will conflict with current EU law in force and fundamental rights, the reform may formalize an obligation to conclude monetization agreements between content creators and online platforms. This might also serve as fair compensation for a UGC exception that could be coupled with the monetization agreements.¹⁶¹ Mandatory

¹⁵⁸ See, e.g., DSMS, *supra* note 11.

¹⁵⁹ DSM Directive Proposal, *supra* note 6, at 12, 19, 22, 37–38.

¹⁶⁰ *Id.* at 24, 44.

¹⁶¹ See Martin Senftleben, Christina Angelopoulos, Giancarlo Frosio, Valentina Moscon, Miquel Peguera & Ole-Andreas Rognstad, *The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform*, EUR. INTELL. PROP. REV. (forthcoming 2018) (manuscript at 23–24), ssrn.com/abstract=3054967 (proposing fair compensation for a new copyright exception for the creation of users' remixes and mash-ups and their communication via UGC platforms). Actually, fair compensation for privileged uses belongs to a long-standing EU copyright law's tradition, see Directive 2001/29/EC, *supra* note 14, at recital 35, art. 5(2)(a)–(b). For examples and discussions on the introduction of UGC exceptions, see An Act to amend the Copyright Act, 2010, Bill C-32, art 22 (Can.) (introducing a UGC exception in Canadian law); Peter K. Yu, *Can the Canadian UGC Exception Be Transplanted Abroad?*, 26 INTELL. PROP. J. 175 (2014) (discussing a Hong Kong proposal for a UGC exception); Warren B. Chik, *Paying it Forward: The Case for a Specific Statutory Limitation on*

monetization agreements could be entered by individual creators or collective management organizations for entire repertoires. According to current Google policy, for example, with the deployment of Content ID, if there is a match between an uploaded file and a reference file, one option is to monetize a matched video for the copyright owner by running advertisements against it. Other options are to block the video or track the video's viewership statistics.¹⁶² Rather than imposing blocking of allegedly infringing files, platforms should be only under the obligation to provide content creators with the revenue stream coming from advertising run against the content. This would boost revenue streams for creators according to the popularity of their works—and quantity of reuses. In contrast, it seems counter-intuitive to block access to content that if made available to the public would compensate creators the more it is widespread. Rather than fighting technological change—which is driving cost of content reproduction close to zero, having third parties, rather than creators, sustaining distribution costs and accurately tracking online uses—policy reform should embrace it. As Francis Gurry noted,

the central question of copyright policy . . . implies a series of balances. . . . Digital technology and the Internet . . . have given a technological advantage to one side of the balance, the side of free availability, the consumer, social enjoyment and short-term gratification. History shows that it is an impossible task to reverse technological advantage and the change that it produces. Rather than resist it, we need to accept the inevitability of technological change and to seek an intelligent engagement with it. There is, in any case, no other choice—either the copyright system adapts to the natural advantage that has evolved or it will perish.¹⁶³

At least in a scenario dealing with content uploaded on large UGC platforms—as that considered in Article 13—moving towards an arrangement that closely resembles a liability rule or an apportionment of profit, rather than the traditional copyright principle of exclusivity,

Exclusive Rights for User-Generated Content Under Copyright Law, 11 J. MARSHALL REV. INTELL. PROP. L. 240 (2011); Daniel Gervais, *The Tangled Web of UGC: Making Copyright Sense of User-Generated Content*, 11 VAND. J. ENT. & TECH. L. 841, 861–69 (2009); Debora Halbert, *Mass Culture and the Culture of the Masses: A Manifesto for User-Generated Rights*, 11 VAND. J. ENT. & TECH. L. 921, 934–53 (2009); Mary W. S. Wong, “Transformative” User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use?, 11 VAND. J. ENT. & TECH. L. 1075 (2009); Edward Lee, *Warming Up to User-Generated Content*, 2008 U. ILL. L. REV. 1459, 1462 (2008).

¹⁶² See *How Content ID works*, YOUTUBE HELP, <https://support.google.com/youtube/answer/2797370?hl=en> (last visited Mar. 28, 2018).

¹⁶³ Francis Gurry, Director General, World Intellectual Property Organization, *Blue Sky Conference: Future Directions in Copyright Law at Queensland University of Technology*, WIPO (Feb. 25, 2011), http://www.wipo.int/about-wipo/en/dgo/speeches/dg_blueskyconf_11.html.

might turn out to be a win-win situation, both for creators and users.¹⁶⁴ Regardless, a knowledge-and-take-down mechanism will be still available under the eCommerce Directive. The value-gap would be addressed and internal inconsistency avoided.

¹⁶⁴ See, e.g., DAVID LANGE & JEFFERSON H. POWELL, *NO LAW: INTELLECTUAL PROPERTY IN THE IMAGE OF AN ABSOLUTE FIRST AMENDMENT* 179, 384 n.37 (Stanford Law Books 2009); Giancarlo F. Frosio, *Rediscovering Cumulative Creativity from the Oral-Formulaic Tradition to Digital Remix: Can I Get a Witness?* 13 *J. MARSHALL REV. INTELL. PROP. L.* 341, 390–93 (2014); Christophe Geiger, *Promoting Creativity through Copyright Limitations: Reflections on the Concept of Exclusivity in Copyright Law*, 12 *VAND. J. ENT. TECH. L.* 515, 547 (2011) (proposing the implementation of a “limitation-friendly copyright protection, even if doing so would require rethinking the principle of exclusivity . . . [and] the scope of copyright is reduced to the prevention of the mere copy of the work, and does not cover the creative re-uses”); Jed Rubinfeld, *The Freedom of Imagination: Copyright’s Constitutionality*, 112 *YALE L.J.* 1, 1 (2002).