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An academic perspective on the copyright reform

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A B S T R A C T

The recently proposed new Copyright Directive was released on 14 September 2016. It has been described by EU law-makers as the pillar of the copyright package promised by the European Commission (EC), to be delivered before the end of Mr. Juncker's mandate. In its Communication of 6 May 2015, the EC had stressed "the importance to enhance cross-border access to copyright-protected content services, facilitate new uses in the fields of research and education, and clarify the role of online services in the distribution of works and other subject-matter." The proposed Copyright Directive is thus a key measure aiming to address two of these three issues. However it is not without shortfalls.

We have therefore decided to publicly express our concerns and send an open letter to the European Commission, the European Parliament and the Council to urge them to re-assess the new provisions dealing with mandatory filtering of user-generated content in the light of the CJEU case law and the Charter of Fundamental Rights of the European Union.

In a more extended statement, we examine in details the text of both the explanatory memorandum and the Directive itself.

Our conclusions are:

1. A comprehensive re-assessment of Article 13 and Recital 39 in the light of the Charter of Fundamental Rights of the European Union and the E-commerce Directive (in particular Article 15) including CJEU case law is needed, as the proposed Copyright Directive does not expressly address the issue of its compatibility with both of these texts.

2. Recital 38 does not clarify the domain and effect of Article 13. Rather, it creates confusion as it goes against settled CJEU case law (relating to Articles 14 and 15 of the E-commerce Directive and Article 3 of the Infosoc Directive). Recital 38 should therefore be deleted or substantially re-drafted/re-phrased. If the EU wants to introduce a change in this regard it should clearly justify its choice. In any case, a recital in the preamble to a directive is not an appropriate tool to achieve this effect.

We hope that this exercise will prove useful for the debate that has now begun both in the European Parliament and in the Council.

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1. Letter to the European Commission – Strasbourg, 30 September 2016

We very much appreciate the effort to engage into a review and re-assessment of the EU acquis. The future of the Single Market will be digital, if it is not already, and it is essential to determine whether the EU acquis still makes sense in this context. This is true in particular given the recent trend: *"Digital content transmitted on private networks and hosted on private platforms is increasingly subject to State and corporate regulation,"* writes the UN Special Rapporteur on the promotion and protection of the right to freedom of opinion and expression in his report of May 2016.

1.1. *Why we have a problem*

However, we have a problem and an important one we believe. The recent developments, starting with the Communication on Online Platforms and the Digital Single Market Opportunities and Challenges for Europe released on 25/05/2016, followed by a series of proposals (Proposal for a Directive amending the Audiovisual Media Services Directive, Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market) and soft law initiatives (the EU Internet Forum against Terrorism and the Code of Conduct on Countering Illegal Hate Speech Online) seriously put at risk the **consistency** and **integrity** of the EU acquis in this field.

Directive 2000/31 on electronic commerce (E-commerce Directive) sets forth conditional liability exemptions to the benefit of information society providers offering certain types of intermediary services as well as a prohibition of general monitoring obligations.

The prohibition of general monitoring obligations is a means to achieve at least two central objectives: 1) the encouragement of innovation, which is essential for the flourishing of the Digital Single Market and 2) the protection of fundamental rights of ***all*** Internet users and in particular Article 7 and 8, Articles 9, 10 and 14 of the European Charter of Fundamental Rights and the requirement of due process, which lay the foundation of any democratic society. In 2011 (Scarlet v Sabam) and 2012 (Sabam v Netlog) the Court of Justice of the European Union (CJEU) acknowledged that the prohibition of general monitoring obligations was anchored in Articles 8 and 11 of the European Charter of Fundamental Rights.

It is clear both from the text of the E-commerce Directive and the CJEU case law that Member States shall not impose upon providers of intermediary services (e.g. providers of user-generated content platforms such as blogging platforms or other types of social media) an obligation *to actively monitor all the data of each of their users in order to prevent the transmission of unlawful content, e.g. infringements of intellectual property rights. More precisely, requiring providers of intermediary services to use automated means, such as Content ID-type technologies, to detect systematically unlawful content is forcing providers of intermediary services to actively monitor all the data of each of their users and thereby is imposing a general monitoring obligation on these providers.*

Yet, the proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market in its Article 13 requires providers of intermediary services which consist in the storage and provision to the public of access to large amounts of works or other subject-matter uploaded by their users to put in place measures *to "prevent the availability on their services of works or other subject-matter identified by rightholders"* such as the use of *"effective content recognition technologies."* In other words, Article 13 of the proposal imposes a general monitoring obligation upon a great number of providers of intermediary services. Such an obligation is not a special monitoring obligation but a general monitoring obligation as it does require the monitoring of the activities of ***all*** users.

Exceptions to the prohibition of general monitoring obligations shall always be narrowly construed, always pursue a legitimate aim, always be based on a clear and foreseeable legal ground as well as always be proportionate. As it stands, Article 13 of the proposed copyright Directive contradicts Article 15 of the ecommerce Directive. Recital 38 of the proposed copyright Directive does not resolve this conflict. Besides, Recital 38 creates other problems of interpretation as it adopts a very narrow reading of Article 14 of the E-commerce Directive and the category of hosting providers as providers of intermediary services.

Moreover, given the CJEU case law and its reference to the European Charter of Fundamental Rights it is doubtful whether Article 13 of the proposed copyright Directive is actually proportionate, even if Article 17(2) of the European Charter provides that intellectual property shall be protected, as Article 17(2) does not have the same beneficiary basis as Articles 7 and 11. Articles 7 and 11 of the European Charter are fundamental pillars of any democratic society. Copyright infringements should not be put too quickly in the same category as serious crimes such as child pornography.

1.2. *Why it is important to solve it*

It is crucial to make sure the prohibition of general monitoring obligations is maintained for at least three fundamental reasons. The first one is to preserve legal certainty and make sure private actors still receive a clear message. The second one is to encourage innovation and make sure automated means such as screening technologies do not act as a barrier to entry. The third one is the most important one: the prohibition of general monitoring obligations is a key safeguard against violations of all Internet users' human rights.

1.3. *What we ask for*

We are therefore asking the European Commission:

- To maintain the prohibition of general monitoring obligations and make sure that exceptions to general monitoring obligations are always narrowly construed, always pursue a legitimate aim, are always based on a clear and foreseeable legal ground and are always proportionate.
- To make sure a transversal discussion on the importance of Articles 14 and 15 of the electronic Commerce Directive takes place in each of its DGs every time a proposal that has a link with the Digital Single Market is produced.
- To open a public and transparent discussion on the interplay between the proposed copyright Directive and the E-commerce Directive as the former has been released only 4 months after the Commission officially announced that it would not amend/re-open the E-commerce Directive. We