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Draft law provision on the administrative removal and blocking of online copyright infringing content. Will 2016 bring more “happiness” to Greek copyright law?

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The draft law for the implementation in Greece of Directive 2014/26/EU on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, which was released for public consultation a few days ago, contains a surprise provision, which has the potential to reverse the way copyright law is enforced in Greece. Following the model of the Italian Communication Authority’s (‘AGCOM’) Regulation on Online Copyright Infringement and the French HADOPI, the draft law discreetly introduces at article 69 an administrative procedure for the taking down and blocking of copyright content offered illegally online.

Unlike AGCOM and HADOPI, the proposed Greek administrative body (which is rather oddly called “the Committee for the notification of Internet copyright and related rights infringements”) is not an independent administrative authority, but a collective administrative body whose members are appointed by the Ministry of Culture. The Committee is chaired by the President of the state supervised Hellenic Copyright Organisation (OPI). The Greek authority does not aim to “educate” individual users who infringe copyright, but to impose on Internet service providers and hosting providers taking down, blocking or other appropriate measures for the termination of copyright infringement, if copyright infringement is affirmed after a complaint has been officially and properly filed. The procedure does not concern cases which are already pending in front of courts, and if the copyright holder decides to commence judicial proceedings the complaint in front of the Committee is dismissed. After examination of the case, the Committee will issue its decision.

The Committee therefore appears to have a competence similar to that which Greek courts independently have in respect of the removal of copyright protected content illegally offered on the Internet on the grounds of article 64A of the Law 2121/1993, which provides for injunctions against intermediaries whose services are used by a third party to infringe a copyright or related right.

But, why introduce a separate, alternative enforcement instrument, given that the Greek courts already have competence on such issues? It is not difficult to guess the proposed law’s goals and inspirations. The application of article 64A by Greek courts was scarce and highly problematic. While the provision was added to law 2121/1993 in 2002, the first injunction against intermediaries was granted ten years later (judgment 4658/2012 of the District Court of Athens).

The second case where the Courts dealt with such an issue lead to the District Court of Athens's very controversial judgment 13478/2014, where it was rather arbitrarily decided that blocking a website illegally offering copyright protected content was both ineffective, provided that it is easy for the infringer to host the illegal content through another IP address and disproportionate, since some of the webpages of the contested website could contain legal content, such as content which has fallen into the public domain or is offered via creative commons licences. The court, in the same decision, also referred to the principle of neutrality of Internet (which is curious, since the principle is not part of the Greek legal system) in order to justify the rejection of the claim. In the meantime, Internet piracy is flourishing in Greece (according to statistics released in September 2015, 88% of Greek Internet users have had access to online copyright protected content for free) thanks to other Greek law paradoxes, such as the impossibility of lifting the confidentiality of communications for copyright infringement cases, since copyright infringement has not been classified as a serious crime where the identification of the holder of the IP address used for copyright infringements is possible. Quite surprisingly, Greek courts have never been asked to clarify whether the complete anonymity of copyright infringers is proportionate and compatible with the protection of property under the Greek Constitution and the ECHR.

So, bypassing the Courts might have appeared as an opportune solution for the drafters of the law in order to deal with the Internet copyright enforcement mess in Greece. Nonetheless, is it the panacea or another Pandora's Box? The decision of the Committee can be appealed in front of the Administrative court of appeals of Athens and, subsequently, to the Greek Administrative Supreme Court (the Greek *Conseil d' Etat*). However, it remains the case that a state administered body has to balance fundamental rights and freedoms and is called to act as a Court. As the Italian experience shows, this might prove questionable even though recital 45 of Directive 2000/31 refers to the possibility of injunctions which consist of orders by administrative authorities. Indeed, in September 2014 the Regional Administrative Tribunal of Lazio referred to the Italian Constitutional Court a question regarding the constitutionality of the administrative procedure for the removal and blocking of copyright infringing content. The Court's judgment on December 5, 2015 (ordd. 1 e 2/2015) made things more complex, since the constitutionality request was rejected for procedural reasons and the question was not examined on the merits. So, the compatibility of the Italian regulatory scheme with fundamental constitutional freedoms and due process has been left to be decided in the future by Italian Courts.

At an EU level, the CJEU in the case *UPC Telekabel* (C-314/12) established various safety mechanisms in order to limit the availability of injunctions against ISPs. In this context, it was held that in respect of safeguarding the interests of Internet users, the national procedural rules must provide a possibility for Internet users to assert their rights before the court once the implementing measures taken by the Internet service provider are known. This clearly makes sense in cases where the intermediaries are mandated by the Court to decide themselves the measures to be taken to cease copyright infringement. Nonetheless, it might also be relevant in cases where the blocking measures have not been decided by a Court, but by an administrative body. The draft law provides for a judicial review of the Committee's decision in front of the administrative court of appeal. So, according to Greek administrative law only persons having a direct and personal legitimate interest can appeal, such as the concerned Internet service providers, who might not have a strong motivation to do so. It will be difficult for Internet users to successfully claim *locus standi*, since in that case they must prove that a specific harm has been personally caused to them by the Committee's decision.

Given the controversies of the establishment of administrative bodies for enforcing copyright

protection on the Internet, the future of such a regulation in Greece is certainly not paved with rose petals and, despite the draft law's wishes for 2016, more uncertainty is to be awaited.

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