

Transfer of Value Provisions of the Draft Copyright Directive (recitals 38, 39, article 13)

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An Appraisal
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Introduction

In September 2016, the European Commission presented its copyright “package” comprising various measures to modernise the EU copyright rules, including a proposal for a **Directive on copyright in the Digital Single Market** (draft directive).¹ This draft directive includes provisions intended to rebalance the transfer of value which currently benefits certain online platforms to the detriment of creators of cultural content.² The “value gap” issue³ is summarised in recital 37 as follows:

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.

The transfer of value provisions of the draft directive – recitals 38 and 39 and article 13 – have been criticised, sometimes vehemently, by certain academics.⁴ The main objection levelled against the text proposed by the Commission is that it is incompatible with the E-Commerce Directive and the Charter of Fundamental Rights of the European Union. Some of those who have given voice to such criticism dispute the very existence of a value gap that needs closing:

The idea of a “value gap” echoes a discourse almost exclusively fabricated by the music and entertainment industry. [...] This rhetoric seems scarcely concerned with empirical evidence. [...] Actually, there is no clear evidence on the effects of copyright infringement in the digital environment, the scale of it, the nature of it, or the effectiveness of more aggressive enforcement strategies. [...] The “value gap” rhetoric echoes an over-exploited narrative identifying the internet as a “digital threat”, rather than a digital opportunity. Crafting important pieces of a reform that

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¹ Proposal for a Directive on copyright in the Digital Single Market, COM(2016) 593 final.

² A comparable movement can be observed in the USA, see Sisario, *Music World Bands Together Against YouTube, Seeking Change to Law*, The New York Times, 31 May 2016, <http://nyti.ms/1WXeqQB>.

³ See in this regard the petition signed by over 22,000 artists, “Make Internet Fair for Creators”, www.makeinternetfair.eu

⁴ S. Stalla-Bourdillon, E. Rosati et al., *Open Letter to the European Commission - On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society*, 30 September 2016, available at: <https://ssrn.com/abstract=2850483>. - C. Angelopoulos, *EU Copyright Reform: Outside the Safe Harbours, Intermediary Liability Capsizes into Incoherence*, 6 October 2016, available at: <http://kluwercopyrightblog.com/2016/10/06/eu-copyright-reform-outside-safe-harboursintermediary-liability-capsizes-incoherence/>. - S. Stalla-Bourdillon, E. Rosati, K. Turk, C. Angelopoulos, A. Kuczerawy, M. Peguera, M. Husovec, *A brief exegesis of the proposed Copyright Directive*, 24 November 2016, available at: <https://ssrn.com/abstract=2875296>. - C. Angelopoulos, *On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market*, January 2017. - Max-Planck Institute for Innovation and Competition, *Position Statement on the Proposed Modernisation of European Copyright Rules*, Part A, General Remarks, 27 January 2017, Part G, *Use of Protected Content on Online Platforms*, 1 March 2017, available at: <http://www.ip.mpg.de/en/research/intellectual-property-and-competitionlaw/position-statement-modernization-of-european-copyright-rules.html>. - European Copyright Society, *General Opinion on the EU Copyright Reform Package*, 24 January 2017, p. 7. - M. Husovec, *Holey cap ! CJEU drills (yet) another hole in the E-Commerce Directive's safe harbours*, (2017) JIPLP 115. - Copyright Reform: Open Letter from European Research Centres – <http://bit.ly/2loFISF>, 22 February 2017, p. 1.

*should promote the European Digital Single Market on the assumption of a “value gap” to close does endorse a rhetorical approach that would be apparently looking backwards, rather than forward. [...] The literature has shown to a certain degree of consistency that there is in fact an added value to promote, rather than a value gap to close.*⁵

Nevertheless, such criticism, much of which is excessive⁶ and largely unfounded, is not representative of the reception that the proposed directive’s transfer of value provisions have received in the academic community. Indeed, many authors consider that the Commission’s proposal is going in the right direction, even if some of them regret that the advocated solutions are too cautious.⁷ In particular, attention should be drawn to the resolution adopted on 18 February 2017 by the Executive Committee of the International Literary and Artistic Association (ALAI) which fully endorses the European Commission’s proposals in this regard.⁸

The transfer of value provisions in the draft directive are not directed at all information society service providers but only some of them. Indeed, the only service providers covered by the provisions are those which **store and provide to the public access** to works or other subject-matter protected by copyright or related rights uploaded by their users. The scope of the new rules contained in the proposed directive is thus delimited by two criteria relating to the provider’s activity:

- storing
- providing access to the public

These two cumulative criteria are drawn from two different legislative instruments, the first (storing) from the definition of a hosting provider enshrined in article 14 of Directive 2000/31, the second (providing access to the public) from the definition of communication to the public within the meaning of article 3 of Directive 2001/29 as interpreted by the CJEU. Moreover, these acts of storing and providing access to the public concern content that is protected by copyright and related rights uploaded by users of the service.

⁵ G. Frosio, *Reforming Intermediary Liability in the Platform Economy: A European Digital Single Market Strategy*, 6 February 2017, available at: <https://ssrn.com/abstract=2912272>, pp. 7-8. See also Copyright Reform: Open Letter from European Research Centres, *op. cit. supra*, p. 6: “the Commission’s proposals take the ‘value gap’ as given as a rationale for intervention. The idea that the creation of value should lead automatically to transfer or compensation payments has no scientific basis. The concept was invented by the music industry in 2006, initially as a ‘value recognition right’ in the copyright levy debate. [...] It is disturbing that the European legislator now appears to take the concept for granted”.

⁶ See also C. Angelopoulos, *EU Copyright Reform: Outside the Safe Harbours, Intermediary Liability Capsizes into Incoherence*, 6.10.2016, Kluwer Copyright Blog: “Article 13(1) of the proposed directive is deeply worrying. It is ill-conceived, badly-worded and incompatible with established law. It betrays a bewildering lack of understanding of European copyright law and an alarming disregard for the law of fundamental rights”.

⁷ See, e.g., M. Leistner, *Copyright law on the internet in need of reform: hyperlinks, online platforms and aggregators*, (2017) JIPLP, 136-149, fn. 35: “In its recent copyright package, the Commission has made a rather cautious, limited attempt to address this challenge”.

⁸ 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*, 18 February 2017, available at: <http://www.alai.org/en/assets/files/resolutions/170218-value-gap-en.pdf>.

This delimitation of the providers covered by the new rules proposed by the Commission calls for the following observations. From the two requirements of storing and providing access it follows that aggregators⁹ are excluded from the scope of the new provisions because they use linking or framing techniques and thus do not store the content to which they give access. Nor are search engines covered in that the content they store¹⁰ is not uploaded by users. Therefore, article 13 and recitals 38 and 39 of the draft directive are directed primarily at so-called UUC¹¹ platforms like YouTube, Dailymotion, Vimeo and Soundcloud.¹²

I – Primary liability of UUC platforms under the right of communication to the public

Recital 38, para. 1:

*Where information society service providers store and provide access to the public to copyright protected work 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.*

This recital raises two separate questions:

- Do UUC platforms perform an act of communication to the public within the meaning of article 3 of Directive 2001/29?
- If so, can they still benefit from the exemption from liability under article 14 of Directive 2000/31?

A) The right of communication to the public (Dir. 2001/29, art. 3)

Recital 38 of the draft directive provides welcome clarification concerning the classification, in relation to copyright, of the services offered by certain service providers. Contrary to what some commentators have argued,¹³ this is merely a clarification, not an upheaval of the existing rules. The statement is not contrary in any way to the CJEU's case law¹⁴ according to which two components are required for there to be communication to the public, namely an act of communication and the presence of a public.¹⁵

⁹ For example, clearly illegal sites like BitTorrent trackers, such as The Pirate Bay, and, more broadly, all file-sharing sites.

¹⁰ Some search engines, particularly image search engines, do not store any content themselves but use only linking or framing techniques.

¹¹ User Uploaded Content, rather than UGC, user-generated content, given that, in general, users simply upload content, without "generating" anything.

¹² The solutions proposed by the Commission to resolve the problem of the transfer of value thus concern in the main the music and audiovisual sectors, rather than the image sector, which is threatened primarily by image search engines.

¹³ S. Stalla-Bourdillon, E. Rosati, K. Turk, C. Angelopoulos, A. Kuczerawy, M. Peguera, M. Husovec, *A brief exegesis of the proposed Copyright Directive*, p. 13 *et seq.* - C. Angelopoulos, *On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market*, January 2017, p. 31 *et seq.* – G. Frosio, *op. cit. supra*, p. 15.

¹⁴ For an overview of the CJEU's case law on the subject, see A. Lucas-Schloetter, *L'harmonisation des droits économiques dans l'Union européenne*, Les cahiers de propriété intellectuelle, 2016 vol. 28 no. 1, 167-201.

¹⁵ CJEU 13.2.2014, C-466/12, *Svensson*, para. 16; CJEU 19.11.2015, C-325/14, *SBS Belgium*, para. 15; CJEU 31.5.2016, C-117/15, *Reha Training*, para. 37; CJEU 8.9.2016, C-160/15, *GS Media*, para. 32; Opinion of AG Szpunar, 8.2.2017, C-610/15, *Stichting Brein v Ziggo*, para. 36.

The second component (the presence of a public) does not raise any particular difficulties regarding content uploaded onto UUC platforms. The “**indeterminate but fairly large number of potential recipients**” criterion is undoubtedly fulfilled in the case of a website accessible on the internet without any particular restrictions. As to the additional “**new public**”¹⁶ criterion which the CJEU has substituted for that of the “other organisation” in article 11 bis(1)(ii) of the Berne Convention, it is intended to apply only in cases of secondary communication, subsequent to or concomitant with a primary communication. Therefore, it is not relevant when dealing with a single act of communication to the public, such as the act of making works and protected subject-matter available to the public on sharing platforms.¹⁷ It is met anyhow in the case of works and protected subject-matter uploaded without the rightholders’ consent.¹⁸

With regard to the act of communication, the CJEU traditionally adopts two main definitional criteria: **providing access** to the work,¹⁹ on the one hand, and the **indispensable role** of the party to which the act is attributed together with the **deliberate nature** of its intervention,²⁰ on the other. These two criteria are satisfied both by the operator and by the users of the UUC platform.²¹ Indeed, the works are not

¹⁶ According to the CJEU’s now established case law, the act of communication to the public must be directed at a new public, i.e. a public which was not taken into account by the copyright owners when they authorised the initial communication to the public (*SGAE* paras. 40 and 42; *FAPL* para. 197; *Airfield* para. 72; *PPL* para. 51; *OSA* para. 31; *Svensson* para. 24; *Bestwater* para. 14; *Sociedade Portuguesa* para. 21; *Reha Training* para. 45; *GS Media* para. 37). The criterion of the new public that the CJUE has set up as a precondition to the right of communication to the public is nonetheless open to criticism in that it is not compatible with the rule of non-exhaustion of this prerogative (Art. 3.3 of Directive 2001/29) and finds no support in international law (it is enshrined neither in the Berne Convention, nor in the WCT).

¹⁷ Indeed, it is not a question here of assessing the role of an operator which expands the audience of a work previously communicated to the public by a third party, but rather of ascertaining the operator’s liability for its involvement in an initial act of communication to the public. There is no act subsequent to an initial communication, but a single act of communication to the public (making protected works available on the UUC site) and the question is to determine to whom it can be attributed or more specifically whether it can be attributed jointly to more than one person. See also supporting this view, Opinion of AG Szpunar, 8.2.2017, C-610/15, *Stichting Brein v Ziggo*, para. 4: “the problems raised in the present case are in my view substantially different from those in two recent cases concerning the right to communicate works to the public via the internet, namely *Svensson and Others* and *GS Media*. Those cases concerned the secondary communication of works already accessible on the Internet by a person providing the online content himself, whereas the present case concerns original communication, made on a peer-to-peer network. I do not therefore think that the Court’s reasoning in those cases can be directly applied to the case in the main proceedings”.

¹⁸ See Opinion of AG Szpunar, 8.2.2017, C-610/15, *Stichting Brein v Ziggo*, para. 47: “the new public condition must be assessed in relation to the public taken into account by the author when he gave his consent. If the author of the work has not consented to it being shared on a peer-to-peer network, the users of that network constitute by definition a new public”.

¹⁹ CJEU, *Svensson*, para. 19: “As is apparent from Article 3(1) of Directive 2001/29, for there to be an ‘act of communication’, it is sufficient, in particular, that a work is made available to a public in such a way that the persons forming that public may access it, irrespective of whether they avail themselves of that opportunity (see, by analogy, Case C-306/05 *SGAE*, para. 43)”. – *GS Media*, para. 48.

²⁰ CJEU, *GS Media*, para. 35: “Of those criteria, the Court emphasised, in the first place, the *indispensable role played by the user and the deliberate nature of its intervention*. The user makes an act of communication when it intervenes, in full knowledge of the consequences of its action, to give access to a protected work to its customers, and does so, in particular, where, in the absence of that intervention, its customers would not, in principle, be able to enjoy the broadcast work”. See, similarly, *SGAE* para. 42; *FAPL* paras. 195-196; *Del Corso* para. 82; *PPL* para. 31; *OSA* para. 31; *Sociedade Portuguesa* paras. 14-17; *Reha Training* paras. 47-48. See also Opinion of AG Szpunar, 8.2.2017, C-610/15, *Stichting Brein v Ziggo*, para. 37.

²¹ *Contra Frosio*, *op. cit. supra*, p. 16: “As end-users physically upload the work, they alone apparently can fulfill the requirement of being that necessary intervention enabling the new public to enjoy the protected work”. – Angelopoulos, *On Online Platforms and the Commission’s New Proposal for a*

communicated to the public if internet users do not upload them, but those users cannot upload them without the UUC platform's intervention. A single act of communication to the public requires the participation of several players.

The assessment of a UUC platform operator's role ultimately comes down to the question whether the operator confines itself to merely providing physical facilities, as referred to in recital 27 of Directive 2001/29, or whether, on the contrary, it intervenes causally and decisively in the process of communicating works to the public. Either its contribution to the process of making the works available to the public is too insignificant to constitute an act of exploitation, in which case only the uploader will be regarded as having carried out the act of communication to the public; or, on the contrary, its deliberate intervention is indispensable for the public to be able to have access to the works, in which case the operator of the platform performs a copyright restricted act.

The CJEU has not ruled on this issue yet but will soon have an opportunity to do so in a case not involving a UUC platform but rather the (in)famous BitTorrent tracker *The Pirate Bay*. In his opinion delivered on 8 February 2017, Advocate General Szpunar expressed the following view:

It remains to be decided who the persons are, on a peer-to-peer network, who originated the making available of the works which are shared on it: its users or the operator of an indexing site such as The Pirate Bay.

Users, by installing on their computers and starting the sharing software (the BitTorrent client), and providing The Pirate Bay with the torrents that allow the files present on their computers to be traced, and by leaving those computers on so that they can remain active on the network, are intentionally making the works in their possession available to other users of the network.

However, those works would not be accessible and the operation of the network would not be possible, or would at any rate be much more complex and its use less efficient, without sites such as The Pirate Bay, which enable works to be found and accessed. The operators of those sites therefore arrange the system, which enables users to access works that are made available by other users. Their role may therefore be regarded as necessary.²²

*The intervention of those operators therefore meets the conditions of being necessary and deliberate, laid down in the case-law of the Court. Those **operators should** therefore in my view also **be considered, simultaneously and jointly with the users of the network, as originating the making available to the public of works** that are shared on the network without the consent of the copyright holders.²³*

Directive on Copyright in the Digital Single Market, p. 32: "Arguably, with hosting, it is not the provider itself that intervenes to communicate the work to the public, but the user who took advantage of the provider's services. The platform itself is, at worst, merely providing the means used by somebody else to achieve a communication to the public".

²² Opinion of AG Szpunar, 8.2.2017, C-610/15, *Stichting Brein v Ziggo*, paras. 48-50.

²³ Opinion of AG Szpunar, 8.2.2017, C-610/15, *Stichting Brein v Ziggo*, para. 53.

Advocate General Szpunar thus takes a clear stand in favour of the **joint liability** of the operator and users of the platform for the same act of communication to the public,²⁴ as the CJEU did for the broadcaster and satellite package provider in its *Airfield* decision.²⁵

At the national level, few courts have ruled that a single copyright restricted act may be attributed to two separate persons. In general, when several players incur liability for an act of infringement, it is based on secondary liability²⁶ rather than primary liability.²⁷ In the specific case of UUC platforms, the question of their primary liability for acts of illegally making available works and other protected subject-matter is seldom addressed by the courts, at least in countries like France, Spain and Italy where the question of the service provider's possible immunity under the E-Commerce Directive is generally examined before the substance of the dispute.

It would appear that the question whether the act of communication to the public may be imputed to the operator of a UUC platform or a link aggregator has been discussed only in Germany and the United Kingdom, and the courts in these two countries have given diametrically opposed answers. Indeed, on several occasions, the High Court of Justice in England has accepted "the possibility that more than one person may be involved in an act of communication to the public" and has held that "the communication to the public involves both the operators of websites, who provide a mechanism specifically designed to achieve this, and the users, who provide the actual recordings".²⁸

In Germany, two highly publicised cases between GEMA and YouTube were brought respectively before the Court of Appeal in Hamburg²⁹ and the Court of Appeal in Munich³⁰. The German judges

²⁴ See already in *Football Dataco Ltd v Sportradar GmbH* concerning the concept of "re-utilisation" of a database, a sort of right of communication to the public defined as any form of making its content available to the public, with regard to which AG Cruz Villalón stated: "The fact that [...] 're-utilisation' is the result of a series of actions coming together that are attributable to different parties does not mean that each of those actions does not in and of itself warrant classification as an act of 're-utilisation' within the meaning of Directive 96/9 entailing the consequences provided for therein. It is clear that each of those actions is meaningful only as a constituent part of that complex act and, therefore, necessarily shares the classification of the act in question." (Opinion AG Cruz Villalón, 21.06.2012, C-173/11, para. 47.)

²⁵ CJEU, *Airfield v Sabam* C-431/09 and C-432/09, paras. 56, 74 *et seq.* In *SBS Belgium* (CJEU 19.11.2015, *SBS Belgium v Sabam*, C- 325/14), on the other hand, the CJEU refused to attribute the act of communication to the public jointly to the distributor and the broadcaster using the technique of direct injection.

²⁶ Secondary liability is used here as a generic term encompassing the concepts of vicarious and contributory (including for inducement) liability in US law, the doctrines of authorisation and joint tortfeasance in UK law, *Störerhaftung* in German law or *contrefaçon par fourniture de moyens* (infringement through the provision of means) in French law, i.e. all the eventualities in which a party is found liable even though that party did not carry out itself the act of reproduction, distribution or communication to the public.

²⁷ See, however, in Australia, the Federal Court's decision accepting, in a case involving a cloud computing service, that an act of reproduction could be carried out in concert by two parties: *National Rugby League Investments Pty Ltd v Singtel Optus Pty Ltd* [2012] FCAFC 59: "Without the concerted actions of both there would be no copy made [...]. They have needed to act in concert to produce – they each have contributed to – a commonly desired outcome" (at 76) and thus can "both properly be said to be jointly and severally responsible for the act of making the copies" (at 77). See also the decision of the German Federal Court, BGH 11.1.2017, GRUR 2017, 273 – *kinox.to*, accepting the joint (criminal) liability of the video platform's operators and uploading users.

²⁸ *EMI v British Sky Broadcasting* 28.2.2013 [2013] EWHC 379 (Ch), at 46. See also *FAPL v British Sky Broadcasting* 16.7.2013 [2013] EWHC 2058 (Ch), at 42; *Paramount Home Entertainment International v British Sky Broadcasting* 13.11.2013 [2013] EWHC 3479 (Ch), at 34: "Viewed from the perspective of the user, the websites do in a very real sense make the content available to the public".

²⁹ OLG Hamburg 1.7.2015, *GEMA v YouTube*: GRUR-Prax 2016, 44.

³⁰ OLG München 28.1.2016 *Allegro Barbaro*: GRUR-Prax 2016, 130. The Court of Appeal of Munich refused to accept YouTube's liability as the direct perpetrator (*Täter*) of the infringement on the ground that the act of making works available to the public was performed exclusively by the uploading internet

accepted that the musical repertoire made available to internet users by YouTube was comparable, in quantitative and qualitative terms, to that of commercial operators like Spotify. Yet neither Court of Appeal was prepared to accept YouTube's primary liability for making available infringing content uploaded by users of the platform. This case law is criticised, however, by some German scholars who, *inter alia*, express doubts as to its compatibility with European law.³¹ For example, Leistner³² makes the following observation:

*What has been overlooked by most German lawyers in this context is that the original premise of that case law, which does not assume an own act of use by the platforms because of the absence of individual knowledge of the specific infringements, of actual posting of the material by the individual users and owing to the predominantly automatic structuring of content by the platforms, is not self-evident from the perspective of the EU law.*³³

*EU case law on the right of communication to the public tends to view the existence of an act of use within the context of an evaluative economic consideration as being dependent on who offers independently structured content within their own product (principal role of the user) with their own economic interests within the context of their own services for a selected public. If this is the case, there may be several simultaneous offenders to whom the infringement of copyright may be attributed, each as an individual act.*³⁴

In particular, the argument based on the **automatic nature of the process** of posting content on UUC platforms used to deny the deliberate nature of the service provider's intervention is not convincing. Firstly, the fact that the process is entirely automated does not mean that the provider's intervention is not deliberate, because a human being is "hidden" behind every algorithm.³⁵ Secondly, the absence of **control** is totally immaterial in terms of copyright and a wholly insufficient basis to refuse to see an act of communication to the public in the UUC platform's activity. Indeed, the fact of having command over the presence of files on the site is of no relevance for establishing an act of communication to the public. Therefore, the ability of the UUC platform's users to remove the content posted by them whenever they like and the platform operator's resulting lack of influence on whether they remain posted is of no consequence as far as copyright is concerned.³⁶

user. The fact that the acts of infringement could not have been committed without YouTube's contribution was not sufficient, in the Court's view, to find the operator liable in that it merely made an infrastructure available to internet users.

³¹ The incompatibility with European law is due notably to the fact that German case law subjects copyright infringement to the condition that the operator has appropriated the content (*zu-eigen-machen*). In its decision of 28 January 2016, for example, the Court of Appeal of Munich justified its refusal to accept YouTube's primary liability by noting that it did not seek to assume responsibility for the content posted by users. However, while this criterion – drawn from media law – might be useful to distinguish a publisher from a hosting provider, it is not relevant to classify an act of communication to the public.

³² Professor at Ludwig Maximilian University of Munich.

³³ Leistner, *Copyright law on the internet in need of reform: hyperlinks, online platforms and aggregators*, (2017) JIPLP, 136-149, at 139.

³⁴ *Op. cit.*, at 140.

³⁵ See notably the recent German case law expressly refuting the argument based on the automatic nature of the process on the ground that the operator of the platform programmes the algorithms itself, e.g. the decision of the Court of Appeal of Berlin of 28.9.2015 (GRUR-RR 2016, 265) concerning the Google Shopping service and that of the first instance court in Berlin of 26.1.2016 (MMR 2016, 624) concerning Amazon's "Marketplace" service: "die Auswahlkriterien finden Eingang in einen Algorithmus, der zwar automatisch ohne menschliche Intervention abläuft, über dessen Einsatz aber ein Mensch entscheidet. Der Algorithmus stellt nur das Mittel dar, mit dessen Hilfe die Auswahl getroffen wird".

³⁶ The argument has been put forward in connection with linking where the linker has no control over the linked-to content because it is stored on a third party's servers, and was accepted in the past notably by German case law (see, e.g., BGH 17.7.2003, *Paperboy*, GRUR 2003, 958 and BGH 16.5.2013, *Die Realität*, GRUR 2013, 818: provision of a hyperlink does not constitute making available subject to the author's exclusive right because the work is not under the linker's control). However, it is not compatible

- ⇒ The performance of an act of communication to the public is not subject to the condition that the person performing the act has material control over the works; it is sufficient for that person to provide access to the works.³⁷

The same applies to the criterion of **knowledge** which is not a component of the definition of communication to the public either. In principle, ignorance of the infringing nature of stored content is not sufficient to conclude that the operator of a UUC platform performs no act of communication to the public. Indeed, the existence of an act of exploitation is not dependent on the operator's good or bad faith. While it is true that the CJEU recently established the criterion of the linker's knowledge of the illegal nature of the work's publication on the linked-to source site in the *GS Media* case,³⁸ this introduction of a subjective element in the definition of the right of communication to the public is regrettable. However, it concerns only cases of secondary communication and hence is not applicable to UUC platforms which store and give access themselves to works and subject-matter protected by copyright and related rights. In any case, the presumption of knowledge of the illegal nature, established by the CJEU for links posted for profit-making purposes,³⁹ would be applicable to such UUC platforms.

- ⇒ The decisive **criterion** of the right of communication to the public is **access, not control**.

Moreover, there is no provision of international or European law nor any case law⁴⁰ that prevents a **single act of communication to the public from being attributed to two separate players** and that precludes therefore acceptance of the **joint liability of the operator of a UUC platform and the user who posted the infringing content**. The argument that an act of communication to the public may be attributed to two separate persons, accepted in the 1980s-1990s regarding cable distribution,⁴¹ is now also argued in connection with UUC platforms, notably in France and Germany. The French advisory body on literary and artistic property, CSPLA (*Conseil supérieur de la propriété littéraire et artistique*), thus considers, in its report of 3 November 2015 on the interplay between Directives 2000/31 and 2001/29, that the same act of communication to the public can be attributed to two persons (the uploading internet user and the operator of the site) and that:

“the service user’s action of posting the protected content and that of the technical posting online by the information society service provider should be deemed to be a single act in the sense of copyright (emphasis added). Indeed, although a piecemeal understanding is possible in intellectual terms, it would not be logical here as, considered independently, those operations are of no interest in themselves. The service provider is dependent on the user who provides it with the content, and

with the CJEU's more recent case law which views hyperlinking as an act of communication (CJEU 13.2.2014, C-466/12, *Svensson*, para. 20).

³⁷ In contrast to linking, the lack of control is not total, moreover, in the case of UUC platforms because the content is stored on the operator's servers and so the operator does have an influence on whether it stays on its site.

³⁸ CJEU 8.9.2016, C- 160/15, *GS Media*, para. 49. See also concerning the (in)famous BitTorrent tracker The Pirate Bay, the Opinion of AG Szpunar, 8.2.2017, C-610/15, *Stichting Brein v Ziggo*, para. 53, that the site's operator performs an act of communication to the public upon gaining knowledge of the illegal nature of the content to which it links.

³⁹ CJEU 8.9.2016, C-160/15, *GS Media*, para. 51.

⁴⁰ While it is true that, in *SBS Belgium*, the CJEU refused to accept the joint liability of the distributor and broadcaster in the case of direct injection, it did not rule out generally the principle of attributing an act of communication to two operators; it had accepted that principle, moreover, in its *Airfield* decision.

⁴¹ See WIPO/Unesco, Committee of Governmental Experts on Audiovisual Works and Phonograms, Doc. UNESCO/OMPI/CGE/AWP/3, 25 April 1986, Principle AW 36, p. 30: “both the broadcasting organisation transmitting the programme through a fixed service satellite and the organisation distributing the programme by cable should be considered to be responsible – jointly – towards the owners of copyright in audiovisual works”.

*the web user must use the service of the provider which, through its intervention, grants access to the work. There is only one final result”.*⁴²

In this regard, the CSPLA proposes inserting a new recital 16bis in Directive 2001/29 worded as follows:

*“The provision of an access to the public to copyright works and/or subject-matter, which should not be confused with the mere provision of physical facilities as set out by recital 27 of this Directive, constitutes an act of communication to the public and/or making available to the public as defined by Article 3. This act is performed by the service provider giving such access, under its own liability. If the copyright work or subject-matter is sent to said service provider by a user of its services in order that an access to it is given to the public, the service provider and the aforementioned user together perform the act of communication to the public and/or making available to the public, and therefore hold their jointly and several liability”.*⁴³

In Germany too, eminent scholars defend the idea of joint primary liability on the part of the user and operator of a UUC platform for performing an act of communication to the public. In addition to Leistner cited earlier, Ohly⁴⁴ also considers that

*The user and the operator of the portal have both a considerable part in the communication to the public: the user is triggering it technically, the operator of the portal determines its conditions as well as its presentation, supplies the actual transmission to the public and thereby may possibly generate revenues. Both act in a work-sharing way.*⁴⁵

*It results from the Airfield ruling that a single copyright restricted act may be attributed to several users of the protected works. [...] It would be flawed to consider two subsequent actions – first of the user and then of the operator of the portal – as both contributions constitute a single action of using a copyright protected work. The Airfield ruling indicates that, depending on the circumstances of the individual case, this action may be attributable to both, the user and the operator of the portal.*⁴⁶

⇒ The act of communication to the public is jointly performed by the UUC platform and the user posting the content.

The first paragraph of recital 38 of the draft directive thus provides welcome clarification which is not incompatible in any way with the concept of communication to the public as interpreted by the CJEU. The question nevertheless arises as to whether the solution chosen by the European Commission to clarify the role of UUC platforms in relation to copyright is not too restrained. Rather than merely stating the rule in a recital, would it not be preferable to enshrine it in an article of the new directive? That is

⁴² CSPLA, *Mission sur l’articulation des directives 2000/31 ‘commerce électronique’ et 2001/29 ‘société de l’information’* chaired by Professor Pierre Sirinelli – Report and proposals, 3 November 2015, pp. 11-12.

⁴³ *Op. cit.*, p. 10. See also Sirinelli, Bénazéraf, Bensamoun, *Pour une évolution des textes applicables à certains prestataires de services?*, Dalloz IP/IT 2016, p. 186: “The persons concerned give access to the public to the work. Copyright is brought into play in this way by two categories of persons: the internet user who ‘posts’ the content, on the one hand, and the service provider who supplies the means and brings it into contact with the public, on the other”.

⁴⁴ Also Professor at Ludwig Maximilian University of Munich.

⁴⁵ Ohly, *Der unionsrechtliche Rahmen der Haftung von Intermediären*, Opinion on the request of GEMA, 2015, no. 84 p. 33.

⁴⁶ *Op. cit.*, no. 88 p. 35. See also Lausen, *Unmittelbare Verantwortlichkeit des Plattformbetreibers für Dritthandlungen*, conference organised on 20 January 2017 in Munich by the Institut für Urheber- und Medienrecht, *Vergütungsgerechtigkeit auf Online-Plattformen*, who considers that UUC platforms like YouTube are characterised by a distribution of tasks in relation to the communication of works: the service’s user delivers the work by uploading it, while the platform, which acts for and on behalf of the user, makes the content available and transmits it at the request of internet users.

the approach advocated by the French CSPLA which, in its most recent report published in December 2016, proposes adding a new paragraph 3 in article 3 of Directive 2001/29 concerning the right of communication to the public worded as follows:

Any act of giving access to the public to a work and/or protected subject-matter shall constitute an act of communication to the public and/or making available to the public.

*Such an act of communication to the public and/or making available to the public may be carried out by one or more persons, simultaneously or in succession, initially or through a secondary act.*⁴⁷

In Germany, two distinguished academics, professors Leistner and Metzger⁴⁸, recently published an article in a leading daily newspaper, the *Frankfurter Allgemeine Zeitung*, proposing a two-tier system to “deal with the problem of unlawful music use”. One of their recommendations is to clarify the role and function of platforms and to accept that they perform copyright restricted acts when they propose services which, as regards the content, compete with the work’s normal exploitation, in other words platforms with a structured content of videos, music or images.⁴⁹ As Leistner explains elsewhere, the idea is basically to make a distinction between “competing providers”, i.e. intermediaries offering products that compete with the exploitation of works by rightholders, and “complementary providers” such as access providers and pure search engines, which would be exempted from primary copyright liability.⁵⁰

Recognition of the primary liability of UUC platforms for the act of communication to the public performed jointly with the uploading internet user entails an obligation on their part, unless they enjoy the exemption from liability under article 14 of Directive 2000/31, to obtain the necessary authorisations from rightholders. It seems desirable to extend the effects of that authorisation to the platform’s users: the licensing contract concluded by the operator of the UUC platform would cover the acts of uploading carried out by users for non-professional purposes.⁵¹ On the other hand, it seems neither necessary nor desirable to establish a new exception to copyright – even if offset by a right to remuneration – for internet users’ non-commercial uploads⁵² or, based on the Canadian model, for all non-commercial user-generated content.⁵³

⁴⁷ CSPLA, *Mission sur le droit de communication au public* – Report and proposals by Sirinelli, Benazeraf and Bensamoun, December 2016 <http://www.culturecommunication.gouv.fr/Politiques-ministerielles/Proprietelitteraire-et-artistique/Conseil-superieur-de-la-propriete-litteraire-et-artistique>.

⁴⁸ Professor at Humboldt University of Berlin.

⁴⁹ Matthias Leistner and Axel Metzger (2017), *Wie sich das Problem illegaler Musikknutzung lösen lässt*, available at: http://www.faz.net/aktuell/feuilleton/medien/gema-youtube-wie-sich-urheberrechts-streitschlichten-liesse14601949.html?printPagedArticle=true#pageIndex_2.

⁵⁰ Leistner, *Copyright law on the internet in need of reform: hyperlinks, online platforms and aggregators*, (2017) JIPLP, 136-149, at 143.

⁵¹ See CSPLA, *Mission sur l’articulation des directives 2000/31 ‘commerce électronique’ et 2001/29 ‘société de l’information’*, *supra* note 42, proposing the inclusion of a new article 9bis in Directive 2001/29, paragraph 3 of which would provide that the authorisation granted to service providers by rightholders “covers the acts performed by the users of the services when they transmit to those service providers the works and/or protected subject-matter to enable them to be accessed [...] provided that such users do not act in a professional capacity”.

⁵² See, supporting this view, Leistner & Metzger, *supra* note 50.

⁵³ See s. 29.21 of the Canadian Copyright Act.

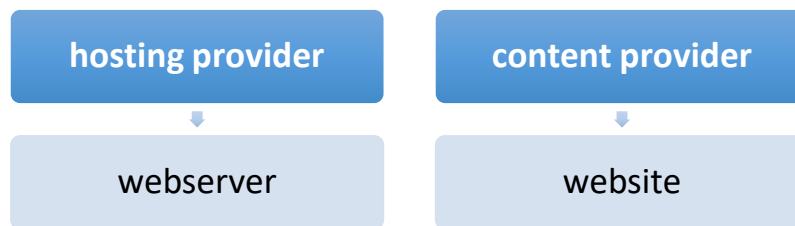
B) Hosting provider status (Dir. 2000/31, art. 14)

Article 14 of the E-Commerce Directive dealing with hosting service providers contains two levels of regulation:

- the definition of the activity of hosting, on the one hand,
- the conditions under which the hosting provider may claim an exemption from liability, on the other.

1) The concept of hosting

The activity of hosting is defined very broadly as consisting in “the storage of information provided by a recipient of the service”. When the E-Commerce Directive was adopted, well before the advent of Web 2.0, the only service providers to store information provided by recipients of their services were website hosting providers which place at the disposal of their customers dedicated or shared servers on which the data necessary for the websites to function are stored. While it is true that, on each request from an internet user, the server hosting the website transmits the requested page from the hosted site to the internet user’s browser, the service nevertheless remains a purely technical one.⁵⁴ Indeed, the provider does not intervene in relation to the content of the hosted website, the design of which is exclusively under the control and responsibility of the website’s operator, the content provider. Similarly, the hosting provider plays a purely passive role in transmitting the content of the website, which is operated under the responsibility of the website’s owner/operator. The hosting provider rents out space on its servers but has no say in the architecture, the choice of headings, the organisation of or the exploitation of the content on the websites hosted by it.



2) Exemption from liability

Article 14 then sets out the conditions under which a hosting provider, thus defined, qualifies for a limitation of liability: on obtaining knowledge or awareness of the illegal nature of the activity, the hosting provider must act expeditiously to remove or disable access to the information. 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.

⁵⁴ That is the reason why the European legislator does not require the hosting provider to have absolute lack of knowledge of or control over the content.

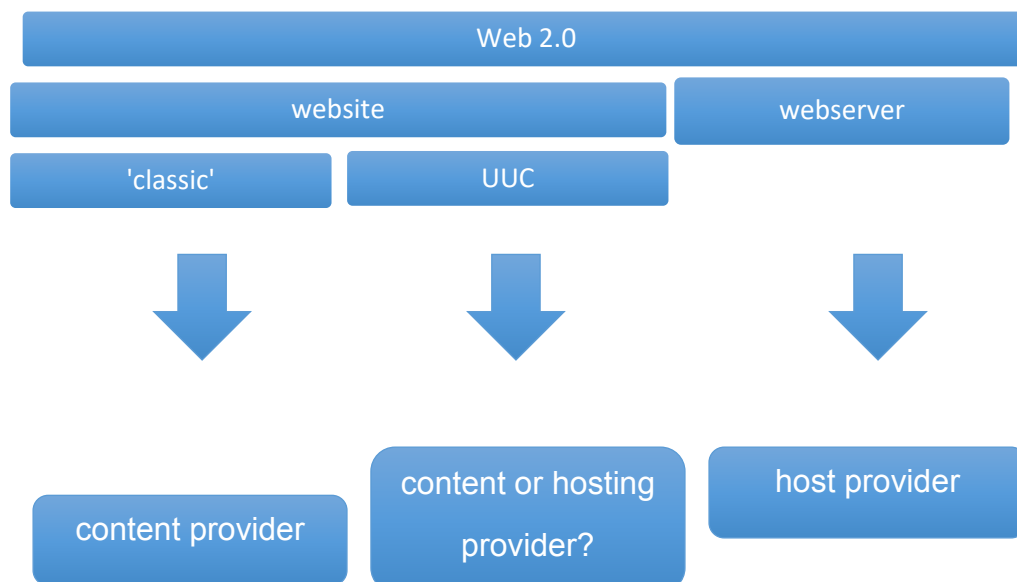
It can be inferred from this that the provider may claim hosting provider status without qualifying for the liability exemption when, for example, it stores data provided by users of its service but knows and/or is aware of the data's illegal nature.⁵⁵



3) Web 2.0 hosting

Hosting provider status was subsequently claimed by operators of collaborative websites which emerged with the advent of the second generation of the internet, such as wikis, forums, social networks and music and video sharing platforms. Unlike “classic” websites where the content is made available to internet users by a publisher (content provider) who assumes responsibility for it, the content of web 2.0 platforms is “user-generated”, i.e. uploaded by internet users themselves. So the question that arose was whether these new internet players could be classified as hosting providers and claim the exemption from liability under article 14.

The uncertainty concerns in the first place whether hosting provider status can be granted to a service provider which does not confine itself to storing content for users of its service but also makes the content accessible online itself. Put differently, the question is whether a hosting provider loses that status if it offers more than a technical service of storage. Is the operator of a UUC platform a hosting provider or a content provider?



⁵⁵ See CJEU 12.7.2011, *L'Oréal v eBay*, C-324/09, para. 124.

In its decision in *L'Oréal v eBay*, the CJEU considered that “the fact that the service provided by the operator of an online marketplace includes the storage of information transmitted to it by its customer-sellers is not in itself a sufficient ground for concluding that that service falls, in all situations, within the scope of Article 14(1) of Directive 2000/31”.⁵⁶ Accordingly, the Court seems to accept that a provider whose activity is to store content supplied by users of its service may “lose” its hosting provider status if the service goes beyond the mere provision of storage. However, in the *Netlog* decision, the CJEU subsequently accepted without discussion that a UUC platform – in this case a social network – qualified for hosting provider status purely because of its storage activity.⁵⁷

In fact, in none of its decisions concerning the concept of hosting providers does the CJEU make a distinction between the foregoing two aspects addressed in article 14, namely between the definition of a hosting activity, on the one hand, and the conditions under which a hosting provider may claim an exemption from liability, on the other. Drawing criteria – which do not actually concern hosts⁵⁸ – from recital 42 of Directive 2000/31, the Court ruled that

*in order to establish whether the liability of a service provider could be limited under Article 14 of Directive 2000/31, [...] it was necessary to examine whether the **role** it plays is **neutral**, in the sense that its conduct is **merely technical, automatic and passive**, pointing to a **lack of knowledge or control** of the data which it stores.*⁵⁹

In so doing, the CJEU conflates the criteria governing the hosting activity (purely technical nature of the service, neutrality in relation to the hosted content) with that of knowledge to be used to assess the provider’s liability. Therefore, the guidelines given by the Court to identify service providers eligible to claim the benefit of the article 14 safe harbour are not very clear. Moreover, despite their reiteration, they have not had the intended clarifying effect, as shown by the hesitations in case law observed at the national level in various Member States, not least in Italy.⁶⁰

Hence the Commission’s proposal to specify under what conditions a UUC platform may claim the safe harbour provided in article 14 of Directive 2000/31 appears very appropriate, as does the choice of making the “active role” the main distinguishing criterion. As to the assessment of the platform’s active role – making it lose the benefit of the safe harbour – the draft directive does not innovate in any way but merely takes up the criteria articulated by the CJEU in *L’Oreal v eBay*.⁶¹ Indeed, the second paragraph of recital 38 of the proposed directive reads:

⁵⁶ CJEU 12.7.2011, *L’Oréal v eBay*, C-324/09, para. 111.

⁵⁷ CJEU 16.2.2012, *Netlog*, C-360/10, para. 27: “the owner of an online social networking platform - such as Netlog - stores information provided by the users of that platform, relating to their profile, on its servers, and [...] it is **thus** a hosting service provider within the meaning of Article 14 of Directive 2000/31”.

⁵⁸ Indeed, recital 42 of Directive 2000/31 concerns only the “mere conduit” and “caching” activities covered by articles 12 and 13.

⁵⁹ CJEU, *Papasavvas*, C-291/13, para. 41; *L’Oréal*, C-324/09, para. 113; *Google*, C-236/08 to C- 238/08, para. 114.

⁶⁰ Italian case law is very divided on the classification of UUC platforms. The majority opinion seems to consider that video-sharing platforms are active hosting providers which do not qualify for the liability exemption under article 14 of Directive 2000/31. See most recently, Trib. civ. Roma, 27.4.2016, no. 8437/2016 *RTI v Break Media*, according to which the liability exemption prescribed by the E-Commerce Directive for hosting providers does not apply to break.com since the ISP is an “active” hosting provider organising the contents published by its users. – See also Trib. civ. Roma 15.7.2016, no. 14279/2016, *RTI v Megavideo*. See, however, Court of Appeal of Milan, 7 January 2015, *Yahoo v RTI*, according to which the content organisation and index-linking through sophisticated IT techniques to monitor and manage the contents – even if aimed at making a profit – are insufficient to exclude the passive role of the hosting provider.

⁶¹ CJEU 12.7.2011, *L’Oréal v eBay*, C-324/09, paras. 116 and 123.

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.

The provision has been criticised for not being compatible with recital 42 of Directive 2000/31 or with the CJEU's case law. According to its critics, service providers could not be deprived of their immunity unless they have knowledge of or control over specific illegal content. Only the scenario "where a provider gives **tailored advice to a specific user**"⁶² would eliminate the platform's neutrality. "Offering **generic and automated support to all users** does not provide knowledge and, without knowledge, real control is excluded".⁶³

Apart from the fact that the criteria of knowledge and control are alternative rather than cumulative ones in the CJEU's case law,⁶⁴ there is no basis for such a narrow interpretation of the concept of neutrality. In *L'Oréal v eBay*, the CJEU contrasted the fact of "provid[ing] general information to its customers", which would not make the platform lose its neutrality, with that of "provid[ing] assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting those offers", which would be characteristic of an active role. There is no mention of the CJEU excluding from the benefit of article 14 only a provider giving tailored advice to a specific user.

Nor can the active role of the operator of a UUC platform be excluded purely on the ground that the optimisation or promotion measures are automated;⁶⁵ algorithm parameters are always programmed by human beings. Moreover, it is interesting to note that, in the USA where Google claims editor status for its search engine in order to benefit from the Constitution's First Amendment protection, it argues that the human intervention necessary to write the algorithmic process reflects editorial judgments.⁶⁶

- ⇒ The proposal to make the "active role" the main test for determining the applicability of the liability exemption to UUC platforms must be endorsed.
- ⇒ The second paragraph of recital 38 contains welcome clarification of the CJEU's case law concerning the conditions under which article 14 of Directive 2000/31 may apply to UUC platforms.

⁶² Angelopoulos, *On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market*, p. 12.

⁶³ Angelopoulos, *op. cit.*, p. 34.

⁶⁴ They are cumulative in recital 42 (the service provider has neither knowledge nor control) but alternative in the *Google*, *L'Oréal* and *Papasavvas* decisions.

⁶⁵ See, G. Dinwoodie, *Secondary Liability for Online Trademark Infringement: The International Landscape*, 37 Colum. J. L. & Arts 463 (2014), fn. 139: "The fact that certain services are automated should not always mean that the provider of those services is itself not 'active'."

⁶⁶ Lecomte & Bégue, *Panorama des régimes d'(ir)responsabilité applicables à Google*, RLDI 2014/105, no. 3410, p. 89, concerning the White Paper commissioned by Google and published in the USA in support of this argument. See Volokh & Falk, *First Amendment Protection for Search Engine Search Results*, 20 April 2012, available at: <http://volokh.com/wp-content/uploads/2012/05/SearchEngineFirstAmendment.pdf>, p. 11: "the computer algorithms that produce search engine output are written by humans. Humans are the ones who decide how the algorithm should predict the likely usefulness of a Web page to the user. These human editorial judgments are responsible for producing the speech displayed by a search engine".

⇒ The second paragraph of recital 38 is particularly intended for national courts which have construed an “active role” too narrowly and have granted safe harbour protection to UUC platforms whose activity goes far beyond a mere technical one of storage.

	Webhoster	UUC platform	UUC platform
	storage (+) public access (-) active role (-)	storage (+) public access (+) active role (-)	storage (+) public access (+) active role (+)
Communication to the public	no	yes	yes
Hosting provider status	yes	yes	yes
Safe harbour	yes	yes	no
	passive hosting provider → exempted	passive hosting provider → exempted	active host → not exempted

Intermediate conclusion

Recital 38 provides useful clarification on the two most controversial issues concerning UUC platforms. On the one hand, it confirms that service providers perform a copyright restricted act of communication to the public jointly with the users of their services when they deliberately give internet users access to protected content. On the other, it contains a reminder that such providers may nevertheless claim the exemption from liability applicable to hosting providers, provided however that they do not play an active role.

II – The enhanced due diligence obligation imposed on certain UUC platforms

A) Article 13 and recital 39 of the proposal for a directive

The draft Directive on copyright in the Digital Single Market includes an article 13, entitled *Use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users*, which imposes a specific obligation on the platforms concerned to take appropriate and proportionate measures to ensure the functioning of agreements concluded with rightholders or to prevent the availability on their services of copyright protected works and other subject-matter. It is a question here of an enhanced due diligence obligation.

Unlike recital 38 which concerns all UUC platforms, article 13 is directed exclusively at platforms which store and give the public access to **large amounts of works** and other protected subject-matter uploaded by users. The criterion for the application of the new enhanced due diligence obligation is thus a purely quantitative one. Therefore, small platforms, whatever their field of activity,⁶⁷ and larger platforms with a business model that does not focus on cultural content, such as blogs and doubtless also wikis, where it is unlikely that the users upload “large amounts” of works and other protected subject-matter, are excluded from the scope of article 13.

⁶⁷ See C. Angelopoulos, *EU Copyright Reform: Outside the Safe Harbours, Intermediary Liability Capsizes into Incoherence*, Kluwer copyright blog 6.10.2016, according to whom “it is not unusual in law to demand different things of different persons, depending on the size of the risk they pose to the interests of others and their ability to control it. In this particular instance, the power of the internet’s giants cannot compare to that of start-ups and SMEs”.

Admittedly, this **quantitative criterion** is rather vague. Nevertheless, it is not certain that a qualitative criterion would be more precise. It would be possible of course to use a criterion drawn from competition law and to impose an enhanced due diligence obligation solely on providers offering a **service substitutable** for those of websites on which cultural content is not posted by users and works are used in compliance with copyright. The proposal would be comparable to the one made in Germany by Leistner and Metzger and modelled on the three-step test to target only platforms offering “structured” cultural content **competing with a normal exploitation** of works.⁶⁸ Basically, the idea would be to use an economic criterion which, moreover, could possibly be combined with the quantitative criterion.

The enhanced due diligence obligation under article 13 applies irrespective of the platform’s status, i.e. whether or not it is covered by the exemption in article 14 of the E-Commerce Directive.⁶⁹ Therefore, article 13 does not create a new category of intermediary but only a new obligation applicable to all UUC platforms beyond a certain quantitative threshold.

Article 13(1) and recital 39 cite the use of effective content recognition technologies as an example of measures to be taken by the UUC platforms concerned in order to fulfil their enhanced due diligence obligation. The provision has come under fierce criticism on the ground that such a measure would be contrary to article 15 of the E-Commerce Directive and to the Charter of Fundamental Rights of the European Union.

B) Article 15’s alleged incompatibility with the E-Commerce Directive

*Member States shall not impose a **general obligation** on providers, when providing the services covered by Articles 12, 13 and 14, **to monitor** the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.* (Art. 15(1))

Contrary to what certain critics of the proposed directive assert, it is not correct to claim that, in the *SABAM* decisions relating to article 15,⁷⁰ the CJEU recognised “that the prohibition of general monitoring obligations was anchored in Articles 8 and 11 of the European Charter of Fundamental Rights”.⁷¹ In actual fact, in the two cases involving respectively an access provider (*Scarlet*) and a social network (*Netlog*), the Court *first* determined that the blocking or filtering measures sought by SABAM were not compatible with article 15 of Directive 2000/31 and *then* that they were liable to infringe certain fundamental rights protected by the Charter.

⁶⁸ Leistner & Metzger, *Recht und Realität im Netz : Wie sich das Problem illegaler Musikknutzung lösen lässt*, Frankfurter Allgemeine Zeitung, 4.1.2017, available at: http://www.faz.net/aktuell/feuilleton/medien/gemayoutube-wie-sich-urheberrechts-streit-schlichten-liesse-14601949-p3.html?printPagedArticle=true#pageIndex_3 Comp., on the subject of secondary liability, the distinction made in German case law between a “legitimate, socially desirable business model, which is not as such designed for a copyright-infringing use” and a “business model which is designed for infringements by the users or promotes such infringements by its own measures” (BGH 26.11.2015, *Störerhaftung des Access-Providers*, IIC 2016, 481).

⁶⁹ When the UUC platform can claim the benefit of the liability exemption under article 14, it is not required nevertheless “to ensure the functioning of agreements concluded with rightholders” (first alternative mentioned in art. 13(1)); hence the object of the enhanced due diligence obligation incumbent upon it can only be “to prevent the availability on its services” of copyright protected works and other subject matter (second alternative mentioned in art. 13(1)).

⁷⁰ CJEU 24.11.2011, *Scarlet v SABAM*, C-70/10 and CJEU 16.2.2012, *SABAM v Netlog*, C-360/10.

⁷¹ S. Stalla-Bourdillon, E. Rosati et al., *Open Letter to the European Commission - On the Importance of Preserving the Consistency and Integrity of the EU Acquis Relating to Content Monitoring within the Information Society*, 30 September 2016, available at: <https://ssrn.com/abstract=2850483>.

1) The applicability of article 15

Before considering the compatibility of the new enhanced due diligence obligation with the provision of article 15 of the E-Commerce Directive prohibiting any general obligation to monitor, a stand should be taken in the first place on whether article 15 is in fact applicable to the UUC platforms under discussion here. This is a legitimate question given that, in recital 38, the draft directive advocates “verify[ing] 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”. Indeed, this clarification of the CJEU’s case law concerning the scope of article 14 of the E-Commerce Directive will lead to certain UUC platforms being denied the benefit of the liability exemption for which the national courts of certain Member States wrongly found them eligible.⁷²

The question arises therefore as to whether UUC platforms which play an active role in relation to the content stored by them – and thus cannot claim the benefit of the exemption from liability under article 14 – must be viewed as active hosting providers or content providers. Indeed, hosting can be understood conceptually as a purely technical activity, incompatible with the slightest active role in relation to the hosted content, in which case the platforms ineligible for the safe harbour would not be able to invoke article 15 either. They would be treated as content providers on which it is perfectly possible to impose a general obligation to monitor content. Nevertheless, the general nature of the terms used by the European legislator to define hosting suggests that the UUC platforms concerned should be regarded as active hosting providers. Indeed, despite the access that they give the public and their lack of neutrality in relation to the stored content, their activity should be viewed as still coming within the scope of hosting. While they cannot claim the benefit of the exemption from liability under article 14 due to their active role, article 15 does apply to them, on the other hand, and prevents a general obligation to monitor the information that they store from being imposed on them.

2) The distinction between a general and a specific monitoring obligation

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 necessarily clearly identified in that case. The difficulties appear when it is a question of requiring an ISP to take measures to *filter* 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, as has been categorically asserted?⁷³

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 Directive 2000/31.⁷⁴

Some commentators seem to infer from article 15 of the E-Commerce Directive that UUC platforms could not be required to take any measures to *prevent* illegal activity, including copyright infringement.

⁷² See, *supra*, I B).

⁷³ Angelopoulos, *On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market*, p. 36.

⁷⁴ See Recital 40 of Directive 2000/31: “service providers have a duty to act, under certain circumstances, with a view to preventing or stopping illegal activities; this Directive should constitute the appropriate basis for the development of **rapid and reliable procedures for removing and disabling access to illegal information**; [...] the provisions of this Directive relating to liability should not preclude the development and effective operation, by the different interested parties, of **technical systems of protection and identification** and of **technical surveillance instruments made possible by digital technology** within the limits laid down by Directives 95/46/EC and 97/66/EC.”

Such an interpretation is incorrect.⁷⁵ Preventive filtering is not prohibited *per se* and although the CJEU refused to accept SABAM's claims in the *Scarlet* and *Netlog* cases, it was not because of the preventive character of the requested measure. On the contrary, as the CJEU stated in *L'Oréal v eBay*, article 11 of Directive 2004/48⁷⁶ allows national courts "to order an online service provider [...] to take measures that contribute not only to bringing to an end infringements committed through that marketplace, but also to preventing further infringements".⁷⁷

The alleged incompatibility of content recognition technologies, the use of which is advocated by the Commission, with article 15 would stem from the fact that they "would involve the active monitoring of almost all of the data relating to all of its service users".⁷⁸ The critics of the draft directive mention in this regard the *Scarlet* and *Netlog* decisions in which the CJEU refused to endorse the preventive measure, at the operator's own cost and for an unlimited period, sought by SABAM. Can it be inferred from this case law, however, that the mere fact that the filtering measure concerns all the content posted by users would constitute a general monitoring obligation?

That is the opinion of Angelopoulos who argues that "it is the broadness of the object of the monitoring which represents the pertinent difference between general and specific monitoring. [...] The issue at stake is whether or not all users' content is subject to monitoring measures, not whether the objective of the monitoring is the prevention of the infringement of a specific work".⁷⁹ Such an interpretation of the *Netlog* case law is not convincing. First, a filtering measure that concerned only some of the content hosted by the platform is unlikely to be effective.⁸⁰ Second, a monitoring measure tailored to target only the content uploaded by certain users raises problems in terms of the protection of personal data because it would imply the identification of those users' IP addresses. Third, the general nature of a monitoring measure does not stem from the number of works or other content screened by recognition technologies but rather from the lack of precision concerning what is to be monitored.

Indeed, general monitoring can only be understood as searching for all potentially illegal content. Therefore, it does not apply when the infringing content to be searched for is identified. What article 15 prohibits is not temporary monitoring to detect content identified by rightholders as being infringing, 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* and *Netlog* cases in which SABAM applied to the court to enjoin 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.⁸¹

The measures contemplated by the draft directive cannot be equated with such a general monitoring obligation: the idea is simply that the platforms concerned should collaborate with rightholders who should provide the necessary data (digital fingerprints) to allow the services to identify their content.⁸² Moreover, article 13 expressly provides that the measures imposed on UUC platforms must be

⁷⁵ See Recital 48 of Directive 2000/31: "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".

⁷⁶ Directive 2004/48 of 29 April 2004 on the enforcement of intellectual property rights.

⁷⁷ CJEU 12.7.2011, *L'Oréal v eBay*, C-324/09, para. 131.

⁷⁸ Angelopoulos, *On Online Platforms and the Commission's New Proposal for a Directive on Copyright in the Digital Single Market*, p. 36.

⁷⁹ Angelopoulos, *op. cit.*, p. 37.

⁸⁰ Yet the measure's effectiveness is, as far as fundamental rights are concerned, a condition for an injunction's validity; see CJEU 27 March 2014, C-314/12, *UPC Telekabel v Constantin Film*, para. 62: "the measures which are taken by the addressee of an injunction when implementing that injunction must be sufficiently effective to ensure genuine protection of the fundamental right at issue."

⁸¹ CJEU 24.11.2011, *Scarlet v SABAM*, C-70/10, para. 38; CJEU 16.2.2012, *SABAM v Netlog*, C-360/10, para. 36.

⁸² Recital 39 of the proposed Directive on copyright in the Digital Single Market.

“appropriate and proportionate”. This is undoubtedly a “monitoring obligation in a specific case” expressly permitted by Directive 2000/31.⁸³

⇒ The monitoring obligation imposed on certain UUC platforms is not a general one and hence is not contrary to article 15 of the E-Commerce Directive.

C) The alleged incompatibility with the EU Charter of Fundamental Rights

Lastly, the critics of the draft directive argue that its article 13 would be contrary to articles 7 and 8 (privacy and protection of personal data), 11 (freedom of expression and information) and 16 (freedom to conduct a business) of the Charter of Fundamental Rights of the European Union. This allegation is unfounded.

In the first place, with regard to the right to respect for private and family life, it is hard to see how it could be affected by the enhanced due diligence obligation which the Commission proposes to place on UUC platforms that store and give access to large amounts of cultural content. As already indicated, this obligation implies that the service providers concerned should collaborate with rightholders both to ensure the proper application of the licensing agreements concluded by them and to prevent the availability of infringing content. The identity of the platform’s users in general and of those who have posted content in particular is totally irrelevant in this respect.

The argument advanced in the *Netlog* case that the filtering system sought by SABAM would involve the identification, systematic analysis and processing of information connected with the profiles created by all the users of the social network clearly does not apply to the measures advocated by the draft directive. First, the content identification measures in question would be limited to uploads and would not in any way concern the internet users who download or stream the content. Second, the content recognition system as contemplated by article 13 is concerned only with the *content*, not with the *identity* of the person uploading it. Protection of personal data or privacy is therefore not relevant, since there is neither a need nor a requirement to connect the data or content to the profiles of individual users of platforms.

⇒ No incompatibility with articles 7 and 8 of the European Charter of Fundamental Rights

Nor does article 13 of the proposal for a directive interfere with freedom to conduct a business. To begin with, the platforms to which the enhanced due diligence obligation applies are only required to take “appropriate and proportionate” measures. Moreover, the content recognition measures are limited purely to infringing content identified by rightholders: the ISP is only required to match the data that is provided by the rightholder against the data uploaded on its platform. Lastly, the service providers subject to the obligation may choose the technologies to be used by them.⁸⁴ The assertion that article 13 would require all platforms to resort to a particularly costly system comparable to YouTube’s Content-ID is incorrect. Indeed, there are other less expensive and more effective technologies available to identify infringing content.⁸⁵

⇒ No incompatibility with article 16 of the European Charter of Fundamental Rights

The risk of undermining freedom of expression, which is claimed as soon as there is any suggestion of imposing the slightest obligation on UUC platforms, applies primarily to the blocking measures required of access providers, the legitimacy of which was nevertheless accepted by the CJEU in its *UPC Telekabel* decision. By contrast, the risk is more limited in the case of filtering measures imposed on UUC platforms now that new recognition technologies enable illegal content to be precisely identified.

⁸³ Recital 47 of Directive 2000/31.

⁸⁴ CJEU 27 March 2014, C-314/12, *UPC Telekabel v Constantin Film*, para. 52.

⁸⁵ For example, Audible Magic (Dailymotion), Signature (INA), Gracenote (iTunes), Bay TSP, BMAT, Dubset for derivative content (mixes & remixes).

So the risk of blocking or removing lawful content is limited. The only difficulty is when the use of a work or other protected subject-matter is allowed under an exception, as in the case of quotation, parody and press reviews.⁸⁶ That is why article 13(2) of the draft directive provides for the introduction of “complaints and redress” mechanisms. The criticism that such a remedy would not be sufficient because it would apply *ex post* and would thus amount to an intolerable impairment of “end-users’ rights”⁸⁷ is not convincing. Why should the trade-off between fundamental rights be systematically to the detriment of intellectual property and to the advantage of users’ “rights”?

⇒ No incompatibility with article 11 of the European Charter of Fundamental Rights

Conclusion

As the European Parliament stated in its resolution of 9 July 2015, “creative works are one of the main sources nourishing the digital economy and information technology players such as search engines, social media and platforms for user-generated content, but virtually all the value generated by creative works is transferred to those digital intermediaries, which refuse to pay authors or negotiate extremely low levels of remuneration”.⁸⁸ Therefore, the European Commission should be commended for including provisions to address this “value gap” problem in its proposal for a *Directive on copyright in the Digital Single Market*. In this regard, article 13 and recital 38 of the draft directive are balanced texts which, despite the loud complaints that they have prompted from certain quarters, are totally consistent with the *acquis communautaire* and infringe neither the provisions of the E-Commerce Directive nor those of the Charter of Fundamental Rights of the European Union. Consequently, the proposals contained in the Comodini report⁸⁹, which eviscerate article 13 and recital 38 and, if implemented, would prevent the European legislature from dealing with the transfer of value issue in a satisfactory way, are to be regretted.

Munich, 10 March 2017

⁸⁶ See the proposals made by Fred von Lohmann, *YouTube’s Copyright Filter: New Hurdle for Fair Use?*, 15 October 2015, at: <http://www.eff.org/deeplinks/2007/10/youtubes-copyright-filter-new-hurdle-fair-use> to limit the risk of blocking UUC covered by an exception: “Add audio track identification and insist on a video and audio match before any automated blocking of content; if the audio track doesn’t match the video track, that’s a good indication that we’re talking about The Vader Sessions, rather than an infringing upload of Star Wars. Add a test to determine what ratio of the uploaded video is comprised of content claimed by a rightsholder; if the “match” is only 10% of the entire video, that’s a good indication that we’re talking about transformative content, rather than verbatim copying”.

⁸⁷ Angelopoulos, *On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market*, p. 40.

⁸⁸ European Parliament Resolution of 9 July 2015 on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, 2014/2256(INI), recital O.

⁸⁹ European Parliament, Committee on Legal Affairs, Amendments: 73, Therese Comodini Cachi, Copyright in the Digital Single Market, Proposal for a directive COM(2016)0593 – C8-0383/2016 – 2016/0280(COD), pp. 29-32 (Recital 38) and pp. 74-81 (Article 13).

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