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Position paper: Use of Protected Content by Information Society Service Providers

Article 13 of the European Commission's proposal for a Directive on Copyright in the Digital Single Market attempts to address the disparity in revenues generated for rightsholders and platforms from online uses of protected content. The proposed article attempts this by introducing an obligation for “Information society service providers that store and provide to the public access to large amounts of works” to filter user uploads. It would also require these providers to set up licensing agreements with rightsholders.

These proposed measures, however, do not address the issue adequately; instead, they violate fundamental rights of users, contradict the E-Commerce Directive, and go against CJEU case law.

The measures proposed in the Commission’s proposal stem from an unbalanced vision of copyright as an issue between rightsholders and ‘infringers’. The proposal chooses to ignore limitations and exceptions to copyright, fundamental freedoms, and existing users’ practices. In addition, the proposal fails to establish clear rules with regard to how citizens can use protected works in transformative ways—such as remixes and other forms of so-called “user-generated content” (UGC). As a result, a system of this kind would greatly restrict the way Europeans create, share, and communicate online.

The legal uncertainty embedded in the proposal and the omission of protections for users’ rights turn this initiative into an ill-targeted intervention. Furthermore, the lack of proportionality and adequacy of measures proposed pose a dangerous precedent in the European law.

What is proposed in the Directive?

In Article 13 of the Proposal for a Directive on Copyright in the Digital Single Market[1], the European Commission proposes that information society service providers (ISSP) that store and give access to any copyrighted materials that their users upload must take specific measures to ensure that these materials do not contain other rightsholders’ works. In other words, the ISSPs will need to adopt technology that will effectively recognize and prevent uploads of any content that includes even fragments of videos, music, pictures, and any other type of creation that belongs to someone other than the person sharing it.

The proposal specifies that these content recognition filters will have to be appropriate and proportionate to existing technological advancements, and to the services upon which they will be implemented. The Commission requires transparency in informing rightsholders about

[1] http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:52016PC0593

the functioning of the filtering mechanism, as well as on the recognition and use of such works.

Finally, the ISSPs would have to provide users with the ability to file complaints, and to use a redress mechanism whenever there is a dispute over how these measures are applied. The ISSPs, however, are not obliged to fulfill any transparency requirements with regard to their users as to the technology used, or how they apply their filters.

The problems with the proposal

1. Effectiveness and proportionality of undertaken measures are highly questionable

The proposal is constructed as if the only way to prevent copyright infringement is to filter user-uploaded content. All content would be subject to the filtering. This would mean that a censorship machine is implemented just in case there is an infringement of copyright. As a result, users' activity will be constrained before any infringement happens. This approach goes against both fundamental rights and the European law.

Another misconception embedded in the proposal is the approach to how these measures should be overseen. The ISSPs will need to provide "adequate" information on the functioning and deployment of the system to the rightsholders, and also report on recognition and use of protected content.

The proposed requirements for the filtering system do not include any obligation to inform users on how the system functions, or to make rights claims transparent to end users. This leaves users without information necessary to defend themselves in case their use fits one of the exceptions or limitations. It ignores the existing common practice of blocking and/or removing content based on terms of service—as opposed to a specific legal requirement—so the measure may only be partially effective.

2. The upload filters are user-rights blind

Not every unsanctioned use of someone else's content is an infringement — copyrighted works are regularly used without permission in quotation, parody, for private use, or under another exception or limitation. The filter likely will not recognize these types of uses, and as a result the legal use of protected material will be constrained. This type of a system, combined with an ineffective redress mechanism, will create a chilling effect that will thwart users' rights online.

From the perspective of European case law, upload filtering goes against existing CJEU rulings, in particular the Sabam v Netlog case. The Commission's proposal may apply to hosting providers, which are explicitly excluded from any broad obligations to filter content in the Sabam ruling. In that case, the CJEU made a point to note that filtering threatens freedom of expression. Filter systems fail to strike a fair balance between copyright and the

freedom of providers to conduct business, not to mention the ability of users to secure their personal data.

Within the current technological environment, the content recognition system proposed by the Directive is equal to a “system for filtering information” considered by the CJEU. As such, the Commission’s proposal is in contradiction with the EU law.

3. The proposal contradicts the E-Commerce Directive

Recital 38 defines communication to the public as *storing* and providing access to the public to copyright-protected works or other subject matter uploaded by users. Meanwhile, the E-Commerce Directive notes that where ISSPs provide services that *store* information provided by a recipient of the service, “Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service”.

It is not clear whether the Commission’s proposal widens the definition of “communication to the public”. More importantly, the proposal introduces liability for hosting services that currently benefit from the safe harbor envisioned in the E-Commerce Directive. If the Commission’s proposal is adopted, safe harbor may be at risk because the scope of ISSPs covered by the Directive is not clear. In this way, the proposal challenges the established practice under the E-Commerce Directive, and as such is detrimental to the EU rule of law.

4. The proposal fails to define what users can do with protected content

The Commission’s proposal clearly aims at platforms that host so called “user-generated content” (UGC). The emergence of the internet in general—and UGC platforms in particular—have resulted in an explosion of creativity that is fueled by creative expression through the re-use of existing materials.

The European copyright framework does not provide clear and harmonized rules that define how users can re-use protected works when creating remixes and other types of UGC. Introducing filtering requirements to deal with infringing uses on these platforms without first defining what constitutes legitimate uses is harmful to users, and ultimately limits the way internet users in Europe can express themselves online.

Recommendations

The Commission’s proposal to introduce a filtering requirement for ISSPs that can potentially serve as a censorship machine will violate users’ fundamental rights and distort the existing legal framework.

> **Article 13 (“Use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users”) should be removed from the proposal.**

If the EU legislator comes to the conclusion that the existing rules that apply to information society service providers need to be modified, there are two important safeguards that must to be taken into account when establishing additional requirements.

First, the EU legislator needs to provide a clear positive definition of the rights available to use existing content. This can be achieved by introducing in the proposal a new, mandatory exception to copyright that allows noncommercial transformative uses of copyrighted works by private individuals, and their dissemination via online platforms. Rightsholders must not be granted any authority to remove or block user uploads that fall within the scope of such an exception, or any other exception.

Second, users should have access to transparent information about the functioning of measures applied by platforms with regard to rightsholder content. This information must be verifiable by the affected users, and uploaders need to have meaningful ways to contest any removal or filtering actions.

Want to know more?

If you would like to know more about how copyright reform can facilitate research and innovation, please contact COMMUNIA at info@communia-association.org or visit our website http://www.communia-association.org/.