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VALUE GAP – ARTICLE 17 DSM DIRECTIVE

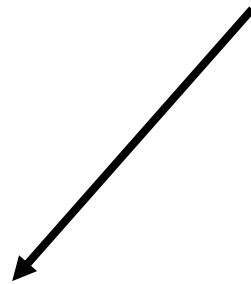
Prof. Dr. Martin Senftleben



IS VERDER KIJKEN

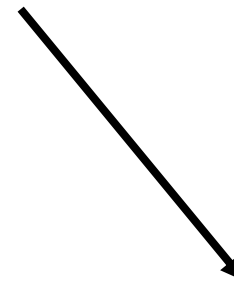
New legal framework

...two central elements:



licensing

(Art. 17(1) DSM
Directive)



filtering

(Art. 17(4) DSM
Directive)

Elephant in the room

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

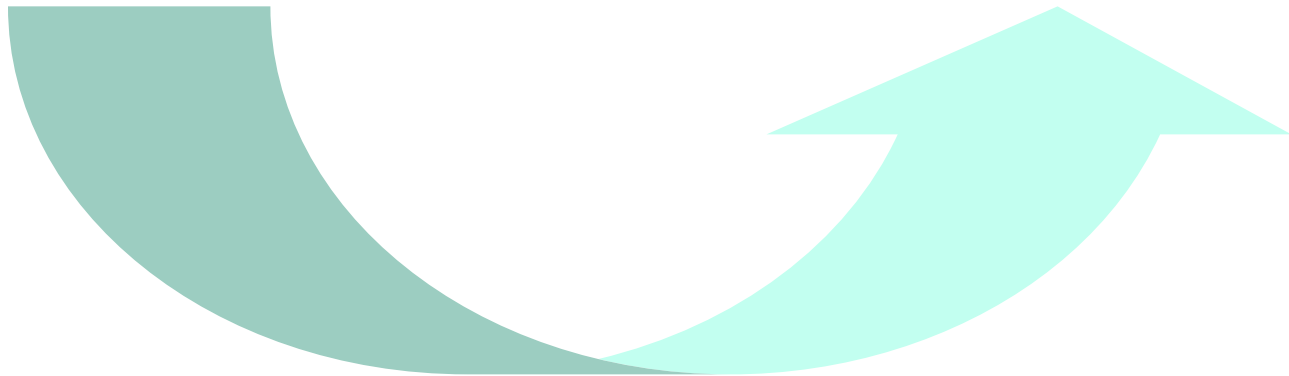
Challenge for both sides

- 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?

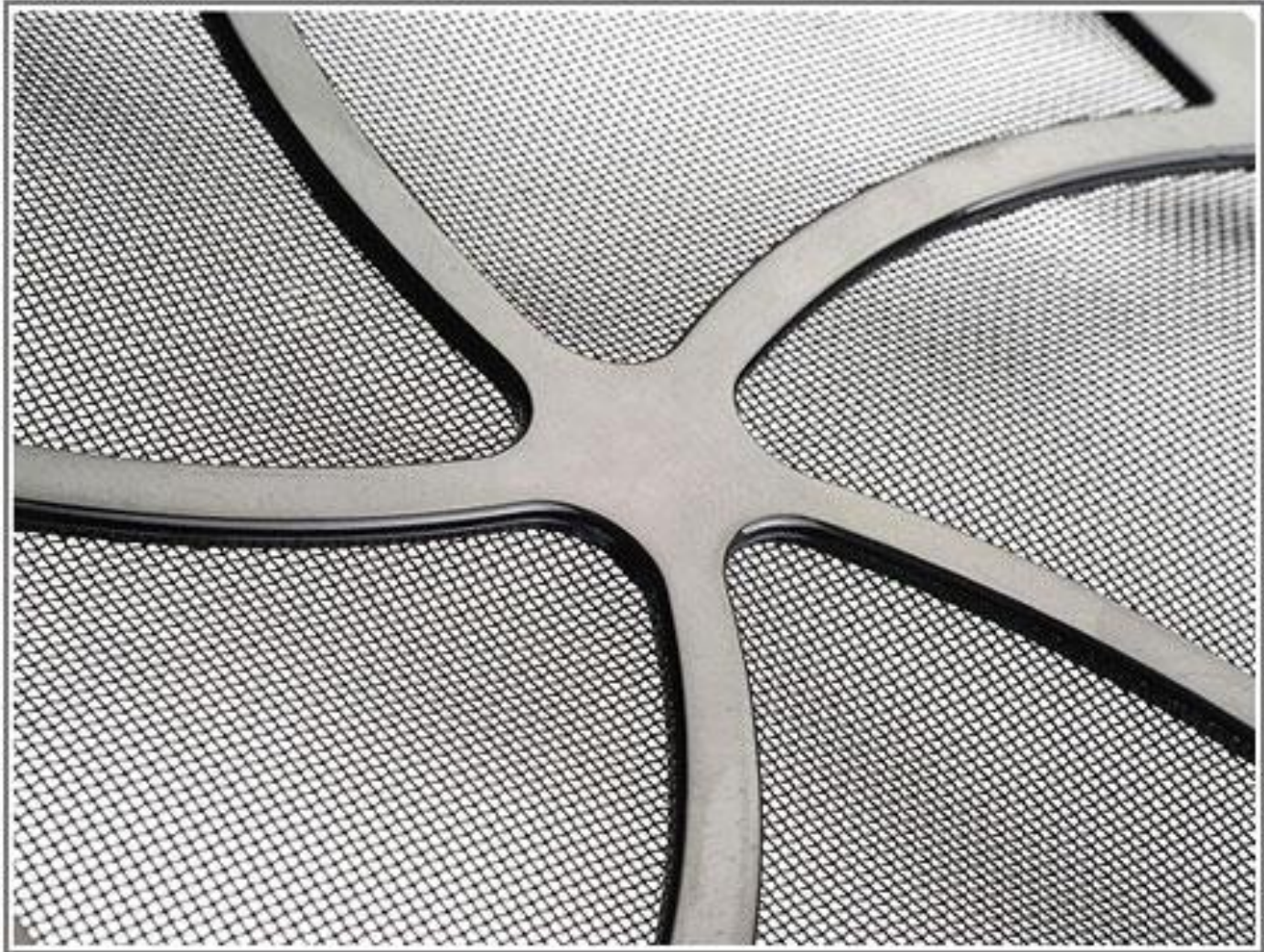
What if no licenses for Europe become available?

from open,
participative
platforms of the
web 2.0

to content
platforms
resembling TV
channels?

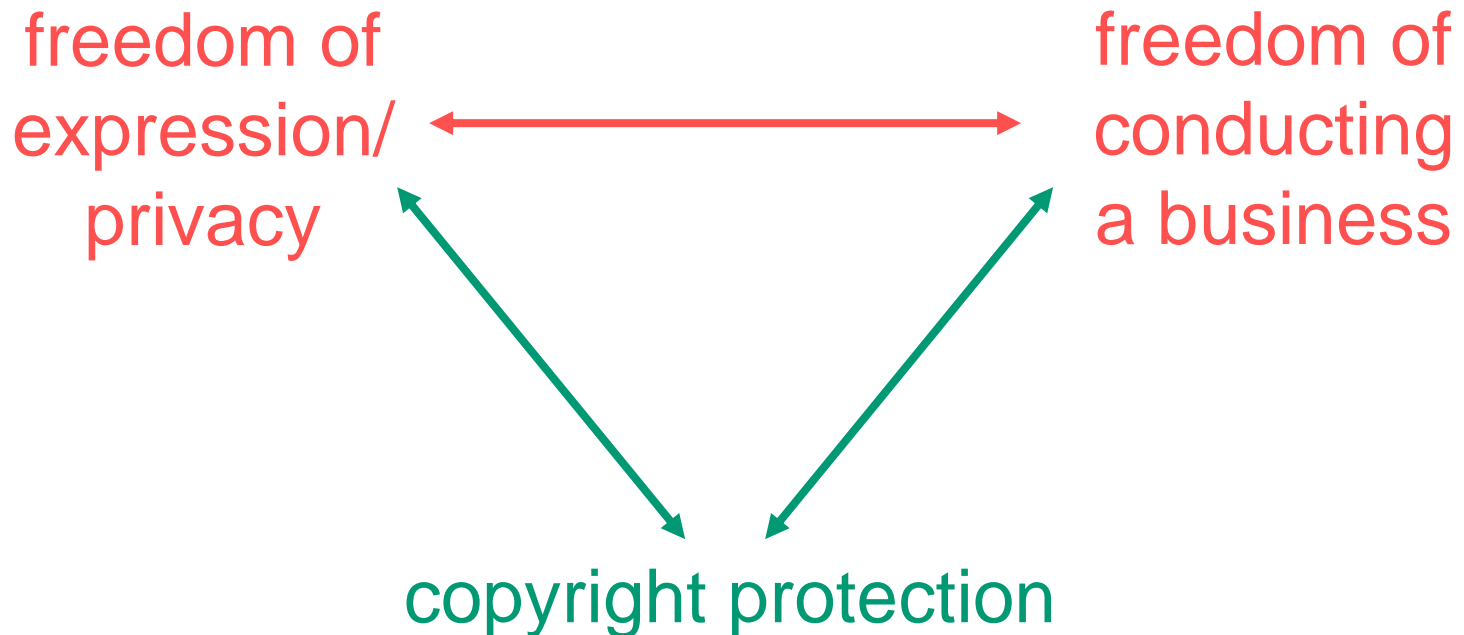


Filtering



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

- general filtering obligation impermissible
- focus on notified works specific enough?



Much reliance on industry cooperation

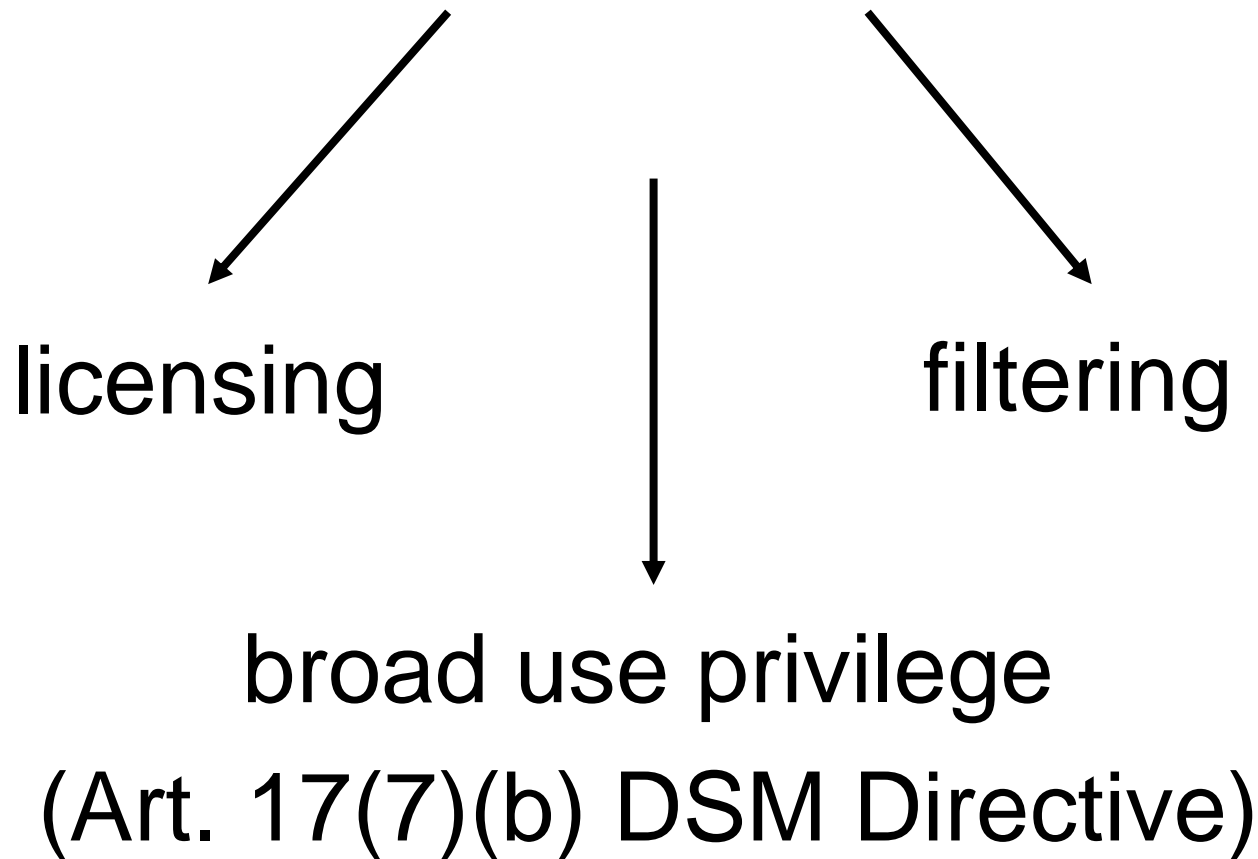
**who represents the
public interest?**

Art. 17(5) and (8) DSM Directive

- ‘The cooperation between online content service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users which do not infringe copyright and related rights, including where such **works or subject matter are covered by an exception or limitation.**’
- focus on quotation, parody, pastiche
- complaint and redress mechanism for users
- reply within ‘reasonable’ time period

Why not a broader limitation?

...third, alternative element:

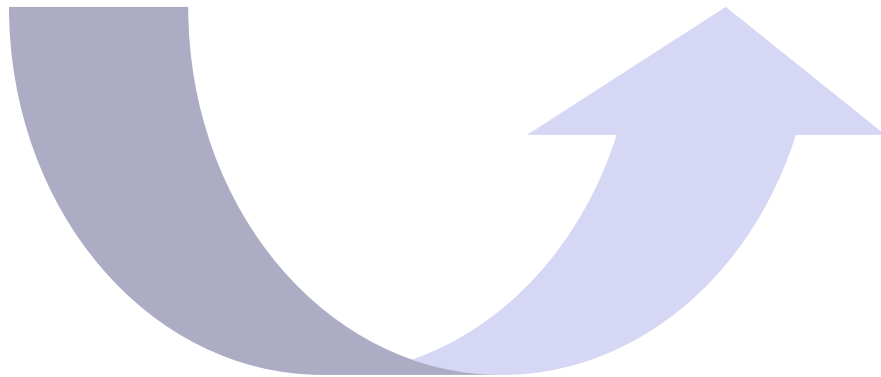


Art. 5(3)(k) Copyright Directive

‘... use for the purpose of caricature, parody or **pastiche**;...’

broad
exclusive
rights

closed list of
permissible
limitations



Pastiche?

The image shows a browser window with a YouTube search for 'funny animal'. The browser tabs include 'Intel. eigendom en technisc' and 'funny animal - YouTube'. The address bar shows the search results URL. A Google privacy notice is visible at the top. The YouTube interface includes a search bar with 'funny animal', a left sidebar with navigation options like Home, Trending, and Abonnementen, and a main content area with video results. The results list include 'Top 200 Highlights of Animals - VERY FUNNY ANIMALS', 'FUNNY ANIMALS: Try not to LAUGH - The FUNNIEST ANIMAL videos', 'ANIMAL & PET VIDEOS way FUNNIER THAN YOU EXPECT! - LAUGH HARD NOW!', and '[30 MIN] ULTIMATE Funny Animals Compilation 2018 - Best Animal Videos | Funny Vine'. Each result includes a thumbnail, title, channel name, view count, and upload date.

Intel. eigendom en technisc funny animal - YouTube

https://www.youtube.com/results?search_query=funny+animal

Conform de wetgeving ten aanzien van de bescherming van gegevens verzoeken we je even de tijd te nemen om de belangrijkste punten van ons Privacybeleid door te lezen. Dit beleid geldt voor alle services van Google. Het beschrijft gegevens gebruiken en welke opties je hebt. **Je moet dit vandaag nog doen.**

YouTube NL

funny animal

FILTEREN

Top 200 Highlights of Animals - VERY FUNNY ANIMALS
Teen Titans Go! • 160 mln. weergaven • 1 jaar geleden
Top 200 Highlights of Animals - VERY FUNNY ANIMALS.

FUNNY ANIMALS: Try not to LAUGH - The FUNNIEST ANIMAL videos
Tiger Productions • 3,9 mln. weergaven • 1 jaar geleden
Just look how all these dogs, puppies, cats, kittens, goats, horses,... behave, play, fail, make funny sounds, react to ...

ANIMAL & PET VIDEOS way FUNNIER THAN YOU EXPECT! - LAUGH HARD NOW!
Tiger Productions • 1,9 mln. weergaven • 5 maanden geleden
The best entertainment are funny animal videos. Animals and pets never fail to make us smile and laugh! Here are the best and ...

[30 MIN] ULTIMATE Funny Animals Compilation 2018 - Best Animal Videos | Funny Vine
Funny Vines • 7,6 mln. weergaven • 1 jaar geleden
Brand new weekly funny vines compilation of August 2018 featuring the funniest animal & pet clips, bloopers, fails, reactions and ...

Funniest Animals - Try Not To Laugh - Funny Domestic And Wild Animals' Life
Funny Animals' Life • 10 mln. weergaven • 3 maanden geleden
Enjoy new funniest and cutest compilation of the week about wild and domestic animals. Try not laugh

CJEU, 3 September 2014, case C-201/13, Deckmyn/Vandersteen

- parody = autonomous concept of EU law
 - reference point: usual meaning in everyday language (para. 20)
- pastiche = autonomous concept as well?
 - usual meaning in everyday language?
 - ‘pastiche’ broad enough to cover user-generated content mash-ups and remixes?

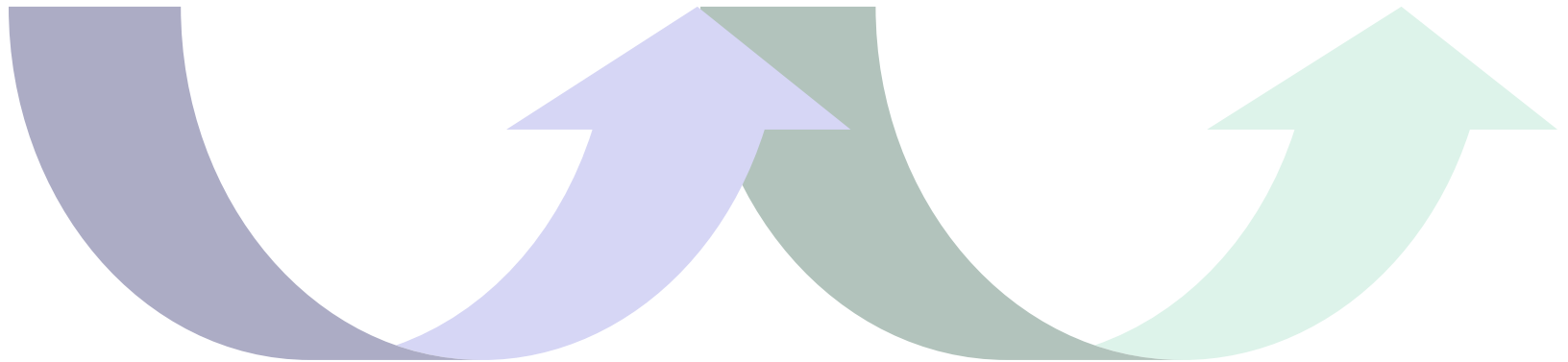
Art. 5(3)(k) Copyright Directive

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three-step
test



Compliance with three-step test? <https://ssrn.com/abstract=3325017>



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User-Generated Content – Towards a New Use Privilege in EU Copyright Law

*RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND DIGITAL TECHNOLOGIES, Tanya Aplin, ed.,
Cheltenham: Edward Elgar Publishing 2019, Forthcoming*

26 Pages • Posted: 7 Feb 2019

[Martin Senfleben](#)

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Advantage: reverse filtering logic

from focus on
takings from
protected works

to focus on
creative elements
added by users





THE END. THANK YOU!



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