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Subject: Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market
- Questions by the Belgian, Czech, Finnish, Hungarian and Dutch delegations to the Council Legal Service regarding Article 13 and Recital 38

As requested by delegations at the meeting of the Working party on Intellectual Property (Copyright) on 11/12 September 2017, the General Secretariat is hereby circulating the written questions submitted by the above mentioned delegations to the Council's Legal Service.

**WRITTEN QUESTIONS FROM THE AUTHORITIES OF BELGIUM, CZECH
REPUBLIC, FINLAND, HUNGARY 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**

Article 13 of the Commission proposal for a directive on copyright in the Digital Single Market imposes an obligation on certain platforms to proactively prevent the uploading on their platform by users of content that contains part of protected works or subject matter which right holders wish to block.

This can only be achieved through the use of identification and filtering technology.

In its Communication “Online Platforms and the Digital Single Market; Opportunities and Challenges for Europe ” the Commission states that it will uphold the existing principles of the e-Commerce Directive and will maintain a balanced and predictable liability regime for online platforms since this is crucial for the further development of the digital economy in the EU and for unlocking investments in platform ecosystems.

During the discussion of the proposal, the Commission stated that the obligation under Article 13 should be considered as a standalone measure and that the current proposal, including recital 38, does not alter the provisions of Directive 2000/31/EC, nor does it provide a new interpretation of Article 3 of Directive 2001/29/EC (communication to the public).

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

The prior identification and filtering before the stage of upload of content on the publically available platform would occur automatically when the identification technology finds a match with a work or protected subject-matter. This process would apply across a wide variety of online services and platforms used by European citizens to upload content to the internet.

In practice this would happen irrespective of the fact that the user can benefit from an exception to copyright. According to the proposal, users would be given a possibility to file complaints in the context of a redress mechanism set-up by the platform, however without obtaining any assurances that they can actually benefit from this copyright exception.

Unlike what is the case under Article 6(4) of Directive 2001/29/EC (interface between technical protection measures and copyright exceptions), the proposal does not provide for appropriate measures that would enable these users to actually benefit from public interest copyright exceptions. It is important to point out that certain exceptions to copyright, such as e.g. parody or the quotation right are the embodiment in copyright of fundamental rights other than the right to property.

Furthermore, established case law of the CJEU highlighted the conflict between monitoring and Fundamental Rights such as the protection of personal data and the right to conduct a business. In the case Sabam/Netlog¹, the CJEU refused to impose an obligation to systematically monitor the contents transmitted by users on the grounds of art. 8, 11 and 16 of the Charter of Fundamental Rights.

¹ See case C-360/10, Sabam v Netlog NV, Judgment of the Court (Third Chamber), 16 February 2012, ECLI:EU:C:2012:85

Question:

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?

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

Recital 38 of the proposal intends to present a state of play of the jurisprudence of the CJEU regarding the eligibility of information society service providers (ISP's) for the liability exemption provided in Article 14 of Directive 2000/31/EC. It states that ” *in respect of Article 14, it is necessary to verify whether the service provider plays an active role, including by optimizing the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor*”. However recital 38 of the proposal omits to mention an important key element for exemption of liability for hosting services, i.e. the actual knowledge of the illegal activity on the platform.

Actual knowledge is required by the CJEU. In case C-324/09 *eBay vs L'Oréal* the CJEU (case concerning trademarks) held that “... an active role of such a kind as to give it knowledge of, or control over, the data relating to those offers for sale”. Furthermore, under Recital 42 of the Directive on electronic commerce, the reference to “passive” activities is also clearly subject to determining whether a service has knowledge or control over information. Finally, recital 38 of the current proposal has a horizontal nature and is not limited to copyright.

The European Commission states that it does not intend to modify the provisions of the directive on electronic commerce.

Question:

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?

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?

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/EC²? 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)?

² Liability for activities in the network environment concerns not only copyright and related rights but also other areas, such as defamation, misleading advertising, or infringement of trademarks, and is addressed horizontally in 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")(4), which clarifies and harmonises various legal issues relating to information society services including electronic commerce. (...). This Directive is without prejudice to provisions relating to liability in that Directive.

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

During the discussions in the Council working group, the European Commission stated that the standalone obligation under Article 13 (prior identification and filtering of unauthorized protected content by certain platforms) does not constitute a general obligation for platforms to monitor the information which they store, nor a general obligation actively to seek facts or circumstances indicating illegal activity. Such a general obligation to monitor is prohibited under Article 15(1) of the Directive on electronic commerce.

The European Commission stated that Article 15 of the Directive on electronic commerce does not apply since Member States are prevented under this provision from imposing a monitoring obligation on service providers only with respect to obligations of a general nature, while this does not concern monitoring obligations in a specific case. According to the European Commission, the identification and filtering happens prior to the upload on the platform (accessible to all users of the platform) and would constitute such a specific case. In case C- 70/10 SABAM vs Scarlet, the CJEU found that in view of its technical characteristics, the obligation to implement a filtering system would require the Internet Access Provider to actively monitor all the data of each of its customers in order to prevent any future infringement of IP-rights, which would be in breach of Article 15 of the Directive on electronic commerce. Other stakeholders, including a number of European academics³, argue that the proposal creates a general monitoring obligation as it covers a wide range of platforms used by consumers and covers the activities of *all* users.

³ Open Letter to the European Commission - On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society (September 30, 2016). Available at SSRN: <https://ssrn.com/abstract=2850483>

Question: 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?

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

Recital 38 of the proposal states that “*Where information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements (...).*”

Subsequent to questions asked by Member States regarding the use of the notion “providing access to the public”, the Commission stated that, in its view, although the CJEU has not ruled on this specific situation yet, two separate acts of communication may take place in the event of an upload of protected content by a user: one communication to the public by the user and one by the platform.

Over the last decade, the CJEU has been clarifying the notion of communication to the public through rulings on preliminary references it appears to be very difficult to encapsulate the entire jurisprudence of the CJEU on the matter, especially given the fact that a number of preliminary references is still pending. An attempt to encapsulate in the directive the current state of play of case law risks to be rapidly outdated.

The use of the notion “providing access to the public to copyright works” creates legal uncertainty. The European Commission has repeatedly stated that the aim of the proposal was not to modify the notion of communication to the public as provided under Article 3 of directive 2001/29/EC, but it does not wish to delete the words that give rise to legal uncertainty.

The proposed provision would also broaden the scope of the right of communication to the public considerably. Recital 38 would imply that services that (store and) “provide access” are automatically communicating to the public in the meaning of Article 3 of Directive 2001/29. However, the case law of the CJEU considers various factors in establishing whether or not a communication to the public takes place. The CJEU has never considered that it was sufficient for a service to be “providing access” in order to establish that it is communicating to the public.

The notion of “providing access” in the context of establishing a communication to the public is used by the CJEU in a very specific context. The CJEU refers to “providing access” in the context of use of hyperlinks ((Case, C-610/15, *GS Media, paragraph 49 :owner of a website is posting hyperlinks to protected works published without the consent of the right holder*) or in the context of an injunction against an ISP (Case C-610/15, *The Pirate Bay, paragraph 45: injunction to block access to The Pirate Bay, links to protected works are uploaded by users*).

The proposal, however, does not appear to take into account the specifics of the case law of the CJEU and the conditions established by the CJEU, such as, inter alia, the requirement of knowledge that a work was published on the internet without the consent of the right holder or that the platform encourages users to make to access works without the consent of right holders. The proposal would expand the notion of “providing access” beyond those specific circumstances in order to include a broad range of ISPs that would be “communicating to the public”.

Question:

Under the premise that it was not the intention of the Commission 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?

Under the premise that it was not the intention of the Commission proposal to modify the notion of communication to the public, how does the Legal Service consider a recital should be drafted in order to avoid the risk of conflicting with the current and future case law of the CJEU?

Under the premise that it was not the intention of the Commission proposal to modify the notion of communication to the public, does the Legal Service consider that it would be prudent to use the words “providing access to the public to copyright protected works” in recital 38 of the proposal given the fact that the CJEU has not yet pronounced itself on the status of uploads by users on platforms in respect of the right of communication to the public and that the use of the above words would create unnecessary legal uncertainty?