



# ECS © for Authors and Performers, 24 May 2019

## VALUE GAP – ARTICLE 17 DSM DIRECTIVE

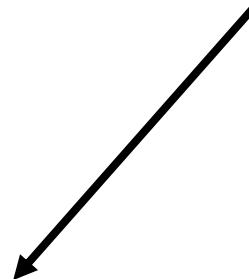
### Prof. Dr. Martin Senftleben



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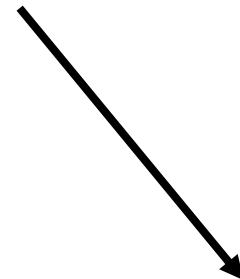
# New legal framework

...two central elements:



licensing

(Art. 17(1) DSM  
Directive)



filtering

(Art. 17(4) DSM  
Directive)

Elephant in the room

**cross-border  
licenses for entire  
EU territory**

# Challenge for both sides

- enormous rights clearance task in light of the content diversity of online platforms
- umbrella licensing agreements with collecting societies available?
- indemnification against claims of non-members offered?
- collecting societies flexible enough to support new business models?

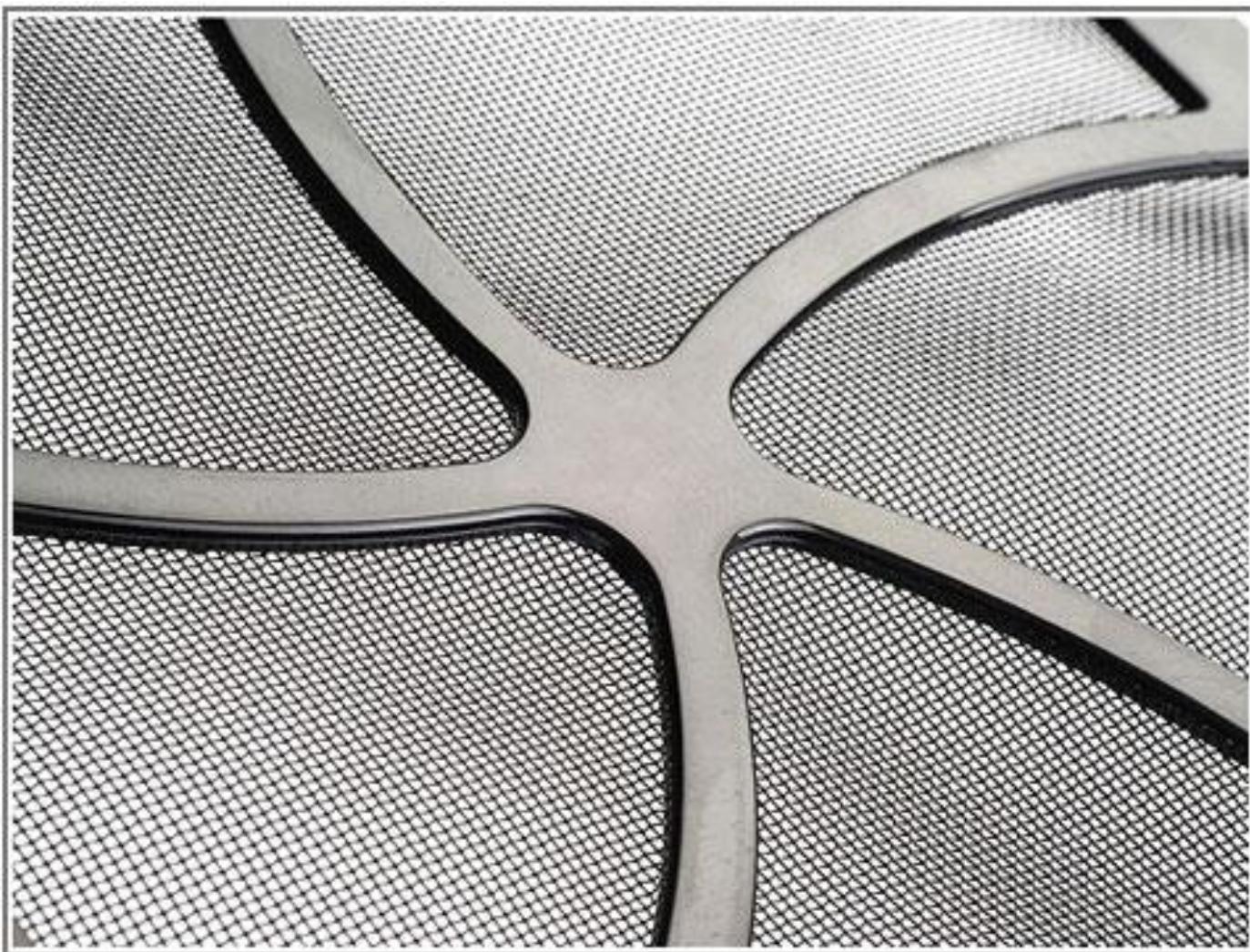
# What if no licenses for Europe become available?

from open,  
participative  
platforms of the  
web 2.0

to content  
platforms  
resembling TV  
channels?

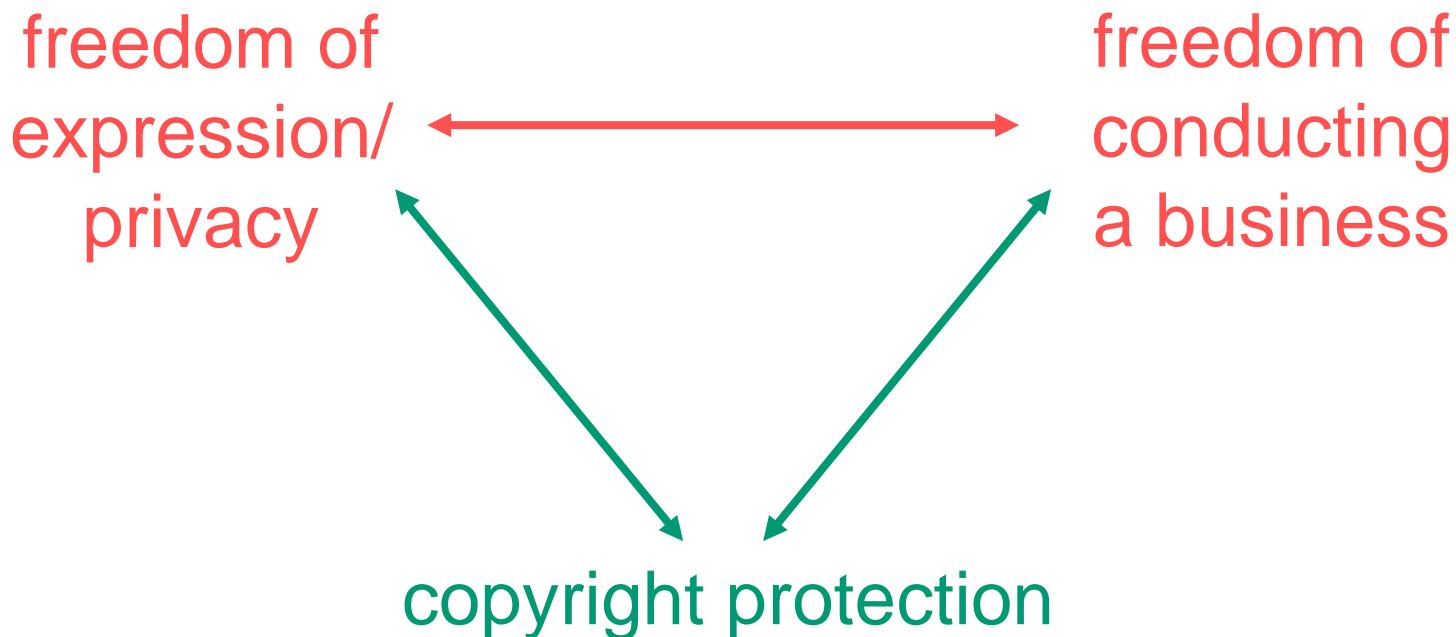


# Filtering



# CJEU, 24 November 2011, case C-70/10, Scarlet/Sabam

- general filtering obligation impermissible
- focus on notified works specific enough?



Much reliance on industry cooperation

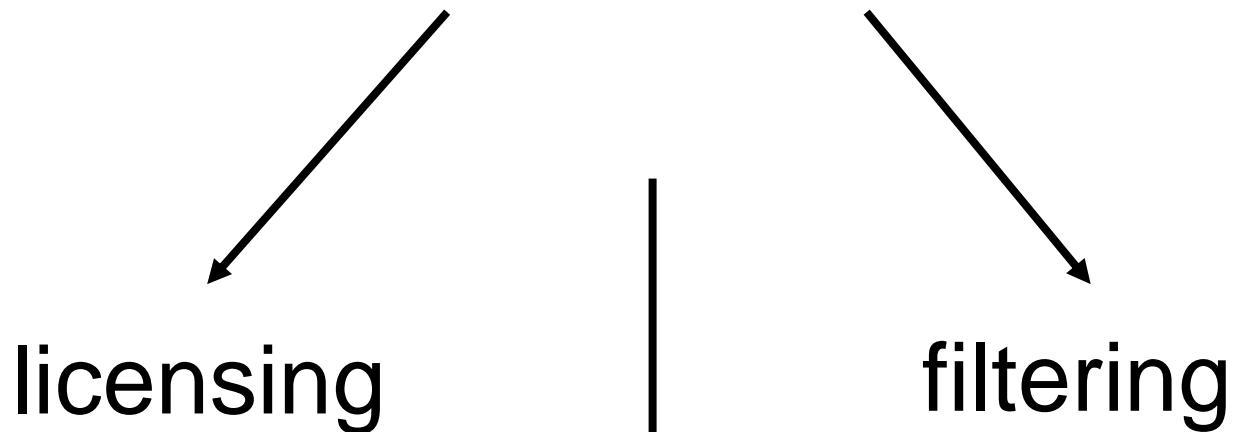
**who represents the  
public interest?**

# Art. 17(5) and (8) DSM Directive

- ‘The cooperation between online content service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users which do not infringe copyright and related rights, including where such works or subject matter are covered by an exception or limitation.’
- focus on quotation, parody, pastiche
- complaint and redress mechanism for users
- reply within ‘reasonable’ time period

# Why not a broader limitation?

...third, alternative element:



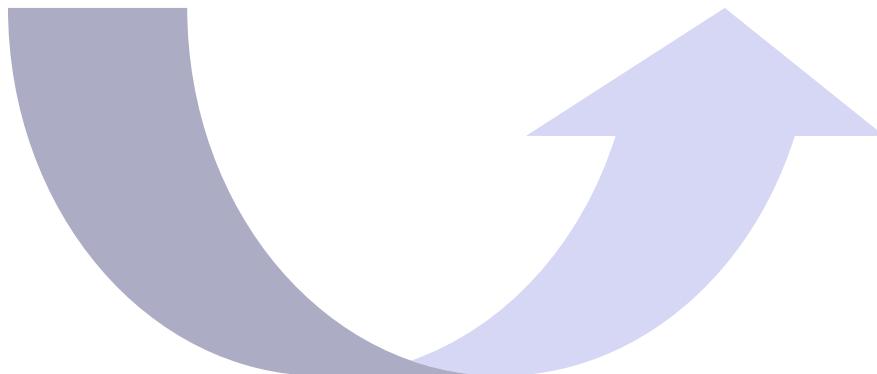
broad use privilege  
(Art. 17(7)(b) DSM Directive)

# Art. 5(3)(k) Copyright Directive

‘... use for the purpose of caricature, parody or **pastiche**;...’

broad  
exclusive  
rights

closed list of  
permissible  
limitations



# Pastiche?

Intel. eigendom en technic

funny animal - YouTube

https://www.youtube.com/results?search\_query=funny+animal

Conform de wetgeving ten aanzien van de bescherming van gegevens verzoeken we je even de tijd te nemen om de belangrijkste punten van ons Privacybeleid door te lezen. Dit beleid geldt voor alle services van Google. Het beschrijft gegevens gebruiken en welke opties je hebt. Je moet dit vandaag nog doen.

YouTube NL

funny animal

Home

Trending

Abonnementen

Bibliotheek

Geschiedenis

Log nu in om je kanalen en aanbevelingen te bekijken.

INLOGGEN

HET BESTE VAN YOUTUBE

Muziek

Sport

Games

Films

News

Live

360°-video

Browse door kan...

FILTEREN

Top 200 Highlights of Animals - VERY FUNNY ANIMALS

Teen Titans Go! • 160 mln. weergaven • 1 jaar geleden

Top 200 Highlights of Animals - VERY FUNNY ANIMALS.

21:16

FUNNY ANIMALS: Try not to LAUGH - The FUNNIEST ANIMAL videos

Tiger Productions 3,9 mln. weergaven • 1 jaar geleden

Just look how all these dogs, puppies, cats, kittens, goats, horses,... behave, play, fail, make funny sounds, react to ...

10:16

ANIMAL & PET VIDEOS way FUNNIER THAN YOU EXPECT! - LAUGH HARD NOW!

Tiger Productions 1,9 mln. weergaven • 5 maanden geleden

The best entertainment are funny animal videos. Animals and pets never fail to make us smile and laugh! Here are the best and ...

10:09

[30 MIN] ULTIMATE Funny Animals Compilation 2018 - Best Animal Videos | Funny Vine

Funny Vines 7,6 mln. weergaven • 1 jaar geleden

Brand new weekly funny vines compilation of August 2018 featuring the funniest animal & pet clips, bloopers, fails, reactions and ...

31:20

Funniest Animals - Try Not To Laugh - Funny Domestic And Wild Animals' Life

Funny Animals' Life • 10 mln. weergaven • 3 maanden geleden

Enjoy new funniest and cutest compilation of the week about wild and domestic animals. Try not laugh

MEER VAN YOUTUBE

# CJEU, 3 September 2014, case C-201/13, Deckmyn/Vandersteen

- parody = autonomous concept of EU law
  - reference point: usual meaning in everyday language (para. 20)
- pastiche = autonomous concept as well?
  - usual meaning in everyday language?
  - ‘pastiche’ broad enough to cover user-generated content mash-ups and remixes?

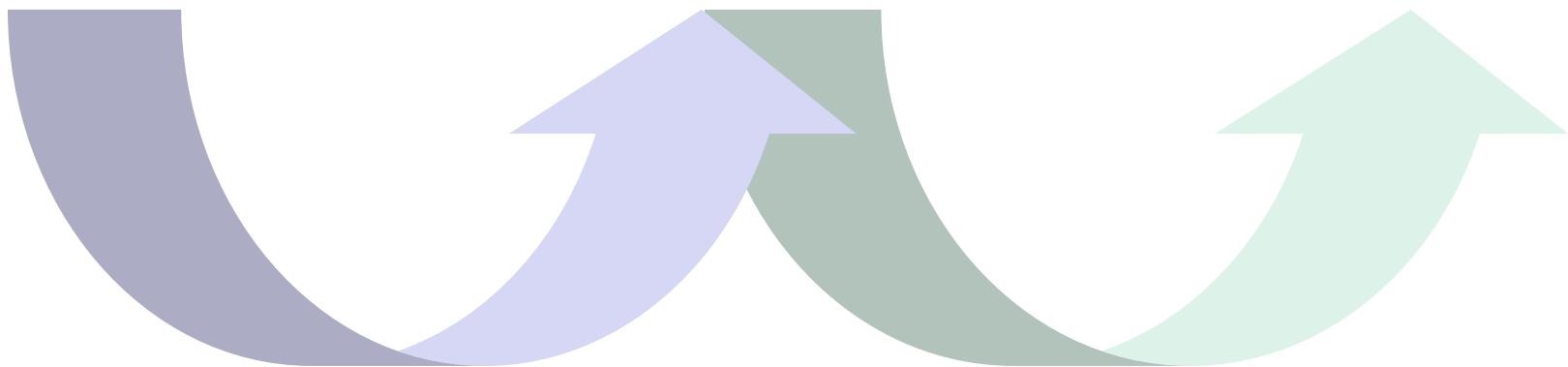
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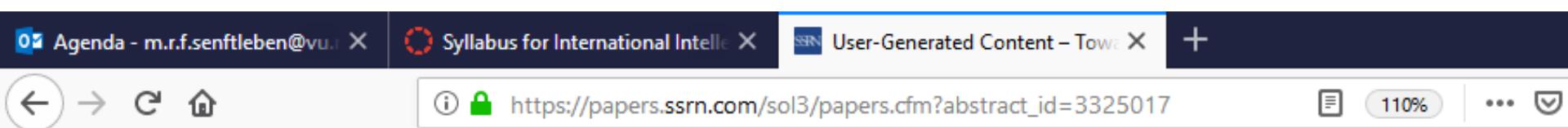
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limitations

three-step  
test



# Compliance with three-step test?

<https://ssrn.com/abstract=3325017>



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## User-Generated Content – Towards a New Use Privilege in EU Copyright Law

*RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY AND DIGITAL TECHNOLOGIES, Tanya Aplin, ed., Cheltenham: Edward Elgar Publishing 2019, Forthcoming*

26 Pages • Posted: 7 Feb 2019

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# Advantage: reverse filtering logic

from focus on  
takings from  
protected works

to focus on  
creative elements  
added by users





THE END. THANK YOU!



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