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ANALYSIS OF THE DIRECTIVE ON COPYRIGHT IN THE DSM [2016/0280(COD)]

TITLE IV – CHAPTER 2

CERTAIN USES OF PROTECTED CONTENT BY ONLINE SERVICES

(‘FILTERING USER-UPLOADED CONTENT’)

ANALYSIS: CHAPTER 2 – CERTAIN USES OF PROTECTED CONTENT BY ONLINE SERVICES

WHAT’S IT ABOUT?

Issue: The proposed measures will require monitoring and filtering of anything that European citizens upload to content-sharing services.

Scope: Information society service (ISS) providers that provide to the public access to large amounts of works or other subject-matter uploaded by users.

Obligation: ISS providers to cooperate with rightholders and implement effective, appropriate and proportionate measures to prevent the availability on their services of works or other subject-matter identified by rightholders, *e.g.* through the use of effective content recognition technology plus by providing rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works.

ARTICLE(S) & RECITALS

Article 13 – Use of Protected Content by Information Society Service Providers Storing and Giving Access to Large Amounts of Works and Other Subject-Matter Uploaded by their Users

Recital 37

Recital 38

Recital 39

WILL THE EC’S PROPOSAL FIX THE ISSUE?

Will the EC's Proposal Fix the Issue? No

Article 13 – Use of Protected Content by Information Society Service Providers Storing and Giving Access to Large Amounts of Works and Other Subject-Matter Uploaded by their Users: Article 13, combined with Recitals 38 and 39, changes the existing EU legislation in place in four substantial manners:

1. The provisions re-interpret the liability protections included in the e-Commerce Directive, basically rendering the latter mostly inoperative, whilst claiming not to affect it.
2. The provisions make web hosting services directly liable for their users’ activity, by creating a near automatic editorial responsibility applying to an ill-defined set of services.
3. They impose a mandatory upload filter to a set of services, the scope of which is unclear.
4. They establish the principle that the upload filter can be used to overturn legally established exceptions and limitations. Filtering is indeed likely to occur under the ‘terms of service’ of the online platforms (as agreed with rightholders), with no meaningful right of appeal.



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WILL THE EC’S PROPOSAL FIX THE ISSUE? (CONTINUED)

Recital 38: Case law from the Court of Justice of the European Union (CJEU) is rewritten or quoted out of context (see [IPKat](#): ‘The Commission’s DSMS and CJEU case law: what relationship?’): the L’Oréal case associated an active role to the ‘knowledge and control of the stored data’, and not to mere optimisation of content. Only if such knowledge was demonstrated, did a service provider lose the benefit of Article 14 of the e-Commerce Directive. This knowledge/control element vanished in this proposal and the ‘optimisation criteria’ proposed instead would mean that most online platforms would lose the benefit of Article 15 of the e-Commerce Directive.

Recital 39: Appropriateness of content filtering measures is to be judged by the rightholder via a mechanism of ‘collaboration’ with the ISS. This basically means that the appropriateness will be solely based on the commercial interests of the rightholders and ISS, with no consideration of fundamental rights or the interests of users more generally.

WHAT SHOULD THE EU DO TO FIX THE ISSUE?

Delete Article 13 and the recitals linked to it, in favour of an exception for User Generated Content (UGC). Furthermore, any enforcement issues should be tackled in the ongoing review process of the IPR enforcement Directive, and a proper assessment on the need to review the e-Commerce Directive should be initiated.

WHO’S AFFECTED?

Citizens: Platforms that host large amounts of user uploaded content can range from YouTube, Facebook, Twitter, etc. to Wikipedia, Tumblr, DeviantArt or the Internet Archive. This implies that the content citizens upload could be wrongfully considered as a copyright infringement. The proposal poses a threat to human rights protected by the European and international law. It would, in reality, require both extensive monitoring of everything uploaded to the internet and deletion of any communications that generated a legal risk for the provider. This would result in a huge ‘chilling effect’ on freedom of expression, and massive private censorship, undermining innovation and competition.

Internet service providers: The concept of ‘information society service provider’ is too broad and would cover an almost unlimited number of online services. The EC appears to have chosen this complicated wording as a way of not saying ‘hosting provider’, an activity protected by the e-Commerce Directive. ‘Hosting’ covers any service (‘cloud’ storage, hosting a website, hosting a blog, etc.). The wording ‘store and provide to the public access’ implies that the intermediary is a publisher and would therefore be liable for all infringements of all laws that may be committed by their users. This is confirmed by the Recital 38. This would overturn the approach taken in EU for the entire history of the Internet and abandon international best practice. The impact of making Internet hosting providers liable for activities about which they have no knowledge would be huge.



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WHO’S AFFECTED? (CONTINUED)

Businesses: The major online user uploaded content services (e.g. Facebook, Google, etc.) have already put in place content identification technologies, however the cost of doing so as a start-up are high, and its money that could be better spend on the development of their service.

Creators: If the costs to set up and run online platforms increases due to the filtering obligations imposed by this provision, there is a risk that less platforms will be able to remain viable. The decrease of available platforms is to the detriment of creators and of the plurality and diversity of distribution channels in general.

WHAT’S AT STAKE?

Requested measures: Content recognition technology requested goes broader than YouTube’s Content ID: not just video and music, but also text, photographs, etc.. Result: **all user uploaded content must be filtered, to the detriment of freedom of expression and at a huge costs for platforms.**

Obligation: Cooperation with rightholders could mean negotiations with hundreds or even thousands of parties or collecting societies.

Disregard for existing granted exceptions: The censorship machine this measure requires from platforms is likely to ignore any freedoms (existing exceptions to copyright) that have been granted by EU and/or national law(s) to use somebody else’s creation: for example for the purpose of quotation, teaching, or parody.

Scope: Platforms that host large amounts of user uploaded content can range from YouTube, Facebook, Twitter, etc. to Wikipedia, Tumblr, DeviantArt or the Internet Archive.

e-Commerce Directive: **Pretending that imposing blanket content filtering through ‘voluntary’ agreements is not in conflict with Article 15 of the e-Commerce Directive is pure hypocrisy.**

CJEU case law: The censorship machine proposal chooses to ignore the case law of the Court of Justice of the European Union (CJEU) stating that monitoring and filtering content is a breach of freedom of expression and of privacy. The requirements set by the CJEU are specifically designed to end and prevent infringements in a way which respects all rights – fundamental human rights, commercial rights and protection of intellectual property (IP) rights – to an appropriate degree. This proposal would turn the established approach on its head.

Charter of Fundamental Rights of the European Union: The Charter requires that restrictions on fundamental freedoms (freedom of communication and privacy, in this case) must be: (1) necessary and (2) genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

Complaints and redress mechanism: In order to avoid legal and bureaucratic burdens, most providers prefer to remove or block content on the basis of their terms of service, not on the basis of the law. If the filtering is not done on the basis of the law, then the redress mechanism provided for in the law will not be available for individuals.



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WHAT’S WRONG WITH THE EC’S JUSTIFICATION?

- The analysis of the user uploaded content section is completely skewed under the premise that the only element to look at is how to address the claims by (certain) rightholders that they need more money to come to them from online service providers that ‘store and give access to large amounts of user uploaded content’. There is no analysis or consideration of user uploaded content that is generated by the user, rightholders seem to mainly refer to industry, the benefits brought by these platforms to users and society is absolutely not looked at, etc..
- Legal terms are used very loosely: the online services are said to be ‘using’ this uploaded content and Article 13 seems to consider it a given that hosting providers may be primarily liable for unauthorised acts of communication to the public, even though that concept is extremely tricky and has led to many Court of Justice of the European Union (CJEU) judgements that do not make it obvious that the service providers targeted by Article 13 would be considered as making acts of communication to the public themselves. Because of that shortcut by the EC, they also do not demonstrate why the content uploaded by users on these platforms should fall under a licensing agreement between the rightholders and the service providers.
- Sources are mostly from the music industry (insofar that news articles quoting Taylor Swift are a ‘source’), and a few from the pictures industry. Other types of content do not seem to have been looked at/or nothing was found, yet all forms of content are covered by this provision.
- Whereas the EC has been heavily promoting licensing negotiations instead of legislation in other areas (see the ‘Licences 4 Europe’ [initiative](#)), even though certain stakeholders claimed that there was an imbalance in negotiation power, here they suddenly acknowledge this imbalance and consider that a blanket content filter on all uploaded content is the response.
- A competitive disadvantage is claimed between service providers that allow user uploaded content and those that acquire licences. It is not clear why competition law is not an avenue here? It is also unclear what the extent of the harm is, considering that the latter companies in the music sector have in a very short time been able to acquire 22% of users listening to music online.
- If the lack of clarity claimed by the European Commission’s Impact Assessment (IA) as regards the application of Article 14 of the e-Commerce Directive is as bad as the IA claims, surely it affects more than copyright and should be solved through a review of Article 15 of the e-Commerce Directive itself?



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WHAT’S WRONG WITH THE EC’S JUSTIFICATION? (CONTINUED)

- Content filtering: ‘on the basis of the information available, it is estimated that a small scale online service provider with a relatively low number of monthly transactions can obtain such services as from €900 a month. For online services hosting large amounts of different works, the cost can be significantly higher. At the same time, the major online user uploaded content services have already put in place content identification technologies and therefore the costs for them are likely to be limited’: the European Commission’s Impact Assessment (IA) considers €900 a month a small amount for a start-up, with no analysis on the validity of this statement, neither a cost-benefit analysis weighing this cost against the intended benefit. It also actually recognises that large existing players that have such filters have an undeniable advantage over other players.

FURTHER READING

- EDRi. (2016). [Deconstructing Article 13 of the Copyright proposal of the European Commission](#).

In this in-depth analysis of Article 13, and the related Recitals, EDRi explains that:

“The Commission says that the measures in the Directive do not change the provisions of the E-Commerce Directive. However, the Commission’s proposal radically reinterprets the notion of ‘hosting’ service, contrary to the approach taken by the Court of Justice of the European Union. An even more obvious contradiction is the Commission’s view that the obligation to implement filtering technology, which creates a general obligation to monitor content, does not contradict the E-Commerce Directive, which prohibits the imposition of a general obligation to monitor content.”

- Dr Cristina Angelopoulos. (6 October, 2016). [EU Copyright Reform: Outside the Safe Harbours, Intermediary Liability Capsizes into Incoherence](#).

Dr Cristina Angelopoulos, from the University of Cambridge, analysed Article 13 of the EC’s proposal and came to the following conclusion:

“The proposal is not a good one. In addition to using excessively ambiguous language for a legal text, the new provision relies on a questionable interpretation of both existing EU copyright law and EU intermediary liability law. Most importantly, how the proposed Article 13(1) can be seen as compatible with the higher-level rules of the EU’s Charter of Fundamental Rights is hard to grasp.”



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FURTHER READING (CONTINUED)

- Dr Martin Husovec. (1 September, 2016). [EC Proposes Stay-down & Expanded Obligation to License UGC Services.](#)

In this blog post Dr Martin Husovec, Assistant Professor at the Tilburg University, analysed Article 13 of the leaked proposal on Directive on copyright in the Digital Single Market. In the meantime, he also published a more in-depth [analysis](#) titled ‘Holey Cap! CJEU Drills (Yet) Another Hole in the E-Commerce Directive’s Safe Harbors’, which is forthcoming in the Journal of Intellectual Property Law & Practice.

In his blogpost Dr Husovec concluded that:

“This proposal is deeply worrying. The European Commission clearly wants to challenge the E-Commerce Directive, just without really saying it.

To summarize. First, its proposal tries to impose strict liability by extending right to communication to the public to anyone who is not providing mere infrastructure. And it does not even have balls courage to say in the actual text of the provisions, it just pretends so in the recitals. Second, it imposes a full-flagged filtering and reporting obligation on yet unknown number of service providers.

Effectively, this proposal will petrify competition and raise barriers to entry to the digital single market.”