Art. 13(1) of the © in DSM Directive: a comparative perspective

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Outline

1. Introduction

2. DMCA and “content recognition technologies”

3. CJEU and balancing of rights

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Art. 13(1): an enigmatic norm

Tons of criticisms

E.g.

- Christina Angelopoulos report
- Sophie Stalla-Bourdillon et al.
- MPI position statement
- Communia position statement

One of the worst pieces of EU copyright legislation

- Technically confused and vague
- Against the acquis communautaire
- Wrong in terms of policy

A policy perspective

- From ex post enforcement to ex ante enforcement

- Shaping technologies according to rightholders' interests

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Back to the future?
DMCA in the making

"It would be impossible for any carrier to review all of the material; and we cannot create a legal obligation that is technologically impossible to satisfy. Clearly, the potential for copyright infringement is real—as real as the impossibility of requiring a service provider to monitor every communication, including e-mail, homepages, and chat rooms [for infringing activity]"

144 Cong. Rec. S8729 (daily ed. Sept. 3, 1997) (statement of Sen. Ashcroft)

Back to the future?
DMCA in the making

"We must begin a process internationally that is structured to balance the rights of copyright owners with the needs and technological limitations of those who enable the distribution of the electronic information, and with the rights and needs of individual end users".

"[O]ne of the many important values held in this country is the freedom of expression. The United States must continue to be a leader in the preservation of freedom of expression around the world"

144 Cong. Rec. S8729 (daily ed. Sept. 3, 1997) (statement of Sen. Ashcroft)

Back to the fut
DMCA in the n

Right to intellectual property

"We must begin a process internatio ally that is structured to **balance the rights** of **copyright owners** with the **needs and technological limitations** of those who enable the **distribution of the electronic information**, and with the rights and needs of individual end users".

Freedom to conduct a business

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144 Cong. Rec. S8729 (daily ed. Sept. 3, 1997) (state

Freedom of expression

DMCA §512

- No **legal obligations** on intermediaries to implement content recognition technologies.
- However, §512(i) requires that each intermediary "**accommodates and does not interfere with standard technical measures** [that] have been developed **pursuant to a broad consensus of copyright owners and service providers** in an **open, fair, voluntary, multi-industry standards process** [that] **do not impose substantial costs on service providers or substantial burdens on their systems or networks**".
- 512(m) **Protection of Privacy**.-Nothing in this section shall be construed to condition the applicability [of OCILLA safe harbors] on-(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, **except to the extent consistent with a standard technical measure complying with the provisions of subsection.**

UGC Services Principles

No «broad consensus of copyright owners and service providers» has been reached however UGC Services Principles were adopted:

"3. UGC Services should **use effective content identification technology** […] with the goal of **eliminating** from their services **all infringing user-uploaded audio and video** content for which Copyright Owners have provided Reference Material" → *fingerprinting*

New law (art. 13(1)), old problems

Content recognition technologies

- have false positives
- imposes high costs on intermediaries
- require traffic filtering
- all the same do not protect IP properly

New law (art. 13(1)), old problems

Content re[illegible]ogies

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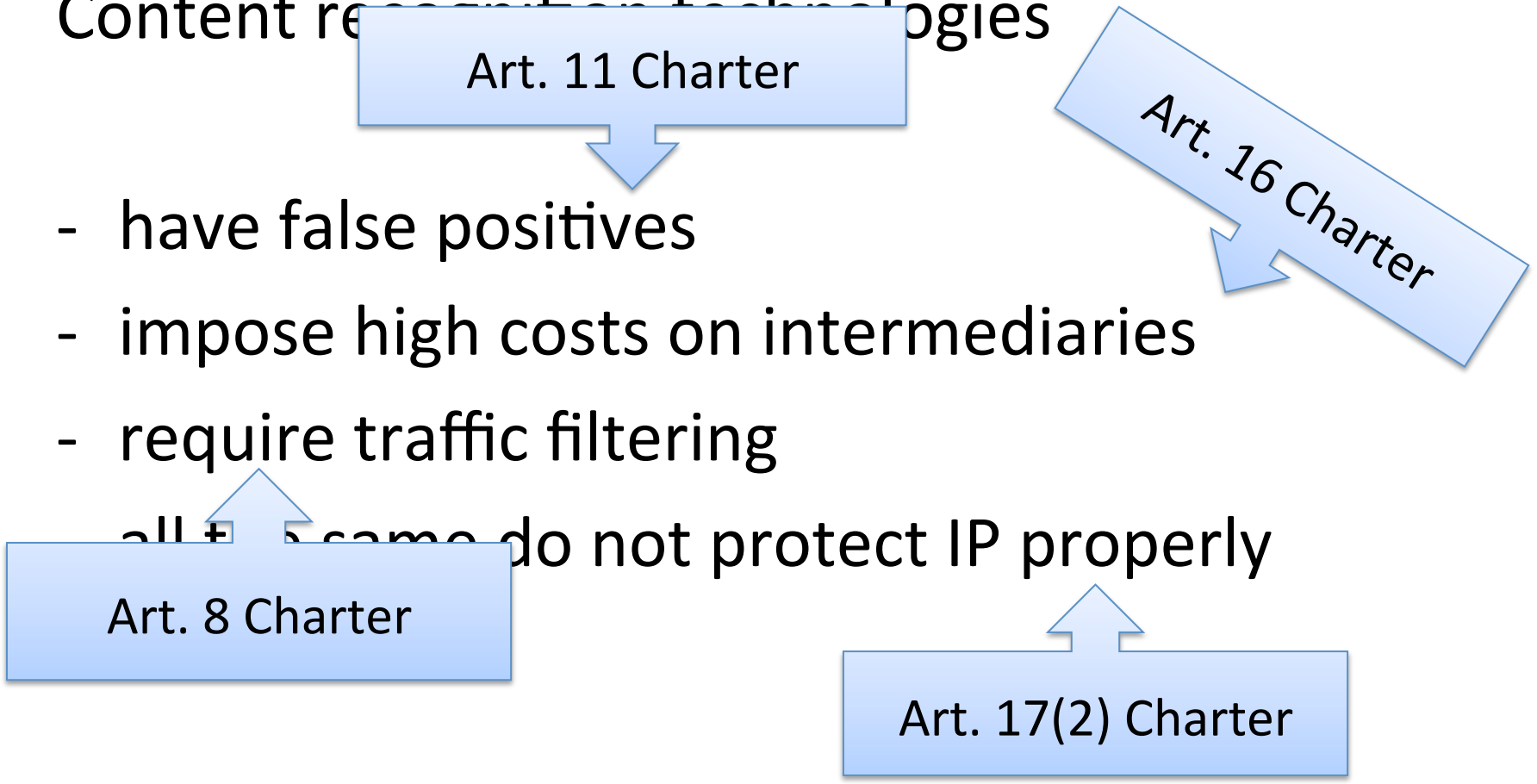

Weird enough…

Art. 13(1) requires the measures to be adopted to be «appropriate and **proportionate**»

This recalls the idea of rights balancing

How can technology encoding a rule allow rights balancing 

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Would everything be lost?

“Community law requires that, when transposing those directives, the Member States take care to rely on an interpretation of them which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order. Further, when implementing the measures transposing those directives, the authorities and courts of the Member States must not only interpret their national law in a manner consistent with those directives but also make sure that they do not rely on an interpretation of them which would be in conflict with those fundamental rights or with the other general principles of Community law, such as the principle of proportionality”

Case C-275/06 Productores de Música de España (Promusicae) v Telefónica de España SAU, judgment of 29 January 2008


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The evolution of balancing of rights

From Promusicae to Mc Fadden: i.e. from generic to (too) specific

- Providers are increasingly treated as private enforcers (of private rights)
- Decisions are more detailed and leave little leeway to national judges
- Copyright becomes the driver of Internet law


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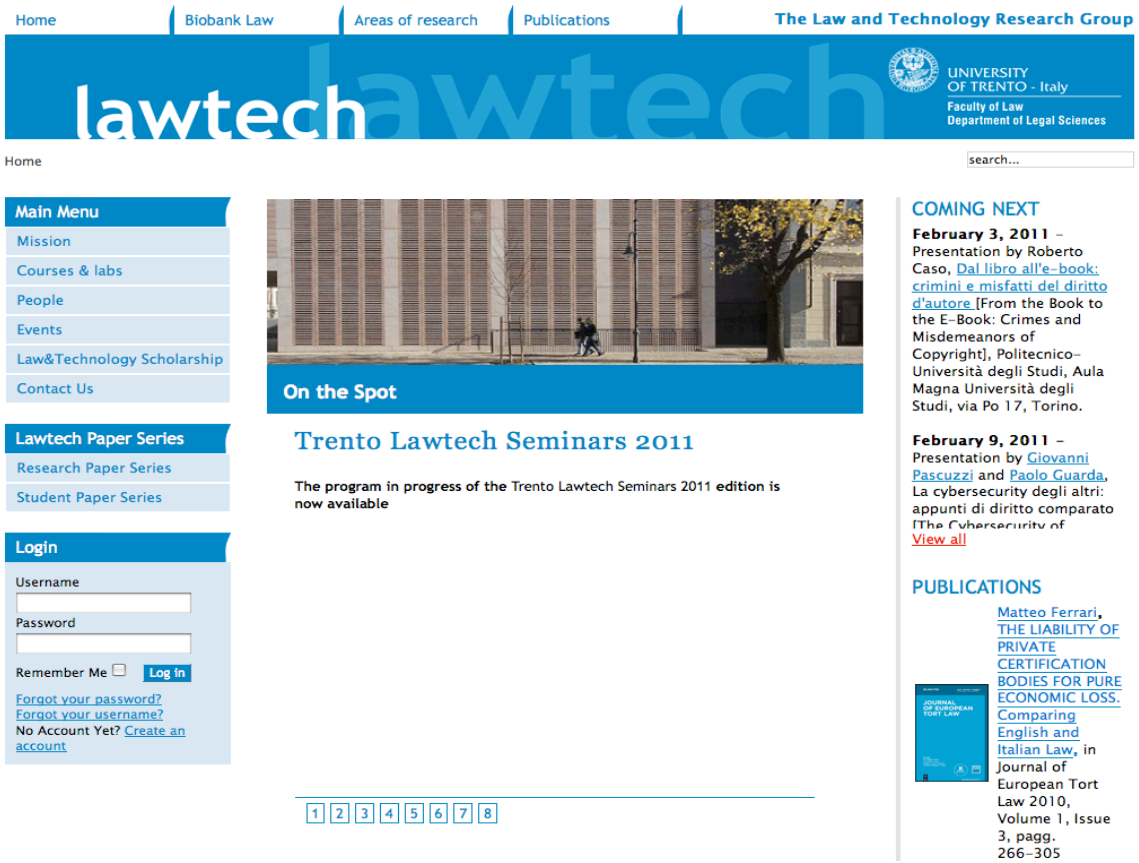

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