INTERNET SERVICE PROVIDERS' OBLIGATIONS IN A NEW COPYRIGHT REGIME

The importance of Internet Service Providers[1] ("*ISPs*") as providers of access to content, has increased in the last decades.[2] ISPs have become the main source of access to content online and have a major impact on the Digital Single Market, since digital content is one of the main drivers of the growth of the digital economy.[3] Recent developments cause a "digital threat"[4] and a value gap:[5]clarification of ISP obligations in relation to copyright, through a harmonised and updated regime, is therefore needed.

I. Current regime

The current regime consists of "*a secondary liability*" set out by Directive 2000/31/EC[6] (hereinafter: "*the E-Commerce Directive*") and the case law of the EU courts: ISPs are liable only where they play an active role in copyright infringements, not where they stay neutral such as with mere conduit, caching and hosting ("*safe harbour*")[7]. In practice, ISPs adopt filtering and access blocking tools,[8] although they have no general obligation to monitor.[9] The CJEU clarified the boundaries for the ISPs' liability and the safe harbour, mainly in relation to the active or neutral (technical, automatic and passive) conduct of the ISPs.[10]

[1] Whereas content providers are holders of copyright or neighbouring rights, ISPs provide access to copyright protected content, uploaded by their users without the involvement of the right holders.
[2] 90% of all data circulating on the Internet was created in the last 2 years, *A Digital Single Market Strategy for Europe,* p 12.
[3] *A Digital Single Market Strategy for Europe,* p 11.
[4] The new capacity for ISP users to reproduce and distribute copyright protected materials threatens the market for sales of copyright protected works; Kemp, B., "Copyright's Digital Reformulation", *Yale Journal of Law & Technology, 2002-2003,* p 144.
[5] The fact that it has become more difficult for right holders to get an appropriate remuneration, as opposed to the ISPs' income through the provision of access to content has created the value gap; Colangelo, G., and Maggiolino, M., *o.c.*, p 1.
[6] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market.
[7] Art 12, 13 and 14 of the E-Commerce Directive; CJEU, 23 March 2010, Case C-236/08, Google France v. Louis Vuitton Malletier SA and others, ECLI:EU:C:2010:159, para. 114.
[8] This is the consequence of Directive 2001/29/EC and Directive 2004/48/EC providing for the possibility for right holders to apply for injunctions against ISPs.
[9] Art 15 of the E-Commerce Directive; see e.g. CJEU, 24 November 2011, Case C-70/10, Scarlet Extended SA v. SABAM, ECLI:EU:C:2011:771, para. 36 ("*Scarlet case*").
[10] See e.g.: CJEU, 23 March 2010, Case C-236/08, Google France v. Louis Vuitton Malletier SA and others, ECLI:EU:C:2010:159 and CJEU, 12 July 2011, Case C-324/09, L'Oréal SA and others v. eBay International AG and others, ECLI:EU:C:2011:474.

Member States have a margin of freedom to order ISPs to terminate or to prevent infringements, through national courts or administrative authorities.[11] ISPs thus in any case need a notice-and-take down system to react when they are notified of uploaded infringing content.[12]

The removal and/or the disabling of access to illegal content can be slow and complicated. Stakeholders consider the action taken against illegal content as ineffective and lacking transparency.[13] Together with abovementioned level playing field of the Member States, this creates a need for further harmonisation.

II. The proposal for a new Copyright Directive: effect on ISP liability

The new proposal for a Copyright Directive as approved by the European Parliament on 12 September 2018[14]covers ISP obligations. Article 13 (and Recital 38) of the proposal impose 1) measures of content recognition by ISPs in case of agreements with copyright holders or when copyright protected works are identified by the right holders, and 2) an obligation of ISPs to conclude agreements with right holders. This raises a question of proportionality and balance between the protection of intellectual property rights enjoyed by copyright holders and the freedom to conduct business enjoyed by ISPs[15]. These obligations could be understood as disproportionately imposing application of filtering tools.[16] Although the CJEU has considered in the Scarlet case that no general monitoring obligation exists,[17]it stated in *Telekabel*[18] that an injunction that imposes a filtering system can be adequate to protect copyright.[19] An obligation of measures such as effective content recognition as such would thus probably be acceptable to the CJEU, to the extent that is not a general obligation. The proposal for a Copyright Directive however imposes ISPs "*when performing an act of communication to the public*" to conclude agreements with right holders, and thus to almost systematically and generally apply these filtering measures.

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[11] Articles 12, 13 and 14 of the E-Commerce Directive.
[12] Cf. Senftleben, M., EU Copyright Reform and Startups – Shedding light on Potential Threats in the Political Black Box*, 20,* p2.
[13] *A Digital Single Market Strategy for Europe*, p12.
[14] See: European Commission joint-statement by Vice-President Ansip and Commissioner Gabriel on the European Parliament's vote to start negotiations on modern copyright rules, http://europa.eu/rapid/press-release_STATEMENT-18-5761_en.htm.
[15] The importance of this balance was stressed by the CJEU in: CJEU, 24 November 2011, Case C-70/10, Scarlet Extended SA v. SABAM, ECLI:EU:C:2011:771, para. 46.
[16] Senftleben, M., EU Copyright Reform and Startups – Shedding light on Potential Threats in the Political Black Box*, 20,* p 3.
[17] See note 84.
[18] CJEU, 27 March 2014, Case C-314/12, UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH, ECLI:EU:C:2014:192

[19] which is a fundamental right that deserves the maximum protection possible, see note 92.

The proposal broadens the definition of "*act of communication to the public*" whereas presently it concerns "*knowingly and willingly playing an indispensable and essential role in making unauthorized copyrighted works accessible to users*"[20], the proposal equals "*an act of communication to the public*" to the mere act of storing and allowing public access to copyrighted materials uploaded by users, therefore broadening the obligation to apply filtering tools.[21]

The proposal also generates a change of interpretation of the safe harbour exemption for hosting, limiting the possibilities for ISPs to benefit from the safe harbour.[22]

Finally, the proposal in Article 13 (and Recital 38) provides for an increase of liability of the ISPs. This broadened liability also seems to go beyond what the CJEU concluded in its case law.[23] The proposal implies "*a direct liability*" (i.e. ISPs could be liable also where they do not play an active role in an infringement but are simply optimising content presentation), which so far has been rejected by the case law of the CJEU.[24]

Although the European Parliament agreed that regulatory action is advised,[25] it had in first instance not adopted the proposal of the Commission.[26] The amendment proposed by the parliamentary JURI Committee, which deletes the reference to "content recognition" and avoids a general obligation of filtering, shows that some of the concerns have been heard. The Committee focuses on the rights of right holders and the balance needed between the different stakeholders[27], which may solve part of the problem of proportionality.[28] The question would remain however, of what measures would then be "appropriate" instead of the content recognition or filtering.

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[20] Article 3 of the Directive 2001/29/EC; cf. CJEU, 14 June 2017, Case C-610/15, Stichting Brein v. Ziggo BV and XS4ALL Internet BV (The Pirate Bay), ECLI:EU:C:2017:456, para 31 and 41; the court has recently, contrary to its tradition, added the aim of profit making to the definition in: CJEU, 8 September 2016, Case C-160/15, GS Media BV v. Sanoma Media Netherlands BV and others, ECLI:EU:C:2016:644.

[21] Cf. G. Colangelo and M. Maggiolino, *ISPs' copyright liability in the EU Digital Single Market Strategy*, 2018, p 9.

[22] Recital 38 of the Proposal refers to "*optimising the presentation*": where an ISP is optimising it would not benefit from the safe harbour, which is stricter that what the CJEU has stated sofar; cf. Senftleben, M., EU Copyright Reform and Startups – Shedding light on Potential Threats in the Political Black Box, 20, p 3.

[23] See supra note 94.

[24] See the court's vision on ISP liability in e.g. Google France v. Louis Vuitton (supra note 7); and on "an act of communication to the public"; supra note 94.

[25] In-depth analysis of the Directorate General for internal policies on the Need of Regulatory Action on Liability of Online Service Providers, August 2017.

[26] A lot of the concerns that where raised are in relation to Art 13 of the proposal.

[27] Amendment of Art 13 of the proposed text by the JURI Committee.

[28] It explicitly excludes a general filtering system by referring to Art 15 E-Commerce Directive and it does not explicitly mention content recognition as a measure.

Regardless of the stated concerns and the proposals of the JURI Committee, the European Parliament has adopted the proposal as it stands. [29]

III. Conclusion on ISP liability in a harmonised EU copyright regime

The need for legislative and harmonising action is clear. Copyright, as a fundamental right, needs to be protected and the value gap needs to be closed, preferably by codifying the rulings of the CJEU. However, the current proposal seems to go beyond that. The agreements and filtering obligation together with the broadened liability, generate quite a change for ISPs, raising the question concerning: imbalance between the ISP obligations and the rights (or gains) of copyright holders, proportionality and effectiveness.

The blocking/filtering of content, the extra costs and liability impose extra burdens on ISPs and limit the use of/access to content, therefore consisting of a risk for investment and creativity in the Digital Single Market and for the balance between the rights of copyright holders and the freedom to conduct business of ISPs. There may be more efficient ways to close the value gap without harming investment and creativity; e.g. instead of blocking content, one could have revenues connected to the copyright protected work flow to the right holders.[30] The proposal would improve the position of right holders in the Digital Single Market, but would not harmonise in a way that is optimal for the balance of rights and the Digital Single Market.

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[29] European Commission joint-statement by Vice-President Ansip and Commissioner Gabriel on the European Parliament's vote to start negotiations on modern copyright rules, http://europa.eu/rapid/press-release_STATEMENT-18-5761_en.htm.

[30] F.e. advertisement revenues.