The Recommendation on Measures to Safeguard Fundamental Rights and the Open Internet in the Framework of the EU Copyright Reform

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Article 13 of the Proposed Directive on Copyright in the Digital Single Market (DSMD) and the accompanying Recital 38 are amongst the most controversial parts of the European Commission's copyright reform package. Several Member States (Belgium, the Czech Republic, Finland, Hungary, Ireland, the Netherlands and Germany) have submitted questions seeking clarification on aspects that are essential to the guarantee of fundamental rights in the EU and to the future of the Internet as an open communication medium. A Recommendation, prepared by a number of leading copyright scholars, and counting many more amongst its first signatories, urges European lawmakers – the Council and the Parliament alike – to consider these questions seriously. It offers guidelines and background information in the light of the jurisprudence of the Court of Justice.

Executive Summary of the Recommendation

The measures contemplated in Article 13 DSMD can hardly be deemed compatible with the fundamental rights and freedoms guaranteed under Articles 8 (protection of personal data), 11 (freedom of expression) and 16 (freedom to conduct a business) of the Charter of Fundamental Rights of the EU. The application of

filtering systems that would result from the adoption of Article 13 DSMD would place a disproportionate burden on platform providers, in particular small and medium-sized operators, and lead to the systematic screening of personal data, even in cases where no infringing content is uploaded. The filtering systems would also deprive users of the room for freedom of expression that follows from statutory copyright exceptions, in particular the quotation right and the right to parody.

The adoption of Recital 38 DSMD would moreover lead to a remarkable restriction of eligibility for the liability privilege following from Article 14 of the E-Commerce Directive. Recital 38 DSMD does not adequately reflect the current status quo in the area of the safe harbour for hosting laid down by Article 14 E-Commerce Directive. Instead, it takes the assessment criteria of "promoting" and "optimising the presentation" of user-generated content out of the specific context of the L'Oréal/eBay decision of the Court of Justice. The general requirement of "knowledge of, or control over" infringing user-generated content is missing. In the absence of any reference to this central requirement, Recital 38 DSMD is incomplete and fails to draw an accurate picture of the current conceptual contours of the safe harbour for hosting.

Furthermore, there can be little doubt that according to the Court of Justice, Article 15 of the E-Commerce Directive is fully applicable to user-generated content platforms and intended to shield these platforms from general monitoring obligations. The Court's jurisprudence shows clearly that an obligation to filter any information uploaded to the server of a platform hosting user-generated content would lead to a prohibited general monitoring obligation and be incompatible with Article 15 of the E-Commerce Directive.

In general, the Commission Proposal and subsequent Council Presidency Compromise Proposals confuse and mix different legal questions by bringing together the issue of the scope of the safe harbour for hosting under Article 14(1) of the E-Commerce Directive, and the issue of whether (and when) platform providers themselves carry out an act of communication to the public and fulfil the requirements of Article 3(1) of the Information Society Directive.

Considering the criteria which the Court of Justice developed in the context of Article 3(1) of the Information Society Directive, it becomes moreover apparent that the mere act of storing and providing access to the public is not sufficient to establish copyright infringement. Recital 38 would dismiss additional infringement

criteria that have evolved in the jurisprudence of the Court. Because of the ambiguous wording of Recital 38 DSMD, there is a real risk of modifying the notion of “communication to the public” considerably.

These findings shed light on the need to clarify service provider immunity instead of further complicating the legal assessment criteria. A further clarification of applicable rules should extend the principle that is already reflected in the EU acquis, namely that providers are not liable for users’ actions which they cannot reasonably be expected to know and control. A further clarification of this rule is advisable to pave the way for a uniform application of service provider immunity throughout the internal market. In the interest of legal certainty and a higher level of harmonization, a well-structured European legislative design of the “notice and takedown” procedure should be introduced, accompanied by an appropriate “counter notice” procedure.
In addition, it would be consistent with the existing acquis to introduce a new use privilege in favour of the creation of content remixes and mash-ups by users and the further dissemination of these remixes and mash-ups on online platforms. As a countermove, online platforms with user-uploaded content could be responsible for the payment of fair compensation. They could either pass on these additional costs to their users, or use a part of their advertising income to finance the payment of fair compensation. To generate an additional revenue stream for authors and performers, this alternative solution is clearly preferable. It does not encroach upon fundamental rights and freedoms, and leaves intact the safe harbour for hosting in Article 14 of the E-Commerce Directive.

The full text of the Recommendation is available here.