

DIGITAL COPYRIGHT AND PLATFORMS

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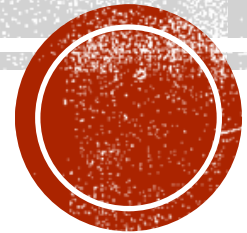
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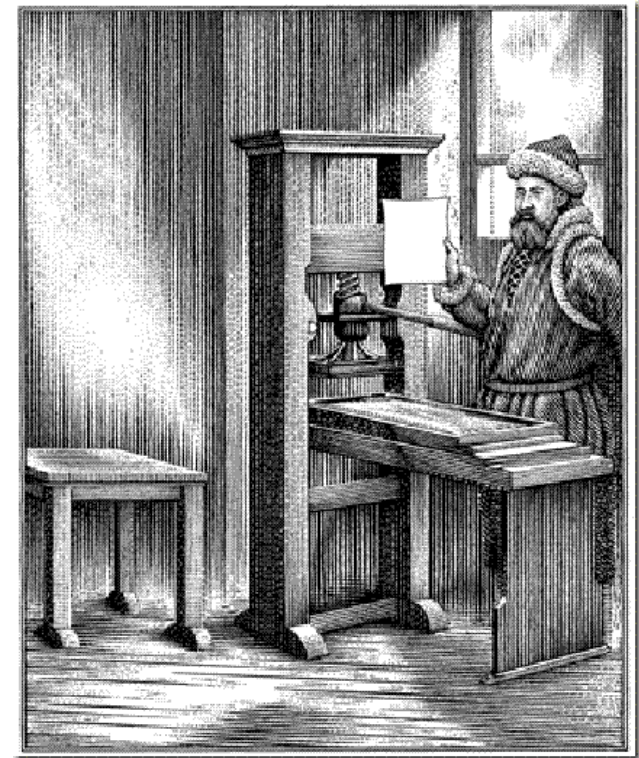


COPYRIGHT LAW AND TECHNOLOGY: HAND IN HAND

Four different phenomena had a crucial role in the appearance and development of copyright law:

(1) The **technology / printing press**:
Johannes Gutenberg (cca. 1439)

“The production of books spread like wildfire in Western Europe following the invention of the printing press in 1450. It is estimated that during the Incubala [which is the period of time from Guttenberg’s invention to 1500] alone, approximately 15,000 different texts were printed in 20 million copies, and in the 16th century 150,000-200,000 different books and book editions were printed, totaling more than 200 million copies.”
(Zack Kertcher & Ainat N. Margalit)



COPYRIGHT LAW AND TECHNOLOGY: HAND IN HAND

(2) The **author**: individuality (humanism) and the renaissance



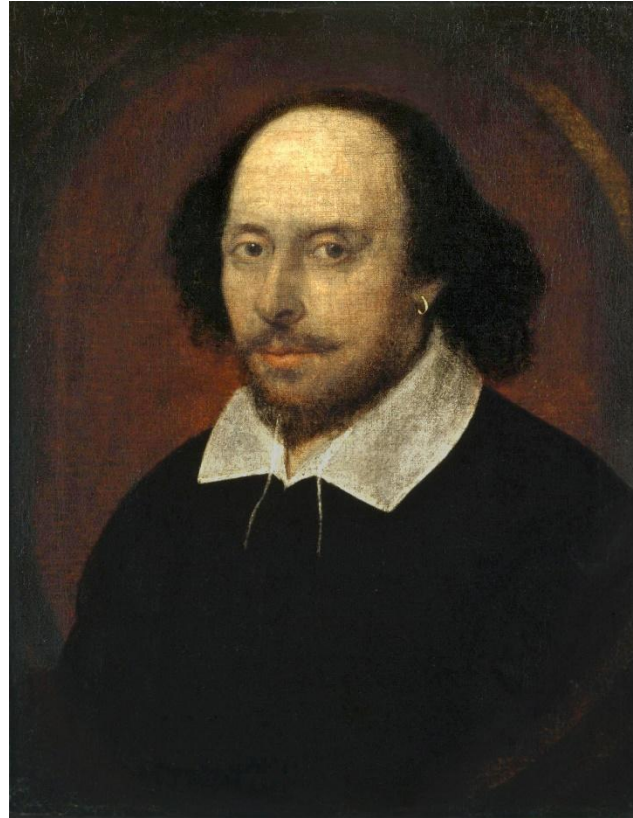
COPYRIGHT LAW AND TECHNOLOGY: HAND IN HAND

(3a) The **market**: consumers' need for intellectual creations;



COPYRIGHT LAW AND TECHNOLOGY: HAND IN HAND

(3b) **Turbulent years:** reformation, privileges and censorship;

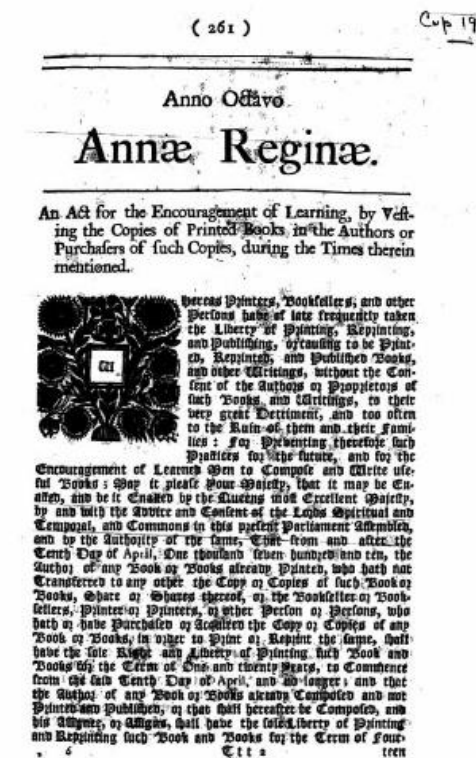
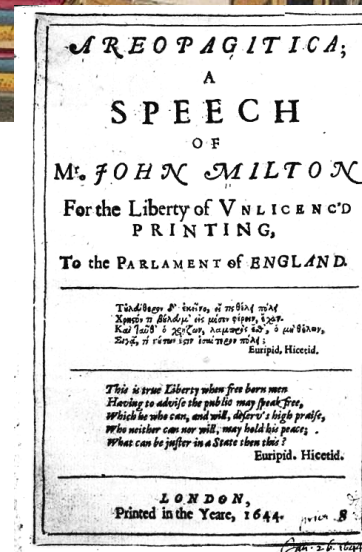


COPYRIGHT LAW AND TECHNOLOGY: HAND IN HAND

(4) Legislative / **political** willingness to regulate copyright (and the market)



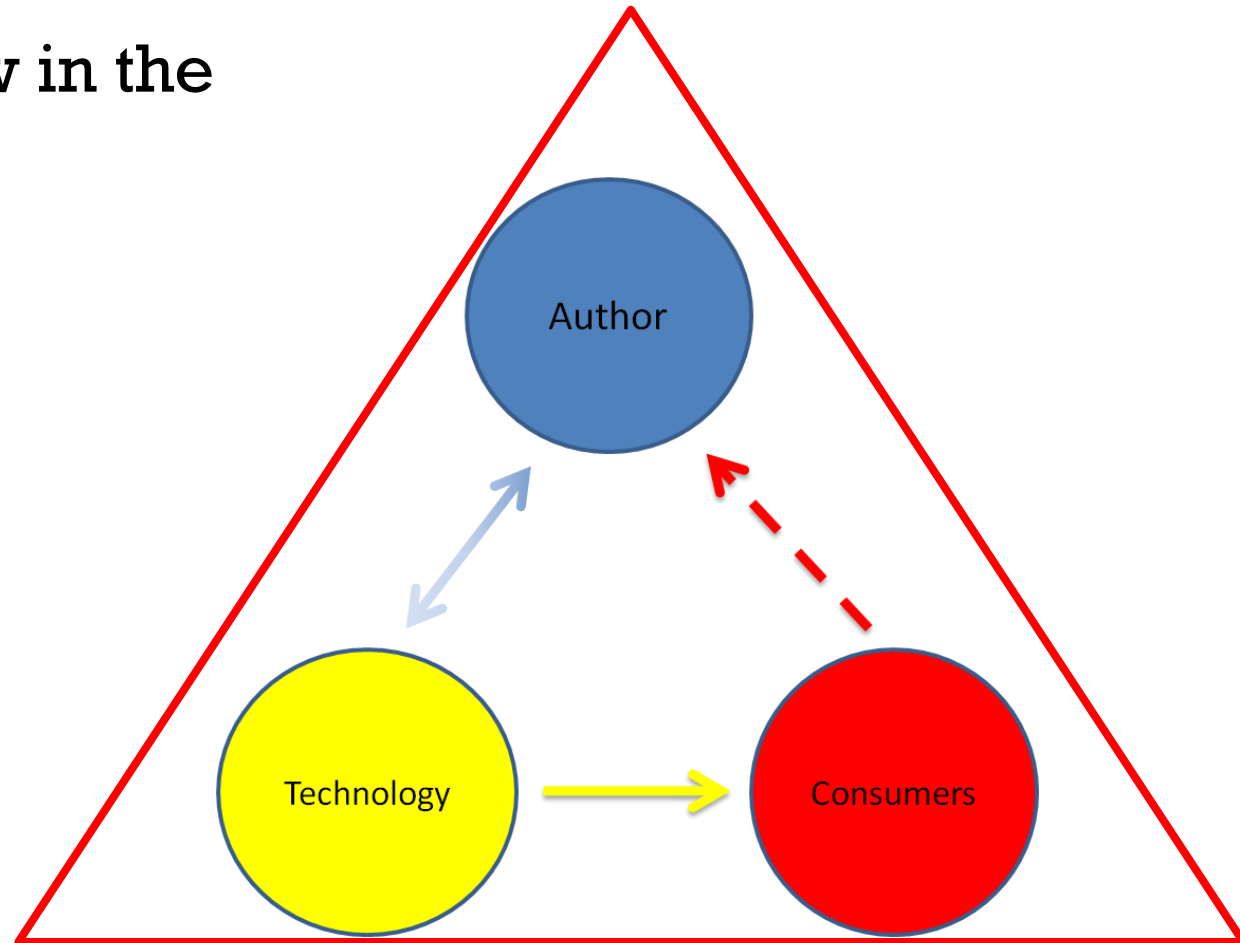
HE FOUND THAT HIS ARMS AND LEGS WERE TIGHTLY FASTENED TO THE GROUND.



COPYRIGHT LAW AND TECHNOLOGY: HAND IN HAND

Dynamics of copyright law in the
early 1700s:

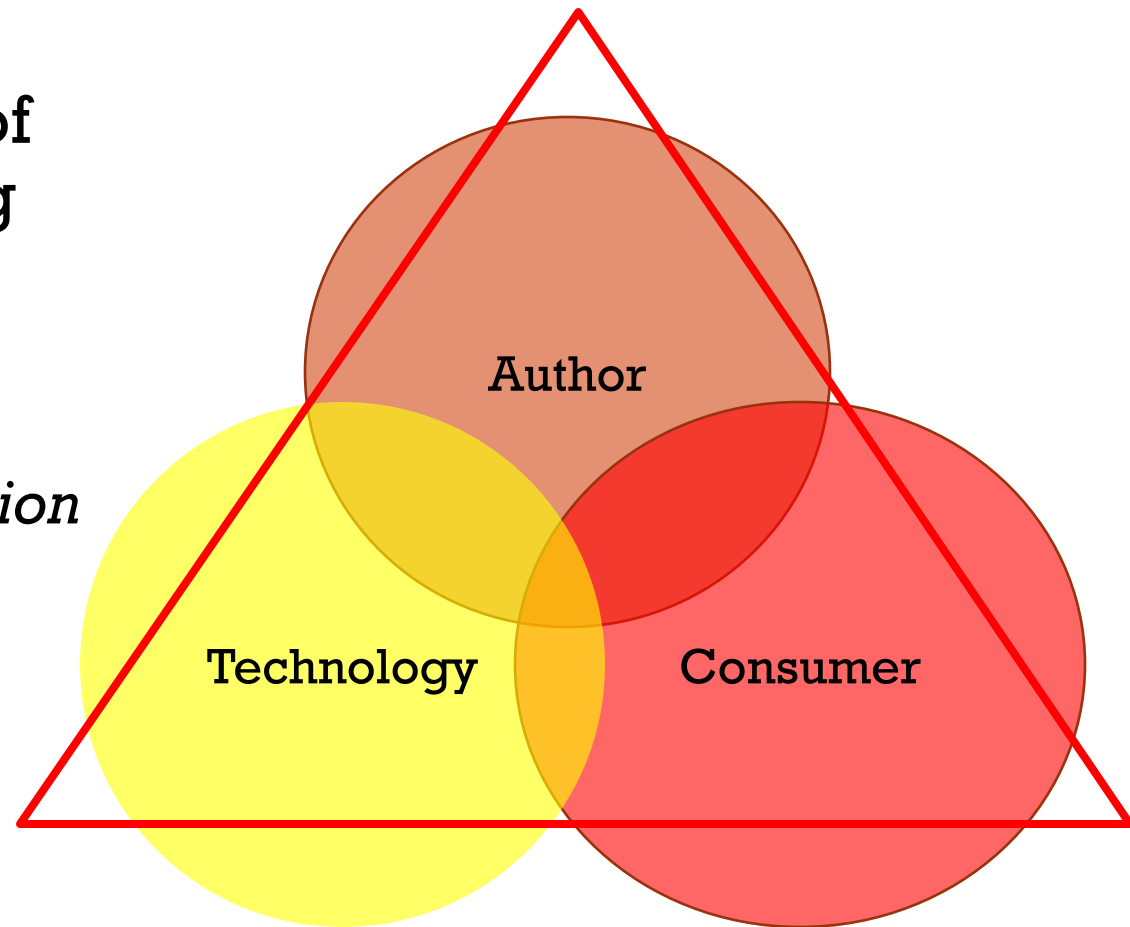
- technology;
- author;
- market;
- regulation.



COPYRIGHT LAW AND TECHNOLOGY: HAND IN HAND

Yoshiyuki Tamura: three waves of technologies have had a leading effect upon the evolution and regulation of copyright law:

- first wave: *printing technology*;
- second wave: *analogue reproduction technologies*;
- third wave: *digital recording equipments*.



COPYRIGHT LAW AND TECHNOLOGY: HAND IN HAND

*Technological development and growing users' demands + late, but powerful reaction from the copyright industry. See: **musical works**.*

18th century: first copyright statutes (no protection for music);

19th century: growing interest to protect musical works;

*19th-21st centuries: new tech
musical works.*



John Philip Sousa:
When I was a boy . . . in front of every house
in the summer evenings you would find
young people together singing the songs of
the day or the old songs. Today you hear
these infernal machines going night and day.
We will not have a vocal cord left. The vocal
cords will be eliminated by a process of
volution, as was the tail of man when he
came from the ape.



COPYRIGHT LAW AND THE DIGITAL SOCIETY

The economical and social trends, including the human communication, methods of marketing, education and studying, went through a ***significant change*** in the past decades.

Digital technologies: an essential, leading role in this transition + an extraordinary ***influence on IP law*** as well.



"Enter the date and time and press OK.
Step 7, enter your credit card number..."



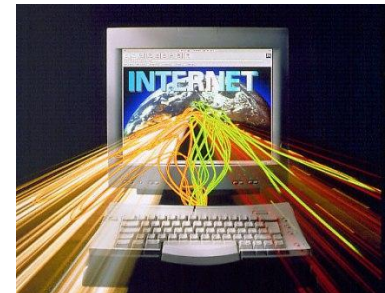
COPYRIGHT LAW AND THE DIGITAL SOCIETY

Traditional way of distribution: from the producer of a work through a long chain of intermediaries to the consumer.

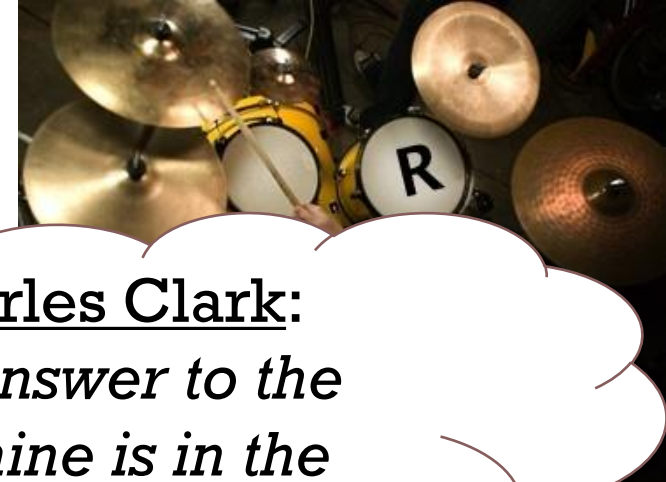


Internet based distribution: from the producer of a content through a shorter chain of intermediaries.

*Digital distribution of copyrighted materials did not result in significantly lower prices » **streaming** has become dominant! [» **value gap?**]*



COPYRIGHT LAW AND THE DIGITAL SOCIETY

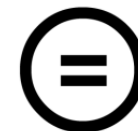


National Research Council (US): Digital dilemma (2000): „perfect access to works and perfect control of use.”

The circumvention of „digital rights management” and „technical protection measures” (TPM) is a © infringement.

Charles Clark:
The answer to the machine is in the machine.

Creative Commons



The balance of interests is upset!

Alternative models: Creative Commons; GNU General Public Licence.



COPYRIGHT LAW AND THE DIGITAL SOCIETY

The three generations of Internet

(1) John Perry Barlow: A Declaration of the Independence of Cyberspace (1996)

“Governments of the Industrial World, you weary giants of flesh and steel, I come from Cyberspace, the new home of Mind. On behalf of the future, I ask you of the past to leave us alone. You are not welcome among us. You have no sovereignty where we gather.(...) Your legal concepts of property, expression, identity, movement, and context do not apply to us. They are based on matter, There is no matter here.”



COPYRIGHT LAW AND THE DIGITAL SOCIETY

The three generations of Internet

(2) *Web 2.0* appeared around 2006 as a response to the centralization of the Internet by the content industry and as a consequence of the extremely rapid Internet penetration.

The paradox of web 2.0: services are offered to the users by for-profit organizations.



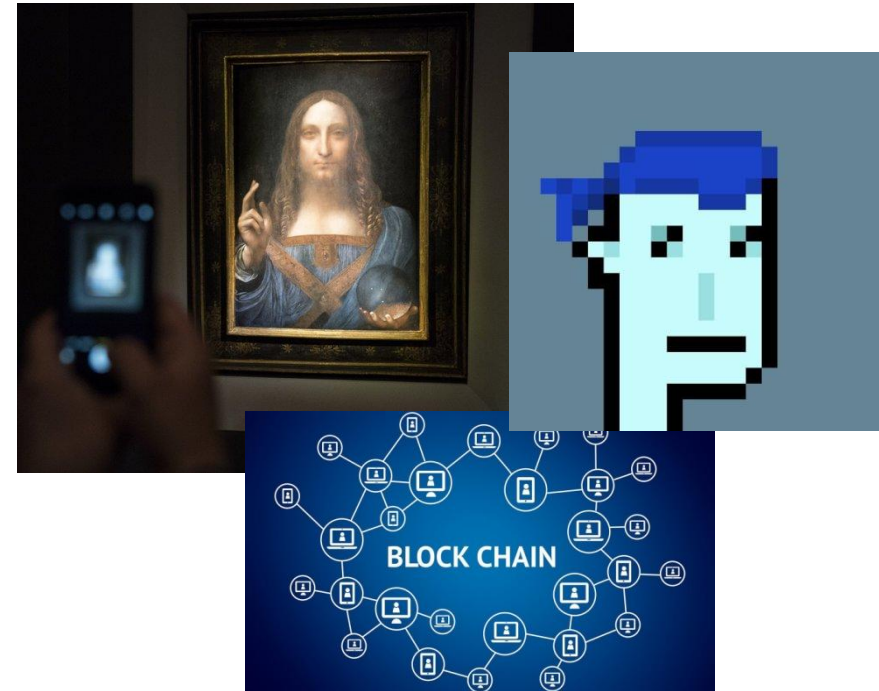
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The three generations of Internet

(3) Democratization of web 2.0 has been ultimately overruled by the business purposes of the tech giants → *web3*



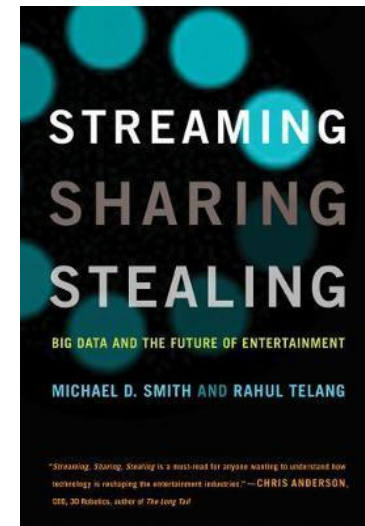
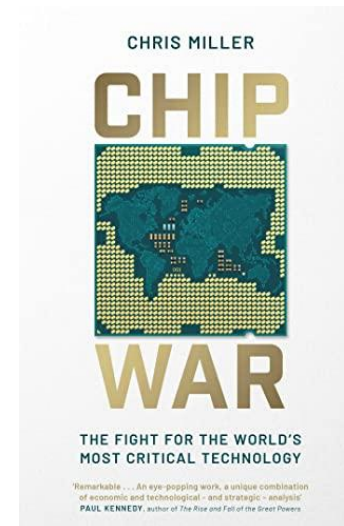
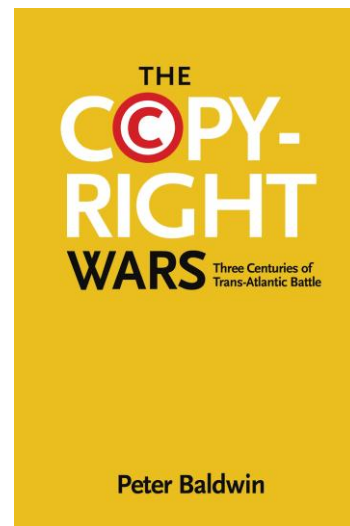
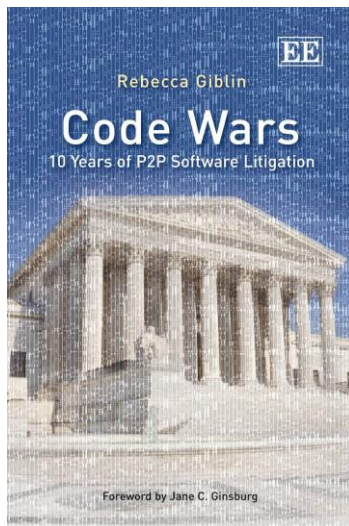
Is *blockchain* the new “Salvator Mundi”?



COPYRIGHT LAW AND THE DIGITAL SOCIETY

A **fair balance** of interests is needed! But where is that balance?

„Copyright wars” between rightholders, intermediaries and users.



WHAT ARE PLATFORMS?



AT SCALE

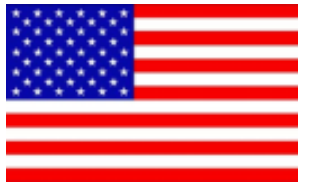
MULTIFUNCTIONALITY

USER INTERACTION

DATAFICATION

**CONTENT PRODUCTION AND
DISSEMINATION**

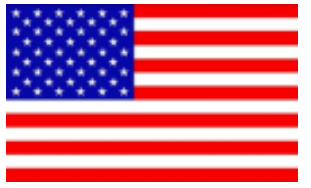




HISTORY OF COPYRIGHT LIABILITY OF INTERMEDIARIES

- ***Communications Decency Act (CDA) (1996)***
 - Could hurt freedom of speech [see Janet Reno, et al., v. American Civil Liberties Union, 521 U.S. 844 (1997)], except Article 230:
 - ***No provider or user of an interactive computer service shall be treated as the publisher or speaker of any information provided by another information content provider.***
 - ***BUT: §230(e)(2) Nothing in this section shall be construed to limit or expand any law pertaining to intellectual property.***



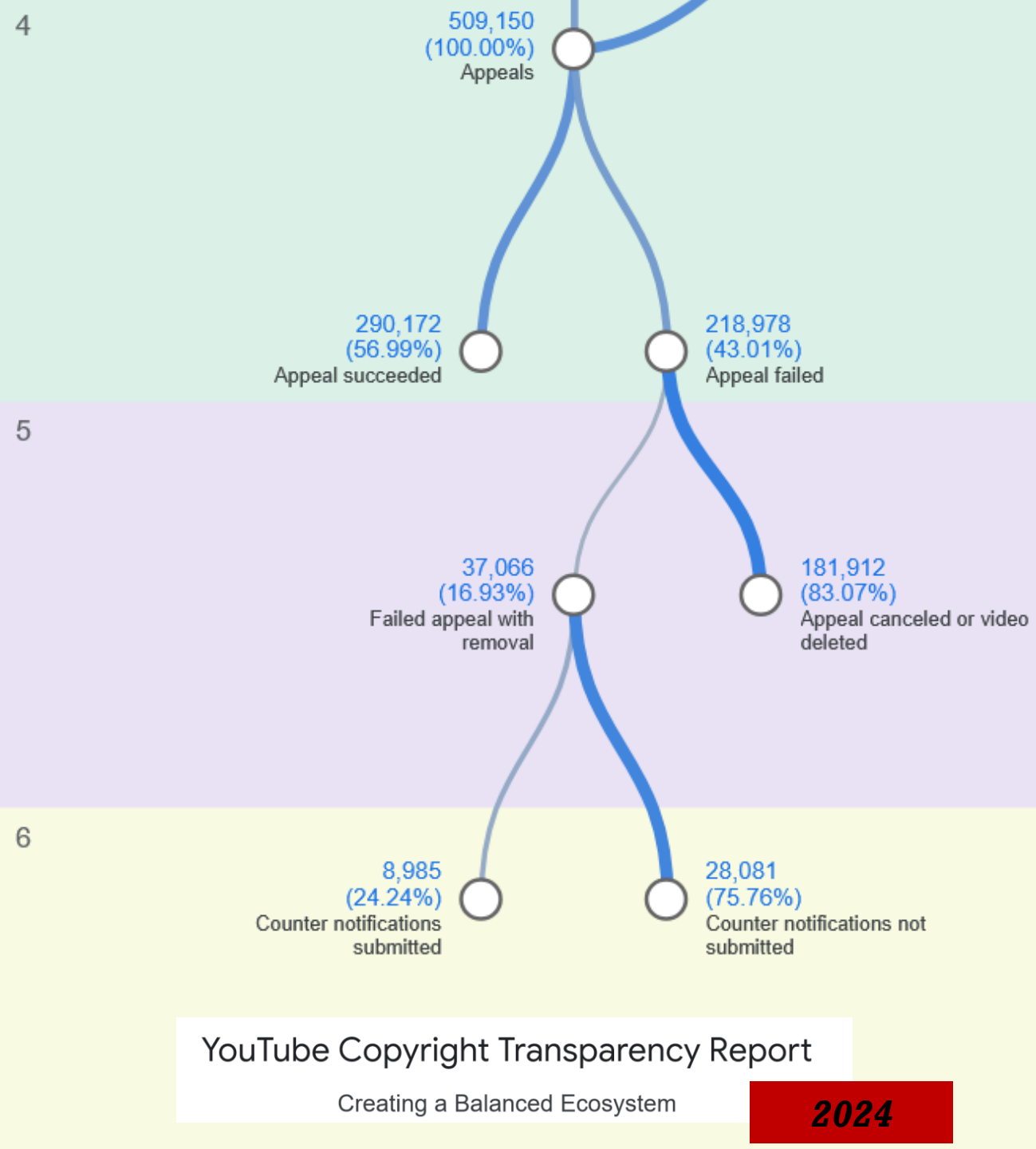
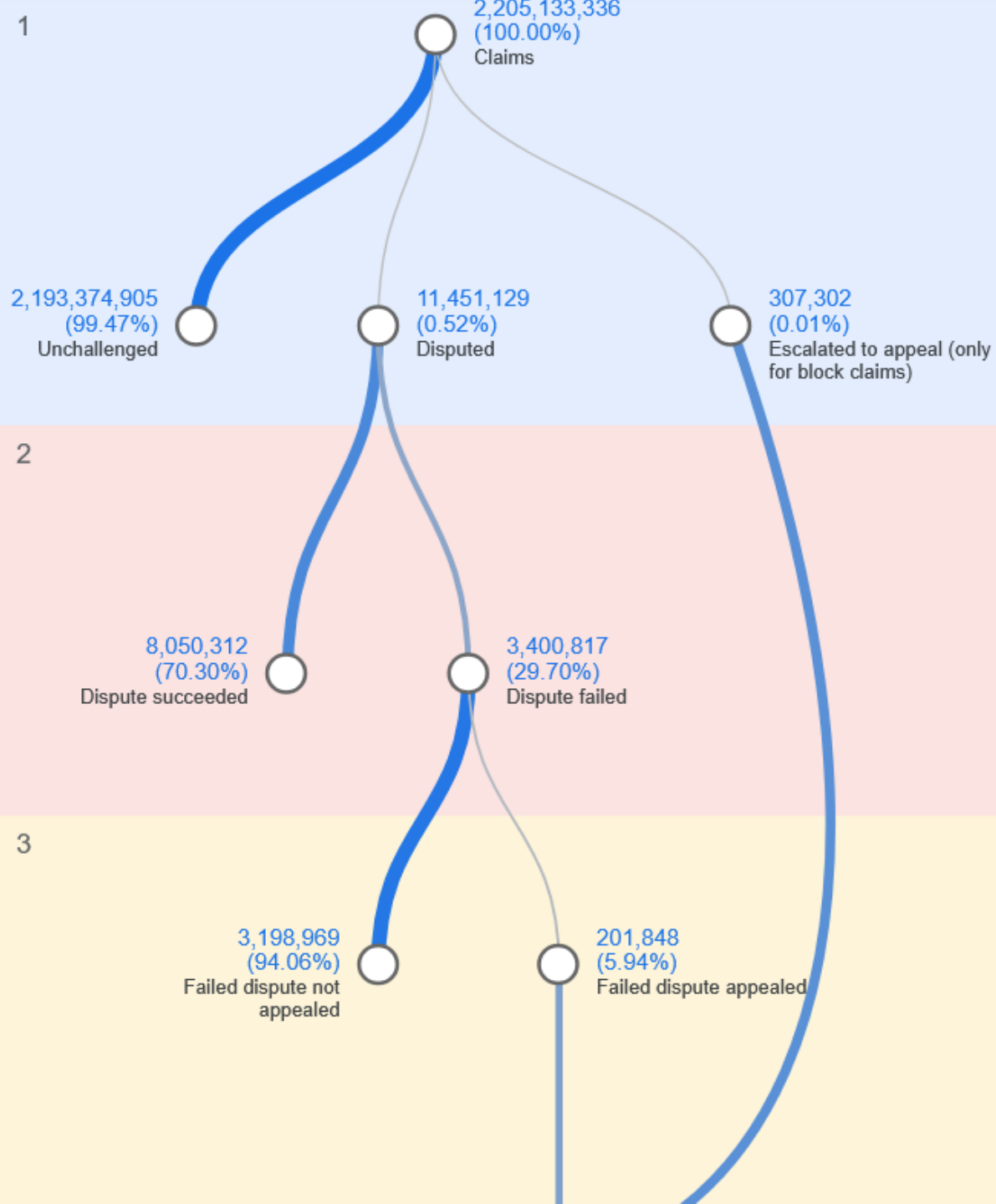


HISTORY OF COPYRIGHT LIABILITY OF INTERMEDIARIES

- ***Digital Millennium Copyright Act (DMCA) (1998)***
 - Safe harbor for selected intermediaries (transitory communications; system caching; storage of information on systems or networks at direction of users; and information location tools).
 - Notice-and-take-down system: copyright and business interests over user freedoms?
 - *Lenz v. Universal Music Corp.*, 801 F.3d 1126 (2015): *copyright holders have a "duty to consider—in good faith and prior to sending a takedown notification—whether allegedly infringing material constitutes fair use"*.
 - US Copyright Office Section 512 Report, p. 5. (2020): „The Copyright Office questions the test for knowing misrepresentation under section 512(f) adopted by the Lenz court, which had the effect of imputing the good faith requirement in section 512(c)(3) for notice sending into the analysis of section 512(f)’s knowing misrepresentation requirement. Such an analysis could result in *placing potential liability on rightsholders who fail to undertake a fair use inquiry before sending a takedown notes, without regard to whether or not the material is actually infringing.*”

CATCH ME IF YOU CAN!





YouTube Copyright Transparency Report

Creating a Balanced Ecosystem

2024

HISTORY OF COPYRIGHT LIABILITY OF INTERMEDIARIES



See further Joined
Cases C-148/21
and C-184/21 in
Louboutin v.
Amazon!

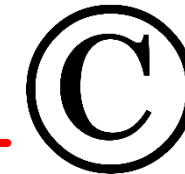
- CJEU case law
 - Case C-236/08 - *Google France v. Louis Vuitton*
 - Case C-324/09 - *L'oréal v. eBay*
 - Case C-360/10 - *Sabam v. Netlog*
 - Case C-610/15 - *Stichting Brein v. Ziggo & XS4ALL*
 - **Case C-682/18 & C-683/18 - YouTube/Cyando**
(+ *Puls 4 TV* revoked)

Rogue sites

**Traditional hosting
service providers**



**Active v. neutral, passive
role = no liability!**



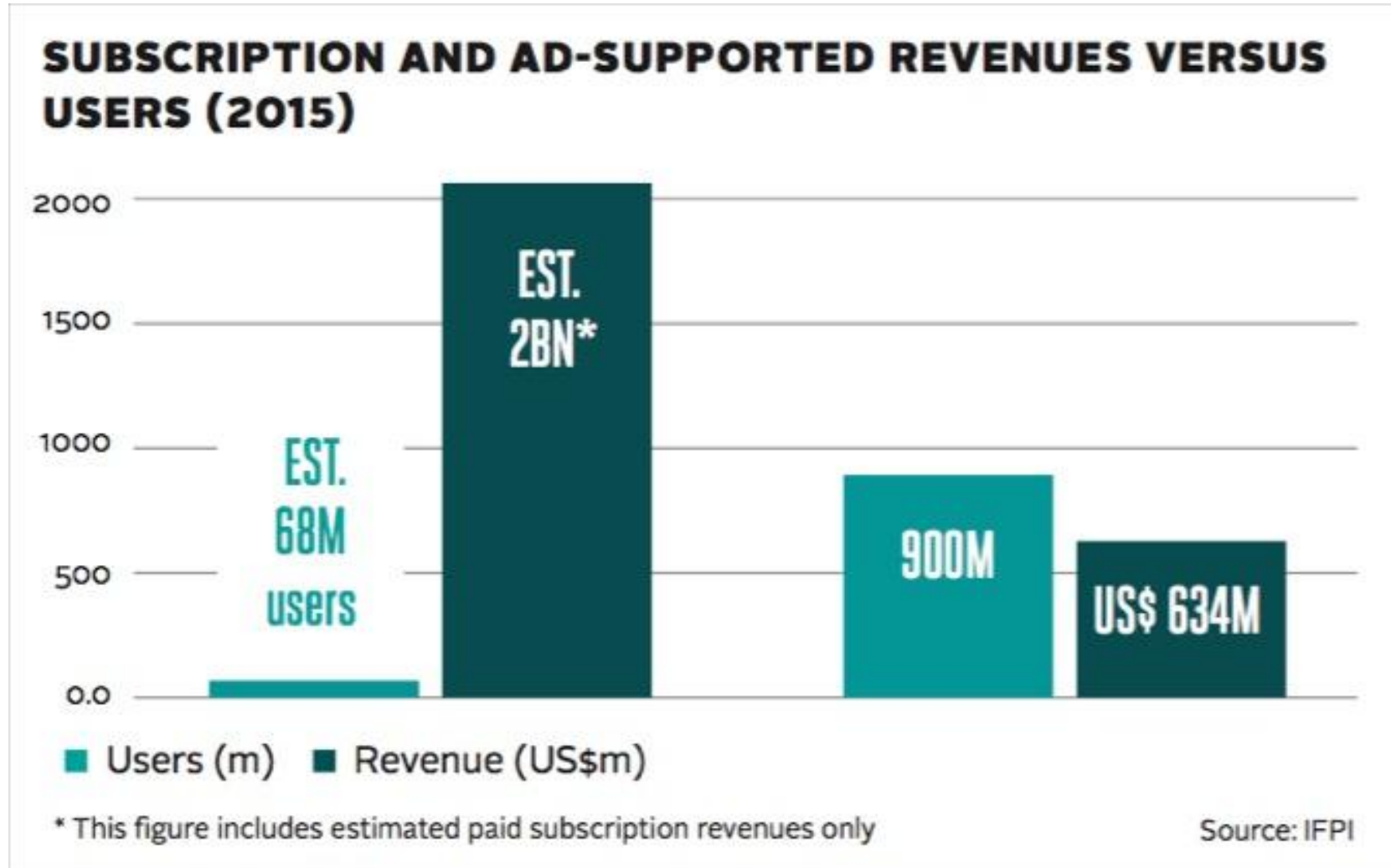
**General monitoring
obligation is prohibited!**

**P2P service provider is
liable for its active role in
the CttP**

**YouTube and Uploaded
remain safe unless...**



THE VALUE GAP(?)



DIRECTIVES/REGULATIONS ACCEPTED

- **Regulation (EU) 2017/1128** of the European Parliament and of the Council of 14 June 2017 on cross-border portability of online content services in the internal market
- **Regulation (EU) 2017/1563** of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled
- **Directive (EU) 2017/1564** of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society
- **Directive (EU) 2019/789** of the European Parliament and of the Council of 17 April 2019 laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, and amending Council Directive 93/83/EEC
- **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



WHAT IS PLATFORM REGULATION 2.0?

- ***A combination of complementary updated/streamlined sets of rules:***
 - ***CDSM Directive (2019/790):*** Art. 2(6) (OCSSPs); Article 17 (new liability regime for OCSSPs, incl. lex specialis safe harbors)
 - ***Digital Services Act (text adopted on July 5, 2022):*** updated safe harbor regime for hosting service providers (other than OCSSPs; especially VLOPs).



CDSM DIRECTIVE

- **Certain uses of protected content by online services (Art. 17):
A BIFURCATED (OR TRIFURCATED) REGIME**
 - Online Content Sharing Service Providers (OCSSP) communicate/make available to the public contents uploaded by their users to their platforms = **authorisation needed** [Art. 17(1)];
 - Authorisation obtained covers users' activities, too [Art. 17(2)];
 - **E-commerce hosting service providers' safe harbour provision does not apply** to OCSSPs [Art. 17(3)];
 - **But** see YouTube/Cyando, The Pirate Bay, Article 2(6) and Recital 62 = SOME intermediaries are exempted from the new regime. For bad faith infringers (e.g. The Pirate Bay) Art. 3 of the InfoSoc Directive; and for good faith non-OCSSPs (e.g. cyberlockers) Art. 14 of the E-Commerce Directive continues to apply.



CDSM DIRECTIVE

- **Certain uses of protected content by online services (Art. 17):
A BIFURCATED (OR TRIFURCATED) REGIME**
 - In the lack of authorization, OCSSPs are **liable for contents communicated/made available to the public, except if** they can demonstrate that
 - „(a) made **best efforts** to obtain an authorisation, and
 - (b) made, in accordance with **high industry standards of professional diligence**, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information; and in any event
 - (c) acted **expeditiously**, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from their websites, the notified works or other subject matter, and made **best efforts** to prevent their future uploads in accordance with point (b).” [Art. 17(4)]



CDSM DIRECTIVE

- **Certain uses of protected content by online services (Art. 17):
A BIFURCATED (OR TRIFURCATED) REGIME**
 - With respect to the exemption from liability, the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service; and the availability of suitable and effective means and their cost for service providers shall be taken into account [Art. 17(5)];
 - The directive **does not apply to start-ups** (companies launched within 3 years) or that have an annual turnover of less than 10 million € [Art. 17(6)];
 - **LAWFUL CONTENTS (INCLUDING WORKS RELYING ON QUOTATION, CRITICISM, REVIEW, CARICATURE, PARODY AND PASTICHE) SHALL NOT BE AFFECTED** [Art. 17(7)];
 - **No general monitoring obligations** might be introduced [Art. 17(8)];
 - **EFFECTIVE AND EXPEDITIOUS COMPLAINT AND REDRESS MECHANISMS SHALL BE AVAILABLE** [Art. 17(9)];
 - Stakeholder dialogues needed [Art. 17(10)] => *Commission Guidance provided on June 4, 2021.*



KEY CHALLENGES OF ART. 17

(1) Filtering wars

- Art. 17(1) v. (4): licensing v. filtering? Ex ante, individual but massive licensing is troublesome + costly! → ***Filtering will dominate (= no other option!)***
- What kind of and how thorough filtering is required/possible?
 - ***De facto*** → how much to invest into filtering? (But: start-up exception)
 - ***De jure*** → in line with user rights under Art. 17(7)
- ***Over-filtering? Automated filtering? False positives? (Under-filtering: false negatives?)***
 - No balancing mechanism against these + no right to information for the benefit of users
 - Hard to train the algorithms
 - Empirical evidences seem not to confirm this hypothesis (yet).



KEY CHALLENGES OF ART. 17

(2) Balancing fundamental rights

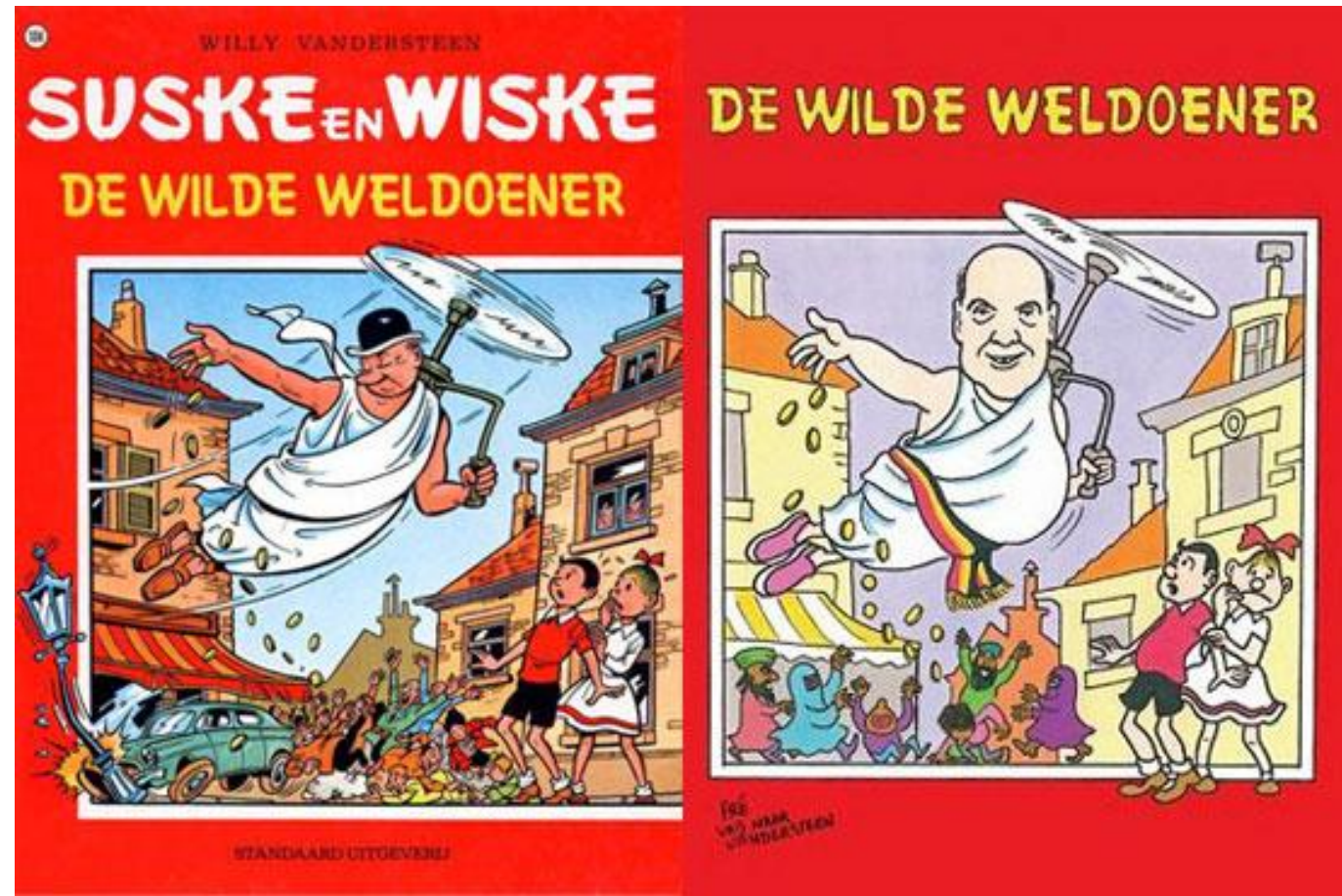
- **Case C-401/19** – Poland v. European Commission: is Article 17(4)(a) and (b) in line with the Charter of Fundamental Rights?
 - AG Saugmandsgaard Øe recommended to dismiss the action: Article 17...
 - is a *serious limitation of freedom of expression*, but **not unconstitutional**;
 - it *does not deploy a general monitoring obligation*, indeed, it **protects end-users rights in certain cases** (parody, quotation etc.);
 - *ex ante* filtering is only allowed, if the **content is manifestly illegal**.
 - The CJEU agreed with AG Saugmandsgaard Øe and recommended to dismiss the action in its preliminary ruling (April 26, 2022).



KEY CHALLENGES OF ART 17

(2) Balancing fundamental rights

- *The parody debate...*
Deckmyn v. Vandersteen
[Case C-201/13]

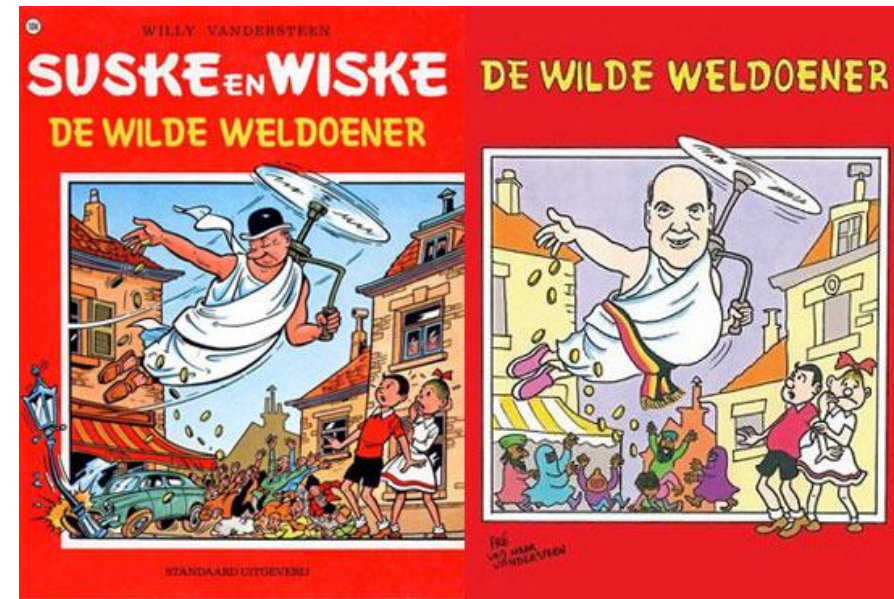


KEY CHALLENGES OF ART 17

(2) Balancing fundamental rights

■ *The parody debate...*

- „the terms of a provision of EU law which makes **no express reference to the law of the Member States** for the purpose of determining its meaning and scope must normally be given an **autonomous and uniform interpretation** throughout the European Union, having regard to the context of the provision and the objective pursued by the legislation in question.” (Para. 14)
- „Since Directive 2001/29 gives no definition at all of the concept of parody, the meaning and scope of that term must, as the Court has consistently held, be determined by considering its (1) **USUAL MEANING IN EVERYDAY LANGUAGE**, while also taking into account the (2) **context** in which it occurs and the (3) **purposes of the rules** of which it is part.” (Para. 19)

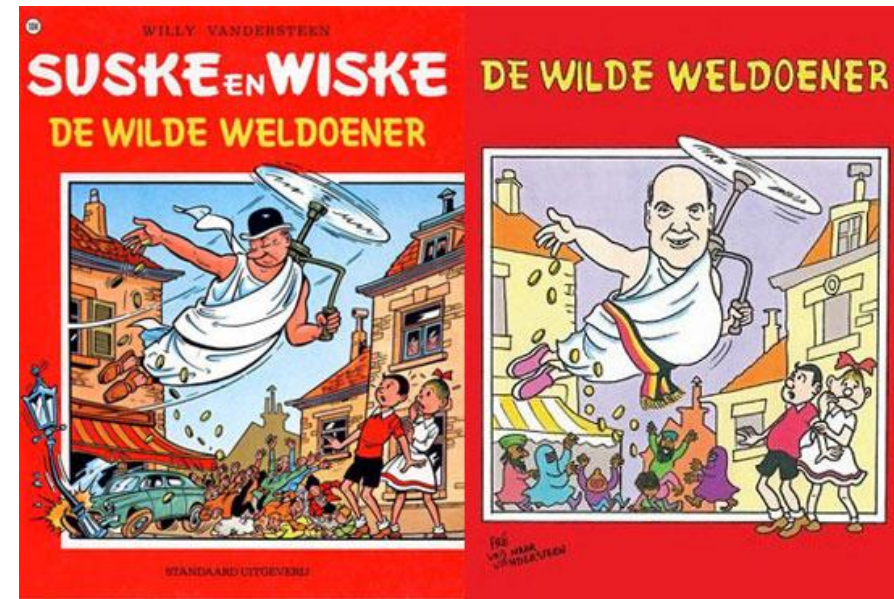


KEY CHALLENGES OF ART 17

(2) Balancing fundamental rights

■ *The parody debate...*

- „the **ESSENTIAL CHARACTERISTICS OF PARODY ARE**, first, to **evoke an existing work while being noticeably different from it**, and, secondly, to **constitute an expression of humour or mockery**. It is not apparent either from the usual meaning of the term ‘parody’ in everyday language, or (...) from the wording of Article 5(3)(k) of Directive 2001/29, that the concept is subject to the conditions set out by the referring court in its second question, namely: that the parody should display an original character of its own, other than that of displaying noticeable differences with respect to the original parodied work; could reasonably be attributed to a person other than the author of the original work itself; should relate to the original work itself or mention the source of the parodied work.” (Para. 20-21)

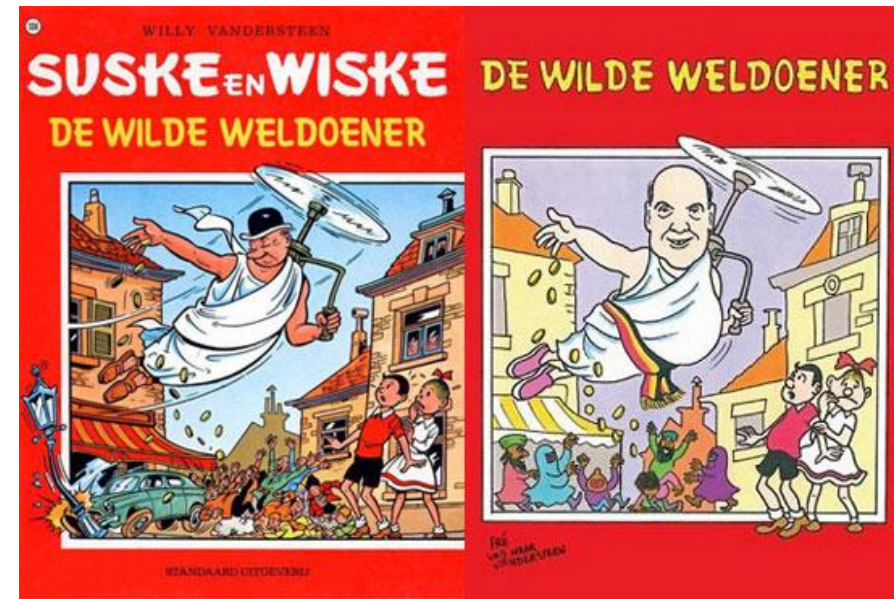


KEY CHALLENGES OF ART 17

(2) Balancing fundamental rights

■ *The parody debate...*

- „The interpretation of the **CONCEPT** of parody must, in any event, **enable the effectiveness** of the exception thereby established to be safeguarded and its purpose to be observed. (...) The fact that Article 5(3)(k) of Directive 2001/29 is **an exception** does therefore **not** lead to the scope of that provision **being restricted by conditions**, such as those set out in paragraph 21 above, which emerge neither from the usual meaning of ‘parody’ in everyday language nor from the wording of that provision.” (Para. 23-24)



KEY CHALLENGES OF ART 17

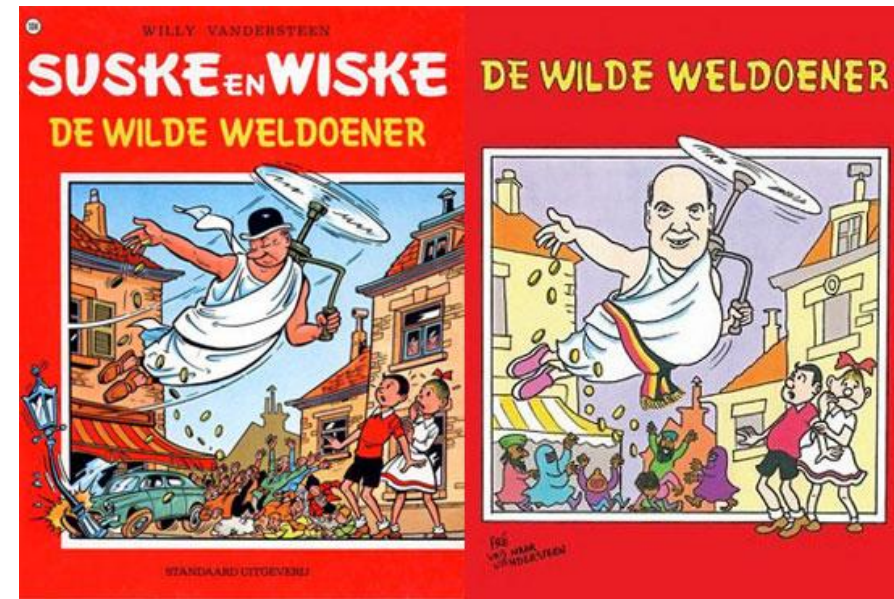
(2) Balancing fundamental rights

■ *The parody debate...*

■ **PURPOSES OF THE RULES:**

- Recital 3: InfoSoc Directive aimed to implement the four freedoms → fundamental principles of law → property/IP + freedom of expression → „**parody is an appropriate way to express an opinion**” (Para. 25);
- Recital 31: InfoSoc Directive – consequently parody as well – aimed to **reach a „fair balance”** between rightholders and users (Para. 26-27).

- „attention should be drawn to the **principle of non-discrimination** based on race, colour and ethnic origin (...) holders of rights (...) have, in principle, a legitimate interest in ensuring that the work protected by copyright is not associated with such a message.” (Para. 30-31)



CDSM DIRECTIVE

- **Revisiting Art. 17(7):**

- **LAWFUL CONTENTS (INCLUDING WORKS RELYING ON QUOTATION, CRITICISM, REVIEW, CARICATURE, PARODY AND PASTICHE) SHALL NOT BE AFFECTED [Art. 17(7)]**

