Intermediary Liability for Copyright Infringement in the EU’s Digital Single Market

Looking at the Proposed Copyright Directive’s Compliance with the current EU framework on Intermediary Liability.

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Abstract
This thesis reviews the European Commission’s Proposal for a Directive on Copyright in the Digital Single Market. Specifically it analyses the provisions relating to intermediary liability and whether it correlates with the current, relevant legislative framework in the European Union. The legislation on intermediary liability has long been the cause of juridical discussions and controversial case law. With this Proposal the Commission aims to further regulate the liability of intermediaries for their users’ copyright infringements, without admitting to changing the liability regime. This thesis uses inter alia legislation, jurisprudence, communications and staff working documents from the European Union as well as scholar papers and articles to interpret the current framework and the Proposal as it currently reads. The thesis concludes that there are disparities between the Proposal and European Union legislation as well as the Charter of Fundamental Rights of the European Union. It furthermore points to lack of clarity in what the Proposal truly aims to regulate and how.
<table>
<thead>
<tr>
<th>Abbreviation</th>
<th>Description</th>
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<tbody>
<tr>
<td>Charter</td>
<td>Charter of Fundamental Rights of the European Union</td>
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<td>CJEU</td>
<td>Court of Justice of the European Union</td>
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<td>CoEU</td>
<td>Council of the European Union</td>
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<td>DSM</td>
<td>Digital Single Market</td>
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<td>ECD</td>
<td>Electronic Commerce Directive</td>
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<td>ECHR</td>
<td>European Convention on Human Rights</td>
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<td>ECtHR</td>
<td>European Court of Human Rights</td>
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<td>EP</td>
<td>European Parliament</td>
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<td>EU</td>
<td>European Union</td>
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<td>InfoSoc</td>
<td>Information Society (Directive)</td>
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<td>IPR</td>
<td>Intellectual Property Right</td>
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<td>ISSP</td>
<td>Information Society Service Provider</td>
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<td>JURI</td>
<td>Committee on Legal Affairs</td>
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<td>MS</td>
<td>Member States</td>
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<tr>
<td>OECD</td>
<td>The Organisation for Economic Co-operation and Development</td>
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<td>OHCHR</td>
<td>The Office of the United Nations High Commissioner for Human Rights</td>
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<td>TPB</td>
<td>The Pirate Bay</td>
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1 Introduction

In July 2014 Jean-Claude Juncker suggested the launch of a strategy for a European Digital Single Market, hereafter the DSM, in his Opening Statement to the European Parliament, hereafter the EP.\(^1\) Already then the topic of copyright was presented as one that needed further harmonisation in the digital Europe.\(^2\) In September 2016 the Commission presented their proposal for a new Copyright Directive,\(^3\) hereafter the Proposal. The Proposal has already received some attention and multiple amendments have been suggested.\(^4\) This thesis will in particular focus on the Proposals conformity with the current legislation concerning intermediary liability in the European Union, hereafter the EU. Specifically, the focus will be on online intermediaries and the rules on exemption from liability for user-generated content and the protection against a general obligation to monitor the same content.

1.1 Research Question

To what extent is the Proposal for a Copyright Directive in conformity with the current EU framework on intermediary liability for copyright infringement, including the E-Commerce Directive\(^5\) section 4 and the Charter of Fundamental Rights of the European Union?

1.2 Structure and Scope

Chapter 1 will introduce the relevant terminology as well as the current EU legislation. This includes presenting the relevant Articles and Recitals in the Electronic Commerce Directive, hereafter the ECD, followed by the relevant case law and the measures available to rightholders wishing to prevent the illegal spreading of their works online. Chapter 2 will introduce some problematic aspects to the question of intermediary liability, which ought to be addressed by legislation, along with the Proposal and its aims. The Proposal will then be examined in relation to the current EU legislation, analysing whether or not it is in accordance with the current legal stance in the EU. First by looking at the scope of the relevant Article of the Proposal, thereafter the obligations it imposes. This will mostly focus on the ECD, but some other Directives will also be of relevance, such as the Directive on Copyright in the Information Society\(^6\), hereafter the InfoSoc Directive. Lastly, Chapter 3 will assess whether the

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\(^1\) Juncker, “A New Start for Europe.”

\(^2\) Ibid. point 2.

\(^3\) COM(2016) 593 final, “Proposed Copyright Directive.”


Proposal is in accordance with the Charter of Fundamental Rights of the European Union, hereafter the Charter.\(^7\)

The thesis will focus on EU legislation, and therefore refrain from analysing the developments of the European Convention of Human Rights\(^8\) and the European Court of Human Rights; although the latter will be briefly mentioned for further insight, hereafter as ECtHR. Questions regarding liability for linking do not fall within the scope of this thesis, but some relevant case law on this subject will be discussed.

1.3 **Methodology**

In an attempt to get an objective overview of the Proposal, its interpretation, aims and concurrence with the current legal framework, there will be use of EU legislation, EU documents as well as critical scholar papers and opinions from third parties. The EU documents will for instance consist of Communications or Staff Working Documents from the European Commission. To further illustrate alternative approaches some proposed amendments will be discussed, but this thesis does not focus mainly on what type of regulation would be preferable, but rather whether or not the Proposal is a decent legislative choice.

2 **Chapter 1: Intermediary Liability**

*Current legal framework*

2.1 **Terminology**

Before we can delve into which obligations and exemptions are relevant for Internet intermediaries regarding content shared by their users, it is necessary to define what falls within the term Internet or online intermediary. Intuitively, an intermediary is someone that acts between two, or more, parties. The Organisation for Economic Co-operation and Development\(^9\) suggests that they “bring together or facilitate transactions between third parties on the Internet. They give access to, host, transmit and index content, products and services originated by third parties on the Internet or provide Internet-based services to third parties.”\(^10\)

The ECD defines the broader category of providers of information society services. It states that a service provider is “any natural or legal person providing an information society service”\(^,\)\(^11\) and an information society service is by reference defined as “any service normally provided for remuneration, at a distance, by electronic means and at the individual request of

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\(^7\) Charter of Fundamental Rights of the European Union, (2012/C 326/02).

\(^8\) ECHR, European Convention for the Protection of Human Rights and Fundamental Freedoms, ETS 5.

\(^9\) The Organisation for Economic Co-operation and Development

\(^10\) OECD, “The Economic and Social Role of Internet Intermediaries,” Page 10.

\(^11\) Directive 2000/31/EC Article 2(1)(b)
a recipient of services”. A provider of such would therefore be termed as an information society service provider, or an ISSP. Recital 18 of the ECD further states that information society services can span a wide range of activities taking place online, noting that it is not limited to services giving rise to online contracting but also extends to services which the receiver does not remunerate for, in so far as it still represents an economic activity.

With this in mind the CJEU found that a free of charge local area network at the vicinity of a business selling and leasing electronic equipment, was an information society service. With reference to the InfoSoc Directive Recital 59 the CJEU held that an intermediary in the case of Article 8(3) was "any person who carries a third party’s infringement of a protected work or other subject-matter in a network", which in the specific case included a provider giving its users access to the Internet.

Another common term often used synonymously with online intermediaries is online platforms, but there is no general consensus on a single definition at EU level. The European Commission has described platforms as ““two-sided” or “multi-sided” markets where users are brought together by a platform operator in order to facilitate an interaction.” They can also be described as an entity, which “provides a (technological) basis for delivering or aggregating services/content and mediates between service/content providers and end-users”. Platforms can be found in a wide range of markets offering an assortment of goods and services. Although the two terms are often used in congruence, their scopes do not necessarily overlap entirely. Access providers could be considered intermediaries but are less likely to be called platforms, whilst the opposite could be argued for content providers. On the other hand, UN Special Rapporteur noted that intermediaries “manage networks and platforms” for user-generated content. Therefore, one could say that the two terms online platform and intermediary have a similar field of application, but that the exact definition of either is not yet agreed upon.

13 Recitals 2 and 19 of Directive 98/48 state that services as used in the definition cited is to be understood as defined in Treaty on the Functioning of EU (TFEU) Article 57: services which are "normally provided for remuneration”.
14 Case C-484/14 McFadden v Sony Music, para 34-43.
15 Case C-314/12 UPC Telekabel Wien, para 30 and 32.
16 Lee-Makiyama and Georgieva, “The Responsibilities of Internet Service Providers,” page 327.
19 Van Gorp and Dr. Batura, “Challenges for Competition Policy in a Digitalised Economy,” page 7.
21 Obergfell and Thamer, “(Non-)regulation of online platforms and internet intermediaries,” page 436.
22 OHCHR. “Report on the promotion and protection of the right to freedom of opinion and expression,” page 10.
2.2 **E-Commerce Directive**

One of the main issues concerning online intermediaries is the question of their liability for content shared by users. For instance, if a user of an online shopping platform sells counterfeit goods to consumers, could the platform service provider become liable for the trademark infringement of the user, and if so, under which conditions.

This has been specifically regulated in the ECD. Section 4 of the Directive is entitled “liability of intermediary service providers” and regulates both the question of liability and the question of general monitoring, the latter being found in Article 15. It divides liability-exempt intermediaries into three categories in Articles 12 through 14: mere conduit, caching and hosting.

2.2.1 **Mere Conduit**

Article 12 is applicable if the service provided is either a “transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network”. This also includes the “automatic, intermediate and transient storage” of the transmitted information, as long as this is done solely for the purpose of carrying out the transmission.²³ The operator is then not liable for the content of the transmission, provided that they did “not initiate the transmission”, did “not select the receiver” and did “not select or modify the information” being transmitted.²⁴

Access providers have traditionally been telecommunications companies,²⁵ but it is now known to also include Wi-Fi operators.²⁶

2.2.2 **Caching**

Similarly, Article 13 concerns “transmission[s] in a communication network of information provided by a recipient of the service” whereby the intermediary stores the information in an “automatic, intermediate and temporary” manner “for the sole purpose” of making the transmission to other recipients of the service more efficient. On certain further conditions, such as not modifying the information, the intermediary shall not be liable for the storage of that information.

2.2.3 **Hosting**

Article 14 is relevant where the service offered is the “storage of information provided by a recipient of the service”. The intermediary’s liability exemption here is dependent on their

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²³ Directive 2000/31/EC Article 12(2)
²⁴ Directive 2000/31/EC Article 12(1)
²⁵ Obergfell and Thamer, “(Non-)regulation of online platforms and internet intermediaries,” page 437
²⁶ Case C-484/14 McFadden v Sony Music
knowledge of the contents of the information stored. They are absolved from liability if they did not have “actual knowledge of illegal activity or information”. Similarly, the operator is protected from civil claims for damages if they are not “aware of facts and circumstances from which the illegal activity or information is apparent”. As is evident, the Article sets a different threshold of knowledge for civil claims and other illegally shared content. Furthermore, to remain exempt from liability the intermediary must act “expeditiously to remove or to disable access to the information” upon obtaining the aforementioned knowledge or awareness, also referred to as notice and take down.

2.2.4 No General Obligation to Monitor

Article 15 of the ECD states that Member States, hereafter MS, “shall not impose a general obligation on providers (...) to monitor information which they transmit or store”. This is reiterated in the ECD Recital 47, but, nonetheless “monitoring obligations in a specific case” may occur. Furthermore, Article 15 prohibits MS from imposing “a general obligation actively to seek facts or circumstances indicating illegal activity”. It is only the intermediaries covered in Articles 12 through 14, mere conduit, caching and hosting providers, which are exempt from any obligation to monitor or filter user generated content on a general basis.

The safeguard found in Article 15 is a precondition for the applicability of the liability exemption provided in Article 14. If hosting providers would be required to filter and monitor their content on a general basis then they would quickly gain either actual knowledge of illegal activity on their services or they would gain awareness of facts and circumstances which point to illegal activity. Such a monitoring obligation would render the liability exemption in Article 14 mute.

Both Articles 14 and 15 of the ECD will be analysed in depth in Chapter 2.

2.3 Illegal Content Online

2.3.1 User Generated Content

In the new era of Web 2.0 anyone can be a content provider. The flip side of this coin is that absolutely anyone could also be an intellectual property rights, hereafter IPR, infringer or a criminal offender in an online environment. The Internet provides scattered geographical distances where judicial reach may be limited and the offending users may have limited financial capacity. This means it is both easier and more tempting to seek compensation from the plat-

27 Directive 2000/31/EC Article 14(1)(a)
29 This term is further discussed in paragraph 2.4.4.2
30 Yannopoulos “The Immunity of Internet Intermediaries Reconsidered?” page 46
forms rather than the users. Moreover, Internet intermediaries may often be "best placed to bring such infringing activities to an end". The types of illegal content are typically IPR; commonly copyright infringing material, but also, content such as incitement to hatred, violence or terrorism, as well as sexually abusive material in which case children are particularly vulnerable. What is illegal in the offline world will also be illegal online, and precisely what is illegal is regulated by a combination of EU legislation and national legislation.

2.3.2 Content Neutrality v Sectoral Approach

The ECD does not specify for what types of illegal content platforms are exempt from liability; it applies to criminal, civil and administrative offenses. This differs from the USA’s approach, whose safe harbour regulation is more sectoral. The EU’s horizontal and neutral approach means that a court decision referring to platform liability for one type of illegal content will affect the platform liability norm in general. Therefore, although this thesis is focusing on copyright, in order to clarify the current legal position for intermediaries, case-law on other illegal content online will also be analysed.

Nevertheless, the EU seems to favour a more sectorial, vertical approach for future legislation of intermediary liability; as we will come to see, the Proposal is an example of such. One reason for this new approach is the difficulty in defining platforms in a sense that is suitable in a broad and horizontal setting, especially considering how platforms can expand into new markets on the Internet with relative ease or create hybrid business models.

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31 Yannopoulos “The Immunity of Internet Intermediaries Reconsidered?” page 44; Valeke et al., “Did the Romans get it Right?” page 102; referencing Van Eecke, “Online service providers and liability,” page 1455; and Obergfell and Thamer, “(Non-)regulation of online platforms and internet intermediaries,” page 437.
35 Idem.
38 Yannopoulos, “The Immunity of Internet Intermediaries Reconsidered?” page 45.
40 EP, “Resolution on online platforms and the digital single market,” point 8
2.4 **Current Legal Status**

2.4.1 Legal Uncertainty?

The ECD came into force in 2000. Since then there have been plenty of new regulations imposing further obligations on intermediaries in fields such as privacy, communication, IPR and child pornography.\(^{42}\) The legal uncertainty surrounding internet liability has given room for public scrutiny\(^ {43}\) and controversial court decisions,\(^ {44}\) examples of which will be presented below. It has been argued that the EU chose to label Internet intermediaries as unengaged middlemen exempt from liability, but that national court decisions have deviated from this.\(^ {45}\) The Internet is continuously developing and changing and previously unforeseen questions arise; therefore, it is not possible to give a proper overview of the current legal status for Internet intermediaries and their liability without delving into the CJEU jurisprudence.

2.4.2 Balance of Interests

Conflicting interests and rights also mark the field. The correct balance between them is not necessarily intuitively apparent.

On the one hand, there is the fundamental right of freedom of expression and information guaranteed by the Charter,\(^ {46}\) as well as the protection of personal data and respect for private life.\(^ {47}\) To further illustrate, the CJEU has acknowledged that Article 15 of the ECD is anchored in the Charter’s Articles 8 and 11 on protection of personal data and that of freedom of expression and information, respectively.\(^ {48}\)

On the other hand, we have the right to intellectual property,\(^ {49}\) although the CJEU has pronounced it not inviolable.\(^ {50}\) Furthermore, in the case of criminally illegal content being shared, national criminal law will be applicable. In addition, there is the platforms’ right to conduct a business.\(^ {51}\)

Therefore, when interpreting the ECD the CJEU and national courts must take into account the assortment of protected rights in question and find a proportional balance between them. The Charter furthermore lays a restriction on national authorities when they interpret and implement the Directives into national law and when they later interpret and apply the legislation; their interpretation must allow for a fair balance to be struck between the various funda-

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\(^{42}\) Yannopoulos “The Immunity of Internet Intermediaries Reconsidered?” page 46.
\(^{43}\) Obergfell and Thamer, “(Non-)regulation of online platforms and internet intermediaries.”
\(^{44}\) Valcke et al., “Did the Romans get it Right?” page 101.
\(^{45}\) Valcke et al., “Did the Romans get it Right?” page 103.
\(^{46}\) Charter Article 11, see also ECHR Article 10
\(^{47}\) Charter Article 7 and 8, see also ECHR Article 8
\(^{48}\) Case C-70/10 Scarlet v SABAM and C-360/10 SABAM v Netlog
\(^{49}\) Charter Article 17(2)
\(^{50}\) Case C-70/10 Scarlet v SABAM para 43 & C-360/10 SABAM v Netlog para 41
\(^{51}\) Charter Article 16
mental rights. The same can be said for platforms. The Commission has stated that online intermediaries have a “significant societal responsibility” in protecting users and society from illegal content on their services, but that in playing this role they also have to consider the balance of the different fundamental rights at stake.

2.4.3 CJEU

For a platform provider to be exempt from liability under the ECD Articles 12 through 14 the provider must show a lack of activity or interference. Recital 42 states that in order to be exempt from liability the provider’s activity must be “of a mere technical, automatic and passive nature”. This distinction between passivity and activity is not fully clear, but the CJEU has continued to attempt to define it.

In this relation the Court has stated in L’Oréal v eBay that an operator is not liable if it “has not played an active role allowing it to have knowledge or control of the data stored”. An active role could be, for instance, “assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting them”. A provider cannot be exempt from liability “if it was aware of facts or circumstances on the basis of which a diligent economic operator should have realised” the unlawful behaviour of users.

In Scarlet v SABAM the CJEU also iterated that an obligation on a platform to block content for its users on a general basis is contrary to the ECD Article 15 because it would require filtering and monitoring of information passing through its services. Similarly, in SABAM v Netlog the Court found that the implementation of a filtering system by a platform for all its customers, as a preventative measure, at its own cost and for an unlimited period cannot be required.

In McFadden v Sony regarding a free wireless local area network, the Court concluded after a balancing of interests that the provider could be required to password protect access to the network in order to impede users’ anonymity. This was after the Court already concluded that the network provider was not liable for the users’ content, since the conditions in the ECD Article 12(1) were upheld. Neither could he be required to filter nor terminate the network.

52 Case C-275/06, Productores de Música de España (Promusicae) v Telefónica de España SAU, para. 68
54 Case C-324/09 L’Oréal v eBay, para 123.
55 Case C-324/09 L’Oréal v eBay, para 124.
56 Case C-70/10 Scarlet v SABAM, para 40.
57 Case C-360/10 SABAM v Netlog, para 38.
58 Case C-484/14 McFadden v Sony, para 101.
59 Case C-484/14 McFadden v Sony, para 73-75.
60 Case C-484/14 McFadden v Sony, para 87-89.
This is simply a brief overview of the CJEU jurisprudence in this field, as the relevant cases will be discussed in more detail in Chapters 2 and 3.

2.4.4 Rightholders’ Redress

Commonly, rightholders would enter into licensing agreements with distributors, whether online or not, to secure their monetary claims and give access to content to the public. However, in practice, when third parties upload content on platforms, there will usually not be such an agreement between the user and the rightholder, or between the platform and the rightholder. Uploading protected works online breaches the rightholders’ right to communication of that work.\(^{61}\) As the case law above illustrates, the intermediary will often be passive and simply supplying the technical means for the communication. If a rightholder finds infringing material online on a passive intermediary’s service, there are actions they may pursue to protect their rights.

2.4.4.1 Injunctions

Article 8(3) of the InfoSoc Directive allows rightholders to request "an injunction against intermediaries whose services are used by a third party to infringe a copyright or related right". An injunction could for instance require an intermediary to block access to a specific website, but, as is probably evident, this must be requested for specific instances of copyright infringement. Article 8(1) of the InfoSoc Directive further states that “the sanctions thus provided for shall be effective, proportionate and dissuasive”.

Similarly, the Enforcement Directive\(^{62}\) Article 9(1)(a) requires that judicial authorities in MS may issue an interlocutory injunction "against an intermediary whose services are being used by a third party to infringe an intellectual property right", but the injunction must be "intended to prevent any imminent infringement of an intellectual property right" or to forbid "the continuation of the alleged infringements of that right". Furthermore, the Enforcement Directive Article 11 ensures that, if infringement of intellectual property has been found by judicial authorities, they may "issue against the infringer an injunction aimed at prohibiting the continuation of the infringement". But as the Directive points out, it "shall not affect (...) Articles 12 to 15 of Directive 2000/31/EC [ECD] in particular".\(^{63}\)

2.4.4.2 Notice and Take Down

The way the ECD Article 14 is formulated, and read in conjunction with Article 15, the development of notice and take down (or notice and action) procedures is not unanticipated; as

\(^{61}\) Directive 2001/29/EC Article 3(1).


\(^{63}\) Ibid. Article 2(3)(a).
long as the hosting provider has no knowledge of illegal content they cannot be held liable. The term refers to the actions taken by intermediaries once notified about illegal content on their services, such as taking down the content, blocking it or requesting the user providing the content take it down voluntarily.  

For notice and take down procedures to be effective there must primarily be an option for users of a platform to notify the platform management of the potentially illegal content. To the extent that the content is available to the public, any person should be able to notify on content, not requiring users to be logged in. The process in itself should also be easy and available electronically. Furthermore, it ought to be “sufficiently precise and adequately substantiated”.

2.4.4.3 Damages for Direct Copyright Infringement

The CJEU recently considered a case regarding liability of an intermediary for damages as opposed to mere injunctions for the first time at EU level. The case concerned the above-cited InfoSoc Directive Article 8(3) and the question of injunctions on intermediaries whose services are used by third parties to infringe copyright. In the specific case the third party was an intermediary, the Pirate Bay, hereafter TPB. The questions referred were first whether TPB was directly infringing copyright; and if not, whether an injunction could still be issued towards the intermediary (the internet access provider) providing access to TPB (the third-party intermediary). The second question was not necessary to answer since the CJEU found that TPB was indeed infringing copyright; making available and managing the online sharing platform was a communication to the public.

The case is merely presented as an example of redress actions for copyright holders. Evidently, the assessment of direct copyright infringement for an intermediary must be done on a case by case basis. The case, and more specifically how the intermediary was found to have infringed on copyright for user generated content, will be discussed further in Chapter 2.

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66 Case C-610/15 Ziggo.
67 Dr. Angelopoulos, “CJEU Decision on Ziggo.”
68 Case C-610/15 Ziggo, para 23.
3  Chapter 2:  
Intermediary Liability EU Legislation

3.1  The EU's Digital Single Market Strategy

Why does the EU see a need for a Copyright Reform?  
The Commission’s Digital Single Market Strategy was first presented by President Juncker.\(^{69}\) What the concept fully entails has been clarified in a Communication dated 6th of May 2015,\(^{70}\) and many more documents since. It is now near two and a half years old, and this summer we saw the publication of the midterm review reporting on the progress made halfway through the Commission’s mandate.\(^{71}\) The DSM Strategy can be summed up as follows. Considering the growing importance and development of technology and the digital society as “immense opportunities for innovation, growth and jobs”\(^{72}\) the Commission saw a need for a collaborative legislative approach in Europe, especially if it were to maintain its “position as a world leader in the digital economy”.\(^{73}\) At the time, MS were all facing the same challenges but at national level, and certain issues are more efficiently dealt with in unison.\(^{74}\) Notably, the current copyright regime in Europe is not fully harmonised, since the level of protection still varies at national level.\(^{75}\)

The DSM ensures the free movement of goods, persons, services and capital in an online environment. Individuals and businesses of any Member State may “seamlessly access and exercise online activities”, whilst fair competition, consumer protection and data privacy remain in place. This is proposed by focusing on three main objectives. First, consumers and businesses must gain better access to online goods and services throughout Europe. Second, the infrastructure, content services and regulatory conditions must allow digital networks and services to flourish. Third, there must be investment, research and innovation to maximise the growth potential of the digital economy in Europe.\(^{76}\)

\(^{69}\) Juncker, “A New Start for Europe.”


\(^{71}\) European Commission, “Digital Single Market Mid-term Review.”


\(^{73}\) Ibid.

\(^{74}\) Ibid. Also expressed in COM(2016) 593 final, “Proposed Copyright Directive,” Recital 44

\(^{75}\) Ibáñez, “Copyright Licensing and the EU Digital Single Market Strategy,” page 2; and Opinion of Advocate General Szpunar in Case C-610/15 Ziggo para 3.

3.1.1 Value Gap

The Commission particularly recognises that one of the main drivers of growth in the digital economy is digital content, which is one of the reasons why it has focused on a copyright reform as part of the DSM package. The EP welcomes the Commission’s focus on modernising the copyright framework and enforcement of IPR on the Internet in line with the digital age, showing a united EU front in this mission. The EP has particularly encouraged the Commission’s focus on regulating online platforms, possibly because they represent one of the biggest challenges facing IPRs in today’s information society.

Certain platforms are source to a particular amount of debate; for instance, audio-visual sharing platforms such as YouTube exist in the grey zone between hosting and content distribution. Other platforms may find themselves expanding into different markets or taking on hybrid business models. Some of these platforms have de facto become content distributors to a significant user base generating revenue from advertising or user data, yet rightholders are unable to enter into licensing agreements with them for the use of their work. These platforms can prohibit rightholders from having “control over the way their content is distributed online”. Rightholders complain of difficulties when attempting to authorise and be fairly remunerated for the use of their works in an online setting. Consequently, despite the easy availability of content online, rightholders “have not seen a comparable increase in revenue from this increase in consumption” of creative content; to which the EP points to a “lack of clarity” in the current copyright and e-commerce legislation. The redress options listed in Chapter 1 are insufficient in protecting rightholders and their financial interests. The Commission’s Proposed Copyright Directive also notes the complexity of the online copyright marketplace and the problems associated with the availability of content on online platforms without the involvement of rightholders. This new trend has been termed the value gap.

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81 Obergfell and Thamer, “(Non-)regulation of online platforms and internet intermediaries.”
82 Obergfell and Thamer, “(Non-)regulation of online platforms and internet intermediaries,” page 138.
85 Ibid.
87 EP, “Resolution on online platforms and the digital single market,” point 30.
On the other hand, platforms also contribute to the economy; for instance, by encouraging growth and facilitating employment. Consumers also benefit from easier access to information and communication as well as an increased choice in goods and services. The issue to be dealt with by the Commission in the DSM is how to properly legislate online platforms so that content providers do not lose revenue or incentive to keep producing creative content, whilst not discouraging the existence of platforms.

3.1.2 Copyright Reform

In the Communication on Online Platforms and the Digital Single Market the Commission stated that they “will maintain the existing intermediary liability regime while implementing a sectorial, problem-driven approach to regulation”. However, in the same documents they go on to list “a number of specific issues relating to illegal and harmful content and activities online” which “need to be addressed”. Likewise, the Commission has previously expressed the need for an “effective and balanced civil enforcement system against commercial scale infringements of copyright” because it is “central to investment in innovation and job creation”. Moreover, the Commission finds that the intermediaries’ growing contribution to content distribution, specifically of copyright protected works, means that the rules applicable to them require clarification.

In sum, it would seem that the Commission wishes to enforce the protection of copyright, clarify the roles of online platforms and move towards a sectorial regulation of intermediary liability, but without changing the existing liability regime. It would not be an exaggeration to suggest that clarification of the legislation is needed, as the EU institutions have suggested. It has also been noted in juridical literature that divergences at national level (both between different MS and within MS) can be partly attributed to problems regarding the interpretation of the framework and the broadly formulated IPR legislation in the EU. Nevertheless, claiming to enforce IPR, clarify the legislation and change the approach to regulating online intermediaries' liability without actually changing the legal norm may be a bit of a stretch.

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95 Valcke et al., “Did the Romans get it Right?” page 103; Van Eecke, “Online Service Providers and Liability,” page 1475.
3.2 **Proposed Copyright Directive**

As part of this clarification the Commission has proposed to implement a Copyright Directive,\(^96\) which touches upon platforms and their obligations, and thereby liability, regarding copyright infringing material shared by users on their services. It aims to further harmonise the EU’s regulation of copyright and related rights, particularly relating to digital sharing of content.\(^97\)

In the Explanatory Memorandum to the Proposal, the Commission expressed that the Proposal aimed, inter alia, to “clarify the role of online services in the distribution of works and other subject-matter”.\(^98\) This may be interpreted as meaning that the Commission aims not simply to clarify the role of online intermediaries, but also regulate their capacity to host user-generated content by, furthermore, regulating the relationship between rightholders and online intermediaries.\(^99\) The main question to be analysed is whether the Proposal merely clarifies the liability regime for intermediaries for user-generated content, or if it aims to change it.

The Proposed Copyright Directive claims to be “consistent” with the current legal copyright framework in the EU.\(^100\) Nonetheless, the Proposal’s Explanatory Memorandum admits to imposing “obligations on some information society services”, but calls them “reasonable”.\(^101\)

The ECD, a horizontal legislation in the context of intermediary liability, is not listed as one of the Directives complemented by the Proposal, a vertical legislation.\(^102\) Therefore, unfortunately, the Proposal does not answer the question of how it is to be interpreted next to the ECD; it is left to us to do so. The Impact Assessment accompanying the Proposal also fails to list the ECD as a relevant directive.\(^103\) The EP has noted this lack of guidance as a negative.\(^104\)

In the following section the Proposal's Article 13 and Recitals 37-39 will be analysed to conclude whether they are in fact consistent with the relevant EU legislation.

### 3.2.1 Introducing Article 13

Article 13 of the Proposal, entitled "Use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter up-

\(^99\) Stalla-Bourdillon, “An academic perspective on the copyright reform.” page 6. “The proposed Copyright Directive is trying to pursue two distinct objectives: 1. the clarification of the role of online services and 2. the regulation of online services used to host user-generated content with a view to reinforcing the position of rightholders vis-à-vis those online services.”
\(^103\) SWD(2016) 301 final, Impact Assessment.
“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 shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.”

It is not intuitively obvious to me who and what this paragraph attempts to legislate, but it is evident that the Article means to impose certain obligations on certain ISSPs.

3.2.2 Scope of Article 13

Article 13 of the Proposal applies to “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”. The question is to whom Article 13 would actually apply. This thesis has already covered the definition of ISSPs found in the ECD. The Proposal makes no reference to the term as defined there, but our first assumption when working with Article 13 can be that the same definition applies in this Proposal.

We have also established that intermediaries whose service is to provide “storage of information provided by a recipient of the service” are protected from liability under the ECD Article 14. The scope of Article 14 of the ECD is merely restricted to intermediaries that have remained neutral and unaware of illegal content on their services. There is nothing in the wording of Article 13 of the Proposal that suggests the ISSPs in question have passed the threshold from neutrality to activity or gained knowledge of the specific illegal content uploaded by their users. The scope of the ECD Article 14 is broader than that of the Proposal Article 13. Article 13 of the Proposal refers to storage providers that also “provide public access” to “large amounts of content”, elements which merely narrow the applicable group of storage providers. This means that the ISSPs which fall under the Proposal’s Article 13 also fall within the scope of the ECD Article 14, insofar as they do not lack neutrality and do not have knowledge of illegal content on their services.105

105 Dr. Angelopoulos, “On Online Platforms,” page 34.
However, the question of who is targeted by the definition in Article 13 still remains; specifically, what constitutes “large amounts” of content and what constitutes “public access”. If the wording of the Proposal is not edited, the eventual meaning of this will ultimately fall on the CJEU to interpret.

3.2.2.1 Large Amounts

The first question is what constitutes "large amounts" of content.

The distinction that the service provider must give access to “large amounts” of content may be the Commission’s attempt to differentiate between larger, international content sharing services with a significant market share and smaller service providers such as start-ups and SMEs. Larger service providers risk having a greater impact on the rightholders’ interests and have a greater ability to control it. However, the Impact Assessment to the Proposal asserts that the factors to be analysed are independent from the size of the service provider, iterating that it can be an SME.

This does not make the distinction between large and non-large amounts any clearer. Questions remain such as: what specific quantity amounts to “large amounts”? Nor do we know if the scale being measured is the total amount of content distributed on the ISSP’s service, or if it is specifically the copyright infringing content; and if the latter, how is it to be measured? Perhaps the ISSP’s user base or the frequency with which their services are being used and accessed will count for the assessment.

One could perhaps draw an analogy to the Database Directive and the CJEU’s interpretation of “substantial parts” of a database. Article 7(1) regulates the rightholder’s sui generis right to prevent extraction and/or re-utilisation of the whole or substantial parts of a database. The sui generis right, although new when first introduced, is also an intellectual property right. The analogy is therefore of interest seeing as the “substantial parts” referenced measures the limit of how much a third party can extract and/or re-utilise before infringing on the maker’s sui generis right. The Court has emphasised that a “substantial part” can be either a quantitative or a qualitative measure. In other words, the value of the parts, to either the infringer or the rightholder, may define their substantiality, not just the quantity. Nonetheless, the terms substantial and large are different; perhaps the qualitative nature the CJEU has found in the term substantial will not be found in the term large – it remains to be seen.

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106 Small and Medium-sized Enterprises. See: Dr. Angelopoulos, “EU Copyright Reform.”
109 Directive 96/9/EC Article 7(1).
111 Case C-304/07 Directmedia Publishing GmbH v Albert-Ludwigs-Universität Freiburg para 59-60.
The Impact Assessment states that what constitutes a “large amount” would have to be assessed based on “a combination of factors including the number of users and visitors and the amount of content uploaded over a certain period of time”. It furthermore points out that a mere quantitative measurement may be difficult, due to the unknown amount of non-infringing content on the service.112

The CJEU will eventually be handed the assignment of deciding these questions, and until they give a clearer response it will be up to the ISSPs themselves to evaluate and identify whether or not they fall within the scope of the Proposal’s Article 13 and must abide by it.

3.2.2.2 Public Access

The second question is which ISSPs “provide to the public access”.

Is there a quantity of recipients that can be considered a public? Is it enough if there are potentially large quantities of recipients, or must a certain amount of people actually have accessed the content?

Perhaps we can learn some of these answers by drawing an analogy to the InfoSoc Directive and authors’ exclusive right to authorise or prohibit “communication to the public”,113 and previous CJEU case law defining the term. The term has been given broad interpretation114 and includes two aspects, an “act of communication” and, more importantly for us, that this communication takes place towards a “public”.115

The right of communication to the public has been interpreted as including making the works available in such a way that “members of the public may access them from a place and at a time individually chosen by them”.116 If we apply the same interpretation to the “public” in the Proposal’s Article 13, then it would suffice that a certain amount of people have the possibility of accessing the content. Additionally, considering the question of what quantity of people make a public, the Court has held that it is “an indeterminate number of potential viewers and implies, moreover, a fairly large number of people”.117 Still, the CJEU has held that patients at a dentist’s office were not a sufficient crowd to be deemed “a public”.118 Yet, an exact quantity cannot be set; the Court frequently stresses the need for an "individual assessment" for this question.119

Nevertheless, this analogy is not perfect. For the question of communication to the public, it is also necessary that the public would be a new one compared to the public that already had

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115 Case GS Media, para 32.
117 GS Media, para 36.
118 Case C-135/10 Società Consortile Fonografici (SCF) v Marco Del Corso.
119 Ibid. para 78 cf. 76.
access to the content, or that the communication would be done by a new technology.\textsuperscript{120} These are not factors that are necessarily transposable to the term public in Article 13, seeing as a new public in EU copyright law is a public that was not taken into account by the rightholders when authorising an initial communication.\textsuperscript{121} The content in question in Article 13 is illegally shared copyright-protected works. So, although this analogy may give some indication to the meaning of “public” in the Article, again the precise scope and meaning of “provide to the public access” will be up for interpretation by the CJEU; and until it does, ISSPs must themselves deduce whether their activities fall within the scope of Article 13 or not, with limited guidance.

To conclude on the question of the scope of the Proposal Article 13, the Proposal's new category of ISSPs also fall within the scope of the ECD Article 14, as long as they abide by Article 14's conditions and remain neutral and are without knowledge of illegal content on their services.\textsuperscript{122} The more narrowly construed group of ISSPs, which will be affected by Article 13 if the Proposal is approved, remains unknown until the CJEU has the opportunity to voice their interpretation of it.

3.2.2.3 Amendments

The Committee on Legal Affairs has suggested in a draft report amending the text to refer to ISSPs, which "are actively and directly involved in the making available of user uploaded content to the public".\textsuperscript{123} This would alter the scope to refer to the actions taken by the ISSPs rather than using a currently unknown quantitative scale. This is a more clearly formulated scope, which is more visibly relatable to the CJEU’s current interpretation of the ECD. As described in Chapter 1 the ECD does not afford protection to intermediaries that are actively involved in the process of content sharing on their services. By using the CJEU's terminology the Proposal would more clearly be giving the message that it does not wish to deviate from established interpretation of the ECD, given the obligations that will be discussed below.

Being "actively and directly involved" with the content distribution is quite different from the "mere technical, automatic and passive" activity that the ECD protects.\textsuperscript{124} One could, of course argue that the fine line of what constitutes an active and direct involvement is not any more intuitively clear than the Proposal's wording and would also be left to the CJEU to define. The difference is that the CJEU has already developed quite substantial case law regarding Article 14; jurisprudence already exists.

\textsuperscript{120} Case C-160/15 GS Media, para 37.
\textsuperscript{121} Case C-610/15 Ziggo, para 44.
\textsuperscript{122} Dr. Angelopoulos, “On Online Platforms,” page 34.
\textsuperscript{124} Directive 2000/31/EC Recital 42.
Similarly, a leaked document from the Presidency of the Council of the EU showed a proposal for two alternative sets of amendments to the relevant Article and Recitals. The second alternative being changing the scope of Article 13 to an ISSP that "stores and is actively involved in providing access to the public to copyright protected works". Unfortunately, this document is not officially publicly available and its proper source is unknown to me. However, it is still of value as it demonstrates that a qualitative scope rather than a quantitative scope is seen as a good alternative by other parties as well.

Moreover, a working document from the French, Spanish and Portuguese delegations suggests a similar amendment. Their proposal would amend the scope of Article 13 to refer to ISSPs that store content "uploaded by their users and are actively involved in providing access to the public to such contents", specifying that by doing so they would perform an act of communication to the public and fall outside the scope of Article 14. This would lead to no confusion about the potential overlap between the ECD Article 14 and the Proposal Article 13. The scope of the ECD Article 14 has already been nuanced by case law, and it would remain the same as before.

To conclude, the analysis of Article 13’s current phrasing, combined with the amendments proposed above, show a lack of clarity in the text and possibly a lack of conformity with the current regulation, depending on the content of the obligations.

3.2.3 Passivity vs. Activity

The aforementioned amendment also brings about an entirely different question of conformity between the ECD and the Proposal. Where and how does the Proposal draw the distinction between passive and active intermediaries and does it correspond with the ECD and CJEU? As previously concluded, the ISSPs that fall within the scope of the Proposal Article 13 also fall within the scope of the ECD Article 14; but once an intermediary has played an active role it will no longer be protected from liability by the ECD Article 14. Therefore, the distinction is important.

Recital 38(2) of the Proposal suggests that the liability exemption in Article 14 is not applicable where an ISSP has played “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”. Initially this may seem to be in line with current CJEU case law as presented in Chapter 1. In L’Oréal v eBay the court held that “assistance which entails, in particular, optimizing the presentation of the offers for sale in question or promoting them” were actions

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which went beyond the neutrality required of an intermediary, which would therefore lose the protection from liability in the ECD Article 14.\textsuperscript{127} Still, the CJEU’s neutrality definition is developed on the basis of the ECD Recital 42 which states that services “of a mere technical, automatic and passive nature”, meaning that the intermediary has “neither knowledge of nor control over the information which is transmitted or stored”, is what is exempt from liability. The wording of the Proposal Recital 38(2) seems to suggest that any optimisation, even automatic optimisation techniques such as algorithmic optimization, would render the ISSP active.\textsuperscript{128} Still, those optimisation techniques which are "technical, automatic and passive" by nature should render the ISSP exempt from liability under the ECD.

In the referring judgement from the UK High Court of Justice, eBay's various promotional aid services are presented meticulously. On one end of the scale there is the more ordinary support available to all sellers for a fee, such as uploading images of the products, the option to use bold lettering or underlining or highlighting text, showing buyers other products from the same seller they are currently viewing or buying from etc.\textsuperscript{129} On the other end, available exclusively to eBay's "exemplary members" with so-called PowerSeller status, there is a support system which includes "a personal account manager, personal phone support, fast priority email support, final value fee discounts and access to a dedicated PowerSeller board".\textsuperscript{130} To fall within the latter group the seller must fulfil certain sales and activity requirements over time; requirements that a mere 0.4% of registered sellers fulfilled at the time of the judgement. All but one of the eBay sellers in question in the case had the status of PowerSeller at the time the infringements occurred.

In the CJEU's ruling the court specifies "in some cases eBay assists sellers in order to enhance their offers for sale, to set up online shops, to promote and increase their sales".\textsuperscript{131} Telephoning sellers to assist them in setting up an online shop is specifically mentioned in the referring judgement as an assistance offered to PowerSellers.\textsuperscript{132} It can be argued that the CJEU was referring to the more advanced, tailored and personal support for specific users when it found that eBay had stepped outside the protection in Article 14 by rendering “assistance which entails, in particular, optimizing the presentation of the offers for sale in question or promoting them”. This argument is supported by the CJEU’s specification "in some cases" sited above, and the fact that the CJEU held that the assessment of neutrality must be done by national

\textsuperscript{127} Case C-324/09 L’Oréal v eBay, para 123.
\textsuperscript{128} Rosati, “The CJEU Pirate Bay Judgment,” page 14.
\textsuperscript{129} Case C-324/09 L’Oréal v eBay, para 52-55.
\textsuperscript{130} England and Wales High Court, L’Oréal SA & Ors v EB政府采购 International AG & Ors para 59.
\textsuperscript{131} Case C-324/09 L’Oréal v eBay, para 31.
\textsuperscript{132} Case C-324/09 L’Oréal v eBay, Para 54.
court on a case-by-case basis.\footnote{Dr. Angelopoulos, “On Online Platforms,” pages 11-12.} Although the CJEU does not specifically state this differentiation, if all promotions and optimisations were an active role, then there would be no need for a new assessment for each case.

A preliminary conclusion is that the Proposal Recital 38(2) is not fully in line with the ECD Article 14. The "nature of the means used" to optimise the presentation and promote the content on a service could be relevant in an assessment of neutrality. Otherwise, following the language of Recital 38(2), platforms would quite simply not be allowed to enhance or optimise user-generated content by technical and automatic means without also relinquishing the ECD's liability exemption.

Alternatively, some may argue that Recital 38(2) is fully in line with the rule of neutrality as developed by the CJEU.\footnote{Adj. Prof. Dr von Lewinski, “Comments on the ‘value gap’ provisions,” Section 2} The CJEU does not expressly and unequivocally state what level of assistance by eBay was crossing the line of passivity into activity. In the eBay case the Court agreed that an intermediary that "stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers" had not played an active role and retained the protection afforded in the ECD Article 14.\footnote{Case C-324/09 L’Oréal v eBay, para 115.} Therefore, we may conclude that in eBay v L’Oréal the line separating neutral from active intermediaries is found somewhere between one that "stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers" and ones that provide assistance such as eBay offers its PowerSellers.

With that we can conclude that Recital 38(2) of the Proposal at the very least takes a stance not directly supported by the CJEU’s interpretation of the ECD, as it formulates a narrower interpretation of the ECD Article 14.\footnote{Stalla-Bourdillon, “An academic perspective on the copyright reform,” page 4.} Yet, the Proposal may simply be clarifying or specifying the neutrality principle, as it aimed to do.

3.2.4 InfoSoc Directive & Ziggo

3.2.4.1 Compatibility with Copyright Law - Recital 38

According to Recital 38(1) of the Proposal, when ISSPs store and provide access to the public to copyright protected works or other subject-matter uploaded by their users as described in Article 13, "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 the ECD. The act of communicating a work to the public must be done with the rightholder’s consent; that is not a controversial statement. However, the Recital seems to suggest that the relevant Article 13 ISSPs by definition violate the rightholders’ right to communication to the
public within the meaning of Article 3(1) of the InfoSoc Directive when their users are uploading and sharing copyright infringing material.\textsuperscript{137}

An important delineation, Recital 37 of the Proposal notes that copyright protected works are being uploaded by users on online services without the “involvement of right holders”. This affects their possibilities to determine if and under what conditions their works can be shared, and it affects their possibility for appropriate remuneration for that work, which it seems Recital 38(1) intends to amend. However, rightholders will not always have the right to hinder their work being shared online; there are exceptions and limitations to the InfoSoc Directive’s right to communicate works to the public.\textsuperscript{138} Recitals 37 and 38 are unclear on how they relate to this.\textsuperscript{139}

\textbf{3.2.4.1.1 Communication to the Public}

The Proposal makes no attempt at defining the intended meaning of “an act of communication to the public”. But the InfoSoc Directive’s Article 3(1) regulates the author’s exclusive right to communication to the public. The CJEU has stated that it is made up of two elements, an "act of communication" and the communication of that work to the "public". An "individual assessment" is necessary, considering "several complementary criteria, which are not autonomous and are interdependent".\textsuperscript{140}

Interestingly, there have been recent developments in the EU’s threshold for "communication to the public" when applied to intermediaries. On 14\textsuperscript{th} of June 2017 the CJEU ruled on the aforementioned Ziggo case,\textsuperscript{141} concerning the question of liability proper. Notably, Recital 38 of the Proposal may be less in conflict with current EU copyright law as it stands after Ziggo than it did before.

In Ziggo, the Court noted that protected content was being made available on the TPB website by its users.\textsuperscript{142} However, the management of the TPB platform equalled an "intervention" in that regard: the users would be unable to share the content online without such a site, or at least it would be more complex.\textsuperscript{143} By managing the site TPB played an essential role in making the works available, therefore, managing the site and making it accessible amounted to an act of communication.\textsuperscript{144}

\textsuperscript{138} Directive 2001/29/EC Article 5(3).
\textsuperscript{139} Dr. Angelopoulos, “On Online Platforms,” page 32.
\textsuperscript{140} Case C-162/10 Phonographic Performance Limited v Ireland para 29, 30; regularly repeated, see.: Case C-610/15 Ziggo para. 23 and 25
\textsuperscript{141} Case C-610/15, Stichting Brein v Ziggo.
\textsuperscript{142} Case C-610/15, Stichting Brein v Ziggo para 35-36.
\textsuperscript{143} Ibid. para 36.
\textsuperscript{144} Ibid para 37-39.
The “new public” criteria was found fulfilled with reference to four factors based on knowledge. Interestingly, the Court noted that TPB were informed and aware that their platform was being used to communicate protected works and that TPB had expressed that their services were intended to make protected work available and encouraged the activities happening on their platform. Additionally, a very large number of the torrent files available on the TPB platform were works published without the consent of the rightholders, meaning TPB "could not have been unaware" that their platform was providing access to protected works. The Court also noted that the platform was run for the purpose of obtaining profit.\textsuperscript{145}

Notably, Recital 27 of the InfoSoc Directive states that the mere provision of physical facilities for enabling or making a communication cannot in itself be enough to render a communication to the public. As the Ziggo case demonstrates, there are further requirements before an intermediary can be found to communicate works to the public, though this knowledge requirement is not new in relation to the InfoSoc Directive Article 3(1); it is evident in earlier CJEU jurisprudence.\textsuperscript{146}

3.2.4.1.2 Conclusion

If the “act of communication to the public” referred to in the Proposal Recital 38(1) is a standalone criterion, and it is to be interpreted in concurrence with the InfoSoc Directive’s “communication to the public” in Article 3(1), then a preliminary conclusion could be that the Proposal does not conflict with the ECD Article 14. If the hosting providers have knowledge of the specific infringements occurring on their site, then they are not protected by the liability exemption in the ECD Article 14, but they might be found to have communicated works to the public, as was found in Ziggo.

However, the wording of Recital 38 does not imply that an “act of communication to the public” is a standalone criterion, but rather a result of the ISSP “providing access to the public” to works. If this is to comply with current EU legislation then there must be more in the term “providing access to the public” than is evident from Recital 38 and Article 13; seeing as it currently reads as relating to ISSPs otherwise exempt from liability under the ECD Article 14, Recital 38 can at least be criticised for being too simplistic.\textsuperscript{147}

Regardless, one could problematize whether the knowledge criterion in relation to communication to the public in Article 3(1) of the InfoSoc Directive is the same knowledge criterion as found in the ECD Article 14; particularly seeing as the CJEU has created a presumption of knowledge for profit-seeking actors.\textsuperscript{148} Will not most, or at least many, ISSPs store and provide access to users with an aim of gaining profit? As discussed in Chapter 1, information

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\textsuperscript{145} Ibid. para 45-46.
\textsuperscript{146} For instance Cases C-306/05 SGAE, C-527/15 Filmspeler and C-160/15 GS Media.
\textsuperscript{147} Prof. Dr. Hilty et al., “Contributions by the Max Planck Institute for Innovation,” page 14.
\textsuperscript{148} Case C-160/15 GS Media, para 51.
society services as regulated in the ECD refer to services that represents an economic activity. If the two knowledge thresholds are to be interpreted the same, then it might render the ECD Article 14 practically void. This threshold is already being provoked by ISSPs’ desire to voluntarily monitor their services to ascertain their rules of conduct are being followed. Where will that fine line go?

3.2.5 E-Commerce Directive

Obligations in Article 13

Article 13 of the Proposal imposes two alternative obligations on the ISSPs that fall within its scope. The first option for the ISSP is to "take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter". Alternatively, the ISSP shall take "appropriate and proportionate" measures "to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers". These were described as an obligation on online services “to put in place appropriate technologies and to increase transparency vis-a-vis rightholders” in the Commission Staff Working Document. This wording was the second option considered by the Commission. The first option consisted of "organisation of a stakeholder dialogue", but this was found to have "limited impact" in strengthening the position of rightholders; the aim being aiding the aforementioned value gap. Option two, as presented above, goes further by providing obligations on certain ISSPs. With reference to the nature of the services provided, their impact on the online contents market and the quantity of copyright protected content stored on them the Commission expressed that the obligations were deemed “reasonable”.

3.2.5.1 Compatibility with Recital 48 and Article 14 of the ECD – Licensing Agreements

The first alternative obligation concerns licensing agreements between intermediaries and rightholders. Licensing agreements are an essential part of copyright; they allow right holders to protect their interests whilst also allowing copyright protected works to be spread legally.

149 Kuczerawy et al., “NoC online intermediaries case,” page 9. Although some would argue that human knowledge is necessary to fall outside the liability exemption in the ECD, computer knowledge would not suffice, see: Van Eecke, “Online service providers and liability,” page 1475.
151 COM(2016) 593 final, “Proposed Copyright Directive” page 3 “This proposal provides for measures aiming at facilitating the licensing and clearance of rights process. … Press publishers are facing difficulties in licensing their publications online and obtaining a fair share of the value they generate.” and page 8.
Rights can be licensed either exclusively or non-exclusively, for specific territories and/or specific transmissions, reception or usage technologies and/or for a specific time period.\textsuperscript{154} The safe harbour provisions in Section 4 of the ECD do not preclude imposing duties of care on intermediaries, as is expressed in Recital 48. These duties of care must be “reasonably expected of them”, must be “specified by national law” and must aim to “detect and prevent certain types of illegal activities”.

Although the second alternative obligation of Article 13 is of a preventative nature,\textsuperscript{155} the first obligation, licensing agreements, is less clearly so; what precisely it encompasses is in itself unclear.\textsuperscript{156} If it is an obligation on ISSPs to enter into licensing agreements then it will not be a preventative measure as described in the ECD Recital 48. On the other hand, it might be an obligation to implement preventative measures to ensure the functioning of already existing licensing agreements.

The issue is therefore what precisely the licensing agreement obligation encompasses, particularly seeing as different phrasing is used in different parts of the Proposal. Article 13 requires that platforms "in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works". The Article does not directly require ISSPs to enter into licensing agreements. However, Recital 38(1) states that ISSPs as described in Article 13 that communicate works to the public "are obliged to conclude licensing agreements with rightholders". The Proposal does not resolve whether these two sentences refer to the same obligation or not; again the Proposal lacks clarity.

Initially one might deduce that Recital 38(1) and the first obligation in Article 13 regulate the same matter, but Recital 38(1) specifies that it refers to ISSPs that are “performing an act of communication to the public” whereas Article 13 does not; which, as the previous assessment expressed, is an important, although unclear, distinction.

It is not controversial that communicating or making available a work to the public can only be done with the rightholder’s consent to avoid liability,\textsuperscript{157} unless there are applicable exceptions.\textsuperscript{158} Therefore, a possible interpretation is that the Recital rightfully notes that an ISSP that is communicating works to the public has a responsibility to first gain the rightholder’s consent, which would be achieved through a licensing agreement. For such ISSPs Article 13 then requires them to ensure the proper functioning of these agreements.

Yet, the Explanatory Memorandum presumes that Article 13 “fosters the conclusion of agreements with rightholders”, which could be understood as indicating that Article 13 is


\textsuperscript{155} The second obligation being that ISSPs shall “take measures ... to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers.” It will be discussed below.

\textsuperscript{156} Dr. Angelopoulos, “On Online Platforms,” page 35.

\textsuperscript{157} Directive 2001/29/EC Article 3.

\textsuperscript{158} Directive 2001/29/EC Article 5.
meant as an obligation on ISSPs to enter into licensing agreements with rightholders. If this last remark is true, then there is clearly a conflict between the Proposal Article 13 and the ECD, not only Recital 48 but also Article 14. Why should ISSPs be forced to enter into licensing agreements with rightholders when they have not communicated works to the public and are exempt from liability? The interpretation indicated by the Explanatory Memorandum would debilitate the content and meaning of Article 14 of the ECD.

A purely semantic interpretation of the first obligation of Article 13 would suggest that ISSPs that are already engaged in licensing agreements with rightholders, or legally ought to be, must ensure the functioning of these agreements by implementing certain measures. If this is the case, then the first obligation in Article 13 is in conformity with the ECD Recital 48, it is a preventative measure. This is the interpretation I prefer, as it can be read directly from the phrasing of Article 13.

Nevertheless, entering into a licensing agreement would be necessary for the ISSPs to be able to ensure their functioning. Therefore, it seems that ISSPs are, in reality, left with the choice of either entering into licensing agreements and ensure their functioning, or alternatively the second obligation: “prevent the availability on their services of works”. Perhaps the obligation of choice will be the one of least cost to the ISSP, regardless of whether they are performing an act of communication to the public or not.

Nonetheless, one question remains that needs clarification in the Proposal: what happens if ISSPs do not know who the rightholder is? It would be helpful if the Proposal gave some indication of how much effort is expected of the ISSP in question to find the correct rightholder, whether it be orphan works, derivative works or works with multiple rightholder contenders. In a digitisation project at the Victoria and Albert Museum it took an estimated 78 full working days to identify the rightholders and clear rights to 1,189 protest posters from the last century; and only 458 successfully receive explicit authorisation. That is a costly expense. This question could to a large extent be answered by collective licensing, but it would still be useful with a more explicit reference in the Proposal.

3.2.5.2 Compatibility with Article 15 of the ECD - Technical Measures

The second alternative obligation presented in Article 13 of the Proposal is that ISSPs within their scope must take measures “to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers”. The Article further suggests that such measures could be “effective content recognition technologies”. The question is whether or not this obligation is compatible with the ECD Article 15, which does not allow for a general obligation on intermediaries to monitor content.

3.2.5.2.1 Notice and Take Down

One could argue that this obligation in Article 13 of the Proposal refers to notice and take down procedures. The ISSP may be required to “prevent the availability” of protected content upon gaining knowledge of it. That knowledge would be gained once rightholders have “identified” the works in cooperation with ISSPs, and then informed said ISSP. However, as I understand the Article, this is not what it refers to. The suggested preventative measure, content recognition technologies, would not facilitate a notice and take down procedure. It would rather allow for an automatic detection and removal; no third party would be required to notice the infringement. Furthermore, the mere phrasing of the obligation suggests that the "works or other subject-matter identified by rightholders" is referring to the copyright protected works with which automatic technologies could be used to identify infringements. Yet, these two interpretations are quite different, and the fact that the question can be asked speaks to the Article’s clarity, or lack thereof.

3.2.5.2.2 Filtering

Effective content recognition technologies would entail examining content stored and made available to the public on a massive scale. The technology would involve processing and comparing the content made available on an ISSP’s platform with unique and identifying features of copyright protected works to verify if the content is in breach of copyright or of the terms of the licensing agreement.160 The Impact Assessment Annex 12A details two types of content recognition technologies: fingerprinting and watermarking. The former allows for content to be compared with unique features in copyright protected works, which are registered in a database. The latter consists of embedding a unique digital watermark into each legitimate copy of the work; illegally available copies can then be traced back to its predecessor. For either one of these to be effective it would have to be implemented at a large scale, filtering through all user-uploaded content, both infringing and legal content, searching for these unique and identifying features.161

“Effective content recognition technologies” is only an example of a possible measure to implement. That being said, the Proposal Article 13 requires preventative measures such as those, to inhibit users from sharing copyright protected works, and only names this one measure. This could easily be interpreted as a strong suggestion from the EU legislature towards ISSPs to specifically implement content recognition technologies. The Proposal does not elaborate which other types of preventative measures would be deemed to fulfil the requirement. It is much safer, from the point of view of an ISSP, to follow the suggested preventative measure, than to assume that another measure is preventative enough to satisfy Article 13’s

160 Gartner IT Glossary, “Automatic Content Recognition.”
standards. This will in turn lead to industry practice or standards, which may be difficult for a single ISSP to diverge from if other preventative measures are scarce and difficult to obtain. With these concerns in mind we may also wonder who the Proposal deems fit to assess the appropriateness of a preventative measure. The text of the Article seems to suggest that rightholders have a clear say in the question, seeing as all measures shall be taken “in cooperation with rightholders”. If it is truly up to the rightholders to assess which preventative measures the ISSPs should implement, then they will quite likely opt for the most efficient one for them, which is likely to be automatic content recognition technologies. Therefore, it is difficult to read Article 13 as requiring anything other of ISSPs than some form of content filtering measure. Furthermore, if other measures are to be found sufficient and genuinely preventative to the same extent as content recognition technologies, they would still require the monitoring of all user’s content at the time of uploading or sharing since it is unknown beforehand whose content may be infringing copyright. The EP also notes that Article 13 as it is proposed “seems to introduce such a general monitoring obligation” as regulated in the ECD.  

In SABAM v Netlog the CJEU found that an obligation to install a “filtering system would oblige [the hosting service provider] to actively monitor almost all the data relating to all of its service users in order to prevent any future infringements” of IPR, which would be contrary to the ECD Article 15.  

Content recognition technology measures (or similar) must be considered monitoring as currently prohibited by the ECD Article 15. We have already established that ISSPs, which fall within the scope of Article 13 of the Proposal, also fall within the scope of the ECD Article 14, meaning that the ECD Article 15 is applicable to them. As previously stated, monitoring cannot be required on a general basis of ISSPs that fall under the liability exemptions in the ECD Articles 12 through 14, but only in specific instances.  

We may therefore conclude that Article 13 of the Proposal strongly suggests/requires the implementation of a general obligation to monitor content for certain ISSPs, which does not coincide with the current regulation in the ECD Article 15 and CJEU case law.

3.2.5.2.3 Appropriate, Proportionate & Necessary Filtering

The safeguard, in the Proposal Article 13(1), that this monitoring must be appropriate and proportionate, a wording also found in Recital 38(3), does not make it any less contradictory to the ECD Article 15. This notion is also reiterated in the Proposal Article 13(3) stating that best practices "such as appropriate and proportionate content recognition technologies" shall be defined through dialogues with stakeholders. This shall be done by taking into account, 

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163 Case C-360/10 SABAM v Netlog, para 38.  
inter alia, "the nature of the services, the availability of the technologies and their effectiveness in light of technological developments".\textsuperscript{165}

The specification is in line with EU law in general. The Enforcement Directive states that "measures, procedures and remedies necessary to ensure the enforcement" of IPR shall be "fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays".\textsuperscript{166} Similarly, Article 8(1) of the InfoSoc Directive states “the sanctions thus provided for shall be effective, proportionate and dissuasive”. Although the measures in Article 13 must be effective, proportionate and appropriate, there is no clarity with regards to where the responsibility to assess this conformity lies. It may be a completely different assessment from the point of view of an ISSP and a rightholder, since they have different concerns in mind when balancing interests.

The importance of collaboration between right holders and the ISSPs in question for the "functioning of technologies" is affirmed in Recital 39 of the Proposal. It iterates the need for information flow from rightholders to ISSPs and transparency towards the rightholders regarding the technologies used, the way they operate and their rate of success in recognising protected content. This information flow and transparency is to "allow the assessment of [the technologies'] appropriateness". It would therefore seem that the assessment of appropriateness is meant to be taken from the point of view of the rightholders. Furthermore, as the CJEU has noted in L’Oréal v eBay, "a general monitoring obligation would be incompatible with Article 3 of Directive 2004/48 [Enforcement Directive], which states that the measures referred to by the directive must be fair and proportionate and must not be excessively costly".\textsuperscript{167} In other words, according to the CJEU, a general obligation to monitor is in itself non-proportionate.

Consequently, Article 13’s proportionality safeguard does not make the obligation to use filtering measures any less contrary to the ECD Article 15.

3.2.5.2.4 Specific monitoring

An interesting distinction concerns the ECD Recital 47. As previously noted, although intermediaries cannot be obligated to perform monitoring on a general basis, they can be required to monitor in specific instances.\textsuperscript{168} Effective content recognition technologies could potentially be used in such an instance. The filtering obligation which was found to be incompatible with the ECD Article 15 in SABAM v Netlog concerned particularly broad monitoring, found to include almost all of the information stored and all users.\textsuperscript{169}

\textsuperscript{165} COM(2016) 593 final, “Proposed Copyright Directive,” Article 13(3).
\textsuperscript{166} Directive 2004/48/EC Article 3(1).
\textsuperscript{167} Case C-324/09 L’Oreal v eBay, para 139.
\textsuperscript{168} Directive 2000/31/EC, Recital 47.
\textsuperscript{169} Case C-360/10 SABAM v Netlog, para 37.
Article 13 of the Proposal requires cooperation between rightholders and service providers to identify the protected works. This indicates that service providers are limited to searching for specifically identified works rather than all copyright protected works in existence. However, even when using content recognition technologies to remove infringing copies of one specific piece of copyright protected work, the breadth of content shared on the service would have to be filtered to discover potential infringements.\(^\text{170}\)

Therefore, the exception in the ECD Recital 47 does not preclude the Proposal Article 13 from conflicting with the ECD Article 15.

### 3.2.5.2.5 Conclusion

To conclude, imposing an obligation on intermediaries to use effective content recognition technologies in general, as the Proposal’s Article 13 does, would be contrary to Article 15 of the ECD.

### 3.3 Conclusion

As previously expressed, both the European Commission and Parliament have noted the need to clarify the intermediary liability legislation and the Commission has aimed to do so with this Proposal, hoping that the Proposed changes will lead to a "more legally secure environment".\(^\text{171}\) Some academics would argue that they have achieved this, that the Proposal does not change the current legislation but merely clarifies it.\(^\text{172}\) Other scholars would argue the opposite, that the proposed Article 13 creates legal uncertainty with its "undefined legal concepts and barely understandable formulations".\(^\text{173}\) Personally, I agree with the latter. This is not only due to the nonconformity with the ECD Section 4, but also due to the use of undefined terms and thresholds whose contents remain unknown. The disparities are even evident within the Proposal itself.

The amendment presented by the Committee on Legal Affairs removes the suggestion of implementing "content recognition technology" measures completely.\(^\text{174}\) Instead it opted to focus on ensuring the functioning of licensing agreements between rightholders, and that this be done through a higher level of transparency and dialogue between the two parties.\(^\text{175}\) More

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\(^{172}\) Adj. Prof. Dr von Lewinski, “Comments on the ‘value gap’ provisions.”

\(^{173}\) Prof. Dr. Hilty et al., “Contributions by the Max Planck Institute for Innovation,” page 2.

\(^{174}\) Although keeping the reference to the technology in the Proposal Recital 39 “Collaboration between information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users and rightholders is essential for the functioning of technologies, such as content recognition technologies.” See: JURI, “Draft report on the Proposal,” page 22.

\(^{175}\) JURI, “Draft report on the Proposal,” page 40-41
precisely, the amendment suggests only obligating ISSPs to implement measures to ensure the functioning of licensing agreements, not requiring them to implement measures otherwise.\textsuperscript{176} This, combined with the suggested amendment to the scope of Article 13, would, in my opinion, result in a clearer legislation more in line with the current EU framework.

4 Chapter 3: Compatibility with Charter

As previously mentioned, the Charter of Fundamental Rights of the EU\textsuperscript{177} is relevant when discussing intermediary liability. Particularly important for the proposed legislation is the freedom of expression and information in Article 11, the right to respect of private life and the right to the protection of personal data in Articles 7 and 8 respectively, the freedom to conduct a business in Article 16 and, of course, the right to protection of intellectual property in Article 17(2). As previously noted, the ECD Article 15 is anchored in the Charter's Articles 8 and 11. Any EU legislative instrument, including this Proposal, must be in accordance with the Charter, meaning it must find a fair balance between the opposing, protected rights listed above.\textsuperscript{178}

Recital 45 of the Proposal states that the "Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union". Additionally, the Explanatory Memorandum holds that the obligations imposed on ISSPs are "reasonable in view of the nature of the services covered".\textsuperscript{179} Yet, the obligations presented in the Proposal Article 13, specifically the filtering obligation, may interfere with the fundamental right to freedom of expression and information as well as the right to private life and personal data. The following analysis will therefore question whether the Proposal interferes with any of the rights initially listed.

4.1 Charter 52(1): Interference

4.1.1 Right to Conduct a Business

Following the decision in SABAM v Netlog, the obligation to use content recognition technologies will interfere with the service providers’ freedom to conduct a business. Although they will only have to implement the measures to detect and remove user-uploaded content

\begin{footnotesize}
\begin{enumerate}
\item Such as the current phrasing of Article 13(1) does when it suggests obligating ISSPs to implement measures to "prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers."
\item As the Treaty on European Union Article 6(1) states that the EU recognises the rights, freedoms and principles set out in the Charter, and that the Charter shall have the same legal value as the Treaty.
\item Case C-360/10 SABAM v Netlog, para 43 and Case C-70/10 Scarlet v SABAM, para 45.
\end{enumerate}
\end{footnotesize}
which infringes on works specifically identified by the right-holders, this will still require the ISSP to filter through all their content; either as it is being uploaded or in retrospect. Although this may seem like a large job, with vast amounts of content being shared each day, if the correct technology is available for the type of content in question at an affordable price, the service provider will simply have to implement it.

In SABAM v Netlog the Court emphasized that the service provider would have to implement a "complicated, costly, permanent computer system at its own expense" when considering the filtering obligation's compliance with Article 16 of the Charter. If the technologies available today are less complicated, costly or permanent, then perhaps the obligation to implement them will not conflict with Article 16. However, it is unlikely that time has affected the complexity or permanence of filtering systems, and it is difficult to ascertain where the threshold for too costly technologies lies. More recently than the SABAM v Netlog case, SoundCloud could inform that they spent an estimated 5-10 million Euros developing their content identification system, in addition to the cost of employing 12 full time employees to develop, maintain and manage the systems. That is no small cost.

Additionally, under the new General Data Protection Regulation ISSPs may be required to comply with further obligations when systematically monitoring individuals on a large scale, such as appointing a data protection officer. Obligations such as this will be even more burdensome for ISSPs. Consequently, the Proposal’s content recognition technology requirement imposes a limitation on the Charter Article 16.

4.1.2 Freedom of Expression

As the Impact Assessment correctly identifies, users’ freedom of expression and information may be affected negatively where content recognition technologies unjustifiably remove uploaded content or disallows the uploading of content. It continues by pointing to the procedural safeguards already in place for notice and take down procedures, which would also be implemented for a content recognition technology and hopefully impede the obstruction of users’ rights. It furthermore points out that ISSPs must “provide for procedures” to allow users to contest situations where their content is being removed unjustifiably, but does not speci-

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180 Statistic Brain, “YouTube Statistics.”
182 Case C-360/10 SABAM v Netlog para 46.
183 SWD(2016) 301 final, Impact Assessment Part 3/3, page 166: referencing their reply to the public consultation on online platforms: https://ec.europa.eu/eusurvey/pdf/answer/6acf2b21-865a-402c-876a-e2b67c0ceef9
185 Ibid. Article 37.
fy what procedures. Moreover, available "complaints and redress mechanisms" for users are explicitly required by the Proposal Article 13(2).

Despite these, the automatic nature of technical measures would mean that users' content would be filtered at a much faster rate than their complaints would be addressed. In particular, to ensure the liability exemption in the ECD Article 14 continues to apply: once the service provider has gained knowledge of illegal content on their service, they must remove or disable access to it "expeditiously". This timeframe can be quite short. For instance, in situations where infringing content is being live streamed, waiting an hour to verify the correctness of the technology’s assessment would be pointless if the aim is to stop the infringement from occurring. This requirement would make it difficult for the findings of the content recognition technology to be verified by humans before removing or disabling access to it. Additionally, the vast amount of content being shared each day also impedes the ISSPs from being able to follow due process when filtering and removing content through technical and automatic means. Even if only a small portion of YouTube’s 300 hours of uploaded content per minute sets off the content recognition technologies, it would require considerable manpower if the content were to be verified by humans before being taken down expeditiously. The commission has previously stated that it is important that ISSPs make swift decisions regarding the removal of content, but that they also apply adequate safeguards. But the more time efficient the removal of content becomes, the less accurate and cautious it will be. Furthermore, this concern is even more troubling when content recognition technologies have known to be mistaken in the past. The Impact Assessment states that available technologies, which can be used for audio, visual or video content, have a “very high” level of accuracy. However, it seems that this accuracy relates to matching shared content with protected works; there are few false negatives, but it does not specify the rate of success regarding false positives. The Impact Assessment reports this possibility, specifying that the risk is particularly associated with automated notification.

The content recognition technologies would have to be highly intelligent to recognise the difference between when content is uploaded in a copyright infringing manner versus when it falls under one of the exceptions and limitations of copyright, such as for educational use.

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190 YouTube alone receives 300 hours of uploaded video content each minute, data from 2016, see Statistic Brain, “YouTube Statistics.”
195 Directive 2001/29/EC Article 5(3)(a) and Recitals 14 and 34.
There are already multiple examples of such technologies not achieving such differentiations. The Impact Assessment also presents technological protection measures as a frequent obstacle for learning institutions and educators when wanting to use illustrative content in teaching activities.

Requesting ISSPs to use content recognition technologies would be a form of private censorship. If ISSPs are forced to take on the role of policing their platforms, where they risk financial liability if they do not remove illegal user-generated content immediately, then they will sooner remove legal content placed in a grey zone, rather than take on the financial risk of letting it stay. This would de facto be censorship and a direct violation on freedom of expression. Unfortunately, with the ever-increasing regulation of digital content, the private policing trend may be difficult to stop.

Although the case law of the ECtHR falls outside the scope of this thesis, the Court has an interesting point of view in the Delfi case. In the case the dissenting judges pointed to the potential consequences of introducing a norm of liability for user-generated content without actual knowledge of what it consists of. The simplest way of showing prior restraint is by deactivating the comments option on their portal. Even without the specific use of content recognition technologies, some ISSPs may quickly find that the simplest way to avoid liability when forced to implement preventative measures as required by the Proposal Article 13, is to limit or remove the ability for users to share content. The dissent clearly stated that “freedom of expression cannot be a matter of a hobby”; a statement which legal scholars have concurred with.

The Commission admits that the removal of legal content impacts freedom of expression. All things considered, the obligation found in Article 13 amounts to a limitation on Internet users’ freedom of expression. The argument that private censorship and policing may have negative consequences to information flow and freedom of expression should be taken seriously. For many people online platforms are their main source of information.

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198 OHCHR. “Report on the promotion and protection of the right to freedom of opinion and expression,” page 10.
199 ECtHR Case of Delfi AS v. Estonia (Application no. 64569/09).
200 Ibid. dissent para 8.
201 For instance: Husovec “General monitoring of third-party content.”
4.1.3 Data Privacy

Users have a right to respect for private life and protection of personal data. To establish an interference with these rights it is not necessary for the data concerned to be sensitive or that the persons concerned have been inconvenienced by the monitoring. In SABAM v Netlog the CJEU also stated that the implementation of a filtering system would require the "identification, systematic analysis and processing of information" connected with the service's users, which would violate Article 8 of the Charter. The use of content recognition technologies would not only filter through content which is knowingly interfering with copyright, it would also filter through user-created content and would have to process user-data. The content of the user-created works could be anything and might feature the users themselves. Even the Impact Assessment uses “family pictures” as an example of plausible content.

In the Digital Rights Ireland case the Data Retention Directive was found to be a serious infringement on the right to respect for private life and the right for the protection of personal data in the Charter as it imposed an obligation on providers of publicly available electronic communications services to retain data relating to persons' private life and communications. The Court found that the EU legislator had exceeded the limit of proportionality in the Charter Article 52(1) and the Directive was subsequently found invalid.

For the question of the Proposal, the infringements on Articles 7 and 8 of the Charter consists of mass monitoring of user-generated content. Contrary to the Digital Rights Ireland case, the Proposal concerns monitoring of content, not just the time, duration, source, destination et cetera of correspondence. On the other hand, the content that the ISSPs must filter under the Proposal is content made available to the public. One could definitely argue that content which has already been made publicly available does not warrant the same protection from surveillance as private correspondence, in particular concerning Article 7, the respect to private life. But this argument depends on the interpretation of public availability in the Proposal's Article 13. Furthermore, to implement this ex ante monitoring, platforms may quickly

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204 Case C-293/12 Digital Rights Ireland, para 33.
205 Case C-360/10 SABAM v Netlog, para 49.
208 Directive 2006/24/EC of the European Parliament and of the Council of 15 March 2006 on the retention of data generated or processed in connection with the provision of publicly available electronic communications services or of public communications networks
209 Charter Article 7.
210 Charter Article 8.
211 Case C-293/12 Digital Rights Ireland, para 34-37.
212 Case C-293/12 Digital Rights Ireland, para 34 cont.
213 Directive 2006/24 Articles 3, 4 and 5.
214 Considering the phrase "provide to the public access" to content in the Proposal Article 13
be tempted to curtail their users' privacy rights if it can improve their monitoring system, to not risk any liability claims from rightholders.\textsuperscript{215}

Also, considering that ISSPs do not need to inform users of their monitoring under the Proposal, meaning users will not know which service providers are monitoring what, users may easily feel that their activities online are under constant surveillance.\textsuperscript{216} However, the ISSP will be required to inform the user (or data subject) of certain aspects related to the data processing; the regulation of which will be stricter once the General Data Protection Regulation enters into force in May 2018.\textsuperscript{217}

Therefore, considering the obligation to monitor content, the Proposal imposes an interference on users' right to respect for private life and the right for the protection of personal data protected in the Charter.

4.2 **Charter Article 52(1) Cont.**

It is well established by CJEU jurisprudence that "restrictions may be imposed on the exercise of fundamental rights, in particular in the context of a common organisation of the market".\textsuperscript{218} But such restrictions must be in accordance with the Charter Article 52. Any infringement on the Charter must be provided for by law, respect the essence of those rights and freedoms, and subject to the principle of proportionality must be necessary and "genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others".\textsuperscript{219} If these requirements are not fulfilled the legislation will become void.\textsuperscript{220} If the Proposed Copyright Directive is implemented, then the interference will be provided for by law.\textsuperscript{221}

In the current case, the right of rightholders to protect, authorise the distribution of and be remunerated for their protected works is being enforced, to the detriment of the ISSPs right to conduct a business, data privacy and the freedom of expression. Therefore, the question remains whether this is a proportionate interference to protect the IPR of rightholders.

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\textsuperscript{215} Valcke et al., “Did the Romans get it Right?” page 102.
\textsuperscript{216} Compare with: Case C-236/09 Digital Rights Ireland, para 37.
\textsuperscript{217} Regulation (EU) 2016/679, Articles 11-14, see also EP, “Resolution on online platforms and the digital single market,” point 39.
\textsuperscript{218} Case C-292/97 Kjell Karlsson, para 45.
\textsuperscript{219} Charter Article 52.
\textsuperscript{220} Charter Article 52; as happened in Case C-236/09 Digital Rights Ireland regarding Directive 2006/24/EC.
\textsuperscript{221} Although the lack of clarity presented above could be problematized with regards to the condition of provision by law in the Charter Article 52(1), this will not be discussed in this thesis, since it would require a thorough analysis and is considered to fall more within the category of human rights law rather than intermediary liability.
4.2.1 Proportionality

CJEU case-law states that the principle of proportionality in the Charter Article 52(1) “requires that measures implemented by acts of the European Union are appropriate for attaining the objective pursued and do not go beyond what is necessary to achieve it.” As briefly mentioned above, Article 13 of the Proposal will have a positive impact on copyright protection, seeing as it gives rightholders more control over the use of their works.

In SABAM v Netlog the CJEU found that not only was the suggested filtering obligation in conflict with the ECD Article 15, but it also did not achieve the “fair balance” required by the Charter. The CJEU held that the filtering obligation failed to achieve a fair balance between the right to protection of IPR and the intermediary's freedom to conduct a business; stating that the filtering obligation was a "serious infringement" to the latter. In addition to this came the users’ rights in the form of freedom of expression and information and data privacy; meaning that the filtering obligation was not proportional vis-à-vis merely one of the protected rights listed above.

One could, however, argue that since most ISSPs already impose such filtering obligations for their own purposes, that it would not change the current situation to require ISSPs to continue to do so. But as Dr. Angelopoulos has pointed out, fundamental rights do not usually bind private parties, but State authorities. MS cannot impose obligations on private parties that restrict citizens’ fundamental rights and freedoms. Rather, MS are obligated to ensure that their citizens benefit from the fundamental rights and freedoms listed in the Charter.

4.3 Conclusion

The EP has also stressed the importance of the current limits on liability for online intermediaries found in the ECD, as "protection of the openness of the internet, fundamental rights, legal certainty and innovation". If the Proposal is implemented as suggested, we risk shifting those limits of liability for ISSPs.

To conclude, implementing the Proposed Copyright Directive would conflict with the fundamental rights protected by the Charter. Although the protection of intellectual property would be strengthened, both the rights of the ISSPs to conduct their business and the rights of the users to freedom of expression and information and protection of data privacy would be weakened. This does not balance out. In particular when consider the large group of users

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222 Case C-92/09 and C-93/09 Volker and Hartmut Eifert v Land Hessen, para 74.
223 Charter Article 17(2).
225 C-360/10 SABAM v Netlog, para 51.
who would be affected and the tremendous importance of freedom of expression and data privacy, in particular in today's digital environment.

Therefore, although the measures suggested in the Proposal Article 13 "protect the rights and freedoms of others", they do not conform to the principle of proportionality and are not compatible with the Charter. Had the Proposal aimed to protect society from a more serious threat than infringement of IPRs, the balance of interests may have been concluded differently. For instance, similar filtering measurements could be used to detect and remove content inciting terrorist acts. Everyone has the right to life, liberty and security. Therefore, one might argue that terrorism is a more significant concern than IPR and that the fight against it is a more justifiable reason for invasion of privacy and freedom of expression. Although that is not to say that the fight against terrorism in itself justifies monitoring of online content. Such a conclusion would require a proper and specific assessment, which falls outside the scope of this thesis.

5 Conclusion

As the above assessment demonstrates, there are multiple disparities between the Proposed Copyright Directive Article 13, read in conjunction with Recitals 37-39, and other European legislation. For the question of the Proposal's nonconformity with the ECD, the relationship between the two could simply be addressed by the Proposal. Alternatively, a change could be made to how the ECD currently reads. Some scholars argue that developments in case law have rendered the ECD useless and time for revision is overdue.

Another option is to change the wording of Article 13; some suggested amendments have been noted throughout Chapter 2. Overall, an amendment close to that suggested by the Committee on Legal Affairs’ may be the best outcome. Not only because it would not disturb the current intermediary liability framework to the same extent as the Proposal, but also because a change in the wording would be necessary for it to be in conformity with the Charter. In particular, by removing the suggested "content recognition technologies", much would be improved.

Furthermore, one of the aims of the Proposal was to clarify the regulation of liability for user-generated content for ISSPs. As the analysis in Chapter 2 demonstrates, this can hardly be said to have been achieved with the current phrasing of the Proposal Article 13 and the rele-

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229 Charter Article 52(1)

230 European Council meeting of 22-23 June 2017. The conclusion expresses an expectation of development of such technologies and tools with an aim of detecting and removing content inciting to terrorist acts, and if necessary, EU legislative encouraging such development, see page 2.

231 Charter Articles 1(1) and 6.

232 Valcke et al., “Did the Romans get it Right?” page 102.
vant Recitals. A phrasing that is more easily recognisable as being in conformity with the current framework would do much to avail this.
6 References

6.1 European Legislation

Chronologically by date

6.1.1 EU Directives


http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A32004L0048R%2801%29

6.1.2 Other Legislation

http://www.echr.coe.int/Documents/Convention_ENG.pdf

Charter of Fundamental Rights of the European Union (2012/C 326/02). Date of publication 26 October 2012. 

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

6.2 Case Law

Chronologically by date

6.2.1 CJEU Case Law

Case C-292/97 Kjell Karlsson and Others. Judgment of the Court (Sixth Chamber) of 13 April 2000. 

Case C-306/05 SGAE Sociedad General de Autores y Editores de España v Rafael Hoteles SA. Judgment of the Court (Third Chamber) of 7 December 2006. 

Case C-92/09 and C-93/09 Volker und Markus Schecke GbR (C-92/09) and Hartmut Eifert (C-93/09) v Land Hessen. Judgment of the Court (Grand Chamber) of 9 November 2010.

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Case C-360/10 Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV. Judgment of the Court (Third Chamber), 16 February 2012.


Case C-314/12 UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH. Judgment of the Court (Fourth Chamber), 27 March 2014.

Case C-293/12 Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and Others and Kärntner Landesregierung and Others. Judgment of the Court (Grand Chamber), 8 April 2014.

Case C-160/15 GS Media GS Media BV v Sanoma Media Netherlands BV and Others. Judgment of the Court (Second Chamber) of 8 September 2016.
Case C-484/14 Tobias McFadden v Sony Music Entertainment Germany GmbH. Judgment of the Court (Third Chamber) of 15 September 2016.

Case C-610/15 Stichting Brein v Ziggo BV and XS4All Internet BV. Opinion of Advocate General Szpunar delivered on 8 February 2017.


Case C-610/15 Stichting Brein v Ziggo BV and XS4All Internet BV. Judgment of the Court (Second Chamber) of 14 June 2017.

6.2.2 Other Case Law


Case of Delfi AS v Estonia (Application no. 64669/09), 16 June 2015, Available at:
http://hudoc.echr.coe.int/eng?i=001-155105

6.3 EU Documents and Websites

Chronological by Date


Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions. “Online Plat-
forms and the Digital Single Market Opportunities and Challenges for Europe.”

http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX%3A52016DC0592


6.4 Other Legal Documents


6.5 Books, Journal Articles and Studies


https://doi.org/10.1093/jiplp/jpv200


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http://dx.doi.org/10.2139/ssrn.2567183


### 6.6 Internet Articles


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