EU Copyright Reform: Grappling with the Google Effect

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Introduction

Sweeping changes are coming to copyright law in the European Union. Following four years of negotiations, the European Parliament in April 2019 approved the final text of the Digital Single Market Directive (DSMD).[1] EU member states now have two years to transpose its provisions into

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[1] Directive 2019/790, O.J. 2019 (L 130/92) (hereinafter DSMD).

domestic law. The new directive, which is the most substantial change to EU copyright law in a generation, contains provisions for enhancing cross-border access to content available through digital subscription services, enabling new uses of copyrighted works for education and research, and, most controversially, 'clarifying' the role of online services in the distribution of copyrighted works.

The provisions associated with the last of these goals—Article 15 (the 'link tax') and Article 17 ('upload filters') take aim directly at two services operated by Google: Google News and YouTube. Article 15 is intended to provide remuneration for press publishers when snippets of their articles are displayed by search engines and news aggregators.[2] Article 17, which this article takes for its subject, is intended to address the so-called 'value gap'—the music industry's longstanding complaint that YouTube undercompensates music rightholders for streams of user videos containing claimed copyrighted content.[3] The text of the DSMD nowhere mentions YouTube, but anyone versed in the political economy of digital copyright knows that Article 17 was purpose-built to make YouTube pay.

The important questions to ask in the wake of Article 17 are who *else* will pay—and in what ways. This article offers a focused examination of Article 17 as public law created to settle a private score between the music industry and YouTube. In Part I, I explain and critique the 'value gap' as a policy rationale for altering the scope of generally applicable copyright safe harbors. Part II breaks down the terms of the European Commission's original proposal for Article 13 (which later became Article 17) in relation to existing provisions of the E-Commerce Directive (ECD)[4] and the Information Society Directive (ISD).[5] In Part III, I survey human rights and competition-related criticisms of Article 13's mass licensing and 'technical measures' mandates. Part IV analyzes the adopted text of Article 17 with attention to the nature and adequacy of revisions made to answer the criticisms outlined in Part III.

I. Safe Harbors, YouTube, and the 'Value Gap'

The policy rationale for Article 17 comes directly from the music industry's 'value gap' lobbying campaign.[6] The 'value gap' is a slogan that music industry trade groups created sometime

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[2] *See* DSMD, *supra* note 1, at 118 (art. 15) (governing "protection of press publications concerning online uses").

[3] *See* DSMD, *supra* note 1, at 119 (art. 17) (governing "use of protected content by online content-sharing service providers").

[4] Directive 2000/31, O.J. 2000 (L 178) (hereinafter "ECD").

[5] Directive 2001/29, O.J. 2001 (L 167) (hereinafter "ISD")

[6] Trade associations representing the music industry have concertedly and constantly used the term 'value gap' in their public and government relations campaigns since at least 2015. *See, e.g.,* IFPI, Digital Music Report 2015, at 22–23, https://www.ifpi.org/downloads/Digital-Music-Report-2015.pdf; RIAA *et al.*, Joint Comments of the "Music Community," U.S. Copyright Office Section 512 Study, Docket No. 2015-7, Appendix C, at 5-6, Mar. 31, 2016, https://perma.cc/56GE-TA9A; RIAA, *Five Stubborn Truths About the Value Gap*, Medium, Aug. 18, 2017, https://perma.cc/EU56-696Y; RIAA & NMPA, Comments in Response to Request of the U.S. Intellectual Property Enforcement Coordinator for Public Comments: Development of

around 2015 to sell policy makers on the idea that copyright safe harbors are not a sound policy choice for the whole Internet but a 'legal loophole' that allows YouTube to unfairly exploit the music industry's valuable intellectual property.[7] According to the IFPI and other music industry trade groups, safe harbors create a 'value gap' between what content-sharing services like YouTube pay per stream of copyrighted music and what dedicated music streaming services like Spotify pay.[8] The fact that copyright law treats YouTube and Spotify differently, they argue, has created a "distorted" digital music marketplace that suppresses streaming royalty rates across the board.[9]

The upshot of the 'value gap' as a copyright policy proposition is that music industry stakeholders want more money from YouTube, and they want to reshape copyright law to get it. Simply put, they want to redefine the scope of existing storage (or hosting) safe harbors in the European Union and the United States to exclude YouTube from their protection. The predicted effect of such a change is to force YouTube to (re)negotiate its existing licenses with record labels and music publishers on terms more favorable to them. As I explain in the pages that follow, both the European Commission and the European Parliament embraced this solution, with potentially serious collateral consequences for the open Internet, the expressive rights of Internet users, and the vast array of content-sharing businesses that allow Internet users to take part in the digital economy and digital culture.

A major flaw in the logic of the 'value gap,' albeit not one that troubled the Commission, is that the music industry's asserted equivalence between dedicated streaming services and user-generated content (UGC) services is false. Not only is it false, it is false in a way that directly implicates the policy rationale for safe harbors, which is to limit risk and liability for online businesses that allow members of the public to create and share content. Safe harbors make it possible for the public to access open online forums for creative expression and cultural participation. Because Spotify and YouTube operate under different business models, they don't face the same legal risks. Spotify is a closed distribution platform; it directly chooses and controls the whole universe of content it makes available to subscribers.[10] It therefore knows exactly what content will be available on its service at any given time. No random subscriber in Paris—France or

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the Joint Strategic Plan on Intellectual Property Enforcement, Nov. 13, 2018, at 4, https://perma.cc/MRM9-8EYB.

In the European Commission's public information campaign for the DSMD, the Commission routinely described Article 13/17 as a solution for the 'value gap' without ever attributing the term to music industry lobbyists. *See, e.g.,* Press Release, European Commission, Questions & Answers: EU Negotiators Reach a Breakthrough to Modernise Copyright Rules (Feb. 13, 2019), http://europa.eu/rapid/press-release_MEMO-19-1151_en.htm; Press Release, European Commission, Speech by Vice-President Ansip on Copyright at the Charles Clark Memorial Lecture, London Book Fair (Apr. 10, 2018), http://europa.eu/rapid/press-release_SPEECH-18-3124_en.htm.

[7] *See* IFPI, *supra* note 6, at 22–23 (explaining the 'value gap').

[8] *Id.*

[9] *Id.*

[10] *See* CRUNCHBASE, https://www.crunchbase.com/organization/spotify#section-overview (describing Spotify as "a commercial music streaming service that provides restricted digital content from a range of record labels and artists").

Texas—can upload a cat video to Spotify at three o'clock in the morning on a Sunday. YouTube, by contrast, is open to all comers all the time.

Because users decide in the first instance what content will be available on UGC services, such services face uncertain and continuous exposure to legal claims arising from their users' illegal activity, including copyright infringement. Safe harbors were created for online service providers that host UGC because policy makers knew that infringement is inevitable on open, public-facing online services. Closed services like Spotify don't enjoy the protection of safe harbors not because they are being treated unfairly, but because they don't need it. Considering the nature of the services in question, the comparison at the heart of the 'value gap' campaign is apples to oranges.

Legal exposure arising from copyright-infringing UGC is profound for any US-based service operating at Internet scale, because U.S. copyright law permits recovery of statutory damages of up to $150,000 per infringed work.[11] To give a concrete example of how quickly those damages can pile up, Viacom claimed over a billion dollars in statutory damages when it sued YouTube—then still a startup—in 2007.[12] Copyright safe harbors exist so that online businesses hosting UGC can raise capital and operate. Without safe harbors, UGC-based online business models would be unsustainable for all but mega-services like YouTube and Facebook, which can withstand eight-figure legal judgments and the cost of taking whatever measures are necessary to prevent them.

As the dominance of YouTube and Facebook draws increased regulatory scrutiny, it is important to remember that intermediary safe harbors don't just benefit the Internet's platform giants. Safe harbors are essential to the Internet's interactive architecture. They are indispensable for the wide swath of service providers that keep the Internet's application layer diverse, offering the public opportunities for creativity and conversation beyond the confines of the major platforms. The danger of the 'value gap' campaign from a policy perspective is its narrow focus on the impact of a particular service (YouTube) on a particular industry (recorded music).

The safe harbor in the crosshairs of the 'value gap' campaign is the storage (or hosting) safe harbor in Article 14 of the ECD.[13] Article 14 conditions safe harbor for storage providers on their not having knowledge of infringement and on their removing or disabling access to infringing content when they learn about it, whether through notice from a rightholder or otherwise.[14] Article 14 also conditions safe harbor on a provider's not having control over its users' illegal activities.[15] A provider's knowledge of infringement can be based on notice or, alternatively, on facts and circumstances from which infringing activity is apparent.[16] The copyright enforcement framework

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[11] *See* 17 U.S.C. § 504 (providing for statutory damages of up to $150,000 per work in cases of willful infringement).
[12] Jonathan Stempel, *Google, Viacom Settle Landmark YouTube Lawsuit*, REUTERS, Mar. 18, 2014, https://www.reuters.com/article/us-google-viacom-lawsuit/google-viacom-settle-landmark-youtube-lawsuit-idUSBREA2H11220140318. Google acquired YouTube for $1.65B in 2006. *Id.*
[13] ECD, *supra* note 4, at 13 (art. 14).
[14] *Id.*
[15] *Id.*
[16] *Id.*

embodied in Article 14 is reactive; knowledge of a particular infringement serves as the trigger for action on the provider's part.[17] As a general matter, actionable knowledge comes from notices, and notices come from rightholders.

The ECD's reactive, notice-and-takedown framework puts the burden of monitoring for infringement on rightholders. Accordingly, Article 15 provides that member states cannot condition safe harbor for any eligible service provider on a "general monitoring obligation."[18] Article 15 would thus seem to prevent member states from requiring service providers to use technical measures—*e.g.,* automated content recognition (ACR) systems like YouTube's Content ID—to continuously screen all of the content their users upload, with an eye to preventing infringements. At the same time, however, Article 14 provides that a rightholder may seek an injunction, as permitted by national law, "requiring the service provider to terminate *or prevent* an infringement."[19] Whereas *terminating* an infringement is consistent with a solely reactive posture on the part of a service provider, *preventing* an infringement is not, and would appear to entail active and ongoing monitoring for infringing content. It is thus challenging to reconcile Article 14's allowance of preventive injunctions with Article 15's prohibition on general monitoring. As discussed in Part II.B below, courts in the European Union have confronted this tension.

In 2007, when YouTube introduced Content ID, notice-and-takedown was the legal framework within which YouTube and rightholders operated when it came to policing copyrights. Because YouTube had no legal obligation to monitor user uploads for infringing content, it made Content ID available to selected corporate partners on terms of its own choosing.[20] Content ID works by creating a unique digital fingerprint of every uploaded user file and then using that fingerprint to query a database populated with fingerprints of reference files provided by rightholders.[21] If any portion of an uploaded file matches content in a reference file, the user's upload is automatically claimed for the rightholder who submitted the reference file.[22] The rightholder elects when submitting individual reference files whether they want to monetize or block algorithmically claimed user uploads.[23] For claimed videos that the rightholder elects to monetize,

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[17] *See generally* Martin Husovec, *The Promises of Algorithmic Copyright Enforcement: Takedown or Staydown? Which Is Superior? And Why?*, 42 COLUM. J. L. & ARTS 53 (2018) (providing a taxonomy of enforcement models and explaining notice-and-takedown procedures under the ECD and the Digital Millennium Copyright Act).
[18] ECD, *supra* note 4, at 13 (art. 15).
[19] *Id.*, art. 14.
[20] *See* Brad Stone & Miguel Helft, *New Weapon in the Web War over Piracy*, NY Times, Feb. 19, 2007, https://www.nytimes.com/2007/02/19/technology/19video.html (reporting on media companies' negative reaction to YouTube's conditioning access to Content ID on the execution of broader licensing agreements).
[21] *See How Content ID Works*, GOOGLE, https://support.google.com/youtube/answer/2797370?hl=en (last visited June 24, 2019). *See also* Evan Engstrom & Nick Feamster, *The Limits of Filtering*, Engine, 13 (March 2017), https://perma.cc/5Y2D-CRN5 (explaining the acoustical fingerprinting technology that underlies Content ID).
[22] *See How Content ID Works*, *supra* note 21.
[23] *Id.*

the uploader's share of ad revenue from views of the video is diverted to the rightholder.[24] For claimed videos that are blocked, no revenue is generated for anyone.

Content ID offered participating rightholders two major benefits over notice-and-takedown: (1) it continuously monitored YouTube uploads for rightholders' copyright-protected content, thereby relieving them of the hassle of sending bulk notices, and (2) it allowed them to authorize and monetize user infringements instead of blocking them.[25] Content ID created an entirely new revenue stream for rightholders: automated, real-time licensing of initially unauthorized amateur uses. Before Content ID, there was no practical, scalable way for rightholders to track, claim, and monetize users' infringements on YouTube. Takedown was the only game in town, and it earned rightholders nothing. Content ID revealed the utility of ACR technology not just for blocking unauthorized uses but for licensing them at scale. It should thus come as no surprise that ACR—a 'technical measure'—is integral to the music industry's desired policy solution to the "value gap."

To get access to Content ID and the new market it unlocked, the major record labels and music publishers agreed to license their catalogs to YouTube in return for undisclosed compensation, including a cut of ad revenue.[26] A lesser-known fact is that the major labels also negotiated for equity stakes in YouTube that were reportedly valued at up to $50 million.[27] In addition, the industry derives other value from YouTube. Not only do rightholders monetize claimed content in user-uploaded videos, they operate and monetize official YouTube channels for their own artists.[28] Some of these are among the platform's most popular.[29] As channel owners, the major labels rely on YouTube to reach and grow audiences for their artists. They also use YouTube to identify and recruit new talent, including superstars like Justin Bieber, Carly Rae Jepson, Shawn Mendes, Alessia Cara, and the Weeknd.[30] It is unclear how, if at all, these factors figure into the industry's 'value gap' accounting.

Over time, the music industry's relationship with YouTube has been lucrative. From October 2017 to September 2018, YouTube reported that it paid more than $1.8 billion in ad revenue to music industry partners.[31] From the music industry's viewpoint, however, the deal is not

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[24] *Id.*

[25] Over 90% of claimed videos in Content ID are monetized rather than blocked. *How Google Fights Piracy*, Nov. 2018, at 14, https://storage.googleapis.com/gweb-uniblog-publish-prod/documents/How_Google_Fights_Piracy_2018.pdf.

[26] Andrew Ross Sorkin & Jeff Leeds, *Music Companies Grab a Share of the YouTube Sale*, NY TIMES, Oct. 19, 2006, https://www.nytimes.com/2006/10/19/technology/19net.html.

[27] *Id.*

[28] *See* Todd Spangler, *YouTube Will Merge Vevo Channel Subscribers Into Unified 'Official' Music Artist Accounts*, VARIETY, Jan. 23, 2018, https://variety.com/2018/digital/news/youtube-vevo-music-channels-consolidation-official-artists-1202674125/ (reporting on YouTube's consolidation of Vevo artist channels and unofficial artist channels into Official Artist Channels).

[29] *Id.*

[30] *See* Isis Brione, *12 Major Artists Who Got Their Start on YouTube*, TEEN VOGUE, Mar. 29, 2016, https://www.teenvogue.com/story/best-artists-discovered-on-youtube.

[31] *See How Google Fights Piracy*, *supra* note 25, at 21.

lucrative enough.[32] The IFPI claims in its 'value gap' talking points that for every $20 Spotify returns to the music industry, YouTube returns only a dollar.[33] Neither side's claims about who pays what to whom are easily verifiable. It is indisputable, however, that the music industry's annual revenues have been increasing dramatically—with copyright safe harbors fully intact—since its trade associations began messaging about the 'value gap' back in 2015.[34] In 2018, the RIAA reported that sound recording revenues rose 12% to $9.8 billion, reaching their highest level in 10 years.[35] Streaming revenues grew by 30%.[36] The NMPA reported that music publishing revenues rose to $3.3 billion, an increase of 11.8% over the previous year.[37] In short, the industry has rebounded from the hit it took during the Napster years, and streaming has been the game changer.

Rightholders have long argued that YouTube should be legally required to give them access to Content ID with no strings attached.[38] Viacom made precisely that argument when it sued YouTube in 2007, but the court saw no legal basis for it. Citing Section 512(m) of the Digital Millennium Copyright Act (DMCA), which is the US equivalent of ECD Article 15, the court held that YouTube could not be denied safe harbor under Section 512(c)—the equivalent of ECD Article 14—for "refusing to provide access to mechanisms by which [it] affirmatively monitors its own network."[39] Because safe harbors have not historically been conditioned on a provider's giving rightholders free access to whatever proprietary technical measures they might be using, rightholders have had to bargain for such access. Having no affirmative duty to monitor for infringement has afforded YouTube leverage in licensing negotiations that rightholders want policymakers in both the European Union and the United States to remove. To that end, rightholders have advocated expelling YouTube from statutory storage safe harbors and making it directly liable (in the absence of newly negotiated licensing agreements) for all of its users' infringing uploads.

Despite the false equivalence at the heart of the 'value gap' campaign, the European Commission was persuaded that YouTube's entitlement to the protection of the ECD storage safe

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[32] *See, e.g.,* RIAA & NMPA, *supra* note 6, at 4 (asserting that YouTube licenses content "at a fraction of market value").
[33] Roy Trakin, *IFPI Report Finds Streaming Continues to Rise, YouTube Dominates Online Listening*, VARIETY, Oct. 9, 2018, https://variety.com/2018/music/news/ifpi-report-streaming-youtube-online-listening-1202974035/.
[34] According to the RIAA, "2015 was a milestone year for streaming music." *See* Joshua P. Friedlander, News and Notes on 2015 RIAA Shipment and Revenue Statistics, https://perma.cc/73MV-6SY3. For 2015, the RIAA reported $2.4B in total streaming revenue, offsetting combined losses that year from sales of digital downloads and physical formats. *Id.* Of that total, $1.2B came from paid streaming subscriptions, up 52% from 2014. $385M came from ad-supported streaming, up from $295M in 2014. *Id.*
[35] Jem Aswad, *U.S. Music Industry Posts Third Straight Year of Double-Digit Growth as Streaming Soars 30%*, VARIETY, Feb. 28, 2019, https://variety.com/2019/biz/news/u-s-music-industry-posts-third-straight-year-of-double-digit-growth-as-streaming-soars-30-1203152036/.
[36] *Id.*
[37] Ed Christman, *NMPA Announces 11.8% Member Revenue Growth to $3.3B at Annual Meeting*, BILLBOARD, June 12, 2019, https://www.billboard.com/articles/business/8515757/nmpa-member-revenue-growth-david-israelite-annual-meeting.
[38] *See* Stone & Helft, *supra* note 20 (reporting on media companies' demands that YouTube implement audiovisual fingerprinting technology).
[39] Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 41 (2d Cir. 2012).

harbor has not been conducive to "a fair sharing of value"[40] for use of recorded music on the platform. In its proposal to Parliament, the Commission was frank about the intended redistributive effects of Article 13:

> By improving the bargaining position of authors and performers and the control rightholders have on the use of their copyright-protected content, the proposal will have a positive impact on copyright as a property right….This positive impact will be reinforced by the measures to improve licensing practices, and ultimately rightholders' revenues.[41]

To accomplish its redistributive goal—a wealth transfer from YouTube to music industry stakeholders, to close the 'value gap'—the Commission proposed Article 13.

II. Article 13: The Commission's Original Proposal

In the Commission's proposal of September 2016, Article 13 swept broadly, covering all "information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users."[42] All such providers were to "take measures to ensure the functioning of [licensing] agreements concluded with rightholders…or to prevent the availability on their services of works or other subject-matter identified by rightholders through cooperation with service providers."[43]

The recitals to the original Article 13 summarized the provision as embodying two requirements: (1) a plenary licensing requirement for any provider falling outside the scope of the ECD's Article 14 storage safe harbor, and (2) an infringement-prevention (or blocking) requirement applicable to all providers—even those eligible for Article 14 safe harbor.[44] Positioning Article 13 as the policy solution to the 'value gap,' the Commission implicitly targeted YouTube, contemplating that it and other covered providers would use 'technical measures' (*e.g.,* Content ID) to recognize copyrighted content in user-uploads and then monetize or block the videos containing that content, according to the relevant rightholder's predetermined preference.

This section will unpack Article 13's original licensing and technical measures requirements and explain how they intersected with Articles 14 and 15 of the ECD, as interpreted by the Court of Justice for the European Union (CJEU).

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[40] Commission Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market, at 3, COM (2016) 593 final (Sept. 14, 2016) (hereinafter "DSMD Proposal").
[41] *Id.* at 9.
[42] *Id.* at 29 (art. 13).
[43] *Id.*
[44] *Id.* at 20 (recital 38).

A. The Licensing Requirement

The licensing requirement in Article 13 exempted any provider eligible for the Article 14 storage safe harbor, which covers service providers that engage in "storage of information provided by a recipient of the service…at the request of [the] recipient."[45] The CJEU has never decided whether YouTube is eligible for safe harbor under Article 14. US courts, by contrast, have concluded in multiple cases that video-sharing services, including YouTube, are eligible for the DMCA's Section 512(c) storage safe harbor.[46]

Rightholders believe that YouTube should be ineligible for safe harbor because playback and other core functions of the service (i.e., search and recommendations) are "active" and therefore fall outside the limited definition of "storage" in Article 14, which they would limit to purely passive or "neutral" functions.[47] They also argue that YouTube's video playback functionality—the service's defining feature—constitutes "communication to the public" within the meaning of Article 3(1) of the ISD and therefore requires a license from rightholders.[48] Both issues are now pending before the CJEU in *LF v. Google*, a November 2018 referral from Germany's Bundesgerichtschof.[49]

In its original proposal for Article 13, the Commission embraced rightholders' views on both Article 14 and Article 3(1). With respect to the scope of ECD Article 14, the Commission wrote that eligibility hinges on "whether the service provider plays an active role, including by optimizing the presentation of the uploaded works…or promoting them."[50] With respect to the scope of Article 3(1), the proposal stated that services providing public access to copyrighted works "[go] beyond the mere provision of physical facilities and [perform] an act of communication to the public."[51] All such services, the Commission said, must license the works their users stream or be liable for infringement.[52]

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[45] ECD, *supra* note 4, at 13 (art. 14).
[46] *See* Viacom Int'l, Inc. v. YouTube, Inc., 676 F.3d 19, 41 (2d Cir. 2012); UMG Recordings, Inc. v. Shelter Capital Partners LLC, 718 F.3d 1006 (9th Cir. 2013); Capitol Records, LLC v. Vimeo, LLC, 826 F.3d 78 (2d Cir. 2016).
[47] *See* IFPI, *supra* note 6, at 5 ("Laws that were designed to exempt passive hosting companies from liability in the early days of the internet—so-called 'safe harbours'—should never be allowed to exempt active digital music services from having to fairly negotiate licences with rights holders."). This argument has repeatedly failed in the United States as applied to the storage safe harbor in section 512(c) of the DMCA. US courts have held specifically that YouTube's playback, search, and recommendation functions do not disqualify it from safe harbor. *See Viacom*, 67 F.3d at 39 (holding that "safe harbor extends to software functions performed for the purpose of facilitating access to user-stored material" and that limiting safe harbor to purely 'passive' functions "would eviscerate the protection afforded to service providers by § 512(c)").
[48] *See* IFPI et al., Joint Statement on Transfer of Value—Value Gap, Oct. 11, 2017, https://perma.cc/U7YQ-SPZ8 (urging EU policy makers to adopt the position that platforms providing users with access to copyrighted works engage in communication to the public).
[49] Case C-682/18, LF v. Google LLC (2018).
[50] DSMD Proposal, *supra* note 40, at 20 (recital 38).
[51] *Id.*
[52] *Id.*

The CJEU's case law on Article 14's scope is somewhat mixed. As Jaani Riordan points out, "[t]he dividing line that separates protected acts of storage from unprotected acts of intervening in content can be difficult to discern."[53] Two trademark cases support the Commission's narrow reading, but a more directly analogous (and roughly contemporaneous) copyright case doesn't. The trademark cases are *Google France v. Louis Vuitton*[54] and *L'Oréal v. eBay*,[55] both involving claims of infringement by means of Google's AdSense program. The copyright case is *Sabam v. Netlog*,[56] in which a Belgian collecting society for music rightholders sued a now-defunct social media platform.

In *Google France*, the CJEU considered whether Google could claim the storage safe harbor with respect to AdSense, which lets advertisers run ads against Google Search results for selected keywords in user search queries. Louis Vuitton sued Google over the use of Louis Vuitton's trademarks as keywords. The Court interpreted Article 14 eligibility to depend on "whether the role played by th[e] service provider is neutral, in the sense that its conduct is merely technical, automatic and passive, pointing to a lack of knowledge or control of the data which it stores."[57] The Court held that setting payment terms, providing information to users, and displaying ads triggered by search terms corresponding to user-selected keywords were sufficiently passive and automatic to fall within the scope of the safe harbor. By contrast, it said, drafting content for ads and selecting keywords for advertisers were too active.

In *L'Oréal*, the Court again applied an active/passive test to determine Article 14 eligibility. L'Oréal sued eBay for using its trademarks as keywords in AdSense, resulting in the display of sponsored links to eBay listings alongside search results for L'Oréal's branded products. The CJEU again said that eligibility for Article 14 turns on the nature of the service's relationship to user content. Article 14 does not apply "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."[58] Analyzing eBay's advertising through the active/passive lens, the Court said that offering user-provided goods for sale, setting terms of service, receiving remuneration for service, and providing general information to customers are safe-harbored activities, but "optimising the presentation of…offers for sale…or promoting them"[59] are not.

Scholars have criticized the court's reasoning in *Google France* and *L'Oréal*, because it effectively guts the storage safe harbor for today's most popular and useful public-facing online services.[60] Moreover, the CJEU's narrow reading of Article 14 is arguably rooted in a misapplication

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[53] JAANI RIORDAN, THE LIABILITY OF INTERNET INTERMEDIARIES 401 (2016).
[54] C-236/08, Google France v. Louis Vuitton Malletier (2009).
[55] C-324/09, L'Oréal SA v. eBay Int'l AG (2010).
[56] C-360/10, Sabam v. Netlog (2012).
[57] *Google France*, ¶ 114.
[58] *L'Oréal*, ¶ 113.
[59] *Id.* at ¶ 116.
[60] *See* Sophie Stalla-Bourdillon, *Internet Intermediaries as Responsible Actors? Why It Is Time to Rethink the E-Commerce Directive as Well, in* THE RESPONSIBILITIES OF ONLINE SERVICE PROVIDERS 286-288 (M. TADDEO & L. FLORIDI EDS. 2017) (arguing that the active/passive dichotomy for interpreting the scope of Article 14

of an ECD recital intended to apply only to Articles 12 and 13, which cover transmission and caching providers, respectively.[61] In the wake of these decisions, which apply the active/passive test to services claiming safe harbor under Article 14, only the most access-restrictive and feature-poor cloud storage services can realistically qualify for protection.

In *Sabam v. Netlog*,[62] the relevant copyright case, the defendant social media platform allowed users to upload and share video clips and other types of content, including photos and music. Sabam sued, alleging that users' uploaded content infringed copyrights in its music repertoire. The parties had apparently tried but failed to reach a whole-repertoire licensing agreement of the type contemplated in Article 13. Notably, Sabam didn't dispute, and the Court apparently saw no reason to question, Netlog's eligibility for safe harbor under Article 14:

> [I]t is not in dispute that the owner of an online social networking platform…stores information provided by the users of that platform, relating to their profile, on its servers, and that it is thus a hosting service provider within the meaning of Article 14.[63]

Inasmuch as its users maintained their own profiles and were able to share music and video clips, Netlog had at least some functionality in common with YouTube. Because the Court's opinion took Netlog's Article 14 eligibility for granted, and because the service no longer exists, it is impossible to do a side-by-side comparison of the two services' functionality. *Netlog* does establish, however, that the Commission could have looked to CJEU authority other than the keyword advertising cases for guidance about the applicability of Article 14 to a social media platform accused of infringing music copyrights. Instead, it chose two trademark cases that took a very narrow view of Article 14's scope.

Existing copyright case law from the CJEU supports the Commission's broad reading of 'communication to the public' under ISD Article 3(1). Article 3(1) requires member states to give authors "the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works."[64] The ISD doesn't define 'communication to the public' but requires an interpretation that is consistent with the policy goal of "establish[ing] a high level of protection for authors, allowing them to obtain an appropriate reward for the use of their works."[65]

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more or less eviscerates the safe harbor because all services are to some extent "active" in their handling of users' data).

[61] RIORDAN, *supra* note 53, at 402 ("The neutrality requirement probably stems from a mistaken reading of recital (42) (which applies only to caching and transmission)."). *See also L'Oreal*, Op. of A.G. Jääskinen, ¶¶ 138–142 (expressing doubt that recital 42 applies to hosting providers).

[62] C-360/10, Sabam v. Netlog (2012).

[63] *Id.* at ¶ 27. The live issue in the case, discussed below in Part II.B, was whether the preventive injunction Sabam sought under Article 14 was too broad in light of Article 15's prohibition on general monitoring obligations.

[64] ISD, *supra* note 5, at 16 (art. 3(1)).

[65] Case C-610/15, Stichting Brein v. Ziggo (2017), ¶ 21–22.

The CJEU case that is most closely on point is *Brein v. Ziggo*,[66] involving the Pirate Bay. The question presented was whether the Pirate Bay—a search engine for peer-to-peer torrents—engaged in communication to the public by indexing and categorizing links to copyrighted works so that users could find and share them. In its analysis, the Court distinguished between activities that count as an 'act of communication' and those that involve 'the mere provision of services for enabling or making a communication.' To determine on which side of that line the Pirate Bay fell, the CJEU cited a rule from previously decided cases involving hyperlinking: "[P]rovision…of clickable links to protected works published without any access restrictions on another site affords users of the first site direct access to those works" sufficient to establish an act of communication.[67]

Despite recognizing that third parties provided all of the links on the site, the Court in *Ziggo* held that direct liability for the Pirate Bay was appropriate. By indexing third-party links to content that it knew to be infringing, and by making those links searchable, the Pirate Bay enabled users to share copyrighted files that they would otherwise either not be able to share or have difficulty sharing. In doing so, the Court concluded, the Pirate Bay communicated those works within the meaning of Article 3(1). Moreover, the Court held, the Pirate Bay went beyond 'the mere provision of services' by classifying the linked works under different subject matter categories, having employees check to make sure works were properly classified, deleting obsolete or corrupt torrent files, and filtering some content. The CJEU's catalog of the ways in which the Pirate Bay exceeded the mere provision of services calls to mind its application of the active/passive test to Google and eBay in the Article 14 cases. In the Court's analysis, all of the functionality that makes the Pirate Bay in any way useful as a service also makes it liable.

By ratifying rightholder arguments on the scope of Article 14 and Article 3(1) in its proposal for Article 13, the Commission weighed in on live legal questions about YouTube that are pending before the CJEU in *LF v. Google*.[68] As far as the Commission was concerned, to the extent that a provider makes UGC videos searchable (thereby "optimizing" them) and recommends them to other users (thereby "promoting" them), it is too active to qualify for Article 14's storage safe harbor.[69] And to the extent that a provider allows playback of UGC videos, it goes beyond "the mere provision of physical facilities"[70] and gives the public access to copyrighted works, thereby communicating them to the public within the meaning of Article 3(1).

Implicitly, the Commission's proposal for Article 13 ticked all of the boxes on the music industry's 'value gap' wish list: it expelled YouTube from Article 14's safe harbor; it made YouTube

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[66] *Id.*

[67] *Id.* at ¶ 32.

[68] *See* Case C-682/18, LF v. Google LLC (2018) (referring to the CJEU questions about YouTube's eligibility for the ECD Article 14 storage safe harbor and its liability for communication to the public under ISD Article 3(1)).

[69] *See* DSMD Proposal, *supra* note 40, at 20 (recital 38) (stating that for purposes 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").

[70] *See id.* (stating that it is an act of communication to the public to "store and provide access to the public to copyright protected works").

liable under Article 3(1) for unauthorized communication to the public; and it mandated that YouTube obtain licenses for all of the content it hosts, including all of the UGC that record labels and music publishers currently monetize through Content ID on terms the industry doesn't like. The Commission's intended result was to close the 'value gap' by tuning safe harbors in a way that would put YouTube in a weaker position from which to negotiate future deals with major music industry stakeholders.

B. The (Technical) Measures Requirement

The 'measures' requirement in Article 13 was framed as necessary to "ensure the functioning of [licensing] agreements…or to prevent the availability" of copyrighted works on covered services.[71] The contemplated measures were technical ones, "such as the use of effective content recognition technologies."[72] The Commission's proposal was silent as to what systems might qualify, but the impact assessment for the Directive contains an appendix (Annex 12) that is chock full of relevant information, including a vendor list.[73]

As discussed in Part I above, Content ID is the paradigmatic example of a content recognition (or filtering) system that can automatically claim content on behalf of a rightholder and either monetize or block it, as the rightholder specifies. As required by Article 13, it can both ensure the functioning of licensing agreements (i.e., by tracking views of claimed, monetized videos) and prevent the availability of copyrighted works (i.e., by blocking videos that rightholders claim but elect not to monetize). Besides Google, the only other prominent major player in the ACR-for-copyright-compliance market is Audible Magic, a US-based private firm.[74] YouTube initially licensed Audible Magic's digital fingerprinting technology, but Google ultimately decided to build its own proprietary system.[75] Confusingly, both firms now refer to their systems as Content ID.[76]

Google doesn't license Content ID for third-party use, but Audible Magic sells ACR as a service to universities and social media platforms.[77] Its growing list of existing social media clients includes Facebook, Vimeo, Spinrilla, SoundCloud, DailyMotion, Twitch, and Tumblr.[78] Seeing an

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[71] *Id.* at 29 (art. 13).
[72] *Id.*
[73] *See* European Comm'n, Impact Assessment on the Modernisation of EU Copyright Rules, Sept. 14, 2016, 167-172, https://perma.cc/J6TZ-35QS.
[74] *See* About Audible Magic, AUDIBLE MAGIC, https://perma.cc/T8P5-2QDP.
[75] *Cf.* Br. of Amicus Curiae Audible Magic, Viacom Int'l v. YouTube Inc., Doc. 117, No. 10-3270 (2d Cir. Dec. 10, 2010), 1-2 (stating that YouTube was Audible Magic's customer for ACR technology beginning in 2007).
[76] The two firms are embroiled in a dispute over trademark rights in the "Content ID" name. *See* Press Release, Audible Magic, Audible Magic Pursues Trademark Case Against Google (Jan. 10, 2017), https://www.audiblemagic.com/2017/01/10/audible-magic-pursues-trademark-case-against-google/. Audible Magic claims that it is the rightful owner of the trademark and has filed a petition with the USPTO to cancel Google's federal registration of the mark. *Id.* The cancellation proceeding was pending when this Article went to press.
[77] *See* About Audible Magic, *supra* note 74 (listing available products and services).
[78] *See* Customers and Partners, AUDIBLE MAGIC, https://perma.cc/M27S-H45P.

extraordinary business opportunity, Audible Magic lobbied aggressively for mandatory content filters during the public consultation that preceded the Commission's proposal—and throughout the remainder of the DSMD policy making process.[79] On message with music industry trade associations, it submitted a slide deck to the Commission, pitching its technology as a solution to the 'value gap.'[80] In 2017, it published a promotional video on Vimeo, touting its system as an easy, accurate, and affordable Article 13 compliance tool.[81]

Recital 39 of the Commission's proposal made it clear that the Commission intended "measures" in Article 13 to mean a content-recognition-and-monetization system like Content ID:

> Collaboration between information society service providers… and rightholders is essential for the functioning of…content recognition technologies. In such cases, rightholders should provide the necessary data to allow the services to identify their content and the services should be transparent towards rightholders with regard to the deployed technologies, to allow the assessment of their appropriateness. The services should in particular provide rightholders with information on the type of technologies used, the way they are operated and their success rate for the recognition of rightholders' content. Those technologies should also allow rightholders to get information from the information society service providers on the use of their content covered by an agreement.[82]

The Commission contemplated that service providers would be accountable to rightholders with respect to their choice of technology and would be obliged to provide rightholders on an ongoing basis with performance statistics and analytics. Rightholders' sole obligation would be to give providers reference files—'necessary data' for content matching and automated claiming. Under the Commission's proposal, the expense of implementing and maintaining technical measures fell entirely on service providers.

Article 13's technical measures requirement was exactly what the music industry wanted. During the public consultation preceding the Directive's drafting, industry trade groups demanded that providers be required to deploy technical measures as a precondition for claiming safe harbor under ECD Article 14. For example, the British trade association UK Music—which represents record labels, music publishers, and concert promoters—filed comments referencing Content ID specifically:

> The duty of care under the system provided in Articles 12–15 ECD needs to be clarified so that online platforms have to apply measures to bring to an end (and to

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[79] *See* Annex 1—Gestdem 2017/4050, https://perma.cc/KP9V-NCQS (collecting, in response to an open records request, communications relating to Audible Magic's services from Audible Magic to various EC and EU officials, including the Directorate-General for Communications Networks, Content and Technology).
[80] *Id.* at 23.
[81] Audible Magic, Audible Magic Content ID for Compliance and Monetization in Europe, Jan. 10, 2017, https://vimeo.com/198929871.
[82] DSMD Proposal, *supra* note 40, at 20 (recital 39).

> prevent) further infringements….A duty of care should include obligations to employ software to enable identification of copyright content. Solutions can be based on technology which is readily available such as the Content ID software programme.[83]

The ECD does permit member states to impose "duties of care" on storage providers "in order to detect and prevent certain types of illegal activities."[84] Such duties are limited, though, by Article 15. As discussed above in Part I, Article 15 prohibits member states from conditioning safe harbor on a general monitoring obligation.[85] At the same time, the ECD does allow member states to impose monitoring obligations "in a specific case."[86]

Article 13's 'technical measures' requirement was difficult to reconcile with ECD Article 15. Proponents argued that the required measures amounted only to permissible 'specific' monitoring for a closed universe of works designated by rightholders. As described above, however, Content ID and Audible Magic both work by screening every piece of user-uploaded content in real time against that universe of works. No file escapes the system's surveillance. If such functionality does not amount to general monitoring, it is hard to imagine what would. The argument that ACR systems like Content ID perform only specific monitoring strains credulity in light of the fact that Audible Magic's reference database already contains 10 million files and is growing at the rate of 300,000 files per month.[87] The Commission's proposal did not address the tension between Article 13 and ECD Article 15.

The CJEU has spoken on the question of filtering mandates for service providers—in cases involving judicial injunctions. In *Scarlet v. Sabam*,[88] it held that Article 15 prevents a court from ordering an Internet access provider to continuously and permanently filter all traffic transiting its network for the purpose of preventing infringing peer-to-peer file-sharing. Sabam wanted Scarlet and other defendants to block peer-to-peer file transfers in real time. The defendants argued that such an order would be a de facto general monitoring obligation in violation of Article 15, "inasmuch as any system for blocking or filtering peer-to-peer traffic would necessarily require general surveillance of all the communications passing through [their] network[s]."[89] In other words, in order to filter out any one type of data protocol from the network's total traffic flow, the provider would have to screen all data.

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[83] UK Music, Public Consultation on the Regulatory Environment for Platforms, Online Intermediaries, Data and Cloud Computing and the Collaborative Economy, Dec. 21, 2015, 7-8, http://ec.europa.eu/information_society/newsroom/image/document/2016-7/uk_music_14048.pdf.
[84] ECD, *supra* note 4, at 7 (recital 48).
[85] *See id.* at 13 (art. 15) (providing that member states may not "impose a general obligation on providers…to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity").
[86] *Id.* at 7 (recital 47)
[87] *See* Content Registration, AUDIBLE MAGIC, https://perma.cc/5RBV-MFZZ.
[88] Case C-70/10, Scarlet v. Sabam (2011).
[89] *Id.* at ¶ 25. Scarlet also argued that the requirement would violate EU privacy law, because it required identification of the Internet Protocol addresses of file sharers. *See id.* at ¶ 26.

The Court agreed with Scarlet, finding that "[p]reventive monitoring of this kind would…require active observation of all electronic communications…and, consequently, would encompass all information to be transmitted and all customers using th[e] network."[90] In addition, the Court held, requiring an ISP at its own expense to continuously and indefinitely monitor all traffic for potential infringements would not strike a fair balance (as required by Article 3(1) of the Enforcement Directive) between the plaintiff's intellectual property rights and the defendant's right to conduct business.

In *Sabam v. Netlog*,[91] the CJEU interpreted Article 15 as applied to a proposed filtering injunction against a social media platform. As discussed above in Part II.A, Netlog was protected by Article 14's storage safe harbor. Sabam sought an injunction requiring Netlog to implement and permanently operate a filtering system "capable of identifying electronic files containing musical, cinematographic or audio-visual work[s]…with a view to preventing those works from being made available to the public."[92] Note that this is precisely what the Commission proposed for providers covered by Article 13, regardless of their eligibility for Article 14's storage safe harbor. Citing *Scarlet*, the Court in *Netlog* held that such an injunction would violate Article 15:

> Preventive monitoring of this kind would thus 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…. It follows that that injunction would require the hosting service provider to carry out general monitoring, something which is prohibited by Article 15(1).[93]

In light of *Scarlet* and *Netlog*, any insistence that Article 13's 'measures' requirement would not require general monitoring rings hollow. Services like Content ID work by monitoring all content from all users all the time. The CJEU has stated clearly that such monitoring is 'general monitoring.' As proposed, Article 13 effectively repealed ECD Article 15 for ECD Article 14 storage providers.

III. Objections to the Commission's Proposal

Criticism of Article 13 focused on three main types of harms: harms to individuals' expressive freedom, harms to online businesses, and harms to innovation and competition at the Internet's application layer.[94] For a proposal designed to address a quite specific power imbalance in

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[90] *Id.* at ¶ 39.
[91] Case C-360/10, Sabam v. Netlog (2012).
[92] *Id.* at ¶ 26.
[93] *Id.* at ¶ 37.
[94] *See, e.g.,* Danny O'Brien & Jeremy Malcolm, *70+ Internet Luminaries Ring the Alarm on EU Copyright Filtering Proposal*, EFF BLOG (June 12, 2018), https://www.eff.org/deeplinks/2018/06/internet-luminaries-ring-alarm-eu-copyright-filtering-proposal (describing and linking to a letter opposing Article 13 signed by Vint Cerf, Tim Berners-Lee, and other prominent technologists who built the early Internet); David Kaye, Mandate of the [UN] Special Rapporteur on the Promotion and Protection of the Right to Freedom of Opinion and Expression, OL OTH 41/2018, June 13, 2018,

the music streaming market, Article 13 represented a substantial disruption of longstanding copyright policy, creating shockwaves for services beyond YouTube, content beyond music, and fundamental human rights beyond the protection of intellectual property. This Part surveys the primary objections to Article 13 from civil society groups, human rights advocates, and online businesses. In doing so, it exposes the risks of drafting generally applicable legislation to serve narrow sectoral interests.

A. Harms to Individual Users

The Charter of Fundamental Rights of the European Union (CFR) protects freedom of expression, including the freedom to receive and impart information.[95] It also protects the right to intellectual property.[96] In cases where fundamental rights collide, policy makers and judges must attempt to balance them, aiming for proportionality when fashioning remedies.[97]

The CJEU recognized in *Scarlet* and *Netlog* that content filtering requirements implicate the expressive rights of Internet users because ACR systems are unable to distinguish between lawful and unlawful content.[98] ACR systems are built on content-matching algorithms, which means they can recognize content in an upload that duplicates content in a reference file.[99] Not all copying is legally actionable, however; there are limitations and exceptions to copyright that permit unauthorized copying in certain circumstances.[100] Because copyright is not an absolute right to exclude all secondary uses, detecting a match between an upload and a reference file is only the first step in determining if there has been copyright infringement. Unfortunately, today's ACR systems can't go beyond that first step to analyze whether an uploader's duplicated content falls within an exception or limitation. ACR systems are thus prone to false positives and resultant expressive harms.

Despite Audible Magic's confident claims about the accuracy of its system for detecting infringement, the shortcomings of ACR for copyright enforcement are well documented. Ben Depoorter and Robert Kirk Walker count enforcement automation among several sources of false positives that bedevil the copyright system and give creators of the past veto power over creators of the present.[101] Toni Lester and Dissislava Pachamanova examine the problem of algorithmic false positives in the specific context of hip-hop music on YouTube, arguing that Content ID

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https://www.ohchr.org/Documents/Issues/Opinion/Legislation/OL-OTH-41-2018.pdf (asserting Article 13's incompatibility with Article 19 of the International Covenant on Civil and Political Rights(ICCPR) and Article 15 of the International Covenant on Economic, Social and Cultural Rights(ICESCR)).

[95] *See* Charter of Fundamental Rights of the European Union, 2012/C 326/02, at 398 (art. 11) (hereinafter "CFR").

[96] *Id.* at 399 (art. 17).

[97] Case C-360/10, Sabam v. Netlog (2012), ¶ 42.

[98] Case C-70/10, Scarlet v. Sabam (2011), ¶ 52; *Netlog*, ¶ 50,

[99] Engstrom & Feamster, *supra* note 20, at 18.

[100] Exceptions and limitations are not harmonized at the EU level; rather, they are permissive for member states. *See* ISD, *supra* note 5, at 16–17 (art. 5).

[101] Ben Depoorter and Robert Kirk Walker, *Copyright False Positives*, 89 N.D. L. REV. 319, 332-36 (2013).

disproportionately hampers creativity in hip-hop because artists in that genre rely heavily on sampled loops and other de minimis borrowed elements.[102] From an expressive rights standpoint, ACR would be a less problematic enforcement tool if vendors could train algorithms to assess context-dependent secondary uses of copyrighted material.[103] Although machine learning technology is advancing, it isn't there yet. Rightholders are unconcerned about the limits of ACR technology when it comes to analyzing exceptions and limitations, because over-claiming is revenue-positive for them.

ACR systems are also unable to detect unwarranted claims on public domain material that arise from mistaken or fraudulent submission to vendors of reference files containing such material. When it comes to a provider like Audible Magic that ingests hundreds of thousands of new reference files every month, questions loom large concerning proper verification of copyright ownership and safeguards against over-claiming. Some notorious examples of public domain material wrongly claimed by rightholders through YouTube's Content ID system are white noise,[104] bird songs,[105] NASA mission footage,[106] and Beethoven's Fifth Symphony.[107]

In its assessment of the DSMD's net impact on fundamental rights guaranteed by the CFR, the Commission concluded that the directive as a whole would "have a positive impact on copyright as a property right" and only a "limited impact on the…freedom of expression and information…due to the mitigation measures put in place and a balanced approach to the obligations set on the relevant stakeholders."[108] The Commission's proposal did not, however, address the known limitations of ACR technology or the impact of those limitations on the expressive rights of users attempting to share third-party content lawfully but without authorization.

B. Harms to Online Businesses

The CFR also recognizes the right to conduct a business as a fundamental right.[109] To the extent that statutory licensing and filtering obligations impose costs and burdens on the businesses to which they apply, Article 13 impacted the right to conduct a business. The question is whether

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[102] Toni Lester and Dissislava Pachamanova, *The Dilemma of False Positives: Making Content ID Algorithms More Conducive to Fostering Innovative Fair Use in Music Creation*, 24 UCLA ENT. L. REV. 51 (2017).
[103] *See* Niva Elkin-Koren, *Fair Use By Design*, 64 UCLA L. REV. 1082, 1094-1099 (2017) (considering the challenges and potential of automating fair use analysis with machine learning and artificial intelligence).
[104] Chris Baraniuk, *White Noise Video on YouTube Hit by Five Copyright Claims*, BBC, Jan. 5, 2018, https://www.bbc.com/news/technology-42580523.
[105] Mike Masnick, *Guy Gets Bogus YouTube Copyright Claim….On Birds Singing In The Background*, TECHDIRT, Feb. 27, 2012, https://www.techdirt.com/articles/20120227/00152917884/guy-gets-bogus-youtube-copyright-claim-birds-singing-background.shtml.
[106] Timothy B. Lee, *How YouTube Lets Content Companies "Claim" NASA Mars Videos*, ARS TECHNICA, Aug. 8, 2012, https://arstechnica.com/tech-policy/2012/08/how-youtube-lets-content-companies-claim-nasa-mars-videos/.
[107] Ulrich Keiser, *Google: Sorry Professor, Old Beethoven Recordings on YouTube Are Copyrighted*, ARS TECHNICA, Sept. 3, 2018, https://arstechnica.com/tech-policy/2012/08/how-youtube-lets-content-companies-claim-nasa-mars-videos/.
[108] DSMD Proposal, *supra* note 40, at 9.
[109] CFR, *supra* note 95, at 399 (art. 16).

the Commission got the right balance between the interests of rightholders and the interests of online businesses subject to Article 13's new obligations.

A coalition of 240 EU-based online businesses thought the Commission got it wrong. Their CEOs signed an open letter urging Members of European Parliament (MEPs) to reject Article 13.[110] The letter cited the financial and operational burdens of implementing filtering systems, the inaccuracy of available technology, and the lack of protection in Article 13 for small and medium-sized enterprises.[111] The draft DSMD, they wrote, "fail[s] to strike a fair balance between creators and all other parts of society."[112]

In *Netlog*, the CJEU considered harm to the defendant service provider's business interests when it considered whether the challenged filtering injunction reflected a fair balance between the parties' competing rights.[113] The Court held that a permanent, service-wide filtering injunction was not justifiable. To reach that conclusion, it surveyed what the injunction required Netlog to do: install a filtering system to monitor all or most of the content it hosted; monitor without any time limitation; and monitor not only for existing works but for works to be created in the future.[114] In its analysis, the Court cited both the CFR and the Enforcement Directive[115]:

> [S]uch 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.[116]

Complicated, costly, and permanent is a trio of adjectives that applies equally to the preventive measures the Commission mandated in Article 13.

For whatever reason, the Commission appears to have ignored *Netlog* and *Scarlet* in its assessment of Article 13's impact on the right of online service providers to conduct business. The Commission believed that Article 13's filtering requirement was unproblematic because "it only applie[d] to information society services storing and giving access to large amounts of copyright-protected content uploaded by their users."[117] Such services, presumably, could afford to pay the freight. But what counts as 'large amounts'? Every UGC service operating at Internet scale hosts

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[110] Open Letter to European Members of Parliament from 240 EU Businesses Against Copyright Directive Art. 11 & 13, Mar. 19, 2019, https://perma.cc/VX2C-SAXC.
[111] *Id.*
[112] *Id.*
[113] *See* Case C-360/10, Sabam v. Netlog (2012), ¶¶ 43-47 (holding that the injunction did not strike a fair balance).
[114] *Id.* at ¶ 45.
[115] Directive 2004/48, O.J. 2004 (L 157/45).
[116] *Id.* at ¶ 46.
[117] DSMD Proposal, *supra* note 40, at 9.

what one might reasonably describe as 'large amounts' of copyright-protected content. For a policy intended to reach YouTube, Article 13 ended up casting quite a wide net.

C. Harms to Innovation and Competition

Among the concerns the EU's Internet businesses raised in their open letter to MEPs was that Article 13 would harm innovation and competition by imposing costs and burdens that small enterprises are not in a position to bear.[118] By creating barriers to entry for new services that might compete with—or even displace—today's giants, cost-intensive regulations enacted to discipline those giants could operate counterproductively to further entrench them. Lacking a carve-out of any kind for small and medium-sized businesses, Article 13 threatened to chill investment in new EU-based content-sharing services and raise operating costs for existing ones.

The expense of operating a filtering system involves both technological and human resources. The necessary technological resources are in the form of software and hardware. The necessary human resources are in the form of ongoing customer support—for both rightholders and users. Rightholders continuously submit new reference files for inclusion in ACR databases. To prevent mistake and fraud, each assertion of copyright ownership in a reference file must be verified. Users, for their part, continuously appeal mistaken and abusive automated claims. Those appeals must ultimately be decided by humans, given the technological limits of ACR systems. Under Article 13, all compliance-related costs fell on service providers.

The big players can afford it. YouTube long ago absorbed the cost of developing Content ID, which it put at $60 million in 2014.[119] Including ongoing operational costs, it has spent a total of $100 million on the system.[120] And, as mentioned above in Part II.B, most of the Internet's largest and most popular content-sharing services already voluntarily license ACR technology from Audible Magic. The cost of those licenses is undisclosed, and it is unclear what additional human resource costs those services incur. Startups and smaller providers, by contrast, have not already built or licensed ACR systems.[121] They haven't already hired—and likely couldn't pay—staff to manage the related customer support issues. All costs of compliance associated with the DSMD will be new to them. To the extent that those costs prevent small and new providers from operating profitably, those providers will cease to exist, further concentrating power in the Internet's giants.[122]

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[118] *See* Open Letter, *supra* note 110 ("European companies like ours will be hindered in their ability to compete or will have to abandon certain markets completely.").
[119] *See* Katie Oyama, *Why the Digital Millennium Copyright Act Is Working Just Fine*, DIGITAL MUSIC NEWS, Apr. 10, 2014, https://www.digitalmusicnews.com/2014/04/10/dmcaworkingjustfine/ (stating the cost of developing Content ID)
[120] How Google Fights Piracy, *supra* note 25, at 27.
[121] *See* Open Letter, *supra* note 110 ("Most companies are neither equipped nor capable of implementing the automatic content filtering mechanisms [Article 13] requires, which are expensive and prone to error.")
[122] *See id.* ("Although the purpose of these regulations is to limit the powers of big US Internet companies like Google or Facebook, the proposed legislation would end up having the opposite effect. Article 13 requires filtering of massive amounts of data, requiring technology only the Internet giants have the resources to build.").

Another competition-related issue arising from Article 13 is the lack of competition in the market for ACR technology that offers permission-management functionality for copyrighted content.[123] As stated above in Part II.B, Google does not license Content ID to third parties, which makes Audible Magic the only obvious alternative. New entrants to the ACR market could provide competition, but they will need to steer clear of Audible Magic's portfolio of patents covering ACR and fingerprinting technology.[124] An additional hurdle for new entrants in the ACR market is access to reference files. With its current store of over 10 million reference files, Audible Magic has already scaled and won the trust of the world's largest corporate rightholders, giving it a considerable first-mover advantage. In order to minimize legal exposure, content-sharing services subject to a technical measures mandate will logically choose an ACR vendor with an established reputation and a vast database of reference files. Right now, Audible Magic is the market leader, touting its Copyright Compliance Service as "the industry standard," which "the biggest names in music…most often recommend."[125]

III. Article 17: From De Jure to De Facto Technical Measures

Article 17, as adopted by the EU Parliament in April 2019, targets a narrower range of providers than the original Article 13 did. It abandons Article 13's use of the term "information society service providers"—a holdover from the ECD—in favor of a new term of art: "online content-sharing service provider" (OCSSP). Recital 62 of Article 17 goes to great lengths to qualify the definition of OCSSP in a way that homes in on YouTube and its ad-supported, engagement-driven business model:

> The definition…should target only online services that play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences. The services covered by this Directive are services, the main or one of the main purposes of which is to store and enable users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit therefrom, either directly or indirectly, by organising it and promoting it in order to attract a larger audience, including by categorising it and using targeted promotion within it.[126]

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[123] There are several other providers who offer ACR technology for related use cases—some involving cross-device marketing and audience analytics, others geared to image recognition. *See* Impact Assessment, *supra* note 73, at 167–172 ("The aim of the table is to give an indicative and non-exhaustive list of available services covering different content and different features, based on publicly available information. It is not to be read as a comparison of services and their prices.").

[124] *See* Patents, AUDIBLE MAGIC, https://perma.cc/FJ5L-WERN ("Patents are in the areas of digital fingerprint-based media detection technology;…identification of content as it flows across networks; and approaches to caching and indexing a reference database to improve the performance of the system.").

[125] Copyright Compliance Service, AUDIBLE MAGIC, https://perma.cc/7ZWF-EC8B.

[126] DSMD, *supra* note 1, at 106 (recital 62).

The recital further stipulates that a provider's status as an OCSSP must be determined on a case-by-case basis, taking into account a combination of elements, including number of users and number of files hosted. Requiring case-by-case adjudication is presumably a way to avoid implicating less 'important' (*i.e.,* less dominant) providers that do not contribute to the 'value gap.' But case-by-case adjudication comes at the cost of certainty for providers.

Further narrowing the scope of Article 17's coverage, Recital 62 lists several types of providers that should *not* be deemed OCSSPs, including business-to-business cloud service providers, cyberlockers, open source software repositories, not-for-profit scientific or educational repositories, and not-for-profit online encyclopedias. These explicit exclusions address the concern that Article 13's very broad definition of covered services would capture a broad swath of providers historically protected by Article 14 that have nothing to do with getting music industry stakeholders paid.

A. The Licensing Requirement

The licensing requirement in the Commission's original proposal applied only to providers ineligible for the Article 14 safe harbor—a determination requiring adjudication. As adopted, Article 17 states explicitly that OCSSPs engage in communication to the public under ISD Article 3(1).[127] It also states that OCSSPs consequently cannot qualify for safe harbor under Article 14.[128] Article 17 thus establishes beyond peradventure, and without any need for adjudication of ECD safe harbor eligibility, that an OCSSP must license all copyright-protected content appearing on its service. If the provider fails to do so, it faces liability for direct infringement.

B. The 'Best Efforts' Requirement

With respect to an OCSSP's obligation to prevent the availability of *un*licensed content on its service, Article 17 and its corresponding recitals omit the references to technical measures that appeared in Article 13. Instead, Article 17 requires 'best efforts' by OCSSPs to prevent the appearance of unauthorized copyrighted material in UGC. What Article 17 doesn't say, and what the DSMD's recitals don't admit, is that the preventive measures demanded in the final text cannot realistically be achieved at scale without an ACR system like Content ID.

Whereas Article 13 unabashedly embraced upload filters, Article 17—revised in response to the criticisms discussed above in Part II—seems to have been drafted for plausible deniability on the filtering question. Instead of "effective content recognition technologies,"[129] it refers coyly to "high

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[127] *See id.* at 119 (art. 17, ¶ 1) ("Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.").

[128] *See id.* at 119 (art. 17, ¶ 3) ("When an online content-sharing service provider performs an act of communication to the public or an act of making available to the public under the conditions laid down in this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article.").

[129] DSMD Proposal, *supra* note 40, at 29 (art. 13, ¶ 1).

industry standards of professional diligence…to ensure the unavailability of specific works for which the rightholders have provided the…relevant and necessary information."[130] In place of "deployed technologies,"[131] it requires unspecified "suitable and effective means."[132]

Through the 'best efforts' requirement, Article 17 displaces the ECD's reactive notice-and-takedown model in favor of a notice-and-staydown model for OCSSPs.[133] An OCSSP can avoid liability for hosting inadvertently unlicensed third-party content by promptly removing the claimed content upon receipt of notice from the aggrieved rightholder. Once the OCSSP has received notice concerning a particular piece of content, it must use "best efforts to prevent further uploads of the notified works and other subject matter for which the rightholders have provided relevant and necessary information."[134] Translated into the language of ACR, which Article 17 pointedly avoids, 'relevant and necessary information' means digital reference files. The OCSSP is tacitly charged with ingesting or creating a reference file for any content that is the subject of a notice and then screening all subsequent uploads to prevent that content from reappearing. The 'best efforts' requirement is inarguably a de facto technical measures requirement.

To determine whether a provider has satisfied the 'best efforts' requirement, Article 17 lists factors to be taken into account, including the type, audience, and size of the service and the type of content the service hosts. Other relevant factors include "the availability of suitable and effective means and their cost."[135] The inclusion of the last two factors is responsive to concerns discussed above in Parts II.B and II.C. about compliance costs and the highly concentrated market for ACR technology. The array of different factors to be considered when assessing 'best efforts' compliance avoids the inflexibility of rigid mandates but, like the definition of OCSSP, undermines regulatory certainty for businesses.

One aspect of Article 17 that will be difficult for member states to square with the de facto technical measures requirement is a late-added prohibition on a general monitoring obligation—a prohibition reminiscent of ECD Article 15. The text of Article 17 tries to finesse the monitoring question by limiting the 'best efforts' obligation to "specific works"[136] that rightholders identify. As the CJEU recognized in *Netlog*, however, algorithmically blocking specific content inevitably requires monitoring all content, and that looks like general monitoring under any natural definition of 'general.' To the extent that ACR technology works by monitoring all user uploads, and a staydown mandate requires ACR technology, there is no practical way to implement Article 17's staydown

[130] DSMD, *supra* note 1, at 120 (art. 17, ¶ 4(b)).
[131] DSMD Proposal, *supra* note 40, at 20 (recital 39).
[132] DSMD, *supra* note 1, at 120 (art. 17, ¶ 4(b)).
[133] *Cf.* Husovec, *supra* note 15, at 61-64 (discussing notice-and-staydown as a policy choice).
[134] DSMD, *supra* note 1, at 120 (art. 17, ¶ 4(c)).
[135] *Id.* at 120 (art. 17, ¶ 5).
[136] *Id.* at 120 (art. 17, ¶ 4(b)).

mandate without also requiring general monitoring. In this sense, Article 17 contains conflicting requirements that will be difficult for member states to transpose coherently.[137]

C. Limited Relief for New Businesses

In response to concerns about the business and competitive harms associated with Article 13's licensing and technical measures requirements, Article 17 contains a very narrow exception for new OCSSPs. To qualify, a business must be less than three years old and have annual turnover of less than $10 million EUR.[138] Businesses that meet those conditions must still make 'best efforts' to obtain licenses, but they are subject only to a notice-and-takedown (versus a notice-and-staydown) mandate for preventing the appearance of unlicensed content. A notice-and-staydown mandate kicks in immediately, however, if an otherwise qualified service exceeds an average of 5 million unique monthly users over the previous calendar year.[139]

A critical question is whether this exception is too narrow to be meaningful. Is the apparently arbitrary allowance of three years of limited liability and lighter obligations enough to allow a new OCSSP to gain a foothold? Is 5 million unique monthly users too low a threshold to trigger disqualification for companies even less than three years old? As a point of reference, it took YouTube less than two years to exceed 70 million unique monthly users.[140] Only time will tell whether the very limited new business exception that Article 17 provides can actually help EU startups disrupt, compete with, or dislodge dominant players like YouTube and Facebook.

D. Speech-Protective Provisions

As adopted, Article 17 contains provisions intended to address the free-speech-related challenges associated with automated enforcement. It provides that preventive measures "shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright."[141] For the benefit of OCSS users, member states are required to protect

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[137] A recent preliminary ruling from the CJEU's Advocate General, *Glawischnig-Piesczek v. Facebook Ireland*, Case C-18/18, offers a quite generous interpretation of 'specific' monitoring that is permissible under Article 15. The plaintiff sued Facebook seeking an order requiring Facebook to permanently block all posts containing specific defamatory statements about the plaintiff and their semantic equivalents. The Austrian national court held that Facebook could be required to remove semantically equivalent posts only if it had notice of them from the plaintiff, third parties, or otherwise. The Advocate General held that a storage service provider may be required, after receiving notice of a particular piece of prohibited content on its service, to prevent re-uploads of the same or equivalent content by the original uploader and re-uploads of the same content by all other users. Such 'specific' monitoring, the Advocate General said, would not violate Article 15. This result seems impossible to reconcile with the CJEU's reasoning in *Netlog* and *Scarlet* about what counts as general monitoring.

[138] DSMD, *supra* note 1, at 120 (art. 17, ¶ 6).

[139] *Id.*

[140] *See Google Buys YouTube for $1.65bn*, BBC News, Oct. 10, 2006, http://news.bbc.co.uk/2/hi/business/6034577.stm ("YouTube, launched in February 2005, has grown quickly into one of the most popular websites on the internet. It has 100 million videos viewed every day and an estimated 72 million individual visitors each month.")

[141] DSMD, *supra* note 1, at 120 (art. 17, ¶ 7)

certain secondary uses of copyrighted material: quotation, criticism, review, caricature, parody, and pastiche.[142]

The problem with Article 17's speech-protective provisions is that they will be quite difficult to implement in practice, given the technical limitations of today's ACR systems. To address the fact that such systems are incapable of identifying public domain content or applying context-dependent limitations and exceptions, Article 17 requires that OCSSPs implement complaint and redress mechanisms for users who believe their content has been wrongly blocked or removed.[143] YouTube's Content ID system does incorporate an appeal process, but users have criticized it for taking too long.[144] Audible Magic's service does not incorporate complaint and redress mechanisms, which means that OCSSP's outsourcing compliance to Audible Magic will be responsible for either designing and implementing user protections in-house or outsourcing that function to yet another provider for yet another fee. Either way, the cost of that function is likely to be significant, because appeals under Article 17 require human review.[145]

Conclusion

With the adoption of Article 17, it no longer matters what the CJEU decides in *LF v. Google*. By the time the opinion issues, the Court's analysis of ECD Article 14 and ISD Article 3(1) as applied to YouTube will be moot. In the interest of closing the 'value gap,' policy makers in Brussels assigned themselves the task of 'clarifying' how existing EU law should apply to YouTube's business model. They did so by defining a new type of online intermediary subject to new liability rules.

Under Article 17, an OSSP is by definition liable to rightholders under ISD Article 3(1) for any infringing UGC it hosts and ineligible for safe harbor under ECD Article 14. As a result, OSSPs must take prescribed steps to avoid the liability their business model entails. First, they must attempt to conclude licensing agreements with all interested rightholders, so that all content uploaded by users is preauthorized. Then, they must use 'best efforts' to ensure that no unlicensed copyrighted content is available to users. Once notified of such content, they have an ongoing obligation to prevent future uploads.

Granting the music industry's wish for narrowed safe harbors that exclude YouTube, Article 17 converts the ECD's longstanding notice-and-takedown regime into a notice-and-staydown regime. Article 17 avoids mentioning upload filters or technical measures, but the 'best efforts' provision constructively requires OSSPs to implement ACR systems capable of blocking any claimed content a rightholder declines to license (i.e., monetize). Modifying the Commission's

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[142] *Id.*
[143] *Id.* at 120 (art. 17, ¶ 9).
[144] *See, e.g.,* Shoshana Wodinsky, *YouTube's Copyright Strikes Have Become a Tool for Extortion*, THE VERGE, Feb. 11, 2019, https://www.theverge.com/2019/2/11/18220032/youtube-copystrike-blackmail-three-strikes-copyright-violation (reporting that the appeal process can take at least a month, during which time the complainant is barred from uploading any new content).
[145] DSMD, *supra* note 1, at 109 (recital 70) ("Any complaint filed…should be processed without undue delay and be subject to human review.").

original proposal, which contained no speech-protective provisions, Article 17 requires OSSPs to honor copyright exceptions and limitations when exercising 'best efforts'—a very tall order given the known limitations of existing ACR technology.

In Content ID, YouTube has a pre-built compliance infrastructure for Article 17. That's because Article 17 was designed for Content ID, and not vice versa. From the drawing board, Article 17 was about adjusting copyright liability rules to redistribute wealth from YouTube to music industry stakeholders. Whether it will actually accomplish that goal is an open question. Against the music industry's potential benefits, we can weigh potential losses to other stakeholders in the digital content economy. For new content-sharing services hoping to co-exist and compete with rich incumbents like YouTube, Article 17 changes the rules of the game by increasing liability and raising operating costs. For Internet users and amateur creators, Article 17 changes the rules of the game by subjecting their creative production to brittle and pervasive algorithmic enforcement. The only stakeholders that look like sure winners in the Article 17 sweepstakes are ACR providers like Audible Magic, which the EU Parliament just handed a great deal of new business.