**Controversy between Article 13 of the proposed Directive for Copyright in the Digital Single Market and the EU acquis**

18 Gennaio 2018
media LAWS

Di Eugenio Foco

As part of the Digital Single Market Strategy, implemented by the European Union (EU) in 2015, the European Commission (EC) presented in September the Copyright reform packet. The latter introduced the Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market – COM (2016)593. Among the different provisions constituting the aforementioned proposal Article 13 intends to tackle what Brussels defines as the *value gap* (i.e. the idea that revenues generated from the online use of copyright-protected content are being unfairly distributed between the different players in the value chain of online publishing[1]).

Although the resolution of the value gap controversy is considered of the essence to a modern copyright legal framework the instruments introduced by Article 13 and its respective recitals 38 and 39 to achieve such goal result controversial.

The aim of this paper is thus to briefly outline the critical aspects that emerged between Article 13 and the EU acquis, namely:

i. Compatibility with Article 14 of Directive 2000/31/EC (E-Commerce Directive);

ii. Compatibility with Article 15 of Directive 2000/31/EC

iii. Compatibility with the Charter of Fundamental rights of the European Union.

2. (In)Compatibility with Article 14 E-Commerce Directive

The controversial formulations used in the wording of Article 13 are at the basis of the contrast between the proposal and Article 14 of the E-Commerce Directive (ECD).

The first inconsistency stems from the definition of the providers that the proposal targets and whether they shall fall within the safe-harbor exemption provided by Article 14 ECD.

Article 13 of the proposal addresses “*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*”.

However, given that Article 13 (1) of the proposal introduces, but does not define, two additional requirements for the providers (“provide public access” and “large amounts of works”), it can be stated that the definition envisaged in Article 14 ECD is more general and thus encompasses the one provided in Article 13 (1) of the proposal. With this in mind, the question that arises is: when will the providers targeted by Article 13 (1) of the proposal fall under the safe harbor exemption provided in Article 14 ECD?

Furthermore, the fact that Article 1 (2) of the proposal presents a list of existing Directives whose validity the proposal does not intend to affect – with the ECD being excluded – ECD further enhances the potential
legal uncertainty that Article 13 would create if it were to become applicable law.
The second inconsistency relates to the concept of “neutrality” asserted in Recital 42 ECD and by the jurisprudence of the CJEU in Case C-324/09 L’Oréal v EBay and its misinterpretation in Recital 38 of the proposal. In an attempt to include in the proposal the CJEU’s notion of neutrality, Paragraph 2 of Recital 38 states that hosting providers are excluded from the safe harbor protection when they play an “active role […] irrespective of the means used therefore”. However, given that the notion of neutrality asserted in Recital 42 ECD is largely based on “knowledge” and “control” over the information stored or transmitted by the Information Society Service, the “nature of the means used therefore” are essential to determine whether a hosting provider is neutral (e.g. Offering generic and automated support to all users does not provide knowledge, and without knowledge, real control is excluded[2]). Therefore, by not acknowledging the importance of the means used by providers to store or transmit the information paragraph 2 of Recital 38 contrasts with both Recital 42 ECD and the CJEU jurisprudence.

3. (In)Compatibility with Article 15 E-Commerce Directive
Article 13(1) of the proposal requires that the measures taken by providers to ensure copyright protection must be “appropriate and proportionate and may include the use of effective content recognition technologies”.
However, this provision seems once again in contrast with both the provisions in the E-Commerce Directive and the established case law of the CJEU.
In particular, Article 15 (1) ECD states that for the providers falling under the safe harbor exemption “Member States shall not impose a general obligation […] to monitor the information which they transmit or store, nor a general obligation actively to seek facts or circumstances indicating illegal activity”.
Furthermore, by rendering the decision in Scarlet Extended VA v. SABAM (Case C-70/10) the CJEU explicitly stated that requiring a provider to adopt a filtering system to monitor all the data of its users to prevent future infringement of IP rights directly violates Article 15 of Directive 2000/31/EC.
However, the use of “content recognition technologies” (e.g. filtering systems) under Article 13 of the proposal entails exactly what is forbidden under Article 15 E-Commerce Directive and the CJEU case law i.e. a general obligation to monitor. For these reasons the wording of Article 13 of the proposal in this scenario has raised various doubts especially given that no definition of what “appropriate and proportionate” has been provided.

4. (In)Compatibility with the Charter of Fundamental Rights of the EU.
The controversy relating to the compatibility between Article 13 of the proposal and the Charter of Fundamental Rights of the EU (herein after the Charter) once again stems from the requirement that content recognition technologies may be adopted.
It has been widely acknowledged by the CJEU case-law (e.g. see Promusicae v. Telefónica de España SAU, Case C?275/06) that Member States shall interpret Directives in a way that a fair balance must be struck between the different fundamental rights protected by the Charter.
In the case at hand the balance must be struck between Article 8 (Data Protection), Article 11 (Freedom of Expression and Information), Article 16 (Freedom to Conduct Business) and Article 17 (2) (Copyright Protection) of the Charter.
In the SABAM v. Netlog NV, Case C?360/10 the CJEU asserted that obliging a hosting provider to adopt a filtering system on all its users does not guarantee a fair balance between the fundamental rights in play. Following the CJEU’s reasoning, imposing a general filtering system on a platform provider contrasts with
a) Freedom of Expression and Information given that the platform would decide which information can be accessed by the public; b) Data Protection, as it would require monitoring all users’ data; c) Freedom to Conduct Business, as it would impose an excessive monetary and operational burdens on platform providers.

Therefore, it seems that the proposed Article 13 fails to strike an appropriate balance between the different rights and interests at stake.

5. Conclusive Remarks

The complicated wording presented by Article 13, along with the different obligations it seems to set upon platforms hosting and sharing user-generated content raised serious doubts on whether the proposal should become applicable law. For these reasons, in an open letter, 56 fundamental rights organizations asked the policy-makers to delete Article 13. Following their reasoning the obligations set in Article 13 of the proposal are in no way compatible with the EU acquis and thus threaten the fundamental rights at stake.

The attempt by the European policy-makers to provide a copyright legal framework that tackles the issues raised by new technologies has not been criticized as such. It seems that the tools used are not up to the task and must be reviewed.


Redatto il 9 gennaio 2018

TAG: copyright, media audiovisivi, Diritto dell'informatica, Diritto dell'Unione Europea, Diritto d'autore

Avvertenza
La pubblicazione di contributi, approfondimenti, articoli e in genere di tutte le opere dottrinarie e di commento (ivi comprese le news) presenti su Filodiritto è stata concessa (e richiesta) dai rispettivi autori, titolari di tutti i diritti morali e patrimoniali ai sensi della legge sul diritto d’autore e sui diritti connessi (Legge 633/1941). La riproduzione ed ogni altra forma di diffusione al pubblico delle predette opere (anche in parte), in difetto di autorizzazione dell’autore, è punita a norma degli articoli 171, 171-bis, 171-ter, 174-bis e 174-ter della menzionata Legge 633/1941. È consentito scaricare, prendere visione, estrarre copia o stampare i documenti pubblicati su Filodiritto nella sezione Dottrina per ragioni esclusivamente personali, a scopo informativo-culturale e non commerciale, esclusa ogni modifica o alterazione. Sono parimenti consentite le citazioni a titolo di cronaca, studio, critica o recensione, purché accompagnate dal nome dell’autore dell’articolo e dall’indicazione della fonte, ad esempio: Luca Martini, La discrezionalità del sanitario nella qualificazione di reato perseguiibile d’ufficio ai fini dell’obbligo di referto ex. art 365 cod. pen., in “Filodiritto” (https://www.filodiritto.com), con relativo collegamento ipertestuale. Se l’autore non è altrimenti indicato i diritti sono di Inforomatica S.r.l. e la riproduzione è vietata senza il consenso esplicito della stessa. È sempre gradita la comunicazione del testo, telematico o cartaceo, ove è avvenuta la citazione.

Filodiritto(Filodiritto.com) un marchio di InFORomatica S.r.l