

Debunking the Myths: EPP “alternative” CAs on Article 13

	“Alternative” Compromise	Debunking the Myths
Extending the scope	⇒ Recital 37 and Recital 38 of the “alternative” CAs ensure that Article 13 would apply to all information society services that provide access to significant amounts of copyright-protected content.	⇒ The Commission's proposal was focused on hosting providers that store and give access to content. The “alternative” compromises will now target all internet intermediaries, including access providers such as Belgacom, O2, Orange, satellite companies etc., as the amendments encompass all services that provide access to content - which were not the intended targets of this proposal!
Undermining the e-Commerce Directive...	<p>⇒ Firstly, Recital 38(2) of the “alternative” CAs states that—for the purposes of Article 14 of the e-Commerce Directive— it is necessary to verify if the role played by the service provider is of an active nature.</p> <p>⇒ Secondly, Recital 39a (new) states that the proposal to introduce content filtering in Article 13 is not in violation of Article 15 of the e-Commerce Directive, because the monitoring would be based on data provided by rightholders.</p>	<p>⇒ Recital 38(2) of the “alternative” CAs is a complete misinterpretation of Article 14 of the e-Commerce Directive. Hosting providers are NOT liable because they play an active role. They are liable when they have “knowledge or control of the data stored” (this knowledge or control may or may not be the result of the provider's active role). This fundamental criterion established by the CJEU in L’Oréal v. eBay is omitted from the alternative compromises.</p> <p>⇒ Recital 39a (new) of the “alternative” CAs incorrectly claims that filtering all user uploaded content against the data provided by rightholders doesn’t lead to a general obligation to monitor and is therefore in compliance with Article 15 of the e-Commerce Directive. The prohibition on a general obligation to monitor is based on who is monitored, not on what is monitored. All users and their uploads will have to be filtered and then compared to the catalogue provided by rightholders; this initial act of filtering is a general obligation to monitor as defined by CJEU case law and is in contradiction to Article 15 of the e-Commerce Directive (See CJEU cases Scarlet v. SABAM, SABAM v. Netlog, Telekabel and L’Oréal v. eBay).</p>
...Thereby undermining fundamental rights	⇒ Recital 39a (new) of the “alternative” amendments claims that technical measures do not require the identity of uploaders and hence do not pose any risk for privacy of individual end users, therefore ensuring that the proposed Article 13 is compliant with fundamental rights.	⇒ By impacting on the prohibition on general monitoring obligations in the e-Commerce Directive as described above, the proposal <i>is</i> undermining users’ fundamental rights. This prohibition on general monitoring is not there to protect the internet intermediaries or their revenues, it exists to protect fundamental rights including the right to conduct a business and the right to protection of personal data (SABAM v. Netlog). By extending mandatory filtering systems to social media, communications applications and other types of online services, the proposal creates a general monitoring of the internet, as virtually all of the services used in everyday life are targeted. In practice, as highlighted above, these services would have to track works and monitor the activity of users. The CJEU already ruled (see Scarlet v. SABAM , SABAM v. Netlog) that requiring a hosting service to install a copyright filtering system - that was Audible Magic - infringed fundamental rights.