

How to Strike a Balance Between Actors of User-Generated Content in the Web 2.0?

The Wolf, the Goat and the Cabbage Dwell on the Same Boat

Mémoire réalisé par
FLORIAN PONCIN

Promoteur(s)
ALAIN STROWEL

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For My promoter, Mr. Strowel- He guided me towards this subject and found the words to allay my fears.

For my family and friends- They endured my stress.

For my uncle, Armand Spoden- He always gave me the best advice and was available for any question.

For All YouTubers- Especially those who answered my inquiries.

*“The good thing about automation is that you don’t have to involve real people to make decisions.
The bad thing about automation is that you don’t have to involve real people to make decisions”**

*Alex Pasternack

TABLE OF ABBREVIATIONS AND ACRONYMS

AC	Analysed Content
CD	Copyright Database
CJEU	Court of Justice of the European Union
DMCA	Digital Millennium Act
UGC	User-Generated Content
UGCS	User-Generated Content Site(s)
YPP	YouTube Partner Program

Disclaimer: Every Hyperlink appearing in this work has been visited for the last time on the 12th of May 2015.

Table of contents

Introduction.....	1
1. The user-generated content sites in the context of a Web 2.0.....	3
1.1. A far-stretched neologism.....	3
1.2. UGC stands for “user-generated content”.....	4
2. The wolf, the goat and the cabbage: actors of UGC.....	6
2.1. Isn't the beaten dog a voracious wolf ? The copyright right-holders.....	6
2.2. The goat who searches to avoid sacrifice: the hosting provider in the safe-harbour system of the e-commerce directive.....	7
2.2.1 Qualification of hosting provider.....	7
2.2.2. Conditions of safe harbour.....	9
2.2.3. The entente between goat and wolf in order to oppose copyright infringements.....	11
2.3. The users as mere cabbages.....	13
3. Databasing: an improper and iniquitous tool.....	16
3.1. Nature of Databasing and nuance in the Netlog Case.....	16
3.1.1. A brief explanation of the mechanism of databasing.....	16
3.1.2. The Netlog case: an illustration of the prohibition of general obligation to monitor.....	18
3.2. “Content ID” is a bot; neither a man nor a judge.....	22
4. Internal machinery.....	27
4.1. YouTube's system.....	27
4.1.1. “Terms and conditions may apply”.....	27
A.) Scope and limits of the Terms.....	27
B.) Restrictions on use.....	30
C.) A “limited” licence.....	32
D.) Conclusions.....	34
4.1.2. Monetised content.....	36
4.1.3. Copyright notice and three strikes rule.....	37
4.2. Chilling effect.....	42
4.2.1. Fear to use.....	42
4.2.2. Fear to voice.....	43
5. How to achieve the balance?.....	46
5.1. The legal solutions.....	46
A.) More clarity and less restrictive safe-harbour.....	47
B.) The “Fair-Use” doctrine in E.U.....	49
C.) A new UGC exception to copyright in the web 2.0.....	53
5.2. The technical and contractual solutions.....	57
A.) Strict identification.....	58
B.) Prior Settlement.....	60
C.) Crowdsourcing.....	61
5.3 A practical combination of both aspects.....	64
Conclusions.....	66

Introduction

Internet has already taken a great place in most of our lives. Social interactions, education, learning or economy can't go back anymore to the old system. The web has created new opportunities but an equal amount of issues. Law is not an exception. As everyone starts to give more and more importance to his/her life in the cyberworld, the legislator seems to have difficulties to keep up with the rapid pace of changes on the Internet. It is especially the case for a certain type of system, already implemented a long time ago (at least from an online perspective). Here, we are referring to websites relying almost exclusively on "Users-Generated Content", or "UGC". We will see later what those terms cover.

It is striking that many creators who adopted the Web medium to express their ideas and opinions are genuinely in distress. On one hand, the vast majority of them are very pleased with the unrivalled freedom that one can benefit from the Internet, unlike old media like television. On the other hand, the same people have noticed that this freedom is not only slowly disappearing, but that they have no power to oppose this situation.

First, the Law is no longer adapted to these new forms of diffusion. Currently, the most recent European Directives on the subject dates from the early 2000'. One can imagine that the context has evolved since then. In addition, the main objective of these legal texts was, above all, to protect the copyright right-holders and the Internet Service Providers (ISP's). In the specific problematic of UGC, we will focus on a sub-category: the hosting providers, as defined by the relevant provisions. Creators who have chosen to use this medium complain about economic pressure and legal disinterest. We share the view that these actors should not be discriminated for the only reason that they have chosen the most modern medium.

Second, even if users are the main source of success and prosperity of these platforms, the contractual terms and conditions laid down put them at a great disadvantage. The available leeway is so narrow that the creators can rarely voice their discontent. Worse: they are being discouraged to do so.

As websites are gates towards information, entertainment and many form of culture, their legal status deserve a thorough analysis. We live in an age where each person can choose to participate in

this global forum. The recent years have shown us that anybody can be a broadcaster of ideas, or at least a user of these modern media. Whether we teach or learn by means of collaborative platforms, whether we share hilarious videos with friends on Facebook, whether we consult an online tutorial on an office software, we are playing the game. Therefore, if everyone is potentially affected by this problem, we truly think that its resolution is worthy of attention.

We will have to thoroughly analyse the context to (hopefully) reach an acceptable solution. This analysis will be done in Part 1, where we'll try to define the concept of “Web 2.0”. Then, we will approach the notion of UGC and define the sites that can receive that qualification.

Part 2 will describe the different actors dealing with UGC and the changes they have undergone in this peculiar context. On this point, we will mainly tackle the safe-harbour conditions in EU law.

In Part 3, we will discuss the most common method used to deal with potential infringing content: databasing. We will see that this automatic mechanism raises many issues of legitimacy and accuracy.

With the example of YouTube, probably the best illustration of a modern UGC site, Part 4 will be dedicated to a thorough analysis of the legal and economic aspects of this platform.

Thereafter, in Part 5, we will provide the reader with potential solutions to the problems raised in this study. We will first present the legislative solutions, then the economic and contractual ones.

Finally, we will reiterate the issues at hand and what can be done to resolve them. We can only hope that our work will, at least, bring to light the fact that the current situation is not sustainable in the long run.

1. The user-generated content sites in the context of a Web 2.0.

1.1. A far-stretched neologism

To fully understand the context of the user-generated content sites, it is best to have a glance at the notion of “Web 2.0”. It is in 2005 that the director of an American media company, Tim O'Reilly came up with this famous neologism which would agitate the doctrinal world for a long time¹.

There is no legal definition of this concept, probably because not even scholars seems to agree on its scope. In this work, we will nevertheless try to circumvent this difficulty and try to find a definition that will satisfy most readers. As imagined by its author, the expression “Web 2.0” emerged in the context of web development. In the beginning, users of the Internet were only used to a passive stance when confronted with online content. Similarly as with traditional media, viewers, readers or listeners could only receive information and gobble it without taking any part in the process. Then, everything changed with the appearance of the new paradigm called “Web 2.0”. Since then, users started to share their home-brew content on the web. From mere bystanders, they became major actors of the Internet. Nowadays, it is a commonplace to point out the dazzling ascension of social media like Facebook or Myspace. Another well-known illustration being YouTube, the content of which is essentially made by the users themselves.

From an economical point of view, it should be added that it's that particular content that made possible the growth and the worth of these enterprises. To use the words of an eminent author: “*web 2.0 websites as they exist today rely on the content of their end-users but the programming of their own developers*”². Still, this element is probably the only one unanimously recognised. In fact, experts permanently debate about numerous classifications of websites, ranged under the heading of “Web 2.0”. To the extent of this work and to summarise the keys ideas of this concept, we suggest the following definition, mainly adopted by scholars and O'Reilly himself. Web 2.0 is: “*when the bulk of a website's content, growth and development come from individual end-users*”³.

1 T. O'REILLY; *Not 2.0?*; available at http://radar.oreilly.com/archives/2005/08/not_20.html.

2 B. BROWN; *Fortifying the safe harbors: reevaluating the DMCA in a Web 2.0 world*; Berkeley Technology Law Journal; 2008; volume 23, issue 1, article 18; p. 441; G. GONZALES FUSTER, S. GUTWIRTH; *Privacy 2.0?*; Revue du droit des technologies de l'information; 2008; p. 352; P. TRUDEL; *La régulation du Web 2.0*; Revue du droit des technologies de l'information; 2008; pp. 283-307.

3 B. BROWN; *Fortifying the safe harbors: reevaluating the DMCA in a Web 2.0 world*; *Op. Cit.*; p. 441.

However, we cannot concur with other authors saying that “Web 2.0” and user-generated content sites are synonymous⁴. In our perspective, “Web 2.0” is only the context, not the material effect. It is a new tendency that greatly evolved since the beginning of the digital era, but it cannot be confused with its practical implementation, i.e. the user-generated content sites. It is important to understand at this stage that without the context of a “Web 2.0”, some problems may have arisen, but not to the current extent. As such, that doesn't mean that a traditionalist media approach would have been better than the “web 2.0”, or that the latter one is now out of control. On the contrary, one should always keep in mind that the infrastructures of the Internet (sites; blogs; software) are in an ever-changing state, due to conscious and voluntary choices made by programmers and managers. Thus, chaos is not the natural state of the “web 2.0”.

Now that the reader has a better understanding of the context in which the actors of the “new Internet” are playing, we will dwell in the following lines on the issue at hand : the user-generated content and the sites exploiting this new source of revenue.

1.2. UGC stands for “user-generated content”

For the sake of clarity, we would like first to explain to our readers the meaning of some acronyms we will abundantly use through this work. Most scholars use the letters “UGC” to refer to “User-Generated Content” and we will do so. On another hand, when referring to the sites hosting⁵ this very content, we shall use the acronym “UGCS”, i.e. “User-Generated Content Sites”.

As we said before, user-generated content sites rely nearly solely on the production of their users to live and to thrive. In their economical perspective, this content is the raw material necessary to expand their activities. With that goldmine, they can later use it as a means of advertising or promotion. We will address later in this work the complex notion and juridical qualification of those sites. Now, let us look at one of the most representative figure of the “web 2.0”: YouTube⁶.

The golden story of this firm began in February 2005. Its original purpose was to provide a way for few intimate people to share friendly videos⁷. Then, the enterprise bulged so swiftly that just one

⁴ *Ibidem*; p. 442.

⁵ For more information concerning the notion of “hosting”, see part 2.2.1., *infra*.

⁶ It's the view of most authors like: M. SZABO CARL; *Thwack!! Take that, user-generated content!: Marvel Enterprises v. NCSoft*; Federal Communications Law Journal; Volume 62, issue 3, article 2; 2010; p. 559.

⁷ H. GREEN; *YouTube: way beyond home videos*; Business Week Online; 2006;
http://www.businessweek.com/magazine/content/06_15/b3979093.htm.

year later, the audience of the website was that of one American out of four⁸. Today it is estimated that more than one billion people are visiting YouTube each month and that eighty percent of that traffic is produced outside of the territory of the United States of America⁹. These spectacular numbers give a fair idea of the success of the website. The content shared on the platform ranges from the most idiotic video of a cat's trick to the most serious and contemporary political speech. On its various pages, there are music tracks, parodies, fan-made homage, hazardous content, pirated films, etc. The list stretches to infinity. What is more interesting in the scope of the present study, is that content protected by *droit d'auteur* can be found in this inextricable labyrinth, without the permission of the said author. Let us be clear about the presence of such content on YouTube: the fact that it exists does not mean it represents all the content or even a large part of it¹⁰. Far from that fictional point of view, it should be highlighted that a colossal amount of those videos are in reality mere recording of facts of the actuality.

Here, we would like to briefly remember to the reader that several important criteria have been dictated by the Court of Justice of the European Union (CJEU) itself regarding the protection of a work by *droit d'auteur*. In a nutshell, the Court found in the Painer case¹¹ that the requirements were: the presence of a work; the originality of that work and its concrete shaping. The criterion of an “*intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that work*” was found decisive by the Court of Luxembourg. Thus, in analysing the content of YouTube, one should avoid judging all videos as a work protected by *droit d'auteur* or copyright. Even if it is commonly accepted that the threshold of “*an intellectual creation of the author*” is set at such a level that it can easily be reached¹², it's clear that the checking of such a condition would be a really perilous exercise without the appreciation of an accomplished lawyer or possibly the help of a judge¹³. We will discuss that specific point more broadly in part 3.2. of this work.

8 C. E. KIM; *YouTube: testing the safe harbors of digital copyright law*; Southern California Interdisciplinary Law Journal, 2009; p.140.

9 <http://www.YouTube.com/yt/press/fr/statistics.html>.

10 B. BUCKLEY; *SueTube: Web 2.0. and copyright infringement*; Columbia Journal of Law & the Arts, 2008; p. 239.

11 CJEU; Case C-145/10 Eva-Maria Painer v. Standard VerlagsGmbH and Others; 1 December 2011; available at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=115785&pageIndex=0&doclang=EN&mode=req&dir=&occ=first&part=1&cid=324805>.

12 H. BENGTSSON; *EU harmonisation of the copyright originality criterion*; <http://www.worldservicesgroup.com/publications.asp?action=article&artid=4597>.

13 L. LEISTER; *YouTube and the law: a suppression of creative freedom in the 21st century*; Thurgood Marshall Law review; 2011; p. 119.

2. The wolf, the goat and the cabbage: actors of UGC

During the preparation of the present analysis, it quickly appeared that the economical and sociological situation of the UGCS was far from being simple. Some stakeholders are suffering from the absence of balance between their rights and powers. The legal framework in that matter is of little help, mainly because (as it has been emphasised by many experts¹⁴) it is not consistent with the reality of a “web 2.0” approach. This issue surprisingly shares many similarities with an old and famous riddle.

“The enigma of the wolf, the goat and the cabbage” can be easily summarise in a few lines. A ferryman travelling with a wolf, a goat and a cabbage has to cross a river. Unfortunately, his boat is not very big and he can only take one passenger at a time. It is well-known that wolves eat goats and that the latter eat cabbages. Therefore, the ferryman cannot let one of those couples together on the same river bank. Those conditions being set, how can the ferryman get each of its possession to the other shore, in a minimum of crossings and without having one of them being eaten in the process? The answer to that question may seem difficult but it is more simple than it appears. We will see in our conclusions that it may also be the case for the UGC issue.

With this didactic (and naive) analogy, we will analyse the roles of each UGC actor, and see why most of them are presently at a pinch. We will also see that without sufficient care, a situation where one of the three major groups is discriminated¹⁵ is bound to happen.

2.1. *Isn't the beaten dog a voracious wolf ? The copyright right-holders*

As alluded in the previous pages, the emergence of the “Web 2.0” approach led to a drastic change in the way users handle creative content. At the time when original content was nearly solely produced, advertised and sold in a one-way vertical chain, copyright right-holders enjoyed an impressive and (almost) total control over their creations. With some exceptions like VHS copies or other minor infringements, if any, their job was limited to keep an eye on the most dangerous fraudsters¹⁶.

14 J. BENJUMEA MORENO; *Publisher or technical provider? Monitoring as editorial control and the safe harbor of art; 14 e-commerce directive*; Jura Falconis Jg. 49; 2012-2013; number 4; p. 671; T. HANNIBAL; *Opting out of the Internet in the United States and the European Union: copyright, safe harbors, and international law*; Notre Dame Law Review; Volume 84, issue 1; article 6; 2008; p. 364.

15 In the common meaning of the word.

16 C. K. HORMANN; *The death of the DMCA? How Viacom v. YouTube may define the future of digital content*;

In the new cyber-environment, content not only became more accessible to the former passive users and could be more easily duplicated, but each and every individual became able to produce its own creations. Therefore, it was no surprise that the volume of infringing content rose dramatically. In fact, the financial shortfall caused by this phenomenon is amounting, according to some estimations, at millions of US dollars¹⁷. In this regard, one could most assuredly pity the creators of works protected by *droit d'auteur*, generally represented by larger companies or associations. To tell the truth, since the establishment of the copyright protection in the EU, the system was meant to encourage the creation of original work and to provide economic security to their creators¹⁸.

Faced with such trouble, the copyright holders had to find a solution as soon as possible. If they were condemned to lose so much money, someone would have to pay for it.

At first glance, the persons convicted of infringement would be the logical targets. In fact, they are personally concerned by the illegal copies and should take responsibility for it. Nevertheless, the copyright right-holders don't seem to have chosen to focus on this category of persons in the UGC world to compensate for their financial losses. As a matter of fact, there is a ridiculously low amount of case law involving right-holders against individuals¹⁹. Why not suing isolated persons? For the main reason that they are usually not solvable.

Instead of pursuing individuals with limited resources, it is way more profitable for copyright companies to aim at well-funded preys. Clever readers have probably understood who we are referring to: hosting providers enterprises like YouTube.

2.2. The goat who searches to avoid sacrifice: the hosting provider in the safe-harbour system of the e-commerce directive

2.2.1 Qualification of hosting provider

The analogy of the “goat” is, in our view, blatantly convincing. As the character in the riddle above,

Houston Law Review; 2010; p. 1377

17 R. COOKSON; *Music groups claim YouTube “abuses” copyright law*; <http://www.ft.com/intl/cms/s/0/8df8fd66-e28d-11e4-aa1d-00144feab7de.html#axzz3ZWMS0lse>.

18 In this order! J.-P. TRIAILLE, F. COPPENS; *User Generated Content (UGC)*, in: *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the “InfoSoc Directive”)*; European Commission; 2013; p. 446.

19 P. MCKAY; *Culture of the future: adapting copyright law to accommodate fan-made derivative works in the twenty-first century*; Regent University Law Review; 2011; p. 122.

they have a central implication in this issue. On one hand, they take advantage of the users who want to spread their creations (the “cabbage” case, as seen in the next part of this work) and depend on them to survive by advertising the hosted content. On the other hand, however, they fall prey to the strong but nonetheless legitimate vigilance of the copyright holders (the “wolf”). Obviously, some companies have more resources than others to keep a permanent eye on the ever-changing Web and thus, the number of complains can greatly vary from one author to another. For instance, an academician²⁰ notes that the famous company Viacom alleged that after YouTube was purchased by Google in October 2006, no less than 150.000 videos had been identified as infringing the rights of its sole company! At this point, it is worth mentioning that this impressive accusation was only possible with the help of many co-workers dedicated to this strict surveillance. In another case law, but in the same circumstances, it is known that at least three full-time employees were found necessary to check the UGCS for the count of NBC Universal²¹.

But what is really a “hosting provider” and what are the legal consequences attached to this concept? In Europe at least, the conditions to be qualified as a hosting provider and protected against liability are set in article 14 of the 2000/31/EC directive on electronic commerce²². The text states the following: “*Where an information society service is provided that consists of the storage of information provided by a recipient of the service [...]*”. Let us stop here to analyse the very nature of a hosting provider, as seen by the European institutions.

First, we can note that the hosting provider is “someone” who effectively provides an information society service consisting in the “*storage of information*”. It seems interesting to note that the Directive does not refer to “a piece of work”, a “work” or even a “content”, but rather to the concept of “*information*”. Consequently, the scope of the object stored by the provider appears much broader than only content which would be protected by *droit d'auteur*.

Second, the last condition to be part of the “goat's group” is to host “*information*” created, or at least provided, by a third party. This last actor is the “*recipient of the service*”: the user and the content provider. As such, a site cannot legally be qualified as a hosting provider without the contribution of a person providing user-generated content, or more precisely “user-generated

20 T. HANNIBAL; *Opting out of the Internet in the United States and the European Union: copyright, safe harbors, and international law*; *Op. Cit.*; p. 398.

21 B. BUCKLEY; *SueTube: Web 2.0. and copyright infringement*; *Op. Cit.*; p. 238.

22 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce in the Internal Market (Directive on electronic commerce); available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32000L0031&from=en>.

information”.

2.2.2. Conditions of safe harbour

As far as UGC is concerned, the American and European systems are quite similar. If it's true that the former influenced greatly the legal vision of the latter, some differences remain. For instance, the concept of “*fair use*” or “*secondary infringement*”, is recognised in the US but not in the EU legal order. At this stage, we will just focus on the second part of article 14 of the e-commerce directive²³ regarding the conditions for hosting providers to access “safe-harbours”. In fact, these conditions do not greatly differ from those of the Digital Millennium Act²⁴ of the USA. Although, we can note that the European Union adopted a more horizontal approach providing a protection against liability for any content. Whether be it copyright infringements or, for example, defamation. On the other side of the Atlantic, the DMCA articles on safe-harbours only cover copyright violations and one would need to refer to other provisions for different issues²⁵.

The text of the directive goes on as it follows:

“[...] *Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that [...]*”. As we have done it before, let us stop here to ascertain the sense of this provision.

Article 14 provides a generous protection against liability for the hosting providers, as described *supra*. For those sites that are the favourite target of the copyright right-holders, the mechanism set in place by this article is truly a blessing. It is specifically applicable for the information stored by these actors at the request of the users of UGCS.

This blissful state of sound and safe security has been described in Europe and on the other side of the Atlantic as a “*safe-harbours protection*”. As a matter of fact, this expression is perfectly fitting. The “goat on the boat” will be able to take refuge in a secured harbour under certain conditions. These conditions are described in the following paragraphs of the directive:

“(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal

²³ *Ibidem*.

²⁴ Digital Millenium Act; 1998. See 17 U.S.C. § 512 (2012).

²⁵ T. WISEMAN; *Limiting innovation through wilful blindness*; Nevada Law Journal; Fall 2013; USA; p. 229.

activity or information is apparent; or

(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

2. Paragraph 1 shall not apply when the recipient of the service is acting under the authority or the control of the provider. [...]"

It is thus with a two-steps mechanism and an assorted exception that the directive ensures the protection of safe-harbours for the hosting providers. Before explaining this mechanism, it is worthwhile mentioning that the said protection only acts towards damages that copyright holders would be tempted to claim. As to interim measures or prohibitory injunctions or cessation, the “wolf” is still free to resort to them, even if the safe-harbour protection is in process²⁶.

The provider has to fulfil the first condition, i.e. that he is not aware of the illegal nature of the content he is hosting on his website. Moreover, point (a) of article 14 pinpoints another aspect of the knowledge the “goat” shall possess. In fact, even if one can't prove that the UGCS wasn't aware of the existence of illegal activities residing on its platform, the hosting provider still can't have access to safe-harbour if said activities should be proven evident.

Point (b) is about the condition regarding the next phase of the surveillance operated by copyright right-holders. Here, in the eventuality that the provider had indeed fulfilled the first step, the directive states that he still needs to delete or block the infringing information if its nature has been brought to its knowledge. This obligation would exist whether the provider has received the information from the copyright holders or by other means. In general, this step is what most authors refer to when using the expression “*Take-Down and Notice Procedure*”²⁷. This stage is of vital importance in the daily life of the UGCS. Indeed, it's the presence of this particular mechanism of the E-commerce Directive that shaped the current regulation of infringing and non-infringing content adopted by the platforms.

26 Recitals 45 and 47 in the preamble to directive 2000/31 state: ‘(45) *The limitations of the liability of intermediary service providers established in this Directive do not affect the possibility of injunctions of different kinds; such injunctions can in particular consist of orders by courts or administrative authorities requiring the termination or prevention of any infringement, including the removal of illegal information or the disabling of access to it.*

27 Although this expression refers more to the DMCA provisions than the EU ones. P. MCKAY; *Culture of the future: adapting copyright law to accommodate fan-made derivative works in the twenty-first century*; *Op. Cit.*; p. 125; A. S. TARBELL; *Don't tread on me: the need for an alternate dispute resolution process for the creators and uploaders of user-generated content*; *Pepperdine Dispute Resolution Law Journal*; Vol. 14: 27; USA; 2014; p. 39.

At last, article 14 provides us with an exception to the safe-harbour protection. If the hosting provider governs effectively the activities of the UGC creator, he loses the benefit of his legal protection. Thus, a systematic and *a priori* control of the content uploaded by users should not be permissible. The logic behind this paragraph is rather simple: how can a hosting provider not be held liable in the case he perfectly knows, prior to anyone, that the final content would be infringing? It's in this sense that paragraph 2 of article 14 should be understood when it refers to “*acting under the authority or the control of the provider*”.

Because hosting providers have to comply with the fact that they must either “*remove or disable*” problematic information, or take the risk of losing their prized safe-harbour, weighing the pros and cons is an easy task. Is it true? Sure, the safe-harbour mechanism has the fantastic virtue of limiting the responsibility of the UGCS, but at what price? One should keep in mind that each and every content (or “*information*”, as written in the directive) is potentially subjected to the two-steps control of article 14. As such, the legal framework requires an enormous attention from websites like YouTube. As we mentioned it before, the number of creators of UGC on this site had kept up to an unparalleled number: more than 115 millions in 2013²⁸. On one hand, the platforms are asked not to meddle with the creators nor give them direct orders. On the other hand, they have to check the content provided by the users and creators, and take the appropriate measures when an infraction to copyright seems to have happened.

2.2.3. The entente between goat and wolf in order to oppose copyright infringements

We will see that this remedy isn't perhaps the most appropriate one. The mechanism put into place by copyright holders and UGCS, although economically brilliant, neglects the interests of the very producers of their assets: the users and creators of the platforms. Unfortunately, the hosting providers have abandoned half-hearted measures. As a figure of speech, they have untied the Gordian knot.

Confronted to the fact that the “Web 2.0” revolution has changed many things in the cultural and legal world, the “goat” and the “wolf” realised that it would be profitable for them to cooperate. In the most common case (and specifically in YouTube's case) Copyright right-holders or their

28 O. B. AREWA; *YouTube, UGC, and digital music: competing business and cultural models in the internet age*; Northern University Law Review; Vol. 104, No 2; 2010; p. 432.

representatives would provide the hosting websites with a large database of their works. In return, the UGCS would enable the control of the content submitted by the users to see if a match between the database and the information submitted exists. The former would thus gain the guaranty that they will be the only ones to broadcast their own works, and the latter would preserve their safe-harbour. Well and good. But in this arithmetic, the two actors forgot to include the legal, economical and social interests of the users.

People and specialists have eventually to realise that the “Web 2.0” changed the outcome of a gigantic industry: the one related to information and entertainment. Statistics have shown that the value of this media market only increases as time passes²⁹. But the new tendency seems to show that “old” media like television are running out of steam³⁰, especially amongst the teens and young adults population. The new format of online viewing and sharing is cornering the market a little more each day. The success of new business models like “Netflix”³¹, a platform of films and series is a fitting illustration.

In the new paradigm of online content, users who can be qualified as creators are legion³². We are sharing the view that it would be stupid to hinder the growth of such a promising market³³. As they say: “*you can't stop progress*”. We should be firm and resolute about infringement of works protected by copyright. This cannot be allowed. That, at least, is certain. But we will show that by safeguarding the rights of a few number, the technical mechanism installed on UGCS has discourage or even stopped the creation of rich intellectual creations and economical wealth for hard-working creators³⁴. For instance, when Robert Kyncl (YouTube head of business and content operations) was asked about the current economic situation, he explicitly answered that: “*Online video is one the cusp of a growth spurt, much like cable television 30 years ago. It makes more sense for YouTube to invest in “Internet natives” creators”, rather than traditional TV shows*”³⁵.

29 <http://www.statista.com/statistics/237749/value-of-the-global-entertainment-and-media-market/>.

30 J. FORD; *Is YouTube the new television?*; <http://www.ft.com/cms/s/2/3591cb26-6abf-11e4-a038-00144feabdc0.html#axzz3TJYKe2A9>.

31 <http://www.netflix.com/be-fr/>.

32 W. WINKLER; *YouTube: 1 billion viewers, no profit*; <http://www.wsj.com/articles/viewers-dont-add-up-to-profit-for-youtube-1424897967>.

33 B. BUCKLEY; *SueTube: Web 2.0. and copyright infringement*; *Op. Cit.*; p. 263.

34 P. S. MENELL, B. DEPOORTER; *Using fee shifting to promote fair use and fair licensing*; *California Law Review*; 2014; p.75.

35 W. WINKLER; *YouTube: 1 billion viewers, no profit*; <http://www.wsj.com/articles/viewers-dont-add-up-to-profit-for-youtube-1424897967>.

2.3. The users as mere cabbages

As disappointing as it is, the joke is on the users. Although good reasons may explain why this situation has come to existence, the stalemate is nonetheless real. Hosting providers benefit from this system, as it has been proven that YouTube generates a colossal amount of money from its ads³⁶. Indirectly, copyright right-holders are in the same situation. Less outrageous infringements happen on those sites and their revenues continue to grow³⁷.

But on the other side, what do the users of UGCS win from this rather cold and automatic treatment of the “information”³⁸? Nothing but headaches. As more and more testimonies seem to prove it³⁹, the conditions under which the users have to live and diffuse their own works appear quite restrictive.

We didn't choose the qualification of “cabbage” by pure chance. A cabbage can't move. Its only fate is to feed the goat and be ignored by the wolf. It is precisely what is happening right now. YouTube and other platforms need users to survive, while copyright holders don't really care about their situation, except if they harm their copyright severely.

At this point, it would be wise to point which kind of “user” we are referring to in most parts of this study. There is a need to make a distinction between passive people on UGC (i.e. “the viewers”) and active people (i.e. “the users”). Although both groups may regularly consume online content, “the users” actually engage in creation on UGCS.

36 Although it is not certain that the site actually makes profit: O. B. AREWA; *YouTube, UGC, and digital music: competing business and cultural models in the internet age*; *Op. Cit.*; p. 432. However, it can at least be asserted that YouTube's ads generate quite the money: <http://www.forbes.com/sites/timworstall/2013/12/12/googles-youtube-ad-revenues-may-hit-5-6-billion-in-2013/>.

37 J. HOPEWELL; *Vivendi's Universal Music group bottoming out*; <http://variety.com/2014/music/global/vivendis-universal-music-group-bottoming-out-1201119832/>.

38 As qualified in article 14 of the e-commerce directive.

39 See, for instance: [http://www.YouTube.com/watch?v=i3Pd2k6GefQ](http://www.YouTube.com/watch?v=i3Pd2k6GefQ;);

[http://www.youtube.com/watch?v=ietv7vBIjI&list=TLc80pvVzqVfDaZB7LG3iB5jLMXFDHAAy4](http://www.youtube.com/watch?v=ietv7vBIjI&list=TLc80pvVzqVfDaZB7LG3iB5jLMXFDHAAy4;);

[http://www.youtube.com/watch?v=5T233d3P_0o&list=UUCpwMG0qZkr62FNZktfcvYg](http://www.youtube.com/watch?v=5T233d3P_0o&list=UUCpwMG0qZkr62FNZktfcvYg;);

[http://www.youtube.com/watch?v=E6-KsWv9ZAI&list=UUUV5wuGZmg_FGQp25uzKKDaw](http://www.youtube.com/watch?v=E6-KsWv9ZAI&list=UUUV5wuGZmg_FGQp25uzKKDaw;);

[http://www.youtube.com/watch?v=Hh-67jrOLeE&list=UUOYWgypDktXdb-HfZnSMK6A&index=1](http://www.youtube.com/watch?v=Hh-67jrOLeE&list=UUOYWgypDktXdb-HfZnSMK6A&index=1;);

http://www.youtube.com/watch?v=T8rx9xvb_o&list=UUnX9ICBUU8WZgMhrZUcRyuw&src_vid=E6-KsWv9ZAI&feature=iv&annotation_id=annotation_3017643759;

https://www.youtube.com/watch?v=Gi6FcI2wFrw&src_vid=E6-KsWv9ZAI&feature=iv&annotation_id=annotation_1017044807;

<http://www.jeuxvideo.com/news/2014/00075339-travail-et-droit-d-auteur-a-l-heure-d-internet-conference-stunfest-2014.htm#infos>;

[https://www.youtube.com/watch?v=uU7O0jppTAI&list=UU4ii4_aeS8iOFzsHuhJTq2w](https://www.youtube.com/watch?v=uU7O0jppTAI&list=UU4ii4_aeS8iOFzsHuhJTq2w;);

<http://www.youtube.com/watch?v=v17zznEpxNA>.

A more contractual approach would highlight that only the latter group need to accept the Terms and Conditions of YouTube in exchange of the access to the Service⁴⁰. This explains why only users can upload videos, comment other's content or directly contact each other. For these reasons, except if clearly stated, we will only dwell upon the second category of “users”.

It should be added that the “cabbages” are composed of two sub-groups: **(a)** the diffusers and **(b)** the creators. The formers consists of people that merely copy other's creations (with or without their permission) and cover news developments. It comes as no surprise that most copyright infringers reside in this category. Either harmless or ill-intentioned, their only role in the innovation process is to massively diffuse already existing creations. As they don't always act in fair-play regarding copyright regulation, hindering and monitoring their activities would seem only fair.

The second group, however, has an important part to play in the new artistic media. Some have qualified them as “*prosumers*”⁴¹ to emphasise their dual facet of content maker *and* consumer. These men and women frequently generate artistic and humoristic creations as well as reviews and political debates on different platforms. Surely, many of their works can be qualified as a “*intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that work*”⁴². They represent the “2.0. face” of today creators. Most UGC issues concern them but the current context doesn't allow them to take actions to protect their rights.

Enterprises as well as the general public seem easily to forget that most users of these platforms are not vulgar infringing delinquents but rather real creators. Outstandingly gifted, sometimes. The “bad” users are indeed a minority, as we did explain before⁴³. The problem is that they are a *very* noisy minority. It is easier to see and hear about few devious copiers of famous movies than paying attention to all the favourable content made by online creators. Another aspect of the problem might be that few users really grasp the meaning of copyright and all its exceptions⁴⁴. Sadly, this situation sometimes leads to unintentional infringements.

40 On this point, see part 4.1., *infra*.

41 O. VILANKA ; *Communicational approach to copyright*; JICLT; Vol. 9, No. 1; Helsinki; 2014; p.56.

42 See part 1.2., *supra*; p. 4 of this work.

43 B. BUCKLEY; *SueTube: Web 2.0. and copyright infringement*; *Op. Cit.*; p. 239.; Some studies even show that these marginal infringements have no actual effects on the industry: O. B. AREWA; *YouTube, UGC, and digital music: competing business and cultural models in the internet age*; *Op. Cit.*; p. 467.

44 F. ODUOL ODUOR; *The internet and copyright protection: are we producing a global generation of copyright criminals*; Villanova University School of Law Digital Repository; Volume 18, issue 2, article 6; 2011; pp. 508.

Unfortunately, the entente between the “wolf” and the “goat” made a system where the opinion of the user is negligible, so to say. The latter have indeed some remedies available when a wrongful act has been passed against their content but, as we will see in part 4.2., those procedures are of little help. Worse, they are made in such a way as that they are discouraging creators to even fill in a complaint⁴⁵.

In that sense, a survey with have realised amongst UGC creators led to similar supporting statements⁴⁶. Most users expressed disappointment with the current policy of the platforms regarding copyright⁴⁷. Some claimed that they are often forced to circumvent or break the rules of YouTube or other UGCS, if they want to upload their lawful content the way they want it.

A user especially gave a fair summary of the situation: “*The issue comes from the fact that the videos are analysed by a bot that do not make a distinction between the mere copying of “Iron Man 3”, and a review of “Iron Man 3”. We should deal with people, not with machines*”⁴⁸.

45 An illustration: Durendal1; “YouTube et les droits d’auteur”;; <http://www.YouTube.com/watch?v=i3Pd2k6GefQ>. On this point, see *infra*, part 4.2. on “chilling effect”.

46 You can find a copy of this survey in the Annexes, on the last page of this work.

47 See footnote 39, *supra*.

48 Free translation. The actual statement was expressed in French: «*Le problème vient du fait que les vidéos sont analysées par un bot qui ne fait pas de distinction entre l'upload d'Iron Man 3, et l'upload d'une critique d'Iron Man 3. Il faudrait pouvoir avoir affaire à des personnes plutôt qu'à des machines*”.

3. Databasing: an improper and iniquitous tool

It appears that databasing may be the keystone system of UGCS who seek safe-harbour protection. Rather cheap for the finances of those powerful enterprises⁴⁹ (a few thousand euros per month) and excessively simple to use, it would be a shame to work without it. If the quality of these software can't be questioned, its degree of precision can be. In the eminently sensitive field of Intellectual Property, precision matters. There are a great number of exceptions to *droit d'auteur* and only a delicate analysis of each case can conclude to the application or non-application of a derogative regime. At first, we will talk about the nature and the technicality of said softwares and their qualification in the mechanism of the e-commerce directive. Then, we will see why, in our view, this system is not sustainable nor consistent with the legal UGC framework and user's daily activities.

3.1. Nature of Databasing and nuance in the Netlog Case

3.1.1. A brief explanation of the mechanism of databasing

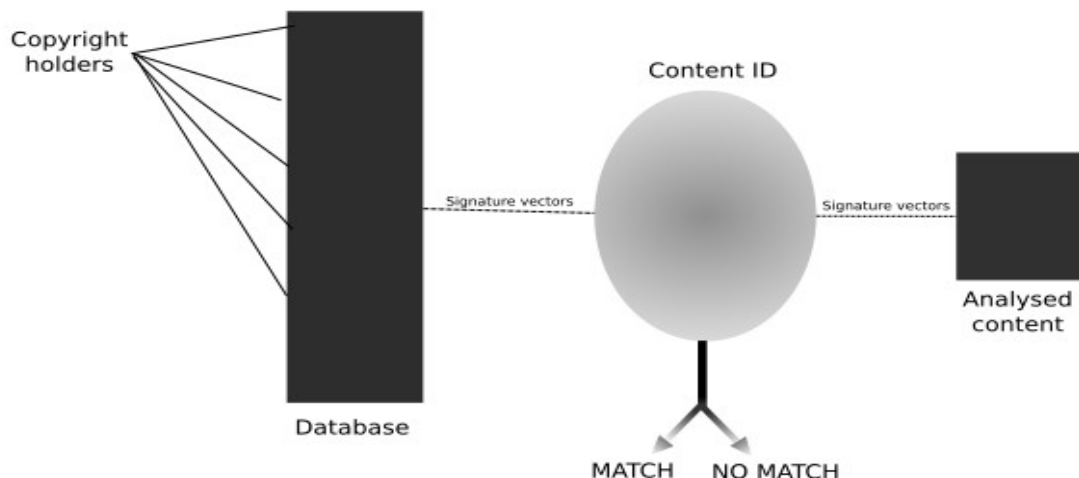
When approaching the concept of databasing, two important elements have to be understood first: the copyright's database ("CD") and the analysed content ("AC"). The first one is a gigantic database composed of "*ten of millions of titles and works submitted by the music, TV and motion picture industries*"⁵⁰. The second is any content submitted, this time, by the users of UGC, whatever it may be⁵¹.

49 <http://www.audiblemagic.com/smart-device-apps-pricing/>.

50 <http://www.audiblemagic.com/media-sharing-platforms/>.

51 Musics, videos and so on and so forth.

Databasing mechanism



The software starts by scanning the “AC”, or more precisely, its “*signature vector*”. Pragmatically, this vector could be described as the “digital fingerprint” of the content⁵². Then, this vector is compared with all other individual vector residing in the “CD”. If a match appears in the database, the software automatically report the “AC”. As it is suggested by the word “automatically”, no appreciation of the context, the intent or the length of the user's content has been taken into account in this process.

Once the match has been established between the two pieces of information, the program saves this result for later tracking purposes. In fact, MySpace or other UGCS were frequently facing the same “reiterated infringing content” problem in the past. In short: users who re-uploaded the exact (or similar) content on the platform, just some time after it had been thoroughly suppressed by the site operator. At that time, the websites honestly complied with the text of the e-commerce directive⁵³ and only deleted or rendered the access difficult for infringing content. Although this stance was passive, the legal safe-harbours didn't (and still don't) require more. Rather it would be the opposite, as it is stated in the last paragraph of article 14:

“Paragraph 1 shall not apply when the recipient of the service is acting under the authority

52 A. JESDANUM; *Myspace to launch video filtering system*; http://usatoday.com/tech/news/2007-02-12-myspace-filter_x.htm.

53 Directive 2000/31/EC; *Op. Cit.*; p. 8 of this work.

or the control of the provider. [...]”.

With the new system of databasing that has been implemented, the UGCS have even abandoned their self-investment in the control of content. Nowadays, the software does all the job⁵⁴. First it records each match between the signature vectors. Then, it uses the memory of these matches to repel all attempts of the users to replace the infringing content on the platform. A fantastic innovation, isn't it? Well, for the actual infringing information it sure is. It reduces the load of work of sites like YouTube and enables an efficient tracking of the information. But once again, one forgets that infringing users or “pirates” are far from actively present on those platforms. That kind of pariah are more generally part of the fauna of the peer-to-peer networks or on specialised sites of illegal copies of films or music. The UGC space, for its part, is unquestionably full of oddballs but rather creative and innocent ones.

Therefore, the software has the mortal flaw of treating information out of context. Automatically. Even if there is an exception of parody⁵⁵ to copyright regarding a motion picture, it matches it. Whether, a video commentator criticises or reviews⁵⁶ a film and shows extracts of the said film, it matches it. Whether an avid reader comments a recent novel and uses an illustration of the book, it matches it.

Now that we have grasped how databasing works, let us examine the Netlog vs. SABAM case of the 16th of February 2012⁵⁷, which offers a good illustration of how the CJEU deals with the idea of monitoring online content and the prohibition of a general obligation to do so.

3.1.2. The Netlog case: an illustration of the prohibition of general obligation to monitor

Let us start with the facts. The “SABAM” is the company representing all categories of authors in

54 C. E. KIM; *YouTube: testing the safe harbors of digital copyright law*; *Op. Cit.*; p. 146.

55 For instance, in Belgium, see: Article XI.190, 10°; Loi portant insertion du Livre XI "Propriété intellectuelle" dans le Code de droit économique, et portant insertion des dispositions propres au Livre XI dans les Livres I, XV et XVII du même Code; 19 April 2014; available at http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2014041960.

56 In Belgium, see: Article XI.189; Loi portant insertion du Livre XI "Propriété intellectuelle" dans le Code de droit économique, et portant insertion des dispositions propres au Livre XI dans les Livres I, XV et XVII du même Code; 19 April 2014; available at http://www.ejustice.just.fgov.be/cgi_loi/change_lg.pl?language=fr&la=F&table_name=loi&cn=2014041960.

57 CJEU (Third chamber); Case C-360/10; Belgische Vereniging van Auteurs, Componisten en Uitgever CVBA (SABAM) vs. Netlog NV; 16/02/2012; available at <http://curia.europa.eu/juris/document/document.jsf?docid=119512&doclang=EN>.

Belgium and its job is to manage the *droits d'auteur* of its clients and to protect them against infringement or prejudices⁵⁸.

In 2012, the society discovered that the website “Netlog” enabled a system where its users could diffuse extracts or complete works (music, video, ...) via their online profile. And, worst of all, without paying royalties to the adequate authors once the content appears to be their legitimate property. SABAM asked for a prohibitory injunction to the president of the *rechtbank van eerste aanleg te Brussel* to immediately stop public access to their copyrighted works on the Netlog platform. Moreover, SABAM asked the tribunal to oblige Netlog to install a filtering system of content, in order to pinpoint its copyrighted works and block their access.

The principal function of Netlog was to dedicate a space where the users could exchange messages and information between them, as a means to build or entertain their relationships⁵⁹. In essence, this site resembled greatly Facebook. In this specific case, an element of utmost importance was used as an argument by Netlog to oppose the prohibitory injunction: the prohibition of a general obligation to monitor the information, provided in article 15 of the e-commerce directive⁶⁰.

We already commented article 14 and its general principles concerning safe-harbour for the hosting provider. Where article 14 is listing several conditions to enjoy the graces of its liability regime, article 15 has a totally different purpose. The first paragraph of this article states:

“1. Member States shall not impose a general obligation on providers, when providing the services covered by articles 12, 13 or 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity. [...]”

This provision intends to avoid that national authorities impose unreasonable obligations upon hosting providers. Although they have to take into account the interests of the copyright right-holders, the “wolf” is not the only relevant actor. The drafters of article 15 seem to have understood this situation. As a matter of fact, article 15 actually embodies an interdiction made to Members States⁶¹ to adopt measures that would oblige hosting providers to systematically monitor all

58 <http://www.sabam.be/fr>.

59 The site has changed its brand-mark for “Twoo” and is nowadays more centred on dating opportunities. See it at <http://www.twoo.com/about>. The site currently benefits from an active media coverage.

60 Article 15 of directive 2000/31/EC; *Op. Cit.*; p. 8 of this work.

61 As we know it, the concept of “state” in EU Law is to be understood within a large meaning. It covers all powers of

information they are storing⁶². With great lucidity, the authors of the directive have noticed that allowing or imposing such an obligation would put the “goat” in great danger. Even if some UGCS would be capable to keep on with the huge costs that this obligation would imply, it would be wise to assume that most would not be able to pull it off⁶³.

In paragraph 34 of the case, the CJEU of Luxembourg exposes the reasons why such measures imposed by a Member State would not be consistent with the rules of EU Law:

“In that regard, the Court has already ruled that that prohibition applies in particular to national measures which would require an intermediary provider, such as a hosting service provider, to actively monitor all the data of each of its customers in order to prevent any future infringement of intellectual-property rights. Furthermore, such a general monitoring obligation would be incompatible with Article 3 of Directive 2004/48, which states that the measures referred to by the directive must be fair and proportionate and must not be excessively costly (see Scarlet Extended, paragraph 36).”

The sustainability and equability of the system is once more reaffirmed. The Court refers to the Scarlet Extended vs. SABAM case⁶⁴ that first illustrated many principles of this regime, though with other concerned parties than hosting providers. The conclusion of the Netlog case was the refusal of the Court to impose the contentious filtering system. As we can observe in the foregoing extract of the judgement, different arguments were upheld.

First, a filtering system such as suggested by SABAM would inevitably enters the realm of the prohibition of general obligation stated in article 15 of the e-commerce directive. In the view of the Court, it would concern a system:

(i) that filters information which is stored on the servers by its service users;

(ii) which applies indiscriminately to all of those users;

the state in any way the public authority is represented; e.g.: courts and tribunals, government or legislative power. See: M. WATHELET, J. WILDERMEERSCH; *Contentieux européen*; Larcier, Février 2014; 2e édition; pp.1-552.

62 J. BERND NORDEMANN; *Internet copyright infringements: remedies against intermediaries- The European perspective on host and access providers*, in *Doctrine Author's rights*; Larcier; Bruxelles; 2013; p. 530.

63 E. C. KIM ; *YouTube: testing the safe harbors of digital copyright law*; *Op. Cit.*; p. 165.

64 CJEU (Third chamber); Case C-70/10; Scarlet Extended SA vs. Belgische Vereniging van Auteurs, Componisten en Uitgever CVBA (SABAM); 24/11/2011; at <http://curia.europa.eu/juris/document/document.jsf?text=&docid=115202&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=514447>.

(iii) *as a preventive measure;*

(iv) *exclusively at the hosting provider's expense; and*

(v) *for an unlimited period of time*⁶⁵.

Keen observers will surely notice the troubling resemblance between these criteria and the ones we have already mentioned about the use of databasing on UGCS. Same general and abstract approach, same “*preventive*” character and the same detachment *vis-à-vis* the users. Exit their specificities; only hypothetical infringements matter. But if the Court of Luxembourg ruled that this kind of filtering system was deemed inconsistent with article 15 of the e-commerce directive, how can it be explained that databasing is still in effect on sites like YouTube?

Here lies a tremendous difference between this case and the actual practice. Article 15 prohibits “*Member States*” from acting in this manner. Consequently, neither legislative nor judicial powers can *oblige* hosting providers to conduct a general monitoring of the content. The terms “*Member States*” and “*oblige*” are crucial. On one hand, the provision does not give precisions regarding other actors than Member States, such as private parties. On the other hand, if national authorities can't indeed impose this mechanism on UGCS, nothing precludes them from proposing that type of filtering system or encourage its use. In the Netlog case, the issue was that SABAM asked a tribunal to impose the technical solution it had imagined. If the Belgian society had reached an agreement with the sharing platform, consisting in the implementation of the contentious filtering system, prohibition of article 15 would have been purposeless.

A second justification of the Court is based on article 3 of directive 2004/48⁶⁶. As we did previously, let us quote this provision here, for a better understanding of its meaning:

“1. Member States shall provide for the measures, procedures and remedies necessary to ensure the enforcement of the intellectual property rights covered by this Directive. Those measures, procedures and remedies shall be fair and equitable and shall not be

65 CJEU (Third chamber); Case C-360/10; Belgische Vereniging van Auteurs, Componisten en Uitgever CVBA (SABAM) vs. Netlog NV; 06/02/12; *Op. Cit.*; §26 of the ruling.

66 Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights; available at [http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0048R\(01\)&from=EN](http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32004L0048R(01)&from=EN).

unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays.

2. Those measures, procedures and remedies shall also be effective, proportionate and dissuasive and shall be applied in such a manner as to avoid the creation of barriers to legitimate trade and to provide for safeguards against their abuse”.

At this point, we see that the Court had no choice but to reject the demand of SABAM. In fact, even if the prohibition of article 15 of directive 2001/31 could not have been proven applicable in the present case, another provision clearly applies to the Member States. Article 3 of directive 2004/48 allows the enforcement of intellectual property rights by means of different measures. The problem is that those measures must be “*fair and equitable and shall not be unnecessarily complicated or costly, or entail unreasonable time-limits or unwarranted delays*”. As we have seen, the proposed filtering system would have been the exact opposite of a proportionate measure.

In conclusion, we could highlight that the Court continues its never-ending pursuance of the balance of interests. Obviously, *droit d'auteur* must be protected against infringements and other illegal threats. But when interpreting this legal regime, one needs to take into consideration the interests of other parties; *i.e.* the hosting providers and the users. From a Member State point of view, it has been clarified that a filtering system with the characteristics of databasing could not be upheld in EU law. But what have private parties made for their part?

3.2. “Content ID” is a bot; neither a man nor a judge

Programs such as “*Audible Magic*” have been used by both “wolf” and “goat” to ensure the largest control over UGC. We purposely mention this specific program because it is the most used one in the “web 2.0” realm. Sites like Facebook, Dailymotion, Vimeo, Ensequence or Soundcloud still use it⁶⁷ at the time we write these lines⁶⁸. And so did YouTube until recent times⁶⁹. Google, the owner of YouTube, decided to shift to its personal databasing program, known as “Content ID”⁷⁰. This simplistic denomination does not make it different from the mechanism of databasing we have explained above. The new name only means that the site is one of the few that can afford its own

⁶⁷ See footnote 50, *Op. Cit.*; p. 16 of this work.

⁶⁸ May 2015.

⁶⁹ B. BROWN; *Fortifying the safe harbors: reevaluating the DMCA in a Web 2.0 world*; *Op. Cit.*; p. 457.

⁷⁰ <http://support.google.com/youtube/answer/6013276>.

program of content identification and doesn't need to pay other enterprises anymore. This observation could be another argument to further support the view that this UGCS owned by Google is economically sustainable.

The main issue is that databasing is, first and foremost, automatic. It's only when a user is persistently asking the platform to check the veracity of an alleged infringement that a non-artificial intelligence will proceed to analyse the uploaded content. And one could say that we are rather optimistic. In fact, the actual mechanism and procedure conducted by members of YouTube staff is still quite opaque. The fact that dozens of pages of advice addressed to the users can be found on the website legal section⁷¹ doesn't change this lack of clarity.

The best illustration would be the three lines that YouTube dedicates to explain “*How Content ID works*”⁷²:

“Copyright owners can use a system called Content ID to easily identify and manage their content on YouTube.

*Videos uploaded to YouTube are scanned against a database of files that have been submitted to us by content owners. Copyright owners get to decide what happens when content in a video on YouTube matches a work they own. When this happens, the video gets a Content ID claim.”*⁷³

For now, we can already note that YouTube doesn't especially provide its users with vast pieces of information regarding the treatment of their content. We only know that the program will proceed to “match” the right-holder's samplings with the material uploaded on the site. In a nutshell, we know that databasing will happen but we do not know *how*. The expectations and requirements of clearness and legal certainty are not met. How can one know if Content ID takes into account all the nuances and subtleties required to decide whether a content is a mere copy of a work, or actually an exception to copyright? In our view, this question is pointless. First, the complexity of such a program would be difficult to imagine and the question of the relevance of its judging standards could arise. Second, even human experts have, sometimes, difficulties to distinguish between an

71 See, for example: <http://www.youtube.com/yt/copyright/en/>.

72 <http://support.google.com/youtube/answer/2797370?hl=en>.

73 Quickly followed by three sections, respectively describing:

- *What options are available to copyright owners?/- Who can use Content ID?/- Related topics.*

We will have time to dwell on those questions in the subsequent points.

infringing content and a legitimate pastiche⁷⁴.

At the end of the day, isn't it logical to conclude that only a judge, or at least a person, would be able to realise such a prowess⁷⁵? We think so. The problem is even harder to resolve in US Law where the vague concept of “fair use” exists. It is therefore no surprise that a Federal American court has already stated that this mechanism of automatic comparison doesn't meet the criteria of verifiability and reliability⁷⁶.

Moreover, it should be clarified that the “protection” that the Content ID mechanism offers against infringement is awfully biased. In fact, the program only runs with copyrighted material owned by the biggest and most famous companies. To have the privilege to be shielded by YouTube's fearsome weapon, one has to meet several requirements⁷⁷.

“YouTube only grants Content ID to copyright owners who meet specific criteria. To be approved, they must own exclusive rights to a substantial body of original material that is frequently uploaded by the YouTube user community”.

Therefore, to be eligible you need to own **(a)** exclusive rights on copyrighted works and **(b)** a colossal amount of said works. We can state with little doubt that few amongst the ordinary authors can benefit from the Content ID mechanism. The logical conclusion is disappointing. User's interests are not only set apart with this databasing system but its implementation moreover favours only big and wealthy companies. Strangely, it is the people who need the least protection that receive the most. The opposite is also true.

We have already stated that we had serious doubts about the efficiency of the Content ID mechanism and similar programs. Genuine matching cases can illustrate these fears. Furthermore, it is important to note that those authentic examples have eventually led to a “Notice and Take Down” procedure⁷⁸, as it is set out in YouTube Terms and Conditions. You may recall that this procedure

74 See, for instance: CJEU; (Grand Chamber); Case C-201/13; Johan Deckmyn, Vrijheidsfonds VZW v. Helena Vandersteen, Christiane Vandersteen, Liliana Vandersteen, Isabelle Vandersteen, Rita Dupont, Amoras II CVOH, WPG Uitgevers België; 3 September 2014; available at <http://curia.europa.eu/juris/document/document.jsf?docid=157281&doclang=EN>.

75 L. LEISTER; *YouTube and the law: a suppression of creative freedom in the 21st century*, *Op. Cit.*; p. 119.

76 UMG Recordings, Inc. vs. Veoh Networks, Inc.; 665 F Supp. 2D 1099; 1116 (C.D. Cal. 2009).

77 <http://support.google.com/youtube/answer/1311402>.

78 Most of the following examples come from A. S. TARBELL; *Don't tread on me: the need for an alternate dispute resolution process for the creators and uploaders of user-generated content*; *Op. Cit.*; p. 40.; TASSI P.; *The injustice of YouTube ContentID crackdown reveals Google's darkside*; <http://www.forbes.com/sites/insertcoin/2013/12/19/the->

directly derives from the legal obligations of article 14 and 15 of the e-commerce directive⁷⁹.

A. A video showed a user of the website growing and harvesting salads in his garden⁸⁰. Of course, the action was shot outside and some sounds of nature like bird's tweets or wind were recorded. Nevertheless, the music licensing company “Rumbelfish” claimed copyright over the video that was eventually taken down by YouTube. Here, there was no possible copyrighted material on the video. No background music nor artistic picture of a salad. Just a pure record of a man gardening in his property. This example is rather bizarre but it illustrates perfectly the lack of power of the users on UGCS. Once a copyright holder has decided to have a content taken down, the user has almost no chance to reverse this situation. In this case, the user first received the notice that Content ID found a match between his video and Rumbelfish database. Of course, he rejected the accusation and opposed the fact that he could be held responsible for any infringement of that sort. His answer was rejected. Rumbelfish confirmed to YouTube that their rights have been violated and the music company consequently gained control over the user's video. Here, the difference between a salad and a “cabbage” can be hard to find...

B. With the criterion of “*intellectual creation of the author reflecting his personality and expressing his free and creative choices in the production of that work*”⁸¹, a political speech can assuredly be protected by copyright. In the quoted video, Barack Obama, the President of the United States of America was *not* explaining a political view. The president was singing a few lyrics of “Let's Stay Together” of Al Green, in a video-montage made by the Republican Party⁸². As in the first example, the company BMG Rights Management bypassed this flagrant exception of “fair use”⁸³ and eventually blocked the video. For what reason? Simply because the company claimed that it was the holder of the copyrighted song. This conclusion is all the more strange as you realise that the footage of the President singing is still available in several other videos that have not been blocked or muted⁸⁴. Thus, we are here, once again, confronted to the flaws of this system that leaves the

injustice-of-the-youtube-content-id-crakedown-reveals-googles-dark-side/.

79 And especially of the DMCA approach. Directive 2000/31/EC; *Op. Cit.*; p. 8 of this work.

80 A. BAID; *Copyright kings are judge, jury an executioner on YouTube*; www.wired.com/business/2012/02/opinion-baiodmcayoutube/.

81 CJEU; Case C-145/10; Eva-Maria Painer vs. Standard VerlagsGmbH and Others; 1 December 2011; *Op. Cit.*; p. 5 of this work.

82 T. B. LEE; *Music publisher uses DMCA to take down Romney ad of Obama crooning*; ARSTECHNICA; 16 July 2012; www.arstechnica.com/tech-policy/2012/07major-label-uses-dmca-to-take-down-romney-ad-of-obama-crooning/.

83 Even if this video happened in the context of the DMCA, one can imagine that European exceptions like parody or quotation could have been upheld in this case.

84 For instance, here is the footage of NBC News: <http://www.youtube.com/watch?v=d8Qu8nThJ5w>.

“wolf” to decide which content can survive on the platform, at its own discretion⁸⁵.

C. A last example will certainly convince the reader that the current databasing system does not strike a balance between the rights and obligations of each party on UGCS. Everybody knows “Curiosity”, the sympathetic NASA robot that departed to Mars with the objective of collecting data and samples on the Red Planet. However, few people know that copyright issues can actually travel through space. The video of “Curiosity” landing on Mars, was displayed by NASA on YouTube. The goal of the American Society was to upload it in a public domain approach⁸⁶. The Space Administration was proud to put this video on YouTube so that everybody could enjoy this “giant leap for mankind”. The clip remained viewable for about ten minutes. Right after, the message “*This video contains content from Scripps Local News, who has blocked it on copyright grounds*” appeared⁸⁷. Even if the problem was fixed later on, NASA insisted that it was not the first time that the private news company impeded the broadcasting of its free-copyright material. Since then, the National Aeronautics and Space Administration has tried to negotiate with YouTube to fix this kind of problem, in vain.

We will conclude this part with a quote that perfectly illustrates the issue:

*“The good thing about automation is that you don’t have to involve real people to make decisions. The bad thing about automation is that you don’t have to involve real people to make decisions”*⁸⁸.

85 H. ANJANETTE RAYMOND; *Heavyweight bots in the clouds: the wrong incentives and poorly crafted balances that lead to the blocking of information online*; Northwestern Journal of technology and intellectual Property; 2013; Volume 11, issue 6, article 1; p. 498.

86 A. PASTERNAK; *NASA’s Mars rover crashed into a DMCA takedown*; MOTHERBOARD; <http://motherboard.vice.com/blog/nasa-s-mars-rover-crashed-into-a-dmca-takedown>.

87 A. EAKMAN; *The future of the digital millenium copyright act: how automation and crowdsourcing can protect fair use*; Indiana Law Review; Volume 48, number 2; USA; 2015; p. 631.

88 A. PASTERNAK; *NASA’s Mars rover crashed into a DMCA takedown*; MOTHERBOARD; <http://motherboard.vice.com/blog/nasa-s-mars-rover-crashed-into-a-dmca-takedown>.

4. Internal machinery

4.1. YouTube's system

Now that we have analysed the relevant legislative provisions regarding user-generated content, we need to have a look at the contractual context of a UGCS like YouTube. Indeed, if on one hand the European directives and national laws have shaped the safe-harbour mechanism, on the other hand, Terms and Conditions are directly affecting the fate of the users.

Let us examine if the Terms and Conditions of YouTube preclude the application of exceptions to copyright and what exactly the users are agreeing to when they enter the site.

4.1.1. “Terms and conditions may apply”

This title refers to an extraordinary bluffing documentary directed by Cullen Hoback⁸⁹. With his research, he demonstrated how easily people are agreeing to contractual conditions on the Internet and what it implies in terms of privacy, information and business-models. He especially focused on user-generated content sites like Facebook and YouTube.

In the case of YouTube, you will have to agree to the “Terms of Service” of the site if you want to use the platform. In the scope of this study, we will only focus on the “Terms of Service” for European citizens⁹⁰.

A.) Scope and limits of the Terms

It would be foolish to think that it is sufficient to accept the “Terms of Service” to get rid of other obligations. In fact, clause 1.2 of the contract states clearly that:

“1.2 Your legal agreement with YouTube is made up of (A) the terms and conditions set out in this document [the “Terms of Service”], (B) YouTube's Privacy Policy⁹¹ and (C) YouTube's

89 See the trailer at <http://www.youtube.com/watch?v=zyafieRcWE>. The documentary was released the 12th of July 2013 in the USA.

90 This choice seemed to be the most logical as regard to the language of this work. See it at <http://www.youtube.com/t/terms?gl=GB>. We will return to the Belgian Terms and Conditions at the end of this part.

91 <http://www.google.co.uk/intl/en-GB/policies/privacy/>.

*Community Guidelines*⁹²”.

In short, the Terms include three joined parts. If one can doubt that most users even read the first part of the contract, it is even more unlikely that they have thoroughly read all the other information before agreeing to the Terms and Conditions. Terms of Service are around six pages long, YouTube's Privacy Policy is around ten and the Guidelines contain more than a dozen pages, thus an approximate total of thirty pages of contractual material. This impressive amount of information is largely ignored by users that carelessly agree to it in a split second. We will now analyse what those Terms imply for the UGC issue. Although we will mainly focus in this part on the “Terms of Service” that enclose most provisions on user-generated content, please keep in mind parts (B) and (C) of the Terms and Conditions.

The Terms have quite a large scope. In fact, it is said that:

*“1.4. The Terms apply to all users of the Service, **including**⁹³ users who are also contributors of Content, on the Service. “Content” includes the text, software, scripts, graphics, photos, sounds, music, videos, audiovisual, combinations, interactive features and other materials you may view on, access through or contribute to the Service”.*

Consequently, the contractual conditions not only concern creators and broadcasters of the site, but even people using the services proposed by YouTube (like the “comment” section, below a video). In addition, the Terms clearly state that

“(2.3) You can accept the Terms by simply using the Service. You understand and agree that YouTube will treat your use of the Service as acceptance of the Terms from that point onwards”.

We doubt that most people are fully aware of the implications of this statement.

When comparing the “content” mentioned here with the concept of “information” of article 14 of the e-commerce directive⁹⁴, we can see many similarities. First, both encompass many practical applications. Besides, the list of YouTube's “content” doesn't seem to be exhaustive, as the terms

92 <http://www.youtube.com/yt/policyandsafety/en-GB/communityguidelines.html>.

93 Emphasis added.

94 Directive 2000/31/EC; *Op. Cit.*; p. 8 of this work.

“other material” seem to suggest. Second, the two concepts only don't seem to refer only to copyrighted material. “Information” and “Content” should both be understood as all constituent parts of the structure of the hosting platform, whether subjected or not to an intellectual property right.

Moreover, the Terms are not set in stone. Rather the opposite:

“3. Changes to the Terms

YouTube reserves the right to make changes to the Terms from time to time, for example to address changes to the law or regulatory changes or changes to functionality offered through the Service”.

It can be concluded from this extract that users are not safe from crucial changes appearing in the Terms that could drastically change their status. We could add that there is no contractual provision obliging YouTube to personally inform a user of such changes. On the contrary, it's the user him/herself who has to regularly consult YouTube's pages to ascertain that no changes have occurred to his/her contractual obligations⁹⁵.

If one wishes to terminate the contract with YouTube, two ways are available in clause 11.2 of the contract. One way is to **(a)** notify your decision to YouTube's address in writing; the other one is to **(b)** close your YouTube account. These procedures suggest an active implication of the user. It is doubtful that most of them will resort to solutions of this length when they want to quit. They will probably merely stop using the Service. But few realise that it is not sufficient to fully terminate the contract.

In a more passive way, clause 11.3 of the Terms provides that: “YouTube **may**⁹⁶ at any time terminate its legal agreement with you if:

- 1. You have breached **any**⁹⁷ provision of the Terms (or accepted in manner which clearly shows that you do not intend to, or are unable to comply with the provisions of the Terms);*
- or*
- 2. YouTube is required to do so by law”.*

⁹⁵ See paragraph 2 of clause 3 of the Terms of Service.

⁹⁶ Emphasis added.

⁹⁷ *Ibidem*.

We can infer from the first sentence that the site “may” or may not decide to terminate the contract with the user, apparently at its own discretion. One may ask on what basis the site would make this choice⁹⁸. Furthermore, it should be noted that “any” breach of the Terms (remember that they entail several dozens of pages) may suffice to induce the termination of the contract. The sanction seems particularly strict.

B.) Restrictions on use

When agreeing to the Terms, you do not only receive the right to use the Service but you also submit yourself to several obligations⁹⁹. Three relevant sets of conditions restrict the use and the broadcasting of the content on YouTube. Two of them are positive obligations, the last one is not.

At clause 7.4 of the Terms of Service, you have to assert that you possess “*all¹⁰⁰ necessary licences, rights, consents, and permissions which are required to enable YouTube to use your Content [...]*”. We can already note at this point that the requirement is hard to obtain for any kind of user, because it implies that you are certain to have “all” rights concerning the content you wish to upload. If we put aside the cases of reviews and pastiches where consents and permissions are almost impossible to obtain from the concerned parties, clause 7.4 raises other problems. For example, how can the average user be certain that he possesses “*all the necessary licences*”¹⁰¹? Another problem lies between brackets in the same article of the Terms. In fact, clause 7.4 also provides that you shall have these rights and consents at the time of the agreement “*(and [that you] will continue to have [them] during your use of the Service) [...]*”. As consents and permissions may waver over time, this condition may be proven difficult to fulfil. The Terms nevertheless require that the user agrees in total assurance.

Thereafter, clause 7.5 reminds once again that the Community Guidelines¹⁰² are part of the

98 I. GIL'AD; *How to make lemonade from lemons: achieving better free speech protection without altering the existing legal protection for censorship in cyberspace*; Campbell University School of Law; 2014; Volume 36, issue 1, article 5; p. 171.

99 In fact, most starts with the words “*You agree not to...*”. See, for example, clause 5.1., 1-5 of the Terms of Service.

100 Emphasis added.

101 We wish to remind the reader that a person can start to use the platform once he/she attains the legal age to form a binding contract. In average: eighteen years old in EU. In reality, most people uses the site way before that age. We doubt that the vast majority of the users thus know what is a copyright licence and what it implies in terms of costs and investment.

102 See footnote 92, *supra*.

contract. Hence, you have to behave in accordance with those guidelines and you also have to “agree that the content of all of your Content shall comply [with them]”.

Clause 7.7 of the Terms poses a relevant interdiction on use for the purpose of the present work. It provides that:

“You agree that Content you submit to the Service will not contain any third party copyright material, or material that is subject to other third party proprietary rights [...], unless you have a formal licence or permission from the rightful owner; or are otherwise legally entitled, to post the material in question and to grant YouTube the licence referred to in paragraph 8.1 below”.

Here, the site describes its policy about copyrighted materials. As a first step, the Terms simply forbid the user to use “any” content protected by a right¹⁰³. This main principle is then restricted by two exceptions. Either you possess a “*formal licence or permission from the rightful owner*”. But as we have seen it before, this condition poses several problems of proof and continuity. Or else, you benefit from a legal provision to use that said material. Here lies a tremendously important element of the contract between the “goat” and the “cabbage”. In other words, YouTube does *not* contractually erase the legal exceptions to *droit d'auteur*. Therefore, not only imperative exceptions (e.g. private copy in Belgian law¹⁰⁴) can be upheld by the users, but also all exceptions legally recognised in their country. This provision could appear rather obvious but it actually represents one of the few contractual liberties that users can still enjoy on the platform..

One could think that this last clause is a scam and that European users will finally be subjected to American law and its vague¹⁰⁵ exceptions to copyright. In spite of that pessimistic outcome, the last

103 We should specify that in the French version of the Terms, it is not referred to “*copyright*” or “*droit d'auteur*” but rather “*des droits*” without any other precisions. The scope of the French version thus seems more broad than in the UK version. See it at : <http://www.youtube.com/t/terms=FR>.

104 Article 5, 2. b) directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society; available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32001L0029&from=EN>. And its transposition in Belgian law in article XI.229, Loi portant insertion du Livre XI “Propriété intellectuelle” dans le Code de droit économique; *Op. Cit.*; footnote 56 of this work.

105 We especially think about the fair-use exception that will be later addressed in this study.

clause of the Terms of Service is perfectly clear on that matter¹⁰⁶. According to the nationality and the language of the person that agrees to the contract, its national law shall govern “*The Terms, and your relationship with YouTube under the Terms [...]*”. Moreover, the national law will also define the relevant jurisdiction if an issue concerning the Terms arises.

In conclusion, for a citizen of the United-Kingdom, the terms shall be governed by English law and he/she (and YouTube) will submit to the exclusive jurisdiction of the courts of England¹⁰⁷. For a French citizen, the terms shall be governed “*par la loi française*”¹⁰⁸ and he/she (and YouTube) will submit to “*la compétence exclusive des tribunaux français*”. The same logic would apply for a Belgian citizen. At the end of the day, the national and European exceptions to copyright would not be depleted.

Finally, with regard to liability, YouTube's Terms clearly state that “*you are solely responsible for (and that YouTube has no responsibility to you or to any third party for) any breach of your obligations under the Terms and for the consequences (including any loss or damage which YouTube may suffer) of any such breach*”¹⁰⁹. This clause is completing the protection against liability that the safe-harbour may already provide to the hosting provider. As a matter of fact, with this provision, YouTube prevents the user to invoke its shared-responsibility and is thus distancing itself from any legal consequences the user may have caused. Note that YouTube cleverly uses the broader term “responsibility” instead of “liability” to cover as many cases as possible. In this way, YouTube is ensuring for itself a double legal protection: the legislative shield from the directive safe-harbour, and the contractual shield from its Terms.

C.) A “limited” licence

When a user decides to diffuse content on the site, specific consequences occur. Firstly, the Terms reassure the contractor: “*You retain all of your ownership rights in your Content [...]*”¹¹⁰. After pages of one-sided obligations, YouTube finally seems to recognise some rights to the users. However, this satisfactory discovery is of short duration. Clause 7.2 continues: “..., but you are

106 Clause 14.6 of the Terms of Service.

107 <http://www.youtube.com/t/terms?gl=GB>.

108 <http://www.youtube.com/t/terms=FR>.

109 Clause 5.6 of the Terms of Service.

110 Clause 7.2 of the Terms of Service.

required to grant limited licence rights to YouTube and other users of the Service. These are described in paragraph 8 of these Terms (Rights you licence)”. Here, the hosting provider doesn't require full rights concerning the contents but only a “limited” licence. The reason of this choice is obvious. If YouTube obtained all patrimonial rights over the information, directive 2000/31¹¹¹ wouldn't allow the site to keep its safe-harbour status. Indeed, in such a case the position of the UGCS would most certainly be judged inconsistent with article 14, last paragraph¹¹². With regards to this logic, one can concede that a “limited” licence is a fair price to pay to let the user enjoys the services of YouTube.

But what do the Terms exactly mean by a “limited” licence? According to clause 8. (Rights you licence):

“8.1 When you upload or post Content to YouTube, you grant:

1. to YouTube, a worldwide, non-exclusive, royal-free, transferable licence (with right to sub-licence) to use, reproduce, distribute, prepare derivative works of, display and perform that Content in connection with the provision of the Service and otherwise in connection with the provision of the Service and YouTube's business, including without limitation for promoting and redistributing part or all of the Service (and derivative works thereof) in any media formats and trough any media channels; [...].”

The so-called “limited” licence seems awfully complete. For any non-lawyer user of the site, the licence described has all the characteristics of an oxymoron. In fact, it seems that the only feature missing to that licence is exclusivity. The extent of the possibilities appears almost infinite. Please note that further in the same clause, the Terms also provide a gigantic licence (although with less potential) to “*each [other] user of the Service*”¹¹³. In conclusion, once your content has been put on the site, you nearly lose all control over it. You can almost only proclaim that you keep ownership, author's moral rights (generally considered as inalienable¹¹⁴) and (some) commercial uses of you work.

111 Directive 2000/31/EC; *Op. Cit.*; p. 8 of this work.

112 On this point, see page 15 of the present study.

113 Clause 8.1, sub-point 2 of the Terms of Service.

114 This touchy issue would deserve some development. For more information, see for example: M. SALOKANNEL, A. STROWEL; *Study contract concerning moral rights in the context of the exploitation of works trough digital technology*; Final report; Commissioned by the European Commission's Internal Market; 2000. pp. 3-225.

It may be assumed that the Terms of Service are using the word “limited” to indicate the temporal application of the licence. Either way, the wording may confuse the ordinary contractor. In fact, further in the Terms of Service, it is specified that the licence terminates when you remove or delete your Content from the website¹¹⁵. We should add that it is not the case for a very peculiar sort of content (that can also sometimes be qualified as “original work protected by *droit d'auteur*”), i.e. “textual comments” that one can post under a YouTube video. For these comments, the Terms provide a “perpetual and irrevocable” licence to the site. Nevertheless, we shall not dwell on those “comments” in the scope of this study.

D.) Conclusions

We have examined some relevant provisions of the Terms, but we should remember that the complete contractual package of YouTube is far more consequent than these sole extracts. Confronted to such an intimidating load of documents, it is no surprise that the average user neglects to read carefully each and every line of its contract with the site. The aforementioned documentary film¹¹⁶ arrived at the same conclusion. However, for those who would delve further into the Terms, many surprises await.

First, the agreement actually consists of three different parts that delimit the rights and obligations of YouTube and the site's users. In other words: **(a)** the “Terms of Service” that represent the main body of the contract and regulate the responsibility of each contractor; **(b)** YouTube's Privacy Policy that deals with personal information issues and last, **(c)** YouTube's Community Guidelines, which defines the appropriate uses of the platform and the practical consequences of a misuse. In part A.) we have also seen that the scope of the Terms was really large and that every category of user was affected. Moreover, we have seen that the current obligations were likely to change at every moment, while YouTube enjoys a great liberty to decide when it wishes to terminate the contract.

Second, the agreement poses a really difficult condition to fulfil: to obtain “*all*” rights, consents and permissions surrounding the content you wish to upload. Incredibly problematic to gather, those various proofs may become impossible to maintain over time. With this clause, the website put the user under much pressure and can easily terminate the contract on the ground that the “cabbage”

¹¹⁵ Clause 8.2 of the Terms of Service.

¹¹⁶ HOBACK C.; *Terms and Conditions may apply*; *Op. Cit.*; footnote n° 78.

committed a breach. For users that need parts of third party material to upload their own content, this clause is a real nightmare. If they want to act in good faith, they will need to be absolutely certain that the required rights and consents will not fail them.

In addition, we have seen that the contractual conditions of the Terms of Service did not prevent the use of EU copyright law. Firstly, the Terms allow exceptions to *droit d'auteur* to operate on YouTube. In this light, a user will be able to circumvent the expensive solution of taking a systematic licence, if he respects the legal conditions. Secondly, European tribunals (i.e., the national courts and tribunals, depending on the concerned user) will have full power to decide **(a)** if the Terms are lawful according to their law, and **(b)** if one of the contractor has perpetrated a copyright infringement or a breach of the contract.

We have also noted that the “goat” chose to consolidate its legal protection on the contractual side. With the assurance of safe-harbour and an ingenious clause of limitation of liability¹¹⁷, the hosting provider is thus protecting all of its flanks.

Third, we observed that the so-called “limited” licence that YouTube requires from its users is not really limited, at least in the common meaning of the word. In our view, a licence is absolutely required for the site to function. Yet, we have some doubts about the necessity for YouTube to request a licence as extensive as the one stated in its current Terms.

It is in these conditions that the users may enjoy the services of the hosting provider. For a fair number¹¹⁸ of them, creating content on the platform is their main economical activity. Their revenues are directly generated by the ads displayed on the site before and during their videos. For this new economic sector, the contractual conditions are a little bit more complicated than the standards Terms we just described.

117 Clause 5.6 of the Terms of Service. We shall see clause 13 of the Terms about another kind of limitation of responsibility in a later part.

118 To the best of our knowledge, there are no official statistics on this subject.

4.1.2. Monetised content

YouTube offers the opportunity to earn revenues from the videos you submit. In the business jargon, the operation that consists in inserting ads before, during or besides the video is called “monetisation”. It is with this technical solution that YouTube, users and some copyright holders carry out their professional activities. However, a few conditions need to be fulfilled before one can proclaim him/herself professional “YouTuber”. Two additional agreements have to be concluded.

First, you need to enter the “*YouTube Partner Program*” (YPP) in order to enable the option to monetise one or all of your videos¹¹⁹. Several criteria establish who may enter this program and who may not. We could quote the criterion of a “*good standing account*” or the simple fact that the program has to be available in your country¹²⁰. For the sake of this study, we will only focus on the contractual obligations that derive from the YPP and the Terms and Conditions. To enter this program, YouTube insists once more on the mandatory character of its Terms of Service and Community Guidelines. Before analysing the relevant clauses of the Terms regarding monetisation of the user's content, let us specify the final step required to obtain ad revenues on this UGCS.

The user will be asked to agree to Google's “AdSense” Terms of Service¹²¹. This contract is completely independent from the Terms of Service of YouTube described before. It is a separate agreement that only concerns YouTube creators who wish to monetise their videos. The structure of this contract however bears certain resemblances. In addition to the Terms of Service of “AdSense”, you need to agree to the AdSense Programme Policies¹²² and the Google Branding Guidelines¹²³. This three parts of a single contract (“The Agreement”) mainly set the conditions for a user to receive its share of the ad revenues. The system is based on thresholds. There is a threshold for the number of views a video has harvested and another one for the number of people who have clicked on or seen an ad. From those numbers, AdSense then calculates the percentage of revenues the user can claim. Once a user has accumulated enough views and clicks for its content, the final sum is paid to him at the end of the month¹²⁴.

119 <http://support.google.com/youtube/answer/72851?hl=en>.

120 We will not detail those criteria in this study. To learn more on the subject, see:

<http://support.google.com/youtube/answer/82839> and <http://support.google.com/youtube/answer/72857>.

121 <http://www.google.com/adsense/localized-terms>.

122 http://support.google.com/adsense/answer/48182?utm_source=aso&utm_medium=link&utm_campaign=ww-ww-et-asfe_.

123 <http://www.google.com/wssynd/02brand.html>.

124 Clause 5 of the Terms of Service of AdSense. Also, see the thresholds at :

The advertising on YouTube is strictly supervised. Indeed, the “goat” doesn't want to see its users starting to undermine its main source of revenues. Therefore, the Terms of Service provide for specific clauses related to the commercial aspect of user-generated content. The user agrees¹²⁵ :

“[...] not to use the Service (including the YouTube Player) for any of the following commercial uses unless you obtain YouTube's prior written approval:

1. The sale of access to the Service

2. The sale of advertising, sponsorships or promotions placed on or within the Service, or Content; [...]

F. Prohibited commercial uses shall not include (i) uploading an original video to YouTube, (ii) maintaining an original channel on the Website in order to promote a business or artistic enterprise, [...]”

Therefore, the only way for a user to earn money with ads is to cooperate with YouTube. The Terms preclude him from choosing other partners, even if the video is his own original creation. His/her only choice is to accept the various Terms, leading to a situation where YouTube takes 45% of the gross revenue¹²⁶. Please take into account that a copyright right-holder may decide to monetise all or part of a video (without worrying too much about the legitimacy of his claim) and you will conclude that, in many cases, users scarcely obtain their rightful share.

4.1.3. Copyright notice and three strikes rule

It is also necessary to tackle the issue of “Take Down and Notice Procedures” in this study. In fact, it is because of the DMCA provisions and articles 14 and 15 of the e-commerce directive¹²⁷ that hosting providers have to take action once they are aware of the infringing nature of an “information”¹²⁸. Whether with the help of a dedicated databasing software, or as soon as a copyright owner has unilaterally contacted the platform about a specific content.

<http://support.google.com/adsense/answer/154018?hl=en>.

125 Clause 5, E and F of the Terms of Service.

126 M. JOHNSTON ; *Why you probably won't get rich & famous on YouTube*; <http://monetizepros.com/blog/2014/why-you-probably-wont-get-rich-famous-on-youtube/>.

127 Directive 2000/31/EC; *Op. Cit.*; p. 8 of this work.

128 As defined by the Directive; *Ibidem*.

We have already highlighted the fact that some “wolves” may be tempted to use this legal requirement to monopolise content, jeopardising in this way the liberty and creativity of the users¹²⁹. But we have yet to describe in which cases such power can be applied and what choices the copyright right-holders have at their disposal.

YouTube Community Guidelines¹³⁰ make the distinction between what they call “*Content ID claim*” (in short: the “Claim”) and “*Copyright Strikes*” (in short: a “Strike”)¹³¹. We shall analyse separately these different sanctions affecting users.

The former one is directly linked to the databasing software we already examined, i.e “Content ID”. It is the first step a UGC may encounter before being actually taken down. What does this “Claim” means? According to YouTube Guidelines¹³² it happens when: “[...] *We found some material in your video that's owned by someone else*”. From the previous examples we gave¹³³, one may really doubt that this is always true¹³⁴. More concretely, the companies that are part of the Content ID system receive an alert from the software that a video contains the same “*signature vectors*” as their copyrighted material. At this stage, the “wolf” has four available options:

a.) Blocking the video in one or several countries. This decision can even have a worldwide effect. It entails that the copyright holder makes sure that users won't be able to access the content. This action has to be distinguished from a pure suppression (or “take down” measure). In fact, by blocking the video, you merely deny the access to the viewers, but the content remains on the platform. We should also indicate that all copyright holders are not equal before YouTube. In fact, some of them (called “preferred partners”) are authorized by the website to *directly* block a video they would judge infringing their rights¹³⁵. For these preferred partners, a match executed by Content ID is not required before

129 See *supra*, pp. 25-26.

130 That are part of the general Agreement seen above.

131 <http://www.youtube.com/yt/copyright/#yt-copyright-education>.

132 <http://support.google.com/youtube/answer/6013276>.

133 See part 3.2 of this work, *supra*.

134 For instance, in the Warner v. Hotfile case, it has been proven that even the dedicated employees to seek and take down infringing content didn't even check nor downloaded the litigious content before confirming its suppression: Disney Enter.; Inc. v. Hotfile Corp.; No. 11-20427-CIV.; 2013 WL 6336286; S.D. Fla.; 20 September, 2013.

135 See A. BAID; *Copyright kings are judge, jury an executioner on YouTube*; at <http://www.wired.com/2012/02/opinion-baiodmcayoutube/>. The article mentions, for example, the Universal Music

taking action.

b.) Muting the video. By doing so, they remove all sounds from the content. This solution may be seen as a good countermeasure to illegal copies of copyrighted songs and musics. Its only flaws resides in the legitimacy of the “Claim” and its proportionality, when the infringing soundtrack is not the only material composing the video.

c.) Monetising the content. With this possibility, the copyright holder can either add advertisement to the relevant video, or take the revenues from these ads, if they existed beforehand. YouTube specifies in its Guidelines that: *“In most cases, you can't monetize a video that has a Content ID claim. Instead, the copyright owners can choose to monetize your video”*¹³⁶. Here, the biggest problem is that many people rely solely on UGCS to make a living. When a “wolf” monopolises the ads revenues of a UGC creator on an unfounded or inappropriate “Claim”, he threatens the economical situation of that person.

d.) Blocking certain platforms. Finally, the copyright holder can choose not to restrict the access to the video on YouTube nor change its features, but only to narrow the access to content to specific channels. In such a case, the “wolf” could, for example, deny the viewing of a YouTube video on certain websites.

It is indeed an impressive arsenal of possibilities that the UGCS offers to copyright right-holders¹³⁷. It could be argued that it would be for the best if the latter could use these solutions with parsimony. Fortunately, the website provides the user with a procedure to dispute a “Claim”, he/she would find unfounded. We will elaborate further on that procedure in part 4.2.2. .

The second and final notice a user could receive concerning copyright infringement is called by YouTube a “ Copyright Strike”¹³⁸. This “Strike” will be sent to the user in two cases. First, at the end of a “Content ID Claim” procedure, if the user repetitively dispute the fact that its video is

Group as one of them.

136 <http://support.google.com/youtube/answer/6013276> .

137 R. S. ABIGAIL; *Contracting in the dark: casting light on the shadows of second level agreements*; William & Mary Business Law Review; Volume 5, issue 1, article 8; 2014; pp. 315-316.

138 <http://support.google.com/youtube/answer/2802032?hl=en>.

infringing a copyrighted material. In such a case, YouTube may enable the copyright holder to “take down” the content, or in other words, delete it from the website. The other case would happen when the copyright holder fill in a “*complete legal request*”¹³⁹ to the hosting provider to suppress the disputed video.

Once *one* “Strike” has been received, the user loses several features of his/her video, including the possibility to monetise it¹⁴⁰. When *three* “Strikes” have been accumulated, the user's account and access to the Service is purely and simply terminated. The Community Guidelines and the Terms of Service should be read jointly on that matter. Clause 6 of the Terms accordingly states that:

*“6.2 As part of YouTube's copyright policy, YouTube will terminate user access to the Service if a user has been determined to be a repeat infringer. A repeat infringer is a user who has been notified of infringing activity more than twice”*¹⁴¹.

The Community Guidelines are linking two more consequences to a third “Strike”:

*“If you receive three copyright strikes, your account will be terminated. All the videos uploaded to your account will be removed. Users with terminated accounts aren't able to create new accounts”*¹⁴².

Please note that you may only succeed to dispute a “Strike” in two situations. Either by getting a retraction from the copyright holder, or by sending a counter notification to YouTube. Let us be clear on this matter: succeeding will be very hard. Indeed, it is definitely doubtful that a “wolf” will turn back after taking the time to send a “complete legal request” to the UGCS.

In conclusion, the consequences of getting three consecutive “Strikes” are particularly serious. A user who collects them would be completely deprived of his/her revenues. The sanction would touch not only the disputed videos but all his/her previous work. All the traces of his/her presence

¹³⁹ *Ibidem*.

¹⁴⁰ *Ibidem*.

¹⁴¹ Clause 6.2 of the Terms of Service.

¹⁴² <http://support.google.com/youtube/answer/2814000?hl=en>.

on the platform would be wiped out.

One should not be too severe with the “Take Down and Notice Procedure”, as it prevents genuine fraudsters to misuse the system. Actually, it precludes them from taking another identity (or account) to endlessly repeat their misdeeds towards *droit d'auteur*. Our only fear is that this powerful procedure might be used to target UGC creators who are in perfect compliance with the copyright regime and its lawful exceptions. As illustrated, in previous examples, this fear is not irrational but rather based on genuine experiences. Nevertheless abuses of “Strikes” *should*¹⁴³ be less frequent than for “Claims”, as the procedures are much more detailed and demanding for the former one.

One last clause deserves some lines of comments. In fact, YouTube has once more foreseen the economic and legal consequences that such a procedure would have on the users. Clause 13 of the Terms of Service¹⁴⁴ provides that:

“13. Limitation of liability [...]

13.2 [...] YouTube shall not be liable to you for:

1. any indirect or consequential losses which may be incurred by you. This shall include; (i) any loss of profit [...]; any loss of goodwill or business reputation; (iii) any loss of opportunity; or (iv) any loss of data suffered by you;”

This provision should be linked with clause 5.6 we examined in part 4.1.1. B), *supra*¹⁴⁵. Both are related to a limitation of responsibility of YouTube. Although a distinction should be made. The purpose of clause 5.6 was to protect the website against the consequences of infringing acts the user would commit, whereas clause 13 has been provided to avoid any responsibility when a user encounters economic misfortunes caused by the system. With this double contractual protection against responsibility plus the help of the legal safe-harbour, the hosting provider can efficiently shield its interests.

¹⁴³ We have no proof that it would be currently the case, as no official records of these “Claim” and “Strike” have been made available to the public. *A contrario*, videos criticising this issue actually exist. See, for example, footnote 39 of this work. .

¹⁴⁴ Clause 13 of the Terms of Service.

¹⁴⁵ See footnote 109 of this work.

4.2. Chilling effect

The legal and contractual structure of UGC we just detailed leads to numerous problems for the users. UGC creators who rely on ads to make a living are in a precarious or fragile position. On one hand, they know (or at least, they should know) that any mistake from their part could threaten their works and, thereby, their revenues. On the other hand, they can't even be confident in the impartiality of the system. Either "Content ID" may fail to understand that their content is lawful or that it fall under an exception to *droit d'auteur*. Or else, greedy or misinformed copyright right-holders may want to take over their content or delete it.

Another extremely important issue should be addressed. As explained *supra*, the main goal of copyright related legislation is to promote and protect the creation of works of arts and literature¹⁴⁶. However, with the current structure of the UGC world, this objective is greatly impaired. In fact, a "chilling effect" has been put into place that reduces the willingness and the possibility for people to freely create original content and to upload them on the platforms. This "chilling effect" exists at two stages: when a user wants to create something; and when he/she wishes to dispute an unfounded claim of copyright infringement.

4.2.1. Fear to use

In science as well as in culture, material produced by other people can sometimes be essential or can be a source of inspiration for a user to create his/her own content. But this operation entails many risks. The whole system of UGCS is made in a way that prevents users to freely use material build by a third person. It is good news. Copyrighted works should be protected to encourage creativity and innovation. However, a too strict approach will have the exact opposite effect. When a creator can't risk to *lawfully* use the copyrighted content of somebody else, innovation is in peril.

This is what's happening on YouTube. Both the Community Guidelines and the Terms of Service¹⁴⁷ are drafted in a way that is intimidating the user, instead of merely warning him/her. One could wonder if this feeling is of voluntary nature or not. The most telling example would be clause 11.3 of the Terms¹⁴⁸, we have already examined. As a reminder, this clause provides that "any" breach of

146 See for instance: World Intellectual Property Organisation, WIPO Copyright Treaty, Preamble; 20 December 1996; available at http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html and Directive 2000/31/EC; *Op. Cit*; p. 8 of this work.

147 We remind the reader that both are part of the global contract between the website and its user (the "Agreement").

148 See p. 29 of this work, *supra*.

the contract may be enough to terminate the relationship between the hosting provider and the “cabbage”.

We have also seen that the user needs to gather “all” rights, permissions and authorisations to use parts or the whole content produced by a third person. The difficulty¹⁴⁹ of this task and its fragile continuity have been discussed before. Such a clause can only repel most users to even try to use useful material¹⁵⁰. Only creators who benefit from a good economic support and sound legal knowledge can give it a try¹⁵¹. Although not even in all cases. Costs of soundproof licences can sometimes be so high that some creators have to cut in the middle of their work to remove the copyrighted passage. In some cases, creativity and freedom of expression of the creators are even hindered because of the very costs of copyright licences¹⁵².

It is not our intention to draw an entirely gloomy picture of the UGCS. It appears that users have realised this issue and have started to find different solutions to this matter. Sites like “Loudr.fm”¹⁵³ have recently been created to provide users of UGCS with solid and not too expensive licences. As an illustration, some famous “YouTubers” like Peter Hollens¹⁵⁴ currently use this system. But it does not resolve everything. Mainly because those sites often focus on “covers” licences and music-related rights. As we know it, the meaning of “content” is broader than this sole aspect.

4.2.2. Fear to voice

In another vein, users particularly suffer from intimidation to voice their discontent. We have said that YouTube provided for specific procedures for users who want to dispute a “Claim” or a “Strike”. These procedures operate in three steps. First, the copyright holder applies for a “Claim” or fills in a “complete legal request”.

Then, YouTube allows the involved user to dispute the complaint if he/she thinks that the content has been misidentified or has fallen under a false claim. In fact, disputes, “Claims” or “complete

149 Or impossibility, in some cases, e.g. when the copyright holder is unknown or when the conditions of the licence have changed.

150 P. MCKAY, *Culture of the future: adapting copyright law to accommodate fan-made derivative works in the twenty-first century*; *Op. Cit.*; p.126.

151 This is more the exception than the rule. See an illustration : F. ODUOL ODUOR; *The internet and copyright protection: are we producing a global generation of copyright criminals*; *Op. Cit.*; p. 508.

152 P. S. MENELL, B. DEPOORTER; *Using fee shifting to promote fair use and fair licencing*; *Op. Cit.*; p. 75.

153 <http://loudr.fm/>.

154 Peter Hollens is a famous music and song creator on YouTube. Most of his first videos were “covers” of other artists. See him at : <http://www.youtube.com/user/peterhollens>.

legal requests” should not be started without good reasons¹⁵⁵. On that point, YouTube is quite clear. But the user is warned in a rather aggressive way about the consequences he/she would face if the dispute is rejected¹⁵⁶.

These cold warnings occur all across the Terms of Service and the Community Guidelines. For example, when you wish to counter a “Content ID Claim”, the Guidelines specify that¹⁵⁷: “*If you dispute a claim without a valid reason, the copyright owner may choose to take down your video. If it happens, your account will get a copyright strike.*”. The threat is real. We have seen what serious consequences a “Strike” may have for the activities of a user¹⁵⁸. If it was the only warning related to the right of users to voice their concerns, we could take it as a commendable advice. Unfortunately, this kind of chilling sentence is not an isolated case.

In the third step of the procedure, the “wolf” can decide to either withdraw the “Claim” or “complete legal request”, or to take down the video. The only requirement to do so is for them to: “[...] *believe their claim is still valid*”¹⁵⁹. In such a case, the consequences for the user are quite serious. The “cabbage” risks to “*get a copyright strike*” on his/her account. Worse than that: copyright owners “*may eventually choose to take legal action against you*”¹⁶⁰. These are logical consequences in the current legal framework of UGC. Nonetheless, the very legitimacy of such claims have been greatly challenged, since it has been proven that 57% of them were directed towards direct competitors of the claimant, while 37% were simply invalid claims¹⁶¹.

In most cases, users will choose to stop at the first step, in order to avoid any disagreement¹⁶². The mere fact that they assume that their content is not infringing any copyrighted material is not often sufficient to counter the fear that copyright holders may win the argument. Users are not prepared for the consequences. The only remedy they could find is before courts and tribunals. As said before, YouTube managed to protect itself from any legal actions in such circumstances. Bringing

155 The period of time required to counter a claim is estimated around one full month on YouTube: A. EAKMAN; *The future of the digital millenium copyright act: how automation and crowdsourcing can protect fair use*; Op. Cit.; p. 633.

156 B. BUCKLEY, *SueTube: Web 2.0. and copyright infringement*; Op. Cit.; p. 237.

157 <http://support.google.com/youtube/answer/2797454?hl=en>.

158 See footnote 141 and 142, *supra*. Especially the following sentence that could also be included in “chilling warnings”: “*If you receive three copyright strikes, your account will be terminated. All the videos uploaded to your account will be removed. Users with terminated accounts aren't able to create new accounts*”.

159 *Ibidem*.

160 *Ibidem*.

161 A. S. TARBELL; *Don't tread on me: the need for an alternate dispute resolution process for the creators and uploaders of user-generated content*; Op. Cit.; p. 40.

162 See footnote 39 and 42; *supra*.

an action before a court is too much of a hassle for the users to even try it. The financial costs of an action¹⁶³, the risk of aggravating the situation and the time it would take to get a result are important barriers to litigation. Therefore, it is no surprise that few cases (if any) have been brought before European courts and tribunals on that matter¹⁶⁴. The explanation might be that users dare not do it, so that copyright right-holders are satisfied by such inertia.

163 Please note that while punitive damages don't exist in EU law, the basic costs of any legal action can discourage most of the users to bring an action against the copyright holders. A. S. TARBELL; *Don't tread on me: the need for an alternate dispute resolution process for the creators and uploaders of user-generated content*; *Op. Cit.* ; p. 42.

164 J. BENJUMEA MORENO; *Publisher or technical provider? Monitoring as editorial control and the safe harbor of art. 14 e-commerce directive*; p. 673. The situation is quite similar in the USA: P. MCKAY , *Culture of the future: adapting copyright law to accommodate fan-made derivative works in the twenty-first century*; *Op. Cit.*; p.122.

5. How to achieve the balance?

In this last part, we will dwell on some potential solutions regarding the UGC stalemate. Neither we nor the authors who suggested these solutions can't guarantee their efficiency. Only actual practice could reveal which one would work. However, when comparing these various recommendations, we discovered that some of them would make more sense than others in the legal European framework. Therefore, we will further insist on those.

We will first discuss the legislative solutions that could somehow modify or suppress the current provisions from directives and national laws. In a second point, we will address the more technical and contractual changes that could and should occur. Finally, we will see why a “mixed” approach between these two aspects of the problem might be the best answer to achieve a better balance in the UGC field.

5.1. The legal solutions

We have seen that the most recent directive about user-generated content in the EU dated, at best¹⁶⁵, from 2001. Many scholars have stressed that there is a gap between the current context¹⁶⁶ and this legislation based on the rudiments of the Internet. This might be the root problem that led to the problematic highlighted in this study. The European directives focus too much on the sole role of the hosting provider and forget to take the user's interest into account.

Mark A. Lemley has ingeniously summarised where the flaw is laying: “[the safe-harbour system] *almost immediately became obsolete as new technologies [...] were developed*”¹⁶⁷. Maybe it is about time that *all* actors of UGC would be recognised by the legislative body.

165 If the official date of the E-commerce directive is in 2000, it didn't appear on the spot. The process took time and the preparatory works started way before its adoption. See http://ec.europa.eu/internal_market/e-commerce/directive/index_fr.htm#maincontentSec2 for more details. Moreover, we shall remember that the directive is mostly based on the 1998 DMCA, written three years before it.

166 O. B. AREWA; *Youtube, UGC, and digital music: competing business and cultural models in the internet age*; *Op. Cit.*; p. 471.; P. CELIS; *When is a YouTube video a “threat”?*; *Washington Journal of Law, Technology & Arts*; Volume 9; Issue ;; USA; Winter 2014; pp. 237; G. R. ALLEN., F. D. WARD; *Things aren't always as they appear: who really owns your user-generated content?*; *Landslide*; American Bar Association; November/December 2010; pp. 49-54.

167 M. A. LEMLEY ; *Rationalizing Internet safe harbors*; 6J. TELECOMM. & HIGH TECH. L. 101; 2007; p. 113.

A.) More clarity and less restrictive safe-harbour

The simplest and less destructive solution would be to clarify the roles and responsibilities of each actor. Various authors have expressed their concerns about the clarity of the safe-harbour system¹⁶⁸.

They mainly criticise the blurred limits of the hosting providers protection. They think that the conditions to benefit from safe-harbour should be made less restrictive. If so, the “goat” can more easily assume that the “wolf” will not chase for infringements happening on its platform. Ergo, “[...] *only ISPs that actively encourage users to post infringing content will lose protection.*”¹⁶⁹. With this solution, copyright right-holders would have to bear the “*burden of policing copyright infringement*”¹⁷⁰ that is currently carried by the “goat”¹⁷¹. Supporters of this thesis present three arguments in its favour.

First, the greater clarity that would follow a less restrictive safe-harbour access would prevent to fall into the current jurisprudential confusion¹⁷². Indeed, judges have sometimes difficulty¹⁷³ to determine if a hosting provider is monitoring the content, or even match the definition of the directive¹⁷⁴.

Second, the expensive litigation costs could be drastically reduced¹⁷⁵. The clarification would not only reduce the uncertainty of qualification in lawsuit, but it would also temper the amount of inaccurate or inadmissible claims¹⁷⁶.

168 J. DI PLANTA; *The Digital Millennium Copyright Act and the clash between authors and innovators: the need for a legislative amendment to the safe harbor provisions*; *Op. Cit.*; p. 823.; See also footnote 166.

169 J. DI PLANTA; *The Digital Millennium Copyright Act and the clash between authors and innovators: the need for a legislative amendment to the safe harbor provisions*; *Op. Cit.*; p. 825.

170 *Ibidem*.

171 Indeed, Content ID is the first step that will alarm the copyright holders about a possible infringement. Except for bigger enterprises that can monitor the flow of content by themselves, most of them count on YouTube to do their job.

172 J. DI PLANTA; *The Digital Millennium Copyright Act and the clash between authors and innovators: the need for a legislative amendment to the safe harbor provisions*; *Op. Cit.*; p. 825.

173 See for instance: CJEU; Judgement of the Court (Seventh Chamber); Case C-291/13; Sotiris Papasavvas v. O Fileleftheros Dimosia Etairia Ltd, Takis Kounnafi, Giorgos Sertis; 11 September 2014; available at <http://curia.europa.eu/juris/document/document.jsf?docid=157524&doclang=EN>; J. BENJUMEA MORENO; *Publisher or technical provider? Monitoring as editorial control and the safe harbor of art. 14 e-commerce directive*; *Op. Cit.*; p. 680.

174 Directive 2000/31/EC *Op. Cit.*; p. 8 of this work.

175 J. DI PLANTA; *The Digital Millennium Copyright Act and the clash between authors and innovators: the need for a legislative amendment to the safe harbor provisions*; *Op. Cit.*; p.827.

176 K. J. LANDSMAN; *Two decisions in battle between old and new media leave little resolved* ; N.Y.L.G.; May 24;

Third, technology and innovation would be boosted by this change. In fact, “*the threat of liability for copyright infringement and the lack of clearly defined protections will deter innovators from creating new technologies*”¹⁷⁷. With a clearer version of the directive and national transpositions, this pitfall could be avoided.

We believe that this solution bears great promises and deserve further investigation. Nevertheless, we have noticed some flaws in this rather simplistic approach.

One point that seems to have been forgotten by the supporters of the “clarity thesis” is that hosting providers are not the only involved parties related to UGC. It would be appropriate to broaden the limitation of responsibility for the “goat”, but it would ultimately not change the situation of the “cabbage”. With this solution, only the hosting providers would be affected by the modification of the legal terms. They would be the only one to truly benefit from these small changes in the wording of the directive¹⁷⁸. Neither copyright holders nor users would see their status modified. In a “Web 2.0.” environment, we think that such a lack of accuracy can't continue to exist.

Moreover, the legislative change would not automatically involve a modification of the contractual terms and conditions imposed on the users. An easier accessible safe-harbour doesn't mean that the platforms would feel compelled to give up their current databasing system. In fact, they spent much time and money on the creation of their system and it is more likely that they will be in favour of a *status quo*. The conclusion to the “more clarity and less-restrictive safe-harbour” is that it would only cure one flaw of the UGC problem, i.e. the uncertainties surrounding the hosting providers safe-harbour. On the other side, this simplistic measure would come to naught for the two other actors.

2012; p. 1.

177J. DI PLANTA; *The Digital Millennium Copyright Act and the clash between authors and innovators: the need for a legislative amendment to the safe harbor provisions*; *Op. Cit.*; p. 828.

178 Directive 2000/31/EC *Op. Cit.*; p. 8 of this work.

B.) The “Fair-Use” doctrine in E.U.

“Fair-use” is the most prominent legal doctrine recognised in US law as an exception to copyright¹⁷⁹. The US Courts have elaborated four factors to determine its rightful utilisation. These factors are as it follows:

*“(1) The purpose and character of the use, including whether such use is of a commercial nature or is for nonprofit educational purposes; (2) the nature of the copyrighted work; (3) the amount and substitutability of the portion used in relation to the copyrighted work as a whole; and (4) the effect of the use upon the potential market for a value of the copyrighted work”*¹⁸⁰.

Moreover, all these requirements have to be met at the same time and in the light of the purpose of copyright protection. In other words: *“promoting the progress of science and useful arts”*¹⁸¹. This doctrine is in a constant evolution and its interpretation vary from one court to another. Needless to say, the approximative wording of those four conditions led to a rather confused case law regarding the nature of fair-use. Entire theses have been written about all the implications of this doctrine, but we have no pretension to do so. In the scope of this work, we'll only focus on the pros and cons of such system and see how it could help to strike a balance on UGCS, if it would be implemented in EU law.

Up to now, EU Member States have not adopted this rather peculiar exception. For the moment, they continue to deal with their own specific copyright exceptions such as parody¹⁸², criticism¹⁸³ or private copy¹⁸⁴. Contrary to a limited list of exceptions, the Anglo-American fair-use is based on a more general, contextual and indicative approach. According to some authors, it is this particular feature that could make it a more appropriate tool on UGCS than traditional European exceptions. The reasoning behind this view is simple: exceptions set into stone are not as effective as the

179 Copyright Act of 1976, 17 U.S.C., § 107.

180 A. EAKMAN; *The future of the digital millenium copyright act: how automation and crowdsourcing can protect fair use*; *Op. Cit.*; p. 641.

181 Article I, Section 8, Clause 8 of the USA's Constitution (“copyright clause”).

182 See footnote 55.

183 See footnote 56.

184 See footnote 104.

flexible fair-use doctrine to deal with the ever-changing Web and its technical innovations. Flexibility is thus the main argument of fair-use supporters¹⁸⁵.

Of course, it would be ridiculous to ask EU Members States to abandon centuries of copyright policy to adopt the Anglo-American fair-use doctrine and its gigantic related case-law as such. However, a “fair-use like” provision could be implemented in the current EU system, for example in place of article 5 of the “copyright directive” of 2001¹⁸⁶. The provision could be drafted as it follows:

“it does not constitute an infringement to use a work or other subject-matter for non-commercial scientific research or illustrations for teaching, for the reporting of current events, for criticism or review of material that has already been lawfully made available to the public, or quotations from such material serving comparable purposes, for caricature, parody or pastiche, or the incidental inclusion in other material, provided that such use does not conflict with a normal exploitation of the work or other subject-matter and does not unreasonably prejudice the legitimate interests of the right holder”.¹⁸⁷

Others¹⁸⁸ have taken the view that already existing exceptions to copyright should only be broaden in order to include “similar cases”. Few words would thus be added at the end of each exception in this manner:

*“(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose; **and in similar cases**”*^{189, 190}

185 See for example: M. SENFTLEBEN; *Bridging the differences between copyright's legal traditions- the merging of fair EC fair use doctrine*; available on www.ssrn.com.

186 Directive 2001/29/EC; *Op. Cit.*; p. 28 of this work.

187 B. HUNGENHOLTZ, M. SENFTLEBEN; *Fair use in Europe, in research of flexibilities*; 2011, available on <http://ssrn.com>.

188 Drafters of the European Copyright Code, available on <http://copyrightcode.eu/>.

189 Emphasis added.

190 Directive 2001/29/EC ; *Op. Cit.*; p. 28 of this work; article 5 (d).

With such provisions, Member States could keep their historic exceptions while endorsing the greater flexibility and adaptability of the fair-use doctrine¹⁹¹.

Unfortunately the drawbacks of this implementation of a “fair-use like” provision would cause much trouble in the already confused UGC context.

On one hand, Anglo-American authors have already voiced their dissatisfaction of said doctrine to deal with databasing and its deficiencies. First, the obscure nature of fair-use obliges creators to try to foresee the status of their content, without being certain that this doctrine will protect it against copyright claims¹⁹². Second, some scholars have underlined that the automatic processing of content can only fail when asked to determine if a video (or any content) meets all the criteria of fair-use¹⁹³. The reason behind it should be obvious: while a program may have difficulty to verify if specific conditions are met (like in the case of the “quotation” exception), the task shall be even harder when faced to the uncertain requirements of the fair-use approach.

On the other hand, European experts themselves seem unwilling to adopt a “fair-use like” approach for several reasons. First, some have noted that “*more flexibility in the system of exceptions entails less legal certainty [...]*”¹⁹⁴. The predictability of the application of a copyright exception could be even more undermined within this new system. Second, the amount of litigation concerning the interpretation of such provision, or of the terms “*and in similar cases*”, would certainly be astronomic¹⁹⁵. Third, harmonisation could suffer from such add-ons to EU law. Each Member State have different interpretation and transposition of the directives¹⁹⁶. Introducing a new article would only aggravates the discrepancies between countries. Finally, and more pragmatically, scholars have severe doubts regarding the political will of the Member States to change their current exceptions to *droit d'auteur* for a little understood and chaotic new approach¹⁹⁷.

191 J.-P. TRIAILLE, F. COPPENS; *User Generated Content (UGC)*; *Op. Cit.*; p. 537.

192 P. S. MENELL, B. DEPOORTER; *Using fee shifting to promote fair use and fair licensing*; *Op. Cit.*; p. 57.

193 A. EAKMAN; *The future of the digital millenium copyright act: how automation and crowdsourcing can protect fair use*; *Op. Cit.*; p. 643.; D. L. BURK, J. COHEN; *Fair use infrastructure for rights management systems*; 15 HARV. J.L. & TECH. 41; 43; 2001.

194 J.-P. TRIAILLE, F. COPPENS; *User Generated Content (UGC)*; *Op. Cit.*; p. 537.

195 *Ibidem*; p. 538.

196 Directive 2001/29/EC and directive 2000/31/EC; *Op. Cit.*; p.8 and p. 28.of this work.

197 J.-P. TRIAILLE, F. COPPENS; *User Generated Content (UGC)*; *Op. Cit.*; p. 537.

Finally, please note that any new exception to copyright shall pass the “three-steps test” of article 5.5 of directive 2001/29¹⁹⁸ in order to be accepted by EU law. This test is meant to be a protection of the copyright holders' interests. Moreover, it has been enshrined in the most important copyright-related international texts: the Berne Convention¹⁹⁹, the TRIPS Agreements²⁰⁰ and the WIPO Treaties²⁰¹. The test is composed of three-steps: (a) exceptions should be confined to “*certain special cases*”, (b) they mustn't “*conflict with a normal exploitation of a work*” and (c) they mustn't “*unreasonably prejudice the legitimate interests of the author*”²⁰².

Some authors have highlighted that an issue could arise from the first step, when implementing fair-use in EU law²⁰³. In fact, the rather vague scope of such kind of exception would have difficulties to pass the test of “specificity” required by the directive²⁰⁴. Maybe the second option, that would entail to only add “*and in similar cases*” to the text of the directive, would more easily meet this criterion.

At the end of the day, a “fair-use like” provision would not satisfy any of the actors and could not achieve the needed balance on UGCS. First, the “wolf” would not be sure to see its interests safeguarded if this legislative add-on can't pass the three-steps test. Second, the “goat” would not undergo any change in its current policy, for the simple reason that it already has to deal with fair-use when it contracts with its Anglo-American clients²⁰⁵. Finally, the users would still be treated as “cabbages” on those websites. Why? Because databasing softwares like Content ID can't effectively detect a traditional EU exception to copyright nor a case of fair-use. They could only fear that the addition of the ambiguous fair-use doctrine would only makes the matter worse.

198 Directive 2001/29/EC; *Op. Cit.*; p. 28 of this work.

199 Berne Convention for the Protection of Literary and Artistic Works of September 9, 1886, completed at PARIS on May 4, 1896, revised at BERLIN on November 13, 1908, completed at BERNE on March 20, 1914, revised at ROME on June 2, 1928, at BRUSSELS on June 26, 1948, at STOCKHOLM on July 14, 1967, and at PARIS on July 24, 1971, and amended on September 28, 1979, available at http://www.wipo.int/treaties/en/text.jsp?file_id=283698.

200 Agreements on trade-related aspects of intellectual property rights, Annex 1C of the Marrakesh Agreement establishing the World Trade Organization, signed in Marrakesh, Morocco on 15 April 1994; available at http://www.wto.org/english/tratop_e/trips_e/t_agm0_e.htm.

201 World Intellectual Property Organization Copyright Treaty, adopted in Geneva on December 20, 1996; available at http://www.wipo.int/treaties/en/text.jsp?file_id=295166.

202 See, for example, article 9(2) of the Berne Convention; *Op. Cit.*; footnote 185.

203 J.-P. TRIAILLE, F. COPPENS; *User Generated Content (UGC)*; *Op. Cit.*; p. 538.

204 Article 5.5 of directive 2001/29/EC; *Op. Cit.*; p. 28 of this work.

205 In addition, please note that YouTube considers fair-use as the standard of all exceptions to copyright, as suggested by its Community Guidelines. See: <http://www.youtube.com/yt/copyright/fair-use.html>.

C.) A new UGC exception to copyright in the web 2.0.

A more bold approach would be to adopt a specific UGC exception in EU law. This would necessarily imply to add a new paragraph to article 5 of the copyright directive²⁰⁶, provided that all requirements are met, especially the “three-steps test”.

At present time, one country has chosen to follow this solution, although not an European Member State. On the 7th of November 2012, Canada has indeed adopted a new article 29.21 in its Copyright Act²⁰⁷. The novelty of this exception is that it allows entry to safe-harbour for the concerned “goat” and “cabbage” as long as a limited list of conditions is respected²⁰⁸:

- (a) the pre-existing work has been published;
- (b) it is used to create a new work (so the mere copying is not covered by this provision);
- (c) the use of the new work if done solely for non-commercial purposes;
- (d) the source and name of the author are mentioned, if it is reasonable in the circumstances to do so;
- (e) the person had reasonable grounds to believe that the existing work (or other subject-matter) was not infringing copyright;
- (f) the use (both by the uploader and the hosting provider) of the new work does not have a substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the pre-existing work or on an existing or potential market for it, including that the new work or other subject-matter is not a substitute for the existing one.

A storm of criticisms followed the adoption of this provision. An association of copyright holders like the Writers' Rights Coalition²⁰⁹ and some scholars²¹⁰ reproached the Canadian government for creating a useless and dangerous new exception that should not have been implemented. Why

206 Directive 2001/29/EC; *Op. Cit.*; p. 28 of this work.

207 You can find the full text at <http://laws-lois.justice.gc.ca/eng/acts/c-42/page-19.html>.

208 For this list, we will follow the structure of J.-P. TRIAILLE, F. COPPENS; *User Generated Content (UGC)*; *Op. Cit.*; p. 532.

209 See their criticisms at <http://www.playwrightsguild.ca/news/writers-rights-coalition-bill-c-32-brief>.

210 J.-P. TRIAILLE, F. COPPENS; *User Generated Content (UGC)*; *Op. Cit.*; p. 533.

useless? Because there already are “*important exceptions in the Directive which could be useful for UGC purposes*”²¹¹. Why dangerous? Because “*an infringement will not be known until too late and may depend on how many others create “mash-ups” using the same work*”²¹².

We can't concur with these statements. In our view, the criticism of “uselessness” is not relevant for the issue at hand. It is true that the European Union already has to face many challenges regarding the harmonisation of its copyright exceptions and that adding another element to the equation could be worrisome. But it is another issue that shall be addressed in time, and in another study. It is also true that many national exceptions like quotation and parody *should* protect efficiently the users against the claims of the so-called copyright right-holders. However, we have precisely demonstrated that this protection does not occur²¹³. Faced to the current databasing system, the user's only choice is to bring an action before a court to make its use of a classic²¹⁴ copyright exception fully recognised.

On the opposite, a specific UGC exception would have the benefits of clarity, transparency²¹⁵ and efficiency. The existence of a tailored and relevant exception would greatly improve the degree of legal awareness of the users. Hence, a reduction of the negative effects of legal uncertainty and a greater accessibility for new creators on UGCS, through transparency. The new safe-harbour that would protect both users and hosting providers would contribute to this welcome change. The adoption of this new kind of exception would force the websites to reconsider their current databasing system to take into account the redistribution of responsibility. Indeed, a user shielded by a safe-harbour provision is not as vulnerable as a mere “cabbage” and all the risks can't be put on his/her shoulders anymore. Moreover, given the broad and generous approach of the UGC exception, the current databasing system could not be of any help to detect any of its application. This would automatically lead to more unfair claims from “Content ID-like” programs or, more optimistically, to a complete overhaul of the system.

Concerning the problem of “dangerousness” raised by the authors and the copyright companies, we

211 *Ibidem*.

212 <http://www.playwrightsguild.ca/news/writers-rights-coalition-bill-c-32-brief>.

213 See part 3. to 4.2. ; *supra*.

214 We obviously mean “already existing exceptions” like criticism, pastiche, private copy, etc.

215 On a side note, J.-P. TRIAILLE and F. COPPENS recognise these advantages to the UGC solution, although not being supporters of this thesis. See their article: *User Generated Content (UGC)*; *Op. Cit.*; p. 534.

share the view of the Canadian government on that point:

“[The new exception] applies only to creations that do not affect the market for the original material. Examples include making a home video of a friend or family member dancing to a popular song and posting it online, or creating a “mash-up” of video-clips. This provision would not permit such activities as simply adding [...] a brief introduction to a song and then posting the copy for free online, [...]. Creator's moral rights would also continue to be respected. Moreover, this provision applies only to the UGC creator in such works and only for non-commercial purposes”²¹⁶.

That is to say that the interests of the copyright right-holders would not be severely damaged. In cases where those interests could be endangered, the UGC exception would not protect the user anymore. It seems that the Canadian government has sought to take into account the new concerns of the Web 2.0. (like derivative works) and the legitimate rights of the copyright holders. Only time will say if a balance has been reached with this new exception.

A final criticism concerning the “specific exception” thesis was addressed to Canada concerning the compliance of the new article 29.21 with its international obligations. The “three-steps test” is once more at the heart of the problematic. The “a certain special case” requirement is especially debated²¹⁷. Some authors take the view that the sole protection of freedom of expression “*is hardly an acceptable reason alone since Article 12 and 14(1) of the Berne convention provide for an exclusive right of adaptation [...]*”²¹⁸. However, one could take the opposite view and say that the “a certain special case” condition is really fulfilled if we consider that online derivative works (which can sometimes be parodies, quotations and reviews) are included in the very “special case” of the UGC pattern²¹⁹. The issue of the “three-steps test” is a fairly difficult problem and it would require

216 <http://balancedcopyright.gc.ca/eic/site/crp-prda.nsf/eng/rp01186.html>.

217 M. FICSOR; *Comments on the UGC provisions in the Canadian Bill C-32: potential dangers for unintended consequences in the light of the international norms on copyright and related rights*; October 23, 2010; available at http://www.copyrightseesaw.net/archives/?sw_10_item=31.

218 *Ibidem*.

219 On that point, we would like to follow the definition of “a certain special case” made by Dr. Caroline Colin in C. COLIN, S. DUSSOLIER ; *Etude de faisabilité des systèmes de licences pour les échanges d'oeuvres sur Internet, rapport pour la SACD/SCAM- Belgique*; CRIDS; Faculté universitaires Notre-Dame de la Paix; Namur; 16 septembre 2011; p. 49 and following, available at http://www.crids.eu/recherche/publications/textes/rapport-final-sacd-scam.pdf/at_download/file. Especially this passage, related to the notion of “certain” special case: “The adjective “certain” refers to “known and particularised but not explicitly identified. [...] The term “certain” means that “the exception or the limitation in the national legislation has to be clearly defined” without the requirement

more than the present study to be resolved.

In conclusion, an new UGC exception similar to the Canadian model would prove to be interesting in the EU. It would require some changes to directive 2000/31²²⁰ and directive 2001/29²²¹ in order to integrate the new approach. In the former, its article 14 would need to provide the same safe-harbour protection for both hosting provider and user. In the latter, the lists of exceptions of article 5 would need to include the specific UGC case. Another solution would be to simply create a new directive dedicated to the UGC context that would include these changes. One could also imagine to draft a completely new directive to address all new issues that have appeared on the Web since 2001²²². There is no doubt that some criticisms related to the “three-steps test” would be heard, but the debate is still open on this point.

In terms of balancing, the “wolf” would be put in a more perilous situation than the current one, but as the Canadian government has said, the new exception would not tolerate serious infringements. It would only support innovation, friendly uses, as well as creativity. With the help of a dual safe-harbour filter, only gross and convinced infringers should be targeted by the copyright right-holders. Creators and respectful users could continue to create original content or to harvest salads in their garden, in peace.

Within this system, the “goat” would keep its crucial safe-harbour status. A limitation of its responsibility would continue to operate. In addition, the websites would find the current databasing softwares less needed, as the user's safe-harbour would reverse the burden of proof for infringement. In fact, it would only be in cases where the website or the copyright holder can prove

that one would need to “identify explicitly every potential situation where the exception could apply, provided that the scope of the exception is known and particularised”. (self-made translation from French).

220 Directive 2000/31/EC; *Op. Cit.*; p. 8 of this work.

221 Directive 2001/29/EC; *Op. Cit.*; p. 28 of this work.

222 As an illustration, the Directive 2011/83/EU of the European Parliament and of the Council of 25 October 2011 on consumer rights, amending Council Directive 93/13/EEC and Directive 1999/44/EC of the European Parliament and of the Council and repealing Council Directive 85/577/EEC and Directive 97/7/EC of the European Parliament and of the Council (available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32011L0083&from=EN>). This recent directive has taken into account the new challenges of online contracts for consumers and has chosen to adapt the old texts to better suit the modern society. In recital (2), the directive states that : “*Those Directives have been reviewed in the light of experience with a view to simplifying and updating the applicable rules, removing inconsistencies and closing unwanted gaps in the rules. That review has shown that it is appropriate to replace those two Directives by a single Directive*”. A similar application could be considered for UGC or, more broadly, for Web users and the online community.

that the content has a “*substantial adverse effect, financial or otherwise, on the exploitation or potential exploitation of the pre-existing work* [etc.]” that it could be taken down. Moreover, the financial investment that hosting providers have made into databasing would not be lost, for the logical reason that these programs could still be used to trace gross infringements (the “*mere copying*” referred to in point (b)).

Finally, users would not be treated as “cabbages” anymore. If they respect the conditions set out in this new exception and don't try to abuse the system, they will receive the shelter of a dedicated safe-harbour. Creativity and innovation, the two pillars of all copyright legislation²²³, would finally be reaffirmed on UGCS.

Potential drafters of this exception in EU law should however take into account several remarks concerning its implementation. First, the EU has to respect its international obligations and, in the same way, the “three-steps test”. The UGC exception will only be a valid option when all doubts related to its conformity to this test will be excluded. Second, some requirements from the Canadian version of the exception would not be easily implemented in the EU system. The condition of “*non-commercial purposes*”²²⁴ is probably too connected to Anglo-American doctrines like “fair-use”. A misleading interpretation of such a condition would only hinder the efficiency of the system. In a worst case scenario, it could ultimately deprive professional UGC creators (that make a living from what they upload on the sites) from the protection of safe-harbour. In our view, it would be better to either suppress this condition or replace it by an interdiction of “*parasitism and unduly profit from the frame of the pre-existing work*”²²⁵.

5.2. The technical and contractual solutions

As discussed before, the legislative framework is the cornerstone of the whole UGC system. The practical layout of the websites will derive from it and will affect all actors. Legislative and technical approaches are, thus, inseparable. Many authors take the view that the current legislative

223 On this point, see for instance *supra*, footnote 146.

224 Point (c), *supra*, p. 53 of the present study.

225 This condition would be similar as what already exists for European brands in article 4, §3 and §4 of Directive 2008/95/EC of the European Parliament and of the Council of 22 October 2008 to approximate the laws of the member States relating to trade marks (codified version), available at <http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32008L0095&from=EN>.

system is not at fault but that the weakness lies in its implementations²²⁶. They prefer to focus on contractual and technical methods to solve the problems related to User-Generated Content.

A.) Strict identification

Some people have opted for a radical identification approach. These academics suggest that the flaws of the system derive from the impunity that some users may enjoy in creating false names and accounts on UGCS²²⁷. According to them, the fact that some users make up email addresses and other personal information forces the hosting providers and the copyright right-holders to take drastic measures such as databasing. Hence the solution proposed by the authors: strict identification of *all* users.

Supporters of this idea imagined a system where users but even mere viewers would have to register using their credit card to access the website²²⁸. This would allow the “goat” and the “wolf” to collect useful information for future litigations. In addition to the identification of users and viewers, the registration would be followed by a permanent monitoring of the activities of the concerned persons. Each content would be placed under scrutiny, as well as every individual that has once accessed it²²⁹. The archive would be kept for a determined period of time, then deleted once suspicions of copyright infringement could be set aside²³⁰.

To the criticisms that many could voice against this insidious system, followers of the “strict identification” solution put forwards two benefits for users that have to be taken into account²³¹. First, a complete (via credit card) identification would simplify the registration process. For example, it would merge the YouTube and the Google Wallet registration²³². Second, the UGC creators could enjoy the system to finally be able to track the use of their own works on the

226 For instance, I. GIL'AD; *How to make lemonade from lemons: achieving better free speech protection without altering the existing legal protection for censorship in cyberspace*; *Op. Cit.*; p. 165.

227 A. M. KNUCKEY; *Youtube- the next generation of infringing on creative works: what can be done to protect the screenwriters?*; *Northwestern Journal of Technology and Intellectual Property*; Volume 7, issue 2, article 5; 2009; p. 231; T. PINTO, N. SHAN, S. FREYTAG, E. VON BRAUNSCHWEIG, V. AUMAGE; *Liability of online publishers for user generated content: a European perspective*; *Communications Lawyer*; April 2010; pp. 5-12.

228 A. M. KNUCKEY; *Youtube- the next generation of infringing on creative works: what can be done to protect the screenwriters?*; *Op. Cit.*; p. 232.

229 *Ibidem*; p. 234.

230 *Ibidem*.

231 *Ibidem*.

232 <http://www.google.com/wallet/>.

platforms. Because UGC creators can also be protected by copyright for their original works, as any other person, their creations may very well be infringed upon. Currently, the databasing system only protects “eligible” copyright holders, a status that most UGC creators can't attain²³³. But with strict identification and a continuous tracking of the viewers and users activities, the creators could finally determine what happens to their work on the Web²³⁴.

Obviously, this solution would raise many other issues, mainly related to privacy and control of the collected information. Despite these concerns, the scholars brush all worries aside by saying that Google's (and other major UGC-related companies) security devices can't be broken that easily²³⁵.

The strict identification thesis proposes us to sacrifice liberty and privacy to achieve a so-called balance in the UGC world. Although it would allow the websites to quit the current databasing system for a more case-by-case approach, the price to pay would be really high.

The “goat” would have everything to win in adopting this solution: valuable information, security and solid proof of infringing activities in case of litigation. However, the “unaware” requirement of article 14 of the e-commerce directive²³⁶ could not be met with such thorough tracking of the content.

The “wolf”, for its part would not see its situation drastically changed. As long as infringements would be dealt with, it has no reason to be dissatisfied by this solution.

That would certainly not be the case for the users. Except for few of them that could benefit from the advantages listed above, they would continue to be treated as “mere cabbages”. In the “strict identification” scenario, they would still not be given proper powers on UGCS. Worse: all their actions would be scrutinised and recorded. Despite the fact that they represent the first asset of UGC, they would be relegated to their role of “product” with even less liberty than in the current

233 See *supra*; p. 22 of this work.

234 A. M. KNUCKEY; *YouTube- the next generation of infringing on creative works: what can be done to protect the screenwriters?*; Northwestern Journal of Technology and Intellectual Property; Volume 7, issue 2, article 5; 2009; p. 235.

235 *Ibidem*, p. 232.

236 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000; *Op. Cit.*.

databasing system. Furthermore, mere viewers would need to create an account, even only to see one content, and would be subjected to the same surveillance as the users. In our humble opinion, this would not strike a balance, but rather equals to jump out the frying pan into the fire.

B.) Prior Settlement

Other scholars promote a more direct link between “wolf” and “cabbage” by means of a prior agreement on a project²³⁷. In a nutshell, the mechanism would consist for the creator of UGC to submit a fair offer to the relevant copyright right-holder before broadcasting its creation. In exchange of a certain sum, the creator could limit his responsibility and carry on his activities without worrying about a potential litigation. The sum could be later returned to the UGC creator after a predetermined period of time.

An indisputable advantage of this solution is that it is creating a genuine link between users and copyright holders that doesn't exist in the current UGC world. Databasing is not suited to operate this junction between the two actors, but a direct dialogue may be the best solution to decide on the fate of the Content.

However, as admitted by the authors themselves, the “prior settlement” solution is not the panacea²³⁸. First, it omits to take into account that the majority of creators lacks both economic power and legal knowledge²³⁹. Second, the scholars behind this idea insist on the point that other arrangements would need to be put into place. Pre-control institutions and a relevant legislation would be necessary to ensure that the system would not wreak havoc. We could add that prior settlement is by its very nature an American law mechanism that European lawyers are not familiarised with. That is not to say that the EU could not use this solution in the future, but litigation still remains the ordinary way in countries like Belgium. Prior settlement being of contractual nature may however be more easily implemented than a revolutionary revision of the e-commerce directive²⁴⁰.

237 P. S. MENELL, B. DEPOORTER; *Using fee shifting to promote fair use and fair licensing*; *Op. Cit.*; p. 71.

238 *Ibidem*; pp. 72-74.

239 T. N. BEATY; *Navigating the safe harbor rule: the need for a DMCA compass*; Marquette Intellectual Property Law Review; Volume 13, issue 1, article 4; 2009, p. 222.

240 Directive 2000/31/EC; *Op. Cit.*; p. 8. See also point 6.1. B.), *supra*.

C.) Crowdsourcing

We have abundantly warned the reader about the risks and excesses of the databasing mechanism. However, this software is merely a tool. Well used, databasing could become a useful device to deal with UGC issues. Adam Eakman, amongst others²⁴¹, has proposed to adopt the model of crowdsourcing that would combine the advantage of automation and the asset of mass monitoring²⁴². YouTube and other UGCS neglect their most important asset: the users. These people represent millions of potential actors that would be glad to be involved in the monitoring routine of the platforms. Crowdsourcing is nowadays a well-known and well-tried mechanism that could certainly achieve great results in the UGC realm.

The first step of the monitoring system would be the same as now. Through databasing and identification of the “*signal vectors*” of the content, the program would detect if a match exists. However, only content that matches more than ninety percent of the copyrighted work would be blocked²⁴³. This first step would ensure that most serious infringements to copyright would be at least as severely punished as in the current system. Pursuant to article 14 of the e-commerce directive²⁴⁴, the hosting provider would; then; take down the infringing “information” to safeguard the interests of the copyright holders. As usual, the user who uploads such content could nevertheless introduce a counter-claim. Of course, if the software doesn't detect a single match between the analysed content and the database, it would be absurd to focus on it, and the content would be authorised on the website without further ado²⁴⁵.

However, the second step of the crowdsourcing mechanism would be tremendously different from its previous implementation. For contents getting a match rate of less than ninety percent, all users of the platforms would be able to cast a vote regarding its nature. In this manner, the users themselves would decide, via a survey, if the video is infringing copyright or not. Adam Eackman proposes that a handful of people (between 100 and 1000 of first viewers) would only be necessary

241 *Fair use principles for user generated video content*, Electronic Frontier Foundation; <http://www.eff.org/pages/fair-use-principles-user-generated-video-content>.; J. BENJUMEA MORENO; *Publisher or technical provider? Monitoring as editorial control and the safe harbor of art. 14 e-commerce directive*; Op. Cit.; p. 681.

242 A. EAKMAN; *The future of the digital millenium copyright act: how automation and crowdsourcing can protect fair use*; Op. Cit.; p. 653.

243 *Ibidem*; p. 654.

244 Directive 2000/31/EC; Op. Cit.; p.8.

245 A. EAKMAN; *The future of the digital millenium copyright act: how automation and crowdsourcing can protect fair use*; Op. Cit.; p. 654.

to classify the video, as it would allow the system to proceed smoothly²⁴⁶. The content submitted to a public survey would still be accessible until users decide to which category it belongs. If the vote doesn't allow a firm conclusion after a certain deadline or once all the 1000 viewers have expressed their opinion, a greater number of people would be asked to settle the matter. Once again, a counter-claim mechanism should still be available to prevent unfair results. With this system, the users would finally not be relegated to their role of “cabbages” and could take concrete actions on UGC sites.

After a certain time, the data related to the results of the surveys could be later used to enhance the efficiency of automatic databasing softwares²⁴⁷. In a long-term approach, these data could increase the sensibility and adequacy of the program and lead to a better analysis of the content's nature.

An identification of the voters with their IP address could be deemed necessary to temper the abuses of the system. The risk of a crowdsourcing solution is that some users would be tempted to continuously cast a “non-infringing vote” on every content for personal purposes, without honestly addressing the nature of the content. With a strict identification, a program could compare the vote of these viewers²⁴⁸ with the final result, and draw the appropriate conclusions. If a specific voter repetitively expresses an opinion contrary to the vast majority of all voters, while the content has been branded almost unanimously as “infringing”, the credibility of such possibly fraudulent voter would decrease. Concretely, the power of the voter would have less impact in future surveys²⁴⁹. In worst cases, his/her vote could be counted as null and void. This solution would allow the system to operate efficiently without too much hindering its reliability.

The crowdsourcing solution clearly offers valuable answers to the UGC problem. Not only does it place the user in a more appropriate position regarding its importance on UGCS²⁵⁰, but it also doesn't destroy the current databasing system. As such, the interests of the copyright holders would still be protected and the economical investments of the platforms in the databasing technology would be safeguarded. Assuredly, crowdsourcing is one of the most promising solution to strike a

246 *Ibidem*.

247 *Ibidem*; p. 655.

248 Only viewers that are also part of the user community. It would not make any sense to open the vote to anyone.

249 A. EAKMAN; *The future of the digital millenium copyright act: how automation and crowdsourcing can protect fair use*; *Op. Cit.*; p. 658.

250 A. S. TARBELL; *Don't tread on me: the need for an an alternate dispute resolution process for the creators and uploaders of user-generated content*; *Op. Cit.* ; p. 50.

fair and concrete balance. Sites like Wikipedia²⁵¹ already function with this mechanism of monitoring content by users. Articles are rated and verified by every interested person and the site continues to work admirably²⁵². Thus, a transposition of such an organisation in other parts of the UGC world could be achieved.

Finally, this proposal could overturn the problematic “chilling effect” that the “cabbages” have to face. In this new structure users would, on the contrary, be encouraged to voice their opinion and discontent. After some time, this continuous solicitation could even educate them to not abnormally fear the consequences of a counter-claim. At the end of the day, the whole efficiency of the system would be enhanced.

Nevertheless, some flaws of the current databasing system would continue to exist if this model is adopted as such. Indeed, this solution is based on the assumption that every user knows and can identify what is copyright, what are its exceptions and in which cases they apply. For the most serious infringements (for example, a pirated copy of a series hosted on YouTube), one could assume that users will be able to distinguish its nature. But it is doubtful that all people possess the required legal knowledge to analyse more complex cases²⁵³. Thereby, it would be useful to provide a system that would give the appropriate information to the public, before it could actually cast its vote.

Furthermore, a legislative incentive would still be necessary to make the platforms move towards this solution. Otherwise, the sole willingness of the users would probably be insufficient to change the current awry implementation of the safe-harbour provisions. Therefore legal dispositions should be taken to either incite or oblige the “goat” to adopt the crowdsourcing model.

251 http://en.wikipedia.org/wiki/Main_Page.

252 A. EAKMAN; *The future of the digital millennium copyright act: how automation and crowdsourcing can protect fair use*; *Op. Cit.*; p. 654. Though Wikipedia recently faced economic issues, the same critics can't be addressed to UGCs like YouTube, for the main reason that its revenues are generated differently than UGCs that count on commercials to survive; E. B. ARSHAM, *Monetizing infringement: A new legal regime for hosts of user-generated content*, Carnegie University B.S., 2013; p. 790.

253 N. BEATY T.; *Navigating the safe harbor rule: the need for a DMCA compass*; *Op. Cit.*; p. 222; F. ODUOL ODUOR; *The internet and copyright protection: are we producing a global generation of copyright criminals*; *Op. Cit.*; p. 508.

5.3 A practical combination of both aspects

In this part, we would like to propose what could, in our view, be the best solution to strike a concrete balance on UGCS. We have already highlighted a crucial point on that matter: an overhaul of the legislative framework would prove to be useless if not followed by real implementations and technical changes. In the same manner, technical and contractual solutions will not be enforced by the websites, if no legal framework compel or comfort them to do so²⁵⁴. Therefore, our conclusion is that only a combination of both legislative and technical aspects can truly change the situation.

A specific UGC exception, as suggested in part 6. 1. C.)²⁵⁵ would be perfect to counterbalance the flaws of the previously discussed “crowdsourcing model”²⁵⁶. As a matter of fact, we have underlined that the biggest flaw of crowdsourcing was that it requires users with sound legal knowledge of all exceptions to copyright. Otherwise, the system would not be as fair and equitable as it should be to respect the legitimate rights of copyright holders. However, with the implementation of a specific UGC exception, and the protection of safe-harbour for both users and hosting providers, the amount of legal knowledge to master would be significantly reduced. In this sense, voters who are invited to express their opinion about which content is infringing copyright would firstly be informed about the conditions of the specific UGC exception.

Another advantage of such a combination is that databasing would not be tossed aside. Rather, it would be “recycled” within the new system. On one hand, it would prevent gross infringements (“mere copying”) to take advantage of the safe-harbour provision and would not undermine the usefulness of the UGC exception. On the other hand, it would filter the content, so that only content with a match rate of less than ninety percent would be subjected to the approval of users²⁵⁷. Any higher match rate would be considered as infringing copyright and could be taken down by the hosting provider.

Of course, this combination cannot be adopted as such without particular precautions. Concerning the legislative aspect of the solution, the concerns discussed before need to be addressed. In short,

254 T. WISEMAN; *Limiting innovation through wilful blindness*; *Op. Cit.*; p. 225.

255 See *supra*, p. 51 of this work.

256 See *supra*, p. 59 of this work.

257 See footnote 234, *supra*.

the “three-steps test” will have to be provided for and the “non-commercial purposes” requirement will have to be clarified²⁵⁸. Those issues might not be insurmountable, but the drafters would need to be especially cautious on these two points.

For the “crowdsourcing” part, the lack of legal knowledge from the vast majority of users should be compensated by the implementation of a specific UGC exception. Nevertheless, great care should be taken in ensuring that all voting users have been made familiar with this exception beforehand. One could think of integrating an explicit clause on that matter in the Terms and Conditions. Or else, implementing an automatic pop-up before each vote, illustrating the legal theory and providing sound examples of its applications. A last but more drastic idea would be to implement a vocal software that would calmly read the relevant information relating to the new UGC exception before each vote. Only after a dozens of first votes, a user could decide to skip the entire reading record, assuming that he/she is familiar with that subject.

With this solution, copyright holders could still protect their interests against abnormal uses of their works, hosting providers would conserve their limitation of responsibility and users would finally have a say in the UGC matter.

258 See *supra*, p.56 of this work.

Conclusions

Many scholars²⁵⁹ share the view that the current legal framework of UGC was shaped by and for declining media. Yet, the initial intention of the drafters of the DMCA and the e-commerce directive, was benevolent. The initiators even stated that the purpose of this legal framework was to “*loath to permit the spectre of liability to chill innovation that could also serve substantial socially beneficial functions*”²⁶⁰. This desire to protect innovations, culture and artistic works can be found at the basis of all Intellectual Property acts. Be it in the preamble of the international WIPO Treaty²⁶¹ or in the recitals of European directives²⁶². Nevertheless, the gap between intention and reality is wide and deep.

Today, the balance of powers between the three actors is broken²⁶³. On one side, the copyright holders are “wolves” who seek to eliminate any infringer, real or not. Pushed by the fear of loss of profit caused by pirates and convinced infringers, their lack of thoughtfulness prejudices all users. The hosting providers are “goat” who only want to continue their economic activities without having the sword of Damocles of litigation hanging over their heads²⁶⁴. With the assistance of a legal safe-harbour and rock-solid contracts this objective is attained. The issue is that, in order to respect the conditions of such safe-harbour, the “goat” has chosen the most cheap and easiest solution: blind databasing. Even though user's content represent their most important asset, only the final product is at the centre of their concern, nevermind the creator of that content.

Finally, between predators and indolent platforms lies the user in his/her non-fitting role of “cabbage”. Hunted down by both copyright “right”-holders and the databasing system itself, the

259 T. WISEMAN ; *Limiting innovation through wilful blindness*; pp.225-233; HORMANN C. K., *The death of the DMCA? How Viacom v. YouTube may define the future of digital content*; *Op. Cit.*; p. 1377; DI PLANTA J.; *The Digital Millennium Copyright Act and the clash between authors and innovators: the need for a legislative amendment to the safe harbor provisions*; *Op. Cit.*; p. 823; BENJUMEA MORENO J.; *Publisher or technical provider? Monitoring as editorial control and the safe harbor of art. 14 e-commerce directive*; *Op. Cit.*; p. 682; LEISTER L.; *Youtube and the law: a suppression of creative freedom in the 21st century*; *Op. Cit.*; p. 129; DAY B.; *In defense of copyright: record labels, creativity, and the future of music*; SETON HALL J. SPORTS & ENT. L.; Vol. 21, No 1; 2011; pp. 62-80.

260 T. WISEMAN; *Limiting innovation through wilful blindness*; *Op. Cit.*; p. 223.

261 World Intellectual Property Organisation, WIPO Copyright Treaty, Preamble; 20 December 1996; available at http://www.wipo.int/treaties/en/ip/wct/trtdocs_wo033.html.

262 Directive 2000/31/EC; *Op. Cit.*; p. 8 of this work; Directive 2004/48/EC; *Op. Cit.*; footnote 66.

263 H. FISHER; *Danger in the DMCA safe-harbors: the need to narrow what constitutes red flag knowledge*; University Of Richmond Law Review; Volume 49:643; USA; 2015; p. 668.

264 T. HANNIBAL; *Opting out of the internet int the United States and the European Union: copyright, safe harbors, and international law*; *Op. Cit.*; p. 398; E. MONTERO, Q. VAN ENIS; *Enabling freedom of expression in light of filtering measures imposed on Internet intermediaries: Squaring the circle?*; Computer Law & Security Review 2011; Nr. 27; p. 22.

only recognition of their leading role is (in some cases) a small financial compensation. Despite the existence of actual exceptions to copyright, the databasing system can't detect the complicated conditions of their implementation. The sole rightful interest of databasing is to identify “mere copying”, i.e. true infringing content to copyrighted works, through a comparison of their “signature vectors”. For more specific cases, this system is simply not suited²⁶⁵.

In addition, users can't, in practice, voice their discontent. Neither can they show to the websites that they respect the conditions of an exception to *droit d'auteur*. There is, clearly, “a chilling effect” on UGCS and it is caused by both the platforms and the participating copyright holders²⁶⁶. As a matter of fact, there *are* dedicated procedures available for dissatisfied users. Nonetheless, the wording of these application forms can only intimidate the “cabbages”. This effect, coupled with the fact that copyright holders can ultimately decide, on a unilateral way, that a content is infringing their rights deprive the existing copyright exceptions of their actual usefulness²⁶⁷.

For the aforementioned reasons, some balance has to be found in the UGC world²⁶⁸. Many theses exist concerning this problem. Some authors are choosing a minimalist approach by only clarifying the provisions of the e-commerce directive. As discussed before, this solution would only deal with the status of the hosting provider but it would certainly not strike any balance²⁶⁹. Others favour a “fair-use like provision” solution. However, we have shown that such proposal would only add more confusion to the issue at hand, and would not resolve the “databasing problem” at all²⁷⁰.

Finally, amongst other theses, some scholars would like to follow the Canadian example in adopting a specific UGC exception combined with a user's safe-harbour²⁷¹. In our view, this solution has the merit of reducing uncertainties of the application of already existing copyright exceptions. Moreover, it would push the three actors towards a potential balance. In any event, such solution would raise some concerns regarding the respect of the “three-steps test” and its implementation in

265 The system is also not suited for all copyrighted works that are not part of its database. E. WHITE; *The Berne Convention's flexible fixation requirement: a problematic provision for user-generated content*; Chicago Journal of International Law; Vol. 13, No. 2; 2013; p. 697.

266 See part 4.2., *supra*, p. 42 of this work.

267 O. B. AREWA; *Youtube, UGC, and digital music: competing business and cultural models in the internet age*; *Op. Cit.*; p. 452.

268 A. N. BRAVERMAN, T. SOUTHWICK; *The user-generated content principles: the motivation, process, results and lessons learned*; Columbia Journal Of Law & The Arts; p. 472.

269 See part 5.1. A.) , *supra*, p. 47 of this work.

270 See part 5.1. B.) , *supra*, p. 49 of this work.

271 See part 5.1. C.) , *supra*, p. 53 of this work.

EU law²⁷².

On the other side, other experts take the view that the balance should be achieved through technical or contractual implementations. The supporters of a “strict identification thesis” would like to monitor every person related to UGCS: the users, the copyright holders and even mere viewers²⁷³. Obviously such drastic solution would cause many worries in terms of privacy, security and, more than all, the very respect of the directives' conditions to safe-harbour. For authors favouring “prior settlement” as a remedy to the issue at hand, a contractual agreement between users and copyright holders could settle the matter²⁷⁴. The prior payment of a predetermined sum to the “wolves” has however the great flaws that it would require dedicated institutions. Moreover, EU nor domestic laws may not be ready to implement such mechanism.

Finally, the “crowdsourcing” solution has caught our particular attention. Such a system would at last give users the possibility to play a more important and befitted role in the Web 2.0²⁷⁵. The monitoring of the content would be made by the online community itself so that the “goat” would conserve the protection of the safe-harbour status. In addition, the databasing system would not be lost. It would allow both copyright holders and hosting providers to know if real and serious infringements occur on the platforms. Indeed, databasing is only a means to an end. As quoted earlier: *“The good thing about automation is that you don’t have to involve real people to make decisions. The bad thing about automation is that you don’t have to involve real people to make decisions”*²⁷⁶. With an appropriate use, it could accomplish wonders. Finally, the “chilling” effect should disappear as users are acquiring a better knowledge through their voting experience. Users would be judged by their peers instead of the “wolves”.

In our humble opinion, the only remaining problem is that no balance will be reached solely by a legislative overhaul or by technical measures. Both are needed to make a concrete change happen. It is for that reason that we would like to propose a solution based on the combination of the “specific UGC exception” and the implementation of “crowdsourcing”. With the advantages of clarity and

272 See *supra* p. 56 of this work.

273 See part 5.2. A.) , *supra*, p. 58 of this work.

274 See part 5.2. B.) , *supra*, p. 60 of this work.

275 See part 5.2. C.) , *supra*, p. 61 of this work.

276 A. PASTERNAK; *NASA's Mars rover crashed into a DMCA takedown*; MOTHERBOARD; <http://motherboard.vice.com/blog/nasa-s-mars-rover-crashed-into-a-dmca-takedown>.

uniformity of the former and the beneficial impact of the latter, a balance would not be anymore a distant dream. We realise that a UGC exception in EU law would raise some concerns but we believe that it is the best available chance to tackle this issue. It would be wise to seek a solution that would entails less risks, but we are convinced that crowdsourcing will not be implemented alone on websites like YouTube without a clear and strong legal support.

To conclude, it would be fair to give the solution of the riddle to the reader²⁷⁷. In this enigma, the ferryman would have to first take the goat to the other bank, then to return with an empty boat. Next, he would take the wolf on his boat, drop it on the shore, then return to the other side with the goat and drop it on the first bank. At last, he would take the cabbage to drop it near the wolf and finally make an ultimate trip to fetch back his goat.

Like the riddle, the solution to the UGC problem might be easier than it appears. It also shows that each actor needs to be taken into account and that only a balance between all groups would lead to a peaceful outcome. The issue is that some actors like copyright holders and hosting providers have been prioritised over the users²⁷⁸. The same users who create all the content embodying so many innovations, original creations and economical opportunities for all actors²⁷⁹. Fortunately, some companies begin to understand that cooperation with users can be a viable and interesting option²⁸⁰. Only one thing is certain: a balance is badly needed on UGCS. Be it a legislative, a technical solution or a combination of both approaches, the matter cannot suffer any delay.

²⁷⁷ See p. 6 of this work.

²⁷⁸ K. HUNT; *Copyright and YouTube: pirate's playground or fair use forum?*; Michigan Telecommunications and Technology Law Review; Volume 14, issue 1; 2007; p. 205

²⁷⁹ B. BUCKLEY, *SueTube: Web 2.0. and copyright infringement*; *Op. Cit.*; p. 260.

²⁸⁰ As an illustration, Sony Music took the decision to *not* confirm a "Claim" against a video of a couple dancing on "Forever" the single of Chris Brown, though Sony owned the copyright of the song. Thereafter, the video collected over eighty-three millions views and quite a success. From the "buzz" made by this video, the single of Chris Brown was back on the top ten charts and the copyright company continued to increase its revenues. A win-win situation was made possible through the good will of the copyright right-holder. See: A. EAKMAN; *The future of the digital millenium copyright act: how automation and crowdsourcing can protect fair use*; *Op. Cit.*; p. 660.; See also: S. HETCHER; *User-generated content and the future of copyright: part two- agreements between users and mega-sites*; Santa Clara High Technology Law Journal; Volume 24, issue 4, article 3; 2007; p. 841.

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This study analyses the relationships between actors on User-Generated Content websites. The author focuses on the issue of databasing, i.e. automatic analysis of the content, and stress the fact that this mechanism does not take into account copyright exceptions. In a final part, the author proposes several solutions that may strike a better balance in the peculiar context of User-

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ANNEX 1**USER-GENERATED CONTENT/
CONTENU CREE PAR LES UTILISATEURS****SURVEY/SONDAGE D'OPINION**

<u>ENGLISH VERSION</u>	<u>VERSION FRANCAISE</u>
This survey will help us to realise a study concerning User-Generated Content (UGC) on website such as YouTube. You will be asked to answer to six questions in this survey. You may either answer to all of them or even one if you wish so. A space has been managed for your expected answer beneath each question. You are free to use less space than proposed or to respond in greater length. We hereby assure you that the results will be anonymous and genderless. We will not use this data for any other purpose that the sole realisation of the aforementioned study. This study will be conducted by a student of the Law Faculty of the “Université Catholique de Louvain” (Belgium). You can contact him at this address for any further information: florian.poncin@student.uclouvain.be We thank you again for your cooperation.	Ce sondage aidera à la réalisation d'un mémoire de fin d'études concernant les plateformes de contenu en ligne, telle le site YouTube. Il vous sera posé six questions. Vous pouvez répondre à chacune d'entre elles ou bien à une seule si vous le désirez. Un espace a été prévu pour vos réponses en dessous de chaque question. Vous êtes libre d'utiliser tout l'espace proposé, de n'en remplir qu'une partie ou même de répondre de façon plus détaillée encore. Nous vous assurons que les réponses à ces questions resteront anonymes et sans précision de genre. Nous n'utiliserons ces données pour aucun autre but que la réalisation du mémoire susnommé. Cette étude sera menée par un étudiant de la Faculté de Droit de l' « Université Catholique de Louvain » (Belgique). Vous pouvez le contacter à cette adresse pour toute information supplémentaire: florian.poncin@student.uclouvain.be Nous vous remercions une nouvelle fois pour votre coopération.

SURVEY/SONDAGE D'OPINION

(EN) 1. For how long have you been broadcasting online content?

(FR) 1. Depuis combien de temps diffusez-vous du contenu en ligne?

(EN) 2. How would you describe your activity? Would you describe it as a mere hobby, or is it a genuine professional activity?

(FR) 2. Comment décririez-vous votre activité? S'agit-il pour vous d'un simple passe-temps, ou cela constitue-t-il une véritable activité professionnelle?

(EN) 3. Do you know and understand the legal framework concerning your activity?

a. Are you informed about the conditions stemming from the law?

b. Are you informed about the conditions stemming from the contract between you and the website?

(FR) 3. Connaissez-vous le cadre légal qui entoure votre activité?

a. Êtes-vous informé des conditions issues de la loi?

b. Êtes-vous informé des conditions contractuelles?

(EN) 4. Have you ever received a « strike » from YouTube or a « copyright notification » concerning you content, that you considered unjustified? If yes, how did you react?

(FR) 4. Avez-vous déjà reçu un « strike » de YouTube ou une notice copyright qui vous semblait injustifiée concernant votre contenu? Si oui, comment avez-vous réagit?

(EN) 5. Do you think that the internal system of YouTube concerning copyright could be improved? If yes, how?

(FR) 5. Pensez-vous que le système interne de YouTube concernant les droits d'auteur puisse être amélioré? Si oui, comment?

(EN) 6. Do you think that YouTube favours too much its relationship with copyright holders?

(FR) 6. Pensez-vous que YouTube favorise de manière trop importante ses relations avec les titulaires de droits d'auteur?

