

# The 'Value Gap' and the New Proposal for a Directive on Copyright in the DSM

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# The 'Value Gap'

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the **misalignment** between the volume of creative content accessed globally by users through certain online platforms (ad-funded platforms) and the revenue that this access generates for the holders of copyright and related rights in that content.

# Copyright in the DSM

Proposal for a  
DIRECTIVE OF THE EUROPEAN PARLIAMENT  
AND OF THE COUNCIL

**on copyright in the Digital Single Market**

(COM(2016) 593 final)

# Copyright in the DSM

**3 MAIN  
INCOMPATIBILITIES  
WITH EXISTING EU LAW**

# Incompatibility 1

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## Recital 38 of the Proposal

‘Where information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements with rightholders, unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC [“E-Commerce Directive”].’

# Incompatibility 1

storing and providing access to the public to protected content uploaded by users

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going beyond the mere provision of physical facilities and performing an act of communication to the public (CttP)

# Incompatibility 1

CJEU:

No judgment on hosting

FR:

Hosting = CttP (YouTube/Dailymotion)

BUT: heavy reliance on safe harbours

DE:

Hosting ≠ CttP (YouTube)

INSTEAD: ‘*Störerhaftung*’

UK:

Usenet, BitTorrent, steaming  
= CttP / Popcorn Time ≠ CttP

BUT: heavy reliance on ‘highly material intervention’

# Incompatibility 2

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# Incompatibility 2

## Article 13(1) of the Proposal

‘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 [...], such as the use of effective content recognition technologies, shall be appropriate and proportionate.’

# Incompatibility 2

## Article 15(1) E-Commerce Directive

‘Member States shall not impose a general obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.’

# Incompatibility 2

**‘effective content recognition technologies’ =  
general monitoring**

Infringing content can only be ‘effectively recognised’ on a platform by a technological tool if that tool monitors all or a lot of the content on that platform.

It is not possible to ‘recognise’ unlawful content by only monitoring content that is unlawful.

# Incompatibility 2

## *SABAM v Netlog (C-360/10)*

‘the injunction imposed on the hosting service provider requiring it to install the contested filtering system would oblige it to actively monitor almost all the data relating to all of its service users in order to prevent any future infringement of intellectual-property rights. It follows that that injunction would require the hosting service provider to carry out general monitoring, something which is prohibited by Article 15(1).’

# Incompatibility 3

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‘**Fair Balance**’ between competing fundamental rights

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## **SABAM v Netlog (C-360/10)**

‘in the context of measures adopted to protect copyright holders, national authorities and courts must strike a **fair balance** between the protection of copyright and the protection of the **fundamental rights** of individuals who are affected by such measures.’

# Incompatibility 3

## *SABAM v Netlog (C-360/10)*

‘Consequently, it must be held that, in adopting the injunction requiring the hosting service provider to install the contested filtering system, the national court concerned would **not** be respecting the requirement that **a fair balance** be struck between the right to intellectual property, on the one hand, and the freedom to conduct business, the right to protection of personal data and the freedom to receive or impart information, on the other.’

# Incompatibility 3

**Freedom to conduct a business (Article 16 CFREU):** ‘a complicated, costly, permanent computer system at its own expense.’

**Protection of personal data (Article 8 CFREU):** ‘would involve the identification, systematic analysis and processing of information connected with the profiles created on the social network by its users. The information connected with those profiles is protected personal data because, in principle, it allows those users to be identified.’

**Freedom of expression (Article 11 CFREU):** ‘might not distinguish adequately between unlawful content and lawful content, with the result that its introduction could lead to the blocking of lawful communications.’

# Conclusion

The current Proposal is incompatible with the E-Commerce Directive and the Charter of Fundamental Rights.

It should be significantly amended or withdrawn.

# Thank you for your attention!

