

## **Comments on Article 13 and related provisions in the JURI Committee Report for a Directive on Copyright in the Digital Single Market**

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In the run-up to the Plenary vote of the European Parliament in June and again currently, some academics and other voices have criticized the JURI Committee Report especially on Article 13 of the Proposal for a Directive on Copyright in the Digital Single Market. Among others, they purport that these proposals would contravene the *acquis communautaire* on the exclusive right of communication to the public/making available and on the liability exemptions of the E-commerce Directive or even fundamental rights under the Charter. This short paper aims at examining such claims on the basis of an analysis of current EU law.

In particular, it discusses:

1. whether the proposed text represents a departure from EU law regarding the Art. 3 InfoSoc Directive and Art. 14 E-commerce Directive;
2. whether the duty to introduce measures to prevent the availability of unauthorised works would be an unreasonable or disproportionate obligation in light of the EU and national case law; and
3. whether the proposal is problematic as regards fundamental rights of users.

In summary, this paper concludes that a careful analysis of the JURI Committee Report shows that the proposed Art 13 is fully compatible with the relevant EU law and CJEU case law, and in particular that:

- The proposed Art. 13 and the related provisions of the JURI Committee Report would helpfully clarify the application of Art 3 of InfoSoc Directive to online content platforms;
- The proposed text does not represent a departure from the EU law regarding the relationship and interplay between Art. 3 InfoSoc Directive and Art. 14 E-commerce Directive;
- The Report does not propose to impose unreasonable or disproportionate obligations in light of the EU and national case law, and introduces solid guarantees for users of platforms to benefit from copyright exceptions and protection of their personal data.

## 1. Does the proposed text of the JURI Committee Report represent a departure from EU law regarding Art. 3 InfoSoc Directive and Art. 14 E-commerce Directive?

The short answer to this question is: No, Art. 13 (-1.) and the related Recitals of the Report **only clarify existing EU law and do not depart from the *acquis communautaire*** set out in Art. 3 InfoSoc Directive and Art. 14 E-commerce Directive as interpreted by the Court of Justice. In particular, as will be shown below, first, the **activities by those online content sharing service providers that are covered by the proposed Art. 13 (and as defined in Art. 2(1) pt. 4b/4c) of the Report regularly constitute acts of communication to the public/making available** within the meaning of Art. 3 EU Information Society Directive as interpreted by the CJEU; secondly, the **JURI Committee Report** does not contradict the safe harbor provision under Art. 14 E-commerce Directive as interpreted by the Court.

### *1.1 Communication to the public/making available under Art. 3 EU Information Society Directive as interpreted by the CJEU*

#### 1.1.1 Proposed and existing law

Art. 13(-1.) of the Report states the following: “Without prejudice to Article 3(1) and (2) of Directive 2001/29/EC, online content sharing service providers perform an act of communication to the public...”; Art. 2(1) pt. 4b) of the Report defines ‘online content sharing service provider’ as “a provider of an information society service one of the main purposes of which is to store and give access to the public to copyright protected works or other protected subject-matter uploaded by its users, which the service optimises. Services acting in a non-commercial purpose capacity such as online encyclopaedia, and providers of online services where the content is uploaded with the authorisation of all rightholders concerned, such as educational or scientific repositories, should not be considered online content sharing service providers within the meaning of this Directive. Providers of cloud services for individual use which do not provide direct access to the public, open source software developing platforms, and online market places whose main activity is online retail of physical goods, should not be considered online content sharing service providers within the meaning of this Directive;” and Art. 2(1) refers in pt. 4(c) to the definition of “information society service” in Art. 1(1)(b) of Directive (EU) 2015/1535.

In brief, such service providers run platforms from which works uploaded by users and optimised by the service providers are made available to the public.

Art. 3 Information Society Directive provides for the **exclusive right of communication including making available to the public** for authors and the exclusive making available right for certain related rights' owners and thereby implements Art. 8 WIPO Copyright Treaty and Art. 10, 14 WIPO Performances and Phonograms Treaty. The act of making available covered by these rights is described in these provisions as 'making available to the public of their works in such a way that members of the public may access these works from a place and at a time individually chosen by them'. This act occurs in particular when a work is uploaded on a UUC platform run by an online content sharing service provider so that it is thereby offered to the public, and it also covers the transmission to the public once that transmission occurs, i.e., when a member of the public individually accesses the work on the platform.<sup>1</sup>

#### 1.1.2 "Communication" according to the Court

According to the Court, a **communication** is any transmission, irrespective of the technical means or procedure (e.g., REHA 38). In addition, also the Court has confirmed that it is sufficient that the public *may* access the work, irrespective of whether an actual transmission takes place (e.g., Svensson 19; Filmspeler 36). More generally, the CJEU, when interpreting these rights, refers to Recitals 9, 10 and 23 of the Information Society Directive; they, respectively, require a high level of protection; stress the need of authors and performers to receive an appropriate reward for the use of their work, as well as of producers in order to be able to finance this work; and suggest a broad interpretation of the right of communication to the public. There is no doubt that a "communication" also according to the Court's interpretation occurs in the situation covered by Art. 13.

#### 1.1.3 "Public" according to the Court

The communication must be "**to the public**". The main criterion of the Court for this is fulfilled in the situation covered by Art. 13: there is an **indeterminate and fairly large number of persons** that constitute the public to which works are communicated from the relevant platforms. In line with this, the JURI Committee Report by means of clarification explicitly excludes

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<sup>1</sup> See, e.g. the Report and Opinion by ALAI, <http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf>, in particular p. 3.

services that are only accessible to individual users but not to the public (Art. 2(1) pt 4(b) states: “Providers of cloud services for individual use which do not provide direct access to the public... should not be considered online content sharing service providers within the meaning of this Directive.”).

Even if one takes into account further criteria that were developed by the Court but are likely to be in contravention of the underlying international law,<sup>2</sup> i.e. the criteria of a ‘new public’ and the ‘non-profit character’, they do not constitute an obstacle to the application of the communication / making available right to the situation covered by Art. 13. First, a ‘new public’ according to the Court is only relevant in case of re-transmissions of primary communications (for ex. by a hyperlink) rather than for a new posting on a platform (such as in the case covered by Art. 13, and as recently held by the Court in Land Nordrhein-Westfalen, 35, where communication was not considered being to a new public); anyway, the ‘new public’ criterion does not apply to works uploaded without the consent of the right owner (as is often the case for UUC platforms). Secondly, the UUC platform activity is typically **for profit**; moreover, under Art. 2(1) pt 4(b) of the JURI Committee Report, “services acting in a non-commercial purpose capacity... should not be considered online content sharing service providers within the meaning of this Directive.” Accordingly, the latter ones are not regulated by this provision.

Again, there is no doubt that a communication covered by Art. 13 of the JURI Committee Report is “to the public” also according to the Court’s interpretation.

#### 1.1.4 Who performs the act according to the Court?

The main question therefore is **who is performing an act of communication to the public**: the online content sharing service providers covered by Art. 13 or only the individual users who upload the content. The Court of Justice in several cases has dealt with the question of who performs such act. In particular, the operator of a hotel or public house performs a communication to the public when intervening in full knowledge of the consequences of its action to give access to content to its customers. The Court has stressed the important, **‘indispensable’ role of the user** as the one performing such act (‘without its intervention the customers cannot enjoy the works ...’, e.g., SGAE 42; Première League 195; see also SCF 82), and highlighted that content may be accessed by the public ‘only as a result of a deliberate

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<sup>2</sup> See, e.g., the ALAI Opinion <http://www.alai.org/en/assets/files/resolutions/2014-opinion-new-public.pdf>, e.g. p. 2.

intervention of that operator' (e.g. PPL 40). Such intervention may also be the installation of a CD player and phonograms in a hotel room by a hotel operator, who thereby makes a communication to the public (PPL 66-69), since without its intervention, the guests would not have access to the works. Merely in light of this assessment, it is correct to state that a UUC or similar platform plays an indispensable role when enabling access to the content uploaded by its users.

The fact that also the acts by users who upload content are indispensable for the overall act of communication / making available to the public still allows to acknowledge that there may be several actors (and thus both users and UUC platforms) who play such indispensable role and are liable as users. In particular, in the case 'Airfield', a satellite package provider performed an act of communication to the public by intervening in the communication of programs by satellite by broadcasting organizations (Airfield, e.g. 79, 83). Accordingly, a party participating in a communication may (also) be held liable for communication / making available to the public (e.g. Airfield 69-70). More recently, the Court held in the case of the platform "The Pirate Bay" that, although users had uploaded works on that platform, the "operators, by making available and managing an online sharing platform such as that at issue main proceedings, intervene, with full knowledge of the consequences of their conduct, to provide access to protected works, by indexing on that platform torrent files which allow users of the platform to locate those works and to share them within the context of a peer-to-peer network" (The Pirate Bay 36). It therefore considered the platform as "playing an essential role in making the works in question available" (The Pirate Bay 37). Art. 2(1) pts 4(b) of the JURI Committee Report describes a similar activity, which reflects such essential role: it explains that the covered service providers are those which "optimise" the subject matter uploaded by the users; such "optimising" is further illustrated by Recital 37a of the Report by the examples of "promoting displaying, tagging, curating, sequencing the uploaded works or other subject-matter, irrespective of the means used therefor" with the result that the service providers "therefore act in an active way". Against this background and following the quoted case law, it seems obvious that the UUC platform, which intervenes in the act of communication to the public initiated by the uploader, will regularly be liable for the act of communication / making available to the public.

#### 1.1.5 No “mere provision of physical facilities”

According to Recital 27 of the Information Society Directive, the **mere provision of physical facilities** does not constitute an act of communication to the public. In this regard, the Court held, e.g., that the mere installation of television sets in hotel rooms does not constitute a communication to the public, but that the enabling of the subsequent transmission of the signal to the guests by means of the television sets does so (SGAE 46; for a similar judgment, see Organismus Sillogikis 39). The Court also held that the mere provision of facilities were ‘the simple activity of sale or rental of television sets by specialized enterprises.’ (Organismus Sillogikis 40), but that the technical intervention of the hotel owner that rendered access to works for guests in hotel rooms was a communication to the public (Organismus Sillogikis 41). In addition, in the Pirate Bay case, the Court clarified that that platform, by indexing and classifying the user-uploaded files so that they can be easily located, etc., did more than merely providing facilities, and that it had to be considered performing an act of communication to the public (The Pirate Bay 38, 39).

Given this case law, a provider covered by Art. 13 and the related provisions of the JURI Committee Report may not be considered as merely providing physical facilities but rather as performing an act of communication to the public.

#### 1.1.6 Knowledge

Finally, UUC and similar platform providers also generally know that, through their deliberate intervention, the works uploaded by users are made available to the public; this is sufficient according to the Court, which requires that the user intervenes ‘in full **knowledge** of the consequences of its action’, ‘intentionally’, or ‘deliberately’ (SGAE 42, Première League 195, 196, Organismus Sillogikis 39, Filmspeler 31, et al.).

#### 1.1.7 Result

**As a result, the proposed Art. 13 and related provisions of the JURI Committee Report only clarify the *acquis communautaire*. It should be noted in addition that Art. 13 (-1.) explicitly “leaves without prejudice” Article 3(1) and (2) of Directive 2001/29/EC on the communication to the public.**

### *1.2 Art. 14 E-commerce Directive as interpreted by the Court of Justice*

From a systematic point of view, Art. 14 E-Commerce Directive aims at exempting host provider services from liability for acts of third persons, under certain conditions. In contrast, where someone is liable for his or her own act (in particular, act of communication to the public), primary liability applies; he must thus acquire licenses for performing such act. As the Court held in particular for a service offering a platform to which users upload files (The Pirate Bay, see 1.1.4 and 1.1.5 above), such service does perform an act of communication to the public and is thus primarily liable, if it indexes and classifies the user-uploaded files so that they can be easily located, etc.. Such criteria correspond to those applied by the Court to exclude the applicability of the safe harbour of Art. 14 E-Commerce Directive. In particular, the Court held that a provider is not covered thereby if it **‘plays an active role** of such kind as to give it knowledge of, or control of, those data’ (L’Oréal 113), or as to ‘provide(d) assistance which entails, in particular, **optimizing the presentation of the offers...**’ (L’Oréal 116). Accordingly, the Court’s jurisprudence is coherent where it renders primarily liable a provider who plays an active role (as described above, see the Pirate Bay case) and at the same time excludes such provider who plays an active role from the safe harbour of Art. 14 E-Commerce Directive.

This system of the law as interpreted by the Court has exactly been mirrored in the JURI Committee Report, especially in its Recital 38: Accordingly, online content sharing service providers perform themselves an act of communication to the public and thus are themselves responsible for their own act, and “therefore” (logically) cannot be exempted from liability as a mere host under Art. 14 E-Commerce Directive; that Article does not apply to providers who play an active role (as further described, in line with the case law of the Court, in Recital 38 para. 3 of the Report, which refers to the examples of “optimising the presentation” of the works or “promoting” them).

A service provider is covered by Art. 14 E-Commerce Directive only if he plays a passive role, in particular when he supplies a ‘service neutrally by a merely technical and automatic processing of the data provided by its customers,’ (L’Oréal 113), and simply ‘stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers’ (L’Oréal 115). A provider who himself performs the act of

communication to the public (as those under Art. 13, in line with the case law of the Court) does not play such passive role.

**Accordingly, Art. 13 and Recital 38 correspond to and reaffirm the existing case law of the Court on Art. 14 E-Commerce Directive and do not depart from it.**

### *1.3 Overall result*

**The proposed text of the JURI Committee Report does not represent a departure from EU law regarding Art. 3 InfoSoc Directive and Art. 14 E-commerce Directive but fully corresponds to it, including to the interpretation by the Court.**

## **2. Would the duty to introduce measures to prevent the availability of unauthorised works be an unreasonable or disproportionate obligation in light of the EU and national case law?**

Authors and other right owners whose works or other subject matter is made available to the public, including through UUC platforms, have the exclusive right to permit such uses through licenses, or to prohibit such uses. This is the very essence of their fundamental right of property as enshrined and specified in all copyright laws in the EU and elsewhere. Where the right owner does not offer such licenses to online content sharing service providers, he has the right to prohibit such unauthorized uses. This preventive nature of the right (where it is not licensed) is not only clearly expressed by the words “the exclusive right to authorize or prohibit” in Art. 3 Information Society Directive, but has most recently again been confirmed by the Court of Justice in its judgement Land Nordrhein-Westfalen (“authors have a right which is preventive in nature which allows them to intervene between possible users of their work and the communication to the public which such users might contemplate making, in order to prohibit such communication”, no. 29, with reference to earlier case law; see also no 30, and, in no. 44: “it is open to the author, if he no longer wishes to communicate his work on the website concerned, to remove it from the website”).

Consequently, where unauthorised content is available to the public, the right owner has the right to prohibit such use, by means of the remedy of an injunction under Art. 8(3) Information Society Directive (as also, for other IP rights, under Art. 11, sentence 3, Enforcement Directive), i.e., the right to prevent anyone from making available unauthorised content. This remedy applies both to



active host providers (who do not benefit from the safe harbour under Art. 14 E-Commerce Directive) and to passive ones covered by Art. 14 E-Commerce Directive.

Art. 15 E-Commerce Directive only determines framework conditions of how such injunctions may or may not be implemented in relation to service providers, including passive host providers covered by Art. 14 E-Commerce Directive. In particular, Art. 15 E-Commerce Directive, according to its wording and as interpreted by the Court, only prohibits general monitoring obligations. The related recital 47 confirms that only obligations “of a general nature” must not be imposed. The Court has decided on this basis that an obligation of a host provider to actively monitor all the data in relation to all its users is not permitted (SABAM/Netlog 38 ff.).

Consequentially, Recital 47 explicitly specifies that the prohibition of a general monitoring obligation under Art. 15 E-Commerce Directive “does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation”. Accordingly, national law already has recognised the possibility to impose on host providers the obligation to apply filters after notification of specific titles of works (e.g., the German BGH, 15 August 2013, I ZR 79/12, 56 – File Hosting-Dienst II). In fact, this is necessary for a balanced approach, since otherwise, the right to an injunction would become obsolete and owners of copyright and related rights would in fact be deprived of enforcing their rights on such platforms.

The JURI Committee Report fully corresponds to those legal provisions and case law and tries to specify in a balanced manner the rather general distinction between general and specific monitoring obligations: it only applies to specific service providers, namely those defined as “online content sharing providers”; it only requires “appropriate and proportionate” measures, and this only as regards infringing material (Art. 13 (1) subpara. (2)), and it only applies to specific content, namely that identified by right holders (Art. 13 (1a.); “specific and duly notified”, see Recital 39), and it is based on cooperation between service providers and right holders (Art. 13 (1) subpara. (2)). In addition, it obliges Member States to ensure a proportionate and balanced implementation of the measures and explicitly repeats that, where Art. 15 E-Commerce Directive applies, there must not be a general monitoring obligation (Art. 13 (1b.), all this is repeated and further specified in Recitals 38 and 39).

**Accordingly, the JURI Committee Report fully reaffirms the existing EU law, in particular Art. 15 E-Commerce Directive and does not introduce any measures that would be an unreasonable or disproportionate obligation in light of the EU and national case law.**

### **3. Is the proposal problematic as regards fundamental rights of users?**

Users enjoy the fundamental right of freedom of expression and information (Art. 11 EU Charter of Fundamental Rights), which includes the right to receive and impart information and ideas without interference by public authority and regardless of frontiers. They also enjoy the right of protection of personal data (Art. 8 Charter of Fundamental Rights). It has been argued that Art. 13 would be in conflict with those rights. This contribution does not agree with such proposition.

It has to be recalled that fundamental rights do not exist limitless but have to be balanced with other fundamental rights, as in particular the property right of owners of copyright. There is no fundamental right to get access to works that have been posted illegally on a platform. In the framework of copyright law, the different fundamental rights are regularly balanced in particular through limiting copyright protection in time (e.g., to 70 years p.m.a.), and through stipulation by law of certain permitted uses, such as for making parodies.

The JURI Committee Report fully takes account of concerns of users as far as protected by those fundamental rights. First, as regards the freedom of expression, the obligation to take measures leading to the non-availability of works is explicitly limited to infringing subject matter, while non-infringing subject matter “shall remain available” and thus accessible for users (Art. 13 (1) subpara. 2). Secondly, it explicitly obliges Member States to ensure that measures leading to the non-availability of infringing works “shall be proportionate and strike a balance between the fundamental rights of users and right holders” (Art. 13 (1b)). Moreover, since automated systems cannot currently distinguish between illegal uses and uses covered by a limitation, as in particular a parody, Art. 13 (2) explicitly obliges Member States to ensure that relevant service providers “put in place effective and expeditious complaint and redress mechanisms” “to prevent misuses or limitations in the exercise of exceptions and limitations to copyright”, and further specifies safeguards for users within such mechanisms, including for their personal data; also Recital 39 makes further specifications to protect users’ interests, such as to avoid identification of individual users through the measures by service providers. In addition, going beyond any

protection of users under fundamental rights, even their liability is supposed to be covered by licensing agreements between right holders and relevant service providers if the act for non-commercial purposes (Art. 13 (-1)).

**Accordingly, the JURI Committee Report has introduced solid guarantees for users who will be able to benefit from copyright exceptions and from the protection of their personal data. There is no possible conflict with fundamental rights of users on the basis of the JURI Committee Report, and allegations of “censorship” made by some in respect of that Report have to be considered as untenable.**

#### **Case law of the CJEU referred to in this contribution**

**Reha:** *Reha Training Gesellschaft für Sport- und Unfallrehabilitation mbH v Gesellschaft für musikalische Aufführungs- und mechanische Vervielfältigungsrechte (GEMA)*, (C-117/15), judgment of 31 May 2016.

**Land Nordrhein-Westfalen:** *Land Nordrhein-Westfalen v Dirk Renckhoff*, (C-161/17), judgement of 7 August 2018.

**SGAE:** *Sociedad General de Autores y Editores de España v Rafael Hoteles SA* (C-306/05), judgment of 7 December 2006.

**Premier League:** *Football Association Premier League Ltd and Others v QC Leisure and Others*, C-403/08, and *Karen Murphy v Media Protection Services Ltd* (C-429/08), judgment of 4 October 2011.

**SCF:** *Società Consorzio Fonografici (SCF) v Marco Del Corso* (C-135/10), 15 March 2012.

**PPL:** *Phonographic Performance (Ireland) Limited v Ireland and Attorney General* (C-162/10), 15 March 2012.

**Airfield:** *Airfield NV and Canal Digitaal BV v Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (Sabam)* (C-431/09), and *Airfield NV v Agicoa Belgium BVBA* (C-432/09), 13 October 2011.

**The Pirate Bay:** Stichting Brein v Ziggo BV, XS4ALL Internet BV (C-610/15), 14 June 2017.

**Organismus Sillogikis:** Organismos Sillogikis Diacheirisis Dimiourgon Theatrikon kai Optikoakoustikon Ergon v Divani Akropolis Anonimi Xenodocheiaki kai Touristiki Etaireai (C-136/09), judgment of 18 March 2010.

**Filmspeler:** Stichting Brein v Jan Frederik Wullems (C-527/15), judgment of 26 April 2017

**L'Oréal:** L'Oréal SA and Others v eBay International AG and Others (C-324/09), judgment of 12 July 2011.

**SABAM/Netlog:** Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV (C-360/10), judgment of 16 February 2012.