



HIGH COUNCIL FOR LITERARY AND ARTISTIC PROPERTY

*REPORT BY THE RESEARCH MISSION ON RECOGNITION TOOLS FOR COPYRIGHT-
PROTECTED CONTENT ON DIGITAL PLATFORMS*

COPYRIGHT PROTECTION ON DIGITAL PLATFORMS: EXISTING TOOLS, GOOD PRACTICE AND LIMITATIONS

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- the content of the report reflects the authors' view only –*

FINAL REPORT

Summary

According to a study by the European Grouping of Author and Composer Societies (GESAC)¹, cited by the impact study on the European Commission's Proposal for a Directive on copyright issued in September 2016, two-thirds of videos published on YouTube contain copyright-protected works (primarily musical), and over half have been published online without the initial authorisation of the rightholder². These figures show that access to cinematographic, audiovisual and musical works is one of the key reasons why users access video-sharing platforms. This is also the case for the sharing of other types of content (music, images and texts), even though special platforms for these domains often have fewer users.

This finding led the European Commission to propose (in Article 13 of the above-mentioned Proposal for a Directive) that these platforms should be required to implement technical tools to protect copyright, primarily by blocking content for which rightholders have provided a digital fingerprint. Rightholders would be able to select a 'monetisation' option under which they would receive any advertising revenue related to their works, following the deduction of a generally substantial commission for the platform³, and, where relevant, remuneration of the user if they produce their own creative work based on the original work. This option is usually applied to musical works. The fact that platforms can generate new revenue streams using this option has offered them a powerful incentive to implement their own tools, even though third-party companies offer content blocking solutions at a relatively low cost.

The mission sees as a positive step the fact that, in addition to a number of rightholder-platform licence agreements having been entered into, some of the platforms have committed to cooperation agreements with rightholders⁴. A specific example is the adoption of the 'Principles for User Generated Contents' code of conduct in the United States in 2007. More recently, in 2013, Google/YouTube entered into an agreement with the Spanish copyright revenues collecting society Egeda on the use of its automatic content recognition tool. It also signed a broader cooperation agreement in September 2017 with the French Association against Audiovisual Piracy (ALPA)⁵ and the National Centre for Cinematography and the Moving Image (CNC)⁶. Similar agreements are underway with Facebook and Dailymotion.

Nevertheless, the mission has concluded that the rather patchy European framework in this area, which covers the 'notice and take down' procedure for infringing content, and the content blocking tools implemented by certain platforms, has three major drawbacks: firstly, a great deal of legal uncertainty for platforms, secondly, insufficient protection for rightholders and thirdly, a lack of guarantees for users acting in good faith. The European Commission has attempted to provide some initial solutions to these difficulties in its Communication on tackling illegal content online⁷ dated 28 September 2017, noting that it was considering the option of proposing new legislation in this area in 2018. However, this Communication

¹ https://www.rolandberger.com/gallery/pdf/Report_for_GESAC_Online_Intermediaries_2015_Nov_EUR.pdf

² These works are not published online by rightholders, but monetisation agreements have been entered into between certain platforms and rightholders.

³ In the region of 50% of YouTube's revenue.

⁴ Independently of the agreements covering search engines, which do not fall within the scope of this mission.

⁵ Association française de lutte contre la piraterie audiovisuelle (ALPA)

⁶ Centre national du cinéma et de l'image animée(CNC)

⁷ [Reference COM\(2017\) 555 final](#)

primarily refers to infringements such as inciting racial hatred or terrorism and child pornography.

Now more targeted solutions are required for the digital piracy of protected works on online sharing platforms. It is for this reason that the mission supports, in principle, Article 13 of the Proposal for a Directive on copyright. It has taken note of the concerns that have been expressed both in relation to the financial and administrative burden that this new provision would place on platforms, and to the risk of unreasonable blockages which would inconvenience users. It appears however that these concerns can be addressed by adding clarifications either in the Directive itself, or at the very least in the European Commission guidelines, particularly in relation to the following points:

- The criteria under which the rules of Article 13 would be binding on the platforms: Platforms with the largest number of users should be targeted, while subjective assessments would be set aside (such as the intention to benefit from the sharing of protected works),
- The types of works to be protected according to the availability and costs of the technology, and minimum required performance levels for automatic recognition tools.
- Platforms' transparency obligations to rightholders and users.
- Complain and redress mechanisms for users, which must be simple and fair.

The Directive must also clarify which Member State has jurisdiction to set the rules which apply to platforms (the country of origin or the receiving country/country of destination), within a European framework which shall be harmonized as far as possible. Therefore, in order to prevent national transpositions which fall short, it is crucial that the Directive states that the European Commission will adopt guidelines, in accordance with the approach used in the Proposal for a Directive amending the Audiovisual Media Services (AMS) Directive⁸.

Finally, the mission would like to see greater clarification of the exemption from liability for copyright which platforms currently benefit from, pursuant to Article 14 of E-commerce Directive 2000/31/EC.

Setting clearer rules for online sharing platforms forms part of a broader movement towards more stringent regulation of these platforms by national and European authorities. It will provide a better legal certainty for these companies, strengthened safeguards for users and a more effective copyright protection, which is essential to the sustainability and development of our cultural industries and literary and artistic creative works in Europe.

⁸ Article 28a, § 3a, according to the wording adopted by the Council of the European Union on 23 May 2017: http://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CONSIL:ST_9691_2017_INIT&from=EN

| | |
|--|-----------|
| INTRODUCTION..... | 5 |
| | |
| I. THE NOTICE AND TAKE DOWN PROCEDURE, WHICH IS THE ONLY PROCEDURE REQUIRED UNDER CURRENT REGULATIONS, DOES NOT PROVIDE EFFECTIVE COPYRIGHT PROTECTION..... | 8 |
| I.1. UNDER CURRENT REGULATIONS, AS INTERPRETED BY CASE LAW AND IMPLEMENTED BY THE MAJOR PLATFORMS, THESE PLATFORMS ARE PRIMARILY EXEMPT FROM ANY LIABILITY WHEN THEIR USERS POST INFRINGEMENT CONTENT..... | 8 |
| I.2. SOME PLATFORMS HAVE VOLUNTARILY IMPLEMENTED IMPROVEMENTS TO THIS PROCEDURE, WHICH SPECIFICALLY BENEFIT CERTAIN RIGHTHOLDERS | 13 |
| I.3. THE ‘NOTICE AND TAKE DOWN’ APPROACH IS VERY RESTRICTIVE FOR RIGHTHOLDERS AND DOES NOT PROVIDE EFFECTIVE COPYRIGHT PROTECTION..... | 14 |
| | |
| II. AUTOMATIC CONTENT RECOGNITION OFFERS HOPE, BUT AN APPROACH WHICH IS EXCLUSIVELY VOLUNTARY IN NATURE IS NECESSARILY LIMITED | 17 |
| II.1. EXISTING TECHNOLOGY ALREADY OFFERS RELIABLE SOLUTIONS FOR THE AUTOMATIC RECOGNITION OF PROTECTED CONTENT..... | 17 |
| II.2. THESE TOOLS OPEN UP NEW POSSIBILITIES FOR COPYRIGHT PROTECTION ON DIGITAL PLATFORMS..... | 19 |
| II.3. THE FACT THAT THERE IS NO REGULATORY FRAMEWORK FOR THE USE OF THESE TOOLS ON CONTENT- SHARING PLATFORMS LIMITS THEIR EFFECTIVENESS IN THE AREA OF COPYRIGHT PROTECTION. | 24 |
| | |
| III. ARTICLE 13 OF THE PROPOSAL FOR A DIRECTIVE ON COPYRIGHT REPRESENTS GENUINE PROGRESS FOR THE PROTECTION OF COPYRIGHT ON ONLINE PLATFORMS, PROVIDED THAT CERTAIN SAFEGUARDS ARE IN PLACE..... | 28 |
| III.1. ARTICLE 13 OF THE PROPOSAL FOR A DIRECTIVE ON COPYRIGHT REPRESENTS GENUINE PROGRESS FOR COMPLIANCE WITH COPYRIGHT AND RELATED RIGHTS..... | 28 |
| III.2. ARTICLE 13 OF THE PROPOSAL FOR A DIRECTIVE ON COPYRIGHT HAS ADVANTAGES FOR ALL OF THE STAKEHOLDERS CONCERNED..... | 30 |
| III.3. ARTICLE 13 OF THE PROPOSAL FOR A DIRECTIVE ON COPYRIGHT CREATES RISKS IN RESPONSE TO WHICH SUFFICIENT SAFEGUARDS SHOULD BE IMPLEMENTED | 33 |
| | |
| CONCLUSION..... | 40 |
| | |
| APPENDIX I: MISSION LETTER | 41 |
| APPENDIX II: HEARINGS AND INTERVIEWS CONDUCTED BY THE MISSION | 43 |
| APPENDIX III: PROPOSALS | 46 |
| APPENDIX IV: MAIN CONTENT RECOGNITION TOOLS BASED ON FINGERPRINT RECOGNITION..... | 49 |

Introduction

“Online services providing access to copyright protected content uploaded by their users without the involvement of right holders have flourished and have become main sources of access to content online.”⁹

The growing importance of the role of digital platforms in accessing works, in particular audiovisual and musical works, has led European and national authorities to question how these platforms should be held liable both in respect of the public, and the holders of copyright on works and other subject-matter¹⁰. In its report published in 2015¹¹, which was primarily based on data from the High Authority for the Dissemination of Works and the Protection of Rights Online (Hadopi)¹², GESAC estimated that two thirds of the videos published on YouTube contain cultural content, which includes:

- 59% music content, of which 21% is ‘unofficial’ (as opposed to the official accounts of artists, producers or broadcasters);
- 7% video content not created by the users in question, all of which is ‘unofficial’ (based on the same definition).

Although this unofficial content is not necessarily illegal, it is likely that a significant proportion of it includes components which are covered by copyright without the rightholder’s permission.

In France, the High Council of Copyright (CSPLA)¹³ has worked extensively on this subject and has produced two reports. The first one, written in 2014 by Professor Pierre Sirinelli, more broadly covers the revision of Copyright Directive 2001/29¹⁴, while the second, on which *Maître* Josée-Anne Benazeraf and Alexandra Bensamoun also collaborated, is based on the link between the aforementioned Directive 2001/29 and E-commerce Directive 2000/31¹⁵. Meanwhile this year the Conseil d’Etat issued a series of proposals to strengthen the regulation of these platforms¹⁶.

The European Union also plans to set minimum obligations for the major platforms in order to protect minors and the public against content which is violent, incites hatred or glorifies terrorism as part of the ongoing revision of the Directive on audiovisual media services¹⁷.

⁹ Recital no. 37 from the Proposal for a Directive on copyright in the Digital Single Market:

[Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market](#)

¹⁰ For easy readability, we only use the expression ‘copyright’ in this report, which should be understood to also cover works and other subject-matter.

¹¹ https://www.rolandberger.com/gallery/pdf/Report_for_GESAC_Online_Intermediaries_2015_Nov_EUR.pdf

¹² Haute autorité pour la diffusion des œuvres et la protection des droits sur internet (Hadopi)

¹³ Conseil supérieur de la propriété littéraire et artistique (CSPLA)

¹⁴ [Mission du CSPLA relative à l’avenir de la directive 2001/29 "Société de l’information"](#), December 2014.

¹⁵ [Mission du CSPLA sur l’articulation des directives 2000/31 "commerce électronique" et 2001/29 "société de l’information"](#), November 2015.

¹⁶ [Etude annuelle 2017 : Puissance publique et plateformes numériques : accompagner l’«ubérisation»](#), La Documentation française

¹⁷ [Orientation générale du Conseil du 24 mai 2017 sur la proposition de directive du Parlement européen et du Conseil modifiant la directive 2010/13/UE visant à la coordination de certaines dispositions législatives](#).

At the same time, the European Commission recently introduced two key initiatives on this issue.

Firstly, in September 2016 it issued a Proposal for a Directive on copyright in the digital single market¹⁸. Article 13 of this Proposal suggests that platforms “that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users” should be required to enter into cooperation agreements with holders of copyright and related rights, with measures “such as the use of effective content recognition technologies”, with the purpose of fairer value sharing between platforms and rightholders with a greater emphasis on the latter.

Secondly, on 28 September 2017, the Commission published a Communication entitled: “Tackling Illegal Content Online – Towards an enhanced responsibility of online platforms”¹⁹, which targets all illegal content including infringing content.

Ongoing discussions between various categories of stakeholders on the wording of Article 13 of the Proposal for a Directive on copyright have given rise to various concerns, which can be summarised as follows:

- Rightholders believe that the legislative text does not go far enough in the obligations it imposes on the platforms.
- Platforms believe that they have already made protection tools available to rightholders and that they have entered into revenue-sharing agreements with many of them. They therefore conclude that no legal obligation is required. Smaller platforms are concerned about the implementation and management costs for such tools.
- Representatives of platform users are concerned that the systematic filtering of protected works will remove their rights to a number of copyright exceptions, such as citation and parody, and more generally that it will infringe upon their freedom of expression.

With this in mind, the CSPLA would like to shed some light on the current practices of the main platforms which provide public access to copyright protected works published online by users, such as YouTube, Dailymotion and, more recently, Facebook.

The mission will not address the thorny legal issue of the link between the ‘E-commerce’ Directive 2000/31 and Directive 2001/29 on ‘copyright in the information society’ which, as stated above, has already been covered in a special report by the CSPLA. It will not cover websites heavily involved in infringements, which are not directly targeted by the aforementioned European Commission initiatives and which are the subject of alternative discussions and actions.

It will, on the other hand, focus on the tasks set out by the mission letter (Appendix I). In other words, after having met with representatives from the main stakeholders, it will examine the scope, effectiveness any restrictions of the copyright protection tools provided to rightholders by the major platforms as cited above.

[réglementaires et administratives des États membres relatives à la fourniture de services de médias audiovisuels, compte tenu de l'évolution des réalités du marché](#) (Article 28a).

¹⁸ [Proposition du 14 septembre 2016 n° 2016/0280 \(COD\)](#).

¹⁹ [Référence COM\(2017\) 555 final](#)

The mission has decided to focus on videos, the most widely-debated area due to the economic power of the platforms in question. We will however touch on the issue of music, text and images on other types of platforms.

The mission has also conducted research into the main types of contractual agreements entered into between platforms and rightholders, without providing in-depth details on these agreements due to the non-disclosure clauses that the majority of them contain. It has also had some difficulties with gathering accurate information on the situation in other European countries in the very short time frame granted to it. Therefore, the data included may be rather fragmented in nature.

For greater clarity, this study will specify how the major platforms manage their ‘notice and take down’ procedure, which rightholders can use for infringing content, (I) firstly by looking at automatic recognition tools for this type of content, and (II) by highlighting the voluntary steps taken by each of the stakeholders to cooperate with this process, as well as any current constraints. The mission will then issue a number of recommendations for the drafters of the future Directive on copyright in the digital single market (III).

I. The notice and take down procedure, which is the only procedure required under current regulations, does not provide effective copyright protection

The past few decades have seen the creation of interactive platforms which enable large numbers of users to share content which may be copyright protected, and where rightholders are not involved in the process. This content is often promoted through ranking or recommendation tools, and attracts high numbers of users, who usually have access to it on a free-of-charge basis. This enables the platform to generate revenue from advertising or by harvesting users' data.

In this context, it is difficult for rightholders to challenge the online publication of their works, given that it is the numerous and dispersed users of the platform who have published the works rather than the platform itself. Platforms usually adopt the position that they cannot be held liable for illegal content as they are covered by the hosting provider status set out under Article 14 of E-commerce Directive 2000/31/EC of 8 June 2000, which releases them from all liability unless they “have actual knowledge of illegal activity or information”, primarily by way of a notice and take down procedure. Moreover, should a rightholder simply wish to share the generated revenue rather than taking the work down, the current legal framework does not require the platform to allow revenue sharing and ensure that the revenue sharing system is transparent. Therefore, despite the value chain having changed beyond recognition, current provisions in force are ineffective both in the protection of copyright and related rights, and in ensuring that authors, publishers, performers and producers receive fair remuneration for protected content.

I.1. Under current regulations, as interpreted by case law and implemented by the major platforms, these platforms are primarily exempt from any liability when their users post infringing content

I.1.1. Case law has extended the reduced liability regime which applies to hosting providers to digital content-sharing platforms.

The liability of online platform operators is dependent on how they qualify under the French “law to support confidence in the digital economy” of 21 June 2004 (LCEN)²⁰, Article 6 of which transposes Article 14 of E-commerce Directive 2000/31/EC of 8 June 2008, which states that service providers which qualify as mere **hosting providers** are covered by a reduced liability regime.

Article 14 of this Directive states that service providers whose business involves storing information provided by third parties are not liable for the information stored, provided firstly that they have no knowledge of the illegal nature of the supplier's actions or of the information that has been supplied, and secondly, that as soon as they are made aware of the illegal nature of certain information and files, they promptly withdraw them or prevent them from being accessed.

²⁰ loi pour la confiance dans l'économie numérique du 21 juin 2004 (LCEN)

Under French law, LCEN Article 6, I.2 specifies that: “*Individuals or legal entities who provide storage of signals (...) or messages of any kind sent by the recipients of the services, even free-of-charge, for the purpose of making available to the public via online communication to the public, shall not be held liable for the actions or information stored at the request of the recipient of the services, provided that they had no knowledge of the illegal nature of these actions or information or of the facts and circumstances behind them, and that as soon as they became aware of them, they act promptly to take down the data or prevent it from being accessed.*”

The status of hosting provider, which was created in 2000, was developed for intermediaries playing a purely technical role as opposed to publishers. Thus recital 42 of the Directive specifies that in order for the activity to provide an exemption from liability, it must be “*limited to the technical process of operating and giving access to a communication network over which information made available by third parties is transmitted or temporarily stored, for the sole purpose of making the transmission more efficient*”, and must be “*of a mere technical, automatic and passive nature, which implies that the information society service provider has neither knowledge of nor control over the information which is transmitted or stored*”. However, since the creation of platforms which enable users to publish online content themselves, thereby making them accessible to the public or to groups of users, case law has upheld a broad definition of the concept of storage and hosting.

In a judgment dated 23 March 2010 regarding Google’s referencing service, the Court of Justice of the European Union (CJEU) stated that a service provider qualifies as a hosting provider rather than a publisher if it “*has not played an active role of such a kind as to give it knowledge of, or control over, the data stored*”.²¹ In a judgment dated 12 July 2011 relating to eBay, it stated that a service provider plays an active role “*where [it] has provided assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers*”²². In the 2012 *SABAM vs. Netlog* case, in response to a preliminary question on a social network which allowed image and video sharing, the Court stated: “*first, it is not in dispute that the owner of an online social networking platform - such as Netlog - stores information provided by the users of that platform, relating to their profile, on its servers, and that it is thus a hosting service provider*”²³.

In France, the Court of Cassation ruled in 2011 that platforms that publish photos online or that reference photos on the web could claim hosting provider status, provided that they were not involved in any selection of the content. The fact that such sites sell advertising space was deemed irrelevant²⁴. In the case of the video platform Dailymotion, it considered that the creation of content categories such as ‘Music’, ‘Cinema’ or ‘TV’ could be justified solely by the need to streamline the structure of the service and to render it more user-friendly, and that it was not incompatible with a hosting provider status.

The no-liability status for hosting providers is however conditional. The hosting provider is presumed to have knowledge of the illegal content that it is hosting if it has been provided with the information set out by Article 6.I.5 of the LCEN, particularly by rightholders.

²¹ CJEU, 23 March 2010, *Google France SARL and Google Inc. v. Louis Vuitton Malletier SA et al*, C-236/08.

²² CJEU, 12 July 2011, *L’Oréal et al v. eBay*, C-324/09.

CJEU, 16 February 2012, *SABAM v. Netlog*, case C-360/10.

²⁴ See Court of Cassation. 1st Civil Division, 17 February 2011, *Carion v. Dailymotion*, no. 09-67.896

Therefore, in order to still be covered by the limited liability regime linked to the status of hosting provider, any platform which receives such a notice is urged to delete the reported content as soon as possible. In a judgment dated 4 February 2011, the Paris Court of Appeal, having granted hosting provider status to the Google Images image search engine, ruled that the two-week time frame in which Google had taken down the reported content from the platform was too slow²⁵. In a judgment dated 2 December 2014, the Paris Court of Appeal ordered Dailymotion to pay €1.2 million in damages to companies in the TF1 Group for not having promptly taken down videos from its website, following reports by the TF1 Group about the illegal dissemination of its programmes. It was therefore found to be in breach of its obligations as a hosting provider²⁶.

However, **Article 15 of the E-Commerce directive prohibits Member States from imposing “a general obligation on providers, when providing the services covered [by Article 14], to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity”**²⁷. Recital 47 of this Directive reiterates that the prohibition only covers obligations of a general nature, and that “*this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation*”.

In the aforementioned *SABAM v. Netlog* judgment, the CJEU stated for the record that the current legislation prohibits national judges from issuing an injunction to a hosting provider to set up a preventative filtering system for all of its customers, at its own expense and indefinitely, which would filter all of the platform’s content to identify any content published online without the rightholder’s consent. This judgment relates to circumstances in which the court ordered that a content recognition tool be implemented, rather than the platform implementing it of its own free will.

Furthermore, approaches to the **automatic detection of content already taken down** at the request of rightholders in order to ensure that it stays down differ from country to country.

In France, the Court of Cassation interpreted the aforementioned Article 15 as contradicting an injunction to implement a tool to identify content previously subject to a notice and take down procedure. In a judgment dated 12 July 2012, it deemed that such a requirement equated to imposing on hosting providers “*a general obligation to monitor the images that they store and to search for illegal online publications, and requiring them to implement a blocking tool indefinitely which is disproportionate to the objective sought*”²⁸.

²⁵ Paris CA, Division 5 Ch. 2, 4 February 2011.

²⁶ Paris CA 2 December 2014, *TF1 v. Dailymotion*, no. 13/08052

²⁷ Provisions transposed to Article 6 I) 7) of the LCEN.

Court of Cass, Civ. Div. 1, 12 July 2012, *Bac films v. Google France*: “Whereas in issuing this ruling, the Court of Appeal breached the above-mentioned provisions, given that preventative measures were imposed on Google companies to prevent any new online publication of the infringing videos, with no due notification to inform them of the illegal nature of these videos or their location requiring them to act promptly to take down the videos or prevent access to them. This equates to going beyond the right to order action to prevent or stop damage linked to the current content of the website in question, by imposing a general obligation to monitor the images that they store, to search for illegal online publications and by requiring them to implement a blocking tool indefinitely which is disproportionate to the objective sought. ”

In Germany, on the other hand, case law has generally ruled in favour of the ‘stay down’ principle. In its ruling of 1 July 2015, the Hamburg Court of Appeal, while acknowledging YouTube’s status as a hosting provider, also deemed that it was indirectly liable for the online publication of illegal content, which enabled it to impose ‘stay down’ injunctions on YouTube, not only for the files taken down, but for any recording depicting the same work²⁹.

Similarly, in Italy, in a summary ruling of 5 June 2015, the Court of Turin ordered Dailymotion to ensure that videos corresponding, in whole or in part, to videos that had already been taken down after having been reported by Delta TV would stay down. The Court ruled that implementing detection technology was not tantamount to a general obligation to monitor as prohibited under European law, but rather formed part of Dailymotion’s duties as a hosting provider, deeming that the concept of “having knowledge” of the illegal nature of the content should be defined in the light of the technological context, and that “from a technical viewpoint, current technology enables the specified content to be identified from all of the files uploaded onto the platform”³⁰. A number of the infringing videos had been transferred to Dailymotion after having been removed from YouTube, following legal action by Delta TV against YouTube. At the end of the dispute between Delta TV and YouTube, and after having noted that the platform already had a content recognition system in place (Content ID), in a judgment dated 7 April 2017 the Court of Turin ordered that even though the rightholder had refused to create a Content ID account, it was the platform’s own responsibility to use this tool to create reference files in order to ensure that other users did not republish content already removed at the request of Delta TV.

Therefore, in certain countries, the outcome of the interpretation of current legislation is that hosting provider status not only provides an exemption for content-sharing platforms from checking the legality of videos, photos or text published on their websites, but additionally, according to French case law, it prohibits administrative authorities or national courts from imposing ‘stay down’ obligations on these platforms. Rightholders are therefore obliged to wait for the content to be reposted on the platform before they can then send a new take down request. And yet in practice, rightholders seldom have the resources to be able to set up permanent monitoring of illegal online content and send take down requests. The International Federation of the Phonographic Industry (IFPI)³¹ estimates that close to 96% of take down requests that it sends could have been avoided if the recipient services had complied with their ‘stay down’ obligations.

I.1.2. The implementation of the notice and take down procedure by American platforms, in Europe as well as the United States, is modelled on the obligations arising from American legislation currently in force

The main content-sharing platforms founded in the United States such as YouTube, Facebook and Twitter have implemented **procedures** which meet the obligations set out by section 512 of the 1998 Digital Millennium Copyright Act (**DMCA**), which exempts service providers from any liability for copyright infringements, provided that they delete or disable access to content reported for infringement as soon as they receive a request which meets certain requirements.

²⁹ Oberlandesgericht Hamburg 1 July 2015 No. 5 U 87/12 (*Gema v. YouTube*)

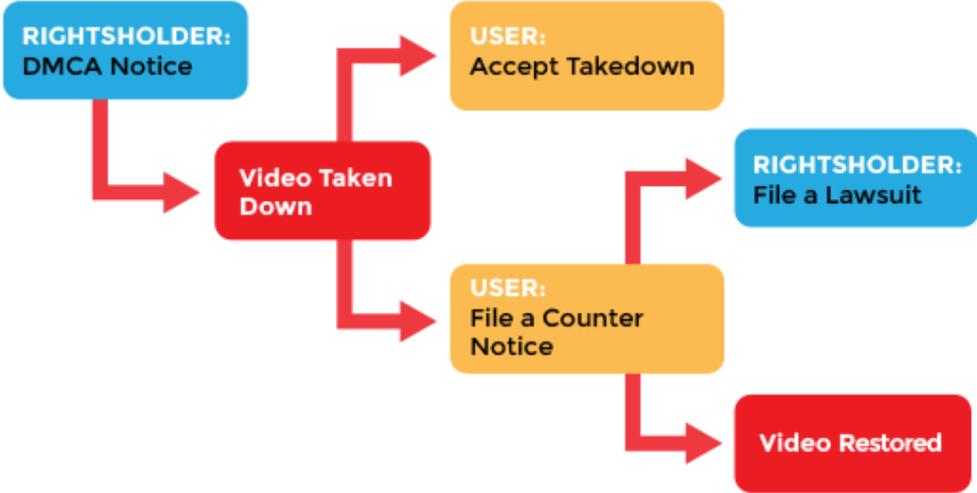
³⁰ Tribunale di Torino, 3 June 2015, No. 11343/2015 (*Delta TV v. Dailymotion*), free translation; Tribunale di Torino, 7 April 2017 No. 38112/2013 (*Delta TV vs. Google/YouTube*).

³¹ Fédération internationale de l’industrie phonographique (IFPI)

The service provider is exempt from any liability for deletion of legal content, provided that it republishes it within 10 to 14 business days following a complaint by the user which published the content (a ‘counter notice’), unless the rightholder can provide proof that it has brought legal action against the user. The DMCA sets out the information to be provided to provide notice of an infringement of copyright, as well as the procedure to be followed in this scenario.

Although the liability regime for hosting providers as set out by **E-commerce Directive 2000/31** is similar to the one detailed by the DMCA, primarily given that it is based on a prompt take-down of the content that the hosting provider knows to be illegal, there are also a number of differences. Firstly, the Directive does not describe the notice and take down procedure, and Article 6 of the French LCEN Act only specifies which information must be provided in order for a notice to be valid. Moreover, neither the E-Commerce Directive nor the LCEN contain a provision which is equivalent to the obligation to restore the disputed content within 10 to 14 business days following a complaint by the user if no legal action is brought by the rightholder. On the contrary, **in principle take down is final**, and the user must bring legal action in order to have the content restored.

The notice and take down procedure operated by YouTube and Facebook is depicted in the diagram below:



Furthermore, in accordance with the DMCA’s requirements, a **phased penalty** procedure has been implemented on major platforms (including Facebook, Dailymotion and YouTube) for users who **repeatedly infringe copyright**. On YouTube, each notification is followed by a copyright infringement warning (‘strike’). After three warnings, the user’s YouTube channel is shut down. Users can annul a breach of copyright warning within 90 days provided that they complete a YouTube tutorial entitled “Copyright School”. Facebook and Dailymotion operate a similar penalty procedure.

Finally, the DMCA provides for **considerable penalties for false notices**. French law contains similar provisions under Article 6 of the LCEN, whereby informing a hosting provider that its content is illegal in order that it will be taken down in the knowledge that this information is inaccurate is punishable by one year in prison and a fine of €15,000.

I.2. Some platforms have voluntarily implemented improvements to this procedure, which specifically benefit certain rightholders

In its Communication of 28 September 2017 on tackling illegal content online and the enhanced responsibility of online platforms³², which covers not only infringing content but also illegal content, and particularly content related to terrorism or child pornography, the European Commission highlighted the lack of harmonisation of content notice and take down procedures on a European level. It recommended the implementation of easily-accessible, user-friendly tools enabling illegal content to be reported electronically.

Although it is possible to send a take down notice for infringing content to a platform in any format, as long as the required information is provided, in practice **the major platforms have created dedicated forms** to ensure that all information is included. Those wishing to submit a notice are also asked to check that the content has definitely been published in infringement of copyright legislation. Similarly, user complaint forms are also available for users who have published content reported for infringement.

Notices are then processed manually by the platforms, regardless of the type of offence allegedly committed, including alleged breaches of copyright. Also, in the case of YouTube, Google has established large teams, which may decide to disregard a notice if they decide that it is groundless. Facebook has also informed the mission that it has teams of approximately 200 people dedicated to monitoring notice and take down procedures who deal primarily with copyright infringements, are available 24/7 and are based in different continents. These teams are able to handle content in different languages and are aware of specific provisions of law which apply in each country in which content can be accessed, particularly as regards copyright exceptions. Once the content has been reported, it is usually taken down very quickly, generally within two hours and sometimes in minutes (particular attention is given to the dissemination of popular content which may be a pirate or illegal version, such as particular films, television series or sports events). Meanwhile Dailymotion claims that notices are handled by the platform's 24/7 support team which comprises around 10 people. The average time frame for taking down content once it has been confirmed to be illegal is less than two hours. Dailymotion states that in the context of this procedure, the number of content deletion requests that the platform decides to close without action is less than 5%.

Special features have been implemented for certain rightholders, which may have been inspired by the proposals of the Commission in its Communication dated 28 September 2017. The Commission stated that it was in favour of creating a status of **trusted flagger**, to be conferred upon entities specialising in the detection of illegal content. Although not specifically stated in the legislative text, discussions between the mission and the Commission's departments have revealed that as far as copyright is concerned, this status is expected to benefit professional bodies which represent rightholders such as the French Association against Audiovisual Piracy (ALPA). Platforms are encouraged to work more closely with such trusted flaggers by implementing "*mechanisms to facilitate a privileged channel for those notice providers which offer particular expertise in notifying the presence of potentially illegal content on their website*".

³² Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – "*Tackling Illegal Content Online – Towards an enhanced responsibility of online platforms*", 28 September 2017, COM (2017) 555 final.

The Communication specifies in particular that: “*Notices from trusted flaggers should be able to be fast-tracked by the platform. This cooperation should provide for mutual information exchange so as to evaluate and improve the removal process over time*”, and, conversely, it is important to demote “*the treatment in priority of notices from a notice provider who sends a high rate of invalid notices or receives a high number of counter-notices, or by revoking the trusted flagger status, according to well-established and transparent criteria*”.

In practice, although YouTube originally created the ‘trusted flagger’ concept for other types of illegal content, and even if the concept is not officially applied to the area of copyright protection, there are a number of positive initiatives which should be highlighted. In addition to the notice form which is available to all, YouTube has set up a ‘Content Verification Programme’ for rightholders who regularly send a high volume of content deletion notices for copyright infringements, and whose previous notices have been trustworthy. These rightholders have access to a special interface and their requests are handled using a simplified procedure. The status of ‘trusted flagger’ may be acknowledged according to certain eligibility criteria, and holders of this status are able to report more issues, have their take down requests processed faster and/or are given a dedicated point of contact. As an official representative of phonographic producers, the IFPI reports having obtained a special status for the processing of its notices on platforms including YouTube, Dailymotion and Facebook. Meanwhile, the Society of Authors for Graphic and Visual Arts (ADAGP)³³ has obtained a dedicated e-mail address from the Flickr image-sharing platform to report images uploaded without the rightholder’s permission.

I.3. The ‘notice and take down’ approach is very restrictive for rightholders and does not provide effective copyright protection

Implementing notice and take down procedures is a **substantial administrative burden** for rightholders, as the illegal content must first be located so that the location can be provided to the platform. It can therefore be costly in terms of human resources requirements.

Several rightholder representatives have expressed concerns that the **standard reporting tools are not user-friendly**. While certain platforms offer tools that are more suited to multiple notices, as indicated above, access to these tools is not guaranteed and the **eligibility criteria are not transparent**. In principle these tools are reserved for rightholders for whom the standard procedure is deemed unsuitable.

Furthermore, while it is possible to check whether protected content appears on public pages by calling on specialist technical service providers, this option does not apply to **content which is restricted to a limited group of users**, as is the case on certain profile pages or specific content on social networks like Facebook. This is also the case on YouTube and Dailymotion, where videos can be shared with a restricted group of people. In this context, it is impossible for rightholders to detect and therefore to report the existence of protected content.

In addition, the **effectiveness of notice and take down procedures is questionable**. If the platform is headquartered in the United States and is subject to American law, it applies DMCA rules.

³³ Société des Auteurs dans les Arts graphiques et plastiques (ADAGP)

As mentioned previously, these rules state that the platform's exemption from liability in the case of content taken down in response to a notice is dependent on such content being republished within 10 to 14 days in the event of a user complaint, unless the rightholder can prove that it has initiated legal proceedings against the user. Therefore, in practice, although YouTube and Facebook's teams may analyse notices before the content is taken down, and despite YouTube's claims that counter-notices are investigated at the rightholder's request to ensure that they are not clearly groundless, **in principle a counter-notice automatically leads to restoring** the content once the time frame has elapsed. Moreover, legal proceedings initiated by rightholders are very rare. Platforms do not always provide rightholders with the necessary information. The user's identity in particular is not always clear, as the identity information provided is limited to the information which the user declares. As a general rule, the cost of legal action is too high to encourage rightholders to pursue all infringers.

While it is difficult to obtain data on how many complaints are made to notices submitted under the procedure, our interviews with rightholders show that **a considerable proportion of these complaints are unreliable**. Therefore the IFPI, which represents phonographic producers, indicates that most complaints to its take down requests for musical content are unfounded, and that many of them are based on the American copyright exception of 'fair use', which is not applicable in Europe, or on a licence which does not actually cover such use. In all cases, **any republished 'premium' content can cause significant harm**.

Finally, even if the rightholder has been able to ensure that the infringing content is taken down, **it has no guarantee that the content will not be republished**. As previously mentioned, French case law interpreted Article 15 of Directive 2000/31 (which prohibits Member States from imposing on technical service providers the general obligation to monitor the legality of the content posted on its websites) as prohibiting the judge from issuing an injunction imposing on hosting providers a general obligation to monitor if content which has previously been taken down is republished ('stay down'). Some platforms interpret this case law as a prohibition on the platforms themselves from voluntarily setting up a filtering system which prevents files identified as infringing from being republished online. One example of this is Dailymotion, which, in order to protect rightholders, and at their request, creates a fingerprint of the infringing content already reported in the INA (National Audiovisual Institute)³⁴ database, and encourages rightholders to submit all of their fingerprints so that this content can subsequently be identified by their content recognition tool before being published online (see below). Facebook has also confirmed that it does not automatically block the republication of content which has previously been taken down for copyright infringement. As for YouTube, although it claims to block the republication of such content, this process is based on a relatively basic tool which uses MD5 hashing (see below), which is unable to identify a file that is not strictly identical to the original file.

In its Communication of 28 September 2017, the Commission "*strongly encourages the further use and development of automatic technologies to prevent the re-appearance of illegal content online*", including copyright infringements, while highlighting that exceptions should be appropriately provided for, and that there should be a reversibility safeguard for erroneous decisions.

³⁴ Institut national de l'audiovisuel (INA)

To conclude, **the current notice and take down system does not provide effective copyright protection on content-sharing platforms.** This is a long-standing issue for audiovisual and musical content. While considerable progress has been made in the struggle against websites heavily involved in infringements, which have been forced out through legal proceedings or squeezing of their revenues, the growing supply of attractive content on more compliant platforms and the concurrent advances in image and sound recognition technologies have led to a number of solutions being proposed based on cooperation between websites and rightholders.

II. Automatic content recognition offers hope, but an approach which is exclusively voluntary in nature is necessarily limited

Nowadays content recognition technology, which has been in development since the 2000s, can effectively detect copyright protected content, provided that the rightholder has supplied the reference content (for fingerprint-based solutions), or provided that the original work has been watermarked (for watermarking-based solutions). Fingerprint-based tools are the best-suited to copyright protection on digital platforms, and there are a number of existing solutions available on the market. The main audiovisual content-sharing platforms voluntarily implement these tools. However, the lack of safeguards as regards their performance and usage procedure means that rightholders' rights are not effectively protected.

II.1. Existing technology already offers reliable solutions for the automatic recognition of protected content

II.1.1. There are various technologies, each suitable for different uses

The main existing technologies are based on:

- Hashing;
- Watermarking;
- Fingerprinting.

Hashing is a technology which was developed in the 1990s. Nowadays many open-source versions are available. It assigns a unique alphanumeric character string to each file, which enables any exactly identical file to be detected. This technology is of limited use in the area of copyright protection, as a file which is not exactly identical to the reference file will not be recognised. It is however used, specifically by Google on its YouTube platform to prevent files previously taken down following a notice and take down procedure from being republished.

Watermarking can be used to identify videos, sounds or images³⁵. It is a type of (generally invisible) barcode integrated into the work which enables originals to be differentiated from copies, using a special detection tool. It is often used with image or video files, but can also be used for sound files. This technology is often used in the film industry to be able to identify the source of piracy, for example in the case of unauthorized broadcast of a copy of a work, or an illegal recording made in a cinema. Each copy is usually individually watermarked, so that the rightholder can identify exactly which copy was at the source of the illegal broadcast. It is also possible to create a unique watermark for a work intended for use by multiple users. Any watermarked copy will be immediately detected, while a copy without a mark (for example where the copy was made prior to the watermarking process) cannot be recognised. In addition, this technology is not able to identify the use of protected content within content which is entirely produced by a third party, such as musical cover versions. Finally, watermarking cannot be applied retroactively. It can therefore only be used to protect new content streams, and not existing works which are already in circulation.

³⁵ Suppliers of this technology include French companies such as Content Armor and Nexguard (bought out by Swiss group Kudelski in 2016), and American companies such as Verimatrix.

Fingerprinting recognition is based on a unique digital representation of the content (the fingerprint), which is not integrated into the work itself but is created using some of its characteristics. Fingerprints of works can be created, as required, by the technology supplier, by rightholders themselves using a software package supplied by the service provider, or by platforms to create a database of content fingerprints to be checked. By checking against a reference database, the technology identifies protected content from all content published on a website. Fingerprints can be created for the purpose of identifying videos, sounds or images. Unlike hashing, fingerprint-based content identification technologies recognise original works even when alterations have been made. This is because the technology recognises the content itself rather than the file. The most advanced tools can even recognise a melody in a cover version by another performer.

Other technologies are also being used in beta testing versions, or in combination with those described above in order to enhance their performance or reduce the required computing power. For example, a targeted search can be performed using metadata provided by the user, such as the name of the work or performer, or using artificial intelligence to recognise specific content such as an actor's facial features.

II.1.2. Fingerprint-based protected content recognition tools are already being offered by independent providers or developed by the platforms

As indicated above, although watermarking is used in the audiovisual industry for tracking new content, currently only fingerprinting technologies can protect content which has already been broadcast or disseminated. Some **service providers** offer rightholders tools which can create fingerprints, manage fingerprint databases and **search for matching content already published on a group of pre-determined websites**.

For example, Right Tracks (Surys) is used by book publishers to detect e-books which have been illegally published online by content-sharing websites. Also worth noting is the tool developed by Videntifier to identify images and visual content in videos, which the ADAGP uses on certain websites to detect images matching a reference database of its members' content. It is also used by American audiovisual producers to detect illegal live broadcasts of sporting content. These tools, which are based on databases created by rightholders, are used to scan suspicious content on target websites, as well as being used by platforms to process files before they are published online.

The major audiovisual content-sharing **platforms** have taken the initiative of implementing fingerprint-based content recognition tools to **check for matches of content with fingerprinted content even before it is published online**. While some platforms such as Dailymotion and Vimeo use external providers, others such as YouTube and Facebook have developed their own internal tools (see II.2.2).

While independent providers offering copyright protection tools are still relatively rare, **there is huge potential for market newcomers**. Indeed, many companies offer content recognition tools with a similar level of performance for other purposes, such as the tracking of advertising broadcasts, the collection of user data, real-time product placement, the dissemination of synchronized ads on a second screen (TV/smartphone), setting up interactive features, etc³⁶.

³⁶ One of the main European providers is the German company Mufin, whose fingerprint-based content recognition tool, although developed for alternative purposes, could also be used for copyright protection.

II.2. These tools open up new possibilities for copyright protection on digital platforms

II.2.1. The European Commission encourages the use of these tools in its Communication of 28 September 2017

Some hosting providers may be deterred from taking preventative action against the publication of illegal content, fearing that they might indicate, as specified by the regulations, that they have knowledge of the existence of illegal content on their platforms, which would deprive them of their hosting provider status and the corresponding liability regime. And yet, recital no. 40 of E-Commerce Directive 2000/31 states that: *“the provisions of this Directive relating to liability should not preclude the development and effective operation, by the different interested parties, of technical systems of protection and identification and of technical surveillance instruments made possible by digital technology”*.

The European Commission attempted to raise these concerns in its recent Communication as referenced above on tackling illegal content online and the enhanced responsibility of online platforms, stating explicitly that *“platforms should (...) adopt effective proactive measures to detect and remove illegal content online and not only limit themselves to reacting to notices which they receive. (...) taking such voluntary, proactive measures does not automatically lead to the online platform losing the benefit of the liability exemption provided for in Article 14 of the E-Commerce Directive. ”*

II.2.2. Some digital platforms have already voluntarily implemented content identification solutions

This section takes a closer look at the **measures adopted by three of the major** audiovisual content-sharing **platforms**, YouTube, Dailymotion and Facebook. YouTube and Facebook initially used the technology offered by the independent third party **Audible Magic**, which analyses the soundtrack of musical or audiovisual content, before developing their own tools, **Content ID** (YouTube) and **Rights Manager** (Facebook). Meanwhile, Dailymotion uses Audible Magic for musical content and **Signature** (developed by the INA) for video-based content. Finally, music-sharing platform Soundcloud, which had been using the Audible Magic tool since 2010, has now developed its own tool. Facebook and SoundCloud are still using the Audible Magic tool alongside their own.

These content recognition tools **now play a major role** in copyright protection for these platforms. They are used to process all files before they are published online, as well as being applied to some (but not all) existing files. Google reports that 98% of its copyright disputes are processed using Content ID, while only 2% use the notice and take down procedure. On Dailymotion, close to 94% of content identified as infringing is blocked by automatic recognition tools prior to publication on the platform, while the remaining 6% is removed after being reported via the notice and take down procedure.

As well as enabling platforms to combat illegal copyright protected content on their websites, these tools also boost advertising revenue to be shared with rightholders through recognition and **monetization** of the most popular **content**. Indeed, the tools developed by YouTube and Facebook allow rightholders to define the action taken for each item of recorded content.

The options include blocking dissemination, authorising dissemination while obtaining audience statistics, or authorising dissemination and receiving a share of the advertising revenue. As the platform also receives a share of the advertising revenue for the video, it has an incentive to encourage rightholders to opt for the monetization of content uploaded by third parties rather than blocking it³⁷.

For rightholders, **the decision on whether to block or monetize** covers or reruns posted by third parties often depends on the revenue which could be generated by officially broadcasting the content. Therefore, **in the case of audiovisual content**, the rightholder **generally decides to block the content**, particularly if it is the first broadcast or a live broadcast. Monetization may however be a more attractive option for older content. For **music clips on the other hand, the vast majority of rightholders opt for monetization** (95% of musical content on Content ID)³⁸.

The economic model on which these tools is based does of course differ greatly according to whether they are integrated into a platform or offered by a third party.

For internal tools created by platforms such as YouTube's Content ID or Facebook's Rights Manager, rightholders have access to the tool free-of-charge, including fingerprint creation, and all costs are borne by the platform. These costs comprise not only the blocking of illegal content, but also the monetization feature and other costs. It is difficult to find accurate information on this point due to commercial secrecy.

For solutions offered by independent suppliers which are installed on platforms to recognise protected content before it is published, the costs are generally borne by the platform while the service is free to rightholders. Only the INA asks rightholders to contribute to the running of a centralised fingerprint database. While these tools were primarily designed to block content, Signature (INA) allows platforms to set up a monetization option, and Audible Magic will soon offer a version which includes a monetization feature.

The costs charged to platforms depend on the required computing power in the light of the expected performance, and are specifically based on the following parameters:

- Content streams to be processed by the tool following publication;
- Content already online which requires verification;
- Volume of the fingerprint database used for comparison;
- Speed of recognition;
- Granularity (ability to recognise a short extract).

These parameters should be adjusted as required, as an advanced level of recognition is not always necessary or desirable. In the case of a live retransmission of sporting content, the main requirement is the speed of recognition and the **ability to recognise a short extract**, for example the few seconds it takes to score a goal. Speed and granularity are however less crucial for other types of content. In some cases it might even be preferable to prevent the recognition of short extracts such as trailers, which should not be blocked or monetized.

³⁷ After YouTube video creators have reached the threshold of 1000 views, they can ask to open a Google AdSense account and agree to videos being included in their channel, which is remunerated based on the number of views. Google receives 45% of the corresponding revenue.

³⁸ On YouTube, it is possible to monetize the original audiovisual content or the soundtrack only. The latter case allows for revenue sharing even in the case of a protected musical work used on a video created by a third party.

Finally, given that the volume of a fingerprint database tends to expand over time³⁹, **it is not always vital to compare new online content against all fingerprints, which may be costly** as most uses cover a small proportion of content (often the most recent). It is therefore possible to define an ‘active’ fingerprint database, which excludes the content which is no longer likely to be the source of a sufficient number of positive comparisons. Expected performance can therefore be defined in cooperation with rightholders, for optimised use of the tool.

This is particularly relevant to content other than video. Thus, **in the area of visual arts**, it is not realistic to try to put together an exhaustive database, given that on average each painter creates 5000 original works, and each photographer produces several million. However, the ADAGP indicates that **10% of the works cover 80% of online uses**. Therefore an automatic recognition system which can target the most frequently disseminated content would represent considerable progress for the protection of the rights of visual arts producers.

The technology is priced based on the number of comparisons made with the reference fingerprint database, and on the size of the database.

The table below shows the list prices for **Audible Magic’s music and video soundtrack recognition services**. The video soundtrack service is offered at a lower price given that the reference fingerprint database is smaller. For information purposes, every month, three million videos are published on Dailymotion.

| Audible Magic - List price (per month) | | |
|---|---------------------------------|----------------------------------|
| Input stream for analysis (in number of videos) | Music recognition ⁴⁰ | Recognition of video soundtracks |
| Up to 10,000 | \$ 1,000 | \$ 1,000 |
| Up to 100,000 | \$ 4,000 | \$ 2,375 |
| Up to 1 million | \$ 11,000 | \$ 6,750 |
| Up to 10 million | \$ 28,000 | \$ 17,000 |

However in practice, prices can be negotiated on a case-by-case basis according to the platform’s requirements, and may be significantly lower than the list price. Audible Magic reports having signed recent contracts with smaller platforms for a monthly fee of less than €500.

For the **Signature tool provided by the INA** to a video content-sharing platform, video content analysis is available **from €2700 per month**, for input analysis streams of 100,000 hours of content (equivalent to 600,000 requests for 10-minute videos), with a response time of less than 5 minutes. Rightholders must register individually for a package which enables them to activate fingerprints of their choice for analysis, for an annual cost of €5 per hour of content. Fingerprint creation and storage is free-of-charge.

³⁹ 35 million in the case of Audible Magic, the main independent supplier.

⁴⁰ A premium service which recognises videos with a slight alteration such as speeding up of the video is offered at a 33% surcharge.

It is also worth noting the prices offered by **Videntifier**, a fingerprint-based **image recognition tool which also works for the recognition of images within videos**. Videntifier is currently primarily used to identify child pornography and terrorist material, but also for the recognition of protected image or video content, and is capable of processing large volumes.

| Videntifier - List price (per month) | | |
|---|------------------------------------|---------------------------------------|
| Input analysis stream | Volume of reference database | |
| | 5000 hrs of video/1 million images | 50,000 hrs of video/10 million images |
| 15,000 hrs of video/3 million images | €490 | €2990 |
| 150,000 hrs of video/30 million images | €2990 | €5990 |
| 1,500,000 hrs of video/300 million images | €5990 | €9990 |

The figures show that **the cost of these tools is still very reasonable for small platforms and is proportionate to their size**.

II.2.3. Agreements between rightholders and platforms on the use of content recognition tools can improve the effectiveness of these tools

In 2007, a US-based voluntary initiative between a number of platforms such as Dailymotion and Myspace, and representatives of rightholders such as Disney and Sony Pictures led to the adoption of a code of conduct known as “**Principles for User Generated Content Services**”⁴¹. In this code of conduct, platforms undertook to work with rightholders to implement **fingerprint-based content identification technology** in order to prevent the illegal online publication of protected audio and video content. Since then, **use of such tools has become widespread**, including by platforms such as YouTube which did not participate in the initiative⁴². However, it is clear that the effectiveness of these solutions is based on cooperation between platforms, which must implement effective and transparently-managed tools, and rightholders, who must provide the fingerprints for the content that they wish to protect or the content itself, as well as the metadata specifying the rights which are attached thereto. They must also specify the management rules to be applied, such as blocking or monetization.

In the music industry, content recognition tools have been used in agreements between platforms and certain rightholders, authorising platforms to provide access to musical works uploaded by users in exchange for remuneration paid to rightholders based on the number of views. As not all works are listed in the fingerprint database, the number of views can only be estimated using the data supplied by the content recognition tool, and the sharing of advertising revenue generated through the dissemination of the works is negotiated between the platform and each individual copyright revenue collecting society. In France, the Society of Music Writers, Composers and Publishers (SACEM)⁴³ has therefore signed agreements with the major platforms to cover the uploading of music clips.

⁴¹ <http://www.ugcprinciples.com/>

⁴² Conversely, as far as we are aware, platforms such as Twitter do not use any anti-piracy content recognition tools, even though the platform allows videos of up to two minutes and 20 seconds to be shared, i.e. the same length as a comedy sketch or music clip.

⁴³ Société des auteurs, compositeurs et éditeurs de musique (SACEM)

Dailymotion has signed similar agreements with other authors' societies such as the ADAGP, the Society of Authors and Composers of Dramatic Works (SACD)⁴⁴ and the Civil Society of Multimedia Authors (SCAM)⁴⁵.

In the audiovisual industry however, representation of rightholders (usually producers) is far more fragmented. There are no existing monetization agreements for video uploads such as those entered into by the SACEM and the platforms. Nevertheless, **in July 2013 an agreement was signed between Google and Spanish collecting society Egeda** (*Entidad de gestión de derechos de los productores audiovisuales*), which manages the rights of audiovisual producers in Spain and in a number of Latin American countries. The agreement is based on the use of Content ID, and grants Egeda the role of a 'one-stop-shop' for the management of protected content uploaded to YouTube for those rightholders who opt to be covered by it⁴⁶. After an initial trial period, Egeda found that two thirds of its rightholders had opted for monetizing rather than blocking their content, and Content ID allowed for a 87% increase in the advertising revenue generated by this content.

In France, a mission was granted to Messrs Tessier, Japiot and Gabla at the beginning of 2016 at the initiative of the CNC. The purpose of this mission was firstly to set up a shared fingerprint creation service for the producers of cinematographic and audiovisual works, and secondly to create links between them and the major online video-sharing platforms to combat copyright infringements.

One of the outcomes of this mission was **an agreement entered into on 19 September 2017 by Google, the CNC and ALPA**, covering the main film and audiovisual producers (including US-based producers) as well as television broadcasters and SACEM. The purpose of the agreement was to facilitate the creation of a digital fingerprinting service based on YouTube's Content ID, with technical and financial assistance from YouTube, and to implement a wide range of measures to combat digital copyright infringements, including cases involving Google's search engine. This agreement will enable the three signatories to work more closely together and represents genuine progress. However, in the absence of a strong regulatory framework in this area, it has not been possible to change the Content ID operating rules in ALPA's favour, despite its official status and the support of the French authorities. Specifically, when Content ID blocks a video, it is automatically republished online if a user complains about it, even if the complaint is clearly spurious. ALPA, like any other rightholder, has to confirm its 'claim' to the protected work in order to block it again. Should the user uphold his complaint, the block is lifted unless ALPA or the rightholder brings legal action against the user within 10 days, in accordance with the American DMCA legislation, even though this legislation does not apply in Europe (see I.1.2 above). This agreement demonstrates Google's willingness to cooperate, but it also highlights the limitations of a purely voluntary approach with no European legislative framework.

Finally, the CNC, ALPA, Facebook and Dailymotion have recently agreed to enter into negotiations with a view to agreeing to similar partnerships to the one entered into with Google, with the same benefits for those involved and the same potential limitations in the absence of European regulations.

⁴⁴ Société des auteurs et compositeurs dramatiques (SACD)

⁴⁵ Société civile des auteurs multimédia (SCAM)

⁴⁶ http://www.egeda.es/documentos/NOTASPrensa/2013/NP_ACUERDO_EGEDA_YOUTUBE.pdf

II.3. The fact that there is no regulatory framework for the use of these tools on content-sharing platforms limits their effectiveness in the area of copyright protection.

While the voluntary implementation of content recognition tools by the major musical and audiovisual content-sharing platforms constitutes progress, the lack of any legal framework necessarily restricts the benefits for copyright protection. Indeed, rightholders may experience difficulties in accessing tools, the procedure used in the event of a dispute with a user does not guarantee that their rights will be upheld, and improvements are required as regards the transparency of the technology's performance and terms of use.

II.3.1. Access to the tool and to the fingerprint creation feature

Rightholders are not always permitted to use content recognition tools. Facebook reports that Rights Manager is for use by companies only, while YouTube assesses applicants based on various factors such as the popularity of their works, the number of notice and take down requests that they have sent and the validity of these requests, in order to reduce the risk of undue removals. Rightholders who are not accepted are invited to apply through collective rightholder representatives. In practice, the eligibility criteria are not set out in a transparent manner, and rightholders have no advance knowledge of whether or not they will have access to the tool.

In addition, although rightholders can generally use content recognition tools free-of-charge, **fingerprint recognition may entail additional costs.** YouTube and Facebook offer to create fingerprints for rightholders for any works that the latter agree to provide, enabling new fingerprints to be created when the tool is updated to foil any circumvention attempts by hackers. However, platforms do not offer any concrete safeguards against the risk of accidental release of the original works. Therefore, some rightholders, particularly audiovisual producers, generally prefer to provide fingerprints that they have created and paid for themselves, which they are also responsible for updating. One interim solution may be to provide an impaired version of the work (e.g. black and white or truncated) to render it suitable for the creation of fingerprints, but unappealing in the event of an accidental release.

The possibilities of extending the use of content recognition tools to platforms which have not developed an internal solution are limited by the fact that **multiple fingerprints would have to be created by rightholders for the same content.** Currently, each system on the market uses a specific fingerprint type, and designing universal fingerprints which are compatible with all technologies appears to be an impossible task. The "France 2012 digital plan" included the creation of a national repository of copyrighted works, containing fingerprints generated by various protection tools as well as metadata related to the exploitation of rights⁴⁷. In the end however, the creation of such a database was deemed to be an overly arduous and complex task, and the project was never completed. Therefore, rightholders are exposed to the high costs of creating as many fingerprints as there are tools, particularly in industries in which rights are not managed collectively. While the limited number of platforms likely to be affected by the Article 13 obligation goes some way towards mitigating the issue, it is nonetheless recommended that rightholders work together to foster interoperability of fingerprinting technology and to harmonise the necessary metadata.

⁴⁷ 'France numérique 2012' (Digital France 2012): Digital economy development plan, report submitted by E. Besson, Secretary of State for long-term planning, the assessment of public policy and the development of the digital economy, October 2008.

Indeed, while the variety of technologies can be explained by innovative steps taken independently, **the lack of harmonisation of content management systems exposes rightholders to considerable management costs**⁴⁸.

II.3.2. Dispute procedure

The procedure applied in disputes between users who have published content online and rightholders claiming their rights over this content is not set out by any law or regulation, and is therefore **freely defined by each platform**.

In practical terms, the procedure applied **by YouTube and Facebook** includes:

- Step one, in which YouTube does not adopt a stance on the validity of any claims or complaints, but simply sends them to the other party;
- Step two which includes a traditional notice and take down procedure, unless the rightholder decides to initiate this procedure earlier.

At this stage, if each party upholds their claim and if the platform does not deem the complaint to be clearly unfounded, the content will only be removed permanently if the rightholder brings legal action against the user, in accordance with the provisions of American DMCA legislation (see I.1.2).

However, other platforms such as SoundCloud and Dailymotion use the same procedure for automatic content recognition and for “notice and take down”, whereby the content is removed immediately. Dailymotion tells us that should the user who attempted to publish the content challenge the decision to block it, the content will only be uploaded with the approval of the rightholder who provided the fingerprint.

How the Content ID procedure works (YouTube):

Step one

- **Claim** by rightholder: automatic blockage of content⁴⁹;
- **Complaint** by the user: claim disabled and content published online;
- **Confirmation** by the rightholder (within a maximum of 30 days): content removed;
- **Appeal** by the user: content republished online;

Step two

- **Notice and take down** procedure followed by the rightholder: content removed;
- **Complaint** by the user: the content remains temporarily suspended;
- **Confirmation** by the rightholder: the rightholder has 10 working days to supply proof of legal action taken to ensure that the content is not republished. If this evidence is not provided, the content will be republished once this period has elapsed.

⁴⁸ French TV broadcaster TF1 states that it employs one full-time person for each technology to oversee the content management systems.

⁴⁹ The claim may also cover the monetization of third-party published content rather than its blocking and the third party in question may challenge the monetization claim. In such a case, the advertising revenue is blocked until the dispute has been resolved.

On Content ID, the user's ability to challenge a claim is dependent on their copyright infringement history. The user must also provide additional information in order to make a complaint, such as an address and phone number (which YouTube checks by sending an SMS). According to YouTube, fewer than 1% of claims are challenged, and content owners accept one third of these complaints. These figures should however be viewed in relation to the nearly 400 hours of video uploaded each minute to the platform⁵⁰.

The main problem for rightholders is that **in the event of a user complaint**, regardless of whether it is the initial complaint or an appeal, **the content is immediately republished online**. It then remains accessible until the rightholder restates their claim. Moreover, rightholders' limited resources rarely allow them to react immediately, while several hours of illegal dissemination can expose them to a substantial loss of profit. Although complaints may be reasonable, this is not always the case, even where the user is acting in good faith. For example, in the case of musical content, SACEM explained that it receives thousands of complaints submitted by users based on the 'fair use' exception, a concept taken from American law which does not exist in Europe.

II.3.3. Lack of transparency

Given that the abovementioned tools are implemented on a voluntary basis, stakeholders are not always given the necessary assurances in relation to transparency.

It is often difficult to ascertain **whether the tool is applied to all content** published online, or whether some is able to slip through the net. Until 2013, the content of YouTube's 'professional' Multi-Channel Networks was not covered by YouTube's Content ID. The platform based this decision on the premise that professional stakeholders should be responsible for the copyright compliance of their own content. Google has stated that since 2013 all content, without exception, is now processed by Content ID before it is published online, unless the rightholder has decided of their own accord to exclude certain content from the check. However, not all the stakeholders we met knew about this new rule.

As regards the operation of the tool, communication with technical teams is not always sufficient, and **malfunctions** on certain platforms are sometimes only discovered by rightholders after they have noticed that their content is being freely distributed in spite of being fingerprinted.

More fundamentally, information on **technological performance** and the way in which tools are set up is not publicly available. There are therefore questions to be asked on whether **pre-existing online content is analysed** when a new fingerprint is registered, and how frequently. The **recognition capabilities** of the tools are also difficult to measure. Of course, trade secrets should be taken into account and keeping some technical details confidential can be necessary to prevent detection systems from being circumvented. However, in the present context, rightholders have no choice but to rely on claims made by platforms about the performance of content recognition tools, and may not seek an independent analysis.

⁵⁰ <https://www.statista.com/statistics/259477/hours-of-video-uploaded-to-youtube-every-minute>

Finally, **penalty rules for users who have committed multiple** copyright infringements are not always clearly explained. While YouTube claims that channels are closed after three warnings, the account closure terms for Facebook and Dailymotion are less clearly defined. This situation is open to criticism both by rightholders, for whom this approach may be too lax, and by users, who have no assurances as to which penalties will be applied.

To conclude, although some fine tuning may be required, musical and audiovisual content recognition tools provide a generally satisfactory level of technological performance. However, in the light of the sheer volume of content to be protected, there is no entirely suitable technical solution for other types of content, which may be exposed to infringement issues either now or in the future. These include images, and also e-books: although the latter still represents a minority share of total book sales, 14% of e-book readers have already used an illegal offer.⁵¹ In addition, the use of existing tools to detect infringing content on sharing platforms for video, music or other types of content, which is currently a voluntary initiative by the platforms themselves, does not offer sufficient safeguards for rightholders. Therefore, a regulatory framework should be set up in order to address these issues.

⁵¹ Source: 2017 edition of the "Baromètre sur les usages du livre numérique" (Report on e-book use).

III. Article 13 of the Proposal for a Directive on copyright represents genuine progress for the protection of copyright on online platforms, provided that certain safeguards are in place

In the light of the current situation as detailed above, it is crucial to boost the legal basis for the voluntary measures implemented by stakeholders, as set out by Article 13 of the Proposal for a Directive on copyright. This would benefit all parties. Of course, a number of safeguards should be applied when drafting Article 13 of the future Directive, and in its subsequent implementation, in order to achieve the desired objective.

III.1. Article 13 of the Proposal for a Directive on copyright represents genuine progress for compliance with copyright and related rights

Article 13 of the Proposal for a Directive on copyright in the Digital Single Market creates an **obligation for online platforms giving access to large number of works protected by copyright and related rights to cooperate with the rightholders for these works, specifically by providing them with access to automatic protected content recognition tools and complaint management tools**. The first draft of the European Commission's Proposal⁵², dated 14 September 2016, reads as follows:

Article 13

Use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users

- 1. 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.*
- 2. Member States shall ensure that the service providers referred to in paragraph 1 put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1.*
- 3. Member States shall facilitate, where appropriate, the cooperation between the information society service providers and rightholders through stakeholder dialogues to define best practices, such as appropriate and proportionate content recognition technologies, taking into account, among others, the nature of the services, the*

⁵² Référence 2016/0280 (COD).

availability of the technologies and their effectiveness in light of technological developments.

This legislative text is clarified by recitals 38 and 39:

(38) 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 public⁵³, 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 of the European Parliament and of the Council 34.

In respect of Article 14, it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor.

In order to ensure the functioning of any licensing agreement, 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 should take appropriate and proportionate measures to ensure protection of works or other subject-matter, such as implementing effective technologies. This obligation should also apply when the information society service providers are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC.

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

It should be noted that this text does not adopt a stance on the articulation between ‘E-Commerce’ Directive 2000/31 and Directive 2001/29 on “copyright and related rights in the information society” (see I.1.1). The Commission simply clarifies that the obligation established by Article 13 above also applies to platforms covered by the exemption of liability established by Article 14 of Directive 2000/31 for content hosting providers which play only a passive role, although in recital 38, it attempts to summarise the case law of the Court of Justice of the European Union (CJEU) on this topic (for more details on this issue, please refer to the CSPLA report of November 2015⁵⁴).

⁵³ Note the rather worrying discrepancy between the English version and the French translation on this point: “*allant ainsi au-delà de la simple fourniture d’équipements et de l’acte de communication au public*”.

⁵⁴ [Mission du CSPLA sur l’articulation des directives 2000/31 "commerce électronique" et 2001/29 "société de l’information"](#), November 2015.

The key points of the Proposal can be summarised as follows:

- Although the preparatory work for the legislation indicates that video content is the primary focus, it is **not restricted to video content, but rather refers to all works protected by copyright or related rights**.
- It specifically covers **platforms which store and provide access to the public to “large amounts of copyright protected works or other subject-matter”** without defining the concept of ‘large amounts’.
- It requires the platforms in question to: **“take appropriate and proportionate measures to ensure protection of works or other subject-matter, such as implementing effective technologies”**. More specifically, it refers to **automatic content recognition tools**.
- It also puts great emphasis on the **need for cooperation between platforms and rightholders**.
- **Rightholders must provide platforms with the data necessary for identifying the works** covered by their rights. Therefore, digital fingerprints must be submitted (or a copy of the work itself, as required), together with the corresponding metadata for automatic recognition technologies.
- **Platforms must provide rightholders with information on the effectiveness of the technologies** that they use (particularly how effective the tool is at recognising content). They must also **provide them with information on how their works are used**, primarily in order to enable collecting societies to divide the proceeds of monetization according to the actual level of exposure of each work.
- Platforms must also implement a **tool for users adversely-affected** by copyright protection measures.

Although it does not resolve all difficulties in relation to the exemption from liability set out by Article 14 of Directive 2000/31, in principle **this Proposal seems balanced and realistic** and largely meets the diverse interests of platforms, rightholders and users. We will look at the benefits it provides for each type of stakeholder, the potential risks and areas for further improvement.

III.2. Article 13 of the Proposal for a Directive on copyright has advantages for all of the stakeholders concerned

It goes without saying that introducing an obligation on digital platforms to strengthen copyright protection will primarily benefit copyright holders. Nonetheless, it also delivers real benefits both to platforms and users.

➤ **For rightholders:**

Rightholders have a clear interest in the introduction of additional obligations on platforms, with a view to **ending the free-of-charge dissemination of copyrighted content without their authorisation** or, if they prefer, **obtaining better remuneration arrangements for such dissemination**. In drafting Article 13 of the Proposal for a Directive, the European Commission clearly intended to rebalance value sharing between platforms and rightholders (to close the ‘value gap’).

In addition to this overall objective, rightholders may also be able to obtain **better assurances as to the technical reliability of the content recognition tools**, although this obligation is rather vague in the Directive (see below).

Rightholders can also expect to see **greater transparency on the way in which platforms calculate their remuneration**, particularly for musical content. This information is particularly important to collecting societies such as SACEM, as it enables them to fairly divide remuneration between rightholders according to the actual level of exposure of their works (based on the number of views for videos).

Finally, **clear rules must be set out for managing potential user complaints** on blocking or monetization of the works that they publish, ensuring that the interests of users and rightholders are sufficiently balanced. Indeed, as noted previously (see II.3.2), an overly complex complaint system may render content recognition tools far less effective, particularly where blocked content is automatically republished even if the user’s reasoning is clearly spurious (for example, if it is based solely on the American concept of ‘fair use’, which is not recognised in Europe). Clearer rules could also preclude any issues regarding which legal system applies to these types of complaints, as platforms tend to prioritise the American DMCA Act, as shown above.

➤ **For platforms:**

At first glance, it would seem that introducing the obligations such as those set out by Article 13 of the Proposal for a Directive on copyright is of no benefit to digital platforms. Yet it stands to reason that platforms will in fact benefit from a number of very clear advantages.

Firstly, setting out such rules **strengthens legal certainty in the area of infringements**, provided that it leads to a clarification of the link between E-Commerce Directive 2000/31 and Directive 2001/29 on “copyright in the information society” (see II.3.1). Peaceful relationships with rightholders and ending recurring legal disputes would also **improve the reputation of the platforms in question**.

The provision of content recognition tools offering the required assurances would also make it easier to **distinguish the ‘legal’ platforms from those which promote infringement** and are likely to be subject to legal action by rightholders and the public authorities.

Harmonised rules for all platforms **would also reinstate a level playing field between them**, by no longer giving preferential treatment (in the eyes of the users) to those who let infringements continue.

The rules would also **broaden the use of automatic content recognition tools**, and given that a market for such technology would emerge and research and development would be shared between a greater number of stakeholders, the **cost of the tools would also fall**.

In this respect, it is worth noting that two of the major video-sharing platforms (YouTube and Facebook) started with an external tool and subsequently decided to create their own tools⁵⁵. This strategy demonstrates **that content recognition is of benefit to platforms, as they can use it to promote monetization**. The way forward is therefore to increase platform revenue and share it with rightholders and users.

Finally, some (primarily video) content-sharing platforms **are planning to produce protected works themselves or to be involved in their funding, and will therefore also benefit from copyright protection measures in their capacity as rightholders**.

➤ **For users:**

As is the case for the platforms, the benefits to users of a framework such as the one set out by Article 13 of the Proposal for a Directive on copyright are not immediately obvious. However, users will also gain significant benefits.

Firstly, like the platforms, they will benefit from **greater legal certainty when they upload content for which they do not hold full rights**. Their risks of prosecution will be greatly reduced, as the most sensitive content will be automatically blocked prior to dissemination, and the user in question may be able to make contact with the rightholder via the platform. Above all, users would benefit from the monetization agreements entered into by platforms and rightholders, particularly for music, as this would allow them to disseminate more of their content without seeking the prior authorisation of the rightholder in question.

Moreover, **harmonisation of the management rules for user complaints in the case of an unauthorised blocking or monetization of the content** that they wish to publish online, may indeed provide **better protection of user rights**, for example if the user is covered by a legal copyright exception.

Finally, as is the case for platforms, **developing the monetization of content may generate additional revenues within a legal framework for some users**, who themselves hold rights over a part of the content that they have created. This would form part of a fairer process for revenue sharing between users, platforms and any other rightholders (e.g. for the music component of cover versions of songs or game commentaries).

⁵⁵ Audible Magic, which Facebook continues to use alongside its own tool.

III.3. Article 13 of the Proposal for a Directive on copyright creates risks in response to which sufficient safeguards should be implemented

As stated in the introduction to this report, unresolved issues regarding the scope of the exemption from liability for hosting providers set out by Article 14 of Directive 2000/31 do not fall within the scope of this mission. It would however be advisable for **this topic to be clarified in a final version of the Directive, ensuring that this does not extend the scope of platforms' exemption from liability to the detriment of rightholders**. The mission understands that **the requirements set out by Article 13 in the European Commission's proposed wording would primarily impact upon the platforms covered by the exemption from liability set out by the 'E-Commerce' Directive**, as online services which are not covered would have to implement the contractual measures to obtain licences from rightholders, or risk being found guilty of infringement.

This issue aside, the mission has also identified a number of risks linked to the wording and implementation of Article 13 of the Proposal for a Directive on copyright. It therefore makes a number of recommendations to reduce these risks:

➤ **Scope of the platforms in question:**

All parties involved, and particularly platforms, **require legal certainty**. For this reason, **the mission strongly advises against vague and subjective criteria** such as the concept of 'large amounts' of works, which is repeated several times in the European Commission's proposed draft, or "the profit-making purpose of the exploitation of the works" set out in some drafts examined by the Council of the European Union⁵⁶.

The mission calls for the most objective possible criteria to be used, essentially based on the platform's characteristics and audience (rather than the number of available works). Indeed, it would be preferable to consider the number of consultations or views of works made available on the platform (which plays a greater role in the harm caused to rightholders) rather than the number of works published online. Indeed, a platform which offers a limited number of recent popular films will generate more views than a platform offering many different works which no-one views. In every instance, comprehensive and objective criteria should be set out in the Directive, and could be specified in more detail in guidelines from the European Commission (see below).

➤ **Scope of the works in question:**

Very wisely and in the interests of equal treatment, the Proposal for a Directive on copyright does not stipulate which type of work is covered by Article 13. As stated above under section II, the hearings conducted by the mission show that unlike those websites heavily involved in infringements, **the major worldwide sharing platforms which offer large numbers of works to the public wish to cooperate with rightholders of video and musical works**.

⁵⁶ See the version by the Presidency of the Council of the European Union, submitted for discussion on 16 November 2017: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_14482_2017_INIT&from=EN

Yet **one should not exclude the development of smaller platforms which share with the public large numbers of images, text or music files**, or even modelling files for 3D works. Such platforms already exist, although their numbers may be reduced due to new features added to social networks such as Facebook, Instagram or Snapchat. For this reason it is crucial to retain the very general term ‘works’ used in the European Union text.

Nonetheless, **European harmonisation is required in order to determine when these platforms should put in place technological protection measures for these other types of works.**

➤ **Types of measures to be implemented by the platforms:**

Article 13 of the Proposal for a Directive requires platforms to take “*measures to ensure the functioning of agreements concluded with rightholders for the use of their works (...) or to prevent the availability on their services of works (...) 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.*” (§1). It also stipulates that as far as technical recognition tools are concerned, the following criteria should be considered: the nature of the service offered by the platform, the availability of the technologies and their effectiveness (§3).

This wording is extremely unclear and therefore a major source of legal uncertainty both for platforms and for rightholders. Indeed, **it creates a vast area for complaints and consequently disputes on the definition of ‘appropriate and proportionate’ measures.** Indeed, it is unclear which public authority shall be in charge of determining whether the technical measures implemented by a platform meet this requirement of the Directive

Platforms are concerned that rightholders, with the support of certain Member States, will be too demanding in terms of the technology used. They assert in particular that they will probably never be able to identify all copyrighted works, and will be even less able to identify all protected rights within these works (such as images or text appearing in videos). Conversely, rightholders fear that platforms will only be bound by a minimal obligation which will not fully protect their rights.

Both of these concerns are legitimate in view of the lack of clarity on the obligation in question. Some Member States have proposed a clarification of this obligation, for example by also taking into account the cost of the technical tool for the platform⁵⁷.

The mission deems that although the above criteria are relevant, they are still extremely unclear, particularly the criterion of the cost to the platform. Nevertheless, it is difficult to see how the Directive could be clearer. For this reason, **and on this point also, the mission calls for a European harmonisation based on flexible terms in order to be able to adapt to rapid changes in technology** (see below). Specifically, although the primary focus is currently on digital fingerprint recognition (see II.1), other technologies are likely to emerge in the coming years, such as metadata-based tools (content title, name of artist etc.).

⁵⁷ See the version by the Presidency submitted for discussion on 16 November 2017: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_14482_2017_INIT&from=EN

Harmonisation must also cover assurances to rightholders on the effectiveness and transparency of the technical tools, which remain woefully inadequate (see II.3.). The obligations set out by the Directive in this area are equally vague: *“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 (...)”*.

The ideal solution would firstly be to **set minimum requirements in terms of tool recognition capabilities**, and secondly to establish a **labelling or certification system for these tools**. For example the European Commission might wish to instruct the European Committee for Standardization (CEN) to determine the necessary technical standards. The national authorities could also set up certification systems through private or public bodies. In France this role could be delegated to Hadopi, which under Article L. 331-13 of the French Intellectual Property Code [*code de la propriété intellectuelle*] is granted the role of regulating and monitoring technological measures for the protection and identification of works and material protected by copyright or related rights. Hadopi therefore has the authority to assess trials of content recognition and filtering technologies. Alternatively the role could be entrusted to the French Accreditation Committee (Cofrac)⁵⁸ which, in accordance with the Decree of 19 December 2008⁵⁹, is the only national body with the authority to issue accreditation certificates to compliance assessment bodies.

Finally, the Directive would be the perfect opportunity to end the discrepancies in national case law as mentioned previously (see I.1.1) regarding **‘stay down’ obligations as part of the notice and take down procedure**. In its aforementioned Communication dated 28 September 2017, the Commission recommends this by pointing out (§ 5.2) that *“basing itself on practice in the field of copyright in the area of automatic content recognition, the Commission proposal on copyright in the Digital Single Market recognises such technologies – as long as they are appropriate and proportionate – as a possible means, inter alia, of preventing the availability of non-licensed content on the relevant online services”*. The Directive should clearly state that platforms must prevent infringing content from being republished online.

➤ **Working with rightholders:**

The Proposal for a Directive puts great emphasis on the importance of cooperation between rightholders and platforms. The purpose of the technological measures the platforms are required to implement is to “to ensure the functioning of agreements” that they have entered into with rightholders, and to prevent works being made available on the platforms which have been “identified by rightholders through the cooperation with the service providers”. This means that any rightholder who has not provided the platform with the identification components for its works, such as digital fingerprints, cannot be covered by technological protection measures.

The mission understands that without the assistance of the rightholders in question it would be extremely difficult for platforms to identify all of the works, if only to offer a choice between standard platform options (i.e. free dissemination, blocking or monetization- see II.2.) or to respond to user complaints (see below).

⁵⁸ Comité français d'accréditation (Cofrac)

⁵⁹ Decree no. 2008-1401 of 19 December 2008 on compliance accreditation and assessment, adopted pursuant to Article 137 of Act no. 2008-776 of 4 August 2008 on the modernisation of the economy.

Nevertheless, **it is important to ensure that the administrative burden on rightholders is not excessive**. While interoperability is not necessarily required, it is vital that platforms' technical tools enable rightholders to **create digital fingerprints easily and on a free-of-charge basis** (or more generally to identify the works to be protected), **without requiring overly-frequent renewals**. Tools should in particular allow impaired copies of works to be submitted (i.e. black and white or extracts), enabling the platform to update fingerprints automatically (as is the case for YouTube).

In addition, **a user-friendly interface must be provided to manage user complaints, making it easier for rightholders to respond**, which is not always the case currently (see II.3.1). Thus it would be very useful if all platforms covered by Article 13 were required to **give users simple explanations about what constitutes a copyright infringement and ensure that spurious complaints**, for example frequent complaints based on the simple purchase of a CD or a DVD or referring to the concept of 'fair use', which does not exist within the European Union, **are automatically dismissed**.

Platforms should grant a special status to 'trusted flaggers' (as defined by the European Commission's Communication of 28 September 2017 – see I.2.), providing them with additional technological features to manage user complaints as well as audit options for technical tools.

The creation of shared fingerprint management services for rightholders, supported by platforms, should be promoted, following the example of ALPA in France and Egeda in Spain (see II.2.3).

The **assurances offered to rightholders in terms of transparency of monetization conditions and compliance checks for these conditions** should also be made clearer. Groups such as copyright collecting societies would therefore automatically receive information on the number of views of works in their repository, thereby enabling them to fairly divide revenue received from platforms.

Yet again, **it is crucial to harmonise the assurances offered to rightholders at a European level**.

➤ **Working with users:**

Article 13 rightly states that users should have access to means of appeal when the technological measures described above wrongly prevent them from publishing a work identified as protected. For example, difficulties may arise when licences are granted to several distributors at the same time, even if in principle these licences cover different territories or periods. Difficulties also often arise from the complexity of assessing copyright exceptions, particularly those regarding parody or quotation.

Therefore, **platforms must ensure that user complaints are dealt fairly and quickly, in cooperation with rightholders**. As stated previously, it is advised that platforms automatically dismiss the most far-fetched complaints, at least at the first level, so that rightholders are not burdened with this task. However, **rightholders should also respond to other complaints within a reasonable time frame, which could be fixed in the Directive, for example a maximum of 14 days**, as provided for in the DMCA, except in the case of a proven emergency.

If no response is received within this time frame, the platform would be able to unblock and republish the content in question.

For the purpose of processing complaints, **platforms must require users who have complained about their content being blocked to provide their name, telephone number and postal address**, with a minimum identity check (ID request), in order that rightholders can verify that they are licence holders and, in the event that legal proceedings are required, that they have the minimum information required in order to issue a summons.

Moreover, in the light of the differences in process between the various platforms, which sometimes apply American legislation (the DMCA) even in Europe (see II.1.), **it is proposed that Article 13 (or the recitals) should specify that the identification of content performed by an automatic recognition tool implemented by the platform at the request of the rightholder (by providing a digital fingerprint linked to the setting which blocks any matching content) implies that the platform is aware of the illegal nature of this content within the meaning of Article 14 of the ‘E-Commerce’ Directive, at least as far as the ‘trusted flaggers’ are concerned** as defined by the European Commission’s Communication dated 28 September 2017 (see I.2.). In such a case, the online platform could keep the benefits of the exemption from liability set out by Article 14 of the Directive, provided that it acts promptly to prevent the content from being published online, or to remove it as soon as it has knowledge of it. Such a clarification in the Directive would support the interpretation made by the Commission in its Communication⁶⁰. This means **that the disputed content could only be published online with the rightholder’s consent (which may be express, or implied if no response is received to a user complaint within 14 days), or pursuant to a ruling by a judge at the user’s initiative.**

Member States should also **promote the implementation of systems for the extra-judicial settlement of disputes between rightholders and users**, in order to prevent court action⁶¹.

Finally, in the light of the above findings (see II.3.3.), the Directive must require platforms to **introduce more transparent procedures for closing the accounts of users who have committed multiple infringements**, having published infringing content online several times in a given period. Yet again, European Commission guidelines on transparency and the effectiveness of the procedures are required in order to ensure that both rightholders and users are protected.

➤ **Applicable national law and harmonisation at European level:**

The hearings conducted by the mission indicate that the national legislation on the technical measures addressed by Article 13 is not clearly defined. This is however of fundamental importance. Indeed, the effectiveness of Article 13 of the Proposal for a Directive on copyright

⁶⁰ See point 3.3.1, p.13, of the Commission’s Communication on tackling illegal content online and the enhanced responsibility of platforms.

⁶¹ See for this purpose recital 39c of the version by the Presidency submitted for discussion on 16 November 2017: http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CONSIL:ST_14482_2017_INIT&from=EN

might be significantly reduced if the law of the country of origin is applied, and if this law reiterates the provisions of the Directive, which have been shown to be unclear.

In practical terms, if this were the case, the Irish authorities would be responsible for defining the rules which apply to platforms based on their territory, specifically YouTube and Facebook.

In order to dispel any ambiguity on this critical matter, **it is crucial that the Directive (at the very least in its recitals) settles the issue of which Member State has jurisdiction to set the rules which apply to measures implemented in respect of platforms, in order to prevent protected works from being made available without rightholders' consent.** Provided that, **in the area of copyright and related rights, the scope of protection and means of appeal are in principle governed by the law of the country in which protection is sought, through the application of international conventions, the mission is in favour of the application of the law of the receiving country or country of destination,** which would preclude the risk described in the previous paragraph. However it is also aware of the complexity of meeting the requirements of all national legal systems for platforms operating in all EU Member States.

Regardless of the decision taken regarding applicable law, **it is absolutely crucial that Article 13 is fully applied in a harmonised manner throughout Europe.** The European Commission appears to be the most legitimate authority in this respect. The mission therefore recommends that the Directive should require the Commission to set out (for each type of work or platform, e.g. public video-sharing platforms) **the minimum requirements applicable to the technological measures implemented by the platforms, in terms of technical recognition capabilities and features for rightholders and for managing user complaints** (see above). **These minimum rules must be defined using a flexible instrument, revised on a regular basis following consultation of the stakeholders in question, in partnership with the Member States, for example as part of a contact committee. The wording of Article 13 could be guided in this respect by that of Article 28a (3a) of the Proposal for a Directive amending the Directive regarding on-demand audiovisual media services (AMS),** based on the wording adopted by the Council of the European Union on 23 May 2017⁶²: *“In order to ensure the effective and coherent implementation of this Article, where appropriate, the Commission, after consultation of the Contact Committee, publishes guidelines on the practical application of the Article (...).”*

With the same purpose in mind, **Article 13 could also reiterate the ‘monitoring’ obligation for Member States set out by Article 28a (4) of the aforementioned Proposal for a Directive on AMS:** *“Member States shall establish the necessary mechanisms to assess the appropriateness of the measures referred to in paragraphs (...) taken by [video-]sharing platform providers.”* This rule could be linked to a periodic reporting obligation for the European Commission on the implementation of these mechanisms, for example as part of a contact committee as set out above.

Finally, it might be useful to also draw on Article 28a (5) of the Proposal for a Directive on AMS, which states: *“Member States shall not impose on video-sharing platform providers measures that are stricter than the measures referred to in paragraph 1 and 2. When adopting such measures, they shall respect the conditions set by applicable Union law, such as, where appropriate, those set in Articles 14 and 15 of Directive 2000/31/EC or Article 25 of Directive 2011/93/EU”*.

⁶² http://eur-lex.europa.eu/legal-content/FR/TXT/PDF/?uri=CONSIL:ST_9691_2017_INIT&from=EN

The mission insists on the absolute need to set out flexible yet crucial measures for minimum harmonisation at European level, at the initiative of the European Commission, in order to ensure that Article 13 of the Proposal for a Directive can be fully effective.

* * *

Conclusion

Following the research and hearings that it has conducted within the very short time frame granted to it, the mission has found that the patchy European framework in relation to notice and take down procedures for infringing content on platforms, and above all the conditions for implementing automatic detection tools for this type of content, give rise to three major drawbacks: firstly, a great deal of legal uncertainty for platforms, secondly, insufficient protection for rightholders and thirdly, inadequate assurances for users acting in good faith.

The mission therefore supports the European Commission's two recent initiatives which aim to clarify the rules in this area: Article 13 of the Proposal for a Directive on copyright in the Digital Single Market, and the Communication of 28 September 2017 on tackling illegal content online.

Nevertheless, it calls for a clearer framework at European level both in the Directive itself, and in Commission's guidelines that should complement this Directive, in reference to the following points:

- Which Member State has jurisdiction to set rules which apply to the platforms (i.e. those that apply to the country of origin or receiving country/country of destination),
- The criteria under which platforms are covered by the rules of Article 13, excluding subjective assessments,
- Minimum performance requirements for automatic recognition tools,
- Platforms' transparency obligations to rightholders and users,
- Complaint procedures for users.

Clearer rules will be of benefit to all stakeholders, including users, and will enable fairer value sharing between platforms and rightholders. They will also provide a boost to European cultural industries, thereby improving literary and artistic creation.

* * *

Appendix I: Mission letter



MINISTÈRE DE LA CULTURE

Paris, le 25 JUIL. 2017

Monsieur Olivier Japiot

Conseil supérieur
de la propriété
littéraire et artistique

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Monsieur *et che Olivier,*

Les plateformes numériques, en donnant accès à leurs utilisateurs à une multitude d'œuvres protégées, occupent désormais une place centrale dans la diffusion des œuvres sur les réseaux numériques et la lutte contre la contrefaçon. Certaines d'entre elles, soucieuses de coopérer avec les ayants droit pour la défense des droits de propriété intellectuelle, se sont elles-mêmes dotées d'outils de détection automatique des œuvres présentes sur leurs sites. Il s'agit pour l'heure de pratiques de collaboration volontaires, qui ne découlent d'aucune obligation législative particulière. La situation pourrait toutefois prochainement évoluer puisque la Commission européenne s'est emparée du sujet à travers deux instruments différents.

En premier lieu, l'article 13 de la proposition de directive sur le droit d'auteur dans le marché unique numérique, qui prévoit de créer une obligation, pour les plateformes en ligne donnant accès à des œuvres protégées par le droit d'auteur et les droits voisins, de mettre à la disposition des titulaires de ces droits des outils de reconnaissance automatique des contenus contrefaisants et de gestion des plaintes concernant ceux-ci.

En deuxième lieu, la Commission a annoncé, dans sa communication du 10 mai dernier sur le bilan à mi-parcours de sa stratégie pour le marché unique numérique, un projet de « lignes directrices » (ou « orientations ») concernant les modalités de signalement et de retrait des contenus illicites (« notice and take down ») sur les plateformes en ligne et le soutien à celles qui mettent en place des mesures volontaires de lutte contre ce type de contenus.

Dans ce contexte, je souhaite vous confier une mission d'étude visant à recueillir des informations en vue d'éclairer les positions prises par les autorités françaises dans le cadre des débats sur les deux textes communautaires en cours de préparation.

La mission consistera notamment à interroger les acteurs français et européens sur les pratiques en matière de lutte contre les contenus illicites des principales plateformes d'hébergement de vidéos, notamment YouTube,

na

Facebook et Dailymotion, dans les principaux États de l'Union européenne, en particulier la France, l'Allemagne, le Royaume-Uni, l'Espagne et l'Italie. Identifier les mesures volontaires prises par certaines de ces plateformes en coopération avec les ayants droit permettra de mettre en valeur les bonnes pratiques existantes.

L'objectif assigné à la mission est double. D'une part, elle s'efforcera de démontrer aux parlementaires européens que l'article 13 du projet de directive ne crée pas une charge insupportable pour les plateformes mais qu'il permettrait de conforter les bonnes pratiques émergentes. D'autre part, elle alimentera et pourra orienter les réflexions de la Commission européenne dans l'élaboration de ses « lignes directrices » en matière de signalement/retrait de contenus illicites (« notice and take down »).

Pour mener à bien cette mission, vous pourrez vous appuyer, d'une part, sur les réflexions déjà conduites par le CNC avec votre aide et celle de MM. Marc Tessier et Emmanuel Gabla et, d'autre part, sur les services culturels des ambassades des pays concernés et sur la Fédération internationale de l'industrie phonographique (IFPI). Vous consulterez les membres du Conseil supérieur qui le souhaitent ainsi que les personnalités extérieures qui pourront y contribuer.

Vous bénéficierez du soutien des services compétents du secrétariat général et de la direction générale des médias et des industries culturelles, et serez assisté par un rapporteur qui sera désigné ultérieurement.

Il serait très souhaitable que la mission puisse rendre ses premières conclusions au plus tard au mois de novembre 2017, compte tenu du calendrier d'élaboration des deux textes européens.

Je vous remercie d'avoir accepté cette mission et vous prie de croire, Monsieur, à l'expression de mes sentiments distingués.

Avec toute ma confiance

Le président



Ministère de la culture et de la communication
Conseil supérieur de la propriété littéraire et artistique
(CSPLA)

182 rue Saint-Honoré
75033 Paris Cedex 01

Appendix II: Hearings and interviews conducted by the mission⁶³

1. Rightholder and consumer representatives

Association de lutte contre la piraterie audiovisuelle (ALPA): Frédéric Delacroix, Executive Officer

Association des producteurs indépendants (API): Hortense De Labriffe, Executive Officer

Canal Plus: Peggy Le Gouvello, Director of External Relations, Christophe Roy, Head of Competition and European Affairs, Céline Boyer, Head of Information Systems Security

Chambre syndicale de l'édition musicale française (CESDM): Juliette Metz, President of the CSDEM, Sophie Waldteufel, Executive Officer of the CSDEM, Carole Guernalec, Legal Director of Warner Chappell Music France, Jean-Christophe Bourgeois, Managing Director of Sony/ATV

Eurocinema: Yvon Thiec, Executive Officer

Fédération internationale de l'industrie phonographique (IFPI): Lodovico Benvenuti, European Director, Kristina Janušauskaitė, European Advisor

European Grouping of Societies of Authors and Composers (GESAC): Véronique Desbrosses, Managing Director, Burak Özgen, Legal Advisor

Société des auteurs dans les arts graphiques et plastiques (ADAGP): Marie-Anne Ferry-Fall, Managing Director, and Thierry Maillard, Legal Director

Société des auteurs et compositeurs dramatiques (SACD): Hubert Tilliet, Legal Director

Société des auteurs, compositeurs et éditeurs de musique (SACEM): David El Sayegh, General Secretary, Julien Dumon, Digital Manager, Mylène Innocente, Business Intelligence and Audit Manager

Société des gens de lettres (SGDL): Geoffroy Pelletier, Managing Director, Maïa Bensimon, Head of Legal

Société des producteurs de cinéma et de télévision (PROCIREP): Idzard van der Puyl, Executive Officer, Debora Abramowicz, Deputy Executive Officer,

Société française des intérêts des auteurs de l'écrit (SOFIA): Florence-Marie Piriou, General Secretary

Syndicat des éditeurs de la presse magazine (SEPM): Marie-Laure Franck, Head of Legal, Patrick Sergeant, Former Chair of the SEPM Legal Committee

Syndicat des producteurs indépendants (SPI): Emmanuelle Mauger, Cinema Representative

⁶³The association La Quadrature du Net and Twitter (in France) did not respond to the mission's requests for an appointment.

French Publishers Association (SNE): Julien Chouraqui, Head of Legal, Léa Bernard, Officer to the Legal Committee, Yoric Kermarrec, Legal Director of the Madrigall Group, Laurence Ballet, Legal Director for publisher Dalloz

TF1: Anthony Level, Director of Digital Regulatory Affairs, Nils Hoffet, Director of TF1 Studio Operations

Union des producteurs de cinéma (UPC): Frédéric Goldsmith, Executive Officer

Union syndicale de la production audiovisuelle (USPA): Jérôme Dechesne, Deputy Executive Officer

UFC-Que Choisir: Karine De Crescenzo, Head of Institutional Relations, Antoine Autier, Deputy to the Head of the Research Department

2. Representatives of the digital platforms and of content recognition service providers

Association des services Internet communautaires (ASIC): Giuseppe de Martino, President

Audible Magic: Michael Edwards, Vice-President

Dailymotion: Clément Reix, Head of Public and Regulatory Affairs

Facebook: Anton-Maria Battesti, Public Relations Manager, Ophélie Gerullis, Public Affairs Manager

Google: Olivier Esper, Director of Institutional Relations for Google France, Thibault Guiroy, Head of Institutional Relations, Cédric Manara, Copyright Manager

Institut national de l'audiovisuel (INA): Jean-François Debarnot, Legal Director, Jean-Gabriel Minel, Head of the Digital Research and Innovation Department, Jean Carrive, Deputy to the Head of Department

Videntifier: Herwig Lejsek, CEO, Jean-Christophe Le Toquin, Director

3. French authorities

Office of the Prime Minister: Olivier Courson, Advisor on Culture, Communication and Digital Regulation

Ministry of Culture: Alban de Nervaux, Head of Legal and International Affairs Department, Anne le Morvan, Head of the Bureau of Intellectual Property

Ministry of Economy and Finance: Loïc Dufлот, Assistant Director of Networks and Digital Uses to the Directorate-General for Enterprise, Chantal Rubin, Angélique Girard

Haute autorité pour la diffusion des œuvres et la protection des droits sur Internet (HADOPI): Christian Phéline, President, and the members of the panel, Jean-Michel Linois-Linkovskis, Secretary General, and the departments

Commission supérieure du numérique et des postes (CSNP): Ludovic Provost, Secretary General, Henri d'Agrain and Françoise Sokolowski, experts

Bibliothèque nationale de France (BNF): Harold Codant, Head of the Legal Department, Marianne Clatin, Head of the Forecasting Service for the Department of Bibliographical and Digital Information, Vanessa Richard

Conseil national du numérique: Marc Tessier, Member of the Commission, Judith Herzog-Bufalo, Rapporteur

Centre national du cinéma et de l'image animée (CNC): Christophe Tardieu, Deputy Managing Director, and Raphaël Keller, Director of Innovation, Video and Technological Industries

Permanent Representative to the European Union: Florian Blazy, Legal Advisor and Séverine Fautrelle, Deputy Legal Advisor

4. European Commission and European Parliament

Manuel Mateo Goyet, Member of the offices of the Commissioner for Digital Economy and Society, Mariya Gabriel

Marco Giorello, Head of Copyright Unit to the Directorate-General for Communications Networks, Content and Technology (DG CONNECT), and Sarah Jacquier, a member of this Unit

Werner Stengg, Head of the E-Commerce and Digital Platforms Unit to the Directorate-General for Communications Networks, Content and Technology (DG CONNECT)

Axel Voss, Member of the European Parliament, Rapporteur on the Proposal for a Directive on copyright to the Juri Committee

5. Other contacts

Pierre Sirinelli, Professor at Université Paris-I

Valérie-Laure Benabou, Professor at Université d'Aix-Marseille

Paolo Buccirossi, Director of Lear (Rome, Italy)

Appendix III: Proposals

1. Scope of platforms and works covered:

- **In the Directive, adopt the most objective criteria possible**, primarily based on:
 - The characteristics of the platform and **its audience (number of hits or views)**, which is a better gauge of the harm caused to rightholders than simply the number of available works;
 - The availability and cost of online content recognition technology for each type of work (video, music, images, text).
- **Specify these criteria and the types of recognition technology considered to be available to platforms at a reasonable cost in guidelines from the European Commission that are to be updated periodically.**

2. Defining the obligations of platforms:

- **Define the minimum required recognition performance for automatic content recognition tools implemented by platforms in guidelines from the European Commission**, calling on the European Committee for Standardization (CEN) where required;
- **Encourage labelling or certification of these tools** at a European or national level;
- Require that platforms ensure that **infringing content that has been previously suppressed after a ‘notice and take down’ procedure remains blocked (‘stay down’)**.

3. Working with rightholders:

- **Ensure that the administrative burden on rightholders is not excessive**, primarily by enabling them to generate digital fingerprints easily and free-of-charge, and without imposing fingerprint renewal too frequently (for example, by allowing an impaired version of works to be submitted so that fingerprints can be updated automatically), as well as by facilitating management of user complaints via a user-friendly interface (see § 4 below).
- **Work closely with ‘trusted flaggers’**, as defined by the European Commission Press Release of 28 September 2017, particularly as regards user complaints and audit options for technical tools.
- **Promote the creation of shared fingerprint management services for rightholders supported by platforms**, following the example of ALPA in France and Egeda in Spain.
- **Specify the safeguards offered to rightholders in terms of transparency of monetization conditions and compliance checks for these conditions.**

Yet again, it is crucial to harmonise the safeguards offered to rightholders at a European level.

4. Working with users:

- **Define harmonised rules at European level for the processing of user complaints if their content is blocked**, ensuring that cases are looked at quickly and fairly in cooperation with rightholders.
- Ask platforms to **automatically dismiss**, (at least at the first level), **the most far-fetched complaints from non-professional users** (e.g. the frequent complaints based on simply purchasing a CD or DVD based on the concept of ‘fair use’, which does not exist in the European Union).
- **Require that rightholders respond to the other complaints within a reasonable timeframe**, which could be fixed in the Directive, for example a maximum of 14 days, as provided for in the DMCA, except in the case of a proven emergency. If no response is received within this time frame, the platform would be able to unblock and republish the content in question.
- Ask **users who have complained about their content being blocked to provide their name, telephone number, address and e-mail address**, with a minimum identity check (ID request), in order that rightholders can verify that they are licence holders and, in the case that legal proceedings are required, that they have the minimum information required in order to issue a summons.
- Specify in the Directive that the identification of content performed by an automatic recognition tool implemented by the platform at the request of the rightholder (by providing a digital fingerprint and specifying that any matching content should be blocked) implies that the platform is aware of the illegal nature of this content within the meaning of Article 14 of the "e-commerce" Directive, at least as far as the ‘trusted flaggers’ are concerned as defined by the European Commission’s Communication dated 28 September 2017. This means that **the disputed content could only be published online with the rightholder’s consent** (which may be express, or implied if no response is received to a user complaint within 14 days), **or pursuant to a ruling by a judge or mediator at the user’s initiative**.
- **Promote the implementation of systems for the extra-judicial settlement of disputes between rightholders and users**, in order to prevent court action.
- Introduce **transparent procedures for closing the accounts of users who have committed multiple infringements**, having published infringing content online several times in a given period.

5. Applicable national law and harmonisation at European level:

- Define, in the Directive, **the Member State with jurisdiction to set rules applicable to the measures implemented by platforms to prevent protected works from being made available without rightholders' consent.** With regard to copyright, **the mission would be in favour of the application of the law of the receiving country or country of destination.**
- **Provide, in the Directive, the adoption of guidelines from the European Commission, reviewed regularly, after consultation of the relevant stakeholders and in partnership with Member States,** for example by establishing up a contact committee based on Article 28a(3a) of the Proposal for a Directive amending the Audiovisual Media Services (AMS) Directive.
- **Introduce a monitoring obligation for the Member States as provided for by Article 28a(4) of the above-mentioned Proposal for a Directive on AMS,** with a periodic report to the European Commission on the implementation of these mechanisms, by for example establishing a contact committee as referred to above.
- Draw on Article 28a(5) of the Proposal for a Directive on AMS, which states: *“Member States shall not impose on video-sharing platform providers measures that are stricter than the measures referred to in paragraph (...)”*.

Appendix IV: Main content recognition tools based on fingerprint recognition

1. Tools developed by the platforms:

ContentID (YouTube platform):

- Created by Google
- In operation since 2007
- Identified content: audio, video including live streams, compositions (Melody ID)
- Performance:
 - Granularity: minimum threshold of 30 seconds; the rightholder may opt to set this threshold at a higher level, for example a 3-minute match with the reference work, to cover the quotation exception
 - Able to handle changes (re-framing, reversal of the image, speeding up etc.)
- Creation of fingerprints: free-of-charge for rightholders, original work or impaired version of the original work must be supplied, option to supply the fingerprint
- Content compared to fingerprints:
 - Content uploaded after the fingerprint has been submitted and existing content
 - The tool scans all published content regardless of which user has uploaded it, including (since the end of 2013) the Multi-Channel Networks.
- Managed volume:
 - Fingerprint database: 65 million entries
 - 400 hours of videos uploaded every minute
 - 600 million videos have been claimed by partner rightholders
- Management rules: Block or monetize (the monetization option is chosen in 90% of cases)
- Partner rightholders: 9000 users representing hundreds of thousands of rightholders; the tool is accessible only to rightholders with a broad range of content or to representatives of multiple rightholders.

Rights Manager (Facebook)

- Created by Facebook
- In operation since 2017
- Identified content: videos, including live streams
- Creation of fingerprints: free-of-charge for rightholders, original work or black and white version of the original work must be supplied.
- Content compared to fingerprints:
 - Content published online after the fingerprint has been submitted, and some of the existing content (10% of the most-viewed videos the previous week)
 - The tool scans all published content regardless of which user has uploaded it, unless the rightholder personally chooses to exclude some content from the check.
- Management rules: Blocking, monetization, monitoring, manual handling on a case-by-case basis

- Partner rightholders: 3000 users (film and sporting content producers, news channels); for use by companies only,
- User platforms: Facebook, plan to extend to Instagram videos

2. Tools developed by independent providers:

Signature:

- Created by the INA (Institut national de l'audiovisuel)⁶⁴
- In operation since 2008
- Identified content: video content and soundtrack of video content, including live streams
- Performance:
 - Granularity: capable of recognising extracts of a minimum of 6 seconds (setting to be defined by the rightholder)
 - Able to handle changes in content
 - No false positives on Dailymotion
 - Analysis time before content is published: less than 5 minutes
- Managed volume:
 - Fingerprint database: several million entries covering hundreds of thousands of hours
- Management rules: Block or monetize (the platform manages the monetization option directly)
- Cost to platforms: depends on the level of service required and the input analysis stream
- Cost to rightholders: fingerprint creation currently costs €5 per hour of content stored in the active database (free-of-charge storage for inactive fingerprints, which can be reactivated on request, or sent to service providers for anti-hacking processes as instructed by the rightholder)
- User platforms: primarily Dailymotion
- Platforms are responsible for dispute management

Audible Magic:

- Independent, US-based
- In operation since 1999; a content recognition tool specifically dedicated to audiovisual content-sharing platforms has been available since 2007.
- Identified content: audio, video soundtracks including live; video and composition recognition currently in development.
- Performance:
 - Granularity: Able to recognize extracts of a minimum of 2 to 5 seconds, criterion usually set to 21 seconds identical to the reference work
 - Recognition rate of over 99%, almost no false positives
- Managed volumes: 35 million entries in the database, 300,000 new entries each month, 2 billion checks per month, over 400 million works identified as protected in 2017

⁶⁴ An industrial and commercial public institution responsible for archiving audiovisual productions, producing, publishing and granting rights to audiovisual and multimedia content for professionals and individuals, for all screen types. The INA also has a training and research centre covering the audiovisual, media and digital sectors.

- Creation of fingerprints: free-of-charge for rightholders, based on the original work or an impaired version supplied to the platform; option for rightholders to create the fingerprint themselves using the tool provided by Audible Magic
- Content compared to fingerprints:
 - Content published online after the fingerprint has been submitted and some of the existing content (10% of the most-viewed videos the previous week)
- Management rules: Block, authorise, monitor, monetize in manual mode (combining authorisation and monitoring of use in order to comply with the terms of the licence agreements; an integrated version of the monetization feature is in development).
- User platforms include Facebook, Instagram, Dailymotion, Soundcloud, Vimeo and Tumblr.

Videntifier:

- This tool is the product of a joint venture between Videntifier (Iceland) and the CNRS Research Institute of Computer Science and Random Systems⁶⁵ (France)
- Identified content: images and videos, including live, using visual comparison.
- Created in 2007: Initially created for the detection of content containing child pornography and terrorism (clients include Interpol, US Department of Homeland Security, UK Home Office)
- Active in the copyright sector since 2016:
 - For the ADAGP: Protection of a 400,000-image database, plan to extend the service to other European author societies under the auspices of CISAC
 - For Dutch security company Ir.deto: securing live broadcasts of sporting video content for American producers
- Performance:
 - Mass processing capabilities (millions of images or hours of video)
 - Identifies content in 1-2 seconds, 10-12 seconds for live content
 - Able to handle changes and distortions in content
 - False positive rate, less than 1 in 100,000
- Economic model:
 - Fingerprints are created and managed within a database. The tool then compares content with this database;
 - Rightholders and the competent authorities currently use the tool to scan the websites and platforms which may offer illegal content;
 - The tool can also be integrated into a platform to systematically check content before it is published online.

Right tracks:

- Created by Hologram industries, which became Surys in 2015
- In operation since 2013
- Identified content: e-books (over 3000 titles are protected every month covering 1200 different authors).
- Check of all specialist sharing websites every 48 hours, which covers all works in the database

⁶⁵ Institut de Recherche en Informatique et Systèmes Aléatoires du CNRS

- Sends automatic notifications to the author and the website hosting provider until the illegal content or search engine link has been removed
- Creation of fingerprints: cost included in the service provided to publishing rightholders, priced at around €2 per work per month based on current volumes, not including partial coverage of costs (up to 50% of costs incurred) by the French Society for the Interests of Text Authors (Sofia)⁶⁶.

3. Platforms using third-party tools

Dailymotion:

- Uses Audible Magic (since 2007) for the sound component of its content, Signature (since 2008) to protect video content, and Content Protection Solution, an internal tool developed by Dailymotion and based on INA technology
- Managed volume: 3 million videos uploaded each month
- Fingerprints are submitted through Audible Magic and/or the INA (Signature tool), whom rightholders are advised to contact, and/or Dailymotion (Content Protection Solution tool)
- Management rules: block using Audible Magic and Signature tools, monetization through Content Protection Solution
- Take down time frame of less than 2 hours once illegal content has been reported and confirmed
- procedure in case of user complaints when content is blocked: either republish or stay down after a manual check

SoundCloud

- Musical (non-audiovisual) content-sharing platform created in Germany in 2007, headquartered in the United Kingdom
- Has used Audible Magic since 2010, and an internal tool originating from takeovers of independent providers since 2012
- Comparisons made: each file is compared against the database as soon as it is uploaded, and then again after 40 hours and after 14 days.

⁶⁶ Société française des intérêts des auteurs de l'écrit (Sofia)