

ALAI Congress 2012
Kyoto, October 18, 2012

Breathing Space for
Cloud-Based Business Models



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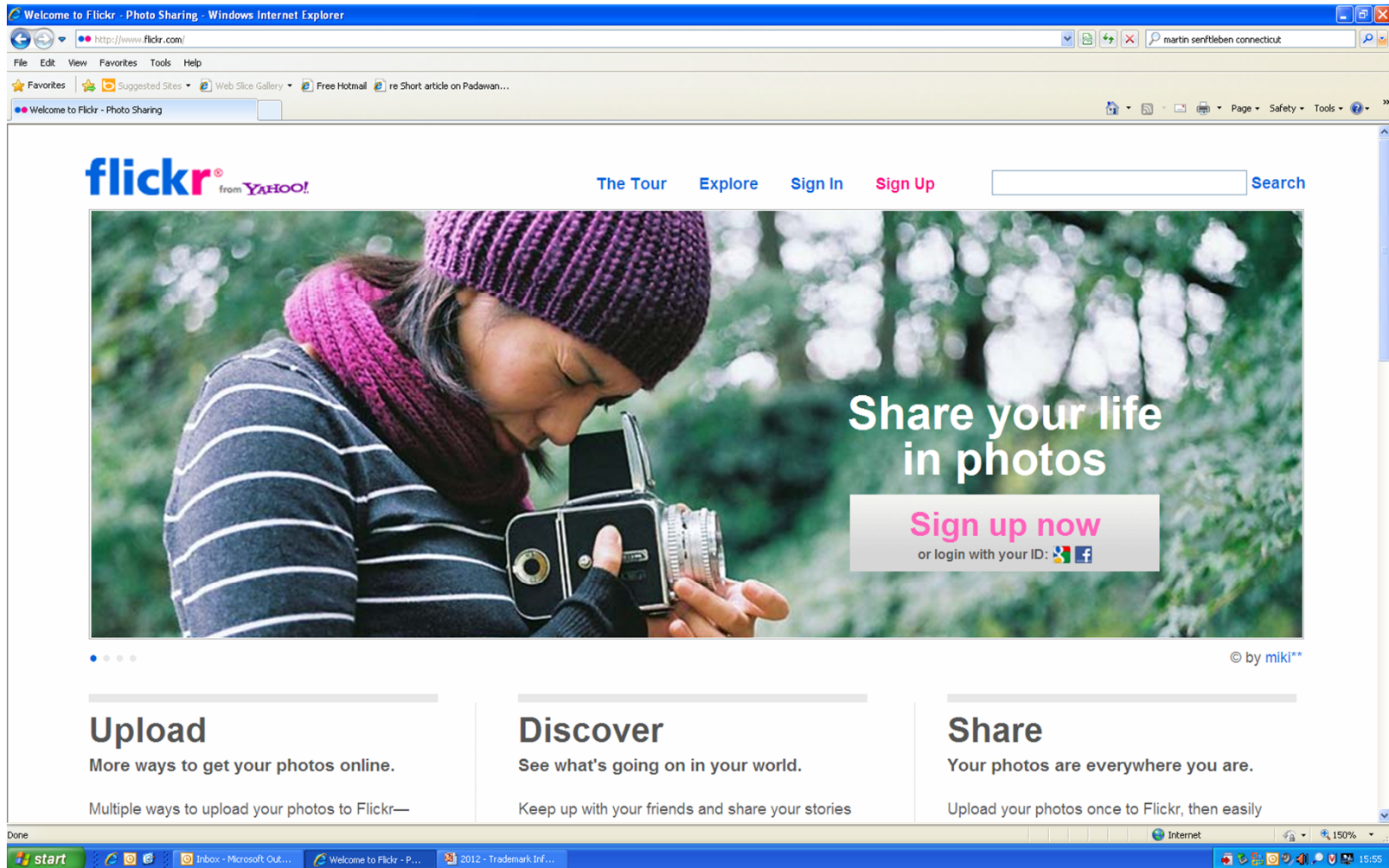
Contents

- Cloud-based services
- Interests involved
- Legal issues
 - Exceptions
 - Safe harbours
 - Injunctions
- General guideline

Cloud-Based Services



For the general public



For individual subscribers

shift TV - Windows Internet Explorer

http://www.shift.tv/

File Edit View Favorites Tools Help

shift TV

10 Sender gleichzeitig aufnehmen.
Download auf den eigenen Rechner möglich.

shift TV
der online tv rekorder

start - what is shift tv - about us - Pressinfo - contact - hire shift TV recorder - terms & conditions

[Programmübersicht] * [Reuters Nachrichten] * [Tech News] * [Sport News]

Login <<

NEW at shift TV ?
Register now for free <<

Fernsehen wann ich will!
Jetzt Abos abschließen und ab sofort keine Sendung mehr verpassen.

Ein Jahr lang deutsches Fernsehen aufzeichnen für einmalige: 100€

The coolest long distance relationship I've ever had! Your own Online Videorecorder for just € 9.99 monthly

start | Inbox - Microsoft Out... | shift TV - Windows In... | 2012 - Trademark Inf... | Internet | 200% | 15:57

For groups

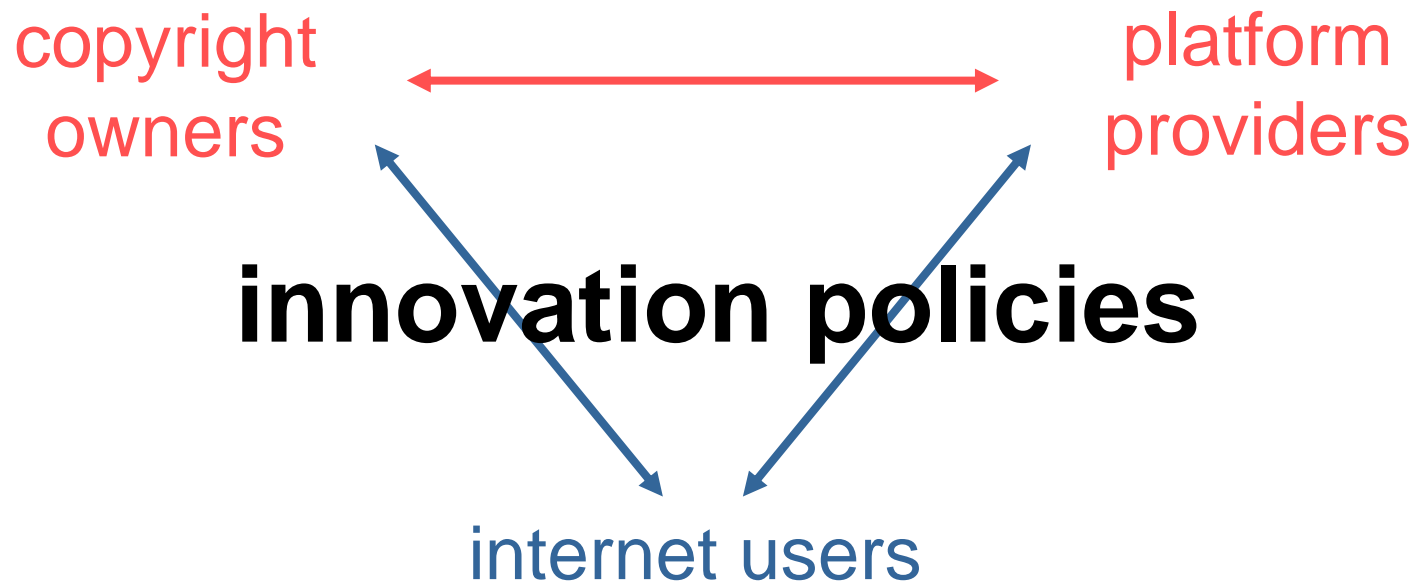
The screenshot shows the Facebook registration page in a Windows Internet Explorer browser. The browser's address bar displays 'http://www.facebook.com/'. The page header includes the Facebook logo and a login section with fields for 'E-mailadres of telefoonnummer' and 'Wachtwoord', and an 'Aanmelden' button. Below the header, there is a registration section titled 'Registreren' with the text 'Het is gratis (en dat blijft het ook)'. The registration form includes fields for 'Voornaam:', 'Achternaam:', 'Je e-mailadres', and 'Voer e-mailadres nogmaals in:'. It also features a 'Nieuw wachtwoord:' field, a 'Selecteer je geslacht:' dropdown menu, and date selection fields for 'Dag:', 'Maand:', and 'Jaar:'. A note explains why the birth date is required: 'Waarom moet ik mijn geboortedatum invullen? Als je op Registreren klikt, bevestig je dat je akkoord gaat met onze Voorwaarden en dat je ons Beleid inzake gegevensgebruik hebt gelezen, inclusief ons cookiegebruik.' To the left of the registration form is an 'App Center' advertisement with the text 'Leuke sociale apps zoeken' and icons for ChefVille, SongPop, Diamond Dash, TripAdvisor, and SimCity Social. The Windows taskbar at the bottom shows the 'start' button and several open applications, including 'Inbox - Microsoft Out...', 'Welkom bij Facebook...', and '2012 - Trademark Inf...'. The system tray on the right shows the 'Internet' icon, a volume icon, and the time '15:59'.

Interests involved



Stakeholders

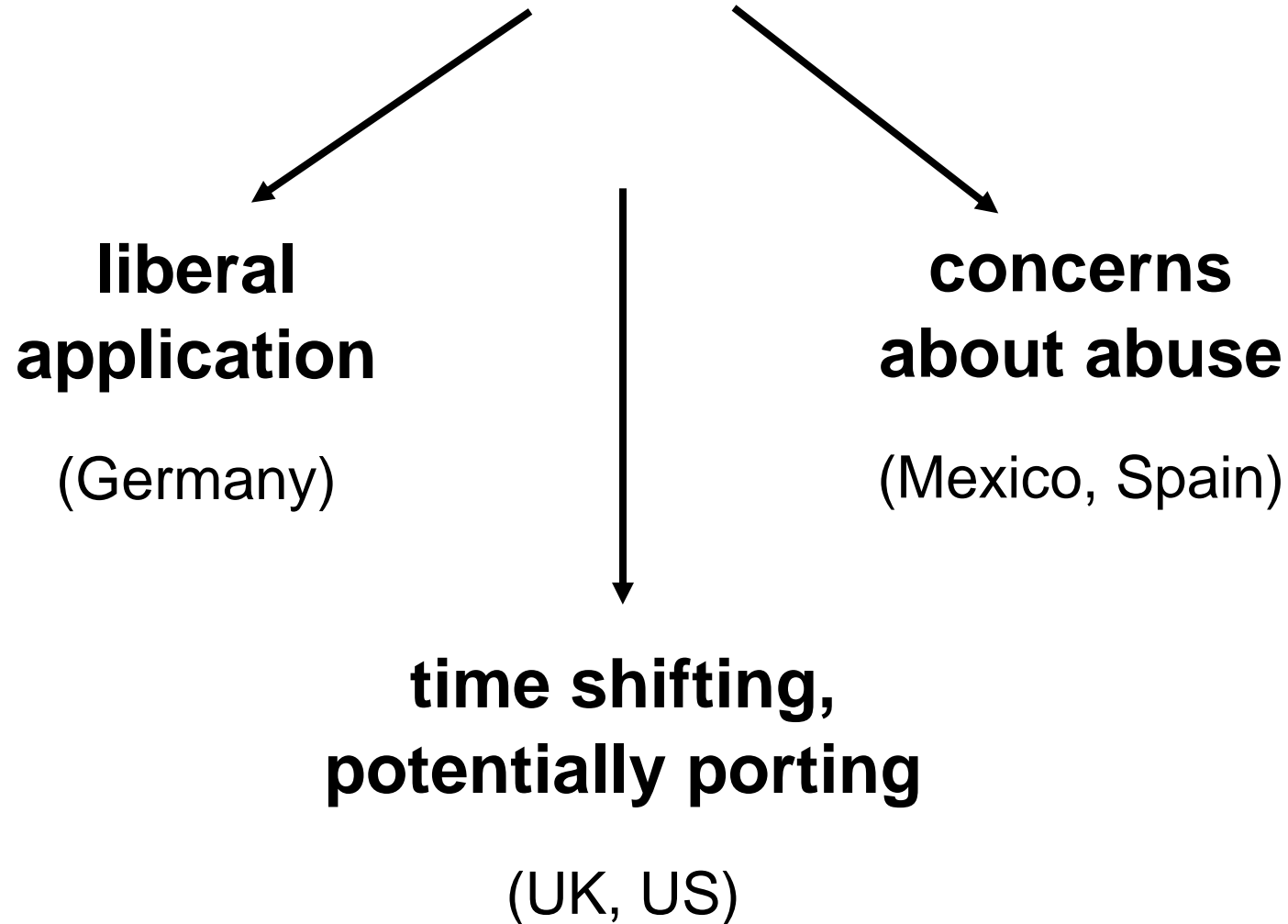
- copyright owners: appropriate reward?
- platform providers: sufficient legal certainty?
- internet users: mere convenience?



Exceptions



Private copying



Private copying

- might exempt personal access services, e.g. online video recorders
- requires initiative for copying to be taken by the private user
- national regimes may cover copying on behalf of private users
- challenge of establishing adequate remuneration scheme

Mere copying or making available?

storage of an individual copy for each private users

master copy as a basis for executing individual requests



Re-transmission?

over-the-air
television and
radio signals

transferred to cloud
video recorders of
private users



Further exceptions

**facilitation of
cloud use for
private users**

**exemption required
for educational
institutions?**

**exemption required for cultural
heritage institutions?**

(extended collective licensing in
Norway and Sweden)

Safe harbours



Starting points

- might be available for hosting of third-party content (passive role)
- provision of technical means \neq making available/communication to the public
- no general monitoring obligation



Example: EU safe harbour

The screenshot shows a Google search for "apple ipod" in a Windows Internet Explorer browser. The search results are displayed in Dutch. The top navigation bar includes links for "Zoeken", "Afbeeldingen", "Maps", "Play", "YouTube", "Nieuws", "Gmail", "Documenten", "Agenda", and "Meer". The search bar contains "apple ipod" and the search button is labeled "Zoeken". Below the search bar, it indicates "Ongeveer 911.000.000 resultaten (0,34 seconden)".

The search results are categorized into "Web", "Afbeeldingen", "Maps", "Video's", "Nieuws", "Shopping", "Applicaties", and "Meer". The "Web" category shows a result for "bol.com iPod Store - Nu: De verbeterde serie iPods." with a star rating and a link to "www.bol.com/Apple-iPod".

The "Shopping" category displays a list of products with their prices and retailers:

Product	Price	Retailer
Apple iPod Touch 8 Gb	€ 179,00	wehkamp.nl
Apple Universal Dock	€ 51,99	Conrad.nl
Apple iPod Nano 16 Gb	€ 169,00	wehkamp.nl
Apple iPod Nano 16 Gb	€ 169,00	wehkamp.nl
Apple iPod Nano 16 Gb	€ 169,00	wehkamp.nl

The "Internet" category shows a result for "Apple - Play music and more on iPod." with a link to "www.apple.com/nl/ipod/". The organic search results include "iPod nano. Completely renovated. Just £129. iPod shuffle. It's big on color. Just £ 40." and "Apple TV. Great HD content, AirPlay and more on your widescreen TV. Just ...".

CJEU, 23 March 2010, case C-236/08, Google/Louis Vuitton

- Google = host eligible for safe harbour?
‘...it is necessary to examine whether the role played by that service provider is **neutral**, in the sense that its conduct is **merely technical, automatic and passive**, pointing to a lack of knowledge or control of the data which it stores.’ (para. 114)
- financial interest which Google has in its advertising service is not decisive
(para. 116)

CJEU, 12 July 2011, case C-324/09, L'Oréal/eBay

- new standard of 'diligent economic operator'
'...it is sufficient, in order for the provider of an information society service to be **denied entitlement to the exemption** [for hosting], for it to have been aware of facts or circumstances on the basis of which a **diligent economic operator should have identified the illegality** in question...' (para. 120)
- still no general monitoring obligation
- but own investigations relevant

CJEU, 12 July 2011, case C-324/09, L'Oréal/eBay

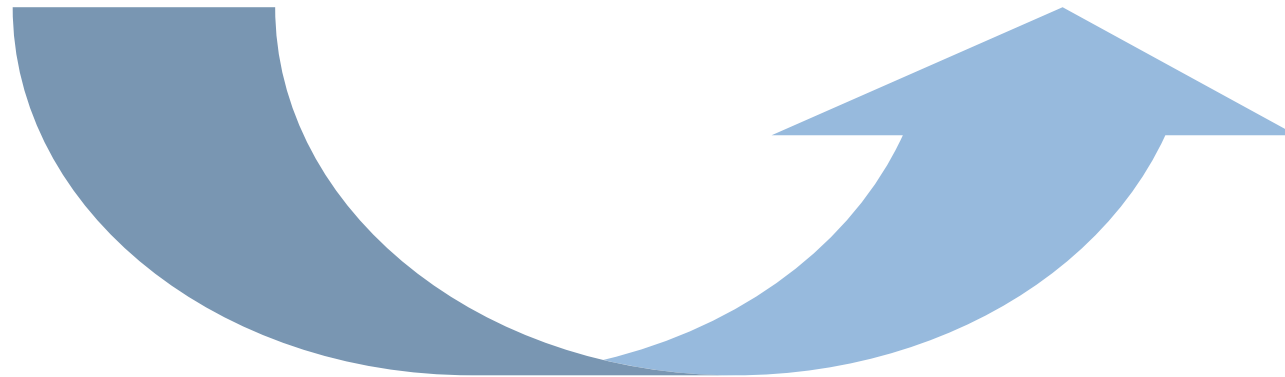
- imprecise or inadequately substantiated notifications may also become relevant

‘...the fact remains that such notification represents, as a general rule, a factor of which the **national court must take account** when determining [...] whether the [service provider] was actually aware of facts or circumstances on the basis of which a **diligent economic operator should have identified the illegality.**’ (para. 122)

Current development in the EU

**from general
exemption from
investigations**

**to obligation to
seriously consider
even imprecise
notifications**



Notice and takedown

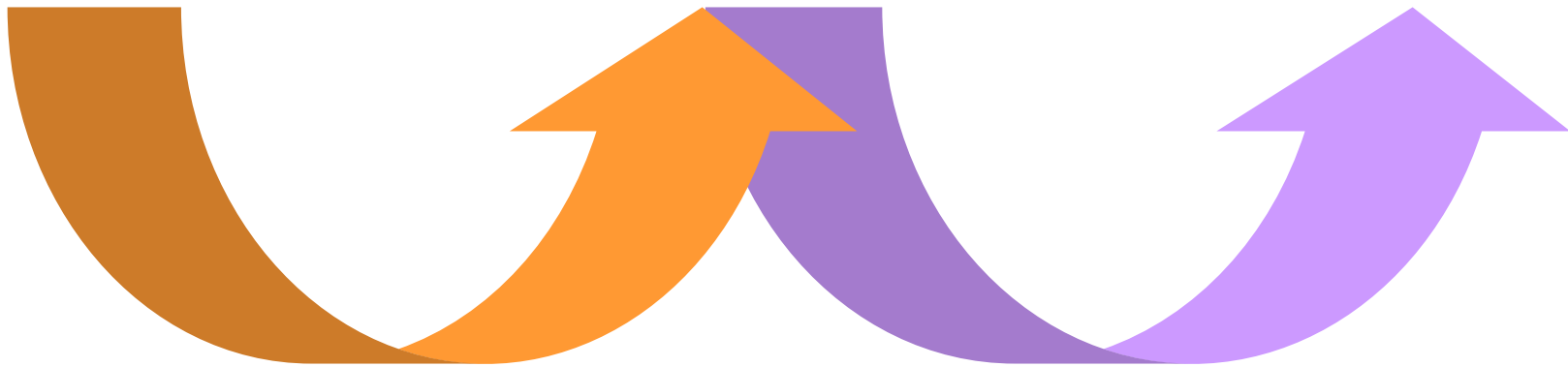


Which procedural steps?

notice

takedown

?



Departure from takedown?

- notice-and-notice in Canada's new Copyright Modernization Act (Bill C-11)
 - need for communication instead of removal?
 - safeguard against unjustified removal required?
 - system of counter-notices insufficient?
- notice-and-action initiative in the EU
 - quicker takedown for rights owners
 - increased legal certainty for ISPs
 - more safeguards for fundamental rights

Injunctions



CJEU, 12 July 2011, case C-324/09, L'Oréal/eBay

- injunctions against online platforms
‘...to order an online service provider, such as a provider making an online marketplace available to internet users, to take measures that contribute not only to **bringing to an end** infringements committed through that marketplace, but also to **preventing further infringements...**’ (para. 131)
- basis: Art. 11 EU Enforcement Directive,
Art. 14(3) EU E-Commerce Directive

CJEU, 12 July 2011, case C-324/09, L'Oréal/eBay

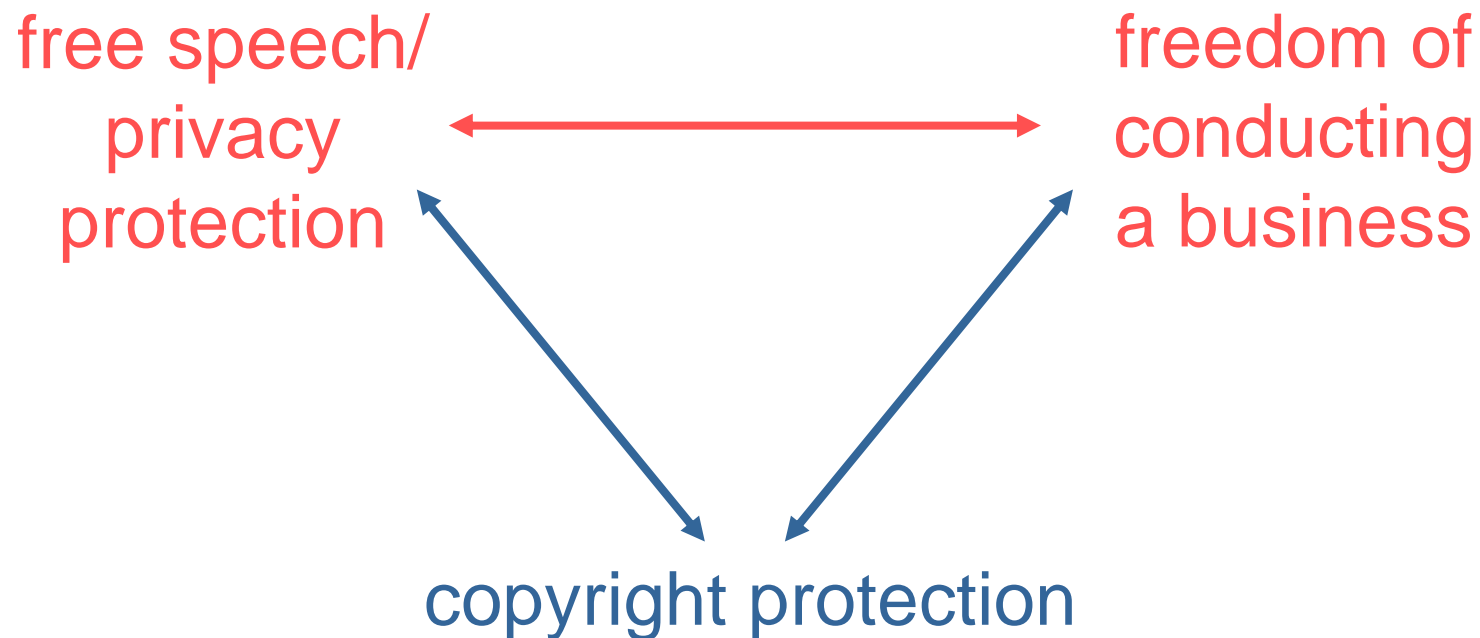
- no general and permanent prohibition on the use of specific material
- but measures against repeat infringers
‘...if the operator of the online marketplace does not decide, on its own initiative, to suspend the [infringer] to prevent **further infringements of that kind by the same seller** in respect of the same trade marks, it may be ordered, by means of an injunction, to do so.’ (para. 141)

Filtering



Delicate balancing of legal positions

- copyright owner: erosion of copyright?
- platform provider: too heavy a burden?
- internet users: sufficient safeguards?



Specific filters permissible?

- e.g. text filters (Germany, Netherlands)
- acceptable burden for ISPs?
- encroachment upon freedom of speech?

Blocking of websites preferable?

- more efficient than procedures against individual users?
- industry roundtables deciding on online contents?

General guideline



Preamble of the Berne Convention

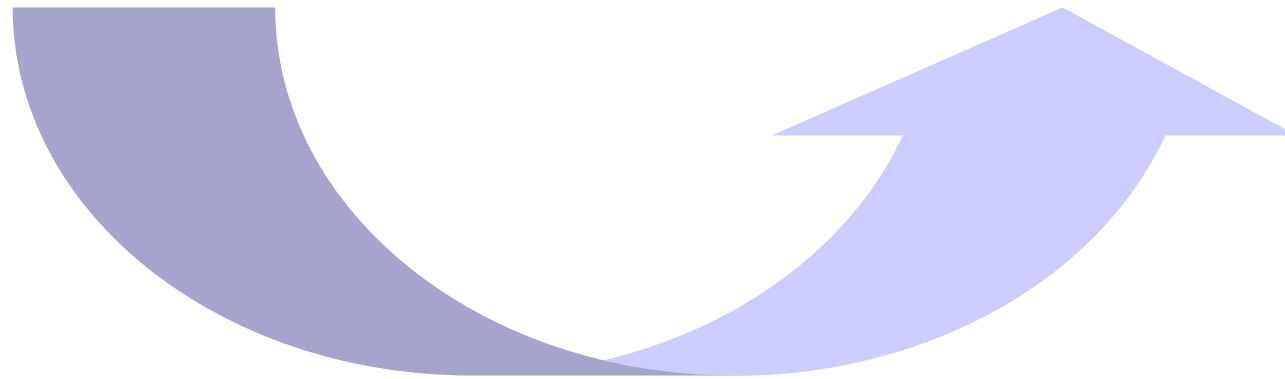
‘The countries of the Union, being equally animated by the desire to protect, in as effective and uniform a manner as possible, the rights of authors in their literary and artistic works,...’



Need to fortify the foundations

not only legal
legitimacy

but also social
legitimacy



The end. Thank you!

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'senftleben' on www.ssrn.com.**



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