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# 'Notice and staydown' and social media: amending Article 13 of the Proposed Directive on Copyright

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## ABSTRACT

This paper critically assesses the compatibility of content recognition and filtering technology or so-called notice and staydown approach with the right of social network platforms and users to a fair trial, privacy and freedom of expression under Articles 6, 8 and 10 of the European Convention on Human Rights (1950) (ECHR). The analysis draws on Article 13 of the European Commission's proposal for a Directive on Copyright, the case-law of the Strasbourg and Luxembourg Court and academic literature. It argues that the adoption of content recognition and filtering technology could pose a threat to social network platforms and user human rights. It considers the compliance of 'notice and staydown' with the European Court of Human Rights' (ECtHR) three-part, non-cumulative test, to determine whether a 'notice and staydown' approach is, firstly, 'in accordance with the law', secondly, pursues one or more legitimate aims included in Article 8(2) and 10(2) ECHR and thirdly, is 'necessary' and 'proportionate'. It concludes that 'notice and staydown' could infringe part one and part three of the ECtHR test as well as the ECtHR principle of equality of arms, thereby violating the rights of social network platforms and users under Articles 6, 8 and 10 of the Convention.

## ARTICLE HISTORY

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## 1. Introduction

According to Urban, Karaganis, and Schofield (2016), the US Digital Millennium Copyright Act 1998 (DMCA) includes a compromise which encourages rightholders and service providers to cooperate in reducing online copyright infringement. Its key characteristic is found in section 512. This sets out a safe harbour framework that on the one hand allows rightholders to send takedown requests to these services, which must be expeditiously acknowledged, while on the other enables the targets of notifications to challenge those requests through a counter-notice system. In a nutshell, the report outlines that provided a service prevents access to unlawful content which it becomes aware of and blocks users who regularly breach copyright, it cannot be found monetarily liable for the infringement. Urban, Karaganis, and Schofield (2016) explain that the E-Commerce Directive 2000/31/EC was broadly inspired by the DMCA safe harbour framework (Urban, Karaganis,

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and Schofield 2016, 1–4, 22). As in section 512, Article 14 of the E-Commerce Directive provides freedom from liability for hosting third-party content, provided that a service does not have knowledge of illegality or upon gaining such knowledge, promptly removes the unlawful content. Moreover, under Article 15 of the E-Commerce Directive, no general monitoring obligations for the detection or takedown of unlawful material can be imposed on these services.

Engstrom and Feamster (2017) also explain that the European Commission (EC) has suggested a proposal which is a significant deviation from the E-Commerce Directive 2000/31/EC. It is enshrined in Article 13 of the Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market – COM(2016)593 (the Directive), and is in conflict both, with the safe harbour for hosting under Article 14 of the E-Commerce Directive, as well as Article 15 of the E-Commerce Directive. The latter aims to shield service providers from general monitoring obligations (Engstrom and Feamster 2017, 11). Notably, the EC Impact Assessment (the Impact Assessment) asserts that while some services have become key players in material distributed online, rightholders are not always able to determine whether and under what conditions rightholders can make their content available on the services and obtain fair remuneration. However, it stresses that these terms are at odds with copyright licensing contracts, as such services are under no legal obligation to bargain with rightholders, but only reach voluntary ‘monetisation agreements’ (EC 2016a, 138–139). Moreover, the Impact Assessment indicates that when uploaded material is infringing, rightholders can simply request that the services individually take it down although this results in significant costs and in any case is insufficient due to massive user upload activity. In sum, it concludes that this has led to a worrying ‘take it or leave it’ scenario where rightholders must either welcome the terms and conditions dictated by the service or keep sending thousands of notices for each specific content (EC 2016a, 140–142).

To address this problem, Engstrom and Feamster (2017) state that in recent years many rightholders have argued that service providers should be required to pre-monitor all user uploads as an essential condition to qualify for the safe harbour, both in the US and in Europe. The report asserts that service providers would be exempt from direct and indirect copyright liability provided it can be shown that they used the right content recognition and filtering technology to tackle online copyright infringement. It explains that such proposals are also known as ‘notice and staydown’ duties, under which a regular takedown notification from a rightholder for a specific unlawful file would trigger a duty for the service provider to proactively identify and eliminate all instances of the allegedly infringing content and prevent future uploads (Engstrom and Feamster 2017, 10). It is important to mention that the EC has officially confirmed through its Communication tackling illegal content online that service providers should ‘voluntarily’ comply with these duties. However, it has highlighted that the adoption of content recognition and filtering technology should not be limited to copyright issues but notably, it should also address the proactive identification and removal of other unlawful material such as terrorism and hate-related content. Crucially, the EC has warned that it will monitor voluntary progress and assess whether, ultimately, the future legislative action is required (EC 2017).

The Impact Assessment also notes that rightholders claim that the functioning of notice and staydown systems remains largely ‘opaque’ to them (EC 2016a, 141). However, as of 21

September 2017, this contrasts with TorrentFreak's announcement on its site that, as in the past, Google has reached an agreement with the French audio-visual industry to provide rightsholders with direct access to takedown and staydown tools on its YouTube Content ID system. Equally, Google has also disclosed that, to use Content ID, rightsholders should detect the content by making available reference files along with metadata. Google explains that these files are then fingerprinted so that even small fractions can be detected regardless of whether significant modifications have been made. It asserts that new content uploaded to YouTube is checked against the fingerprint database and, following this, YouTube implements the rightsholders' business instructions. It adds that rightsholders can choose either to prevent copyrighted material from ever being shown on YouTube initially, to keep track of the use of their content but take no action, or to monetize the disputed material through advertising (Google 2017, 3).

There is an old saying that if someone repeats a lie often enough, it becomes the truth. Psychologists refer to this as the illusory truth effect. Yet, human beings tend to believe credible and feasible things. This means that when someone makes a questionable statement such as the one expressly contained in the Copyright Directive that 'the use of effective content recognition technologies, shall be appropriate and proportionate', but provides no evidence to back up its technical feasibility, and seems as though the statement may be true, one tends to believe it. The more that statement is repeated – as is the case in the Directive, the Recitals and the Impact Assessment – the more believable it appears (*BBC News*, October 26, 2016). This will persist unless someone takes the time to explore such a statement.

The purpose of this paper is twofold: firstly, to critically assess whether the implementation of notice and staydown required by the Directive would be compatible with the right of social network platforms and users to a fair trial, privacy and freedom of expression under Articles 6, 8 and 10 of the European Convention on Human Rights (ECHR) 1950 and secondly, if the adoption of content recognition and filtering technology were to violate the Convention, to suggest and appraise some procedural safeguards to ensure the Directive's compatibility with the ECHR. Whether the implementation of notice and staydown is legitimate, largely depends on the compatibility of this technology with the three-parts of the Strasbourg Court's non-cumulative test. Under the ECHR, any interference with Articles 8 and 10 must firstly be 'in accordance with the law'; secondly, it must pursue one or more of the legitimate aims contained in Articles 8(2) and 10(2) and thirdly, be 'necessary' and 'proportionate'. I conclude that unless the amendments suggested in this paper are explicitly incorporated into the Directive, the implementation of notice and staydown will violate the rights of service providers such as, social network platforms and users under Articles 6, 8 and 10 of the Convention.

## **2. Problems with notice and staydown**

It should be pointed out that, by its very nature, the adoption of content recognition and filtering technology raises serious concerns regarding not only the right to privacy but also the right to freedom of expression. To begin with, notice and staydown can lead to privacy issues if Deep Packet Inspection (DPI) is deployed for the purposes of monitoring and detecting whether, for instance, a social media user is unlawfully uploading copyright protected content through a social network platform prior to preventing access to such

content (Internet Society 2010, 77). This is because content recognition and filtering generally relies on fingerprinting and watermarking technology, which entails 'real-time' monitoring and identification of unlawful material on route to the user, before blocking access. Notably, as opposed to blocking measures, DPI systems surveil and examine the content of network packets for values or features, rather than focusing on the source such as a URL black-list (Internet Society 2010, 64). Thus, it is important to mention that DPI technology might reveal information from which a user's identity, location, interests, activities and so on can be easily determined. Problematically, however, this is more information than would otherwise be required to identify and establish online copyright infringement, and such examination could also disclose personal data regarding innocent third parties (Internet Society 2010, 77).

Moreover, it is worth stating that Urban, Karaganis, and Schofield (2016) emphasize that notice and staydown also generates concerns regarding its impact on freedom of expression, as choices are made based on software and database matches instead of human understanding (Urban, Karaganis, and Schofield 2016). Interestingly, they reveal that each week Google receives millions of takedown requests, which are mainly sent by or on behalf of the top entertainment corporations (Urban, Karaganis, and Schofield 2016, 8–11). As of 5 October 2017, Keller cautions that the use of this technology can easily lead to mistakes, specifically the blocking of lawful content (false positives) or the passage of unlawful material (false negatives). Similarly, Google argues that in contrast with voluntary approaches, imposing notice and staydown duties on service providers is unjustifiable. However, the search engine also advises that voluntary approaches, which function in one context such as, YouTube's Content ID cannot easily be applied to a different context like social network platforms (e.g. Facebook, Twitter, Snapchat, Instagram, etc.). Google explains that it is easier than ever for authors to connect with the public, build a fanbase and share their content online via such networks. Thus, it concludes that increasing obligations upon services and decreasing legal certainty concerning the platforms through which these authors earn a living, endangers this renaissance (Google 2017, 4–5).

### 3. The substantive law

The key feature of the Proposed Directive is given in Article 13 which, as of 14 September 2016, expressly states that:

1. 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 shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.
2. Member States shall ensure that the service providers referred to in paragraph 1 put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1.
3. Member States shall facilitate, where appropriate, the cooperation between the

information society service providers and rightholders through stakeholder dialogues to define best practices, such as appropriate and proportionate content recognition technologies, taking into account, among others, the nature of the services, the availability of the technologies and their effectiveness in light of technological developments.

In order to provide advice on the interpretation of Article 13, the Directive also incorporates some important Recitals. To begin with, Recital 37 states that since service providers, such as social network platforms, have become the main content distribution platforms with no rightholder involvement, this affects rightholders' willingness to agree any terms and conditions concerning how their content is used and to obtain fair remuneration. Recital 38, thus, explains that service providers have an obligation to reach licensing agreements with rightholders unless they are exempt from liability under Article 14 of the E-Commerce Directive 2000/31/EC. Specifically, it stresses that for any licensing agreement to work, these platforms should implement effective, appropriate and proportionate systems regardless of whether they are entitled to the liability exemption. Furthermore, Recital 39 indicates that to evaluate the appropriateness of these systems, while rightholders should give the necessary information to enable the services to detect their content, such services should collaborate and be transparent to rightholders concerning the technologies deployed. Importantly, Recital 45 elaborates that the Directive respects the rights and principles included in the EU Charter of Fundamental Rights (the Charter). More specifically, Recital 46 clarifies that under the Directive any personal data processing should comply with the right to privacy and protection of personal data (Articles 7 and 8 Charter), as well as the Data Protection Directive 95/46/EC and E-Privacy Directive 2002/58/EC. Although left unmentioned in Recital 46, it should be emphasized that the decision of *Sabam v Netlog* examined the imposition of notice and staydown measures on a social network platform hosting third-party content for the purpose of online copyright enforcement. The Court of Justice of the EU (CJEU) found that the detection, systematic analysis and processing of personal data, relating to Netlog's social media user profiles, could potentially infringe their right to privacy in the context of Article 8 Charter.<sup>1</sup> Crucially, this finding also confirms the Court's earlier decision in *Sabam v Scarlet*<sup>2</sup> and was endorsed in its later ruling in *Mc Fadden*.<sup>3</sup> However, in assessing the compatibility of content recognition and filtering systems with Articles 6, 8 and 10 of the ECHR, it is also particularly important to pay attention to the Impact Assessment.

### **3.1. The impact assessment**

According to the Impact Assessment, there are three options available.

#### **3.1.1. Baseline**

The Impact Assessment asserts that the baseline option is no policy intervention. It indicates that this alternative would rely upon the 'voluntary' use of notice and staydown by service providers such as, social network platforms, which would keep applying their own terms and conditions and approach to transparency regarding how these systems function (EC 2016a, 144). However, it notes that while rightholders claim that the current legal framework must be clarified, in contrast, service providers consider that this framework is clear. It adds that users understand that there is no need to change

as any policy intervention could lead to a chilling effect on the right to freedom of expression (EC 2016a, 145).

### ***3.1.2. Option 1 – stakeholder dialogues between rightholders and service providers that store and provide access to large amounts of user uploaded content***

The Impact Assessment states that the EC could initiate stakeholder dialogues to bring together rightholders and service providers to establish best practices for the deployment and support of content recognition and filtering systems. It explains that this would be specifically intended to enhance the rightholders' ability to set out the terms and conditions for the use of their material and remuneration. However, it stresses that these dialogues should be directed at services such as social network platforms, which store and give access to large amounts of user uploaded copyrighted content and, considering the volume of material available and the scale of their audience, they have a significant effect upon the market.

The Impact Assessment notes that since technology suppliers would also be engaged in the dialogue, to achieve an optimal solution, multiple factors must be taken into account, such as current technologies, their availability, effectiveness and costs for each party. To illustrate this point, it confirms that best practices could also concentrate on ways to ensure that service providers not only receive the necessary information from rightholders to make notice and staydown function but are also transparent to rightholders regarding the functionality, features and effectiveness of such systems. It indicates that due to the distinct dynamics within the audio-visual, music and images sectors, these dialogues would be conducted gradually and on a sector-by-sector basis (EC 2016a, 145). Importantly, however, the Impact Assessment points out that because of its voluntary character it appears unlikely that stakeholder dialogues would lead to enough improvements in the first place. Specifically, it asserts that the optional nature of these dialogues is unlikely to result in a behavioural change of platforms which have not used any notice and staydown technologies before or for those that have voluntarily deployed them for years but under their own terms and conditions. It also mentions that rightholders would remain in a fragile negotiating situation when such platforms used their content.

To sum up, the Impact Assessment considers that Option 1 is unlikely to have any effect, or only a very narrow one, upon copyright as a property right. Similarly, it recognizes that it might also have a limited negative impact on the right to freedom of expression supposing that, following the dialogues, service providers such as, social network platforms introduced systems which may unjustifiably restrict the user uploaded content, for instance, if the material is covered by a permitted act. However, importantly, it concludes that in such an improbable scenario there would also be a narrow negative effect on the freedom of social network platforms to conduct their business, due to the costs they would have to incur because of these dialogues (EC 2016a, 150–151).

### ***3.1.3. Option 2 – a duty on service providers that store and provide access to large amounts of user uploaded content to increase transparency and adopt adequate systems but not on rightholders***

The Impact Assessment states that it is difficult to assess what constitutes 'large amounts' of content, which often might not be copyright relevant such as 'family pictures' (EC 2016a, 146). However, it notes that the notice and staydown duty would only apply to the services



if the user uploaded content was copyright protected. It explains that rightholders must provide the necessary information to service providers such as social network platforms to identify the content, whereas these platforms must provide 'adequate information' to rightholders regarding the systems (EC 2016a, 146). It indicates that when rightholders provide the content or fingerprints needed to these services, the effect is likely to be limited or overridden by the positive effects of such a solution (EC 2016a, 151).

The Impact Assessment also recognizes that the adoption of notice and staydown systems would entail some costs. It confirms that while for large and medium-sized services the costs are expected to remain reasonable, new start-up entrants would not be impacted since the duty to adopt these systems is limited to those services providing access to large amounts of user uploaded content. Moreover, it cautions that some costs might also result from the need to create processes to allow users the opportunity to challenge cases where such systems would unreasonably restrict their opportunity to upload material (EC 2016a, 151–153). For example, it stresses that the right to freedom of expression might be impacted when exceptions to copyright apply, the material falls within the public domain or it is incorrectly detected and removed, thus resulting in 'false positives' (EC 2016a, 141). However, it observes that such a negative effect would be limited because platforms must adopt procedural safeguards for users which already exist in the notice and takedown framework (EC 2016a, 152–153). Although omitted from the Impact Assessment, this is despite the fact that the notice and takedown framework is criticized exactly for the lack of such safeguards (Bridy and Keller 2017, 9–10). Importantly, the Impact Assessment acknowledges that although some services claim that their systems achieve high success rates in content recognition, detecting unlawful remixes, DJ sessions and transformed works 'may be very challenging' (EC 2016a, 140)

Furthermore, the Impact Assessment elaborates that different types of services are available, such as Audible Magic, the leading automated content recognition solution, which has large clients such as Facebook. It explains that Audible Magic offers 'real-time' monitoring to produce statistics of what users browse, how they watch films, listen to music and how images are used. Vitality, it highlights that service providers such as, social network platforms can then use this information for targeted display advertising strategies or give it to rightholders (EC 2016b, 164–165). In sum, the Impact Assessment adds that the effect of notice and staydown on the freedom of services to conduct their business is likely to be limited since the duty is imposed only on services providing access to 'large amounts' of material. It indicates that this effect is mitigated by the fact that the proportionality in the use and selection of systems would also consider the scale and type of services. Importantly, it concludes that, overall, Option 2 is the best solution to achieve the policy aims while at the same time striking a fair balance between copyright and other human rights (EC 2016a, 154).

#### **4. Assessment of applicability and compliance with Articles 8 and 10 of the ECHR**

In order to determine whether the implementation of notice and staydown required by the Directive would respect the right of social network platforms and users to privacy and freedom of expression, it is essential to examine the compatibility of these systems with Articles 8 and 10 of the Convention. The European Court of Human Rights (ECtHR)

case-law has stated that 'private life' is a wide concept without offering an exhaustive definition.<sup>4</sup> Therefore, Article 8 affords a right to 'private life' in its widest sense.<sup>5</sup> Moreover, it has noted that private and business telephone conversations and work-related emails are included within the notions of 'private life' and 'correspondence' for the purposes of Article 8 of the Convention.<sup>6</sup> Importantly, in *Copland v UK* the ECtHR stressed that the same rule was applicable to the monitoring of an individual's internet usage<sup>7</sup> as for instance, using DPI-based content recognition and filtering systems for the purpose of online copyright enforcement. Furthermore, as to the right to privacy, the Strasbourg Court case-law also gives a broad interpretation to the right to freedom of expression in Article 10 of the ECHR. The latter not only guarantees the right to impart information but also the public's right to receive it.<sup>8</sup> The ECtHR has explained that, while Article 10 applies to both the content of the information and the method of communication and reception, it also guarantees the right to freedom of expression to 'everyone'.<sup>9</sup> It has confirmed that no distinction is made in it as to whether the legitimate aim pursued is commercial or not.<sup>10</sup>

Moreover, the ECtHR has pointed out that service providers, such as, social network platforms, allow user-generated content (UGC) to be easily and quickly disseminated, thus offering an unrivalled medium for the full enjoyment of services and users' right to freedom of expression.<sup>11</sup> Specifically, it has indicated that considering its accessibility and ability to keep and transmit massive amounts of information, the internet plays a crucial role in improving the public's access to news and simplifying the transmission of information.<sup>12</sup> Thus, it has highlighted that States have a positive obligation to develop the infrastructure required to enable internet access that facilitates and ensures universal connectivity. At the same time, it has cautioned that when it comes to private internet communications, States cannot guarantee that citizens are able to express themselves or freely seek, receive and impart information without also promoting, respecting and protecting their right to privacy. It has voiced that – as it would happen if the adoption of notice and staydown technology, demanded by Article 13 of Directive, were to become a legal requirement – situations might arise where both the right to freedom of expression and the right to private life of those engaged in electronic communications, might collide with the rights and freedoms of others.<sup>13</sup>

It should be observed that in *Barbulescu v Romania* the Grand Chamber noted that the monitoring of the applicant's Yahoo Messenger communications was not carried out by a State authority but by a private sector corporation.<sup>14</sup> Since Article 13 explicitly requires service providers to adopt content recognition and filtering systems to tackle online copyright infringement, this would also be the case under the Directive as well. The Grand Chamber remarked that this monitoring and examination of the content of the applicant's communications did not amount to an 'interference' with his right to private life.<sup>15</sup> However, notably, it stressed that the responsibility of State authorities was in fact engaged if the disputed facts originated from a failure on their part to secure to the claimant the enjoyment of a right, which was expressly contained in Article 8.<sup>16</sup> Equally, but this time with reference to the CJEU case-law, it should also be mentioned that in *Sabam v Scarlet* the Advocate General (AG) confirmed that the requirement to proactively identify and remove infringing copyright protected content was not an interference a posteriori (after an infringement had already been detected) but an interference a priori, namely, one to prevent such an infringement and avoid any future breach.<sup>17</sup> Furthermore,

coming back to the above ECtHR ruling in *Barbulescu v Romania*, the Strasbourg Court has elaborated that attention must also be paid to the fair balance to be achieved between the competing interests of the whole community and those of citizens, subject to the margin of appreciation enjoyed by the State.<sup>18</sup>

Again, in *Sabam v Scarlet*, the AG noted that while, under Article 6(3) of the Treaty on the European Union (TEU) 2007, human rights as recognized by the ECHR constituted general principles of EU law, pursuant to Article 6 TEU, the EU Charter had the same legal status as the Treaties.<sup>19</sup> The AG observed that Article 52 of the Charter referred to 'the need to protect the rights and freedoms of others'.<sup>20</sup> Specifically, AG Cruz-Villalón explained that the right to property was included in Article 17(2) Charter which explicitly states that 'intellectual property shall be protected'.<sup>21</sup> He also remarked that considering both CJEU case-law and Directives 2004/48/EC and 2001/29/EC, copyright was a property right. Similarly, he added that following repeated precedents of the EC of Human Rights and the ECtHR, intellectual property has undoubtedly been protected by Article 1 of Protocol 1 ECHR.<sup>22</sup> Moreover, he also confirmed that Article 52(3) of the Charter provides that the meaning and scope of the rights guaranteed under the Charter correspond to those guaranteed under the Convention. In particular, the AG underlined that the rights enshrined in Article 8 ECHR 'corresponded', within the meaning of Article 52(3), to those enshrined in Article 7 Charter (respect for private and family life) and Article 8 Charter (protection of personal data), in the same way as the rights enshrined in Article 10 ECHR 'corresponded' to those enshrined in Article 11 Charter (freedom of expression and information).<sup>23</sup>

It is worth pointing out that, as of 6 July 2017, the European Parliament Think Tank states on its site that the legally binding character of the Charter in 2009 did not deprive the Convention of its role as a source of fundamental rights protection in the EU. The European Parliament explains that the Treaty of Lisbon has paved the way for EU accession to the ECHR. However, it clarifies that in 2015 the CJEU found that the negotiated agreement neither provided the Court's exclusive jurisdiction, nor sufficient protection concerning the EU's specific legal arrangements. Thus, although both the European Parliament and the EC stress the need for EU accession, as of January 2018, a new draft accession agreement is still waiting. Importantly, in assessing the relationship between the Convention and the Charter, in the CJEU decision in *Tele2/Watson*, the AG advised that according to Article 6(3) TEU, human rights as enshrined in the ECHR, constituted general principles of EU law. However, the AG acknowledged that since the EU had not acceded to the Convention, the latter could not be considered a legal instrument, which had been formally incorporated into the Union's law.<sup>24</sup> The AG elaborated that EU law did not preclude the Charter from offering more extensive protection than that available in the Convention.<sup>25</sup> Thus, AG Saugmandsgaard-Øe concluded that when it comes to assessing human rights matters such as the use of unlawful mass surveillance powers, it would not be legally correct to impose a different test on Member States, depending on whether the Convention or the Charter was being examined.<sup>26</sup> Indeed, in addition to *Tele2/Watson*, the CJEU ruling in *Digital Rights Ireland*<sup>27</sup> also reflects how the case-law of the Strasbourg and Luxembourg Court is increasingly becoming carefully 'aligned'.<sup>28</sup>

In conclusion, under the Convention, any interference with Articles 8 and 10 must firstly be 'in accordance with the law'; secondly, it must pursue one or more of the legitimate

aims included within Articles 8(2) and 10(2) and thirdly, be 'necessary' and 'proportionate'. Importantly, a failure to satisfy one prong constitutes a violation regardless of conformity with the other two prongs (Cameron 2006, 105).

#### 4.1. 'In accordance with the law'

The ECtHR's case-law has stated that for any interference with the right to privacy and freedom of expression to be 'in accordance with the law' under Articles 8 and 10 of the Convention, three conditions must be fulfilled: firstly, it needs to be based in national legislation; secondly, this legislation should be accessible and thirdly, it must satisfy the Strasbourg Court's foreseeability and rule of law principles.<sup>29</sup> The basis in national legislation condition is easy to satisfy, as the Directive (written law) and, for instance, *Delfi v Estonia*,<sup>30</sup> which discusses filtering systems, provide a legitimate basis for interference with these rights. However, concerning the second and third conditions, this section will argue that the adoption of notice and staydown systems could fail to satisfy the Court's accessibility, foreseeability and rule of law principles, thus breaching the first-part of its non-cumulative test under Articles 8(2) and 10(2).

In terms of the first principle, it is well-established ECtHR case-law that the quality of the law condition under Articles 8 and 10 ECHR requires that the law be published and therefore be adequately accessible to the affected persons.<sup>31</sup> As outlined above, the Impact Assessment states that rightholders must provide the necessary information to service providers to identify the content, whereas these services must provide 'adequate information' to rightholders regarding the systems (EC 2016a, 146). Worryingly, however, the Directive fails to afford the public full transparency, as users are denied access to the technical details of these evidence-gathering techniques, thereby rendering them unable to rely on judicial review to challenge their use. In *Sabam v Scarlet*, the AG observed that notice and staydown entails not only the filtering of all electronic communications passing via the service provider to identify those implicated in copyright infringement but also the blocking of all incoming and outgoing communications which involved such infringement.<sup>32</sup> However, the AG highlighted that it was impossible to determine the *modus operandi* of these systems, such as the specific criteria under which the monitoring was performed, the filtering methods used and the procedures for detecting infringing material.<sup>33</sup>

As discussed before, the Impact Assessment states that rightholders argue that the functioning of these technologies remains largely 'opaque' to them (EC 2016a, 141). A letter from Dr Clayton, 2 October, 2012, cautions that, before these systems are introduced, the public should also have the right to know how they function. It recommends that to facilitate independent review, some technical details must remain confidential, such as the monitoring system's IP address and commercial keywords, but the rest should indeed be published. Importantly, it concludes that 'secret designs' should not be deemed to produce valid results. Thus, given that when users upload copyrighted content the Directive does not afford them the opportunity to understand how the filtering and blocking measures would impact on their electronic communications, it arguably fails to satisfy the ECtHR accessibility principle under Articles 8(2) and 10(2) ECHR.

As far as the foreseeability principle is concerned, it is also well-settled ECtHR case-law that the law must be sufficiently foreseeable as to the scope of the applicable measures, as

guaranteed by Articles 8 and 10.<sup>34</sup> As stated above, Article 13(3) of the Directive asserts that stakeholder dialogues should consider the type of services and the availability of content recognition and filtering systems. However, regrettably and in conflict with the ECtHR blocking injunction decision in *Yildirim v Turkey* and the CJEU notice and staydown ruling in *Sabam v Scarlet*, the Directive does not make the slightest reference to the scope of the *ratione personae*, *ratione materiae* and *ratione temporis* of the surveillance and technical measures required to implement these systems.<sup>35</sup> Importantly, Google remarks that what is technically possible for a video-sharing provider such as YouTube is not necessarily possible for a private, message encryption or cyberlocker provider, or for a provider hosting non-audio-visual material or sharing links (Google 2017, 4). Thus, the Directive should expressly specify the number of affected users and the categories of services to be impacted. Moreover, the Impact Assessment acknowledges that often material might not be copyright relevant, for instance, 'family pictures' (EC 2016a, 146). Alarming, this suggests that the level of inspection necessary to implement this technology is an invasive analysis of not only personal but also a sensitive data. Therefore, since notice and staydown relies on surveillance equipment, the Copyright Directive should also explicitly lay down the level of examination required to perform user monitoring, namely, DPI, Shallow Packet Inspection (SPI) or both. Lastly, as of 26 March 2017, TorrentFreak on its site explains that the service Piracy Solution claims that its system performs 'relentless' 24/7 monitoring. However, this notably contradicts *Barbulescu v Romania* where the ECtHR found that the use of continual technical measures violated the Convention.<sup>36</sup> Equally, it is also inconsistent with Article 15 of the E-Commerce Directive 2000/31/EC, which – as opposed to Recital 47 of Directive 2000/31 that allows for a time-limited and targeted 'monitoring obligation in a specific case' – shields services such as, social network platforms from unlimited and untargeted general monitoring obligations. The Directive should also expressly state the duration period of these measures. Thus, since the Directive fails to set out explicitly the number of users and services to be affected, the types of communications to be impacted and the time to be taken over the measures, it arguably fails to satisfy the ECtHR foreseeability principle under Articles 8(2) and 10(2).

In applying the rule of law principle, the Strasbourg Court has observed that executive authority interference with individuals' Articles 8 and 10 Convention rights must also be subject to effective supervision.<sup>37</sup> As outlined above, Article 13(3) of the Directive also states that Member States shall promote the cooperation between rightholders and service providers to implement notice and staydown systems. However, troublingly, the Directive appears to disregard the fact that the use of this technology should also be subject to States' oversight authority. Indeed, in *Tele2/Watson* the CJEU held that, considering both Article 8(3) Charter and the Court's case-law, a fundamental aspect about the protection of individuals concerning the processing of their personal data was prior review by the courts or independent authorities.<sup>38</sup> Similarly, the European Data Protection Supervisor (EDPS) agrees that before surveillance and technical measures to proactively detect and stop copyright infringement are introduced, data protection authorities must check and authorize them (EDPS 2010, 8). This was supported by the AG opinion in *Promusicae v Telefonica*.<sup>39</sup> One could, therefore, argue that the Directive should require that before authorizing the adoption of these systems, State authorities should conduct a prior check to assess how users and service providers are affected, how communications are impacted and the length of time the measures will take.

Moreover, since service providers update and change their algorithms very frequently, State authorities should also perform regular audits to ensure that notice and staydown measures satisfy the accessibility, foreseeability and rule of law principles. This was confirmed by the Grand Chamber in *Barbulescu v Romania* when it found that domestic legislation must ensure that monitored individuals have access to an effective remedy before the courts to assess the legitimacy of unregulated private sector surveillance.<sup>40</sup> Therefore, given that in contrast to requiring the participation of a court or a data protection supervisory authority the Directive merely promotes cooperation between rightholders and service providers such as, social network platforms, it can be argued that it fails to satisfy the ECtHR rule of law principle under Articles 8(2) and 10(2).

#### **4.2. Legitimate aim**

Articles 8(2) and 10(2) of the ECHR outline that State authorities can interfere with the right to privacy and freedom of expression to protect, *inter alia*, one or more of the following legitimate aims: firstly, domestic security, public safety or the economic well-being of the country; secondly, the prevention of crime or disorder and lastly, the protection of the reputation or rights and freedoms of others.<sup>41</sup> It would be relatively easy for States to comply with the legitimate aim prong, thus satisfying the second-part of the ECtHR's non-cumulative test. Arguably, the implementation of content recognition and filtering technology would probably achieve the prevention of crime or disorder, and the protection of the reputation or rights and freedoms of others. Indeed, the Court of Strasbourg expressly acknowledged this in its decision in *Sunde v Sweden*.<sup>42</sup>

#### **4.3. 'Necessary' and 'proportionate'**

The next issue to be analysed in this paper is whether the adoption of content recognition and filtering systems would satisfy the third part of the ECtHR's test. The Strasbourg Court's case-law has stated that under Articles 8(2) and 10(2) of the ECHR, surveillance and technical measures are 'necessary' in a democratic society if they respond to a 'pressing social need' and are proportionate to the legitimate aim pursued.<sup>43</sup> Furthermore, the ECtHR has observed that the grounds provided by the State to justify these measures must be 'relevant and sufficient'.<sup>44</sup> Yet, while State authorities enjoy a margin of appreciation, the final evaluation as to whether such measures remain necessary and proportionate is subject to review by the Court.<sup>45</sup> This section will argue that notice and staydown fails to satisfy the necessity and proportionality principles.

With regard to the first principle, it is well-established ECtHR case-law that under Articles 8(2) and 10(2) ECHR, the level of intrusiveness of a measure is one fundamental factor for assessing whether the means chosen could be deemed necessary to achieve the legitimate aim pursued.<sup>46</sup> As outlined above, the Impact Assessment states that when uploaded material is infringing, rightholders can only ask service providers to individually take it down, thus resulting in significant costs, while this is, in any case, insufficient due to massive upload activity (EC 2016a, 140). However, as Google has rightly contended, the major rightholders would not submit the impressively large volume of takedown requests unless they appreciated that the rewards for doing so were worth the effort (Google 2017, 6). Importantly, Urban, Karaganis, and Schofield (2016) suggest

that notice and takedown is one of the most effective ways to enforce IP rights. It is true that notice and takedown is criticized for incentivising over-compliance and lacking sufficient freedom of expression safeguards. However, the report notes that this system also functions well procedurally, as it effectively resolves conflict and mediates between right-holders, service providers and users (Urban, Karaganis, and Schofield 2016, 115). Indeed, this is consistent with *Delfi v Estonia*, in which the ECtHR held that when supplemented with effective processes that enabled a quick response, notice and takedown worked as ‘an appropriate tool’ for balancing the different human rights at stake.<sup>47</sup> In contrast, in *Sabam v Netlog* the CJEU explained that notice and staydown violated EU law because it required social network platforms to implement technology for filtering all communications. This would apply to all their users indefinitely as a precautionary measure and would be at their own expense.<sup>48</sup> To the above list of problems must be added the fact that, in conflict with Strasbourg<sup>49</sup> and Luxembourg<sup>50</sup> case-law, these systems not only fail to process encrypted files but also, unhelpfully, can be easily bypassed and manipulated (Engstrom and Feamster 2017, executive summary). Thus, since a less intrusive measure such as, notice and takedown could be equally or even more effective than notice and staydown, but would impact on social network platforms and user rights to a lesser degree, it is arguable that the Directive fails to satisfy the ECtHR necessity principle under Articles 8(2) and 10(2).

In applying the proportionality principle, it is also well-settled ECtHR case-law that the impact of surveillance and technical measures on individuals’ Articles 8 and 10 Convention rights, must be adequate.<sup>51</sup> As flagged above, Article 13(1) of the Directive states that service providers must implement effective, appropriate and proportionate content recognition and filtering systems. However, it is concerning that the Directive fails to address, much less acknowledge, the AG warning in *Sabam v Scarlet* that DPI technology deployed to filter by content all electronic communications would cause unnecessary interference with the right to privacy, personal data protection and confidentiality of communications.<sup>52</sup> Moreover, it would adversely impact on legitimate expression, as it has been advised that this technology cannot handle complex decisions such as determining whether a specific use is a fair use, detecting copyright ownership, and evading mistaken, duplicative or unnecessary notices, i.e. overblocking (Urban, Karaganis, and Schofield 2016, 35). Indeed, Urban, Karaganis, and Schofield (2016) have stressed that important questions remain over whether rightholders should be able to request that service providers take down search result pages which contain both non-infringing and infringing content, or threads which include an unlawful link within the thread, or pages that include dynamic material that no longer includes the content. Furthermore, it is noteworthy that the report elaborates that the decision to take down is context-dependent. For instance, while site-wide removal is rightholders’ preferred option for torrent, direct download and streaming sites, they often review social network platforms hosting UGC including mash-ups, remix material and parodies. But again, the question remains whether services should be forced to take down the entire website, just the link or just the file (Urban, Karaganis, and Schofield 2016, 39, 56, 57). Fortunately, the ECtHR and the CJEU clarified this matter in finding that, if exceptional circumstances justified the blockage of unlawful material, these measures had to be specifically targeted so that users were always able to legally access information.<sup>53</sup> Thus, since the Directive does not take into account the impact of surveillance and technical measures on the rights

of social network platforms and users under Articles 8 and 10 ECHR, it might be argued that it fails to satisfy the ECtHR proportionality principle.

Regarding the proportionality principle, the Strasbourg Court has repeatedly observed that in assessing whether surveillance and technical measures are proportionate under Articles 8(2) and 10(2) ECHR, the gravity of the sanction must also be considered.<sup>54</sup> As noted above, Recital 45 states that the Directive protects the rights and principles contained in the Charter. Problematically, however, this assertion appears to be questionable. Importantly, in *Sabam v Netlog*, the CJEU observed that Article 15(1) of the E-Commerce Directive prohibited domestic courts from imposing injunctions against social network platforms through general monitoring obligations. The Court remarked that since stay-down injunctions obliged these platforms to implement a complex, expensive and permanent system at their own expense, this seriously infringed the freedom to conduct their business. Notably, it held that this technology violated Article 3(1) of Directive 2004/48/EC.<sup>55</sup> Indeed, this is consistent with the Grand Chamber in *Barbulescu v Romania*. Equally, in *Sabam v Netlog* the CJEU noted that the filtering measure also entailed the detection, automatic analysis and processing of personal information, probably blocking legitimate communications. It also controversially violated user rights under Articles 8 and 11 Charter.<sup>56</sup> Relying on *Promusicae v Telefonica*, the CJEU found that notice and stay-down thus failed to strike a fair balance between, on the one hand, rightholders' right to IP, and on the other social network platforms' freedom to conduct their business, as well as users' right to personal data protection and their right to receive and impart information.<sup>57</sup> Lastly, following Strasbourg and Luxembourg case-law, the EDPS has argued that random user monitoring in trivial cases is disproportionate and violates Article 8 ECHR, Articles 7 and 8 Charter, and Directive 95/46/EC (EDPS 2012, 6–7). Thus, as opposed to specifically targeted user monitoring obligations aimed at well-founded suspicions of commercial scale infringement, the Directive imposes on social network platforms general user monitoring obligations directed at not-for-profit, minor and small-scale infringement. Common sense dictates that it fails to satisfy the ECtHR proportionality principle under Articles 8(2) and 10(2).

## 5. Assessment of applicability and compliance with Article 6 of the ECHR

Having found that the adoption of notice and staydown systems could neither be 'in accordance with the law', nor 'necessary' or 'proportionate', under Articles 8 and 10 ECHR, this section will examine whether it would also contravene the ECtHR principle of equality of arms, under Article 6 of the Convention. The Strasbourg Court's case-law has stated that both concepts, the determination of criminal charge and the determination of civil rights and obligations, are autonomous, that is, their meaning might well vary depending on the relevant domestic legislation. The ECtHR has noted that it would determine whether proceedings were to be deemed 'criminal' or regarding 'civil rights and obligations' by considering Article 6 of the Convention. Importantly, it has stressed that for the civil head of Article 6 to apply, there are four essential conditions that must be satisfied (INTERIGHTS 2009, 2–3).

Firstly, in assessing the initial requirement, the ECtHR's case-law has explained that for Article 6 to be applicable there had to be a contestation over a right or obligation.<sup>58</sup> As outlined above, Article 13 of the Directive imposes a duty on services that provide



access to large amounts of content to implement effective, appropriate and proportionate notice and staydown systems. Moreover, the Impact Assessment cautions that to protect users' rights these services need to establish processes that allow users to 'contest situations' where the adoption of such systems would unreasonably restrict their upload activity (EC 2016a, 147). Thus, the first condition is fulfilled. Secondly, with regard to the next requirement, the ECtHR's case-law has observed that this right must also be based on domestic legislation.<sup>59</sup> The Impact Assessment indicates that the CJEU has not yet examined the issue of whether these services engage in an act of communication to the public when the content is uploaded. However, notably, it highlights that under existing copyright legislation of Member States rightholders have the right to authorize and commercially exploit the communication to the public of their content through licences in exchange for compensation (EC 2016a, 142–143). Therefore, the second condition is also satisfied. Thirdly, regarding the next requirement, the ECtHR's case-law has elaborated that the outcome of a dispute must also be directly decisive for civil rights and obligations.<sup>60</sup> One could argue that in view of *Sabam v Netlog*, the imposition of a general obligation on social network platforms to adopt notice and staydown technology is clearly decisive for these rights and duties. Indeed, as flagged above, the CJEU has warned that such technology failed to strike the right balance between, on the one hand, rightholders' rights, and on the other, social network platforms and users' rights.<sup>61</sup> Thus, the third condition is also fulfilled. Finally, as regards the last requirement, the ECtHR's case-law has added that such a right or obligation must also be of a civil nature, such as the right to compensation.<sup>62</sup> Again, the Impact Assessment acknowledges that while rightholders are not always able to reach agreements with service providers, the adoption of these systems would enable rightholders to obtain 'appropriate remuneration' (EC 2016a, 138). Therefore, the last condition is also fulfilled. It is noteworthy that the ECtHR's case-law confirms that only having satisfied all these cumulative requirements would the Strasbourg Court then carry out a legal assessment of the applicant's claim that the disputed domestic proceedings violated Article 6 (INTERRIGHTS 2009, 3).

### **5.1. Compatibility of notice and staydown with the ECtHR principle of equality of arms**

The ECtHR's case-law has stated that the equality of arms principle is just one key characteristic of the broader notion of a fair trial included in Article 6(1) of the Convention. The Court has observed that this principle requires that there must be a sense of reasonable balance between claimants and defendants. Namely, each party must be afforded a fair opportunity to argue their case under conditions which do not put them at a substantial disadvantage vis-a-vis their opponent.<sup>63</sup> Put differently, it demands that all parties are procedurally equal before the law.<sup>64</sup>

The principle of equality of arms is built upon three fundamentals:

Equipage equality: a real battle between equally armed opponents  
 Rule equality: a commitment to offer adversaries similar procedural opportunities  
 Outcome equality: cases with similar facts should achieve similar results. (Rubenstein 2002, 4)

As regards the equipage equality principle, it is well-settled ECtHR case-law that Article 6(1) requires there to be a reasonable balance between all parties involved in litigation.<sup>65</sup>

As outlined above, Article 13(2) states that Member States must ensure that service providers adopt 'complaints and redress mechanisms' for users in case of disputes. Controversially, however, the Directive strikes the human rights balance clearly in favour of the major rightholders, as it neither demands that users affected by takedowns be notified of requests, nor does it afford users counter-notice and put-back procedures or monetary remedies compared to the DMCA (Urban, Karaganis, and Schofield 2016, 16, 22). It is true that some EU countries have adopted counter-notification systems. However, one might argue that to ensure harmonization across all Member States, the Directive should make it an explicit legal duty that service providers are not only required to notify users of the removal of their content but also give them the opportunity to send counter-notices and rely on recovery remedies. Notably, in *Tele2/Watson* the CJEU observed that where human rights were infringed, notification was a fundamental safeguard necessary to permit individuals to exercise their right to a legal remedy.<sup>66</sup> Indeed, the Grand Chamber in *Barbulescu v Romania* agreed that in the absence of a prior warning to the claimant advising him that his internet usage was being monitored, he still had a reasonable expectation of privacy.<sup>67</sup> Similarly, another point that should be mentioned is that to ensure due process, under the DMCA users are also able to send counter-notices to the service provider requesting that their uploaded content be reinstated. Lastly, to avoid the abuse of these procedures, the DMCA additionally gives parties who make a knowing material misrepresentation in notifications and counter-notifications the right to recover costs and damages (Urban, Karaganis, and Schofield 2016, 16). This is despite the fact that the wording and penalty is different for these notifications and counter-notifications, thereby resulting in abusive notices as well as users being discouraged from submitting counter-notices (Bridy and Keller 2017, 9–10). Thus, given that in contrast to the DMCA under the Directive the major rightholders, social network platforms and users are not equally armed combatants, it is debatable whether it could infringe the ECtHR's equality of arms principle under Article 6(1).

Considering the rule equality principle, it is also well-established ECtHR case-law that Article 6 requires the defendant's claims to be heard to an equal degree along with those of the claimant.<sup>68</sup> As outlined above, the Impact Assessment states that while some services claim that their systems achieve high success rates in content recognition, detecting unlawful remixes, DJ sessions and transformed works 'may be very challenging' (EC 2016a, 140). However, it is concerning that the Directive fails to give rightholders, social network platforms and users similar procedural opportunities as it does not require that targeted uploaded content is left unremoved before the user is afforded the opportunity to respond (Urban, Karaganis, and Schofield 2016, 118). Notably, in *Sabam v Scarlet* the AG alerted that the staydown blocking measure was taken with no explicit provision being made for all the users affected, to contest the blockage of a file or to challenge its justification.<sup>69</sup> Equally, Urban, Karaganis, and Schofield (2016) acknowledge that notice and takedown systems have always raised concerns regarding whether their procedural framework adequately protects copyright exceptions, limitations or defences. For example, the report illustrates that in a copyright case the accused can rely on fair use or other matters in defence, whereas in notice and takedown the accused can only send a counter-notice, even if these notices are rarely used (Urban, Karaganis, and Schofield 2016, 95). It is worth stressing that in *Sabam v Netlog* and *Sabam v Scarlet*, the CJEU cautioned that these systems were unable to properly distinguish between illegal and legal content,

thus negatively impacting on statutory exceptions to copyright, content falling within the public domain or being shared freely.<sup>70</sup> Moreover, the Impact Assessment foresees that the introduction of these systems could lead to ‘false positives’ (EC 2016a, 141). However, in the view of Urban, Karaganis, and Schofield (2016) this would only exacerbate the problem since neither the major rightholders nor service providers can be held liable for sending mistaken, duplicative, unnecessary or abusive takedown requests – despite the fact that almost a third of rightholders’ automated notifications are invalid (Urban, Karaganis, and Schofield 2016, 116). Thus, as the Directive does not give opponents similar procedural opportunities, arguably it could breach the ECtHR’s equality of arms principle under Article 6(1).

In terms of the outcome equality principle, the ECtHR’s case-law has reiterated that the simple impression of imbalance in the defendant’s rights suffices to infringe Article 6(1).<sup>71</sup> As outlined above, the Impact Assessment states that when rightholders provide the contents or fingerprints needed for notice and staydown to function, the effect is likely to be limited or overridden by the positive effects of such a solution (EC 2016a, 151). However, it could be argued that rather than just being left to rightholders to decide, the Directive should make it a mandatory legal requirement that the determination as to whether a specific use of content is permitted is explicitly set out in statute. Importantly, Urban, Karaganis, and Schofield (2016) state the statistic that each week Google receives millions of takedown requests, of which over 15% fail to sufficiently identify the allegedly infringed file or the supposed infringing content. It stresses that this is particularly concerning as detecting the file in question is essential to assessing claims as well as removing material (Urban, Karaganis, and Schofield 2016, 12). Thus, perhaps unsurprisingly, in *Promusicae v Telefonica*, the AG advised that requiring the participation of State authorities was crucial because unlike rightholders – and indeed unlike the Directive – these authorities took into account circumstances which exempted users suspected of infringement.<sup>72</sup> It can be noted that this is consistent with Urban, Karaganis, and Schofield (2016) report, which echoes that since the decision to takedown material might be context-dependent, rightholders often take down particular uses of content indiscriminately. It explains that what sets the boundaries between ‘tolerated’ and ‘unacceptable’ use curiously differs from rightholder to rightholder. Moreover, it elaborates that to assess what constitutes ‘tolerated’ use, and relying on YouTube’s Content ID, rightholders block clearly illegal uses, monetize borderline cases or enable transformative uses without monetization (Urban, Karaganis, and Schofield 2016, 57–59). To put it differently, under the Directive cases with similar facts are unlikely to achieve similar results because what amounts to ‘tolerated’ and ‘unacceptable’ use can vary greatly between rightholders. Thus, a case could be made that it contravenes the ECtHR’s equality of arms principle under Article 6(1).

## 6. Discussion of findings

On the one hand, academics such as, Lucas-Schoetter (2017) argue that Article 13 of the Copyright Directive is a balanced text that despite attracting heavy criticisms, is entirely consistent with the Community *acquis* and contravenes neither the EU Charter of Fundamental Rights, nor the E-Commerce Directive (Lucas-Schoetter 2017, 21). On the other, a growing body of legal scholarship has warned of the risks and challenges associated with content recognition and filtering systems (Angelopoulos and Smet 2016; Stalla-Bourdillon

et al. 2016; Angelopoulos 2017; Frosio 2017; Senftleben et al. 2017). Equally, as of 6 September 2017, TorrentFreak reported on its blog that digital activists and Member States have argued that notice and staydown could be incompatible with both the EU Charter and CJEU case-law. For example, Belgium, Czech Republic, Finland, Hungary, Ireland, the Netherlands (CE 2017a) and Germany (CE 2017b) have claimed that in *Sabam v Netlog* and *Sabam v Scarlet* the CJEU declined to impose a duty on service providers to automatically monitor the contents disseminated by their users on the basis of Articles 8, 11 and 16 of the Charter. To date, however, there has been very little research carried out on the legality of the Copyright Directive in view of the minimum human rights standards contained within the Convention, in particular Articles 6, 8 and 10. If this research is not conducted, the input of the cyber-lawyer in this research field will be non-existent. It is worth stating that the findings of this paper are consistent with the joint dissenting opinion of Judges Sajó and Tsotsoria in *Delfi v Estonia*. This is as opposed to the heavily criticized ECtHR ruling by a number of academics, for its almost total disregard of the important role of service providers and the media in society (Woods 2015; Angelopoulos 2016; Ombelet, Kuczerawy, and Valcke 2016). Judges Sajó and Tsotsoria observed that although governments did not always directly restrict expression, the fact that they exerted pressure and imposed liability upon service providers meant that ‘collateral or private-party censorship’ was the unavoidable outcome.<sup>73</sup> These judges cautioned that the use of technical means to review material before publication led to a number of problems, such as intentional overbreadth and diminished procedural safeguards.<sup>74</sup> Moreover, crucially, they concluded that as service providers would need to provide ‘supervision 24/7’, this would result in absolute and strict liability, namely, ‘blanket prior restraint’.<sup>75</sup> In sum, there was no independent review of the adequacy of the filtering measures, no expert assessment, no cross-examination, no consideration of the feasibility of less restrictive measures, but worryingly just takedown ‘without delay’.<sup>76</sup> It should also be noted that the Electronic Frontier Foundation warns that when material is taken down without adequate justification, it not only affects users, but also the public at large. For example, if takedown requests target political ads during an election campaign, this can lead to abuse as the public is deliberately deprived of news related to their political views (Electronic Frontier Foundation 2017, 4). Furthermore, particularly concerning is that it has been reported that the use of Facebook big data analytics, to model target specific groups of social media users and predict their behaviour, by ensuring the right political advertising messages are directed to the right voters, can affect crucial events such as the Brexit referendum and the US presidential election (*The Guardian News*, March 4, 2017). Alarming, as flagged above, the Directive serves as the legal basis for social network platforms and rightholders to use Audible Magic users’ analytics for targeted display advertising (EC 2016a, 164–165). The problem is made even worse by the fact that Wagner shows how DPI technology also enables the modification of content as it passes through the network. Yet, while packet modification has been used for behavioural advertising, problematically this feature could also be used for government censorship (Wagner, Ludwig-Maximilians-Universität München, and Universiteit Leiden 2009, 9–10). Thus, the fundamental question then arises as to whether once the content recognition and filtering infrastructure is widely deployed to tackle online copyright infringement, it would be relatively easy from a technical perspective, for a private sector corporation or government to change the filtering rules to block access to other information, thereby tacitly encouraging web censorship (Internet Society 2010, 80).

## 7. Conclusion

This paper has critically assessed whether the implementation of notice and staydown systems would be compatible with the right of social network platforms and users to a fair trial, privacy and freedom of expression under the ECHR. I conclude that unless the amendments suggested below were explicitly incorporated into the Copyright Directive, Article 13 would constitute a violation of the rights of social network platforms and users under Articles 6, 8 and 10 Convention. Thus, it is suggested that the EC should amend its Directive on Copyright to require that:

- The technical details of the systems are independently reviewed and published.
- The scope of *ratione personae*, *ratione materiae* and *ratione temporis* of the surveillance and technical measures are explicitly set out in statute that is, stating the number of users and the categories of services to be impacted, the level of inspection required to conduct user monitoring (DPI and/or SPI), and the duration period of these measures.
- There is involvement of State authorities to check and authorize the systems, and then carry out regular audits.
- It must be shown that notice and takedown is not sufficient and limited to situations where these systems could be deemed necessary to achieve the legitimate aim pursued.
- The impact of surveillance and technical measures on the right of social network platforms and users to privacy and freedom of expression is assessed and considered to be compatible with Articles 8 and 10 ECHR.
- Time-limited and specifically targeted user monitoring obligations are aimed at commercial scale copyright infringement that is, unlimited and untargeted user monitoring obligations directed at not-for-profit, minor small-scale infringement would be unlawful.
- Users affected by takedowns are notified of requests, afforded counter-notice and put-back procedures, and monetary remedies such as occurs in the US – despite the fact that this is not really functioning well in the US.
- The determination as to whether a specific use of content is permitted is explicitly stated in statute.
- The determination of ‘tolerated’ and ‘unacceptable’ use is expressly set out in statute.

At a time when *Barbulescu v Romania* has warned that EU law allows the lodging of complaints with the courts and supervisory authorities if human rights abuses take place,<sup>77</sup> it may seem dangerous for the EC not to amend the Directive according to the recommended safeguards. In my opinion, if these were ignored, nothing could be more risky since, as currently drafted, its Proposal for a Directive on Copyright in the Digital Single Market violates the rights of social network platforms and users under Articles 6, 8 and 10 of the Convention.

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No potential conflict of interest was reported by the author.

## Notes

1. Case 360-10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] ECR I-0000 [51].
2. Case 70-10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4 [53].
3. Case 484/14 *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH* [2016] [87].
4. *Sidabras and Dziautas v Lithuania* App nos 55480/00 and 59330/00 (ECtHR, 24 July 2004) [43].
5. *Bigaeva v Greece* App no 26713/05 (ECtHR, 2009) [22]–[28].
6. *Copland v the United Kingdom* (App no 62617/00) (2007) 45 EHRR 37 [41].
7. *Copland v the United Kingdom* (App no 62617/00) (2007) 45 EHRR 37 [41].
8. *Yildirim v Turkey* App no 3111/10 (ECtHR, 18 March 2013) [50]; *Guerra and others v Italy* (1998) 26 EHRR 357 [53]; *Observer and Guardian v the United Kingdom* (1992) 14 EHRR 153 [59].
9. *Öztürk v Turkey* App no 22479/93 (ECtHR, 28 September 1999) [49]; *Autronic AG v Switzerland* (1990) 12 EHRR 485 [47].
10. *Öztürk v Turkey* App no 22479/93 (ECtHR, 28 September 1999) [49]; *Autronic AG v Switzerland* (1990) 12 EHRR 485 [47].
11. *Delfi v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [110]–[118]; *Yildirim v Turkey* App no 3111/10 (ECtHR, 18 March 2013) [48]; partly Dissenting Opinion of Judge Pinto de Albuquerque in *Barbulescu v Romania* App no 61496/08 (ECtHR, 12 January 2016) [3].
12. *Times Newspapers Ltd (nos 1 and 2) v the United Kingdom* App nos 3002/03 and 23676/03 (ECtHR, 10 June 2009) [27].
13. Partly Dissenting Opinion of Judge Pinto de Albuquerque in *Barbulescu v Romania* App no 61496/08 (ECtHR, 12 January 2016) [3].
14. *Barbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017) [109].
15. *Barbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017) [109].
16. *Barbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017) [109], [110].
17. AG's Opinion in Case 70-10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4 [AG 4].
18. *Barbulescu v Romania* App no 61496/08 (ECtHR, 12 January 2016) [112].
19. Advocate General's Opinion in Case 70-10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4 [AG 29]–[AG 30].
20. Advocate General's Opinion in Case 70-10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4 [AG 89].
21. Advocate General's Opinion in Case 70-10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4 [AG 90].
22. Advocate General's Opinion in Case 70-10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4 [AG 90].
23. Advocate General's Opinion in Case 70-10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4 [AG 31].
24. Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post-och telestyrelsen* [2016] All ER (D) 107 (Dec) and *Secretary of State for the Home Department v Tom Watson* [2016] All ER (D) 107 (Dec) [AG 76].
25. Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post-och telestyrelsen* [2016] All ER (D) 107 (Dec) and *Secretary of State for the Home Department v Tom Watson* [2016] All ER (D) 107 (Dec) [AG 80].
26. Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post-och telestyrelsen* [2016] All ER (D) 107 (Dec) and *Secretary of State for the Home Department v Tom Watson* [2016] All ER (D) 107 (Dec) [AG 142].

27. Joined Cases C-293/12 and C-594/12 *Digital Rights Ireland Ltd v Minister for Communications, Marine and Natural Resources and others* [2014] WLR (D) 164.
28. Legal opinion by the Legal Service of the European Parliament (confidential legal opinion 22 December 2014) 9 – with special thanks to Dr Sonia Morano-Foadi.
29. *Kennedy v the United Kingdom* App no 26839/05 (2010) 52 EHRR [151]; *Rotaru v Romania* App no 28341/95 (2000) 8 BHRC 449 [52]; *Liberty and others v the United Kingdom* App no 58243/00 (2008) 48 EHRR 1 [59]; *Yildirim v Turkey* App no 3111/10 (ECtHR, 18 March 2013) [57]; *Delfi v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [120]–[122].
30. *Delfi v Estonia* App no 64569/09 (ECtHR, 16 June 2015) see for instance [65].
31. *Kennedy v the United Kingdom* App no 26839/05 (2010) 52 EHRR [151]; *Liberty and others v the United Kingdom* App no 58243/00 (2008) 48 EHRR 1 [59]; *Yildirim v Turkey* App no 3111/10 (ECtHR, 18 March 2013) [57].
32. Advocate General's Opinion in Case 70-10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4 [AG 46].
33. Advocate General's Opinion in Case 70-10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4 [AG 52].
34. *Kennedy v the United Kingdom* App no 26839/05 (2010) 52 EHRR [151]; *Liberty and others v the United Kingdom* App no 58243/00 (2008) 48 EHRR 1 [59]; *Yildirim v Turkey* App no 3111/10 (ECtHR, 18 March 2013) [57].
35. *Yildirim v Turkey* App no 3111/10 (ECtHR, 18 March 2013) [59]; see also Concurring Opinion in *Yildirim v Turkey* App no 3111/10 (ECtHR, 18 March 2013), 27–28; Case 70-10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4 see final holding; see also Advocate General's Opinion in Case 70-10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4 [AG 53]–[AG 59].
36. *Barbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017) [140]–[141]; see also Concurring Opinion in *Yildirim v Turkey* App no 3111/10 (ECtHR, 18 March 2013) page 28.
37. *Barbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017) [110]; *Rotaru v Romania* App no 28341/95 (2000) 8 BHRC 449 [59]; see also *Klass and others v Germany* App no 5029/71 (1979–1980) 2 EHRR 214 [55]; *Amann v Switzerland* App no 27798/95 (2000) 30 EHRR 843 [60].
38. Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post-och telestyrelsen* [2016] All ER (D) 107 (Dec) and *Secretary of State for the Home Department v Tom Watson* [2016] All ER (D) 107 (Dec) [123].
39. Advocate General's Opinion in Case 275/06 *Productores de Musica de Espana (Promusicae) v Telefonica de Espana SAU* [2008] ECR I-271 [AG 121].
40. *Barbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017) [122].
41. *Golder v the United Kingdom* App no 4451/70 (1979) 1 EHRR 524 [44].
42. *Neij and Sunde Kolmisoppi v Sweden* App no 40397/12 (ECtHR, 19 February 2013).
43. *Peck v the United Kingdom* App no 44647/98 (2003) 36 EHRR 41 [76]; *S and Marper v the United Kingdom* App no 30562/04 and 30566/04 (2008) ECHR 1581 [101]; *Delfi v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [78]; *Khurshid Mustafa and Tarzibachi v Sweden* App no 23883/06 (ECtHR, 16 March 2009) [42].
44. *Peck v the United Kingdom* App no 44647/98 (2003) 36 EHRR 41 [76]; *S and Marper v the United Kingdom* App no 30562/04 and 30566/04 (2008) ECHR 1581 [101]; *Delfi v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [78]; *Khurshid Mustafa and Tarzibachi v Sweden* App no 23883/06 (ECtHR, 16 March 2009) [42].
45. *S and Marper v the United Kingdom* App no 30562/04 and 30566/04 (2008) ECHR 1581 [101]; *Coster v the United Kingdom* App no 24876/94 (2001) 33 EHRR 20 [104]; *Delfi v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [78]; *Khurshid Mustafa and Tarzibachi v Sweden* App no 23883/06 (ECtHR, 16 March 2009) [43].
46. *James and Others v the United Kingdom* App no 8793/79 (ECtHR, 21 February 1986) [51]; see also *Barbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017) [121]; *Yildirim v Turkey* App no 3111/10 (ECtHR, 18 March 2013) [64]; *Uzun v Germany* App no 35623/05 (2010) 53 EHRR 852 [78].

47. *Delfi v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [159].
48. Case 360-10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] ECR I-0000 see final holding; see also Case 70-10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4 see final holding.
49. The fact that technical measures might be easily circumvented makes the necessity of these measures questionable see Concurring Opinion in *Yildirim v Turkey* App no 3111/10 (ECtHR, 18 March 2013) page 28.
50. C-314/12 *UPC Telekabel Wien GmbH v Constantin FilmVerleih GmbH and Wega Filmproduktionsgesellschaft GmbH* [2013] [62].
51. *Barbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017) [140]–[141]; Concurring Opinion in *Yildirim v Turkey* App no 3111/10 (ECtHR, 18 March 2013) page 29; see also *Delfi v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [159].
52. Advocate General's Opinion in Case 70-10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4 [AG footnote 31].
53. *Yildirim v Turkey* App no 3111/10 (ECtHR, 18 March 2013) page 29; C-314/12 *UPC Telekabel Wien GmbH v Constantin FilmVerleih GmbH and Wega Filmproduktionsgesellschaft GmbH* [2013] [56].
54. *Barbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017) [137]; *Neij and Sunde Kolmisoppi v Sweden* App no 40397/12 (ECtHR, 19 February 2013).
55. Case 360-10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] ECR I-0000 [33]–[34]; see also Case 70-10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4 [35]–[48].
56. Case 360-10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] ECR I-0000 [48]–[50]; see also Case 70-10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4 [51]–[53].
57. Case 360-10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] ECR I-0000 [51]; see also Case 70-10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4 [53]; and Case 484/14 *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH* [2016] [87].
58. *Bentham v the Netherlands* (App no 8848/80) (1985) 8 EHRR 1 [32].
59. *MS v Sweden* (App no 20837/92) (1997) ECHR 49.
60. *Bentham v The Netherlands* App no 8848/80 (ECtHR 23 October 1985) [32].
61. Case 360-10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] ECR I-0000 [51]; see also Case 70-10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4 [53]; and Case 484/14 *Tobias Mc Fadden v Sony Music Entertainment Germany GmbH* [2016] [87].
62. *Baraona v Portugal* App no 10092/82 (1987) ECHR 13 [44]; *Zimmermann and Steiner v Switzerland* App no 8737/79 (1983) 6 EHRR 17 [22].
63. *Dombo Beheer BV v The Netherlands* App no 14448/88 (1993) 18 EHRR 213 [33]; *Ankerl v Switzerland* App no 17748/91 (1996) ECHR 45 [38]; *Bulut v Austria* App no 17358/90 (1996) ECHR 10 [47]; *Niderost-Huber v Switzerland* App no 18990/91 (1997) ECHR [23].
64. *Neumeister v Austria* App no 1936/63 (1968) 1 EHRR 191 [22].
65. *Dombo Beheer BV v The Netherlands* App no 14448/88 (1993) 18 EHRR 213 [33].
66. Joined Cases C-203/15 and C-698/15 *Tele2 Sverige AB v Post-och telestyrelsen* [2016] All ER (D) 107 (Dec) and *Secretary of State for the Home Department v Tom Watson* [2016] All ER (D) 107 (Dec) [121].
67. *Barbulescu v Romania* App no 61496/08 (ECtHR, 5 September 2017) [133].
68. *Pelladoah v the Netherlands* App no 16737/90 (1994) 19 EHRR 81 [34].
69. Advocate General's Opinion in Case 70-10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4 [AG 106].
70. Case 360-10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* [2012] ECR I-0000 [50]; see also Case 70-10 *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* [2012] ECDR 4 [52].
71. *Borgers v Belgium* App no 12005/86 (1991) 15 EHRR 92 [29].



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73. Joint dissenting opinion of Judges Sajó and Tsotsoria in *Delfi v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [2].
74. Joint dissenting opinion of Judges Sajó and Tsotsoria in *Delfi v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [2].
75. Joint dissenting opinion of Judges Sajó and Tsotsoria in *Delfi v Estonia* App no 64569/09 (ECtHR, 16 June 2015) [35].
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