



Contributions by the Max Planck Institute for Innovation and Competition in response to the questions raised by the authorities of Belgium, the Czech Republic, Finland, Hungary, Ireland and the Netherlands to the Council Legal Service regarding Article 13 and Recital 38 of the Proposal for a Directive on Copyright in the Digital Single Market.

It has been brought to the attention of the Max Planck Institute for Innovation and Competition (the Institute) that the Legal Service of the Council of the European Union is working to answer questions on Article 13 and Recital 38 of the Proposal for a Directive on Copyright in the Digital Single Market that have been raised by some Member States. The Institute intends to provide its own independent contribution to the debate offering some insights regarding the abovementioned questions. These indications are based on the position already adopted by the Institute on the matter in Part G of the Position Statement on the “Modernisation of the EU Copyright Rules” (online available at http://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/MPI_Position_Statement_PART_G_incl_Annex-2017_03_01.pdf). Executive summary and conclusions of Part G are presented below.

Executive Summary

The proposed Article 13 COM(2016)593 final is to be criticised regarding its approach and substance.

- Article 13 of the proposed Directive creates legal uncertainty, in particular by its use of undefined legal concepts and barely understandable formulations.
- As the proposal leaves existing EU law unaffected, it is unclear how the proposed Article 13 fits into and aligns with the *acquis* (i.e. Directive 2000/31/EC and 2001/29/EC). Beyond that, the provision would be inconsistent with Directive 2000/31/EC.
- Some requirements contained in Article 13 can enable abusive behaviour, thereby threatening freedom of expression and information (Article 11 of the Charter of Fundamental Rights of the European Union).

Therefore, it is inadvisable to adopt Article 13 of the proposed Directive and its respective Recitals, 38 and 39.

Alternatively, a comprehensive approach is suggested, including:

- specification of provider liability;
- harmonisation of the “notice and take down procedure”;
- introduction of a “counter notice procedure”;
- implementation of a mandatory exception for private, non-commercial exploitation of works in social networks not affecting the rightholder’s normal exploitation of works;
- establishment of mandatory remuneration for the exploitation of works in social networks, payable by platform providers; and
- simplification of trans-European licensing mechanisms.

Conclusion

“The European legislature is strongly discouraged from adopting the proposed Article 13 of the proposed Directive in its proposed form. Instead of adding an inconsistent facet in itself and in relation to current law, it seems more reasonable to first start with the existing *acquis*. Certain adjustments are recommended in particular concerning the **E-Commerce Directive**. Also certain interventions in the **InfoSoc Directive** would allow specific improvements. Depending on the concept and subject to other adjustments, a new directive may have its justification as long as it is carefully concerted with remaining EU Law.

A rejection of the proposed Article 13 of the proposed Directive (and its respective Recitals 38 and 39) thus does not mean that it is not the right moment to free current law of uncertainties and to improve it in light of the developments that have occurred in the meantime. It also does not mean that new – and in particular technology-based – obligations cannot be imposed on service providers, which act beyond the liability exemption. Such **legislative measures should** simply be **better coordinated**; an isolated approach, as attempted with Article 13 of the proposed Directive, is not promising”.

Question 1: Relation with exceptions and the Charter of Fundamental Rights of the European Union

Would the standalone measure/obligation as currently proposed under Article 13 be compatible with the Charter of Human Rights (and more specifically Article 11 - freedom of expression and information, Article 8 - Protection of personal data - and Article 16 - Freedom to conduct a business) in the light of the jurisprudence of the CJEU that aims to secure a fair balance in the application of competing fundamental rights? Are the proposed measures justified and proportionate?

No, the Proposed Article 13 entails serious risks of contrasts with the Charter of Fundamental Rights as well as with copyright exceptions.

EU Directives are to be in accordance with the rights and principles of the Charter of Fundamental Rights of the European Union (the Charter of Fundamental Rights). This means that copyright protection (Article 17(2) of the Charter of Fundamental Rights) on the one hand, and the freedom to conduct a business (Article 16 of the Charter of Fundamental Rights), the protection of personal data, as well as the freedom of expression and information (Articles 8 and 11 of the Charter of Fundamental Rights) on the other, must be fairly balanced (see the CJEU case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog*, p. 261, 263). Also, EU primary law, and in particular the Charter of Fundamental Rights of the European Union, represents a direct limitation on the measures that national law may impose on intermediaries. In a number of cases the CJEU turned to the law of fundamental rights. The Court stated that in transposing the directives and implementing the transposing measures, the “Member States must [...] take care to rely on an interpretation of the directives which allows a fair balance to be struck between the various fundamental rights protected by the Community legal order” (see, C-275/06, *Productores de Música de España (Promusicae) v Telefónica de España SAU*, para. 68).

Instead, the proposal imposing content recognition technology and procedures - that are ultimately related to the obligations set for “Information society services

providers that store and provide to the public access to large amounts of works or other subject matter uploaded by their users” in the first sentence of the first paragraph of the proposed Article 13 – can lead to a significant limitation of the fundamental rights including freedom of expression and information. For example, content pertaining to political opinions or admissible parody could be blocked (Article 5(3)(k) of the Directive 29/2001/EC - InfoSoc Directive) by those technologies. Precisely because content recognition technologies and procedures can lead to a sensitive limitation of the fundamentally protected freedom of expression and information (Article 11 of the Charter of Fundamental Rights), it must remain reserved to legally authorised judges to decide on the legality of content (see also the CJEU cases *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL*; C-324/09, and *SABAM*). Consequently, the fundamental principle contained in Article 15(1) of Directive 2000/31/EC (E-Commerce Directive), that providers have no general filtering or monitoring obligation in regards to pure user content, must be maintained – also in favour of platform operators.

Furthermore, content recognition technology and procedures enable abuse. Because it does not necessarily have to be rightholders requesting the service providers to remove content; competitors, for example, could also do this (e.g. <https://trendblog.euronics.de/tv-audio/youtube-content-id-system-abzocker-freuen-sich-15843/>). The victims would not only be the (legally acting) users, but also the consumers. Conflicting with Article 11 of the Charter of Fundamental Rights, their freedom of information would be hindered without that being required by the legitimate interests of the rightholders.

Question 2: relation with Article 14 of Directive 2000/31/EC ('Directive on electronic commerce')

Is it appropriate to modify the manner in which the Directive on electronic commerce is applied and interpreted in a horizontal manner, in a Recital in a Directive on copyright?

No, it is not appropriate. Derogations from existing law - if any - should be specific and clearly stated in the text of the proposal. Several proposals regulating the same subject-matter superimpose an already problematic – and inconsistent – regulatory framework.

The proposed provision does not replace the existing E-Commerce Directive, which – as it stands – remains valid. In conformity with Article 1 as well as Title V (Articles 17 and following) of the proposal, the proposed Article 13 seems to leave existing EU Law formally unaffected. According to the Impact Assessment (pp. 147, 154), such intention especially concerns the scope of the E-Commerce Directive. Even Recital 38 refers to the E-Commerce Directive without expressing the purpose of modifying it.

At the same time, however, Article 13 of the Directive proposed by the European Commission contains a series of undefined legal concepts that make it difficult to identify points of contact and differences of the proposal with the E-Commerce Directive. In particular, the proposal does not contain any explanation or definition concerning which service providers are to be qualified as “information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users”. How much importance is given to the criterion “large amounts” is questionable: for instance, whether it is of relevance whether commercial (e.g. YouTube) or non-commercial platforms (e.g. Wikipedia) offer services.

In this context, however, it is worth noting that the **definition of Article 14 is broader** than that of the proposal: no reference in Article 14 is made to either the quantity of the content hosted or whether or not the information society service

provider allows the public to access that content. As a result “information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users” might fall under the liability exemption of Article 14 of the E-Commerce Directive.

Nevertheless, the fact that Article 1(2) of the proposal includes a list of existing Directives that the proposal is intended to leave intact, while that list fails to mention the E-Commerce Directive, may raise interpretative doubts. These doubts are bolstered by the fact that some **incompatibilities** exist with regard to Article 14 of the E-Commerce Directive. Therefore, if Article 13 and the related Recitals of the proposed Directive became applicable law, it would be difficult to identify which legislation applies to a specific case causing legal uncertainty.

More specifically, according to the principle *lex specialis derogat legi generali*, a special (sector-specific) legal rule could potentially modify an existing general legal rule. However, this principle does not apply with regard to the proposed Article 13 and related Recitals, since Recital 38 explicitly states the applicability of Article 14 of the E-Commerce Directive. Indeed, under certain circumstances, service providers would fall under the liability exemption of Article 14 of the E-Commerce Directive, regardless of whether they adopt any measures in accordance with Article 13 of the Proposed Directive. Such circumstances, however, are not easy to define for more than one reason:

1) It is unclear how much importance should be given to the requirement “provide to the public access” in the first paragraph of Article 13 of the proposed Directive. This question concerns two aspects. The first is what is meant by this with regard to Article 3(1) InfoSoc Directive (see answer to question 4). The second is whether this requirement aims at a demarcation in regard to the E-Commerce Directive. In fact, without any real clarity as to what the first obligation proposed by Article 13 entails, it is impossible to assess its relationship with Article 14(1) of the E-Commerce Directive. To put it differently: if a service provider is protected by Article 14 and therefore not liable for the infringements committed using its

services by its users, why would the provider sign a licensing agreement with rightholders?

2) The description in Recital 38 of the current state of play of the jurisprudence of the CJEU regarding the eligibility of ISPs for liability exemptions under Directive 2000/31/EC is inaccurate and incomplete (on this point, please see the answer to the following question).

Is the description in Recital 38 of the current state of play of the jurisprudence of the CJEU regarding the eligibility of ISPs for liability exemptions under Directive 2000/31/EC accurate and complete?

No, it is not accurate and, considering the above, this legislative approach – if not corrected during the legislative process – will worsen the current patchwork causing further significant inconsistencies.

The EU *acquis* lacks a clear definition of the scope of Article 14(1) of the E-Commerce Directive. National case law concerning Article 14(1) of the E-Commerce Directive is inconsistent. It is thus difficult to determine cases in which, based on the proposed Directive, service providers can enjoy the “safe harbour” regulated by Article 14 of the E-Commerce Directive. In this respect, a norm valid for all of Europe would be welcome.

Instead, the Commission’s proposals further complicate the legal situation: Recital 38 in referring to Article 14 (1) of the E-Commerce Directive misinterprets the CJEU case law on the matter (for details concerning such misalignments, see C. Angelopoulos, *On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market*, January 2017, p. 34, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800).

In the event that the description in Recital 38 would be incomplete or would create legal uncertainty, would it not be more preferable to replace part of Recital 38 with a “without prejudice clause” in respect to the directive on electronic commerce, similar to the clause in Recital 16 of directive 2001/29/EC? Also, would it not be

desirable to complement article 1 with a without prejudice clause similar to the clause in article 2.4 of Regulation (EU) 2016/679 (General Data Protection Regulation)?

Both actions represent a minimal achievement in the context of a proposal that needs to be completely reviewed (see Part G of the Position Statement of the Max Planck Institute on the Proposed Modernisation of European Copyright Rules, available at http://www.ip.mpg.de/fileadmin/ipmpg/content/stellungnahmen/MPI_Position_Statement_PART_G_incl_Annex-2017_03_01.pdf).

Question 3: (relation with Article 15 of Directive 2000/31/EC - 'Directive on electronic commerce')

Is Article 15 of the Directive on electronic commerce to be understood that the prohibition for Member States to impose general monitoring obligations does not apply in the situation where Member States' legislation would oblige certain platforms to apply technology that identifies and filters all the data of each of its users before the upload on the publically available services?

No, obliging certain platforms to apply technology that identifies and filters all the data of each of its users before the upload on the publicly available services is contrary to Article 15 of the InfoSoc Directive as well as the European Charter of Fundamental Rights.

Article 15 of the E-Commerce Directive prohibits Member States from imposing, on providers that enjoy the protection of a safe harbour, general obligations to monitor the information which they transmit or store, as well as general obligations actively to seek facts or circumstances indicating illegal activity.

Again, as was the case with the previous issue (concerning Article 14 of the E-Commerce Directive) the inconsistencies of the proposal with Article 15 of the E-Commerce Directive are not clearly resolved by the proposal. However, as argued above, under certain circumstances, service providers would fall under the liability exemption of Article 14 of the E-Commerce Directive. This presents a problem for the proposal, as “*effective content recognition technologies*” will, by definition, require monitoring. In fact, infringing content cannot be effectively recognized on a platform by means of a technological tool without the oversight of the totality of the content on that platform. This is made clear by Annex 12A of the Impact Assessment supporting the proposal (p. 164-165). As it explains, content recognition technologies check each piece of content that an end user attempts to upload onto the service. Therefore, installing and applying a content recognition (i.e. filtering) system would involve the active monitoring of almost all of the data relating to all of service provider users.

The argument made by the European Commission that content recognition technologies are not incompatible with Article 15 of the E-commerce Directive in view of Recital 47 of the Directive is based on a misleading interpretation. According to Recital 47 “*Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation*”. The difference between “general” and “specific” monitoring is not made explicit by the text of the directive, but such difference is clear in light of both a literal and systematic interpretation of the E-Commerce Directive. What matters is the breadth of the material being monitored, which represents the difference between general and specific monitoring. As made clear by the CJEU, Article 15(1) of the E-Commerce Directive is aimed at avoiding a system for filtering that applies indiscriminately to all users as a preventive measure (see case C-360/10 *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog*, para. 26). Specific cases are therefore those cases that are authorised by national authority (e.g. judges) and do not require indiscriminate monitoring to all users, e.g. judge-authorized monitoring of a specific individual or group of identified users on a platform. Indeed, it should remain reserved to legally authorised judges to decide the legality of the content.

Finally, it is worth noting that the imposition of obligations on intermediaries that do not enjoy immunity according to Articles 12-15 of the E-Commerce Directive can be incompatible with EU Law. CJEU case law has applied directly EU primary law, beyond the secondary law of the directives. Limitations on the measures that national law may impose on intermediaries may arise directly from the Charter of Fundamental Rights of the European Union. Therefore the introduction of “effective content recognition technologies” would also be incompatible with the Charter of Fundamental Rights of the EU. In the *Netlog* case, for instance, the imposition of a filtering obligation was seen as incompatible with Article 15, but also with a fair balance of the fundamental rights at stake. On these aspects please refer to the answer to question 1.

Question 4: (relation with Article 3 of Directive 2001/29/EC - copyright in the information society)

Under the premise that it was not the intention of the Commission's proposal to modify the notion of communication to the public, does the Legal Service consider it is sufficient to "provide access to the public" to a copyrighted work to constitute an act of communication to the public under Directive 2001/29, or does the CJEU require that further conditions be met to establish a communication to the public?

The answers are negative for the following reasons.

Whether those service providers that store content uploaded by their users and "provide access to the public to copyright protected works or other subject matter uploaded by their users" carry out an act in light of Article 3(1) InfoSoc Directive themselves, does not clearly result from Recital 38 of the proposed Directive. Recital 38(1) of the proposed Directive merely indicates that those service providers that go beyond the simple provision of the physical infrastructure and carry out an act according to Article 3(1) InfoSoc Directive are obligated to conclude licensing agreements. That, however, does not clarify the current legal situation. On the contrary, the wording of the provision in question further complicates the matter, stating that "*information society service providers [that] store and provide access to the public to copyright protected works or other subject matter uploaded by their users [are] thereby [...] performing an act of communication to the public [...]*".

This statement raises at least **three issues**:

First, it is unclear what "*provide access to the public to copyright protected works*" looks like and how it differs from "*storing*". The CJEU *decisum* in the case C-324/09, *L'Oréal SA and Others v eBay International AG and Others*, dealing with the interpretation of Article 14(1) of the E-commerce Directive, may be recalled here. According to the Court "*Article 14(1) of Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce')* must be interpreted as applying to the

*operator of an online marketplace where that operator has not played an active role allowing it to have knowledge or control of the data stored. The operator plays such a role when it provides assistance which entails, in particular, **optimising the presentation** of the offers for sale in question or **promoting them**".* In this context, it is worth asking what is the relationship between those conditions - which are referenced again in the Recital 38(2) in respect of Article 14 of the E-Commerce Directive - and the notion of "*provide access to the public to copyright protected works*". This question, as mentioned above (see answer to question 2), raises more than one concern. One of those is what is meant by this with regard to the definition of the right of communication to the public within Article 3(1) InfoSoc Directive.

Secondly, highly debatable, at best, is the laconic statement of the European Commission in Recital 38, which does not reflect the notion of "communication to the public" of the InfoSoc Directive as interpreted by the CJEU. Article 3(1) of the InfoSoc Directive does not define the concept of "communication to the public". This provision, in fact, only states that EU "*Member States shall provide authors with the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them*". The provision is to be read in conjunction with Recital 27 of the InfoSoc Directive according to which "*The mere provision of physical facilities for enabling or making a communication does not in itself amount to communication within the meaning of this Directive*". The exclusive right under discussion has been subject to several references for a preliminary ruling to the CJEU. In its case law on Article 3(1), the CJEU has consistently stated that the essential requirements of Article 3(1) are an 'act of communication', directed to a 'public'. To define the notion of 'act of communication' that technically requires the mere making available of a copyright work (not also its actual transmission), in such a way that the public may access it, the CJEU has also introduced **further criteria**, such as the need to consider whether there is a necessary and deliberate intervention on the side of the defendant (the intermediary) without which third parties could not access the work and the profit-making intention. Also, in the

context of Article 3(1) of the InfoSoc Directive the CJEU - since its first decision on this matter (the 2006 judgment in C-306/05 *Sociedad General de Autores y Editores de España (SGAE) v Rafael Hoteles SA (SGAE)*) - has referred to the need for “**full knowledge of the protected nature of that work and the possible lack of consent to publication on the internet by the copyright holder**” (see C-160/15, *GS Media BV v Sanoma Media Netherlands BV and Others (GS Media case)*). In this regard, the last decision of the CJEU - *Pirate Bay* - did not mark a departure from its earlier decisions, in particular, *GS Media* and C-527/15, *Stichting Brein v Jack Frederik Wullems (Filmspeler)*. Those criteria are interdependent and may – in different situations – be present to widely varying degrees. According to the CJEU they must be **applied case by case both individually and in their interaction with one another** (see para. 25 of the recent CJEU decision in C-610/15, *Stichting Brein v Ziggo BV and XS4All Internet BV*, hereinafter *Pirate Bay*. For a more detailed analysis of the interpretative case law of the CJEU on the matter, please refer to C. Angelopoulos, *On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market*, January 2017, available at https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2947800).

It is still somewhat unclear what might be the CJEU’s ultimate conclusion on what that notion looks like. However, a picture is emerging that does not identify with the monolithic (and to some extent simplistic) assertion in Recital 38. Even from the last decision, *Pirate Bay*, which, at first glance, seems to bring grist to the mill of the European Commission approach, it is impossible to draw the conclusion that information society service providers perform an act of communication to the public by storing and “providing access” to user-uploaded content.

In addition, it is worth noting that the extent of the harmonization of the notion of the right of communication to the public is questionable when looking at the harmonization of exceptions and limitations. The only mandatory limitation introduced by the InfoSoc Directive is that of Article 5(1) on temporary and transient acts of reproduction. The Directive gave significant leeway to the Member

States with regard to the possible exceptions and limitations to the right of communication to the public.

Furthermore, and most importantly, we should not overlook the fact that the approach pursued by the CJEU aiming at broadening the scope of the right of communication to the public is the consequence of a **lack of harmonized intermediaries' liability and secondary copyright infringement**. This has been clearly highlighted by the AG Szupnar in his Opinion on 8 February 2017 (see para. 3 of the AG *Pirate Bay* Opinion). The AG highlighted that leaving the matter to the Member States to be decided according to liability rules would ultimately mean that *“the scope of the copyright holders' rights would depend on the very divergent solutions adopted under the different national legal systems”*.

In fact – and this is the **third** of the abovementioned three issues - the goal of widening the scope of copyright protection (and therefore copyright liability) including the right of communication to the public within Article 3(1) to cover actions by a party that may “contribute” to a copyright infringement may mask the intention of covering “contributory infringement” cases. This may be proved by the fact that according to the CJEU the infringement of the right of communication to the public by an intermediary (defendant) is composed of a conduct element and a **mental element**, while copyright infringement has been traditionally regarded as a knowledge-independent strict liability tort (conduct element only). However, the attempt to bring the intermediaries' liability within the field of copyright infringement (primary liability) is open to criticism: it was never the intention of the EU legislature, on the basis of the InfoSoc Directive, to harmonize the conditions for secondary liability of intermediary services.

These considerations lead us to refer to the suggestion made in Part G of the Position Statement of the Max Planck Institute on the Proposed Modernisation of European Copyright Rules concerning in particular the need of **specification of provider liability**. In the words of the Advocate General of the European Court of Justice - which although expressed in the context of trademark infringement online would apply *mutatis mutandis* to copyright as well: *“Liability rules are more*

appropriate, since they do not fundamentally change the decentralised nature of the internet by giving trade mark proprietors general – and virtually absolute – control over the use in cyberspace of keywords which correspond to their trade marks. Instead of being able to prevent, through trade mark protection, any possible use – including, as has been observed, many lawful and even desirable uses – trade mark proprietors would have to point to specific instances giving rise to Google’s liability in the context of illegal damage to their trade marks” (see C-236/08, *Google France SARL and Google Inc. v Louis Vuitton Malletier SA* (C-236/08), *Google France SARL v Viaticum SA and Luteciel SARL* (C-237/08) and *Google France SARL v Centre national de recherche en relations humaines (CNRRH) SARL and Others* (C-238/08), Advocate General Opinion).

In conclusion, Recital 38 of the proposal misunderstands EU copyright and related rights law by assuming that these providers go beyond the mere provision of physical facilities and perform an act of communication to the public. Acts of facilitation of third-party copyright infringement are instead to be brought under the liability rules, a field of law that has not yet been harmonized at the European level.

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