

The Value Gap:
Licensing Content on Social Media Platforms under
Article 13 of the proposed DSM Directive

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The Value Gap

IFPI: 46% of all streams worldwide are YouTube streams

Copyright-protected content on social media platforms:

- sustains the business model of the platforms
- competes with content on subscription streaming services

If not licensed, this creates a value gap:

- no licensing income for content on platforms
- pressure on licensing tariffs for subscription services
- reduced income for music on subscription services



Can rightholders license social media platforms?

Platforms: no, we are not liable:

- we merely facilitate the communication to the public by the users
- we benefit from safe harbor protection under Article 14 EU E-commerce directive

Safe harbor

Article 14 E-commerce Directive: information society service is not liable if it:

- a) 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) upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

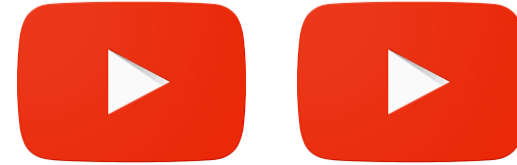
Article 15: no general obligation to monitor

Safe harbor

ECJ in *l'Oréal/eBay* (2011): exemption does not apply if the service provider plays an active role allowing it to have knowledge or control of the data stored. The operator of an online market place plays such a role when it provides assistance which entails, in particular, optimising the presentation of the offers for sale in question or promoting them.

Do social media platforms play an active role?

YouTube's two-way approach to copyright:



- Deny liability for infringements; invoke safe harbour: no active role
- Lobby to exempt UGC from copyright protection

while at the same time:

- Notice and Take Down
- Content identification technology – business model (ContentID)
- Enter into agree to disagree agreements with (certain) CMO's

YouTube's approach fairly succesful:

- dodged the bullet in most lower courts
- managed to avoid bad case precedents
- no preliminary questions to ECJ on liability of social media platforms until 2018 (!)

Facebook??

Are the tables turning?

- 2016: Draft Directive Copyright in the Digital Single Market - Value Gap Proposal Article 13
- 2017: ECJ holds ThePirateBay liable for copyright infringement
- June 2018: YouTube held liable by lower court in Austria (*Puls 4/YouTube*)
- 12 September 2018: EP adopts directive with amendments
- 13 September 2018: German Supreme Court refers case on YouTube liability to ECJ

German Supreme Court refers YouTube case to ECJ:

- is a platform like YouTube liable for copyright infringement?
- does it play an active role (pre-empting it from invoking safe harbour protection)?
- if not, what does it have to do to prevent infringement?
Preventive filtering, notice and take down *and* stay down or just notice and take down?

Directive on Copyright in the Digital Single Market

September 2016: EC Proposal

May 2018: Council amended proposal

September 2018: EP amendments

January 2019: trilogue. Closed door negotiations between EP, Council and EP

March-April 2019: EP to vote on compromise to be reached in trilogue

Article 13 Directive - EC proposal

Recital 38: if an information society service provider stores and provides access to large amounts of copyright-protected content it is performing an act of communication to the public and must therefore obtain a license, unless the provider is eligible for safe harbor protection under Article 14 Ecommerce Directive.

Article 13: information society service providers that store and provide access to large amounts of copyright-protected content shall, in cooperation with rightholders, take appropriate and proportionate measures to allow:

- the functioning of agreements reached on the use of copyright-protected content, or
- prevent the availability of unauthorised content

Recital 38: measures also to be taken if safe harbor applies.

May 2018: EU Council amended text proposal

Article 13 limited to ‘online content sharing service provider’:

- Information society service whose main purpose is to store and give access to large amount of uploaded content **and who organises it and promotes it for profit-making purposes** (Recital 37a: e.g. indexing the content, presenting it in a certain manner and categorising it, as well as using targeted promotion on it)
- Expressly excluded:
 - not for profit online encyclopaedias, educational and scientific repositories and open source software developing platforms
 - access service providers, online marketplaces and providers of private cloud services
 - services the main purpose of which is to engage in or to facilitate copyright piracy (Recital 37a).

Council proposal

13.1: online content sharing service provider performs a communication to the public, which means that he must either obtain authorization or, in the absence of authorization, prevent access.

Recital 38: this clarifies and does not change the current notion of communication to the public.

13.1.2: If the parties enter into a license agreement this agreement should also cover uploading by users who act in their private capacity and for non-commercial purposes.

Council proposal: special liability exemption (Article 13.3, 13.4):

Safe harbor protection under Article 14 Ecommerce Directive not applicable, but online content sharing provider is exempted from liability if it:

- a) demonstrates that, by implementing **effective and proportionate measures**, it has made best efforts to prevent availability of **specific content** for which the rightholders have provided the relevant and necessary information for the application of these measures (**best efforts to block specific content**).
- b) and upon notification by rightholders has acted expeditiously to remove or disable access and demonstrates that it has made best efforts to prevent their future availability through the measures referred to in point (a) (**Notice-and-take-down and best efforts to make it stay down**)

This is without prejudice to remedies under national law for cases other than liability for copyright infringements and to the possibility for national courts or administrative authorities of issuing injunctions (Recital 38c).

Council proposal

13.4: **Effective and appropriate measure**: may vary depending on size of provider, amount of content, type of content, costs, state of the art of technology.

Recital 38e: It is not excluded that in some cases unauthorised content may only be avoided upon notification of rightholders, in particular in case of small or micro enterprises.

13.7: measures must be implemented without prejudice to possibility for users to benefit from exceptions or limitations. For that purpose, the online content sharing service provider must implement procedure allowing users to complain about unjustified removal or blocking

September 2018: EP adopts amended text

EP further specifies notion of ‘online content sharing service provider’:
‘online content sharing service provider’ shall cover information society service providers one of the main purposes of which is to store and give access to the public or to stream significant amounts of copyright protected content uploaded / made available by its users, and that optimise content, and promote for profit making purposes, **including amongst others displaying, tagging, curating, sequencing**, the uploaded works or other subject-matter, irrespective of the means used therefor (Recital 37a).

Microenterprises and small sized enterprises excluded (Article 2.1.4b)

EP amended text

13:1 online content sharing service provider performs communication to the public and shall conclude fair and appropriate licensing agreements

13.2: agreement to cover liability of non-commercial uploaders

13.2a: **if the rightholder does not wish to conclude a license agreement, the online content sharing service providers and right holders shall cooperate in good faith in order to ensure that unauthorised content is not available on their services.**

13.2b: online content sharing service provider must implement procedure allowing users to complain about unjustified removal of their content

EP amended text

“cooperate in good faith in order to ensure that unauthorised content is not available on their services”: what does this mean?

- 13.2.a: may not lead to preventing the availability of non-infringing content
- 13.2b: may not lead to any identification of individual users nor the processing of their personal data
- Recital 39b:
 - development of best practices;
 - special account to be taken of fundamental rights, the use of exceptions and limitations
 - special focus to ensure that burden on SMEs remains appropriate
 - special focus to ensure that automated blocking of content is avoided

What will Article 13 bring to artists and other rightholders?

- agreements between CMO's and platforms based on fair tariffs (in lieu of agree to disagree arrangements)
- higher recording industry shares in social media ad income

But:

- Save the Internet petition over 4 mio signatures
- Google/YouTube to intensify lobby
- audiovisual rightholders want out

YouTube's response

- to vloggers: EP text will require us to shut down your channels
- to creators and artists: EP text will require us to block millions of music videos, mashups and parodies costing hundreds of thousands of jobs, including your jobs.
- to (adolescent) YouTube users: raise your voice against Article 13.
- to politicians: limit liability to content that can be blocked through ContentID and NTD system

Audiovisual industry response

- EP text strengthens the role of platforms to the detriment of right holders and undermines the status quo in terms of the EU liability regime.
- the proposal would further muddy the waters of jurisprudence in light of the German Supreme Court's referral to the CJEU
- we propose to return to the principles of the initial EC proposal as regards liability with reference to the existing CJEU jurisprudence
- If this does not happen we propose to leave audiovisual works out and limit Article 13 to musical works and phonograms

Thank you

Höcker
ADVOCATEN