

BETTER REGULATION FOR COPYRIGHT



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KEYNOTE by Commissioner Mariya Gabriel

PANEL DEBATES: • Neighbouring right for publishers
• Platform Liability • Copyright on data

WED 6 SEPT 2017 15:00–18:30

European Parliament
Room ASP 1G3

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paper has taken the current situation of individual creators and small-size independent content producers into specific consideration, pointing out that the online distribution of their works triggers a ‘lose-lose’ situation. On the one hand, the excessively burdensome and costly nature of notice-and-takedown mechanisms do not place these right-holders in a position to effectively enforce their rights when unauthorised users makes them available on online platforms. On the other hand, such rights-holders have no contractual freedom under standard terms and conditions of use of these services to licence and effectively monetize their own creations when they decide to join online platforms and social networks and to create their own, official accounts. The paper suggests that the provision of Article 13 could have a much stronger justification if its goal to fill a gap in the value chain of online content were more closely linked to the codification of a right to fair remuneration to be achieved through effective rights and remedies (i.e. a right to information about the levels of remuneration and the modes of online exploitation; a right to contractual redress in case of disproportionately low remuneration) that the 2016 draft directive embodies under Article 14 and 15.

Form and Substance in the Value Gap Proposal¹

Tito Rendas²

In September 2016, the European Commission published a copyright reform package, including a new Directive on copyright in the Digital Single Market. One of the Directive’s most controversial aspects is the so-called “value gap proposal” provided in Article 13 and accompanying recitals.

This proposal suffers from a number of fundamental problems, of both a formal and substantive nature. From the formal point of view, the proposal (i) includes normative provisions in the recitals, (ii) lacks basic clarity, and (iii) uses trivially vague language. On the substantive side, if passed into law the proposal will (i) thwart digital innovation and (ii) disproportionately restrict the fundamental rights of Internet users and platform operators.

Given the seriousness of these flaws, the EU institutions should consider deleting or, at least, significantly rewriting the proposal.

Introduction

In September 2016, the European Commission published a copyright reform package³. The most controversial instrument in this package⁴ is the Directive on copyright in the Digital Single Market⁵ (draft Directive). The main reason behind the controversy, along with the proposed right for press publishers⁶, lies in the so-called “value gap proposal” provided in Article 13 and Recitals 37 to 39.

Over the last few years, rightholders and their representatives have been floating the idea that there is a value gap in the online content marketplace that is in need of closing. In their lobbying efforts, the value gap⁷ has come to replace piracy as the main digital threat to the survival of the creative industries⁸. The idea is that rightholders face difficulties when seeking to license and be remunerated for the online distribution of their works⁹. With the evolution of digital technologies, platforms of user-uploaded content (think of YouTube, Dailymotion and Vimeo) have become important vehicles for such distribution. According to rightholders, these platforms inappropriately invoke the “hosting safe harbour” laid down in Article 14 of the E-Commerce Directive in order to argue that they are under no obligation to conclude licensing agreements. Rightholders claim that, as a result, they are not always able to obtain a fair remuneration from platforms of user-uploaded content. The unfairness, they add, is made evident by the difference between the remuneration paid by these (typically ad-funded) platforms and that paid by subscription services, such as Spotify Premium and Deezer¹⁰.

¹ The title of this contribution borrows from the title of one of the most influential American law review articles of the late twentieth century: Kennedy (1976).

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³ With the fundamental purpose of “modernising” EU copyright rules for the digital age, the package comprises one Regulation on copyright and related rights for online transmissions and retransmissions of television and radio programmes and one Directive on copyright in the Digital Single Market, as well as two other instruments dedicated to implementing the Marrakesh Treaty into EU law.

⁴ The number of amendments submitted by MEPs – almost 1.000 – may serve as an illustration of the degree of controversy. See <http://en.euractiv.eu/wp-content/uploads/sites/2/2017/05/JURI-copyright-amendments.pdf>.

⁵ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016) 593 final.

⁶ Criticising the introduction of a new right for press publishers, see, e.g., Hugenholtz (2016); Kretschmer et al. (2016); Peukert (2016); Ramalho (2017); and Geiger et al. (2017).

⁷ The expression “transfer of value” is sometimes used instead of “value gap”. See, e.g., Lucas-Schloetter (2017).

⁸ See, e.g., the petition at <http://www.makeinternetfair.eu>.

⁹ See Recital 37.

¹⁰ See IFPI (2015), p. 23.

Grounded on this rationale, Article 13 and Recitals 37 to 39 of the draft Directive attempt to address this gap, by reinforcing the position of rightholders to negotiate and be remunerated for the online use of their works by platforms of user-uploaded content¹¹.

Article 13(1), the proposal's centrepiece, reads as follows:

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.

Since the Commission released the draft Directive, numerous independent academics have raised their voices against the value gap proposal¹². With the present contribution, I merely reinforce the chorus of critics, by discussing those that are, in my view, the major problems with the proposal.

These problems are of a twofold nature: formal and substantive. Formal problems and substantive problems are naturally intertwined, in that poor drafting choices often affect the provision's substance. For clarity of exposition, nonetheless, I will treat these problems separately. The problems that arise from the way in which the Commission chose to formulate the proposal, even where these choices have substantive repercussions, are treated under the section "formal problems" (1.). On the other hand, the problematic nature of some of the options made by the Commission is purely material and independent from the exact formula employed in the text of the Directive. I address these shortcomings under the section "substantive problems" (2.).

1. Formal problems

1.1. The proposal includes normative provisions in the recitals

The departure point of the proposal seems to lie in Recital 38, which starts by stating that online platforms, in storing and providing public access to protected content uploaded by their users, perform an act of communication to the public. Abruptly, though at the same time stealthily, a significant change to the copyright *acquis* is proposed: if the text of Recital 38 is approved as it stands, *all* platforms of user-uploaded content, in providing their services, will be *prima facie* liable for communicating works to the public.

It is important to note that Recital 38 is not merely codifying a CJEU-developed construction¹³.

On the one hand, throughout a long line of case law, the CJEU has shaped a complex concept of communication to the public, composed of many interdependent criteria. None of these criteria, nor the way in which they interact with each other, are reflected in the value gap proposal. Instead, Recital 38 simply states that platforms go beyond the mere provision of physical

facilities and violate the right of communication to the public, leaving no room for further considerations related to the nature of the platform's intervention or to its profit-making intention – considerations that the CJEU has found essential in recent case law¹⁴.

On the other hand, when the draft Directive was published there was no clear indication in the copyright *acquis* that the concept of communication to the public within the meaning of Article 3(1) InfoSoc covered the activities of platforms of user-uploaded content. Arguably, some such platforms would nonetheless be found liable on grounds that they exerted an "indispensable intervention" in providing access to protected works¹⁵. This was made clearer in the recent *Pirate Bay* judgment, in which the CJEU held that an online search platform that indexes, categorizes, deletes and filters content may actually engage in acts of communication to the public¹⁶. But the nature of the intervention of BitTorrent websites like The Pirate Bay differs from that of other platforms that store and provide public access to user-uploaded content. This CJEU "precedent" could well be found inapplicable to platforms that do not show as high a degree of editorial intervention as The Pirate Bay¹⁷.

The Commission therefore (mis)uses Recital 38 of the draft Directive to reshape the concept of communication to the public, extending its coverage to new situations. As is common knowledge among jurists, in general, and among those interested in EU law matters, in particular, recitals are (supposed to be) interpretative tools. According to the Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, "[t]he purpose of the recitals is to set out concise reasons for the chief provisions of the enacting terms, without reproducing or paraphrasing them. *They shall not contain normative provisions* or political exhortations"¹⁸. The CJEU has also acknowledged that recitals should not perform a normative a role, holding that "the preamble to a Community act has no binding legal force and cannot be relied on as a ground for derogating from the actual provisions of the act in question"¹⁹.

In agreeing that recitals should not assume the role of their act's operative part, EU institutions show a palpable concern with legal certainty and with the protection of the expectations of legal subjects. In the draft Directive, the Commission grossly neglects these values, by including a crucial normative development of the copyright *acquis* in Recital 38²⁰. Assuming such a development is to be adopted at all, it should be included in the operative part of the Directive and subject to the corresponding scrutiny.

1.2. The proposal lacks basic clarity

Legal norms, if they are to give their subjects any guidance, must be clear. "The desideratum of clarity", in the words of a celebrated legal theorist, "represents one of the most essential ingredients of legality"²¹. The value gap proposal fails to achieve that desideratum. In fact, Article 13(1), read together with Recital 38, is a remarkably confusing provision²².

As seen, Recital 38 determines that online platforms that store and provide public access to protected content uploaded by their users perform acts of communication to the public. These platforms are thus obliged to conclude licensing agreements with rightholders, *unless* they are eligible for the hosting safe harbour provided in Article 14 E-Commerce. How a platform's liability for communicating works to the public relates to the protection conferred by the safe harbour is not made entirely clear. Is the hosting safe harbour supposed to work as a defence

¹¹ See Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, 'Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market', COM(2016) 592 final, p. 8.

¹² See Stalla-Bourdillon et al. (2016a); Stalla-Bourdillon et al. (2016b); Angelopoulos (2016); Angelopoulos (2017); European Copyright Society (2017); Max Planck Institute for Innovation and Competition (2017); and CREATE (2017). Scholars dispute the very existence of a "value gap". See, e.g., Frosio (2017), p. 7 (arguing that the "value gap" rhetoric is "fabricated" by rightholders and "scarcely concerned with empirical evidence"), and CREATE (2017), p. 6 (claiming that "[t]he idea that the creation of value should lead automatically to transfer or compensation payments has no scientific basis").

¹³ Such a codification of judge-made law would not be unprecedented. For instance, Article 4(2) of the InfoSoc Directive codified the rule of exhaustion of the distribution right developed by the CJEU in *Deutsche Grammophon*, C-78/70.

¹⁴ See CJEU, *GS Media*, C-160/15, paras. 47-55, and CJEU, *Filmspeler*, C-527/15, paras. 41-53.

¹⁵ See Rosati (2016), p. 20.

¹⁶ See CJEU, *The Pirate Bay*, C-610/15, in particular para. 38. See also Rosati (2017), p. 15, noting that this recent judgment brought CJEU case law closer to the Commission's legislative initiative.

¹⁷ See Angelopoulos (2017), p. 32.

¹⁸ Interinstitutional Agreement of 22 December 1998 on common guidelines for the quality of drafting of Community legislation, para. 10 (emphasis added). Similarly, see Interinstitutional Style Guide, <http://publications.europa.eu/code/en/en-120200.htm>, stating that "[r]ecitals set out the reasons for the contents of the enacting terms (i.e. the articles) of an act".

¹⁹ CJEU, *Nilsson*, C-162/97, para. 54.

²⁰ In the words of Angelopoulos (2017), p. 31, "[f]or a nonchalant statement hidden in a recital, this represents a dramatic development of EU copyright law".

²¹ Fuller (1964), p. 63.

²² See Angelopoulos (2016) and European Copyright Society (2017), p. 7, deeming the provision's language "ambiguous"; and CREATE (2017), stating that the proposal is "poorly drafted".

against primary liability, in the sense that if the platform acts neutrally²³ its liability for infringing the right of communication will be negated? Or is the platform's non-neutrality (*i.e.*, its active role) a requirement for it to be considered as performing an act of communication? Who bears the burden of showing what?

In any case, proceeds the recital, *regardless* of whether platforms are protected by the safe harbour, they need to take measures to guarantee the protection of content, so as to ensure the functioning of licensing agreements... agreements which, as stated in the very same recital, protected platforms do not need to conclude. Imposing on platforms that are immunised by the hosting safe harbour an obligation to ensure the functioning of licensing agreements that they need not have concluded is, at best, puzzling. For the sake of analysis, however, let us consider the case of a platform that provides its service non-neutrally, being thus ineligible for the safe harbour, and that therefore undoubtedly needs to license the content it hosts (at least according to Recital 38).

In that case, Article 13(1) kicks in, imposing two alternative obligations upon the platform, in order to try and close the value gap: the platform should (a) take measures to ensure the functioning of agreements concluded with rightholders for the use of their content; *or* (b) take measures to prevent the availability on their services of content identified by rightholders through the cooperation with the service providers.

The first obligation – when interpreted in light of Recital 38, which uses similar language in its third paragraph (“ensure the functioning of any licensing agreement”) – translates into an obligation to take appropriate and proportionate measures to ensure the protection of content, such as implementing “effective technologies”. These technologies, judging by the second sentence of Article 13(1), Article 13(3) and Recital 39, can be no other than content recognition technologies.

Alternatively, platforms should take measures to prevent the availability on their services of content identified by rightholders. What are the precise measures that platforms should take? The suggestion that Article 13(1) makes, yet again, is that platforms use “effective content recognition technologies”. The question then becomes: How, in practical terms, does preventing infringement (second obligation) differ from ensuring the protection of content (first obligation)? Are they truly alternative – and, by necessity, *different* – obligations? A combined reading of Recital 38 and Article 13(1) indicates that the two (supposedly alternative) obligations laid down in the latter are, in reality, one and the same obligation – and a rather worrying one²⁴: that online platforms implement content recognition technologies. But it may well be that the Commission intended to give online platforms a true choice. What that choice is, though, remains unclear.

In sum, as I hope to have successfully showed, several parts of Article 13(1) and Recital 38 lend themselves to importantly diverging interpretations. This lack of clarity is possibly the product of a difficult, compromise-ridden drafting process. Understandable as that is, it is safe to anticipate that the proposed formulation will result in different transpositions by Member States, thus fostering disharmony and legal uncertainty.

1.3. The proposal uses trivially vague language

Vague words are words that have borderline cases, *i.e.* cases in which “one just does not know whether to apply the expression or withhold it, and one's not knowing is not due to ignorance of the facts”²⁵. Typical examples of vague words are gradable adjectives like “bald”, “rich” and “mature”. We all know people that are clearly bald and people that are clearly not bald, but we also know people that are borderline bald (I would count myself as one such person). Legislators tend to avoid employing these trivially vague terms. For instance, in establishing the legal

capacity to vote, legislators set an age of majority, instead of stipulating that “mature citizens” are entitled to vote²⁶. And if legislators want to tax rich people more heavily, they usually do so by reference to a numerical level of income, instead of imposing a higher rate on “rich people”²⁷.

Sometimes, however, vagueness in the law is useful or simply unavoidable. The most notable examples of vagueness in the law are cases of extravagant vagueness²⁸. Every jurist is familiar with examples of legal norms deploying this type of language, such as norms exempting the “*fair* use” of protected works from liability or norms requiring adherence to a standard of “*reasonable* care”. In certain circumstances, the situations that ought to be covered by a norm are so diverse that vague language allowing for a multi-dimensional evaluation is needed. One scholar offers “child *neglect*” as an example of a situation where a myriad of factors need to be taken into account: “[y]ou just cannot stipulate that, say, leaving a child unattended for *n* hours would constitute neglect”²⁹.

In defining its subjective scope of application, Article 13(1) uses a vague adjective. The provision applies to information society service providers that store and provide to the public access to “*large* amounts” of content uploaded by their users. “Large”, like “rich” or “mature”, is a trivially vague word – the type of vagueness that the law normally tries to avoid. In most cases, instead of resorting to this sort of language, the law defines a more or less precise threshold for its application. The exercise of defining such a threshold is, of course, fairly arbitrary; but there are very good reasons for doing it, namely legal certainty and efficiency.

While in some cases the flexibility provided by vague language is needed, the situation regulated by Article 13 is far from being one such case. If online platforms are to comply with an obligation to implement certain exacting measures, they need a high degree of guidance. They need to know, at the very least, if they are subject to that obligation or not. It is beyond doubt that YouTube and Dailymotion are platforms hosting “large amounts” of user-uploaded content. But what should be said about the Portuguese platform Sapo Vídeos or the German tape.tv? Do these platforms host large or non-large amounts of content? Where and how should the line be drawn?

2. Substantive problems

2.1. The proposal thwarts digital innovation

By now, you hopefully agree that the value gap proposal is not an example of good legal drafting. Still, you may be tempted to downplay the criticism: after all, form is not substance and substance trumps form. On the substantive front, however, the value gap proposal does not fare any better.

As seen, in what regards the measures for copyright protection that should be adopted by platforms hosting large amounts of user-uploaded content, the only suggestion given by Article 13(1) and the cited recitals is the implementation of content recognition technologies.

This suggestion, if transposed by Member States as a mandatory requirement, has the potential to seriously threaten innovation in the digital economy. Requiring online platforms to use such technologies entails erecting a market entry barrier that is very costly to overcome. Google, for example, reported that, by 2016, it had invested more than \$60 million on its ContentID system³⁰. An obligation to filter user uploads would discourage investment in the development of this type of platforms, with indirect adverse effects on user creativity.

The fact that the requirement may be imposed only upon hosts of “large amounts” of content does not eliminate the problem. At a certain point in their growth (a point that Article 13 leaves indeterminate), smaller platforms will be forced to invest in technology the development and

²³ The requirement to act in a neutral manner was developed by the CJEU as a threshold condition for accessing the defence provided in Article 14 E-Commerce. See CJEU, *Google France*, C-236/08, para. 114, and CJEU, *L'Oréal v. eBay*, C-324/09, para. 113.

²⁴ See *infra* 2.1. and 2.2.

²⁵ Grice (1989), p. 177.

²⁶ See Endicott (2011), p. 17.

²⁷ See Marmor (2014), p. 87.

²⁸ The term “extravagant” associated with these instances of vagueness is attributable to Timothy Endicott. See, e.g., Endicott (2011), p. 17.

²⁹ Marmor (2013), p. 5.

³⁰ See Google (2016), p. 6.

maintenance of which is said to be “unattainably expensive”³¹. The requirement that online platforms install such an expensive technology for copyright enforcement purposes would always amount to an intolerable constraint upon their operators’ right to freely pursue an economic activity³². Even if the operators of smaller platforms manage to license some reasonably effective technology, instead of developing their own, this cost will hinder their capacity to compete with the larger incumbents³³. As noted by the European Copyright Society, “[t]he unforeseen effect of the provision may, therefore, be locking in YouTube’s dominance in the EU”³⁴.

2.2. The proposal disproportionately restricts fundamental rights

Several commentators have shown a concern with the proposal’s compatibility with Article 15 E-Commerce, which establishes a prohibition on general monitoring obligations. In fact, the use of content recognition technologies necessarily involves such monitoring. And, again, the fact that the proposal applies only to some platforms is not enough to save it: the covered platforms, however few they may be, will have to monitor *all* of the new content that is uploaded onto them³⁵. Christina Angelopoulos puts the point metaphorically: “[t]he chaff cannot be separated from the grain without the thrashing of all the harvested wheat”³⁶.

But the proposal’s incompatibility with the E-Commerce Directive is not, in and of itself, a decisive argument against the requirement of using content recognition technologies. A conflict between Article 13 of the draft Directive and Article 15 E-Commerce would be solved by the well-known meta-rule *lex posterior derogat legi priori*. EU institutions may well want to amend the *acquis*, in which case the later rule, introducing an exception to the general rule prohibiting monitoring obligations, would prevail³⁷.

But the commentators’ concern runs deeper than this. The conflict with Article 15 is particularly worrying because it is, simultaneously, a conflict with the Charter of Fundamental Rights of the EU. As hinted by the CJEU, the prohibition against general monitoring obligations is rooted in Articles 8 (protection of personal data), 11 (freedom of expression and information) and 16 (freedom to conduct a business) of the Charter³⁸.

In the name of safeguarding the interests of rightholders, an obligation to implement content recognition technologies would disproportionately restrict the Internet users’ right to the protection of their personal data, as well as their freedom of expression and information. First, content recognition technologies would necessarily involve the “identification, systematic analysis and processing of information” connected with the profiles of individual users, allowing them to be identified³⁹. Second, these technologies are not infallible: they often fail to adequately distinguish between lawful and unlawful content, taking down uses that may be protected by copyright exceptions⁴⁰. Not long ago, it must be noted, the European Parliament invoked these rights when rejecting the adoption at the EU level of enforcement strategies based on a three-strikes policy (the so-called “graduated response systems”)⁴¹.

In addition, as suggested above, the obligation to use content recognition technologies would gravely affect the platform operators’ freedom to conduct their business, since it would require them “to install a complicated, costly, permanent computer system at [their] own expense”⁴².

Contrary to what is stated in its Recital 45, the draft Directive *does not* respect the fundamental rights enshrined in the Charter. The value gap proposal fails to strike a fair balance between, on the one hand, (i) the users’ right to the protection of their personal data, (ii) the users’ free-

dom of expression and information, and (iii) the online platform operators’ freedom to conduct their business, and, on the other hand, the intellectual property rights of creators, protected by Article 17(2) of the Charter. If enacted without the necessary amendments, Article 13 may be struck down by the CJEU on grounds of violations of the foregoing rights⁴³.

Conclusion

The value gap proposal, as provided in Article 13 and Recitals 37 to 39 of the draft Directive, suffers from a number of fundamental problems. From the formal point of view, the proposal (i) includes normative provisions in the recitals, (ii) lacks basic clarity, and (iii) uses trivially vague language. On the substantive side, if passed into law the proposal will (i) thwart digital innovation and (ii) disproportionately restrict the fundamental rights of Internet users and platform operators.

Given the seriousness of these flaws, the EU institutions should consider deleting or, at least, significantly rewriting the proposal. The amendments put forward by former rapporteur Therese Comodini Cachia address some of the mentioned flaws and could form the basis of a possible rewrite. Nevertheless, the amended provisions fail to give targeted platforms guidance regarding the appropriate and proportionate measures they should take, while preserving a risky reference to content recognition technologies in Recital 39. At this stage, and considering the extent of the necessary amendments, it should be kept in mind that it may be better to pass no text than to pass a text that promotes legal uncertainty and threatens innovation in the digital economy.

31 Urban et al. (2016), p. 58.

32 See *infra* 2.2.

33 See Angelopoulos (2017), pp. 37-38. See also Husovec and Leenes (2016), pp. 47-48, reporting on the costs behind the implementation of filtering technologies.

34 European Copyright Society (2017), p. 7.

35 I thus disagree with von Lewinski (2017).

36 Angelopoulos (2017), p. 36.

37 In any case, such a change should be made clear in the enacting terms of the Directive, rather than left tacit.

38 See CJEU, *Scarlet*, C-70/10, paras. 46-50, and CJEU, *Netlog*, C-360/10, paras. 44-48.

39 See CJEU, *Scarlet*, C-70/10, para. 51, and CJEU, *Netlog*, C-360/10, para. 49.

40 See CJEU, *Scarlet*, C-70/10, para. 52, and CJEU, *Netlog*, C-360/10, para. 50.

41 See European Parliament, Resolution of 10 March 2010 on the transparency and state of play of the ACTA negotiations, para. 11.

42 See CJEU, *Scarlet*, C-70/10, para. 48, and CJEU, *Netlog*, C-360/10, para. 46.

43 Although the CJEU has been assessing the validity of EU legislation against fundamental rights for some time now, it has been more open to engaging in such close scrutiny since the Charter became legally binding. See, notably, CJEU, *Digital Rights Ireland*, C-293/12, in which the CJEU annulled the Data Retention Directive, on grounds of violation of Articles 7 and 8 of the Charter.

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