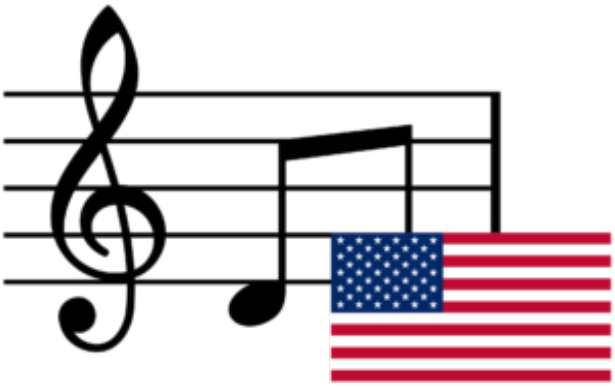
Kluwer Copyright Blog

Comments on Article 13 and related provisions in the JURI Committee Report for a Directive on Copyright in the Digital Single Market

Silke von Lewinski (Franklin Pierce Center for IP, Univ. of NH) · Monday, September 3rd, 2018



In the run-up to the Plenary vote of the European Parliament in June and again currently, some academics and other voices have criticized the JURI Committee Report especially on Article 13 of the Proposal for a Directive on Copyright in the Digital Single Market. Among others, they purport that these proposals would contravene the *acquis communautaire* on the exclusive right of communication to the public/making available and on the liability exemptions of the E-commerce Directive. This article aims at examining such claims on the basis of an analysis of current EU law.

In particular, it discusses whether the proposed text represents a departure from EU law regarding Art. 3 InfoSoc Directive and Art. 14 E-commerce Directive.

In summary, this article concludes that a careful analysis of the JURI Committee Report shows that the proposed Art. 13 is fully compatible with the relevant EU law and CJEU case law, and in particular that:

- The proposed Art. 13 and the related provisions of the JURI Committee Report would helpfully clarify the application of Art. 3 InfoSoc Directive to certain online content platforms;
- The proposed text does not represent a departure from the EU law regarding the relationship and interplay between Art. 3 InfoSoc Directive and Art. 14 E-commerce Directive.

1. Does the proposed text of the JURI Committee Report represent a departure from EU law regarding Art. 3 InfoSoc Directive and Art. 14 E-commerce Directive?

The short answer to this question is: No, Art. 13 (-1.) and the related Recitals of the Report **only clarify existing EU law and do not depart from the *acquis communautaire*** set out in Art. 3 InfoSoc Directive and Art. 14 E-commerce Directive as interpreted by the CJEU. In particular, as will be shown below, first, the **activities by those online content sharing service providers that are covered by the proposed Art. 13 (and as defined in Art. 2(1) pt. (4b)/(4c) of the Report)**

regularly constitute acts of communication to the public/making available within the meaning of Art. 3 InfoSoc Directive as interpreted by the CJEU; secondly, the **JURI Committee Report** does not contradict the safe harbour provision under Art. 14 E-commerce Directive as interpreted by the Court.

1.1 Communication to the public/making available under Art. 3 EU InfoSoc Directive as interpreted by the CJEU

1.1.1 Proposed and existing law

Art. 13(-1.) of the Report states the following: "Without prejudice to Article 3(1) and (2) of Directive 2001/29/EC, online content sharing service providers perform an act of communication to the public…"; Art. 2(1) pt. (4b) of the Report defines 'online content sharing service provider' as "a provider of an information society service one of the main purposes of which is to store and give access to the public to copyright protected works … uploaded by its users, which the service optimises. Services acting in a non-commercial purpose capacity such as online encyclopaedia, and providers of online services where the content is uploaded with the authorisation of all rightholders concerned, such as educational or scientific repositories, should not be considered online content sharing service providers …. Providers of cloud services for individual use which do not provide direct access to the public, .., should not be considered online content sharing service providers …;" and Art. 2(1) refers in pt. (4c) to the definition of "information society service" in Art. 1(1)(b) of Directive (EU) 2015/1535.

In brief, such service providers run platforms from which works uploaded by users and optimised by the service providers are made available to the public.

Art. 3 InfoSoc Directive provides for the **exclusive right of communication including making available to the public** for authors and the exclusive making available right for certain related rights' owners and thereby implements Art. 8 WIPO Copyright Treaty and Art. 10, 14 WIPO Performances and Phonograms Treaty. The act of making available covered by these rights is described in these provisions as '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 on a UUC platform run by an online content sharing service provider so that it is thereby offered to the public, and 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.[1]

1.1.2 "Communication" according to the Court

According to the Court, a **communication** is any transmission, irrespective of the technical means or procedure (e.g., Reha 38). In addition, the Court has also confirmed that it is sufficient that the public *may* access the work, irrespective of whether an actual transmission takes place (e.g., Svensson 19; Filmspeler 36). More generally, the CJEU, when interpreting these rights, refers to Recitals 9, 10 and 23 of the InfoSoc Directive (e.g., Filmspeler 3, The Pirate Bay 3); they, 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, as well as producers in order to be able to finance this work; and suggest a broad interpretation of the right of communication to the public. There is no doubt that a "communication" according to the Court's interpretation occurs in the situation covered by Art. 13.

1.1.3 “Public” according to the Court

The communication must be “**to the public**”. The main criterion of the Court for this is fulfilled in the situation covered by Art. 13: there is an **indeterminate and fairly large number of persons** that constitute the public to which works are communicated from the relevant platforms. In line with this, the JURI Committee Report by means of clarification explicitly excludes services that are only accessible to individual users but not to the public (Art. 2(1) pt (4b) states: “Providers of cloud services for individual use which do not provide direct access to the public… should not be considered online content sharing service providers within the meaning of this Directive.”).

Even if one takes into account further criteria that were developed by the Court but are likely to be in contravention of the underlying international law,[2] i.e. the criteria of a ‘new public’ and the ‘non-profit character’, they do not constitute an obstacle to the application of the communication / making available right to the situation covered by Art. 13. First, a ‘new public’ according to the Court is only relevant in the case of re-transmissions of primary communications (e.g., by a hyperlink) rather than for a new posting on a platform (such as in the case covered by Art. 13, and as recently held by the Court in Land Nordrhein-Westfalen, 35, where communication was not considered as being to a new public); anyway, the ‘new public’ criterion does not apply to works uploaded without the consent of the right owner (as is often the case for UUC platforms). Secondly, the UUC platform activity is typically **for profit**; moreover, under Art. 2(1) pt (4b) of the JURI Committee Report, “services acting in a non-commercial purpose capacity… should not be considered online content sharing service providers within the meaning of this Directive.” Accordingly, the latter services are not regulated by this provision.

Again, there is no doubt that a communication covered by Art. 13 of the JURI Committee Report is “to the public”, according to the Court’s interpretation.

1.1.4 Who performs the act according to the Court?

The main question therefore is **who is performing an act of communication to the public**: the online content sharing service providers covered by Art. 13 or only the individual users who upload the content. The CJEU has in several cases dealt with the question of who performs such an act. In particular, the operator of a hotel or public house 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. The Court has stressed the important, **‘indispensable’ role of the user** as the one performing such act (‘without its intervention the customers cannot enjoy the works …’ , e.g., SGAE 42; Premier League 195; see also SCF 82), and highlighted that content may be accessed by the public ‘only as a result of a deliberate intervention of that operator’ (e.g. PPL 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 (PPL 66-69), since without its intervention, the guests would not have access to the works. Merely in light of this assessment, it is correct to state that a UUC or similar platform plays an indispensable role when enabling access to the content uploaded by its users.

The fact that the acts by users who upload content are also indispensable for the overall act of communication / making available to the public still allows acknowledgement that there may be several actors (and thus both users and UUC platforms) who play such an indispensable role and are liable as users. 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 (Airfield, e.g. 79, 83). Accordingly, a party participating in a communication may be held liable for communication / making available to the public (e.g. Airfield 69-70). More recently, the Court held in the case of the platform "The Pirate Bay" that, although users had uploaded works on that platform, the "operators, by making available and managing an online sharing platform such as that at issue in the main proceedings, intervene, with full knowledge of the consequences of their conduct, to provide access to protected works, by indexing on that platform torrent files which allow users of the platform to locate those works and to share them within the context of a peer-to-peer network" (The Pirate Bay 36). It therefore considered the platform as "playing an essential role in making the works in question available" (The Pirate Bay 37). Art. 2(1) pt (4b) of the JURI Committee Report describes a similar activity, which reflects this essential role: it explains that the service providers covered are those which "optimise" the subject matter uploaded by the users; such "optimising" is further illustrated by Recital 37a of the Report by the examples of "promoting displaying, tagging, curating, sequencing the uploaded works or other subject-matter, irrespective of the means used therefor" with the result that the service providers "therefore act in an active way". Against this background and following the quoted case law, it seems obvious that the UUC platform, which intervenes in the act of communication to the public initiated by the uploader, will regularly be liable for the act of communication / making available to the public.

1.1.5 No "mere provision of physical facilities"

According to Recital 27 of the InfoSoc Directive, 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 46; for a similar judgment, see Organismos Sillogikis 39). The Court also held that the mere provision of facilities was 'the simple activity of sale or rental of television sets by specialized enterprises.' (Organismos Sillogikis 40), but that the technical intervention of the hotel owner that rendered access to works for guests in hotel rooms was a communication to the public (Organismos Sillogikis 41). In addition, in the Pirate Bay case, the Court clarified that that platform, by indexing and classifying the user-uploaded files so that they can be easily located, etc., did more than merely providing facilities, and that it had to be considered as performing an act of communication to the public (The Pirate Bay 38, 39).

Given this case law, a provider covered by Art. 13 and the related provisions of the JURI Committee Report may not be considered as merely providing physical facilities but rather as performing an act of communication to the public.

1.1.6 Knowledge

Finally, 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 according to the Court, which requires that the user intervenes 'in full **knowledge** of the consequences of its action', 'intentionally', or 'deliberately' (SGAE 42, Premier League 195, 196, Organismos Sillogikis 39, Filmspeler 31, et al.).

1.1.7 Result

As a result, the proposed Art. 13 and related provisions of the JURI Committee Report only

clarify the *acquis communautaire*. It should be noted in addition that Art. 13 (-1.) explicitly "leaves without prejudice" Article 3(1) and (2) of Directive 2001/29/EC on communication to the public.

1.2 Art. 14 E-commerce Directive as interpreted by the Court of Justice

From a systematic point of view, Art. 14 E-Commerce Directive aims at exempting host provider services from liability for acts of third persons, under certain conditions. In contrast, where someone is liable for his or her own act (in particular, an act of communication to the public), primary liability applies; he must thus acquire licenses for performing such act. As the Court held in particular for a service offering a platform to which users upload files (The Pirate Bay, see 1.1.4 and 1.1.5 above), such a service does perform an act of communication to the public, and is thus primarily liable, if it indexes and classifies the user-uploaded files so that they can be easily located, etc..

Such criteria correspond to those applied by the Court to exclude the applicability of the safe harbour of Art. 14 E-Commerce Directive. In particular, the Court held that a provider is not covered thereby if it '**plays an active role** of such kind as to give it knowledge of, or control of, those data' (L'Oréal 113), or as to 'provide(d) assistance which entails, in particular, **optimizing the presentation of the offers…'** (L'Oréal 116). Accordingly, the Court's jurisprudence is coherent where it renders primarily liable a provider who plays an essential role in the communication (as described above, 1.1.4, referring to the Pirate Bay case and largely corresponding to an active role) and at the same time excludes such provider who plays an active role from the safe harbour of Art. 14 E-Commerce Directive.

This system of the law as interpreted by the Court has been mirrored exactly in the JURI Committee Report, especially in its Recital 38: Accordingly, online content sharing service providers themselves perform an act of communication to the public and thus are themselves responsible for their own act, and "therefore" cannot be exempted from liability as a mere host under Art. 14 E-Commerce Directive; that Article does not apply to providers who play an active role (as further described, in line with the case law of the Court, in Recital 38 para. 3 of the Report, which refers to the examples of "optimising the presentation" of the works or "promoting" them).

A service provider is covered by Art. 14 E-Commerce Directive only if he plays a passive role, in particular when he supplies a 'service neutrally by a merely technical and automatic processing of the data provided by its customers,' (L'Oréal 113), and 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' (L'Oréal 115). A provider who himself performs the act of communication to the public (as those under Art. 13, in line with the case law of the Court) does not play such a passive role.

Accordingly, Art. 13 and Recital 38 of the JURI Committee Report correspond to and reaffirm the existing case law of the Court on Art. 14 E-Commerce Directive and do not depart from it.

2. Overall result

The proposed text of the JURI Committee Report does not represent a departure from EU law regarding Art. 3 InfoSoc Directive and Art. 14 E-commerce Directive but fully corresponds to it, including to the interpretation by the Court.

[1] See, e.g. the Report and Opinion by ALAI, http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf, in particular p. 3.

[2] See, e.g., the ALAI Opinion http://www.alai.org/en/assets/files/resolutions/2014-opinion-new-public.pdf, e.g. p. 2.

To make sure you do not miss out on regular updates from the Kluwer Copyright Blog, please subscribe here.

This entry was posted on Monday, September 3rd, 2018 at 9:25 pm and is filed under inter alia, for ensuring that EU law is interpreted and applied in a consistent way in all EU countries. If a national court is in doubt about the interpretation or validity of an EU law, it can ask the Court for clarification. The same mechanism can be used to determine whether a national law or practice is compatible with EU law. The CJEU also resolves legal disputes between national governments and EU institutions, and can take action against EU institutions on behalf of individuals, companies or

organisations.”>CJEU, Communication (right of), Digital Single Market, European Union, Legislative process, Liability

You can follow any responses to this entry through the Comments (RSS) feed. You can leave a response, or trackback from your own site.