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The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform

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☞ Communication to the public right; Copyright; EU law; Expert systems; Freedom of expression; Freedom to conduct a business; Fundamental rights; Internet service providers; Online infringement; Proportionality; Safe harbour; User-generated content; Web hosting

Article 13 of the Proposed Directive on Copyright in the Digital Single Market¹ (DSMD) and the accompanying Recital 38 are amongst the most controversial parts of the European Commission's copyright reform package. Several Member States (Belgium, the Czech Republic, Finland, Hungary, Ireland, the Netherlands² and Germany³) have submitted questions seeking clarification on aspects that are essential to the guarantee of fundamental rights in the EU and to the future of the Internet as an open communication medium. The following recommendation urges European lawmakers—the Council and the Parliament alike—to consider these questions seriously. In the light of the jurisprudence of the Court of Justice, it offers guidelines and background information with regard to the issues raised by the Member States: the compatibility of the proposed new legislation with the Charter of Fundamental Rights, the relation with the safe harbour provisions in arts 14 and 15 of the E-Commerce Directive, the relation with the concept of communication to the public in art.3 of the Information Society Directive and the objective to compensate authors and performers for the use of their works and performances.⁴

Compatibility with the Charter

Question 1—Belgium, Czech Republic, Finland, Hungary and the Netherlands

“Would the standalone measure/obligation as currently proposed under Article 13 be compatible with the Charter of Human Rights (and more specifically Article 11 – freedom of expression and information, Article 8 – Protection of personal data – and Article 16 – Freedom to conduct a business) in the light of the jurisprudence of the CJEU that aims to secure a fair balance in the application of competing fundamental rights?”

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¹ European Commission, Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market (14 September 2016), Doc. COM(2016) 593 final.

² Council of the EU, Document 12127/17, Interinstitutional File 2016/0280 (COD), Proposal for a Directive on the European Parliament and of the Council on Copyright in the Digital Single Market—Questions by the Belgian, Czech, Finnish, Hungarian and Dutch Delegations to the Council Legal Service Regarding Article 13 and Recital 38 (13 September 2017).

³ Council of the EU, Document 12291/17, Interinstitutional File 2016/0280 (COD), Proposal for a Directive on the European Parliament and of the Council on Copyright in the Digital Single Market – Questions by the German Delegation to the Council Legal Service Regarding Article 13 (18 September 2017).

⁴ The Explanatory Notes offer concise background information. For a more detailed discussion of the issues, see C. Angelopoulos, “On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market” (January 2017), SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800; European Copyright Society, “Opinion on European Commission Proposals for Reform of Copyright in the EU”, <https://europeancopyrightsociety.org/how-the-ecs-works/ecs-opinions/>; G.F. Frosio, “From Horizontal to Vertical: An Intermediary Liability Earthquake in Europe” (2017) 12 Oxford Journal of Intellectual Property and Practice 565, SSRN, <https://ssrn.com/abstract=2956859>; G.F. Frosio, “Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy” (2017) 112 Northwestern University Law Review 19, SSRN, <https://ssrn.com/abstract=3009155>; R.M. Hilty and V. Moscon (eds), “Modernisation of the EU Copyright Rules – Position Statement of the Max Planck Institute for Innovation and Competition”, Max Planck Institute for Innovation and Competition Research Paper No.17-12 (2012), Max Planck Institute for Innovation and Competition, Munich (2017), https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3036787; R.M. Hilty and V. Moscon, “Contributions by the Max Planck Institute for Innovation and Competition in response to the questions raised by the authorities of Belgium, the Czech Republic, Finland, Hungary, Ireland and the Netherlands to the Council Legal Service regarding Article 13 and Recital 38 of the Proposal for a Directive on Copyright in the Digital Single Market”, http://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/Answers_Article_13_2017_Hilty_Moscon-rev-18_9.pdf; CREATE et al., “Open letter to Members of the European Parliament and the Council of the European Union”, <http://www.create.ac.uk/policy-responses/eu-copyright-reform/>; E. Rosati, “Why a Reform of Hosting Providers' Safe Harbour is Unnecessary Under EU Copyright Law”, CREATE Working Paper 2016/11 (August 2016), <https://ssrn.com/abstract=2830440>; M.R.F. Senftleben, “Copyright Reform, GS Media and Innovation Climate in the EU – Euphonious Chord or Dissonant Cacophony?” (2016) 5 Tijdschrift voor Auteurs-, Media- & Informatierecht 130, <https://ssrn.com/abstract=2865258>; S. Stalla-Bourdillon, E. Rosati, M.C. Kettemann et al., “Open Letter to the European Commission – On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society” (2016), SSRN, <https://ssrn.com/abstract=2850483>; S. Stalla-Bourdillon, E. Rosati, K. Turk et al., “A Brief Exegesis of the Proposed Copyright Directive” (November 2016), SSRN, <https://ssrn.com/abstract=2875296> [All accessed 1 January 2018].

Are the proposed measures justified and proportionate?”

Question 6—Germany

“How is it possible to ensure that platforms onto which authors upload mainly their own works, or on which mostly public-domain works are stored, will not be encumbered with the costs of installing monitoring systems, should any such systems be introduced? How can it be made clear, should this be needed, that the provision does not apply to platforms serving non-commercial or scientific purposes?”

Article 13 DSMD refers to the use of “effective content recognition technologies”. The Member States conclude that this filtering would occur “automatically when the identification technology finds a match with a work or other subject-matter”. Against this background, the Questions raised by the Member States concern the use of content recognition technology “across a wide variety of online services and platforms used by European citizens” and, more specifically, the impact on platforms hosting self-created content, public domain material and scientific papers.

EU primary law, in particular the Charter of Fundamental Rights of the EU (CFR), sets direct limits to measures which national legislators may impose on information society service providers, including providers of online platforms for user-uploaded content. The CJEU has stated explicitly that in transposing EU directives and implementing transposing measures:

“Member States must ... take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order.”⁵

The application of filtering technology to a social media platform hosting user-generated content occupied centre stage in *Sabam v Netlog*. The case concerned Netlog’s social networking platform, which offered every subscriber the opportunity to acquire a globally available “profile” space that could be filled with photos, texts, video clips, etc.⁶ Claiming that users make unauthorised use of music and films belonging to its repertoire, the collective management organisation Sabam sought to obtain an injunction obliging Netlog to install a system for filtering the information uploaded to Netlog’s servers. As a preventive measure, and at Netlog’s expense, this system would apply indiscriminately to all users for an unlimited period, and would have been capable of identifying electronic files containing music and films

from the Sabam repertoire. In the case of a match, the system would prevent relevant files from being made available to the public.⁷

Hence, the *Sabam v Netlog* case offered the CJEU the chance to provide guidance on a filtering system that could become a standard measure if art.13 DSMD was implemented at the national level. However, the CJEU did not arrive at the conclusion that such a filtering system could be deemed permissible. Instead, the CJEU saw a serious infringement of fundamental rights. The court took as a starting point the explicit recognition of intellectual property as a fundamental right in art.17(2) CFR. At the same time, the court recognised that intellectual property must be balanced against the protection of other fundamental rights and freedoms.⁸

Weighing the right to intellectual property asserted by Sabam against Netlog’s freedom to conduct a business, which is guaranteed under art.16 CFR, the court observed that the filtering system would involve monitoring all or most of the information on Netlog’s server in the interests of copyright holders, would have no limitation in time, would be directed at all future infringements and would be intended to protect not only existing but also future works.⁹ Given these features, the CJEU concluded that the filtering system would encroach upon Netlog’s freedom to conduct a business:

“Accordingly, such an injunction would result in a serious infringement of the freedom of the hosting service provider to conduct its business since it would require that hosting service provider to install a complicated, costly, permanent computer system at its own expense, which would also be contrary to the conditions laid down in Article 3(1) of Directive 2004/48, which requires that measures to ensure the respect of intellectual-property rights should not be unnecessarily complicated or costly (see, by analogy, *Scarlet Extended*, paragraph 48).”¹⁰

The CJEU also found that the filtering system would violate the fundamental rights of Netlog’s users, namely their right to the protection of their personal data and their freedom to receive or impart information, as safeguarded by arts 8 and 11 CFR respectively. In particular, the identification, systematic analysis and processing of information connected with the user profiles on Netlog’s social network risked amounting to a privacy infringement in the sense of art.8 CFR. Moreover, the filtering system could potentially undermine freedom of information, as long as it was not capable of distinguishing adequately between unlawful content and lawful content, with the result that it could block lawful communications.¹¹

⁵ *Productores de Música de España (Promusicae) v Telefónica de España SAU* (C-275/06) EU:C:2008:54; [2008] 2 C.M.L.R. 17 at [68].

⁶ *Sabam v Netlog* (C-360/10) EU:C:2012:85; [2012] 2 C.M.L.R. 18 at [16]–[18].

⁷ *Sabam v Netlog* EU:C:2012:85; [2012] 2 C.M.L.R. 18 at [26] and [36]–[37].

⁸ *Sabam v Netlog* EU:C:2012:85; [2012] 2 C.M.L.R. 18 at [41]–[44].

⁹ *Sabam v Netlog* EU:C:2012:85; [2012] 2 C.M.L.R. 18 at [45].

¹⁰ *Sabam v Netlog* EU:C:2012:85; [2012] 2 C.M.L.R. 18 at [46]–[47].

¹¹ *Sabam v Netlog* EU:C:2012:85; [2012] 2 C.M.L.R. 18 at [48]–[50].

In this regard, the CJEU recalled that the use of protected material in online communications may be lawful under statutory exceptions to copyright in the Member States, and that some works may have already entered the public domain, or been made available for free by the authors concerned.¹² Given this corrosive effect on fundamental rights, the court concluded:

“Consequently, it must be held that, in adopting the injunction requiring the hosting service provider to install the contested filtering system, the national court concerned would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other (see, by analogy, *Scarlet Extended*, paragraph 53).”¹³

In the light of this case law, it can hardly be concluded that the measure/obligation proposed under art.13 DSMD is compatible with the fundamental rights and freedoms guaranteed under arts 8, 11 and 16 CFR. Indeed, the filtering system that gave rise to the *Sabam v Netlog* case seems to come very close to the content recognition measures envisaged in art.13 DSMD. The Member States also point out correctly in their Questions that the filtering system may deprive users of the room for freedom of expression that follows from statutory copyright exceptions, in particular the quotation right¹⁴ and the right to parody.¹⁵ As explained above, the court explicitly confirmed this point in *Sabam v Netlog*. Taking all this into account, the proposed measures do not appear justified and proportionate under the approach followed by the CJEU.

Admittedly, arguments have been put forth according to which the reasoning developed by the CJEU in *Sabam v Netlog* would not apply to the measures currently proposed in the DSMD. Indeed, it is arguable that, in some respects, art.13 DSMD represents an improvement over the filtering system contemplated in that case. This suggestion is most convincing as regards the provider’s freedom to conduct a business. For one thing, art.13 explicitly envisages the involvement of right holders in the content identification process, while Recital 39

suggests that right holders should provide the necessary data to allow the services to identify their content. The provider would thus only be expected to match the data provided by the right holder against content uploaded on to its platform. This may conceivably represent a significant alleviation of the burden imposed on the provider, which might otherwise have been obliged to collect data on infringed content itself.¹⁶ In addition, it has been suggested that, in the years since the *Sabam v Netlog* decision was handed down, less expensive and more efficient technologies have been developed for the identification of infringing content.¹⁷

However, other research advises convincingly that content recognition technologies remain quite expensive for small and medium-sized businesses, particularly for start-ups.¹⁸ Moreover, the analysis must not be confined to the identification of infringing content. Regardless of potential improvements in this area, the problems outlined in *Sabam v Netlog* vis-à-vis arts 8 and 11 CFR remain.¹⁹ The Impact Assessment accompanying the Commission Proposal itself acknowledges that content recognition technologies continue to result in “false positives” (i.e. incorrect identifications and removals of content), an issue that is particularly pronounced as concerns transformative content, such as parodies.²⁰ It suggests, however, that the procedural safeguards envisioned in art.13(2) DSMD may mitigate this negative impact. Yet this solution ignores the fact that the concern of the CJEU in *Sabam v Netlog* was with the “blocking of lawful communications”. The court made no indication that put-back mechanisms are capable of sufficiently addressing the harm caused by incorrect automatic removals. Although complaints and redress mechanisms can be helpful, studies have indicated that, if improperly formulated, they may have a “chilling effect” on end-users, who are dis-incentivised from using them to exert their rights.²¹ In this regard, it is significant that, as currently formulated, the complaints and redress mechanisms included in art.13 remain very vaguely sketched. It is also worth noting that a Compromise Proposal tabled by the Council is particularly worrying, as it would place decision-making in the case of disputes in the hands of the right holder—a party with strong incentives to disallow use.²²

¹² *Sabam v Netlog* EU:C:2012:85; [2012] 2 C.M.L.R. 18 at [50].

¹³ *Sabam v Netlog* EU:C:2012:85; [2012] 2 C.M.L.R. 18 at [51].

¹⁴ Information Society Directive 2001/29 art.5(3)(d).

¹⁵ Information Society Directive 2001/29 art.5(3)(k).

¹⁶ C. Angelopoulos, “Study on Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market” (February 2017), p.38, SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800 [Accessed 1 January 2018].

¹⁷ A. Lucas-Schloetter, “Transfer of Value Provisions of the Draft Copyright Directive” (March 2017), p.20, <http://www.authorsocieties.eu/uploads/Lucas-Schloetter%20Analysis%20Copyright%20Directive%20-%20EN.pdf> [Accessed 1 January 2018].

¹⁸ E. Engstrom and N. Feamster, “The Limits of Filtering: A Look at the Functionality & Shortcomings of Content Detection Tools” (March 2017), p.26, <http://www.engine.is/events/category/the-limits-of-filtering-a-look-at-the-functionality-shortcomings-of-content-detection-tools>; cf. M.R.F. Senftleben, “Copyright Reform, GS Media and Innovation Climate in the EU” (2016) 5 *Tijdschrift voor Auteurs-, Media- & Informatierecht* 130, SSRN, <https://ssrn.com/abstract=2865258> [Both accessed 1 January 2018].

¹⁹ C. Angelopoulos, “Study on Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market” (February 2017), p.38, SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800 [Accessed 1 January 2018].

²⁰ Commission Staff Working Document, “Impact Assessment on the Modernisation of EU Copyright Rules Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market and Proposal for a Regulation of the European Parliament and of the Council Laying Down Rules on the Exercise of Copyright and Related Rights Applicable to Certain Online Transmissions of Broadcasting Organisations and Retransmissions of Television and Radio Programmes”, SWD(2016) 301 final (Brussels, 14 September 2016), pp.140–141.

²¹ J. Urban, J. Karaganis and B. Schofield, “Notice and Takedown in Everyday Practice”, UC Berkeley Public Law Research Paper No.2755628 (March 2016), pp.44–46, SSRN, <http://ssrn.com/abstract=2755628> [Accessed 1 January 2018].

²² See Presidency Compromise Proposal regarding Articles 1, 2 and 10 to 16, 2016/0280 (COD) (Brussels, 30 August 2017) art.13(2).

Finally, it has been suggested that the measures contemplated by art.13 DSMD would not engage art.8 CFR. It has, for example, been argued that this follows from the fact that they would only target uploads and not concern internet users who download or stream content, as well as from the fact that the measures would only focus on the content and not the identity of the person uploading it.²³ Again, these arguments ignore the wording of the *Sabam v Netlog* judgment which focused on “the identification, systematic analysis and processing of information connected with the profiles created on” the platform by the contested filtering system. This indicates that the system’s objective to identify content cannot detract from the inevitable connection of that content with the user who posted it. Similarly, there is no reason why uploaders should not enjoy the protections afforded to downloaders: not all uploaded content will infringe copyright and, in its effort to uncover infringing content, the identification systems will necessarily examine content which does not.

This unresolved dilemma shows that art.13 DSMD is incompatible with the guarantee of fundamental rights and freedoms and the obligation to strike a fair balance between all rights and freedoms involved. The current state of the art in the field of filtering technology does not allow the implementation of a system that could achieve the indispensable fair balance. In addition, the Question posed by Germany with regard to self-created works, public domain material and scientific papers sheds light on missing nuances in art.13 DSMD and the technology that is currently available. Platforms with self-created works, public domain material or scientific papers would fall under the proposed new rules and thus be obliged to introduce filtering systems for all uploaded material, regardless of whether this material consists of an uploader’s own creations, unprotected works in the public domain or papers serving the academic debate. Also from this perspective, art.13 DSMD is disproportionate and irreconcilable with the fundamental rights guaranteed in the Charter.

Relation to the safe harbour for hosting

Question 2—Belgium, Czech Republic, Finland, Hungary and the Netherlands

“Is it appropriate to modify the manner in which the Directive on electronic commerce is applied and interpreted in a horizontal manner, in a recital in a Directive on copyright?”

Is the description in recital 38 of the current state of play of the jurisprudence of the CJEU regarding the eligibility of ISPs for liability exemptions under Directive 2000/31/EC accurate and complete?”

Question 5—Germany

“Would it be possible to introduce a provision on ‘notice and takedown’ having applicability throughout the European Union? And would such a provision potentially be suited to likewise protect the interests of rightholders?”

As the explanation given by the Member States shows, these Questions concern in particular the second paragraph of Recital 38 DSMD:

“In respect of Article 14, 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 therefor.”

This paragraph seems to indicate that an active role depriving internet service providers of the liability privilege following from art.14 of the E-Commerce Directive can readily be inferred from acts of optimising the presentation of user-generated content or promoting this content. In CJEU jurisprudence, such acts were central to the decision in *L’Oréal v eBay*. To fully understand this decision, it is necessary to consider the factual background to the case.

The *L’Oréal v eBay* lawsuit arose from eBay’s practice of assisting sellers, in some cases, to enhance their offers for sale, set up online shops and promote and increase their sales. More specifically, eBay had used keyword advertising to draw the attention of consumers to certain offers uploaded by users to its marketplace.²⁴ A search for “shu uemura”, for example, triggered the display of the following eBay advertising as a sponsored search result:

“Shu Uemura
Great deals on Shu uemura
Shop on eBay and Save!
www.ebay.co.uk.”²⁵

When clicking on this sponsored link, internet users were led to a page on the <http://www.ebay.co.uk> website which showed Shu Uemura perfume offers, including offers that infringed L’Oréal’s trade mark rights.²⁶ Discussing eBay’s secondary liability for trade mark infringement in this factual context, the CJEU recalled the neutrality test

²³ Lucas-Schloetter, “Transfer of Value Provisions of the Draft Copyright Directive” (March 2017), p.20, <http://www.authorsocieties.eu/uploads/Lucas-Schloetter%20Analysis%20Copyright%20Directive%20-%20EN.pdf> [Accessed 1 January 2018].

²⁴ *L’Oréal v eBay* (C-324/09) EU:C:2011:474; [2012] Bus. L.R. 1369 at [28]–[31].

²⁵ *L’Oréal v eBay* EU:C:2011:474; [2012] Bus. L.R. 1369 at [40].

²⁶ *L’Oréal v eBay* EU:C:2011:474; [2012] Bus. L.R. 1369 at [38]–[42].

adopted in *Google France*,²⁷ that is, that a hosting service provider falls outside the scope of art.14 of the E-Commerce Directive where it

“plays an active role of such a kind as to give it knowledge of, or control over, those data (*Google France and Google*, paragraphs 114 and 120)”²⁸.

The CJEU then declared that:

“Where, by contrast, the operator has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers, it must be considered not to have taken a neutral position between the customer-seller concerned and potential buyers but to have played an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale. It cannot then rely, *in the case of those data*, on the exemption from liability referred to in Article 14(1) of Directive 2000/31.”²⁹

Quite clearly, the conclusion derived from optimising the presentation of user-generated offers, and promoting certain offers, was thus based on specific activities carried out by eBay—activities that implied knowledge of the offers concerned. When referring to certain offers on the online marketplace in its own keyword advertising, eBay can be expected to have checked the contents of these offers. Similarly, eBay can be expected to have obtained knowledge of the products offered for sale on its marketplace when it offers assistance to improve the presentation of these offers. In contrast to these specific circumstances of the *L'Oréal v eBay* case, the general rule underlying current EU legislation is to be found in Recital 42 of the E-Commerce Directive. In *L'Oréal v eBay*, the CJEU referred to this general rule before applying it to the facts of the specific case before it:

“[I]n order for an internet service provider to fall within the scope of Article 14 of Directive 2000/31, it is essential that the provider be an intermediary provider ... That is not the case where the service provider, instead of confining itself to providing that service neutrally by a merely technical and automatic processing of the data provided by its customers, plays an active role of such a kind as to give it knowledge of, or control over, those data.”

In Recital 38 DSMD, however, the general requirements of knowledge and control are not mentioned. Instead, the acts of “promoting” or “optimising the presentation” of

user-generated content are detached from the specific circumstances of the *L'Oréal v eBay* case and presented as isolated, self-contained assessment factors. In consequence, the Recital gives the impression that *any* act of promoting or optimising the presentation of user-generated content automatically excludes eligibility for the liability safe harbour established by art.14 of the E-Commerce Directive. Recital 38 DSMD could thus lead to an exclusion of the liability privilege that goes far beyond the status quo reached in *L'Oréal/eBay*. The particular examples of optimisation and promotion of the uploaded offers are so linked to the particularities of eBay's platform that the CJEU did not state that they would entail, in general, a lack of neutrality as a service provider, but more specifically a lack of a “neutral position between the customer-seller concerned and potential buyers”.³⁰ Furthermore, the lack of neutrality considered by the CJEU does not imply that all the platform's activity falls outside the exemption of liability; rather, the CJEU expressly limited that effect to the data which have been so optimised or promoted, noting that the service provider “cannot then rely, *in the case of those data*, on the exemption from liability referred to in Article 14(1) of Directive 2000/31”.³¹

As long as Recital 38 is not aligned with the requirement of “an active role of such a kind as to give [the internet service provider] knowledge of, or control over”, user-generated content, the inroads made into the safe harbour for hosting will be considerable. Taken to the extremes, the distinction between different categories of content that is available on an internet platform could already be seen as a form of “optimising the presentation”. Similarly, the general promotion of a platform with user-generated content could also be understood as a relevant form of “promoting”, even if the advertising does not refer to any specific content on the platform. Moreover, according to the wording of the proposed Recital, which explicitly rejects differentiations on the basis of “the nature of the means used”, any optimisation of the presentation of content or the promotion of content, even through the mere provision of generic or automated support to end-users, could be relevant. The departure from CJEU jurisprudence is further emphasised by the addition, in Recital 38, of the clause “irrespective of the nature of the means used therefor”, thereby potentially encompassing instances of optimisation and promotion by automatic means in the absence of knowledge or control.

²⁷ *Google France Sàrl v Louis Vuitton Malletier SA* (C-236/08) EU:C:2010:159; [2011] Bus. L.R. 1 at [113]–[114].

²⁸ *L'Oréal v eBay* EU:C:2011:474; [2012] Bus. L.R. 1369 at [113].

²⁹ *L'Oréal v eBay* EU:C:2011:474; [2012] Bus. L.R. 1369 at [116].

³⁰ *L'Oréal v eBay* EU:C:2011:474; [2012] Bus. L.R. 1369 at [116].

³¹ *L'Oréal v eBay* EU:C:2011:474; [2012] Bus. L.R. 1369 at [116] (emphasis added).

In comparison with the specific situation underlying the *L'Oréal v eBay* decision, Recital 38 DSMD would thus lead to a remarkable restriction of eligibility for the liability privilege following from art.14 of the E-Commerce Directive.³² Hence, Recital 38 DSMD does not adequately reflect the current status quo in the area of the safe harbour for hosting following from art.14 of the E-Commerce Directive. It takes the assessment criteria of “promoting” and “optimising the presentation” of user-generated content out of the specific context of the *L'Oréal v eBay* case. The additional requirement that these activities only be relevant if they lead to “knowledge of, or control over” infringing user-generated content is missing. This requirement, however, played a central role in *L'Oréal v eBay*.³³ In the absence of any reference to this central requirement, Recital 38 DSMD is incomplete and fails to draw an accurate picture of the current conceptual contours of the safe harbour for hosting.

At the same time, the Commission Proposal and subsequent Presidency Compromise Proposals confuse and mix different legal questions by bringing together the issue of the scope of the safe harbour for hosting under art.14(1) of the E-Commerce Directive, and the issue of whether (and when) platform providers themselves carry out an act of communication to the public and fulfil the requirements of art.3(1) of the Information Society Directive. As to the first issue, which lies at the core of Question 2, it is worth noting that while the Commission Proposal does not aim to replace or amend the existing rules in the E-Commerce Directive, serious doubts arise with regard to a potential corrosive effect of the proposed new copyright rules on the more general rules laid down in art.14 of the E-Commerce Directive. As discussed, the description in Recital 38 DSMD of the current state of play of the CJEU jurisprudence regarding the eligibility of providers of hosting services for liability exemptions under the E-Commerce Directive is inaccurate and incomplete. Moreover, the Commission Proposal does not contain any explanation or definition of the concept of service providers, which are to be qualified as “information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users” in the

context of art.13(1) DSMD. It also remains unclear how the criterion of “large amounts” should be applied and how much weight it should have in the assessment.

These conclusions shed light on the need to clarify service provider immunity instead of further complicating the legal assessment criteria. A further clarification of the applicable rules should extend the principle that is already reflected in the EU *acquis*, namely that providers are not liable for users’ actions which they cannot reasonably be expected to know and control.³⁴ A further clarification of this rule is advisable to pave the way for a uniform application of service provider immunity throughout the internal market. In the interest of legal certainty and a higher level of harmonisation, a well-structured European legislative design of the “notice and takedown” procedure should be introduced, accompanied by an appropriate “counter notice” procedure.³⁵

Relation to the prohibition of general monitoring obligations

Question 3—Belgium, Czech Republic, Finland, Hungary and the Netherlands

“Is Article 15 of the Directive on electronic commerce to be understood that the prohibition for Member States to impose general monitoring obligations does not apply in the situation where Member States’ legislation would oblige certain platforms to apply technology that identifies and filters all the data of each of its users before the upload on the publically available services?”

Question 2—Germany

“How do Article 13 and Recital 38 of the draft relate to the liability privileges for service providers that have been established in the Directive on electronic commerce (2000/31/EC)? How could Article 13 of the draft be put in more clear terms?”

The implementation of art.13 DSMD would lead to the application of content recognition technology to user-generated content platforms. Article 13 DSMD generally refers to “[i]nformation society service

³² For examples of national case law reflecting the broader application of the safe harbour for hosting under current legislation, see French Cour de cassation (Chambre commerciale, financière et économique), 13 July 2010, *Google France v Louis Vuitton Malletier* (06-20.230); *Google France v GIFAM* (08-13944); *Google France v CNRRH* (06-15136); *Google France v SA Viaticum* (05-14331), where the court annulled the lower courts’ rulings that rejected immunity as having employed the wrong criterion in examining Google’s advertising activities and confirmed that protection from liability as a hosting service provider depends on whether the intermediary has played an active role of such a kind as to convey knowledge or control over the stored information; Court de cassation, 17 February 2011, *Sté Nord-Ouest v Dailymotion* (09-67.896), where the court explicitly acknowledged that “the sale of advertising space does not imply the service’s ability to act in relation to the uploaded content”. The court also noted that the implementation of technical means ensuring the content’s compatibility with the viewing interface and limiting the size of posted files for reasons of optimisation of the server’s integration capacity are mere technical operations that are part of the essence of a hosting service and in no way imply that the provider is involved in the selection of uploaded content. The same was said about the provision of presentation frames and of tools for the classification of content, which are necessary for the organisation of the service and in order to facilitate user access to the content; *England and Wales Cricket Board Ltd v Tixdaq Ltd* [2016] EWHC 575; [2016] Bus. L.R. 641, which concerned the liability of the operators of a Vine-inspired mobile application which allowed users to upload and add commentary to screen-captured eight-second clips of broadcast footage. The question arose whether the operators were protected by the safe harbours. No final conclusion was reached with regard to the hosting safe harbour. However, based on *L'Oréal v eBay*, the judge did offer the provisional view that this defence would only be available in respect of user-posted clips which were not editorially reviewed by the defendants, but not in respect of clips which were editorially reviewed.

³³ *L'Oréal v eBay* EU:C:2011:474; [2012] Bus. L.R. 1369 at [116].

³⁴ See E-Commerce Directive arts 12 to 14, which establish this principle.

³⁵ For a more detailed elaboration of this point, see Max Planck Institute for Innovation and Competition Position Statement (September 2017), pp.99–113, paras 42–46, SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3036787 [Accessed 1 January 2018]. For a comparison with the US safe harbour system which includes the possibility of counter-notices, see M. Peguera, “The DMCA Safe Harbour and Their European Counterparts: A Comparative Analysis of Some Common Problems” (2009) 32 *Columbia Journal of Law and the Arts* 481.

providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users”. This seems to encompass blogging platforms, news portals working with citizen journalists and/or offering discussion fora, photo/film/music portals, social networking sites, online marketplaces and search engines offering keyword advertising services. Therefore, the Member States conclude that the adoption of art.13 DSMD would lead to the application of filtering measures “across a wide variety of online services and platforms used by European citizens”, and that filtering would occur “automatically when the identification technology finds a match with a work or other subject-matter”.

As to the question whether the obligations following from art.13 DSMD would amount to a general monitoring obligation in the sense of art.15 of the E-Commerce Directive, the CJEU made the following statement in *L’Oréal v eBay*:

“First, it follows from Article 15(1) of Directive 2000/31, in conjunction with Article 2(3) of Directive 2004/48, that the measures required of the online service provider concerned cannot consist in an active monitoring of all the data of each of its customers in order to prevent any future infringement of intellectual property rights via that provider’s website. Furthermore, a general monitoring obligation would be incompatible with Article 3 of Directive 2004/48, which states that the measures referred to by the directive must be fair and proportionate and must not be excessively costly.”³⁶

As explained above, *L’Oréal v eBay* concerned eBay’s online marketplace and, therefore, a platform hosting user-generated content in the sense of the proposed art.13 DSMD. Hence, there can be little doubt that according to the CJEU, art.15 of the E-Commerce Directive is fully applicable to user-generated content platforms and intended to shield these platforms from general monitoring obligations. In the aforementioned case *Sabam v Netlog*, this point comes to the fore even more clearly. With regard to Netlog’s social networking site, the CJEU repeated its earlier ruling in *Scarlet v Sabam* that an obligation to filter any information uploaded to Netlog’s server would lead to the imposition of a general monitoring obligation and be incompatible with art.15 of the E-Commerce Directive:

“In 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. It follows that that injunction would require the hosting service provider to carry out general monitoring, something which is prohibited by Article 15(1) of Directive 2000/31 (see, by analogy, *Scarlet Extended*, paragraph 40).”³⁷

It is to be noted, however, that arguments have been made in favour of a different interpretation of “general monitoring”. It has, for example, been suggested that “general monitoring can only be understood as searching for all potentially illegal content. Therefore, it does not apply when the infringing content to be searched for is identified”.³⁸ According to this interpretation, art.15 of the E-Commerce Directive prohibits the “permanent, systematic monitoring of all hosted content, with no prior identification of what to search for”.³⁹

This approach, however, cannot be accepted as correct. Notably, *Sabam v Netlog* also concerned the application of a content recognition mechanism only to the repertoire of a single claimant,⁴⁰ and nevertheless the system was found to require the hosting service provider to carry out general monitoring. Certainly, no indication was given in that ruling that specific content from within Sabam’s repertoire was to be notified to the provider. Yet the CJEU ignored the broadness of the injunction in terms of the content which it sought to protect and focused exclusively on the breadth of the material being monitored. It thus noted that the system examined 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”.⁴¹

It was on this basis that the court found a violation of art.15 of the E-Commerce Directive.

Doubts may be cast on the validity of this interpretation owing to the focus in *Sabam v Netlog* on the prevention of “any future infringement”. This might suggest that the case allows for monitoring geared towards preventing *specific* future infringements, i.e. the future infringement of specific works. In *McFadden*, however, the CJEU clarified this issue. There, the court stated that art.15(1) of the E-Commerce Directive “excludes the imposition of a general obligation on, inter alia, communication network access providers to monitor the information that they transmit”.⁴² No qualification regarding the specificity of the material for the protection of which the measure would be employed was made. This is significant given that the question submitted to the court made it clear that the contemplated measure would involve “examining all

³⁶ *L’Oréal v eBay* EU:C:2011:474; [2012] Bus. L.R. 1369 at [139].

³⁷ *Sabam v Netlog* EU:C:2012:85; [2012] 2 C.M.L.R. 18 at [38].

³⁸ Lucas-Schloetter, “Transfer of Value Provisions of the Draft Copyright Directive” (March 2017), p.19, <http://www.authorsocieties.eu/uploads/Lucas-Schloetter%20Analysis%20Copyright%20Directive%20-%20EN.pdf> [Accessed 1 January 2018].

³⁹ Lucas-Schloetter, “Transfer of Value Provisions of the Draft Copyright Directive” (March 2017), p.19, <http://www.authorsocieties.eu/uploads/Lucas-Schloetter%20Analysis%20Copyright%20Directive%20-%20EN.pdf> [Accessed 1 January 2018].

⁴⁰ *Sabam v Netlog* EU:C:2012:85; [2012] 2 C.M.L.R. 18 at [23].

⁴¹ *Sabam v Netlog* EU:C:2012:85; [2012] 2 C.M.L.R. 18 at [37].

⁴² *McFadden v Sony Music Entertainment Germany GmbH* (C-484/14) EU:C:2016:689; [2017] Bus. L.R. 430 at [87]; *Tommy Hilfiger Licensing LLC v Delta Center as* (C-494/15) EU:C:2016:528; [2016] Bus. L.R. 1008 at [34].

communications passing through [the provider’s systems] in order to ascertain whether the particular copyright-protected work is unlawfully transmitted again”.⁴³ While that case concerned an internet access provider (specifically a Wi-Fi provider), there is no reason why a different conclusion would apply to online platforms. CJEU jurisprudence does not support a distinction between general filtering obligations imposed on internet access providers and general filtering obligations imposed on user-generated content platforms. As the identical considerations in the cases *Scarlet Extended v Sabam* and *Sabam v Netlog* demonstrate,⁴⁴ the court rejected a general filtering obligation with regard to both types of service providers: internet access providers (*Scarlet Extended v Sabam*) and user-generated content platforms (*Sabam v Netlog*) alike.

Relation to the concept of communication to the public

Question 4—Belgium, Czech Republic, Finland, Hungary and the Netherlands

“Under the premise that it was not the intention of the Commission proposal to modify the notion of communication to the public, does the Legal Service consider it is sufficient to ‘provide access to the public’ to a copyrighted work to constitute an act of communication to the public under Directive 2001/29, or does the CJEU require that further conditions be met to establish a communication to the public?”

Question 1—Germany

“To what extent are the actions by the service providers set out in Article 13 paragraph 1 of the draft governed, already under applicable law, by the right of communication to the public within the meaning of Article 3 of the InfoSoc Directive – and all the more so in light of the most recent adjudication by the CJEU, inter alia in the legal matter C-527/15 (*FilmSpeler*), legal matter C-160/15 (*GS Media*) and legal matter C-610/15 (*The Pirate Bay*)?”

These Questions shed light on the ambiguity of the first paragraph of Recital 38 DSMD:

“Where information society service providers store and provide access to the public to 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 of the European Parliament and of the Council.”

The Questions are based on an understanding of the word “thereby” in the sense of indicating an automatic consequence: if information society service providers store and provide access to user-generated content, they inevitably do more than providing physical facilities and in fact perform an act of communication to the public. In recent years, the CJEU has developed a complex factor analysis to determine whether an act of providing access to a work in the digital environment can be qualified as an act of communication to the public. In the light of this case law, it becomes clear that a relevant act of communication to the public cannot readily be inferred from the mere act of providing access.

In *Svensson*, the CJEU held that for an “act of communication” within the meaning of art.3 of the Information Society Directive, it was sufficient that a work was made available to a public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity. Applying this assessment standard, the court concluded that the use of hyperlinks to content that was freely available on the internet with the copyright holder’s consent constituted such an “act of communication”.⁴⁵ In *GS Media*, the CJEU confirmed this approach with regard to hyperlinks to content that was made available without the consent of the copyright holder. In this context, the court referred to the more general criterion of an “intervention” seeking to give customers access to a protected work where, in the absence of such intervention, customers would not, in principle, be able to enjoy the affected work.⁴⁶ In the more recent *Breйн (FilmSpeler)* decision, the CJEU added that the provision of a multimedia player containing pre-installed add-ons with hyperlinks to unauthorised audio-visual content offered its users direct access to protected works without the consent of copyright holders and, therefore, had to be regarded as an “act of communication”.⁴⁷ Finally, the court held in *Breйн (Pirate Bay)* that, as a rule, any act by which a user, with full knowledge of the relevant facts, provided its clients with access to protected works was liable to constitute an “act of communication” for the purposes of art.3 of the Information Society Directive.⁴⁸ Against this background, the court was satisfied that the making available and management of an online file-sharing platform, such as The Pirate Bay, had to be considered an “act of communication”.⁴⁹

⁴³ *McFadden* EU:C:2016:689; [2017] Bus. L.R. 430 at [33], question 10.

⁴⁴ See *Scarlet Extended SA v Sabam* (C-70/10) EU:C:2011:771; [2012] E.C.D.R. 4 at [39]–40], on the one hand, and *Sabam v Netlog* EU:C:2012:85; [2012] 2 C.M.L.R. 18 at [37]–[38], on the other hand.

⁴⁵ *Svensson v Retriever Sverige AB* (C-466/12) EU:C:2014:76; [2014] Bus. L.R. 259 at [17]–20].

⁴⁶ *GS Media BV v Sanoma Media Netherlands BV* (C-160/15) EU:C:2016:644; [2016] Bus. L.R. 1231 at [35].

⁴⁷ *Stichting Breйн v Wullems (t/a FilmSpeler)* (C-527/15) EU:C:2017:300; [2017] Bus. L.R. 1816 at [42].

⁴⁸ *Stichting Breйн v Ziggo BV (The Pirate Bay)* (C-610/15) EU:C:2017:456; [2017] Bus. L.R. 1899 at [34].

⁴⁹ *The Pirate Bay* EU:C:2017:456; [2017] Bus. L.R. 1899 at [37]–[39].

However, it must not be overlooked that the court applied the test of providing access to protected works only as a first step in the analysis. An “act of communication” is not alone sufficient for a finding of infringement. Instead, an infringement of the exclusive right granted in art.3 of the Information Society Directive requires more than a mere “act of communication”, namely an “act of communication to the public”. In the light of this more complex requirement, the CJEU established the rule that the infringement analysis required an “individual assessment” of the circumstances of each case.⁵⁰ This individual assessment involves further steps complementing the first, preliminary, step of ascertaining an “act of communication”. Not surprisingly, these further steps can lead to the conclusion that, even though an “act of communication” has taken place, the use does not amount to infringement, because other criteria are not fulfilled.

In *Svensson*, for instance, the act of communication based on the use of hyperlinks was finally found permissible because a relevant new public (that could be distinguished from the public already having access to the initial online publication carried out by the copyright holder) was missing.⁵¹ In *GS Media*, the court introduced a nuanced approach to hyperlinks relating to illegal online content. In such a case, the knowledge of the person posting the hyperlink will be a decisive factor. The court stated that, in the framework of the indispensable “individual assessment”, it is necessary, in the case of hyperlinks not provided for profit, to take account of the fact that the user did not know and could not reasonably know that the affected work had been published on the internet without the consent of the copyright holder.⁵² In contrast, where it is established that the hyperlinker knew or ought to have known that the hyperlink he posted provided access to a work illegally placed on the internet, for example as a result of a notification by the copyright holder, it is necessary to consider whether the provision of that link constitutes not only an “act of communication”, but also an “act of communication to the public” within the meaning of art.3 of the Information Society Directive.⁵³ Similarly, in *Filmspelers*, the court focused on the individual circumstances of the case and the degree of knowledge. In this case, the finding of infringement rested, in particular, on the fact that the sale of the “Filmspelers” multimedia player had been made in full knowledge of the facts that pre-installed add-ons containing hyperlinks gave access to works published illegally on the internet; that the advertising of the multimedia player had specifically referred to this option

of watching unauthorised online content on a television screen; that the multimedia player was supplied with a view to making a profit; and that the price for the multimedia player was being paid in particular to obtain direct access to protected works available on streaming websites without the consent of copyright holders.⁵⁴ Finally, in *The Pirate Bay*, the court deemed it decisive that a large number of subscribers to the internet access providers Ziggo and XS4ALL had downloaded media files using the file-sharing platform The Pirate Bay; that the operators of The Pirate Bay were claiming, on their online sharing platform, to have several dozens of millions of “peers”; that the file-sharing activities were aimed at an indeterminate number of potential recipients and involved a large number of persons; that the operators of The Pirate Bay could not have been unaware of the fact that their platform provided access to unauthorised works; and that they ran the file-sharing platform to obtain a profit.⁵⁵

Considering the additional criteria established in these cases—ranging from the requirement of a “new public” to “knowledge”, and the existence of a “profit motive” that presumes that knowledge—it becomes apparent that, indeed, the mere act of storing and providing access to the public is not sufficient to establish an infringement of art.3 of the Information Society Directive. If Recital 38 DSMD is understood to merely require an act of storing and providing access to the public, it would cut off various additional infringement criteria that have evolved in CJEU jurisprudence. Because of the described ambiguity of Recital 38 DSMD, there is a real risk of considerably modifying the notion of “communication to the public” flowing from decisions of the CJEU.⁵⁶

To avoid this result, it would be necessary to clarify the wording of Recital 38 DSMD. In particular, it should be made clear that the requirement of “providing access to the public” and “performing an act of communication to the public” are two separate and cumulative requirements which must both be fulfilled to establish an infringement of the exclusive right granted in art.3 of the Information Society Directive. Following this approach, the requirement of “providing access to the public” would reflect the first, preliminary, CJEU test of an “intervention”, whereas the further requirement of “performing an act of communication to the public” would reflect additional tests evolving from CJEU jurisprudence, such as the criterion of a “new public”, “knowledge” and a “profit motive”—the latter as a vehicle for a presumption of knowledge. In this way, Recital 38

⁵⁰ *GS Media* EU:C:2014:76; [2014] Bus. L.R. 259 at [33]; *Filmspelers* EU:C:2017:300; [2017] Bus. L.R. 1816 at [28]; *The Pirate Bay* EU:C:2017:456; [2017] Bus. L.R. 1899 at [23].

⁵¹ *Svensson* EU:C:2014:76; [2014] Bus. L.R. 259 at [27]–[29].

⁵² *GS Media* EU:C:2014:76; [2014] Bus. L.R. 259 at [47].

⁵³ *GS Media* EU:C:2014:76; [2014] Bus. L.R. 259 at [49].

⁵⁴ *Filmspelers* EU:C:2017:300; [2017] Bus. L.R. 1816 at [50]–[51].

⁵⁵ *The Pirate Bay* EU:C:2017:456; [2017] Bus. L.R. 1899 at [42]–[46].

⁵⁶ It must be noted that this jurisprudence may come up with even more nuances and conditions regarding the situation where the work is not merely linked to but also stored. In this vein, a referral pending before the CJEU is asking the court whether “the inclusion of a work—which is freely accessible to all internet users on a third-party website with the consent of the copyright holder—on a person’s own publicly accessible website constitutes a making available of that work to the public within the meaning of Article 3(1) of Directive 2001/29/EC if the work is first copied onto a server and is uploaded from there to that person’s own website”. See *Land Nordrhein-Westfalen v Renckhoff* (C-161/17).

DSMD could be brought into line with the approach taken by the court and a modification of the notion of “communication to the public” could be avoided.

As a result, the Questions raised by the Member States could be answered in the sense that: (1) to “provide access to the public” is not sufficient to find a communication to the public, as the CJEU requires further conditions to be met; (2) the first paragraph of Recital 38 should either be drafted in the way noted above, or simply deleted; and (3) the current wording of Recital 38 does lead to legal uncertainty.

From a more general perspective, it has to be added that the broadening of the right of communication to the public (and corresponding copyright liability) does not constitute an appropriate compensatory measure for the lack of a harmonised system of intermediary liability, including rules on notice and takedown procedures and a system of counter-notices. The attempt to regulate intermediary liability on the basis of rules concerning primary copyright infringement is inconsistent and imbalanced: the Information Society Directive was never intended to harmonise liability questions arising from intermediary services, such as the services of online platforms hosting user-generated content. Not surprisingly, the Information Society Directive does not provide for the checks and balances necessary to achieve a proper equilibrium of all fundamental rights and freedoms involved.

Fair compensation of authors and performers

Question 3—Germany

“How can it be assured that authors and performers obtain a reasonable share of the income resulting from the online use of the content they have created? Are there any legal concerns against providing for a direct claim to remuneration for authors and performers?”

While the objective of the Commission Proposal to give right holders a fair share of the profit accruing from the online dissemination of their works is laudable, it would be wrong to adopt the concrete legal measures proposed in art.13 and Recitals 37 to 39 DSMD to reach this goal. If the proposal became applicable law, it would lead to considerable legal uncertainty. As discussed, it contains imbalanced, undefined legal concepts that make it incompatible with the existing *acquis*.

Given this result of the analysis, it is advisable to ensure an adequate remuneration of authors and performers in a different way. In the light of the existing *acquis*, it is surprising that the Commission Proposal is silent on an alternative approach that would lead to an additional revenue stream for authors and performers in line with the current EU copyright system: the adoption of a new exception to copyright covering the creation of content remixes and mash-ups by users and the further dissemination of these remixes and mash-ups via online platforms for user-uploaded content.⁵⁷ Article 5 of the Information Society Directive shows clearly that it is already established EU practice to combine the adoption of certain use privileges with an obligation to pay fair compensation. The private copying rules in art.5(2)(a) and (b), for example, depend on whether “the rightholders receive fair compensation”. Similarly, the broadcasting rule concerning social institutions which is laid down in art.5(2)(e) of the Information Society Directive only applies “on condition that the rightholders receive fair compensation”. Recital 35 of the Information Society Directive explains this:

“In certain cases of exceptions or limitations, rightholders should receive fair compensation to compensate them adequately for the use made of their protected works or other subject-matter. When determining the form, detailed arrangements and possible level of such fair compensation, account should be taken of the particular circumstances of each case. When evaluating these circumstances, a valuable criterion would be the possible harm to the rightholders resulting from the act in question. In cases where rightholders have already received payment in some other form, for instance as part of a licence fee, no specific or separate payment may be due. The level of fair compensation should take full account of the degree of use of technological protection measures referred to in this Directive. In certain situations where the prejudice to the rightholder would be minimal, no obligation for payment may arise.”

Hence, it would not be inconsistent with the existing *acquis* to introduce a new use privilege in favour of the creation of content remixes and mash-ups by users and the further dissemination of these remixes and mash-ups on online platforms. As a counter-move, online platforms with user-uploaded content could be responsible for the payment of fair compensation. They could either pass on these additional costs to their users, or use a part of their

⁵⁷ For an example of such a specific use privilege for user-generated content, see art.29.21 of the Copyright Act of Canada, as introduced by Bill C-11, Copyright Modernization Act, adopted on 18 June 2012. As to the general debate on user-generated content and the need for copyright exceptions in this area, see S.D. Jamar, “Crafting Copyright Law to Encourage and Protect User-Generated Content in the Internet Social Networking Context” (2010) 19 *Widener Law Journal* 843; N. Helberger and L. Guibault et al., “Legal Aspects of User Created Content”, Amsterdam: Institute for Information Law (2009), SSRN, <http://ssrn.com/abstract=1499333> [Accessed 1 January 2018]; M.W.S. Wong, “Transformative User-Generated Content in Copyright Law: Infringing Derivative Works or Fair Use?” (2009) 11 *Vanderbilt Journal of Entertainment and Technology Law* 1075; E. Lee, “Warming Up to User-Generated Content” [2008] *University of Illinois Law Review* 1459; B. Buckley, “SueTube: Web 2.0 and Copyright Infringement” (2008) 31 *Columbia Journal of Law and the Arts* 235; T.W. Bell, “The Specter of Copyism v. Blockheaded Authors: How User-Generated Content Affects Copyright Policy” (2008) 10 *Vanderbilt Journal of Entertainment and Technology Law* 841; S. Hechter, “User-Generated Content and the Future of Copyright: Part One – Investiture of Ownership” (2008) 10 *Vanderbilt Journal of Entertainment and Technology Law* 863; G. Lastowka, “User-Generated Content and Virtual Worlds” (2008) 10 *Vanderbilt Journal of Entertainment and Technology Law* 893.

advertising income to finance the payment of fair compensation.⁵⁸ This alternative solution is clearly preferable. It is in line with the current *acquis* and generates an additional revenue stream for authors and performers without encroaching upon fundamental rights and freedoms and eroding the safe harbour for hosting in art.14 of the E-Commerce Directive.

Conclusion

The measures contemplated in art.13 DSMD can hardly be deemed compatible with the fundamental rights and freedoms guaranteed under arts 8 (protection of personal data), 11 (freedom of expression) and 16 (freedom to conduct a business) of the Charter of Fundamental Rights of the EU. The application of filtering systems that would result from the adoption of art.13 DSMD would place a disproportionate burden on platform providers, in particular small and medium-sized operators, and lead to the systematic screening of personal data, even in cases where no infringing content is uploaded. The filtering systems would also deprive users of the room for freedom of expression that follows from statutory copyright exceptions, in particular the quotation right⁵⁹ and the right to parody.⁶⁰

The adoption of Recital 38 DSMD would moreover lead to a remarkable restriction of eligibility for the liability privilege following from art.14 of the E-Commerce Directive. Recital 38 DSMD does not adequately reflect the current status quo in the area of the safe harbour for hosting laid down by art.14 E-Commerce Directive. Instead, it takes the assessment criteria of “promoting” and “optimising the presentation” of user-generated content out of the specific context of the *L’Oréal v eBay* decision of the Court of Justice. The general requirement of “knowledge of, or control over” infringing user-generated content is missing. In the absence of any reference to this central requirement, Recital 38 DSMD is incomplete and fails to draw an accurate picture of the current conceptual contours of the safe harbour for hosting.

Furthermore, there can be little doubt that according to the Court of Justice, art.15 of the E-Commerce Directive is fully applicable to user-generated content platforms and intended to shield these platforms from general monitoring obligations. The court’s jurisprudence shows clearly that an obligation to filter any information uploaded to the server of a platform hosting user-generated content would lead to a prohibited general monitoring obligation and be incompatible with art.15 of the E-Commerce Directive.

In general, the Commission Proposal and subsequent Council Presidency Compromise Proposals confuse and mix up different legal questions by bringing together the issue of the scope of the safe harbour for hosting under art.14(1) of the E-Commerce Directive, and the issue of whether (and when) platform providers themselves carry out an act of communication to the public and fulfil the requirements of art.3(1) of the Information Society Directive.

Considering the criteria which the Court of Justice developed in the context of art.3(1) of the Information Society Directive, it becomes moreover apparent that the mere act of storing and providing access to the public is not sufficient to establish copyright infringement. Recital 38 would dismiss additional infringement criteria that have evolved in the jurisprudence of the court. Because of the ambiguous wording of Recital 38 DSMD, there is a real risk of modifying the notion of “communication to the public” considerably.

These findings shed light on the need to clarify service provider immunity instead of further complicating the legal assessment criteria. A further clarification of applicable rules should extend the principle that is already reflected in the EU *acquis*, namely that providers are not liable for users’ actions which they cannot reasonably be expected to know and control.⁶¹ A further clarification of this rule is advisable to pave the way for a uniform application of service provider immunity throughout the internal market. In the interest of legal certainty and a higher level of harmonisation, a well-structured European legislative design of the “notice and takedown” procedure should be introduced, accompanied by an appropriate “counter notice” procedure.

In addition, it would be consistent with the existing *acquis* to introduce a new use privilege in favour of the creation of content remixes and mash-ups by users and the further dissemination of these remixes and mash-ups on online platforms. As a counter-move, online platforms with user-uploaded content could be responsible for the payment of fair compensation. They could either pass on these additional costs to their users, or use a part of their advertising income to finance the payment of fair compensation. To generate an additional revenue stream for authors and performers, this alternative solution is clearly preferable. It does not encroach upon fundamental rights and freedoms, and leaves intact the safe harbour for hosting in art.14 of the E-Commerce Directive.

⁵⁸ For a proposal pointing in this direction and modelled on the existing system for the payment of private copying levies, see M. Leistner and A. Metzger, “Wie sich das Problem illegaler Musikknutzung lösen lässt” (4 January 2017), *Frankfurter Allgemeine Zeitung*, <http://www.faz.net/aktuell/feuilleton/medien/gema-youtube-wie-sich-urheberrechts-streit-schlichten-liesse-14601949-p2.html> [Accessed 1 January 2018]; M. Leistner, “Copyright law on the internet in need of reform: hyperlinks, online platforms and aggregators” (2017) 12(2) *Journal of Intellectual Property Law & Practice* 146.

⁵⁹ Information Society Directive 2001/29 art. 5(3)(d).

⁶⁰ Information Society Directive 2001/29 5(3)(k).

⁶¹ See E-Commerce Directive arts 12–14, which establish this principle.

The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform

The Signatories,

- *Acknowledging* that, in the light of the practical importance of an appropriate legal framework for the production of rich and diverse creative content and innovative online services, it is a laudable objective to clarify and further harmonize the rules for the hosting and provision of access to content uploaded by users, and reward authors and performers for the online use of their creations;
- *Emphasising*, however, that such clarification and harmonisation should aim to further develop the existing *acquis* in a consistent way, as that emerges from the E-Commerce Directive,⁶² the Information Society Directive,⁶³ the interpretative case law of the CJEU and the Charter of Fundamental Rights of the EU, by devising an appropriate interface between potential new legal standards in the field of copyright and the *acquis*;
- *Pointing out* that current Commission and Council proposals concerning the text of Article 13 DSMD and accompanying Recitals entail the *risk of a serious encroachment upon fundamental rights and freedoms*, in particular the rights and freedoms laid down in Articles 8, 11 and 16 of the Charter, and that these proposals disregard CJEU jurisprudence which leaves no doubt about the need to establish a fair balance between all fundamental rights and freedoms involved;
- *Recalling* that EU policy makers are bound by the fundamental rights and freedoms guaranteed under the Charter and obliged to strike a fair balance between all rights and freedoms involved, in particular in light of the principle of proportionality;
- *Underscoring* that it is indispensable to give a clear and sound reason for imposing legal obligations on information society service providers that store and provide access to user-uploaded works;
- *Recalling* that current EU legislation in the field of information society service providers, including Article 14 of the E-Commerce Directive, *concerns the regulation of immunity from liability, but not the regulation of liability. These different notions should not be mixed.* Considering the complexity of the various other copyright issues addressed in the current reform debate, it is doubtful whether the EU copyright reform is an appropriate forum to also tackle the highly complex issues arising from platform liability questions which have strong repercussions outside the field of copyright law;
- *Emphasising* that the notion of “monitoring obligations in a specific case” reflected in Recital 47 of the E-Commerce Directive should not be overstretched to justify acts of filtering which would target all content uploaded onto a given platform and apply indiscriminately to all users, even if the filtering seeks only to identify instances of infringement of an individual item of protected content. In line with CJEU jurisprudence, monitoring should be deemed specific only if it relates to a specific content item, in respect of which infringement has been established previously, or if it targets a specific user who has previously been found to have engaged in such infringements⁶⁴;
- *Warning* against the erosion of the nuanced requirements that have evolved in the case law of the CJEU with regard to the eligibility of information society service providers for invoking the safe harbour for hosting laid down in Article 14 of the E-Commerce Directive. In particular, it is *not advisable to depart from an analysis based on knowledge and control as assessment factors*. Moreover, case-specific notions, such as the reference to “optimising the presentation” and “promoting” in *L’Oréal v eBay*,⁶⁵ should not be taken out of the specific context in which the Court applied them;
- *Stressing* that new legislation which disregards the nuanced approach adopted by the CJEU is likely to generally deprive user-uploaded content platforms of the liability privilege following from Article 14 of the E-Commerce Directive. The *corrosive effect of such legislation would be felt across the whole spectrum of relevant services: from online marketplaces and social media platforms to collaborative*

⁶² Directive 2000/31 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce) [2000] OJ L178/1.

⁶³ Directive 2001/29 on the harmonisation of certain aspects of copyright and related rights in the information society [2001] O.J. L167/10.

⁶⁴ *L’Oréal v eBay* EU:C:2011:474; [2012] Bus. L.R. 1369 at [138]–[141]; *McFadden* EU:C:2011:474; [2012] Bus. L.R. 1369 at [87]; *Tommy Hilfiger* EU:C:2016:528; [2016] Bus. L.R. 1008 at [34].

⁶⁵ *L’Oréal v eBay* EU:C:2011:474; [2012] Bus. L.R. 1369 at [116].

software development platforms⁶⁶ and repositories of public domain material and scientific papers. It would render the safe harbour for hosting meaningless, destroy the equilibrium between affected fundamental rights and freedoms, erode the basis for investment in new online services – particularly new services developed by small and medium-sized enterprises – and, in consequence, lead to *further market concentration in favour of providers which already have a strong market position*;

- *Pointing out* the need to further clarify the criteria for the exemption of information society service providers from liability for infringing content to arrive at a uniform application of Article 14 of the E-Commerce Directive throughout the internal market. This *further clarification should lead to more specific, harmonized rules on the “notice and takedown” procedure and include the introduction of a “counter notice” procedure.* However, there should be no liability for user action which platform providers cannot reasonably be expected to know and control;
- *Emphasising* that filtering mechanisms have not currently advanced to the state where they can adequately distinguish material that should be allowed in accordance with the exceptions and limitations to copyright. Their use thus risks encroachments upon freedom of expression and information. The most sophisticated systems that do currently exist are expensive and require substantial investment. *EU platform providers, particularly small and medium-sized platform operators, should not be disadvantaged through the imposition of obligations to invest in filtering systems or due to an inability to purchase the most advanced systems.* It should also be noted that all filtering requires examination of content posted by non-infringing users, which could negatively impact end users’ right to privacy;
- *Emphasising* that any reform of the safe harbour for hosting laid down in Article 14 of the E-Commerce Directive *should seek to follow a balanced approach, distributing new legal obligations appropriately between providers of platforms with user-uploaded content and copyright*

holders. In particular, new legislation in this area should create sufficient incentives for copyright holders to set up workable rights clearance systems with pan-European reach;

- *Recalling* that in the light of CJEU jurisprudence, the assumption that acts of hosting and providing access, generally, amount to an act of communication to the public that requires the authorization of copyright holders is not always correct. The CJEU has developed a complex set of conditions for identifying acts of communication to the public. Given the diversity of affected online services and forms of use, new legislation in this area should *refrain from collapsing the different assessment criteria into one single test of providing access. Instead, it is desirable to distinguish clearly between infringement criteria that apply to the primary act of uploading content, and those that apply to the secondary acts undertaken in relation to uploaded content*;
- *Emphasising* that, in order to avoid an encroachment upon freedom of expression and information, it is *indispensable to safeguard limitations and exceptions to copyright protection when it comes to the use of filtering mechanisms*, as explained by the CJEU in *Scarlet Extended v Sabam*⁶⁷ and *Sabam v Netlog*.⁶⁸ To this end, the introduction of obligations for platform providers based on content recognition technologies should not be attempted before these limitations and exceptions have been properly harmonized at EU level;
- *Pointing out* that the introduction of a *new copyright limitation permitting the uploading and further dissemination of user-generated remixes and mash-ups of protected content, as is usual practice in social networks, could play an important role in alleviating the problems* currently embedded in Article 13 and Recital 38 DSM. Such a new copyright limitation⁶⁹ would offer a sound basis for the payment of equitable remuneration which could become an *additional source of income for authors and performers.* The adoption of a new copyright limitation is also appropriate considering that not only platform

⁶⁶ OpenForum Europe and Free Software Foundation Europe, “European Copyright reform: Impact on Free and Open Source Software and developer communities” (September 2017), <http://www.openforumeurope.org/release-of-efsf-paper-european-copyright-reform-impact-free-open-source-software-developer-communities/> [Accessed 1 January 2018].

⁶⁷ *Scarlet Extended v Sabam* EU:C:2011:771; [2012] E.C.D.R. 4 at [52].

⁶⁸ *Sabam v Netlog* EU:C:2012:85; [2012] 2 C.M.L.R. 18 at [50].

⁶⁹ For a further discussion of the conceptual contours of such a new copyright limitation, see Position Statement of the Max Planck Institute for Innovation and Competition (Munich 2017), pp.99–113, SSRN, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3036787 [Accessed 1 January 2018].

providers, but also copyright holders and users, should contribute to the development of adequate solutions;

- *Pointing out* that any legislation leading to the use of content filtering mechanisms must ensure that courts have the opportunity to exercise effective control to prevent excesses. *The decision over the scope and reach of filtering measures must not be left to agreements between industry representatives that are likely to focus on cost and efficiency considerations instead of seeking to avoid unnecessary content censorship. The involvement of the courts can ensure sufficient deference to public interests*, such as the maintenance of an equilibrium between all rights and freedoms involved. Courts can also give sufficient weight to the interests of end consumers which are not represented in negotiations between copyright holders and platform providers.

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