



The Consumer Voice in Europe

2016 Copyright package - BEUC's viewpoint on Art. 13 of the proposed Copyright Directive

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3 fundamental problems of the European Commission's approach to the « value gap »

- 1) Incompatibility with EU Law (E-commerce Directive)
- 2) Insufficient / inappropriate consumer safeguards
- 3) Potential violation of the EU Charter of Fundamental Rights

1. Incompatibility with EU Law

- Surprisingly this directive shall **(not)** “*leave intact*” Directive 2000/31/EC in article 1(2) although recital 38 directly refers to art. 14 = clear intention to affect the E-commerce Directive.
- Proposed art. 13 imposes an obligation to adopt content recognition technologies, which under ECJ jurisprudence could be considered as a monitoring obligation in the sense of 15 of the E-commerce Directive.
- New liability regime if article 13(1) and recital 38 ¶ 2 combined?

*“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.**”*

- ECJ *L'Oréal / eBay* § 116: optimising or promoting = knowledge, BUT: inconsistent with requirement of 'actual' knowledge in § 119 AND article 14 (1) (a).
- “Irrespective of nature or means” = automatic placement of advertising, without 'actual' knowledge?

IMPORTANT: This recital would apply to all service providers falling under art. 14 of the E-commerce Directive

Why is this relevant to consumers?

- If any platform could become liable for content uploaded by consumers, we can expect further restrictions (e.g. see *Delfi v Estonia*, ECHR).
- Cloud of legal uncertainty: who is responsible for what?
- Open door for other monitoring obligations applicable to Internet Service Providers, main target of copyright enforcement in the recent years.
- End of the internet as we know it.

2) Insufficient / inappropriate consumer safeguards

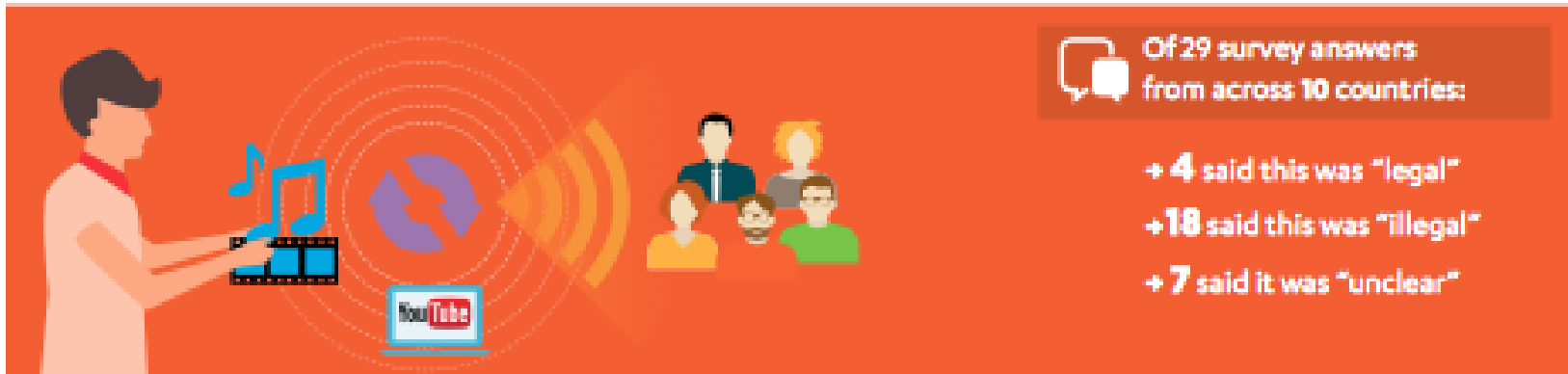
*“Member States shall ensure that the service providers referred to in paragraph 1 put in place **complaints and redress mechanisms** that are available to users in case of disputes over the application of the measures referred to in paragraph 1.”*

Problems:

- Ex-post solution (content already taken down)
- Difficult implementation: in copyright law there are no rights for users, but exceptions.
- What happens with situations not covered by an exception? E.g. User Generated Content?

The situation around UCG is far from being clear

BEUC members asked to copyright experts in 10 countries whether it was legal to share a homemade video with a song in the background on a social media platform.... and the answers are far from clear.



3) Potential violation of the EU Charter of Fundamental Rights

According to ECJ *Sabam v Netlog*, broad filtering obligations - like the one of the proposed art. 13 - are incompatible with 3 rights:

- Article 16: Freedom to conduct business
- Article 8: Protection of personal data
- Article 11: Freedom of expression and information

*(51) Consequently, it must be held that, in adopting the injunction **requiring the hosting service provider to install the contested filtering system**, the national court concerned would not be respecting the requirement that a fair balance be struck between the right to intellectual property, on the one hand, and the **freedom to conduct business**, the **right to protection of personal data** and the **freedom to receive or impart information**, on the other (see, by analogy, *Scarlet Extended*, paragraph 53).*

*“The **freedom of expression and information may be affected negatively** in cases where the services limit user uploaded content in an unjustified manner (for example when an exception or a limitation to copyright applies or the content is in public domain) or when the technologies fail to identify the content correctly. **This negative impact should be mitigated by the fact that the services would be obliged to put in place the necessary procedural safeguards for the users** which in the majority of cases **already exist** in the related context of notice and take down requests.”* (pages 153-154)

The EC is regulating on the assumption that negative impact on the exercise of a fundamental **should be mitigated by safeguards** that:

- a) are legally **unenforceable**;
- b) based on the **T&Cs + algorithms** of each platform;
- c) have **already proved to be ineffective** from a consumer viewpoint.

Conclusions

- The EC proposal is highly questionable from a legal perspective.
- Consumer safeguards are insufficient.
- The proposed article 13 goes against well-established ECJ jurisprudence.
- Urgent call to scrutinise this proposal against the EU Charter of Fundamental Rights.
- Look for less invasive alternatives e.g. voluntary agreements, guidelines on article 14.



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Thank you
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