BACKGROUND

1. Even if not explicitly mentioned in the text, upload-filters will be the consequence of article 13 (now article 17).

Some people claim that concerns about the widespread use of upload-filters are overblown as the text that will be voted in the European Parliament does not *explicitly* mention them. It is indeed correct that they are not mentioned. However, the wording of article 13 (now article 17) leaves little doubt that upload filters are the most likely consequence:

- The article does say that companies must "obtain an authorisation from the rightholders" to make the works available online.
- The article continues that if no authorisation is granted, those companies "shall be liable" if copyright protected videos are spread online.
- Liability can only be avoided if companies have made "best efforts to obtain an authorisation" and "in accordance **with high industry standards** of professional diligence, **best efforts to ensure the unavailability of specific works and other subject matter** for which the rightholders have provided the service providers with the relevant and necessary information".

Our concern is that, in order to avoid liability, companies will have to resort to the use of upload filters.

2. Upload-filters are ineffective as they cannot always distinguish between content that infringes copyright and content that doesn't

Consumers are increasingly sharing content online which they produced or generated themselves in the form of videos or audio recordings. For example, today, it has become normal for consumers to make a video of their holidays or their daughter's first steps, adding a popular song and posting it online for their friends to watch and comment.

The text of the current proposal lists several exceptions which can apply to the upload of some of these copyright-protected works: a) quotation, criticism, review and (b) use for the purpose of caricature, parody or pastiche.

These exceptions risk to be ignored by the filters: there is an abundance of examples where filtering techniques in use were incapable of recognising legitimate content and have prevented perfectly legitimate content from being uploaded:

- Facebook blocks home-made performance composition of Bach[1]
- White noise video on YouTube hit by five copyright claims[2]
- YouTube removes educational video of Harvard professor (on copyright)[3]
- Bogus copyright claim takes down NASA video of Mars landing of Curiosity Rover[4]

[1] https://thenextweb.com/eu/2018/09/11/copyright-takedown-notices-are-completely-baroque-en/
[2] https://www.bbc.com/news/technology-42580523
[3] https://torrentfreak.com/youtube-copyright-complaint-kills-harvard-professors-copyright-lecture-160217/
[4] https://www.techdirt.com/articles/20120806/11053019945/curiositys-mars-landing-video-disappears-youtube-due-to-bogus-copyright-claim.shtml

3. What others say:

David Kay, United Nations Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression

"Article 13 of the proposed Directive appears destined to drive internet platforms toward monitoring and restriction of user-generated content even at the point of upload. Such sweeping pressure for pre-publication filtering is neither a necessary nor proportionate response to copyright infringement online.

Misplaced confidence in filtering technologies to make nuanced distinctions between copyright violations and legitimate uses of protected material would escalate the risk of error and censorship. Who would bear the brunt of this practice? Typically it would be creators and artists, who lack the resources to litigate such claims."[5]

Ulrich Kerber, Federal Commissioner for Data Protection and Freedom of Information

"The copyright reform package that is currently being discussed in Brussels could also pose significant risks relating to data privacy rights. Above all, the use of so-called upload filters presents a threat of a few large providers of such technology gathering even more data concerning the users of many Internet platforms and services."[6]

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[5] 11 March 2019, https://www.ohchr.org/EN/NewsEvents/Pages/DisplayNews.aspx?NewsID=24298&LangID=E
[6] 26/02/2019, https://www.bfdi.bund.de/DE/Infothek/Pressemitteilungen/2019/10_Uploadfilter.html
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