Position Statement of the

Max Planck Institute for Innovation and Competition

on the Proposed Modernisation of European Copyright Rules

PART G

Use of Protected Content on Online Platforms

(Article 13 COM(2016) 593)

I. Background and Objectives

(1) Access and the dissemination of copyright protected material occur mostly through the internet nowadays. Online services play an important role in this process. A **participation of rightholders** in the profits generated through this is not self-evident (Communication of the Commission COM(2016) 529 final, p. 7; proposal for a Directive on Copyright in the Digital Market COM(2016) 539 final (Draft Directive), p. 3 and recital 37). This is especially so in the case of services, which save on their servers content uploaded by their users so it can be subsequently retrieved by the public (Impact Assessment on the Modernisation of EU Copyright Rules (IA), pp. 132, 137 et seqq., 142 et seq.).

(2) A Supreme Court decision regarding the scope of Article 14(1) of the Directive 2000/31 (E-Commerce Directive) as well as whether and when providers themselves fulfil the requirements in Article 3(1) of the Directive 2001/29 (InfoSoc Directive) has not yet been issued (IA, p. 143). In this **unclear legal situation**, service providers can either fully refuse the conclusion of a licensing agreement with rightholders or more or less enforce their one-sided conditions (IA, p. 139, 142 et seqq.).

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(3) The objective of the Commission's proposed regulation is to **improve** this (negotiating) **position of the rightholders**. In particular, they should be able to better control and determine whether their works are available on online platforms or rather negotiate licensing agreements and remuneration for the use and publication of their works on the internet (Draft Directive, p. 3). From a technical perspective, this should be achieved through a reinforced and improved adoption of "suitable and adequate" measures (e.g. content recognition technologies, which prevent or at least reduce the accessibility of content made available illegally).

(4) This way, **equal conditions and competition requirements** should be created also for all providers (content service providers) of copyright protected contents on the internet without penalizing those who obtain a licence (IA, p. 141 et seqq.; COM(2015) 626 final, p. 9).

II. Regarding the Commission's Proposal

1. Content

(5) In order to achieve these objectives, the Commission proposes specific obligations for online services within the scope of Article 13 of the Draft Directive. In particular, "information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users" should be obligated to **take measures** that guarantee that

1st alternative: their agreements concluded with rightholders concerning the use of their works or other subject-matter will be complied with;

2nd alternative: via their services, no access to works or other subject-matter identified by rightholders in cooperation with them exists.

(6) These measures („**such as the use of effective content recognition technologies**“) must be “appropriate and proportionate” in accordance with the second sentence the first paragraph of Article 13 of the Draft Directive, whereby certain support obligations are attributed to the service providers in favour of the rightholders (third sentence of the first paragraph of Article 13 of the Draft Directive). Conversely, Member States must ensure that service providers put in place complaints and redress mechanisms that are available to affected users (Article 13(2) of the Draft Directive). Furthermore, they should promote stakeholder dialogues to define best practices (Article 13(3) of the Draft Directive).

2. Conceptual Critique

a) Overall

(7) If Article 13 of the Draft Directive became applicable law, such would lead to new, considerable **legal uncertainty**.

(8) *Whether* those service providers that save content uploaded by their users and make it available to the public, carry out an **act in light of Article 3(1) InfoSoc Directive** themselves, does not clearly result from recital 38 of the Draft Directive. Recital 38(1) of the Draft Directive merely indicates *that* those service providers that go beyond the simple provision of the physical infrastructure and carry out an act according to Article 3(1) InfoSoc Directive are obligated to conclude licensing agreements. Such does not clarify the current legal situation. Provided that service providers for certain do not want to commit any liability causing rights infringement, they must conclude licensing agreements already in accordance with current law.

(9) Article 13 of the Draft Directive proposed by the EU Commission contains furthermore a series of undefined legal concepts, apart from the fact that it is **barely understandably** formulated. In particular, the proposal does not contain any explanation or definition concerning which service providers are to

be qualified as "information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users". What importance is given to the criterion "large amounts" is especially questionable: for instance, whether it is of relevance whether commercial (e.g. YouTube) or non-commercial platforms (e.g. Wikipedia) offer services.

(10) Moreover, it is unclear what importance should be given to the requirement "**provide to the public access**" in the first sentence of the first paragraph of Article 13 of the Draft Directive. This question concerns two aspects. The first is what is meant by this with regard to Article 3(1) InfoSoc Directive. The second is whether this requirement aims at a demarcation in regard to the E-Commerce Directive.

b) In regard to the German and English version

(11) Numerous **discrepancies between the German and the English version** make the comprehension of the first sentence of the first paragraph of Article 13 of the Draft Directive even more difficult. The English version mentions for ex. "information society service providers that store and provide to the public access…", whereas the German version mentions "information society service providers that store or provide to the public access…". This difference can also be found in other passages, for ex. in recital 38. Given the subject-matter, only the English version can be correct.

(12) Both **alternatives of the first sentence of the first paragraph of Article 13 of the Draft Directive** mentioned under point 5 differ in the English version in that

- In the first alternative, agreements between rightholders and service providers concerning the use of works or other subject-matter already exist; the specific matter concerns their compliance;

- In accordance with the second alternative, rightholders and service providers identify together which works or other subject-matter should not be accessible.

In contrast, the German version seems to require **agreements** between the rightholders and the service providers also concerning the second alternative. However, this makes no sense – on the contrary. This alternative must also be applicable to those service providers, which haven't concluded any licence agreement with the rightholders. Such results not only from recital 38 of the Draft Directive; in support of this is also the detailed explanation of certain provisions of the proposal (p. 10) and, in particular, the wording in the English version (pp. 10, 29), while the wording of the second alternative of the first sentence of the first paragraph of Article 13 of the Draft Directive in the German version greatly differs from the explanation (pp. 12, 31). Only the English version correlates to the spirit and purpose of the proposed rule, to create incentives to the conclusion of licence agreements. Such incentives would be destroyed if those of all service providers, which already have licence agreements with the rightholders, would be obligated to the further measures under alternative nr. 2.

3. Substantive Objections

a) Alternative with Licence Agreement (First Alternative of the First Sentence of the First Paragraph of Article 13 of the Draft Directive): "Pacta Sunt Servanda"

(13) The **first alternative of the first sentence of the first paragraph of Article 13 of the Draft Directive** focuses on service providers that have concluded agreements with the rightholders for the use of their works or other subject-matter. Indeed, only service providers that do not fall under the liability exemption of Article 14(1) of the E-Commerce Directive are required to conclude such licence agreements (recital 38 of the Draft Directive). However,

also service providers that conclude voluntarily licence agreements with the rightholders fall under the scope of the first sentence of the first paragraph of Article 13 of the Draft Directive.

(14) This requirement does not constitute an additional burden either in one or in the other case, since the service providers are not required to more than what is already applicable: "**pacta sunt servanda**". As contracts are to be met in any case according to general applicable (contract) law, the first alternative of the first sentence of the first paragraph of Article 13 of the Draft Directive is simply superfluous. To the extent that it (falsely) may suggest that service providers that venture licence agreements may be subject to additional obligations, the norm may even have a dissuasive effect.

b) Alternative without Licence Agreement (Second Alternative of the First Sentence of the First Paragraph of Article 13): Notice and Take Down?

(15) The **second alternative** aims at preventing access to certain contents, which have been identified by the rightholders in cooperation with the service providers. The question that arises here is to which extent the first sentence of the first paragraph of Article 13 of the Draft Directive should complete or extend the "notice and take down procedure" (NTD procedure) foreseen in Article 14(1)(b) of the E-Commerce Directive.

(16) In accordance with this "**NTD procedure**" (which does not coincide with the one foreseen in § 512 of the U.S. Copyright Act), the rightholder must first notify the service provider of a rights infringement and request the provider to remove the illegal content. In order to not lose its exemption from liability in accordance with Article 14(1) of the E-Commerce Directive, the service provider must comply with this request.

(17) In addition to this, according to Supreme Court case-law in Germany, **specific, situation-related monitoring obligations** are required in order to

avoid repeated infringements of the same type (BGH GRUR 2013, 370, 371 – Alone in the Dark; BGH GRUR-RS 2013, 15388 recital 38 – Prüfpflichten), which fall under the scope of what is permissible under EU Law (ECJ EuZW 2012, 261, 262 – SABAM/Netlog; ECJ GRUR 2012, 265, 267 – Scarlet Extended/SABAM; ECJ GRUR 2011, 1025, 1034 – L'Oréal/eBay et al.). De facto, this case-law compels those service providers that desire to guarantee the availability of content on their platforms in the future to conclude licence agreements with the rightholders.

(18) If Article 14(1) of the E-Commerce Directive is interpreted in accordance with the German case-law, the norm fulfils comparable objectives to the proposed first sentence of the first paragraph of Article 13 of the Draft Directive. In this respect, a **norm valid for all of Europe** would be welcome since national case-law concerning Article 14(1) of the E-Commerce Directive is inconsistent. However, as the type of cooperation between rightholders and service providers is not further specified in the first sentence of the first paragraph of Article 13 of the Draft Directive, it remains dubious whether further harmonisation would really be achieved through it.

c) Compatibility with other EU Law

(19) In conformity with Article 18(3) of the Draft Directive, the new directive leaves existing EU Law **unaffected**. In regard to Article 13 of the Draft Directive, and according to the Impact Assessment (pp. 147, 154) and recital 38, such concerns especially the scope of the **E-Commerce Directive**. Under certain circumstances, service providers would thus fall under the liability exemption of Article 14 of the E-Commerce Directive, regardless of whether they adopt any measures in accordance with Article 13 of the Draft Directive.

(20) A **general monitoring obligation wouldn't be compatible with Article 15(1) of the E-Commerce Directive**. Consequently, the first sentence of the

first paragraph of Article 13 of the Draft Directive cannot introduce at the outset any substantial new obligations. In any case, service providers, which fall under the liability privilege of Article 14 of the E-Commerce Directive, cannot be obligated to proactively monitor all data of all clients indefinitely. General monitoring obligations would furthermore be incompatible with Article 3 of the Directive 2004/48 (Enforcement Directive) (ECJ EuZW 2012, 261, 262 et seq. – SABAM/Netlog).

(21) Moreover, directives are to be interpreted and applied in accordance with the rights and principles of the **Charter of Fundamental Rights of the European Union** (the Charter of Fundamental Rights) (recital 45). This means that copyright protection (Article 17(2) of the Charter of Fundamental Rights) on the one hand, and the freedom to conduct a business (Article 16 of the Charter of Fundamental Rights), the protection of personal data, as well as the freedom of expression and information (Articles 8 and 11 of the Charter of Fundamental Rights) on the other, must be fairly balanced (cf. ECJ EuZW 2012, 261, 263 – SABAM/Netlog).

d) Content Recognition Technologies and Procedures

(22) All **further requirements contained in Article 13 of the Draft Directive** – in particular the EU Commission's attempt to introduce by law obligatory content recognition technologies and procedures – are ultimately related to the first sentence of the first paragraph of Article 13 of the Draft Directive. Thus, also they cannot lead to any changes of the current legislation worthy of mention.

(23) On the contrary, precisely such content recognition technologies and procedures also entail risks. For example, content pertaining to political opinions or admissible parody are not to be recognised (Article 5(3)(k) of the InfoSoc Directive). Furthermore, they enable **abuse**. Because it does not necessarily have to be rightholders requesting the service providers to remove content;

also competitors, for example, could do this (cf. e.g. https://trendblog.euronics.de/tv-audio/youtube-content-id-system-abzocker-freuen-sich-15843/). The victims would not only be the (legally acting) users, but also the consumers. Conflicting with Article 11 of the Charter of Fundamental Rights, their freedom of information would be hindered without such being required by legitimate interests of the rightholders.

(24) Precisely because **content recognition technologies and procedures** can lead to a sensitive limitation of the fundamentally protected freedom of expression and information (Article 11 of the Charter of Fundamental Rights), it must remain reserved to legally authorised judges to decide on the legality of content (cf. also: ECJ ZUM 2012, 29, 33 – Scarlet Extended/SABAM; ZUM 2012, 307, 311 – SABAM/Netlog). Consequently, the fundamental principle contained in Article 15(1) of the E-Commerce Directive, that providers have **no general filtering or monitoring obligation in regards to pure user content**, must be maintained – also in favour of platform operators.

III. Suggestions for Improvement

1. Specification of Provider Liability

(25) The **specification of the liability rules for platform operators** seems advisable - however, without increase in relation to the current liability exemption. Because with that, each platform operator would be de facto forced – even without a legal obligation – to apply said content recognition technologies and procedures, which should be rejected on the abovementioned grounds. In order to avoid the consequences of liability, they would have to adjust these technologies so that potentially illegal content is blocked at the outset. Even with such “over blocking”, however, it would remain dubious whether copyright infringements could be systematically and extensively prevented.

(26) A specification of the liability rules must rather mean to extend the principle already reflected in the *Acquis* that providers are **not liable for** users' **actions**, **which they cannot reasonably control** (Articles 12-14 of the E-Commerce Directive), to the situation nowadays primarily at hand, that service providers merely place the infrastructure at the disposal of their users in order for them to be able to carry out acts of exploitation exempted within the scope of legal exceptions. By implication, a liability exemption can only exist as long as the service providers haven't or couldn't have **any knowledge** of the illegal users' actions. Should the provider be made aware of possibly illegal content (especially when made aware by a rightholder), it must initiate the NTD procedure described unter point III 3., in order to avoid liability.

(27) Essentially, this rule could already be interpreted from the current Article 14 of the E-Commerce Directive. However, as long as the ECJ does not address the question of the norm's extent, a **uniform application** throughout the internal market isn't ensured – apart from the fact that interpretations can differ from case to case. It thus seems indicated to extend the norm by adding a respective paragraph 1a. Such could be formulated as follows: "Paragraph 1 is also applicable to the provision of an infrastructure for saving content with the objective of making it available to the public without assistance of the service provider."

(28) The **liability exemption must cease** as soon as a service evidently intends to enable users to illegally upload copyright protected content. To absolve service providers of responsibility in such cases is also not in accordance with the freedom of expression and information (Article 11 of the Charter of Fundamental Rights). More than ever, a service provider must be responsible for its own acts; such also includes the non-authorised use of third-party content in a way that makes it seem like it is part of the provider's own service (in the sense of an appropriation).

(29) If the E-Commerce Directive is complemented as abovementioned, this demarcation could simultaneously be made even clearer by way of an **addition to recital 44**. A possible wording could be, for example: "The same applies to the intentional induction or support of illegal user actions by third-parties." It goes without saying that own illegal actions are deprived of the exemption. What is to be considered appropriating use seems, however, still unclear; such is particularly shown by the debates concerning the extent of permissible linking.

(30) If the necessity of this delimitation is acknowledged and the focus is limited to service providers beyond the liability exemption, i.e. it is unquestionable that they must be liable for infringements – in particular for their own acts –, a provision concerning the application of certain content recognition technologies and procedures is at least in principle justified. In this respect, certain approaches of Article 13 of the Draft Directive shouldn't be categorically rejected; what is worthy of critique is first and foremost the **lack of differentiation**. Also the concerns expressed under point II.3.d against such technologies and procedures also in the realm of illegal behaviour are not void. Rather, the concomitant risks should be taken into account in an improved liability rule as proposed.

2. Consideration of the Users Interests

(31) The interests of today's users often go beyond the exchange of opinions. Publishing audio data, videos, photos, etc. – partially self-edited or made using pre-existing works (so-called *user generated content*) – constitutes for many people a daily activity. This user behaviour constitutes a reality that can barely be prohibited but isn't reflected in current copyright law. However, for its effective enforcement and implementation, **society's acceptance** of copyright law is of crucial importance.

(32) The German legislator recognised this already in 1965 and found a long-lasting solution by implementing an **exception with obligatory remuneration** in favour of the private copy, in order to bring about a balance of interests. The sustainability of this approach has been proven true up to today; in particular in Europe, most States have adopted this model. It is now time for the European legislator to take a respective step in the internet age.

(33) It is decisive that the legitimate interests of the rightholders are taken into account with this model. Therefore, **only** that **private exploitation** that corresponds to the usual practice in social networks, should be legalised. Exploitation attaining a commercial degree or serving commercial objectives from the outset are not to be allowed. But also for private exploitation per se, the limit is when the possibilities of a normal exploitation become distinctly affected. Such is arguably the case with pure file sharing, the publication of a complete movie or an entire album. Time also plays a role: the longer a work is available, the less potential there is of damage for the rightholder, and all the more can more extensive uses be allowed.

(34) Developing the case-law, in accordance to which a use permission only relates to works that do not originate from an obvious illegal source (ECJ, EuZW 2015, 351, 357 – Copydan Bandkopi/Nokia Danmark), content available online should only be allowed to be used when it has been **uploaded legally**. Thereby, a private user action may build upon previous acts of exploitation from third-parties that are covered by an exemption, however not through the exploitation of illegal file sharing.

(35) With criteria such as the abovementioned, national legislators and courts obtain sufficient but not too broad leeway for solutions fair to all interests. In order to nevertheless bring about a certain legal certainty for the users, certain positive or negative **examples** could be included in the recitals.

(36) If the proposal to allow normal exploitation subject to payment instead of prohibiting is implemented also in the context of social networks, an adequate payment should be secured for the **upload** itself – regardless of the question whether the legally uploaded content remains unchanged or whether the user has introduced creative or non-creative changes. (See part F para 14 et seqq. as to the splitting of the payment between creators and subsequent rightholders.)

(37) Individual billing of each user would admittedly be far too complex and costly for the rightholders. It thus seems inevitable to collect the reasonable remuneration centrally and supported by the established mechanisms of **collective rights management**. Here, the service provider comes into play, since it enables such user conduct to start with – to a certain extent, similar to the producer of blank recording media that enables private copies. This service provider should, of course, not be liable for the user's conduct, especially not when the user acts within the scope of an exception. However, is seems reasonable and fair that, as **paying agents**, an action can be brought against the **platform providers**. Thereby, costs arise for them, however they can shift them directly or indirectly to the users similarly to how the producers of blank media burden them with the copyright levies. How this payment mechanism is implemented in practice can be left up to the Member States; the Directive can limit itself to laying down the principle of collective rights management and at most, determine certain parameters for it in a recital.

(38) How an exception subject to payment for private conduct in social networks is implemented legislatively is, however, a fundamental question. It must be noted that there are two issues here. Firstly, the **upload of works** or parts of works in social networks according to the abovementioned criteria should be allowed. Secondly, **such uses of the work**, which are carried out within the scope of *user generated content* **before uploading**, should, however, also be covered by this permission. Although copyright law does not prohibit such

actions as long as they occur in private, the user abandons this realm, however, when such content is administered to a social network. To this extent, it is ultimately the act of uploading in each case that must be permitted.

(39) If this permission would be implemented by simply complementing the current Article 5 of the **InfoSoc Directive** with a further offense, this exception would be optional for the Member States in accordance with the current concept; only an order (as is the case currently with, for example, Article 5(2)(a),(b) and (e)) could be made mandatory – should this exception be transposed into national law. Should the Member States instead be obligated to take up such an exception, such would be as equally possible with a new, independent Directive such as how the Commission proposes this for a series of new exception provisions within the scope of a Directive on copyright in the digital internal market. In contrast, with a regulation in the InfoSoc Directive, a new norm category for **mandatory exceptions** would have to be created; other use permissions – currently of facultative transposition – could then be transferred to such.

(40) The **core elements** of such a statutory exemption – in addition to possibly other specifications, which could be explained in recitals – would essentially have to be the following:

- Exploitation by a private person
- Unchanged or changed by the private person
- Usual practice in social networks
- No commercial extent
- No noticeable impairment of the possibility of a normal work exploitation
- The rightholders obtain remuneration.

(41) The mandatory remuneration obligation may represent a significant burden for platforms, which are not directly or indirectly (e.g. advertising based) profit-oriented. However, copyright doesn't traditionally apply to profit orientation; also the use of the work for a benefit concert requires licence payments. Such circumstances can be taken into account, however, when **setting the fees**; such lies within the Members States discretionary power.

3. Measures against illegal uploads (NTD Procedure)

a) Harmonisation of the NTD Procedure

(42) The currently existing possibilities for rightholders to proceed against unauthorised user actions within the scope of the NTD procedure (cf. above, point II. 3. b)) are not affected by the here proposed exception for private user conduct in social networks, but simply limited substantively: the possibility to prohibit certain work uses is converted into a right to remuneration. Indeed, the service providers will have the new function of paying agents by way of such an exception. However, **no new monitoring obligations** are related to it. In order to not lose the liability exemption of Articles 12-14 of the E-Commerce Directive, they will not have to act preventively, for instance when a user acts beyond the exception, but rather upon actual or possible knowledge, for instance after respective notice from a rightholder.

(43) Substantially, the shift of the limit between admissible and inadmissible exploitations concomitant with the here proposed changes leads, however, to increased requirements in the management of the NTD procedure. In the interest of legal certainty, but also in order to achieve a higher level of harmonisation within the EU, an **elaborate legislative design of the NTD procedure** is imposed. In particular, measures to contain potential abuse of NTD seem particularly sensible. Precisely because the here proposed exception could increase the incentives to remove legally published content based on an NTD procedure.

(44) Not only the user's interests deserve closer attention; also the duties of the rightholders should be substantiated. Specifically, in particular certain requirements for the **legitimacy of those rightholders** who want to remove certain protected content should be regulated by law (cf., for example, the respective provision in section 191 of the Finnish Information Society Code (917/2014)). This could be done, for example, by them having to reveal their identity. Also a precise identification of the (alleged) illegally published content as well as the respective unlawful user seems reasonable. Mandatory disclosure as to why the publication of the content is illegal or not covered by an exception could also be worth considering.

b) Counter Notice Procedure

(45) In order to counteract a disproportionate restriction of the freedom of expression and information (Article 11 of the Charter of Fundamental Rights), but also to prevent a circumvention of the here proposed or of other exceptions, the introduction of so-called **counter notice procedures** seems the obvious way forward (cf., for example, the respective provision in section 192 of the Finnish Information Society Code (917/2014)). Such opens up the possibility for users who use content unapparent illegally, to react to a respective complaint of the rightholder, provided that they are informed by the service provider upon the initiation of a NTD procedure.

(46) In order to attain a level of harmonisation as high as possible, certain requirements for this counter notice procedure on an EU level appear desirable. The objective must be to facilitate **communication between rightholders and users** and, at the same time, to relieve service providers of the obligation to decide on the illegality of content. Here, Member States can retain certain flexibility in the transposition in order to take into account national parameters.

4. Licensing Simplification

(47) The proposed Article 13(3) of the Draft Directive aims for cooperation and dialogue between service providers and rightholders, while, however, only focussing on the measures planned in paragraph 1, which should be turned down, at least for the liability exemption, based on the abovementioned grounds. Whereas the problematic that the necessary licences are, in practice, not at all available or only difficult to obtain, isn't addressed. For those service providers wishing to act legally, this leads to **substantial transaction costs**, which can constitute actual market entry barriers especially for start-ups as well as burden smaller companies with disproportionate costs.

(48) Interests that would justify such costs are hardly evident – on the contrary: simple licencing possibilities should be a wish especially for rightholders wanting to prevent illegal uses. Being their interests normally oriented to the monetisation of the economic value of copyrights, licence grants constitute the actual basis for this. To this extent, measures, which simplify licensing, contradict the **interests of rightholders** at most when they wish to achieve preferably high margins by way of unlimited exclusivity; whether such would be worthy of protection is, however, another question.

(49) The interests in preferably accessible licences are reflected also in the system of collective rights management, insofar as the collecting society has the **obligation to cover those seeking a licence**. This mechanism presupposes, however, that the rights are not exercised by the rightholder himself. But even when rights are self-administrated, copyright law has mechanisms to prevent escalating consequences from exclusivity. For instance, Article 13(1) of the Revised Berne Convention – already taken up in 1908 – allows its contracting parties under certain conditions to grant compulsory licences in favour of recording companies.

(50) Whether one wishes to go as far as this, obligating rightholders in certain circumstances to grant licences to certain service providers is ultimately a political question. Such is not necessary when the rights clearance can be carried out without great expense and the conclusion of contracts between licence seekers and rightholders is as simple as possible. For this, the basis must be established in European Law. Because if the digital internal market is to be achieved, **trans-European licensing** plays a central role. Isolated measures of individual States would barely have any effect to facilitate activities of service providers beyond the country's own borders.

(51) An important step in this direction was given with Directive 2014/26 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. The scope of application of this directive is, however, comparatively narrow and the directive is also limited to constellations in which rights are managed by collecting societies. As such, it is able to promote the digital internal market in certain segments only. If, in comparison, the proposed **Article 13(1) of the Draft Directive** aims at bringing service providers to conclude licences in order to achieve an adequate remuneration of the rightholders, then it is going in the right direction. In its proposed form, however, it **will not achieve those objectives**.

IV. Conclusion

(52) The European legislator is strongly discouraged from adopting the proposed Article 13 of the Draft Directive in its proposed form. Instead of adding an inconsistent facet in itself and in relation to current law, is seems more reasonable to first start with the existing *acquis*. Certain adjustments are recommended in particular concerning the **E-Commerce Directive**. Also certain interventions in the **InfoSoc Directive** would allow specific improvements. Depending on the concept and subject to other adjustments, a new di-

rective may have its justification as long as it is carefully concerted with remaining EU Law.

(53) A rejection of the proposed Article 13 of the Draft Directive (and its respective recitals 38 and 39) thus does not mean that it is not the right moment to free current law of uncertainties and to improve it in light of the developments that have occurred in the meantime. It also does not mean that new – and in particular technology-based – obligations cannot be imposed on service providers, which act beyond the liability exemption. Such **legislative measures should** simply **be better coordinated**; an isolated approach, as attempted with Article 13 of the Draft Directive, is not promising.

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Annex: Synopsis German – English

	Use of Protected Content on Online Platforms **Stellungnahme**	**Use of Protected Content on Online Platforms** **Position Paper**
1	**I. Hintergrund und Ziele** Der Zugang zu und die Verbreitung von urheberrechtlich geschütztem Material erfolgt mittlerweile zu wesentlichen Teilen über das Internet. Online-Dienste spielen dabei eine wichtige Rolle. Eine **Beteiligung der Rechteinhaber** an den dadurch generierten Erträgen ist nicht selbstverständlich (Mitteilung der Kommission COM(2016) 592 final, S. 7; Vorschlag für eine Richtlinie über das Urheberrecht im digitalen Binnenmarkt COM(2016) 593 final (RL-E), S. 3 und Erwägungsgrund 37). Dies trifft insbesondere auf Dienste zu, die von ihren Nutzern hochgeladene Inhalte auf ihren Servern speichern, damit diese anschließend von der Öffentlichkeit abgerufen werden können (Impact Assessment on the modernisation of EU copyrigth rules (IA), S. 132, 137 ff., 142 f.).	**I. Background and Objectives** Access and the dissemination of copyright protected material occur mostly through the internet nowadays. Online services play an important role in this process. A **participation of rightholders** in the profits generated through this is not self-evident (Communication of the Commission COM(2016) 529 final, p. 7; proposal for a Directive on Copyright in the Digital Market COM(2016) 539 final (Draft Directive), p. 3 and recital 37). This is especially so in the case of services, which save on their servers content uploaded by their users so it can be subsequently retrieved by the public (Impact Assessment on the Modernisation of EU Copyright Rules (IA), pp. 132, 137 et seqq., 142 et seq.).
2	Eine höchstrichterliche Entscheidung zur Reichweite von Art. 14 I der Richtlinie 2000/31/EG (E-Commerce-RL) sowie dazu, ob und wann Provider selbst den Tatbestand von Art. 3 I der Richtlinie 2001/29/EG (InfoSoc-RL) erfüllen, steht aus (IA, S. 143.). Bei dieser **ungeklärten Rechtslage** können Diensteanbieter den Abschluss von Lizenzverträgen mit Rechteinhabern entweder ganz verweigern oder mehr oder weniger einseitig ihre Bedingungen durchsetzen (IA, S. 139, 142 ff.).	A Supreme Court decision regarding the scope of Article 14(1) of the Directive 2000/31/EC (E-Commerce Directive) as well as whether and when providers themselves fulfil the requirements in Article 3(1) of the Directive 2001/29/EC (InfoSoc Directive) has not yet been issued (IA, p. 143). In this **unclear legal situation**, service providers can either fully refuse the conclusion of a licensing agreement with rightholders or more or less enforce their one-sided conditions (IA, p. 139, 142 et seqq.).
3	Ziel der von der Kommission vorgeschlagenen Regelung ist es, diese (Verhandlungs-) **Position der Rechteinhaber zu verbessern**. Namentlich sollen sie besser	The objective of the Commission's proposed regulation is to **improve** this (negotiating) **position of the rightholders**. In particular, they should be able to better control and

	kontrollieren und bestimmen können, ob ihre Werke auf Online-Plattformen zugänglich sind, bzw. für die Nutzung und Veröffentlichung ihrer Werke im Internet Lizenzverträge und damit Vergütungen aushandeln (RL-E, S. 3). In technischer Hinsicht soll dies durch den verstärkten und verbesserten Einsatz „geeigneter und angemessener" Maßnahmen erreicht werden (z. B. Inhaltserkennungstechniken, die die Abrufbarkeit von widerrechtlich zugänglich gemachten Inhalten verhindern oder zumindest reduzieren).	determine whether their works are available on online platforms or rather negotiate licensing agreements and remuneration for the use and publication of their works on the internet (Draft Directive, p. 3). From a technical perspective, this should be achieved through a reinforced and improved adoption of "suitable and adequate" measures (e.g. content recognition technologies, which prevent or at least reduce the accessibility of content made available illegally).
4	Dadurch sollen auch für alle Anbieter („Content Service Provider") von urheberrechtlich geschützten Inhalten im Internet **gleiche Bedingungen und Wettbewerbsvoraussetzungen** geschaffen werden, ohne diejenigen, die Lizenzen erwerben, zu benachteiligen (IA, S. 141 ff.; COM(2015) 626 final, S. 10 f.).	This way, **equal conditions and competition requirements** should be created also for all providers (content service providers) of copyright protected contents on the internet without penalizing those who obtain a licence (IA, p. 141 et seqq.; COM(2015) 626 final, p. 9).
5	**II. Zum Vorschlag der Kommission** **1. Inhalt** Um diese Ziele zu erreichen, schlägt die Kommission i. R. v. Art. 13 RL-E spezifische Pflichten für Online-Dienste vor. Namentlich sollen „Diensteanbieter der Informationsgesellschaft, die große Mengen der von ihren Nutzern hochgeladenen Werke und sonstigen Schutzgegenstände (…) speichern [und] öffentlich zugänglich machen" dazu verpflichtet werden, **Maßnahmen zu ergreifen**, die sicherstellen, dass 1. Alt.: ihre Vereinbarungen mit den Rechteinhabern bezüglich der Nutzung von Werken oder sonstigen Schutzgegenstände eingehalten werden; 2. Alt.: über ihre Dienste kein Zugang zu Werken oder sonstigen Schutzgegenständen besteht, die sie gemeinsam mit den Rechteinhabern identifiziert haben.	**II. Regarding the Commission's Proposal** **1. Content** In order to achieve these objectives, the Commission proposes specific obligations for online services within the scope of Article 13 of the Draft Directive. In particular, "information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users" should be obligated to **take measures** that guarantee that 1st alternative: their agreements concluded with rightholders concerning the use of their works or other subject-matter will be complied with; 2nd alternative: via their services, no access to works or other subject-matter identified by rightholders in cooperation with them exists.

6	Diese Maßnahmen („**beispielsweise wirksame Inhaltserkennungstechniken**“) müssen gem. Art. 13 I 2 RL-E „geeignet und angemessen“ („appropriate and proportionate“) sein, wobei den Diensteanbietern zugunsten der Rechteinhaber gewisse Unterstützungspflichten zukommen (Art. 13 I 3 RL-E). Umgekehrt müssen die Mitgliedstaaten sicherstellen, dass Diensteanbieter betroffenen Nutzern Beschwerdemechanismen und Rechtsschutzmöglichkeiten zur Verfügung stellen (Art. 13 II RL-E). Außerdem sollen sie Stakeholderdialoge fördern, um „best practices“ zu ermitteln (Art. 13 III RL-E).	These measures („**such as the use of effective content recognition technologies**“) must be “appropriate and proportionate” in accordance with the second sentence the first paragraph of Article 13 of the Draft Directive, whereby certain support obligations are attributed to the service providers in favour of the rightholders (third sentence of the first paragraph of Article 13 of the Draft Directive). Conversely, Member States must ensure that service providers put in place complaints and redress mechanisms that are available to affected users (Article 13(2) of the Draft Directive). Furthermore, they should promote stakeholder dialogues to define best practices (Article 13(3) of the Draft Directive).
7	**2. Konzeptionelle Kritik** **a) Allgemein** Würde Art. 13 RL-E geltendes Recht, führte dies zu neuer, erheblicher **Rechtsunsicherheit**.	**2. Conceptual Critique** **a) Overall** If Article 13 of the Draft Directive became applicable law, such would lead to new, considerable **legal uncertainty**.
8	*Ob* diejenigen Diensteanbieter, die von ihren Nutzern hochgeladene Inhalte speichern und diese der Öffentlichkeit zur Verfügung stellen, dadurch selbst eine **Handlung gem. Art. 3 I InfoSoc-RL** vornehmen, geht aus Erwägungsgrund 38 des RL-E nicht eindeutig hervor. Erwägungsgrund 38 Abs. 1 des RL-E besagt lediglich, *dass* diejenigen Diensteanbieter, die über die bloße Bereitstellung der physischen Infrastruktur hinausgehen und selbst eine Handlung i. S. v. Art. 3 I InfoSoc-RL vornehmen, zum Abschluss von Lizenzverträgen verpflichtet sind. Dies klärt die bestehende Rechtslage nicht. Sofern Diensteanbieter mit Sicherheit keine haftungsbegründende Rechtsverletzung begehen wollen, müssen sie schon nach geltendem Recht Lizenzverträge abschließen.	*Whether* those service providers that save content uploaded by their users and make it available to the public, carry out an **act in light of Article 3(1) InfoSoc Directive** themselves, does not clearly result from recital 38 of the Draft Directive. Recital 38(1) of the Draft Directive merely indicates *that* those service providers that go beyond the simple provision of the physical infrastructure and carry out an act according to Article 3(1) Infosoc Directive are obligated to conclude licensing agreements. Such does not clarify the current legal situation. Provided that service providers for certain do not want to commit any liability causing rights infringement, they must conclude licensing agreements already in accordance with current law.

9	Der von der EU-Kommission vorgeschlagene Art. 13 RL-E enthält zudem eine Reihe unbestimmter Rechtsbegriffe, davon abgesehen, dass er **kaum verständlich** formuliert ist. Namentlich enthält der Vorschlag keinerlei Erklärung oder Definition dazu, welche Online-Dienste als „Diensteanbieter der Informationsgesellschaft, die große Mengen der von ihren Nutzern hochgeladenen Werke und sonstigen Schutzgegenstände (…) speichern [und] öffentlich zugänglich machen“ zu qualifizieren sind. Fraglich ist insbesondere, welche Bedeutung dem Kriterium „große Mengen“ zukommt, etwa ob es dafür eine Rolle spielt, ob kommerzielle (z. B. YouTube) oder nicht kommerzielle Plattformen (z. B. Wikipedia) Dienste anbieten.	Article 13 of the Draft Directive proposed by the EU Commission contains furthermore a series of undefined legal concepts, apart from the fact that it is **barely understandably** formulated. In particular, the proposal does not contain any explanation or definition concerning which service providers are to be qualified as “information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users”. What importance is given to the criterion “large amounts” is especially questionable: for instance, whether it is of relevance whether commercial (e.g. YouTube) or non-commercial platforms (e.g. Wikipedia) offer services.
10	Sodann erscheint unklar, welche Bedeutung dem Tatbestandsmerkmal **„öffentlich zugänglich machen“** in Art. 13 I 1 RL-E zukommen soll. Diese Frage betrifft zwei Aspekte. Zum einen geht es darum, was damit im Verhältnis zu Art. 3 I InfoSoc-RL gemeint ist. Zum anderen fragt sich, ob diese Voraussetzung eine Abgrenzung im Verhältnis zur E-Commerce-RL bezweckt.	Moreover, it is unclear what importance should be given to the requirement “**provide to the public access**” in the first sentence of the first paragraph of Article 13 of the Draft Directive. This question concerns two aspects. The first is what is meant by this with regard to Article 3(1) InfoSoc Directive. The second is whether this requirement aims at a demarcation in regard to the E-Commerce Directive.
11	**b) In Bezug auf die deutsche und die englische Sprachfassung** Zahlreiche **Unstimmigkeiten zwischen der deutschen und der englischen Fassung** erschweren das Verständnis von Art. 13 I 1 RL-E zusätzlich. Die englische Fassung spricht z. B. von “Information society service providers that store and provide to the public access …”, wohingegen die deutsche Fassung von “Diensteanbieter der Informationsgesellschaft, die … speichern oder öffentlich zugänglich machen“ spricht. Dieser Unterschied findet sich auch in anderen Passagen, z. B. in Erwägungsgrund 38. Richtig sein kann von der Sache her nur die englische Fassung.	**b) In regard to the German and English version** Numerous **discrepancies between the German and the English version** make the comprehension of the first sentence of the first paragraph of Article 13 of the Draft Directive even more difficult. The English version mentions for ex. “information society service providers that store and provide to the public access…”, whereas the German version mentions “information society service providers that store or provide to the public access…”. This difference can also be found in other passages, for ex. in recital 38. Given the subject-matter, only the English version can be correct.

12	Die beiden in Ziff. 5 genannten **Alternativen in Art. 13 I 1 RL-E** unterscheiden sich in der englischen Fassung dadurch, dass • bei der ersten Alternative Vereinbarungen zwischen Rechteinhabern und Diensteanbietern bezüglich der Nutzung von Werken oder sonstigen Schutzgegenstände vorliegen; konkret geht es darum, dass diese eingehalten werden; • der zweiten Alternative zufolge Rechteinhaber und Diensteanbieter gemeinsam identifizieren, zu welchen Werken oder sonstigen Schutzgegenständen kein Zugang bestehen soll. Demgegenüber scheint die deutsche Fassung auch bezogen auf die zweite Alternative **Vereinbarungen** zwischen den Rechteinhabern und den Diensteanbietern vorauszusetzen. Das ergibt jedoch keinen Sinn – im Gegenteil. Diese Alternative muss gerade auch zulasten jener Diensteanbieter anwendbar sein, die keine Lizenzvereinbarungen mit den Rechteinhabern abgeschlossen haben. Dies geht nicht nur aus Erwägungsgrund 38 RL-E hervor; dafür spricht auch die ausführliche Erläuterung einzelner Bestimmungen des Vorschlags (S. 12) und namentlich die Wortwahl in der englischen Fassung (S. 10, 29), während der Wortlaut des Art. 13 I 1 Alt. 2 RL-E in der deutschen Fassung erheblich von der Erläuterung abweicht (S. 12, 31). Allein die englische Fassung entspricht Sinn und Zweck der vorgeschlagenen Regelung, Anreize für den Abschluss von Lizenzverträgen zu schaffen. Solche Anreize würden vernichtet, wenn ausgerechnet jene Diensteanbieter zu den zusätzlichen Maßnahmen gemäß Alternative 2 verpflichtet wären, die bereits Vereinbarungen mit den Rechteinhabern abgeschlossen haben.	Both **alternatives of the first sentence of the first paragraph of Article 13 of the Draft Directive** mentioned under point 5 differ in the English version in that • In the first alternative, agreements between rightholders and service providers concerning the use of works or other subject-matter already exist; the specific matter concerns their compliance; • In accordance with the second alternative, rightholders and service providers identify together which works or other subject-matter should not be accessible. In contrast, the German version seems to require **agreements** between the rightholders and the service providers also concerning the second alternative. However, this makes no sense – on the contrary. This alternative must also be applicable to those service providers, which haven't concluded any licence agreement with the rightholders. Such results not only from recital 38 of the Draft Directive; in support of this is also the detailed explanation of certain provisions of the proposal (p. 10) and, in particular, the wording in the English version (pp. 10, 29), while the wording of the second alternative of the first sentence of the first paragraph of Article 13 of the Draft Directive in the German version greatly differs from the explanation (pp. 12, 31). Only the English version correlates to the spirit and purpose of the proposed rule, to create incentives to the conclusion of licence agreements. Such incentives would be destroyed if those of all service providers, which already have licence agreements with the rightholders, would be obligated to the further measures under alternative nr. 2.

13	**3. Inhaltliche Bedenken** **a) Alternative mit Lizenzvertrag (Art. 13 I 1 Alt. 1): „pacta sunt servanda“** Die **erste Alternative von Art. 13 I 1 RL-E** fokussiert auf Diensteanbieter, die mit den Rechteinhabern Vereinbarungen über die Nutzung ihrer Werke oder sonstigen Schutzgegenstände abgeschlossen haben. Zu solchen Lizenzvereinbarungen verpflichtet sind zwar nur Diensteanbieter, die nicht unter den Haftungsausschluss des Art. 14 I E-Commerce-RL fallen (Erwägungsgrund 38 RL-E). In den Anwendungsbereich von Art. 13 I 1 RL-E fallen aber auch Diensteanbieter, die freiwillig Lizenzvereinbarungen mit den Rechteinhabern abschließen.	**3. Substantive Objections** **a) Alternative with Licence Agreement (First Alternative of the First Sentence of the First Paragraph of Article 13 of the Draft Directive): “Pacta Sunt Servanda”** The **first alternative of the first sentence of the first paragraph of Article 13 of the Draft Directive** focuses on service providers that have concluded agreements with the rightholders for the use of their works or other subject-matter. Indeed, only service providers that do not fall under the liability exemption of Article 14(1) of the E-Commerce Directive are required to conclude such licence agreements (recital 38 of the Draft Directive). However, also service providers that conclude voluntarily licence agreements with the rightholders fall under the scope of the first sentence of the first paragraph of Article 13 of the Draft Directive.
14	Eine zusätzliche Belastung stellt diese Vorgabe freilich weder im einen noch im anderen Fall dar, denn letztlich wird von Diensteanbietern nicht mehr als das verlangt, was ohnehin gilt: **„pacta sunt servanda“**. Sind Verträge nach allgemein geltendem (Vertrags-) Recht ohnehin einzuhalten, ist die erste Alternative von Art. 13 I 1 RL-E schlicht überflüssig. Insoweit, als sie (falsch) suggerieren mag, dass Diensteanbieter, die sich auf Lizenzverträge einlassen, zusätzlichen Pflichten unterliegen, mag die Norm sogar abschreckend wirken.	This requirement does not constitute an additional burden either in one or in the other case, since the service providers are not required to more than what is already applicable: “**pacta sunt servanda**”. As contracts are to be met in any case according to general applicable (contract) law, the first alternative of the first sentence of the first paragraph of Article 13 of the Draft Directive is simply superfluous. To the extent that it (falsely) may suggest that service providers that venture licence agreements may be subject to additional obligations, the norm may even have a dissuasive effect.
15	**b) Alternative ohne Lizenzvertrag (Art. 13 I 1 Alt. 2): notice and take down?** Die **zweite Alternative** zielt darauf, den Zugang zu bestimmten Inhalten zu unterbinden, die seitens der Rechteinhaber in Zusammenarbeit mit den Diensteanbietern identifiziert worden sind. Hier stellt sich die	**b) Alternative without Licence Agreement (Second Alternative of the First Sentence of the First Paragraph of Article 13): Notice and Take Down?** The **second alternative** aims at preventing access to certain contents, which have been identified by the rightholders in cooperation with the service providers. The question that

	Frage, inwieweit Art. 13 I 1 RL-E das bereits in Art. 14 I b) E-Commerce-RL vorhergesehene sogenannte „notice and take down-Verfahren“ (NTD-Verfahren) ergänzen bzw. erweitern soll.	arises here is to which extent the first sentence of the first paragraph of Article 13 of the Draft Directive should complete or extend the “notice and take down procedure” (NTD procedure) foreseen in Article 14(1)(b) of the E-Commerce Directive.
16	Bei diesem **„NTD-Verfahren“** (das nicht mit jenem nach § 512 des U.S. Copyright Act übereinstimmt) muss der Rechteinhaber den Diensteanbieter zunächst auf eine Rechtsverletzung hinweisen und diesen auffordern, die unzulässigen Inhalte zu entfernen. Um seine Haftungsfreistellung gem. Art. 14 I E-Commerce-RL nicht zu verlieren, muss der Diensteanbieter dieser Aufforderung Folge leisten.	In accordance with this “**NTD procedure**” (which does not coincide with the one foreseen in § 512 of the U.S. Copyright Act), the rightholder must first notify the service provider of a rights infringement and request the provider to remove the illegal content. In order to not lose its exemption from liability in accordance with Article 14(1) of the E-Commerce Directive, the service provider must comply with this request.
17	Nach höchstrichterlicher Rechtsprechung in Deutschland sind darüber hinaus **spezifische, anlassbezogene Überwachungspflichten** zur Vorbeugung erneuter gleichartiger Rechtsverletzungen erforderlich (BGH GRUR 2013, 370, 371 – Alone in the Dark; BGH GRUR-RS 2013, 15388 Rn. 38 – Prüfpflichten), was sich im Rahmen des europarechtlichen Erlaubten bewegt (EuGH EuZW 2012, 261, 262 – SABAM/Netlog; EuGH GRUR 2012, 265, 267 – Scarlet Extended/SABAM; EuGH GRUR 2011, 1025, 1034 – L'Oréal/eBay u.a.). Faktisch zwingt diese Rechtsprechung jene Diensteanbieter, die die Abrufbarkeit von Inhalten über ihre Plattform in die Zukunft gerichtet gewährleisten wollen, zu Lizenzvereinbarung mit den Rechteinhabern.	In addition to this, according to Supreme Court case-law in Germany, **specific, situation-related monitoring obligations** are required in order to avoid repeated infringements of the same type (BGH GRUR 2013, 370, 371 – Alone in the Dark; BGH GRUR-RS 2013, 15388 recital 38 – Prüfpflichten), which fall under the scope of what is permissible under EU Law (ECJ EuZW 2012, 261, 262 – SABAM/Netlog; ECJ GRUR 2012, 265, 267 – Scarlet Extended/SABAM; ECJ GRUR 2011, 1025, 1034 – L'Oréal/eBay et al.). De facto, this case-law compels those service providers that desire to guarantee the availability of content on their platforms in the future to conclude licence agreements with the rightholders.
18	Wird Art. 14 I E-Commerce-RL entsprechend der deutschen Rechtsprechung ausgelegt, verwirklicht die Norm vergleichbare Ziele wie der nun vorgeschlagene Art. 13 I 1 RL-E. Insoweit wäre eine **europaweit geltende Norm** begrüßenswert, nachdem die nationalen Rechtsprechungen zu Art. 14 I E-Commerce-RL uneinheitlich sind. Nachdem die Art der Zusammenarbeit zwischen Rechteinhabern und Diensteanbietern	If Article 14(1) of the E-Commerce Directive is interpreted in accordance with the German case-law, the norm fulfils comparable objectives to the proposed first sentence of the first paragraph of Article 13 of the Draft Directive. In this respect, a **norm valid for all of Europe** would be welcome since national case-law concerning Article 14(1) of the E-Commerce Directive is inconsistent. However, as the type of coopera-

	bietern in Art. 13 I 1 RL-E jedoch nicht näher konkretisiert wird, bleibt zweifelhaft, ob damit tatsächlich eine weitergehende Harmonisierung bewirkt würde.	tion between rightholders and service providers is not further specified in the first sentence of the first paragraph of Article 13 of the Draft Directive, it remains dubious whether further harmonisation would really be achieved through it.
19	**c) Vereinbarkeit mit anderweitigem EU-Recht** Nach Art. 18 III RL-E belässt die neue Richtlinie das bisherige EU-Recht **unberührt**. Bezogen auf Art. 13 RL-E gilt dies dem „Impact Assessment" (S. 147, 154) und Erwägungsgrund 38 zufolge insbesondere für den Anwendungsbereich der **E-Commerce-RL**. Diensteanbieter würden also unabhängig davon, ob sie im Sinne von Art. 13 RL-E Maßnahmen treffen, unter gegebenen Voraussetzungen unter die Haftungsfreistellung des Art. 14 E-Commerce-RL fallen.	**c) Compatibility with other EU Law** In conformity with Article 18(3) of the Draft Directive, the new directive leaves existing EU Law **unaffected**. In regard to Article 13 of the Draft Directive, and according to the Impact Assessment (pp. 147, 154) and recital 38, such concerns especially the scope of the **E-Commerce Directive**. Under certain circumstances, service providers would thus fall under the liability exemption of Article 14 of the E-Commerce Directive, regardless of whether they adopt any measures in accordance with Article 13 of the Draft Directive.
20	Eine **generelle Überwachungspflicht wäre mit Art. 15 I E-Commerce-RL nicht vereinbar**. Damit kann Art. 13 I 1 RL-E von vornherein keine substantiellen neuen Pflichten einführen. Jedenfalls Diensteanbieter, die dem Haftungsprivileg nach Art. 14 E-Commerce-RL unterliegen, können nicht dazu verpflichtet werden, alle Daten sämtlicher Kunden zeitlich unbegrenzt proaktiv zu überwachen. Allgemeine Überwachungspflichten wären im Übrigen nicht mit Art. 3 der Richtlinie 2004/48 (Enforcement-RL) vereinbar (EuGH EuZW 2012, 261, 262 f. – SABAM/Netlog).	A **general monitoring obligation wouldn't be compatible with Article 15(1) of the E-Commerce Directive**. Consequently, the first sentence of the first paragraph of Article 13 of the Draft Directive cannot introduce at the outset any substantial new obligations. In any case, service providers, which fall under the liability privilege of Article 14 of the E-Commerce Directive, cannot be obligated to proactively monitor all data of all clients indefinitely. General monitoring obligations would furthermore be incompatible with Article 3 of the Enforcement Directive (ECJ EuZW 2012, 261, 262 et seq. – SABAM/Netlog).
21	Richtlinien sind im Übrigen im Einklang mit den Rechten und Grundsätzen der **Charta der Grundrechte der europäischen Union** (GR-Charta) auszulegen und anzuwenden (Erwägungsgrund 45). Dies bedeutet, dass der Schutz des Urheberrechts (Art. 17 II GR-Charta) einerseits und der Schutz der unternehmerischen Freiheit (Art. 16 GR-Charta), der Schutz personen-	Moreover, directives are to be interpreted and applied in accordance with the rights and principles of the **Charter of Fundamental Rights of the European Union** (the Charter of Fundamental Rights) (recital 45). This means that copyright protection (Article 17(2) of the Charter of Fundamental Rights) on the one hand, and the freedom to conduct a business (Article 16 of the Charter

	bezogener Daten sowie des freien Empfangs oder der freien Sendung von Informationen (Art. 8 und 11 GR-Charta) andererseits in Ausgleich zu bringen sind (siehe: EuGH EuZW 2012, 261, 263 – SABAM/Netlog).	of Fundamental Rights), the protection of personal data, as well as the freedom of expression and information (Articles 8 and 11 of the Charter of Fundamental Rights) on the other, must be fairly balanced (cf. ECJ EuZW 2012, 261, 263 – SABAM/Netlog).
22	**d) Inhaltserkennungstechniken und -verfahren** Alle **weiteren in Art. 13 RL-E enthaltenen Vorgaben** – und namentlich der Versuch der EU-Kommission, gesetzlich verpflichtende Inhaltserkennungstechniken und -verfahren einzuführen – stehen letztlich in Relation zu Art. 13 I 1 RL-E. Auch sie können damit nicht zu nennenswerten Änderungen der geltenden Rechtslage führen.	**d) Content Recognition Technologies and Procedures** All **further requirements contained in Article 13 of the Draft Directive** – in particular the EU Commission's attempt to introduce by law obligatory content recognition technologies and procedures – are ultimately related to the first sentence of the first paragraph of Article 13 of the Draft Directive. Thus, also they cannot lead to any changes of the current legislation worthy of mention.
23	Hingegen bringen gerade solche Inhaltserkennungstechniken und -verfahren auch Risiken mit sich. Nicht zu erkennen sind damit etwa Inhalte von meinungspolitischer Relevanz oder erlaubte Parodien (Art. 5 III k) InfoSoc-RL). Darüber hinaus eröffnen sie Möglichkeiten zum **Missbrauch**. Denn es müssen nicht zwingend Rechteinhaber sein, die Diensteanbieter zur Entfernung von Inhalte auffordern; auch z. B. Konkurrenten könnten das tun (s. z. B. https://trendblog.euronics.de/tv-audio/youtube-content-id-system-abzocker-freuen-sich-15843/). Leidtragende wären nicht nur die (rechtmäßig handelnden) Nutzer, sondern namentlich die Verbraucher. Im Widerspruch zu Art. 11 GR-Charta würde ihr freier Informationszugang behindert, ohne dass berechtige Interessen von Rechteinhabern dies erfordern.	On the contrary, precisely such content recognition technologies and procedures also entail risks. For example, content pertaining to political opinions or admissible parody are not to be recognised (Article 5(3)(k) of the InfoSoc Directive). Furthermore, they enable **abuse**. Because it does not necessarily have to be rightholders requesting the service providers to remove content; also competitors, for example, could do this (cf. e.g. https://trendblog.euronics.de/tv-audio/youtube-content-id-system-abzocker-freuen-sich-15843/). The victims would not only be the (legally acting) users, but also the consumers. Conflicting with Article 11 of the Charter of Fundamental Rights, their freedom of information would be hindered without such being required by legitimate interests of the rightholders.
24	Gerade weil **Inhaltserkennungstechniken und -verfahren** zu einer empfindlichen Einschränkung der grundrechtlich geschützte Informations- und Meinungsfreiheit	Precisely because **content recognition technologies and procedures** can lead to a sensitive limitation of the fundamentally protected freedom of expression and infor-

	(Art. 11 GR-Charta) führen können, muss es gesetzlich legitimierten Richtern vorbehalten bleiben, über die Rechtmäßigkeiten von Inhalten zu entscheiden (siehe auch: EuGH ZUM 2012, 29, 33 – Scarlet Extended/SABAM; ZUM 2012, 307, 311 – SABAM/Netlog). Entsprechend muss das in Art. 15 I E-Commerce-RL normierte Grundprinzip, dass Provider **keine allgemeine Filter- oder Überwachungspflicht für reine Nutzerinhalte** trifft, erhalten bleiben – dies auch zugunsten von Plattformbetreibern.	mation (Article 11 of the Charter of Fundamental Rights), it must remain reserved to legally authorised judges to decide on the legality of content (cf. also: ECJ ZUM 2012, 29, 33 – Scarlet Extended/SABAM; ZUM 2012, 307, 311 – SABAM/Netlog). Consequently, the fundamental principle contained in Article 15(1) of the E-Commerce Directive, that providers have **no general filtering or monitoring obligation in regards to pure user content**, must be maintained – also in favour of platform operators.
25	**III. Verbesserungsvorschläge** **1. Präzisierung der Providerhaftung** Die **Haftungsregeln für Plattformbetreiber zu präzisieren**, erscheint zwar ratsam – jedoch ohne Verschärfung im Verhältnis zur heutigen Haftungsprivilegierung. Denn damit würden jegliche Plattformbetreiber – selbst ohne gesetzliche Verpflichtung – faktisch gezwungen, jene Inhaltserkennungstechniken und -verfahren einsetzen, die aus den genannten Gründen abzulehnen sind. Um den Folgen einer Haftung zu entgehen, müssten sie diese Techniken so einstellen, dass potentiell rechtsverletzende Inhalte von vornherein blockiert werden. Selbst mit solchem „Overblocking“ bliebe aber zweifelhaft, ob sich Urheberrechtsverletzungen systematisch und flächendeckend verhindern ließen.	**III. Suggestions for Improvement** **1. Specification of Provider Liability** The **specification of the liability rules for platform operators** seems advisable - however, without increase in relation to the current liability exemption. Because with that, each platform operator would be de facto forced – even without a legal obligation – to apply said content recognition technologies and procedures, which should be rejected on the abovementioned grounds. In order to avoid the consequences of liability, they would have to adjust these technologies so that potentially illegal content is blocked at the outset. Even with such “over blocking”, however, it would remain dubious whether copyright infringements could be systematically and extensively prevented.
26	Eine Präzisierung der Haftungsregeln muss vielmehr bedeuten, den schon im geltenden Acquis zum Ausdruck kommenden Grundsatz, Provider **für Handlungen** von Nutzern **nicht haften** zu lassen, **die sie vernünftigerweise nicht kontrollieren können** (Art. 12-14 E-Commerce-RL), auf den heute primär im Fokus liegenden Sachverhalt zu erstrecken, dass Diensteanbieter ihren Nutzern lediglich die Infrastruktur zur Verfügung stellen, damit diese durch	A specification of the liability rules must rather mean to extend the principle already reflected in the *Acquis* that providers are **not liable for** users’ **actions, which they cannot reasonably control** (Articles 12-14 of the E-Commerce Directive), to the situation nowadays primarily at hand, that service providers merely place the infrastructure at the disposal of their users in order for them to be able to carry out acts of exploitation exempted within the scope of legal excep-

	Schrankenregelungen freigestellte Nutzungshandlungen vornehmen können. Im Umkehrschluss kann eine Haftungsprivilegierung nur bestehen, solange der Diensteanbieter von rechtswidrigen Nutzerhandlungen **keine Kenntnis** hat oder haben kann. Wird er auf einen möglicherweise rechtswidrigen Inhalt aufmerksam (insbesondere wenn er vom Rechteinhaber darauf hingewiesen wird), muss er das unter III. 3. beschriebene NTD-Verfahren einleiten, um einer Haftung zu entgehen.	tions. By implication, a liability exemption can only exist as long as the service providers haven't or couldn't have **any knowledge** of the illegal users' actions. Should the provider be made aware of possibly illegal content (especially when made aware by a rightholder), it must initiate the NTD procedure described unter point III 3., in order to avoid liability.
27	Im Grunde ließe sich diese Regel schon in den geltenden Art. 14 E-Commerce-RL hinein interpretieren. Solange der EuGH nicht mit der Frage der Reichweite der Norm befasst wird, ist die **einheitliche Anwendung** im gesamten Binnenmarkt jedoch nicht sichergestellt – davon abgesehen, dass eine Auslegung je nach Sachverhalt so oder anders ausfallen könnte. Angezeigt erscheint es daher, die bestehende Norm um einen entsprechenden Absatz 1a zu erweitern. Lauten könnte dieser etwa wie folgt: „Absatz 1 gilt auch für das Bereitstellen einer Infrastruktur zur Speicherung von Inhalten, um diese der Öffentlichkeit ohne Zutun des Diensteanbieters zugänglich zu machen."	Essentially, this rule could already be interpreted from the current Article 14 of the E-Commerce Directive. However, as long as the ECJ does not address the question of the norm's extent, a **uniform application** throughout the internal market isn't ensured – apart from the fact that interpretations can differ from case to case. It thus seems indicated to extend the norm by adding a respective paragraph 1a. Such could be formulated as follows: "Paragraph 1 is also applicable to the provision of an infrastructure for saving content with the objective of making it available to the public without assistance of the service provider."
28	Die **Haftungsprivilegierung muss** dort **enden**, wo ein Dienst erkennbar darauf abzielt, Nutzern das rechtswidrige Hochladen urheberrechtlich geschützter Inhalte zu ermöglichen. Diensteanbieter in solchen Fällen der Verantwortung zu entziehen, verlangt auch die Meinungs- und Informationsfreiheit (Art. 11 GR-Charta) nicht. Erst recht muss ein Diensteanbieter für sein eigenes Handeln einstehen; dazu gehört auch die nicht autorisierte Nutzung fremder Inhalte in der Weise, dass diese als Teil eines eigenen Angebot des Dienstes erscheinen (im Sinne einer Aneignung).	The **liability exemption must cease** as soon as a service evidently intends to enable users to illegally upload copyright protected content. To absolve service providers of responsibility in such cases is also not in accordance with the freedom of expression and information (Article 11 of the Charter of Fundamental Rights). More than ever, a service provider must be responsible for its own acts; such also includes the non-authorised use of third-party content in a way that makes it seem like it is part of the provider's own service (in the sense of an appropriation).

29	Wird die E-Commerce-RL in Art. 14 im vorstehenden Sinne ergänzt, könnte diese Grenzziehung gleichzeitig durch eine **Ergänzung in Erwägungsgrund 44** noch verdeutlicht werden. Möglich wäre beispielsweise die Formulierung: „Gleiches gilt für das absichtliche Herbeiführen oder Fördern rechtswidriger Nutzerhandlungen durch Dritte." Von selbst versteht sich, dass eigene rechtsverletzende Handlungen der Privilegierung entzogen sind. Was als aneignende Nutzung zu beurteilen ist, erscheint allerdings noch nicht geklärt; das zeigen namentlich die Debatten über die Reichweite der erlaubten Linksetzung.	If the E-Commerce Directive is complemented as abovementioned, this demarcation could simultaneously be made even clearer by way of an **addition to recital 44**. A possible wording could be, for example: "The same applies to the intentional induction or support of illegal user actions by third-parties." It goes without saying that own illegal actions are deprived of the exemption. What is to be considered appropriating use seems, however, still unclear; such is particularly shown by the debates concerning the extent of permissible linking.
30	Wird jedoch grundsätzlich anerkannt, dass diese Grenzziehung erforderlich ist, und beschränkt sich der Fokus auf Diensteanbieter jenseits der Haftungsprivilegierung, d. h. steht außer Frage, dass sie für Rechtsverletzungen – und namentlich für eigenes Handeln – einzustehen haben, so lässt sich eine Vorschrift zum Einsatz bestimmter Inhaltserkennungstechniken und -verfahren zumindest grundsätzlich rechtfertigen. Insoweit sind gewisse der Ansätze des vorgeschlagenen Art. 13 RL-E nicht pauschal abzulehnen; zu kritisieren ist vielmehr in erster Linie die **fehlende Differenzierung**. Auch sind die unter II.3.d geäußerten Bedenken gegen solche Techniken und Verfahren auch im Bereich illegalen Verhaltens nicht hinfällig. Vielmehr sind die damit einhergehenden Gefahren in einer gegenüber dem Vorschlag verbesserten Haftungsregelung angemessen zu berücksichtigen.	If the necessity of this delimitation is acknowledged and the focus is limited to service providers beyond the liability exemption, i.e. it is unquestionable that they must be liable for infringements – in particular for their own acts –, a provision concerning the application of certain content recognition technologies and procedures is at least in principle justified. In this respect, certain approaches of Article 13 of the Draft Directive shouldn't be categorically rejected; what is worthy of critique is first and foremost the **lack of differentiation**. Also the concerns expressed under point II.3.d against such technologies and procedures also in the realm of illegal behaviour are not void. Rather, the concomitant risks should be taken into account in an improved liability rule as proposed.
31	**2. Berücksichtigung der Nutzerinteressen** Die Interessen heutiger Nutzer gehen oft über den Meinungsaustausch hinaus. Das Veröffentlichen von – zum Teil selbst bearbeiteten oder unter Verwendung vorbestehender Werke erstellten (sog. *user generated content*) – Audiodateien, Videos, Bildern etc. stellt inzwischen für eine Vielzahl	**2. Consideration of the Users Interests** The interests of today's users often go beyond the exchange of opinions. Publishing audio data, videos, photos, etc. – partially self-edited or made using pre-existing works (so-called *user generated content*) – constitutes for many people a daily activity. This user behaviour constitutes a reality that can

	von Menschen eine alltägliche Handlung dar. Dieses Nutzerverhalten stellt eine kaum noch zu unterbindende Realität darf, wird im geltenden Urheberrecht aber nicht reflektiert. Für dessen wirksame Durch- und Umsetzung ist die **gesellschaftliche Akzeptanz** des Urheberrechts jedoch von entscheidender Bedeutung.	barely be prohibited but isn't reflected in current copyright law. However, for its effective enforcement and implementation, **society's acceptance** of copyright law is of crucial importance.
32	Der deutsche Gesetzgeber hat dies schon im Jahr 1965 erkannt und mit der Einführung einer **vergütungspflichtigen Schrankenregelung** zugunsten der Privatkopie eine nachhaltige Lösung entwickelt, um einen Interessenausgleich herbeizuführen. Die Tragfähigkeit dieses Ansatzes hat sich bis heute bewahrheitet; namentlich in Europa hat die Mehrzahl der Staaten dieses Modell übernommen. Es ist nun an der Zeit, dass der europäische Gesetzgeber einen entsprechenden Schritt im Internetzeitalter unternimmt.	The German legislator recognised this already in 1965 and found a long-lasting solution by implementing an **exception with obligatory remuneration** in favour of the private copy, in order to bring about a balance of interests. The sustainability of this approach has been proven true up to today; in particular in Europe, most States have adopted this model. It is now time for the European legislator to take a respective step in the internet age.
33	Entscheidend ist, dass in einem solchen Modell die berechtigten Verwertungsinteressen der Rechteinhaber Berücksichtigung finden. Deshalb dürfen **nur** solche **private Nutzungshandlungen** legalisiert werden, die den üblichen Gepflogenheiten in sozialen Netzwerken entsprechen. Nutzungshandlungen, die ein kommerzielles Ausmaß erreichen oder von vornherein zu gewerblichen Zwecken erfolgen, sind nicht zu erlauben. Aber auch bei an sich privaten Nutzungshandlungen besteht dort eine Grenze, wo die Möglichkeiten der normalen Verwertung eines Werks spürbar beeinträchtigt würden. Der Fall sein dürfte dies etwa bei reinem Filesharing, der Veröffentlichung eines kompletten Spielfilms oder eines vollständigen Albums. Auch die zeitliche Komponente mag eine Rolle spielen; je länger ein Werk erhältlich ist, desto kleiner ist das Schädigungspotential zulasten des Rechteinhabers, und umso eher mögen auch umfassendere Nutzungen erlaubt sein.	It is decisive that the legitimate interests of the rightholders are taken into account with this model. Therefore, **only** that **private exploitation** that corresponds to the usual practice in social networks, should be legalised. Exploitation attaining a commercial degree or serving commercial objectives from the outset are not to be allowed. But also for private exploitation per se, the limit is when the possibilities of a normal exploitation become distinctly affected. Such is arguably the case with pure file sharing, the publication of a complete movie or an entire album. Time also plays a role: the longer a work is available, the less potential there is of damage for the rightholder, and all the more can more extensive uses be allowed.

34	In Fortentwicklung der Rechtsprechung, wonach sich eine Nutzungserlaubnis nur auf Werke bezieht, die nicht aus einer offensichtlich unrechtmäßigen Quelle stammen (EuGH, EuZW 2015, 351, 357 – Copydan Bandkopi/Nokia Danmark), sollten online verfügbare Inhalte sodann nur genutzt werden dürfen, wenn sie **rechtmäßig hochgeladen** worden sind. Damit darf eine private Nutzerhandlung zwar auch auf vorangehende Nutzungshandlungen Dritter aufbauen, die ihrerseits von einer Schrankenbestimmung gedeckt sind, nicht aber unter Ausnutzung von nicht rechtmäßigem Filesharing.	Developing the case-law, in accordance to which a use permission only relates to works that do not originate from an obvious illegal source (ECJ, EuZW 2015, 351, 357 – Copydan Bandkopi/Nokia Danmark), content available online should only be allowed to be used when it has been **uploaded legally**. Thereby, a private user action may build upon previous acts of exploitation from third-parties that are covered by an exemption, however not through the exploitation of illegal file sharing.
35	Mit Kriterien wie den genannten erhalten die nationalen Gesetzgeber und Gerichte einen ausreichenden, aber nicht zu weitgehenden Spielraum für interessengerechte Lösungen. Um dennoch eine gewisse Rechtssicherheit zugunsten der Nutzer herbeizuführen, könnten gewisse positive oder negative **Beispiele** in die Erwägungsgründe aufgenommen werden.	With criteria such as the abovementioned, national legislators and courts obtain sufficient but not too broad leeway for solutions fair to all interests. In order to nevertheless bring about a certain legal certainty for the users, certain positive or negative **examples** could be included in the recitals.
36	Wird der Ansatz, übliches Nutzerverhalten vergütungspflichtig zu erlauben statt es zu verbieten, auch im Kontext von sozialen Netzwerken verwirklicht, ist für das **Hochladen** an sich – unabhängig von der Frage, ob der erlaubterweise hochgeladene Inhalt unverändert bleibt, oder ob seitens des Nutzers schöpferische oder nicht schöpferische Änderungen erfolgt sind – zugunsten der Rechteinhaber eine **angemessene Vergütung** zu zahlen (s. zur Aufteilung dieser Vergütung zwischen ursprünglichen und derivativen Rechteinhabern auch Part F Rn. 14 ff.).	If the proposal to allow normal exploitation subject to payment instead of prohibiting is implemented also in the context of social networks, an adequate payment should be secured for the **upload** itself – regardless of the question whether the legally uploaded content remains unchanged or whether the user has introduced creative or non-creative changes. (See part F para 14 et seqq. as to the splitting of the payment between creators and subsequent rightholders.)
37	Eine individuelle Abrechnung über den jeweiligen Nutzer wäre für die Rechteinhaber freilich viel zu komplex und aufwendig. Daher erscheint es unausweichlich, die angemessene Vergütung zentral und gestützt auf die etablierten Mechanismen der **kollektiven Rechtewahrnehmung** zu erheben.	Individual billing of each user would admittedly be far too complex and costly for the rightholders. It thus seems inevitable to collect the reasonable remuneration centrally and supported by the established mechanisms of **collective rights management**. Here, the service provider comes into play,

	An dieser Stelle kommt der Diensteanbieter ins Spiel, indem er es ist, der solches Nutzerverhalten erst möglich macht – in gewisser Hinsicht vergleichbar mit dem Hersteller von Leerträgern, mit dessen Hilfe Privatkopien ermöglicht werden. Zwar soll dieser Diensteanbieter für das Nutzerverhalten nicht selber haften, zumal dann nicht, wenn der Nutzer im Rahmen einer Schranke handelt. Hingegen erscheint es sinnvoll und interessengerecht, die **Plattformbetreiber als Zahlstelle** ins Recht zu fassen. Dadurch entstehen ihnen zwar Kosten, doch können sie diese in ähnlicher Weise direkt oder indirekt auf ihre Nutzer umlegen, wie die Hersteller von Leerträgern jene mit der Urheberrechtsabgabe belasten. Wie dieser Zahlmechanismus konkret umgesetzt wird, kann den Mitgliedstaaten überlassen werden; die Richtlinie kann sich darauf beschränken, den Grundsatz der kollektiven Rechtewahrnehmung zu statuieren und allenfalls gewisse Eckwerte dafür in einem Erwägungsgrund festzulegen.	since it enables such user conduct to start with – to a certain extent, similar to the producer of blank recording media that enables private copies. This service provider should, of course, not be liable for the user's conduct, especially not when the user acts within the scope of an exception. However, is seems reasonable and fair that, as **paying agents**, an action can be brought against the **platform providers**. Thereby, costs arise for them, however they can shift them directly or indirectly to the users similarly to how the producers of blank media burden them with the copyright levies. How this payment mechanism is implemented in practice can be left up to the Member States; the Directive can limit itself to laying down the principle of collective rights management and at most, determine certain parameters for it in a recital.
38	Wie eine vergütungspflichtige Schranke für privates Verhalten in sozialen Netzwerken gesetzestechnisch umgesetzt wird, ist hingegen eine Grundsatzfrage. Zu beachten ist dabei, dass es um zwei Komponenten geht. Zum einen ist das **Hochladen** von Werken bzw. Werkteilen in sozialen Netzwerken nach Maßgabe der vorstehend genannten Kriterien zu erlauben. Zum andern sind von dieser Erlaubnis aber auch jene **Werkverwendungen** zu erfassen, die im Rahmen des *user generated content* **vor dem Hochladen** vorgenommen werden. Zwar verbietet das Urheberrecht solche Handlungen nicht, solange sie im Privatbereich stattfinden; jedoch verlässt der Nutzer diesen Bereich, wenn er solche Inhalte einem sozialen Netzwerk zuführt. Insoweit ist es letztlich in jedem Fall der Akt des Hochladens, der erlaubt werden muss.	How an exception subject to payment for private conduct in social networks is implemented legislatively is, however, a fundamental question. It must be noted that there are two issues here. Firstly, the **upload of works** or parts of works in social networks according to the abovementioned criteria should be allowed. Secondly, **such uses of the work**, which are carried out within the scope of *user generated content* **before uploading**, should, however, also be covered by this permission. Although copyright law does not prohibit such actions as long as they occur in private, the user abandons this realm, however, when such content is administered to a social network. To this extent, it is ultimately the act of uploading in each case that must be permitted.

39	Würde diese Erlaubnis dadurch verwirklicht, dass lediglich der heutige Art. 5 **InfoSoc-RL** um einen weiteren Tatbestand ergänzt wird, wäre diese Schranke nach der aktuellen Konzeption für die Mitgliedstaaten fakultativ; verpflichtend vorgeschrieben werden könnte dann – falls diese Schranke ins nationale Recht umgesetzt wird – nur eine Verfügung (wie dies gegenwärtig z. B. für Art. 5 II Bst. a, b und e der Fall ist). Sollen die Mitgliedstaaten stattdessen zur Aufnahme einer solchen Schranke verpflichtet werden, wäre das in einer neuen, eigenständigen Richtlinie ebenso möglich, wie die Kommission dies im Rahmen einer Richtlinie zum Urheberrecht im digitalen Binnenmarkt für eine Reihe von neuen Schrankenbestimmungen vorschlägt. Demgegenüber müsste bei einer Regelung in der InfoSoc-RL eine neue Normenkategorie für **zwingende Schranken** geschaffen werden; in jene könnten dann weitere – heute fakultativ umzusetzende – Nutzungserlaubnisse transferiert werden.	If this permission would be implemented by simply complementing the current Article 5 of the **InfoSoc Directive** with a further offense, this exception would be optional for the Member States in accordance with the current concept; only an order (as is the case currently with, for example, Article 5(2)(a),(b) and (e)) could be made mandatory – should this exception be transposed into national law. Should the Member States instead be obligated to take up such an exception, such would be as equally possible with a new, independent Directive such as how the Commission proposes this for a series of new exception provisions within the scope of a Directive on copyright in the digital internal market. In contrast, with a regulation in the InfoSoc Directive, a new norm category for **mandatory exceptions** would have to be created; other use permissions – currently of facultative transposition – could then be transferred to such.
40	Die **Kernelemente** eines solchen Erlaubnistatbestandes müssten – nebst möglicherweise weiteren Spezifikationen, die auch in Erwägungsgründen erläutert werden könnten – im Wesentlichen die folgenden sein: • Werknutzung durch Privatperson • in unveränderter oder durch die Privatperson veränderter Form • übliche Gepflogenheiten in sozialen Netzwerken • kein kommerzielles Ausmaß • keine spürbare Beeinträchtigung der Möglichkeit einer normalen Werkverwertung • die Rechteinhaber erhalten eine Vergütung.	The **core elements** of such a statutory exemption – in addition to possibly other specifications, which could be explained in recitals – would essentially have to be the following: • Exploitation by a private person • Unchanged or changed by the private person • Usual practice in social networks • No commercial extent • No noticeable impairment of the possibility of a normal work exploitation • The rightholders obtain remuneration.

41	Für Plattformen, die selbst weder direkt noch indirekt (z. B. werbebasiert) auf Gewinnerzielung ausgerichtet sind, mag die zwingende Vergütungspflicht eine erhebliche Belastung bedeuten. Allerdings stellt das Urheberrecht traditionellerweise nicht auf die Gewinnorientierung ab; auch bei Benefizkonzerten setzt die Werknutzung Lizenzzahlungen voraus. Berücksichtigen lassen sich solche Umstände jedoch bei der **Tarifgestaltung**; diese liegt im Ermessen der Mitgliedstaaten.	The mandatory remuneration obligation may represent a significant burden for platforms, which are not directly or indirectly (e.g. advertising based) profit-oriented. However, copyright doesn't traditionally apply to profit orientation; also the use of the work for a benefit concert requires licence payments. Such circumstances can be taken into account, however, when **setting the fees**; such lies within the Members States discretionary power.
42	**3. Maßnahmen gegen rechtswidrige Uploads (NTD-Verfahren)** **a) Harmonisierung des NTD-Verfahren** Die heute bestehenden Möglichkeiten der Rechteinhaber, im Rahmen des NTD-Verfahrens gegen unautorisierte Nutzerhandlungen vorzugehen (s. o. II. 3. b)), werden durch die hier vorgeschlagene Schranke für privates Nutzerverhalten in sozialen Netzwerken nicht beeinträchtigt, sondern nur inhaltlich begrenzt: die Möglichkeit, bestimmte Werknutzungen zu verbieten, wird in einen Vergütungsanspruch umgewandelt. Den Diensteanbietern kommt durch eine solche Schranke zwar neu die Funktion der Zahlstelle zu. Damit verbunden sind aber **keine neuen Überwachungspflichten**. Um die Haftungsprivilegierungen der Art. 12-14 E-Commerce-RL nicht zu verlieren, müssen sie auch künftig nicht präventiv tätig werden, etwa wenn ein Nutzer jenseits der Schranke handelt, sondern erst nach tatsächlicher oder möglicher Kenntnis, etwa nach entsprechendem Hinweis eines Rechteinhabers.	**3. Measures against illegal uploads (NTD Procedure)** **a) Harmonisation of the NTD Procedure** The currently existing possibilities for rightholders to proceed against unauthorised user actions within the scope of the NTD procedure (cf. above, point II. 3. b)) are not affected by the here proposed exception for private user conduct in social networks, but simply limited substantively: the possibility to prohibit certain work uses is converted into a right to remuneration. Indeed, the service providers will have the new function of paying agents by way of such an exception. However, **no new monitoring obligations** are related to it. In order to not lose the liability exemption of Articles 12-14 of the E-Commerce Directive, they will not have to act preventively, for instance when a user acts beyond the exception, but rather upon actual or possible knowledge, for instance after respective notice from a rightholder.
43	In der Sache führt die mit den hier vorgeschlagenen Änderungen einhergehende Verschiebung der Grenze zwischen zulässigen und unzulässigen Nutzungshandlungen allerdings zu erhöhten Anforderungen bei der Handhabung des NTD-Verfahrens. Im Interesse der Rechtssicherheit, aber auch	Substantially, the shift of the limit between admissible and inadmissible exploitations concomitant with the here proposed changes leads, however, to increased requirements in the management of the NTD procedure. In the interest of legal certainty, but also in order to achieve a higher level of harmonisa-

	um einen höheren Harmonisierungsgrad innerhalb der EU zu erreichen, drängt sich daher eine **verfeinerte gesetzliche Ausgestaltung des NTD-Verfahren** auf. Sinnvoll erscheinen namentlich Maßnahmen, um das Missbrauchspotential von NTD einzudämmen. Denn gerade die hier vorgeschlagene Schranke könnte die Anreize erhöhen, rechtmäßig veröffentlichte Inhalte gestützt auf ein NTD-Verfahren entfernen zu lassen.	tion within the EU, an **elaborate legislative design of the NTD procedure** is imposed. In particular, measures to contain potential abuse of NTD seem particularly sensible. Precisely because the here proposed exception could increase the incentives to remove legally published content based on an NTD procedure.
44	Verstärke Aufmerksamkeit verdienen aber nicht nur die Nutzerinteressen; auch die Obliegenheiten der Rechteinhaber sollten konkretisiert werden. Konkret sind insbesondere gewisse Anforderungen für die **Legitimierung jener Rechteinhaber** gesetzlich vorzuschreiben, die bestimmte geschützte Inhalte entfernen lassen wollen (siehe z. B. die entsprechende Regelung in Section 191 des finnischen Information Society Code (917/2014)). Dies könnte z. B. dadurch erfolgen, dass sie ihre Identität offenlegen müssen. Auch eine möglichst genaue Bezeichnung der (angeblich) rechtswidrig veröffentlichten Inhalte sowie der jeweiligen unrechtmäßigen Nutzer erscheint sinnvoll. Eine Erläuterungspflicht dazu, warum die Veröffentlichung des Inhalts rechtswidrig bzw. nicht von einer Schrankenregelung erfasst sei, wäre ebenfalls erwägenswert.	Not only the user's interests deserve closer attention; also the duties of the rightholders should be substantiated. Specifically, in particular certain requirements for the **legitimacy of those rightholders** who want to remove certain protected content should be regulated by law (cf., for example, the respective provision in section 191 of the Finnish Information Society Code (917/2014)). This could be done, for example, by them having to reveal their identity. Also a precise identification of the (alleged) illegally published content as well as the respective unlawful user seems reasonable. Mandatory disclosure as to why the publication of the content is illegal or not covered by an exception could also be worth considering.
45	**b) Counter Notice Verfahren** Um einer unverhältnismäßigen Einschränkung der Informations- und Meinungsfreiheit (Art. 11 GR-Charta) entgegenzuwirken, aber auch um ein Unterlaufen der hier vorgeschlagenen oder sonstiger Schrankenregelungen zu verhindern, drängt es sich auf, sogenannte **Counter Notice Verfahren** einzuführen (siehe z. B. die entsprechende Regelung in Section 192 des finnischen Information Society Code (917/2014)). Nutzern, die Inhalte nicht offensichtlich rechtswidrig nutzen, eröffnet dies die Möglichkeit, auf eine entsprechende Rüge des	**b) Counter Notice Procedure** In order to counteract a disproportionate restriction of the freedom of expression and information (Article 11 of the Charter of Fundamental Rights), but also to prevent a circumvention of the here proposed or of other exceptions, the introduction of so-called **counter notice procedures** seems the obvious way forward (cf., for example, the respective provision in section 192 of the Finnish Information Society Code (917/2014)). Such opens up the possibility for users who use content unapparent illegally, to react to a respective complaint of the

	Rechteinhabers zu reagieren, sofern sie nach Einleitung eines NTD-Verfahrens zunächst vom Diensteanbieter informiert werden.	rightholder, provided that they are informed by the service provider upon the initiation of a NTD procedure.
46	Um einen möglichst hohen Harmonisierungsgrad zu erreichen, erscheinen gewisse Vorgaben für dieses Counter Notice Verfahren auf EU-Ebene wünschenswert. Ziel muss es sein, die **Kommunikation zwischen Rechteinhaber und Nutzer zu erleichtern**, und gleichzeitig Diensteanbieter aus der Pflicht zu entlassen, über die Rechtmäßigkeit eines Inhalts zu befinden. Dabei mag den Mitgliedstaaten ein gewisser Spielraum verbleiben, um bei der Umsetzung die nationalen Rahmenbedingungen zu berücksichtigen.	In order to attain a level of harmonisation as high as possible, certain requirements for this counter notice procedure on an EU level appear desirable. The objective must be to facilitate **communication between rightholders and users** and, at the same time, to relieve service providers of the obligation to decide on the illegality of content. Here, Member States can retain certain flexibility in the transposition in order to take into account national parameters.
47	**4. Erleichterung der Lizenzierung** Der vorgeschlagene Art. 13 III RL-E zielt auf eine Zusammenarbeit und den Dialog zwischen Diensteanbietern und Rechteinhabern ab, fokussiert dabei aber einzig auf die im Absatz 1 anvisierten Maßnahmen, die aus den vorstehend genannten Gründen jedenfalls im Bereich der Haftungsprivilegierung abzulehnen sind. Nicht adressiert wird hingegen die Problematik, dass die notwendigen Lizenzen in der Praxis oft gar nicht oder nur schwierig erhältlich sind. Dies führt für jene Diensteanbieter, die sich legal verhalten wollen, zu **erheblichen Transaktionskosten**, welche gerade für Startups eigentliche Markteintrittsbarrieren bedeuten können sowie kleinere Unternehmen mit unverhältnismäßigen Kosten belasten.	**4. Licensing Simplification** The proposed Article 13(3) of the Draft Directive aims for cooperation and dialogue between service providers and rightholders, while, however, only focussing on the measures planned in paragraph 1, which should be turned down, at least for the liability exemption, based on the abovementioned grounds. Whereas the problematic that the necessary licences are, in practice, not at all available or only difficult to obtain, isn't addressed. For those service providers wishing to act legally, this leads to **substantial transaction costs**, which can constitute actual market entry barriers especially for start-ups as well as burden smaller companies with disproportionate costs.
48	Es sind kaum Interessen ersichtlich, welche solche Kosten rechtfertigen würden – im Gegenteil: gerade Rechteinhabern, die illegale Nutzungen verhindern wollen, müssten einfache Lizenzierungsmöglichkeiten ein Anliegen sein. Sind ihre Interessen normalerweise darauf gerichtet, den ökonomischen Wert von Urheberrechten zu moneta-	Interests that would justify such costs are hardly evident – on the contrary: simple licencing possibilities should be a wish especially for rightholders wanting to prevent illegal uses. Being their interests normally oriented to the monetisation of the economic value of copyrights, licence grants constitute the actual basis for this. To this extent,

	risieren, bilden Lizenzerteilungen die eigentliche Grundlage dafür. Insoweit widersprechen Maßnahmen, die Lizenzierungen erleichtern, den **Interessen der Rechteinhaber** höchstens dann, wenn sie mit unbeschränkter Exklusivität möglichst hohe Margen erzielen wollen; inwieweit solches schützenswert wäre, ist aber eine andere Frage.	measures, which simplify licensing, contradict the **interests of rightholders** at most when they wish to achieve preferably high margins by way of unlimited exclusivity; whether such would be worthy of protection is, however, another question.
49	Die Interessenlage, dass Lizenzen möglichst verfügbar sein sollten, spiegelt sich auch im System der kollektiven Rechtewahrnehmung, soweit seitens einer Verwertungsgesellschaft ein **Abschlusszwang** gegenüber Lizenzsuchern besteht. Dieser Mechanismus setzt allerdings voraus, dass die Rechte nicht vom Rechteinhaber selbst wahrgenommen werden. Doch selbst bei eigener Verwaltung der Rechte kennt das Urheberrecht Mechanismen, um ausufernden Konsequenzen von Exklusivität vorzubeugen. So erlaubt es der – bereits 1908 in die Revidierte Berner Übereinkunft aufgenommene – Art. 13 Abs. 1 RBÜ den Verbandsländern unter gewissen Voraussetzungen, eine Zwangslizenz zugunsten von Tonträgerherstellern zu erteilen.	The interests in preferably accessible licences are reflected also in the system of collective rights management, insofar as the collecting society has the **obligation to cover those seeking a licence**. This mechanism presupposes, however, that the rights are not exercised by the rightholder himself. But even when rights are self-administrated, copyright law has mechanisms to prevent escalating consequences from exclusivity. For instance, Article 13(1) of the Revised Berne Convention – already taken up in 1908 – allows its contracting parties under certain conditions to grant compulsory licences in favour of recording companies.
50	Ob man so weit gehen will, Rechteinhaber in bestimmten Konstellationen zur Erteilung von Lizenzen an gewisse Diensteanbieter zu verpflichten, ist letztlich eine politische Frage. Erforderlich ist dies dann nicht, wenn das sog. Rechteclearing ohne unnötigen Aufwand erfolgen kann und Vertragsschlüsse zwischen Lizenzsuchenden und Rechteinhabern so einfach wie möglich sind. Hierfür müssen die Grundlagen im europäischen Recht geschaffen werden. Denn soll der digitale Binnenmarkt verwirklicht werden, spielen **transeuropäische Lizenzerteilungen** eine zentrale Rolle. Isolierte Maßnahmen einzelner Mitgliedstaaten hätten damit kaum den Effekt, Dienstanbietern Aktivitäten über die eigenen Landesgrenzen hinaus zu erleichtern.	Whether one wishes to go as far as this, obligating rightholders in certain circumstances to grant licences to certain service providers is ultimately a political question. Such is not necessary when the rights clearance can be carried out without great expense and the conclusion of contracts between licence seekers and rightholders is as simple as possible. For this, the basis must be established in European Law. Because if the digital internal market is to be achieved, **trans-European licensing** plays a central role. Isolated measures of individual States would barely have any effect to facilitate activities of service providers beyond the country's own borders.

51	Ein wichtiger erster Schritt in diese Richtung wurde mit der RL 2014/26 über die kollektive Wahrnehmung von Urheber- und verwandten Schutzrechten und die Vergabe von Mehrgebietslizenzen für Rechte an Musikwerken für die Online-Nutzung im Binnenmarkt unternommen. Der Anwendungsbereich jener Richtlinie ist jedoch vergleichsweise eng, und sie ist auf Konstellationen beschränkt, in denen Rechte von Verwertungsgesellschaften wahrgenommen werden. Den digitalen Binnenmarkt vermag sie daher nur in Teilbereichen zu fördern. Zielt der vorgeschlagene **Art. 13 I RL-E** demgegenüber darauf ab, Diensteanbieter zu Lizenzvereinbarungen zu bewegen, um auf diese Weise eine angemessene Beteiligung der Rechteinhaber zu ermöglichen, so geht er an sich in die richtige Richtung. In der vorgeschlagenen Form **wird** er **solche Ziele** aber **nicht erreichen**.	An important step in this direction was given with Directive 2014/26 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. The scope of application of this directive is, however, comparatively narrow and the directive is also limited to constellations in which rights are managed by collecting societies. As such, it is able to promote the digital internal market in certain segments only. If, in comparison, the proposed **Article 13(1) of the Draft Directive** aims at bringing service providers to conclude licences in order to achieve an adequate remuneration of the rightholders, then it is going in the right direction. In its proposed form, however, it **will not achieve those objectives**.
52	**IV. Ergebnis** Dem europäischen Gesetzgeber ist dringend davon abzuraten, den vorgeschlagenen Art. 13 RL-E in der vorgeschlagenen Form zu verabschieden. Statt eine weitere, weder in sich selbst noch im Verhältnis zum geltenden Recht konsistente Facette hinzuzufügen, erscheint es weit sinnvoller, zunächst beim bestehenden *Acquis* anzusetzen. Gewisse Anpassungen empfehlen sich namentlich bei der **E-Commerce-RL**. Auch gewisse Eingriffe in die **InfoSoc-RL** würden punktuell Verbesserungen erlauben. Je nach Konzeption und in Abhängigkeit sonstiger Anpassungen mag auch eine neue Richtlinie ihre Rechtfertigung haben, solange sie sorgsam auf das übrige EU-Recht abgestimmt ist.	**IV. Conclusion** The European legislator is strongly discouraged from adopting the proposed Article 13 of the Draft Directive in its proposed form. Instead of adding an inconsistent facet in itself and in relation to current law, is seems more reasonable to first start with the existing *acquis*. Certain adjustments are recommended in particular concerning the **E-Commerce Directive**. Also certain interventions in the **InfoSoc Directive** would allow specific improvements. Depending on the concept and subject to other adjustments, a new directive may have its justification as long as it is carefully concerted with remaining EU Law.
53	Eine Ablehnung des vorgeschlagenen Art. 13 RL-E (und der auf ihn bezogenen Erwägungsgründe 38 und 39) bedeutet also nicht, dass nun nicht der richtige Zeitpunkt wäre, das geltende Recht von Unklarheiten zu befreien und es im Hinblick auf die zwi-	A rejection of the proposed Article 13 of the Draft Directive (and its respective recitals 38 and 39) thus does not mean that it is not the right moment to free current law of uncertainties and to improve it in light of the developments that have occurred in the mean-

	schenzeitlichen Entwicklungen zu optimieren. Es bedeutet auch nicht, dass Dienstanbietern, die jenseits der Haftungsprivilegierung operieren, nicht neue – und namentlich technikbasierte – Pflichten auferlegt werden könnten. Solche **gesetzgeberische Maßnahmen sind** aber **besser aufeinander abzustimmen**; ein isolierter Ansatz, wie er mit Art. 13 RL-E versucht wurde, ist nicht erfolgversprechend.	time. It also does not mean that new – and in particular technology-based – obligations cannot be imposed on service providers, which act beyond the liability exemption. Such **legislative measures should** simply **be better coordinated**; an isolated approach, as attempted with Article 13 of the Draft Directive, is not promising.