

# **Copyright in the Digital Age**

organized by  
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## **COPYRIGHT AND THE DIGITAL AGE: NEW LEGISLATIVE DEVELOPMENTS IN THE EUROPEAN UNION**

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# **I. THE EU COPYRIGHT REFORM PACKAGE; IN PARTICULAR THE DRAFT DIRECTIVE ON COPYRIGHT IN THE DIGITAL SINGLE MARKET**

# EU copyright reform package

- **Package published on 14 September 2016:**
  - **Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016) 593);**
  - **Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes (COM(2016) 594);**
  - **Proposal for Regulation of the European Parliament and of the Council on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled (COM/2016/ 595);**
  - **Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (COM(2016) 596).**

# Contents of the Draft Digital Single Market Directive (1)

- **TITLE I GENERAL PROVISIONS:** *Article 1. Subject matter and scope; Article 2 Definitions*
- **TITLE II. MEASURES TO ADAPT EXCEPTIONS AND LIMITATIONS TO THE DIGITAL AND CROSS-BORDER ENVIRONMENT:** *Article 3. Text and data mining; Article 4. Use of works and other subject-matter in digital and cross-border teaching activities; Article 5. Preservation of cultural heritage; Article 6. Common provisions.*
- **TITLE III. MEASURES TO IMPROVE LICENSING PRACTICES AND ENSURE WIDER ACCESS TO CONTENT**
  - **CHAPTER 1. Out-of-commerce works:** *Article 7. Use of out-of-commerce works by cultural heritage institutions; Article 8 .Cross-border uses; Article 9 Stakeholder dialogue.*
  - **CHAPTER 2. Access to and availability of audiovisual works on video-on-demand platforms:** *Article 10. Negotiation mechanism.*

# Contents of the Draft Digital Single Market Directive (2)

- **TITLE IV. MEASURES TO ACHIEVE A WELL-FUNCTIONING MARKETPLACE FOR COPYRIGHT**
  - **CHAPTER 1. Rights in publications:** *Article 11. Protection of press publications concerning digital uses; Article 12. Claims to fair compensation*
  - **CHAPTER 2. Certain uses of protected content by online services:** *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;*
  - **CHAPTER 3. Fair remuneration in contracts of authors and performers:** *Article 14. Transparency obligation; Article 15. Contract adjustment mechanism; Article 16. Dispute resolution mechanism*
- **TITLE V FINAL PROVISIONS:** *Article 17. Amendments to other directive; Article 18. Application in time; Article 19 .Transitional provision; Article 20. Protection of personal data; Article 21.Transposition; Article 22 .Review; Article 23; Entry into force*

## **II. ARTICLE 13 OF THE DRAFT DIGITAL SINGLE MARKET DIRECTIVE: THE MOST AWAITED, MOST IMPORTANT, AND BRAVEST COPYRIGHT PROVISION PROPOSED RECENTLY IN THE EU - INTRODUCTION**

# Francis Gurry on copyright in the online environment and the role of intermediaries

Francis Gurry in his famous „Blue Sky” speech (Sidney, 2012) on the future of copyright said this about the decisive role of online intermediaries:

I believe that **the question of... the responsibility of intermediaries is paramount. The position of intermediaries is key.** They are at once, service providers to, as well as partners, competitors and even clones of creators, performers and their business associates; hence the difficulty that we have in coming to a clear position on the role of intermediaries. (Emphasis added.)

# **Outline: what should be seen to understand the importance of Article 13 (1)**

**It would be impossible to understand the importance of Article 13 of the draft Digital Single Market Directive without reviewing the following:**

- **II.1. A strange alliance against effective protection of copyright and related rights in the online environment**
- **II.2. General provisions on the liability of internet intermediaries**
- **II.3. Notice and takedown**
- **II.4. Monitoring, filtering; „notice and *stay down*”**
- **II.5. Blocking access to „rogue” websites**
- **II.6. Existing cross-industry cooperation**
- **II.7. CJEU ruling in *L'Oréal* on active intermediaries**
- **II. 8. The CJEU's failed attempt at trying to establish balance of interests in *Scarlet* and *Netlog***
- **II.9. Attempts at „follow the money” solutions**

# **Outline: what should be seen to understand the importance of Article 13 (2)**

**Road to the proposal embodied in Article 13 of the draft Directive:**

- **II.10. Creators speaking up against neglecting their rights In favour of internet intermediaries in the name of „free access”**
- **II.11. Proposal of the French government to clarify the liability of „false intermediaries”.**

**It is in the light of all this that it may be understood the importance and brave nature of**

- **III. Article 13 of the draft Digital Single Market Directive.**

# **II.1. TO UNDERSTAND ARTICLE 13: STRANGE ALLIANCE AGAINST EFFECTIVE PROTECTION OF COPYRIGHT AND RELATED RIGHTS IN THE ONLINE ENVIRONMENT**

# Anti-copyright ideologies and lobbying (1)

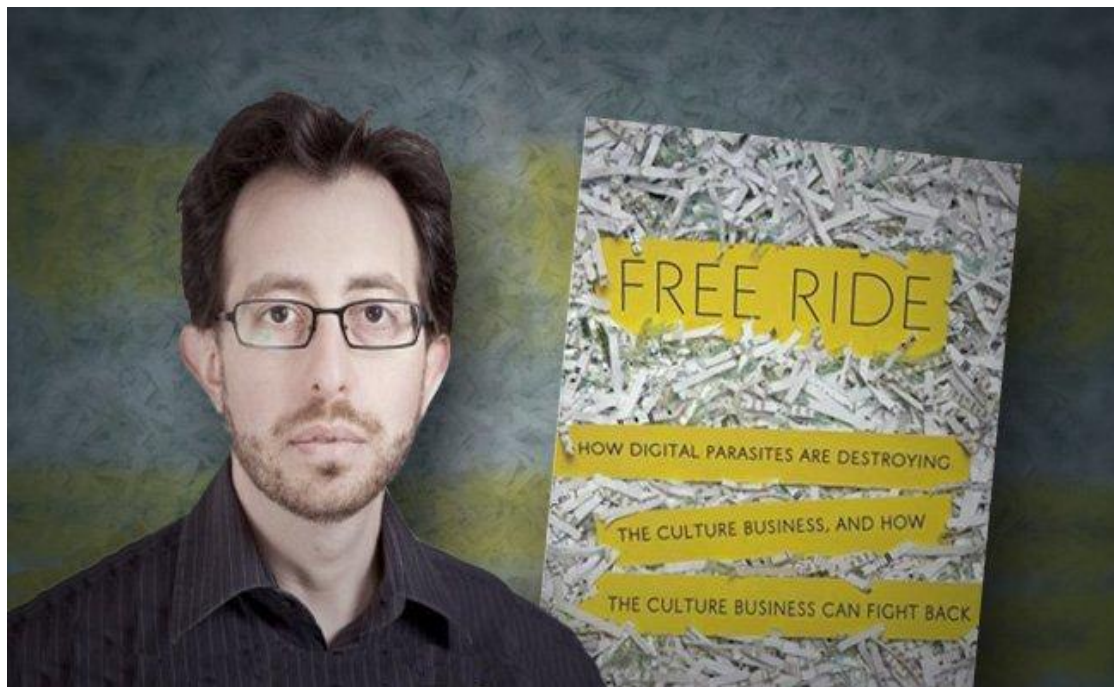
**New industries with great economic power and political influence which are – or at least believe that they are – interested in weaker protection and enforcement of copyright .**

- **„Men in black” at the WIPO African regional consultation:** representatives of super-rich IT companies speaking about the interests of consumers and public-interest establishments.
- **Birth and flourishing of improbable alliances;** consumer and „public interest groups” acting in close cooperation with huge IT industries against „greedy” copyright owners.
- Thesis: it is **also against the long-term (or even medium-term) interests of the IT industries, consumers and public-interests groups** to try to undermine copyright protection.

# Anti-copyright ideologies and lobbying (2)

Presentation at the WIPO SCCR session in December 2013

Robert Levine: „Free Ride: How Digital Parasites Are Destroying the Culture Business,” Doubleday, 2011.



# Anti-copyright ideologies and lobbying (3)

Robert Levine at the WIPO SCCR in December 2013 on a deal offered by online intermediaries to their customers:

We internet intermediaries, obtain our profit mainly from advertisements on our sites. The advertisers pay in proportion of the number of your visits on our websites; therefore, the more frequently you use our websites the more profit we get. It is obvious that the easier access you have to attractive contents (music, films, books, etc.) on our websites you will visit them the more frequently and the more profit we will have. Therefore, it is our common interest to decrease the level and efficiency of copyright protection in the online environment. Let us act together. We, internet intermediaries with our enormous economic and lobbying power obtained due to your frequent visits on our websites and you our customers, organized by the activists with our support, with the political influence you represent in politics. If we do so and act together, we continue obtaining big profit and you will get attractive contents through our websites as easily as possible. A perfect deal, a win-win deal for us, internet intermediaries and for you, our customers. Well, it is to the detriment of authors, performers, publishers and producers, but it is their problem; they should solve it.

## **II.2. TO UNDERSTAND ARTICLE 13: GENERAL PROVISIONS ON THE LIABILITY OF INTERNET INTERMEDIARIES**

## Results of lobbying against liability: agreed statements in the WIPO „Internet Treaties” (1)

- **Agreed statement to Article 8 of the WCT** included as a result of intensive lobbying by the representatives of ISPs at the December 1996 Diplomatic Conference:  
“It is understood that the **mere provision of physical facilities for enabling or making a communication does not in itself amount to communication** within the meaning of this Treaty [the WCT] or the Berne Convention.” (Emphasis added.)
- This agreed statement **states something obvious**, since it has always been evident that, if somebody carries out an act other than an act directly covered by a right provided for in the Convention (and in corresponding national laws), he has **no direct liability**. It is another matter that, depending on the circumstances, he **may still be liable on the basis of some other forms of liability, such as contributory or vicarious liability**.
- **The international treaties on intellectual property rights**, understandably and rightly, **do not cover such issues of liability**. The WCT follows this example (and so does the WPPT).

## Results of lobbying against liability: agreed statements in the WIPO „Internet Treaties” (2)

However , let us repeat in the light of the current disputes on the status of certain active intermediaries **what is not qualified as communication (making available) to the public** under the agreed statement:

„Mere provision of physical facilities for enabling or making a communication”

„Mere provision of physical facilities”

„Mere... physical facilities”

# Results of intensive ISP lobbying: specific conditions of limitation of their liability

- **Special provisions concerning the liability of Internet service providers (ISPs)** – and the conditions of the limitation thereof (in the most detailed manner in the US Copyright Act and the E.U. Electronic Commerce Directive) – in respect of different services:
  - **mere conduit**;
  - **system caching**;
  - **hosting**;
  - **information location tools** (under the US law and, e.g., the Hungarian law; the EU Directive does not cover location tools).
- **Notice and take down systems**: **hosting and location tool services may only be exempted from liability if they, upon being informed of infringing material, act expeditiously to remove, or disable access to, such material.**

# Electronic Commerce Directive (1)

## Article 14. Hosting

1. **Where** an information society **service** is provided that **consists of the storage of 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, **on condition that**: (a) the provider **does not have actual knowledge of illegal activity or information** and, as regards claims for damages, is **not aware of facts or circumstances from which the illegal activity or information is apparent**; or (b) the provider, **upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information**.

2. Paragraph 1 **shall not apply when the recipient of the service is acting under the authority or the control of the provider**.

3. **This Article shall not affect the possibility for a court or administrative authority, in accordance with Member States' legal systems, of requiring the service provider to terminate or prevent an infringement, nor does it affect the possibility for Member States of establishing procedures governing the removal or disabling of access to information.** (Emphasis added.)

# Electronic Commerce Directive (2)

## Article 15. No general obligation to monitor

1. Member States **shall not impose a general obligation** on providers, when providing the services covered by Articles 12, 13 and 14, **to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.**
2. Member States **may establish obligations for information society service providers promptly to inform the competent public authorities** of alleged illegal activities undertaken or information provided by recipients of their service **or obligations to communicate to the competent authorities**, at their request, **information enabling the identification of recipients of their service with whom they have storage agreements.** (Emphasis added.)

# Electronic Commerce Directive (3)

Recitals (47) and (48) relevant for the interpretation of Article 15:

- (47) Member States are **prevented from imposing a monitoring obligation** on service providers **only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case** and, in particular, does not affect orders by national authorities in accordance with national legislation.
- (48) This Directive **does not affect the possibility for Member States of requiring service providers**, who host information provided by recipients of their service, **to apply duties of care, which can reasonably be expected from them** and which are specified by national law, **in order to detect and prevent certain types of illegal activities**. (Emphasis added.)

## **II.3. TO UNDERSTAND ARTICLE 13: NOTICE AND TAKE DOWN**

# Notice and take down – US (1)

## US Copyright Act, Section 512(c)

The section applies to **online service providers that store copyright infringing material**. It **requires that the online service providers**: 1) do not receive a financial benefit directly attributable to the infringing activity, 2) are not be aware of the presence of infringing material or know any facts or circumstances that would make infringing material apparent, and 3) **upon receiving notice from copyright owners or their agents, act expeditiously to remove the allegedly copyright infringing material**.

A online service provider **can be notified through the copyright owner's written notification** of claimed infringement. The online service provider **must expeditiously remove or disable access** to the allegedly infringing material, otherwise the provider is exposed to possible liability. (Continues.)

# Notice and take down – US (2)

## US Copyright Act, Section 512(c) (continued)

Following removing, or disabling access to, the infringing material, the online service provider **must promptly notify the alleged infringer of the action.** If there is a **counter notification** from the alleged infringer, the online service provider **must then promptly notify the claiming party** of the individual's objection. **If the copyright owner does not bring a lawsuit** in district court **within 14 days, the service provider must restore the material** to its location on its network.

**If the court determines that the copyright owner misrepresented the claim** of copyright infringement, the copyright owner **becomes liable for** any **damages** that resulted to the online service provider from the improper removal of the material. (Emphasis added.)

# Notice and take down – Hungary (1)

## Hungarian „notice and take down” system:

- **The Electronic Commerce Act contain (Act CVIII of 2001) “horizontal” rules (covering violations of different laws) limiting service providers’ civil liability, but it also provides for a “notice and takedown” procedure exclusively with respect to claims concerning the infringement of copyright or neighboring rights.**
- **If the owner of such a right claims that a service provider is making accessible any information that infringes its right, that owner may serve a notice, with full evidentiary effect, on the service provider to demand the latter to remove, or to disable access to, the information in question. This notice must specify the following: (a) the right-owner with its name, telephone number, main postal address, and electronic-mail address; (b) in what work or other media production the pertinent right is claimed and facts probative of the infringement; and (c) data identifying the information in question.**

# Notice and take down – Hungary (2)

## Notice and take down system under the Hungarian Electronic Commerce Act (continued):

- **Within 12 hours from the receipt of the notice, the service provider must remove or disable access to the information identified in the notice.**
- **Within 3 days, it must inform the user of its service, who has provided the information in question, of the terms of the notice requesting removal or disablement of access.**
- **Within 8 days from the user's receipt of such notification of the removal or disablement of access, the user of the service may request, in a notice with full evidentiary effect, that the information be restored to the system. Such a counter-notice must specify (a) the user of the service with the requisite contact information set out above for the right-owner, (b) the information claimed to be infringing, and (c) the prior network location of this information. Further, the counter-notice must include a statement that, with appropriate justification, explains why the information in question is not infringing. **The service provider, must also inform the right-owner of the terms of the counter-notice and the restoration of the information.****

# Notice and take down – Hungary (3)

## Notice and take down system under the Hungarian law (continued):

- Within 10 days of the receipt of a counter-notice, the rightowner has the options of filing a civil suit to obtain a temporary injunction and ultimately a permanent injunction to restrain the infringement or of initiating a criminal proceeding.
- Within 3 days of filing a civil suit or starting a criminal proceeding, the right-owner must send the service provider a copy of the pleadings or process commencing the pertinent action.
- The rightowner has to notify the service provider of any temporary injunction or final judicial decision on the merits issued in the case. The service provider, depending on the judicial outcome, must either restore the information in question or maintain its removal or disablement of access.
- The service provider is not liable for removing or disabling access to the information in question, **provided that it has acted in good faith** and in harmony with the pertinent provisions of the Electronic Commerce Act.
- The owners of rights , in case of false notices, are liable for damages.

## **II.4. TO UNDERSTAND ARTICLE 13: MONITORING, FILTERING; „NOTICE AND *STAY DOWN*”**

# No general monitoring obligations, but...

## US Copyright Act, section 512(m)

(m) Protection of Privacy. – Nothing in this section shall be construed to condition the applicability of subsections (a) through (d) on –

(1) a service provider monitoring its service or affirmatively seeking facts indicating infringing activity, except to the extent consistent with a standard technical measure complying with the provisions of subsection (i); or

(2) a service provider gaining access to, removing, or disabling access to material in cases in which such conduct is prohibited by law.

# No general monitoring obligations, but...

## Electronic Commerce Directive of 2000 of the EU

### Article 15.1. No general obligation to monitor

1. Member States shall not impose a *general* obligation on providers, when providing the services covered by Articles 12, 13 and 14, to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity.

### Recital (47)

Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.

# Filtering; „notice and *stay down*”

**Obligation of non-general monitoring (filtering) and of preventing future infringements: what is taken down must stay down**

**GEMA v. YouTube** (Hamburg Regional Court (*G Hamburg*) 310 O 461/10).

YouTube has **intermediary “disturber” liability** (“*Störerhaftung*”) by providing its platform and thus contributing to the infringing acts.

- When notified of an infringement, YouTube has the **obligation not only to remove or block access to the video without delay but also to take measures to prevent further infringements**. (This duty does not extend to those videos that had already been uploaded to the platform.)
- **No disproportionate duties may be imposed on YouTube.** Nevertheless, **it is a reasonably proportionate obligation to prevent future illegal uploads of the same musical works on the same recording by using filtering software**. YouTube should use the software itself and **could not leave this to its users**.

# Filtering; „notice and *stay down*”

**Obligation of non-general monitoring (filtering) and of preventing future infringements: what is taken down must stay down**

In **Atari v. RapidShare**, the **locker provider**, first, seemed to be the winner. The **Regional Court (LG)** of Düsseldorf found against it. However, the **Higher Regional Court** in Düsseldorf (**OLG**) **reversed the ruling** in favor of RapidShare. The OLG did not find it justified to obligate RapidShare, in addition to take down illegal copies when duly notified, also to prevent, through a filtering system, repeated uploading of illegal copies of the same works.

The **German Federal Court of Justice (BGH)** **reversed the ruling of the Düsseldorf OLG**. (BGH, I ZR 18/11, LG Düsseldorf – 12 O 40/09). **Although** it stated that, in principle, **file hosting services** **are to be recognized as an appropriate business model, they should duly cooperate with copyright owners not only by removing illegal copies from their system but also by preventing their inclusion** (that is, if illegal copies of a work are taken down, they should stay down and not uploaded again). **If RapidShare does not apply a reasonable filtering system for this purpose, it will be liable for the infringements.**

## **II.5. TO UNDERSTAND ARTICLE 13: BLOCKING ACCESS TO „ROGUE” WEBSITES**

# Blocking injunctions

- **Pirate Bay** (decision February 2, 2010, of the Tribunal of Bergamo) The court has found that it is an obligation of the Italian Internet service and access providers to block access to the pirate website.
- **British Telecom** (High Court of Justice, London, July 28, 2011). The Court has found in favor of Twentieth Century Fox, Universal Film Studios, Warner Bros. Entertainment, Paramount Pictures, Disney Enterprises and Columbia Pictures. The High Court judge has ruled that **BT must block access to a website which provides links to pirated movies**. The case has concentrated on **Newzbin 2**, a site aggregating a large amount of illegal copies of movies on its Usenet „discussion” forums. A landmark decision since it was the first time in the UK that a service provider – one of the biggest ones – has been ordered to block access to such a site. It opened the way **to block other similar illegal sites (such as Pirate Bay)**.

# Blocking injunctions

- On 22 October 2013 in a case against the Pirate Bay, the **Belgian Court of Cassation (Belgium's Supreme Court)** **confirmed the lawfulness of a far-reaching injunction order against all national Internet service providers.** According to this judgment, the examining magistrate (*juge d'instruction*) is entitled to order, **in a single injunction, all national Internet service providers to block access** to IP rights-infringing content which is hosted by a server, linked to a specific main domain name, and such by employing all possible technical means at their disposal or at least by blocking all domain names that refer to a specified main domain name (*"thepiratebay.org"*).
- There have been blocking injunctions **also in other EU Member States** (France, Germany, Spain), etc. **as well, for example, in Russia and India.**

# Blocking injunctions

**CJEU:** in the *UPC Telekabel v Constantin and Wega* (C-314/12) the judgment of the Court of Justice of the European Union adopted on March 27, 2014, found that an internet access provider can be required to block access by its customers to a website which infringes copyright.

A specific blocking measure imposed on a provider relating to a specific website is not, in principle, disproportionate only because it entails not inconsiderable costs but can easily be circumvented without any special technical knowledge. It is for the national courts, in the particular case, taking into account all relevant circumstances, to weigh the fundamental rights of the parties against each other and thus strike a fair balance between those fundamental rights

## **II.6. TO UNDERSTAND ARTICLE 13: EXISTING CROSS-INDUSTRY COOPERATION**

# Cross-industry co-operation (1)

An example: the „UGC principles:“ [www.ugcprinciples.com](http://www.ugcprinciples.com). Key elements:

- **UGC Services should use effective content identification technology** (“Identification Technology”) **with the goal of eliminating** from their services **all infringing user-uploaded audio and video content** for which Copyright Owners have provided Reference Material. To that end..., UGC Services **should fully implement commercially reasonable Identification Technology** that is highly effective,...in achieving the goal of eliminating infringing content.
- **If a Copyright Owner has provided**: (1) the **reference data** for content required to establish a match with user-uploaded content; (2) **instructions regarding how matches should be treated**; and (3) **representations** made in good faith **that it possesses the appropriate rights** regarding the content (collectively, “Reference Material”), then **the UGC Service should apply the Identification Technology to implement a Filtering System.**

# Cross-industry co-operation (2)

## UGC principles (continued):

- **UGC Services and Copyright Owners should work together to identify sites that are clearly dedicated to, and predominantly used for, the dissemination of infringing content or the facilitation of such dissemination.** Upon determination by a UGC Service that a site is so dedicated and used, **the UGC Service should remove or block the links to such sites.** If the UGC Service is able to identify specific links that solely direct users to particular non-infringing content on such sites, the UGC Service may allow those links while blocking all other links.
- **UGC Services should use reasonable efforts to track infringing uploads** of copyrighted content **by the same user and should use such information in the reasonable implementation of a repeat infringer termination policy.** UGC Services should use **reasonable efforts to prevent a terminated user from uploading audio and/or video content following termination,** such as blocking re-use of verified email addresses.

# Cross-industry co-operation (3)

## UGC principles (continued):

- The **Identification Technology** should use Reference Material **to identify user-uploaded audio and video content** that matches the reference data and **should permit Copyright Owners to indicate how matches should be treated.**
- **If the Copyright Owner indicates** in the applicable Reference Material **that it wishes to block user-uploaded content that matches the reference data, the UGC Service should** use the Identification Technology to **block such matching content** before that content would otherwise be made available on its service (“**Filtering Process**”). **The Copyright Owner may indicate** in the applicable Reference Material **that it wishes to exercise an alternative to blocking** (such as **allowing the content to be uploaded, licensing use of the content or other options**), in which case, the UGC Service may follow those instructions or block the content, in its discretion.

## **II.7. TO UNDERSTAND ARTICLE 13: CJEU RULING IN *L'ORÉAL* ON ACTIVE INTERMEDIARIES**

# *L'Oréal (1)*

## CJEU judgement *L'Oréal and others v. eBay and others* (case C-324/01)

- In order for an internet service [hosting] provider to fall within the scope of Article 14 of Directive 2000/31, **it is essential that the provider be an intermediary provider** within the meaning intended by the legislature in the context of Section 4 of Chapter II of that directive.
- **This is not the case where the service provider**, instead of confining itself to providing that service neutrally by a merely technical and automatic processing of the data provided by its customers, **plays an active role of such a kind as to give it knowledge of, or control over, those data**

## *L'Oréal (2)*

- Since the operator **has provided assistance which entails**, in particular, **optimising the presentation of the offers in question or promoting those offers**, it must be considered not to have taken a neutral position, but to have **played an active role of such a kind as to give it knowledge of, or control over, the data**. It **cannot then rely**, in the case of those data, **on the exemption from liability** referred to in Article 14(1) of Directive 2000/31.

**II.8. TO UNDERSTAND ARTICLE 13:  
THE CJEU'S FAILED ATTEMPT AT  
TRYING TO ESTABLISH BALANCE OF  
INTERESTS IN *Scarlet* AND *Netlog***

# ***Scarlet (1)***

## ***SABAM v. Scarlet*** (case C-70/10)

Scarlet qualified as **access provider** rather than hosting provider.

The issue: **filtering** (as described in the referral)

- **all electronic communications** passing via its services, in particular those involving the use of peer-to-peer software;
- which applies **indiscriminately to all customers**;
- **as a preventive measure**;
- **exclusively at the service provider's expense**; and
- **for an unlimited period**.

# Scarlet (2)

## *SABAM v. Scarlet*

- „serious infringement of the freedom of the ISP concerned to conduct its business since it would require that ISP to install a complicated, costly, permanent computer system at its own expense”;
- The business involved was based, to a great extent, on (i) illegal making available of works by a huge number of customers of the business, (ii) increasing by this the number of visitors of the website, and, (iii) as a result of this sort of popularity, obtaining income from advertisers. What about the business of those whose creations and productions were used illegally, and without which the business could not have had chance to succeed?
- The filtering system proposed was qualified too complicated and too costly (without any real analysis or calculation why it should be regarded so). What about possible filtering systems that would be simpler and less costly or that is not “permanent”?
- Would not it have been justified to consider that the ISP might have to bear the cost of a reasonable filtering system from its income indirectly derived from the infringements taking place through its system?

# ***Scarlet (3)***

***SABAM v. Scarlet*** The outlined filtering system

- „may also infringe the fundamental rights of that ISP’s customers, namely their right to **protection of their personal data and their freedom to receive or impart information**”;
- **Insubstantiated, slogan-based sweeping statement** which could hardly stand any serious scrutiny .
- **Why would** a filtering system **violate the protection of customers’ personal data if it only consisted in the identification of illegal materials (not of the customer) and in their removal?** In particular, why would it be so if an **automatic system** were involved and it functioned **only in the relation between the ISPs and their customers** ?
- **Did the court see it an appropriate position according to which free unauthorized making available of , e.g., freshly released films to the tiny internet population is a matter of freedom of receiving and imparting information.**

# Scarlet (4)

**SABAM v. Scarlet** The outlined filtering system

- "could potentially **undermine freedom of information** since that system might not distinguish adequately between unlawful content and lawful content;"
- **It can be easily proved how huge exaggerations this unsubstantiated statement contains** and how much it is poorly founded. **It is sufficient to refer to the successful operation of the filtering system applied by YouTube** in accordance with the cross-industry agreement published on **www.ugcprinciples.com**.
- It is still a major understatement if it is stated that, **in the extremely overwhelming majority of cases, the "matches" found by the filter are unequivocally infringing copies**.
- The same UGC principles take into account and take care of the **overly exceptional situations** which form only a microscopic tiny fraction of the enormous number of cases.
- **Is does not seem a right solution to throw out the baby not just along with the bath water but her alone merely because one of her fingers is still somewhat wet? Why not to try finding a means to dry that small spot?**

# ***Scarlet (5)***

***SABAM v. Scarlet*** (If the application of filtering system were ordered)

- **„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.”**
- In the concrete situation with the concrete details, **this may have been true.**
- However, **it seems quite sure that the CJEU, in this case, no matter how good intention it may have had, has fulfilled this requirement even less; the preliminary ruling is largely unbalanced to the detriment of copyright owners.**

# *Scarlet* (6)

**SABAM v. Scarlet** Further unanswered questions:

- What does it mean in Recital (45) of the E-Commerce Directive that **injunctions may consist in orders to require not only the termination but also prevention of infringements?** How filtering infringing copies to prevent their making available to the public **as a means of prevention** rather than *post festum* termination of infringements **should be considered** from this viewpoint? **Are there at present any realistically available effective means to prevent the inclusion of infringing materials in an online system other than filtering?** What would be the meaning and value of this recital if, although orders to prevent online infringements are possible, their only effective application would not be allowed?

# *Scarlet (7)*

- **What does the prohibition of general obligation to monitor the information that ISPs transmit or store mean and what kind of non-general obligations to monitor may be ordered, in particular in the light of the clarification in Recital (47) which reads as follows: “Member States are prevented from imposing a monitoring obligation on service providers only with respect to obligations of a general nature; this does not concern monitoring obligations in a specific case and, in particular, does not affect orders by national authorities in accordance with national legislation.”? (Emphasis added.)**

# Netlog

***SABAM v. Netlog*** (case C-360/10) (Netlog: a **social networking platform** qualifying as **hosting provider**)

- The court completely **disregarded that, contrary to Scarlet, clearly a hosting provider was involved** to which stricter rules apply under Article 14 of the Electronic Commerce Directive.
- **It reproduced practically in a copy-and-past verbatim manner the Scarlet findings** on the freedom of conducting business and the alleged conflicts with the protection of personal data and the freedom of information.
- **It did not pay attention to *L'Oréal*, although the application of the principles and criteria laid down in that case would have been justified.**

## **II.9. TO UNDERSTAND ARTICLE 13: ATTEMPTS AT „FOLLOW THE MONEY!” SOLUTIONS**

# „Follow the money!” in an EU policy paper

Extract from the **Communication of the European Commission of 9 December 2015** entitled „Towards a modern, more European copyright framework” (COM(2015) 626 final):

„The Commission will take immediate action to engage, with all parties concerned, in setting up and applying **‘follow-the-money’** mechanisms, based on a self-regulatory approach... Codes of conduct at EU level could be backed by legislation, if required to ensure their full effectiveness...

„A ‘follow-the-money’ approach... **can deprive those engaging in commercial infringements of the revenue streams** (for example from **consumer payments and advertising**) emanating from their illegal activities, and therefore act as a deterrent.”

# Failure of the „follow the money” draft laws (SOPA and PIPA) in the US

- In **2011**, in the US two draft laws - the **Stop Online Piracy Act (SOPA)** and the **Protect Intellectual Property Rights (PIPA)** – were based on the „follow the money” approach, and **would have prohibited to credit card operators and advertizers to serve websites making available infringing materials.**
- **This would have reduced the income of certain big online intermediaries** who obtained big amount of money due to the fact that a lot of infringing materials were (and of course still are) made available through their systems.
- **Some major online intermediaries organized a hysteria campaign** among their users instructing them to send e-mails and letters to the members of the Congress and to organize – with their financial and logistical support – manifestations. The intermediaries in order to protect their profit obtained to the detriments of authors and other owners of rights also **blackmailed the politicians by the manace of suspending their systems.** Finally the Congress gave in; and the bills were withdrawn. **A Munich moment?**

**II.10. THE ROAD TO ARTICLE 13:  
CREATORS SPEAKING UP AGAINST  
NEGLECTING THEIR RIGHTS  
IN FAVOUR OF INTERNET  
INTERMEDIARIES IN  
THE NAME OF „FREE ACCESS”**

# Copyright policy changes with the end of the term of the previous E.C.

**Around the end of the term of the previous European Commission, certain Commissioners (Neelie Kroes in charge of digital economy issues supported by Viviane Reding in charge of justice but previously of digital economy) published discussion papers and proposals suggesting a number of limitations of copyright and related rights with exaggerated unilateral preference for „free access” and for limitations of the obligations and liability of Internet service providers and other online intermediaries.**

# Creators' uprisal: enough is enough! (1)

**Neelie Kroes' attempt** to drastically reduce protection of the rights of creators and allow generalized free uses with the online intermediaries to collect income instead of creators **was stopped in the last moment before the end of the term of the Baroso Commission**

- **by a letter to the Commission by European Ministers of Culture, and**
- **by the famous manifesto „Enough is enough” signed by more than 18.000 authors and artists (see [www.ipetitions.com/petition/Support-authors](http://www.ipetitions.com/petition/Support-authors)).**

# Creators' uprisal: enough is enough! (2)

Enough is enough:

**On 5th December [2013] ... the College of Commissioners will meet to examine initiatives that the Commission might adopt in the field of copyright.**

**Should the worst be feared? This is a valid question, especially when you consider the interconnections and almost cosiness that exist between some very powerful private anti-copyright lobbyists and certain departments and directorates of the Commission. Let there be no mistake; the message emerging is that copyright is the enemy of consumers and their desire to access culture...**

# Creators' uprisal: enough is enough! (3)

Enough is enough:

**Every day in Europe, where authors' rights began, their influence is being contested, their scope is under attack, their collective management criticized. Every day, new exceptions, or rather expropriations, are being proposed; every day, mechanisms that make it possible to finance creation are being contested in the name of free competition; every day, private copying remuneration is being denigrated. In a nutshell, all sources of revenue for authors are under threat and attack.**

**For the benefit of whom? Obviously not the creators themselves, whose general situation is becoming more and more precarious in many countries! And certainly not the consumers, whose access to works is not facilitated by the questioning of authors' rights and for whom the cost of acquiring digital equipment is not reduced in any way by lowering the payments to authors!**

# Make the Internet Fair for Creators!

New manifesto by European creators of July 11, 2016; see at [www.authorsocieties.eu/uploads/Make the Internet Fair for Creators!](http://www.authorsocieties.eu/uploads/Make_the_Internet_Fair_for_Creators!)

**The dominant players on the market, like YouTube, are platforms built on user uploaded or aggregated content that don't or only barely provide remuneration for our works. Worse yet, the fact that these platforms get away with this pulls the entire market value of creative works down in a never ending race to the bottom.**

**The problem calls for more than light fixes. Legislation should acknowledge that the platforms that play a key role in providing access to copyright protected content, whether it be user uploaded or aggregated, should no longer be able to escape liability for their copyright related activities. Do not tolerate an economic and legal loophole for free riders, and the perpetuation of unacceptable harm to creativity and economic growth in Europe.**

# The GRULAC proposal (1)

**Proposal for analysis of copyright related to the digital environment -**

*Document presented by the Group of Latin American and Caribbean Countries (GRULAC) – SCCR 31/4, December 1, 2015*

**The low payment of creators, composers, songwriters and performers is today the most visible part of the impact caused by technological advances in the use of protected works in the digital environment. Particularly in the music industry, despite the fact that digital technology has allowed a wider access to music by society as never before, there are questions about the importance that has been attributed to these creators and performers and if it is enough...**

**In this context, the low payment resulting from digital services is one of the most frequently mentioned problems in relation to the digital environment. Composers and artists from all around the world complain about the low payment that comes from digital platforms, especially from those that use the technology of streaming.**

# The GRULAC proposal (2)

## The GRULAC proposal:

GRULAC offers **three areas of work to be discussed** in the SCCR/WIPO:

- **Analysis and discussion of legal frameworks** used to protect works in digital services;
- **Analysis and discussion of the role of companies and corporations that make use of protected works in the digital environment** and their way of action, including **the verification of the level of transparency on business and the proportions of copyright and related rights payment to the multiple rights holders.**
- **Building consensus on the management of copyright in the digital environment**, in order to deal with the problems associated to this matter, **from the low payment of authors and artists to the limitations and exceptions to copyrights in the digital environment.**

## **II.11. THE RODE TO ARTICLE 13 : PROPOSAL OF THE FRENCH GOVERNMENT TO CLARIFY THE LIABILITY OF „FALSE INTERMEDIARIES”**

***Liberté-Égalité-Fraternité***

**REPUBLIQUE FRANCAISE**



## **HIGH COUNCIL FOR LITERARY AND ARTISTIC PROPERTY**

### **MISSION TO LINK DIRECTIVES**

**2000/31 AND 2001/29 - *Report and Proposals***

Pierre Sirinelli, *President*

Josee-Anne Benazeraf, *Vice-President*

Alexandra Bensamoun, *Vice-President*

# The French Proposal

The Report and Proposal recommended the introduction of a new Article in the Information Society Directive (Art 9a):

**Without prejudice to Articles 12 and 13 of the Directive on electronic commerce, information society service providers that give access to the public to copyright works and/or subject-matter, including through the use of automated tools, do not benefit from the limitation of liability set out by Article 14 of said Directive.**

These service providers **must obtain permission from the relevant rightholders as they**, either alone or with the participation of users of their services, **are exploiting the rights set out by Articles 2 and 3.**

**Such permission covers acts performed by users of their services when they send the copyright works and/or subject-matter to the aforementioned service providers in order to allow the access set out by sub-paragraph one.**

(Emphasis added.)

# **III. ARTICLE 13 OF THE DRAFT DIGITAL SINGLE MARKET DIRECTIVE**

# Article 13 in the draft Digital Single Market Directive (1)

## Title IV. Chapter II. Certain uses of protected content by online services

### Article 13(1)

**Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. (Emphasis added.)**

# Article 13 in the draft Digital Single Market Directive (2)

**Why is it a brave proposal by the European Commission** – in view of the enormous economic power, political influence and huge lobbying capacity of internet intermediaries and the IT industry in general? **Let us read:**

**„Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users”.**

- **This means, *inter alia*, YouTube. Therefore, at the other side of the ring, the Commission – and the rightholders whose rights this time are truly taken into account – are faced with the heavy-weight online intermediaries and their „avatars”.**

(Continues.)

# Article 13 in the draft Digital Single Market Directive (3)

(Continued). What Article 13 means:

- „[T]ake measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter.”
  - Translation: stop free riding and narrow or eliminate the „value” gap; at least share the income you have obtained in this way.
- „[O]r to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers.”
  - This means, *inter alia*, that what is taken down should stay down, and – yes – this means specific and targeted monitoring/filtering obligation.

# Recitals making the obligations of intermediaries even clearer (1)

**Recitals (38) and (39) of the draft Digital Single Market Directive:**

**(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<sup>34</sup>.**

**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. (Continues.)**

# Recitals making the obligations of intermediaries even clearer (2)

(Continued.) 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. (Emphasis added.)

- That is: (i) YouTube-type „false intermediaries” perform acts covered by copyright and related rights; (ii) they need licence for this; and (iii) they – but also intermediaries eligible for liability exemption under Article 14 of the Electronic Commerce Directive – should apply effective technological measures against infringements.

# Recitals making the obligations of intermediaries even clearer (3)

**(39) Collaboration between 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 and rightholders is essential for the functioning of technologies, such as content recognition technologies. In such cases, rightholders should provide the necessary data to allow the services to identify their content and the services should be transparent towards rightholders with regard to the deployed technologies, to allow the assessment of their appropriateness.**

➤ **This clearly refers to filtering obligations.**

**Bravo Maria Martin-Prat and your team! This may be an even more impossible „Mission Impossible” than in what Tom Cruise has ever acted.**

# THANK YOU

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