

ECONOMIC ANALYSIS OF SAFE HARBOR PROVISIONS

Dr. Stan J. Liebowitz

Ashbel Smith Professor of Economics
Director of the Center for the Analysis of
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1. INTRODUCTION

1. A new class of website has arisen during this century that is based on users uploading materials (copyrighted and not) that other users can consume. These sites are described in several different ways, but I shall refer to them as user uploaded content (UUC) sites. The largest such site, YouTube, has well over a billion users and is the largest music streaming site in the world, as well as streaming other types of content.
2. In the 1990s, prior to the emergence of UUCs, legislators were setting up rules for businesses on the Internet and were asked to help nascent Internet Service Providers (ISPs) by weakening traditional copyright laws with respect to copyright materials that might be uploaded to ISPs. Legislation was created that included provisions to help ISPs avoid being blamed for copyright infringement undertaken by their users, and a key component in doing so was the “safe harbor” which, as the name implies, allowed ISPs to avoid copyright liability as long as the ISPs followed certain rules, the most important of which is known by the term “notice and takedown,” essentially requiring them to remove infringing works quickly after being notified of such infringement.
3. The safe harbor has become a contentious issue as music copyright owners feel that the safe harbor has allowed rich and powerful UUCs to arise while paying either nothing or what appear to be unusually small amounts to copyright owners, even though a large portion of the UUC users consume copyrighted music. UUCs argue that this is not the case at all.
4. In the following report, I examine the intended purpose of the safe harbor, the nature of the UUC market that has arisen under the auspices of the safe harbor, and the economic consequences of the safe harbor.

2. SUMMARY OF RESULTS

5. The safe harbor was a mechanism designed to provide ISPs a way to avoid copyright liability for occasional infringements by their users as long as the ISP agreed to quickly remove the infringing material when asked to do so by copyright owners (through notice and takedown provisions). The growth and usage of UUC sites, however, has caused the quantity of infringing music uploads, and the amount of infringing music consumption, to be enormously larger than anticipated by the architects of safe harbors.
6. The notice and takedown provisions have proven to be entirely inadequate for the removal of copyright infringing material. Thus, the amount of copyright infringing material available for UUC users to access on these sites is very large, meaning that UUC sites can provide their users with access to a large library of copyrighted works for which no permission was granted by copyright owners.

7. Because operators of UUC sites can provide their users access to copyright materials without paying copyright owners for those materials, economic analysis indicates that these sites should be unwilling to pay a full market price equivalent to what they would be willing to pay if they required permission of copyright owners before they could provide their users access to this material. This gives UUCs an unfair bargaining advantage when they negotiate rates for permission to use copyrighted works on their sites, which UUCs wish to have since permission still has some marginal value to them. This lower cost permission, which is the consequence of unequal bargaining power, allows UUCs to take market share away from non-UUC sites by lowering advertising intensity and/or using their financial advantage to make their sites more attractive to users in other ways.
8. The largest UUC website (YouTube) has another advantage over sites purchasing permissions of copyright owners. Because YouTube is not a stand-alone company, but is instead a part of the much larger entity, Google (Alphabet), YouTube should maximize the profits it generates for all of Google and not maximize its stand-alone profits. Because YouTube provides valuable information about its customers that Google can use when it displays advertisements to these customers all over the web, Google will prefer YouTube to generate more users than it would if it was a stand-alone company, since that will maximize their joint profits. YouTube will achieve a greater number of users by having a lower advertising intensity than its advertising based competitors.
9. The lower payments made by UUC sites gives them an advantage over non-UUC competitor web sites that rely on purchasing permission from copyright owners to host copyrighted music. Because music based UUC sites such as SoundCloud and YouTube are competitors for non-UUC sites, such as Spotify (ad-based or subscription), the competitive response by non-UUC sites would be to lower their advertising intensity (or subscription prices), lowering their revenues and copyright payments.
10. The safe harbor, therefore, because it provides the basis for the bargaining advantage of UUC sites, lowers the overall price paid to copyright owners for the use of music whether through the reduction in advertising intensity (which can be viewed as the price paid by consumers) and revenues, or the price charged to consumers for monthly subscriptions.
11. Empirical evidence supports this conclusion. The copyright payments made by UUC sites are considerably lower, per stream, than other, similar but non-UUC streaming sites. YouTube also pays out a smaller percentage of its revenues to copyright owners, and also generates less advertising per stream than other sites, as economic theory suggests.
12. YouTube claims that its Content ID system removes any damage from the safe harbor, but this claim is false. First, if the Content ID system worked as well as YouTube suggests, YouTube would have no need for a safe harbor at all. But the more directly relevant fact is that the safe harbor does not work nearly as well as YouTube claims. Imperfect Content ID does not remove UUC sites' bargaining advantage due to the safe harbor, and thus Content ID does not remove the diminished level of copyright payments due to the safe harbor.
13. The net result of the safe harbor induced advantage of UUC sites is that UUC sites make lower copyright payments than they otherwise would. This competitive advantage causes UUC sites to gain customers from permission-based sites, lowering the revenues of permission-based sites and lowering their resultant copyright payments below what they would be in a world without safe harbors.

14. Because the lower prices caused by the safe harbor affect both UUC sites and their permission based competitors, it is necessary to examine more than just the difference in copyright payments between the two types of sites when estimating the lost copyright payments caused by the safe harbor. Instead, we must compare current payments by both UUC sites and permission based sites to the higher payments that each group would have made in the absence of safe harbors, and calculate the amount of shortchanged copyright payments on that basis.

1. BACKGROUND: • MARKETS AND PROPERTY RIGHTS

15. Markets, when they function properly, improve standards of living and create efficient production, distribution, and consumption. The main focus of economics is on how markets operate, and on various possible impediments to the functioning of markets. The main tools economists use to examine the workings of individual markets are the celebrated concepts of supply and demand.
16. A key assumption underlying the efficient workings of markets is that sellers (suppliers) and buyers (demanders) of the product being sold in the market must be making voluntary decisions. Sellers should be basing their sell decisions on the costs of production and their profit maximizing calculations, and buyers should be making their purchase decisions based on the values they expect to receive from the product relative to the price of the product. Markets would not operate efficiently if, say, sellers were being coerced to make their products available at prices they would not voluntarily accept.
17. A second assumption required for markets to operate properly is that effective property rights exist over the products being produced and consumed. A farmer planting corn for sale at harvest time will be less inclined to plant corn if he knows that some of the corn will be stolen before harvest time. The more corn that the farmer expects to be stolen, the less likely he will plant any corn. Equivalently, buyers of corn will be less willing to purchase corn if there is a high probability that their purchased corn might be stolen from them after the sale. Insecure property rights, such as in these examples, tend to disrupt if not destroy, the functioning of markets.¹
18. The basic logic of markets is that consumers vote with their dollars for products that they wish to consume. Sellers compete with one another for consumer dollars and produce products they hope that consumers want. Consumer expenditures go to those producers who are best able to provide products that consumers want at attractive prices. Since producers are providing these products to earn profits, the prices they charge must at least cover all their costs, and producers would like, if possible, to earn economic profits.² The bottom line is that consumers get products they want, at reasonable prices, even if producers are only interested in maximizing profits. This is Adam Smith's "invisible hand."

¹ There are other assumptions required for markets to lead to socially efficient outcomes (e.g., no externalities for the product in the market, which means that all the costs of production or benefits of consumption are included in the market transaction) but we do not need to discuss these other assumptions here.

² Economic profits have a different meaning than the typical accounting profits discussed in the business press. Economic profits occur when revenues are greater than all costs, including opportunity costs. In other words, if economic profits are positive it means that the returns on investment are above normal, that the investors in the firm earned higher returns than they could have earned in other endeavors (the opportunity cost). The typical economic profit in a competitive market is expected to be zero although accounting profits should indicate a positive return on investment, just one that is not unusually high.

19. Note that in the idealized market described above, as found in numerous textbooks, consumers of the product pay the market price, and all their payments go to the producers. When this relationship is altered, such as when the government imposes a tax on the product, so that the payment made by consumers differs from the receipts received by the sellers (net of taxes), markets are expected to deviate from their optimal levels.³ In the example of farmers having their corn stolen, the linkage between consumer consumption and producer revenues is broken because thieves are able to consume or sell the product (corn) without paying the producer. Markets do not function properly when that linkage between buyers and sellers is broken.
20. A different type of problem that can disrupt the functioning of markets is what I have elsewhere called ‘parasitic’ products.⁴ Imagine a set of burglar tools (or ransomware hacking software) that make it easy for burglars to steal items from people’s homes (or lock up computers) but serve absolutely no other purpose. Burglars would be willing to pay for such tools (and hackers for the software). If demand for the tools were sufficiently high, producers of these tools would break even or make economic profit. The burglar tool market would provide net value (known as surplus to economists) to burglars and the makers of the tools, but the impact on society would be negative because the value to the burglars comes entirely from the activity of stealing the property of others, an activity with no productive purpose on its own. Burglar tools reduce the overall production of socially valuable items, as potential victims, hoping to reduce the number of break-ins, use resources to defend themselves against possible theft. Those resources are diverted from more productive uses, which would not have been necessary if there were no burglar tools.⁵
21. The parasitic technology is destructive because it breaks the transaction between the sellers of the goods that wind up being stolen and the buyers of those goods. If the goods are stolen from the sellers, then the sellers will have less incentive to produce the goods. If the goods are stolen from the buyers after the transaction, then the buyers will be unwilling to purchase items in markets that are subject to theft. Burglar tools are a direct attack on property rights, and thus make markets less efficient. In the extreme case where many thefts occurred all the time (e.g., corrupt police and courts) the entire economy might essentially grind to a halt, as we see in some less developed economies. Making the same point in another way, farmers will not plant crops in the spring if they understand that, due to theft, they would be unable to harvest the crops in the fall.
22. It is generally understood that disrupting the functioning of markets in this way is harmful to society, which is why successful societies have laws (and social norms) against theft, robbery, and selling stolen goods.
23. Like parasites, which live off the host while harming the host, parasitic products siphon away resources from the productive economy, thus decreasing output in the productive economy.⁶ Note that the gain to the parasite might be much less than the loss to the host, so this is not just a transfer from the host to the parasite.⁷ The parasitic activity I discussed in my earlier writings was filesharing, otherwise known as piracy. Websites such as Limewire, or the original Napster, did

³ The field of “public finance” is focused on the question of how the government can generate revenues in ways that are least harmful to the efficiency of the economy.

⁴ Liebowitz, Stan J., “Parasitic Technologies and Non-Creative Destruction” IP Central, March 2006, available at <https://ssrn.com/abstract=1026328>. All links referenced in this report were accessed between July and December of 2017.

⁵ This can also be thought of as what economists call a negative “externality” where the participants in this “market” ignore the full costs of this product on others outside the market to whom this product causes damage (as is true for the archetypical externality, air pollution). A difference between these two externalities is that the typical externality involves a product that has positive net value to society but also a negative byproduct whereas the parasitic technology has a negative net value.

⁶ Defenders of piracy often point out that the lower prices caused by piracy benefit consumers as long as *the number of songs produced does not fall*. The economic purpose of paying creators, however, is to encourage production, so the assumption that the creation of songs is unrelated to payments is contrary to our understanding of supply curves being upward sloping (not vertical), which is assumed in almost all other markets.

⁷ For example, if the burglar “fences” the stolen items, they will usually generate far less revenues than a legitimate sale of the item, so the burglar receives less than those who are burgled lose. Society loses as well, since resources are now “wastefully” spent to protect against burglary.

not purchase the rights to the music they offered to listeners, and did not pay creators, but instead they allowed users to download songs from other users, while the websites generated advertising revenues. Those websites did not host the songs themselves, but merely links to songs available from individual users, which had the dual purpose of keeping their hosting costs down while providing a possible defense against legal liability for copyright infringement.

24. The songs available on pirate websites were substitutes for authorized versions. Because the pirated versions were free, it was to be expected that many music listeners would switch to the zero priced songs instead of purchasing the songs through normal market mechanisms. This intuition is supported by the typical findings of economics studies examining the reason that record sales fell so dramatically after the arrival of Napster in 1999.⁸ Those studies revealed that piracy was the main cause of the enormous sales decline that took place.
25. What does this discussion of parasitic technologies have to do with safe harbors? As Ashcroft and Barker (2014) have noted, safe harbors can and have had the unanticipated effect of creating parasitic websites, as I explain below.⁹

2. WHAT IS A “SAFE HARBOR”

26. The Internet makes it possible for individuals to broadcast to the world their opinions, their histories, their creations, and to copy other people’s histories, opinions, and creations. The mechanism for doing so was initially based upon individuals using their accounts with Internet Service Providers (ISPs) which allows those individuals to interact with one another, although these ISP have often been replaced by Apps in recent years.
27. During the 1990s, when the Digital Millennium Copyright Act (DMCA) in the U.S., the E-Commerce Directive in Europe, and similar legislation in other countries were being envisioned, there was a concern about how ISPs would be expected to handle copyright violations that might occur if some of their users posted content that they did not have the legal right to post (i.e., did not have the copyright). ISPs and their allies argued that it was unreasonable for them to be liable for copyright violations over which they had little or no control, since they presumably couldn’t prevent each of their potentially millions of users from posting such material on their web pages.

⁸ Although economic studies reach various conclusions about the impact of piracy, most studies found that piracy decreased sales, and the average result was that piracy was responsible for the entire very large decline in sales that took place worldwide. See Liebowitz “How much of the Decline in Sound Recording Sales is due to File-Sharing?” *Journal of Cultural Economics*, 40(1), Feb 2016, pp. 13-28. Although defenders of piracy often point to an influential 2007 study by Oberholzer-Gee and Strumpf [“The Effect of File Sharing on Record Sales: An Empirical Analysis” *Journal of Political Economy* 115 (1): 1–42] which found no impact of piracy, that study has been shown to be flawed both in its logic and because it made several important errors in its empirical analysis (see Liebowitz [“Responding to Oberholzer-Gee & Strumpf’s Attempt to Defend Their Piracy Paper” *Econ Journal Watch*, May 2017, 14(2) 174-195, <https://econjwatch.org/articles/responding-to-oberholzer-gee-and-strumpf-s-attempted-defense-of-their-piracy-paper>], [“Why The Oberholzer-Gee/Strumpf File-Sharing Article Is Not Credible” *Econ Journal Watch*, 13(3) September 2016, pp 373-396, <https://econjwatch.org/articles/why-the-oberholzer-gee-strumpf-article-on-file-sharing-is-not-credible>], and Oberholzer-Gee and Strumpf [“The Effect of File Sharing on Record Sales Revisited, *Information Economics and Policy*, 2016, 37:61–66]).

⁹ Robert Ashcroft and George Barker “Is copyright law fit for purpose in the Internet era? An economic and legal perspective” 2014 (https://prsformusic.com/-/media/files/prs-for-music/corporate/is_copyright_law_fit_for_purpose_in_the_internet_era.pdf).

- 28.** Instead, ISPs argued that they were as against copyright violations as anyone else, and would be willing to remove offending pages when asked to do so by copyright owners. This was a convincing, although likely incorrect argument, and implementing this argument led to the rule that is currently known as a safe harbor, now found in the DMCA in the U.S., Article 14 of the E-commerce Directive in Europe, and in law in other countries as well. The safe harbor¹⁰ absolves the ISP of copyright infringement if it follows a certain set of rules.
- 29.** The reason that this was likely an incorrect conclusion is that it appears to be relatively easy for technology companies to create an algorithm that can prevent infringing works from being put up in the first place, although it is more difficult to create an algorithm that finds virtually all infringing works. By requiring copyright owners to find infringements, instead of having ISPs trying to prevent infringements (which would have been the case if ISPs had been made liable for infringement) the law acted as if copyright owners were the parties with the lowest cost of finding infringements, which if true, would make it efficient for content owners to be the ones checking for infringement. In fact, at the time the DMCA was put into law, the costs are likely to have been lower for ISPs,¹¹ and they almost certainly are lower for ISPs now, given the ability of websites to use automated filters to find infringing works, as sites such as Google and Sound Cloud do with their content ID systems. One problem with Content ID systems is that the incentives under current legal regimes is for ISPs is to have Content ID systems that are only moderately good at finding infringing works, but not excellent (see Section V.C below).
- 30.** The intent of the safe harbor was to allow copyright owners to have infringing works removed (taken down) without the ISP being liable for the damages caused by copyright infringement. If the infringing work would be taken down in, say, a day or two, it seemed likely that any harm caused to the copyright owner by the infringement would be small. We can think of this as ‘piecemeal’ infringement, which could be solved by piecemeal detection and enforcement.
- 31.** The idea of a safe harbor seemed very reasonable in the mid to late 1990s, when email and web surfing (with little audio or video content) were the main activities of individuals using ISPs on dial-up telephone lines. Most content consumed by users was created by curators such as AOL or Prodigy, in systems that were described as “walled gardens.”¹² There was little indication then that millions or billions of people were going to upload massive amounts of audio and video content.
- 32.** Although allowing ISPs to respond to takedown requests instead of requiring them to affirmatively look for copyright infringements may have seemed reasonable at the time, safe harbors have evolved to be very different in practice from what was envisioned at the time the DMCA was implemented. In particular, no one seemed to have envisioned the possibility of entire websites where the main activity consisted of individuals uploading exceedingly large amounts of copyrighted material with the hope that other users, of whom there are hundreds of millions, would download or stream this material.
- 33.** Nevertheless, a business model has evolved where Internet sites encourage users to upload works, many of which infringe copyrights, with audiences sometimes in the hundreds of millions, or billions. Those audiences are primed and ready to download or stream infringing works once they appear on the site, and those users are also primed and ready to upload copyrighted works for others to download. This is infringement on a mass-production scale, not piecemeal infringement.

¹⁰ There are actually four safe harbors in the DMCA, but we are interested in the safe harbor related to “information residing on systems or networks at the direction of users” which is the harbor protecting UUC sites such as YouTube and SoundCloud, where users upload copyrighted works.

¹¹ As early as 2001, only a few years after the DMCA was passed, Napster was offering to filter out infringing songs from its site, in the face of legal liability for copyright infringement. See “Napster, LoudEye strike digital fingerprinting deal,” Jun 7, 2001, Macworld (<https://www.macworld.com/article/1017876/napster.html>). It was unable to perfectly filter out all infringing files, however.

¹² AOL (American Online), Prodigy, and CompuServe were three of the largest ISPs in the U.S. during the 1990s.

34. One simple question that might be asked is why so many users were and are primed to upload copyrighted material to sites such as YouTube (or, as we will see, Grooveshark). Although the answer requires some speculation on our part, many individuals who enjoy listening to music (or watching movies and television) have become accustomed to using pirate websites that relied on some users to make music in their collections available to other (sharing) so that these other users could download music. On these pirate sites, users were exposed to the etiquette of making songs available to other users if they wanted to be able to download songs. Some websites explicitly asked downloaders to also upload files, and some websites threatened to remove a user's ability to download if they did not also upload, or make available, as well. Thus, it has become second nature for many users to upload music on sites where they are getting music (or video) for free, which would include sites such as YouTube or SoundCloud.
35. The immense audience ready to upload and download any (unauthorized) copyrighted work is the fly in the ointment that was not anticipated by the creators of the DMCA. It is the size of the active, attentive audience, the ingredients required for the mass production of infringement, that makes the takedown provisions of the safe harbor unworkable as a mechanism to protect copyright owners. To understand why this is so, it is useful to examine how takedown notices work in the safe harbor world.

3. REMOVING INFRINGING WORKS IN A SAFE HARBOR ENVIRONMENT

36. After a copyright owner has reported a copyright violation to a site such as YouTube, and asked for a takedown, the law requires the website to expeditiously remove the offending audio or video work and offer the purported infringer the option to appeal the takedown. In the words of the DMCA (which will be the example I use when referring to these laws) the operator is protected by the safe harbor if:

upon notification of claimed infringement as described in paragraph (3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.¹³

This “expeditious removal” applies to the ISP’s who respond to takedown requests from infringed copyright owners. Note that there is no definition of exactly what constitutes expeditious removal.

37. The purported violator can have the material reinstated by submitting a counter-notification (appeal) claiming that the uploaded work does not infringe copyright.¹⁴ If a counter-notification is submitted, the copyright owner has ten days to demonstrate that they have begun copyright infringement court proceedings, otherwise the copyrighted material in question will be put back on the website.

¹³ Subsection (c) (1)(A)(iii) of 17 U.S. Code 512.

¹⁴ This process is explained at YouTube’s website at this <https://support.google.com/youtube/answer/2807684>.

38. The major record labels suggest that the requirement that they need to bring lawsuits after a counter notification is unreasonably costly, given that there are potentially thousands of these lawsuits.¹⁵ Although it is difficult to judge whether these claims are correct, it seems far more likely to be true that individual copyright owners would be unable to take on the expense of bringing a lawsuit, although the DMCA provides them no other choice if they want to keep their works off a UUC site. Uploaders with few assets have little reason to fear these potential lawsuits since they have nothing to lose if sued, and the likelihood of having a lawsuit brought against them is low.
39. For an ISP to qualify for the safe harbor it must meet several other requirements. One of the requirements found in the DMCA is that the ISP must have a form of punishing repeat infringers, described as:

a policy that provides for the termination in appropriate circumstances of subscribers and account holders of the service provider's system or network who are repeat infringers.¹⁶

YouTube, SoundCloud, and other sites try to meet this obligation by applying “strikes” to users who post works that are removed by takedown requests. The law does not specify how many strikes should lead to termination, but SoundCloud allows only one strike, and should a second strike occur, termination takes place. The more lenient YouTube allows two strikes in a three-month period whereupon a third strike brings termination. Whereas strikes on SoundCloud never expire, with users being terminated upon a second infringing upload, the more lenient YouTube takes a weaker stand against infringement by having strikes expire after three months if users take a four-minute online course about copyright, meaning that its users can upload up to eight detected infringing works each year without having their accounts terminated. Users who file counter-notifications have the ‘strikes’ removed from their records, unless the copyright owner files a lawsuit.

A. Notice and Takedown is only capable of handling piecemeal infringement

40. The takedown system can only fulfill its purpose when copyright infringements are far and few between. It takes time for copyright owners to discover infringing works and it takes time for their takedown request to be acted on by UUC sites.¹⁷ UUC sites have the option of determining the meaning of “expeditiously” and thus can greatly influence how many copyright infringing uploads remain available for download on their system. Remember, it is the unauthorized downloading or streaming, of copyrighted materials that directly harms copyright owners, not the upload by itself.
41. As a hypothetical example, if it were to take 12 hours for the copyright owner to find the offending file and have it removed by the UUC site, then it would merely take two new uploaded copies (separated by 12 hours) per day of an infringing work for the work to be constantly available for downloading by others. This implies that 730 uploads per year could keep a particular infringing work virtually always available during that year. Yet, popular works seem to

¹⁵ “The potentially significant cost of federal court litigation over any given single posting is a powerful (but unjust) deterrent to enforcement of UMG’s intellectual property rights. But the alternative is likewise unattractive: burdening the federal court system with thousands of additional lawsuits.” See page 37 of “Comments of Universal Music Group”, United States Copyright Office Library of Congress, Notice of Inquiry, Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7

¹⁶ Subsection (i)(1)(A) of 17 U.S. Code 512.

¹⁷ Some sites, such as YouTube and SoundCloud allow certain copyright owners to directly take down infringing works, so in these cases the only delay is one of finding the infringing works.

be uploaded by an order of magnitude above the rate of two per day.¹⁸ Any website with sufficiently many users uploading copyrighted materials in large enough numbers could, if it desired, ensure that infringing popular songs or videos be taken down slowly enough to keep them almost continuously available, while still appearing to remove them in a manner that seemed consistent with the takedown provisions of the DMCA, since there are no specific time limits.

42. Thus, we should not expect the notice and takedown provisions of the safe harbor, as implemented by UUCs, to be able to protect copyright owners of popular songs from having to compete with readily available infringing copies of their works unless the number of files being uploaded only averaged one or two per week or month. This type of “piecemeal” infringement seems to be what the creators of the safe harbor laws had in mind when they created the legislation. Unfortunately for the copyright owners, the type of infringement that occurs in web sites populated by hundreds of millions of users who are apparently eager to upload creative works is not this type of piecemeal infringement but instead is infringement on a far more massive scale.

B. We currently have Mass-Produced infringement

43. UUC sites such as YouTube and SoundCloud were created to allow their users to upload audio and video files, and those users have done so in amazingly large numbers. To gauge the number of uploaded works it is useful to examine YouTube’s reporting on the number of consumption minutes of video files (including music videos)¹⁹ uploaded every day or hour. In May of 2017, a Google executive reported that, on average, video files uploaded to YouTube each minute provided more than 400 hours of listening or viewing.²⁰ If video files averaged 5 minutes each, this would be the equivalent of over 6 million files uploaded per day. Even if a majority of the files did not violate copyright, it becomes easy to understand how unauthorized copies of popular copyrighted works would remain almost continuously available for download even if YouTube responded to takedown notices in less than a day.
44. The videos that large numbers of people want to watch or listen to, however, tend to be videos with copyrighted content. Equally important to the fact that many individuals want to consume copyrighted material is the fact that many individuals upload copyright material. For popular works, there is a torrent of uploads, as the statistics on infringing works make clear.
45. Google does not release data on takedown requests made of YouTube but Boyden (2013) reported that the Motion Picture Association of America (MPAA) sent takedown requests for over 13 million files to website operators (including YouTube) over a six-month period in 2013 and 12 million notices to search engines.²¹ Boyden also reported that the RIAA sent a similar number of takedown requests.
46. Using more recent bits and pieces of information that Google makes available, we can try to infer how many infringing files are uploaded to YouTube in a year. Google stated in 2016 that “The Content ID team²² has resolved millions of invalid claims [presumably uploads that should not have been blocked by Content ID] in the last year alone.”²³ Taking the plural usage of

¹⁸ As reported below (see footnote 54) a single popular song can average well over 1000 uploads per day for months at a time.

¹⁹ Many of these “videos” have no actual video component but instead show, say, a still cover of a music album while the music plays.

²⁰ This statistic comes from “Improving our brand safety controls,” web blog by Ronan Harris of Google, on Google’s blog (<https://www.blog.google/topics/google-europe/improving-our-brand-safety-controls/>).

²¹ The Failure of the DMCA Notice and Takedown System: A Twenty-First Century Problem, Bruce Boyden December 2013, Center for The Protection Of Intellectual Property, George Mason (<https://cpip.gmu.edu/2013/12/05/the-failure-of-the-dmca-notice-and-takedown-system-2/>).

²² Content ID, which is an algorithm to take down infringing works without the copyright owner manually asking for them to be taken down, will be discussed at length in Section V.A.

²³ Found in an illustration labeled “YouTube by the Numbers” which appears in a Google public policy blog by Katherine Oyama dated July 13, 2016 (<https://www.blog.google/topics/public-policy/continuing-to-create-value-while/>).

'millions' in the above quote to mean at least 2 million disputes resolved in favor of the uploader, and YouTube's statement that they only considered one fourth of these claims valid, a minimum value for the number of Content ID disputes was 8 million per year.

47. Since Google also tells us that "fewer than 1% of the [Content ID] claims are disputed,"²⁴ the clear implication is that the minimum estimate of files (claims) that Content ID tagged as copyright infringing was more than 800 million per year, on YouTube alone, of which 600 million were considered to be infringing.²⁵ This is a staggeringly large number of infringing files, and given how it was calculated it is an underestimate due to the likelihood that "millions" means more than two million and "fewer than 1%" could mean considerably less than 1%.²⁶
48. The enormous size of this copyright infringement is generally backed up by statements from UMG that the number of files (both from Content ID and UMG's efforts) thought to infringe UMG's copyrights on YouTube, was 100,000 per day.²⁷ This works out to 36.5 million per year. Quadruple that value for the other two major labels plus independent labels and the total rises to about 150 million. Double that value for infringement claims from the movie industry. Then add in copyright owners from the television and adult video industry, and the number of files that might be thought to be infringing could easily be near a billion.

C. Drinking water from a firehose

49. With so many infringing files, it becomes easy to see how reliance on the notice and takedown system can lead to popular songs being made almost continuously available for download. New material would be put up faster than copyright owners could possibly have it taken down, due in part to the delay between when the infringement is made, when it is noticed, and the actual takedown. The delay would lead, and has led, to popular copyrighted works being almost continuously available for download on any UUC sites that had tens of millions, or hundreds of millions, or billions, of users.
50. This is an instance where a very large number of users can easily overwhelm the takedown system which was not created with the intent of being able to handle massive amounts of copyright violations. This is an instance where a crowd of individually inconsequential individuals is more powerful than seemingly powerful organizations, such as a record company or movie studio, and certainly more powerful than individual copyright owners.
51. It has long been recognized that when it comes to people, there is power in numbers. It is this power in numbers which lies behind the ideas of crowdsourcing and crowdfunding, where a large number of small computers or small individual lenders can have a larger impact than supercomputers or large banks.²⁸ These latter examples are instances where crowds can be used for productive activities. Crowds can also engage in unproductive activity, however, at which point they are usually referred to as "mobs." In the digital realm, hackers who try to bring down websites through denial of service attacks use many small computers to bring down large servers. The evidence from filesharing made clear that millions of individuals were happy to steal music in spite of potential legal jeopardy from music industry lawsuits, presumably because their large numbers made the odds of any individual being sued very small.

²⁴ Found on page 28 of "How YouTube Fights Piracy" (<https://drive.google.com/file/d/0BwxyRPFduTN2TmpGajJ6TnRLaDA/view>).

²⁵ It is impossible that much human analysis could be used in separating the infringing from the noninfringing works since there are 200 million of these works. If it were to take 10 minutes to adjudicate each claim, and adjudicators worked 8 hours a day, 52 weeks a year, this would require over 16,000 people working full-time as adjudicators. Although Google does not break out employment figures for YouTube, Glassdoor estimates that it has between 1,000 and 5,000 employees, most of whom seem to have other types of jobs (see https://www.glassdoor.com/Overview/Working-at-YouTube-EL_IE40803.11,18.htm).

²⁶ In paragraph 87, Google is quoted as saying that the value is 99.5%.

²⁷ This value can be found on page 19 of "Comments of Universal Music Group," page 17, United States Copyright Office Library of Congress, Notice of Inquiry, Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7.

²⁸ The value of otherwise unused spare capacity in personal computers to scientific endeavors looking for additional capacity is discussed in the New York Times "Donate Your Computer's Spare Time to Science" by J. D. Biersdorfer October. 19, 2016, found <https://www.nytimes.com/2016/10/20/technology/personaltech/donate-your-computers-spare-time-to-science.html>.

- 52.** If the crowd can be used to overload the DMCA takedown system, copyright infringement can occur on a massive scale. The ISP or website gets to determine how quickly they respond to takedown provisions, as long as they can claim that the response is “expeditious” as that term is normally understood.²⁹ Because takedown times of less than a day or two appear to be considered “expeditious”, such a website can ensure that copyright infringement is continuous and ongoing in a way that allows them to provide a legal method for their users to bypass the normal market for copyrighted goods, and in so doing break the linkage between supply and demand that would otherwise help keep markets efficient.
- 53.** The takedown system under these circumstances fits the idiom of someone trying to drink water from a firehouse. The capacity to deal with the rush of water, or uploads in this case, is overwhelmed. That is because the safe harbor was never intended to handle sites like YouTube.
- 54.** To demonstrate that these claims are not merely hypothetical, it is useful to examine an actual instance of an UUC site that used the safe harbor to create a business model where (1) it made money because copyrighted works were available to users; (2) the works were available because they could not be taken down fast enough; (3) the UUC hid behind the safe harbor to avoid copyright prosecution.

4. A PARASITIC WEBSITE THAT RELIED ON SAFE HARBORS

- 55.** The high-speed Internet connections that became common after the turn of the century allowed some websites to provide a profusion of copyrighted works available at no cost to users. Starting with Napster, the most obvious examples of these sites were piracy sites such as the Pirate Bay and Limewire, among numerous others. These sites generally did not attempt to take advantage of the safe harbor but instead tried to avoid copyright infringement liability by arguing that they did not store the actual content, but instead merely connected the computers of different users together so the downloader (sharee) could acquire a copyrighted work from the uploader (sharer).³⁰ Some of these websites have been shut down, but piracy is still a common activity.
- 56.** But there was another way that these sites could have tried to avoid copyright liability, although it might not have been immediately apparent. Piracy sites made it clear that the Internet could be used to bring uploaders and downloaders together to avoid paying for works in the legitimate market. It is only a short step from that understanding to realizing that the safe harbor, which was intended to be a form of protection against copyright liability for innocent ISPs, could be used as a mechanism for encouraging massive copyright infringement without breaking the law. That the creators of the safe harbor never intended it to be used as a mechanism to protect massive copyright infringement would be irrelevant.

²⁹ Sony reports that an IFPI study of takedown speed for 2016 revealed that 20% of files were not taken down until more than 48 hours, for sites with user generated content and the share of content not taken down in that time was larger for other types of sites. Google boasts that it has an average response time of 6 hours for search takedown requests. See Additional Comments of Sony Music Entertainment, page 17, United States Copyright Office Library of Congress, Notice of Inquiry, Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7 and “How Google Fights Piracy”

³⁰ By not hosting the copyrighted material themselves they also saved money in not having to purchase expensive storage space and bandwidth.

57. The way in which the safe harbor can be used to avoid copyright liability, even though copyright infringement is encouraged, is to rely, first, on the vast number of individuals happy to upload copyrighted works, and second, on the fact that the term “expeditious removal” is vague and slow, compared to speeds in the digital realm. Nor is this just a hypothetical possibility.
58. Grooveshark proves to be a cautionary tale that best exposes the inadequacy of safe harbors to the task of safeguarding copyright owners from a form of voracious piracy. Grooveshark was a website that used the DMCA safe harbor to shield itself from copyright obligations. It was, for all practical purposes, no different than a pure piracy site, most of which claimed that they were interested in helping and promoting artists and their work, typical boilerplate language that all most all pirate sites used to one extent or another. The rules under which the safe harbor of the DMCA operates allowed Grooveshark to avoid paying for the content that was the basis for their revenues, just as they allow sites like YouTube or SoundCloud to avoid paying fair market prices for the content which they host, as I explain in Section VI below.
59. Grooveshark, which claimed to have 35 million users, was a seemingly legitimate entity whose creators were listed as 2008 finalists in Business Week’s “Best Young American Entrepreneurs,”³¹ were considered two of Forbes Magazine’s 2011 top “30 under 30 important influencers” in music,³² and had received over \$4 million in venture capital seed money.³³ Although Grooveshark tinkered with several business models in its formative period, it settled on one that consisted of running advertising while its users streamed songs from the library of songs uploaded to its servers by its users.
60. Grooveshark’s business model relied not just on using the safe harbor to escape copyright liability, but also to have users stream the music as opposed to downloading it, which provided several additional advantages. First, users would need to spend more time on the site while they listened to the music, which would be advantageous for advertising revenues. Second, no permanent copy would be made on the users’ devices, avoiding direct claims of copyright infringement.
61. An important point to note about Grooveshark is that, with its tens of millions of users, it was able to provide a large library of songs to streaming patrons in spite of notice and takedown requests by the industry. The takedown provisions of the DMCA were entirely inadequate in stopping Grooveshark from running a business requiring a sufficient library of songs to attract tens of millions of users, although it did not obtain copyright permission for those songs. Grooveshark would have had an even easier time maintaining a full library of songs if it had had an audience over thirty times larger, as does YouTube.
62. Grooveshark claimed to want to pay copyright owners, and in 2009 even reached a royalty agreement with one of the then major record labels, EMI. Here is some of the verbiage used by Grooveshark:

We respect the ownership rights of the major labels and publishers, and our core mission has always been to compete with piracy by offering a service that is genuinely better than what illegal networks offer, while also ensuring fair payment to copyright holders. ³⁴

³¹ The link is here (https://web.archive.org/web/20080912220353/http://images.businessweek.com/ss/08/09/0908_2008_entrepreneurs/15.htm). Business Week is now Bloomberg Business Week.

³² Most of the others on the Forbes list were recording artists.

The list can be found here (https://www.forbes.com/special-report/2011/30-under30-12/30-under-30-12_music.html).

³³ Information on venture funding can be found here (<https://www.cbinsights.com/company/grooveshark>).

³⁴ This quote can be found here (http://www.mi2n.com/press.php3?press_nb=120825).

Despite this verbiage, three years later EMI sued Grooveshark, claiming that Grooveshark had “made not a single royalty payment to EMI, nor provided a single accounting statement.”³⁵ It is worth noting Grooveshark’s claim that if it did not exist, its users would have gone to “illegal” pirate sites which paid nothing. Similar statements are made by current UUC sites, such as YouTube.³⁶

63. Emails from Grooveshark’s Chairman in 2009, Sina Simantob (made available in discovery during UMG’s lawsuit against Grooveshark), made it clear that Grooveshark intended to avoid any payments to copyright owners, at least until it had amassed 100 million users:

The only thing that I want to add is this: we are achieving all this growth without paying a dime to any of the labels... We bet the company on the fact that it is easier to ask for forgiveness than it is to ask for permission...In our case we use the label’s songs till we get a 100 [million] uniques [users], by which time we can tell the labels who is listening to their music, where, and then turn around and charge them for the very data we got from them, ensuring that what we pay them in total for streaming is less than what they pay us for data mining. Let’s keep this quite [sic] for as long as we can.³⁷

It should be understood that avoiding “asking for permission” is a euphemism for taking or stealing the product. Grooveshark could avoid purchasing most rights thanks to the safe harbor, hoping that at some later point it would be able to acquire rights without paying much for them. In Section VI below, I explain how the safe harbor allows sites to receive below market prices if they do decide to “ask for permission” (purchase the rights).

64. The author of the C/Net article containing the above quote wondered whether the embarrassing emails would have had any impact on Grooveshark’s business model:

But it is unclear here how Simantob’s apparent acknowledgement that Grooveshark intended to build a business on unlicensed music will affect Universal’s case. Nowhere in the e-mails included in Universal Music’s exhibits does Simantob mention piracy or illegal file sharing. Grooveshark says it is protected by the Digital Millennium Copyright Act’s safe harbor, which protects online service providers from liability for copyright violations committed by users.

The author of the C/Net article was correct to question whether those emails, by themselves, would cause legal problems for Grooveshark. The plan of using the safe harbor to either not pay at all for copyrighted works, or to pay only a small amount, is viable under the DMCA, and Grooveshark was not the only, nor the first company, to use this model.

65. Grooveshark gives credit to another entity for devising this business model. One of Grooveshark’s founders stated: “we model ourselves on YouTube.”³⁸

³⁵ See New York Times “New LawsUIT Means All Major Labels Are Suing Grooveshark” by Ben Sisario January 5, 2012, available here (<https://mediadecoder.blogs.nytimes.com/2012/01/05/new-lawsuit-means-all-major-labels-are-suing-grooveshark/>). The article notes: “Grooveshark says its service is legal under the Digital Millennium Copyright Act, a federal law that protects Internet companies that host third-party material if they comply with take-down notices from copyright holders.”

³⁶ For example, see “Continuing to create value while fighting piracy: an update” a Google policy post by Katherine Oyama, Senior Policy Counsel for Google on Jul 13, 2016, found here (<https://www.blog.google/topics/public-policy/continuing-to-create-value-while/>).

³⁷ These quotes are found in C/Net News “How we built a music service without, um, paying for music” by Greg Sandoval, November 28, 2011 (<https://www.cnet.com/news/grooveshark-email-how-we-built-a-music-service-without-um-paying-for-music/>).

³⁸ Mashable “Grooveshark Circumvents Mobile Bans by Launching an HTML5 Player” by Joann Pan Sep 05, 2012. (<http://mashable.com/2012/09/05/grooveshark-html5-player/#cpOA2qJanuqB>).

66. Grooveshark proved to be a bad actor, no different than other piracy networks such as Limewire. The sound recording companies eventually were able to defeat Grooveshark in court and put it out of business, but only because they demonstrated that Grooveshark executives and employees sometimes uploaded music themselves immediately after responding to a takedown notice (unwilling to wait for their users to upload the song). Evidence from the trial indicates that Grooveshark lied about this activity and that Grooveshark then attempted to hide evidence from the court during the lawsuit.³⁹
67. There can be little doubt that Grooveshark used the DMCA safe harbor as the basis of a business model so that it could avoid copyright payments. Despite Grooveshark's statements to the contrary, it did not have a good faith interest in respecting the ownership rights of the copyright holders. It wanted to make money specifically by evading copyright liability, which the safe harbor allowed them to do until they were caught not even following the rules of the safe harbor. Surely, it was not the intent of the framers of the DMCA to provide the foundations of a business model that allows firms to achieve competitive advantage through the avoidance of copyright payments for the very works that generated revenues under that business model. Yet, that is exactly what the DMCA allows. The safe harbor allows a business model where the selling of access to music is the product but where the owner pays nothing for the rights to the music.
68. We should note that SoundCloud did not become a quasi-permission site until 2014. Facebook is in the process of becoming a quasi-permission site as I write this in late 2017. It is also important to note that other UUC sites do not attempt to license the copyrighted works they make available to users.
69. Thus, the UUC sites have a competitive advantage over the old-fashioned sites that actually ask for permission from copyright holders to use their works. UUC sites also do not need to pay market prices for the rights to works because the safe harbor provides them a playing field tilted in their favor because they can provide the works to their users without acquiring permission. Basic economic theory would predict that this will have the effect, in the long run, of driving the non-UUC sites out of business (unless the non-UUC sites are also given this lower rate), since the extra cost of paying free-market prices for copyright permissions would be a tremendous handicap.⁴⁰ This is described in more detail in section VI below.

5. AUTOMATIC TAKEDOWN (CONTENT ID) SYSTEMS

70. Some major UUC sites have algorithms intended to prevent infringing works from being uploaded, although many sites do not. These algorithms are not required by law and are entirely voluntary. While we should applaud such algorithms, copyright owners cannot count on them due to the fact that UUC sites can do what they want with their algorithms, including shutting them down, weakening them, or limiting their use. We discuss this in more detail below.

³⁹ Grooveshark's defense worked for several years and it was only after the record companies found evidence that Grooveshark employees had uploaded songs to fill holes in their libraries, instead of waiting for a user to upload those songs, that they were able to put Grooveshark out of business. See New York Times "Judge Rules Against Grooveshark in Copyright Infringement Case" by Ben Sisario Sept. 29, 2014. (https://www.nytimes.com/2014/09/30/business/media/judge-rules-against-grooveshark-in-copyright-infringement-case.html?partner=rss&emc=rss&_r=0)

⁴⁰ Assuming no differences in efficiency between permission and quasi-permission UUC-sites, the only way that non-UUC firms can survive in the long run is if their copyright payments are no higher than the UUC-sites, meaning that no firms pay free-market prices for copyright.

71. YouTube’s algorithm, called Content ID, is described on their site:

Videos uploaded to YouTube are scanned against a database of files that have been submitted to us by content owners. Copyright owners get to decide what happens when content in a video on YouTube matches a work they own. When this happens, the video gets a Content ID claim.

Copyright owners can choose different actions to take on material that matches theirs:

Block a whole video from being viewed.

Monetize the video by running ads against it; in some cases sharing revenue with the uploader.⁴¹

The database of files that Content ID uses as an input comes from copyright owners providing information about their works to YouTube. YouTube appears to have been working on such an algorithm from almost its very inception.⁴²

72. YouTube does not make their Content ID program available to all copyright owners. Instead, copyright holders must meet certain, unclear, criteria. YouTube states “Content ID acceptance is based on an evaluation of each applicant’s actual need for the tools...Content ID applicants may be rejected if other tools better suit their needs.”⁴³ It seems likely that individual creators such as composers and lyricists will have a more difficult time accessing the Content ID system than large corporations. Copyright owners not affiliated with major recording labels are liable to have no monetization of their works and no reliable method of preventing their works from being consumed on YouTube without any payment.

73. It is also clear, since the Content ID program is voluntary on YouTube’s part, that copyright owners cannot count on Content ID to be fully used for their works unless YouTube finds it worthwhile to do so. Nothing prevents YouTube from crippling particular Content ID searches, or failing to use it at all. Thus, it can be a tool for YouTube to provide it an advantage in its negotiations with copyright owners.

74. The Content ID system, as created by YouTube, has some features that would seem to indicate YouTube’s ambivalence about reducing copyright infringement. For example, in paragraph 39 above, the DMCA requirement for UUC sites to terminate repeat copyright infringers was discussed. Nevertheless, when it comes to Content ID, a mechanism not required by the DMCA, YouTube does not provide any strikes for repeat ‘infringers’ no matter how many times they attempt to upload infringing works, although this would surely violate the spirit of the DMCA. Since Content ID is used to eliminate the vast majority of known infringing works (99.5% according to YouTube—see paragraph 87), the vast majority of repeat infringers will not suffer strikes even if they continuously upload infringing material.

A. Content ID, as currently implemented, is not a solution.

75. UUC sites do not need to pay market prices for copyright permissions because the safe harbor allows them to make copyrighted works available to their users without receiving such permission. These artificially low payments negotiated by UUC sites, sometimes called “value grab” by the record labels, a “transfer of value” (ToV) by performing rights organizations, and a “value gap” by others, will be explained in Section VI. Naturally, UUC sites deny any such advantage in negotiating with copyright owners.

⁴¹ Found here, (<https://support.google.com/youtube/answer/2797370?hl=en>).

⁴² Over a decade ago a Viacom spokesman accused YouTube of not being willing to use its filtering technology unless Viacom made a deal to license it works to YouTube, at presumably below market rates. See New York Times, “Viacom Tells YouTube: Hands Off” by Geraldine Fabrikant and Saul Hansell Feb. February 3, 2007, (<http://www.nytimes.com/2007/02/03/technology/03tube.html>).

⁴³ The quote is found here, (<https://support.google.com/youtube/answer/1311402>).

76. For example, Google denies any such “value grab”:

Those pressing the “value grab” argument also assert that the royalty rates in these licenses are too low, allegedly because the DMCA’s notice-and-takedown process makes it too difficult for record labels to withdraw their works from YouTube in the face of users re-uploading those works. This claim, however, ignores Content ID, which has been in existence since 2008 and which record labels (and many other copyright owners) use every day to monetize their works on YouTube. Thanks to Content ID, record labels do not have to rely solely on the DMCA’s notice-and-takedown process on YouTube—they can remove any or all user-uploads of their works from the platform on an automated and ongoing basis.⁴⁴ [my emphasis]

Google claims that “any or all” user uploads can be removed by record labels and “many other” copyright owners.

77. If Content ID were completely accurate at preventing infringing works from being uploaded, Google could be correct that the existence of Content ID would eliminate the possibility of a value grab. But there would need to be some additional requirements imposed on Content ID before the value grab would be alleviated. First, YouTube would need to guarantee that Content ID be made available to all copyright owners without restrictions or limitations, so that Google could not, at will, remove Content ID usage from any particular copyright owner. Also, YouTube would need to be required to not weaken Content ID’s ability to detect and remove offending works. For an example of such activity by YouTube, Sony reports that

Many “channels” on YouTube are not scanned by ContentID [sic], including ones operated by YouTube content partners and channels programmed by persons affiliated with “multi-channel networks”⁴⁵

Obviously, if a hypothetical Content ID could perfectly remove infringing works, it would need to operate on all the files on the YouTube site. Without these conditions, YouTube could still make any or all copyright owners rely on the safe harbor takedown provisions, reducing the bargaining position of copyright owners, just as the proponents of the value grab have suggested, tilting the playing field in favor of itself.

B. If Content ID was best at removing infringing works, the safe harbor would be unnecessary

78. An important, and heretofore unnoticed implication of a near-perfect Content ID system, however, is that the need for a safe harbor is eliminated when Content ID works as well as Google suggests it does. Google’s assessment of the effectiveness of its Content ID seems to imply that there are virtually no copyright infringements. If Content ID removed “any and all” infringing content, then Google would not need to pay any copyright damages under a traditional copyright regime with no safe harbor, since copyright owners would be unable to detect infringement. The entire justification for the safe harbor would disappear.

79. Content ID would not even need to be almost perfect to remove the need for a safe harbor. It would merely need to be the best detection system available, in which case copyright owners would be unable to find any infringement and thus would be unable to sue YouTube for copyright damages. Thus, even if Content ID were imperfect, with infringement taking place, YouTube would not need the protection of the safe harbor, as long as Content ID was the best system for detecting infringement.

⁴⁴ See Comments of Google Inc, page 6, United States Copyright Office Library of Congress, Notice of Inquiry, Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7

⁴⁵ See Additional Comments of Sony Music Entertainment, page 4, United States Copyright Office Library of Congress, Notice of Inquiry, Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7.

80. The point of the safe harbor, after all, was to protect ISPs who were not thought capable of finding and reacting every time one of their users uploaded a file that infringed copyright. But this concern—that it would be unreasonable to expect ISPs to police and monitor their users copyright violations—loses its relevance when ISPs, such as YouTube, can run a program that monitors what is being uploaded better than anyone else can.
81. Further, unlike the mid 1990s when nascent ISPs could claim to be terrified of the more powerful copyright industries bringing lawsuits, the leading ISPs now dwarf the leading copyright owners in terms of revenues and profits.
82. Although copyright owners should have a duty to provide YouTube with information about their copyrighted works before they could claim copyright infringement, once such information were provided, normal copyright law, *without the safe harbor*, would provide the proper incentives for YouTube to make sure that its Content ID worked better than any alternative. Although this may not have been the obvious solution when the DMCA was being drafted, it should be clear at this time that the safe harbor is merely an antiquated methodology for dealing with copyright infringement that has been made obsolete by improvements in technology.

C. *UUC sites have no incentive to produce the best Content ID system*

83. One of the main impediments to this solution, however, is Google's incentive, which is to make YouTube's voluntary filtering system only accurate enough to silence critics of its treatment of copyright holders, as opposed to actually eliminating infringing files. YouTube (and Google) does not benefit from creating a filtering system that would level a playing field that was otherwise tilted in its favor. It would be naïve to believe that Google would voluntarily act in a manner that was harmful to itself.
84. If Google wants to claim to be going above and beyond the requirements of the DMCA, it is merely necessary for it to provide a Content ID system that works moderately well, since any such system is voluntary. In fact, it would be surprising if Content ID worked as well as Google could make it, since such a Content ID system would weaken YouTube's bargaining position with the copyright holders with whom it does business. If Content ID worked as Google suggests, meaning almost perfectly, copyright owners who thought they were being underpaid by YouTube would remove their material from YouTube since YouTube's users would no longer have access to those copyrighted works, as Google claims in the above quote. As we shall soon see, however, the current Content ID system is insufficiently accurate to remove YouTube's superior bargaining position, which is why YouTube is fighting to keep the safe harbor which it would not need with a more accurate Content ID system.
85. In spite of Google's claims to the contrary, a large enough number of infringing works make it past the current Content ID system that the negative consequences for copyright owners remain as described earlier in this report in the context of a system without Content ID, as I now demonstrate.

D. *Imperfections with current Content ID*

86. Unfortunately, Content ID has not been nearly as foolproof in eliminating infringing uploads as Google claims. Because of the very large number of infringing uploaded works, Content ID would need to be extremely precise if it were to be able to reduce the impact of infringing content to de minimus levels.

87. Google touts Content ID:

Looking at the music industry specifically, 99.5% of reported sound recording copyright claims are automated through Content ID—meaning that Content ID automatically identifies the work and applies the copyright owner’s preferred action without the need for intervention by the copyright owner in all but 0.5% of cases. ⁴⁶

These statistics give the impressions that Content ID is an impressively accurate system. But note that this quote does not claim that 99.5% of all infringements are found by Content ID, but instead merely that Content ID finds 99.5% of *files found to be infringing*. But this leaves out the infringing files that are not found, which is an unknown quantity.

88. We have already seen (paragraph 48 above) that there appear to be in the vicinity of a billion files uploaded to YouTube thought to be infringing, per year, and perhaps 150 million infringing music files. Note that these are not the complete set of infringing files, but only the files found by Content ID and copyright owners asking for take-downs.

89. But we do not know how many infringing files both Content ID and copyright owners fail to discover. Content ID finds 99.5% of known infringing files. But this means that at least 0.5% of infringing files get past Content ID, since those are the files that copyright owners find and take down. But copyright owners are unlikely to catch every infringing file that makes it past Content ID. Let’s say that copyright owners, using their own detection algorithms, are able to catch one half of the infringing materials that were undetected by Content ID (although it might be much less). That would mean that Content ID catches 99% of all infringing files.⁴⁷ That might sound like an effective filtering system, but it would still leave a large number of files available to users. The 1% of undetected infringing files are equivalent to 1,500,000 files per year (with the estimated 150 million infringing files) that would then be available for streaming if Content ID were the only system being relied upon for detecting copyright infringement. And the number might be much larger if copyright owners fail to detect as many as half of infringing files missed by Content ID and if infringing files from other years remain on the system.

90. By way of comparison, radio stations tend to have weekly playlists of less than 300 songs,⁴⁸ Amazon Prime has about 2 million songs on its streaming service and Pandora is reported to have about 1.5 million.⁴⁹ If the infringing files on YouTube are to be few enough to limit the harm from infringing streamed music to minimal levels, the number of undetected infringing files would need to be much lower than what Content ID is currently capable of detecting. Thus, even this level of ‘success’ in detecting infringement would be insufficient to prevent UUC sites from having an unfair negotiating advantage when bargaining with copyright owners.

91. This result is not a surprise, given that YouTube does not have an incentive to produce a voluntary system that works much better than this. The current safe harbor does not provide an incentive for YouTube to improve Content ID, but copyright law without the safe harbor is one system that does provide the proper incentive to YouTube (Google) to improve Content ID.

⁴⁶ Found on page 26 of “How YouTube Fights Piracy” (<https://drive.google.com/file/d/0BwxyRPFduTN2TmpGajJ6TnRLaDA/view>).

⁴⁷ Mathematically, I am treating the original sample, which has now grown to 100.5% of itself, as if it is still 100%, which would lead to a trivial arithmetic error.

⁴⁸ See this article, (<http://blog.nuvooodoo.com/2016/02/10/how-big-is-your-playlist-do-your-listeners-know-that>).

⁴⁹ The Amazon figure comes from its advertising where it boasts: “you can stream over 2 million songs ad-free” which can be found here, (https://www.amazon.com/gp/dmusic/promotions/PrimeMusic?tag=mh0b20&hvadid=77721760432965&hvqmt=p&hvbmt=bb&hvdev=c&ref=pd_sl_52x3zvqz1k_b). The Pandora library is described in this article, (<https://www.npr.org/2014/11/26/366339553/pandoras-new-deal-different-pay-different-play>).

6. HOW THE SAFE HARBOR ERODES THE BARGAINING POSITION OF COPYRIGHT OWNERS

92. Given that UUC sites can supply their users with free music without requiring permission from copyright owners, it might seem that UUC sites have little reason to pay anything to copyright holders. But purchasing the rights from copyright owners still provides some advantages to these sites. First, the criticism that they face from copyright holders might tarnish their reputations. Paying for copyrights would seem to eliminate this potentially bad publicity.⁵⁰ Second, being portrayed as economic leeches has potential political implications, particularly the possibility that the safe harbor might be statutorily weakened or removed, which would eliminate the business model they have chosen. Third, these websites might wish to directly sell subscriptions or downloads for the copyrighted works and the permission of the copyright holders appears to be required for these types of websites (if for no other reason than to be able to guarantee having the works that users want). Relatedly, purchasing permissions will give them an assured library, whereas the UUC model is likely to provide an incomplete library.
93. For all these reasons, UUC sites have an incentive to pay something to copyright owners for the rights (permissions) to stream the music. But their willingness to pay is less than it would be if they could not operate without the permission of the copyright holders, as is the case for true permission based sites streaming music, such as Spotify or Apple Music. As discussed earlier, property rights are required for markets to function properly and a characteristic of property rights is that the seller knows that the buyer cannot acquire the seller's property (to provide later access to users) unless the buyer pays for it.
94. In the case of a UUC site, however, the copyright seller is confronted with an uneven playing field because the seller's property rights have been abridged by the safe harbor. The seller knows that the UUC site cannot be effectively stopped from providing a large number of copyrighted products to its users. Although the copyright owner can impose costs on the UUC site through take-down requests, creating take-down requests is also costly for the copyright owner, perhaps more so than to the UUC site, and both parties know this.
95. The UUC site owner can offer a deal that a rational copyright owner 'can't refuse,' to use the terminology found in the "Godfather." The UUC site owner can say "I can stream your material and generate revenues without your permission, and you get nothing. But if you give me permission to stream your material, I will pay you something, which is better than nothing. Take my something, or get paid nothing." The only reason the UUC site makes this offer is because there are some advantages to having permission, but the amount that the UUC site owner would pay for the copyright owner's permission cannot be as much as it would pay if it were not able to stream the music without permission.

⁵⁰ But if the copyright owners complain about the level of payments, as was the case when Warner's Chief Executive Steve Cooper put out a memo complaining about negotiating what he thought were unfair prices with YouTube due to the safe harbor, the payments might not provide much good publicity. See Washington Post "Why musicians are so angry at the world's most popular music streaming service" by Todd C. Frankel, July 14, 2017 - (https://www.washingtonpost.com/business/economy/why-musicians-are-so-angry-at-the-worlds-most-popular-music-streaming-service/2017/07/14/bf1a6db0-67ee-11e7-8eb5-cbccc2e7bfbf_story.html?utm_term=.fdfd14599c0c).

96. Thus, it is not a surprise that some copyright owners have reached agreements with some UUC owners. But the prices found in these agreements should be expected to be considerably lower than what they would be if the copyright owners actually had effective property rights over the copyrighted materials (i.e., could effectively remove their material from the website). We refer to UUC sites that purchase rights to music, such as YouTube and SoundCloud, as quasi-permission sites because, although they do acquire permission, they do so from an unnaturally advantageous bargaining position.
97. Economic theory is quite unambiguous in this case. Under normal bargaining, the buyer's willingness to pay (known as "demand" by economists) reflects the buyer's value of the item in the market relative to the potential buyer not having that item. In the case of UUC sites, their willingness to pay for rights to the music reflects merely the value from having a more complete library and avoiding bad publicity, but, crucially, does not reflect the value of the product compared to the alternative of not having the product at all. The UUC sites do not consider the absence of a song as the alternative to paying for it because the combination of inadequate safe harbor protection and their large audiences make it likely that they will be able to have the song available to their users even if they do not purchase the permission to use the song.
98. The willingness to pay for copyright permission when the product will be available for sale anyway (as is the case for UUC sites) will always be lower than the willingness to pay when the alternative is the complete absence of the availability of the product to sell. This means that the demand for copyrighted permission on the part of UUC sites operating under the safe harbor will be necessarily lower than the demand would have been if there were no safe harbor. Lower demand means lower revenues and lower prices in the market, holding all other factors constant. These lower copyright payments for UUC sites provide them a cost advantage over permission-based music streaming sites, other factors being held constant.
99. This artificially low negotiated payment by UUC sites to copyright owners, caused by the UUC sites' safe harbor induced bargaining position, is the cause of the already mentioned "value grab" or "transfer of value" (ToV). Regardless of its name, the safe harbor tilts the playing field against the copyright owners because it allows UUC sites access to copyrighted materials without needing permission from copyright owners.

A. The safe harbor's cascading harm to the copyright owners

100. Markets for entertainment products are complex because there are multiple substitute settings that can be used for selling a single artistic work to different portions of the overall audience. For example, when a major movie is produced, it is typically released to movie theaters first, because the per person payment (net of costs) by movie theater patrons is higher than other types of movie consumption (book publishers try to achieve similar results by putting out hard cover versions of some titles before the paperback editions). After playing in theaters, the movies are sold through 'on demand' cable and satellite outlets where consumers pay prices similar to but not quite as high as those in movie theaters. Next, the movies are shown on cable and satellite "pay" networks for which consumers pay a separate monthly fee. Finally, movies are made available on advertising based channels, because advertising payments provide the lowest per capita monetization of the product. This process of moving the product from high monetization venues to low monetization venues is known as "windowing."

- 101.** There is a reason that movies are not made available simultaneously on all platforms—the various platforms are substitutes for one-another. Not perfect substitutes, but substitutes nonetheless. The movie producers know that if they provide their movies to all the venues at once, the lower monetization outlets such as advertising-based networks, will siphon off some viewers from the high monetization outlets. The movie producers, naturally, do not want to have sales cannibalized in this manner, since this would lower overall revenues and profits.⁵¹
- 102.** Music sales do not go through the same type of windowing, but it is nevertheless true that various methods that music listeners use to obtain music are substitutes for one another. Pirated songs, for example, are good substitutes for purchased songs (with lawbreaking and spoofing being factors reducing the degree of substitutability) which is why piracy has been harmful to sound recording sales (see footnote 8). Subscription services are likely to be considered substitutes for sales of songs (digital or physical) by many consumers. Most importantly for understanding the current competition in music markets, free advertising-based streaming is a substitute for subscription-based streaming, with two factors making the two markets somewhat less good substitutes for one another: the annoyance of advertising and possible differences in the libraries of music available to consumers in the two types of streaming.
- 103.** Under normal circumstances, when the producer of a product is the only entity who can sell that specific product, she decides in which venues to sell the product. That is what we would expect for music copyright owners as well. They could choose to sell CDs, or digital downloads, or to use streaming services, in whatever combination of markets they think makes good business sense. If selling the copyrighted work in a particular market does not seem to make good business sense, the copyright owner would choose to not make her works available in that market.
- 104.** As an example of this, Taylor Swift apparently believed that selling her music on ad supported streaming services was harmful to her finances and thus she tried to remove her songs from the ad supported market in 2014. She didn't want her songs attracting listeners to the ad supported market who might otherwise have joined a subscription market with the effect of cannibalizing high subscription revenues with low advertising revenues.^{52, 53}
- 105.** Copyright owners, like any property owners, are supposed to be able to keep their property from being sold in markets in which they do not wish to participate. At least that is the way markets are supposed to work. The safe harbor was not intended to overturn this basic right, but it has. This can be illustrated by a different example of Ms. Swift's business decisions. Her

⁵¹ The reader should note that movies tend to be viewed only once, so that a viewing in a low-price venue often will strongly discourage a later viewing at a high-priced venue. Music listeners, on the other hand, listen to the same song or album multiple times, so that a single listen does not prevent later listening to the same song. Thus, music does not have the same type of windowing issues.

Nevertheless, particular songs tend to have periods of peak popularity and some artists believe that they should keep their songs off of low revenue per capita venues, such as advertising based streaming during this period. I happen to think those artists are correct.

⁵² A single individual artist is not likely to convince very many consumers to switch from advertising based streams to subscription streams, but if most leading artists were to take their recent music off advertising based sites, the impact would be far larger.

⁵³ Media reports indicate that there has been considerable debate about the wisdom of putting the same music on advertising-based streaming services as subscription based streaming. By withholding the newer music from advertising-based streaming, the two sources of music become lesser substitutes for one another. This became a news story when Taylor Swift wanted to remove her music from Spotify's advertising-based product but not Spotify's subscription based service (Spotify wouldn't agree to this request, so at that time she removed her music from both tiers). See this story (<https://qz.com/310630/why-one-of-the-biggest-names-in-streaming-music-says-taylor-swift-is-a-hero/>). The point is that industry insiders seem to understand that the free-tier is a low revenue substitute for the more remunerative paid tier. See this story (<https://www.digitalmusicnews.com/2016/02/19/sony-music-industry-future-hollywood-windowing/>). Without positing a conclusion, we note that the most direct potential harm to music sellers from advertising based streaming is that advertising-based streaming cannibalizes the more lucrative subscription based streaming, although the number of users of a free service who would have used a paid service in the absence of the free service, the key parameter that would determine whether advertising-based streams are worthwhile for copyright owners or the streaming company, is not known.

record company had agreed to use extra resources to try to block copies of her 2014 album “1989” from being freely available from websites that did not pay for permission to make it available. Under normal circumstances, and except for the safe harbor, this would be the norm for law abiding entities. However, in spite of considerable extra resources devoted to keeping her album off of sites that did not purchase permission to provide the album to users, her album was nevertheless available on non-permission sites.⁵⁴

106. The availability on UUC sites of music for which there was no permission granted, throws a monkey-wrench into the business decisions of copyright owners. The availability of their music is not under the control of copyright owners because the takedown and notice regime is incapable of handling the deluge of infringements found on UUC sites. This distorts the entire set of markets that depend on this music.
107. Because the safe harbor eliminates the ability of copyright owners to control monetization of their music by UUC sites,⁵⁵ those sites are a substitute for copyright permission-based sites such as Spotify or Apple Music. Streaming sites acquiring permission for copyrighted works, therefore, are forced to compete with UUC sites that have much of the same music (and sometimes considerably more music⁵⁶) and yet have abnormally low costs because they did not need to pay market prices for permission.
108. The cost advantage of UUC sites would be expected to cause the most intense competitive harm to advertising based full permission sites such as ad-Spotify because the leading UUC sites, relying as they do on advertising based revenues, are closer substitutes for the advertising (free) component of permission services such as Spotify than they are for the subscription based services. The competition between UUC sites and permission based advertising services would be expected to lead to lower revenues and smaller audiences for permission based sites.
109. Permission based sites are also likely to reduce their advertising intensity to compete with UUC sites. That is because the number of ads and their obtrusiveness (which I will refer to as advertising intensity) is a tool that advertising based sites use to compete with one another for users. The lower costs of UUC sites would allow them to reduce their advertising intensity below that of permission based sites so as to increase their customer base.⁵⁷ YouTube has an addition sui generis advantage in this regard over most other sites, in that it generates profits for Google even if it does not generate profits on its own, which will be discussed in more detail below.

⁵⁴ UMG stated “A staff of UMG employees devoted essentially 100% of their time between November 2014 and February 2015 to manually search for infringements of “1989”...These efforts were supplemented by approximately a dozen employees working for IFPI who devoted a significant portion of their work days to the same task...UMG or its agents have had to send over 66,000 DMCA takedown notices...in addition to nearly 114,000 blocks that were automatically put in place through YouTube’s Content ID system...and nearly 30,000 additional blocks or takedowns that UMG or its agents manually placed through online interfaces that YouTube and SoundCloud make available to copyright owners...notwithstanding UMG’s and [her label] Big Machine’s considerable efforts, infringement was still accomplished on a massive scale.” See page 6-7 of “Comments of Universal Music Group”, United States Copyright Office Library of Congress, Notice of Inquiry, Section 512 Study: Notice and Request for Public Comment, Docket No. 2015-7

⁵⁵ YouTube has argued that the copyright owners can choose to monetize their songs, or not, because Content ID algorithms allow the copyright owner to remove any songs they wish from the site. But those algorithms are not sufficiently accurate to be able to keep their songs off the sites. And even if they were accurate enough, the UUC site is under no legal obligation to use its algorithms to fully protect any set of copyrighted works.

⁵⁶ The libraries of music owned by the audiences of UUC sites are collectively larger than the libraries that the record companies keep. Digital copies of televised performances, of concerts, of recordings that are out of print, are often only available in someone’s collection, and this gives sites like YouTube a wider selection of musical performances than can be found on sites such as Spotify. This is another case of the crowd of small individuals overwhelming the large corporation.

⁵⁷ In a “long run” timeframe, we would expect lower cost firms producing the same product as higher cost firms to drive the higher cost firms out of business. The long run could be quite long, however, as illustrated by Keynes joke, that in the long run we are all dead.

110. Thus, there are two sources of negative impacts of UUC sites on the revenues to copyright owners. The first, which is a static effect, is the lower direct payment to copyright owners by UUC sites because these sites do not need permission of the copyright owners to provide access to their works and if they get permission they pay below market rates. Second, and of a size that could be larger than the first, is a dynamic effect which is the reduction in revenues from the unfair competition that UUC sites impose on permission based sites, lowering their audiences and revenues, and by necessity, reducing the payments that they make to copyright owners.⁵⁸
111. The harm the UUC sites would cause the subscription services is likely to be proportionally less severe, since UUC sites' advertising-based services are less substitutable for subscription services (than for permission based ad services), although as we saw in paragraph 104, the degree of substitutability between free and subscription based services is a matter of dispute within the industry.⁵⁹ We should also recognize that if ad-based sites reduce the advertising intensity, they become better substitutes for subscription services, cutting into the audiences and revenues of subscription services.
112. SoundCloud and YouTube began when the primary form of music consumption was the purchase (or pirating) of musical files. Subscription based streaming was a market of little significance and ad supported streaming was even smaller (with respect to revenue generation).⁶⁰ UUC sites were not as enormous as they are now, nor were they very good substitutes for file downloads, so the impact of UUC sites on industry revenues was relatively small, particularly compared to piracy.⁶¹
113. UUC sites have grown to be enormous. Because they pay below market rates when they ask for quasi-permission, their payments to copyright owners are below what they would have been without the safe harbor. This is the factor that has been so far recognized as the "value grab."
114. But the relatively close substitutes for UUC sites, permission-based streaming sites, have also grown to become an increasingly important source of revenue to the music industry (accounting for over 40% of U.S. industry revenue in 2016). The reduced copyright payments due to the competition of these sites with UUC sites is another source of harm to copyright owners. Also, the now very large UUC sites have a relatively larger negative impact on less good substitutes (forms of music consumption other than permission based streaming). Thus, there are additional sources of harm to copyright owners caused by the advantage that safe harbors provide to UUC sites, and these sources of harm are usually ignored in discussions of safe harbors. We will return to this issue in Section VIII.

⁵⁸ Note that these two factors are not always noticed. A March 2017 report by Beard, Ford and Stern titled "Safe Harbors and the Evolution of Music Retailing" tries to estimate the impact of the safe harbor on sound recording revenues but limits itself to estimating the first effect only, which it estimates at between \$650 million and \$1 billion. A rather facile 2013 examination by MIDiA Research seems not to understand either of these factors and concludes that the safe harbor is no longer a problem because the most heavily used UUC sites utilize quasi-permissions.

⁵⁹ There is another factor at work as well, which is the fact that streaming services are relatively new and during the transition to this new method of providing music, a form of free sampling might be expected to be used to introduce potential consumers to the benefits of streaming. The ad based component can be thought of as a free sample (although the subscription service could have a direct free sample). This factor, however, would only last until streaming had lost its novelty.

⁶⁰ In the U.S., RIAA statistics indicate that subscriptions made up less than 2% of revenues in 2006 and ad supported revenues were too small for the RIAA to bother measuring.

⁶¹ Although stream ripping software is capable of turning streamed music into files that are then good substitutes for purchased downloads.

7. SOME SPECIAL FACTORS IN THE CASE OF YOUTUBE

115. YouTube was created in 2005 by three employees of PayPal. In 2006, it was purchased by Google for \$1.65 billion.⁶² YouTube has some special characteristics that require a sui generis analysis different from almost all other streaming sites. The unusual characteristic of YouTube is that the viewing of content by users generates two sources of value to the owner of the site, Google.
116. By any metric, YouTube is enormous. YouTube viewers worldwide watch and listen to a billion hours of videos per day. By way of comparison, that is about ten times the viewing of Netflix. It is also reported that in early 2017 YouTube achieved over two billion unique users over a ninety-day period.⁶³ It is well known that a large proportion of YouTube's billions of users stream music.
117. Music is one of the most popular categories of videos on YouTube. YouTube is larger than any other music streaming site. Tech Times claimed that in 2015, YouTube was responsible for 57% of all music streams worldwide.⁶⁴ YouTube appears to be somewhat less dominant in the U.S. and other English-speaking countries, and somewhat less dominant in very recent years. Edison Research claims that in 2017 YouTube was the largest digital source used to keep music savvy listeners up to date with music in the U.S., although Pandora was 75% as influential and Spotify was half as influential.⁶⁵ BuzzAngle reports that in the first half of 2017 YouTube was responsible for 36% of all on-demand music streams in the U.S., although the number of users of these various sites is not broken down.⁶⁶ For the major English speaking countries at the end of 2016, MIDiA reports that YouTube's user penetration among weekly "active" users was the highest, at 26% (with Spotify second at 16%).⁶⁷
118. YouTube's size makes it something of an outlier. What makes YouTube unique, however, is that YouTube provides its owner, Google, with two separate sources of value: one source of value is the direct revenues generated by advertisements placed in YouTube videos; the other, more novel source of value, is the information provided by tracking the user's choice of audiovisual materials on the YouTube web site.⁶⁸ Google/Alphabet is one of the largest companies in the world, and it relies on advertising for virtually all of its revenues.⁶⁹ The information about individuals revealed by their YouTube usage is of value to Google because advertisers want to know as much about their audiences as possible so that the advertising can be as effective as possible. The information about users revealed by YouTube allows Google to refine the advertisements that it places on many sites throughout the Internet.

⁶² See New York Times "Google to Acquire YouTube for \$1.65 Billion" by Andrew Ross Sorkin and Jeremy W. Peters October. 9, 2006, <http://www.nytimes.com/2006/10/09/business/09cnd-deal.html>

⁶³ Both statistics come from: Wall Street Journal "YouTube Tops 1 Billion Hours of Video a Day, on Pace to Eclipse TV" by Jack Nicas, Feb. 27, 2017. The article (<https://www.wsj.com/articles/youtube-tops-1-billion-hours-of-video-a-day-on-pace-to-eclipse-tv-1488220851?mod=e2fb>) compares worldwide YouTube viewing with American television viewing, which is a fairly meaningless comparison that provided a misleading headline for the article.

⁶⁴ Tech Times "YouTube - Not Spotify, Pandora Or Apple Music - Is The Number One Music Streaming Service Worldwide: Here's Why" 8 July 2015, by James Geddes <http://www.techtimes.com/articles/66603/20150708/youtube-not-spotify-pandora-or-apple-music-is-the-number-one-music-streaming-service-worldwide-here-s-why.htm>

⁶⁵ Edison Research, The Infinite Dial, page 33, 2017 (<http://www.edisonresearch.com/wp-content/uploads/2017/03/The-Infinite-Dial-2017.pdf>)

⁶⁶ If, as seems likely, subscription users download more songs per capita than do users of free services, then there could be more users on advertising services even though there are more files downloaded from subscription services according to BuzzAngle. <http://www.buzzanglemusic.com/wp-content/uploads/BuzzAngle-Music-2017-Mid-Year-U.S.-Report.pdf>

⁶⁷ These values can be found at this link (<https://www.midiaresearch.com/blog/whos-leading-the-streaming-music-pack/>)

⁶⁸ This additional revenue generation would be similar to a magazine which sold its subscriber list to vendors of the products discussed in the magazine. In that case, the payments made to the inputs of the magazine, such as the writers and editors, would be expected to be based, in part, on the revenues generated by sales of the subscriber list just as they are based on the advertising revenue and subscription revenue.

⁶⁹ For example, see this article (<https://qz.com/970765/alphabet-goog-q1-2017-earnings/>).

A. YouTube, because it is not a stand-alone company, probably does not maximize its stand-alone profits.

119. Before Google can determine the most effective ads to show users on its partners' websites, it needs to obtain information about those users. Google increases the effectiveness of its advertising by using information about individuals that it derives from the behavior of those users on its web pages, including what they discuss in their emails, what they look for on the web, where they travel, and so forth. Here is Google's explanation, from its "Advertising" web page:

Working with our partners, we may use cookies for a number of purposes, such as... to show ads that are likely to be more relevant (such as ads based on websites you have visited)...Sometimes you might also see an ad on the web that's based on your app activity or activity on Google services.⁷⁰

A somewhat more informative explanation can be found in an earlier version of that page:

"As you browse websites that have partnered with us or Google sites using the DoubleClick cookie, such as YouTube, Google may place the DoubleClick cookie in your browser to understand the types of pages visited...Based on this information ...Google...uses these categories to show interest-based ads. For example, if you frequently visit travel websites, Google may show more ads related to travel... Google can also use the types of pages that you have visited or content that you have viewed to infer your gender and the age category you belong to.⁷¹

120. The music and video tastes of individuals can reveal a great deal about their likely age, education, tastes, income, and so forth, and this can be very valuable to Google, independent of any revenues that YouTube might generate on its own. Google can better tailor its advertisements throughout its various non-YouTube webpages as well as through its partners' websites for whom Google helps to place advertisements.

121. There are also some YouTube users who do not use the main Google sites, preferring, perhaps, other search engines (e.g., Bing), other programs, or other ecosystems such as those associated with Apple or Microsoft. In those instances, YouTube serves an especially useful function for Google by introducing the cookies into the browsers used by these individuals when they use the very popular YouTube website.

122. Thus, there is good reason to believe that the information about users provided by YouTube might have significant value for Google's placement of advertising. Using Alexa's metrics of website popularity, YouTube is number 2, second only to Google's number 1 but ahead of Facebook's number 3.⁷² YouTube provides a great deal of information about users (that can be used by Google in its advertising on its other properties) both because of its extremely large audience and also because of the quality of information about the tastes and age of those audience members, revealed by their choices in music consumption.

⁷⁰ This information can be found here, <https://www.google.com/policies/technologies/ads/>

⁷¹ This comes from a 2012 version of Google's policies, found here, <http://web.archive.org/web/20120115123521/http://www.google.com/privacy/ads/>.

⁷² These value come from the Alexa website (<https://www.alexa.com/topsites>).

123. YouTube's advertising revenues from music, although they are not routinely broken out separately by Google, are clearly dwarfed by Google's advertising revenues according to the limited information that YouTube has made available. YouTube apparently generated about \$2 billion in music advertising revenues in 2016, while Google generated about \$80 billion in advertising revenues.⁷³ The value of Google's non-YouTube advertising that might be enhanced by YouTube's information about the music usage of its users is, therefore, highly leveraged, at approximately a 40 to 1 ratio.
124. This great leverage implies that if the information about the musical preferences of YouTube's users enhanced the revenues generated by Google's advertising sale by only 2.5%, the additional dollar value of that information to Google would be equivalent to the complete advertising revenues directly generated by music on YouTube. Given these circumstances, Google might very well find that its best use for YouTube is to use it for generating information that helps generate revenues elsewhere for Google, as opposed to maximizing its standalone revenue.
125. Nevertheless, YouTube faces a tradeoff between generating its own revenues and providing informational value to Google. YouTube would maximize its stand-alone profits if it required that its users experience the profit maximizing amount and intrusiveness of advertising. But increased advertising intensity lowers the number of YouTube users, reducing the information about those users to Google. Because of this tradeoff, it is likely that YouTube would reduce advertising below its standalone profit maximizing level, in order to increase the amount of information generated for Google by YouTube's larger resulting audience.
126. In the most extreme case, it could be optimal for YouTube to forgo direct advertising revenue altogether and focus only on generating information about their users to benefit Google (just as Google, by way of analogy, forgoes Android operating system revenues by giving it away in order to maximize advertising and app profits that flow from Android usage). This tradeoff implies, therefore, that any entity, such as a performing rights society, that is paid solely on the basis of YouTube revenues, as opposed to YouTube's full value which includes the value of information that it provides to Google, will likely be shortchanged.
127. YouTube's fair market payments (relative to direct revenues) would be expected to be higher than other, self-contained, streaming services. This has several important implications. For the purposes of this report, it implies that the copyright payments that YouTube would be expected to make per stream, would be *higher* than the payments made by other streaming services. It also implies that other organizations, such as performing rights societies, which often receive percentages of revenue on the assumption that those revenues reflect the value of the underlying content, including music, should have their copyrights valued using revenues above and beyond those found in YouTube's advertising alone.
128. Note as well that YouTube's advertising revenues are likely to understate the value of the source material for two interrelated reasons. First, advertising revenues are likely to understate actual because YouTube does not maximize stand-alone profits. Google wants YouTube to have a larger audience than would be achieved by maximizing YouTube's stand-alone profits. Second, the informational value of YouTube's audience to Google, does not show up in any of YouTube's revenues. Nevertheless, that extra value would be a consideration in any fair, market-based transactions between copyright owners and YouTube.⁷⁴

⁷³ YouTube announced that it had paid \$1 billion to music rights holders in 2016 (see its December 2016 blog entry- <https://youtube.googleblog.com/2016/12/a-billion-reasons-to-celebrate-music-on.html>, implying that YouTube generated about \$2 billion in advertising on music videos before its 44%/55% split with rightsholders. Google's advertising revenues are reported here, https://abc.xyz/investor/pdf/2016_google_annual_report.pdf.

⁷⁴ Note that this analysis holds for any advertising based company that has a large component unrelated to copyrighted music, as would be the case for Facebook if it were to decide to stream music.

B. Evidence that YouTube does not maximize its stand-alone profits

129. I have described how Google might maximize overall revenue and profits by intentionally failing to maximize advertising revenues (and stand-alone profits) from YouTube. An important question naturally arises: is there any empirical support for this belief? An answer can be gleaned by examining whether YouTube treats its advertising in a manner similar to other web-based music streaming sites that also generate revenue from advertising.
130. Note that in spite of its enormous size, YouTube claims that profitability is not its primary focus. In October of 2016 Susan Wojcicki, CEO of YouTube stated, “We are still in investment mode” and with regard to profitability “There’s no timetable.”⁷⁵ Although it is possible that YouTube is really still in investment mode, it seems more likely that part of the reason that it has not yet achieved the stand-alone profitability that analysts seem to expect is because it is maximizing joint profitability with Google, and that leads to lower advertising revenues and lower stand-alone profitability than would otherwise be the case. Google might be very happy with the overall economic profit being generated by YouTube for Google, even if stand-alone profits are negative.
131. YouTube has also introduced “skippable” ads that allow users to cancel ads shortly after they begin. I am not aware of other music streaming sites that do this. The Wall Street Journal reported:

Revenue accelerated in part due to skippable ads YouTube introduced in 2010. Viewers like them because they can skip ads they don’t want to watch; advertisers like them because they pay only when viewers do watch. ⁷⁶

Skippable ads will generate more revenues than having no advertising at all, but they do not seem to be the type of advertising that generate the most revenue.⁷⁷ It is understandable why users would like such skippable advertisements since they are less intrusive and can be easily removed after about 5 seconds. Such advertising is much friendlier to users, and YouTube seems to want to keep these users aboard even if some of these users (those who choose to skip ads) do not generate much or any direct advertising revenue to YouTube. YouTube plans to make all ads of 30 seconds or more skippable beginning in 2018.⁷⁸

132. YouTube, due to it being a site for videos, also has an option for very non-intrusive video advertising. Sometimes YouTube runs small video advertising banners which are easily dismissed by clicking the “x” in the upper right corner. Beside the ease in removing these advertisements, these ads do not contain sound and thus do not interfere with audio consumption. Other music sites that might show a banner ad on the web or app page generally do not allow those ads to be fully removed. YouTube’s ads, again, seem focused on keeping their audience while forfeiting some revenue.

⁷⁵ Here is the link, (<https://finance.yahoo.com/news/youtube-ceo-says-no-timetable-232313041.html>).

⁷⁶ Wall Street Journal, “YouTube: 1 Billion Viewers, No Profit” by Rolfe Winkler Feb. 25, 2015, <https://www.wsj.com/articles/viewers-dont-add-up-to-profit-for-youtube-1424897967>.

⁷⁷ Advertisers usually want users to see the entire advertisement and be engaged by the medium when they see the ad, which is why television ads are more frequent during the climatic scenes in dramas.

⁷⁸ See this story, <http://www.campaignlive.co.uk/article/youtube-stop-30-second-unskippable-ads/1424541>

133. YouTube, like many other streaming services, can be run from browsers. However, unlike most other streaming services, YouTube can only be run from browsers on Windows and Mac PCs as there is no YouTube app in the Windows or Mac stores, although YouTube could easily create such apps, as Spotify has. The reason this is important is that browsers can be easily set to block advertisements, which destroys the monetization of music streams. Sites that try to maximize monetization prefer that customers use their apps, which are less susceptible to ad blockers. But not YouTube. Not only does YouTube fail to minimize ad blockers by not providing apps for PCs, YouTube does not even attempt to prevent (banner) ads for ad blocking software during the playing of videos on YouTube, which allow users to install ad blocking software with a single click. YouTube’s seeming indifference to whether YouTube viewing is monetized is consistent with the economic analysis showing that direct advertising revenue might not be its most important contribution to Google.⁷⁹

8. THE HARM CAUSED BY SAFE HARBORS

134. Much of the momentum for the value gap discussion derives from the fact that when the payments for streams are examined, YouTube and SoundCloud appear to underpay copyright holders relative to the payments made by other streaming services. There are various sources of evidence about these payments.

135. Digital Music News reported in 2017 on two analyses about payments that were being made to artists from streaming services.⁸⁰ One claim, based on RIAA’s analysis of payments to copyright owners, compared three services and concluded that the comparison showed YouTube as a last place outlier. The amount paid to copyright owners for 1000 streams is shown below:

- Apple Music: Slightly over \$12.
- Spotify: About \$7.50.
- YouTube: Around \$1.50.

A second examination by Information is Beautiful (for signed artists) provided the following statistics showing the same position for YouTube:

- | | |
|----------------|----------|
| • Napster | \$19. |
| • Tidal | \$12.50. |
| • Apple Music: | \$7.50 |
| • Google Play | \$6.8 |
| • Deezer | \$6.4 |
| • Spotify | \$4.4 |
| • YouTube | \$0.70 |

⁷⁹ For details and examples of the ad blocker ads, see this story on Digital Music News September 6, 2017, <https://www.digitalmusicnews.com/2017/09/06/youtube-video-ad-blockers/>.

⁸⁰ Digital Music News, “What Streaming Music Services Pay (Updated for 2017)” July 24, 2017, <https://www.digitalmusicnews.com/2017/07/24/what-streaming-music-services-pay-updated-for-2017/#comments>.

136. What these estimates, as well as many others, have in common is that YouTube and Sound Cloud⁸¹ are outliers at the bottom, with the higher paying services sometimes paying ten times the amount per stream.⁸² Admittedly, subscription and ad-supported services should not be compared to one another but instead we should compare likes-to-likes: ad-based with ad-based and subscription with subscription. In addition, revenues should only be compared for the same countries in the same year. Nevertheless, even with these imperfect data observations, YouTube (which I will use to represent all UUC sites for the rest of this section) seems to have strikingly lower payments to copyright owners.
137. The payout rate per stream is the product of two factors. First, there is the amount of advertising or subscription revenue generated for streams of music, the monetization of the audience. Second, there is the share of the revenues that the service pays back to the copyright holder. The two factors multiplied together generate the total copyright payouts and dividing this product by the number of streams gives us the per stream statistics we are discussing.
138. We have already noted several reasons to expect that YouTube's monetization of its audience would be lower than permission-based services. YouTube and other services protected by the safe harbor have lower costs than permission-based services such as Spotify, and this advantage is likely to cause them to lower advertising monetization in order to increase their market shares, as discussed in paragraph 108. As seen in section VII.B, Google has good reasons to want YouTube to not maximize advertising revenues, so that Google can have a larger audience from which it can derive information that Google uses in its own advertising endeavors.
139. This view is supported by the fact that YouTube has skippable ads and does not charge advertisers for ads that users skip. Allowing users to skip ads will lead to lower monetization than would otherwise be the case and other sites such as ad-based Spotify do not allow users to skip ads. YouTube's monetization should get worse in 2018 when YouTube will make all ads of a 30 second duration or above, skippable.
140. The weakened bargaining position the safe harbor imposes on copyright owners is also likely to lead to them receiving a smaller percentage of revenues. It is, therefore, not surprising to find that Apple and Spotify each claim that they pay 70% of their revenues in copyright royalties whereas YouTube pays only 55%.^{83, 84} If these numbers are correct, then the share YouTube pays out is only 79% [55%/70%] of the share paid out by Spotify and Apple. The safe harbor is the most natural explanation for the lower payout rate of YouTube.
141. Last August, YouTube spokesman Lyor Cohen defended YouTube's payments in a blogpost and claimed, without providing raw numbers, that YouTube paid out \$3.00 per thousand streams in the U.S., which, he said was "more than other ad supported services."⁸⁵ This claim appears to be at variance with the numbers above.

⁸¹ It appears that SoundCloud did not begin to pay artists until 2014 (see <https://www.musicbusinessworldwide.com/how-much-does-sound-cloud-owe-the-music-business/> and <https://vulcanpost.com/18374/soundcloud-advertisements/>) or pay composers until 2015 (see <http://www.techtimes.com/articles/118411/20151221/soundcloud-will-now-pay-royalties-signing-licensing-deal-prs.htm>), so that calculating payments per stream would have been either impossible or misleading prior to that time.

This 2016 story (<https://www.digitalmusicnews.com/2016/09/15/streaming-music-earn-1-dollar/>) claims that SoundCloud's recent payments are almost identical to YouTube's.

⁸² I exclude Pandora from this list, although it was included in the article, because it uses a statutory form of payment in the U.S. that it is allowed to choose since it does not allow the user to pick individual tracks, unlike the other services. Even so, it paid out about twice the rate of what YouTube paid out.

⁸³ The figures come from Apple's Robert Kondrk and Spotify's Jonathan Prince, as quoted in ReCode, "Here's What Happens to Your \$10 After You Pay for a Month of Apple Music" by Peter Kafka June 15, 2015 (<https://www.recode.net/2015/6/15/11563558/heres-what-happens-to-your-10-after-you-pay-for-a-month-of-apple-music>). YouTube's payments are based on Google's standard advertising split.

⁸⁴ It is not clear whether these figures include payments to composers and publishers, or are based only on labels and makers.

⁸⁵ The blogpost can be found here (<https://youtube.googleblog.com/2017/08/five-observations-from-my-time-at.html>).

142. Cohen's claim about YouTube's payout was recently discussed by Jason Peterson of GoDigital Media Group, who pointed out that Cohen's number was not actually the value of an average YouTube stream, but instead the advertising value for a stream that happened to be accompanied by a viewed advertisement. Peterson claimed, the actual value for a typical American YouTube stream, averaging the monetization across all streams, was a much lower level, \$1.20 per thousand streams.⁸⁶
143. Peterson also claimed that Spotify's payments for 1000 streams were \$2.11 for its ad-supported service. If Peterson's numbers are correct, then making the appropriate comparison, between ad-supported Spotify and ad-supported YouTube, in the same (U.S.) market, YouTube's payments to artists were barely more than half (57%) [\$1.20/\$2.11] of the level that Spotify paid to artists. These numbers appear to be an apples-to-apples comparison.
144. YouTube's 79% relative payout rate compared to Spotify is nevertheless a higher percentage than the 57% value that represent the actual dollars going to the average copyright owner of a YouTube stream versus the payment going to Spotify ad-supported streams. Thus, it appears that YouTube not only pays a smaller share of its advertising revenue to copyright owners than do its competitors, but it also fails to generate as much revenue per stream as its competitors. Both of these results are consistent with the economic incentives of YouTube discussed in Section VII above.
145. Given that YouTube can rely on the safe harbor to avoid paying market rates, it should not be a surprise that it makes below fair market payments to copyright owners, since that is what economic theory would predict, at least until a long-run equilibrium were achieved where UUC sites either have eliminated other advertising based sites or other permission based sites have eliminated their disadvantage from not using the safe harbor.

A. How to Measure the Static Safe Harbor Damage to Copyright Owners

146. One question that we would like to answer is "how much have UUC sites reduced the payment to creators." That is a difficult question to answer for the simple reason that we do not know what the payments would have been in a world without safe harbors. Although I will not attempt to answer that question here, I will discuss the data we would want and how we would use that data to answer such a question.
147. Although the first streaming site (Rhapsody/Napster) began in 2002, permission based streaming sites were still in their infancy when YouTube began in 2006, so each of these two types of sites grew up under the influence of the other. We cannot, therefore, compare data prior to and then after the existence of UUC sites in the hope of examining the impact of UUC sites.
148. Measured by the number of users, UUC sites are by far the largest streaming sites in existence, (even SoundCloud, which is in decline, has more users than Spotify or Pandora).⁸⁷ The typical \$10/month fee charged by subscription streaming sites came about while those sites were competing with UUC sites such as YouTube, so we do not know whether the \$10 monthly price chosen by Spotify and most other subscription services would have been the chosen price in

⁸⁶ This information is taken from Peterson's discussion here, <https://www.godigitalmg.com/wp-content/uploads/2017/09/Thought-Leadership-on-Value-Gap-v4.1.pdf>. The claim that many YouTube videos with music are not monetized is supported by Pex.com, whose CEO (Rasty Turek) notes (<https://blog.pex.com/how-big-is-music-on-youtube-5fb7cc5d3f77>) that almost two thirds of videos with music on YouTube are not claimed by Content ID. To check whether this was due to copyright owners not giving the information to Content ID, he examined one of the most popular YouTube videos (Gangnam Style) and found that it had about 20% of its 891,685 copies not being monetized although the copyright owner had set Content ID to monetize such videos.

⁸⁷ See the chart in this article, <https://www.digitalmusicnews.com/2017/08/15/soundcloud-traffic-plunge-100-million/>.

a world without competition from UUC sites. Economic theory indicates that the existence of lower priced (e.g., advertising-based) competitors should lower the profit maximizing price of the businesses that purchase full permission rights to operate. The UUC sites would also be expected to take customers away from the permission based ad-sites. By way of analogy, the introduction of Amazon into a market tends to lower prices and speed up delivery times of other retailers as they try to compete with Amazon, which is known for low prices and fast delivery. Its competitors must try to keep up or else they will lose their customers and be driven out of business.⁸⁸

149. In order to compete with UUC sites, advertising-based permission sites must provide a user experience that is not clearly inferior to that provided by YouTube. If YouTube has less intrusive or less frequent advertising, say because YouTube does not need to maximize its own profit, then YouTube's competitors will need to try to match, to some extent, YouTube's less invasive advertising.
150. A static analysis would focus only on measuring the extent to which YouTube underpays rights owners *relative to payments made to permission sites*, ignoring any impacts its underpayment has had on permission based streaming sites, whether advertising based or subscription based, and ignoring its impact on further removed markets, such as radio or download markets.
151. The required measurements involved in calculating this narrow version of the copyright under payment would be a measure of the degree to which YouTube underpays its rights holders compared to permission based ad-services, and the total amount of payments it makes. A second and less obvious element would be the premium YouTube should pay relative to other streaming sites because of the benefits received by Google. As discussed in paragraph 127, Google benefits from the information about YouTube's users, whereas other streaming services do not have this additional source of revenues.⁸⁹ This should increase YouTube's expected market payments to a premium level above the level associated solely with its revenues. Thus, when negotiating copyright payments on a level playing field, YouTube would be expected to pay a *higher amount per stream* than we would expect Spotify and other ad-based services to pay.
152. As an illustration of how these factors would be used in a calculation, assume that YouTube pays \$1 billion to all rights holders (composers, publishers, labels, makers) but that its payments per stream are half that of permission based advertising streaming sites. Assume as well that the price Google would pay, in a hypothetical market, for the value it gets from the information about YouTube users, would be half the amount of YouTube's fair market payment to rights holders for the fully monetized advertising generation capabilities of its users. In this case, the lost revenue to rights holders would be \$1 billion in underpayments for the value of its audience to advertisers, plus \$500 million for the market value of its information to Google, for a total of \$1.5 billion.

⁸⁸ But note that Amazon's cost advantages are due to real efficiencies and thus its competition improves markets. UUC sites low cost is due to a defectively protected property right and thus their lower costs, arising from shortchanging copyright owners, tend to make markets worse.

⁸⁹ Unless they can sell information to third parties about their users' musical tastes.

B. How to Measure a more complete Dynamic Estimate

- 153.** A static analysis ignores the effects of YouTube’s under-monetization on the behavior of its customers and competitors. Nevertheless, it is virtually certain that competition from YouTube over the last decade has lowered the revenues of permission sites (both ad-based and subscription), by forcing the ad-based services to lower their advertising intensity (to compete with YouTube for users), by reducing the audiences of ad-based services (because they could not fully match YouTube’s low advertising intensity), and by reducing the number of subscribers (because ad-based services showing fewer advertisements induce subscribers to switch to their services). A more complete and proper calculation of copyright losses due to the safe harbor would need to take these dynamic adjustments into account. It also would need to adjust for the likelihood that if YouTube were to raise its advertising intensity, it would lose some customers, with some switching to other streaming sites, such as Spotify ad-based or Spotify subscription, and others switching away from streaming sites altogether.
- 154.** I am going to posit that the closest substitutes for YouTube music streams are other ad-based music streaming services (which do not have the video that is often found on YouTube).⁹⁰ The next closest substitutes are subscription streaming services which differentiate themselves by having a positive monetary price and by the exclusion of ads. Further away, as a substitute, is music consumption based on ownership of individual songs, whether purchased or pirated. Additional substitutes are radio stations which broadcast over-the-air and on the Internet.
- 155.** In the static case, we examine and contrast the current payments by YouTube and Spotify’s ad-based service to gain some insight into a counter-factual possibility of what copyright payments would have been in a world where YouTube did not have a safe harbor advantage. Thus, if ad-Spotify paid \$4 per thousand streams and YouTube paid \$2, we would have concluded that the safe harbor reduced copyright payments by half (prior to any adjustment for extra YouTube payments due to its being owned by Google).
- 156.** In the dynamic case, we understand that the current Spotify prices have been influenced by YouTube, and that we want to determine the difference between the current payments and what the payments by both vendors would have been in the absence of a safe harbor. If we were able to determine, for example, that in the absence of a safe harbor, ad-Spotify would have paid \$5 per thousand streams and YouTube would have paid \$6.00 (YouTube pays more because of its informational value to Google), then the lost copyright revenues would be much larger than the static estimate. The lost copyright payments from YouTube would no longer be \$2 per thousand streams ($\$4 - \2), but \$4.00 per thousand streams ($\$6.00 - \2). There would also be the lost revenue for ad-Spotify equal to \$1 per thousand streams ($\$5 - \4). The difference in copyright payments in the two cases would be the measure of the lost copyright revenue due to the safe harbor for ad-based music streams.

⁹⁰ Note that many YouTube “videos,” particularly those uploaded by users, merely contain a picture of the album cover, not a video per se.

- 157.** But the dynamic case is not limited to ad-based streaming. YouTube’s under-monetization of its audience lowers the revenues of other substitutes, such as subscription based services. After all, in the extreme case of no ads in ad-based Spotify, there would be no reason for anyone to sign up for subscription Spotify. Similarly, there is evidence that listeners are substituting YouTube for broadcast radio.⁹¹ If, as seems likely, YouTube underpays copyright and under-monetizes audiences relative to broadcast radio, then there would be a decline in copyright payments as listeners switch from radio to YouTube, and we would want to include that impact in the dynamic estimate of copyright losses due to the safe harbor.
- 158.** Although we are not in a position to estimate these dynamic impacts of the safe harbor, it is clear that they would be considerably larger than a simple static estimate.

⁹¹ For example, in data from Edison Research (the “Infinite Dial”; here <https://www.slideshare.net/secret/I5hauCBF13BDTG>, here <http://www.edisonresearch.com/wp-content/uploads/2014/03/The-Infinite-Dial-2014-from-Edison-Research-and-Triton-Digital.pdf> and here <http://www.arbitron.com/downloads/InfiniteDial2013.pdf>) discussing where American consumers learn about new music, 72% mentioned AM/FM radio and 77% said YouTube in 2013. By 2017, radio had fallen to 50% while YouTube had increased to 80%. When the question turned to source used “most often” for keeping up-to-date with music, the decline is more dramatic, with radio falling to 8% in 2017 from 35% in 2014 and YouTube rising to 19% from 10% (the first year for reporting answers to this question was 2014).

9. CONCLUSIONS

- 159.** The safe harbor component of copyright legislation enacted at the end of the 20th century has had a profound and unintended impact on copyright owners in this century. The safe harbor was enacted to protect fledgling Internet service providers from being held liable whenever one of their millions of users occasionally uploaded a work that infringed copyright. Such infringements were thought likely to be small in number, and not particularly harmful to copyright owners, because the potential audience for the infringed work was thought to be small. It was also thought that having the ISPs remove the infringing material in a matter of hours or days through notice and takedown provisions, would be sufficient to protect copyright owners from any but trivial harm.
- 160.** UUC sites, which were not even contemplated when the safe harbor was put into law, have contributed to the consumption of user uploaded music and video files to be orders of magnitude larger than was envisioned at the time of the enactment of the safe harbor provisions of the law. Users of these sites are measured in the billions. This has led to a massive number of copyright-infringing uploads and downloads that is far beyond the ability of notice and takedown to control. Thus, the provisions of the safe harbor leave copious amounts of infringing materials available for other users to download.
- 161.** Because UUC sites do not need copyright permissions to make a large number of infringing works available to users of their sites, they have an advantageous bargaining position vis-à-vis copyright owners. This bargaining advantage also allows UUC sites to have a competitive advantage over permission based sites as the two sets of sites compete with one another.
- 162.** YouTube argues that the safe harbor cannot provide it any bargaining advantage or competitive advantage because copyright owners can use its Content ID system to remove their works, with the supposed effect of eliminating those copyrighted works from YouTube's users. This claim is wrong because Content ID is not anywhere accurate enough to remove all works, and Content ID's defects leave enough works on YouTube to provide a large enough library of infringing works to generate considerable streaming revenue from its users. YouTube also fails to notice that if Content ID were accurate enough, the arguments in favor of a safe harbor would disappear.
- 163.** Because the lower prices caused by the safe harbor affect both UUC sites and their permission based competitors, it is necessary to examine more than just the difference in copyright payments between the two types of sites when estimating the lost copyright payments caused by the safe harbor. Instead, we must compare current payments by both UUC sites and permission based sites to the higher payments that each group would have made in the absence of safe harbors and calculate the amount of shortchanged copyright payments on that basis.
- 164.** The net result of the safe harbor induced advantage of UUC sites is that UUC sites make lower copyright payments than they otherwise would because they either do not need to get copyright permission or if they do negotiate for permission they do so on a playing field tilted in their favor by the safe harbor. Additionally, permission based sites make lower copyright payments because their revenues and audiences are diminished by competition from UUC sites. The reduced copyright payments caused by the safe harbor would appear to be very substantial.

ABOUT THE AUTHOR

Stan Liebowitz is the Ashbel Smith Professor of Managerial Economics, and the Director of the Center for Property Rights and Innovation at the University of Texas at Dallas. He received his undergraduate degree from Johns Hopkins and a doctorate in Economics from UCLA. He has written numerous academic books and articles on the subjects of intellectual property, networks, and new technologies. He has consulted internationally on these subjects for both private parties and various governments.

He has published articles specifically related to copyright and new technologies in academic outlets such as the *American Economic Review*, the *Journal of Political Economy*, the *Journal of Law and Economics*, the *Review of Economics and Statistics*, the *Harvard Journal of Law and Technology*, as well as many other journals. His articles have generated over 10,000 citations on Google Scholar and have been cited by the U.S. Supreme Court.

His first book, *Winners, Losers, and Microsoft: Competition and Antitrust in High Technology* (written with Steve Margolis) and published by the Independent Institute, received many positive reviews including in the *Wall Street Journal*, the *Economist*, and *Wired Magazine*. His second book, “Rethinking the Network Economy” was published by Amacom Press in 2002 and was picked as one of the top 30 business books in 2003 by Soundview Executive Books. Both books, although intended for a general audience, have had considerable influence on academic researchers.

In 2002 he was asked to give the inaugural keynote address at what has become the annual conference of the Society for Economic Research on Copyright Issues. In 2006 he was elected president of that organization. In June of 2012 he was asked to give the keynote address to the Society of Cultural Economics. He is also on the Editorial and Advisory Boards for several intellectual property and technology focused journals and organizations.



SERVING AUTHORS WORLDWIDE
AU SERVICE DES AUTEURS DANS LE MONDE
AL SERVICIO DE LOS AUTORES EN EL MUNDO

Comunicado de imprensa Lançamento imediato

Os "portos seguros" na legislação autoral distorcem o mercado digital e reduzem os pagamentos aos criadores, revela um novo estudo económico

Paris, França - 27 de fevereiro de 2018 - As regras do "porto seguro", elaboradas há um quarto de século para ajudar pequenas start-ups na internet, distorcem hoje o mercado de serviços digitais e levam a um pagamento insuficiente aos titulares de direitos de autor, revela um estudo económico dos EUA.

"Economic Analysis of Safe Harbour Provisions", pelo professor Stan Liebowitz da Universidade do Texas, é o exame económico mais detalhado até à data de como os titulares de direitos de autor na música foram prejudicados pelas chamadas regras de "porto seguro" na legislação autoral.

O estudo económico foi encomendado pela CISAC, a Confederação Internacional de Sociedades de Autores e Compositores. A CISAC é a principal rede mundial de sociedades de autores, com 239 sociedades membros em 123 países, representando mais de 4 milhões de criadores de música, audiovisual, teatro, literatura e arte visual.

Comentando o estudo publicado hoje, o diretor-geral da CISAC, Gadi Oron, disse: "Este estudo mostra que os portos protegidos na legislação autoral, projetados para uma internet do século XX, precisam urgentemente ser reexaminados no século XXI. Em vez de proteger empresas de internet que simplesmente oferecem instalações de armazenamento, como era o seu propósito original, são hoje usados portos seguros para proteger os gigantes da tecnologia do pagamento aos criadores pela utilização das suas obras.

Este não é um problema que possa ser resolvido apenas pela indústria - é uma responsabilidade para os governos que se preocupam com o setor cultural e criativo. Os criadores merecem leis do século XXI que garantam um pagamento justo pelas suas obras e não leis que transferem o valor dessas obras para os serviços digitais globais. A tecnologia evoluiu, e a lei deveria evoluir com ela".

O professor Liebowitz é um dos principais autores, investigadores e académicos da economia da propriedade intelectual, das redes e das novas tecnologias. Entre as descobertas de seu estudo estão as seguintes:

-Por causa dos portos seguros, os serviços do User Upload Content, como o YouTube, têm "uma vantagem ineficaz e injusta" quando negociam licenças para utilização de obras protegidas por direitos de autor nas suas plataformas.

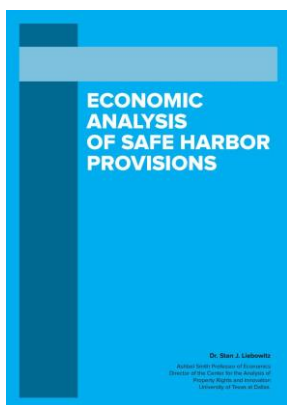
- Como resultado, as UUCs não pagam por licenças de direitos de autor ou, se pagam algo, pagam menos

do que o valor de mercado.

- Outros serviços on-line (como serviços de assinatura, por exemplo, Spotify e Apple Music) estão em desvantagem competitiva quando competem com plataformas UUC.

Esses serviços geram receitas mais baixas e têm uma base de utilizadores reduzida, devido ao impacto da distorção de portos seguros.

- Como resultado líquido, os titulares de direitos de autor recebem pagamentos muito reduzidos tanto das plataformas de UUC como de outros serviços, aparentando ser "muito substancial".



[Fin]

About CISAC

CISAC – the International Confederation of Societies of Authors and Composers – is the world’s leading network of authors’ societies (also referred to as Collective Management Organisations, or CMOs).

With 239 member societies in 121 countries, CISAC represents over four million creators from all geographic regions and artistic repertoires including music, audiovisual, drama, literature and visual arts. CISAC is presided over by electronic music pioneer Jean-Michel Jarre and the organisation’s vice-presidents are: Beninese singer Angélique Kidjo, Argentinean film director Marcelo Piñeyro, Spanish visual artist Miquel Barceló and Chinese film director, scriptwriter and producer Jia Zhang-ke.

CISAC protects the rights and represents the interests of creators worldwide. Founded in 1926, it is a non-governmental, not-for-profit organisation with headquarters in France and regional offices in Africa, Latin America, Asia-Pacific and Europe.

www.cisac.org | Twitter: [@CISACNews](https://twitter.com/CISACNews) | Facebook: [CISACWorldwide](https://www.facebook.com/CISACWorldwide).

Media Contact

For more information, please contact:

Adrian Strain – CISAC Director of Communications
adrianstrain@cisac.org | +44 7775 998 294

Guylaine Moreau – CISAC Communications
guytaine.moreau@cisac.org | Mobile: +33 (0)6 62 13 09 16

Exma, Senhora

Deputada Carla Sousa

Coordenadora do Grupo de Trabalho do
Mercado Único Digital,

12cccjd@ar.parlamento.pt

Lisboa, 13 de julho de 2018

V.^a Ref.^a

N.^a Ref.^a: Car7/2018- GTMUD

Assunto: Propostas de diretivas respeitantes à reforma dos direitos de autor e aos serviços de comunicação social audiovisual.

Exma. Senhora Deputada,

A FEVIP – Associação Portuguesa de Defesa de Obras Audiovisuais, é uma associação sem fins lucrativos que representa as empresas de edição e distribuição de vídeo e videojogos, a distribuição de cinema e a distribuição de televisão por subscrição (Cabo, Satélite, IPTV, etc.). A FEVIP tem por objeto a defesa dos interesses dos seus associados, em matéria de proteção dos direitos inerentes à produção, edição, comercialização, distribuição e difusão de obras audiovisuais e atividades relacionadas dos seus associados.

A GEDIPE – Associação para a Gestão Coletiva de Direitos de Autor e de Produtores Cinematográficos e Audiovisuais, é uma associação de utilidade pública sem fins lucrativos, que tem por objeto a gestão coletiva dos Direitos Conexos dos produtores audiovisuais, sejam eles, Produtores Cinematográficos, Videográficos ou Produtores Independentes de Televisão. Representa em Portugal a produção independente de televisão, nacional e internacional, bem como a produção cinematográfica e videográfica nacional e internacional.

As signatárias agradecem a oportunidade que lhes foi concedida de expressarem a sua opinião relativamente às Propostas de Diretivas em apreço, e disponibilizam-se desde já para serem ouvidas em audiência do Grupo de Trabalho que V. Exa coordena, em dia e hora a agendar oportunamente.

De qualquer forma, segue em anexo a posição adotada pelas signatárias nesta matéria.

POSIÇÃO DA FEVIP E DA GEDIPE FACE ÀS PROPOSTAS DE DIRETIVAS RESPEITANTES À REFORMA DOS DIREITOS DE AUTOR E AOS SERVIÇOS DE COMUNICAÇÃO SOCIAL AUDIOVISUAL.

I. APRECIACÃO NA GENERALIDADE

A FEVIP e a GEDIPE militam convictamente entre aqueles que defendem a importância destas reformas, sobretudo a que lhes diz mais diretamente respeito, ou seja, a proposta de Diretiva da Comissão, de 14.09.2016, sobre o Direito de Autor no Mercado Único Digital.

Não obstante o retrocesso que representou a Deliberação do Plenário do Parlamento Europeu ocorrida no passado dia 05.07.2018, que adiou a discussão do texto da Proposta de Diretiva para o próximo mês de setembro, mantém-se na íntegra a convicção de que a solução proposta pela Comissão Europeia, em particular no tocante ao chamado “*Value Gap*” (diferencial de valor) é aquela que melhor serve os interesses do setor, repondo o equilíbrio nas relações entre os criadores e principais investidores em conteúdos audiovisuais e outros materiais protegidos, por um lado, e os utilizadores intermediários e consumidores finais desses conteúdos, por outro.

Desde já importa que fique consignado que a FEVIP e a GEDIPE gostariam de ver aprovado, em sede de art.º 2.º e art.º 13.º, e Considerando 37, um texto aproximado ao seguinte, **que não se afasta significativamente daquele que o Comité JURI do Parlamento Europeu aprovou¹**

“ Article. 2 (Definitions)

(..)

(5) ‘online content sharing service provider’ within the meaning of this Directive is a provider of an information society service whose main or one of the main purposes is to share and give the public access to a significant amount of copyright protected works or other protected subject-matter uploaded by its users which the service organises with the aim of obtaining any form of profit from their use, including an advantage in notoriety for advertising purposes, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public.”

¹ Documento de 19.06.2018 final COMPROMISE AMENDMENTS AND ALTERNATIVE COMPROMISE AMENDMENTS, em anexo.

“Recital 37

[...] It is therefore necessary to clarify the copyright relevant obligations applicable to online content sharing services without affecting other services, such as internet access, providers of cloud services, which allow users to upload content for their individual use, such as cyber lockers or online marketplaces whose main activity is not giving access to the public to copyright protected content but selling other kinds of goods and services, as long as they remain neutral namely by not actively promoting nor incentivising the sharing of significant amounts of such protected content. The obligations applied to online sharing content providers shall not affect the use or works and other subject matter under an exception or limitation to copyright and related rights nor the application of Article 3(1) and (2) of Directive 2001/29/EC and Article 8 (2) of Directive 2006 /115/EC in other situations but the provision of online content sharing services.”

“Article 13

- 1. Member States shall ensure that online content sharing service providers shall either conclude or ensure the existence of fair and balanced licensing agreements with rightholders or rightholders’ representatives concerning the upload and use of works or other subject-matter protected by the users of their services.*
- 2. Under the terms of those agreements, such service providers shall, in cooperation with rightholders, take measures to ensure the effective and transparent functioning of the agreements concluded with rightholders for the use of their works or other subject-matter.*
- 3. In the absence of an agreement, Member States shall ensure that an online content sharing service provider takes effective measures to prevent the availability on their services of works or other subject-matter identified by rightholders as protected by copyright or neighbouring rights according to any international protection standards or formalities.*
- 4. The measures referred to in paragraph 3 shall be appropriate and proportionate, taking into account, among others, the nature of the services, the type of works or other protected subject-matter uploaded by the users of the services, the availability and costs of relevant technologies and their effectiveness in light of technological developments.*
- 5. The online content sharing service providers referred to in paragraph 1 shall provide rightholders, at their request, with adequate information on the functioning and deployment of the measures, as well as, when relevant, adequate reporting on the use of the works and other protected subject-matter.*

6. Member States shall ensure that the measures referred to in paragraph 3 shall be implemented by the online content sharing service providers without prejudice to the freedom of expression and information of their users and the possibility for the users to benefit from an exception or limitation to copyright. For that purpose, the service provider shall put in place a complaint and redress mechanism that is available to users of the service in case of disputes over the implementation of the measures. Complaints submitted under this mechanism shall be processed by the relevant rightholders within a reasonable period of time. The rightholder shall duly justify its decision.

7. Member States shall facilitate, where appropriate, the cooperation between the information society service providers referred to in paragraph 1 and rightholders through stakeholder dialogues to define best practices, such as the use of appropriate and proportionate technologies.

8. Member States shall provide that licensing agreements concluded between online content sharing service providers and rightholders or rightholders' representatives shall cover the acts of the users of the services falling within Article 3(1) and (2) of Directive 2001/29/EC and Article 8 (2) of Directive 2006/115/EC, when the users are not acting in a professional capacity.”

Esta proposta traduz a solução possível para a desigualdade que se verifica na partilha de valor, assente, sobretudo, nos proveitos económicos gerados pela utilização de obras pelos serviços da sociedade de informação, que disponibilizam e facultam ao público grandes quantidades de trabalhos protegidos pelo Direito de Autor e Direitos Conexos, sem a atribuição de uma justa remuneração aos titulares dos respetivos direitos, com finalidades lucrativas.

No fundo, pretende-se corrigir a manifesta desigualdade existente entre titulares de direitos exclusivos, que, na prática, estão a ser expropriados da sua propriedade intelectual pela comunidade, em proveito quase exclusivo dos prestadores de serviços da sociedade de informação, nomeadamente os operadores de plataformas de partilha de conteúdos protegidos.

É, assim, muito importante que a futura Diretiva forneça indicações claras sobre as circunstâncias em que um prestador intermediário de serviços da sociedade de informação deixa de poder ser considerado como mero prestador de armazenamento passivo ou neutral, para passar a poder ser visto como parte ativa no processo e, como tal, a poder ser responsabilizado pela licitude ou ilicitude dessa atividade, assumindo obrigações acessórias que se traduzem na tomada de medidas proporcionais e adequadas ao respeito pelos Direitos de Autor e Conexos, nomeadamente, concluindo contratos de licenciamento dessa utilização.

Como refere a Professora Eleonora Rosati, no [blog ipkitten](#), a verdade é que a proposta de Art.º 13.º, lida à luz dos Considerandos 38 e 39, não obstante as questões de índole prática que levanta (diversidade de abordagens em função do tipo de conteúdos; necessidade de informação rigorosa a ser prestada pelos titulares de direitos em conformidade com a [Decisão eBay](#); necessidade de escolha de sistemas de filtragem apropriados por parte dos prestadores de serviços de partilha de conteúdos, etc.) corresponde a temas que já foram tratados no âmbito do atual quadro legal europeu, tal como interpretado pelo Tribunal de Justiça da UE, em mais de vinte Decisões sobre o conceito do “*direito exclusivo de comunicação ao público*”.

Neste sentido, a adoção da Proposta da Comissão (agora assumida pelo Parlamento Europeu) dificilmente assinalará um desvio significativo do direito decorrente dos instrumentos legislativos atuais, mais depressa traduzindo uma consolidação e possível clarificação do mesmo. Adiante, em sede de especialidade, explicitaremos os pontos de discordância em relação à Proposta de Compromisso da Presidência Búlgara, que não nos parece uma boa solução, por, no texto do futuro art.º 13º, se limitar a consagrar um novo tipo de “*Safe Harbour*”.

De facto, nos termos do recente estudo “[Economic Analysis of Safe Harbour Provisions](#)”, da autoria do professor Stan Liebowitz da Universidade do Texas, que igualmente se anexa, fica claro que as regras do “Porto Seguro”(Safe Harbour), criadas há 25 anos para incentivar o desenvolvimento do mercado digital, e que constam do art.º 14.º da Diretiva 2000/31/CE de 08.06.2000, **estão hoje a distorcer o mercado no que diz respeito ao pagamento, ou antes, ao não pagamento aos titulares de direitos.** Por outras palavras, já não se adequam.

A propósito deste estudo, o Diretor-Geral da CISAC, Gadi Oron, disse: “*Este estudo mostra que os portos protegidos na legislação autoral, projetados para uma internet do século XX, precisam urgentemente ser reexaminados no século XXI. Em vez de proteger empresas de internet que simplesmente oferecem instalações de armazenamento, como era o seu propósito original, são hoje usados portos seguros para proteger os gigantes da tecnologia do pagamento aos criadores pela utilização das suas obras.*

Este não é um problema que possa ser resolvido apenas pela indústria – é uma responsabilidade para os governos que se preocupam com o sector cultural e criativo. Os criadores merecem leis do século XXI que garantam um pagamento justo pelas suas obras e não leis que transferem o valor dessas obras para os serviços digitais globais. A tecnologia evoluiu, e a lei deveria evoluir com ela”.

II. APRECIÇÃO NA ESPECIALIDADE

As signatárias preferem, sem ambiguidade, o texto das alterações propostas pelo Comité JURI do Parlamento Europeu, ao texto das últimas Propostas de Compromisso da Presidência do passado dia 24.05.2018², ao qual deverão ser feitas as seguintes alterações, para ser aceite:

1. O texto do Cons. 37b reintroduz o subjetivismo em algo que deverá ser bastante objetivo. O público-alvo é provavelmente um conceito inadequado para se aplicar aos assinantes ou utilizadores de um prestador de serviço de partilha de conteúdos em linha.

2. O Cons. 38 é útil, e interessa manter a referência à não alteração do conceito de comunicação ao público no sentido do art.º 3.º n.º 1 e 2 da Diretiva 2001/29/CE de 22 de maio.

3. O Cons. 38b é útil, nomeadamente para difamação, difusão de “notícias falsas”, violações da proteção de dados pessoais ou outras questões não relacionadas com direitos de autor que possam exigir a responsabilidade do prestado de serviços de armazenamento;

4. O Cons. 38c da Proposta da Presidência pode vir a tornar-se a fonte de grandes problemas, uma vez que criar só uma obrigação de “melhores esforços” quando o prestador está realmente a obter lucros substanciais com base em situações que ele também pode escolher ignorar, após o uso de medidas de proteção tecnológica ineficazes, não é, de todo, suficiente.

5. O Cons. 38ca coloca o problema do ónus da prova. A reversão do ónus da prova é um grande golpe nos Princípios de Direitos Autorais, de acordo com os quais o titular do direito tem o direito exclusivo de licenciar qualquer uso possível de sua obra protegida, pelo que deveria ser o utilizador a provar que tem licença. Não obstante, é ele quem tem de tomar a iniciativa de fornecer aos prestadores de serviços uma informação específica e suficientemente detalhada.

6. O Cons. 38d é útil e pode vir a tornar-se a melhor solução para violação de direitos de autor, se o prestador começar a obter licenças que cobrem os seus próprios utilizadores não profissionais, *i.e.* sem fins lucrativos;

7. Os considerandos 39^a e, 39b são úteis.

² Documento 9691/17, Dossiê interinstitucional: 2016/0151 (COD)

8. Art. 2.º: (5) A definição de operador de serviço de partilha de conteúdos parece estar correta e parece estar alinhada com a noção de *Serviço de Plataforma de Partilha de Vídeos* (art.º 1.º n.º 1 aa) da Proposta de Diretiva que atualiza a Diretiva Serviços de Comunicação Audiovisual, E, efetivamente, esse alinhamento deve ser total.

A principal preocupação dos titulares de direitos consiste em ver o legislador europeu identificar e destacar um conjunto de ISPs que não devem beneficiar da isenção de responsabilidade do art. 14 da Diretiva 2000/31/CE de 08.06.2000 sobre Comércio Eletrónico (serviços de armazenamento em linha) e impor-lhes obrigações jusautorais.

Tendo isso em mente, parece correto destacar a atividade de organização/promoção de conteúdos gerados pelo utilizador (UGC) para fins lucrativos, embora, provavelmente, seja necessário esclarecer que *websites* financiados por publicidade e redes sociais que ganham dinheiro recolhendo e “vendendo” dados como nomes pessoais e endereços de e-mail devem qualificar-se também como tendo fins lucrativos.

9. Art 13 (1) a redação parece ser aceitável, colocando toda a ênfase numa obrigação de licenciamento em nome do prestador de serviços de partilha de conteúdos (PSPC), licenciamento esse que abrange os atos de utilizadores finais sem fins lucrativos, e, caso contrário, deixando uma alternativa que equivale a remoção dos conteúdos não licenciados. Quanto aos utilizadores que exercem uma atividade comercial, a licença do PSPC não cobre a sua utilização e, portanto, eles deverão ser informados dessa exclusão pelo próprio PSPC, não pelos titulares de direitos.

10. O artigo 13 (3) é útil (ver comentário ao Cons. 38b) acima;

11. O Artigo 13 (4) não é aceitável pelas razões apresentadas acima sobre o tema do Cons. 38c – ou seja: se a PSPC for obrigada a implementar medidas efetivas, como se pretende, é óbvio que uma obrigação de “melhores esforços” claramente não é suficiente. A obrigação estabelecida na subseção (b) é semelhante à do art.º 14 b) da Diretiva Comércio Eletrónico (DCE). No entanto, os requisitos para o “Porto Seguro” no art.º 14 da DCE **não são uma obrigação de “melhores esforços”**; portanto, não é aceitável que uma PSPC, que está mais ativamente envolvida no negócio da partilha de conteúdos, possa escapar da obrigação de assegurar o respeito pelos Direitos de Autor e Conexos pelo conteúdo por um padrão mais baixo do que o ISP sob o Art.º. 14 da DCE.

12. Os Artigos 13.5., 13.6 e 13.8 são úteis.

13. A frase final do Artigo 13.7 é outro encargo injustificado para os titulares de direitos que parece ignorar os seus direitos exclusivos de determinar livremente como o conteúdo deve ser explorado e utilizado. Por que razão os titulares de direitos têm de justificar o seu pedido para remover ou bloquear o acesso? Não lhes basta invocar a titularidade do direito exclusivo de reprodução e colocação à disposição? Seria preferível diferenciar claramente as obrigações da PSPC dos provedores gerais de armazenamento, concentrando-se na atividade intensiva de partilha de conteúdos da primeira e incentivando-a a licenciar sua atividade negociando licenças gerais com Entidades de Gestão Coletiva, representando todos os diferentes tipos de titulares de direito e definitivamente se afastando de “obrigações de melhores esforços”, as quais são claramente impróprias para os fins do Artigo 13.

III. COMENTÁRIOS SOBRE A PROPOSTA DE DIRETIVA DO PARLAMENTO EUROPEU E DO CONSELHO QUE ALTERA A DIRETIVA 2010/13/UE (Texto revisto de compromisso da Presidência)

De uma forma geral, A FEVIP e a GEDIPE concordam com a abordagem e a iniciativa visando atualizar as regras aplicáveis aos serviços de comunicação social audiovisuais e aproximá-las dos hábitos de consumo das gerações atuais.

Conforme se deixou referido a propósito da Proposta de Diretiva sobre Direito de Autor no Mercado Único Digital, e, em particular, do art.º 13.º, a noção de “*serviço de partilha de conteúdos*” desta última deve estar alinhada com a de “*serviço de plataforma de partilha de vídeos*”, que a Proposta de alteração da Diretiva AVMS pretende introduzir e sujeitar a algumas obrigações. A FEVIP e a GEDIPE não poderiam estar mais de acordo com a equiparação do nível regulatório entre os serviços de televisão tradicionais e os serviços audiovisuais a pedido (*On Demand*), uma vez que atualmente já praticamente todos os serviços de televisão são consumidos a pedido, pelo que se trata de uma distinção que deixou de fazer sentido.

Quanto aos “*serviços de plataforma de partilha de conteúdos*”, nos quais parece não ser possível identificar uma entidade como responsável editorial, à semelhança da solução proposta para a questão do respeito pelos Direitos de Autor e Direitos Conexos, é essencial a imposição de algumas obrigações, pelo menos, tendo em consideração a realidade da

concorrência entre os demais serviços de conteúdos audiovisuais existentes, por um lado, e estas plataformas, por outro, quer em termos de audiências quer de receitas (v.g. publicitárias).

Além disso, conforme é reconhecido na Proposta de Diretiva “*estas últimas plataformas têm também um impacto considerável, uma vez que proporcionam aos utilizadores a possibilidade de formarem e influenciarem as opiniões de outros utilizadores. Por conseguinte, e a fim de proteger os menores de conteúdos nocivos e todos os cidadãos da incitação ao ódio, violência e terrorismo, é perfeitamente razoável prever que estes serviços sejam abrangidos pela presente diretiva. No caso dos serviços de redes sociais, estes serviços deverão ser abrangidos na medida em que satisfaçam os requisitos que definem um serviço de plataforma de partilha de vídeos.*”

Não poderíamos estar mais de acordo, havendo apenas que determinar os responsáveis pelo cumprimento das obrigações impostas pela futura Diretiva, pelo que será fundamental conhecer a identidade das pessoas singulares que exploram a plataforma ou a rede social, não podendo a lei admitir a falta de transparência quanto à propriedade dos meios, incluindo estes.

A política de harmonização legislativa por detrás da Proposta de Diretiva vai no sentido de esta ser, mais uma vez, uma regulação de mínimos, compatível, portanto, com um grau de exigência superior por parte dos legisladores dos Estados Membros. Nada temos a opor a essa perspetiva, a qual viabiliza, por exemplo, que um Estado Membro que imponha regras mais exigentes aos meios de comunicação social audiovisual estabelecidos no seu próprio território possa alargar essas mesmas regras a outros operadores que emitam a partir do território de outros Estados Membros para esse Estado Membro.

Nesse sentido, A FEVIP e a GEDIPE concordam com o teor do Art.º 4.º n.º1 “*Os Estados-Membros têm a liberdade de exigir que os fornecedores de serviços de comunicação social sob a sua jurisdição cumpram regras mais pormenorizadas ou mais rigorosas nos domínios coordenados pela presente diretiva, desde que essas regras não infrinjam o direito da União*”.

Também nos parece muito importante o disposto no Art.º 4.º n.º 8. “*A Diretiva 2000/31/CE é aplicável, salvo disposição em contrário prevista na presente diretiva. Em caso de conflito entre*

uma disposição da Diretiva 2000/31/CE e uma disposição da presente diretiva, prevalece o disposto na presente diretiva, salvo disposição em contrário desta última.”

Deste texto parece decorrer, por exemplo, que as obrigações impostas aos prestadores de serviços de plataformas de partilha de vídeo não poderão ser rejeitadas por estes últimos com o pretexto de se tratar de prestadores de serviços de armazenagem, ao abrigo do art.º 14.º da DCE, porquanto a futura Diretiva sobre Serviços de Comunicação Social Audiovisuais prevalece sobre a DCE. Aplica-se aqui *mutatis mutandis*, o que se referiu *supra* sobre a necessidade de rever o recurso ao “*Safe Harbour*” para obstar ao cumprimento de obrigações.

A FEVIP e a GEDIPE concordam com a necessidade de harmonizar conceitos, tais como “racismo” e “xenofobia” como constantes do Art.º 6.º a-A) (alinhados pela definição constante da Decisão-Quadro 2008/913/JAI do Conselho, de 28.11.2008 relativa à luta por via do direito penal contra certas formas e manifestações de racismo e xenofobia) e “terrorismo” (Art.º 6.º a-B) e Cons. 8-A (alinhado com o art.º 5.º da Diretiva 2017/541/EU relativa à luta contra o terrorismo).

A FEVIP e a GEDIPE consideram absolutamente essencial a manutenção do Art.º 8.º (“Os Estados-Membros asseguram que os fornecedores de serviços de comunicação social sob a sua jurisdição não transmitam obras cinematográficas fora dos períodos acordados com os detentores de direitos”) e sugerem uma tutela reforçada desta norma, nomeadamente em sede de fiscalização de obrigações de licenciamento ou autorização.

Outro domínio em que A FEVIP e a GEDIPE consideram ser de apoiar a Proposta de Diretiva é em matéria de promoção da produção audiovisual europeia, aumentando as obrigações percentuais, o que terá como consequência o aumento no investimento na produção nacional.

Segundo a proposta de Art.º 13.º: “Os Estados-Membros asseguram que os fornecedores de serviços de comunicação social a pedido sob a sua jurisdição garantem uma quota de pelo menos 30% de obras europeias nos seus catálogos e lhes asseguram uma posição de relevo.”

Esta norma é para ser interpretada e aplicada em linha com o Considerando 21: “Os fornecedores de serviços de comunicação social audiovisual a pedido deverão promover a produção e a distribuição de obras europeias, assegurando que os seus catálogos contêm uma quota mínima dessas obras e que lhes é dado suficiente relevo. Trata-se assim de promover as

obras europeias facilitando o acesso a essas obras, O relevo pode ser assegurado por diversos meios, como uma secção dedicada a obras europeias que seja acessível a partir da página inicial do serviço, a possibilidade de procurar obras europeias na ferramenta de busca disponibilizada pelo serviço, a utilização de obras europeias em campanhas do serviço ou a promoção de uma percentagem mínima de obras europeias do catálogo, utilizando por exemplo cartazes ou instrumentos similares." É muito importante a "encontrabilidade" das obras europeias nos catálogos disponibilizados ao público

Segundo o Art.º 13.º n.º 2. "Caso os Estados-Membros exijam que os fornecedores de serviços de comunicação social sob a sua jurisdição contribuam financeiramente para a produção de obras europeias, nomeadamente através de investimentos diretos em conteúdos e de contribuições para fundos nacionais, podem igualmente exigir que os fornecedores de serviços de comunicação social que visem audiências nos seus territórios mas estejam estabelecidos noutro Estado-Membro paguem tais contribuições financeiras. Nesse caso, a contribuição financeira baseia-se apenas nos rendimentos auferidos nos Estados-Membros visados. Se o Estado-Membro em que o prestador de serviços está estabelecido exigir tal contribuição financeira, tem em conta as eventuais contribuições financeiras impostas pelos Estados-Membros visados. Todas as contribuições financeiras respeitam o direito da União, nomeadamente as regras em matéria de auxílios estatais.

Esta equiparação é muito importante para criar uma sã e leal concorrência entre operadores estabelecidos em diferentes Estados Membros.

A FEVIP e a GEDIPEE recomendam apenas a clarificação do texto do Cons. 24: "*Quando os Estados-Membros impuserem contribuições financeiras aos fornecedores de serviços de comunicação social, tais contribuições deverão ter como finalidade uma promoção suficiente das obras europeias evitando simultaneamente os riscos de dupla imposição dos fornecedores de serviços de comunicação social.*"

As medidas de promoção da produção europeia deverão assentar no investimento direto, e não na contribuição para "fundos" ou "instituições" de carácter público ou privado, que, normalmente, suscitam várias dificuldades na aplicação e distribuição dessas verbas, não se adequando às exigências de transparência aplicáveis. Deve ser exigido o **investimento direto**.

No mesmo Considerando 24, é referido que "(...) se o *Estado-Membro em que está estabelecido o fornecedor do serviço de comunicação social impuser uma contribuição financeira, deverá ter em conta as eventuais contribuições financeiras impostas pelos Estados-Membros visados.*" Importará, a nosso ver, clarificar o que se pretende dizer. "*ter em conta*" significa deduzir as contribuições financeiras impostas por outros Estados Membros ou, simplesmente, reduzir aquelas contribuições, em função da carga contributiva externa?

Outro aspeto que deverá ser clarificado é o que decorre do Considerando 25: "*A fim de evitar que as obrigações de promoção de obras europeias comprometam o desenvolvimento do mercado e de possibilitar a entrada de novos operadores no mercado, as empresas sem uma presença significativa no mercado não deverão estar sujeitas a tais requisitos. É o caso, em especial, das empresas com um baixo volume de negócios e baixas audiências. As baixas audiências podem ser determinadas com base por exemplo, no tempo de visionamento ou nas vendas, em função da natureza do serviço, enquanto que a determinação do baixo volume de negócios deverá ter em conta as diferentes dimensões dos mercados audiovisuais nos Estados-Membros. Poderá igualmente ser inadequado impor tais requisitos nos casos em que, dada a natureza ou o tema dos serviços de comunicação social audiovisual a pedido, tal fosse impraticável ou injustificado.*"

Importa tornar, o mais possível, objetiva a aplicação desta norma "*de minimis*" indexando, por exemplo, ao conceito de micro e pequenas empresas no âmbito do Título I do Anexo à Recomendação da Comissão 2003/361/CE.

São estas, de um modo geral, as nossas observações e os nossos contributos para o processo legislativo em curso na UE, mantendo-nos, naturalmente, ao dispor para a prestação de qualquer esclarecimento complementar.

Pela GEDIPE e pela FEVIP

António Paulo Santos
(Diretor Geral)



Council of the
European Union

Brussels, 25 May 2018
(OR. en)

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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.

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on copyright in the Digital Single Market
(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Articles 53(1), 62 and 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹,

Having regard to the opinion of the Committee of the Regions²,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights should contribute further to the achievement of those objectives.

¹ OJ C , , p. .

² OJ C , , p. .

- (2) The Directives which have been adopted in the area of copyright and related rights provide for a high level of protection for rightholders and create a framework wherein the exploitation of works and other protected subject-matter can take place. This harmonised legal framework contributes to the good functioning of the internal market; it stimulates innovation, creativity, investment and production of new content, also in the digital environment. The protection provided by this legal framework also contributes to the Union's objective of respecting and promoting cultural diversity while at the same time bringing the European common cultural heritage to the fore. Article 167(4) of the Treaty on the Functioning of the European Union requires the Union to take cultural aspects into account in its action.
- (3) Rapid technological developments continue to transform the way works and other subject-matter are created, produced, distributed and exploited. New business models and new actors continue to emerge. The objectives and the principles laid down by the Union copyright framework remain sound. However, legal uncertainty remains, for both rightholders and users, as regards certain uses, including cross-border uses, of works and other subject-matter in the digital environment. As set out in the Communication of the Commission entitled 'Towards a modern, more European copyright framework'³, in some areas it is necessary to adapt and supplement the current Union copyright framework keeping a high level of protection of copyright and related rights. This Directive provides for rules to adapt certain exceptions and limitations to digital and cross-border environments, as well as measures to facilitate certain licensing practices as regards the dissemination of out-of-commerce works and the online availability of audiovisual works on video-on-demand platforms with a view to ensuring wider access to content. In order to achieve a well-functioning marketplace for copyright, there should also be rules on rights in publications, on the use of works and other subject-matter by online service providers storing and giving access to user uploaded content and on the transparency of authors' and performers' contracts.

³ COM(2015) 626 final.

- (4) This Directive is based upon, and complements, the rules laid down in the Directives currently in force in this area, in particular Directive 96/9/EC of the European Parliament and of the Council⁴, Directive 2000/31/EC of the European Parliament and of the Council⁵, Directive 2001/29/EC of the European Parliament and of the Council⁶, Directive 2006/115/EC of the European Parliament and of the Council⁷, Directive 2009/24/EC of the European Parliament and of the Council⁸, Directive 2012/28/EU of the European Parliament and of the Council⁹ and Directive 2014/26/EU of the European Parliament and of the Council¹⁰.

⁴ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p. 20–28).

⁵ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ L 178, 17.07.2000, p. 1–16).

⁶ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10–19).

⁷ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 376, 27.12.2006, p. 28–35).

⁸ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ L 111, 5.5.2009, p. 16–22).

⁹ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (OJ L 299, 27.10.2012, p. 5–12).

¹⁰ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (OJ L 84, 20.3.2014, p. 72–98).

- (5) In the fields of research, education and preservation of cultural heritage, digital technologies permit new types of uses that are not clearly covered by the current Union rules on exceptions and limitations. In addition, the optional nature of exceptions and limitations provided for in Directives 2001/29/EC, 96/9/EC and 2009/24/EC in these fields may negatively impact the functioning of the internal market. This is particularly relevant as regards cross-border uses, which are becoming increasingly important in the digital environment. Therefore, the existing exceptions and limitations in Union law that are relevant for scientific research, teaching and preservation of cultural heritage should be reassessed in the light of those new uses. Mandatory exceptions or limitations for uses of text and data mining technologies in the field of scientific research, illustration for teaching in the digital environment and for preservation of cultural heritage should be introduced. The exceptions and limitations existing in Union law should continue to apply, including to text and data mining, education and preservation activities, as long as they do not limit the scope of the mandatory exceptions laid down in this Directive and on condition that their application does not adversely affect nor circumvent the mandatory rules set out in this Directive. Directives 96/9/EC and 2001/29/EC should be adapted.
- (6) The exceptions and the limitation provided for in this Directive seek to achieve a fair balance between the rights and interests of authors and other rightholders on the one hand, and of users on the other. They can be applied only in certain special cases which do not conflict with the normal exploitation of the works or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholders.

- (7) The protection of technological measures established in Directive 2001/29/EC remains essential to ensure the protection and the effective exercise of the rights granted to authors and to other rightholders under Union law. This protection should be maintained while ensuring that the use of technological measures does not prevent the enjoyment of the exceptions and the limitation established in this Directive. Rightholders should have the opportunity to ensure this through voluntary measures. They should remain free to choose the appropriate means of enabling the beneficiaries of the exceptions and the limitation established in this Directive to benefit from them. In the absence of voluntary measures, Member States should take appropriate measures in accordance with the first subparagraph of Article 6(4) of Directive 2001/29/EC, including where works and other subject-matter are made available through on-demand services.
- (8) New technologies enable the automated computational analysis of information in digital form, such as text, sounds, images or data, generally known as text and data mining. Those technologies allow researchers to process large amounts of information with a view to gaining new knowledge and discovering new trends. Whilst text and data mining technologies are prevalent across the digital economy, there is widespread acknowledgment that text and data mining can in particular benefit the research community and in so doing support innovation. These technologies benefit research organisations as well as cultural heritage institutions, which may also carry out research in the context of their main activities. However, in the Union, such organisations and institutions are confronted with legal uncertainty as to the extent to which they can perform text and data mining of content. In certain instances, text and data mining may involve acts protected by copyright and/or by the *sui generis* database right, notably the reproduction of works or other subject-matter and/or the extraction of contents from a database. Where there is no exception or limitation which applies, an authorisation to undertake such acts would be required from rightholders.

- (8a) Text and data mining may also be carried out in relation to mere facts or data which are not protected by copyright and in such instances no authorisation is required under copyright law. There may also be instances of text and data mining which do not involve acts of reproduction or where the reproductions made fall under the mandatory exception for temporary acts of reproduction laid down in Article 5(1) of Directive 2001/29/EC, which should continue to apply to text and data mining techniques which do not involve the making of copies beyond the scope of that exception.
- (9) Union law provides for certain exceptions and limitations covering uses for scientific research purposes which may apply to acts of text and data mining. However, those exceptions and limitations are optional and not fully adapted to the use of technologies in scientific research. Moreover, where researchers have lawful access to content, for example through subscriptions to publications or open access licences, the terms of the licences may exclude text and data mining. As research is increasingly carried out with the assistance of digital technology, there is a risk that the Union's competitive position as a research area will suffer unless steps are taken to address the legal uncertainty for text and data mining.
- (10) This legal uncertainty should be addressed by providing for a mandatory exception to the exclusive right of reproduction and also to the right to prevent extraction from a database. In line with the existing European research policy, which encourages universities and research institutes to develop collaborations with the private sector, research organisations should also benefit from the exception when their research activities are carried out in the framework of public-private partnerships. While research organisations and cultural heritage institutions should remain the beneficiaries of the exception, they should be able to rely on their private partners for carrying out text and data mining, including by using their technological tools.

- (11) Research organisations across the Union encompass a wide variety of entities the primary goal of which is to conduct scientific research or to do so together with the provision of educational services. The term "scientific research" within the meaning of this Directive covers both the natural sciences and the human sciences. Due to the diversity of such entities, it is important to have a common understanding of research organisations. They should for example cover entities such as research institutes, hospitals carrying out research, universities, including university libraries, or other higher education institutions. Despite different legal forms and structures, research organisations across the Member States generally have in common that they act either on a not for profit basis or in the context of a public-interest mission recognised by the State. Such a public-interest mission may, for example, be reflected through public funding or through provisions in national laws or public contracts. Conversely, organisations upon which commercial undertakings have a decisive influence allowing them to exercise control because of structural situations such as their quality of shareholders or members, which may result in preferential access to the results of the research, should not be considered research organisations for the purposes of this Directive.
- (11a) Cultural heritage institutions should be understood as covering publicly accessible libraries, museums and archives regardless of the type of works and other subject matter which they hold in their permanent collections, as well as film or audio heritage institutions. They should include, among others, national libraries and national archives. They should also include educational establishments and public sector broadcasting organisations, as far as their archives and publicly accessible libraries are concerned.
- (11b) Research organisations and cultural heritage institutions, including the persons attached thereto, should be covered by the text and data mining exception regarding content to which they have lawful access. Lawful access should be understood as covering access to content based on open access policy or through contractual arrangements between rightholders and research organisations or cultural heritage institutions, such as subscriptions, or through other lawful means. For instance, in cases of subscriptions taken by research organisations or cultural heritage institutions, the persons attached thereto covered by these subscriptions would be deemed to have lawful access. Lawful access also covers access to content that is freely available online.

- (11c) Research organisations and cultural heritage institutions may in certain cases, for example for subsequent verification of scientific research results, need to retain the copies made under the exception for the purposes of carrying out text and data mining. In such cases, the copies should be stored in a secure environment and not be retained for longer than necessary for the scientific research activities. Member States may determine, at national level and after discussions with relevant stakeholders, further concrete modalities for retaining the copies, including the possibility to appoint trusted bodies for the purpose of storing such copies. In order not to unduly restrict the application of the exception, these modalities should be proportionate and limited to what is needed for retaining the copies in a safe manner and preventing unauthorised uses. Uses for the purpose of scientific research other than text and data mining, such as scientific peer review and joint research, should remain covered, where applicable, by the exception or limitation provided for in Article 5(3)(a) of Directive 2001/29/EC.
- (12) In view of a potentially high number of access requests to and downloads of their works or other subject-matter, rightholders should be allowed to apply measures when there is a risk that the security and integrity of their systems or databases could be jeopardised. Such measures could for example be used to ensure that only persons having lawful access to their data can access it, including through IP address validation or user authentication. These measures should however remain proportionate to the risks involved and should not prevent or make excessively difficult text and data mining carried out by researchers.
- (13) In view of the nature and scope of the exception, which is limited to entities carrying out scientific research any potential harm to rightholders created through this exception should be minimal. Therefore, Member States should not provide for compensation for rightholders as regards uses under the text and data mining exception introduced by this Directive.

(13a) In addition to their significance in the context of scientific research, text and data mining techniques are widely used both by private and public entities to analyse large amounts of data in different areas of life and for various purposes, including for government services, complex business decisions and the development of new applications or technologies. Rightholders should remain able to license the uses of their works and other subject-matter falling outside the scope of the mandatory exception provided for in this Directive and the existing exceptions and limitations provided for in Directive 2001/29/EC. At the same time, consideration should be given to the fact that users of text and data mining techniques may be faced with legal uncertainty as to whether temporary reproductions and extractions which are a part of the process of text and data mining may be carried out on publicly available and lawfully accessed works and other subject-matter, in particular when the reproductions or extractions made for the purposes of the technical process may not fulfil all the conditions of the existing exception for temporary acts of reproduction in Article 5(1) of Directive 2001/29/EC. In order to provide for more legal certainty in such cases, this Directive should enable the Member States to provide under certain conditions for an exception or limitation for temporary reproductions and extractions of works and other subject-matter, insofar as these form a part of the text and data mining process and the copies made are not kept beyond that process. This optional exception or limitation should only apply when the work or other subject-matter is accessed lawfully by the beneficiary, including when it has been made available to the public online, and insofar as the rightholders have not reserved the right to make reproductions and extractions for text and data mining, for example by agreement, unilateral declaration, including through the use of machine readable metadata or by the use of technical means. Rightholders should be able to apply measures to ensure that their reservations in this regard are respected. This optional exception or limitation should leave intact the mandatory exception for text and data mining for research purposes laid down in this Directive.

- (14) Article 5(3)(a) of Directive 2001/29/EC allows Member States to introduce an exception or limitation to the rights of reproduction, communication to the public and making available to the public of works and other subject matter in such a way that members of the public may access them from a place and a time individually chosen by them (‘making available to the public’), for the sole purpose of illustration for teaching. In addition, Articles 6(2)(b) and 9(b) of Directive 96/9/EC permit the use of a database and the extraction of a substantial part of its contents for the purpose of illustration for teaching. The scope of those exceptions or limitations as they apply to digital uses is unclear. In addition, there is a lack of clarity as to whether those exceptions or limitations would apply where teaching is provided online and at a distance. Moreover, the existing legal framework does not provide for a cross-border effect. This situation may hamper the development of digitally-supported teaching activities and distance learning. Therefore, the introduction of a new mandatory exception or limitation is necessary to ensure that educational establishments benefit from full legal certainty when using works or other subject-matter in digital teaching activities, including online and across borders.
- (15) While distance learning and cross-border education programmes are mostly developed at higher education level, digital tools and resources are increasingly used at all education levels, in particular to improve and enrich the learning experience. The exception or limitation provided for in this Directive should therefore benefit all educational establishments recognised by a Member State, including primary, secondary, vocational and higher education. It should apply only to the extent that the uses are justified by the non-commercial purpose of the particular teaching activity. The organisational structure and the means of funding of an educational establishment should not be the decisive factors to determine the non-commercial nature of the activity.

(16) The exception or limitation for the sole purpose of illustration for teaching provided for in this Directive should be understood as covering digital uses of works and other subject-matter to support, enrich or complement the teaching, including learning activities. In most cases, the concept of illustration would therefore imply uses of parts or extracts of works only, which should not substitute the purchase of materials primarily intended for educational markets. When implementing the exception or limitation, Member States should remain free to specify, for the different categories of works or other subject-matter and in a balanced manner, the proportion of a work or other subject-matter that may be used for the sole purpose of illustration for teaching. Uses allowed under the exception or limitation should be understood to cover the specific accessibility needs of persons with a disability in the context of illustration for teaching.

(16a) The use of the works or other subject-matter under the exception or limitation should be only in the context of teaching and learning activities carried out under the responsibility of educational establishments, including during examinations or teaching activities taking place outside the premises of educational establishments, for example in a museum, library or another cultural heritage institution, and be limited to what is necessary for the purpose of such activities. The exception or limitation should cover both uses of works and other subject matter made in the classroom or in other venues through digital means, for example electronic whiteboards or digital devices which may be connected to the Internet, as well as uses made at a distance through secure electronic networks, such as online courses or access to teaching material complementing a given course. Secure electronic networks should be understood as digital teaching and learning environments access to which is limited to the educational establishment's teaching staff and to the pupils or students enrolled in a study programme, notably through appropriate authentication procedures, including password based authentication.

(17) Different arrangements, based on the implementation of the exception provided for in Directive 2001/29/EC or on licensing agreements covering further uses, are in place in a number of Member States in order to facilitate educational uses of works and other subject-matter. Such arrangements have usually been developed taking account of the needs of educational establishments and different levels of education. Whereas it is essential to harmonise the scope of the new mandatory exception or limitation in relation to digital uses and cross-border teaching activities, the modalities of implementation may differ from a Member State to another, to the extent they do not hamper the effective application of the exception or limitation or cross-border uses. Member States should for example remain free to require that the use of works and other subject matter should respect moral rights of authors and performers. This should allow Member States to build on the existing arrangements concluded at national level. In particular, Member States could decide to subject the application of the exception or limitation, fully or partially, to the availability of adequate licences, covering at least the same uses as those allowed under the exception. Member States could notably use this mechanism to give precedence to licences for materials which are primarily intended for the educational market or for sheet music. In order to avoid that such mechanism results in legal uncertainty or administrative burden for educational establishments, Member States adopting this approach should take measures to ensure that rightholders make the licensing schemes allowing digital uses of works or other subject-matter for the purpose of illustration for teaching easily available and that educational establishments are aware of the existence of such licensing schemes. Such measures may include the development of licensing schemes tailored to the needs of educational establishments and the development of information tools aimed at ensuring the visibility of the existing licensing schemes.

(17a) Member States should remain free to provide that rightholders receive fair compensation for the digital uses of their works or other subject-matter under the exception or limitation for illustration for teaching provided for in this Directive. For the purposes of determining the possible level of fair compensation, due account should be taken, inter alia, of Member States' educational objectives and of the harm to rightholders.

- (18) An act of preservation of a work or other subject-matter in the collection of a cultural heritage institution may require a reproduction and consequently the authorisation of the relevant rightholders. Cultural heritage institutions are engaged in the preservation of their collections for future generations. Digital technologies offer new ways to preserve the heritage contained in those collections but they also create new challenges. In view of these new challenges, it is necessary to adapt the current legal framework by providing a mandatory exception to the right of reproduction in order to allow those acts of preservation.
- (19) Different approaches in the Member States for acts of preservation by cultural heritage institutions hamper cross-border cooperation and the sharing of means of preservation by such institutions in the internal market, leading to an inefficient use of resources.
- (20) Member States should therefore be required to provide for an exception to permit cultural heritage institutions to reproduce works and other subject-matter permanently in their collections for preservation purposes, for example to address technological obsolescence or the degradation of original supports. Such an exception should allow the making of copies by the appropriate preservation tool, means or technology, in the required number and at any point in the life of a work or other subject-matter to the extent required for preservation purposes. Acts of reproduction undertaken by cultural heritage institutions for purposes other than the preservation of works and other subject-matter in their permanent collections should remain subject to the authorisation of rightholders, unless permitted by other exceptions or limitations provided for by Union law.
- (20a) Cultural heritage institutions do not necessarily have the technical means or expertise to undertake the acts required to preserve their collections themselves, particularly in the digital environment, and may therefore have recourse to the assistance of other cultural institutions and other third parties for that purpose. Under this exception, cultural heritage institutions should therefore be allowed to rely on third parties acting on their behalf and under their responsibility, including those that are based in other Member States, for the making of copies.

- (21) For the purposes of this Directive, works and other subject-matter should be considered to be permanently in the collection of a cultural heritage institution when copies are owned or permanently held by such institutions, for example as a result of a transfer of ownership or licence agreements or permanent custody arrangements.
- (22) Cultural heritage institutions should benefit from a clear framework for the digitisation and dissemination, including across borders, of works or other subject-matter that are considered out of commerce for the purposes of this Directive. However, the particular characteristics of the collections of out-of-commerce works, together with the amount of works involved in mass digitisation projects, mean that obtaining the prior consent of the individual rightholders may be very difficult. This can be due, for example, to the age of the works or other subject-matter, their limited commercial value or the fact that they were never intended for commercial use. It is therefore necessary to provide for measures to facilitate the collective licensing of rights in out-of-commerce works that are permanently in the collections of cultural heritage institutions and thereby to allow the conclusion of agreements with cross-border effect in the internal market.
- (23) Member States should, within the framework provided for in this Directive, have flexibility in choosing the specific type of mechanism, such as extended collective licensing or presumption of representation, allowing licences for out-of-commerce works to extend to the rights of rightholders that have not mandated a representative collective management organisation, in accordance with their legal traditions, practices or circumstances. Member States should also have flexibility in determining the requirements for collective management organisations to be sufficiently representative, as long as this is based on a significant number of rightholders in the relevant type of works or other subject-matter who have given a mandate allowing the licensing of the relevant type of use. Member States should be free to establish specific rules applicable to cases where more than one collective management organisation is representative for the relevant works or other subject matter, requiring for example joint licences or an agreement between the relevant organisations.

- (24) For the purpose of those licensing mechanisms, a rigorous and well-functioning collective management system is important. That system includes in particular rules of good governance, transparency and reporting, as well as the regular, diligent and accurate distribution and payment of amounts due to individual rightholders, as provided for by Directive 2014/26/EU. Additional appropriate safeguards should be available for all rightholders, who should be given the opportunity to exclude the application of such mechanisms in relation to all their works or other subject-matter or to all licences, or in relation to particular works or other subject-matter or to particular licences, at any time before or under the duration of the licence. Conditions attached to those mechanisms should not affect their practical relevance for cultural heritage institutions. It is important that when a rightholder excludes the application of such mechanisms to one or more of their works or other subject-matter, the informed collective management organisation does not continue to issue licences covering the relevant uses and any ongoing uses are terminated within a reasonable period. Such exclusion by the rightholder should not affect their claim to remuneration for the actual use of the work or other subject-matter.
- (24a) This Directive does not affect the possibility for Member States to determine the allocation of legal responsibility for the compliance of the licensing and the use of out-of-commerce works with the conditions set out in this Directive and for the compliance of the parties with the terms of those licenses.

(25) Considering the variety of works and other subject-matter in the collections of cultural heritage institutions, it is important that the licensing mechanisms introduced by this Directive are available and can be used in practice for different types of works and other subject-matter, including photographs, software, phonograms, audio-visual works and unique works of art, irrespective of whether they have ever been commercially available. Never-in-commerce works may include posters, leaflets, trench journals or amateur audiovisual works, but also unpublished works or other subject-matter, without prejudice to other applicable legal constraints, such as national rules on moral rights. When a work is available in any of its different versions, such as subsequent editions of literary works and alternate cuts of cinematographic works, or in any of its different manifestations, such as digital and printed formats of the same work, this work or other subject-matter should not be considered out of commerce. Conversely, the commercial availability of adaptations, including other language versions or audiovisual adaptations of a literary work, should not preclude the determination of the out-of-commerce status of a work in a given language. In order to reflect the specificities of different types of works and other subject-matter as regards modes of publication and distribution and to facilitate the usability of those mechanisms, specific requirements and procedures may have to be established for the practical application of those licensing mechanisms, such as a time period which needs to have been elapsed since the first commercial availability of the work. It is appropriate that Member States consult rightholders, users and collective management organisations when doing so.

- (25a) When determining whether works and other subject-matter are out of commerce, a reasonable effort should be required to assess their availability to the public in the customary channels of commerce, taking into account the characteristics of the particular work or set of works. Member States should be free to determine the allocation of responsibilities for making the reasonable effort. The reasonable effort should not have to be repeated over time but it should also take account of any easily accessible evidence of upcoming availability of works in the customary channels of commerce. A work-by-work assessment should only be required when this is considered reasonable in view of the availability of relevant information, the likelihood of commercial availability and the expected transaction cost. The verification of availability should normally take place in the Member State where the cultural heritage institution is established, unless verification across borders is considered reasonable, for example when there is easily available information that a literary work was first published in a given language version in another Member State. In many cases the out-of-commerce status of a set of works could be determined through a proportionate mechanism, such as sampling. The limited availability of a work, such as its availability in second-hand shops, or the theoretical possibility to obtain a licence to a work should not be considered as availability to the public in the customary channels of commerce.
- (26) For reasons of international comity, the licensing mechanisms for the digitisation and dissemination of out-of-commerce works provided for in this Directive should not apply to sets of out-of-commerce works or other subject-matter when there is available evidence to presume that they predominantly consist of works or other subject-matter of third countries, unless the concerned collective management organisation is sufficiently representative for that third country, for example via a representation agreement. This assessment can be based on the evidence available following the reasonable effort to determine the out-of-commerce status of the works, without the need to search for further evidence. A work-by-work assessment of the origin of the out-of-commerce works should only be required insofar as it is also required for the reasonable effort to determine their commercial availability.

(27) The contracting cultural heritage institutions and collective management organisations should remain free to agree on the territorial scope of the licence, the licence fee and the allowed uses. Uses covered by such licence should not be for profit making purpose, including when copies are distributed by the cultural heritage institution, such as in the case of promotional material about an exhibition. At the same time, as the digitisation of the collections of cultural heritage institutions can entail significant investments, any licences granted under the mechanisms provided for in this Directive should not prevent cultural heritage institutions from generating reasonable revenues for the purposes of covering the costs of the licence and the costs of digitising and disseminating the works and other subject-matter covered by the licence.

(28) Information regarding the future and ongoing use of out-of-commerce works and other subject-matter by cultural heritage institutions on the basis of the licensing mechanisms provided for in this Directive and the arrangements in place for all rightholders to exclude the application of licences to their works or other subject-matter should be adequately publicised both before a licence is granted and during the operation of the licence as appropriate. This is particularly important when uses take place across borders in the internal market. It is therefore appropriate to make provision for the creation of a single publicly accessible online portal for the Union to make such information available to the public for a reasonable period of time before the use takes place. This portal should facilitate the possibility for rightholders to exclude the application of licences to their works or other subject-matter. Under Regulation (EU) No 386/2012 of the European Parliament and of the Council¹¹, the European Union Intellectual Property Office is entrusted with certain tasks and activities, financed by making use of its own budgetary means, aiming at facilitating and supporting the activities of national authorities, the private sector and Union institutions in the fight against, including the prevention of, infringement of intellectual property rights. It is therefore appropriate to rely on that Office to establish and manage the European portal making such information available. In addition to making the information available through the portal, further appropriate publicity measures may need to be taken on a case-by-case basis in order to increase the awareness of affected rightholders, for example through the use of additional channels of communication to reach a wider public. The necessity, the nature and the geographic scope of the additional publicity measures should depend on the characteristics of the relevant out-of-commerce works or other subject-matter, the terms of the licences and the existing practices in Member States. Publicity measures should be effective without the need to inform each rightholder individually.

¹¹ Regulation (EU) No 386/2012 of the European Parliament and of the Council of 19 April 2012 on entrusting the Office for Harmonization in the Internal Market (Trade Marks and Designs) with tasks related to the enforcement of intellectual property rights, including the assembling of public and private-sector representatives as a European Observatory on Infringements of Intellectual Property Rights (OJ L 129, 16.5.2012, p. 1–6).

(28a) The measures provided for in this Directive to facilitate the collective licensing of rights in out-of-commerce works or other subject-matter that are permanently in the collections of cultural heritage institutions should be without prejudice to the use of such works or other subject-matter under exceptions or limitations provided for in Union law or under other licences with an extended effect, where such licensing is not based on the out-of-commerce status of the covered works or other subject matter. These measures should also be without prejudice to national mechanisms for the use of out of commerce works based on licences between collective management organisation and users other than cultural heritage institutions.

(28b) Mechanisms of collective licensing with an extended effect allow a collective management organisation to offer licences as a collective licensing body on behalf of rightholders irrespective of whether they have authorised the organisation to do so. Systems built on such mechanisms, such as extended collective licensing, legal mandates or presumptions of representation, are a well-established practice in several Member States and may be used in different areas. A functioning copyright framework that works for all parties requires the availability of these proportionate, legal mechanisms for the licensing of works. Member States should therefore be able to rely on solutions, allowing relevant licensing organisations, which are owned or controlled by their rightholder members (or entities representing rightholders) or organised on a not for profit basis, to offer licences covering potentially large volumes of works or other subject-matter for certain types of use, and distribute the revenue received to rightholders.

(28c) In the case of some uses, together with the usually large amount of works involved, the transaction cost of individual rights clearance with every concerned rightholder is prohibitively high and without effective collective licensing mechanisms all the required transactions in these areas to enable the use of these works or other subject matter are unlikely to take place. Extended collective licensing and similar mechanisms have made it possible to conclude agreements in areas affected by this market failure where traditional collective licensing does not provide an exhaustive solution for covering all works and other subject-matter to be used. These mechanisms serve as a complement to collective management based on individual mandates, by providing full legal certainty to users. At the same time, they provide a further opportunity to right holders to benefit from the legitimate use of their works.

(28d) Given the increasing importance of the ability to offer flexible licensing solutions in the digital age, and the increasing use of such schemes in Member States, it is beneficial to further clarify in Union law the status of licensing mechanisms allowing collective management organisations to conclude licences, on a voluntary basis, irrespective of whether all rightholders have authorised the organisation to do so. Member States should have the ability to maintain and introduce such schemes in accordance with their legal traditions, practices or circumstances, subject to the safeguards provided for in this Directive and in full respect of Union law and their international obligations related to copyright. These schemes would only have effect in the territory of the Member State concerned, unless otherwise provided for in Union law. Member States should have flexibility in choosing the specific type of mechanism allowing licences for works or other subject-matter to extend to the rights of rightholders that have not authorised the organisation that concludes the agreement, as long as it guarantees sufficient protection of the non-member rightholders. Such mechanisms may include extended collective licensing, legal mandate and presumptions of representation. The provisions of this Directive concerning collective licensing should not affect existing possibilities of Member States to apply mandatory collective management or other collective licensing mechanisms with an extended effect, such as the one included in Article 3 of Directive 93/83/EEC.

(28e) It is important that such mechanisms are only applied in well-defined areas of uses, where obtaining authorisations from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction, i.e. a licence that covers all the involved rightholders unlikely to occur due to the nature of the use or of the types of works concerned. It is equally important that the licensed use neither affects adversely the economic value of the relevant rights nor deprives rightholders of significant commercial benefits. Moreover, Member States should ensure that appropriate safeguards are in place to protect the legitimate interests of rightholders that are not represented by the organisation offering the licence.

(28f) Specifically, to justify the extended effect of the mechanisms, the organisation should be, on the basis of authorisations from rightholders, sufficiently representative of the types of works or other subject-matter and of the rights which are the subject of the licence. To ensure legal certainty and confidence in the mechanisms Member States may determine the allocation of legal responsibility for uses authorised by the licence agreement. Equal treatment should be guaranteed to all rightholders whose works are exploited under the licence as regards, notably, access to information on the licensing and the distribution of remuneration. Publicity measures should be effective throughout the duration of the licence without the need to inform each rightholder individually. In order to ensure that rightholders can easily retain control of their works, and prevent any uses of their works that would be prejudicial to their interests, rightholders must be given an effective opportunity to exclude the application of such mechanisms to their works or other subject-matter for all uses and works or other subject-matter, or for specific uses and works or other subject-matter. In such cases, any ongoing uses should be terminated within a reasonable period. Member States may also decide that additional measures are appropriate to protect rightholders.

(28g) Member States should ensure that the purpose and scope of any licence granted as a result of these mechanisms, as well as the possible users, should always be carefully and clearly defined in national legislation or, if the underlying legislation is a general provision, in the licensing practices applied as a result of such general provisions, or in the licences granted. The ability to operate a licence under these mechanisms should also be limited to organisations which are either owned or controlled by their right holder members or which operate on a not for profit basis, regulated by national law implementing Directive 2014/26/EU.

(28h) Given the different traditions and experiences with extended collective licensing across Member States and their applicability to rightholders irrespective of their nationality or their Member State of residence, it is important to ensure transparency and dialogue at Union level about the practical functioning of these mechanisms, including as regards the effectiveness of safeguards for rightholders, their usability and the potential need to lay down rules to give such schemes cross-border effect within the internal market. To ensure transparency, information about the use of such mechanisms under this Directive should be regularly published by the Commission. Member States that have introduced such mechanisms should therefore inform the Commission about relevant national legislation and its application in practice, including scopes and types of licensing introduced on the basis of general legislation, the scale of licensing and the collective management organisations involved. Such information should be discussed with Member States in the contact committee referred to in Article 12(3) of Directive 2001/29/EC. The Commission should publish a report by 31 December 2020 on the use of such mechanisms in the Union and their impact on licensing and rightholders.

- (29) Video-on-demand services have the potential to play a decisive role in the dissemination of audiovisual works across the European Union. However, the availability of those works, in particular European works, on video-on-demand services remains limited. Agreements on the online exploitation of such works may be difficult to conclude due to issues related to the licensing of rights. Such issues may for instance appear when the holder of the rights for a given territory has low economic incentive to exploit a work online and does not license or holds back the online rights, which can lead to the unavailability of audiovisual works on video-on-demand services. Other issues may be linked to the windows of exploitation.
- (30) To facilitate the licensing of rights in audiovisual works to video-on-demand services, this Directive requires Member States to provide for a negotiation mechanism allowing parties willing to conclude an agreement to rely on the assistance of an impartial body or of one or more mediators. For that purpose, Member States may either create a new body or rely on an existing one that fulfils the conditions established by this Directive. Member States may designate one or more competent bodies or mediators. The body or the mediators should meet with the parties and help with the negotiations by providing professional and external advice. The body or the mediators could meet with the parties to facilitate the start of negotiations or in the course of the negotiations to facilitate the conclusion of an agreement. The use of and the participation in the negotiation mechanism should remain voluntary and should not affect the parties' contractual freedom. Against that background, Member States should be free to decide on the concrete functioning of the negotiation mechanism, including the timing and duration of the assistance to negotiations and the bearing of the costs. Member States should ensure that administrative and financial burdens remain proportionate to guarantee the efficiency of the negotiation mechanism.

- (31) A free and pluralist press is essential to ensure quality journalism and citizens' access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society. The wide availability of press publications online has given rise to the emergence of new online services, such as news aggregators or media monitoring services, for which the reuse of press publications constitutes an important part of their business models and a source of revenues. Publishers of press publications are facing problems in licensing the online use of their publications to the providers of these kind of services, making it more difficult for them to recoup their investments. In the absence of recognition of publishers of press publications as rightholders, licensing and enforcement of rights in press publications regarding online uses by information society service providers in the digital environment are often complex and inefficient.
- (32) The organisational and financial contribution of publishers in producing press publications needs to be recognised and further encouraged to ensure the sustainability of the publishing industry. It is therefore necessary to provide at Union level a harmonised legal protection for press publications in respect of online uses by information society service providers, leaving unaffected current copyright rules in Union law applicable to uses of press publications by other users, including individual users. Such protection should be effectively guaranteed through the introduction, in Union law, of rights related to copyright for the reproduction and making available to the public of press publications published by publishers established in a Member State in respect of online uses by information society service providers within the meaning of Directive (EU) 2015/1535 of the European Parliament and of the Council.¹² The legal protection for press publications provided for by this directive should only benefit publishers established in a Member State in the meaning of the Treaty of the functioning of the European Union, i.e. when they have their registered office, central administration or principal place of business within the Union.

¹² Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1–15).

- (33) For the purposes of this Directive, it is necessary to define the concept of press publication in a way that embraces only journalistic publications, published in any media, including on paper, in the context of an economic activity which constitutes a provision of services under Union law. The press publications to be covered are those whose purpose is to inform the general public and which are periodically or regularly updated. Such publications would include, for instance, daily newspapers, weekly or monthly magazines of general or special interest and news websites. Press publications contain mostly literary works but increasingly include other types of works and subject-matter, notably photographs and videos. Periodical publications published for scientific or academic purposes, such as scientific journals, should not be covered by the protection granted to press publications under this Directive.
- (34) The rights granted to the publishers of press publications under this Directive should have the same scope as the rights of reproduction and making available to the public provided for in Directive 2001/29/EC, insofar as online uses by information society service providers are concerned. They should not extend to acts of hyperlinking when they do not constitute communication to the public. They should also be subject to the same provisions on exceptions and limitations as those applicable to the rights provided for in Directive 2001/29/EC, including the exception on quotation for purposes such as criticism or review laid down in Article 5(3)(d) of that Directive.

- (34a) Uses of press publications by information society service providers can consist of the use of entire publications or articles but also of parts of press publications. Such uses of parts of press publications have also gained economic relevance. At the same time, where such parts are insubstantial, the use thereof by information society service providers may not undermine the investments made by publishers of press publications in the production of content. Furthermore, insubstantial parts of press publications are not usually the expression of the intellectual creation of their authors, in accordance with the case law of the Court of Justice of the European Union. Therefore, it is appropriate to provide that the use of insubstantial parts of press publications should not fall within the scope of the rights provided for in this Directive. To determine the insubstantial nature of parts of press publications for the purposes of this Directive, Member States may take into account whether these parts are the expression of the intellectual creation of their authors or whether these parts are limited to individual words or very short excerpts, without independent economic significance, or both criteria.
- (35) The protection granted to publishers of press publications under this Directive should not affect the rights of the authors and other rightholders in the works and other subject-matter incorporated therein, including as regards the extent to which authors and other rightholders can exploit their works or other subject-matter independently from the press publication in which they are incorporated. Therefore, publishers of press publications should not be able to invoke the protection granted to them against authors and other rightholders or against other authorised users of the same works and other subject-matter. This is without prejudice to contractual arrangements concluded between the publishers of press publications, on the one side, and authors and other rightholders, on the other side.

(36) Publishers, including those of press publications, books or scientific publications, often operate on the basis of the transfer of authors' rights by means of contractual agreements or statutory provisions. In this context, publishers make an investment with a view to the exploitation of the works contained in their publications and may in some instances be deprived of revenues where such works are used under exceptions or limitations, such as the ones for private copying and reprography, including the corresponding existing national schemes for reprography in the Member States, or under public lending schemes. In a number of Member States the compensation or remuneration for such uses is shared between authors and publishers. In order to take account of this situation and improve legal certainty for all concerned parties, Member States should be allowed but not obliged to determine that, when an author has transferred or licensed his rights to a publisher or a collective management organisation that jointly represents authors and publishers or otherwise contributes with his works to a publication and there are systems in place to compensate for the harm caused by an exception or limitation, publishers are entitled to a share of such compensation. The same possibility should exist for remuneration for public lending, while Member States should remain free to decide not to provide publishers with such remuneration. Member States should remain free to determine the burden on the publisher to substantiate his claim for the compensation or remuneration and to lay down the conditions as to the sharing of this compensation or remuneration between authors and publishers in accordance with their national systems.

(37) Over the last years, the functioning of the online content marketplace has gained in complexity. Online content sharing services providing access to a large amount of copyright-protected content uploaded by their users have developed and have become main sources of access to content online. Legal uncertainty exists as to whether such services engage in copyright relevant acts and need to obtain authorisations from rightholders for the content uploaded by their users who do not hold the relevant rights in the uploaded content, without prejudice to the application of exceptions and limitations provided for in Union Law. This situation affects rightholders' possibilities to determine whether, and under which conditions, their content is used as well as their possibilities to get appropriate remuneration for it. It is therefore important to foster the development of the licensing market between rightholders and online content sharing service providers. These licensing agreements should be fair and keep a reasonable balance for both parties. Rightholders should receive an appropriate reward for the use of their works or other subject matter.

(37a) The definition of an online content sharing service provider under this Directive targets only online services which play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences. The services covered by this intervention are those the main or one of the main purposes of which is to provide access to a large amount of copyright-protected content uploaded by their users with the purpose of obtaining profit therefrom, either directly or indirectly, by organising it and promoting it in order to attract more audiences. Organising and promoting content involves for example indexing the content, presenting it in a certain manner and categorising it, as well as using targeted promotion on it. The definition does not include services whose main purpose is not to provide access to copyright protected content with the purpose of obtaining profit from this activity. These include, for instance, electronic communication services within the meaning of Regulation 2015/2120/EU, including internet access providers, as well as providers of cloud services which allow users, to upload content for their own use, such as cyberlockers, or online marketplaces whose main activity is online retail and not giving access to copyright protected content. Nor does this definition cover websites which store and provide access to content for non-for-profit purposes, such as online encyclopaedias, scientific or educational repositories or open source software developing platforms which do not store and give access to content for profit making purposes. In order to ensure the high level of copyright protection and to avoid the possible application of the liability exemption mechanism provided for in this Directive, this Directive should not apply to services the main purpose of which is to engage in or to facilitate copyright piracy.

(37b) The assessment of whether an online content sharing service provider stores and gives access to a large amount of copyright-protected content needs to be made on a case-by-case basis and take account of a combination of elements, such as the audience of the service and the number of files of copyright-protected content uploaded by the users of the services.

(38) This Directive clarifies under which conditions the online content sharing service providers are engaging in an act of communication to the public or making available to the public within the meaning of Article 3(1) and (2) of Directive 2001/29/EC. It does not change the concept of communication to the public or of making available to the public under Union law nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other services using copyright-protected content.

(38a) *Deleted.*

(38b) When online content sharing service providers communicate to the public, they should not benefit from the limited liability provided for in Article 14 of Directive 2000/31/EC for the purposes of copyright relevant acts. This should not affect the possibility for the same online content sharing providers to benefit from such exemption of liability for other purposes than copyright when they are providing their services and host content at the request of their users in accordance with Article 14 of Directive 2000/31/EC.

(38c) Taking into account the fact that online content sharing service providers give access to content which is not uploaded by them but by their users, it is appropriate to provide that, for cases where no authorisation has been obtained by the services and, for the purpose of this Directive, they should not be liable for unauthorised acts in specific, well-defined circumstances, when they demonstrate that they have acted in a diligent manner with the objective to prevent such unauthorised acts, without prejudice to remedies under national law for cases other than liability for copyright infringements and to the possibility for national courts or administrative authorities of issuing injunctions. In particular, they should not be liable if some unauthorised content is available on their services despite their best efforts to prevent its availability by applying effective and proportionate measures based on the information provided by rightholders. In addition, for the online content sharing service providers not to be liable, they should also in any case, upon notification by rightholders of specific unauthorised works or other subject-matter, act expeditiously to remove or disable access to these and make their best efforts to prevent their future availability.

(38ca) Appropriate collaboration carried out in good faith between online content sharing service providers and rightholders is essential for the effective application of the measures by the online content sharing service providers. These service providers should be transparent towards rightholders with regard to the deployed measures. As different measures may be used by the online content sharing service providers, they should provide rightholders with appropriate information on the type of measures used and the way they operate, including for example information on the success rate of the measures. Such information should be sufficiently specific to provide enough transparency for rightholders and allow cooperation to ensure effective functioning of the measures, without prejudice to the business secrets of service providers. Service providers should however not be required to provide rightholders with detailed and individualised information for each work and other subject matter identified. This is without prejudice to contractual arrangements, which may contain more specific provisions on the information to be provided where agreements are concluded between service providers and rightholders. On the other hand, rightholders should provide the service providers with necessary and relevant data for the application of the measures to their specific unauthorised works or other subject matter taking also into account the size of rightholders and the type of their works and other subject matter. As long as no data for the application of the measures or no notification concerning removal or disabling access to specific unauthorised works or other subject matter has been provided by rightholders and, as a result, online content sharing service providers cannot take the measures or expeditious action as set out in this Directive, these service providers should not be liable for unauthorised acts of communication to the public or of making available to the public.

(38d) Where online content sharing service providers obtain authorisations, including via licensing agreements, for the use on the service of content uploaded by the users of the services, these authorisations should also cover the copyright relevant acts in respect of uploads by the users but only in cases where the users act in their private capacity and for non-commercial purposes, such as sharing their content without any profit making purpose.

(38e) The measures taken by the online content sharing service providers to prevent the availability of unauthorised works or other subject-matter should be effective but remain proportionate, in particular with regard to the size of the online content sharing service provider. While this Directive is expected to foster the development of effective technologies on the market, the availability of the measures may differ according to the type of content for which the measures are applied. Having regard to the technological developments in line with industry best practices, those measures should consequently ensure a level of efficiency appropriate to the amount and the type of works or other subject matter uploaded by the users of the services. For the purposes of assessing the proportionality of measures to be taken by the online content sharing service providers, the state of the art of existing technologies for the different types of content as well as the size of the services should be taken into account notably whether they are small and micro enterprises. Different measures may be appropriate and proportionate per type of content and it is therefore not excluded that in some cases unauthorised content may only be avoided upon notification of rightholders. The measures should be proportionate in order to avoid imposing disproportionately complicated or costly obligations on certain online content sharing service providers, taking into account notably their small size. In particular, small and micro enterprises as defined in Title I of the Annex to Commission Recommendation 2003/361/EC, should be expected to be subject to less burdensome obligations than larger service providers. Therefore, taking into account the state of the art and the availability of technologies and their costs, in specific cases it may not be proportionate to expect small and micro enterprises to apply preventive measures and that therefore in such cases these enterprises should only be expected to expeditiously remove specific unauthorised works and other subject matter upon notification by rightholders.

(39) *Moved up in (38ca)*

(39a) *Moved up in (38ca)*

(39b) The measures taken by the online content sharing service providers should be without prejudice to the application of exceptions and limitations to copyright, including in particular those which guarantee the freedom of expression of users. For that purpose the service providers should put in place mechanisms allowing users to complain about the blocking or removal of uploaded content that could benefit from an exception or limitation to copyright. Replies to the users' complaints should be provided in a timely manner. To make these mechanisms function, cooperation from rightholders is needed, in particular with regard to the assessment of the complaints submitted and justifications for the removal of users' content. Member States should remain free to put in place independent authorities for assessing the complaints submitted by users and making decisions on their validity. The redress mechanism should be without prejudice to the right of the parties to take action before a court.

(39c) In order to foster best practices with regard to the measures to be taken by online content sharing service providers to avoid liability for unauthorised copyright acts, stakeholder dialogues should be encouraged by the Member States and the Commission. In order to give more clarity to the parties some guidance should also be provided by the Commission on the implementation of the measures including as to which measures could be considered to be proportionate for different types of content. For the purposes of the guidance the Commission should consult relevant stakeholders, including user organisations and technology providers, and take into account the developments on the market.

(40) Authors and performers need information to assess the economic value of their rights which are harmonised under Union law. This is especially the case where natural persons grant a licence or transfer rights for the purposes of exploitation in return for remuneration. This need does not arise when the contractual counterpart acts as end user of the work and does not exploit the work or performance itself, which could among others be the case in some employment contracts. Additionally, this need does not arise when the exploitation has ceased, or when the author or performer has granted licence to the general public without remuneration.

(40a) As authors and performers tend to be in a weaker contractual position when they grant licences or transfer their rights, they need information to assess the continued economic value of their rights, compared to the remuneration received for their licence or transfer, but they often face a lack of transparency. Therefore, the sharing of adequate information by their contractual counterparts or their successors in title is important for the transparency and balance in the system that governs the remuneration of authors and performers. The information should be: timely to allow access to recent data; adequate to include information relevant to the exploitation of the work or performance in a manner that is comprehensible to the author or performer; and sufficient to assess the economic value of the rights in question. As long as exploitation is ongoing, contractual counterparts of authors and performers should provide information available to them on all modes of exploitation and on all relevant revenues with a regularity which is appropriate in the relevant sector, but at least annually. The processing of personal data, such as contact details and information on remuneration, that are necessary to keep authors and performers informed on the exploitation of their works and performances should be carried out by those who need to comply with the transparency obligation on the basis of Article 6(1)(c) of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and the free movement of such data (General Data Protection Regulation).

- (40b) In order to ensure that exploitation-related information is duly provided to authors and performers also in cases where the rights have been sublicensed by the first contractor to other parties who exploit the rights, this Directive entitles authors and performers, in cases where the contractual partner has provided the information available to them, but the received information is not sufficient to assess the economic value of their rights, to request additional relevant information on the exploitation of the rights. This can be ensured either directly or through the contractual counterparts of authors and performers. Member States should have the option, in compliance with Union law, to provide for further measures through national provisions to ensure transparency for authors and performers.
- (41) When implementing transparency obligations, Member States should take into account the specificities of different content sectors, such as those of the music sector, the audiovisual sector and the publishing sector and all relevant stakeholders should be involved when determining such sector-specific requirements. Where relevant, the significance of the contribution of authors and performers to the overall work or performance should also be considered. Collective bargaining should be considered as an option to reach an agreement between the relevant stakeholders regarding transparency which should ensure authors and performers the same or higher level of transparency as the minimum requirements provided for in this Directive. To enable the adaptation of current reporting practices to the transparency obligations, a transitional period should be provided for. The transparency obligations do not need to apply to agreements concluded with collective management organisations and independent management entities or by other entities subject to the national rules implementing Directive 2014/26/EU as those are already subject to transparency obligations under Directive 2014/26/EU.

- (42) Certain contracts for the exploitation of rights harmonised at Union level are of long duration, offering few possibilities for authors and performers to renegotiate them with their contractual counterparts or their successors in title when the economic value of the rights turns out to be significantly higher than initially estimated. Therefore, without prejudice to the law applicable to contracts in Member States, a remuneration adjustment mechanism should be provided for cases where the remuneration originally agreed under a licence or a transfer of rights clearly becomes disproportionately low compared to the relevant revenues derived from the subsequent exploitation of the work or fixation of the performance by the contractual counterpart of the author or performer. The assessment of the situation should take account of the specific circumstances of each case, including the contribution of the author or performer, as well as of the specificities and remuneration practices of the different content sectors, and whether the contract is based on a collective bargaining agreement. Where the parties do not agree on the adjustment of the remuneration, the author or performer should be entitled to bring a claim before a court or other competent authority. This mechanism should not apply to contracts concluded by entities defined in Article 3(a) and (b) of Directive 2014/26/EU or by other entities subject to the national rules implementing Directive 2014/26/UE.
- (43) Authors and performers are often reluctant to enforce their rights against their contractual partners before a court or tribunal. Member States should therefore provide for an alternative dispute resolution procedure that addresses claims by authors and performers or their representatives on their behalf related to obligations of transparency and the contract adjustment mechanism. For that purpose, Member States may either create a new body or mechanism or rely on an existing one that fulfils the conditions established by this Directive irrespective of whether these are industry-led or public, including when incorporated in the national judiciary system. Member States should have flexibility in deciding how the costs of the dispute resolution procedure should be allocated. This alternative dispute resolution procedure should be without prejudice to the right of parties to assert and defend their rights by bringing an action before a court.

- (43a) The obligations laid down in Articles 14 and 15 of this Directive should be of a mandatory nature and parties should not be able to derogate from these contractual provisions, whether included in the contracts between authors, performers and their contractual counterparts or in agreements between those counterparts and third parties such as non-disclosure agreements. As a consequence, the rules set out in Article 3(4) of the Regulation (EC) No 593/2008 of the European Parliament and of the Council¹³ should apply to the effect that where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of Articles 14 and 15, as implemented in the Member State of the forum.
- (44) The objectives of this Directive, namely the modernisation of certain aspects of the Union copyright framework to take account of technological developments and new channels of distribution of protected content in the internal market, cannot be sufficiently achieved by Member States but can rather, by reason of their scale, effects and cross-border dimension, be better achieved at Union level. Therefore, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (45) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Directive should be interpreted and applied in accordance with those rights and principles.

¹³ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6–16).

- (46) Any processing of personal data under this Directive should respect fundamental rights, including the right to respect for private and family life and the right to protection of personal data under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union and must be in compliance with Directive 95/46/EC of the European Parliament and of the Council¹⁴ and Directive 2002/58/EC of the European Parliament and of the Council¹⁵.
- (47) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents¹⁶, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

HAVE ADOPTED THIS DIRECTIVE:

¹⁴ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31–50). This Directive is repealed with effect from 25 May 2018 and shall be replaced by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1–88).

¹⁵ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37–47), called, as amended by Directives 2006/24/EC and 2009/136/EC, the “e-Privacy Directive”.

¹⁶ OJ C 369, 17.12.2011, p. 14.

TITLE I
GENERAL PROVISIONS

Article 1
Subject matter and scope

1. This Directive lays down rules which aim at further harmonising the Union law applicable to copyright and related rights in the framework of the internal market, taking into account in particular digital and cross-border uses of protected content. It also lays down rules on exceptions and limitations, on the facilitation of licences as well as rules aiming at ensuring a well-functioning marketplace for the exploitation of works and other subject-matter.
2. Except in the cases referred to in Article 17, this Directive shall leave intact and shall in no way affect existing rules laid down in the Directives currently in force in this area, in particular Directives 96/9/EC, 2000/31/EC, 2001/29/EC, 2006/115/EC, 2009/24/EC, 2012/28/EU and 2014/26/EU.

Article 2
Definitions

For the purposes of this Directive, the following definitions shall apply:

- (1) ‘research organisation’ means an entity, the primary goal of which is to conduct scientific research or to provide educational services involving also the conduct of scientific research:
 - (a) on a non-for-profit basis or by reinvesting all the profits in its scientific research; or
 - (b) pursuant to a public interest mission recognised by a Member State;in such a way that the access to the results generated by the scientific research cannot be enjoyed on a preferential basis by an undertaking exercising a decisive influence upon such organisation;
- (2) ‘text and data mining’ means any automated analytical technique aiming to analyse text and data in digital form in order to generate information such as patterns, trends and correlations;

- (3) ‘cultural heritage institution’ means a publicly accessible library or museum, an archive or a film or audio heritage institution;
- (4) ‘press publication’ means a collection composed mainly of literary works of a journalistic nature which:
- (a) may also include other works or subject-matter;
 - (b) constitutes an individual item within a periodical or regularly-updated publication under a single title, such as a newspaper or a general or special interest magazine;
 - (c) has the purpose of providing the general public with information related to news or other topics; and
 - (d) is published in any media under the initiative, editorial responsibility and control of a service provider;
- (5) ‘online content sharing service provider’ means a provider of an information society service whose main or one of the main purposes is to store and give the public access to a large amount of works or other subject-matter uploaded by its users which it organises and promotes for profit-making purposes.

Providers of services such as non-for-profit online encyclopaedias, non-for-profit educational and scientific repositories, non-for-profit open source software developing platforms, as well as internet access service providers, online marketplaces and providers of cloud services which allow users, including businesses for their internal purposes, to upload content for their own use shall not be considered online content sharing service providers within the meaning of this Directive;

- (6) ‘information society service’ means a service within the meaning of Article 1(1)(b) of Directive (EU) 2015/1535.

TITLE II
MEASURES TO ADAPT EXCEPTIONS AND LIMITATIONS TO THE DIGITAL AND
CROSS-BORDER ENVIRONMENT

Article 3

Text and data mining for the purposes of scientific research

1. Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC and Article 11(1) of this Directive for reproductions and extractions made by research organisations and cultural heritage institutions in order to carry out text and data mining of works or other subject-matter to which they have lawful access, for the purposes of scientific research.
 - 1a. Copies of works or other subject-matter made in compliance with paragraph 1 shall be stored with an appropriate level of security and not be retained for longer than necessary for achieving the purposes of scientific research.
2. *Moved to Art. 6(1).*
3. Rightholders shall be allowed to apply measures to ensure the security and integrity of the networks and databases where the works or other subject-matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective.
4. Member States shall encourage rightholders, research organisations and cultural heritage institutions to define commonly-agreed best practices concerning the application of the obligation and measures referred to respectively in paragraphs 1a and 3.

Article 3a

Optional exception or limitation for text and data mining

1. Without prejudice to Article 3 of this Directive Member States may provide for an exception or a limitation to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC and Article 11(1) of this Directive for temporary reproductions and extractions of lawfully accessible works and other subject-matter that form a part of the process of text and data mining.
2. The exception or limitation provided for in paragraph 1 shall apply provided that the use of works and other subject matter referred to therein has not been expressly reserved by their rightholders including by technical means.

Article 4

Use of works and other subject-matter in digital and cross-border teaching activities

1. Member States shall provide for an exception or limitation to the rights provided for in Articles 2 and 3 of Directive 2001/29/EC, Article 5(a), (b), (d) and (e) and Article 7(1) of Directive 96/9/EC, Article 4(1)(a) and (b) of Directive 2009/24/EC and Article 11(1) of this Directive in order to allow the digital use of works and other subject-matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved, provided that such use:
 - (a) takes place under the responsibility of an educational establishment, on its premises or other venues, or through a secure electronic network accessible only by the educational establishment's pupils or students and teaching staff; and
 - (b) is accompanied by the indication of the source, including the author's name, unless this turns out to be impossible.

2. Notwithstanding Article 6(1), Member States may provide that the exception adopted pursuant to paragraph 1 does not apply generally or as regards specific uses or types of works or other subject-matter, to the extent that licences covering the needs of educational establishments and authorising the acts described in paragraph 1 are easily available in the market.

Member States availing themselves of the provision of the first subparagraph shall take the necessary measures to ensure that rightholders make the licences authorising the acts described in paragraph 1 available and visible for educational establishments.

3. The use of works and other subject-matter for the sole purpose of illustration for teaching through secure electronic networks undertaken in compliance with the provisions of national law adopted pursuant to this Article shall be deemed to occur solely in the Member State where the educational establishment is established.
4. Member States may provide for fair compensation to rightholders due to the use of their works or other subject-matter pursuant to paragraph 1.

Article 5

Preservation of cultural heritage

Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC, Article 4(1)(a) of Directive 2009/24/EC and Article 11(1) of this Directive, permitting cultural heritage institutions to make copies of any works or other subject-matter that are permanently in their collections, in any format or medium, for the purpose of the preservation of such works or other subject-matter and to the extent necessary for such preservation.

Article 6
Common provisions

1. Any contractual provision contrary to the exceptions provided for in Articles 3, 4(1) and 5 shall be unenforceable.
2. Article 5(5) of Directive 2001/29/EC shall apply to the exceptions and the limitation provided for under this Title. The first, third and fifth subparagraphs of Article 6(4) of Directive 2001/29/EC shall apply to Articles 3, 4(1) and 5 of this Directive.

TITLE III
MEASURES TO IMPROVE LICENSING PRACTICES AND ENSURE WIDER ACCESS TO
CONTENT

CHAPTER 1
Out-of-commerce works

Article 7

Use of out-of-commerce works by cultural heritage institutions

1. Member States shall provide that a collective management organisation, in accordance with its mandates, may conclude a non-exclusive licence for non-commercial purposes with a cultural heritage institution for the reproduction, distribution, communication to the public or making available to the public of out-of-commerce works or other subject-matter permanently in the collection of the institution, irrespective of whether all rightholders covered by the licence have mandated the collective management organisation, provided that:
 - (a) the collective management organisation is, on the basis of mandates from rightholders, sufficiently representative of rightholders in the relevant type of works or other subject-matter and of the rights which are the subject of the licence;
 - (b) equal treatment is guaranteed to all rightholders in relation to the terms of the licence;
 - (c) all rightholders may at any time exclude the possibility for collective management organisations to license their works or other subject-matter in accordance with this Article, either in general or in specific cases, or exclude the application of any licence granted in accordance with this Article to their works or other subject-matter.

2. A work or other subject-matter shall be deemed to be out-of-commerce when it can be presumed in good faith that the whole work or other subject-matter is not available to the public through customary channels of commerce after a reasonable effort is made to determine such availability.

Member States may provide for specific requirements to determine whether works and other subject-matter can be licensed in accordance with paragraph 1. Such requirements shall not extend beyond what is necessary and reasonable, and shall not preclude the possibility to determine the out-of-commerce status of a set of works or other subject-matter as a whole, when it is reasonable to presume that all works or other subject-matter are out-of-commerce.

3. *Moved to Art. 8a.*
4. Member States shall ensure that the licences referred to in paragraph 1 are sought from a collective management organisation that is representative for the Member State where the cultural heritage institution is established.
5. This Article shall not apply to sets of out-of-commerce works if, following the reasonable effort to determine commercial availability, there is evidence that such sets predominantly consist of:
 - (a) works or other subject-matter first published or, in the absence of publication, first broadcast in a third country, except for cinematographic or audiovisual works;
 - (b) cinematographic or audiovisual works, the producers of which have their headquarters or habitual residence in a third country; or
 - (c) works or other subject-matter of third country nationals when a Member State or a third country could not be determined, after a reasonable effort, according to points (a) and (b);unless the collective management organisation is sufficiently representative of rightholders of that third country in the meaning of point (a) of paragraph 1.

Article 8
Cross-border uses

1. A licence granted in accordance with Article 7 may allow the use of out-of-commerce works or other subject-matter by the cultural heritage institution in any Member State.
2. *Moved to Art. 8a*
3. *Moved to Art. 8a*

Article 8a
Publicity measures

1. Member States shall ensure that information for the purposes of the identification of the out-of-commerce works or other subject-matter as well as information about the possibilities of rightholders referred to in Article 7(1)(c), and, as soon as it is available, information on the parties to the licence, the covered territories and the allowed uses is made publicly accessible in a single online portal from at least six months before the works or other subject-matter are distributed, communicated to the public or made available to the public in accordance with the licence.

The portal shall be established and managed by the European Union Intellectual Property Office in accordance with Regulation (EU) No 386/2012.

2. Member States shall provide that, if necessary for the general awareness of rightholders, further appropriate publicity measures are taken regarding the possibility for collective management organisations to license works or other subject-matter in accordance with Article 7, the licences granted and the possibilities of rightholders referred to in Article 7(1)(c).

The additional appropriate publicity measures shall be taken in the Member State where the licence is sought. If there is evidence, such as the origin of the works or other subject-matter, to suggest that the awareness of rightholders could be more efficiently raised in other Member States or third countries, such publicity measures shall also cover those Member States and third countries.

Article 9

Stakeholder dialogue

Member States shall consult rightholders, collective management organisations and cultural heritage institutions in each sector before establishing specific requirements pursuant to Article 7(2), and encourage a regular dialogue between representative users' and rightholders' organisations, including collective management organisations, and any other relevant stakeholder organisations, on a sector-specific basis, to foster the relevance and usability of the licensing mechanisms referred to in Article 7(1) and to ensure the effectiveness of the safeguards for rightholders referred to in this Chapter.

CHAPTER 1a

Measures to facilitate collective licensing

Article 9a

Collective licensing with an extended effect

1. Member States may provide, as far as the use within their national territory is concerned and subject to safeguards provided for in this Article, that when a collective management organisation, in accordance with its mandates from rightholders, enters into a licensing agreement for the exploitation of works or other subject-matter such an agreement may be extended to apply to the rights of rightholders who have not authorised the organisation to represent them by way of assignment, licence or any other contractual arrangement; or, with respect to such an agreement, the organisation has a legal mandate or is presumed to represent rightholders who have not authorised the organisation accordingly.
2. Member States shall ensure that the licensing mechanism referred to in paragraph 1 is only applied within well-defined areas of use where obtaining authorisations from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction unlikely due to the nature of the use or of the types of works or other subject-matter concerned and that such mechanism safeguards the legitimate interests of rightholders.
3. The safeguards referred to in paragraph 1 must ensure that:
 - (a) the organisation is, on the basis of mandates from rightholders, sufficiently representative of rightholders in the relevant type of works or other subject-matter and of the rights which are the subject of the licence for the relevant Member State;
 - (b) equal treatment is guaranteed to all rightholders in relation to the terms of the licence;
 - (c) rightholders who have not authorised the organisation operating the licence may at any time easily and effectively exclude their works or other subject-matter from the licensing mechanism established in accordance with this Article;

- (d) appropriate publicity measures are taken to raise the awareness of rightholders regarding the possibility for organisations to license works or other subject-matter and the licensing taking place in accordance with this Article, and the possibilities of rightholders referred to in point (c) starting from a reasonable period before the works or other subject-matter are used under the licence. Publicity measures should be effective without the need to inform each rightholder individually.
4. The rules provided for in this Article are without prejudice to the application of collective licensing mechanisms with an extended effect in conformity with other provisions of Union law, including those which allow exceptions or limitations, and shall not apply to mandatory collective management of rights.
5. Where the law of a Member State provides for a licensing mechanism in accordance with this Article, the Member State concerned shall inform the Commission about the scope of that law, purposes and types of licences that may be introduced under that law as well as contact details for organisations issuing licences in accordance with the mechanism in paragraph 1. The Commission shall publish this information.
6. Based on the information received pursuant to paragraph 5 and on the discussions in the contact committee referred to in Article 12(3) of Directive 2001/29/EC, the Commission shall, by 31 December 2020, submit to the European Parliament and to the Council a report on the use of such mechanisms referred to in paragraph 1 in the EU and their impact on licensing and rightholders. The Commission's report shall be accompanied, if appropriate, by a legislative proposal, including as regards the cross-border effect of such national schemes.

CHAPTER 2

Access to and availability of audiovisual works on video-on-demand platforms

Article 10

Negotiation mechanism

Member States shall ensure that parties facing difficulties related to the licensing of rights when seeking to conclude an agreement for the purpose of making available audiovisual works on video-on-demand services, may rely on the assistance of an impartial body or of mediators. The body or mediators shall provide assistance to the parties with their negotiations and help them reach agreements, including, where appropriate, by submitting proposals to the parties.

Member States shall notify to the Commission the body or mediators referred to in paragraph 1 no later than [date mentioned in Article 21(1)]. In cases where Member States have chosen to rely on mediation, the notification to the Commission shall at least include, when available, the source where relevant information on the entrusted mediators can be found.

TITLE IV
MEASURES TO ACHIEVE A WELL-FUNCTIONING MARKETPLACE FOR COPYRIGHT
CHAPTER 1
Rights in publications

Article 11
Protection of press publications concerning online uses

1. Member States shall provide publishers of press publications established in a Member State with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the online use of their press publications by information society service providers.

The rights referred to in the first subparagraph shall not apply in respect of uses of insubstantial parts of a press publication. Member States shall be free to determine the insubstantial nature of parts of press publications taking into account whether these parts are the expression of the intellectual creation of their authors, or whether these parts are individual words or very short excerpts, or both criteria.

2. The rights referred to in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject-matter incorporated in a press publication. The rights referred to in paragraph 1 may not be invoked against those authors and other rightholders and, in particular, may not deprive them of their right to exploit their works and other subject-matter independently from the press publication in which they are incorporated.

When a work or other subject-matter is incorporated in a press publication on the basis of a non-exclusive licence, the rights referred to in paragraph 1 may not be invoked to prohibit the use by other authorised users. The rights referred to in paragraph 1 may not be invoked to prohibit the use of works or other subject-matter whose protection has expired.

3. Articles 5 to 8 of Directive 2001/29/EC and Directive 2012/28/EU shall apply *mutatis mutandis* in respect of the rights referred to in paragraph 1.

4. The rights referred to in paragraph 1 shall expire 1 year after the publication of the press publication. This term shall be calculated from the first day of January of the year following the date of publication.
5. Paragraph 1 shall not apply to press publications first published before [entry into force of the Directive].

Article 12

Claims to fair compensation

Member States may provide that where an author has transferred or licensed a right to a publisher, such a transfer or a licence constitutes a sufficient legal basis for the publisher to be entitled to a share of:

- (a) the compensation for the uses of the work made under an exception or limitation to the transferred or licensed right; and
- (b) the remuneration for public lending provided for in Article 6(1) of Directive 2006/115/EC.

CHAPTER 2

Certain uses of protected content by online services

Article 13

Use of protected content by online content sharing service providers

1. Member States shall provide that an online content sharing service provider performs an act of communication to the public or an act of making available to the public when it gives the public access to copyright protected works or other protected subject matter uploaded by its users.

An online content sharing service provider shall obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC in order to communicate or make available to the public works or other subject matter. Where no such authorisation has been obtained, the service provider shall prevent the availability on its service of those works and other subject matter, including through the application of measures referred to in paragraph 4. This subparagraph shall apply without prejudice to exceptions and limitations provided for in Union law.

Member States shall provide that when an authorisation has been obtained, including via a licensing agreement, by an online content sharing service provider, this authorisation shall also cover acts of uploading by the users of the service falling within Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis.

2. *Deleted.*
3. When an online content sharing service provider performs an act of communication to the public or an act of making available to the public, it shall not be eligible for the exemption of liability provided for in Article 14 of Directive 2000/31/EC for unauthorised acts of communication to the public and making available to the public, without prejudice to the possible application of Article 14 of Directive 2000/31/EC to those services for purposes other than copyright relevant acts.
4. In the absence of the authorisation referred to in the second subparagraph of paragraph 1, Member States shall provide that an online content sharing service provider shall not be liable for acts of communication to the public or making available to the public within the meaning of this Article when:
 - (a) it demonstrates that it has made best efforts to prevent the availability of specific works or other subject matter by implementing effective and proportionate measures, in accordance with paragraph 5, to prevent the availability on its services of the specific works or other subject matter identified by rightholders and for which the rightholders have provided the service with relevant and necessary information for the application of these measures; and
 - (b) upon notification by rightholders of works or other subject matter, it has acted expeditiously to remove or disable access to these works or other subject matter and it demonstrates that it has made its best efforts to prevent their future availability through the measures referred to in point (a).

5. The measures referred to in point (a) of paragraph 4 shall be effective and proportionate, taking into account, among other factors:
 - (a) the nature and size of the services, in particular whether they are provided by a microenterprise or a small-sized enterprise within the meaning of Title I of the Annex to Commission Recommendation 2003/361/EC, and their audience;
 - (b) the amount and the type of works or other subject matter uploaded by the users of the services;
 - (c) the availability and costs of the measures as well as their effectiveness in light of technological developments in line with the industry best practice referred to in paragraph 8.
6. Member States shall ensure that online content sharing service providers and rightholders cooperate with each other in a diligent manner to ensure the effective functioning of the measures referred to in point (a) of paragraph 4 over time. Online content sharing service providers shall provide rightholders, at their request, with adequate information on the deployment and functioning of these measures to allow the assessment of their effectiveness, in particular information on the type of measures used and, where licensing agreements are concluded between service providers and rightholders, information on the use of content covered by the agreements.

7. Member States shall ensure that the measures referred to in paragraph 4 are implemented by the online content sharing service provider without prejudice to the possibility for their users to benefit from exceptions or limitations to copyright. For that purpose, the service provider shall put in place a complaint and redress mechanism that is available to users of the service in case of disputes over the application of the measures to their content. Complaints submitted under this mechanism shall be processed by the online content sharing service provider in cooperation with relevant rightholders within a reasonable period of time. Rightholders shall duly justify the reasons for their requests to remove or block access to their specific works or other subject matter. Member States shall endeavour to put in place independent bodies to assess complaints related to the application of the measures.
8. The Commission and the Member States shall encourage stakeholder dialogues to define best practices for the measures referred to in point (a) of paragraph 4. Member States shall also endeavour to establish mechanisms to facilitate the assessment of the effectiveness and proportionality of these measures and provide the Commission regularly with information on those mechanisms. The Commission shall, in consultation with online content sharing service providers, rightholders and other relevant stakeholders and taking into account the results of the stakeholder dialogues and the national mechanisms, issue guidance on the application of the measures referred to in point (a) of paragraph 4.

TITLE IV
MEASURES TO ACHIEVE A WELL-FUNCTIONING MARKETPLACE FOR COPYRIGHT

CHAPTER 3
Fair remuneration in exploitation contracts of authors and performers

Article 14
Transparency obligation

1. Member States shall ensure that authors and performers receive on a regular basis, at least once a year, and taking into account the specificities of each sector, timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights or their successors in title, notably as regards modes of exploitation, revenues generated and remuneration due.
 - 1a. Member States shall ensure that where the rights referred to in paragraph 1 have subsequently been licensed to another party, authors and performers may, at their request, receive from those third parties additional information if their first contractual counterpart does not hold all the information that would be necessary for the purposes of the information provision set out in paragraph 1. Member States may provide that such request to those third parties is made directly by the author or performer or indirectly through the contractual counterpart of the author or the performer.
2. The obligation in paragraph 1 shall be proportionate and effective and shall ensure an appropriate level of transparency in every sector. Member States may provide that in duly justified cases where the administrative burden resulting from the obligation in paragraph 1 would become disproportionate in view of the revenues generated by the exploitation of the work or performance, the obligation is limited to the types and level of information that can reasonably be expected in such cases.

3. Member States may decide that the obligation in paragraph 1 does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance.
- 3a. Member States may provide that for agreements subject to or based on collective bargaining agreements the transparency rules of the relevant collective bargaining agreement are applicable provided that they meet the minimum criteria laid down in the national provisions adopted in conformity with the requirements of paragraphs 1 to 3.
4. Paragraph 1 shall not be applicable to agreements concluded by entities defined in Article 3(a) and (b) of Directive 2014/26/EU or by other entities subject to the national rules implementing Directive 2014/26/EU.

Article 15

Contract adjustment mechanism

1. Member States shall ensure that authors and performers are entitled to additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights or their successors in title, when the remuneration originally agreed turns out to be disproportionately low compared to the relevant revenues derived from the actual exploitation of the works or performances.
- 1a. Member States may provide that for agreements subject to or based on collective bargaining agreements the rules of the relevant collective bargaining agreement for the adjustment of remuneration are applicable instead of the national provisions implementing the contract adjustment mechanism.
2. Paragraph 1 shall not be applicable to agreements concluded by entities defined in Article 3(a) and (b) of Directive 2014/26/EU or by other entities subject to the national rules implementing Directive 2014/26/EU.

Article 16
Dispute resolution procedure

1. Member States shall provide that disputes concerning the transparency obligation under Article 14 and the contract adjustment mechanism under Article 15 may be submitted to a voluntary, alternative dispute resolution procedure.
2. Member States shall ensure that representative organisations of authors and performers, including collective management organisations, may initiate such disputes on behalf of one or more authors and performers at their request.

Article 16a
Contractual provisions

Member States shall ensure that any contractual provision which prevents the compliance with the provisions in Articles 14 and 15 of this Directive shall be unenforceable in relation to authors and performers.

TITLE V
FINAL PROVISIONS

Article 17
Amendments to other directives

1. Directive 96/9/EC is amended as follows:
 - (a) In Article 6(2), point (b) is replaced by the following:

"(b) where there is use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and the limitation provided for in Articles 3 and 4 of Directive [this Directive];"
 - (b) In Article 9, point (b) is replaced by the following:

"(b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and the limitation provided for in Articles 3 and 4 of Directive [this Directive];"
2. Directive 2001/29/EC is amended as follows:
 - (a) In Article 5(2), point (c) is replaced by the following:

"(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage, without prejudice to the exception provided for in Article 5 of Directive [this Directive];"
 - (b) In Article 5(3), point (a) is replaced by the following:

"(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and the limitation provided for in Articles 3 and 4 of Directive [this Directive];"

- (c) In Article 12(4), the following points are added:
- "(e) to examine the impact of the transposition of Directive [this Directive] on the functioning of the internal market and to highlight any transposition difficulties;
 - (f) to facilitate the exchange of information on the relevant developments in legislation and case law as well as on the practical application of the measures taken by Member States to implement Directive [this Directive];
 - (g) to discuss any other questions arising from the application of Directive [this Directive]."

Article 18

Application in time

1. This Directive shall apply in respect of all works and other subject-matter which are protected by the Member States' legislation in the field of copyright on or after [the date mentioned in Article 21(1)].
2. *Deleted.*
3. This Directive shall apply without prejudice to any acts concluded and rights acquired before [the date mentioned in Article 21(1)].

Article 19

Transitional provision

Agreements for the licence or transfer of rights of authors and performers shall be subject to the transparency obligation in Article 14 as from [one year after the date mentioned in Article 21(1)].

Article 20
Protection of personal data

The processing of personal data carried out within the framework of this Directive shall be carried out in compliance with Directives 95/46/EC and 2002/58/EC.

Article 21
Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [24 months after entry into force] at the latest. They shall forthwith communicate to the Commission the text of those provisions. When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.
2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 22
Review

1. No sooner than [five years after the date mentioned in Article 21(1)], the Commission shall carry out a review of this Directive and present a report on the main findings to the European Parliament, the Council and the European Economic and Social Committee.
2. Member States shall provide the Commission with the necessary information for the preparation of the report referred to in paragraph 1.

Article 23

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 24

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament

The President

For the Council

The President
