Online platforms and the Proposal for a Digital Single Market Directive

Berlin, November 2016

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Focus

• Accessibility in the digital single market – in search for balanced and reasonable solutions

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

• Online Platforms

• A primer on some ideas for broader revision
  – General issues – How to make the system balanced?
  – Specific issues in light of the recent ECJ‘s case law – How to make the system reasonable and practical?
Online-platforms – Art. 13

• **Duties of care of online-platforms**
  – Regulated cooperation
  – Effective content recognition technologies (nb: competition law issue might arise)
  – Appropriate and proportionate
  – Information duty
  – Complaints and redress mechanisms for users (cf. also ECJ: UPC Telekabel (2014))
  – Regulated self-regulation → best practices

• **Smaller problems:**
  – Definition of „ISP’s that store and provide to the public access to large amounts of works or other subject matter uploaded by their users“
    Too broad: the focus on host providers should be clarified.

• **Fundamental Problem: Can this work without a baseline?**
  – Scope of the right of communication to the public with regard to the activities of structured online user platforms (hosts)
  – Differences in the framework of accessory liability
    (*Arnold J*, Bratislava 2016/11/8)
Online-platforms – Art. 13

To be read with Recital 38:

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

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 [sic!].

In order to ensure the functioning of any licensing agreement, information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users should take appropriate and proportionate measures to ensure protection of works or other subject-matter, such as implementing effective technologies. This obligation should also apply when the information society service providers are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC.
Online-platforms – Art. 13

• thereby going beyond the mere provision of physical facilities and performing an act of communication to the public
  – ECJ: Airfield./. Canal Digitaal (2011)
  – Act of communication to the public under the ECJ’s case law?
    • GEMA ./ Youtube in Germany
    • Recently settled

• 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 therefore
  – ECJ: Google France&Google (2010)
  – Hitherto German case law

• appropriate and proportionate measures – even when the information society service providers are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC
  – ECJ: McFadden (2016)

• and how to enforce or at least “nudge” this cooperation?
The broader picture

• An attempt to clarify the InfoSoc-Directive & the E-Commerce Directive without touching them?

• An attempt to establish co-operation without knowing the mandatory baseline of the attempts at further co-operation?

• Should the European Legislator be more courageous?
  – Revision of the right of communication to the public
  – Revision of ISP liability
Some more reasons for a broader approach

• Hyperlinks to illegal material – ECJ Judgment GS Media (2016)

• Links to illegal material constitute infringement only on the condition of knowledge of the linksetter about the legal status of the material

• Commercial providers will be assumed to have knowledge
  – This assumption is rebuttable on the condition that they have taken all reasonable measures to check the contents under the circumstances of the specific case

• Harmonisation effect?
  – What is the scope of the judgment (e.g. search engines?)
  – When is the posting of a hyperlink „carried out for profit“?
  – Reasonable and practical solutions can only be developed if the duty of care is structured in a realistic, proportionate way – however, this will have to be done by the Member States‘ courts
Some more reasons for a broader approach

• Hyperlinks to legal material –
  ECJ Decisions Svensson, BestWater, GS Media
  – No new public if the material was unrestrictedly available
  – Too undifferentiated with regards to the different kinds of links
  – Appropriating frame links as a problem

• By the way...
  Press publishers right – Art. 11
  – Current case law on the right of communication to the public could make the new right entirely obsolete, depending on the technical implementation of aggregators’ services
Some more reasons for a broader approach

- **ISP accessory liability – the example of website blocking orders**
  - **UK:**
    - Specific court orders
    - No subsidiarity principle
    - Cost for the implementation → ISP
    - Cost for the application → rightholder
    - Procedural protection for users
  
  - **Germany:**
    - BGH: goldesel.to (2015)
    - Open ended court orders (as e.g. in Austria)
    - Subsidiarity principle
    - Cost for the implementation → ISP
    - Cost for the application → ISP
    - Procedural protection for users
  
  - **Europe:**
    - ECJ: UPC Telekabel (2014)
    - Open ended court orders → possible
    - Subsidiarity principle (+/-)
    - Cost question (+/-)
    - Procedural protection for users
Some more reasons for a broader approach

- **ISP accessory liability** – the example of WLAN’s
- **ECJ McFadden (2016)**
- **McFadden-principles**
  - Effectively adopts *Stoererhaftung* →
  - ISP liability exemptions exclude → damages
  - ISP liability exemptions do not exclude → injunctions
    - Including proportionate preventive orders
    - Including the necessary notifications and respective claims to compensate for the necessary costs
    - Including the necessary court proceedings and respective claims to compensate for the necessary legal costs
- **McFadden-specification for public WLAN’s**
  - Must not be exempted entirely from liability
  - Duty to identify their users by way of
    - Registration duty &
    - Password protection
    - Arguably useless & impractical
Possible ways ahead?

• A specific path – GS Media „fix“ and some other odds and ends
  – ECJ McFadden (2016)

• A more general path
  – adapting the right of communication to the public with regard to typical internet uses
  – consider further specifying the framework of accessory liability
... and how to do this? → A primer

• **Sirinelli-Report (France)**
  – Essentially broadening the communication to the public right
  – Limiting the provider privileges under the E-Commerce-Directive for structured hosting platforms
  – Licensing solutions → not necessarily a dysfunctional model
  – Would have to be complemented with an exception for purely referencing use on the internet

• **Differentiations on the level of the communication to the public right**
  – Case law of the ECJ (Airfield etc.)
  – Regulatory technique?
... and how to do this? → A primer

• **Regulatory technique**
  – Broad umbrella general clause
  – Non-conclusive list of case examples

• **Right of communication to the public**
  – Act of communication to the public: broad definition (ECJ, Sirinelli)
  – Economic assessment: complementary or competing uses?
    • „genuine“ use of the protected subject matter
    • Airfield ./ Canaal Digital: receptive public, own structured service, [typically a use which competes with the existing or normal exploitation of the work], knowledge?

  – Case examples
... and how to do this? → A primer

• Case examples
  – Access providers (-)
  – Search engines (-)
    • Possibly different for own uses of search engines which offer an independent service for a receptive public → image search (+)/(-)?
  – News and other aggregators (+)/(-)
  – Normal referencing hyperlinks, normal deep-links (-) ./ appropriating frame links (+)?
  – Platforms structuring content uploaded by the users for a receptive public → (+)?
A primer

• New limitation for online services
  – Service providers processing and providing access to the public to large amounts of material on the internet (in a structured way by whichever means)
  – Collective claim to fair compensation

• Revision of ISP liability
  – Limited to an efficient and clearer defined notice & takedown procedure for hosts
  – Taking into account the interests of the individual users by providing them with a dispute procedure and a procedural standing before the courts
... and how to do this? → A primer

- **Licensing solution → remaining possible**
  - To indemnify the individual users
    - Amount of fair compensation would be reduced accordingly
  - Limitation would remain cumulatively applicable
    - Typically for aggregators
    - But also for third party („private“) material on structured hosting platforms
      (alternative: extended collective licenses)
      - Allowing choice between the individual license-based solution and the collective remuneration-based solution in particular for SME’s

- **Revision of ISP liability**
Thank you very much indeed!

Leistner, ZUM 2016, 580
Leistner, JIPLP 2017, issue no.1
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