Formal comments of the EDPS on a Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market

1. Background to these comments

On 13 September 2017, the European Commission tabled a proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (hereinafter, 'the proposal').

The proposal is one of the sixteen intended actions listed in the Digital Single Market strategy of May 2015 and is referred to in the Commission Communication of December 2015 'Towards a modern, more European copyright framework'. It aims to harmonise the laws of the Member States on copyright and related rights in order to stimulate 'innovation, creativity, investment and production of new content, also in the digital environment' and contribute 'to the Union's objective of respecting and promoting cultural diversity' by covering more clearly fields of 'research, education and preservation of cultural heritage' permitted by digital technologies. It builds on the existing Directive 96/9/EC, Directive 2001/29/EC, Directive 2006/115/EC, Directive 2009/24/EC, Directive 2012/28/EU and Directive 2014/26/EU.

The proposal (Article 20) would require the processing of personal data carried out within the framework of the proposed directive to be in compliance with applicable data protection law.

The EDPS did not issue an Opinion on the proposal.

On 25 May 2018 the Council adopted a text forming the basis of the mandate for the Presidency to begin negotiations on the proposal.

Opinions on the proposal of four European Parliament committees, the Committee on Internal Market and Consumer Protection, the Committee on Industry, Research and Energy, the Committee on Culture and Education and the Committee on Civil Liberties, Justice and Home Affairs, were adopted respectively on 14 June 2017, 1 August 2017, 4 September 2017 and 22 November. On 20 June 2018 the Committee on Legal Affairs (JURI), the lead committee responsible for the Proposal, voted in favour of a draft European Parliament Legislative Resolution ('the draft resolution')[1]. On 26 June 2018, the Rapporteur on the proposal in the Internal Market and Consumer Protection Committee requested formal comments from the EDPS on whether Article 13 of the draft resolution as adopted by JURI would impose a general monitoring obligation on Internet Society Service Providers and whether such an obligation would be compatible with the Charter of Fundamental Rights of the EU.

2. General considerations

Intellectual property is to be respected under Article 17 (2) of the Charter of Fundamental Rights of the EU. There is no inherent conflict between this right and the right to respect for

[1] The present comments are based on the text of JURI report dated 29.6.2018, PE601.094v02-00. The text of Article 13 and accompanying recital 38 are in the Annex for ease of reference.

Postal address: rue Wiertz 60 - B-1047 Brussels
Offices: rue Montoyer 30
E-mail : edps@edps.europa.eu - Website: www.edps.europa.eu
Tel.: 02-283 19 00 - Fax : 02-283 19 50

private and family life, home and communications, the right to protection of personal data and other related rights such as freedom of expression and information[2].

None of these freedoms and rights is absolute; rather they each reinforce one another. For instance, privacy and data protection are necessary for individuals to be able to express themselves freely, to access information freely and to be creative. Intellectual property should in turn be protected, insofar as this protection does not unduly infringe on the freedoms of others.

In the EDPS's 'necessity toolkit'[3], developed as a resource for the legislator when considering the conditions under which a measure may limit fundamental rights, the need is emphasised for an objective assessment of whether the measure is likely to achieve its stated objectives. Such an assessment would need to cover the full set of objectives pursued with the proposal, and it must not be limited to evaluating the satisfaction of the stakeholders immediately concerned.

Furthermore, the basis for EU legislative intervention in the area of intellectual property rights is ensuring that competition in the internal market is not distorted[4]. The EDPS considers that to the extent that digital markets are characterised by a high level of concentration, excessive market power and lack of accountability, this is bound to pose some challenges to privacy, competition and choice. Accordingly, where there is sufficient evidence that this concentration is distorting these legitimate interests, regulatory intervention in digital markets should be considered to de-concentrate these markets, hence putting in place the right conditions for greater competition and for the emergence of business models which pose less challenges to individual rights and freedoms.

Our analysis has focused exclusively on questions of privacy and data protection, because it is not our role to advise on implications of legislative proposals for other rights and freedoms which may be affected by the proposed copyright directive, like freedom to conduct a business and the right to property.

These formal comments are restricted to Article 13 of the draft resolution and accompanying Recital 38. On the basis of a preliminary examination of the overall proposal and draft resolution, we do not consider any other provisions to raise questions of compatibility with privacy and data protection rules. We have considered in particular Article 11 of the draft resolution, which would require Member States to 'provide publishers of press publications with the rights provided for in Article 2 and Article 3 (2) of Directive 2001/29/EC so that they may obtain fair and proportionate remuneration for the digital use of their press publications by information society service providers.' Whilst noting the concerns raised by some as to the potential impact of such a provision on competition in the digital markets in question, it is not a matter for EDPS to advise upon in the light of our responsibilities under Article 41(2) of Regulation 45/2001.

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[2] EDPS has previously advised on initiatives to protect intellectual property on a number of occasions: Opinion of the EDPS on the current negotiations by the European Union of an Anti-Counterfeiting Trade Agreement (ACTA), 22 February 2010; EDPS response to the Commission's Consultation on its Report on the application of Intellectual Property Rights Directive; 8 April 2011; Opinion of the EDPS on the proposal for a Regulation of the European Parliament and of the Council concerning customs enforcement of intellectual property rights, 12 October 2012; EDPS formal comments on DG MARKT's public consultation on procedures for notifying and acting on illegal content hosted by online intermediaries, 13 September 2012. In *Promusicae*, the Court of Justice of the European Union (CJEU) held that the right to property and thus the enforcement of intellectual property rights has to be balanced against other fundamental rights, *Productores de Música de España (Promusicae) v Telefónica de España SAU*, C-275/06, EU:C:2008:54, paragraph 68.

[3] EDPS, Assessing the necessity of measures that limit the fundamental right to the protection of personal data: A Toolkit, April 2017.

[4] Recital 2 to the Proposal.

3. Scope

An 'online content sharing service provider' is defined, according to the draft resolution (Article 2 (1) (4b)), as 'a provider of an information society service one of the main purposes of which is to store and give access to the public to copyright protected works to other protected subject-matter uploaded by its users which the service optimises.' Exempted from this definition are '[s]ervices acting in a non-commercial purpose capacity such as online encyclopaedia, and providers of online services where the content is uploaded with the authorisation of all rightholders concerned, such as educational or scientific repositories' and '[p]roviders of cloud services for individual use which do not provide direct access to the public, open source software developing platforms, and online market places whose main activity is online retail of physical goods'.

The entities within the scope of the obligations created by Article 13 of the Draft Resolution are therefore intended to be a newly-defined subset of information society services,[5] and accordingly information society services, to ensure compliance, would need to consider whether they fall into this category and whether the exemptions are applicable. Given the complexity and novelty of this definition, it is reasonable to expect that, where in doubt and to avoid litigation, information society services would be inclined to comply with these new obligations. The likely consequence is therefore for the obligations set out in Article 13 to be broadly applied or for information society services to cease activities which might bring them within the scope of the provision.

Insofar as these information society services, in fulfilling this obligation, become responsible for determining the purpose and means of processing of personal data, they will be considered data controllers within the meaning of Regulation 2016/679.

4. Clarity

According to Article 52 (1) of the Charter, 'any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.' 'Provided for by law' requires that the legal instrument limiting the fundamental rights of an individual must be accessible, precise and foreseeable so that individuals can exercise their rights[6]. Previous attempts to strengthen the protection of rightholders have been criticised including by the EDPS on grounds

[5] Defined in Directive 98/48/EC of the European Parliament and of the Council of 20 July 1998 amending Directive 98/34/EC laying down a procedure for the provision of information in the field of technical standards and regulations.

[6] The criteria developed by the European Court of Human Rights should be used as suggested in several CJEU Advocates General opinions, see for example Advocate General opinions in joined cases *Tele2 Sverige AB v Post-och telestyrelsen and Secretary of State for the Home Department v Tom Watson and Others*, Joined Cases C-203/15 and C-698/15, EU:C:2016:572 paragraphs 137-154; *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)*, Case C-70/10, EU:C:2011:255, paragraphs 88-114 and *Michael Schwarz v Stadt Bochum*, C‑ 291/12, EU:C:2013:401 C-291/12,paragraph 43. This approach is followed in the General Data Protection Regulation 2016/679 recital (41).In *Telekabel* the CJEU held that 'in order to prevent the fundamental rights recognised by EU law from precluding the adoption of an injunction... the national procedural rules must provide a possibility for internet users to assert their rights before the court once the implementing measures taken by the internet service provider are known', *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft mbH*, Case C‑ 314/12, EU:C:2014:192, paragraph 57.

that their ambiguity increased the risk of harm to individuals and disproportionate interference with fundamental rights[7].

Article 13 (1) of the draft resolution requires online content sharing service providers to 'take appropriate and proportionate measures to ensure the function of licensing agreements' or, 'in the absence of licensing agreements with rightholders', to take such measures 'leading to the non-availability on those services or works or other subject matter infringing copyright or related rights, while non-infringing works and other subject matter shall remain available.

The EDPS notes arguments that this may be seen as placing an obligation on companies within a broad and amorphous sector of the economy either to enter into a licence agreement with all potential rightholders, or else to select what content may be uploaded onto their platforms 'based on information provided by rightholders'[8]. We note that the cost and feasibility of the alternative approaches – licensing or selecting content – has been disputed. Legal certainty and clarity of this provision is therefore essential to avoid disproportionate or unnecessary limitations on the exercise of fundamental rights as well the possible impact on competition.

5. Does Article 13 require generalised surveillance?

Article 7 Right to Privacy

The Court of Justice of the European Union (CJEU) held in *Scarlet Extended SA v Société belge des auteurs, compositeurs et éditeurs SCRL (SABAM)* and *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) v Netlog NV* that a 'fair balance' must be struck between the protection of copyright on the one hand and, on the other hand, the protection of the fundamental rights of other persons. The need to ensure this balance is reflected in the text of the draft resolution with expressions such as 'appropriate and proportionate measures' in the text of Article 13.

The CJEU ruled that 'filtering' by an internet service provider, meaning 'the identification, systematic analysis and processing of information connected with the profiles created on the social network by its users', would violate this requirement, in part because it would require systematic processing of personal data of all users[9]. Such filtering would also be contrary to Article 15 (1) of the e-Commerce Directive because it envisaged generalised monitoring of all data from all customers for any future infringement of intellectual property. In *L'Oréal v eBay* the CJEU held that 'it follows from Article 15(1) of Directive 2000/31, in conjunction with Article 2(3) of Directive 2004/48, that the measures required of the online service provider concerned cannot consist in an active monitoring of all the data of each of its customers in order to prevent any future infringement of intellectual property rights via that provider's website. Furthermore, a general monitoring obligation would be incompatible with Article 3 of Directive 2004/48, which states that the measures referred to by the directive must be fair and proportionate and must not be excessively costly.'[10]. The CJEU also held that the 'filtering system would involve a systematic analysis of all content and the collection and identification of users' IP addresses from which unlawful content on the network is sent[11].'

However, in the case of the proposal and the draft resolution, we observe that Article 13, as drafted, does not appear to impose generalised monitoring obligations such as those addressed

[7] See note 2 above.
[8] Article 13 (1a) of the draft resolution
[9] *Sabam/ Netlog NV*, C-360/10, EU:C:2012:85, paragraph 49.
[10] *L'Oréal SA and Others v eBay International AG and Others*, C-324/09, EU:C:2011:474, paragraph 139.
[11] *Scarlet Extended*, paragraph 51.

above on the service providers concerned. The CJEU in the *SABAM* judgments and in *L'Oréal* addressed the question of monitoring all end user traffic or customer data. By contrast, Article 13 of the proposal targets action to prevent copyright infringements by persons who upload content onto a platform with the intention of making it publicly available; it does not target end users who might download or stream that content. Where a person uploads content to a publicly available platform, this may not be considered a confidential communication. The confidentiality of communications, as safeguarded by Article 7 of the Charter of Fundamental Rights and Directive 2002/58/EC, would not appear to be affected.

Moreover, Article 13 (1b) explicitly requires Member States to ensure that any measures are proportionate, that the balance between fundamental rights of users and rightholders is preserved, and that no general obligation to monitor the information transmitted or stored is imposed. These guarantees would seem to provide sufficient protections as required by the Charter. Nevertheless, some service providers, whose services fall fully in the scope covered by the measures provided for by Article 13, may find it necessary to apply these measures to all content their users attempt to upload.

Article 8 Right to Protection of Personal Data

The second subparagraph of paragraph 2 of Article 13 states that the measures to be taken under Article 13 (1) shall not require the processing of personal data. Such a legislative mandate in line with the principle of data minimisation is certainly welcome. However, the processes of uploading, ensuring that no copyright infringing material is available and providing for a complaint and redress mechanism would appear to make it very difficult if not impossible for the platform to avoid processing personal data. Therefore, insofar as these 'appropriate and proportionate measures' involve the processing of personal data, there can be no doubt that all actors involved in this process would need to comply with the provisions of the Regulation 2016/679 (as provided for by Article 20 of the proposal), and that data processing must necessary and proportionate and data subjects able to fully exercise their rights. This implies also that the 'measures' in question are designed to implement principles like data minimisation and to prevent, by default, disclosure of personal data, in accordance with Article 25 of Regulation 2016/679.

In particular, Article 13 (1a) of the draft resolution creates reporting obligations for content sharing service providers towards rightholders. Any disclosure of personal data to rightholders in the context of this reporting obligation should be in compliance with Regulation 2016/679. This may require clarification.

In conclusion, Article 13 of the draft resolution does not seem in itself to require generalised surveillance, in that obligations targets persons uploading copyright-protected content to be made publicly available. It does however appear to create a paradoxical, even quixotic, obligation in which platforms become liable for copyright-infringing content and have to cooperate with rightholders, while there is no clear obligation for rightholders to offer reciprocal cooperation, or even to provide license agreements at all. The EU will need to be vigilant to ensure that implementation of the provisions does not exacerbate the already excessive monitoring of people on the internet currently endemic to digital society.

6. Accountability

There is evidence that the major platforms in highly concentrated digital markets already voluntarily 'filter' content to prevent the availability of content which infringes copyright. Voluntary accountability measures by individual companies have not been queried from a data

protection regulatory standpoint. A generalised obligation would be a different matter. The effect of this obligation could be to impose disproportionate burdens on smaller players and in so doing to weaken competition with major platforms even further and exacerbate the very distortions which the proposal, in principle, seeks to counter.

Profit-seeking information society services are rightly to be held accountable where they derive value from content transmitted or stored on their platforms and where the dissemination of that content causes genuine harm to the rights and interests of individuals. This is recognised in Recital 38 of the proposal which includes the statement, '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.' In this regard, it is proper for platforms to take responsibility, for example, for content which promotes abuse of children and other vulnerable groups. By extension of this principle, it is appropriate for platforms also to take responsibility for content which infringes intellectual property rights. However, the effect of an obligation to prevent copyright infringements should not be to limit the rights and freedoms of individuals under the Charter, nor should it be to further distort competition in an already over concentrated market.

7. Conclusion and recommendations

The achievement of public value is rarely the result of the advancement of a single interest and certainly never at the detriment of other equally legitimate interests at stake. Having examined Article 13 in the context of the wider proposal, the EDPS:

1) welcomes the efforts made in the proposal and in the draft resolution to restrict interference with fundamental rights including the rights to privacy and to data protection while safeguarding copyright in the digital age;

2) welcomes, in particular, the personal data minimisation requirement, the references to the Charter of Fundamental Rights of the EU and to the Regulation 2016/679 and Directive 2002/58/EC;

3) recognises the distinction between, on the one hand, the requirement under the proposal to prevent copyright-infringing content uploads, and the general monitoring of user activity which has been ruled incompatible with the Charter by the Court of Justice of the EU in the SABAM cases and criticised by EDPS in the case of ACTA;

4) takes note that the provisions contained in this proposal or the draft resolution do not aim to mandate general surveillance of activities on the internet. Given, however, the already endemic monitoring of people on the internet, there is a risk that this proposal would exacerbate the situation if the measures taken prove not to be 'appropriate and proportionate'. Safeguards provided for in the current text must be respected in practice. Strict scrutiny of the Member States' transposition of the Directive and supervision of the measures taken by service providers and rightholders are additional safeguards to be considered;

5) considers that the measures required of content sharing service providers in Article 13 (1) of the proposal will almost certainly involve the processing of personal data, and that Regulation 2016/679 will be duly applicable;

6) recommends the co-legislator continue to reflect carefully on likely practical consequences of the obligations created in Article 13 (1), on the risk of interference with fundamental rights and of circumvention of safeguards, and on the potential for distorting competition in ways which will harm fundamental rights. In such a delicate area, EU law must be as precise and clear as possible. The EU should vigilantly evaluate the implementation of the directive and ensure that data protection by design and other safeguards are effectively put into place.

Brussels, 03 July 2018

Giovanni BUTTARELLI

Annex: Text of Article 13 and Recital 38

Article 13 in the draft resolution as adopted by JURI on 20 June 2018 reads as follows:

> *Use of protected content by online content sharing service providers*
>
> *-1. Without prejudice to Article 3(1) and (2) of Directive 2001/29/EC, online content sharing service providers perform an act of communication to the public and shall conclude fair and appropriate licensing agreements with rightholders, unless the rightholder does not wish to grant a license or licenses are not available. Licensing agreements concluded by the online content sharing service providers with rightholders shall cover the liability for works uploaded by the users of their services in line with terms and conditions set out in the licensing agreement, provided that those users do not act for commercial purposes or are not the rightholder or his representative.*
>
> *1. Online content sharing service providers referred to in paragraph -1 shall, in cooperation with rightholders, take appropriate and proportionate measures to ensure the functioning of licensing agreements where concluded with rightholders for the use of their works or other subject-matter on those services.*
>
> *In the absence of licensing agreements with rightholders online content sharing service providers shall take, in cooperation with rightholders, appropriate and proportionate measures leading to the non-availability on those services of works or other subject matter infringing copyright or related-rights, while non-infringing works and other subject matter shall remain available.*
>
> *1a. Member States shall ensure that the online content sharing service providers referred to in paragraph -1 shall apply the measures referred to in paragraph 1 based on the relevant information provided by rightholders.*
>
> *The online content sharing service providers shall be transparent towards rightholders and shall inform rightholders of the measures employed, their implementation, as well as when relevant, shall periodically report on the use of the works and other subject-matter.*
>
> *1b.Members States shall ensure that the implementation of such measures shall be proportionate and strike a balance between the fundamental rights of users and rightholders and shall in accordance with Article 15 of Directive 2000/31/EC, where applicable, not impose a general obligation on online content sharing service providers to monitor the information which they transmit or store.*
>
> *2. To prevent misuses or limitations in the exercise of exceptions and limitations to copyright, Member States shall ensure that the service providers referred to in paragraph 1 put in place effective and expeditious complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1. Any complaint filed under such mechanisms shall be processed without undue delay. The rightholders shall reasonably justify their decisions to avoid arbitrary dismissal of complaints.*

Moreover, in accordance with Regulation (UE) 2016/679 and Directive 2002/58/EC, the measures referred to in paragraph 1 shall not require the identification of individual users and the processing of their personal data.

Member States shall also ensure that, in the context of the application of the measures referred to in paragraph 1, users have access to a court or other relevant judicial authority to assert the use of an exception or limitation to copyright.

3. Member States shall facilitate, where appropriate, the cooperation between the online content sharing service providers, users and rightholders through stakeholder dialogues to define best practices for the implementation of the measures referred to in paragraph 1 in a manner that is proportionate and efficient, taking into account, among others, the nature of the services, the availability of technologies and their effectiveness in light of technological developments.

Recital 38 of the draft resolution reads as follows:

Online content sharing service providers perform an act of communication to the public and therefore are responsible for their content. As a consequence, they should conclude fair and appropriate licensing agreements with rightholders. Therefore they cannot benefit from the liability exemption provided for in Article 14 of Directive 2000/31/EC.

The rightholder should not be obliged to conclude licensing agreements.

In respect of Article 14 of Directive 2000/31/EC, 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 therefore.

Where licensing agreements are concluded, they should also cover, to the same extent and scope, the liability of users when they are acting in a non-commercial capacity.

In order to ensure the functioning of any licensing agreement, online content sharing service providers should take appropriate and proportionate measures to ensure the protection of works or other subject-matter uploaded by their users, 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.

In the absence of agreements with the rightholders it is also reasonable to expect from online content sharing service providers that they take appropriate and proportionate measures leading to the non-availability on those services of copyright or related-right infringing works or other subject matter. Such service providers are important content distributors, thereby impacting on the exploitation of copyright-protected content. Such service providers should take appropriate and proportionate measures to ensure the non-availability of works or other subject matter as identified by rightholders. These measures should however not lead to the non-availability of non-infringing works or other subject matter uploaded by users.