Kluwer Copyright Blog

Comments on the ‘value gap’ provisions in the European Commission’s Proposal for a Directive on Copyright in the Digital Single Market (Article 13 and Recital 38)

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In the current debates on the ‘value gap’ provisions in the European Commission’s DSM proposal (Art. 13 and Recital 38, see here and, e.g., here), it has been suggested that these provisions would modify the current scope of the exclusive right of communication /making available to the public and the liability exemptions of the E-commerce Directive and should therefore be deleted or amended. This article shows, as set out below, that the **proposal does not modify relevant EU law,** but **only *clarifies:***

1. that the **activities of information society service providers covered by the proposed Article 13 and Recital 38 regularly constitute acts of communication /making available to the public** within the meaning of Art. 3 Directive 2001/29 as interpreted by the CJEU;
2. that the **Commission’s proposal**, according to which it is necessary, in respect of the safe harbour under Art. 14 E-commerce Directive, to **verify whether the service provider plays an active role, corresponds to the existing EU law** as interpreted by the CJEU, and therefore does not alter Article 14 of the E-Commerce Directive; and
3. that the **Commission’s proposal does not establish general monitoring obligations** for service providers and therefore is consistent with Art. 15 E-Commerce Directive.

1. Communication /making available to the public by User Uploaded Content (UUC) services

Art. 3 Directive 2001/29 obliges Member States to provide for the **exclusive right of communication including making available to the public** for authors, and the exclusive making available right for owners of certain related rights, and thereby implements Art. 8 WCT and Art. 10 and 14 WPPT. The making available right covers the ‘*making available to the public of their works*

in such a way that members of the public may access these works from a place and at a time individually chosen by them'.

This act occurs in particular when a work is uploaded onto a UUC platform so as to be thereby offered to the public; it also covers the transmission to the public once that transmission occurs, i.e., when a member of the public individually accesses the work on the platform (see, e.g., this ALAI report, in particular p. 3). According to the CJEU, the right covers **any transmission, irrespective of the technical means or procedure** (*e.g.,Reha Training* para 38), and Recitals 9, 10 and 23 Directive 2001/29 must be taken into account, which, respectively, require a high level of protection; stress the need for authors and performers to receive an appropriate reward for the use of their work, and for producers in order to be able to finance this work; and require a broad interpretation of the communication right.

Other criteria developed by the Court (though in part in contravention of underlying international law, see, e.g. this ALAI Opinion p.2) are regularly fulfilled in the case of UUC platforms: their users represent an indeterminate and fairly large number of persons that constitute the "public"; a 'new public' is only relevant in cases of re-transmissions of primary communications and in any event does not apply to works uploaded without the consent of the right owner. Furthermore, UUC platforms act for profit.

The main question therefore is ***who*** **is performing an act of communication**: the UUC platforms, the individual users who upload the content, or both?

The CJEU has held that the operator of a hotel or pub performs a communication to the public when intervening in full knowledge of the consequences of its action to give access to content to its customers. It has stressed the important, 'indispensable' role of the person or entity performing such an act ('*without its intervention the customers cannot enjoy the works…*' , e.g., *SGAE* para 42; *FAPL* para 195), and highlighted that content may be accessed by the public '*only as a result of a deliberate intervention of that operator*' (e.g. *Phonographic Performance (Ireland) Ltd* para 40). Such intervention may also be the installation of a CD player and phonograms in a hotel room by a hotel operator, who thereby makes a communication to the public (*Phonographic Performance (Ireland) Ltd*, para 66-69), since without its intervention, the guests would not have access to the works. From this CJEU case law we may conclude that UUC or similar platforms play an indispensable role in enabling access to the content uploaded by their users.

The fact that the upload by users is also indispensable for the overall act of communication / making available to the public does not prevent the service from also being liable: There may be **several actors** who play such indispensable roles (in this context, both the uploaders of content and the UUC platforms). In particular, in the 'Airfield' case, a satellite package provider performed an act of communication to the public by intervening in the communication of programs by satellite by broadcasting organizations (e.g *Airfield NV* paras 79, 83). Accordingly, a party **participating** in a communication may (also) be held liable for communication/making available to the public (*Airfield NV* paras 69-70). Consequently, following this case law, where a user uploads works on a UUC platform and thus makes them available to the public, the platform that intervenes in the act also performs such an act itself.

According to Recital 27 of Directive 2001/29, the **mere provision of physical facilities** does not constitute an act of communication to the public. In this regard, the Court held, e.g., that the mere installation of television sets in hotel rooms does not constitute a communication to the public, but

that the enabling of the subsequent transmission of the signal to the guests by means of the television sets does so (*SGAE* para 46; for a similar judgment, see *Organismos Sillogikis* paras 39-41). Given this case law, one may consider that the mere provision of server space etc. would amount to mere provision of physical facilities, while a UUC platform provider, by offering works uploaded by third persons in a structured way, arranging them, and commercialising the use thereof through advertising, performs an act of making available.

UUC and similar platform providers also generally know that, through their deliberate intervention, the works uploaded by users are made available to the public; this is sufficient to establish liability according to the CJEU, which requires that the user intervenes 'in full **knowledge** of the consequences of its action', 'intentionally', or 'deliberately' (e.g., *SGAE* para 42; *FAPL* paras 195, 196; *Organismos Sillogikis* para 39).

As a **result**, the proposed **Recital 38 merely clarifies the *acquis communautaire***.

2. Art. 14 E-Commerce Directive as interpreted by the CJEU

Recital 38, 2nd paragraph of the proposed Directive requires, in determining whether Art. 14 E-Commerce Directive applies to a service, verification of whether service providers play an active role. It thereby simply confirms the interpretation by the CJEU, which held that a service provider is covered by Art. 14 E-Commerce Directive, if it supplies its '*service neutrally by a merely technical and automatic processing of the data provided by its customers*', or simply '*stores offers for sale on its server, sets the terms of its service, is remunerated for that service and provides general information to its customers'*. However, it is not covered if it '**plays an active role** of such kind as to give it knowledge of, or control of, those data' and 'has provided assistance which entails, in particular, **optimising the presentation of the offers for sale in question or promoting those offers'** (*L'Oréal v eBay* paras 112, 113, 115-116).

The Commission's proposal thus only reaffirms these two examples of an active role of the service provider, which, according to the CJEU, excludes the application of the safe harbour. The conditions regarding knowledge in Art. 14(1)(a) E-Commerce Directive and those under lit (b) only become relevant if the service provider is covered by Art. 14, i.e. if he performs a passive rather than active role (L'Oréal para 118 et seq.). See also ALAI Resolution on the European proposals of 14 September 2016 to introduce fairer sharing of the value when works and other protected material are made available by electronic means, IV 1.

3. Art. 15 E-Commerce Directive

Art. 15 E-Commerce Directive, according to its wording and as interpreted by the CJEU prohibits *general* monitoring obligations, as confirmed by recital 47 (accordingly, the prohibition "does not concern monitoring obligations in a specific case"). In contrast, the Commission's proposal is targeted: it only applies to specific service providers (those storing and giving access to large amounts of content) and to specific content (that identified by right holders), and it is based on consultations between service providers and right holders. The Court has allowed the imposition of appropriate and proportionate steps on service providers; the Proposal reaffirms this approach. The proposal is thus **in accordance with Art. 15 E-Commerce Directive.**

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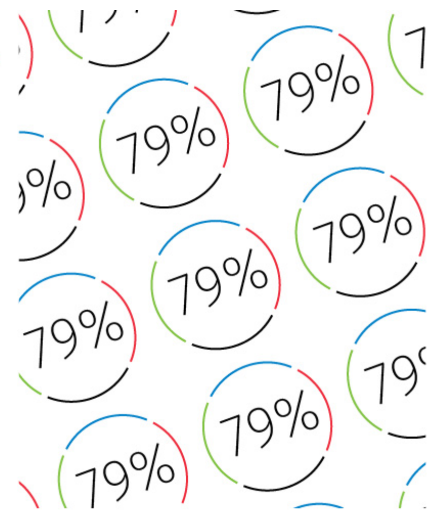

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