



WTO – 25 Years of the TRIPS Agreement

TRIPS and the Digital Landscape

Prof. Martin Senftleben, 24 November 2020

Digital technology

**dream of the free
flow of information
nightmare of
losing control**

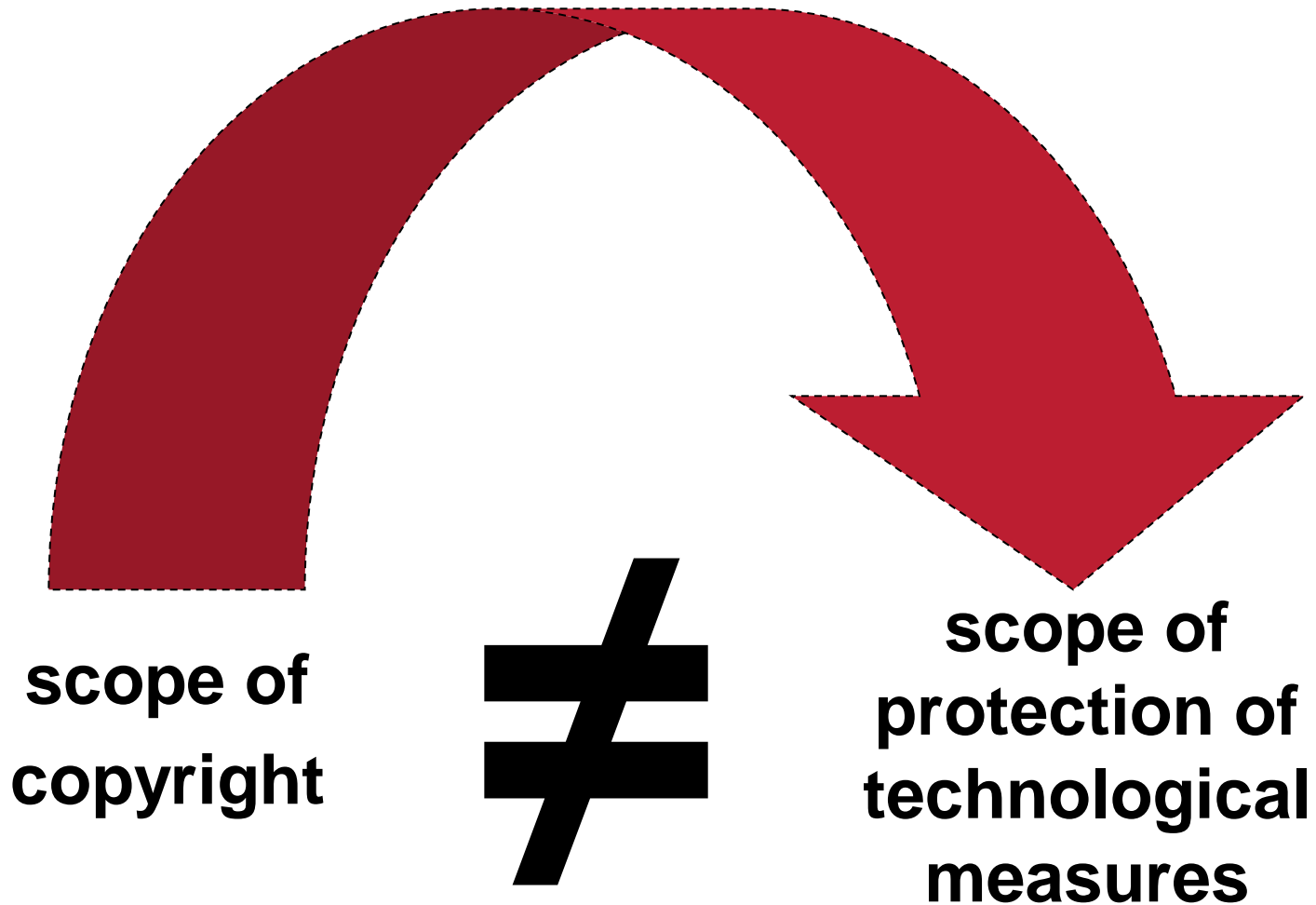
A photograph of the University of Amsterdam building, featuring a prominent white tower with the university logo. The building is modern with a dark facade and many windows. There are trees in the foreground and a canal in the background.

Early regulatory response: copyright

The answer to the machine is in the machine

- ‘...effective technological measures that are used by authors in connection with the exercise of their rights [...] and that restrict acts [...] which are not authorized by the authors or permitted by law.’ (Art. 11 WCT)
- protected against circumvention
 - + protection of rights management information (Art. 12 WCT)
- allowing creative industries to further develop their traditional business model (‘celestial jukebox’)
- hope of broader content offers for niche audiences

Legal dilemma and lack of consumer acceptance



A photograph of the University of Amsterdam building, featuring a tall white tower with the university logo, a modern glass facade, and a brick building. A large tree is on the right, and a canal with a bridge is visible in the foreground. A white text box is overlaid on the image.

**Instead: user
emancipation**

The participative web

- active users
 - more participation and interaction
 - rise of amateur creators
- create and generate online content (UGC)
 - publication on online platforms
 - creative effort
 - outside professional routines

UGC platforms

- blogs
- social networking sites
- content aggregators with ratings
- wikis
- podcasts
- virtual world content

Example: video sharing platforms

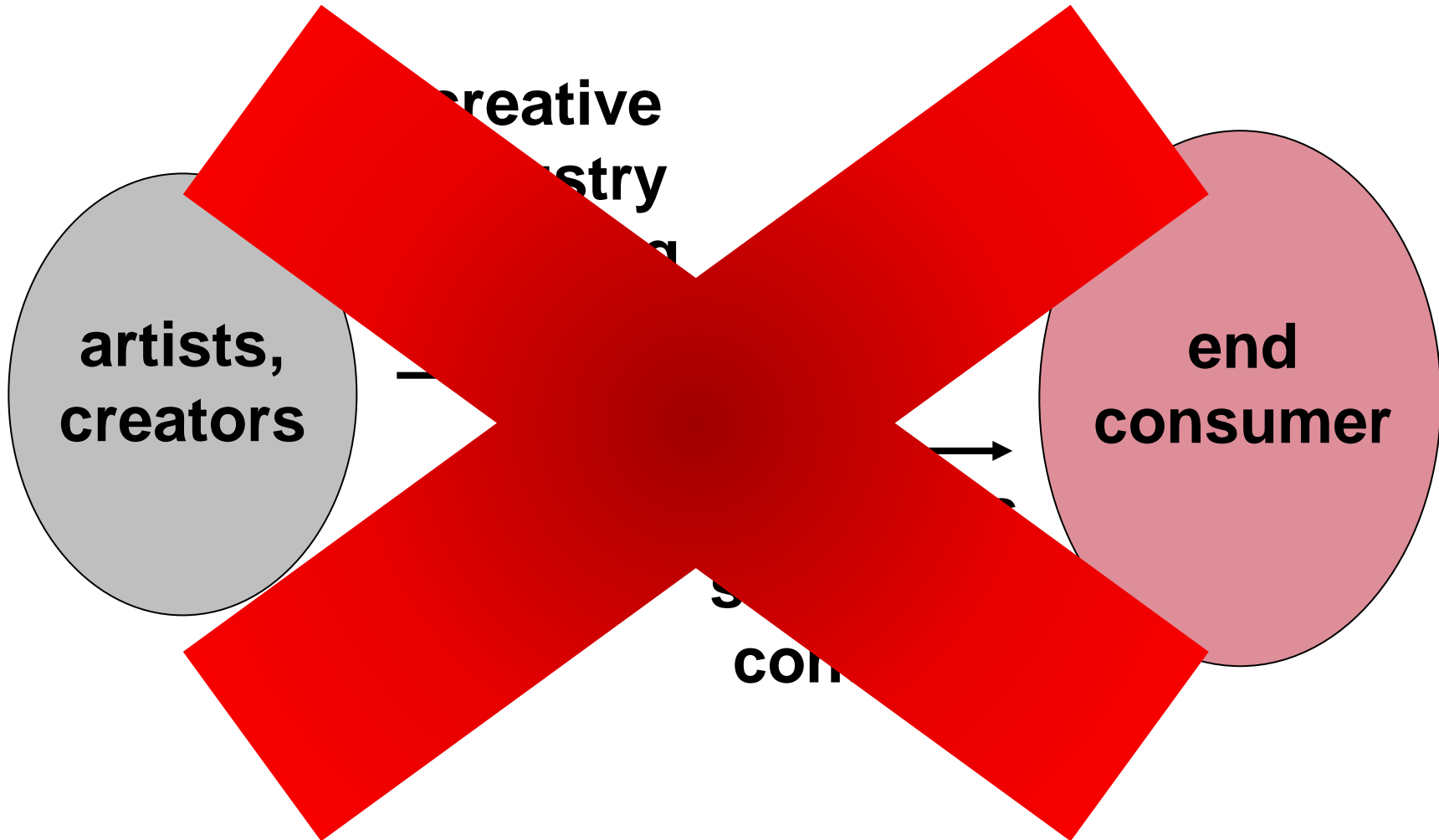
The image shows a browser window with a YouTube search results page. The browser's address bar shows the URL https://www.youtube.com/results?search_query=james+bond+parody. The YouTube interface includes a search bar with the text 'james bond parody' and a search icon. On the left, there is a navigation sidebar with icons for Home, Trending, and Abonnemenen (Subscriptions), and a 'Bibliotheek' (Library) section. The main content area displays two video results:

- Quarantine of Solace – OFFICIAL PARODY – James Bond 007**
1,7K weergaven • 7 maanden geleden
Matthew Rasku
BOND IS BACK! And this time... he's alone. James Bond struggles to overcome his mos...
Will he ...
- THE SPY WHO LOVED HIS CAR (007 Parody)**
49K weergaven • 7 jaar geleden
Mandatory
James Bond loves his Aston Martin more than anything else in the world...damage it an...
licence to ...

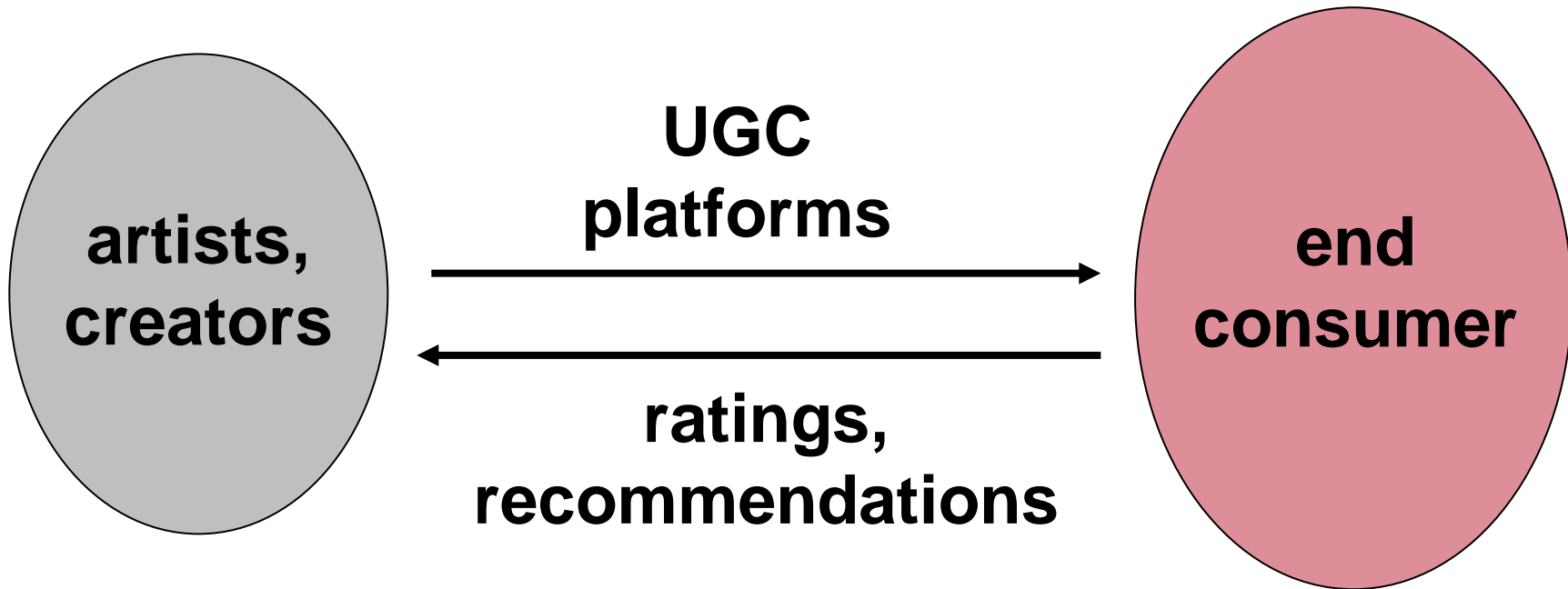
Social and cultural implications

- increased user autonomy
 - democratization of media production
 - increased citizenship engagement
- increased participation
 - shift to a participatory culture
 - establishment of social ties and structures
- increased diversity
 - long tail effect (content for niche audiences)
 - benefits for education and information
 - risk of cultural fragmentation

But: disruptive effect on creative industries



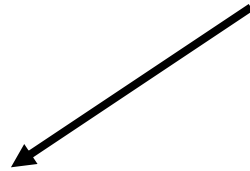
UGC distribution chain





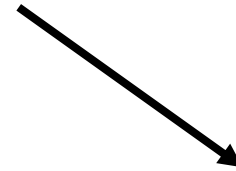
Rise of online content platforms

Safe harbours (liability shields)



US

**specific copyright
provisions**



EU

**horizontal safe
harbour regime**

= notice-and-takedown procedure

no relevant
knowledge or
awareness

notification of
platform provider

obligation
of prompt
removal



Impact on service provision worldwide

- liability shield (safe harbour system) became widespread across regions and continent
- opportunity for developing comparable content sharing services across countries
- chance of comparable access to content offers around the globe
- increasing success of online platforms, increasing competition with traditional media

David vs. Goliath – roles reversed?





New regulatory approach: algorithmic enforcement

New copyright legislation in the EU

L 130/92

EN

Official Journal of the European Union

17.5.2019

DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

of 17 April 2019

**on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC
and 2001/29/EC**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

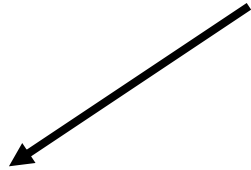
Having regard to the Treaty on the Functioning of the European Union, and in particular Article 53(1) and Articles 62 and 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

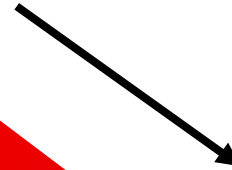
Having regard to the opinion of the European Economic and Social Committee ⁽¹⁾,

Safe harbours (liability shields)



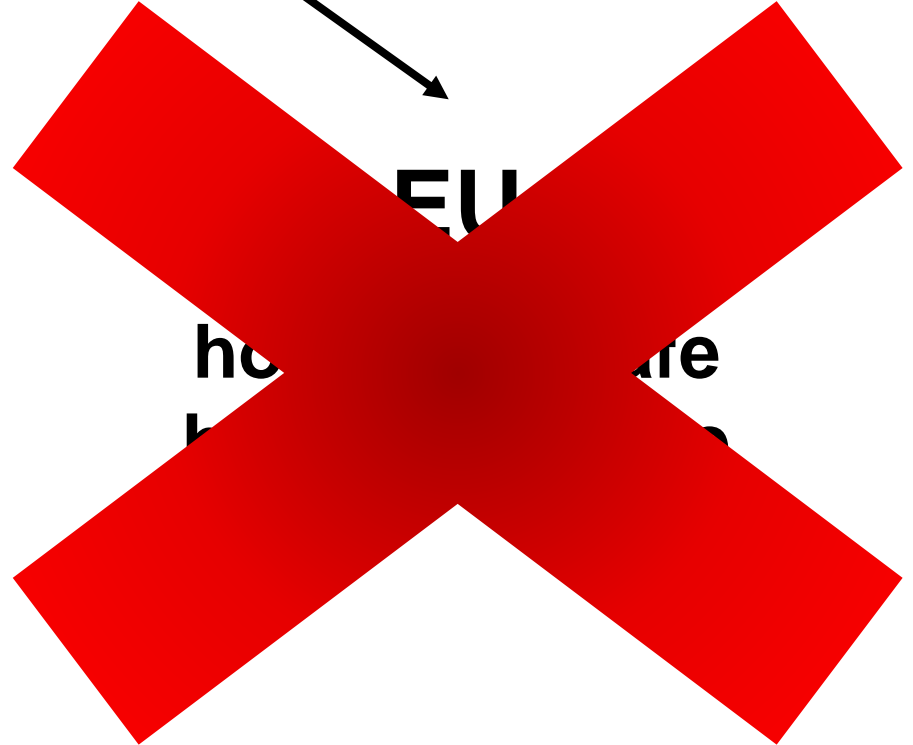
US

**specific copyright
provisions**

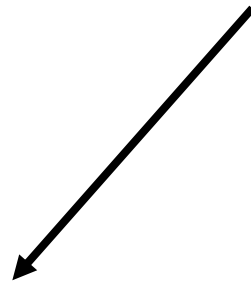


EU

**no specific
provisions**

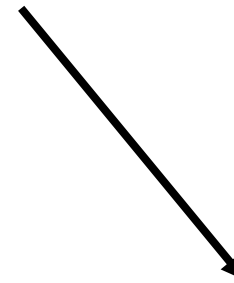


New platform obligations



licensing

**(Art. 17(1) DSM
Directive)**



filtering

**(Art. 17(4) DSM
Directive)**

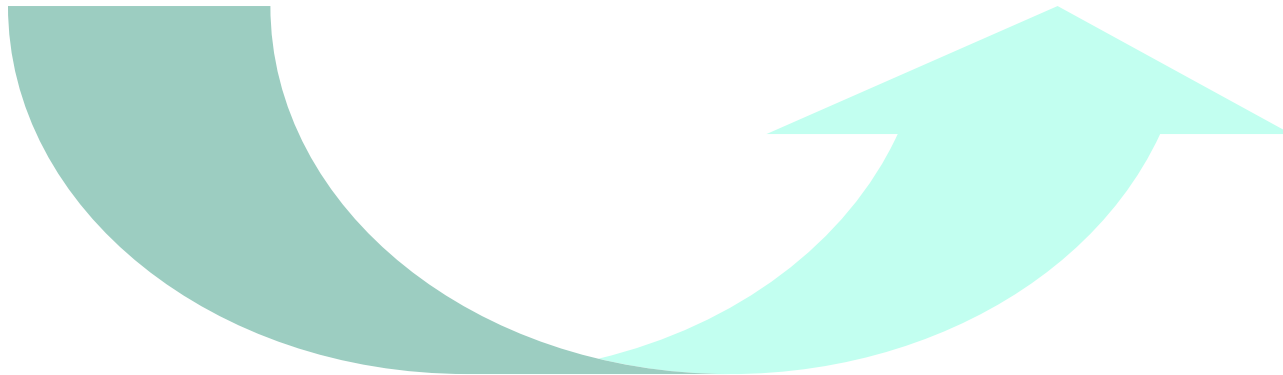
Copyright at the crossroads

**nightmare of
content censorship
end of the free flow
of information?**

Room for recalibration?

**from right to
control and
prohibit use**

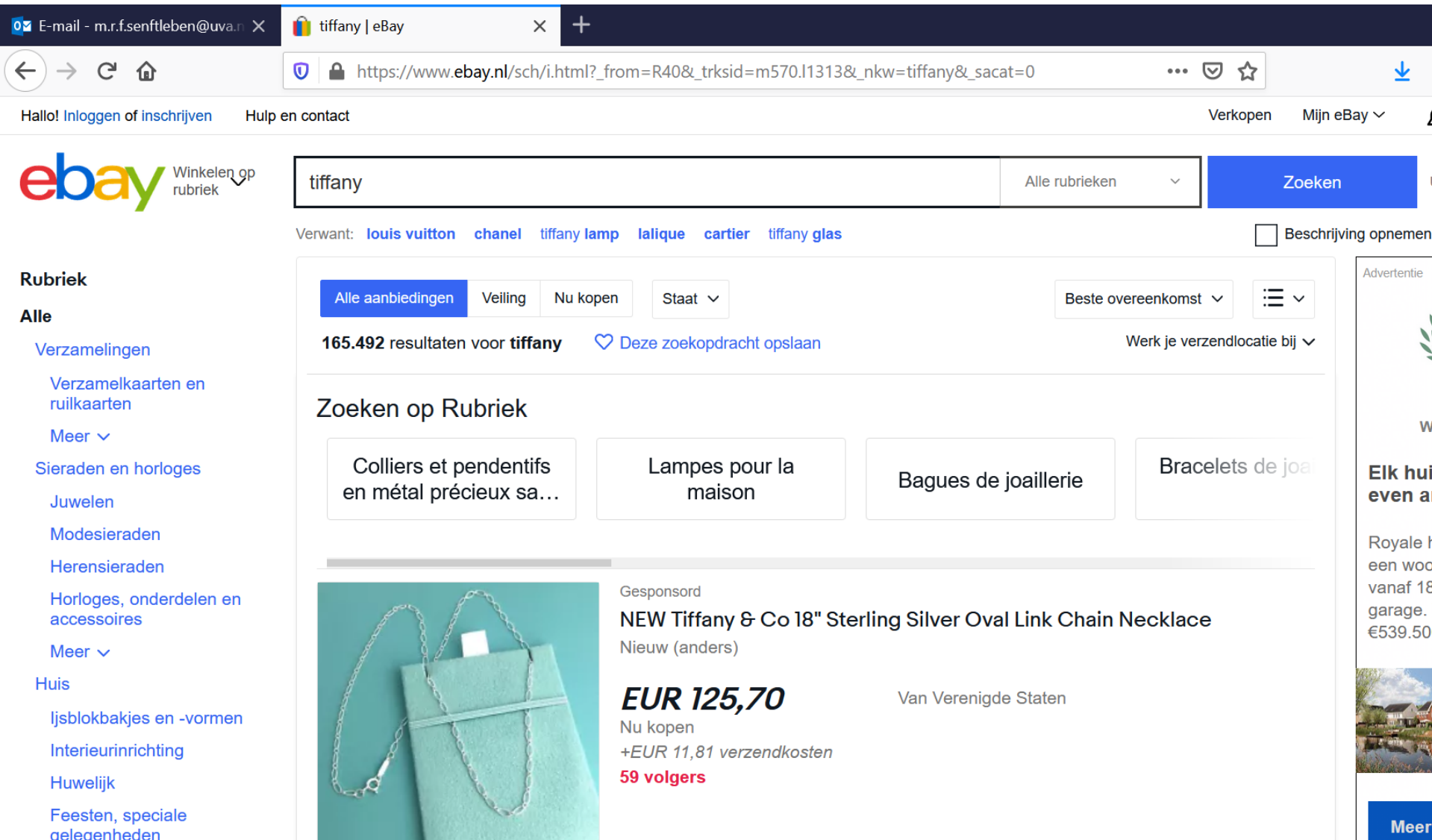
**to mere
entitlement
to fair
remuneration**



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 in the foreground and a canal in the background.

More platform issues: trademarks

Liability of online marketplaces



The screenshot shows a web browser window with the URL https://www.ebay.nl/sch/i.html?_from=R40&_trksid=m570.l1313&_nkw=tiffany&_sacat=0. The page displays search results for 'tiffany' on the Dutch eBay website. The search bar contains 'tiffany' and the search button is labeled 'Zoeken'. Below the search bar, there are filters for 'Verwant' (related) terms: louis vuitton, chanel, tiffany lamp, lalique, cartier, and tiffany glas. The main search results area shows '165.492 resultaten voor tiffany' and a 'Deze zoekopdracht opslaan' button. The 'Zoeken op Rubriek' section features four categories: 'Colliers et pendentifs en métal précieux sa...', 'Lampes pour la maison', 'Bagues de joaillerie', and 'Bracelets de joa'. A sponsored listing is visible for a 'NEW Tiffany & Co 18" Sterling Silver Oval Link Chain Necklace' priced at 'EUR 125,70' with '+EUR 11,81 verzendkosten' and '59 volgers'. The listing includes an image of the necklace on a teal background and text indicating it is 'Nieuw (anders)' and 'Van Verenigde Staten'.

Dependency on new online services

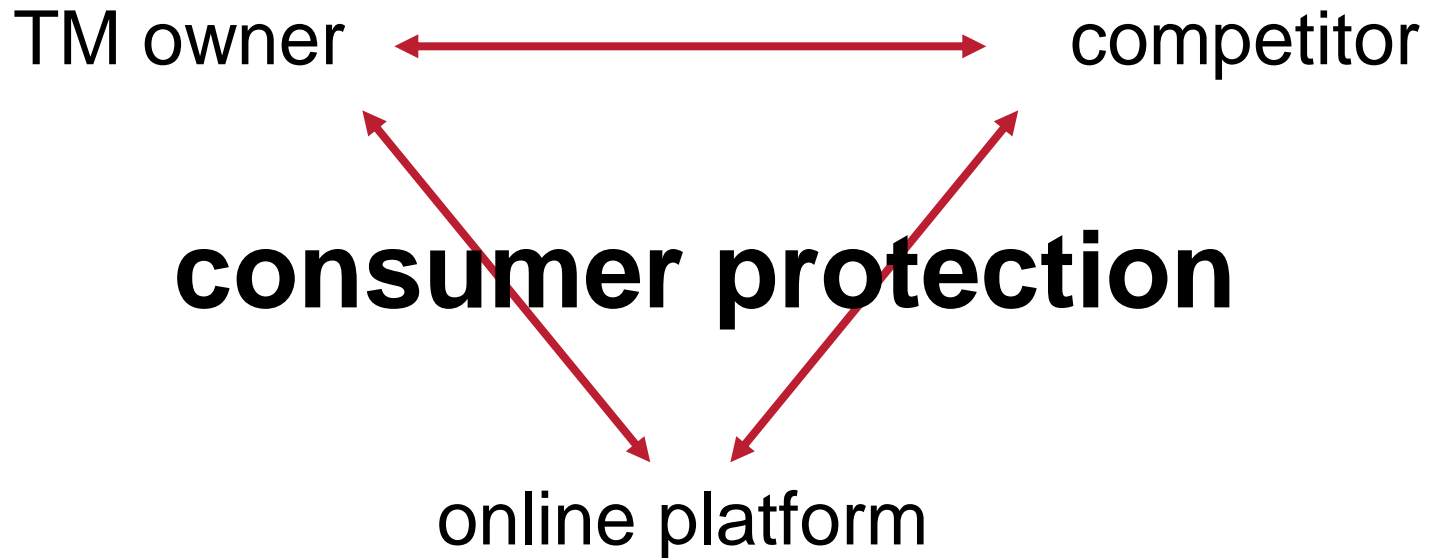
The screenshot shows a Google search for 'louis vuitton'. The browser address bar shows the search URL. The search results page displays 'Ongeveer 190.000.000 resultaten (1,45 seconden)'. Under the 'Advertenties · louis vuitton' section, five product listings are shown:

- LV Volt Cuff, Yellow Gold And**
€ 22.500,00
louisvuitton.com
Gratis verzend...
Van Google
- Travelteq New Original ...**
€ 395,00
Travelteq
Gratis verzend...
Van Google
- Travelteq Briefcase Messenger Bag, Black/Black**
€ 425,00
Travelteq
Gratis verzending
Van Google
- LV Volt Stud, Yellow Gold And**
€ 1.280,00
louisvuitton.com
Gratis verzend...
Van Google
- Louis Vuitton - gebruikt - Louis**
€ 992,00
Gebruikt
Rebelle Secon...
Van smec

Below the listings, there is a link to 'www.louisvuitton.com' and a 'Vertaal deze pagina' button. A 'Vergelijk verwante producten uit meer dan 50 winkels.' link is also visible. On the right side, a sidebar for 'Louis Vuitton' is shown, identifying it as a 'Merk' and providing a brief description: 'Louis Vuitton Malletier, meestal afgeleid van Louis Vuitton, is een Frans merk dat koffieaccessoires en kleding vervaardigt... 1854 toen de ambachtsman Louis Vuitton in Parijs ging specialiseren in het maken van handtassen en accessoires. Wikipedia'. It also lists 'Oprichter: Louis Vuitton', 'Opggericht: 1854, Parijs, Frankrijk', and 'Overkoepelende organisatie: LVMH'.

Policy questions

- TM owner: trademarks damaged?
- competitor: unfair freeriding?
- online platforms: monitoring obligation?



Only the tip of the iceberg

- personalized advertising
- recommendation algorithms
- augmented reality

- impact on freedom of competition?
- impact on consumer information?



Lessons to learn from TRIPS?

Paradigm shift in copyright law?

- ‘Members shall confine limitations or exceptions to exclusive rights to **certain special cases** which do not conflict with a **normal exploitation** of the work and do not **unreasonably prejudice** the legitimate interests of the right holder.’ (Art. 13 TRIPS)
- three-step test
- flexible interpretation possible?
- impact of fundamental rights?

UGC flatrate comparable with private copying levies?



Brands as focal points of online communication

- ‘Article 6bis [PC] shall apply, *mutatis mutandis*, to goods or services which are not similar to those in respect of which a trademark is registered, provided that use of that trademark in relation to those goods or services **would indicate a connection between those goods or services and the owner of the registered trademark** and provided that the interests of the owner of the registered trademark are likely to be damaged by such use.’ (Art. 16(3) TRIPS)
- far-reaching control over brand communication?
- need to inform consumers about alternatives?



**Multilateral approach
desirable**

Task for international policy makers: measures against policy fragmentation

from internet
with shared legal
standards

to ‘splinternet’
with norms
differing from
country to country



More than enough work to do

- primary/secondary liability
- freedom of expression and information
- freedom of competition and consumer protection
- international exchange of best practices
- formulation of policy objectives
- soft law recommendations



The End. Thank you!

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