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6A Copyright Law, Competition & Trademark Law Session. Platform Liability in the U.S. and EU

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**TWENTY-EIGHTH ANNUAL CONFERENCE
INTERNATIONAL INTELLECTUAL PROPERTY
LAW & POLICY**

Friday, April 9, 2021 – 8:00 a.m.

**SESSION 6: COPYRIGHT LAW, COMPETITION &
TRADEMARK LAW
6A. Platform Liability in the U.S. and EU**

Moderator:

Lauri Rechartt

International Federation of the Phonographic Industry (IFPI), London

Speakers:

Maria Strong

U.S. Copyright Office, Washington, D.C.

Five on 512

Abigail A. Rives

Engine, Washington, D.C.

Startup Perspective on DMCA 512

Ursula Feindor-Schmidt

Lausen Rechtsanwälte, Munich

***The Liability of Online Content Sharing Service Providers in EU
Jurisdiction and Legislation – The YouTube/Uploaded Case and Article 17
DSM***

Stanford McCoy

Motion Picture Association EMEA, Brussels

Cybercrime and the Proposed EU Digital Services Act

Panelists:

Sandra Aistars

*Center for the Protection of Intellectual Property (CPIP), Antonin Scalia Law
School, George Mason University, Arlington*

Julia Reda

*Berkman Klein Center for Internet & Society at Harvard University,
Cambridge*

*** * ***

LAURI RECHARDT: Good morning, good afternoon, good evening, wherever you might be logging in, and welcome to this session on Platform Liability in the U.S. and the EU. My name is Lauri Rechartd, and when I'm not moderating this session, I'm the chief legal officer of IFPI,¹ the association representing the recording industry worldwide, so full disclosure there. Why are we discussing platform liability today? You might say that, rather surprisingly, if you think of things a few years back, actually a lot has happened, and a lot is happening in this area, not only with respect to copyright but with respect to privacy, fake news, competition, harmful content, generally, you name it.

But let us stay in the particular area of copyright. In the U.S., the Copyright Office published a report on section 512 safe harbors last year.² In that report, which is of the usual high quality of the Copyright Office, the Office was, I think it is fair to say, critical on the way the courts have interpreted the safe harbors. Subsequently, the Office made recommendations, how to restore the balance that the legislature had originally intended to strike. As a follow-up to that report, there's been a series of hearings and roundtables in Congress, and Senator Tillis published a draft bill to reform section 512.³

In the EU, as we heard already yesterday, there are a couple of very important cases pending before the Court of Justice, the joined YouTube/Uploaded cases⁴ and the "Polish challenge"⁵ to Article 17 of the DSM Directive.⁶ These decisions may well shape copyright or the copyright liability of online platforms in Europe, both with regards to the scope of and conditions for the safe harbors, and as to the type of liability that the platforms may be subject to in Europe. In addition to that, in Europe, we have the alphabet soup, or the D suite. We have Article 17 of the DSM Directive, which was adopted in 2019, and we have the Commission's proposals on the DSA⁷ and DMA,⁸ the Digital Services and the Digital Markets Act. They all address to a greater or lesser degree, the issue of platform liability in Europe. The DSM, as we are all aware, addresses in a very narrow manner the liability of certain online content sharing services. The DSA addresses online intermediaries' liabilities in a horizontal manner with respect to all kinds of content, not only copyright. Just for the record, we will discuss today EU and U.S. developments, but it is

¹ International Federation of the Phonographic Industry.

² U.S. COPYRIGHT OFF., SECTION 512 OF TITLE 17: A REPORT OF THE REGISTER OF COPYRIGHTS (May 2020), <https://www.copyright.gov/policy/section512/section-512-full-report.pdf>.

³ Press Release, Senator Thom Tillis, Tillis Releases Landmark Discussion Draft to Reform the Digital Millennium Copyright Act (Dec. 22, 2020), <https://www.tillis.senate.gov/2020/12/tillis-releases-landmark-discussion-draft-to-reform-the-digital-millennium-copyright-act>.

⁴ Joined Cases C-682/18 and C-683/18, Frank Peterson and Elsevier Inc. v. Google LLC and Others, ECLI:EU:C:2020:586 (June 22, 2021).

⁵ Case C-401/19, Republic of Poland v. European Parliament and Council of the European Union, (May 24, 2019).

⁶ Directive 2019/790, of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130).

⁷ Commission Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM (2020) 825 final (Dec. 15, 2020).

⁸ Commission Proposal for a Regulation of the European Parliament and of the Council on Contestable and Fair Markets in the Digital Sector (Digital Markets Act), COM (2020) 842 final (Dec. 15, 2020).

important to note that these issues are actually looked at around the world. We are seeing developments in India, in Australia, with respect to publishers' rights in particular, in Mexico, you name it.

These ongoing developments beg the question, what is driving these discussions and developments? I think it's fair to say that we are seeing that the policymakers are waking up to the need to re-assess generally the policy pivot—that has prevailed during the past 20 to 25 years—in favor of tech and online companies that has enabled them to grow and prosper. Part of that reassessment is, as we heard clearly from Marco Giorello from the European Commission, an assessment of the balance between the different fundamental rights at play, the protection of copyright in our case, and the freedom of expression and freedom to conduct business.

There are differing views as to where that balance should lie, or whether indeed we have we lost the balance? Or if we have lost the balance which way has the balanced dipped? It may be difficult to get to an agreement on these points, differences run deep and are sometimes ideological rather than based on practical considerations, but naively I still believe that a reasonable sweet spot can be found. My idea of the sweet spot is regulation that protects right holders' legitimate interests while also protecting genuine freedom of expression, which is something we all care deeply about, without allowing it to be used as a pretext to appropriate and monetize other people's expressions. Such a solution should enable online platforms to develop and thrive to the benefit of us all, but at the same time they aren't allowed to use and monetize copyright content, without negotiating licenses first.

We have a great lineup of speakers and panelists today to discuss these issues. As speakers we have Maria Strong, first of all, from the Copyright Office. We have Abby Rives from Engine to give another point of view. We have Ursula Feindor-Schmidt, from Lausen Rechtsanwälte, which I think stands for attorneys of law. And we have Stan McCoy, Motion Picture Association, Europe, Middle East, and Africa. As panelists, we have Sandra Aistars from the Center for the Protection of Intellectual Property at Antonin Scalia Law School at George Mason University. Last but definitely not least, Julia Reda from Berkman Klein Center for Internet and Society at Harvard University. Maria, first over to you and a summary on the Copyright Office report and what is going to happen.

MARIA STRONG: Thanks so much, Lauri, and thanks to Hugh and the whole team for inviting me. I have, in my seven minutes, five points to talk about in the Copyright Office's report that we issued last year and what's been happening since.

My first issue is the report itself. After years of public input analysis, on May 21st of last year, we issued the first ever comprehensive public report by a U.S. government agency on the operation of section 512.⁹

When Congress enacted 512 in 1998, it hoped to balance two objectives: content owners needed effective enforcement so that they could safely make their work in a digital environment with low barriers to infringement, and online service providers needed to have thoroughly defined limits around their liability for their users' actions so that they could continue to develop services without

⁹ Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512.

the fear of crippling liability. What we concluded is that the operation of the section 512 safe harbor system today has become unbalanced.

While OSPs still have the legal certainty they seek, rightsholders' abilities to enforce their copyrights is now less effective than what Congress intended. The report noted that if Congress chose to continue the same balance that it had established in the DMCA and move forward on all the issues that we identified in our report, then our Office harbors some optimism that a path forward for restoring that 512 balance could be found.

In prior speeches and meetings, some of you may have heard me compare the DMCA 512 issues to a 3D ball full of different groups of rightsholders and ISPs,¹⁰ users and policy makers, all with different views, all with different problems, moving through time and going in multiple directions. Given these diverse and complex issues, we identified some guiding principles that we used as we examined the numerous issues related to the operation of 512. This is a slide that identifies some of the many issues that we identified in our report.

While the Office did not recommend any wholesale changes to 512, we pointed out several areas where Congress may wish to improve 512's current operation in order to better balance the rights and responsibilities of OSPs¹¹ and rights holders in the creative industries. We also identified non-statutory areas of untapped potential that could increase the effectiveness of 512.

Also notable is what we did not recommend. For example, we did not recommend adopting notice and stay down at this time. We're watching to see what's happening in Europe, and as well as what might be happening in Congress because we think that if Congress does go that route, they're going to have to look at what are the balancing factors that they want in the system. We also did not recommend website blocking. The SOPA¹² and PIPA¹³ memories live on, and even though dozens of other countries are issuing a type of injunctive relief, any movement on this issue would require congressional direction, and as of now, there seems to be little appetite for that.

Public reaction to our report, as with the case in many of our reports, was mixed. Generally speaking, tech and user communities were relieved that we did not propose throwing out notice and takedown, and that we did not support notice and stay down. Rightsholders were relieved that we saw that the current operation of notice and takedown was not reflecting the balance that Congress intended. Much like the entire debate on 512, the reactions were complex, nuanced, and they should not be seen as black and white, either or polar opposites.

We were also mindful of the opportunities and challenges faced by everyone in an online environment, large and small, medium, creators, OSPs, users—that's all very different today than it was in 1998. Congress could choose to re-evaluate how it structures any balancing factors in the current environment, and it could also consider other measures that would go beyond the current constructs of 512. We noted that these kinds of legislative decisions are in the hands of Congress and the Office made no recommendations with

¹⁰ Internet Service Providers.

¹¹ On-Line Service Providers.

¹² Stop Online Piracy Act, H.R. 3261, 112th Cong. (2011).

¹³ PROTECT IP Act, S. 968, 112th Cong. (2011).

respect to those larger questions about balancing, which brings me to my second point.

Last year, two senators, Senator Tillis and Senator Leahy, then the Chair and Ranking Member of the Senate Judiciary IP Subcommittee, quickly took us up on our offer and our questions that we posed to the Congress. They asked us to get back to them within thirty days with the answers to a series of some complex questions, some of which appear on this slide. We responded back on time, and we identified five issues in the section 512 that we thought would benefit from congressional action.

To be clear, we explicitly noted that our one-size-does-not-fit-all guidance should be considered in at least three areas: the repeat infringer policy, improving the notice and takedown process, and redressing a problem with both a too long or too short timeframe for counter notices. We also provided several outlines and numerous policy guidance and questions that would need to be answered if legislators were to consider a start-from-scratch solution.

This brings my third point, which covers non-statutory actions, and Lauri mentioned some of them that the Copyright Office initiated after we issued our report.

First, we improved our public education resources. We built a new webpage portal that is dedicated to all aspects of the DMCA. Second, we also provided detailed information on what should be in notices and counter-notices. We developed FAQs, from the views of an OSP, a rightsholder, and a user who uses public websites. Third, we also held three public sessions last September on the issue of Standard Technical Measures. As we noted in our report, STMs depend on voluntary cooperation, collaboration in consultation with and across various industry sectors. Recall having a repeat infringer policy and adhering to STMs are actually conditions of eligibility for OSPs under 512.

Many, not all, stakeholders noted that no measures currently qualify for STM despite the availability of various technologies and potential interest across various industry sectors. We are still reviewing what our next steps might be on STMs. Also, it's important to note, last October, our new Register of Copyrights, Shira Perlmutter, joined the office; she has definite hands-on experience with the DMCA as she was with the Office when it was passed.

My fourth point is a quick summary of the congressional action taken by Congress last year. As Lauri mentioned, the Senate IP Subcommittee has held seven hearings on DMCA issues. But it's important to note that DMCA has actually been on the Senate radar since at least 2019, so they're moving forward and showing their interest last year and continuing this year is not really that much of a surprise. There also have been numerous stakeholder meetings with congressional committees over the last year. Last December, Senator Tillis issued a 53-page discussion draft, called The Digital Copyright Act Discussion Draft. He proposed a wide variety of proposals; there are a lot of elements in here. It was intentional on his part to go big. Basically, I think he used word "to throw a bomb" of ideas out there so that he could get stakeholder interest and discussions going. He asked for public comments by March 5th, and he has stated publicly he intends to work toward release a bipartisan, bicameral proposal in April or May. He's hopeful also that voluntary cooperation route is going to happen, but if that doesn't, he's willing to use legislation.

My last point is the what's next. As many of you know, the political powers have shifted in our Senate. Earlier this year, Senator Tillis is now a

Ranking Member. Everyone's looking to see what new Chairman Patrick Leahy, who's no stranger to copyright and IP, is going to be doing in this timeframe, at least at the subcommittee level. Various senators, including Tillis and Leahy, have been sending a number of letters to various players in the internet ecosystem, so they are definitely active right now in getting some information.

To sum up, we're still dealing with that swirling three-dimensional multiverse of copyright liability issues here, but it's fair to say I think a much brighter spotlight is going to be shining on 512 and online platform liability. I can't predict what 2021 will bring, but I do suspect that the conversations in both the voluntary and the legislative space will increase. With that, I thank you. Happy to take questions forward.

LAURI RECHARDT: Thanks, Maria. That's a really brilliant presentation. I would like to bring now the discussion to our panelists. Julia, if you go first, quick reaction. Maria, I hope you don't mind me paraphrasing, but I think it's fair to say that the Copyright Office thought that the courts had not really gotten the DMCA safe harbor right, and therefore, you had to intervene and try to restore the balance. Did the courts get it wrong?

MARIA STRONG: Yes. I think it's right. As an agency in the legislative branch, we want to respect our co-equals in the other branches, so I don't want to make it personal and say courts got it wrong. But we definitely identified numerous areas where we are concerned that some of the court decisions stepped away from the balance that Congress provided in the legislation and as time has gone by, that's the issue that's being challenged both by technological change.

I think everyone would agree that the DMCA is a great success story in the sense that legitimate content owners have far more opportunities to create and distribute their products. The OSPs have also similarly grown and have more products. Users are now a much more active part of the system in terms of both of their voice at the political table as well as, as we've seen in the pandemic, the need for their engagement. I think we raised some very specific issues on the role of especially 512(a)¹⁴ conduits providers and what an overbroad remote disabling access remedy would do to the internet ecosystem including free speech rights.

LAURI RECHARDT: Julia, Sandra, quick reactions.

JULIA REDA: Thank you. I think, first of all, taking the wait-and-see approach regarding the reforms that are underway in Europe is certainly a good idea because we're really seeing that what the European legislature has envisioned is not really possible. Basically saying there should be notice and stay down without the blocking of legal content, so I'm glad to hear that notice and stay down is not on the agenda for the Copyright Office. I don't think the technology exists to satisfy both of those conditions to remove illegal content and leave legal content online. What I would also perhaps like to highlight or ask about is the question of transparency over copyright notices.

At the Berkman Klein Center, there has been a long commitment to cataloging notices in the Lumen Database and this has enabled a lot of very important research about possible abuses of the system. There have been very important investigative journalistic projects such as *The Wall Street Journal* investigation into so-called reputation management companies that use notice

¹⁴ Digital Millennium Copyright Act (DMCA), 17 U.S.C. § 512(a).

and takedown as a means of removing perfectly legal content from the internet.¹⁵ My question would be whether there are ideas to make this reporting and publishing of notices mandatory to enable more research and more regulatory oversight over possible abuses of the system.

MARIA STRONG: Thanks, Julia, for your questions. Yes, the Copyright Office is always a big fan of transparency, and in order to address some of the changes in what's being required by ISPs with respect to both notices and counter-notices, that is part of the reason why we developed the website we did to provide better information for the public to use. To your question about the data, in our notice of inquiry, hearings, and public sessions, we ask for public data. We ask for evidence. The challenge we have in this space is that notice and takedown is not supervised by a government agency. It is an extrajudicial remedy, so we do not have the data for which to inform decisions.

Despite our asking for it, I would say the availability of data fell far short. I am not in a place to say to your subject, to your question, as to whether the Copyright Office at the time is going to mandate data, under the current system; we can't. We are an agency who, by the very definition of the balance struck in the DMCA, where the co-operation is between the rightsholders and ISPs. The government is not involved. To the extent those are ideas you might be posing, obviously, that is possibly a discussion point that will be happening on Capitol Hill either through the voluntary discussions that might be happening going forward or any legislative forum. Thank you for the question.

LAURI RECHARDT: Sandra, Julia thinks that we shouldn't go down the route of stay down. What is your take on that?

SANDRA AISTARS: Thank you for the question. I think one of the topics that received the most interest in the 512 study was, in fact, notice and stay down, and that has been true over the years. In part, that is because the courts have, in fact, done a poor job in interpreting the notice standards in section 512 and that there's been a breakdown in interpreting the so-called red flags notice standard and the courts have collapsed the red flags notice standard into what is required under notice and takedown. The entire statute has become a notice and takedown section effectively. There are basically no requirements on service providers to do anything other than respond to notices that the copyright owners send.

There's this endless battle of sending notices and responding to notices, and then the work goes right back up. That is what all of these discussions have been about over the years. I think it is very important to find some way of getting us out of that for sure. Whether it's what the EU is doing or something different, I don't know. We'll see what comes out of the EU, but I think it's definitely worth looking at and evaluating. The other thing that I think is important to do is you need to look at the meaning of red flag knowledge. It is very curious to me that we can have court decisions that have gone all the way to basically say it's okay for employees to refer to works that appear on websites that they are managing as illegal or stolen and okay for them to look at full-length copies of works on their websites that are currently popular in theaters and not have that trigger red flag knowledge.

¹⁵ Andrea Fuller, Kirsten Grind, and Joe Palazzolo, *Google Hides News, Tricked by Fake Claims*, WALL ST. J., May 15, 2020, <https://www.wsj.com/articles/google-dmca-copyright-claims-takedown-online-reputation-11589557001>.

I think we do need to do something to restore the meaning of red flag knowledge. That might help us in finding a balance with the notice and takedown approach. I think the other thing that would help is revisiting some of the concepts that exist in the DMCA but have gotten very little attention over the years. Maria mentioned one which is this concept that standard technical measures which companies, service providers would be required to implement as they are identified.

I think that's a very promising road to explore. The other is this concept of responding to representative lists of infringing works. I think if we can look at the whole of what the DMCA was supposed to be when it was enacted and try to get back to the entire package, that might remove focus from just one part of the statute as being what will fix the entirety of what's gone wrong over the past now 23 years, I guess. Thanks.

LAURI RECHARDT: Thanks. Yes, look, I think we will get back to both the question of red flag knowledge, which obviously in Europe, under the E-Commerce Directive¹⁶ is equally very much an issue, as well as the stay down which some might argue that actually is already a requirement under the EU law following the European Court of Justice decision in L'Oréal,¹⁷ but let's get back to those issues later. I would now hand over to Abby to give us the views from the start-up community.

ABIGAIL RIVES: Thank you very much, and thanks to the organizers for the invitation to join today. As noted, I'm IP counsel at Engine Advocacy. We're a non-profit that bridges the gap between policymakers and thousands of start-ups across the U.S. through research, policy analysis, and advocacy. This morning, I hope I can offer some perspectives on how section 512 of the Copyright Act works for start-ups and flag some realities that we hope will not be lost in policy discussions over copyright liability.¹⁸

At the outset, I do want to note I think especially in policy conversations, both the framing and the scope of who is invited to participate is extremely important because otherwise, we risk laws that hurt innovation, creativity, free expression, and economic growth. To the extent rhetoric over section 512 policy can sometimes set up a false dichotomy of tech stakeholders versus copyright stakeholders – I find that framing can not only be frustrating and inaccurate but can miss critical nuance and obscure the interests of users and internet-enabled creators.

I very much appreciate Maria's characterization of the diversity and the complexity of the issues at stake in these conversations. To add a little bit more color to what I think Maria already alluded to, we've seen, for example, technology has really democratized creativity, among other things. Internet platforms, including scores of smaller ones, have created entirely new ways for users and creators to reach fans and customers. In 2017 alone, nearly 17 million Americans earned a collective \$6.8 billion by sharing their personal creations on just 9 internet platforms.¹⁹ Another indication of the importance of the

¹⁶ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce, in the Internal Market ('Directive on electronic commerce'), 2000 O.J. (L 178).

¹⁷ Case C-487/07, L'Oréal and others v. Bellure, ECLI:EU:C:2009:70, (June 18, 2009).

¹⁸ 17 U.S.C. § 512.

¹⁹ Robert Shapiro & Siddhartha Aneja, *Taking Root: The Growth of America's New Creative Economy*, Re:Create 2 (Feb. 2019), <https://www.recreatecoalition.org/wp->

conversations we're having today is, I think, exemplified by the fact that we're all gathering, working, educating, shopping, and right now at this very moment, attending a conference remotely. We're more reliant than ever on technology that would not exist but for section 512.

Turning to 512 itself, when Congress passed the DMCA, it of course knew that OSPs would need legal certainty, certainty that they would not be automatically liable when their users were accused of infringement.²⁰ To meet that need, Congress set up the notice and takedown and safe harbor frameworks and all OSPs, and that includes founders that are looking to launch new social media sites and bloggers that allow readers to submit comments on a post, these folks and everyone else has a pretty clear path to follow to avoid liability for things that their users do.

In order to launch, grow, and compete, today's start-ups need the same certainty and protections afforded to their predecessors. Why does this still matter so much for start-ups? First, 512 allows start-ups to comply with the law without having to hire a bunch of lawyers and moderators or purchase expensive yet imperfect upload filters. In fact, for a number of the companies Engine works with, it is the founder or one of the first very few employees that receives takedown notices or checks the mailbox where they are sent.

Second, the avoidance of liability is especially important for tech start-ups. It can cost \$0.5 million just to get to summary judgment in an intermediary liability case,²¹ and that sum is an awful lot of money for most start-ups.²² The mere fact or threat of litigation can pose substantial barriers to start-up entry. We've seen meritless IP litigation put some young tech companies out of business or impose severe operational impacts like causing a substantial drop in the start-up's valuation.²³

Also, even with the certainty of 512, DMCA cases can drag on for decades. They can cost millions of dollars. In one example, DMCA litigation was enough to force a video streaming start-up towards bankruptcy even though it was in compliance with the safe harbor requirements.²⁴ Relatedly, investors

[content/uploads/2019/02/ReCreate-2017-New-Creative-Economy-Study.pdf](https://www.engine.is/content/uploads/2019/02/ReCreate-2017-New-Creative-Economy-Study.pdf) (reporting earnings for U.S. creators from these platforms: Amazon Publishing, eBay, Etsy, Instagram, Shapeways, Tumblr, Twitch, WordPress, and YouTube).

²⁰ See, e.g., S. REP. 105-190, The Digital Millennium Copyright Act of 1998 (May 11, 1998) (Congress sought to “provide[] greater certainty to service providers concerning their legal exposure for infringements that may occur in the course of their activities”).

²¹ Evan Engstrom, *Primer: Value of Section 230*, ENGINE (Jan. 31, 2019), <https://www.engine.is/news/primer/section230costs>.

²² For (the minority) of startups that obtain VC or angel and seed-stage equity financing, the average seed-stage startup raises a total of \$1.2 million, and that is expected to cover all of its costs for nearly two years. *The State of the Startup Ecosystem*, ENGINE (2021), <https://engineis.squarespace.com/s/The-State-of-the-Startup-Ecosystem.pdf>.

²³ See, e.g., Colleen V. Chien, *Of Trolls, Davids, Goliaths, and Kings: Narratives and Evidence in the Litigation of High-Tech Patents*, 87 N.C.L. REV. 1571, 1587-88 (2009) (describing strategic use of patent litigation to threaten a competitor business's survival); Ted Sichelma; *The Vonage Trilogy: A Case Study in “Patent Bullying,”* 90 NOTRE DAME L. REV. 543, 575 (2014) (describing IP litigation that put startup “at the brink of insolvency,” and hurt its value); Amy L. Landers, *The Antipatent: A Proposal for Startup Immunity*, 93 NEB. L. REV. 950, 979-80 (2015) (recounting examples of two former startups who won patent cases but lost market opportunities).

²⁴ Emily Chasan, *Web Video Service Veoh to Liquidate, Founder Says*, REUTERS (Feb. 12, 2010), <https://www.reuters.com/article/veoh-bankruptcy-idCNN1216366120100212> (quoting founder saying “[t]he distraction of the legal battles, and the challenges of the

don't want to spend on legal fees, and so shifting more liability or just expecting start-ups to cover more legal fees could drive away investment.²⁵

Third, in the U.S. at least, the magnitude of statutory damages really amplifies these concerns since plaintiffs can seek up to \$150,000 per work infringed.²⁶ That can really add up very quickly. There's one case where a plaintiff sought statutory damages from an OSP amounting to more money than the entire recording industry had made since the invention of the phonograph.²⁷ While that extraordinary ask may be an anomaly, I think it does help show how copyright damages can really quickly multiply to something no startup could ever afford.

Fourth, another important factor to keep in mind is that most OSPs see very little actual infringement or even allegations of infringement. If we're forcing every OSP, including much smaller or early-stage companies, to police all content, we wouldn't catch much if any additional infringement while it would come with substantial drawback and expense.

Finally, changing the DMCA, even in ways that might seem minor, could shift the ground underneath today's startups. While established incumbents already automate many aspects of their infringement monitoring and have the resources to absorb increase legal risks, startups do not.

Turning to some of the policy proposals and hearkening back to what Maria has already mentioned, there are a number of proposed changes to 512 that are percolating, and for now, I can offer thoughts on just a few, but I'm happy to discuss further, of course. First, on the topic of imposing an affirmative duty to monitor, this would be seriously detrimental for startups, whether that comes through a filtering mandate, notice and stay down or adjusting certain thresholds in the law, these types of changes would create new costs and risks that startups would seriously struggle with.

We know filters have inherent limitations.²⁸ Existing tools have high error rates. For many types of content, there are no filters. And technology is fundamentally incapable of addressing certain fact-specific questions of infringement like fair use and licensing. Importantly, these filters are also out of reach for most startups. Developing them costs orders of magnitude more

broader macro-economic climate have lead to our Chapter 7 bankruptcy.”). Veoh launched in 2005 and was sued by Universal Music Group in 2007. That case was not resolved until 2013. *UMG Recordings, Inc. v. Shelter Capital Partners LLC*, 718 F.3d 1006 (9th Cir. 2013). UMG eventually lost the suit, with the Ninth Circuit affirming that Veoh was operating within the protection of DMCA safe harbors. But while the suit was pending, Veoh filed for bankruptcy. See also, e.g., Joseph Parish, *Universal Loses DMCA Lawsuit Against Veoh*, The Verge (Dec. 22, 2011), <https://www.theverge.com/2011/12/22/2652889/universal-dmca-lawsuit-veoh-affirmed> (covering Veoh’s first Ninth Circuit victory and bankruptcy); *Io Grp., Inc. v. Veoh Networks, Inc.*, 586 F. Supp. 2d 1132 (N.D. Cal. 2008) (in another case filed by adult film producer, court held that Veoh met its burden of proving its entitlement to the safe harbor).

²⁵ See generally, e.g., Matthew C. LeMerle et al., *The Impact of Internet Regulation on Early Stage Investment* (Nov. 2014), <https://static1.squarespace.com/static/571681753c44d835a440c8b5/t/572a35e0b6aa60fe011dec28/1462384101881/%20EngineFifthEraCopyrightReport.pdf>.

²⁶ 17 U.S.C. § 504.

²⁷ *Arista Group LLC v. LimeWire LLC*, No. 784 F. Supp. 2d 313, 317 (S.D.N.Y. 2011).

²⁸ See generally, e.g., Evan Engstrom & Nick Feamster, *The Limits of Filtering: A Look at the Functionality & Shortcomings of Content Detection Tools* (Mar. 2017), <https://www.engine.is/the-limits-of-filtering>.

than what a startup could afford,²⁹ and licensing and maintaining the off-the-shelf filters is similarly out of reach for most startups.³⁰

Likewise, assessing safe harbor eligibility based on whether an OSP's moderation practices are reasonable is also fraught from a startup perspective. Reasonableness is a fact-specific inquiry, it is intentionally flexible, meaning especially for a tech company that's looking to grow quickly what was reasonable one month might not be reasonable the next. Companies would be in a position of having to relitigate reasonableness as often as they were accused of infringement and as such, a safe harbor would have little practical value.

Before I wrap, I did want to make a very brief note about improper takedowns because while 512 has been successful in many ways it is well documented that notice-senders can misuse 512 to hurt competition or remove content that they just don't like. For users who receive those bad faith notices, while they can dispute them--for example, an Etsy seller who loses two weeks of sales during the holiday season due to an improper notice--those strikes can be devastating.³¹ While notice and take down does largely work well overall, it is subject to substantial abuse and in thinking about any potential changes, it's really important to avoid making the problems worse.

Overall, at a time when there is a lot of attention around this and related areas of the law, we hope that as policy makers continue to think about the DMCA, startups, smaller tech companies and the users and internet creators that depend on them will have a seat at the table. Thanks.

LAURI RECHARDT: Thank you, that was a very clear message. I have a quick question to you. Do you think that startups should have different liability regime from the rest of the industry, rest of, if you will, of the world?

ABIGAIL RIVES: I am first very sorry, you froze up right in the middle of that question, but I'm pretty sure that I know what you're asking because we spoke about it during the prep for today's session, on the idea of having a law for big companies and a law for small companies. Is that the question?

LAURI RECHARDT: Yes.

ABIGAIL RIVES: Okay. I very much appreciate that question and that perspective, and I think it's really essential to keep in mind. When those questions come up in the abstract in conversations that we have, there are three red flags that pop up for us because there's inherently a line-drawing exercise, what's a big company and what's a small company? Where you draw the line and how you draw the line is really important, as is what happens when you cross the line – and what is the experience of going across that threshold going to be like for a small company. If you don't answer those questions correctly, it can defeat the purpose of giving small companies the benefit of a different legal regime.

²⁹ See, e.g., Paul Sawers, *YouTube: We've Invested \$100 Million in Content ID and Paid Over \$3 Billion to Rightsholders*, VENTUREBET (Nov. 7, 2018), <https://venturebeat.com/2018/11/07/youtube-weve-invested-100-million-in-content-id-and-paid-over-3-billion-to-rightsholders/> (YouTube spent over \$100 million to develop ContentID).

³⁰ See, e.g., Jennifer M. Urban et al., *Notice and Takedown: Online Service Provider and Rightsholder Accounts of Everyday Practice*, 64 J. COPYRIGHT SOC'Y U.S.A. 371, 400 (2017) (reporting how Audible Magic licenses can cost upwards of \$10,000 per month and require companies to spend more to implement and maintain the software).

³¹ E.g., Letter from Etsy to United States Copyright Office 4-5 (Feb. 21, 2017), <https://www.regulations.gov/document?D=COLC-2015-0013-92464>.

Relatedly, the line-drawing exercise itself can give rise to some concerns. At least in the U.S., we've seen this in areas of the law that do similar line-drawing. It can be very expensive to litigate and prove that you are a small company under the law. The type of line that is drawn and how clear and predictable that is, that is also very important.

The third point, I think, is, sometimes, when these conversations come up it's my sense that there's a bad policy proposal on the table. In order to solve that problem, it's like, "Well, we'll just carve out all the companies that we like so that they don't have to do this thing that's probably a bad idea in a vacuum." If that's what's going on, then I think it's really important to just be very critical of the policy proposal because there are probably other unintended consequences – for companies that would meet the definition of a large company, for users, for some of the creators that rely on these platforms.

I appreciate the question. I think that for policy makers, I hope they'll continue to have that thinking in their mindset, but the devil will be in the details.

LAURI RECHARDT: There is a question to you on the Q&A, I don't know if you can just read it. Essentially, it makes the point that a lot of creators are small businesses, SMEs,³² or even microbusinesses like a startup, and the question is, do you think that Article 17, I don't know if you're familiar with the Article 17 on the DSM Directive, strikes the right balance.

ABIGAIL RIVES: I will first note while Engine as an organization has been involved in conversations around Article 17, I, personally, have been less involved. I'm not sure that this is really going to answer the question, but Article 17 does have a carve-out for smaller service providers.³³ We have a concern that the line there has just been drawn much too low – a company would have to be less than three years old and have a relatively small number of users to meet Article 17's definition. We're really only talking about adjusting Article 17's basic framework for the smallest of companies. Under the definition of larger companies are still relatively young or small companies like Patreon, like Etsy, and the same rules that apply to the largest platforms in the world would apply equally to them. I think that there's a concern that the line drawing in Article 17 may have missed the mark.

LAURI RECHARDT: Stan, do you want to say anything about that? You look like you wanted to say something. I thought you did. No? Okay. Fine. There is also, I think, a question to Maria. If you don't mind, let's save that to the last in the general discussion. If there are no more questions to Abby, or comments, then why don't we move on to Ursula. You're going to discuss the DSM Article 17 and maybe also comment a little on the pending ECJ issues, the Uploaded/YouTube case.

URSULA FEINDOR-SCHMIDT: Yes, thank you. I think you should see the slides now. Is that okay?

LAURI RECHARDT: Yes, it's good.

URSULA FEINDOR-SCHMIDT: Regarding the liability of platforms, we are about to witness some fundamental changes in Europe resulting from

³² Small and Medium-Sized Enterprises.

³³ Article 17(6) of the Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, *available at* <https://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32019L0790&rid=1>.

two parallel developments that have been discussed a lot amongst this audience here, and followed, of course, closely by rightsholders, platforms and users of the internet. The development will climax this year in 2021. Certainly, the *Youtube* and *Uploaded* case³⁴ will be decided, of course, by the European Court of Justice and the implementation of Article 17 of Copyright Directive 2019 by the Member States will be due until June 7th.

Now, both things I will be speaking on were expected to be clear by the time this conference was taking place. Both are actually not clear nor detailed, but we can certainly discuss where things are heading and what this means in practice.

In any event, from my perspective, there will be three main conceptual changes to general principles in copyright we will be facing from 2021 in Europe. There will be new ex-ante obligations platforms will have to comply with before infringements occur. Second, rightsholders, likewise, might have to take action before infringements occur in order to make use of the new law. Thirdly, a third party is reemphasized in the process, it's the users of platforms which are given a greater voice when it comes to the limits and exceptions of exclusive rights granted by copyright.

Let me explain those changes in more detail. Firstly, the new ex-ante obligation for platforms. So far, content sharing platforms generally rely on the argument that they are not themselves making the content available, and that, likewise with the DMCA, according to Article 14 E-Commerce Directive,³⁵ they do not have to do more than comply with legal takedown requests when it comes to copyright infringements by their users.

The European Court of Justice will now decide in due course whether a platform operator which is setting up a system, which in many respects incentivizes uploads for attractive original content, and which thereby as a consequence leads to millions of infringements for the commercial gain of the central organizing platform can be held directly liable for the infringement occurring without the possibility of Article 14 E-Commerce Directive.

If the Court follows its broader course of the past like in the *Filmspeler*³⁶ or the *Pirate Bay* decision,³⁷ it might come to the conclusion that platforms like YouTube and Uploaded are actually communicating to the public themselves, assuming knowledge if massive amounts of copyrighted content are commercialized. If the Court is following the more formalistic approach Advocate General Øe has provided in his opinion on the case in July 2020, it might come to the conclusion that communication to the public is depending on the technical process of the upload alone and on actual knowledge of the specific piece of content.³⁸

³⁴ Joined Cases C-682/18 and C-683/18, Frank Peterson and Elsevier Inc. v Google LLC and Others, ECLI:EU:C:2020:586 (June 22, 2021).

³⁵ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on Certain Legal Aspects of Information Society Services, in Particular Electronic Commerce in the Internal Market ('Directive on electronic commerce') art. 14, 2000 O.J. (L 178).

³⁶ C-527/15, Stichting Brein v. Jack Frederik Wullems, ECLI:EU:C:2016:938 (April 26, 2017).

³⁷ C-610/15, Stichting Brein v Ziggo BV and XS4All Internet BV, ECLI:EU:C:2017:99 (June 14, 2017).

³⁸ Joined Cases C-682/18 and C-683/18, Frank Peterson and Elsevier Inc. v Google LLC and Others, ECLI:EU:C:2020:586 (June 22, 2021).

In this case, the platform, however, might still be liable as an accomplice, but the conditions for this would actually be depending on national law of the respective Member State as this is not harmonized. The decision will certainly shape the basis of the general liability of platforms in the future. Despite the outcome of the decision, the 2019 Copyright Directive provides a *lex specialis* for online content sharing service providers.

It clarifies that those platforms actually are communicating to the public and that they do not qualify for the safe harbor in Article 14 E-Commerce Directive, independent from any degree of knowledge. For those platforms, the legislator is providing for the possibility to escape liability if those platforms follow a very specific process. This process now is imposing conceptionally new ex-ante obligations on those platforms.

To comply with the process in practice, the platforms will actually have to identify the content access is provided to, they will have to identify the rightsholders, they will have to approach rightsholders in order to obtain licenses, they will have to block content rightsholders have provided information to, and they will have to set up a complaint and redress mechanism for users and rightsholders.

This, however, comes at a price for rightsholders. As a general concept of copyright laid down already in Article 5 Berne Convention,³⁹ is that the rightsholder neither has to register its rights, nor have they to monitor the market for unlicensed users. Actually, the user has to approach the rightsholder and ask for permission. For online content sharing services, the new law changes this concept to a certain extent. Therefore, there will also be actions that have to be taken by the rightsholders in order to be able to license or stop unlicensed usage of content on platforms.

The rightsholders have to identify platforms which fall under Article 17.⁴⁰ They have to identify their own content on those platforms, they have to decide whether to license or to block, they have to define their own licensing structures, they have to evaluate industry standards for relevant necessary information, and they have to establish a process for the complaint and redress mechanism.

Thirdly, the battlefield is no longer shared by two parties alone, but a third party is reemphasized by the new law as it has already been mentioned in TRIPS⁴¹ and INFOSOC,⁴² as well as by the jurisprudence in a couple of landmark decisions like the *UPC Telekabel*⁴³ or the *Pelham* case.⁴⁴ Also, Advocate General Øe is taking into account to balance exclusive rights with fundamental rights in the *YouTube* and *Uploaded* opinion.

³⁹ Berne Convention for the Protection of Literary and Artistic Works art. 5, Sept. 9, 1886.

⁴⁰ Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130).

⁴¹ Agreement on Trade-Related Aspects of Intellectual Property Rights (TRIPS), April 15, 1994.

⁴² Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, 2001 O.J. (L 167).

⁴³ Case C-314/12, *UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, ECLI:EU:C:2013:781 (March 27, 2014).

⁴⁴ Case C-467/17, *Pelham GmbH and Others v. Ralf Hütter and Florian Schneider-Esleben*, ECLI:EU:C:2018:1002 (July 29, 2019).

The cooperation between platforms and rightsholders will therefore have to actively safeguard exceptions of limitations for the copyright in favor of the users, which thereby might evolve into actual and enforceable rights positions. Those new positions will require to establish a completely new process with a complex back and forth communication between internet users, platform, and rightsholders.

You might have seen the upload machine the German legislature has set up. We will see what this does to all the parties involved. The process likely will mostly only be handled and financed by the biggest parties in the market and will create problems for small platforms which will be disburdened for a while, as we just heard, but will certainly not be able to reach the status of the current market leaders, which grew without such burden. This will be creating problems for the competition, of course. It will certainly also discriminate against smaller rightsholders which might not have the means to implement the technology required and which will force them into collective licensing by collecting societies, taking away control over their works. Thank you.

LAURI RECHARDT: Thank you. That was spot-on time, Ursula, thanks for that. I would have a question for you. My problem with the German implementation proposal is that it doesn't seem to be in line with the DSM Copyright Directive. What is your view, it seems that in many respects the German implementation draft⁴⁵ doesn't comply with Article 17(4), the so-called mitigation measures, and it also effectively creates new exceptions, which also don't align with European Copyright law? So, how do you square that circle?

URSULA FEINDOR-SCHMIDT: I think it actually is squaring the circle. I think what the German Implementation Act tries to do is to already put in some of the balance the Directive is asking for. There is a balance required between users, rightsholders, and platforms, and there is a balance required for smaller platforms. There's also a balance required between the rightsholders and the platforms in terms of, this pulls them back. Now what the German legislation is trying to do is put some flesh into the gaps that the Directive left.

I wouldn't see it clearly so far that this is overstepping the boundaries, but it's certainly hitting the boundaries the Directive is setting. It will only be clear with the future litigation, which is certainly coming, on how the courts interpret, and whether they interpret the German law in accordance with the Directive and don't put it too strictly. Because, otherwise, I really see that there would be a problem.

LAURI RECHARDT: Maria, if the German implementation may be encroaching, if you will, the international copyright rules, do you see that the U.S. will take action? Has there been any analysis on that in the Copyright Office?

MARIA STRONG: Thanks, Lauri. When it comes to the international sphere, we're part of the broader inter-agency process. As IP is often tied in with trade, we coordinate and work with our colleagues, for example, the U.S. trade representative, the IP attachés in the region. Yes, I can say that the U.S. government inter-agency is keenly aware of what's happening in Germany as well as all the other Member States at various stages of their consideration. In

⁴⁵ Regierungsentwurf [Cabinet Draft], Deutscher Bundestag: Drucksachen [BT] 19/27426, <https://dserver.bundestag.de/btd/19/274/1927426.pdf> (Ger.).

terms of engagement, it's probably more country to country right now. This is not a TRIPS case or anything like that. This is not that jurisdiction, but it is a bilateral concern.

I will say right now, the new Biden administration is still onboarding some of its staff and senior leaders. For example, we would expect and look forward to the inputs of the new PTO director once that person is nominated as well as the IP coordinator in order to come up with a whole of government approach in order to engage our counterparts on the concerns.

Because we realize that the internet ecosystem is international. At the same time, we have our interests to represent American commerce companies who are, obviously, involved in global distribution, all to say, yes, the U.S. government inter-agency is watching.

LAURI RECHARDT: Julia, any comments, any views? One of the issues that has been discussed is the impact of different implementations across EU Member States. I seem to recall that the idea with the Digital Single Market Directive⁴⁶ was to create a single digital market, but now it seems that we're heading in exactly the opposite direction. How do you see that?

JULIA REDA: Yes. I think the reason for that is because the European legislature failed to answer the really difficult questions. How can you make all the illegal content be taken down automatically while leaving all the legal content online? The Directive simply says that this should be the result. The German implementation is trying to put this contradictory requirement into action, albeit, imperfectly, I think it's perhaps the closest to the guidance that the European Commission has so far issued which is really focused on the realization that there have to be measures to prevent legal content from being blocked in the first place.

As was mentioned, the European Court of Justice is currently deliberating over whether Article 17 of the Copyright Directive⁴⁷ is compliant with the Charter of Fundamental Rights. The most hotly debated question at the public hearing in this court case was whether Article 17 ensures that legal content actually stays online. All the European institutions have argued that it does so because the requirement to keep legal content online is a requirement of result, or an obligation of result, whereas the requirement to block content is just a requirement of best effort.

If it's not possible to reach both of those goals at the same time, then the requirement not to block legal content is the more important one, because, otherwise, you would have a situation of prior restraint. You would have a law that would oblige platforms to delete perfectly legal content which cannot be done. I find it strange, though, to question the international compatibility of that, because, frankly, platforms will be more liable than they were before, even under the German implementation.

I find it strange to see how an extension of the scope of application of the right to communication to the public could be, somehow, infringing on international rights. I think, rather, we should be asking the question if this new right that was created in Article 17 is even identical with the right of

⁴⁶ Directive 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, 2019 O.J. (L 130).

⁴⁷ *Id.* art. 17.

communication to the public that we have in the INFOSOC Directive, or whether it isn't an entirely new regime.

LAURI RECHARDT: Thank you. Interesting as always. Let's move on. Ursula, you want to have quick comments before we move on to DSA?

URSULA FEINDOR-SCHMIDT: I just wanted to respond to the new regime. I think this was actually one idea that the German government tried but actually withdrew, because we cannot find anything of this in the reasoning for the Act anymore, and I think it would have brought too many problems how all of this should play together. I think this thought was dropped, from my perspective.

LAURI RECHARDT: I think that is correct. Let's leave a little bit for the last general debate. Stan, over to you, and tell us what is great, and what is not so great about the Commission proposal for the Digital Services Act.⁴⁸

STAN MCCOY: Thanks, Lauri. I'm very happy to do that. The first thing that I need to say on this topic is that the views in this presentation do not belong to Stan McCoy. I'm actually Stan's evil twin: My name is Dan McCrook. I'm a cybercriminal, and I've hacked Stan's feed for purposes of this presentation. I understand that Stan was going to give you some blah-blah-blah happy talk about the EU's proposed Digital Services Act.

I'm sure he would have said "It's a good start, but it needs to be strengthened in some respects..." blah blah blah. That guy is really boring.

I'm going to give you, instead, something I hope you'll find interesting: a cybercriminal's guide to the DSA.

I have to say, when I first heard about this proposed EU Digital Services Act, as a practicing cybercriminal, I was a little bit worried. A lot of the rhetoric was talking about less exposure to illegal content, and about creating a level playing field against providers of illegal content. I don't know what that means, but providers of illegal content is me, so I'm concerned about that.

That came on top of some previous rhetoric from the European Commission pushing platforms to tackle cybercrime, pointing out how platforms need to step up their activities to prevent, detect, and remove illegal content.

I was initially most concerned about some language in the DSA that seems to encourage platforms to take voluntary measures against illegal content. This language in Article 6 talks about intermediaries not being deemed ineligible for liability exemptions solely because of their voluntary actions against illegal content.

But then I realized it's actually nothing new. I went back to the 2017 Communication from the European Commission, where they actually said exactly the same thing about pre-existing law: voluntary proactive measures don't automatically lead to the online platform losing the liability exemption. In truth, not much changes. Status quo is good, as far as I'm concerned, for preserving the cybercrime business model.

Then I worried that the DSA due-diligence obligations could be a problem. They might somehow oblige intermediaries to interfere with illegal activities like mine. Digging into it, however, I actually see two good points in

⁴⁸ Commission Proposal for a Regulation of the European Parliament and of the Council on a Single Market For Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM (2020) 825 final (Dec. 15, 2020).

the text. The first good point: the liability exemptions are not conditioned on compliance with these due diligence rules. It's not like you have to put in place this trusted flagger or repeat infringer, et cetera, in order to protect your own exposure to liability.

That means the platforms are likely to care a lot less about getting it right if they're only exposing themselves to a regulatory violation by doing this, rather than risking their own liability. That's good news for the cybercrime business model, as far as I'm concerned.

The second good point relates to something that I think is really bad in this Digital Services Act proposal, which is this idea of Know Your Business Customer Requirements that seems to have crept in through Article 22.⁴⁹

I would say, in principle, this kind of Know Your Business Customer Requirement would be the scourge of cybercrime in the DSA. This is really a crazy idea: Carried to its logical extreme, everyone doing business on the internet would have to say who they are. Even if you were out to do something illegal, you'd have to reveal your actual identity, and you'd have the police, the tax authorities, the child protection people, the IP rightsholders, all on your back all the time. It'd be impossible to execute an illegal business model.

I'm very happy to report that this concept of Know Your Business Customer, so far, is limited to e-commerce marketplaces only, which is a big relief since that represents a very small percentage of the cybercrime business model. No application to hosting providers, no application to advertising providers. Really good news, as far as I'm concerned.

As I dug a little deeper into some more of the details, I found a couple of more pieces of good news.

Really nice feature number one, no stay down. What a relief! Let me tell you why. Cybercriminals already have low-cost technical tools to defeat notice and action. If you do a Google search for anti-DMCA scripts, you'll find that there are 12 million search results for these kinds of automatic re-upload software. Here's one that restores your videos as soon as they get taken down, a great little tool if you want to do something illegal.

At the end of the day, the DSA proposes process changes around notice and action, but no real disruption of the cybercrime business model, and that's good news as far as I'm concerned as a practicing cyber-criminal.

A bonus feature about this notice and action stuff in the DSA is one of the process changes requires an exact URL to get illegal content taken down, but I increasingly do business through apps that are not even URL-based. That's a nice little loophole for me.

Another thing I like in the DSA: it looks pretty difficult to kick a platform out of the safe harbor because of illegal activity. If you examine this language, it says that intermediaries lose access to the safe harbor if they deliberately collaborate with service recipients to undertake illegal activities.

Well, good luck seeing inside the mind of the platform operator and proving deliberate collaboration. This standard potentially means that platforms can build features that objectively facilitate crime, but still claim their inner thoughts don't include deliberate collaboration. Fortunately for us

⁴⁹ Commission Proposal for a Regulation of the European Parliament and of the Council on a Single Market for Digital Services (Digital Services Act) and amending Directive 2000/31/EC, COM (2020) 825 final (Dec. 15, 2020).

cybercriminals, the inner thoughts of our platform friends often revolve around something else. I'm not going to say what, but I'll let you guess.

In summary, so far the DSA proposal, fortunately, doesn't live up to its promise of curbing my illegal content business, because number one, this stuff on voluntary measures is already the law. Number two, the due diligence requirements are not tied to liability, and the worst of them, KYBC,⁵⁰ is for marketplaces only. Number three, there's no stay down requirement. Number four, platforms can still access the liability exemptions because of that language that I just pointed out on deliberate collaboration. This is all a big relief.

LAURI RECHARDT: Stan, we have lost Dan. Can you hear us?

STAN MCCOY: Sorry. Did you lose the end of my presentation there? I seemed to have a little quirk.

LAURI RECHARDT: Yes, only the very end. I think we got the gist, and first of all, big thanks and convey our best regards to Dan, a great presentation, and now, if we can get Stan back for a while.

STAN MCCOY: Yes.

LAURI RECHARDT: Is there anything good in the DSA?

STAN MCCOY: Yes. As my evil twin brother previewed, Stan's view is actually that this legislation is a step in the right direction. They just haven't gone far enough on some of these points where they had an opportunity to take action against illegal content in a much more meaningful way. Stay down is a great illustration of that. As the 512 report bore out, and as many rightsholders have experienced, notice and takedown is broken. It just doesn't deliver the benefit it was meant to deliver. Here, the Commission had an opportunity to really improve the system in a way that it would have curbed illegal content. The process changes they've laid on the table just won't do that.

LAURI RECHARDT: Thanks. I think we have a couple of minutes left, so a couple of questions from Q&As, and I think this one goes first to Maria, right? The use of algorithms to customize content to add more revenue seems inconsistent with the safe harbor originally intended for passive platforms, should there be a different regime for this?

MARIA STRONG: On the U.S. side of things, obviously algorithms are being used. I think Abby and Julia have also mentioned, as other stakeholders have, in the sense that—the concern is that algorithms can't make decisions on fair use, which is part of some of the decisions, especially coming out of the *Lenz* case.⁵¹ I think that is a factor for discussion with the legislator. I don't see exactly how that's going to be the end-all-be-all in the system as currently established here in the States at all.

I think to the extent we can begin further exploration with respect to what kind of processes might be used to support STMs,⁵² but that's a different question. Algorithms can play a different role to support as a tool, but perhaps not as the ultimate decider at various parts of the current notice and takedown system. But we need more congressional guidance, we need a lot more information and a lot more pieces to pull things together, because I think as we've seen in Europe, there are a lot of different pieces, and putting them all together in a cohesive whole is a really huge challenge.

⁵⁰ Know Your Business Customer.

⁵¹ *Lenz v. Universal Music Corp.*, 815 F.3d 1145 (9th Cir. 2016).

⁵² Standard Technical Measures.

LAURI RECHARDT: Just very quick question from my side, would you say that a service that only uses algorithms to organize, promote, optimize the presentation of the content is automatically eligible for safe harbor for that reason only?

MARIA STRONG: No, I don't think you can make any such blanket statement. I think that goes back to the concerns that we've mentioned in our report, and I think Sandra mentioned earlier as well, that goes to the heart of the red flag knowledge question. That goes exactly to the core of the current system. What is actual? What is red flag? It's a case-by-case circumstance. We think the courts have veered and it needs to be re-evaluated by the legislator. I don't think you can make a blanket statement like that, Lauri, but thank you.

LAURI RECHARDT: Thanks. Okay. The last question in the Q&As. On how many levels did the German implementation of Article 17 shift value from exclusive rights into collective management? Ursula, Julia, if you want to take that, or both of you.

JULIA REDA: Yes. The German implementation actually emphasizes collective management quite a lot, and I think part of that is that all the critics of Article 17 that said that upload filters would lead to the deletion of legal content were told over the entire legislative process that this would not happen because everything would be licensed, but of course, in order to make sure that everything is actually licensed, you have to have some degree of mandatory collective management.

This is the tension that we're seeing here, that we have certain parts of the entertainment industry that are quite happy with collective management arrangement, and I think to some extent, they were also instrumental in lobbying for Article 17 in the first place, but then Article 17 does not distinguish between different types of content and different business models.

Now, we have the problem that other parts of the entertainment industry are actually extremely uncomfortable with this approach of collective management, and I think this was sort of a crucial mistake in the design of Article 17 from the beginning that it was trying to create a system that was based pretty much on the fight between the German collecting society for music rights holders and YouTube, and trying to extrapolate from this one legal dispute and create a rule that applies to all sorts of parts of the entertainment industry, and in fact, all sorts of platforms where this approach may not be the correct way.

URSULA FEINDOR-SCHMIDT: As I said, just to follow up on this, it also, of course, discriminates against smaller rightsholders because of the obligation to approach a rightsholder, and to ask for a license is only true in the German draft act for representative rightsholders. There is no definition of what a representative rightsholder should be, is this a larger film producer, is it a larger music label, or is it a collecting society? It's probably not, but still, it seems like the larger rightsholders will be able to control their rights, whereas smaller rightsholders won't be because they are not representative.

SANDRA AISTARS: Can I jump in here on this as well, Lauri? I think this seems to be a problem across the board with respect to small rightsholders, and Abigail spoke very eloquently about the challenges that startups face, and individual artists and small businesses seem to be ignored far more frequently than startups are, in terms of how they are treated in these sorts of negotiations, whether they are invited to the table to participate in dialogue, whether they are given effective remedies at all.

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This is true, even in business to business discussions, where, as a matter of course, individual artists and small businesses in the arts are almost never given access to things like ContentGuard and other tools that would allow them to manage their rights on platforms such as YouTube and other platforms where their works are consistently infringed, and to some degree, if individual rightsholders had access to these automated tools and the control to decide whether their works are allowed to stay up and be monetized perhaps they wouldn't be taken down so frequently, perhaps you'd be sharing revenue with these individual rightsholders and small businesses, rather than dealing with notice and stay down debates with them as you are.

I think that's something that is worth considering as you think about these issues. The other thing that Abigail mentioned when she was speaking about the challenges that startups face, is this challenge of huge liability in the investments that startups make, and individual rightsholders make those same investments, although they don't have the same kind of venture capitalists and angel funders backing them.

Instead, they're typically zeroing out their retirement funds, if they even have a retirement fund, or maxing out multiple credit cards, or going to their parents or their friends for investments and they can do that only once. Once you have tapped those individual resources they are gone, you're never going to make another film again with those sorts of resources.

You can't just close up shop and say, "Hey, I learned from that failure. Now, I'm going to go launch my next startup." So, you've lost that artist, you've lost that voice, and that's a loss for all of us in the greater community—in the arts ecosystem. We owe it to ourselves as audiences and allies of artists to find ways to solve the sorts of issues that Abigail was raising not only for startups in the tech community but for individuals and small businesses in the arts as well.

LAURI RECHARDT: Thanks, Sandra. I believe that we are at the end of this session. It is a pity we can't continue, but time is up. Anyways, what I'd like to say is that we probably didn't quite reach a consensus as to the sweet spot, where we ought to strike the right balance between the different fundamental rights, but hopefully, we got a fair airing of the different views.