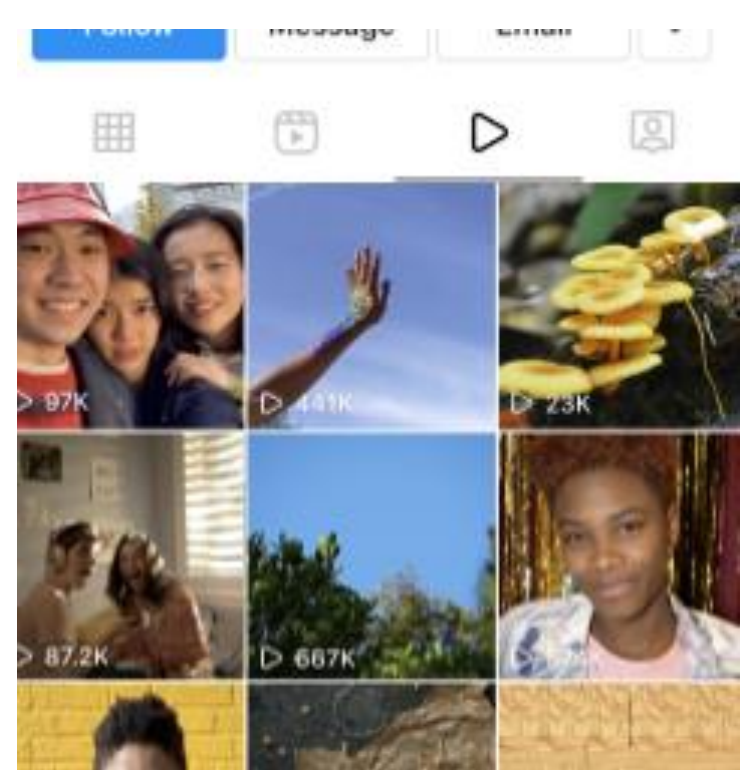
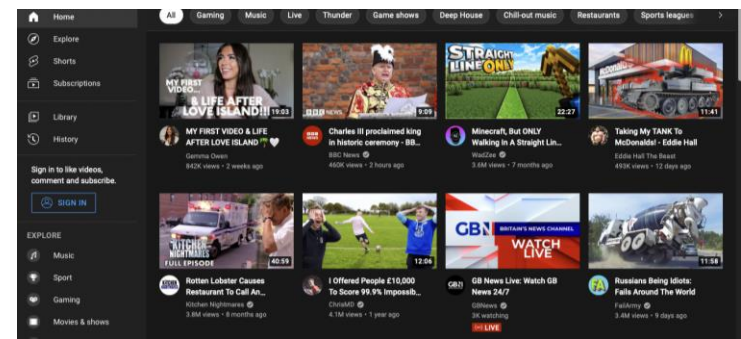


Liability of internet platforms under EU IP law: Between case law and legislative action

欧盟知识产权法下互联网平台的责任： 判例法与立法行动



Eleonora Rosati
13 December 2023
2023年12月13日



Enforcement issues on the internet and primary and secondary liability

互联网上的执法问题以及主要和次要责任

1. Direct infringers 直接侵权者

2. Involvement of intermediaries 涉及中介的情况

- Takedown of infringing content (safe harbours) 下撤侵权内容 (安全港)
- Injunctions against intermediaries 对中介实施禁令

3. Towards the idea that intermediaries may also be direct infringers jointly with their users 中介有可能伙同用户一起构成直接侵权

- Copyright 版权 (C-610/15; C-682/18 and C-683/18)
- Trade marks 商标 (C-148/21 and C-184/21)

Contents内容

- The EU right of communication/making available to the public

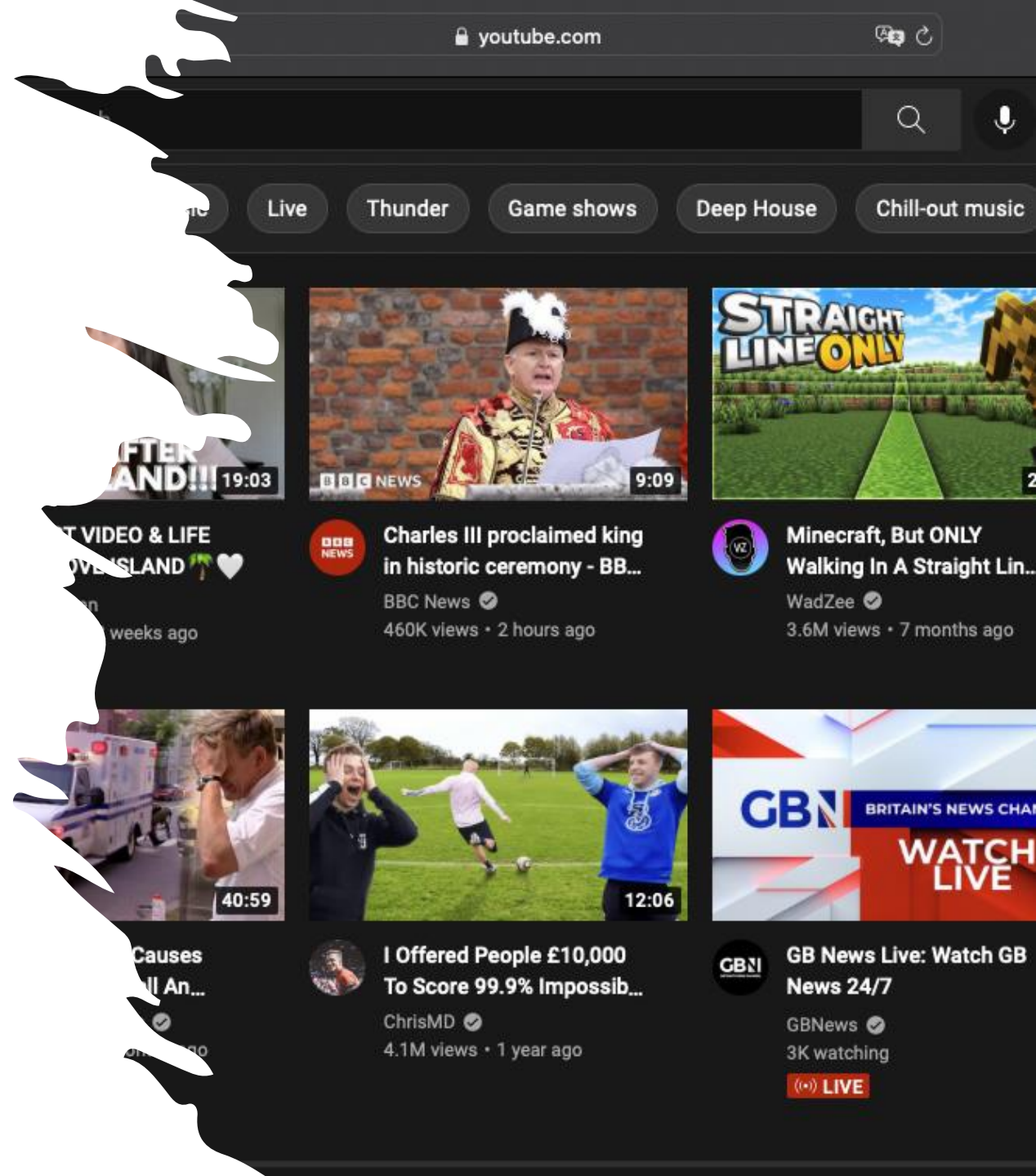
欧盟传播权/ 公众可获取权

- Liability of internet platforms for user-uploaded content

互联网平台对用户上传内容的责任

- Article 17 of the DSM Directive 2019/790

DSM 指令 2019/790 第 17条



The EU right of communication/making available to the public
欧盟传播权/ 公众可获取权

Article 3(1) of Directive 2001/29 (InfoSoc Directive)

2001/29指令（《信息社会指令》）第3(1)条

Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

欧盟成员国应当给作者专属权利来授权或禁止对公众传播其作品，通过有线或无线方式让公众获取其作品，包括公众通过某地点获取其作品，及其在自己选择的时间点获取。



Criteria 标准

High level of protection! 高度保护!
Individual assessment! 个体评估!

An 'act of communication': transmission or simple accessibility?

“传播行为”：传播或仅仅上的获取？

- Indispensable intervention (full knowledge)
- 不可分割的干预（全部知识）

A 'public': indeterminate number of people above de minimis threshold

“公众”：最小标准智商的人数不确定性

- Technical means; 'new public'
- 技术手段；‘新公众’

Access from place and at a time individually chosen

从某一地点及个人选择的某一时间获取

Other, non-autonomous, interdependent criteria

其它，非自主，互相关联的标准

- Profit-making intention 获利意图
- Knowledge 知识

Recital 27: physical facilities

唱诵会27: 实际场所

Liability of internet platforms for user-uploaded content
互联网平台对用户上传内容的责任

From C-610/15 to
C-682/18 and C-
683/18
从C-610/15 到 C-
682/18 及 C-683/18



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Search results: black panther 搜索结果: 黑豹 Displaying hits from 0 to 30

类型	名字: (按照上传人、大小、ULed by, SE, LE顺序)	View: Single / Double	<u>SE</u>	<u>LE</u>
Type	Name (Order by: Uploaded, Size, ULed by, SE, LE)			
Video (HD - Movies)	Black.Panther.2018.1080p.BRRip.x264-BRRIP Uploaded 05-02 07:56, Size 2.17 GiB, ULed by <i>Anonymous</i>		4509	455
Video (Movies)	Black Panther 2018 NEW PROPER HD-TS X264-CPG Uploaded 02-24 15:35, Size 2.38 GiB, ULed by xxxlavalxxx		806	100
Audio (Music)	Kendrick Lamar - VA - Black Panther: The Album (2018) Uploaded 02-09 04:23, Size 113.18 MiB, ULed by Freak0370		339	16
Video (HD - Movies)	Black.Panther.2018.720p.BluRay.x264 Uploaded 05-02 15:46, Size 1.07 GiB, ULed by SeekNDstroy		275	35
Video (HD - Movies)	Black.Panther.2018.1080p.BluRay.x264-SPARKS[EtHD] Uploaded 05-02 03:14, Size 11.01 GiB, ULed by EtHD		138	31
Video (Movies)	Pantera Negra.Black Panther.2018.720.TS.Dublado.PT.LAPUMiA.mp4 Uploaded 02-16 08:44, Size 2.44 GiB, ULed by <i>Anonymous</i>		135	4
Audio (Music)	Kendrick Lamar- Black Panther The Album Music From (2018) Uploaded 02-09 06:30, Size 113.79 MiB, ULed by kajalsus		126	24
Video (HD - Movies)	Black Panther 2018 4K 2160p BluRay x265 10bit HDR Uploaded 05-16 06:58, Size 15.38 GiB, ULed by HobbitFilmz		104	39
Video (HD - Movies)	Black.Panther.2018.1080p.BRRip.6CH.MkvCage Uploaded 05-02 08:45, Size 2.63 GiB, ULed by <i>Anonymous</i>		101	2

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黑豹. 2018. 1080P. BRRip. x 264 - BRRIP

Black.Panther.2018.1080p.BRRip.x264-BRRIP

Type: [Video > HD - Movies](#)
Files: [2](#)
Size: 2.17 GiB (2325333772 Bytes)
Info: [IMDB](#)
Spoken language(s): English
Texted language(s): English

Uploaded: 2018-05-02 07:56:40
GMT
By: *Anonymous*
Seeders: 5839
Leechers: 487
Comments 14

Info Hash:
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Black Panther (2018)
<http://www.imdb.com/title/tt1825683/>
IMDB RATING: 7.7



#CsillagSzületik #mozistar

Lady Gaga & Bradley Cooper - Shallow (OSCAR 2019)

4,167,869 views

49K 1.2K SHARE SAVE ...



Mozi Star

Published on Feb 25, 2019

SUBSCRIBE 56K



Domani - Artisti Uniti p l'Abruzzo (NOMI Autor)

Marshall Pich
Recommended for you

7:21



Mix - Lady Gaga & Bradley Cooper - Shallow (OSCAR 2019)

50+

YouTube, C-682/18 and Cyando, C-683/18 (CJEU ruling on 22 June 2021)
(欧洲联盟法院 2021年6月22日裁决)



Tatan Wonka
32M views

12:53



SUSAN BOYLE "I DREAM OF JEANETTE" BRITAINS GOT TALENT

kuyaHD
Recommended for you

6:51



Live Aid | Bohemian Rhapsody (2018) - scene comp

Article 17 of the DSM Directive 2019/790
DSM指令2019/790 第17条

Article 17 of
the DSM
Directive
2019/790
DSM指令
2019/790 第
17条

Notion of 'value gap'

“价值差距” 概念

Alleged abuse of safe harbours

所谓的安全港滥用

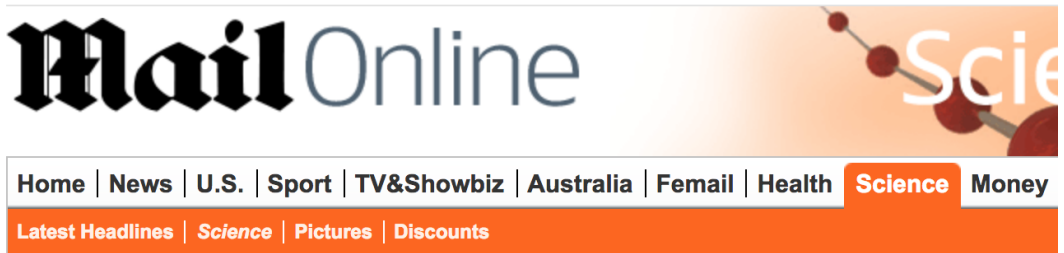
Who's liable for what?

谁负什么责任?

Meet us at WIRED Smarter this October BOOK TICKETS

Tech FOLLOW M

如新欧洲版权法通过，请跟动图和表情说再见 Say goodbye to gifs and memes if this new European copyright law passes



End of internet memes? EU approves controversial copyright law that 'could kill off the web's user-generated content' such as reaction GIFs, quotes from online articles and music remixes

- The Copyright Directive intends to update copyright for the internet age
 - It hands more power to companies to block their copyrighted content online
 - But this also includes user-generated content, such as online memes, that include copyrighted material
- 网络表情终结之时？欧洲通过了充满争议的版权法，将封杀网络用户生成的内容，比如动图、网上文章引用及音乐再混音

WIRED Opinion

If we don't act now, Article 13 could break the internet by mistake

如果我们现在不采取行动，第13条很可能会错误破坏互联网

With Article 13 of the Copyright Directive, the EU Parliament wanted to give a sop to big media corporations. This will backfire horribly

Wikimedia warns EU copyright reform threatens the 'vibrant free web'

Wikimedia警告欧洲版权法改革威胁到“蓬勃自由的互联网”

Natasha Lomas @riptari / 4 weeks ago

Comment



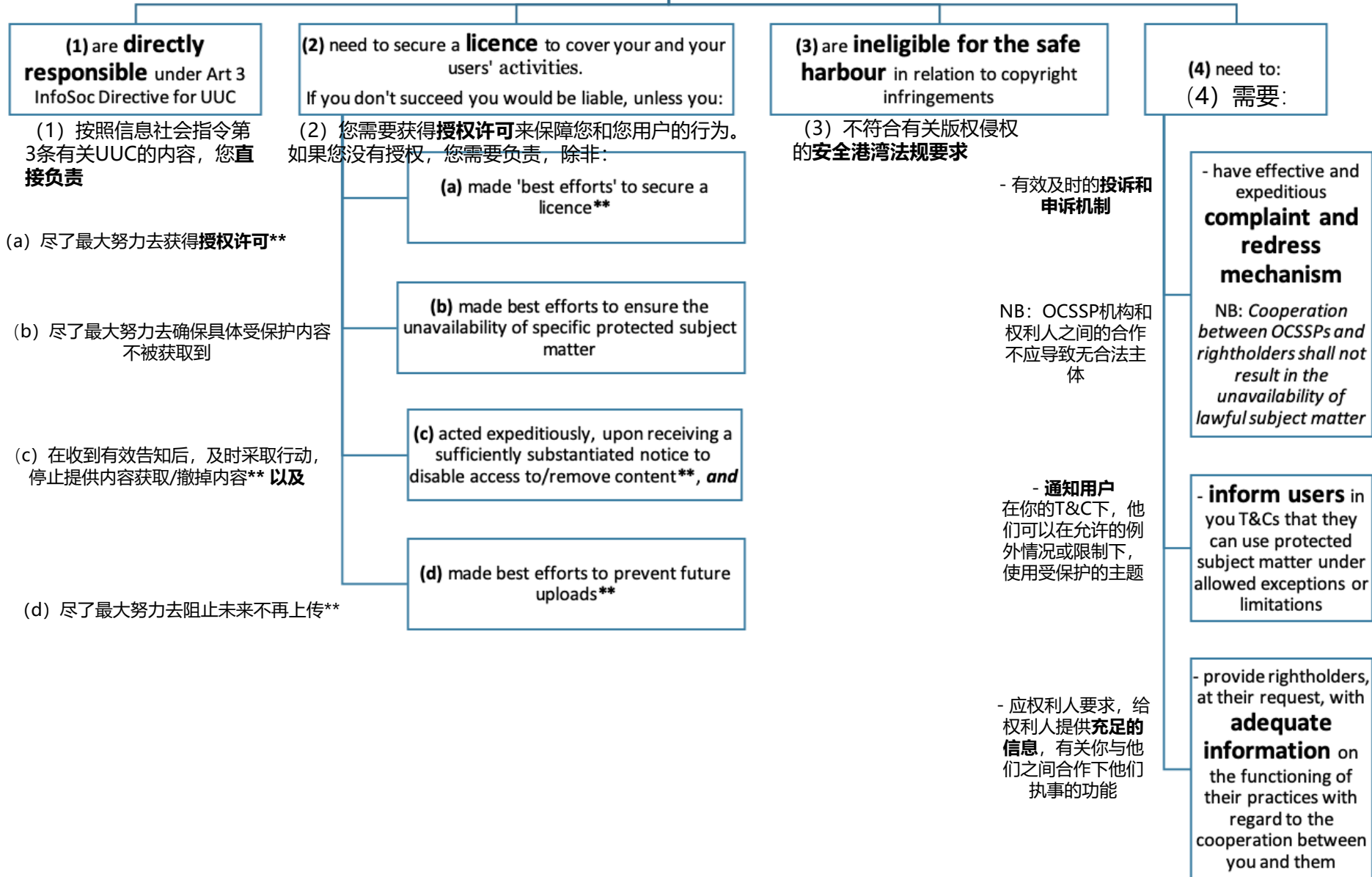
About Issues Our Work Take Action

为什么全世界应该团结起来抵制欧盟即将面临的互联网灾难 Why the Whole World Should Be Up in Arms About the EU's Looming Internet Catastrophe

BY CORY DOCTOROW | SEPTEMBER 5, 2018

如果您是一家OCSSP机构, 则 (I) 您的主要目的或目的之一是存储并给公众提供获取大量的UUC, (II) 你组织和推广并以逐利为目的, 那么:

If you are an **OCSSP** =
(I) your main/one of your main purpose(s) is to store and give the public access to a large amount of UUC, which (II) you organise and promote for profit-making purposes*, then you:



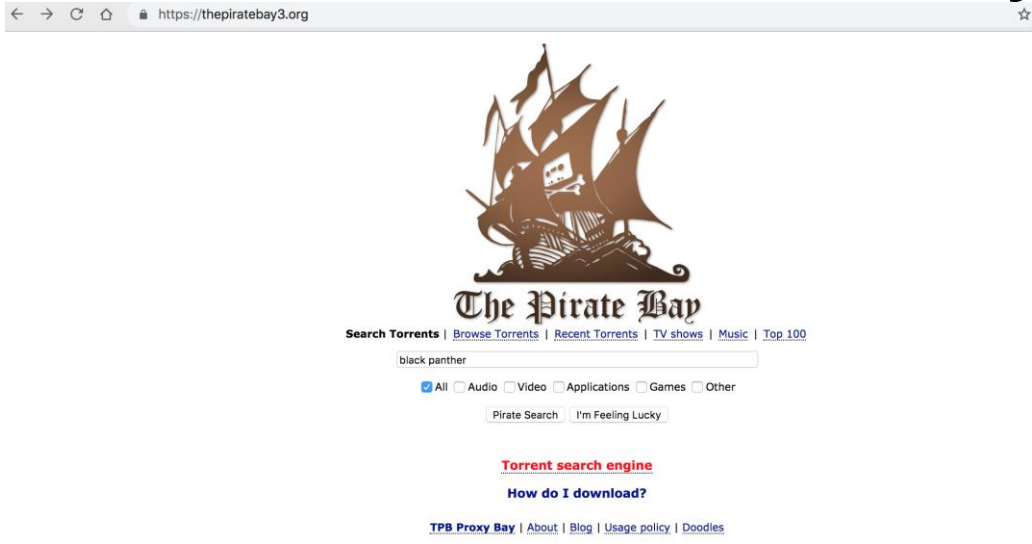
* The notion of 'OCSSP' does not include providers of services like: not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and-sharing platforms, electronic communication service providers as defined in Directive (EU) 2018/1972, online marketplaces, B2B cloud services and cloud services that allow users to upload content for their own use

* “开源软件和服务提供商OCSSP”的概念不包括以下服务提供商: 非营利性在线百科全书、非营利性教育和科学资料库、开源软件开发和共享平台、指令 (EU) 2018/1972 中定义的电子通信服务提供商、在线市场、B2B云服务以及允许用户上传内容供自己使用的云服务

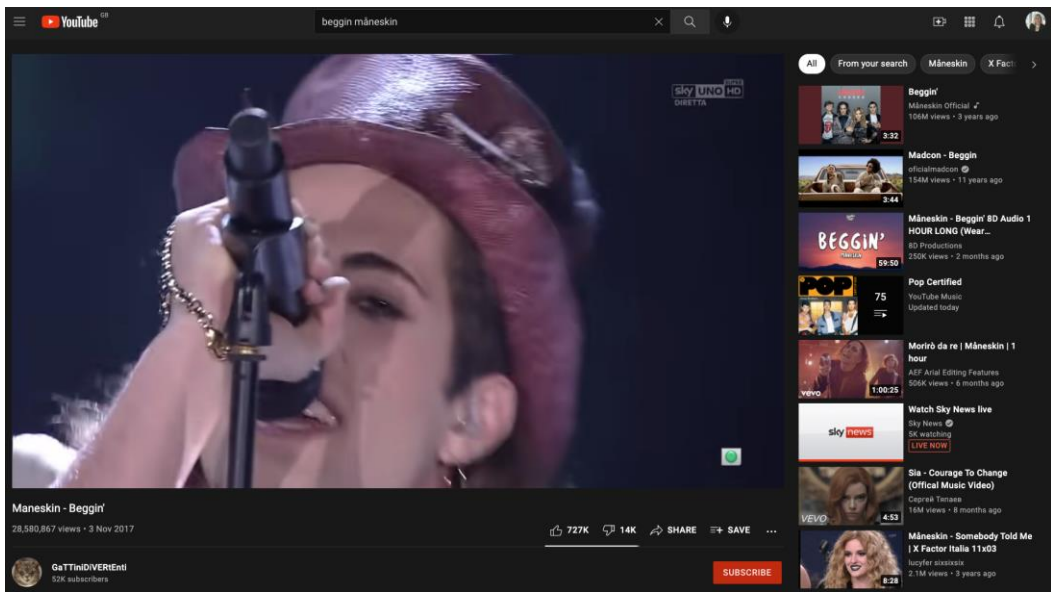
** If your service (i) has been available in the EU for less than 3 years and (ii) has an annual turnover below €10m, then you only need to comply with (a) and (c). If, in addition to (i) and (ii), (iii) the average number of monthly unique visitors exceeds 5 million, then you also need to comply with (d).

** 如果您的服务(i)在欧盟推出时间少于3年, (ii)年营业额低于1000万欧元, 那么您只需遵守(a)和(c)。如果除(i)和(ii)外, (iii)每月平均独立访客数超过500万, 则您还需要遵守(d)。

From *Pirate Bay* to *YouTube* (and back?) 从海盗湾 (Pirate Bay) 网站到YouTube (再回来) ?



Criteria 标准	YouTube	Uploaded上传
Knowledge of unlawful content非法内容知识	☺	☺
ToS	☺	☺ (TBC) 待定
Content filtering tools 内容过滤工具	☺	☹
Unlawful content promotion非法内容宣传推广	☺	☺
Business model 商业模式	☺	☹ (TBC) 待定
% unlawful content非法内容比例		☹ (TBC) 待定



- Article 17: a clarification? 第17条: 澄清?
 - Hosting safe harbour 提供安全港湾
- Platforms that do not qualify as OCSSPs 不符合OCSSP的平台
- Countries that won't transpose Article 17, eg UK (at least in short-/medium-term) 不愿意移调第17条的国家, 如英国 (至少短期/中期内)

The judgment in C-401/19

对C-401/19的判断

1. No technologies that block lawful content
没有阻止合法内容的技术
2. Users have 'rights'
用户拥有 "权利"
3. Accuracy of rightholders' notices
权利人通知的准确性
4. No general monitoring obligation
没有一般监督义务
5. Complaint and redress
投诉和申诉
6. Stakeholder dialogue
利益相关者对话



Next steps and conclusion

下一阶段工作及结论

National transpositions by 7 June 2021
(SOME STILL MISSING!)

2021年6月7日国家互换 (还有缺失!)

(Litigation)

(诉讼)

(Referrals to the CJEU)

(参考欧盟法院)

Source: [Communia](#) (01/12/2023); see [official EC page](#))

Country Pages 国家页面

已采纳:

Adopted:

 Netherlands 🏆

 Hungary 🏆

 Germany 🏆

 Malta

• Denmark (Articles 15 and 17)

 Croatia

 Italy

 Ireland

 Estonia

 France

 Austria

 Romania

 Lithuania

 Spain

 Luxembourg

 Belgium

 Cyprus

 Slovakia

 Slovenia

 Sweden

 Czechia

 Greece

 Finland

 Denmark

 Portugal

Delegation legislation adopted:

In Parliament:

 Bulgaria

Draft laws publicly available:

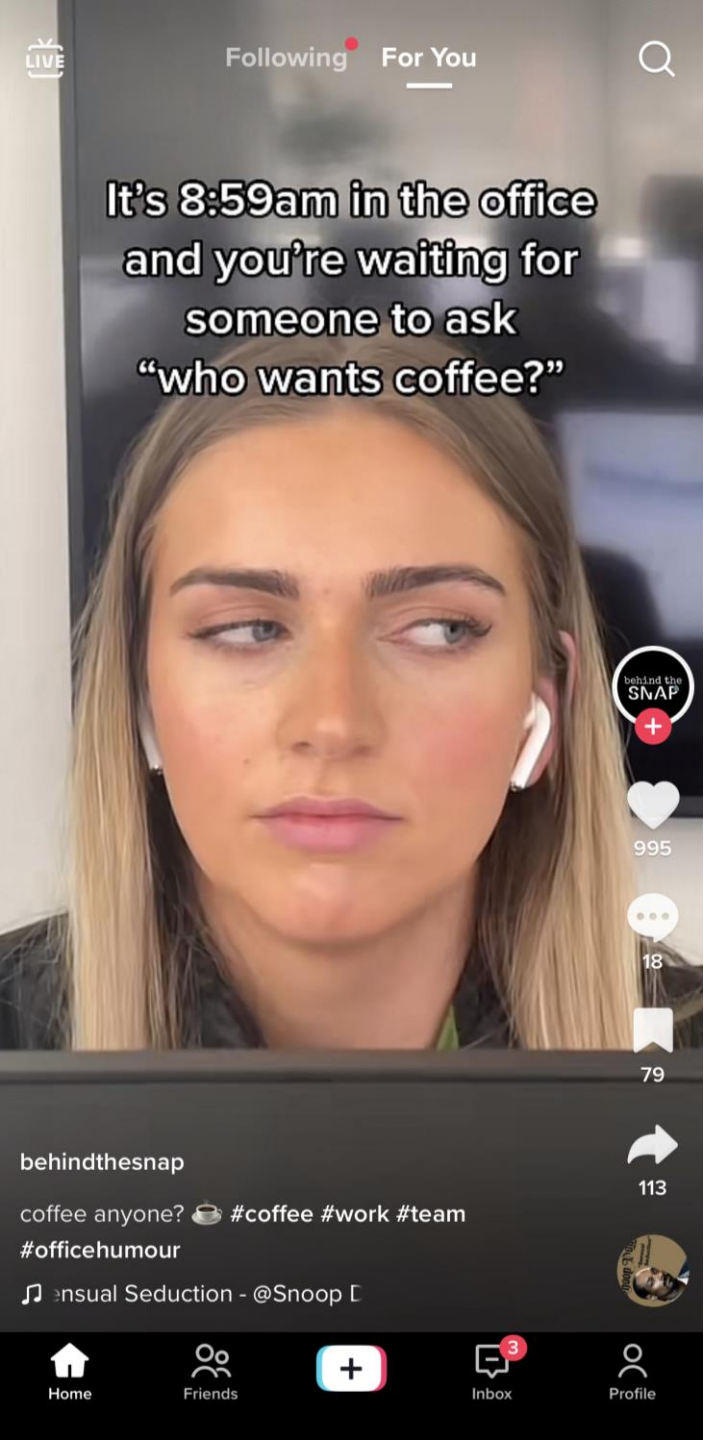
 Poland

仍在走流程:

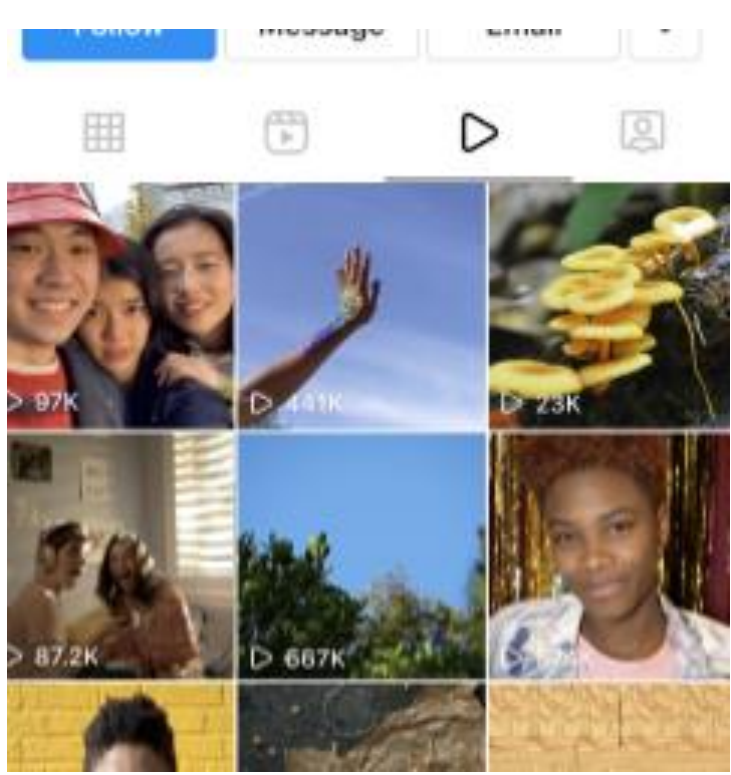
Ongoing process:

 Latvia

 Norway



Thanks for your
attention!
感谢聆听!



eleonora@elawnora.com
<https://www.linkedin.com/in/eleonorarosati/>

Further reading:
E Rosati, Copyright and the Court of Justice of the European Union (OUP:2023), 2nd edn, Chapter 5, §2.5
E Rosati, Copyright in the Digital Single Market. Article-by-Article Commentary to the Provisions of Directive 2019/790 (OUP:2021)

