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ONLINE PLATFORMS AND THE VALUE GAP

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Art. 13(1) Proposed DSM Directive

- Bulgarian Council Presidency: compromise proposal of May 17, 2018
- ‘Member States shall provide that an online content sharing service provider performs an act of communication to the public or an act of making available to the public when it ~~intervenes in full knowledge of the consequences of its action to~~ gives the public access to copyright protected works or other protected subject matter uploaded by its users.’


Remarkable step

abandonment
of knowledge
criterion

independent,
separate
exclusive right

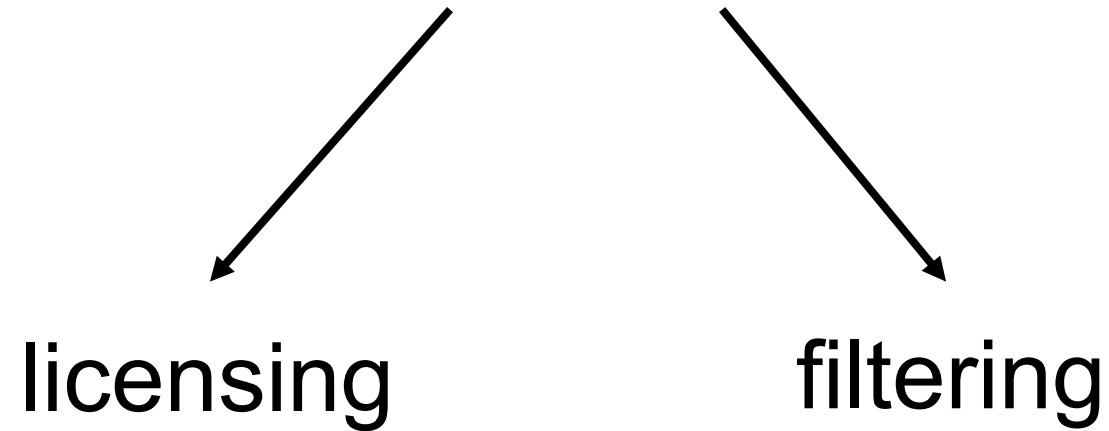


Bulgarian compromise proposal

- ‘An online content sharing service provider shall **obtain an authorisation** from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC in order to communicate or make available to the public works or other subject matter.
 - Where no such authorisation has been obtained, the service provider shall **prevent the availability** on its service of those works and other subject matter, including through the application of measures referred to in paragraph 4.’
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= no strict liability

...two options instead:



LICENSING

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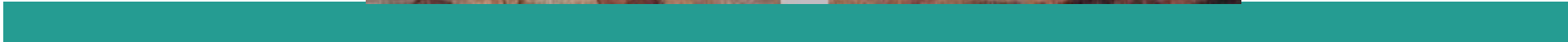


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Bulgarian compromise proposal

- ‘Member States shall provide that when an authorisation has been obtained, including via a licensing agreement, by an online content sharing service provider, **this authorisation shall also cover acts of uploading by the users** of the service falling within Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis.’





Licenses for Europe

- enormous rights clearance task in light of the content diversity of online platforms
- umbrella licensing agreements with collecting societies available?
- indemnification against claims of non-members offered?
- collecting societies flexible enough to support new business models?
- licensing models applied in the case of orphan works an encouraging example?

Elephant in the room

**cross-border
licenses for entire
EU territory**

Loss of user autonomy and
freedom of expression?

from open,
participative platforms
of the web 2.0

to content
platforms resembling
TV channels




FILTERING

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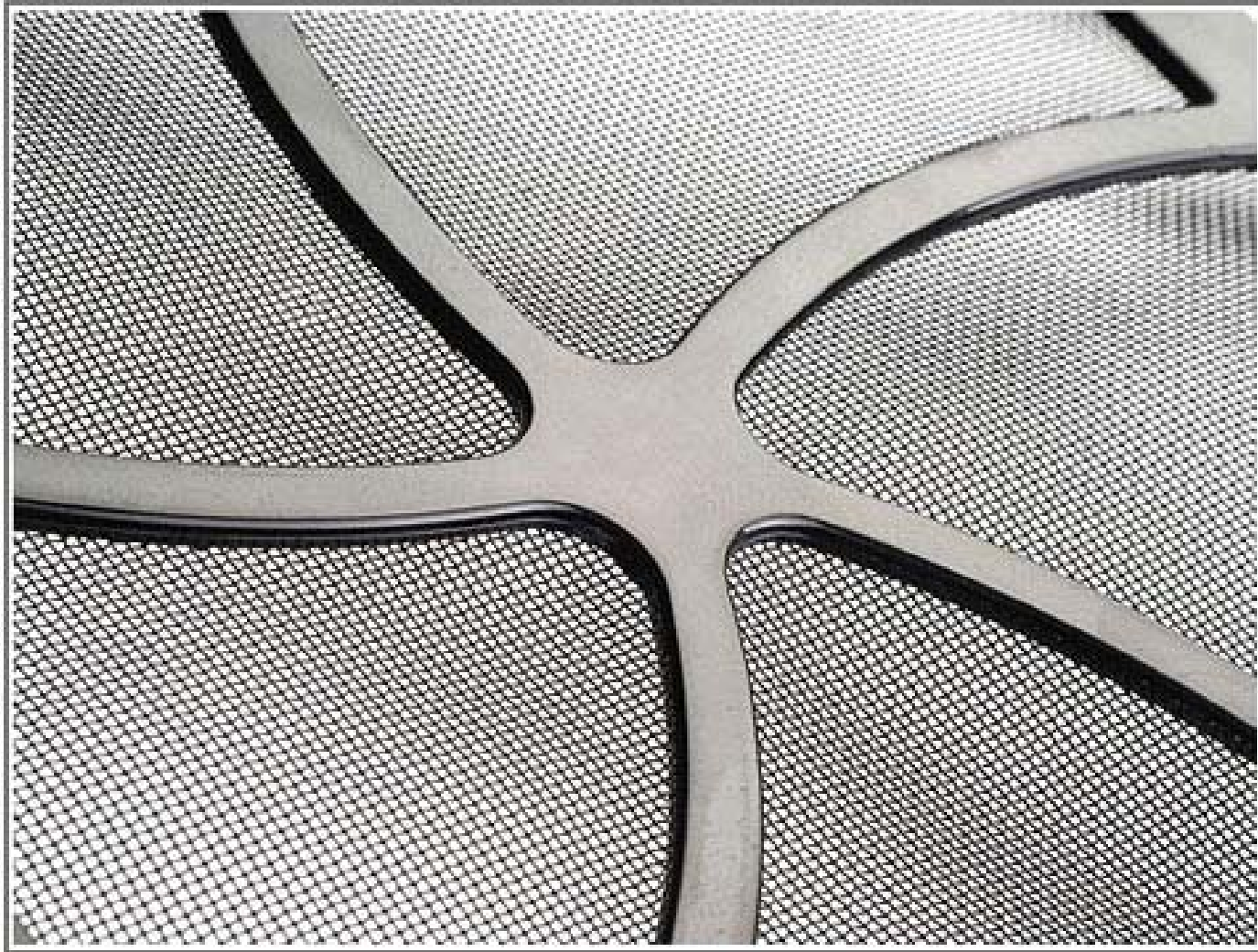


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Art. 13(4)(a) Proposed DSM Directive

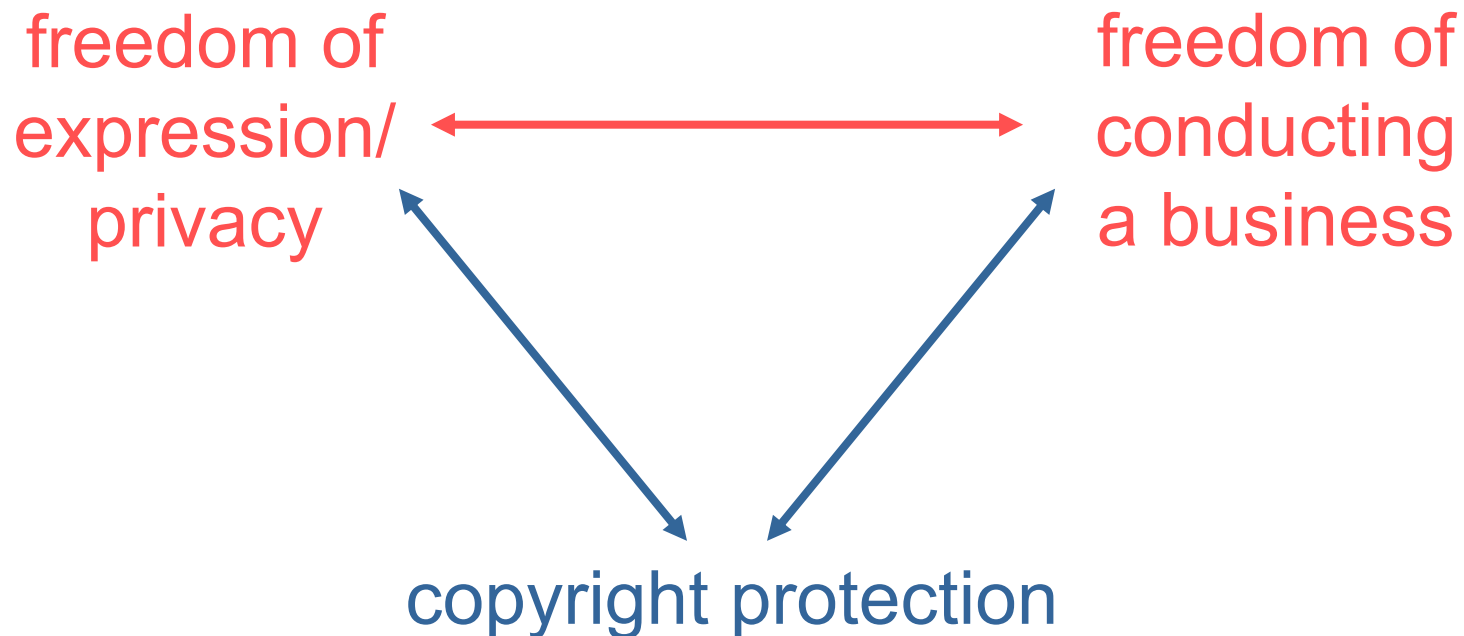
- Bulgarian compromise proposal
 - ‘...made best efforts to prevent the availability of specific works or other subject matter **by implementing effective and proportionate measures [...] to prevent the availability** on its services of the specific works or other subject matter identified by rightholders and for which the rightholders have provided the service with **relevant and necessary** information for the application of these measures;...’
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Effective and proportionate measures



CJEU, 24 November 2011, case C-70/10, Scarlet/Sabam

- copyright owner: erosion of copyright?
- platform provider: too heavy a burden?
- internet users: sufficient safeguards?




Much reliance on **diligent** industry cooperation (Art. 13(5))

**who represents the
public interest?**




Member State assessment of effectiveness and proportionality (Art. 13(5))

**‘...endeavour to
establish mechanisms
to facilitate the
assessment...’**




Art. 13(7) Proposed DSM Directive

- Bulgarian compromise proposal
 - ‘Member States shall ensure that the measures referred to in paragraph 4 are implemented by the online content sharing service provider **without prejudice to the possibility for their users to benefit from exceptions or limitations to copyright.**’
 - complaint and redress mechanism for users
 - within ‘reasonable’ time period
 - endeavour to create **independent bodies**
 - rightholders must justify content blocking
- 

Risk of market concentration

- big players already have quite sophisticated filtering systems in place
- filter obligation = entrance barrier for (small) newcomers
 - need to develop and refine own systems
 - simple systems lead to overblocking and competitive disadvantage
 - additional administrative burdens (complaint mechanisms, reporting obligations)
 - **new:** SME and micro privilege (Art. 13(5)(a))

Bulgarian compromise proposal

- no disproportionate obligations intended
 - ‘The measures should be proportionate in order to avoid imposing disproportionately complicated or costly obligations on certain online content sharing service providers, taking into account notably their small size.’ (Recital 38e Proposed DSM Directive)
 - no filter obligation without **necessary and relevant** data (Recital 38ca)
 - amount and type of uploaded works to be taken into account (Recital 38e)
- 



THE END. THANK YOU!



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