Online platforms and the Proposal for a Digital Single Market Directive

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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 & unpractical

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 → (+)?

… and how to do this? → 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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