

GESAC's views and explanations on the most debated aspects of Transfer of Value/Value Gap proposals

We would first of all like underline that the creators' claims under the "transfer of value/value gap" issue is primarily based on the need to establish in the law that:

- UUC services (like YouTube, Soundcloud, Vimeo, Pinterest, etc.) undertake copyright relevant acts; and
- they cannot claim safe harbour non-liability defence when they play an active role by organising, optimising and promoting the copyright protected content that they give access to through their platforms.

This is a fairness issue for the better functioning of the Digital Single Market for creators and creative industries. And these are the crucial elements of any solution to the "transfer of value/value gap issue", without which the problem cannot be addressed. These are currently reflected in the Recital 38 of the Commission's proposal.

Art 13, as it is proposed by the Commission, focuses on the obligation for platform services to cooperate with rightholders by providing necessary "appropriate and proportionate" technical measures. Deployment of such measures is a natural consequence of any licensing agreement based on copyright and absolutely necessary for proper and accurate rights management.

This paper intends to answer to certain criticism raised on this issue and to provide further explanation for a workable solution for the "transfer of value/value gap" problem.

1. UUC services communicate to the public under Art 3 of InfoSoc Directive.

Article 3 of the 2001 InfoSoc Directive states that there is communication to the public/making available where "(...) *the members of the public may access the works from a place and at a time individually chosen by them*", in line with the WIPO Treaties to which the EU and its Member States are party.

Recital 23 of the InfoSoc Directive further provides that "*[t]his right should be understood in a broad sense covering all communications to the public not present at the place where the communication originates. This right should cover any such transmission or retransmission of a work to the public by wire or wireless means*".

Recital 27 of the InfoSoc Directive states that "*mere provision of physical facilities*" does not itself amount to communication the public.

In this respect, CJEU recently confirmed in its *Ziggo C-610/15* (The Pirate Bay case) ruling that "*operators of the online sharing platform ..., by making that platform available and managing it, provide their users with access to the works concerned. They can therefore be regarded as playing an essential role in making the works in question available*" and approved the Commission's approach in Recital 38 paragraph 1, as the current state of EU copyright law applicable to online sharing platforms.¹

In several cases, such as *Svensson C-466/12* and *TeleKabel C-314/12*, CJEU ruled that provision of direct access to the work and "*making the work accessible*" was enough to establish communication to the

¹ See also in this respect: E. Rosati "The CJEU Pirate Bay Judgment and Its Impact on the Liability of Online Platforms", accessible on: https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3006591

public, and in several other rulings it required that the service play an “*indispensable role*” in communicating the works to the public. In the *Airfield (Joined Cases C-431/09, C-432/09)* ruling, CJEU provided that one act of communication to the public could have two parties involved that are jointly liable for this single and indivisible act, if the role played by the operator is not limited to “mere provision of physical facilities”.

Therefore, under the current copyright rules, activities of services such as YouTube, SoundCloud and Dailymotion should be considered as communication to the public, because they make the work available and accessible to the public, play an indispensable role in this making available, and provide far more than mere provision of technical facilities. However this has not been clear to national courts in many instances² and therefore clarification of this point of law in the proposed Copyright in the DSM Directive is absolutely necessary.

This point of law has also been unequivocally endorsed by the ALAI Executive Committee³ in its resolution of February 2017⁴ by stating that: “*The affirmation by recital 38 ... that information society services which make works accessible to the public could be regarded as committing an act of communication to the public merely applies the solutions advocated by international instruments (Article 8 of the WIPO Copyright Treaty of 20 December 1996) or European ones (Article 3 of Directive 2001/29/EC). However, it is welcome in view of the different interpretations that are sometimes put forward.*”

2. The safe harbour regime under Art 14 of the E-Commerce Directive does not apply to UUC services that play an active role.

Article 14 of the E-Commerce Directive was designed for technical ‘services’ provided by operators which remain neutral in relation to the transmitted or stored information. Therefore, they should apply to certain activities that the operators may perform and not to ‘categories of service providers’. At the time of the adoption of E-Commerce Directive in 2000, the UUC services that are direct perpetrators of copyright relevant acts such as YouTube, SoundCloud, Dailymotion did not even exist, yet they claim to benefit from the safe harbour regime to avoid remunerating creators.

The CJEU requirement for an active role (reflected also in Rec 38 paragraph 2 of the Copyright Directive proposal) includes optimising the presentation of content or promotion thereof. As there has been some rather unfounded criticism arguing that Commission’s wording does not fully reflect *L’Oréal v eBay C-324/09* ruling’s conditions, it would be very helpful to refer to the analysis of the above-mentioned ALAI Resolution in this respect:

² In the *GEMA vs YouTube* cases the German court said there was no act of communication to the public by the service, yet due to YouTube’s current situation in the market where it competed with services like Spotify, it had to have an effective stay-down obligation. Italian courts in cases against RTI and Break Media also asked for strict stay-down measures. In France, the courts in cases against Dailymotion considered the service a hosting provider subject to notice and take down only; although in some of the cases they considered the relevance of communication to the public by the service and full liability in some others (e.g. Google Videos). On the other hand, in the UK, the courts that decided on some of the website blocking cases against user-uploaded content websites established that the concerned services undertake a communication to the public and could not benefit from safe harbour.

³ ALAI Executive Committee includes world’s most authoritative copyright academics, who have written and/or advised the existing WIPO Copyright Treaties, the last changes to Berne Convention and the current EU copyright directives, such as Prof Jane Ginsburg, Prof Ficsor, Prof Sirinelli, Prof Sam Ricketson, Prof Ysolde Gendreau, Prof Frank Gotzen, Prof Silke von Lewinski, etc.

“The European Commission’s formulation of non-exhaustive criteria in Recital 38 of the Proposal for a Directive on copyright in the Digital Single Market (such as, optimising the presentation of uploaded works or other protected subject-matter / promoting them) corrects the error sometimes made by national courts of confusing the provider’s “active role” with the latter’s knowledge of the existence of illegal content, and to infer, incorrectly, that lack of knowledge would therefore suffice to attribute to the service the benefit of the status of a host provider. While proof of such knowledge usually establishes the service’s “active role” (the service is then almost playing an editorial role), it is not appropriate to draw a negative inference: in fact, ignorance of the content is not sufficient to prove a passive role. The Commission’s proposal thus not only dissociates the distinct notions of passive role on the one hand, and ignorance on the other, but also offers useful specification of the type of criteria that should be used to distinguish these notions.”

Therefore, the key concept of knowledge of the unlawfulness of the stored information is not a component of the definition of the activity of hosting but rather a criterion for the application of the liability exemption. So, a platform can be a hosting provider and at the same time play an active role by optimising the presentation of and promoting content. According to some critics, service providers could not be deprived of their immunity unless they have knowledge of or control over specific illegal content. They also argue that the only scenario “where a provider gives tailored advice to a specific user”⁵ would eliminate the platform’s neutrality. However, there is no such a requirement in any part of the case law or the E-Commerce Directive. This knowledge requirement can in no way mean a total control of all uploads or an “editorial responsibility”. YouTube, SoundCloud, Dailymotion, etc., provide direct access through their indispensable role by knowing the consequences of their act. There are available technologies on the market, which they already use to a certain extent, to identify the relevant works for exploitation on their platform. This, under current case law, is sufficient to establish liability for copyright relevant acts and therefore excludes these services from the scope of safe harbour defence of Art 14 of E-Commerce Directive.⁶

3. Deployment of technical measures and obligation to cooperate:

It is often argued by certain stakeholders and some Member States that “state authorities should not directly or indirectly impose a general obligation on intermediaries to monitor content to which they give access” within the context of “transfer of value” discussions and especially regarding Art 13. It is however essential to note that a well-defined and specific monitoring obligation is allowed by the EU law and the CJEU rulings and necessary to be put in place to enable cooperation with rights holders.

Collaboration between rights holders and service platforms is indispensable for the effective, proportionate and targeted monitoring of the uses of copyright protected content online. In particular, the data produced, detailing the use of the works on the platform is essential for the accurate distribution of the remuneration to authors and rights holders. Currently, one of the biggest problem is the quality of data provided by YouTube to authors’ societies. It makes management of rights extremely difficult, if not impossible.

⁵ Angelopoulos, On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market, p. 12.

⁶ Please also see for a comprehensive analysis on the e-commerce compliance and the communication to the public aspects of Commission’ proposals: Agnes Lucas Schloetter “Transfer of Value Provisions of the Draft Copyright Directive (recitals 38, 39, article 13)” accessible from here:

<http://www.authorsocieties.eu/uploads/Lucas-Schloetter%20Analysis%20Copyright%20Directive%20-%20EN.pdf>

Article 13 of the European Commission's proposal for a Directive creates an obligation for UUC platforms, regardless of the safe harbour provisions, to cooperate on the deployment of technical measures if they store and provide access to large amounts of content. Under Article 13, such services are required to deploy effective technical tools to identify works and other subject matter in order either to support the functioning of the agreements with rights holders or to prevent access to works and other subject matters identified as infringing by rightsholders on their platforms. Today, in most cases, such recognition tools are either not in place or are provided by the platforms at their own discretion and decision without taking into account the needs of the creators and right-holders in terms of efficient rights management. This provision is therefore a welcome step towards addressing the serious economic and political problems caused by certain platform services that have become the main access route for cultural and creative content online but which deny any liability for such content by hiding behind safe-harbour provisions.

- Compatibility with Article 15 of the E-Commerce Directive

Determining the scope of Article 15, i.e. the distinction between a general and a specific monitoring obligation, does not raise any particular difficulty when a measure to *block* access to a site is at issue, because the latter is to a great extent clearly identified in the law and court decisions. The questions raise particularly when requiring an ISP to take *ex ante* measures for the content uploaded by users of its service. Does the use of "effective content recognition technologies" advocated in Article 13 of the draft directive necessarily imply a prohibited general monitoring obligation?

It should be pointed out in the first place that the content recognition technologies in question are already used in practice by most UUC platforms that store and give access to a large amount of cultural content, like *YouTube*, with Content-ID, or *Dailymotion*, with Audible Magic. The proposed directive thus merely cites, as an example of measures that may be taken by UUC platforms to perform their enhanced due diligence obligation, a practice which, albeit purely voluntary to date, is already widespread and expressly encouraged by Recital 40 of E-Commerce Directive.

Moreover, it is also to be carefully noted that such technologies are essential for licensing UUC services and rights management purposes and not used only for preventing or removing content. Indeed in most sectors, such as music and visual arts the common practice is licensing every user in a non-exclusive manner, and therefore deployment of such measures and required cooperation is extremely important for the functioning of licences and accurate and timely rights management. On the other hand, for instance in audiovisual sector or for certain premium content or pre-releases the preferred exploitation is territorial exclusivity by which only one user for a specific exploitation window is licensed for each territory. This would naturally require preventing the exploitation of such content on any other platform.

General monitoring can only be understood as searching for all 'potentially' illegal content. Therefore, it does not apply when the licensed or infringing content to be searched for is identified. What Article 15 of E-Commerce Directive prohibits is not temporary monitoring to detect content identified by rightsholders as being infringing (or licensed), but rather permanent, systematic monitoring of all the hosted content, with no prior identification of what to search for. Consequently, it is not relevant to refer to the decisions in the *Scarlet C-70/10* and *Netlog C-360/10* cases in which the Court prohibited requirement from the service provider to filter all the information and to determine itself whether protected works were being communicated and which of them were being unlawfully communicated, i.e. to determine itself the infringing content in order to block it.

The measures contemplated by the draft directive cannot be equated with such a general monitoring obligation: the idea is simply a scanning and matching exercise that the platforms concerned should

collaborate with rightholders who should provide the necessary data (digital fingerprints) to allow the services to identify their content. Moreover, Article 13 expressly provides that the measures imposed on UUC platforms must be “appropriate and proportionate”. This is undoubtedly a “monitoring obligation in a specific case” expressly permitted by Recital 47 of E-Commerce Directive.

- *Compatibility of the cooperation measures with fundamental rights*

Privacy, freedom of expression and information, as well as intellectual property are fundamental rights listed in both the Charter of Fundamental Rights of the European Union (CFREU) and the European Convention of Human Rights (ECvHR). Data protection and freedom to conduct a business are also among the fundamental rights listed in the EU Charter. Inevitably, those rights can conflict with one another but both texts are clear: rights can be limited to the extent that the limitations are “*necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others*” (CFREU) or are “*prescribed by law and are necessary in a democratic society, (...) for the protection of the reputation or rights of others*” (ECvHR)

What matters and is widely recognised, is the striking of a fair balance between rights. As examples, in two cases where the ECtHR considered the need to reconcile two fundamental rights, the Court acknowledged the precedence of justified copyright sanctions over the claims of right of free speech (Ashby Donald and Others vs. France (36769/08) and Neij and Sunde Kolmisoppi v. Sweden - 40397/12 (regarding the Pirate Bay service)).

All the provisions proposed by the European Commission regarding the transfer of value/value gap issue are based on a nuanced consideration of the competing interests of rights holders, internet users and service providers between whom a fair balance must be struck.

As regards the specific fundamental rights that are usually incorrectly claimed to be incompatible with the Commission proposals, the following points would be useful to take into consideration for a comprehensive and appropriate analysis:

- a. *Compatibility of the cooperation measures with privacy and protection of personal data (Articles 7 and 8 of the CFREU and Article 8 of the ECvHR)*

The content recognition system as contemplated by Article 13 is concerned only with the *content*, not with the *identity* of the person uploading it. There is neither a need nor a requirement to connect the data or content to the profiles of individual users of platforms. The process is merely one of matching the *content* uploaded by the user to digital fingerprints of copyright protected works as provided by rightholders and is in compliance with the *UPC Telekabel Wien* decision (C-314/12) and its predecessors, e.g. the *Netlog* C-360/10 ruling. The technology required by Article 13 is already in use voluntarily by some companies and has not generated any issues or criticism to date in this respect (however as mentioned above they use it for their own benefit only and not for creators’ needs). The deployment of such measures simply does not constitute any risk in terms of protecting personal data.

- b. *Compatibility of the cooperation measures with the freedom of expression and information (Article 11 of the CFREU and Article 10 of the ECvHR)*

As said above, Article 13 of the proposal for a Directive only requires matching the data that is provided by the rights holders with the data uploaded on platforms and this has no impact on freedom of expression. There is no need to know who has uploaded such data, or whether the song or the audiovisual work concerned criticises a government, politician, etc. Moreover, there is no need, even no possibility, to know anything on any other content than those specifically targeted by the

rightholders. Therefore, there is no potential risk for the freedom of expression of an individual based on the actual content or message of a song, film or any other content he/she uploads.

Authors and composers want their works to be performed. They therefore wish to license such platforms and the use of the referred technologies is meant to enable accurate rights management and to ensure adequate remuneration. With the proposed text, all content would be legally available for consumers without any problem, hence there would be no likely concern regarding freedom of expression or information, since all will in all cases be able to legally upload and enjoy any content on the platform.

Indeed, there might be cases where a specific content is removed for different reasons, for example based on a claim of a rightholder, or because the platform did not agree to a licence, or the algorithms used by the platform malfunction. If, in such a case, a content that should not have been removed (e.g. because it involves an exception or the uploader has all necessary rights, etc.) is removed and only in such a case, there might be need to consider 'freedom of expression' aspects. However, in this respect, it should be noted that with the proposed law, firstly, the technical cooperation between the rightholders and the platforms would eliminate the majority of possible occurrences,⁷ and in any case the introduction of "complaints and redress" mechanisms would quickly and efficiently address such (limited) risk of blocking or removing lawful content with more legal certainty for consumers, especially vis-à-vis giant platforms. GESAC has always argued for improvement of the redress mechanisms for consumers, especially vis-à-vis such (giant) platform services.

c. Compatibility of the cooperation measures with the freedom to conduct a business (Article 16 of the CFREU)

Inexpensive and effective technologies are available to identify infringing content, in fact there are several start-ups providing affordable, bespoke solutions in this area. The platforms to which the enhanced due diligence obligation applies are only required to take "appropriate and proportionate" measures and the content recognition measures are limited purely to content identified as infringing or licensed by rights holders. The service providers subject to the obligation may choose the technologies to be used by them and, as stated above, a number of service providers do in fact already implement the sort of content recognition technologies referred to in Article 13 and this occurs without causing any harm to the efficient functioning of the Internet and without prejudicing the legitimate interests of Internet users. Furthermore, the deployment of effective content recognition technologies will help to facilitate the ability of creators to continue to exert their right to conduct a business by enabling them to protect and receive equitable remuneration for their product: creative works.

Collaboration between rights holders and UUC platforms is a key element in addressing the transfer of value/value gap issue. It would also bring a level playing field for legitimate online services vis-à-vis those self-proclaimed intermediaries and healthier and better choice for consumers between more and newer services that fairly remunerate the creators they whose works they enjoy.

These provisions on the collaboration between rights holders and UUC platforms, together with the necessary clarifications mentioned at the beginning, are absolute minimum to tackle the issue of transfer of value/value gap and to restore the balance in the online market by enabling the proper remuneration of creation and thereby ensuring its continued growth and future investment in talent.

⁷ See a clear anticipation and comprehensive analysis of this in Jane Ginsburg "Separating the Sony Sheep From the Grokster Goats: Reckoning the Future Business Plans of Copyright-Dependent Technology Entrepreneurs", Columbia Public Law & Legal Theory Working Papers, pages 12-14.