

Intellectual Property – Copyright Directive

Presidency Flash #4 - addendum

12 November 2018

Dear Colleagues,

in addition to the flash you have already received for the Working Party on Intellectual Property on 15 November 2018 we want to give you some explanatory comments on the compromise suggestions on Articles 11 and 13 (WK 13586/2018). In order to have a fruitful discussion, we would like to concentrate only on the following (possible) amendments to the Council's negotiating mandate:

Article 11

In an attempt to move towards Parliament, we

- excluded **scientific and academic periodicals** from the scope of application (row 121);
- explicitly stated that the rights cannot be invoked against uses carried out by **individual users** (row 218, which was already clear from the Council definition covering uses by information society service providers only);
- excluded **hyperlinks** from protection when they do not constitute communication to the public (row 219, see Council recital 34, row 71);
- added in Article 11 paragraph 3 a reference to the **Marrakesh Directive** (row 224);
- added a new paragraph 4a to Article 11 on **appropriate remuneration for authors** (row 226);
- clarified in recital 32 (row 69) that **news agencies** are covered by the concept of publishers of press publications when they publish press publications within the meaning of the Directive;

- addressed **Parliament's recital 32 with regard to remuneration** for press publishers in recital 34, row 71 and
- clarified in recital 34, row 71, that **mere facts** reported in the publication are not covered.

Article 13

- Article 2 paragraph 5

As regards the scope of service providers covered, we kept the introductory definition of the Council's mandate but suggest some compromise solutions for services excluded, the most important one being the exclusion of small enterprises.

- Article 13

In our amendments to Article 13, we tried to accommodate the EP's concerns regarding the use of "measures" and looked for different terminology for expressing the main elements of the Council negotiating mandate in this regard. We want to discuss two different options with Member States that both concentrate on the duty of care of online content sharing service providers in order to avoid liability.

- Option 1: Article 13 paragraphs 4, 5 and 6

In Option 1 we introduced a separate obligation of cooperation in paragraph 4. In paragraphs 5 and 6 we defined the duty of care by putting the emphasis on the obligations of the service provider to avoid unauthorised content on his service without mentioning "measures" explicitly. Furthermore, we stressed that the service provider's obligations depend on identification and information given by rightholders. This approach is similar – even though more explicit – to the approach in Article 13 paragraph 1 of the Council's mandate. Furthermore, we phrased the service provider's liability positively, as a step towards the Parliament, without extending liability beyond the Council's mandate. As regards the principle of proportionality, we followed a similar approach as in the Council's mandate without using the term "measures". We suggest some additional elements to be considered in the balance of interests in the proportionality test. Finally, we introduced a self-standing obligation

for the services to expeditiously remove or disable access to works or other subject matter upon a sufficiently substantiated notification. With this, we want to clarify that this obligation applies in any case, irrespective of the liability regime in paragraph 5 and independent from previous “measures” or cooperation.

- Option 2: Article 13 paragraph 4

Option 2 sets the principle of cooperation between service providers and rightholders to avoid unauthorised content while specifying what this cooperation means in more specific terms, without mentioning measures, as in option 1. The provision on notice and stay down focuses on situations where unauthorised uses could not be avoided by the cooperation between rightholders and service providers and makes it more specific by referring to the need to avoid future uploads of content notified by rightholders (this needs again to be done again in cooperation with rightholders).

- Article 13 paragraphs 7 to 9 [paragraphs 5 to 7]

The remaining paragraphs contain the treatment of legitimate uses, information about the “measures” and stakeholder dialogues. Here again we avoided the term “measures”. In paragraph 7 [5] we broadened the scope of uses remaining unaffected (“legitimate uses”) and added Parliament’s text on data protection. In paragraph 8 [6] we shortened paragraph 6 of the Council’s mandate as the obligation to cooperate is already covered by the previous paragraphs.

- Article 13a

We moved the provisions concerning users of online content sharing services to a new Article 13a taking into account some linguistic elements of the EP mandate.

We look forward to constructive discussions and to seeing you all in the Working Party.

Kind Regards

The Presidency

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WORKING PAPER

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INFORMATION

From:	Presidency
To:	Working Party on Intellectual Property (Copyright)
Subject:	Presidency Flash: Intellectual Property (Copyright) Working Party meeting on 15 November 2018

Delegates will find in the Annex the Addendum to the Austrian Presidency Flash in view of the above mentioned meeting.