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FRENCH NATIONAL CENTRE FOR CINEMA AND THE MOVING IMAGE
HIGH AUTHORITY FOR THE DISSEMINATION OF
WORKS AND THE PROTECTION OF RIGHTS ON THE INTERNET**

MISSION REPORT

**CONTENT RECOGNITION TOOLS ON DIGITAL SHARING
PLATFORMS:**

**PROPOSALS FOR THE IMPLEMENTATION OF ARTICLE 17 OF
THE EU COPYRIGHT DIRECTIVE**

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Summary

Article 17 of Directive (EU) 2019/790 constitutes a major step forward for all stakeholders in the digital world. It sets out a specific liability regime regarding the protection of copyright with respect to online content-sharing service providers, i.e., essentially, those digital platforms on which internet users share large amounts of protected content. It is a major step forward for the enforcement of copyright in the digital world, in a context where sharing platforms have long taken advantage of the online availability of content protected by copyright and related rights, without providing fair compensation for them. This reform will make it possible to encourage the dissemination of licensed content, to the benefit of users, as well as the creative sector and platforms.

However, both its transposition into national law and the development of the guidance to be presented by the Commission have led to certain proposals that would jeopardise its balance. These proposals are premised on the idea that the implementation of Article 17 would disproportionately hamper freedom of expression, by creating risks of “overblocking” as a result of the use of automatic detection tools set up by platforms to ensure the respect of copyright and related rights. Analysis based on actual practices, however, shows that this fear is unfounded.

1. A review of existing best practices shows that content recognition tools should be given full consideration in the implementation of Article 17 of the Directive.

Indeed, tools deployable for the recognition of works are a necessity for any serious regulation of the content found on platforms. Long present on the foremost platforms, they are the only realistic option for regulating the considerable masses of content put online, in a context where the risk of distribution of infringing content or misappropriation of value remains significant. It can be added that platforms make extensive use of content analysis technologies for many purposes other than copyright protection.

These technological tools also offer great reliability and real flexibility. Several types of techniques, in continuous evolution, contribute to copyright protection on the platforms, depending on the contexts and uses. Fingerprinting tools, which are the best available technique to date for recognising video and audio content, are already in widespread use (by such players as Facebook, YouTube, Twitch, etc.). Moreover, these tools are also very reliable. For instance, they flag cases in which the match between the content and the work’s fingerprint is too narrow, and refer them for vetting by a human perspective.

Insofar as rightholders determine the management rules, users may also continue to enjoy, in practice, significant room for manoeuvre. Acts of sharing are not affected when the management rule chosen by the rightholder is content “monetisation”, i.e. authorisation to share in exchange for remuneration. This is by and large the preferred option in many sectors, such as music and, possibly, in the near future, visual arts and photography. It enables broad

content-sharing, which could further develop thanks to the dynamic set in motion by Article 17.

As for the sectors that use recognition tools with a view to blocking content-sharing and thereby foster other modes of making commercial use of their catalogues, a review of the practices of rightholders shows that they frequently implement substantial tolerances.

Rightholders do not always lay claim to their exclusive rights and, to the contrary, sometimes voluntarily restrict the exercise of their prerogatives, by adopting flexible rules for managing these rights. In the field of cinema, for instance, excerpts of up to several minutes can be shared. This type of flexibility supports the principle of free circulation of works and staves off the risk of “overblocking” practices. Similarly, over the course of the dispute proceedings brought by users following a blocking measure, rightholders regularly choose to authorise the use of content, even when not in the context of an exception or limitation.

Content recognition tools are not the bogeyman “filtering tools” many would portray them to be; instead, they are simply mechanisms for applying rules decided and implemented in a framework that allows for human supervision. This supervision may apply at all stages of the process, from the initial definition of the rule, upstream, to the possible authorisation of content distribution after human vetting, downstream.

2. The appropriate balance between the fundamental rights set out in Article 17 must be strictly respected in its implementation.

While the sharing of content on platforms may fall within the scope of freedom of expression, it also falls under the protection of intellectual property rights. As the right to property and freedom of expression are two fundamental rights, their balance must obviously be carefully calibrated and considered. In this regard, the European Court of Justice, like the European Court of Human Rights, has adopted delicately balanced solutions on the subject, taking into account the particular nature of exclusive intellectual property rights and the specific risks stemming from the digital world.

Article 17 strikes this balance between these rights through safeguards for exceptions and the ex post complaint mechanism. Exceptions to copyright - and not a vaguer approach based on all the uses expected or observed by users - are the key to the balance between intellectual property rights and freedom of expression, as the Court of Justice has already stated. However, the exercise of these exceptions must comply with the three-step test imposed by Article 5 of Directive 2001/29/EC of 22 May 2001, known as EUCD, according to which exceptions and limitations “*shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder*”. Users will be able to claim the benefit of these exceptions through the rapid and effective complaint mechanism provided for in Article 17(9) of the Directive.

However, some initiatives appear to be moving away from this balance and proposing new paradigms, such as the existence of an “obligation of result” not to block content where it is even only likely to be covered by an exception, or the introduction of a “*sui generis*” right by Article 17. Apart from the fact that these theories would probably raise difficulties in relation

to international intellectual property law and in particular the three-step test which originates particularly in the Berne Convention, they are neither in line with the plain text of Article 17, nor necessary.

The resulting reinterpretations of Article 17 – quantitative thresholds, unblocking based on user declarations, unblocking as an obligation of result or a probabilistic approach requiring unblocking on the basis of likely or manifestly licit use – appear, furthermore, highly impracticable and dangerous. The probabilistic approach to exceptions, which would seek to block automatically only “dubious” or “likely unlawful” content, would, in fact, result in a solution that is less conclusive than the current state of the art. It would imply a systematic and abstract appraisal of exceptions, which is doomed to fail since the issue requires a complex and concrete legal analysis. The implementation of unblocking based on user declarations, sometimes referred to as “*pre-flagging*” in the discussions, risks leading to the mass dissemination of protected content, without any safeguards in sight. As to the setting of quantitative thresholds below which content could not be blocked, such a measure would fail to take into account the very significant variability that exists within sectors and between content items.

In reality, the combination of preventive enforcement of copyright - in full compliance with the preventive nature of this right as reiterated by the Court of Justice - and an ex post complaint mechanism is the only satisfactory solution. The failure to prevent the appearance of a content that should have been blocked causes a significant and irreversible infringement of copyright, in particular in light of the possibility of uncontrollable dissemination of the content once it is put online. In contrast, the temporary blocking of content used without prior authorisation can be reversed expeditiously and effectively, following a complaint. In fact, the quantitative evidence gathered by the mission shows that such blocking actions concern a very small minority of the total volume of acts of sharing. The responsibility of platforms is the final component in the mechanism created by Article 17: platforms must, in the last instance, be able to be held responsible for any unauthorised dissemination of content, if the technologies, resources and information provided by rightholders (particularly in the context of dispute procedures) enabled them to avoid it.

3. The balances in Article 17 must be maintained by drawing on existing best practices and harnessing all the progress made possible by the Directive.

The mission’s proposals reflect the possibilities opened up by the implementation of Article 17, based on its text and best practice. While its proposals build on existing models, the mission wishes to emphasise the importance of a pragmatic approach tailored to the characteristics of the sectors concerned. The existing best practices must be identified and encouraged, without however becoming rigid, codified or imposed; moreover, it is not always possible that they be applied uniformly by all platforms. The speed of technological and economic change today makes it illusory to set rules that are concurrently exacting and uniform. Flexibility and a voluntary and tailor-made approach should thus prevail in the operational application of Article 17 by the platforms and rightholders.

The mission first proposes to modify the French draft transposition to formally enshrine for the guarantee on exceptions. This modification, which would have no other legal impact than the one of the first draft transposition, would nonetheless clarify and spell out that exceptions, in particular those for quotation and parody, apply and can be invoked by users ex post.

In the French context, the regulator must furthermore play an important part. As a guarantor of the mechanism's balance, it will provide extra-judicial recourse for users wishing to benefit from the intervention of a trusted third-party in the event of what they consider to be unwarranted blocking. The regulator will also be able to play a part by clarifying best practices, particularly from the technical standpoint, and make recommendations.

Users' concerns will be effectively addressed through the expeditious and efficient handling of complaints, if necessary, using "smart processing". The implementation of Article 17 should enable the platforms to align with existing best practices in the field of complaint handling, by guaranteeing that they are quickly taken into account by rightholders. In the absence of a response within the time limit set by platforms, the users' claim will be satisfied. More prospectively, the handling of complaints could be improved by applying smart processing to the requests received, which would be able to differentiate the actions from one another.

The transparency of the management rules applicable to content access rights could also be improved. This transparency could be envisioned with finer shadings, using a variety of approaches. Ex ante transparency for all management rules on all forms of content would likely not be possible and probably be inoperable for users. In contrast, transparency on the rules applicable to each sector, in their broad lines and depending on the types of works involved, as set out by a study on uses undertaken by the regulator, or heightened transparency rules in the implementation of management measures, would facilitate acceptance of the rules. Similarly, it is necessary to increase the transparency as regards the implementation of algorithms and copyright protection measures by the platforms. This transparency for the users and for the rightholders requires appropriate action by the regulator.

Lastly, the effective use of incentives should help broaden the range of the licensed content available. First of all, certain sectors, such as still images, need to be able to take advantage of Article 17 to enter into licensing agreements with platforms: once again, the primary purpose of its provisions is to harmonise practices top-down, between platforms and between sectors. Moreover, Article 17 is also expected to make it possible to consolidate the shared responsibility of all players. In addition to users and platforms, this logic of due diligence and accountability in the implementation of recognition tools will need to be fully implemented, including by rightholders.

Introduction

The content recognition tools deployed on digital sharing platforms lie at the heart of a debate which, although complex, raises issues of crucial importance to the future of both copyright and the digital practices of European citizens. The debate surrounding these tools and their implementation was particularly lively in 2019 upon the adoption of the European Copyright Directive¹, which saw supporters and opponents of its Article 13, now Article 17, clash.

Article 17 of Directive 2019/790 of 17 April 2019 on copyright sets out a specific liability regime regarding the protection of copyright with respect to online content-sharing service providers, in other words, essentially, those digital platforms on which Internet users share large amounts of protected content. It is clearly distinct from the very favourable regime for hosting providers under the 2001 E-Commerce Directive², which was, until now, often applied to such platforms by certain courts. These platforms will now be liable for any copyright infringements committed by users, unless they demonstrate that they have made best efforts to secure authorisation, to prevent the availability of protected works and, in any event, to remove and prevent further uploading of any works that might continue to be shared without authorisation.

By adopting this provision, the European legislator sought to promote fair distribution of value between creators and platforms, while encouraging the development of legal content-sharing and that of the licensing market. Such an ambition was strongly supported by France throughout the negotiation of the 2019 Directive. Moreover, the European legislator, in the provisions of Article 17, was careful to take into account the concerns of various stakeholders, for example by reducing the obligations placed on “small” platforms or providing for safeguards which users will be able to invoke in their dealings with platforms and rightholders.

It was to precisely define all the operational implications of this complex text, in the context of its forthcoming implementation, that **the CSPLA, Hadopi and the CNC conducted an initial mission on content recognition tools**, resulting in a report published on 29 January 2020³.

This work made it possible to produce an overview of the techniques and tools for recognising content, used to protect copyright. It emphasised the role of electronic or digital fingerprinting, a reliable, flexible and proven solution already put to use by many players in the digital economy, as well as showed the contributions and prospects of other tools, including artificial intelligence. This report also precisely mapped out the practices and

¹ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC.

² Directive 2001/31/EC on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.

³ CSPLA, Hadopi, CNC Report, *Towards more effectiveness of copyright law on online content sharing platforms: overview of content recognition tools and possible ways forward*, 29 January 2020. Online: <https://www.culture.gouv.fr/Sites-thematiques/Propriete-litteraire-et-artistique/Conseil-superieur-de-la-propriete-litteraire-et-artistique/Travaux/Missions/Mission-du-CSPLA-sur-les-outils-de-reconnaissance-des-contenus-protoges-par-les-plateformes-de-partage-en-ligne-etat-de-l-art-et-propositions>

expectations of the players who make up the content-sharing platform ecosystem. Lastly, it offers proposals for the implementation of Article 17, underscoring both the set of obligations it imposes and the areas of flexibility that exist in its implementation.

Over the course of year 2020, **the relevance of Article 17 and of discussion on the liability of online content sharing service providers has been consistently confirmed**, from at least four different angles⁴.

Firstly, the Member States are gradually entering the Directive transposition process, which must be completed by 7 June 2021. Some countries, such as the Netherlands⁵, France⁶ or Germany⁷ have already published preliminary transposition bills or draft transposition acts, which reveal diverging choices.

Before the Court of Justice of the European Union, Article 17 itself has been the subject of an action for annulment brought by Poland⁸, which challenges the conformity of some of its provisions with freedom of expression. An oral argument hearing has already been held before the Court, whereby a decision is not expected until sometime in 2021. At the same time, two questions referred for preliminary rulings, in the *YouTube* and *Cyando* cases, could lead the Court to rule on questions connected with those of Article 17 in the previous legal framework, defined by Directive 2001/29⁹.

The European Commission is also preparing guidance for the application of Article 17, the publication of which is expected in the coming months. On 27 July 2020, its services published a consultation document outlining principles to this end, which gave rise to lively debate¹⁰.

It is thus in the year to come – and against a backdrop of still deeply-diverging analyses and proposals – that the Member States, the EU institutions and the economic players

⁴ For an overview of the timeliness of Article 17, see Alexandra Bensamoun, « *L'article 17 de la directive 2019/790 ou le retour à l'opposabilité des droits : une mesure d'équilibre, en équilibre...* », [Article 17 of Directive 2019/790 or the return to the enforceability of rights: a balancing measure, in balance] *RIDA* n° 267, April 2020.

⁵ <https://zoek.officielebekendmakingen.nl/kst-35454-2.html>.

⁶ In France, Law No. 2020-1508 of 3 December 2020 on various provisions for adapting to European Union law on economic and financial matters provides, in its Article 34, for the adoption of legislative transposition measures by ordinance within six months.

⁷ Draft transposition act made public by the German Federal Ministry of Justice and Consumer Protection: [https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_II_Anpassung%20Urheberrecht digitaler Binnenmarkt englischeInfo.pdf?__blob=publicationFile&v=4](https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/DiskE_II_Anpassung%20Urheberrecht%20digitaler%20Binnenmarkt_englischeInfo.pdf?__blob=publicationFile&v=4) (English-language version dated 24 June 2020); draft incorporated into a more extensive version on 13 October 2020: https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Dokumente/RefE_Urheberrecht.pdf?__blob=publicationFile&v=7

⁸ Case C-401/19 – action for annulment by Poland against Article 17(4)(b) and (4)(c) of the Directive.

⁹ Cases C-682/18, *LF v Google LLC, YouTube Inc, YouTube LLC, Google Germany GmbH* and C-683/18, *Elsevier Inc v Cyando AG*.

¹⁰ European Commission, *Targeted consultation addressed to the participants to the stakeholder dialogue on Article 17 of the Directive on Copyright in the Digital Single Market*, July 2020. Online: <https://ec.europa.eu/digital-single-market/en/news/directive-copyright-digital-single-market-commission-seeks-views-participants-stakeholder>

concerned will have to transpose and implement Article 17, in full respect of the balance achieved during its negotiation.

In this setting, the technological tools for recognising content deployed on sharing platforms appear of central importance in the balances to be struck. Although they are not explicitly referred to by the Directive, they are very directly targeted by the notion of "*best efforts, made in accordance with high industry standards of professional diligence*" which platforms are expected to implement if they wish to escape liability in the event of acts of sharing not authorised by rightholders.

By placing the emphasis on the safeguards for legitimate uses of content, in particular on the basis of exceptions and limitations, of which it has made a central subject of its document submitted for consultation, the European Commission also takes aim at content recognition tools, specifying that their unqualified implementation should be reserved only for cases of "*likely infringing content*".

In this newly-defined setting, the mission wishes, for its second report, **to specify very concretely the part which content recognition tools already play on certain platforms and the role which they should be given in the implementation of Article 17, by defining the conditions for a balanced implementation of the said Article 17.** In this respect, the mission is convinced that the balance struck by the legislator between fundamental rights through Article 17 is perfectly robust.

First of all, the mission reiterates that content recognition tools, which it analysed in detail in its previous report, are indispensable tools the role of which should, nonetheless, not be overestimated or demonised (1). Automatic recognition tools, particularly digital fingerprinting, are widely used by platforms for multiple purposes, including copyright. Such tools are indispensable given the considerable volume of content uploaded on these services and the regulatory implications which they carry. That being said, their automatic nature does not preclude real flexibility, just as it does not rule out in-depth human review of their implementation, which contributes to the balance of Article 17.

The mission then analyses the legal parameters of the implementation of Article 17, which must be presented in detail to ensure that it is implemented faithfully (2). It emphasises that the legislator has defined the conditions for a fair balance between the fundamental rights at stake, namely the right to property and freedom of expression. To this end, it has taken into account the issue of exceptions to copyright, which should not be likened to the broader and shifting set of tolerated or even expected uses. This balance would be strongly challenged by certain current reinterpretations of Article 17, and must, to the contrary, be implemented on the basis of the legislator's clear will.

In order to achieve a balanced implementation of Article 17, one which would foster the development of a positive dynamic around the legal provision of content and licences while offering safeguards to all stakeholders – rightholders, platforms and users – the mission concludes by putting forward proposals that extend from those in its first report (3). These proposals centre around three main areas: enshrining the essential safeguards in law while leaving the necessary room for manoeuvre to the stakeholders and the regulator; protecting

the user through an expeditious and effective complaint handling and redress mechanism; and creating appropriate incentives for the development of legitimate uses, through the transparency of management rules and algorithms implemented, the extension of licences to new sectors and the accountability of stakeholders.

I. Review of existing best practices shows that content recognition tools must be given their rightful place in the implementation of Article 17 of the Directive.

Content recognition tools have been put to use by major platforms for more than ten years now. From as early as 2007, the platform Dailymotion implemented recognition technologies for music (Audible Magic solution) and video (Ina Signature) content. The technology “Video Identification”, now better known as Content ID, was widely deployed on YouTube less than a year after its acquisition by Google in 2007. At the time, the company explained that it automatically compares copies provided by rightholders “against every user-uploaded video, searching for matches” and “make sure that when we run advertising, we have all the appropriate rights cleared”¹¹. In 2010, just ten years ago, more than 100 million videos had already been identified via this technology on this platform alone, according to YouTube¹².



Figure No.1: 2007 presentation by David King, Product Manager at YouTube, showing Video Identification’s ability to recognise televised content reproduced by hand-held video camera pointed at a TV screen.

The massive deployment of these tools, the performance of which has incessantly improved, thus goes back a relatively long time, on the scale of the rapid evolution of digital practices, so that their implementation can be reviewed with a certain degree of perspective.

This perspective makes it possible, based on realistic analysis of how platforms function with regard to content recognition technologies (I.A), to debunk the role these tools play in the actual implementation of copyright (I.B).

¹¹ Presentation of Video Identification by David King, Product Manager for YouTube, 2007. Online: <https://www.youtube.com/watch?v=xWizsV5Le7s>

¹² David King, “Content ID turns three”, *YouTube Official Blog*, 2 December 2010. Online: <https://blog.youtube/news-and-events/content-id-turns-three>

A. Realistic analysis of the functioning of sharing platforms shows that the use of automated management tools is needed to guarantee respect of copyright as well as to satisfy other public and private interests.

1. Sharing platforms are managed and regulated spaces, the operation of which is based on automated tools, this characteristic being essential given the volume of content shared and multiple sources involved

i) Sharing services are spaces managed and regulated by their services providers for a multitude of purposes, of which copyright is only a subset

While constituting places of expression and creation for their users, content-sharing services are also, by nature, spaces managed by their providers. Debate on the implementation of copyright in the context of the digital economy has sometimes glossed over this fact, giving the impression that particularly exorbitant measures were being envisioned for intellectual property protection. In reality, the protection of intellectual property rights forms part of a broader spectrum of issues, both commercial and of public-interest, already taken into account by platforms in their approach to content management.

In managing their services, providers of sharing services naturally place great importance on their commercial concerns. Although there may exist paid services, the business model used by sharing platforms is built primarily on advertising. In practice, the effectiveness of their advertising model relies, among other things, on numerous technological solutions – making it possible, for example, to target consumers whose search history shows that they are looking to buy specific products¹³ – including content analysis technologies.

Using the information thus available to them, the platforms can therefore be inclined to act on the monetisation and promotion of certain content, depending on advertisers' expectations. Many of them inform users of this by providing them with their "Content Monetization Terms" (Facebook) or "Advertiser-Friendly Content Guidelines" (YouTube). Video creators have sometimes criticised the extent to which these rules are enforced, or have raised questions about the extent to which the implementation of these guidelines actually reflect the constraints of the advertising market or the platform's editorial preferences.

The mission's interviews with professionals in the sector, in particular with videographers, showed that these commercial concerns, as legitimate as they may be, are not without impact on the content shared. For example, one video maker with whom the mission met listed her over-riding concern as the difficulties she faced in monetising feminist, or even simply women's content, carrying key words such as "period". More generally, the limits on advertising revenues connected with general interest content, dealing with topics perceived as "sensitive" by platforms – violence, LGBT rights, etc. – has stirred increasing attention in

¹³ Google, "About targeting for video campaigns, *Google Ads Help: "In-market audiences: Select from these audiences to find customers who are researching products and actively considering buying a service or product like those you offer"*. Online (last viewed in November 2020): <https://cutt.ly/Sg42j3N>

their user community¹⁴. These concerns voiced by platforms regarding the editorial context of their advertising could grow even deeper in the years to come, a recent report having highlighted the importance of brand safety issues in the regulation of the online advertising market¹⁵.

These platforms are also increasingly, as their influence grows, spaces that are regulated in the name of legitimate public interests. The significance given to freedom of expression on these services is defined in the light of these realities, in a dynamic equilibrium that has not entirely stabilised today.

Facebook, for example, has gradually enacted “community standards”¹⁶ that are more detailed and cover hate speech, violent and explicit content, the subject of adult nudity and sexual activity, cruel and indecent content, etc.

Generally speaking, the rules imposed by platforms on their users, which can vary from one country to another, raise issues of widely varying importance in light of our legislation, from the fight against terrorism to nudity and spam. The platforms decide which content they allow versus which they prohibit and may thus choose to take down.

These rules are specific to them and do not necessarily reflect legislative or regulatory provisions, for example: “*We define attack as violent or dehumanizing speech, harmful stereotypes, statements of inferiority, or calls for exclusion or segregation*”¹⁷ or “*Content that solely exists to incentivise viewers for engagement (views, Likes, comments, etc.) is prohibited*”¹⁸.

As a consequence, platforms are constantly required to manage – in other words, to demonetise, dereference or remove, in particular – the content they host, through more or less automated technological solutions, in accordance with criteria and procedures which they generally define on their own, for any number of purposes, including enforcing the law, protecting user sensitivity, optimising their commercial policy or securing their information system.

For several years now, the European Union has been considering how to deal with illegal content on the Internet in pursuit of the objective recently stated by Internal Market

¹⁴ See, for instance, a study on the “monetisation” of content on YouTube: Robyn Caplan, Tarleton Gillespie, “Tiered Governance and Demonetization: The Shifting Terms of Labor and Compensation in the Platform Economy”, *Social Media + Society*, vol. 6.2, June 2020.

Online: <https://doi.org/10.1177/2056305120936636>

¹⁵ Anne Perrot, Mathias Emmerich, Quentin Jagorel, *Publicité en ligne : pour un marché à armes égales* [Online advertising: for a level playing field] report to the Minister of Culture and the State Secretary for Digital, November 2020. Online: <https://www.vie-publique.fr/sites/default/files/rapport/pdf/277709.pdf>

¹⁶ Facebook, *Community Standards*.

Online (last viewed in November 2020): <https://www.facebook.com/communitystandards/>

¹⁷ *Ibid.* Online (last viewed in November 2020):

https://fr-fr.facebook.com/communitystandards/objectionable_content

¹⁸ Google, “Fake Engagement Policy”, *YouTube Policies*. Online (last viewed in November 2020): https://support.google.com/YouTube/answer/3399767?hl=fr&ref_topic=9282365

Commissioner Thierry Breton: “*that what is illegal offline also be illegal online*”. The European Commission has put forward legislative proposals to improve the fight against illegal or hateful content, or for instance, disinformation, hitherto framed by codes of conduct¹⁹. Already, the 28 September 2017 Communication on the fight against illegal content online and the 1 March 2018 Recommendation were aimed at achieving greater involvement of online platforms in the fight against illegal content.

In its 2017 Communication²⁰, the European Commission encouraged the use of content recognition technologies, in particular as a means of tackling the most serious harm to public interests. Concurrently, it emphasised that the procedures for permanent removal should provide for a reversibility safeguard in the event of a wrongful decision. It deemed, for instance, that “*online 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*”, a point also taken up in the 2018 recommendation²¹. It clarified in passing that, where the E-Commerce Directive is applicable, such proactive measures do not in and of themselves annul the benefit of the hosting platforms’ liability regime.

In doing so, the Commission recognised the need for the guided use of automatic tools, which form an essential component of the role of platforms, well beyond the issue of copyright.

ii) Automated tools are inherent in the functioning of content-sharing platforms.

The nature of sharing platforms and the volume of content shared make it unthinkable to satisfy the legitimate interests at stake, whatever they may be, without resorting to automated tools and acting both preventively, via upload blocking, and curatively, through the removal of illegal content. According to YouTube, in 2019, users put 500 hours of video online every minute²²: viewing the entirety of this content alone would require the work of nearly 150,000 full-time moderators²³, not including the time needed to qualify the videos and take action. The automation of most of these actions appears imperative for the platforms’ proper functioning.

¹⁹ Proposal for a REGULATION OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC (COM/2020/825 final), 15 December 2020.

²⁰ European Commission, *Tackling Illegal Content Online. Towards an enhanced responsibility of online platforms* (COM (2017) 555 final), Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 29 September 2017.

Online: <https://ec.europa.eu/transparency/regdoc/rep/1/2017/EN/COM-2017-555-F1-EN-MAIN-PART-1.PDF>

²¹ European Commission, *Recommendation on measures to effectively tackle illegal content online*, 1 March 2018, p. 14 (point 18).

²² Interview with Susan Wojcicki, Chief Executive Officer of YouTube, in *60 Minutes*. See the transcript produced by the site TechCrunch (Connie Loizos, “In ‘60 Minutes’ appearance, YouTube’s CEO offers a master class in moral equivalency): <https://techcrunch.com/2019/12/01/in-60-minutes-appearance-youtubes-ceo-offers-a-master-class-in-moral-equivalency/>

²³ Mission computations, based on full-time equivalents employed under French law.

The very characteristics of sharing platforms thus make the use of automated management tools a necessity, in order to ensure compliance with copyright law as well as to satisfy the other public and private interests at stake. These technologies are designed to facilitate the detection of content that might infringe their conditions of use. YouTube states, for instance, in its Community Guidelines, that *“With hundreds of hours of new content uploaded to YouTube every minute, we use a combination of people and machine learning to detect problematic content at scale. Machine learning is well-suited to detect patterns, which helps us to find content similar to other content we’ve already removed, even before it’s viewed”*²⁴.

For several years now, YouTube has therefore relied on technologies such as fingerprint detection, hash-based verification and machine learning to prevent the dissemination and re-emergence of images of a terrorist or paedophile nature, a trend that has been continually growing. For example, the same platform stated that in 2020 it had taken steps – particularly in response to the public health conditions – *“to rely more on technology”*, specifically automatic detection systems, *“to help with some of the work normally done by human reviewers”*²⁵.

Likewise, in September 2020, YouTube announced that it was stepping up its efforts to verify content aimed at young audiences. The platform has decided to rely even more on artificial intelligence and machine learning so that, thanks to technology, the age restrictions on online content are applied automatically²⁶.

Meanwhile, Facebook intends in the future to make even greater use of technology to adopt measures regarding content, *“in particular to delete more posts automatically”*²⁷ so that content moderators can focus on those types of content that require more nuances and context to reach a decision.

Thus, in their everyday operations, major platforms already rely on automatic tools, which are behind the vast majority of acts of moderation. Since August 2020, Facebook has published a quarterly report entitled “Community Standards Enforcement Report” on how it moderates content on its platform. The report shows that in 2019, with regard to the removal of prohibited content from the platform for reasons other than copyright infringement, 94.8% of disputed content, i.e. more than 355 million content items, was detected and blocked thanks to detection technologies even before being reported by members.

When it comes to “proactive” actions (as opposed to manual reports), the removal rate reaches as much as 98.7% in the case of content involving nudity, 99.2% in the case of violent

²⁴ Google, “How does YouTube identify content that violates Community Guidelines?” YouTube Rules and Policies Online (last viewed in November 2020):

https://www.youtube.com/intl/ALL_fr/howyoutubeworks/policies/community-guidelines/#detecting-violations

²⁵ Information included with YouTube’s *Transparency Report*. Online (last viewed in November 2020): <https://transparencyreport.google.com/youtube-policy/removals>.

²⁶ <https://blog.YouTube/news-and-events/using-technology-more-consistently-apply-age-restrictions/>

²⁷ Facebook, *Community Standards Enforcement Report, May 2020 Edition*, 16 May 2020.

Online: <https://about.fb.com/news/2020/05/community-standards-enforcement-report-may-2020/>

content and 99.5% in the case of child pornography content. As regards unwanted content, such as spam and fake accounts, it gave rise to more than 15.3 billion reports in 2019 by the platform's monitoring tools (or 99.8% of the cases identified).

Content category	Number of removals... (in millions)	...of which automatic (in millions)	Automatic detection rate	Number of calls by users (in millions)	Appeal rate
Adult nudity and sexual acts	121.50	119.96	98.7%	13.1	10.8%
Hate speech	21.20	16.13	76.1%	4.7	22.2%
Harassment and intimidation	10.90	1.85	17.0%	2.385	21.9%
Drug-related content	16.62	16.13	97.0%	0.491	3.0%
Firearms-related content	7.61	6.98	91.8%	0.569	7.5%
Child nudity and sexual exploitation of children	37.40	37.20	99.5%	0.372	1.0%
Dangerous organisations (terrorism and hate movements)	27.10	25.93	95.7%	0.728	2.7%
Suicide and self-mutilation	9.50	9.26	97.5%	0.149	1.6%
Violent or shocking content	122.90	121.87	99.2%	1.632	1.3%
TOTAL	374.73	355.31	94.8%	24.126	6.4%

Figure No. 2: content blocked by Facebook in 2019²⁸

On YouTube, also in 2019, 86.8% of the video content blocked – for reasons other than infringement of intellectual property – was detected automatically. More than 99.3% of the 1.87 billion removed or filtered comments were automatically flagged by technological tools.

These figures illustrate and demonstrate just how important automated tools are to platforms in their efforts to prevent a considerable amount of dangerous or illegal content from ending up online lastingly. Their attempts to secure intellectual property rights, faced with the same quantitative challenge, likewise cannot do without assistance of technology.

2. The use of automatic tools deployed by the platforms stands out as a necessity in view of the implications for the protection of copyright and related rights

i) Sharing platforms continue to be used to illegally access protected content

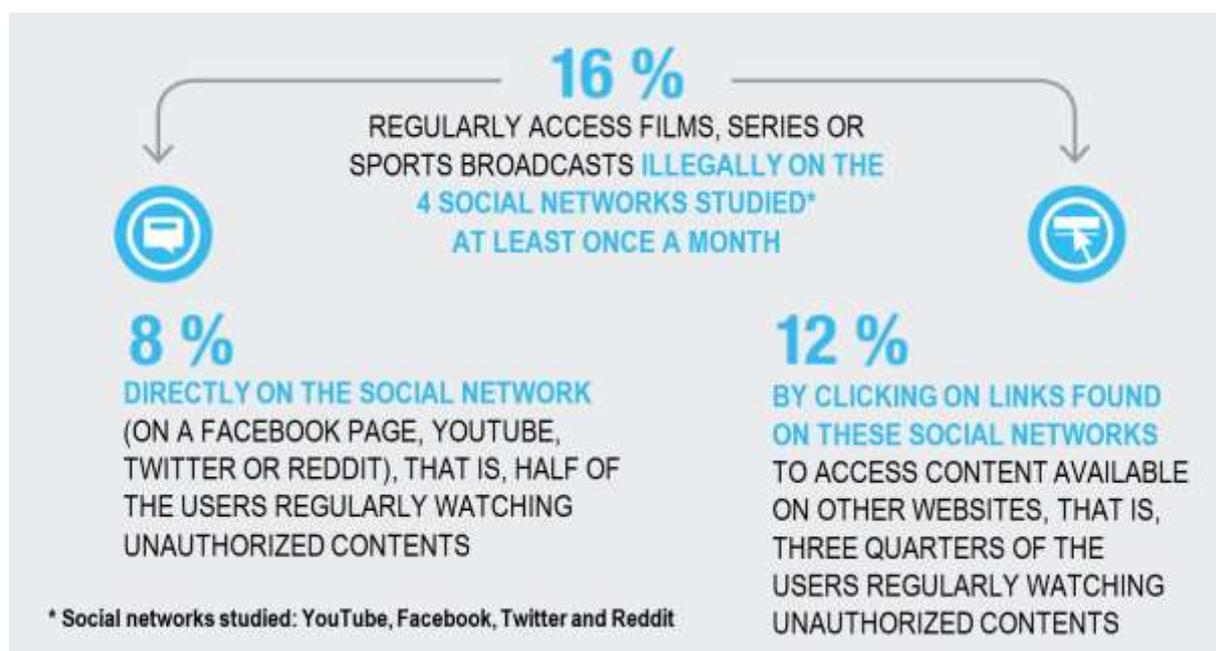
The fight against the illegal dissemination of unauthorised content on platforms based on ad hoc notifications, as foreseen by Directive 2000/31 on electronic commerce, has proved ineffective. The implementation of the right to property by means of notifications to platforms gives rise to an administrative burden and costs that are substantial, whether to mobilise

²⁸ Source: Facebook, “Community Standards Enforcement Report”, *op. cit.*

internal human resources or call on the services of specialised operators to perform these notifications²⁹.

Moreover, the take-down request covers only the content location listed in the notification, when this content may be found in or accessed from multiple places on the site; illegal content may thus also reappear when it is made available again by an Internet user. It was, in fact, to remedy these problems that, as early as 2012 and thereafter, the Court of Justice and the national courts³⁰, such as the French Court of Cassation³¹, enjoined hosting platforms to adopt systems able to identify content placed online without the rightholders' authorisation and to remove it permanently, while also preventing its reappearance in the future. More recently, the Court of Justice specified that injunctions aimed at preventing further dissemination of previously reported illegal content ("notice and stay-down"), which thus imply a duty of vigilance on the part of the platforms, were compatible with the e-commerce directive³².

Today, protected content continues to be accessed illegally via content-sharing services, despite the encouraging results attained in certain instances through agreements between rightholders and platforms.



²⁹ On this topic, see: Olivier Japiot, Laure Durand-Viel, *La protection du droit d'auteur sur les plateformes numériques : les outils existants, les bonnes pratiques et leurs limites* [Copyright protection on digital platforms: existing tools, best practices and their limits], report to the CSPLA, 19 December 2017, p. 14 – 16. Online: <https://www.culture.gouv.fr/Sites-thematiques/Propriete-litteraire-et-artistique/Conseil-superieur-de-la-propriete-litteraire-et-artistique/Travaux/Missions/Mission-du-CSPLA-sur-les-outils-de-reconnaissance-des-oeuvres-sur-les-plateformes-en-ligne>

³⁰ CJEU, 16 February 2012, *SABAM c/ Netlog*, Case C-360/10.

³¹ Cass., 1st civ., 12 July 2012, No. 11-13-666; Nos. 11-15.165 and 11-15.188; No. 11-13.669

³² CJEU, 3 October 2019, *Eva Glawischnig-Piesczek versus Facebook Ireland Limited*, Case C-18/18.

Figure No.3: how social media are used by Internet users ages 15 and over to access content illegally, at least once per month³³

For instance, 8% of Internet users regularly access unauthorised films, series and sporting broadcasts on social platforms and media themselves. Users appreciate the convenience offered by these platforms and in particular the opportunity to receive reviews from other internet users. Consequently, a significant proportion intends to continue or intensify these practices in the future.

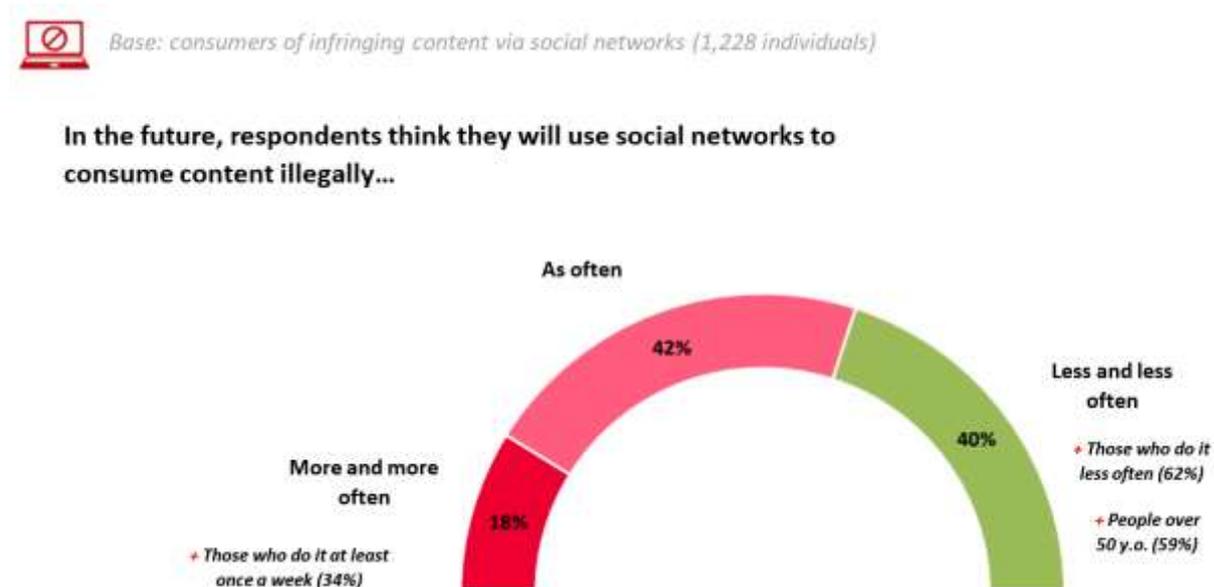


Figure No.4: how social media are used by Internet users ages 15 and over to access content illegally, at least once per month³⁴

As some rightholders pointed out in the context of the debates before the European Parliament on Directive 2019/790 of 17 April 2019, the use of content recognition technologies is the only way to combat infringements of their rights, which continue to be widespread and are impossible to detect on a case-by-case basis.

Considering users' practices and expectations, it is essential that a high level of prevention against illegal distribution of protected content on sharing platforms be sustained.

- ii) **The implementation of content-recognition technologies for copyright protection over more than ten years now has not given rise to a significant number of questionable blocking actions or a rejection of copyright rules**

³³ Source: Ifop for Hadopi, *L'accès illicite à des contenus audiovisuels et sportifs via les réseaux sociaux*, [Illegal access to audiovisual and sporting content via social media] 2019.

³⁴ *Ibid.*

Under 1%

Number of matches identified by the Content ID system as possible copyright infringements, estimated to have been disputed in 2018.³⁴

Automated tools have long been put to use by certain operators to protect copyright in a purely voluntary approach, whether with respect to users and/or to rightholders, without resulting in an alarming number of unjustified blocking actions.

Content recognition based on digital fingerprinting is a reliable and precise technological solution, in that it is based on high-quality reference

fingerprints and takes into account a variety of factors in order to determine whether the match between the content analysed and an identified work is significant or, on the contrary, ancillary. This mission's discussions with the French National Audiovisual Institute, which offers an automatic recognition solution called "Signature", confirm that the tools are designed, from the outset, with the aim of minimising false positives. In a recent analysis of automated content recognition tools, the European Union Intellectual Property Office (EUIPO) emphasised the reliability of fingerprinting techniques and their widespread use in the protection and enforcement of copyright³⁶.

This technical analysis is supported by user statements.

First of all, blocking appears to be rare compared to the number of acts of sharing carried out by Internet users and the number of Internet users involved, even as unauthorized content copying by third parties is very frequent. From the study conducted by Hadopi as part of the first joint mission of the CSPLA with Hadopi and the CNC³⁷, it emerged that 43% of the content shared by Internet users is either mixed content, i.e. incorporating content from third parties, or content consisting entirely of content from third parties. With regard to audio or video content, 4% of Internet users have already been subject to blocking orders, 2% of Internet users challenged it and 1% of Internet users did not succeed in their challenge.

These figures suggest that the number of Internet users having illegally accessed protected content on the platforms could be twice as high as the number of those subject to a blocking measure. Half of the blocked users challenged the blocking measure and half of them managed to have their content unblocked. Lastly, only 10% of users sharing content partly or entirely from third parties, and thus likely to be covered by copyright or related rights, were issued a blocking measure.

³⁵ Google, *How Google Fights Piracy*, November 2018.

Online: https://blog.google/documents/27/How_Google_Fights_Piracy_2018.pdf Although this percentage includes both blocking and monetisation requests, it highlights in particular the high degree of reliability of rightholders' claims.

³⁶ On this point, see: EUIPO, *Automated Content Recognition: Discussion Paper – Phase 1 Existing technologies and their impact on IP*, November 2020, not. p. 17, 19 and 20. Online: https://euipo.europa.eu/tunnel-web/secure/webdav/guest/document_library/observatory/documents/reports/2020_Automated_Content_Recognition/2020_Automated_Content_Recognition_Discussion_Paper_Full_EN.pdf

³⁷ CSPLA, Hadopi, CNC Report on 29 January 2020, *op. cit.*, p. 93.

Secondly, it is plausible that, when content remains blocked after a complaint has been lodged, it was used without authorisation. Although the foundations are too limited to review in detail the situation of the 1% of Internet users who have had their audio or video content blocked following a complaint, it does not seem unreasonable to conclude, in view of the sharing and piracy practices described heretofore, that they involve in very large part unauthorised uses of works that are not covered by an exception or limitation.

This is because, while acts of sharing entail, in fairly similar proportions, the uploading of protected content without any contribution from the Internet user and so-called “mixed” content, blocking measures mainly concern the first type of use and to a much lesser extent the use of the aforementioned “mixed” content³⁸. Moreover, 89% of the blocked sharers state that they understood the reasons behind the blocking. More specifically, 70% stated that they immediately understood the reason for which they received the blocking message, and 19% understood after seeking further information.

Lastly, from the qualitative standpoint, recognition tools enjoy multiple factors for acceptability. The application of content recognition technologies for copyright protection purposes differs in mechanism from the management of automatic advertising placements for instance (cf. I.A.1), in which data from searches carried out by users are cross-referenced with the content they usually view, the type of interactions in which they engage with other users, their socio-demographic characteristics, etc. (cf. I.A.2). When it comes to copyright, the technologies are applied only to content shared and any match that might exist with a pre-existing database. In other words, their approach is content-focused and not user-focused.

Moreover, the previous report drawn up by this Mission emphasised that the legitimacy of copyright protection rules on platforms was understood by a very large majority of internet users, close to or above 90%:

³⁸ CSPLA, HADOPI, CNC Report of 29 January 2020, *op. cit.*, p. 95: “51% of the time, the [blocking] messages received [by the Internet users] followed the posting of original works (i.e. content entirely authored by others), and 29% of mixed content”.

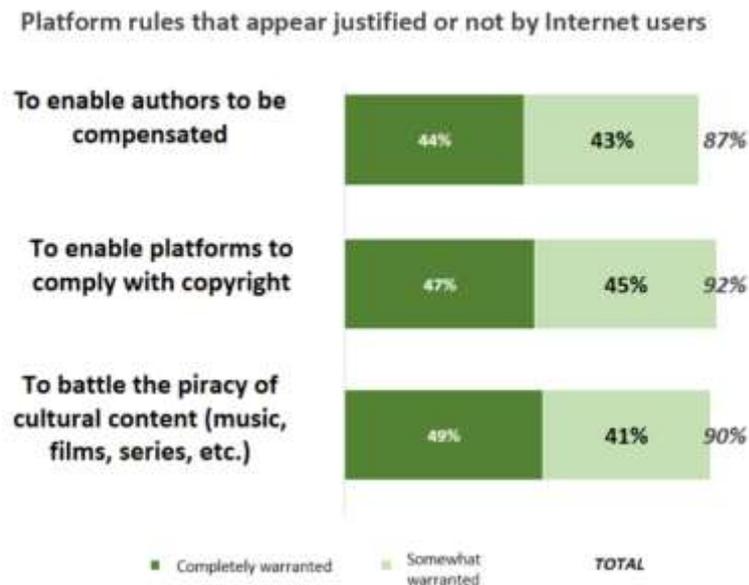


Figure No. 5: Results of an opinion survey on the perception of copyright implementation, by type of grounds cited³⁹

Overall, the content analysis technologies implemented by the major platforms for more than ten years now, are essential to their functioning, which is premised on the sharing of a considerable volume of content, whether to implement their advertising model, enforce the rules they set themselves, or apply copyright. In the specific instance of copyright, the minimally intrusive technologies implemented, which have helped, in particular, curb piracy on sharing platforms though without eradicating it, have given rise to blocking measures that are only very rarely challenged.

Only by disregarding this body of – exceedingly well-documented – technological and practical data, could one question that the use of content recognition technologies for copyright protection is the only suitable option. Far more than the principle of these tools, it is the way in which their settings are determined that conditions their impact on uses.

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* *

B. Debunking the role of automated recognition tools: these tools, which are a technological infrastructure serving human decisions, also play a key role in authorising lawful acts of sharing.

1. Content recognition tools are technological solutions that process content by applying the rules associated with them by the rightholders.

³⁹ *Ibid.*, p. 92. Source: OpinionWay for Hadopi.

i) Recognition tools apply the rules set by rightholders in interaction with the platform, already incorporating flexibilities that can go beyond the benefit of exceptions.

The automated systems set up by the platforms depend on parameters determined upstream by human decision. They are not designed to operate autonomously and unsupervised. These automated systems obey numerous instructions determined by the rightholders in cooperation with the platforms. A great deal of room for manoeuvre results from the fact that the rightholders set the management rules and parameters for the tools provided to them by the platform.

It is the rules set by the rightholders that play the decisive part in determining the sharing options left to users. Consequently, even with platform tools that have become so sophisticated as to be able to detect protected content from 5 seconds or less, rightholders have the freedom to adopt more permissive rules, aimed at preventing unwarranted blocking and fostering the circulation of content.

Last but not least, blocking is only one of the multiple rules that can be implemented in rights management systems. Rightholders can also choose to benefit from advertising revenues derived from the commercial exploitation of their works. This is by far the majority choice, particularly when it comes to music content, and there is good reason to believe that the same could apply, in the implementation of Article 17, to many rightholders of still images. Where the rightholders have opted for monetisation, the preventive implementation of recognition tools at the uploading stage does not result in blocking. The rightholders continue to hold a blocking option but use it only in certain specific, residual cases (for instance, in the case of music producers' rights, for titles that have not yet been released to the market). Where monetisation has been chosen, content recognition tools are used to enable the authorised distribution of legal content, by fairly redistributing value between the user, the rightholder and the platform.

These rules are sometimes more lenient than the requirements for copyright exceptions. Some rightholders in the audio-visual field, particularly in cinema, have decided not to block acts of content-sharing, even when they include extracts of works from their catalogues lasting several minutes. This facilitates broadcasting for trailers or promotional excerpts, but also, in practice, makes it easier to meet the demand to benefit from the exception for quotations. More broadly, it enables users to take advantage of practices that might not be authorised under a formal licence or an exception, but which may be subject to a certain tolerance provided for by the rightholders.

To illustrate, the management rules implemented in France by the Association for the Fight against Audio-visual Piracy (ALPA), in the scope of the one-stop shop offered to audio-visual producers, generally consist in not blocking the replay of film extracts of up to 5 minutes. Though precise information about the practices of the major international rightholders is covered by commercial secrecy, it appears that they define their practices on the basis of both the fair use in effect in the United States and commercial considerations that spur them to encourage a certain exposure for their content on sharing platforms (trailers, excerpts).

Within their own catalogue of protected content, rightholders can adjust these generic rules on a case-by-case basis to line up as closely as possible with actual practices: consequently, decisive actions in the broadcasting of sporting events, news reports in television news programmes and feature films can be subject to very different authorisation regimes. This flexibility and this extensive capacity to adjust the rules are necessarily the result of human decisions. Decisions of this kind depend on the strategies of each rightholder and can change over time in the light of multiple considerations: the desire to secure exposition for a given content piece of content, the value of the said content, the risk of competition for other modes of monetisation, etc.

Some rightholders also choose, for instance, to authorise in principle any extract the duration of which falls under a given threshold, to monetise in certain countries any extract of a specific duration or equivalent to a percentage of a work's length, to validate on a case-by-case basis any fragment lasting more than 5 minutes, etc. Current best practice thus already makes it possible to meet most of the needs reflected by the exceptions, since in practice they probably often go well beyond their formal scope.

Furthermore, in the case of a clip giving rise to monetisation or an authorised film extract, the blocking measure may be taken, irrespective of the rightholder's will, at the initiative of the platform for reasons related to its editorial policy, for example, in the event of content that may contain nudity.

In addition, there exists a method open to YouTube platform users who want to have an idea of the fate of their content before publication, in which they can test their posting on private mode, non-accessible to the public, before publishing it publicly. Should they find themselves faced with a blocking or demonetisation situation, they can either adjust their content or file a claim to demonstrate lawful use. However, only a relatively small number of users (mainly videographers) use this method, having a specific need for visibility on the management and securisation rules in advance of any uploading, for primarily economic reasons. Thanks to this method, the platform and rightholders are able to devote special attention to any claims lodged by these users in the event that their content is blocked or demonetised.

ii) Content recognition tools can allow a certain refinement in the response to sharing situations.

The content comparison does not yield only in a binary outcome (“hit” / “no hit”) but also allows a human review of borderline cases. This is because content recognition tools do not simply establish a match or lack of match between the content analysed and one or more reference fingerprints⁴⁰. Rather, content recognition consists of identifying a level of similarity with the fingerprint. Consequently, when a potential match does not reach the required threshold, it is not automatically taken into account.

⁴⁰ EUIPO, *op. cit.*

This is because many technologies evaluate the level of similarity found, using a “scoring” system. For instance, they take into account the observed duration of the match, the level of similarity between the content analysed and the original content, the quality of the content analysed, the patently significant or ancillary nature of the use observed, in particular the proportion occupied by an identified element within the content analysed.

Some platforms do not take into account matches when they last only a few seconds, as the risk of false positive or misinterpretation is high. On YouTube, for example, when the level of certainty of recognition is not high enough, the platform requires a manual review by the corresponding rightholder, to determine more precisely whether the observed use is proven and whether it is authorised or unauthorised.

The fingerprint settings can also be adjusted to take into account certain lawful content reuses. The leading solutions, the performance of which is constantly improving, are already capable of preventing the over-blocking that occurs, for instance, when a fingerprinted work contains third-party or royalty-free content: presence of an extract from the public domain in a video, or a song excerpt within a soundtrack, etc.

These adjustments are made manually by the rightholders when the fingerprints are created, so that the fingerprints cover only the portions actually created by the rightholders who created the fingerprints. In addition, automated systems are also able to manage white lists to avoid blocking, at the expense of all users, certain types of content that could be picked up by others.

Content recognition algorithms are not limited to binary operating rules – these rules can take into account a wide range of gradients, from the time their settings are determined, and apply them with great refinement when detecting matches and responding to them.

2. Far from being based on an unequivocal blocking logic, content recognition tools play a central part in the conclusion of licensing agreements, enabling content monetisation and thus promoting the circulation of protected works on the Internet

i) The imbalance in relations between platforms and the cultural sector is central to the diagnosis on which Article 17 is based

Platforms have long been offered an advantage by the protective status of the hosting provider, the application of which they invoked, even though cultural content accounts for a significant part of their audience. According to a study by Roland Berger for GESAC, cultural goods amounted to 43% of the content shared on or 18% of the sites visited via Google. In

total, according to this study, cultural goods contributed directly to 62% of the turnover posted by these Internet platforms⁴¹.

The online culture market puts operators with different legal statuses and unequal commercial conditions in competition with each other. The online cultural offer is characterised by the coexistence of services which, from the consumer's point of view, offer similar functionalities, yet in fact are covered by very different legal regimes and, as a result, are subject to unequal commercial conditions.

It is in this context that the issue of the “*value gap*” has risen in the public debate, in parallel with the emergence of these new players. The European Commission, for its part, noted in its impact study prior to its draft revision of the 2001 Directive⁴², that:

- first of all, a situation of unfair competition exists between services that can lay claim to the status of host, and others that are required to conclude agreements with rightholders, though they address the same audience to give it access to the same content; and
- secondly, there is an inequitable transfer of value between rightholders and content-sharing platforms. In the longer term, this transfer of value could lead rightholders, which are also content creators, to scale back their investments, at the risk of harming the entire creative ecosystem.

ii) Article 17 is aimed at extending and broadening a dynamic conducive to creation, which is already underway on certain platforms.

The Directive helps balance out and encourage economic relations between platforms and rightholders. Article 17, by making rightholder authorisations central to the operation of sharing platforms, enables the development of a framework in which platforms that base their activity on the organisation and availability of works will be required to remunerate rightholders. The aim is thus to find leverage to re-establish the economic balance of power and strengthen the rightholders' bargaining power with respect to the platforms. Moreover, Article 17 should also prompt reluctant or non-cooperative platforms to align themselves with best practice.

In practice, the shift initiated by Article 17 should foster the attribution to rightholders of a more significant share of the advertising revenues generated by platforms through the sharing of their own content. The conclusion of balanced agreements, and the financial incentive attached to them, should encourage rightholders to distribute their works more widely on the

⁴¹ Roland Berger, *Cultural content in the online environment: Analyzing the value transfer in Europe*, November 2015, p. 90, 129 et 189. Online: <https://authorsocieties.eu/content/uploads/2016/02/report-for-gesac-online-intermediaries-2015-nov-eur.pdf>

⁴² European Commission, *Impact assessment on the modernisation of EU copyright rules*, SWD(2016) 301 final, Part 1, 14 September 2016, p. 137 et seq. Online: <https://ec.europa.eu/digital-single-market/en/news/impact-assessment-modernisation-eu-copyright-rules>

platforms, as the European Commission emphasised in its impact study on the Directive⁴³. These new provisions are thus expected to enable a series of agreements that were not concluded since the platforms, not being obliged to do so, probably did not see sufficient interest in them.

Content recognition tools enable the implementation of licenses. Firstly, these tools enable rightholders to negotiate with the platforms, by opening up to them the possibility of effectively exercising their exclusive rights. For example, the recognition tool Signature enables the video platforms using it to implement the licences they have signed.

Toward this end, blocking unauthorised acts of sharing is not only a faculty which certain rightholders will use, who may legitimately choose to favour other modes of distribution for their works, but also a deterrent tool in the hands of all rightholders, for the purposes of negotiating licensing agreements. In practice, blocking is by no means the mechanism's central aim.

Moreover, the implementation of licences, which requires detailed follow-up on the viewing of works the distribution of which is authorised, can often only be done with the help of content recognition technologies. It is because such technological solutions exist, of which the improvement should be encouraged, that it is possible to organise the large-scale distribution of works on sharing platforms. These tools make it possible to recognise licensed content and ensure that it is monetised for the benefit of the rightholders who have granted such authorisations.

This virtuous dynamic of agreements between platforms and rightholders is not an optimistic projection, but a reality already under construction. YouTube is already, thanks to such agreements, the leading legal music streaming site in terms of audience, and alone is home to almost half of the hours dedicated to on-demand streaming. The legal uses of works must not only make it possible to guarantee their remuneration to all players, but also encourage the dissemination of works in a secure environment⁴⁴.

Moreover, while these agreements enable organizations that represent creators to receive remuneration for the use of their members' works on the platforms, they also help bring out new creators, who themselves hold rights to their original creations. These creators can moreover be inclined to join a collective management society, which facilitate the effective exercise of rights by authors and the lawful dissemination of works through their functions. In particular, video artists who own channels, in particular on YouTube, have joined the SCAM and SACD to benefit from the distribution of copyright collected by these societies under the agreements concluded with the platform.

⁴³ *Ibid.*, p. 151: an option of this kind “*may increase the willingness of rightholders to allow more of their content to be available on user uploaded content services*”.

⁴⁴ Google, *How Google Fights Piracy*, November 2018, not. p. 21 – 22.

Online: https://blog.google/documents/27/How_Google_Fights_Piracy_2018.pdf

Conclusion to Part I

Content recognition tools have come to have significant implications in the European and global debate on online copyright enforcement. As the first report of this mission showed, they form without any doubt a major technological step forward and are based on a practice that has proven its worth for more than ten years now. The blocking and removal measures enabled by these tools have sparked debate, but should be placed in the overall context, both of the sharing platform ecosystem and copyright implementation.

First of all, automatic content recognition methods are inherent in the operation of platforms, for a wide variety of purposes. No other method is credible or suited for moderating content on the platforms, given the volumes of works that are put online. Not only is this context not specific to copyright, but the solutions implemented for copyright appear in many cases less invasive, better accepted and technologically robust – and this at a time when Article 17 should still provide further safeguards.

Moreover, the functioning and the very purpose of these tools, which may have appeared as a threat during the debates on the Directive, must be analysed precisely in this context. First of all, these tools are “automatic” only during one stage of their operation: their settings must be defined in advance, and the results they yield, far from being binary, make it possible on the contrary to cultivate a certain flexibility in the implementation of the rules. Secondly, the Directive and Article 17 thereof must be read in their overall balance: their purpose is to rebalance the economic relations between platforms and rightholders, without harming the rights of users. The implementation of a content recognition tool, which can provide grounds for blocking as the case may be, is only one component of this overall balance.

It is therefore in a broader legal, economic and political context that the possible place of recognition tools in the implementation of Article 17 should be analysed.

II. The appropriate balance between the fundamental rights set out in Article 17 must be strictly respected in its implementation.

Despite the central part they already play in the operation of sharing platforms and in the implementation of copyright, automatic content recognition tools and the preventive mechanisms for the protection of this right, which they make it possible to implement, continue to be seen more as the villains in public debate. Although poorly supported by figures or concrete examples, criticisms of alleged situations of overblocking rooted in the use of these technologies have found an echo, both in the draft transposition text of the German Ministry of Justice and in the document submitted for consultation by the European Commission.

In both cases, and even though the details of the approaches taken are different, a central idea emerges: in view of the dangers posed by recognition and blocking tools, the implementation of Article 17 of the Directive would make it necessary that their effects be limited, so as to protect the legitimate uses provided for under the Directive, specifically, those that are lawful and more particularly covered by the benefit of exceptions and limitations to copyright for users. In this respect, possible responses include quantitative thresholds below which automated blocking would have to be prohibited, or preventive mechanisms in the hands of users to guarantee the online publication of their content when they invoke an exception.

In the face of this idea taken as self-evident, the mission would like to stress that Article 17, as written, is based on a fair balance between fundamental rights. It makes due room for the protection of users' legitimate practices, in particular on the basis of exceptions to copyright, which in no way justifies a rewriting of the text that would be contrary as much to its wording and the intention of the legislator, as to the international commitments of the European Union and its Member States and the real issues at stake in its implementation.

A. Article 17 is consistent with fundamental rights because it provides itself for the definition of a balance between these rights in its implementation

1. An act of sharing involving content protected by literary and artistic property rights presupposes the implementation of a balance between the different fundamental rights in play

i) The act of sharing protected content lies at the crossroads between multiple fundamental rights

The protection of copyright today is firmly anchored in that of the right to property. The legal systems of many Member States of the European Union first of provide for this assimilation. In the case of Estonia, it is the Constitution itself that provides, in Article 39, that "*The State shall protect intellectual property rights*". Elsewhere, the constitutional courts have also interpreted the general provisions protecting property in this manner. According to the German Federal Constitutional Court, "*copyright (...) is property within the meaning of Article*

14, 1° of the Basic Law”⁴⁵. The French Constitutional Council likewise considers that intellectual property rights are protected by property law within the meaning of Article 17 of the Declaration of 1789. It remarkably justifies this position from a historical perspective, deeming that “*the purposes and conditions of exercising the right to property have since 1789 undergone substantial changes characterized by the extension of this scope to new fields*”⁴⁶, including intellectual property rights.

The Charter of Fundamental Rights of the European Union has also anchored the protection of these rights in property law. Article 17 of the Charter, which is dedicated to the right to property, for instance provides in paragraph 2 that “*Intellectual property shall be protected.*” It is also to this view of copyright that reference is made in the recitals of Directives 2001/29/EC and 2019/790/EU, both of which discuss intellectual property rights as a component of the right to property.

On the basis of Article 1 of Protocol No. 1 (1P1) to the European Convention for the Protection of Human Rights and Fundamental Freedoms, the European Court of Human Rights has also enshrined the assimilation of the right to property with a “possession”. While this autonomous conception of rights under the Convention goes beyond the concept of the right of property within the meaning of national law, in particular French law, the Court considers Article 1P1 as “*in substance guaranteeing the right of property*”⁴⁷. The Court's case-law on the subject of intellectual property rights, while sparse⁴⁸, is nonetheless clear. Confirming the position of the European Commission of Human Rights, it deemed, in Grand Chamber formation, that Article 1P1 did apply to intellectual property⁴⁹.

This protection of literary and artistic property by virtue of the right of property, in addition to these solid statutory foundations, is buttressed by strong arguments. First, it can draw on a philosophical tradition stemming from the Enlightenment, in particular the works of John Locke, for whom private property originates precisely in creative work. It furthermore presents concrete parallels as to its regime: for example, holders of copyright are in possession of a real right, enforceable against all parties⁵⁰.

Nonetheless, the likening between creators’ rights and property law is perfectible. Some intellectual traditions, in particular in Germany, first of all, challenge the ownership-oriented vision of copyright in favour of a less automatic definition, in which “intellectual property rights” are first of all a series of special real rights, which do not have the absolute and general character which the Romano-Germanic legal tradition lends to the right to property. Secondly,

⁴⁵ BVerfG, 1 BvR 765/66.

⁴⁶ Decision No. 2006-540 DC of 27 July 2006 on the Law on Copyright and Neighbouring Rights in the Information Society.

⁴⁷ ECHR, Plenary, 13 June 1979, *Marckx v. Belgium*, Case 6833/74, para. 63.

⁴⁸ As it stated itself: ECHR, Gr. Ch., 11 January 2007, *Anheuser-Busch Inc. v. Portugal*, Case 73049/01, para. 66.

⁴⁹ *Anheuser-Busch* judgment... supra, para. 72.

⁵⁰ See, for a comparative study of the characteristics of the right to property and copyright: Emilie Bouchet-Le Mappian, *Propriété intellectuelle et droits anglais, allemand et français* [Intellectual Property and English, German and French Law], PhD thesis, 2009, 438 pp.

an analysis of the case law attests to the existence of finer shadings in the treatment of this equivalence. To wit, since the ruling on *UPC Telekabel Wien*⁵¹, the Court of Justice has always preferred to rely solely on Article 17(2) of the Charter, as if to make intellectual property independent from the right to property.

The issue of the conciliation between copyright and freedom of expression is undeniably gaining momentum, but gives rise to very differentiated solutions. While the conciliation of intellectual property rights and freedom of expression may be attracting a great deal of attention; the principle itself is not self-evident, in EU law as well as in other legal systems. For instance, the main US Supreme Court precedent in this matter, *Eldred v. Ashcroft*⁵², held that the First Amendment to the Constitution, which protects freedom of speech, should not apply to copyright law. The majority opinion, authored by R. B. Ginsburg, supported this exclusion using two main considerations: first of all, exceptions to copyright rely on an internal consideration of freedom of speech; secondly, copyright itself constitutes an encouragement to creation which positively contributes to freedom of expression.

The European Court of Human Rights itself takes a very cautious approach to the matter. While it deems that the dissemination of copyright-protected content may fall within the scope of Article 10 of the European Convention for the Protection of Human Rights and Fundamental Freedoms, which protects freedom of expression, it holds that States have a broad national margin of appreciation in balancing out copyright, a component of the right to respect for property, with freedom of expression⁵³. Freedom of expression is therefore not bound, contrary to what some parties might have feared or hoped, to prevail over the property rights of creators⁵⁴.

The question of the interaction between copyright and other fundamental rights is now gaining magnitude, with the emergence and the development of digital uses, which in particular enable the development of transformative works: “*the regime instituted for handling copyright infringements on the Internet is (...) born under the sign of fundamental rights*⁵⁵”.

These rising questions have found an echo in French case law. To wit, in a much noted decision, the Court of Cassation was seized of a dispute between a fashion photographer and an artist who had reused his photographs⁵⁶. It held that it was incumbent on judges hearing infringement claims, and, in this context, vested with powers to that end, to seek a “*fair*

⁵¹ CJEU, 27 March 2014, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, Case C-314/12.

⁵² United States Supreme Court, *Eldred v. Ashcroft*, 537 U.S. 186 (2003).

⁵³ ECHR, 10 January 2013, *Ashby Donald and others v. France*, Case 36769/08.

⁵⁴ Alexandre Zollinger, « *Droit d’auteur et liberté d’expression : le discours de la méthode* » [Copyright and Freedom of Expression: Discourse on the Method], *Communication Commerce électronique*, n° 5, May 2013.

⁵⁵ Thomas Lemieux, « *L’équilibre du droit d’auteur à la lumière des droits fondamentaux* » [Balancing copyright in the light of fundamental rights], *Revue des droits et libertés fondamentaux*, 2018, Chronicle n° 10. Online: http://www.revuedlf.com/droit-civil-patrimonial/lequilibre-du-droit-dauteur-a-la-lumiere-des-droits-fondamentaux/#_ftn74

⁵⁶ Cass., 1st civ., 15 May 2015, N° 13-27.391, Civ. Gaz. I.

balance between the rights affected”, namely copyright and freedom of expression. Be that as it may, here as well, the effort to strike a balance does not mean that freedom of expression takes precedence over copyright. Quite to the contrary, the ruling of the Versailles Court of Appeal on reference in the same case adopted a strict reading of the framework set by the Court of Cassation, deeming that the artist had not shown how the use of the photograph in dispute was necessary to his freedom of creation⁵⁷. To our knowledge, these rulings have not been followed by other judgments addressing this issue so frontally and directly.

ii) The case law of the Court of Justice takes into account all the rights at stake as well as the distinctive nature of the digital world

The Court of Justice applies a differentiated conciliation technique drawing on Article 52(1) of the Charter. This matter is mirrored, quite logically, in the legal order of the European Union. Intellectual property rights, as is specified above, are protected in the Union by the Charter of Fundamental Rights. This is also the case of freedom of expression, pursuant to Article 11 of the said Charter. However, as stated in Article 52(1) of the Charter, this freedom may be subject to limitations where these are necessary and fulfil the need to protect the rights and freedoms of others.

The protection of intellectual property rights must thus be weighed against other fundamental rights, such as the right to privacy⁵⁸, entrepreneurial freedom and freedom of expression, as the Court asserted in its *Scarlet* and *SABAM* rulings⁵⁹. To achieve the appropriate balance, it proceeds pragmatically, as demonstrated by the Court's approach in the *UPC Telekabel* ruling⁶⁰.

At the stage during which the appropriateness of the measure is analysed, the Court verifies that the proposed measure contributes to the protection of intellectual property rights, albeit without requiring that it absolutely prevents access to the protected content: it can only make it more difficult⁶¹. This approach attests to a most welcome realism, as no technological method can keep the content totally inaccessible. At the same time, it generates a paradoxical tension: the more generalised a measure is, the more adequate it will be, the risk being that doubts are raised about its necessity and appropriateness.

When reviewing, next, necessity and proportionality *stricto sensu*, the Court invites the national courts to consider the overall balance, taking into consideration all the circumstances of the case. The result is a refined approach to the national measures that have been referred to it for a preliminary ruling. For instance, in its *UPC Telekabel* judgment, the Court did not

⁵⁷ Christophe Caron, « La balance des intérêts entre les mains des juges du fond » [The Balance of Interests in the Hands of Trial Courts], *Communication Commerce électronique*, N° 5, May 2018.

⁵⁸ CJEU, Gr. Ch., 29 January 2008, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, Case C-275/06, para. 62, 63 and 65.

⁵⁹ CJEU, 24 November 2011, *Scarlet Extended SA v. SABAM*, Case C-70/10, para. 44 et seq.

⁶⁰ CJEU, 27 March 2014, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH, Wega Filmproduktionsgesellschaft mbH*, Case C-314/12, para. 55 – 63.

⁶¹ *UPC Telekabel* judgment supra, para 62 and 63.

preclude that, in the said instance, the filtering measure at issue in the main proceedings might deprive Internet users of the possibility of lawful access to information: it is solely for the referring court to ascertain whether that deprivation is “unnecessary”⁶².

This analysis takes into account the specific nature of rights in the digital world. The Court of Justice takes into account the specific nature of the digital environment in its analysis of other regimes for balancing the rights and interests introduced by the co-legislators. The *Eva Glawischnig-Piesczek* ruling, for instance, illustrates the Court's consideration of the “*genuine risk that information which was held to be illegal is subsequently reproduced and shared by another user of that network*”⁶³. This genuine risk enables a Member State court to order a host to remove or block not only information that has been declared illegal but also information the content of which is identical or equivalent⁶⁴.

The diverging issues that emerge in the Court’s case law – balancing out rights, recognising the specificity of intellectual property right infringements in the digital world – are precisely those with which the European co-legislators had to grapple during the negotiation of Directive 2019/790/EU of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the single market. This directive, and in particular Article 17 on the liability regime for content-sharing platforms, reflects a balanced conciliation between these different principles and requirements.

2. This balance is precisely that sought by Article 17 of the Directive in that it provides for the preservation of legitimate uses, the scope of which must be closely analysed

i) The protection of certain uses is a key to the balance of the operative scheme envisioned in Article 17 of the Directive

As was pointed out in this mission’s previous report, the broader issue of authorised uses of copyright-protected content is one of the key balancing points in mechanisms built around automatic content recognition. It is central both for their social acceptability and for the balance to be achieved in the implementation between the various rights and principles at stake. Although their quantitative significance needs to be put into perspective, as demonstrated by the developments set out above and the mission’s previous work⁶⁵, the question of the preservation of these uses is a central qualitative factor in the implementation of Article 17 and the deployment of content recognition tools.

From this perspective, and even before setting this reality against Article 17, a very clear distinction needs to be made between the various implications of the use of such

⁶² *Ibid.*

⁶³ *Eva Glawischnig-Piesczek v. Facebook* ruling, *supra.*, para. 36.

⁶⁴ *Ibid.*, para. 53.

⁶⁵ The Mission refers on this point to pages 129 to 131 of its previous report.

technological measures on copyright-protected content, and in particular the clear distinction in law and practice between exceptions and a series of expected or tolerated uses.

“Expected uses” can be defined as a social demand of platform users, in the context of their content-sharing activity. They involve content covered by copyright that is an exclusive right: use of passages from other works, visual excerpts shown in the background of videos, reappropriation of content to make memes, etc. Such expected uses can arise spontaneously from users’ practices, but also from the new formats offered by the platforms themselves: for example, TikTok offers its users the possibility of dubbing short videos with musical excerpts. These arise, to a certain extent, from the state of the art: the limits of the effectiveness of copyright protection on certain platforms have in some instances given rise to uses that would appear illegitimate in another context, but now substantiated by widespread practice and thus largely expected.

Another category of expected uses relates to content monetisation. Professional videographers form an audience that is no doubt relatively small in number compared to the general mass of users, but which plays an essential part in the platforms’ creative ecosystem. The “demonetisation” of content by a platform cannot, in itself, be likened to a blocking measure in its effects. Moreover, professional video makers cannot be the focus of the discussion on Article 17 as, by definition, they are not users “*not acting on a commercial basis*” within the meaning of Article 17(2) of the Directive⁶⁶. While the question of demonetisation is thus not central to the matter, the expectations of professional video makers and creators should nonetheless be carefully taken into account for the sake of the system’s overall balance.

In addition to these uses expected by users, rightholders tolerate uses which they see as acceptable (“tolerated uses”), even though they may fall within the scope of their exclusive rights and they do not grant formal authorisation. As was emphasised in Part I of this report, depending on considerations specific to their sectors or commercial strategy and the characteristics of the works, rightholders may allow the use of their works without monetisation or blocking – this is the case, often, for uses not exceeding a certain duration. The restrictions of the technological tools themselves contribute to adding a grey area to these tolerated uses, though it is shrinking, as these tools are refined. This is because fingerprint recognition tools cannot recognise content under a certain limit, which varies from a few dozen seconds to a few seconds, depending on their sophistication⁶⁷.

Lastly, exceptions are departures from the copyright protection provided for by the legislator, for various purposes; some of them, in particular those expressly cited in Article 17(7), reflect the internal implementation of fundamental freedoms, in the context of copyright.

⁶⁶ As stated in this mission’s previous report, as a result of Article 17(2), acts of content sharing performed by users not acting on a commercial basis are excluded from the responsibility-transfer mechanism. The authorisation of such acts thus falls under a specific area of concern.

⁶⁷ CSPLA, Hadopi, CNC Report on 29 January 2020, *op. cit.*, p. 47.

The three aforementioned categories – expected uses, tolerated uses and exceptions – have complex interactions. They overlap one another to a large extent, but imperfectly so: tolerances can go beyond exceptions, yet at the same time cover only some of them; expected uses go beyond both tolerances and exceptions, but certain management rules set by rightholders certainly also allow uses that go beyond the sharing of content generally observed on platforms, in particular when relatively long time limits are set, for example on film content.

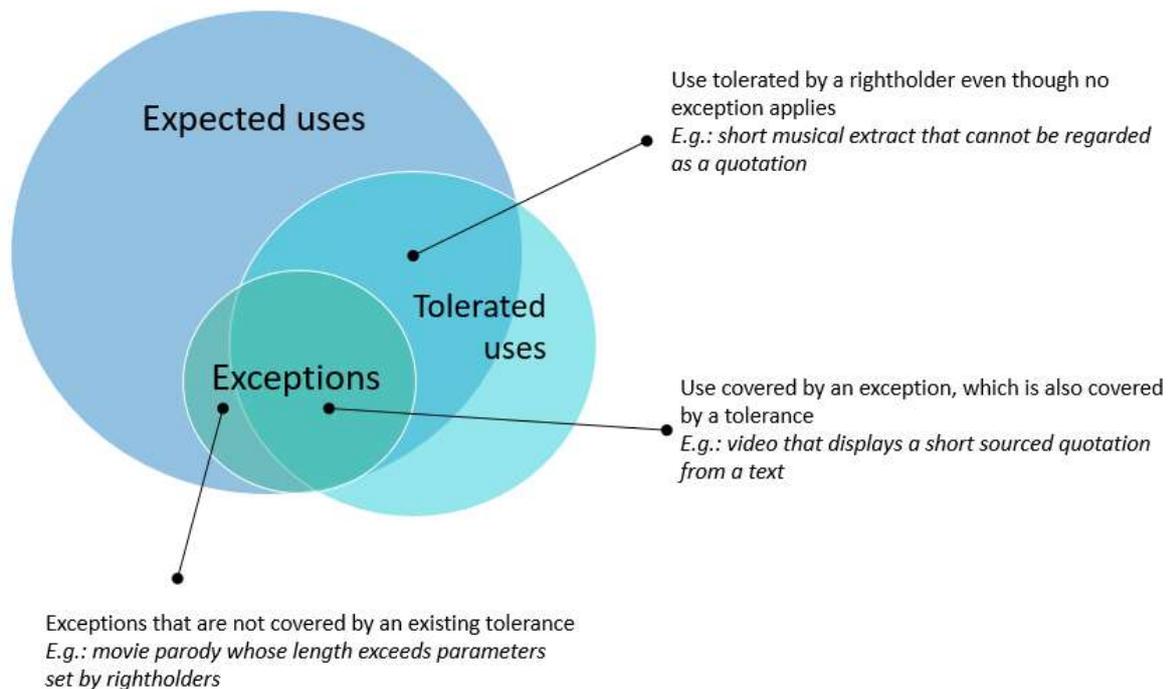


Figure N° 6: Simplified Venn diagram illustrating the coexistence of expected, tolerated and uses covered by exceptions of copyright-protected content

ii) The Directive’s legal parameters, including exceptions and licences, should not be confused with the *fait accompli* of digital practices

This distinction is essential in setting the stage for the discussion on content recognition tools in objective terms. The criticism that can be levelled at these tools, and more generally at the copyright protection mechanisms, are in reality grounded largely in the consideration given to “expected uses”.

The tolerances which rightholders grant voluntarily in the exercise of their exclusive rights already fulfil a significant part of this demand. These will likely gain depth and breadth over time: the increasingly extensive and direct cooperation between platform players and rightholders, as well as the extension of monetisation mechanisms, can contribute to building all the more flexibility into the management practices of rightholders that are ultimately in the interest of the existing system.

However, neither this perspective, nor the existing tolerances, and even less so social expectations alone, can serve as an unerring guide when defining the appropriate balances between fundamental rights, unless the boundaries between *de facto* and *de jure* balances are ignored. The distinction needs to be made between what falls under exclusive rights and licences – *de jure* or *de facto*, implicit or explicit – which no doubt need to be developed through the implementation of Article 17, what falls under the definition of exceptions, and more broadly the legitimate uses within the meaning of Article 17, which are central to the conciliation process under Article 17.

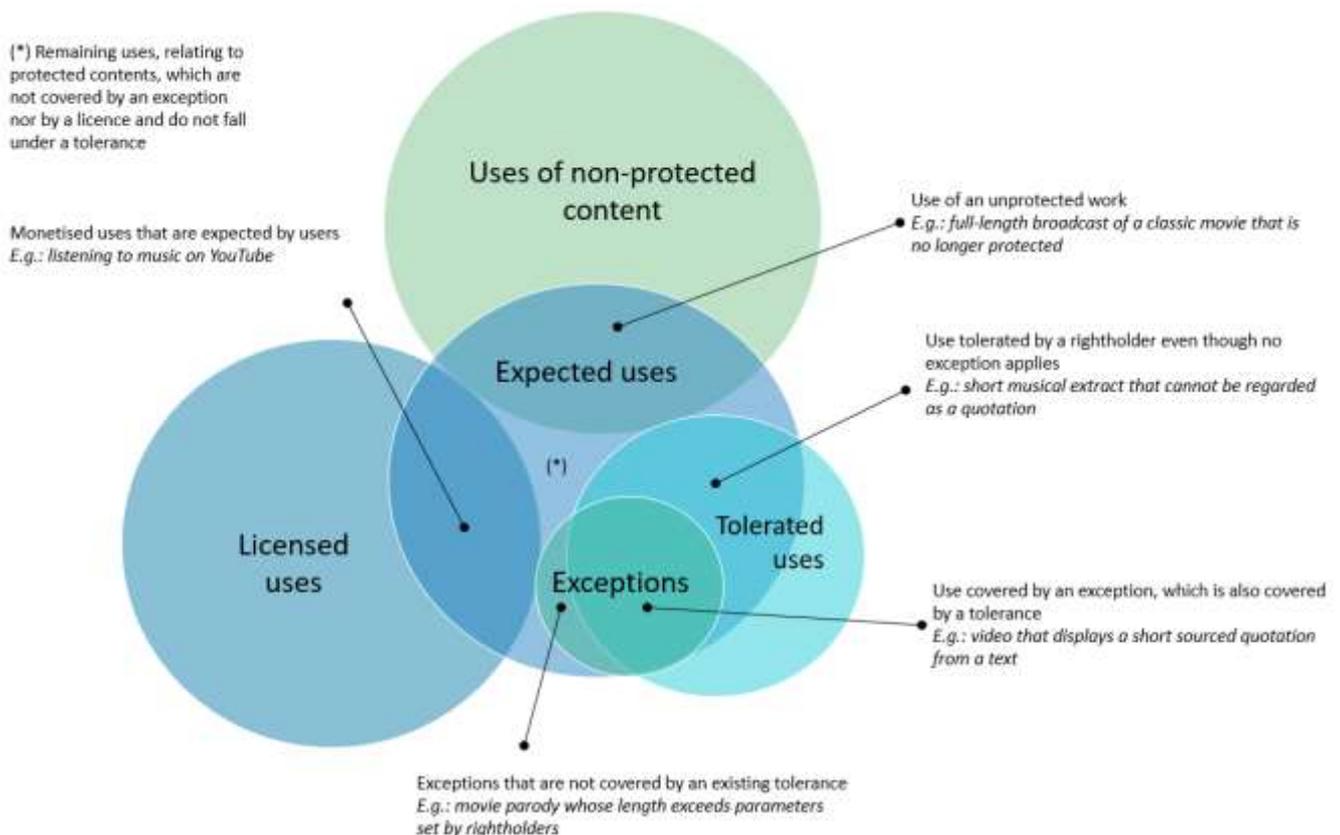


Figure N° 7: Venn diagram illustrating the coexistence between expected, tolerated, licensed uses, exceptions and unprotected content

3. Out of the lawful uses protected by the Directive, exceptions legitimately attract the greatest attention

i) The challenges in using content recognition tools to implement Article 17 of the Directive are actually concentrated in exceptions

While there exist lawful uses other than the exceptions, as outlined above, these other uses do not raise any major difficulties in the implementation of content recognition tools. As pertains to works, the sharing of which is authorised by a rightholder, it is precisely recognition tools that make it possible to implement this authorisation and even to identify possible attempts to unlawfully thwart its effects.

As to works in the public domain, in some respects, they raise trickier questions, with some users reporting experiences of public domain content publications being blocked, particularly in the case of classical music. It is plausible that, in many cases, this content is blocked on the basis of neighbouring rights that protect recordings and are less well-known to users. A few users also report instances of blocking on recordings that are no longer covered by copyright⁶⁸ or even on original recordings.

However, these shortcomings are not due to the mechanism of the recognition tools itself, but inherent in rights management and proper identification of content used. The problem of abusive claims also arises, it should be said, in the context of systems operating on notifications by the rightholder: content recognition tools are therefore not in themselves the source of the difficulty. Any improper claims on content that is in reality in the public domain indicate that those coming forward as rightful claimants yet making wrongful use of the tools (cf. III.C) should be held more accountable. Such improper claims do not call into question the implementation of automated content recognition tools.

Moreover, the Directive provides, in Article 17(4), and in the framework of the liability regime which it establishes, that platforms shall only guarantee the unavailability of a “*specific*” work if they have received the “*relevant and necessary information*”. Making it mandatory for platforms to implement their “*best efforts*” in response to claims by the rightholders, and concurrently seeking to maintain the liability of all players in the more transparent context created by the application of the Directive will likely limit illegitimate claims on content.

The role of recognition tools in the application of exceptions and limitations, in contrast, requires particularly careful examination, considering the importance which both the legislator and the Court of Justice have recognised in them.

ii) The existence of exceptions constitutes a guarantee of fundamental rights and freedoms, as the legislator intended in line with the Court's case-law and in compliance with international conventions

This is because these exceptions play an important part in the overall balance governing copyright protection in Union law, as can be seen both from the case law of the Court of Justice and the balance achieved by the legislator in 2019.

The Court of Justice deems that the exceptions in themselves reflect the reconciliation of freedoms, such as freedom of expression, with copyright. The Court of Justice has given an important place to exceptions in its interpretation of Directive 2001/29, which also informs the understanding of Directive 2019/790. As it held in the Pelham case, “*the mechanisms for striking a fair balance between these different rights and interests are enshrined in Directive 2001/29 itself*”, in particular through the exceptions and limitations provided for in copyright

⁶⁸ See for instance, Ulrich Kaiser, Bernd Fiedler, “Can Beethoven send takedown requests? A first-hand account of one German professor’s experience with overly broad upload filters”, *Wikimedia Foundation*. Online: <https://wikimediafoundation.org/news/2018/08/27/can-beethoven-send-takedown-requests-a-first-hand-account-of-one-german-professors-experience-with-overly-broad-upload-filters/>

law⁶⁹. To reach this conclusion, the Court relied in particular on the harmonisation objective sought by the Directive and the objective of legal certainty.

In the light of this analysis, exceptions (and limitations) are the means which the European legislator has chosen to guarantee users' rights and interests, in particular their freedom of expression, within the framework it has set. Certain exceptions to copyright are moreover analysed classically, in French law, as falling within such an approach⁷⁰. The Court of Justice concluded that, while exceptions to a general rule were in principle to be interpreted strictly, a special treatment should be reserved for those exceptions aimed at guaranteeing respect for fundamental rights, which must be interpreted in such a way as to safeguard their useful effect and purpose⁷¹.

The copyright regime in Union law provides for an internal balance between copyright and freedom of expression, through exceptions, provided for by the legislator itself. This internal balance, considered satisfactory by the Court, prevents the invocation of freedom of expression from overturning the copyright regime. As Advocate General Szpunar emphasised in his conclusions on the Pelham ruling⁷², fundamental rights are a "*a sort of ultima ratio which cannot justify departing from the wording of the relevant provisions except where there is a gross violation of the essence of a fundamental right.*" The doctrine, including when critical, notes that the Court of Justice had intended to rule out the possibility that users' fundamental rights could serve as an "*external limitation to the exclusive rights of the rightholders beyond the closed list of exceptions and limitations*"⁷³.

As Alexandra Bensamoun and Pierre Sirinelli write, upon the conclusion of this jurisprudential construction by the Court of Justice, freedom of expression, "*far from being marginalised, [is] internalised*": "*it incorporates the 'normal' operation of copyright*" through the full mobilisation of its "*internal resources*"⁷⁴.

The balance sought by the legislator and enshrined in Directive 2019/790 is consistent with the case law of the Court of Justice. Article 17 of the Directive gives a special place to exceptions as an internal guarantee of freedom of expression. Article 17(7) provides, first, that users will be able to invoke the exceptions applicable in their country and, secondly, that they

⁶⁹ CJEU, Gr. Ch., 29 July 2019, *Pelham v. Ralf Hütter and Florian Schneider-Esleben*, Case C-476/17, para. 60.

⁷⁰ See, for a typology of exceptions by grounds invoked: Jean-Michel Bruguière, Michel Vivant, *Droit d'auteur et droits voisins*, [Copyright and Neighbouring Rights] Paris: Dalloz, 2019.

⁷¹ CJEU, Gr. Ch., 29 July 2019, *Funke Medien NRW GmbH v. Bundesrepublik Deutschland*, Case C-469/17, para. 69 to 71.

⁷² Para. 98.

⁷³ Thom Snijders and Stijn van Deursen, "The Road Not Taken – the CJEU Sheds Light on the Role of Fundamental Rights in the European Copyright Framework – a Case Note on the Pelham, Spiegel Online and Funke Medien Decisions", *International Review of Intellectual Property and Competition Law*, vol. 50, 2019. Online: <https://link.springer.com/article/10.1007/s40319-019-00883-0>.

⁷⁴ Alexandra Bensamoun et Pierre Sirinelli, « *Chronique de jurisprudence. Exceptions (en général et en particulier), droits, liberté d'expression... : 'je t'aime, moi non plus...'* » [A Chronicle of Jurisprudence. Exceptions (in general and in particular), rights, freedom of expression...: a complicated relationship, *Revue internationale du droit d'auteur*, n° 01/2020, vol. 263, p. 93 – 114. Online: <https://www.la-rida.com/fr/node/3504>.

will in any event be able to invoke the existing parody and quotation exceptions. This indicates the legislator's objective: ensuring that a “central core” of exceptions stemming from freedom of expression can be protected whatever the circumstances.

For instance, Article 17(7) contributes to strengthening the protection for freedom of expression under European Union law. Pursuant to Article 5 of Directive 2001/29/EC, Member States are not obliged to implement the parody, pastiche and quotation exceptions in their domestic law. To wit, the parody obligation is neither transposed, nor formally transposed, in all States⁷⁵. Moreover, the grievance processes on the platforms do not always allow for a formal claim of an exception to copyright.

En envoyant une contestation, vous donnez à [redacted] l'autorisation d'examiner votre vidéo et certaines informations susceptibles d'identifier votre compte. [redacted] disposera de 7 jours pour répondre à votre contestation. Votre vidéo restera bloquée pendant l'examen de votre contestation.

Motif de la contestation

- Vous êtes à l'origine de tout le contenu de la vidéo et vous en détenez tous les droits.
- Vous avez l'autorisation expresse du titulaire des droits d'utiliser ce contenu.
- Vous êtes autorisée à utiliser le contenu. Par exemple, vous revendiquez un usage équitable du matériel ou le contenu fait partie du domaine public. [En savoir plus](#)

Expliquez-nous pourquoi vous avez l'autorisation d'utiliser le contenu qui compose votre vidéo. 0/200

[Retour](#) [Déclarer un litige](#)

Figure N° 8: screenshot of a stage in the dispute process when content shared on Facebook is blocked (in French)

By striving to enable users to benefit from harmonised exceptions in their relations with rightholders and platforms, the legislator enhances the contribution of exceptions to guarantee the freedom of expression.

The very principle of exceptions, in line with the case law of the Court of Justice, plays an internal tempering role in the application of copyright. The implementation of exceptions

⁷⁵ Jean-Paul Triaille *et al.*, *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society*, 2013, p. 476 et seq. Online: <https://op.europa.eu/en/publication-detail/-/publication/9ebb5084-ea89-4b3e-bda2-33816f11425b>; Andrea Renda *et al.*, “The Implementation, Application and Effects of the EU Directive on Copyright in the Information Society”, *CEPS Special Report n° 120*, p. 161. Online: <https://www.ceps.eu/ceps-publications/implementation-application-and-effects-eu-directive-copyright-information-society/>

under Article 17, in contrast, sparks more debate, around two diverging perspectives. They can be summed up as follows:

- according to the first approach, any uploaded content, where it is *prima facie* likely to be covered by an exception, must necessarily be put online without delay. It results that automatic content recognition tools, the functioning principles of which are incompatible with such a postulate in the current state of the art, can only play a subsidiary role in the implementation of Article 17;
- according to the second approach, it is essential that exceptions be effectively protected downstream, by the rapid re-posting of any content covered by one of them. In contrast, upstream, the protection of rights provided for by the Directive implies that their implementation using recognition tools can lead – in a number of cases that should be kept as limited as possible, and where the tolerances set up by rightholders are not already sufficient – to the temporary blocking of content that ultimately proves to be legal.

These two conceptions of exceptions, and more broadly of lawful uses of unauthorised content, result in very different implementations of Article 17 of the Directive, the consequences and feasibility of which must be carefully considered.

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B. The preservation of lawful uses cannot serve as grounds for challenging the content of the Directive, which reflects a fair technological, economic and legal balance

1. Several efforts have sought to rebuild the Directive’s balance around very constructive interpretations that deviate from its wording

The transposition of the Directive and the preparation of the guidance provided for in its Article 17(10) have given rise, admittedly after a somewhat hasty review of best practices, to considerations about how to implement the framework set out by the directive. These considerations have gone so far as to introduce entirely new concepts, which do not manifestly square with the framework set out by the legislator. They are consistent with certain academic discussions^{76,77} and with proposals made by civil society organisations.

⁷⁶ See for instance this interpretation close to the current German draft transposition: João Quintais *et al.*, *Safeguarding User Freedoms in Implementing Article 17 of the Copyright in the Digital Single Market Directive: Recommendations from European Academics*, 11 November 2019. Online: <https://ssrn.com/abstract=3484968>

⁷⁷ Maxime Lambrecht, “Free Speech by Design – Algorithmic protection of exceptions and limitations in the Copyright DSM directive”, *Journal of Intellectual Property, Information Technology and E-Commerce Law, JIPITEC* 68, 2020. Online: <https://www.jipitec.eu/issues/jipitec-11-1-2020/5080>.

i) The notion of likely illegal or infringing content does not appear in the Directive, no more than the pre-identification of content

The Commission services' initial document on its future guidance proposes to distinguish between likely legal or illegal content. The European Commission proposed that the blocking of content protected by intellectual property rights and not covered by a license could only occur where the content appeared to be "likely infringing".

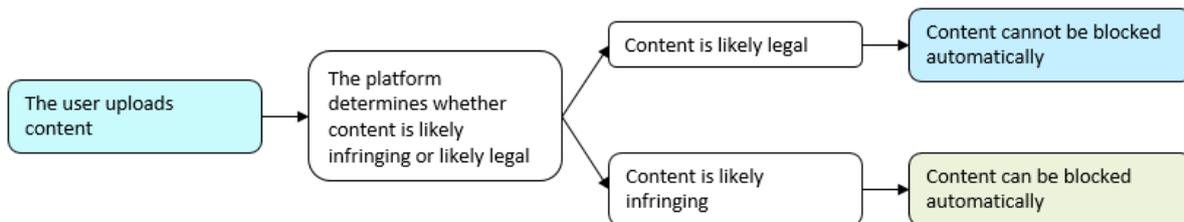


Figure N° 9: Flowchart illustrating the upstream phase of the process, according to the consultation text on the guidance envisioned by the European Commission services

The Commission had already proposed in a non-paper, during the negotiations between the Parliament and the Council, a mechanism guaranteeing that legal content would be kept online and the use of automatic tools restricted as much as possible, while content uploaded by "amateur" users would not be subject to any liability⁷⁸. In substance, it appears to have maintained that position, if one bears in mind that the content of "amateur" users would not be "likely illegal". Notwithstanding, as this proposal has not been taken on by the co-legislators, it is surprising to see it reintroduced into Article 17 of the Directive at the implementation stage.

The draft transposition texts of the German Ministry of Justice, in contrast, propose a system to prevent the blocking of content at users' discretion. In a similar spirit, but using distinct means, the first draft transposition text put online by the German Ministry of Justice and Consumer Protection proposed that users should identify, at the time of uploading, that the use of the content is likely to fall within the scope of an exception (*pre-flagging*). Content identified by the user in this manner would not be blockable or removable after notification by the rightholder, except in cases where this identification is manifestly erroneous.

⁷⁸ "3. Non-infringing content should remain on the platform online. / 4. Automatic blocking, although not forbidden, should be avoided as much as possible."

Online: <https://www.documentcloud.org/documents/5498038-article-13-trilogue-proposal.html>.

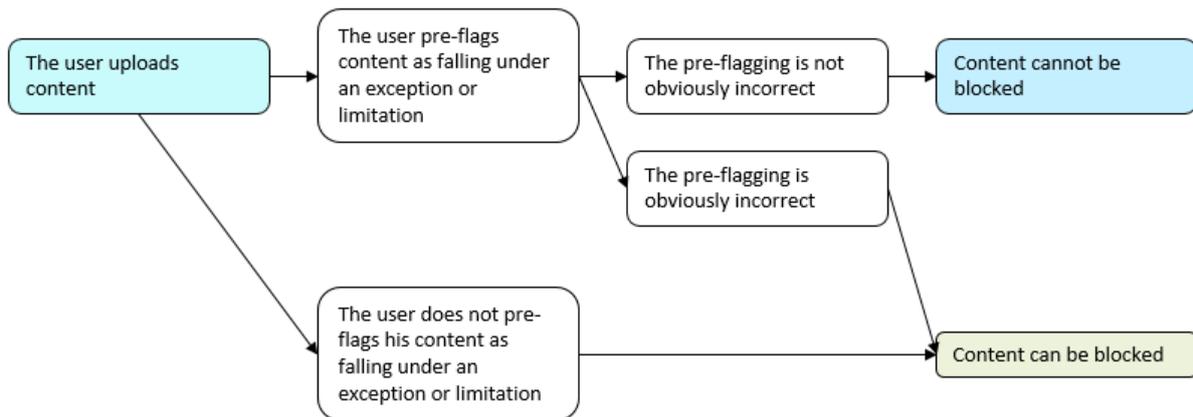


Figure N° 10: Flow chart illustrating the upstream phase of the process, according to the first draft transposition test issued by the German Ministry of Justice and Consumer Protection

This mechanism has been refined in the new draft transposition text made public in October 2020, which preserves the essence of the mechanism while marginally altering its balance over time. In the new version, the identification by the user of content falling within the scope of an authorised use is not carried out *ex ante*, but only when the platform identifies a possible blocking measure. This new version nonetheless retains the essential characteristic of the previous system: the ability for the user to prevent the blocking by simple declaration.

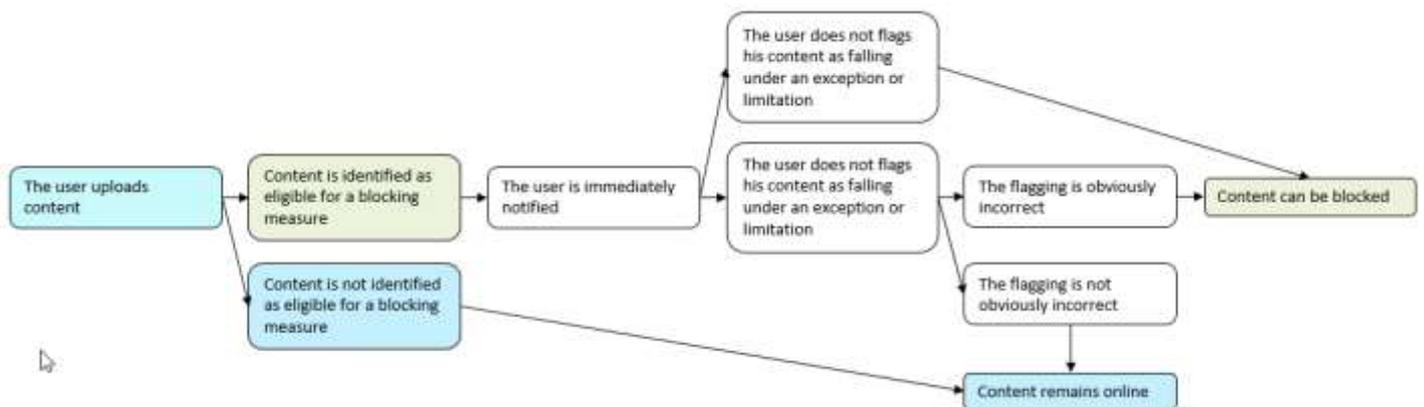


Figure N° 11: flow chart illustrating the upstream phase of the process, according to Germany's second draft transposition text

ii) **Article 17 does not set out an “obligation of result” to never block content that might be lawful**

Some members of the doctrine have put forward an interpretation of Article 17 under which it would create an “obligation of result” to never block the use of content that might be lawful.

This approach appears to be based on an interpretation of the first paragraph of Article 17(7), which provides that:

“The cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter

uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.”

These provisions have given rise to discussions as to a possible “obligation of result” to never block lawful content. This “obligation of result” is sometimes contrasted with the “best-efforts obligation”, to which platforms would be held under Article 17(4)(b). However, such an interpretation is unconvincing.

This interpretation of Article 17(7) would contradict the purpose of the Directive, its provisions and the overall context of Union law. First of all, an “obligation of result” to never block lawful content would contradict the very purpose of Article 17. The latter, even before organising a liability regime, is aimed at subjecting the platform’s acts of communication to the respect of an exclusive right. Under Article 17, the platform is thus to comply with the authorisation regime.

On the contrary, the existence of an “obligation of result” to never block content that could be lawful would effectively result in authorising the uploaded content, and thus make available to the public unlawful content. As a matter of fact, exceptions to copyright law are not defined by easily measurable criteria that could be implemented on an ex ante basis (see below): any uploaded content can theoretically be subject to an exception. Following this reasoning would thus make it impossible to block any content, on the sole grounds that it is not entirely impossible that they may be covered by an exception. Such a result would be totally contrary to the central objective of the legislator: ensuring that online content sharing on platforms should be subject to copyright and neighbouring rights.

Secondly, the interpretation of Article 17(7) as establishing an “obligation of result” to never block lawful content would run contrary to the overall logic of the Directive. Article 17(7) specifies that rightholders and platforms prevent possible exceptional cases of overprotection of copyright, through a collaborative process which itself stems from the obligation to uphold copyright. It is indeed the “*cooperation between service providers (...) and rightholders*” that must prevent the blocking of lawful content, and not the platforms themselves. Such a broad and vague a wording cannot be a sound foundation for an “obligation of result”. Likewise, it should be noted that the legislator has not provided for any specific sanctions for the possible blocking of lawful content, which would appear paradoxical had it really intended to institute an obligation of result.

Thirdly, the interpretation of Article 17(7) as establishing an “obligation of result” to never block lawful content would not be compatible with other sources of copyright-protection. It first appears that the principles for the implementation of exceptions have been set out in Article 5 Paragraph 5 of Directive 2001/29/EC of 22 May 2001, known as EUCD, according to which exceptions and limitations “*shall only be applied in certain special cases that do not conflict with normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder*”. This assertion alone is enough to emphasise that the mere possibility that the use of content may qualify as an exception can in no way justify reversing this logic, at the expense of the exclusive right.

The interpretation of exceptions is also circumscribed by the three-steps test as provided for by international Treaties. An obligation never to prevent sharing of certain types of content would lead to widespread dissemination of illegal content, and would thus contravene the protection of the work's normal commercial exploitation. It would thus raise a problem of compatibility with international instruments protecting copyright, in particular the Berne Convention, the World Intellectual Property Organisation Copyright Treaty (WCT) or the Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS).

The only consistent reading of Article 17(7) is thus to understand it as a provision which is to be implemented on a voluntary basis, but in combination with other mechanisms, in particular the complaint mechanism. A protection of exceptions to copyright implemented on a voluntary basis is not unprecedented in EU law. The terms of Article 17 is close to that of the 2001 Copyright Directive, as regards cases of overprotection arising from the use of technological protection measures (TPMs) which would hinder the benefit of certain exceptions. Article 6 of the Directive provides that TPMs are protected by law against any form of circumvention. It is provided that rightholders shall ensure, by means of voluntary measures, that third parties are able to benefit from the exceptions. Only in the absence of such measures must Member States take appropriate measures to ensure the benefit of the exceptions. This approach has been precisely confirmed by a recital of Directive 2019/790⁷⁹.

Finally, exceptions are to be guaranteed, first and foremost, by the complaint and redress mechanism. Set out as a general principle in Article 17(7), the protection of exceptions is implemented through Article 17(9) and the complaints system, as recalled in Recital 70 of the Directive. The importance granted by the legislator to the effectiveness of this mechanism suggests that it has fully anticipated that certain legal acts of sharing of unauthorised content may be blocked. It is by far less understandable in a system where no legitimate content can ever be blocked on a preventive basis: it is precisely because such blocking measures are possible that the legislator has set up other safeguards, which, taken together, ensure that users benefit from exceptions.

iii) The suggestion that there is an “obligation of result” to never block certain acts of sharing is not more convincing when it is applied to “likely infringing content”

The idea, which seems to guide the Commission services in the preparation of the future guidance, according to which platforms should never block “likely legal” content is not more soundly justified.

⁷⁹ “ (7) The protection of the technical measures provided for in Directive 2001/29/EC remains essential to providing the protection and effective exercise of the rights afforded to authors and other rightholders under Union law. Such protection should be maintained, while ensuring that the use of technical measures does not prevent beneficiaries from benefiting from the exceptions and limitations provided for in this Directive. Rightholders should have the possibility to ensure this through voluntary measures. They should remain free to choose the means appropriate for enabling beneficiaries of the exceptions and limitations provided for in this Directive to effectively do so. In the absence of voluntary measures, Member States should take appropriate measures in accordance with the Article 6(4) subparagraph 1 of Directive 2001/29/EC, including where works and other protected content are made available to the public via on-demand services. ”

Firstly, this approach, halfway between the rigour of an “obligation of result” and the fuzzy notion of “likely legal” content, reveals an internal contradiction. While founded on the idea of an “obligation of result” under Article 17(7), it also recognises, at the same time, that it is impossible to guarantee that no blocking of lawful content will take place pursuant to Article 17, as representatives of the Commission seemed to recognise, in particular during the hearing before the Court of Justice on 10 November 2020.

This “probabilistic” approach to the review of the content, based on the distinction between “manifestly” or “likely” lawful and unlawful content, does not prevent lawful content from being temporarily blocked, if lawful content is incorrectly categorised as “manifestly” or “likely” unlawful.

Moreover, making Article 17(7) a genuine obligation of result is impracticable in practice. No a priori approach, whether by human supervision, given the uncertainty of the legal characterisation, or, as will be shown hereafter (cf. II.B.2), by an automatic tool, can recognise the benefit of an exception. Only the Court of Justice and the national courts can, in reality, definitively ensure that the use of the content is lawful. Yet clearly, the legislator did not intend to create a landscape in which referral to the court would be mandatory before any content could be blocked.

Finally, the “probabilistic” approach which seems to be guiding the Commission services would have the same negative effects as the recognition of an absolute “obligation of result”: it would risk making exceptions the rule, and could lead to the massive liberation of non-authorised protected contents, while creating legal uncertainty. Just as well as a more radical approach, such an interpretation is hard to square with the importance given by the legislator to the complaint mechanism, and thus to the ex post protection of exceptions.

iv) Nor does Article 17 create a sui generis right of communication to the public, by which it would be possible to part from the closed list of exceptions

The very constructive hypothesis of a “sui generis right” has in some cases prompted the consideration of new exceptions with no textual basis. The doctrinal discussion on Article 17 of the Directive has given rise to an interpretation of its wording, according to which the provisions it contains create a *sui generis* right of communication to the public, distinct from that provided for in Directive 2001/29/EC.

According to Article 3(1) of that Directive, Member States “*shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works (...)*”. The interpretation of the notion of communication to the public within the meaning of this article has given rise to still-evolving case law, particularly with regard to platforms, and has recently been the subject of an important preliminary question from the Bundesgerichtshof⁸⁰.

⁸⁰ Cases C-682/18 and C-683/18, *supra*.

According to some authors⁸¹, whose work appears to have been attentively considered by the German Ministry of Justice and Consumer Protection⁸², Directive 2019/790 purportedly intended to create a right entirely distinct from that of Directive 2001/29. It would follow, in particular, that the exclusive right provided for in Article 3(1) of Directive 2001/29/EC does not hold within the scope of the Directive. More concretely, and out of a series of other practical implications of such an interpretation, these authors argue that the exceptions within the meaning of Article 17 of Directive 2019/790 would be independent of the exceptions within the meaning of Directive 2001/29⁸³.

The Member States would thus enjoy the freedom to define new exceptions outside the list in Directive 2001/29, for the purpose of implementing Article 17. It would appear that the preliminary draft transposition texts drawn up by the German Ministry are based on such an interpretation as to create a form of *de minimis* exception to copyright on platforms, which would in particular allow acts of sharing to be protected from any action below certain quantitative thresholds – video duration, image size, etc.

This interpretation, however, appears incompatible with the clear terms of Directive 2019/790. Without analysing here all the components of this debate, and in particular the interconnection with general international intellectual property law, at least two reasons appear to preclude such an analysis.

To begin with, Directive 2019/790 consistently refers to the concepts set out in Directive 2001/29. Firstly, it uses the terms “*act of communication to the public*”. It provides in Article 17(1) that service providers, which perform such an act when they provide access to protected works uploaded by users, must receive for this purpose an authorisation from the rightholders, provided for in Article 3(1) of Directive 2001/29. Its Article 17(7) refers to “*exceptions and limitations*”, the exact term already used in Article 5 of Directive 2001/29. The exceptions made mandatory pursuant to the same paragraph take up, albeit more succinctly, the terms of subsections d and k of Article 5(3) of Directive 2001/29. The third paragraph of Article 17(9) is clearer still, emphasising that Directive 2019/790 does not affect the exceptions and limitations provided for - that is, previously provided for - by Union law, which can only be understood by reference to Directive 2001/29. It appears difficult to understand why the legislator would adopt so completely the terminology of a Directive from which it intends to depart entirely.

Thereafter, Directive 2019/790 itself contains explicit stipulations on its interconnection with Directive 2001/29. Article 1(2) provides, in particular, that the Directive leaves intact the rules

⁸¹ See in particular: Martin Husovec, João Quintais, *How to license Article 17? Exploring the Implementation Options for the New EU Rules on Content-Sharing Platforms*, 1 October 2019. Online: <https://doi.org/10.2139/ssrn.3463011>

⁸² Martin Husovec, João Quintais, “Article 17 of the Copyright Directive: Why the German implementation proposal is compatible with EU law – Part 1”, *Kluwer Copyright Blog*. Online: <http://copyrightblog.kluweriplaw.com/2020/08/26/article-17-of-the-copyright-directive-why-the-german-implementation-proposal-is-compatible-with-eu-law-part-1/>

⁸³ *Ibid.*, p. 15.

of Directive 2001/29 and does not affect them in any way. This would be the case, though, if Article 17 of Directive 2019/790 provided for a *sui generis* right: the latter would derogate from the exclusive right provided for in Article 3(1) of Directive 2001/29. Not only does Article 17 not provide for an explicit derogation from Directive 2001/29, but, as has been said, it also relies on it to define a series of concepts.

In fact, the difference between the exclusive right of communication to the public in Article 3(1) of Directive 2001/29 and the same right within the meaning of Article 17 of Directive 2019/790 is not a difference in concept, but merely a difference in regime: it lies entirely in the possibility of an exemption from liability for online service providers who have made their “*best efforts*” to prevent the availability of protected content and implemented the other cumulative conditions of Article 17(4).

Notwithstanding this difference in liability regime, except where Article 17 explicitly sets out to define a concept in the context of its application⁸⁴, the terms it employs must be understood within the legal framework of Directive 2001/29. This is in particular the case of exceptions: as set out above (see II.A.3), users will have to be able to rely solely on the exceptions of Directive 2001/29, where they have been transposed by their Member State, and, in any event, on the citation and parody exceptions.

All in all, though they do not appear to be legally necessary, these various proposals are likely above all to go against the very purpose of Article 17 of the Directive and constitute a step backwards in relation to current practice: they come up against legal, technical and economic obstacles.

2. Protecting the benefit of exceptions cannot justify denaturing their scope

i) The identification of legal versus illegal content in reality requires complex legal analysis, which cannot be satisfied with mere probability

The first report of the joint mission run by the CSPLA, Hadopi and the CNC drew attention to the effectiveness levels of the main content recognition technologies in existence. These are able to calculate the duration of an extract used, whether the work in question is excerpted once or multiple times and repeatedly within a video. The technologies can for instance differentiate between short extracts of a protected work inserted within an Internet user’s much longer personal video, and the reuse, in its entirety, of a sketch or a short programme within a short video⁸⁵.

⁸⁴ As is the case in Article 17(1), where it is clearly stated that the access offered by platforms to protected works uploaded by users falls within the scope of this exclusive right. This question, which is pending in the context of the aforementioned cases C-682/18 and C-683/18 for the purposes of the application of Directive 2001/29, was thus decided by the legislator within the scope of Article 17 of Directive 2019/790.

⁸⁵ CSPLA, Hadopi CNC Report of 29 January 2020, *op. cit.*, not. p. 51.

That being as it may, despite these capabilities, the identification of content covered by an exception or limitation to copyright presupposes a complex qualification process. The quotation, parody and ancillary inclusion exceptions are three relevant examples.

The scope of the quotation exception, for the purposes of the application of Article 17, cannot be assessed on the basis of purely quantitative criteria. It was originally provided for in Article 5(2)(d) of Directive 2001/29/EC of 22 May 2001 as an optional exception, which it remains, outside the scope of Article 17: States may provide for an exception to copyright and related rights *“in the cases of quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose”*.

According to the Court of Justice, *“the essential characteristics of a quotation are the use, by a user other than the copyright holder, of a work or, more generally, of an extract from a work for the purposes of illustrating an assertion, of defending an opinion or of allowing an intellectual comparison between that work and the assertions of that user”*⁸⁶.

Some of the conditions set out by the Directive and the case law of the Court are more subtle in nature.

The quotation exception, for instance, presupposes a direct and close link between the work quoted and the thinking of the user quoting it. The use of the quoted work must thus be ancillary to the quoting content⁸⁷. Translating this assessment into quantitative criteria appears a very delicate task: the Court of Justice has, for example, ruled that a quotation of only eleven words did fall within the scope of the 2001 Copyright Directive⁸⁸. While the fact that the work quoted amounts to only a small portion of the duration or length of the quoting content may possibly be an indication of ancillary nature, it says nothing about the direct and close link between the two works. A compilation of different protected works does not constitute a quotation, even if each of the works thus compiled represents a small percentage of the compilation.

Furthermore, a quotation within the meaning of the exception must be proportionate and in accordance with fair practice. While this implies limits to the scope of quotations, these limits can only be assessed in the light of the circumstances specific to each act of sharing and each work. For instance, the Court of Justice deems both that the complete quotation of a work is not in itself outside the scope of the exception⁸⁹, but that the incorporation of a musical extract *“even if very brief”* (in this case two seconds) from a phonogram does not fall within the scope of the same exception⁹⁰, where that incorporation is made for the purpose of

⁸⁶ CJEU, Gr. Ch., 29 July 2019, *Spiegel Online GmbH v. Volker Beck*, Case C-516/17, para. 78.

⁸⁷ *Ibid*, para. 79.

⁸⁸ CJEU, 16 July 2009, *Infopaq International A/S vs. Danske Dagblades Forening*, Case C-5/08, para. 56.

⁸⁹ *Spiegel Online GmbH* ruling supra., para. 69.

⁹⁰ *Pelham* ruling supra.

including that extract in another phonogram, unless the extract is included therein, in a modified form which is not recognisable to the listener. Here too, a criterion based on the length of the excerpt quoted would not necessarily make it possible to make a relevant departure between quotations and other uses not covered by the exception.

As for the parody exception, it raises obvious difficulties of technical characterisation. Its scope has also been clarified by the Court of Justice, which held that “*the essential characteristics of parody are, first, to evoke an existing work while being noticeably different from it, and, secondly, to constitute an expression of humour or mockery*”⁹¹.

Concerning the first of these criteria, the evocation of an existing work, this mission’s previous report had emphasised that the objective criteria for identifying it were very difficult to determine⁹². While many parodies are made by dubbing existing content, a difference between the audio and video signal of the same content does not necessarily mean that the work is a parody – it could simply be a foreign-language version of the same work. While the development of “multimedia” footprints, covering both video and soundtrack, and “multilingual” footprints, i.e. accepting multiple audio footprints for the same video content,⁹³ could address this difficulty, such responses do not enable the parody exception to be implemented.

Thus, a video parody can be made other than by dubbing, in particular by adding subtitles⁹⁴. Conversely, modifying the soundtrack of a video or adding new visuals to a soundtrack does not necessarily constitute an “*expression of humour*”. For instance, content that makes use of advanced audio and video synthesis techniques (“*deepfake*”) to spread false information⁹⁵ could fit such a description, yet without constituting a parody.

Lastly, the exception based on unintentional inclusion has been largely put forward in the discussions on Article 17, as ancillary uses cannot reliably be identified *a priori* by automatic tools. While this exception is not mentioned in Article 17(7), it should nevertheless apply in those Member States that have transposed this exception into their national law⁹⁶, pursuant to i of Article 5(3) of Directive 2001/29/EC.

⁹¹ CJEU, gr. ch., 3 September 2014, Johan Deckmyn and others v. Helena Vandersteen and others, case C-201/13, para. 20.

⁹² CSPLA, Hadopi, CNC Report of 29 January 2020, op. cit., not. p. 51 - 2.

⁹³ CSPLA, HADOPI, CNC Report of 29 January 2020, op. cit., p. 52.

⁹⁴ See for example, for an analysis of parodies of the film *The Downfall (Der Untergang)* in American law: Aaron Schwabach, “Reclaiming Copyright from the Outside In: What the Downfall Hitler Meme Means for Transformative Works, Fair Use, and Hitler Meme Means for Transformative Works, Fair Use, and Parody”, *Buffalo Intellectual Property Law Journal*, 2012, Thomas Jefferson School of Law Research Paper No. 2040538. Online: <https://ssrn.com/abstract=2040538>

⁹⁵ For one of the first widely-noted studies of the application of these techniques to policy content: Supasorn Suwajanakorn, Steven M. Seitz, and Ira Kemelmacher-Shlizerman, “Synthesizing Obama: Learning Lip Sync from Audio”, *ACM Transactions on Graphics*, July 2017. Online: <https://doi.org/10.1145/3072959.3073640>

⁹⁶ Although fortuitous inclusion has not been formally transposed into French law in Article L. 122-5 of the Intellectual Property Code, the Court of Cassation maintained its case law on ancillary inclusion after the

Platforms and users' associations have widely emphasised the risks of the blocking actions they identified around ancillary uses: should a video maker specialised in a specific film or video game environment, making videos of himself surrounded by figurines of derivative products characteristic of these environments, be required to remove them in order to share his videos? Would a video made at a disco, in which echoes of the music playing can be heard, be blocked?

In certain cases, the ancillary use of a work must be able to fall within the unintentional inclusion exception and therefore constitute, in those Member States that have chosen to transpose this exception, an exception to copyright. In contrast, other inclusions which users might expect would probably not be covered by this exception. For example, German case law has developed a restrictive conception of this exception, by requiring that a work that is the subject of an unintentional inclusion must be interchangeable and not be part of the "general concept" of the work making the inclusion⁹⁷. No quantitative criteria can easily capture the reasoning in this case either: the fact that included content represents a small part of the televised content says nothing about the "unintentional" nature of the inclusion, or about the interchangeability of the content.

However, it is important not to overestimate the difficulties that the implementation of fingerprinting content recognition tools might raise with regard to the fortuitous inclusion exception, even when the latter is applicable. Regardless of their legal qualification, some of the uses perceived as "ancillary" by users are in reality tolerated as they are. "Ancillary" use will often be brief and thus fall within the scope of tolerances set by rightholders. Moreover, tools for recognising works by fingerprinting cannot recognise all content because of the way they work. A detail visible in the background of a video, or a musical tune captured in the very noisy environment of a discotheque⁹⁸ will in principle not be recognised.

In addition, while some platforms may use pattern recognition to detect, for instance, terrorist content by searching for the logos of certain organisations, it does not appear that such techniques are currently used for the purposes of protecting literary and artistic property. Lastly, as pertains to the example of the figurines characteristic of certain cinematographic, manga or video game environments, it should be noted that the intellectual property protection applicable to these objects is likely to be based, in practice, much more on designs and models protection than on copyright and related rights, which are the only form of intellectual property rights that come under Article 17. The digital fingerprint protection of films or video games does not in itself entail any risk of blocking the sharing of videos that show the favourite Super Mario or Darth Vader figurines of the users concerned.

ii) In the current state of the art, the prior qualification of which uses should be covered by exceptions is beyond the reach of automated tools

transposition of Directive 2001/29/EC, expressly stating that it should be interpreted in the light of the fortuitous inclusion exception provided for by the Directive (Cass., 1st civ., 12 May 2011, no. 08-20.651).

⁹⁷ BGH, 17 November 2014, I ZR 177/13, "Moebelkatalog" Ruling.

⁹⁸ CSPLA, Hadopi, CNC Report on 29 January 2020, *op. cit.*, p. 19.

The qualification operations described above cannot be carried out automatically, in the current state of the art. While technologies using artificial intelligence could enable progress in this field, as this mission’s previous report showed, they also display weaknesses and an lack of transparency that do not make them eligible to replace, at present, fingerprinting content recognition tools⁹⁹.

This remark applies all the more in the face of the complex qualification issues described above, such as, for instance, the question of whether content that forms part of another work is “intellectually confronted” with the latter. With regard to the parody exception, the distinction between likely legal versus likely illegal content is part of a vast and evolving field of research, that of the analysis of natural language by artificial intelligence, and in particular humour. In the current state of the art, the recognition of humour by artificial intelligence is far from being a reality¹⁰⁰, with some researchers even deeming that the recognition of humour on the sole basis of content¹⁰¹ is an “AI-complete”¹⁰² problem, i.e. its resolution assumes the creation of a “general” artificial intelligence, as opposed to specialised algorithms.

These technical limitations make it difficult to imagine that a service provider could, at present or in the near future, recognise with a satisfactory degree of reliability which content is likely illegal or likely legal. While there is good reason to believe that technical improvements will make it possible, in the medium term, to envision such systems, they cannot serve as a horizon for the transposition of the Directive.

The – obvious – limitations of recognition tools when it comes to taking into account exceptions have been widely put forward to challenge their implementation under Article 17 of the Directive. Whether in the preliminary draft of the German Ministry of Justice and Consumer Protection or in the approach floated by the European Commission, the idea of the necessary protection of legitimate uses against the risks of automatic blocking essentially inspires two strategies:

- the first of these strategies, that of quantitative thresholds, would involve establishing “technical approximations”, such as limits on the duration of extracts or file volumes, below which no blocking can occur. It forms, as mentioned above, one of the thrusts of the German transposition projects, and does not seem to be alien to the idea of an *ex ante* approach promoted by the European Commission either;
- according to the second of these strategies, the pre-identification or “*pre-flagging*” approach, it is deemed that any content identified as lawful by the user is likely legal . This strategy is also proposed by the German draft transposition text.

⁹⁹ CSPLA, Hadopi, CNC Report of 29 January 2020, *op. cit.*, p. 53 – 4.

¹⁰⁰ See, for an analysis on this point, Maxime Lambrecht, *op. cit.*, para. 95 et seq.

¹⁰¹ And thus excluding contextual clues such as the tone of the comments or the reactions of other users, which are not available when a work is uploaded.

¹⁰² Kim Binsted *et al.*, “Computational Humor”, *IEEE Intelligent Systems*, vol. 21, March-April 2006. Online: <https://doi.org/10.1109/MIS.2006.22>

Yet such strategies would run the risk of emptying of their substance the intellectual property rights that are supposed to be protected by Article 17 of the Directive.

3. The implementation of Article 17 can be based neither on pre-qualification of content that is still regarded as lawful nor on the setting of quantitative thresholds that would make it possible to escape any blocking.

i) The institution of across-the-board quantitative thresholds would raise serious difficulties

Some have suggested the institution of quantitative thresholds aimed at establishing “technical approximations”, such as time limits below which no blocking can take place. This idea plays out along two distinct lines:

- one, starting from the substance of the rights, consists of enshrining a new *de minimis* exception, as proposed by the German Ministry of Justice in its draft transposition texts;
- the other, taking a more procedural approach, in essence establishes a de facto guarantee of certain uses, by preventing the *ex ante* blocking of the briefest contents or the least voluminous extracts. If this approach were to be coupled with an exemption from liability for the platforms, it would actually produce the same effects as the creation of a new exception: the exclusive rights of rightholders would, below the quantitative thresholds adopted, be deprived of any protection.

However, this idea comes up against very strong objections, both legally and economically.

Firstly, the introduction of quantitative criteria is not in line with the legal reality of exceptions. As was emphasised above, no quantitative rule laid down *ex ante* can offer a satisfactory approximation of the exceptions, as short content may not be covered by them, while long content can be. The institution of rules exempting all brief or low-volume content from the application of copyright on platforms would not so much reflect the implementation of the exceptions as the introduction of a new *de minimis* exception, not provided for whether in Directive 2001/29 or Directive 2019/790.

Secondly, some of the thresholds proposed, based on a match percentage, appear impracticable. In the context of its proposed content pre-identification system (see also II.B.3.ii, below), the German Ministry of Justice proposes that content be considered manifestly infringing if a match exceeding 90% of the “*information provided by the rightholder*” is found. This type of approach may appear attractive at first glance, since, as mentioned above, content recognition tools do not stop at recognising that two fingerprints are identical.

However, counterfeited content does not necessarily produce very high quality matches – just as, for example, matches between the fingerprints of the same person are not always perfect. This is, for instance, the case where the content has been intentionally deteriorated to prevent matches, or, as is sometimes the case with hacked content, is of poor quality. To wit, tests

carried out by the Motion Picture Association¹⁰³ show that content recognition tools may show only very low match rates for content exceeding one hour in duration, the quality of which has been deteriorated, but is still viewable.

While the match percentage may make it possible to manually remove doubt, as is often the case today (cf. I.B.1), it can in no way be used to substantiate a presumption of legality, as this would, in the end, also reward the ingenuity of hackers having found a way to circumvent these devices.

More generally speaking, no quantitative threshold stated in absolute or relative terms can be relevant across the board. By way of illustration, the draft transposition text from the German Ministry of Justice provides for thresholds by content category: 20 seconds for audio-visual content, 1000 signs for text or 250 kilobytes (kb) for images. This approach, however, aligns neither with the reality of the way works are exploited nor with the economic ecosystem of the cultural world.

First of all, it is obvious that this approach in no way reflects the internal diversity of each type of content: 20 seconds of a recent musical “hit”, with a standard duration of three minutes, and the performance of a Mahler symphony lasting an hour and a half, do not have the same relative value. It also ignores the real economic value that can be attached to short excerpts. To broadcast short excerpts from French Football’s Ligue 1 in the form of clips not exceeding 60 seconds, the Internet service provider Free paid 50 million euros¹⁰⁴.

Moreover, beyond these obvious examples, the legitimate demands to derive value from legitimate rights justify a high degree of flexibility, given the great diversity of content involved. This flexibility can sometimes be implemented on a content-by-content basis. In the film industry, for instance, rightholders take into account multiple parameters such as competing modes of commercial exploitation – ongoing theatrical exploitation, possible exclusivity of their own online distribution modes... –, the age of the content, its “premium” quality, etc. In certain cases, for instance to prevent content from being leaked before its official release (pre-release), it is easy to understand that no flexibility, even for short excerpts, can be envisioned.

In some situations, it is even difficult to conceive of a relevant quantitative threshold being implemented. In the image sector, the size of the content is by no means indicative of its value, in addition to being highly sensitive to technical parameters such as compression. By way of illustration, the famed portrait of Allie Mae Burroughs by Walker Evans is displayed on the

¹⁰³ Motion Picture Association, *Stellungnahme Motion Picture Association*, p. 16 – 19. Online: https://www.bmjv.de/SharedDocs/Gesetzgebungsverfahren/Stellungnahmen/2020/Downloads/110820_Stellungnahme_MPA_RefE_Urheberrecht-ges.pdf;jsessionid=418036212734B62A941C335FF8A90315.1_cid297?_blob=publicationFile&v=3

¹⁰⁴ –, « Ligue 1 : Free lance à son tour son offre foot avec une nouvelle application » [Ligue 1: Free rolls out, in turn, its football offer, with a new application], *Le Figaro*, 19 August 2020.

Online: <https://www.lefigaro.fr/flash-eco/ligue-1-free-lance-a-son-tour-son-offre-foot-avec-une-nouvelle-application-20200819>

French version of Wikipedia in a good quality version weighing less than 250 kb¹⁰⁵. Quantitative indicators are scarcely more relevant in the field of writing: one of the best-known poems by Louise Glück, 2020 Nobel Prize for Literature, is around 550 characters long¹⁰⁶.

Lastly and perhaps above all, this approach goes against the current tide of usage and the explosion of short formats. The success of TikTok, following in the footsteps of forerunners such as Vine, has led to a multitude of copycats, both on 'legacy' platforms (Reels, Lasso) and on a series of new entrants (Likee, Dubsmash, etc.). Music is central to these platforms' value proposition, which can prove extremely lucrative: ByteDance, the owner of TikTok, could receive \$27 billion (€22 billion) in advertising revenue in 2020, including around \$16 billion from the Chinese version of the application alone¹⁰⁷. As the basic format of a platform like TikTok is only 15 seconds, the institution of thresholds would deprive rightholders of any leverage in negotiation. Any form of "*de minimis*" exception to the implementation of protected rights is thus likely to become rapidly obsolete in the face of changing uses.

Hence, there would exist obstacles in principle to the definition of quantitative thresholds, both in international law and in opportunity. The setting of quantitative thresholds prohibiting any blocking does not appear to be compatible with the three-steps test required by the international obligations of the Union and its Member States, which requires that an exception must reflect a special case, that the reproduction of the work does not hinder the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author. While the context of sharing platforms may justify the implementation of flexibilities, they cannot be defined *a priori*, nor can they be imposed on rightholders. The level of tolerance thresholds must, in the last instance, depend on the rightholders' choices. Alone in knowing the details of their catalogue of protected works, they are the only ones entitled to define the parameters of their use. As has already been pointed out, these tolerances are already, in many cases, far more generous than the scope of the exceptions.

Conversely, mandatory thresholds, defined by the public authorities – national legislators, the European Commission, etc. – according to a necessarily broad grid, would have counterproductive effects. They would risk making practices more rigid, including on the lower end: forced to agree to higher tolerance levels for highly-protected premium content, crippled in their negotiations with certain short content platforms, some rightholders could be tempted to tighten their requirements on other types of content.

In this respect, a hypothetical procedural approach to quantitative thresholds, in the form of rules imposed on the players, would in fact be no different from a more substantive approach, via the definition of a genuine *de minimis* exception.

¹⁰⁵ Walker Evans, *Portrait d'Allie Mae Burroughs for Louons maintenant les grands hommes*, 1936.

¹⁰⁶ Louise Glück, "The Wild Iris", *The Wild Iris*, New York: Ecco (HarperCollins), 1993.

¹⁰⁷ Julie Zhu, Yingzhi Yang, "TikTok-owner ByteDance to rake in \$27 billion in ad revenue by year-end", *Reuters*, 11 November 2020. Online: <https://www.reuters.com/article/china-bytedance-revenue/exclusive-tiktok-owner-bytedance-to-rake-in-27-billion-in-ad-revenue-by-year-end-sources-idUSKBN27R191>

From the economic standpoint, the impact on the opportunities for deriving value from works would be just as significant. From the legal perspective, the infringement of rights, though less overt, would no less be identical.

The definition of thresholds would, above all, come up against major obstacles in practice, which could only be avoided by a return to a voluntary approach. Practically speaking, this approach would also require answers to the following questions, among others: who should be empowered to define these thresholds? How would they be revised in the light of changing uses and technologies? How would they be adapted to such a wide range of issues in the different sectors?

If these quantitative thresholds were presented, as suggested by the European Commission's professed attachment to a so-called *ex ante* approach, as a necessary guarantee of a fair balance between fundamental rights, the thresholds defined *a priori* should be known to users. Consequently, they could not be defined on a case-by-case basis through cooperation between rightholders and platforms in the framework of the implementation of Article 17. Moreover, it is difficult to see how the European Commission could lay claim to the power to define such parameters from Article 17(10) regarding guidance which it is to issue. As for having them defined by the competent authorities of the Member States, it would hardly appear compatible with the objective of consistent implementation in the Member States, in view of the implications for the internal market.

Moreover, the diversity of practices, issues at stake and the economic need to block specific content for an unlimited period of time – extracts of high-value content, in particular premium sport content, pre-releases, etc. – would require the definition of “safeguard clauses”, so that rightholders could oppose the application of thresholds defined *a priori*. If this distinction were introduced, it would cast doubt on the value of centralised threshold definition: the freedom of the players would ultimately prevail. It would ultimately result in a situation fairly similar to the current one for certain sectors, such as cinema: rightholders in this sector frequently apply *de facto* tolerances but can also be more restrictive when it comes to certain types of content.

In sum, the notion of quantitative thresholds below which the automatic blocking of acts of sharing would be prohibited may seem, in the eyes of some, to offer an interesting policy response to the question of how to protect legitimate uses in the implementation of Article 17, especially when analysed a bit too hastily. Yet, apart from the fact that this approach goes against the letter of Article 17 and the need for a fair balance between fundamental rights and the international obligations of the Union and its Member States, it appears economically fraught with drawbacks and a dead end in practice.

Finally, the corrective measures that should in any case accompany such an approach would end up converging with the situation that already prevails at present: a balanced situation where flexible standards, continually adapted by players on a case-by-case basis and achieved through cooperation between platforms and rightholders, allow the lawful sharing of content on a large scale, all the while accommodating the economic interests at stake.

ii) The identification of lawful content on a declarative basis by users would paralyse the effectiveness of recognition tools.

In terms of principles, the implementation of *ex ante* mechanisms to prevent blocking based on user declarations (“pre-flagging”) poses difficulties that appear no less daunting. Copyright and neighbouring rights are, as the Court of Justice has recognised, by essence, preventive rights: for a work to be communicated to the public, the rightholder’s prior consent is required¹⁰⁸. Furthermore, as stated above regarding the Eva Glawischnig-Piesczek ruling, the Court has already recognised that the risk of copying and sharing of unlawful content once it has been made available must be taken into account. Such an approach thus carries the burdensome risk of disproportionate infringement of intellectual property rights.

The institution of a mechanism enabling users to identify a priori which content can be shared for legitimate use could only result in misunderstandings and risks of misuse, considering the ease with which they would be able to avail themselves of the exceptions and the real complexity of this qualification process. The survey conducted by Hadopi for the first report of this mission consequently emphasised that users consider “legitimate” a number of uses that are in fact problematic when viewed from the perspective of copyright legislation.

For example, two-thirds of Internet users deem that showing the name of the content’s author suffices to guarantee the legality of an act of sharing. Were a pre-notification option to be introduced, two-thirds of Internet users would thus flag this situation as falling under the quotation exception, even though it does not, alone, suffice to qualify for this exception.

<i>In bold and colour: correct answer</i>	TRUE	FALSE
Posting a parody of music, a film or other cultural content does not require permission	55%	45%
Individuals may post content of which they are not the author if they clearly indicate who is the actual author of the content	67%	33%

Fig. N° 12: Results of the OpinionWay survey for Hadopi (2019) on uploading parody and quotation.

Likewise, it is highly likely that a user who has produced a two-second sample believes that it falls within the scope of the quotation exception – when the Court of Justice has clearly ruled that this is not the case when the extract of a protected phonogram is incorporated into another phonogram (cf. II.B.2). Lastly, during this mission’s interview of representatives of the French public service broadcaster France Télévisions, the latter reported that the explanation most frequently provided by Internet users sharing excerpts from the public broadcaster’s programmes without authorisation was that public service content, which is free, should be freely shareable. As self-evident as this reasoning may seem to those who hold to it, it does not line up with any exception opposable to France Télévisions or its content providers.

What is more, real infringers could seize the opportunity opened up by pre-flagging in order to slip through the detection process. While this phenomenon cannot be quantified, the

¹⁰⁸ CJEU, 16 November 2016, *Marc Soulier and Sara Doko versus French Prime Minister and Minister of Culture and Communication*, Case C-301/15, para. 33.

mission’s interviews with rightholders revealed that some users in bad faith claimed that putting content online in its entirety was lawful, hoping to benefit from a favourable decision enabled by a superficial review of their claim.

In this threefold context – the copyright context, the context of the digital economy and the legal landscape created by the Directive – a mechanism enabling users to ensure that one of their content items will be made available, subject only to a “manifestly erroneous” declaration, according to the terms of the preliminary draft transposition texts of the German Ministry of Justice, could allow protected content not covered by any exception or limitation to be uploaded and, in so doing, enable its widespread dissemination.

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C. The combination of recognition tools, upstream, and the complaint mechanism, downstream, enables a balanced implementation of Article 17

1. Preventive intervention at the time of uploading is an appropriate and necessary mode of action for the implementation of Article 17.

i) **The preventive implementation of the “best efforts” provided for in Article 17 must be more effective and better accepted than the current notifications**

The “*best efforts*” that will be implemented in application of Article 17 are not entirely new in the digital world. They are consistent with the copyright protection policies implemented by major platforms for many years now, albeit with varying intensity and according to different procedures. In this report, as in the previous one, the mission devoted particular attention to the YouTube and Facebook models, the practices of which probably foreshadow most precisely the practices that are expected to develop with the advent of Article 17.

It is nonetheless interesting to compare their situation with that of platforms that have so far not implemented such a systematic preventive policy, like Twitch¹⁰⁹. This video streaming service, particularly well known for broadcasting video games live, has been using fingerprinting content recognition solutions since 2014, but with limitations which it attributes largely to the particularities of acts of sharing on its platform – in particular the use of music that is incompletely audible in the background.

Following a series of notifications received from rightholders pursuant to United States legislation, Twitch had to change its content verification policy in June 2020 to include “clips”, i.e. key fragments of longer recordings. This sudden change in its moderation policy set off the

¹⁰⁹ Twitch, *Music-Related Copyright Claims and Twitch*, 11 November 2020. Online: <https://blog.twitch.tv/en/2020/11/11/music-related-copyright-claims-and-twitch>

massive removal of content and a negative response from Twitch’s user community. In autumn 2020, Twitch committed to several important changes to its policy¹¹⁰.

The Twitch example illustrates that the implementation of copyright using an ex post notification system, in every respect, is less satisfactory than a preventive approach. It is widely recognised that it exposes rightholders to a disproportionate administrative burden, given the spread and reproducibility of content on the Internet. It also emerges that such a policy comes up against acceptability issues, in both the user and platform populations, as they can find themselves faced with the sudden removal of content around which uses or even a full-fledged economy had come to crystallise. In contrast, the preventive tools already set up by Twitch for musical content, as well as the watermarking used¹¹¹ – while undoubtedly calling for further refinement in their tools and implementation methods, and though they may warrant a tailored approach to the directive’s implementation according to the features specific to each service – do not give rise to the same difficulties.

By aiming to guarantee, at the source, that as much content as possible is copyright-compliant, and by multiplying the number of licences, the implementation of “*best efforts*” under Article 17 is expected to increase the framework’s predictability for all players and avert the difficulties associated with the use of notifications when these are the only available means of protecting rights.

ii) Preventive rights protection mechanisms based on content recognition tools make it possible to implement Article 17 with only limited and temporary impact on users’ rights

Given the technical limitations to which attention is called above, it is clear that automatic tools, solely suited to enabling the implementation of Article 17 on platforms, cannot recognise the implementation of exceptions on their own. Hence, it can occur that, in cases where the rightholder has requested a blocking measure, acts of communication qualifying for an exception, and thus lawful, can be temporarily blocked.

As was pointed out in the Part I of this report, this is only a residual risk, in light of the technical and organisational factors currently governing the use of content recognition tools: massive development of licences in certain sectors, tolerances – sometimes substantial – on the part of rightholders, technical limitations to the recognition of brief content, human vetting of content that does not reach certain thresholds, etc. Looking past the oft-brandished risk of overblocking, in reality, the use of content recognition tools in the sectors and on the platforms where they are deployed rather gives rise to massive – and moreover welcome, insofar as they are not imposed on rightholders – underblocking as compared to actual sharing uses.

¹¹⁰ *Ibid.*: providing tools to manage past videos in order to ensure their compliance with copyright; providing transparent information to users on the claims of rightholders; concluding licences; running actions to inform and raise awareness of copyright, etc.

¹¹¹ See, on this technique: CSPLA Hadopi CNC Report of 29 January 2020, op. cit. pp. 30 - 33.

Moreover, care must be taken to not overestimate the reach of the residual cases in which legal content might be blocked. A use covered by an exception will in any case have to be promptly put back online after human review, as provided for by Article 17(9) of the Directive, under the complaint mechanism.

Lastly, the mission wishes to emphasise that there is no quantitative evidence to support the reality of “overblocking”, when many factors indicate, to the contrary, that user complaints are rare. It cannot help but point out that the in-depth quantitative studies on uses and perceptions, as it brought to light in its first report, have to its knowledge neither been contradicted nor even truly discussed by any comparable work in Europe. While these studies substantiate the conclusion that the preventive tools deployed on the major platforms are well accepted, it is nevertheless highly paradoxical to radically question their effectiveness, at the risk of an ill-advised interpretation of the directive and through proposals not supported by in-depth studies or figures.

Moreover, it emerges from a review of the first draft transposition texts that, apart from France, other Member States have also chosen to give a predominant role to preventive intervention in maintaining the balance of their transposition of Article 17 into national law, as its provisions naturally suggest. The Dutch Government, for instance, has submitted a proposal to Parliament, the text of which is akin to that of the Directive¹¹². As the explanatory memorandum clarifies¹¹³, the preventive intervention instituted by platforms to block content is a component of their “best efforts”, once they have received the relevant and necessary information from rightholders.

Nor does this approach contravene Article 17(8) of Directive 2019/790, which, taking up a provision from Directive 2001/29, provides that “The application of this Article shall not lead to any general monitoring obligation”. While some authors have seen this paragraph as an obstacle to the use of preventive tools¹¹⁴, such an interpretation has no place, particularly in view of the work carried out in preparation of the Directive.

The Commission specifically addresses this issue in its 2017 Communication on Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights¹¹⁵. It stresses that such an obligation is prohibited only in its most general forms. The Commission deemed precisely that this was not the case with Article 17: “the obligations (...) proposed in Article 13 [now 17] of the Commission's proposal for a Directive on

¹¹² <https://zoek.officielebekendmakingen.nl/kst-35454-2.html>.

¹¹³ <https://zoek.officielebekendmakingen.nl/kst-35454-3.html>, 3.3.iii, in particular paragraph 10 (« *In de derde plaats...* »).

¹¹⁴ Martin Senftleben, Christina Angelopoulos, *The Odyssey of the Prohibition on General Monitoring Obligations on the Way to the Digital Services Act: Between Article 15 of the E-Commerce Directive and Article 17 of the Directive on Copyright in the Digital Single Market*, October 2020.

Online: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3717022

¹¹⁵ European Commission, *Guidance on certain aspects of Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property rights*, COM(2017) 708 final, 29 November 2017. Online: <https://ec.europa.eu/docsroom/documents/26582>

copyright (...) are, in its view, part of the “*due diligence obligations that may be imposed, e.g., on providers of online hosting services with a view to preventing the upload of IPR infringing content (...)*.”¹¹⁶

The first paragraph of Article 17(8) should consequently be read as a reminder that the mechanisms provided for in the rest of the Article are without prejudice to this pre-existing obligation under Directive 2001/29. This subparagraph does not preclude, inversely, the preventive implementation of copyright protection under the specific regime laid down by Article 17.

iii) Any weakening of the legal system enabling blocking risks, paradoxically, calling into question the virtuous dynamic of licensed uses, which is central to the logic promoted by the Directive

One essential objective of Article 17 is to foster the conclusion of licensing agreements between platforms and rightholders, as recalled in Recital 61 of the Directive, which may themselves enable content monetisation. This virtuous dynamic works to the benefit of all stakeholders:

- rightholders regain control over their content and can reap economic benefits from it should they wish, or block the sharing of content on the platforms if they prefer other forms of use;
- users benefit from the broadened and reliable availability of licensed content;
- and platforms enjoy a clear framework regarding their liability and the licences which they have to take out.

This positive dynamic is nonetheless dependent on the success of the negotiations between platforms and rightholders to conclude the licencing agreements provided for in Article 17(1) of the Directive. These negotiations can only be successful if each party stands to gain. In negotiation theory, this self-evident truth is summed up in the concept of “*best alternative to a negotiated agreement*” (or BATNA). When one of the parties’ best alternative to a negotiated agreement is equivalent to the outcome of the negotiation, the interest in negotiating falls away.

This is precisely the risk which some of the draft texts drawn up to transpose the Directive entail. If platforms benefit from a liability exemption when they do not block content that has been identified by the recognition tool, either because the content is likely lawful or because it has been identified by the user as lawful, their interest in entering into licensing agreements becomes minimal. In this case, the licence agreement would not improve their security under the law. Moreover, self-identification by users or the sorting of likely illegal or legal content would in practice enable substantial content-sharing: the platform’s attractiveness, measured in quantitative terms, would remain more or less the same.

¹¹⁶ *Ibid.*, p. 20.

The biggest losers in such a situation would be the rightholders, whose deteriorated negotiating position could result in a drop in the sums offered by the platforms. It is also likely, albeit less intuitive, that users would lose out overall. Admittedly, users sharing content could distribute it more easily when invoking an exception. In contrast, users wishing to make occasional use of protected content by taking advantage of the uses currently tolerated by rightholders or covered by licences might no longer be able to do so. Furthermore, some content currently available thanks to licensing agreements could vanish, at the expense of users who simply wish to have access to this content.

In this regard, it should be reiterated that the obligation to negotiate instituted by Article 17(4)(a) of the Directive is not tantamount to an obligation to conclude an agreement, as also noted in Recital 61 of the Directive. While this obligation to negotiate constitutes, in theory, a safety net with respect to the risk described above, it should be noted that its practical effects are likely to be reduced. This is due to the difficulties inherent in demonstrating and, in any case, in capturing a platform's failure to make "best efforts" to negotiate. Moreover, such a dispute would come only after negotiations have broken down, leaving an interim period of time, varying in length, during which the disadvantages described above would persist for all parties concerned.

2. Preventive verification of content using existing and well-known technical mechanisms, combined with the additional guarantees offered by the Directive, offer the most satisfactory balance.

This is because the balance needed between fundamental rights means, by its very nature, that certain infringements of rightholders' or users' rights will occur as a consequence of the implementation of Article 17, as would be the case with any enactment aimed at such reconciliation. In order to determine this balance, the impact of the infringements of the rights in question needs to be taken into account.

i) First of all, the infringement of property rights resulting from an unlawful but unblocked act of sharing can be very serious

This seriousness stems from the very nature of sharing platforms and their characteristics: a wide audience, viral reproducibility that prevents acts of sharing from being reversed once they have been carried out, and lack of alternative to automated tools for exercising effective supervision. This risk of irreversible dissemination of protected content is by no means hypothetical. By way of illustration, some accounts on very popular platforms are specialised in copying protected content posted on other platforms or sites in order to capture views and the related revenues, when such content is not blocked for uploading¹¹⁷. Content posted on a

¹¹⁷ Sam Quach, "YouTube, K-Pop, and the Emergence of Content Copycats", *Hastings Communications and Entertainment Law Journal*, vol. 41, N° 1, 2019. This case study also illustrates the issues attached to the protection of texts.

high-visibility platform can be downloaded then stored for private use, or even uploaded to other platforms that are less respectful of intellectual property rights¹¹⁸.

Moreover, rightholders facing such dissemination of their content are in effect unable to remedy it, unless they incur disproportionate administrative costs, given the fragmentation of responsibility between multiple platforms and individual users. The prospect of establishing effective compensatory remedies seems just as elusive. No ex post remedy can truly compensate for the seriousness of the copyright infringement that can result from the absence of preventive blocking of content.

ii) Several factors mitigate the impact of the risks of infringement on freedom of expression

First of all, as stated above, any blocking action, if unfounded, will only be temporary, as the complaint mechanism will come into play.

Secondly, the blocking will be anything but automatic: in the majority of cases, it will not be triggered, whether the sharing of the content in question is tolerated by the rightholder under the management rules set out by the latter, or whether the rightholder has chosen to authorise it in return for monetisation of the sharing.

Thirdly, recognition tools do not make any reading of the content of the work itself: they do no more than compare it to a bank of references (fingerprints, watermarks, etc.) to deduce a match. This very operating mode eliminates any risk of censorship on the basis of a user's opinions or the nature of the shared content, and makes it possible to implement a preventive logic without unduly infringing on freedom of expression. The simplicity of these tools thus appears as a form of guarantee with regard to what lies at the very heart of freedom of expression. From this standpoint, the implementation of such preventive proportionate tools for the purposes of copyright protection raises less sensitive issues than those raised, for instance, by the detection of hate speech or content inappropriate for children, which the platforms do develop (cf. I.A.1.i).

The Court of Justice has already accepted similar reasoning with regard to the posting of defamatory content online, in a different legal context — it then becomes a matter of assessing the proportionality of the obligation imposed on a platform. In this instance, the Court found that it was not excessive to require Facebook to automatically prevent the posting

¹¹⁸ The practice of downloading content available on streaming sites, often referred to as stream-ripping, is a rising trend. See, on this topic, Hadopi's September 2020 study on *Les pratiques d'écoute de musique en ligne (volet qualitatif)* [Listening to Online Music: An Overview of Practices (qualitative section)] (online: <https://hadopi.fr/ressources/etudes/les-pratiques-decoute-de-musique-en-ligne>), as well as a complete study dedicated to this point, commissioned by the UK Intellectual Property Office and PRS for Music: *Stream-ripping: How it works and its role in the UK music piracy landscape*, July 2017 (online: <https://www.prsformusic.com/-/media/files/prs-for-music/research/streamrippingresearchjuly2017.pdf>).

of content identical to content previously deemed defamatory, as the identification of such content does not require an “*independent assessment*”¹¹⁹.

iii) Where a tool identifies a match between protected content and uploaded content, in the absence of authorisation, copyright infringement appears highly likely and in turn warrants preventive intervention

The match between the protected content and the uploaded content is enough to presume that the content falls within the scope of copyright. This is because copyright has the characteristic of being an exclusive right: the lawfulness of a use thus depends, subject to exceptions, on the authorisation of the rightful owner, whose judgement will be sought in the event of a claim. The question is thus framed very differently compared to other instances of platform regulation, where the legality of content depends essentially on objective qualification. In matters of copyright, if the copyright or related right is enforced – which will be sufficiently attested by the relevant and necessary information provided by the rightholders –, the match is deemed to constitute a presumption of illegality.

This presumption can only be overruled if the content is legitimately used, in particular, if it qualifies for an exception or limitation, by nature circumscribed instances, or in the case of a false positive, exceedingly rare given the technologies used¹²⁰. In other words, infringement of the right in question is, in the absence of authorisation, very likely when the tool detects a match. As a result, the system ensures, by construction, proportionality in the use of automatic tools, which will be warranted in the vast majority of cases, even when they cause content to be blocked.

If an obstacle were to be set in the way of the copyright protection enabled by recognition tools, for example by a quantitative threshold below which blocking would be prohibited, an asymmetry would appear between the risk of a very strong challenge to copyright protection and the risk of one-off infringements of freedom of expression, which would regardless be limited to a very small minority of cases of blocking. A comparative review of the seriousness of infringements thus justifies the use of automated tools in the implementation of Article 17.

3. The complaint mechanism in the event of blocking, alongside the liability of the platforms, must remain the two main regulatory concepts of Article 17.

i) The complaint mechanism provided for in Article 17(9) provides a necessary and sufficient guarantee to users.

The complaint mechanism is central to Article 17. This mechanism helps guarantee that limited infringements of users’ rights remain only temporary, and that users may avail

¹¹⁹ *Eva Glawischnig-Piesczek* ruling, *supra.*, para 46.

¹²⁰ On this matter, the mission refers readers to the detailed analysis of automatic content recognition techniques in its first report, as well as to the technical analysis produced by EUIPO (*op. cit.*, p. 20).

themselves of the exceptions, in particular for quotations and parody, as set out in Article 17(7).

The text of the Directive itself emphasises the close interconnection between the complaint mechanism and the guarantee on exceptions. Recital 70 of the Directive argues first in this direction. Commenting on Article 17, it states that the complaint mechanism must precisely allow users to challenge measures taken “*where they could benefit from an exception or limitation*”. While the planned system allows users to preventively rely on an exception and prevent any blocking, it appears difficult to understand in what situation, except in the case of an oversight, the same user would then be prompted to challenge blocking on the basis of an exception.

More generally, it is not easy to understand the emphasis laid by the legislator on the complaint mechanism’s effectiveness and expeditiousness, if the usefulness of this complaint mechanism were in fact strongly diminished by a mandatory (albeit not mentioned in the Directive) ex ante approach ensuring the protection of exceptions, whether premised on automatic qualification by the platform or manual qualification by the user.

Lastly, looking solely at the facts, there is evidence that the complaint systems currently implemented by the platforms makes it possible to effectively unblock content when the user’s request is well-founded. The quantitative study carried out by Hadopi for the first report of this mission noted that approximately half of the claims resulted in the related content’s being unblocked, i.e. one third of the blocked content in the sample surveyed¹²¹.

On balance, it thus appears reasonable to consider that:

- Article 17(7) provides, in paragraph 1, that the cooperation of rightholders and platforms shall ensure that the availability of protected subject matter that falls under an exception or limitation to copyright is lastingly prevented;
- Article 17(7) also implies, in Paragraph 2, that users may avail themselves of the quotation or parody exception in all Member States, even though these exceptions are optional under Directive 2001/29/EC of 22 May 2001;
- the complaint mechanism provided for in Article 17(9) can ensure the implementation of these provisions.

¹²¹ CSPLA, Hadopi, CNC Report on 29 January 2020, *op. cit.*, p. 100.

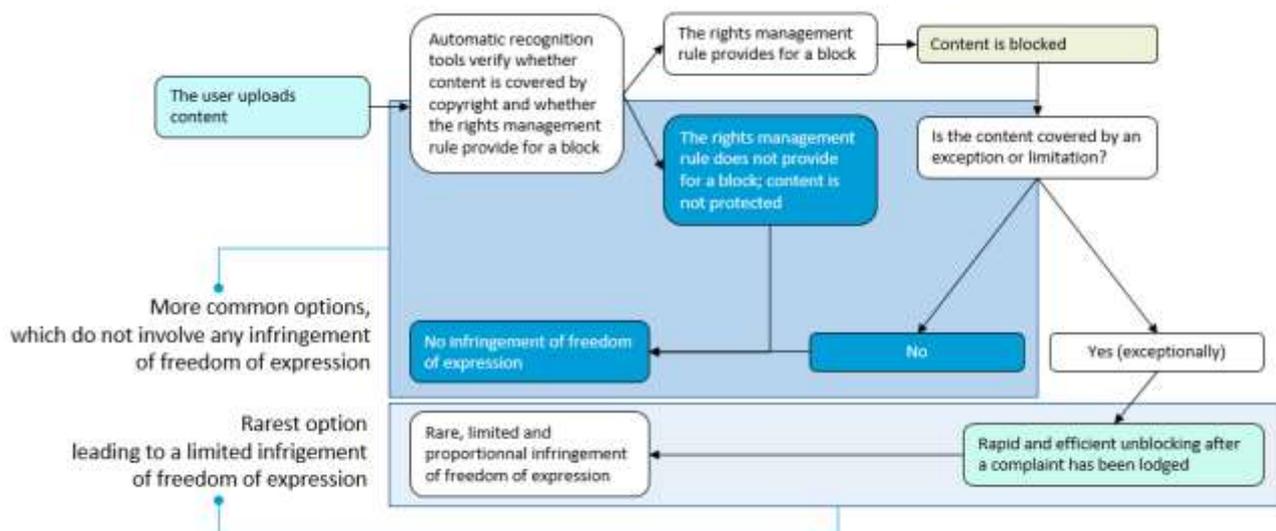


Figure N° 13: Flowchart illustrating the functioning of a preventive mechanism for copyright protection

ii) **Ultimately, the platforms' liability must continue to be central to Article 17.**

In the absence of best efforts demonstrable by the service, Article 17 provides in very clear terms and without further conditions that *"If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public"*. Liability is thus attached to the factual matter of the availability of illegal content.

The alternative proposals being floated in the European debate do not always specify what the liability regime would be for platforms that would make the decision to authorize the distribution of content, by applying quantitative thresholds or a pre-notification system. It should be specified that they could not be understood as implying that platforms are exempt from copyright liability. Such interpretations would, by their very nature, directly call into question the liability of the platforms provided for in the 2019 Directive, and even constitute a rollback of the legal regime instituted by Article 14 of the 2000 Directive on E-Commerce.

In this respect, it is reiterated that the conditions for liability exemption provided for in Article 17, and in particular the *"best efforts"* requirement must be assessed in the light of objective factors. Under the liability regime of Article 17, platforms can only exempt themselves from liability by fulfilling the cumulative conditions provided for in Article 17(4), one of which is making *"best efforts"* to *"ensure the unavailability of works and other protected subject matter"*. Such *"best efforts"* could certainly not be identified in a system where a great deal of protected content could be disseminated upon simple declaration or below a certain quantitative threshold: nothing would then guarantee the unavailability of unauthorized protected works, in the sense of b of Article 17(4) of the Directive.

The *"best efforts"* under b of Article 17(4) can only be conceived of in an objective manner, meaning in view of the features specific to the platform and the means available. Article 17(5) also specifies the factors taken into account for this purpose: the type, audience and size of the service on the one hand, and the availability of the means and their costs on the other.

While these criteria are not exhaustive, they give a clear idea of the legislator’s intention: it sought only to avoid imposing impossible objectives on the platforms, in accordance with the principle of proportionality. In contrast, this legal mechanism excludes any subjective consideration of the platforms’ good faith or their intentions.

It then becomes clear that any platforms which, without the express agreement of the rightholders, implement criteria or processes enabling the inappropriate release of content – thresholds, declaration of conformity by the user – when they could do otherwise, would incur their liability, without being able to rely on any good faith arguments.

Conclusion to Part II

At the current time, two perspectives stand out when it comes to the transposition of Article 17 and the implementation of recognition mechanisms, built on very different postulates (see figure below).

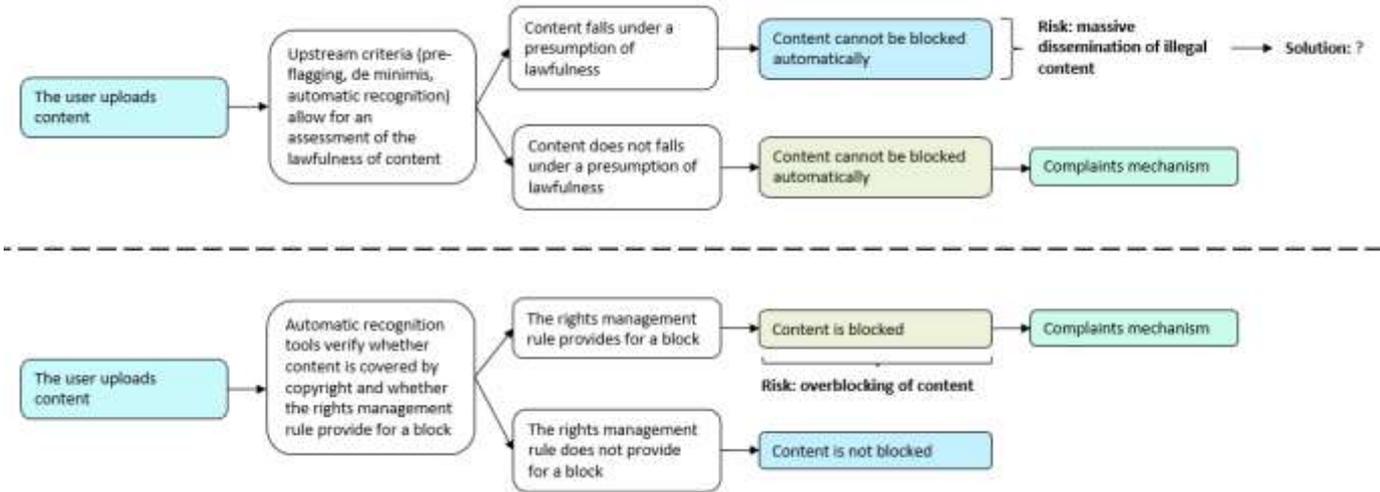


Figure N° 14: flow chart illustrating the balances presented by the Commission and German draft texts (top) and by France’s draft transposition text (bottom)

All things considered, only the interpretation of Article 17 based on the implementation of recognition tools upstream and the complaint system downstream, can ensure a balanced reconciliation of the rights in question: any risk of overblocking can only be residual, thanks to the encouragement of licences and tolerances, and temporary, thanks to effective complaint mechanisms.

The institution of this favourable ecosystem requires further improvement of practices – ranging from the increased transparency of management rules and implemented algorithms to the accountability of rightholders – which are the focus of the last part of this report.

III. The balancing of Article 17 implementation must be achieved by drawing on existing best practices and harnessing all the progress made possible by the Directive.

Article 17 of the Directive is a step forward for all players in view of its balance overall. First of all, it guarantees better protection for intellectual property rights, with a view to bringing the platforms up to standard and uniformising safeguards for rightholders and users. Secondly, it provides new safeguards where content recognition technologies are used.

The mission deems that several measures would help secure the balance of Article 17 of Directive 2019/790, consisting of preserving the interests of users while respecting the prerogatives of rightholders. The mission identifies three main ways of achieving this objective, in compliance with the text of Article 17.

First of all (III.A), it deems that the implementation of Article 17 at the national level requires a fair balance between enshrining the essential principles in law and flexible implementation. From this point of view, it recommends that the possibility of invoking exceptions be clearly provided for in the French draft transposition text, in order to ensure maximum legal certainty (A.1). In contrast, it also asserts that all the parameters of this mechanism, given its necessarily changing nature, cannot be set in stone at this early stage. A regulator - or the practice of economic players - will need to play an important role in the evolution of the framework thus established (A.2).

Secondly (III.B), it emphasises that users must be given their full place in the event of a blocking action, so that they can avail themselves of their rights. This requires the full implementation of the safeguards provided for in Article 17 regarding the complaint process: speed, efficiency and the intervention of human vetting (B.1). More prospectively, the mission is examining the possible introduction of tools for "*smart processing*" of complaints, in order to ensure that complaints are taken into account differentially, in accordance with the issues at stake (B.2).

Thirdly (III.C), it deems that the main objective of the implementation of Article 17 should be to encourage freedom of expression not via the uncontrolled dissemination of illegal content, but through the development of licensing practices and, for content covered by exclusive rights, tolerances granted by rightholders. The mission is exploring two avenues by which this virtuous dynamic could be reinforced: improving the transparency of rights management rules (C.1) and rightholder accountability (C.2).

To develop these proposals, the mission has drawn on the models already used by certain platforms for the protection of certain content. Nonetheless, in line with its general approach on the implementation of Article 17, it does not consider that these practices, which may constitute useful reference points, should be set in stone or codified, not to mention imposed, and even less that they can be applied by all platforms. Depending on their size, their technical and human resources, and the copyright protection challenges they face, different platforms may legitimately adopt different policies and solutions. The same observation applies to the rightholders and types of content involved.

Through its recommendations and examples offered alongside them, the mission wishes to point to the general principles that should apply in the application of Article 17, while stressing that sensitive adaptation of practices to the issues at stake must be the rule, for both platforms and rightholders. A voluntary approach must prevail, as regards both sectors and platforms, and no “one-size-fits-all” solution may be generalised.

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A. Enshrine the essential safeguards in law, while enabling flexible regulation adaptable to developments in technology and uses

1. Enshrine the guarantee on exceptions in the French transposition text

i) The current French draft transposition text does not explicitly refer to the application of the parody and quotation exceptions.

As stated above, Article 17(7) of Directive 2019/790/EU provides that:

“The cooperation between online content-sharing service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or other subject matter are covered by an exception or limitation.

Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services:

(a) quotation, criticism, review;

(b) use for the purpose of caricature, parody or pastiche.”

The French draft law on audio-visual communication and cultural sovereignty in the digital era, submitted on Thursday 5 December 2019 to the National Assembly, did not explicitly transpose this point. It did, however, make explicit reference to the “exceptions and limitations to copyright provided for in this code and allowing the lawful use of works”¹²², which clearly showed that the regime of exceptions, on the one hand, and that of the liability of providers of a content-sharing service, on the other hand, were naturally combined.

The opinion of the General Assembly of the Council of State on the bill¹²³ specified in this sense that exceptions to copyright were already implemented by existing legislation: their implementation in French law, within the framework of the liability regime for platforms, thus did not require any special provisions.

¹²² IV of Article L. 137-4 (new) of the Intellectual Property Code, inserted by Article 16 of the Bill. Online: http://www.assemblee-nationale.fr/dyn/15/textes/l15b2488_projet-loi#B2393458478

¹²³ Point 33.

Article L. 122-5 of the French Intellectual Property Code (CPI) already provides for a list of exceptions to copyright. This list includes in particular the two exceptions made mandatory in the context of Article 17 by the second paragraph of its (7), namely the quotation exception (a of 3° of article L. 122-5 of the CPI) and the parody exception (4° of this article). Moreover, it is clear from the text of the Directive and its transposition that the foundation of the mechanism they establish is indeed copyright.

ii) While the addition of the mandatory exceptions in Article 17 to the French transposition is not strictly necessary, it would help clarify the applicable law

From a purely legal standpoint, the addition of a reference to exceptions to the French text thus does not appear to be strictly necessary: as long as platforms, rightholders and users remain within the framework of copyright law, the exceptions are fully applicable to them. However, the mission considers that the addition of a reference to the application of exceptions under the transposition text could be justified in the light of two main considerations, even if it does not change the applicable law.

First of all, this addition would ensure the internal clarity of the regime for all stakeholders. A referral to the exceptions provided for in French law would make it possible to make this clarification without undermining the consistency of the applicable law and to reassert that this list indeed applies across the board. This reference to the existing exceptions to copyright would also make it possible to mark the distance taken by France with respect to the interpretation of the right of communication to the public as a “*sui generis right*” (cf. II.B.1.iii), and to firmly anchor Article 17 and its transposition into ordinary law.

Secondly, the addition of a reference to the application of exceptions in the text would bring out the procedural dimension introduced by paragraph 2 of Article 17(7). It provides that users may “*rely on*” exceptions in their dealings with the platforms. In view of the importance of the complaint mechanism in the overall balance of the transposition, it is of benefit to specify that users should be able to indicate, when any of their content is blocked, that they deem themselves eligible for an exception. This addition would also have an operational benefit to the platforms, which generally offer users the opportunity to formulate their complaints on the basis of a closed list of grounds: it would make it clear to them that this list must include a reference to the relevant exceptions, in particular quotation and parody.

Proposal N° 1. Add an explicit reference to the exceptions in the French transposition of Article 17.
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2. In the French context, give the regulator its full place in the evolving balance of Article 17.

i) The mission observes that the current balances in the implementation of Article 17 will likely not continue to apply into the next decade or the following one

First of all, technology is rapidly changing. This mission’s first report showed that, while the tools for content recognition by fingerprinting have existed since the 1990s, they were not

adopted by the major players until the end of the 2000s¹²⁴. Beyond their principle itself, they have consistently gained in technical sophistication and are thus now able to recognise short excerpt or identify live feeds¹²⁵. In the future, their ever-greater sophistication or the advent of other tools, in particular tools drawing on artificial intelligence, could transform the landscape, for example by further reducing the already very low rate of “false positives” during uploading or by allowing upstream recognition of content particularly likely to qualify as an exception.

The Directive has drawn the logical conclusions from these findings by opting for technologically neutral terms, such as the notion of “*best efforts*” on the part of platforms or “*necessary and relevant information*” for rightholders to avoid the presence of infringing content.

Internet users’ practices are also continually changing. For instance, a comparison of two studies conducted by Hadopi in 2013¹²⁶ and 2020¹²⁷ on the consumption of musical content online shows a sharp increase in the use of social networks and the emergence of short-format platforms (TikTok, Snapchat) which did not exist in 2013. This change in uses is multiplied by as many sectors, each of which has its own course of development, landscape of platforms, users and rightholders and technological issues at stake. These observations show that the methods for applying the provisions of Article 17 should not be set in stone in accordance with a state of the art and uses that are slated to rapidly change.

ii) In this three-fold context, the opportunity for recourse to the regulator appears particularly appropriate

At least three modes of action can be envisioned, all of which constitute contributions to the other proposals of the mission. They are envisioned in the specific context of France, which already has such a sectoral regulator. In other Member States, self-regulation by the players in the various sectors could play a similar part.

The regulator must first, in the very short term, become a place of recourse to users: less binding than the courts, but also, from the users' point of view, more legitimate than the platforms or rightholders, it can contribute to the effectiveness of the complaint mechanisms instituted by the platforms (see III.B.1), without replacing them and in line with the second paragraph of Article 17(9), which provides for “*out-of-court redress mechanisms*”. It is with this in mind that France’s first draft transposition text proposed inserting a reference to this role of the regulator in III of the new Article L. 137-4 of the CPI.

Proposal N° 2. Consolidate the role of Hadopi as an “out-of-court redress” within the meaning of Article 17(9) of the Directive.

¹²⁴ CSPLA, Hadopi, CNC Report on 29 January 2020, *op. cit.*, p. 20.

¹²⁵ *Ibid.*, p. 21.

¹²⁶ Hadopi, *Study on consumption volumes of dematerialised cultural goods and services*, June 2013.

¹²⁷ Hadopi, *Practices in listening to music online*, September 2020.

The regulator can then intervene, in the medium term, to foster best practices. In the longer term, the regulator could for instance implement non-binding recommendations on good practices or on the tolerances set by rightholders, in order to encourage their dissemination and improve transparency (cf. III.C.1). Such recommendations appear to be better suited to the evolution of the digital world than the setting of quantitative thresholds.

Indeed, as was stated above, tolerances cannot be set across-the-board, for all rightholders, all content and all platforms. Moreover, these tolerances cannot become mandatory standards, as they would then deprive rightholders of the flexibility needed to cover the diversity of their catalogue and uses.

Proposal N° 3. Share general recommendations, showcase good practices and encourage tolerances in the management rules set by rightholders, by type of platform and content.

Lastly, the regulator can help flexibly inform the legal “standards” instituted by the Directive and transposed into French law, such as the notion of best efforts. In doing so, it would increase the legal security of the mechanism for all the stakeholders, while also facilitating its adaptation to technological developments and the diversity of sectors and uses. Just around the corner, the regulator could thus support the implementation of Article 17 in sectors where mechanisms of this kind are still rare – photography, books, etc. In the longer term, it could contribute to continually updating the notion of “best efforts” according to technological developments, for example by clarifying the role which artificial intelligence could play in combination with current techniques.

In order to carry out this task, the regulator should be able to request any useful information from providers of online content-sharing services, the holders of copyright or related rights concerned or the designers of the said content recognition technologies. The High Authority should be able to publish certain data, taking into account both the degree of transparency required and respect for business secrecy.

This evaluation should make it possible to support the platforms and rightholders in their collaboration by means of recommendations and showcasing good practices, particularly with regard to the refinement of the settings on legitimate uses.

Proposal N° 4. Keep technological watch and play an evaluating role that will help inform the concepts of the directive (“*best efforts*”; “*relevant and necessary information*”) in line with technological developments, in particular thanks to appropriate powers entrusted to the regulator that will enable it to have access to useful information while preserving business secrecy.

At the French level, it is intended that these functions be entrusted to the High Authority for the Dissemination of Works and the Protection of Rights on the Internet, as already provided for in the draft enabling article adopted by Parliament in the Act containing various provisions for adaptation to European Union law in economic and financial matters.

At the European level, the Commission will be able to help guide all the authorities of the Member States through the guidance provided for in Article 17(10) of the Directive.

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B. Give users their rightful place by guaranteeing a fast and efficient complaint system

1. Guaranteeing rapid and efficient handling of complaints, where appropriate, via an expedited procedure

i) **Users' claims could be better taken into consideration if the gaps in the existing systems were filled**

The processes for handling user complaints lodged after the implementation of a blocking measure should be improved. The most advanced platforms have already implemented processes for handling complaints. They make it possible to process numerous complaints and, when these complaints are well grounded or sometimes when there is no timely response, allow for the unblocking of shared content.

The implementation of the Article 17 safeguards will help facilitate user access to these complaint mechanisms. The mission's previous report showed, for instance, that these complaint procedures could be clarified and made better known to users: some of them may for instance waive their recourse today because they do not understand the exact scope of the procedure¹²⁸.

In fact, the complaint processes currently operated by the platforms may be somewhat impenetrable and variable, particularly as regards the fate of content during the review periods, even if certain elements are clearly announced to users and appear intangible — for example, the maximum review period left to rightholder, which is 30 days on YouTube.

The mission was for instance able to analyse the process for challenging the blocking of a video on YouTube:

¹²⁸ CSPLA, Hadopi, CNC Report on 29 January 2020, *op. cit.*, p. 101.

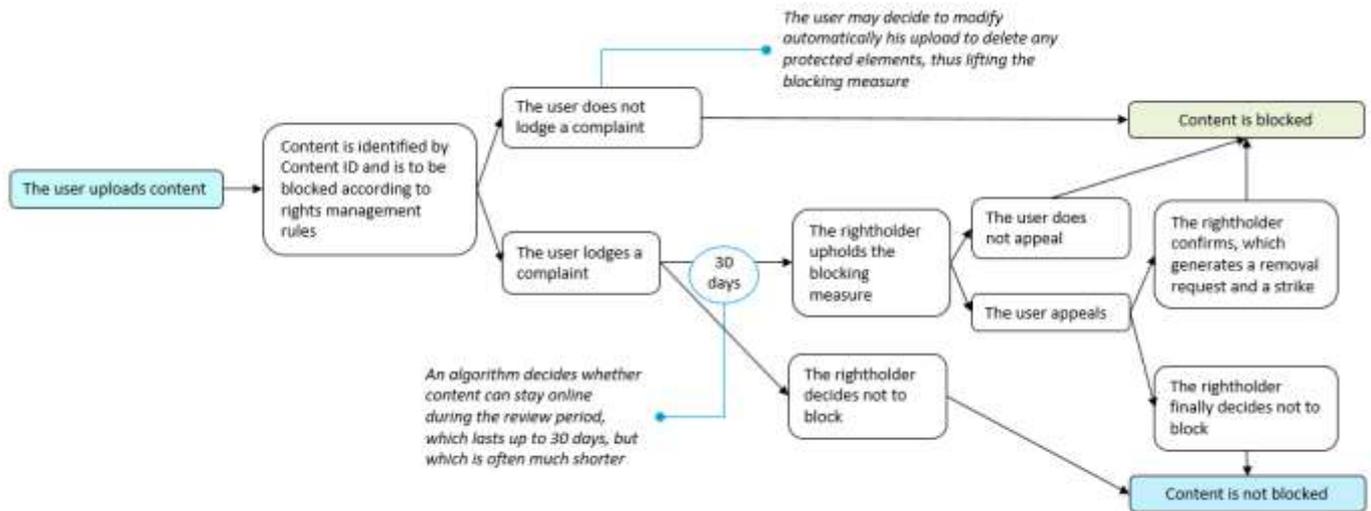


Figure N° 15: Flowchart illustrating the process of disputing a block on YouTube, according to the mission's understanding

These progresses for users are only possible if the country of origin principle is avoided. In its consultation prior to finalising its guidance regarding Article 17 implementation, the Commission emphasised that, in its view, the complaint mechanism provided for by Article 17(9) should be set up according to “country of origin” rules, pursuant to Article 3 of Directive 2000/31/EC on electronic commerce¹²⁹. Such an interpretation would assume that the rules of the Member States in which the platforms are located should be applied to appeals under Article 17(9). This interpretation is however legally questionable and practically impossible to envision.

From a legal point of view, first of all, this interpretation conflicts with Article 3(3) of the E-Commerce Directive, which provides, by reference to an annex, that the country of origin principle does not apply to intellectual property rights. As was demonstrated above, it is not sustainable to make the exclusive right in Article 17 a *sui generis* right distinct from copyright. In any event, even in this interpretation, however ill-founded it may be, this exclusive right would remain an intellectual property right falling within the scope of Article 3(3) of the E-Commerce Directive. The complaint mechanism provided for in Article 17(9) is thus a procedural extension of an intellectual property right. It is not separable from that right, the implementation of which it enables. It can therefore not be subject to the country of origin principle.

From a practical standpoint, secondly, subjecting appeals to the country of origin principle would reduce to nothing the benefits of Article 17 for users. At the stage of direct recourse to the platform and the rightholder, first of all, this principle could impair the readability of the rules applicable: users would not be able to easily find out which rules of law would be applied to them by the platform and the rightholder, depending on the jurisdiction to which the

¹²⁹ European Commission, *op. cit.*, p. 17.

platform is subject. It is not surprising, moreover, that consumer associations have seen this country of origin principle as a “*major deterrent*”¹³⁰ and an obstacle to redress. Moreover, this situation could encourage platforms to place themselves under the national law most favourable to them.

If out-of-court redress were to be subject to this principle, it would become virtually inaccessible to the user, forced to refer the matter to a foreign authority in another language. This authority itself would be forced to decide, in a number of cases, on the basis of optional exceptions that do not exist in its national law. These negative effects appear so obvious though that it seems inconceivable that the country-of-origin principle be implemented at the stage of out-of-court redress.

ii) The implementation of Article 17 will enable concrete progress beyond the practices of the most advanced platforms.

The Directive itself provides for two essential safeguards: expeditious processing and human review. The “effective and expeditious” handling of complaints is already one of the main guarantees provided for in Article 17(9) of the Directive. Article 17(9) further emphasises that the processing of complaints must allow for human review of user claims.

The Covid-19 crisis, by changing the way platforms behave, has underlined the importance of this guarantee. YouTube has had to step up its use of automatic tools, particularly artificial intelligence, in its content moderation policy. An examination of the data posted online by YouTube for Q2 2020 shows a clear increase in the number of videos deleted (+87%) and, correlatively, the number of appeals (+95%) compared with the first quarter¹³¹.

While these data do not include the blocking or demonetisation actions arising from the implementation of copyright rules, they show that the combination of automatic detection and human intervention, enabled by content recognition tools and reinforced by Article 17(9) of the Directive, remains the most balanced solution.

In addition to these two guarantees clearly enshrined in the text of the Directive, at least three developments should be encouraged in order to fully reflect the advances of Article 17. First of all, platforms should thus be encouraged to remove any uncertainty by clearly explaining to users, in the event of a blocking followed by a dispute, which rules will be applied in handling their complaint.

In addition, the Directive provides, through the combination of Articles 17(7) and 17(9), safeguards to platform users through exceptions. The complaint processes should thus enable

¹³⁰ Bureau européen des unions de consommateurs, *BEUC Comments. Targeted Consultation on Art. 17 of the Copyright Directive*, September 2020. Online: <https://www.beuc.eu/publications/beuc-x-2020-088-beuc-comments-targeted-consultation-on-art.17-of-the-copyright-directive.pdf>

¹³¹ April 2020 - June 2020 data from YouTube's Transparency Report <https://transparencyreport.google.com/youtube-policy/removals>.

users to plainly rely on these exceptions, as will be specified in the national transposition texts (cf. III.A.1).

Proposal N° 5. Ensure, through continuous monitoring, that users are able to avail themselves of the benefit of an exception, including in the claims process.

Finally, by enshrining the existence of appeal mechanisms and the possibility for users to have an extra-judicial remedy to challenge the withdrawal of their content, Article 17 provides significantly enhanced protection for legitimate uses. These provisions help consolidate users' rights by enabling them to have recourse to a trusted third party – the regulator – or even a judge, if they consider that the platform and the rightholder concerned have not properly dealt with their request. As an example, when interviewed by this mission, French representatives of the video-making community stressed their strong desire that a relationship of in-depth dialogue with the regulator come about.

2. Initiate thinking on “smart processing” of complaints and actions, on an objective basis, by contextualising acts of sharing.

i) The use of contextual clues, or clues linked to user profiles, is a technique already in use by platforms

Such methods are already being used by platforms in their fight against inappropriate content, for example helping to detect fake accounts used to spread erroneous information¹³². They deserve to be further assessed in the framework of the implementation of Article 17.

These “smart processing” techniques could prove a useful complement in handling complaints.

Depending on the tools' degree of effectiveness and refinement, various outcomes could be connected with this kind of “smart processing”, such as an opinion provided by a decision-making assistance system or accelerated processing of complaints (see also III.B.3.iii). Such advances would contribute to the implementation of Article 17(9) so that the complaints system is fully “expeditious and effective”.

In any event, such measures must be left to the platforms' discretion, in accordance with the observed reliability of the techniques and any negotiations carried out with rightholders. This is because, in all instances, the latter would be held liable if these techniques led to the spread of infringing content: their “best efforts” would then have proved inadequate.

This set of measures would be in line, at the *ex post* stage of complaint handling, with the objective set forth by the European Commission when it proposes to differentiate between likely infringing and likely legal content with the aim of minimising impediments to likely legitimate uses. “Smart processing” is not a decision-making tool and is used on a small volume

¹³² CSPLA, Hadopi, CNC Report on 29 January 2020, *op. cit.*, p. 56.

of content, for which a match has been identified and, moreover, on which the user will have provided contextual elements regarding the use planned.

The purpose of these tools is to recommend choices to facilitate human review of claims, for example, on the complaint handling procedures that should be implemented or on the the response to a dispute in the framework of the preliminary dialogue initiated by the platforms between the Internet user and the rightholder.

Proposal N° 6. Foster the emergence of “smart processing” techniques for complaints.

ii) This avenue, which remains a prospective for the future, must circumvent the pitfall of unfair treatment and implies greater vigilance on the issue of personal data

The procedures by which such a solution would be implemented and the related safeguards will need to help sidestep the initial pitfall of unequal treatment of complaints and claims that can arise from the differing economic power of users and rightholders. One of the objectives of Article 17 is to facilitate fair treatment of both the aforementioned, an area in which the current copyright protection handling system set up by platforms such as YouTube falls short.

The second risk to be addressed relates to personal data processing, and the fears to which it could give rise. Automatic content recognition tools, a key component in the implementation of Article 17, now make it possible to avoid the processing of personal data, in that they rely on the decontextualised comparison of content fingerprints. In contrast, a “smart processing” system for complaints and content would certainly entail such processing, and could even, depending on its characteristics, fall within the scope of decisions based exclusively on automated processing within the meaning of Article 22 of Regulation 2016/679 on data protection (GDPR).

iii) These contextualisation techniques could also address the difficulties reported by professional videographers regarding the demonetisation of content.

While the situation of videographers calls, for reasons elaborated upon above¹³³, for a specific approach in relation to the situation of non-commercial users, it is nevertheless a legitimate concern that must be taken into account.

Even though the authorisations received by the platforms further to the implementation of Article 17 will not, by virtue of its paragraph 2, apply to users whose activities generate significant revenue, videographers will nevertheless be able to benefit from the elements born of the Article 17 ecosystem, such as transparency and the widespread adoption of licences. As the first report of this mission underscored more comprehensively¹³⁴, Article 17 does not appear to rule out an extension of authorisations to videographers by agreement. Moreover,

¹³³ They do not benefit from the transfer of liability to sharing platforms which Article 17(2) reserves for the acts of sharing by users who are not operating on a commercial basis or whose activity does not generate significant revenue.

¹³⁴ CSPLA, Hadopi, CNC Report, *op. cit.*, p. 134 – 6.

it would be desirable that videographers also benefit from procedural improvements in the implementation of copyright.

This could in particular be the case of “smart processing” of actions and claims. For example, a “white list” system¹³⁵ open to certain professional users could be implemented to encourage the platforms’ creative ecosystem without causing undue harm to intellectual property rights. It would be particularly suited to this user population: relatively small in number and engaged in an economic activity that makes them accountable, they have voiced the desire to keep their independence while gaining in professional status, particularly with regard to copyright issues. This logic can be compared, in a completely different field, to that underpinning the “trusted flagger” system instituted by certain platforms¹³⁶: these users, identified as particularly reliable in reporting inappropriate content, are entrusted with special prerogatives.

Video-makers could thus be among the first to benefit from the greater availability of content, induced by the development of licences and the greater transparency in the management of rights encouraged by the Directive.

Proposal N° 7. Enable videographers to align with the implementation of Article 17 through the benefit of “white lists” facilitating the distribution of their content a priori.

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C. Encourage the preservation and extension of the uses accepted by rightholders by increasing the system’s transparency and its incentives in this direction

1. Improve the transparency of rights management rules

i) **Article 17 guarantees a new obligation of transparency towards rightholders through the transmission of relevant information on the tools’ functioning**

This requirement is a significant step forward, as content recognition tools have so far not been subject to any obligation of transparency, and remained a “black box” of sorts, to both rightholders and users. Aside from the complexity inherent in this system, this limited transparency is also ascribable to commercial and legal factors: the exact settings used

¹³⁵ Used here with a connotation different from the term “permission list” on YouTube, sometimes also referred to as a “white list”. White lists enable the rightholders using Content ID to ensure that specific users – with whom they have, for example, concluded an agreement – from being targeted by demonetisation or blocking measures.

¹³⁶ See, regarding this mechanism, European Commission, *Progress on combating hate speech online through the EU Code of conduct*, note to the Permanent Representatives Committee, 27 September 2019. Online: https://ec.europa.eu/info/sites/info/files/aid_development_cooperation_fundamental_rights/assessment_of_the_code_of_conduct_on_hate_speech_on_line_-_state_of_play_0.pdf

constitute sensitive economic information, the dissemination of which may create difficulties with regard to licensing contracts or even competition law.

While it was clear from the results of the study carried out as part of the first joint mission conducted by the CSPLA, Hadopi and the CNC that users accepted and understood that measures would be taken by the platforms to ensure compliance with the law, these results also revealed a certain lack of understanding on the part of Internet users as to how copyright law is applied.

By requiring that users be better informed of the procedures by which copyright is applied, Article 17 makes it possible to better assist them in their activities and spare them from having to deal with the legitimate blocking of their content.

This transparency will help make room for the regular assessment of content recognition technologies and their deployment, essential for a dynamic review of the best efforts made by platforms and to ensure that their implementation is properly balanced.

ii) There exist several avenues by which the transparency of the rules and their implementation procedures can be improved

It should be anticipated, from the outset, that ex ante transparency of rules for all content, platforms and rightholders is probably neither possible nor opportune:

- in practice, it would most certainly be unworkable by the vast majority of platform users due to its level of detail;
- it would risk making the management rules more rigid as time goes by, when the very passage of time, by lowering the economic value of the content, could foster the easing of management rules;
- it could prevent rightholders from taking into account the diversity of content, even as this diversity is a determining factor in setting the rules. For instance, the best actions in a sporting event or the highlights of a television programme can have a high economic value, even if they are only a few seconds long and would not be blocked as part of an other content;
- in view of the prerogatives of rightholders, any form of opposable practice could well consecrate a *de facto* form of *de minimis* exception, which would encourage them to take a restrictive approach;
- as stated above, it would raise economic and commercial, or possibly even competition issues, given the economic sensitivity of such information.

Furthermore, the question of licensed content, a category into which most musical content falls, should be given a place apart at this stage. For this type of content, which can generally be shared online freely by users – subject to possible monetisation – the transparency of management rules does not raise the same issues.

These various factors make it difficult to envision, as matters stand, ex ante and automatic transparency in the management rules applicable to each type of content. A variety of other angles can be considered, however. They need to be regarded as exploratory at this stage: as stated earlier, regulatory dialogue must play its part in defining practices.

The first in this respect is ex ante transparency, which would apply to general principles and not to content. Rightholders could thus be encouraged to publish default rules or an average of the rules applied, by category of content. For example, a film producer might choose to announce that he generally implements blocking to excerpts lasting five minutes and above, conducts case-by-case review above three minutes and allows for tolerance below that threshold, specifying that these rules are still subject to modification, depending on the case.

A more advanced version of this proposal would make the publication of such guidelines mandatory for rightholders. The latter could disclose both their general rule and the various factors they might take into account when considering derogations therefrom. A film producer publishing such guidelines could, for example, specify that he applies lower thresholds on more recent films, but allows greater tolerances for his heritage content.

Lastly, the regulator could contribute to this transparency, including in the short term, by foreseeing a study of uses along with the related authorisation conditions. This study would inform users of rightholders' main policy guidelines in each sector, and possibly specific to certain sub-categories of content. Such a document would make it possible for users to know which sectors give priority to monetisation or blocking, as well as identify the main likely tolerances, depending on the type of content they wish to use.

These factors for ex ante transparency would enable users to anticipate the foreseeable consequences of sharing protected content online according to its nature, length and the identity of its rightholders, and thus reduce both disputes and possible misunderstandings.

<p>Proposal N° 8. Encourage the sharing of guidelines or rules generally applied by rightholders in the implementation of content recognition tools, while guaranteeing flexibility in their implementation. Provide for a study of uses by Hadopi, at the level of each sector.</p>

These guidelines could be supplemented by ex post transparency when applying a management rule. In the event of blocking or monetisation, users could be informed, automatically or upon lodging a claim, of the identity of the rightholder concerned, the exact proportion of the shared content covered by the rights invoked and the content of the management rule implemented. In some cases, this information could be enough for them to adjust their content so as to avoid blocking. It would in any case contribute to the mechanism's acceptance.

This proposal draws on some of the best practices observed on the most advanced platforms. Facebook, for example, displays the action taken and the length of the match. Similarly, YouTube informs Internet users to whom a management measure has been applied of the type of claim, the impact on the video, the rules defined by the copyright holder and the identity of the copyright-holders. YouTube also suggests automatic actions that can be activated to remedy the match. On this aspect, Article 17 should allow alignment on best practices of the policies implemented by the platforms, without preventing those most engaged in the transparency process from taking their efforts further.

Proposal N° 9. Where a management rule is applied to uploaded content, inform users precisely of the rule applied, and open up the possibility for them to adjust their practices accordingly.

Lastly, even beyond the management rules, the conditions under which they are applied by the platforms are a subject of legitimate interest for all the players in the digital ecosystem. The algorithm settings that are used to implement the rules condition both the effectiveness of the system for the rightholders and its acceptability by the users. However, unless extensive tests were to be carried out, similar to those conducted by the mission for its first report, neither of these groups can have reliable data on how the tools are actually functioning or on the extent to which they are implemented. From the legal standpoint, this situation also makes it difficult to accurately assess the content of the “*best efforts*” put forth by platforms, which have sole control of their tools’ technical settings.

Thus, within the broader framework of improvements on the interpretability, on the explainability and on the transparency of algorithmic decisions - or more succinctly “algorithmic transparency” -, better information on the algorithms implemented by the platforms to guarantee the copyright protection could be encouraged.¹³⁷ Such transparency would make it possible to check that the tools and algorithms used are in no way skewed against rightholders or users. It could, in particular, be guaranteed by the use of the regulator’s powers which would enable it to receive information from platforms (see proposal 4).

Proposal N° 10. Increase the transparency of the algorithms and technical solutions implemented by platforms to protect copyright, providing for appropriate intervention by the regulator.

2. Foster the development of legitimate uses by extending licences and rightholder liability

i) Article 17 is intended to give rise to the conclusion of licences by the platforms with rightholders of all sectors whose works are shared

It is essential that Article 17 prompts platforms to extend the scope of protection measures and licences to new content, beyond music and audio-visual. While the mission explored in detail the situation of music and video rightholders in this report, in order to highlight the way in which recognition tools operate today, it wishes to reiterate that many sectors fall within the scope of the Directive without currently benefiting either from licensing agreements nor from the protection offered by the implementation of recognition tools. For these sectors, Article 17 is not only a factor for rebalancing existing agreements but indeed also the starting point for a new contractual dynamic, to the benefit of both rightholders and users.

¹³⁷ See on this topic, in particular, Regulation 2019/1150 of 20 June 2019 and the European Commission’s guidelines on ranking transparency (C/2020/8579) of December 2020.

Rightholders expected to benefit in particular from this dynamic are those in the print — books and press — and graphic and visual arts, including photography, as well as those entitled to make graphic use of music, as highlighted in the mission's previous report¹³⁸. Each of these sectors grapples with different technical and legal considerations, which imply a distinct and tailored implementation of each of the concepts in Article 17.

The book sector, for instance, clearly requires a distinctive approach. Here, the rightholders who — as in other sectors (e.g. cinema) — are very much attached, at least at this stage, to avenues for deriving value from their catalogue other than sharing platforms, will tend to implement their authorisation prerogative accordingly. They will thus have the opportunity to choose the implementation of recognition tools for blocking purposes.

The still image sector offers a different illustration of this situation. The sheer size of catalogues, the fragmentation in the rightholder population and the number of works available on major image-sharing platforms — such as Instagram — should not be barriers to a negotiation that remains largely to be initiated. Quite to the contrary, all of these factors plead in favour of making the development of licensing agreements the prevailing logic, not only for the works on which the information relevant and necessary for the implementation of platforms' best efforts will be provided, but also for all the catalogues concerned.

In this respect, the mission stresses that the platforms' best efforts in securing authorisation are an indispensable prerequisite for the implementation of the Directive. In particular with regard to rightholders who, like the collective management organisations in the visual arts, represent catalogues with an indisputable and amply-documented presence on certain platforms, a wait-and-see attitude and bad faith cannot stand as a negotiating position for the platforms — no more than inertia is an option for the public authorities if the situation were to be confirmed.

The obligation incumbent on platforms to secure authorisation is not limited, in the Directive, to platforms on account of content that is “typically uploaded” by users. As specified in its previous report, the mission emphasises that acts of communication to the public of written or visual works which are made, for example, on video-sharing platforms, do not, as a matter of principle, fall outside the scope of the authorisation that must be issued by rightholders.

Parallel to the negotiations expected to take place for the granting of these authorisations, the question will arise as to the substance of the notion of best efforts made by the platforms to prevent the availability and reappearance online of unauthorised works. Neither the difficulties raised by this notion, nor the risk of blocking acts of sharing works in this repertoire in the absence of authorisation should be overestimated. Rightholders of still images have very massively come out in favour of issuing licences to sharing platforms, which contribute to the exposure of their catalogues, and the practices of which they have had to accept for many years without receiving any remuneration in return. Furthermore, large-scale

¹³⁸ CSPLA, Hadopi, CNC Report of 29 January 2020, op. cit. p. 82-5.

experimentation¹³⁹ is showing that recognition tools can be deployed to identify the presence of images as well as other content on platforms. These tools already make it possible to document the presence of the works concerned on sharing platforms, bearing in mind that they contain only an infinitesimal proportion of the catalogue owned.

The situation in the image sector is a reminder that the implementation of copyright on online sharing platforms is still very much a work in progress. Priority must be given to seeking authorisations from the platforms. While the questions raised by possible blocking of acts of sharing are legitimate, they must not be unduly used to challenge the principle of authorisation, nor should they be overestimated. Even though the exclusive right to authorise and prohibit, as embodied by blocking, is central to the legal prerogatives of the rightholders, thus justifying its essential place in the scheme of Article 17, it is, for many sectors, but a deterrent weapon needed to negotiate an authorisation, as is in many cases their priority.

Rebuilding the interpretation of Article 17 around the risk of excessive blocking, as do the attempts to rewrite the scope of the Directive described in the previous section, will ultimately and singularly reduce its scope, in the name of difficulties that are, furthermore, largely exaggerated. The situation of the visual arts is particularly telling in this respect. While the risk of excessive blocking as a result of image protection is sometimes brandished, actual practice shows that, a year and a half down the line from the Directive's adoption, and apart from the one agreement between ADAGP and YouTube, platforms continue to allow mass sharing of protected images without seeking the authorisation of even the rightholders which are the easiest to identify.

Proposal N° 11. Make the full application of Article 17 in the image and written sectors one of the foremost priorities.

Reiterate that the best efforts of the platforms upon which it calls to obtain authorisation are not limited to previously flagged content or to the case of content typically uploaded to the platform.

Foster dialogue between players on the issuance of licences and the definition of technological solutions.

ii) Article 17 should also encourage a dynamic of accountability of rightholders in implementing the system

The current system implemented by the major platforms provides for a form of incentive for responsible user behaviour, via warning notices sent (“strikes”). This system, aimed at preventing and punishing copyright infringement, has its roots in US law. The 1998 US Digital Millennium Copyright Act requires that any online service provider wishing to be exonerated of liability must implement a policy by which the accounts of users found repeatedly sharing

¹³⁹ The AIR (Automated Image Recognition) database developed for the *Société des auteurs dans les arts graphiques et plastiques* (ADAGP) currently contains digital fingerprints of 800,000 works.

illegal content (repeat infringers) are suspended.¹⁴⁰ In response to this provision, platforms have instituted dissuasive systems such as “strikes”, prior to proceeding with account closure (e.g., YouTube).

One of the issues at stake in achieving a balanced implementation of Article 17 is the extension of this logic of liability to all the players in the copyright protection ecosystem. With regard to platforms, this will hinge on the legal liability mechanism that forms the heart of Article 17 – and which the whole of this report seeks to define and enshrine.

The implementation of Article 17 furthermore warrants a logic of increased accountability for rightholders. By offering rightholders new avenues for exploiting their rights on online sharing platforms, Article 17 also implies a new form of accountability for them¹⁴¹.

Most assuredly, there is no ground to call into question the very usage of the legitimate prerogatives of each rightholder, as this would in effect introduce an external and unjustified limitation to intellectual property rights. The choice between blocking, monetisation and tolerance must remain the province of each right-holder, in accordance to their considerations.

It should be noted, however, that the clarification of the applicable legal framework by fostering direct relations between rightholders and platforms should result in crowding out any third-party players who have made abusive claims. The implementation of Article 17 is thus likely to protect the rightholders themselves from those who would wrongly avail themselves of rights that are not theirs.

Upstream, the due diligence which Article 17 entails, through the provision of relevant and necessary information and the configuration of tools, is part of the logic of involvement expected of rightholders. First of all, Article 17 entails best efforts by the platforms and thereby the implementation of recognition tools only to the extent that the relevant rightholders have provided the relevant and necessary information which their operation implies. There can therefore be no blocking, or indeed monetisation, by means of an automated tool for content to which no rightholder has laid claim. This provision emphasises the responsibility that bears on the beneficiaries in the system’s operation.

Furthermore, it is essential that rightholders use the technical room for manoeuvre available, in order to focus as precisely as possible on the blocking measures that they deem necessary to protect their rights. They must, in particular, ensure that their practices for filing and managing fingerprints do not entail any risk of blocking the sharing of content found in their works but either already in the public domain or in the catalogue of other rightholders who have decided to authorise the sharing of such content. Some platforms consequently ask rightholders – particularly television channels – to ensure that, in their digital fingerprinting policy, they do not file fingerprints for those parts of their programmes that are composed of

¹⁴⁰ 17 U.S.C. §512(i)(1)(A).

¹⁴¹ See, for a proposal in this direction: David El Sayegh, “L’article 17 de la directive 2019/790 : le regard d’un praticien” [Article 17 of Directive 2019/790: a practitioner’s perspective] *RIDA* N° 267, April 2020, p. 126 et seq.

such third-party content. These best practices, already implemented by some rightholders, could be encouraged by the regulator by means of recommendations. Pre-litigation referrals to the regulator by users could help detect and deal with cases that would warrant such intervention.

It furthermore appears important that rightholders should not be able to engage in abusive behaviour in refusing to remove blocks, when, for example, an exception or limitation is applicable. Today, possible abusive behaviour can be managed by the platforms, in the framework of their confidential interactions with rightholders, without real transparency and with possible differences in treatment. In the very near future, within the regulated framework of Article 17, this private power to regulate could be determined by the public sphere. To wit, Hadopi, in its capacity as receiving body for complaints about use, could flag such abuses when investigating appeals and take the necessary action in response.

In the event of a serious and repeated abuse emerging over the course of Article 17's implementation, as highlighted in this mission's first report¹⁴², the judge or at least the regulator would have to be able to intervene. Article 6(4) of Law 2004-575 of 21 June 2004 for Confidence in the Digital Economy (LCEN) already provides, in this respect, that "*portraying to the persons listed in 2 [hosts] content or an activity as illegal with a view to having it removed or stopping its distribution, in the knowledge that this information is inaccurate, shall be punishable by one year's imprisonment and a fine of 15,000 euros*". Such a provision, in addition to acting as a deterrent, materialises the overall balance of the implementation of copyright, the obligations of which extend to each stakeholder.

Proposal N° 12. See to diligent and responsible behaviour on the part of all stakeholders, including rightholders, in the implementation of content recognition tools, by entrusting the regulator with a monitoring role.

Consider, if necessary, mechanisms to punish repeated abusive behaviour, such as Article 6.4 of the Law for Confidence in the Digital Economy.

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* *

Conclusion to Part III

The proposals detailed by the mission make it possible, in its view, to combine two key practical approaches to the implementation of Article 17.

First of all, they enable the addition of further safeguards at all levels of the user process, from far upstream, even before uploading content, thanks to the transparency of the parameters, to far downstream, beyond even a one-off claim, by establishing the logic of rightholder accountability.

¹⁴² CSPLA, Hadopi, CNC Report, *op. cit.*, p. 132.

Between these two boundaries, users subject to a blocking measure could benefit from expedited treatment of their complaint, if necessary according to an accelerated procedure, in particular if their profile allows their claim to be addressed by “smart processing”. A fully explicit transposition text would enable them to be certain that they can, in this context, avail themselves of exceptions. The regulator, among other functions, could ultimately review the appeal if the platform and rightholder did not come out on its side.

The provision of multiple safeguards is prompted by the idea that the balance of Article 17, as defined by the legislator, does not so much call for reinvention as for practical application, and that it should be encouraged to produce all its virtuous effects, particularly as regards the conclusion of licences and the extension of tolerances.

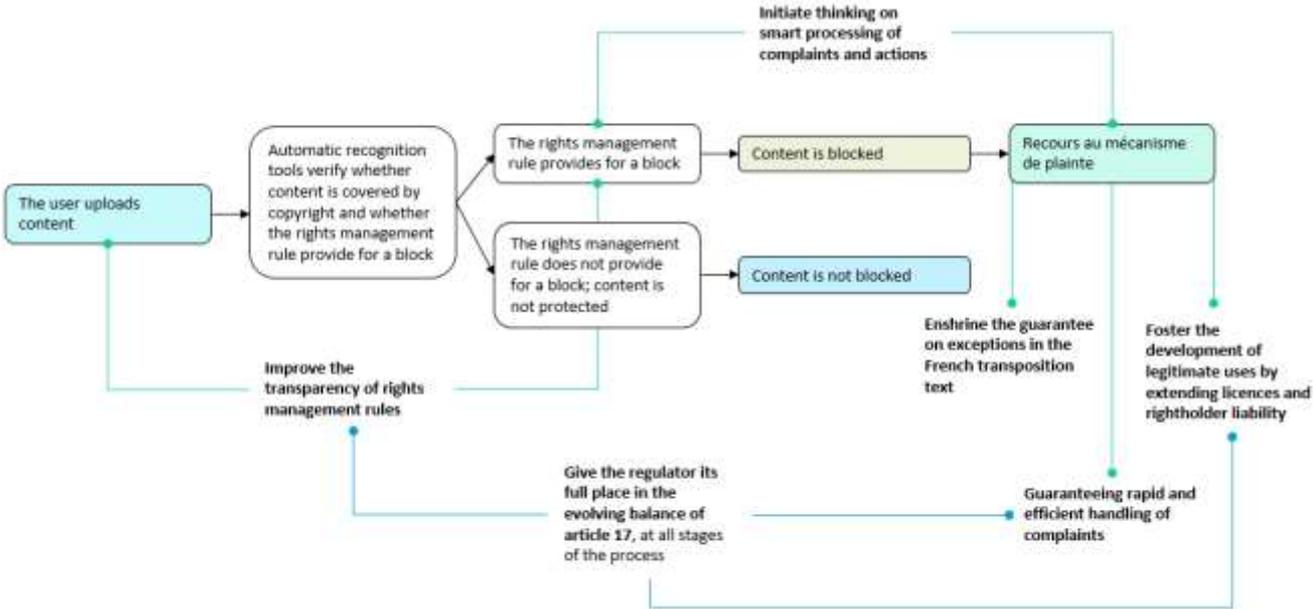


Figure N° 16: flowchart connecting up the proposals with the user experience

Notwithstanding, the mission also intended to address concerns regarding the safeguarding of exceptions, which are part of the legal balance of Article 17, in order to propose an alternative model to the proposals made thus far for the transposition of the Directive. It deems that the combination of its proposals makes it possible to guarantee that, in the vast majority of cases, content qualifying for an exception yet blocked would be unblocked expeditiously and effectively.

The mission wishes to stress once again, however, that the technological balances of 2020 are not those of the future. Directive 2001/29 was negotiated and adopted in a context where the tools used to recognise works were still in the hands of very few parties. If Directive 2019/790 and its Article 17 enjoy comparable longevity, developments in technology will doubtless overtake some of the assumptions underlying the proposals in this report, as well as all current interpretations or re-readings of Article 17.

The mission thus stresses the need to leave significant room for manoeuvre to the players in the digital ecosystem, subject to the regulator’s supervision. The proposals it presents are not intended to be set in law, barring clearly indicated exceptions. Quite to the contrary, their

implementation must first of all involve changes in practice, within the framework of the incentives given to each player by Article 17. In this perspective, public intervention must first of all enable favourable conditions for the development of the legal online offer, which will benefit all stakeholders, within the framework of more balanced economic relations between platforms and rightholders.

Conclusion

At the close of this second report, one observation in particular stands clear to the mission: the role which content recognition tools will be allowed to play in the implementation of Article 17 of the European directive will largely determine the effectivity of copyright in Europe on online sharing platforms – and thus its effectivity in general. Effectivity here means not only the remuneration of rightholders but also the respect of the balance between all parties concerned, the availability of works and the diversity of creation in an ecosystem favourable to all, as opposed to the fly-by-night freeloading in which some may engage and the withering of the creative industries.

The fine balance between fundamental rights on digital platforms and their appropriate regulation in relation to other operators are essential issues. Aware of these issues and struck by the scarcity of publicly available studies and data to shed light on the transition called for by Article 17, the mission has endeavoured, in this report as in the previous one, to share its information and document its analyses and proposals. It can but deplore that the dialogue between the parties provided for by the Directive has thus far not been able to feed into a shared diagnosis and a detailed mapping of current practices and future challenges.

Decisive choices remain to be made in the coming months, at the European level, within the Commission or before the Court of Justice, but also in the legislating bodies of the Member States and last but not least in the practices of all players, platforms, rightholders and users. Faced with these choices, the approach taken must be pragmatic, guided by the concern for proportionality and take refined account of their uses and scope for development in each sector and for each type of service.

As the situation stands however, it can only be noted that the sharing of protected content expected on platforms is today largely possible, first, thanks to the licences massively granted in certain sectors (in particular music), and secondly, in the other sectors, thanks to the management flexibilities granted by rightholders.

Under Article 17, this favourable situation can only consolidate itself further thanks to the development of licences and greater confidence on the part of all players, which should make it possible to maintain existing flexibilities.

There is thus no reason today to depart from the fair balance etched out by the European legislator. Setting quantitative thresholds to hinder the operation of automated tools, for which the directive does not provide, is not warranted. It would impose an a priori limitation on the exercise of rights that could only be conceived at the cost of an approach that is manifestly disproportionate to the reality of the issues at stake. Moreover, such a limitation would be inconceivable without a safeguard clause protecting the value of the rights, for example to prevent the sharing of works prior to their publication. Rather than purporting to correct the legislator's hand by embarking on such an exercise, it is time to live up to its ambition. It is not every day that Europe reinvents copyright in the digital world. Thanks to the European legislator, the bulk of the work is done. All the rest is but a matter of fine-grained, proportionate and pragmatic implementation.

Appendix I – Mission Letter



Paris, le 13 JAN. 2020

Monsieur Jean-Philippe Mochon
Conseiller d'Etat



Conseil supérieur
de la propriété
littéraire et artistique

Le Président

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<http://www.culturecommunication.gouv.fr/Thematiques/Propriete-litteraire-et-artistique/Conseil-superieur-de-la-propriete-litteraire-et-artistique>

Monsieur le Conseiller,

Le rapport que vous avez rédigé conjointement avec l'HADOPI et le CNC sur les outils de reconnaissance des contenus dans le cadre de la mission lancée le 29 mars 2019 marque une étape importante sur un sujet central pour une pleine effectivité du droit d'auteur sur les plateformes de partage en ligne.

Dans le prolongement de la publication très prochaine de ce rapport, je souhaite, en plein accord avec les présidents de l'HADOPI et du CNC, vous confier une nouvelle mission sur ce même sujet.

Cette mission visera d'abord à la diffusion des analyses et propositions du rapport auprès des acteurs français, dans le cadre de la transposition de la directive européenne sur le droit d'auteur, mais aussi européens et internationaux. Dans le contexte du dialogue entre les parties prenantes et des orientations à définir par la Commission européenne, et alors qu'une pleine mise en œuvre de la directive dans l'ensemble des Etats membres est essentielle, il importe en effet que votre récent rapport puisse être connu et largement partagé sur la scène européenne.

La mission tendra également à l'approfondissement des recommandations du rapport pour chacun des secteurs de la création concernés par le nouveau mécanisme d'autorisation et de protection des droits prévu par l'article 17 de la directive. Vos travaux pourront en particulier éclairer la portée susceptible d'être donnée, d'une part, à la notion de meilleurs efforts des fournisseurs de services de partage pour garantir l'indisponibilité des contenus non autorisés et, d'autre part, à celle d'informations à fournir dans ce cadre par les titulaires de droits.

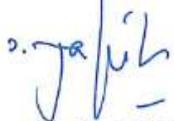
Le rapport que vous avez rendu ayant montré tout l'intérêt et la richesse d'un travail conjoint avec l'HADOPI et le CNC, cette nouvelle mission prendra également la forme d'une mission conjointe avec ces deux institutions. Vous bénéficierez à nouveau du soutien de M. Sylvain Humbert,

maître des requêtes au Conseil d'Etat, qui a accepté d'être le rapporteur de la mission.

Vous ferez rapport de cette nouvelle mission devant le CSPLA d'ici l'automne 2020.

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

Amitiés,


Olivier Japiot

Appendix II – List of persons interviewed

In addition to the persons interviewed in preparing the joint mission’s second report, the mission also drew on the numerous hearings conducted in the framework of the first mission (Appendix 6, p. 154 et seq. of the first report).

French Ministry of Culture

Secretariat General

Alban de Nervaux

Sarah Jacquier

Sèverine Fautrelle

Directorate-General for Artistic Creation (DGCA)

Marion Hislen

Ludovic Julié

Elsa Bachelard

Platforms

Facebook

Sarah Yanicostas

Google

Thibault Guiroy

Clara Sommier

Twitch

Olaf Cramme

Charlie Slingsby

Rightholders

► **Visual Arts**

French Society of Authors in the Graphic and Plastic Arts (ADAGP)

Marie-Anne Ferry-Fall

Thierry Maillard

► **Audio-visual**

TF1

Anthony Level

Vivendi, Universal Music, Canal+ Editis

Marie Sellier

Sébastien de Gasquet

Christophe Roy

Morgan Schuster

Jean Spiri

► **Cinema**

Motion Picture Association (MPA)

Emilie Anthonis

Johanna Baysse

Okke Delfos Visser

Anne-Lise Bruneel

Annemie Neuckemers

► **Print**

Alliance de la presse d'information générale [Alliance of General News Publications]

Samir Ouachtati

Pierre Petillault

International Association of Scientific Publishers

Fred Geraud

Esther Heuver

Carlo Lavizzari

Dan O'Brien

Mathilde Renou

Claudia Russo

Groupement français de l'industrie de l'information [French Information Industry Consortium]

Denis Berthault

Christian Langevin

Syndicat des éditeurs de la presse magazine [Magazine Publishers' Syndicate]

Julie Lorimy

Maël Montarou

Lola Pedrotti

Véronique Seiler

Syndicat national de l'édition [National Publishing Syndicate]

Julien Chouraqui

► **Music**

International Federation of the Phonographic Industry (IFPI)

Lodovico Benvenuti

Patrick Charnley

Abbas Lightwalla

Frances Moore

Lauri Rechart

Shiveta Sooknanan

French Society of Authors, Composers and Music Publishers (SACEM)

David El Sayegh

Caroline Bonin

Users

La Guilde des vidéastes

Guillaume Hidrot

Roxane Tyrbas

Appendix III – List of proposals

Proposal N° 1. Add an explicit reference to the exceptions in the French transposition of Article 17.

Proposal N° 2. Consolidate the role of Hadopi as an “out-of-court redress” within the meaning of Article 17(9) of the Directive.

Proposal N° 3. Share general recommendations, showcase good practices and encourage tolerances in the management rules set by rightholders, by type of platform and content.

Proposal N° 4. Keep technological watch and play an evaluating role that will help inform the concepts of the directive (“*best efforts*”; “*relevant and necessary information*”) in line with technological developments, in particular thanks to appropriate powers entrusted to the regulator that will enable it to have access to useful information while preserving business secrecy.

Proposal N° 5. Ensure, through continuous monitoring, that users are able to avail themselves of the benefit of an exception, including in the claims process.

Proposal N° 6. Foster the emergence of “smart processing” techniques for complaints.

Proposal N° 7. Enable videographers to align with the implementation of article 17 through the benefit of “white lists” facilitating the distribution of their content a priori.

Proposal N° 8. Encourage the sharing of guidelines or rules generally applied by rightholders in the implementation of content recognition tools, while guaranteeing flexibility in their implementation. Provide for a study of uses by Hadopi, at the level of each sector.

Proposal N° 9. Where a management rule is applied to uploaded content, inform users precisely of the rule applied, and open up the possibility for them to adjust their practices accordingly.

Proposal N° 10. Increase the transparency of the algorithms and technical solutions implemented by platforms to protect copyright, providing for appropriate intervention by the regulator.

Proposal N° 11. Make the full application of Article 17 in the image and written sectors one of the foremost priorities.

Reiterate that the best efforts of the platforms upon which it calls to obtain authorisation are not limited to previously flagged content or to the case of content typically uploaded to the platform.

Foster dialogue between players on the issuance of licences and the definition of technological solutions.

Proposal N° 12. See to diligent and responsible behaviour on the part of all stakeholders, including rightholders, in the implementation of content recognition tools, by entrusting the regulator with a monitoring role.

Consider, if necessary, mechanisms to punish repeated abusive behaviour, such as Article 6.4 of the Law for Confidence in the Digital Economy.