

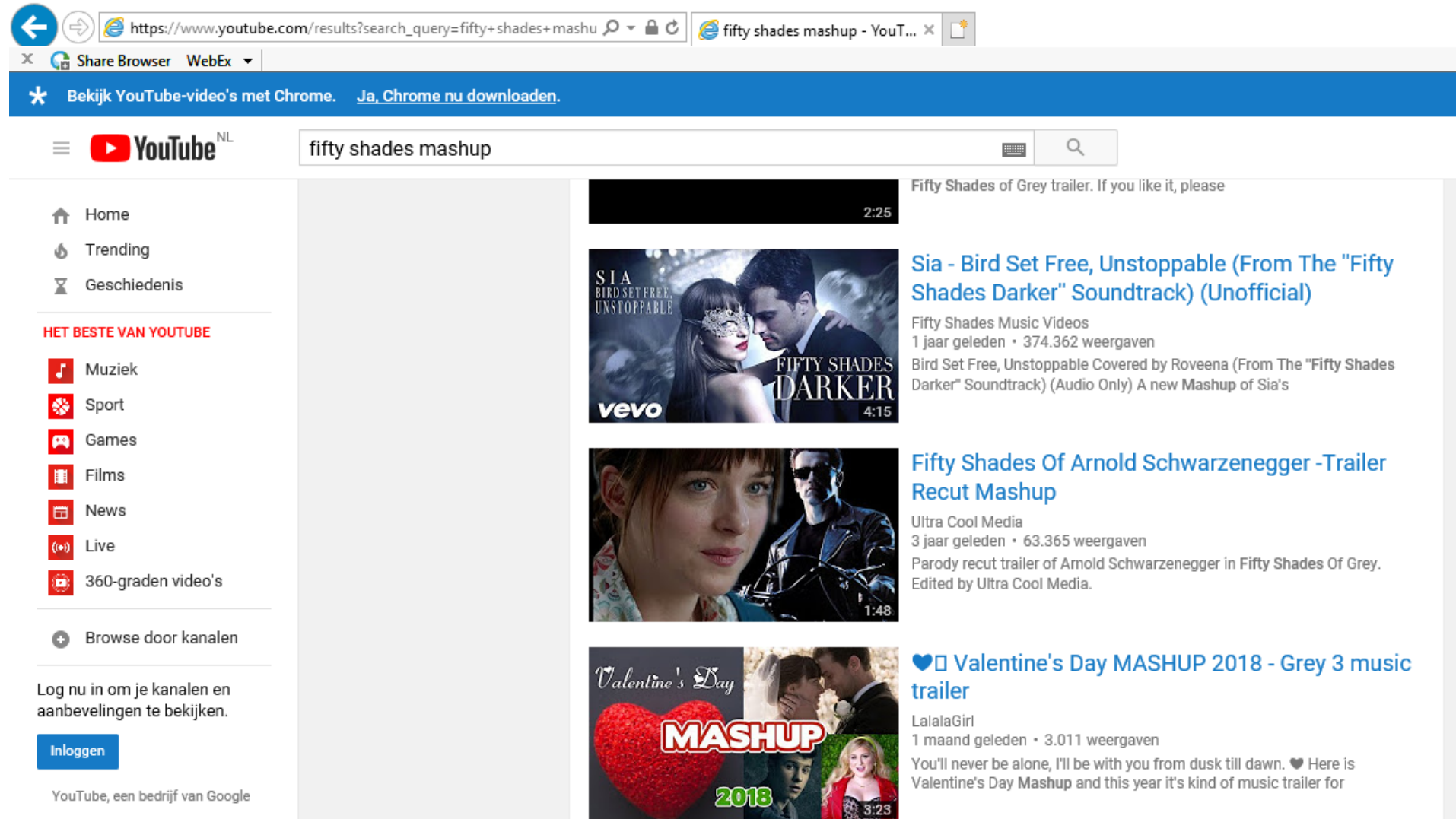


COMMUNIA Salon – DSM Directive

# Article 17, Pastiche and Money for Creators

Prof. Martin Senftleben, 18 June 2020

# Objective: OCSSPs paying for UGC



The screenshot shows a Chrome browser window with the address bar containing the URL [https://www.youtube.com/results?search\\_query=fifty+shades+mashu](https://www.youtube.com/results?search_query=fifty+shades+mashu). The page displays search results for 'fifty shades mashup'. The left sidebar includes navigation options like Home, Trending, and Geschiedenis, along with a 'HET BESTE VAN YOUTUBE' section listing categories like Muziek, Sport, Games, Films, News, Live, and 360-graden video's. The main content area shows three video results:

- Fifty Shades of Grey trailer. If you like it, please**  
Duration: 2:25
- Sia - Bird Set Free, Unstoppable (From The "Fifty Shades Darker" Soundtrack) (Unofficial)**  
Fifty Shades Music Videos  
1 jaar geleden • 374.362 weergaven  
Bird Set Free, Unstoppable Covered by Roveena (From The "Fifty Shades Darker" Soundtrack) (Audio Only) A new Mashup of Sia's
- Fifty Shades Of Arnold Schwarzenegger -Trailer Recut Mashup**  
Ultra Cool Media  
3 jaar geleden • 63.365 weergaven  
Parody recut trailer of Arnold Schwarzenegger in Fifty Shades Of Grey. Edited by Ultra Cool Media.
- ♥ Valentine's Day MASHUP 2018 - Grey 3 music trailer**  
LalalaGirl  
1 maand geleden • 3.011 weergaven  
You'll never be alone, I'll be with you from dusk till dawn. ♥ Here is Valentine's Day Mashup and this year it's kind of music trailer for

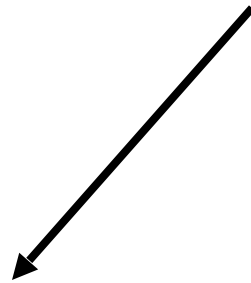
At the bottom, it says 'YouTube, een bedrijf van Google'.

## Vehicle: Art. 17(1) DSM Directive

‘Member States shall provide that an online content sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it ~~intervenes in full knowledge of the consequences of its action to~~ gives the public access to copyright protected works or other protected subject matter uploaded by its users.’

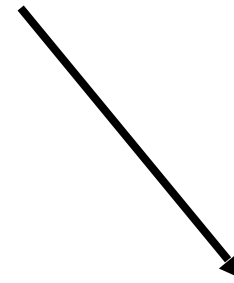
= no strict liability

...two options instead:



licensing

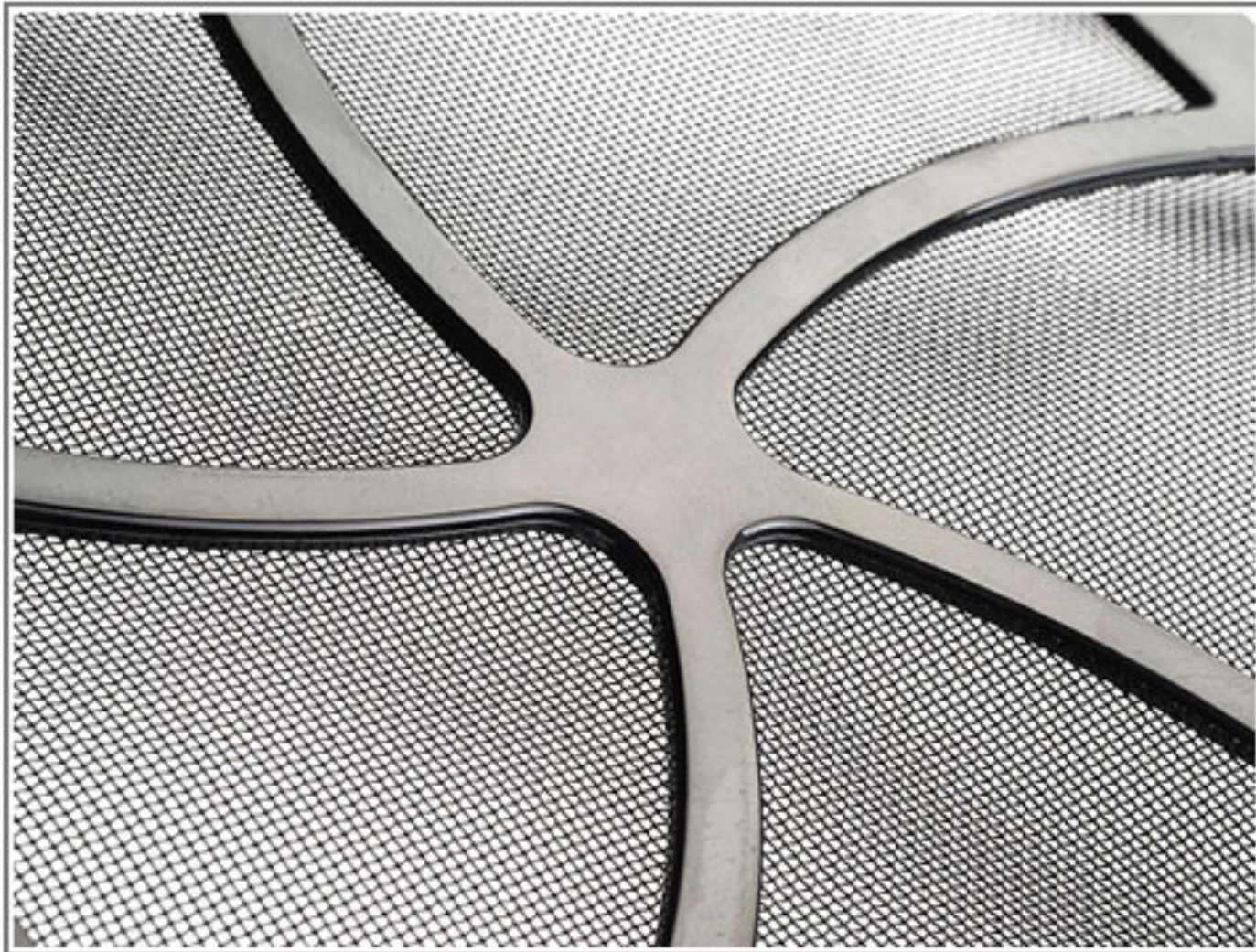
(Art. 17(1) DSM  
Directive)



filtering

(Art. 17(4) DSM  
Directive)

# Much to say about filtering...



## ...but the money is in the licensing part

- Art. 17(4)(a) DSM Directive
- platform providers liable for infringing content unless...
- ‘...made best efforts to obtain an authorisation;...’

# Practically speaking: industry negotiations

content platform  
industry pays  
remuneration

creative industry  
receives  
remuneration

individual  
creator gets  
remuneration



# Typical copyright policy dilemma





## New copyright contract law no solution

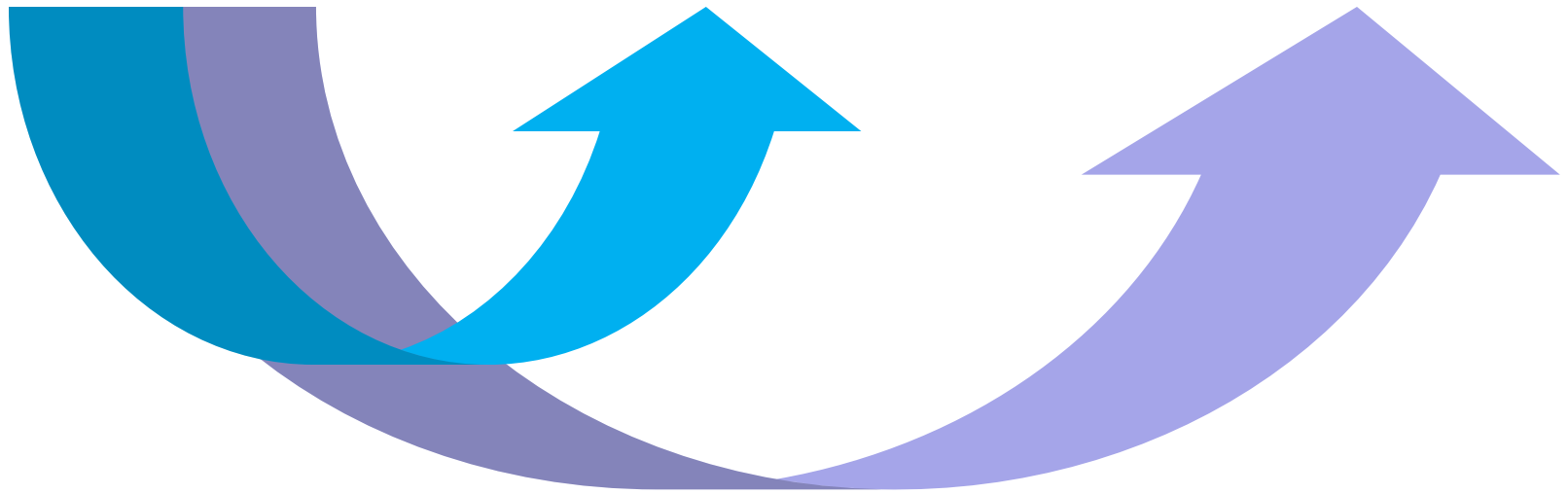
- Art. 18(1) DSM Directive
- ‘...where authors and performers license or transfer their exclusive rights for the exploitation of their works or other subject matter, they are entitled to receive appropriate and proportionate remuneration.’
- wonderful programmatic language!
- experiences in D and NL disappointing
  - evidence problem
  - black list problem

# CMO deals much better for individual creators

CMO receives  
remuneration

% goes to  
individual  
creator

% goes to  
creative  
industry



What is the problem with CMO deals?

**cross-border  
licenses for entire  
EU territory**

A photograph of the University of Amsterdam building, featuring a prominent white tower with the university's logo. The building is modern with a dark facade and many windows. There are trees and a canal in the foreground.

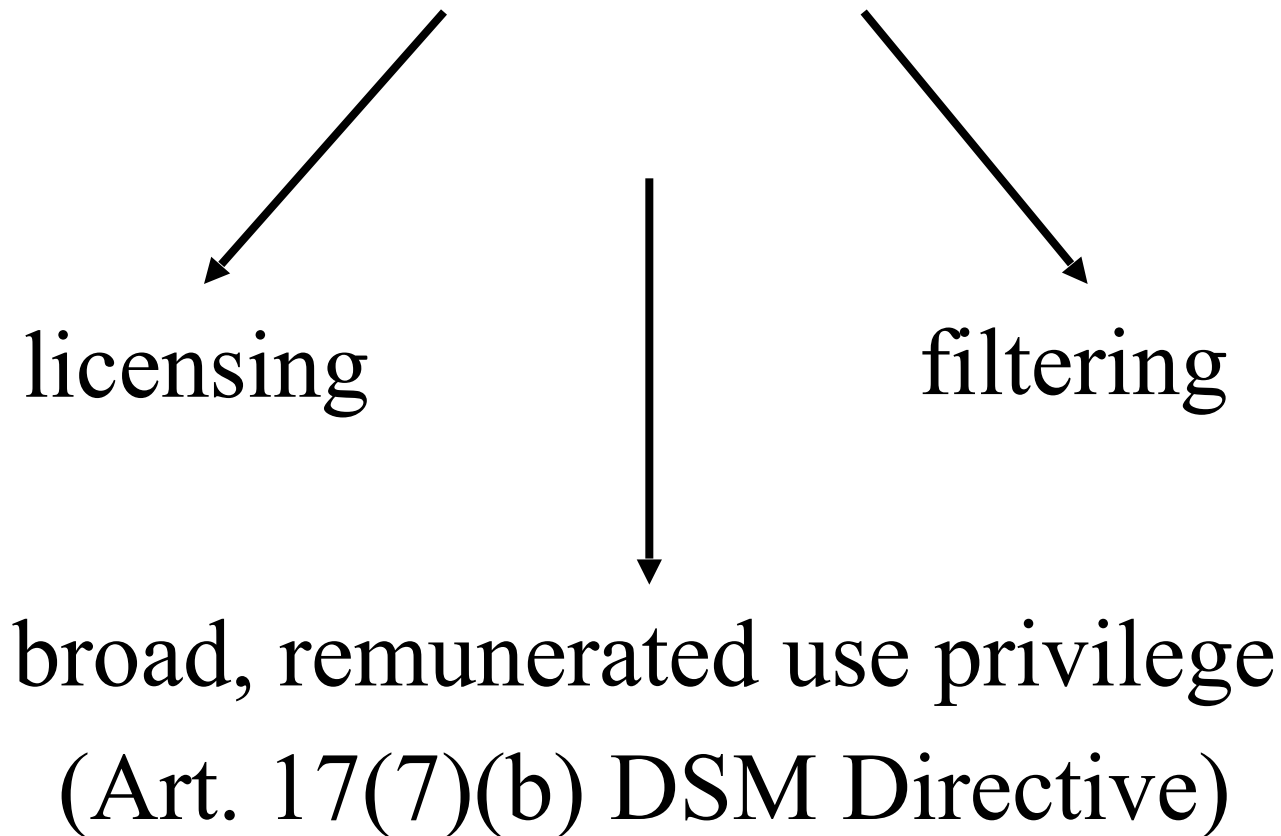
# How to make CMO deals mandatory?

## Art. 17(7) DSM Directive

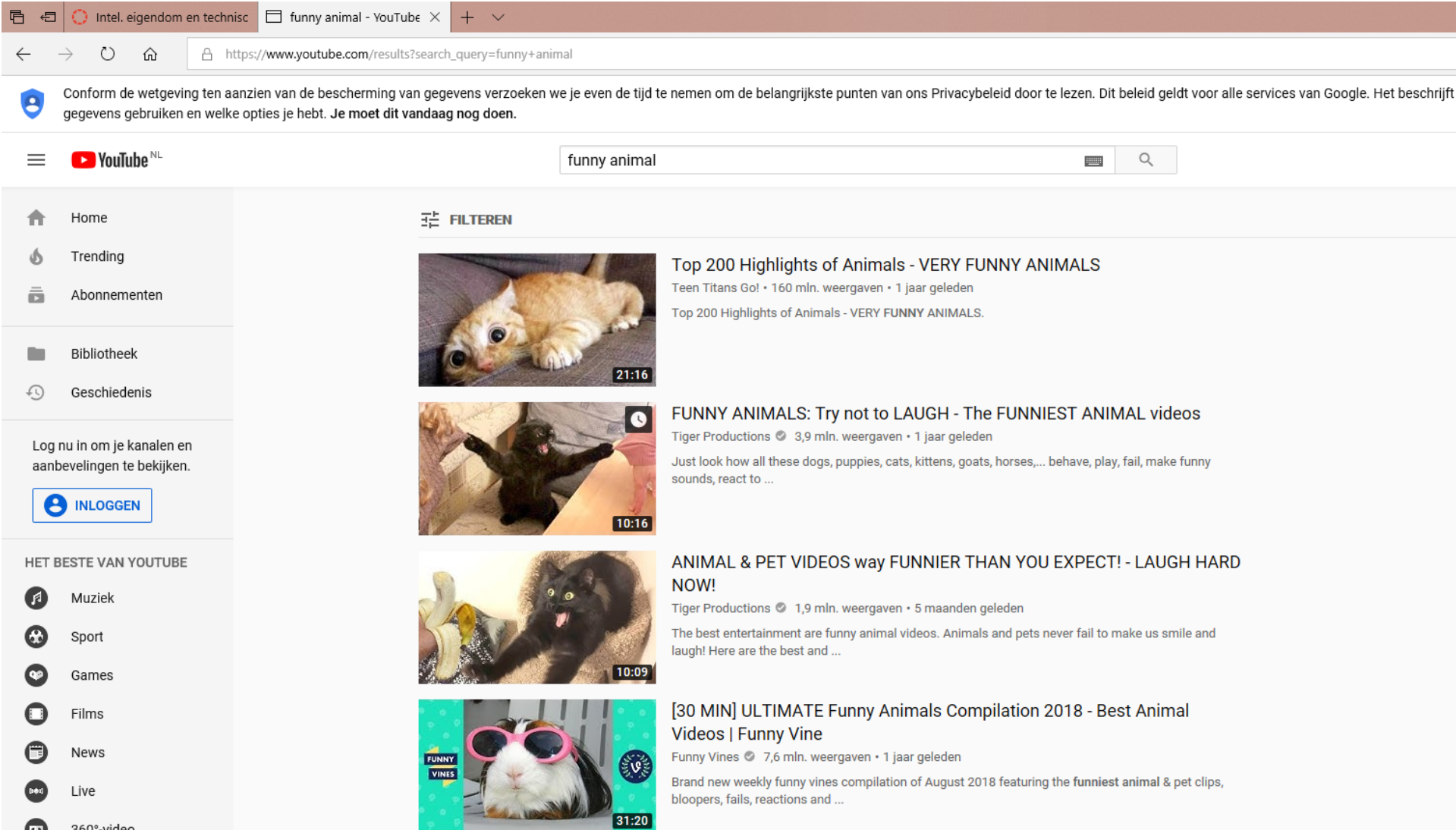
- ‘The cooperation between online content service providers and rightholders **shall not result in the prevention of the availability** of works or other subject matter uploaded by users which do not infringe copyright and related rights, including where such **works or subject matter are covered by an exception or limitation.**’
- focus on quotation, parody, pastiche
- remunerated copyright limitations = vehicle to channel money to CMOs

## Going beyond industry interests

...third, alternative element:



# What does broad mean?



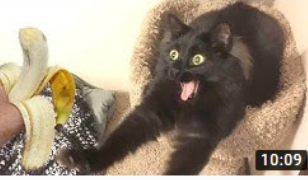



The screenshot shows a web browser window with the URL [https://www.youtube.com/results?search\\_query=funny+animal](https://www.youtube.com/results?search_query=funny+animal). The browser's address bar also shows "Intel. eigendom en technisc" and "funny animal - YouTube".

Below the browser window, a Google Privacy notice is visible: "Conform de wetgeving ten aanzien van de bescherming van gegevens verzoeken we je even de tijd te nemen om de belangrijkste punten van ons Privacybeleid door te lezen. Dit beleid geldt voor alle services van Google. Het beschrijft gegevens gebruiken en welke opties je hebt. Je moet dit vandaag nog doen."

The main content is a YouTube search results page for "funny animal". The search bar contains "funny animal". The left sidebar shows navigation options: Home, Trending, Abonnementen, Bibliotheek, and Geschiedenis. Below the sidebar, there is a login prompt: "Log nu in om je kanalen en aanbevelingen te bekijken." with an "INLOGGEN" button.

The search results are filtered and show the following videos:

- Top 200 Highlights of Animals - VERY FUNNY ANIMALS**  
Teen Titans Go! • 160 mln. weergaven • 1 jaar geleden  
Top 200 Highlights of Animals - VERY FUNNY ANIMALS.  
 21:16
- FUNNY ANIMALS: Try not to LAUGH - The FUNNIEST ANIMAL videos**  
Tiger Productions ✓ 3,9 mln. weergaven • 1 jaar geleden  
Just look how all these dogs, puppies, cats, kittens, goats, horses,... behave, play, fail, make funny sounds, react to ...  
 10:16
- ANIMAL & PET VIDEOS way FUNNIER THAN YOU EXPECT! - LAUGH HARD NOW!**  
Tiger Productions ✓ 1,9 mln. weergaven • 5 maanden geleden  
The best entertainment are funny animal videos. Animals and pets never fail to make us smile and laugh! Here are the best and ...  
 10:09
- [30 MIN] ULTIMATE Funny Animals Compilation 2018 - Best Animal Videos | Funny Vine**  
Funny Vines ✓ 7,6 mln. weergaven • 1 jaar geleden  
Brand new weekly funny vines compilation of August 2018 featuring the funniest animal & pet clips, bloopers, fails, reactions and ...  
 31:20

# Proposal

- underlying legislative model: private copying levies in the EU
- users enjoy freedom of remix, UGC platforms pay levies
- collecting societies pass on money directly to individual creators
- possibly even new collecting society serving as a one-stop shop for entire EU

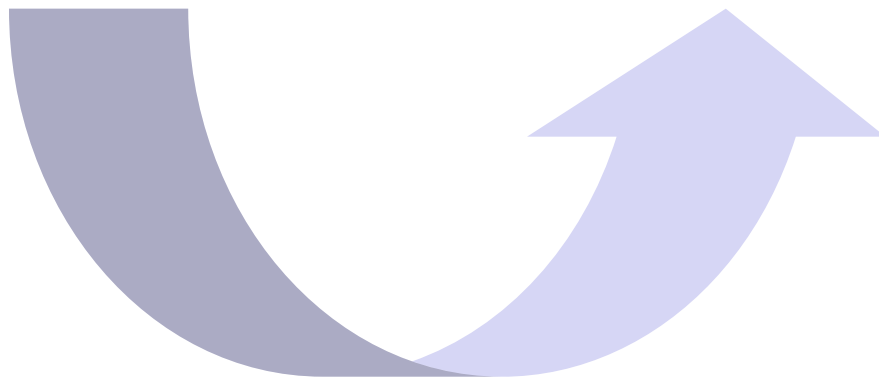


## EU implementation without fair use doctrine

‘use for the purpose of caricature, parody or **pastiche**;  
...’ (Art. 5(3)(k) InfoSoc Directive 2001/29)

**broad  
exclusive  
rights**

**closed list of  
permissible  
limitations**



## CJEU, 3 September 2014, case C-201/13, Deckmyn/Vandersteen

- parody = autonomous concept of EU law
  - reference point: usual meaning in everyday language  
(para. 20)
- pastiche = autonomous concept as well?
  - usual meaning in everyday language?
  - ‘pastiche’ broad enough to cover user-generated content mash-ups and remixes?



# Examples of pastiche

Intel. eigendom en technisc funny animal - YouTube × +

← → ↺ 🏠 [https://www.youtube.com/results?search\\_query=funny+animal](https://www.youtube.com/results?search_query=funny+animal)

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☰ YouTube NL funny animal 🔍


🏠 Home  
 🔥 Trending  
 📺 Abonnementen  
 📖 Bibliotheek  
 ⌛ Geschiedenis


Log nu in om je kanalen en aanbevelingen te bekijken.  
 👤 INLOGGEN


HET BESTE VAN YOUTUBE


- 🎵 Muziek
- ⚽ Sport
- 🎮 Games
- 🎬 Films
- 📰 News
- 📺 Live
- 📺 360°-video

**FILTEREN**

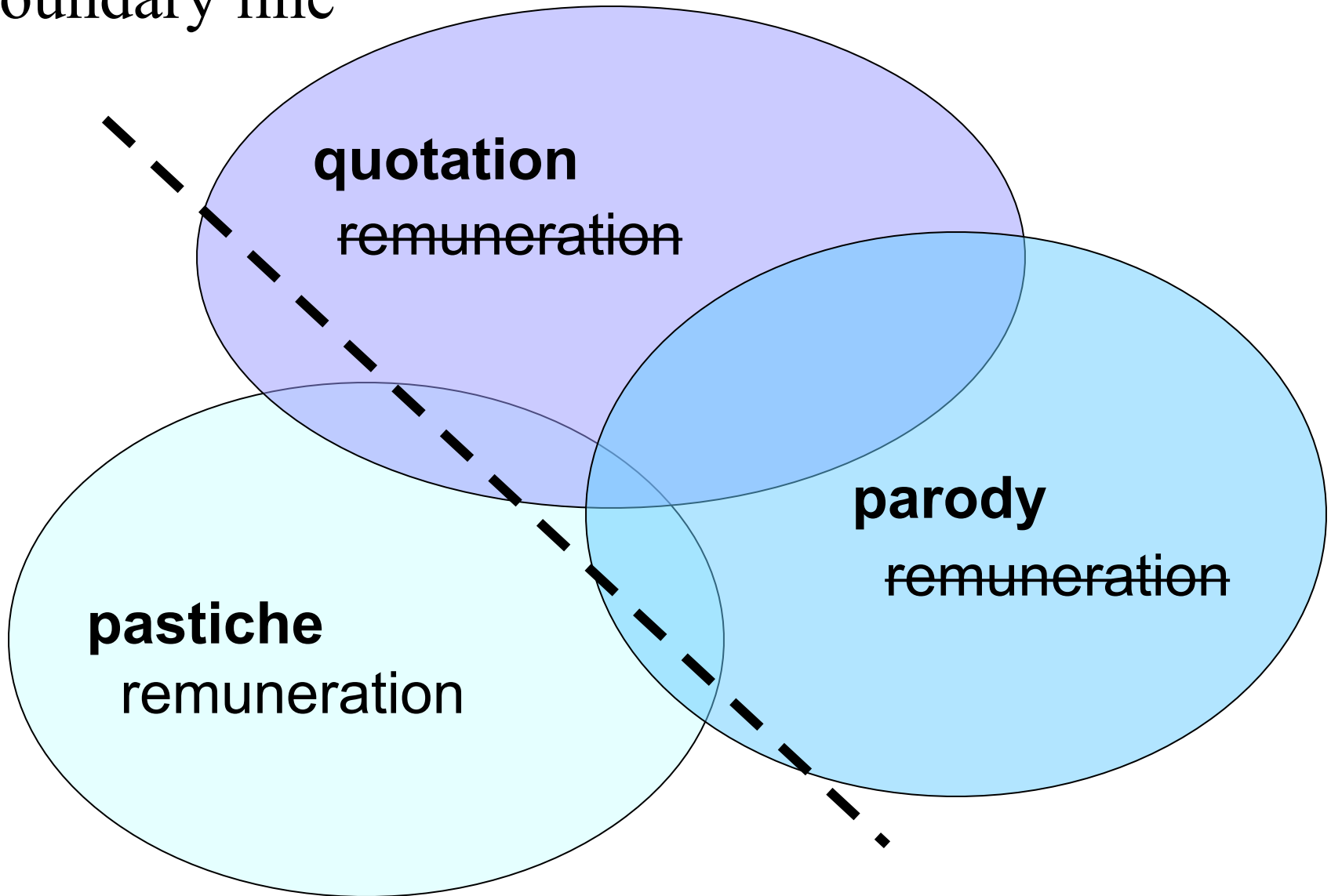
 **Top 200 Highlights of Animals - VERY FUNNY ANIMALS**  
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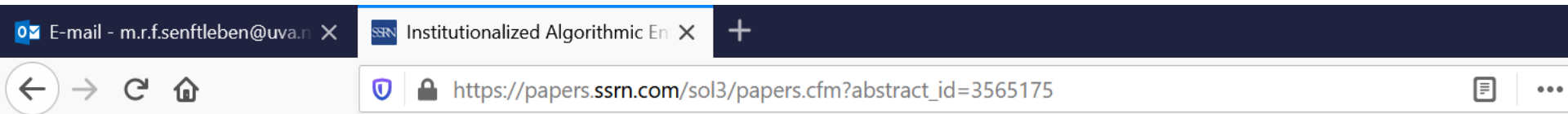
# Boundary line



Identification of pastiche share difficult?

**lumpsum payment  
anyway (% of  
advertising revenue)**

For more details: <https://ssrn.com/abstract=3565175>



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# Institutionalized Algorithmic Enforcement – The **Pros** and **Cons** of the EU Approach to UGC Platform Liability

*Florida International University Law Review 14 (2020), Forthcoming*

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Instituut voor Informatierecht



**The End. Thank you!**

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