

A duty of care

“TRANSFER OF VALUE”

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Summary

- **The providers are *not* liable**
- Neither will they be made liable
- However, they do have a **duty of care**
- to assist in making copyright work vis-à-vis third parties who *are* liable –
- That is not new but just a **specification of rules already in force.**

Transfer of value: basics

(Proposal for a Directive Copyright in the Digital Single Market COM (2016) 593 final)

The problem: no control, no money

- **service providers / online services**

- are main **sources** of access to content online (rec. 37)
- store and provide access to works **uploaded by users** (rec. 37, 38)

- **Rightholders cannot**

- **Monitor & control** the use (rec. 37)
- get appropriate remuneration (rec. 37)

Recital 37: problem: no control, no money

- (37) Over the last years, the functioning of the online content marketplace has gained in complexity.
- Online services providing access to copyright protected content uploaded by their users without the involvement of right holders have flourished and have become main sources of access to content online.
- This affects rightholders' **possibilities to determine whether**, and under which conditions,
 - their work and other subject-matter **are used**
 - as well as their **possibilities to get an appropriate remuneration** for it.

Article 13

The proposed solution

- **Providers take measures** to “make copyright work”
 - No new liability for infringements introduced for providers!
- **Member states facilitate cooperation**
 - Cooperation between providers and rightholders
 - No liability!

Article 13: **Providers take measures**

- **Providers take measures**

- **To ensure** the functioning of **agreements** concluded with rightholders
- **To prevent** the **availability** of works **through cooperation**
- Example: the use of effective **content recognition** technologies

- **Providers provide information** on these measures

- provide rightholders with adequate information, adequate reporting

Art. 13: **Member states facilitate cooperation**

- Cooperation between providers and rightholders
- through stakeholder **dialogues**
- to define **best practices**, such as
- appropriate and proportionate **content recognition technologies**

Article 13 : Measures and best practices

- 1. **Information society service providers** that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders,
 - **take measures** to **ensure the functioning of agreements** concluded with rightholders for the use of their works or other subject-matter or **to prevent the availability** on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the **use of effective content recognition technologies**, shall be appropriate and proportionate.
 - The service providers shall **provide rightholders with adequate information** on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.
- 2. Member States shall ensure that the service providers referred to in paragraph 1 put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1.
- 3. **Member States shall facilitate**, where appropriate, the cooperation between the information society service providers and rightholders through stakeholder **dialogues** to **define best practices**, such as appropriate and proportionate content recognition technologies, taking into account, among others, the nature of the services, the availability of the technologies and their effectiveness in light of technological developments.

Recital 38

Copyright in the Digital Single Market (Proposal for a Directive COM (2016) 593 final)

Recital 38

- (38) para 1,2:

In respect of Article 14, it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor.

- **Where** information society service providers **store and provide access** to the public to copyright protected works or other subject-matter uploaded by their users, **thereby** going beyond the mere provision of physical facilities and **performing an act of communication to the public**, they are obliged to conclude licensing agreements with rightholders, unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council³⁴.

- (38) para 3:

- **In order to ensure the functioning of any licensing agreement**, information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users should **take** appropriate and proportionate **measures** to ensure protection of works or other subject-matter, such as **implementing effective technologies**. This obligation should also apply when the information society service providers are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC.

Recital 38 deals with 2 cases:

1. Traditional:

copyright infringement by **Communication to the public** (para's 1, 2)

2. New:

specification of a **duty of care** to 'make copyright work' for right holders

Case 1:

Traditional copyright infringement

- Rec. 38, para's 1 and 2
- **Where** providers [...] perform an act of **communication to the public**,
- they are obliged to conclude licensing agreements [= “liable”]
- **unless** they are eligible for a **liability exemption**
- That is existing law: nothing changes.
 - (only) existing liabilities are maintained
 - (all) existing exemptions from liabilities are maintained

Case 2:

Specification of a **duty of care**

- **Duty to take measures**
 - in order to ensure the functioning of any licensing agreement,
- Rec. 38, para. 3
- This obligation should **also** apply when
- the providers are **eligible for the liability exemption**
 - In other words:
 - The providers **keep** the **full** exemption of liability for copyright infringement;
 - But they have to comply with a (different, much lighter) duty of care to provide some assistance
 - “We (right holders) respect your (providers’) position, but you must assist us in providing some indispensable help to make your clients respect our position” – by ensuring the functioning of licensing agreements

a duty of care

“if/because you are *not* liable
you *at least* have a duty of care
to help prevent infringement”

E-commerce Directive 2000/31

The duty of care

to assist in making copyright work vis-à-vis *third* parties who are liable

– the clients of the providers –

is not new

but just a specification of rules already in force under the e-commerce directive

by specifying what these rules mean in the context of the new digital environment of the 2.0 technologies.

Article 18. (**preventive**) Court actions.

- 1. Member States shall ensure that court actions [...] allow
 - for the rapid adoption of **measures** [...]
 - designed to terminate any alleged infringement and
 - to **prevent** any further **impairment** of the **INTERESTS** involved.

Duties of care to protect “the interests involved”

- Rec. 48 dir. 2000/31: service providers apply **duties of care**
 - (48) This Directive does not affect the possibility for Member States
 - of requiring service providers,
 - who host information provided by recipients of their service,
 - **to apply duties of care,**
 - which can reasonably be expected from them and which are specified by national law,
 - **in order to detect and prevent** certain types of illegal activities.
 - (Irrespective of exemption of liability)
- Cf. Article 13:
 - rightholders take measures to ensure the functioning of agreements
 - or to prevent the availability on their services of works or other subject-matter

Duty distinguished from liability

- Note:
 - this duty of care was formulated
 - in the **same** directive as introduced the liability exemptions, showing that:
- A duty of care to prevent the impairment of interests
- **must be distinguished from**
- A liability for infringement

Codes of conduct (or best practices) to protect “the interests involved”

- Rec. 49 dir. 2000/31: the drawing-up of **codes of conduct**
 - (49) **Member States** and the Commission
 - are to **encourage the drawing-up of codes of conduct**;
 - this is not to impair the voluntary nature of such codes and the
 - possibility for interested parties of deciding freely whether to adhere to such codes.
- Cf. Art. 13: Member states facilitate cooperation
 - through dialogues
 - to define **best practices**

Measures to protect “the interests involved”

- Rec. 47 dir. 2000/31: monitoring obligations **in a specific case**
 - (47) Member States
 - are **prevented from imposing a monitoring obligation** on service providers
 - **only** with respect to obligations **of a general nature**;
 - this does **not** concern monitoring obligations in a **specific** case and, in particular,
 - does **not** affect orders by national authorities in accordance with national legislation.
- Cf. art. 13/rec. 38:
 - Providers should take appropriate and **proportionate** measures [...]
 - such as implementing effective technologies.
 - A general monitoring obligation is not proportionate, a specific one is

Conclusion (= Summary)

- **The providers are *not* liable**
- Neither will they be made liable
- However, they do have a **duty of care**
- to assist in making copyright work vis-à-vis third parties who *are* liable –
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