

**Intermediaries between primary and secondary liability  
– a critical appraisal of the DSM Directive Proposal and  
the need for broader reform**

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# Focus

- Proposal for a Directive on Copyright in the Digital Single Market, COM (2016) 593 final
- Online Platforms
- A primer on some ideas for broader revision
  - General issues – How to make the system balanced?
  - Specific issues in light of the recent ECJ's case law – How to make the system reasonable and practical?

# Online-platforms – Art. 13 & Recital 38

- **Duties of care of online-platforms**
- **Fundamental Problem: Can this work without a baseline?**
  - Scope of the right of communication to the public with regard to the activities of structured online user platforms (hosts)
    - Does Recital 38 solve this problem?
  - Differences in the framework of secondary liability (*Arnold J*, Bratislava 2016/11/8; *Husovec*, Berlin, 2016/11/14)

# Online-platforms – Recital 38

- **thereby going beyond the mere provision of physical facilities and performing an act of communication to the public**
  - ECJ: Airfield./ Canal Digitaal (2011)
  - Act of communication to the public under the ECJ's case law?
    - GEMA ./ Youtube in Germany (OLG Hamburg, 2015; OLG München, 2015)
    - **Recently settled**
- **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**
  - ECJ: Google France&Google (2010)
  - Hitherto German case law

# The broader picture

- **An attempt to clarify the InfoSoc-Directive & the E-Commerce Directive without touching them?**
- **An attempt to establish co-operation without knowing the mandatory baseline of the attempts at further co-operation?**
- **Should the European Legislator be more courageous?**
  - Revision of the **right of communication to the public**
  - **Thereby clarifying the legal situation of (private) users**
  - Revision of **ISP liability**

# Possible ways ahead?

- **A specific path – GS Media „fix“ and some other odds and ends**
  - ECJ McFadden (2016)
- **A more general approach**
  - **adapting the right of communication to the public with regard to typical internet uses**
  - **thereby clarifying the legal situation of (private) users**
  - consider further specifying the framework of accessory liability

# ... and how to do this? → A primer

- **Regulatory technique**

- Broad umbrella general clause
- Non-conclusive list of case examples
- Clarification that liability exemptions do not apply to primary infringement → instead: specific copyright limitations supplemented by (collective) fair compensation

- **Right of communication to the public**

- Act of communication to the public: broad definition (ECJ, Sirinelli)
- Economic assessment: complementary or competing uses?
  - „genuine“ use of the protected subject matter
  - **Airfield ./.** **Canaal Digital:** receptive public, own structured service, [typically a use which competes with the existing or normal exploitation of the work], **actual or constructive knowledge?**
- Case examples

# ... and how to do this? → A primer

- **Case examples – right of communication to the public**
  - Access providers (-)
  - Search engines (-)
    - Possibly different for own uses of search engines which offer an independent service for a receptive public → image search (+)/(-)?
  - News and other aggregators (+)/(-)
  - Normal referencing hyperlinks, normal deep-links (-) ./.

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appropriating frame links (+)

  - Platforms structuring content uploaded by the users for a receptive public → (+)



# ... and how to do this? → A primer

- **New limitation for (genuinely using) online services**
  - Service providers processing and providing access to the public to large amounts of material on the internet (in a structured way by whichever means)
    - E.g. certain aggregators
    - Content platforms which latter however should also have the choice to opt for individual licensing on the basis of respective agreements with rightholders
  - **Collective claim to fair compensation (first stage)**
- **Revision of ISP liability**
  - Limited to an efficient and clearer defined notice&takedown procedure for hosts
  - Taking into account the interests of the individual users by providing them with a dispute procedure and a procedural standing before the courts

# ... and how to do this? → A primer

- **Licensing solution → remaining possible**
  - To **completely** indemnify the individual users
    - Amount of fair compensation would be reduced accordingly
  - Limitation would remain applicable
    - Typically for aggregators
    - But also for third party („private“) material on structured hosting platforms (alternative: extended collective licenses)
      - Allowing choice between the individual license-based solution and the collective remuneration-based solution in particular for SME's
- **Or: compulsory licenses?**

# ... and how to do this? → A primer

- ... and what about **individual users** acting privately on non-licensed platforms?
- Private, socially typical acts of use which do not conflict with the normal exploitation of the work and which do not unreasonably prejudice the interests of the rightholder should be covered by a new internet limitation
  - Non-commercial uses, such as
  - presenting & sharing **parts of works or works in low quality digitization**

# ... and how to do this? → A primer

- **Supplemented by a claim to fair compensation** against
  - Internet-platforms
  - **Access-providers?**
- **Categorization of different platforms & providers**
  - Platforms: possible pay per stream / pay per user models
  - Access providers: pay per user / pay per data amount

# In sum

- **Two-stage copyright law model for internet use**
- **Non-commercial use by private users**
  - Limitation supplemented by fair compensation
  - Payable by all host providers (and possibly by access providers)
  - → „first stage“-compensation
- **Structured content platforms as genuine users → own act of communication to the public**
  - Acquire licenses and/or
  - Limitation supplemented by fair compensation
  - → „second stage“-compensation

**Thank you very much indeed!**

*Leistner, ZUM 2016, 580*

*Leistner, JIPLP 2017, issue no.1 (2017)*

*Leistner & Metzger, Frankfurter Allgemeine Zeitung, January 3, 2017*

<http://www.faz.net/aktuell/feuilleton/medien/gema-youtube-wie-sich-urheberrechts-streit-schlichten-liesse-14601949.html>

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