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# **COPYRIGHT IN THE DIGITAL SINGLE MARKET: ORIGINS AND EVOLUTION OF THE NEW DIRECTIVE**

# New Directive?



Proposal for the Directive on  
copyright in the Digital Single  
Market (CDSM)

# **DIGITAL SINGLE MARKET (DSM)**

# Digital Strategy for Europe (2010-2014)

## Europe 2020 Strategy (2010)

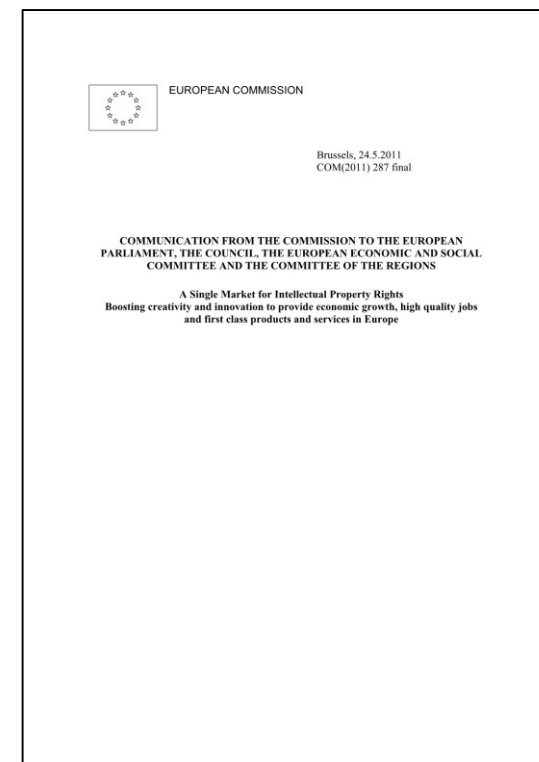
origins of the DSM idea

launch of **the Digital Agenda for Europe** with the aim of creation of a “true single market for online content and services”

## Communication on A Single Market for Intellectual Property Rights (2011)

removal of barriers created by copyright to take advantage of technology development and secure rightholders remuneration

idea of a single copyright title considered

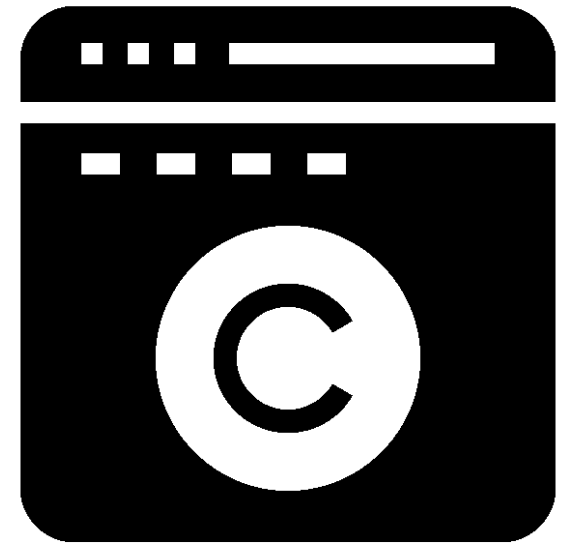


# Digital Strategy for Europe (2010-2014)

Copyright framework for the DSM – two tracks of actions:

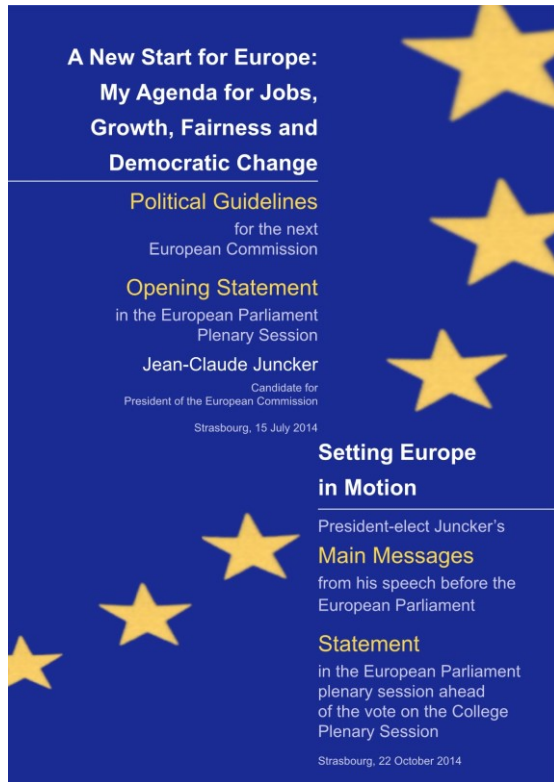
1. Review of the copyright rules: territoriality, harmonisation, limitations and exceptions, fragmentation of EU copyright market and enforcement
2. Stakeholder dialogue „Licenses for Europe“: portability, UGC, audiovisual sector and heritage institutions, TDM

2014: White Paper on a copyright policy for creativity and innovation



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# Political Guidelines for the next European Commission (2014)



2nd priority: creation of "A Connected Digital Single Market"

The goal: "to break down national silos in telecoms regulation, in copyright and data protection regulation (...)"

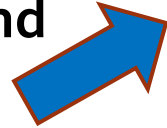
Required step: **modernisation of copyright rules**

Promise of „ambitious legislative steps“

# Digital Single Market Strategy for Europe

Three pillars:

1. **better access for consumers and business to online goods and services across Europe**
2. creation of right conditions for digital networks and services to flourish
3. maximising the growth potential of the European Digital Economy



Promise of legislative proposals for reform of copyright regime by 2015:

- Reducing differences  
but no overcoming barriers
- Securing wider online access  
but no forfeiting territoriality
- Harmonisation  
but no single copyright title

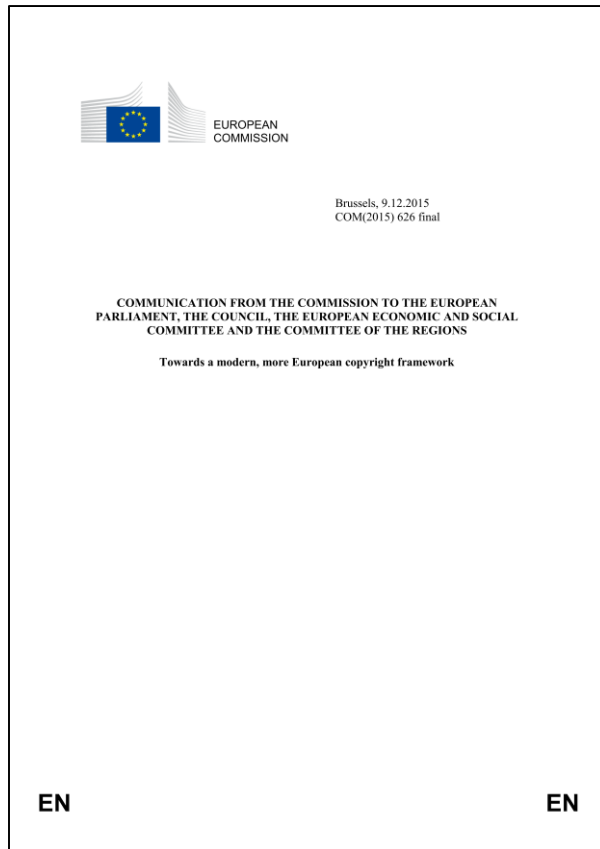
# **LEGISLATIVE HISTORY OF THE CDSM**



# TIMELINE

22.07.2014	EC	A New Start for Europe. Political Guidelines for new EC
6.05.2015	EC	Communication A Digital Single Market Strategy for Europe
9.12.2015	EC	Communication Towards a modern, more European copyright framework
19.01.2016	EP	Resolution Towards a Digital Single Market Act
23.03.2016	EC	Launch of Public Consultation on the role of publishers and panorama exception
14.09.2016	EC	Communication Promoting a fair, efficient and competitive European copyright-based economy in the DSM
14.09.2016	EC	Proposal for directive on copyright in the DSM
10.03.2017	EP	JURI draft Report on the Proposal
14.06.2017	EP	IMCO Opinion on the Proposal
1.08.2017	EP	ITRE Opinion on the Proposal
4.09.2017	EP	CULT Opinion on the Proposal
13.12.2017	Council	Estonian presidency compromise on the Proposal
23.03.2018	Council	Bulgarian presidency compromise on the Proposal
25.05.2018	Council	Bulgarian presidency compromise on the proposal: agreed negotiating mandate
20.06.2018	EP	JURI final vote
29.06.2018	EP	JURI Report on the Proposal
5.07.2018	EP	Plenary vote: JURI Report rejected
12.09.2018	EP	Plenary vote: EP compromise adopted
2.10.2018	EC, EP, Council	First round of trilogue
25.10.2018	EC, EP, Council	Second round of trilogue

# Towards a modern, more European Copyright framework (2015)



Outline of targeted actions and proposals

Four areas requiring EC's intervention:

- Ensuring wider access to content across the EU
- Adopting exceptions to digital and cross-border environments
- Achieving a well-functioning marketplace for copyright
- Providing effective and balanced enforcement system

# Public Consultations

## 2013/2014: Public Consultation on the review of the EU copyright rules

- Part of copyright review process launched in 2012 by Communication on Content in the Digital Single Market
- Broad in scope (80 questions), two main issues:
  - the rights and functioning of the single market
  - limitations and exceptions as applied in the digital environment
- 9500 replies in total
- Report made available July 2014

## 2016: Public consultation on the role of publishers in the copyright value chain and on the "panorama exception"

- Questionnaire available online via EUSurvey
- 6203 replies in total
- Synopsis reports made available September 2016
- Reports very brief, general summary of responses per category of responders

# Proposal for the CDSM (2016)



Published by the EC on 14 September 2016

Part of a legislative package, accompanied by a Communication on Promoting fair, efficient and competitive European copyright-based economy in the DSM and an Impact Assessment

Immediately after the publication, **criticism & controversies followed**


# Council of European Union

The Proposal discussed since November 2016

25 May 2017: adoption of the Council position and negotiation mandate

Most controversial points: art. 11 (press publishers right) and art. 13 (value gap). Separate discussions held on these points.

After adoption of the Council position, changes of opinions among the MS (eg Italy)



Council of the European Union

Brussels, 25 May 2018  
(OR. en)

9134/18

Interinstitutional File:  
2016/0280 (COD)

PI 61  
CODEC 806  
RECH 190  
EDUC 167  
COMPET 326  
AUDIO 38  
CULT 64  
DIGIT 99  
TELECOM 146

**NOTE**

From: Presidency  
To: Delegations  
No. prev. doc.: 8672/18  
No. Cion doc.: 12254/16 + ADD1 + ADD2 + ADD3 + ADD4  
Subject: Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market  
- Agreed negotiating mandate

Delegations will find in the Annex, for information, the text on the basis of which the Permanent Representatives Committee agreed today to grant the Presidency a negotiating mandate for the adoption of the proposed Directive at first reading.

9134/18 DGG 3B LK/np 1  
EN

# European Parliament: Committees

Legal Affairs Committee (JURI) responsible

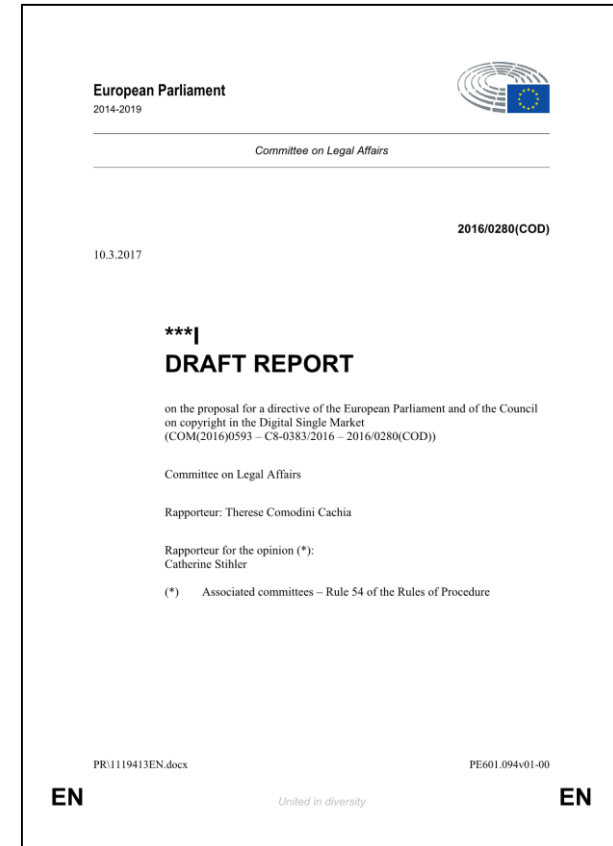
Rapporteur: MEP Comodini-Cachia (October 2016)  
replaced by MEP Voss (June 2017)

More than 250 amendments considered

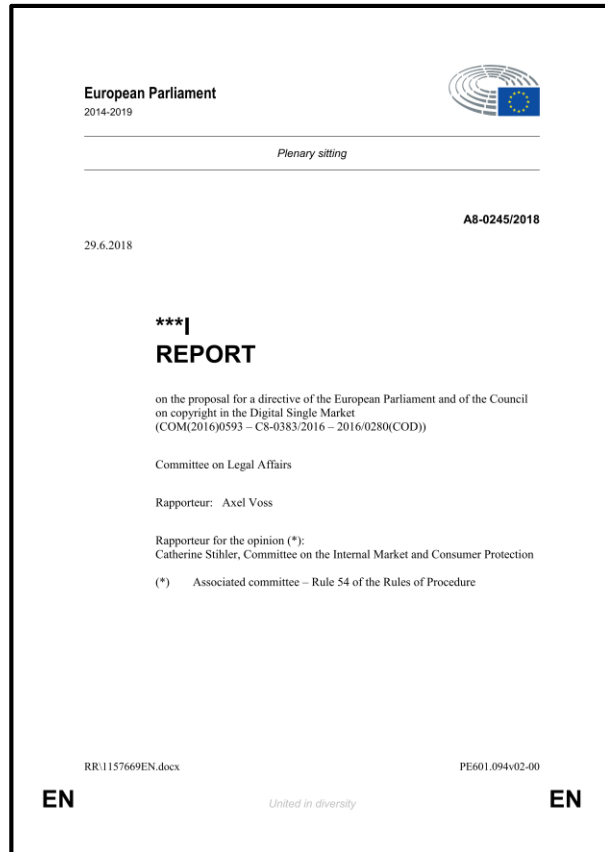
March 2017: draft report

20 June 2018: final vote in JURI, report passes in a  
tight vote

Opinions by: IMCO, ITRE, CULT, LIBE



# European Parliament: Plenary



July 2018: JURI report rejected in a plenary vote

Additional amendments tabled

12 September 2018: CDSM compromise adopted

Compromise adopted following a highly-polarised debate

→ General attitude of the EP: call for modernisation of copyright rules, report on implementation of the InfoSoc Directive

# Trilogue

Four rounds of trilogue scheduled:

2 October

25 October

26 November

13 December

Possible to follow trilogue via website of  
MEP Julia Reda

<https://juliareda.eu/2018/10/copyright-trilogue-positions/>

**Early 2019: final vote in the EP**





# **CONTENT OF THE CDSM**

# Objectives of the CDSM

Establishment and functioning of the internal (digital) market

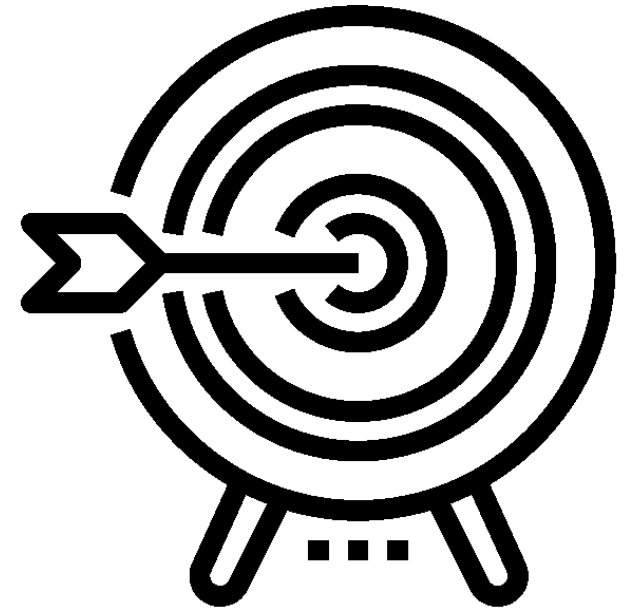
→The CDSM proposal based on art. 114 TFUE, and not art. 118 TFUE providing a special competence of the EU for the IPRs

Further harmonisation of copyright in the MS

Respect and promotion of cultural diversity in the EU

Modernisation of copyright framework to reflect technological development and removal of legal uncertainties surrounding digital, especially cross-border uses

Ensuring a wider access to content



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# Structure of the CDSM: „three prongs“

- I. Adaptation of exceptions and limitations to the digital cross-border environment
  - i. **Text and data mining (TDM)**
  - ii. **Teaching activities**
  - iii. Cultural heritage institutions
- II. Improvement of licensing practices and ensuring a wider access to content
  - i. Out-of-commerce works
  - ii. Negotiation mechanisms
- III. Achievement of a well-functioning marketplace for copyright
  - i. **Press publishers right**
  - ii. **Value gap/filtering obligation**
  - iii. Fair remuneration of authors

# **CORE PROVISIONS OF THE CDSM**

# Art. 3: Text and Data Mining (TDM)

## Problem:

Use of the TDM technologies is likely to infringe copyright and database right. Exceptions and limitations applicable to the TDM technologies not harmonised.

## Proposal:

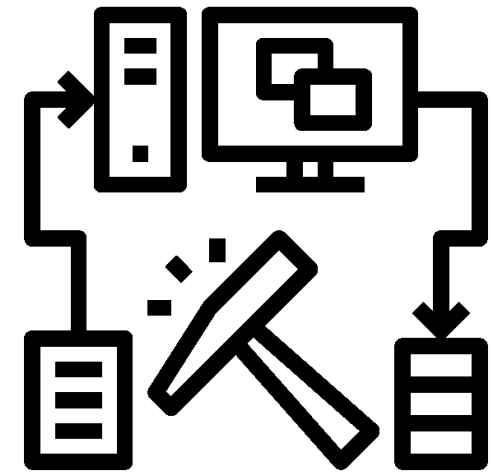
**Mandatory exception** covering reproduction and extraction from a database made to use the TDM technologies **by research organisations for scientific purposes**

## Issues:

Limited to research organisations, narrowly defined

Lawful access

Possibility to apply technical measures



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# Art. 3: Text and Data Mining (TDM)

## Council:

New exception approved

Introduction of art. 3a: **optional exception** for public and private entities covering reproduction and extraction from a database made to use the TDM technologies;

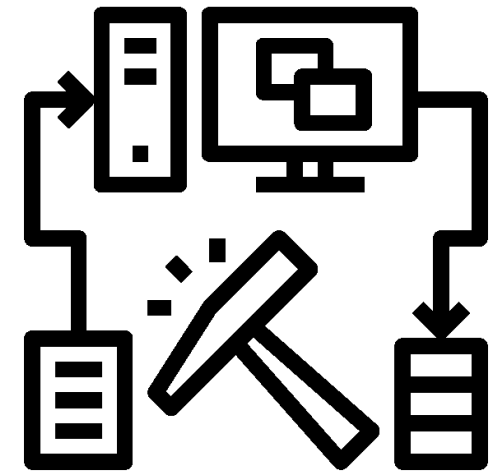
applicable to lawful content in the **absence of rightholder's restriction** to the contrary

## EP:

New exception approved

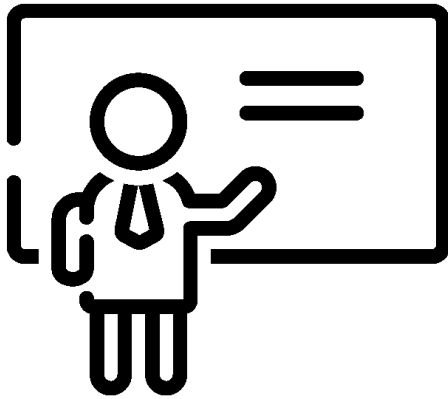
Lawful access *for the purpose of* TDM

Introduction of art. 3a: optional exception similar to the Council proposal



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# Art. 4: Teaching activities



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## Problem:

Legal uncertainty surrounding digital uses of works in education hampers the development of digitally-supported teaching and distance learning

## Proposal:

Mandatory exception covering reproduction, communication and making available to the public necessary for **the purpose of illustration of teaching (non-commercial)**

## Issues:

Only institutionalised forms of teaching: premises of educational institutions & their secure networks

Might apply only when there are **no adequate licenses available**

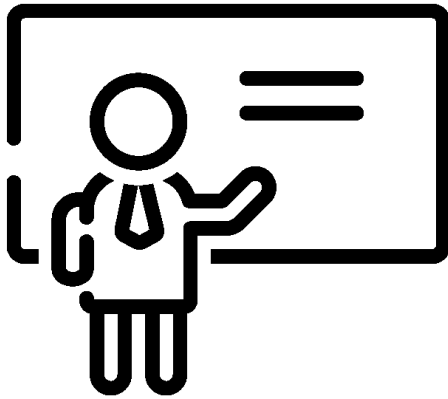
Mandatory remuneration

# Art. 4: Teaching activities

Council:

New exception approved

No significant changes



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EP:

New exception approved

Principle of teaching activities under the responsibility of educational institution remains, but might be **located outside the institution's venue**

Licenses: need to be **tailored** to the needs and specificities of educational establishments; cover collective licensing

Availability of **royalty-free licenses**

**Cultural heritage institutions** can be considered as educational institutions



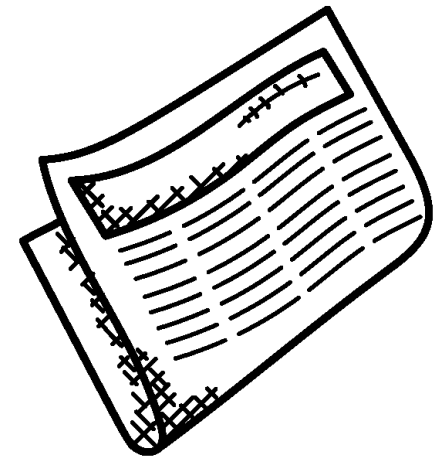
# Art. 11: Press publishers' right

## Problem:

1. threat to free and pluralist press
2. need for sustainable press sector
3. unreliable licensing and enforcement environment

## Proposal:

Related (neighbouring) right in **digital uses of press publications** covering making available and reproduction lasting **20 years** after publication

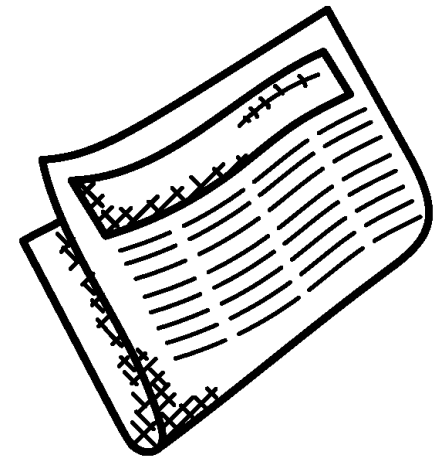


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# Art. 11: Press publishers' right

## Issues:

- Broad definition of a press publication:  
only examples (journalistic nature, newspaper, any topic, any media)  
fixation
- **Lack of threshold:** originality and/or substantial investment
- No personal scope limitation
- Covers **all uses involving digital technologies**
- Material scope of the right:  
Links covered only when an act of communication to the public  
Covers reproduction, also partial: **snippets**
- Length of the term
- Retroactive effect
- No causal connection & no empirical evidence



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# Art. 11: Press publishers' right

## Council:

New right approved

### Online uses

Explicit exclusion of „**insubstantial parts**“; definition by MS based on **originality requirement and/or length**

No retroactive effect

Term of 1 year

## EP:

New right approved

Applicable **solely to information society service providers**

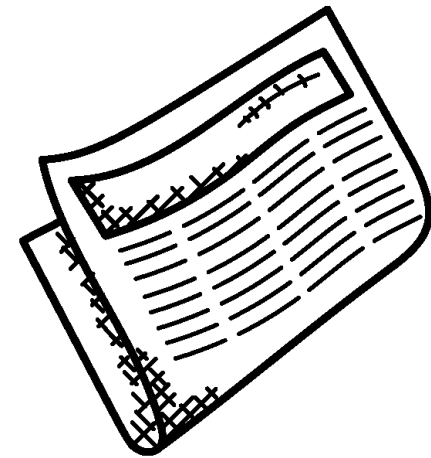
Explicit exclusion of **private, non-commercial individual uses**

Explicit exclusion of mere hyperlinks accompanied by **single words**

Guarantee of **authors' share** in the revenues

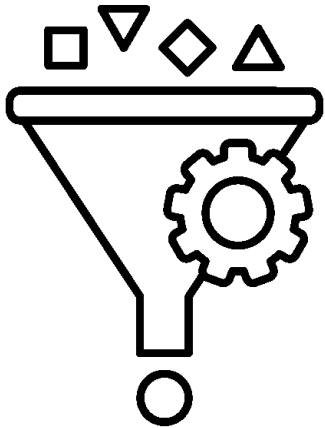
No retroactive effect

Term of 5 years



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# Art. 13: Value gap/filtering obligation



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## Problem:

Value gap: platforms using, at no cost, content produced by the third parties and uploaded by users, and not-sharing revenues generated by distribution of this content

## Proposal:

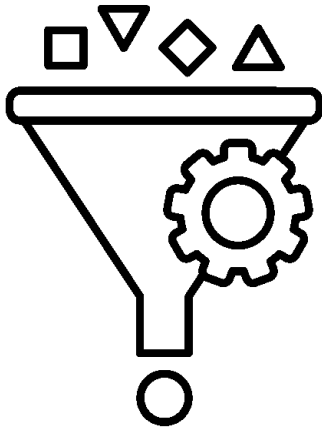
Obligation to use appropriate and proportionate measures preventing availability of copyright-protected works, such as **content recognition technologies**

Applicable to internet service providers storing and providing access to **large amounts of content** uploaded by users

Obligation applicable **irrespective of liability exemptions** from eCommerce Directive

Obligation to enter licensing agreements and to cooperate with rightholders

# Art. 13: Value gap/filtering obligation



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## Issues:

Use of vague language and **undefined concepts** („large amounts of content“)

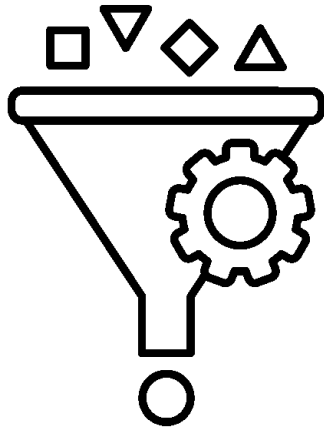
(Possible) imposition of a **general monitoring obligation** incompatible with art. 15 of eCommerce Directive

Interference (violation) of fundamentally protected **freedom of expression and information** (art. 11 of the Charter of Fundamental Rights): technologies prone to disregard parody, criticism etc..

Preference to a **particular technical solution**: costs likely to set entry barriers to the market

General obligation to conclude licenses when liability exemption is not-applicable

# Art. 13: Value gap/filtering obligation



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Council:

**Platforms carry out an act of communication to the public** when providing access to content uploaded by users

**By default, platforms are not eligible for liability exemption** of eCommerce Directive

Platforms not liable if they apply the proportionate and appropriate measures, act expeditiously after notification of infringement and make best efforts to exclude future availability

EP:

Platforms carry out an act of communication to the public and they need to enter licenses with the copyright holders

Explicit mention of „appropriate and proportionate measures“ and „content recognition technologies“ **removed**

Need ensure lack of availability of works for which licensing agreement was not concluded

Is the CDSM an „ambitious legislative step“?

Referred to as a „**missed opportunity**”

Lack of **clear, coherent vision** for EU copyright in the DSM

Fragmentary, problem-based approach

No consistency with *acquis* and jurisprudence of the CJEU

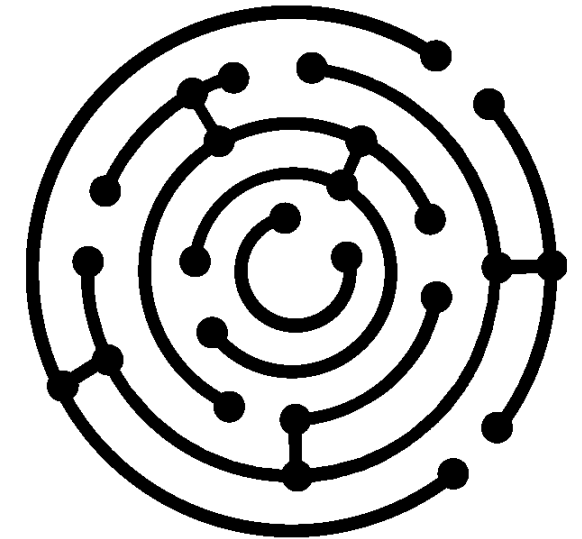
**Double-layering** of rights & enhancing complexity of the copyright system

**Fragmentation** of sources of law

Lack the **causal link & empirical data** to support proposed solutions

Upsetting of the **balance** between content producers and users

Preservation of **territorial character** of copyright



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# Missing elements of the CDSM

No definition of the right of communication to the public  
Lack of clarity on definition noted in 2015 Communication  
Continuing reliance on the CJEU case law  
No explicit exclusion of linking from the scope of copyright

## No **panorama exception**

Exception permitting the use of works permanently located in public spaces considered in 2015 Communication  
2016 Post-consultation report recommended that the MS to adopt appropriate exception  
EU-level intervention deemed not necessary, as most MS already have appropriate exception

## No exception for **user-generated content (UGC)**

UGC as a matter of enquiry within Digital Strategy for Europe  
2014 White Paper recommended removing grey areas surrounding UGC (exception, licensing mechanisms)



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from Noun Project

**THANK YOU FOR YOUR ATTENTION**