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EDITORIAL

The EU Copyright Package: A Way Out of the Dilemma in Two Stages

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The turnover of online platforms, such as YouTube, Facebook, Vimeo or others, has continuously increased in recent years. At the same time, authors' revenues for their creative content have not increased proportionally. This has been called the "value gap" between the revenues of platforms and the arguably disproportionally low return to individual authors. In particular, with regard to advertising-supported upload platforms, the value gap is the result of the liability privileges of the European E-Commerce Directive, which has been in force on the European level since 2000. According to the E-Commerce Directive's safe haven rules, the platforms are not liable for copyright infringement committed by their users if the platform operators had no knowledge of the infringement and acted immediately upon a respective notice of copyright infringement. The liability privilege ends only if the platform effectively plays an active role, e.g. by exercising editorial control or actively structuring the content. By contrast, if the platform is limited to a neutral, purely automatic, technical and passive role, damages for copyright infringement can only be claimed from the infringing users; however, such claims are practically unenforceable in most cases.

The resulting far-reaching liability privilege for Internet platforms has been mitigated by the courts, in particular in Germany and also in the UK as well as in other Member States, by establishing so-called "duties of care" on the part of platform operators for stay downs. If the rightholder notifies the platform operator of

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a specific copyright infringement, the platform operator not only has to delete the specific infringing file, but also has to take reasonable preventive measures, such as filtering, in order to ensure that no comparable infringements of the same content will take place on its platform in the future. The specifics of the duties of care have been further developed in case law. However, the extent of these duties, which can also cumulate as a result of multiple notifications, will always depend on the singular case at hand, which hardly provides for sufficient legal certainty, in particular for smaller and medium-size platform operators. Therefore, in Germany the result of litigation between the Society for Musical Performing and Mechanical Reproduction Rights (GEMA) and YouTube before the Hamburg Higher Regional Court and the Hamburg Court of Appeal, concerning the specific role of YouTube with regard to copyright infringement by its users, was eagerly awaited by copyright lawyers and artists. However, the proceedings ended in 2015 before the Hamburg Court of Appeal with an interim result which was not what the musical authors had hoped for: YouTube, according to the Hamburg Court, does not appropriate its users' content as own content, and is therefore not primarily liable as a copyright infringer in its own right. Accordingly, damage claims against YouTube, as a rule, are excluded, following the reasoning of the Hamburg court. Although this judgment, as well as another judgment from Munich, was appealed by GEMA to the German Federal Supreme Court, this appeal on points of law was ultimately not upheld because in the meantime GEMA and YouTube settled the case on the basis of an agreement. This settlement agreement is subject to a non-disclosure clause. Hence, further details of the settlement remain unknown. As a result, however, after years of legal battling, GEMA content is now available in Germany on the YouTube platform. Despite the agreement, both parties upheld their legal position, i.e. GEMA continues regarding YouTube as a user in its own right, while YouTube argues that the agreement mainly serves to indemnify its individual users. Thus, the vital legal question, if and possibly which content platforms must be regarded as users of copyright protected material in their own right, has not been answered by the long-lasting proceedings in Germany let alone in Europe.

However, this legally unsatisfying situation might now be changed by the European legislator. In September 2016 the Commission presented its Proposal for a Directive on copyright in the Digital Single Market. In its Art. 13 the proposal deals with content platforms, providing for a duty of "providers that store and provide to the public access to large amounts of copyright protected material" to co-operate with rightholders "to take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with service providers". This more practical, "procedural" provision does not really expressly resolve the vital issue of whether certain platforms infringe the exclusive right and therefore must acquire authorization from rightholders for their own use. Further, the provision does not clarify the legal situation of users who upload copyright protected material. With regard to the liability of platforms, the Commission tries to tackle the issue by way of Recital 38 of the proposal, according to which "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 E-Commerce Directive's liability exemptions. However, the exemptions do not apply, according to Recital 38, if the provider plays an active role "by optimizing the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor". These proposed provisions and considerations should now form the basis of a more courageous, future-proof approach by the Council and the European Parliament in the ongoing negotiations of the Commission's proposal.

Given the controversial nature of Internet platform liability, it will be difficult to find a political solution in the coming months although it is more than urgent. Most copyright infringements are committed in the user's private sphere. It is for this reason that copyright depends on its social acceptance more so than property of physical goods. Today, this acceptance is put in peril, especially among younger Internet users. Ultimately, it is the authors who pay the price if their works are constantly used without any compensation.

A way out of this deadlock could be a set of provisions that combines several elements: At an initial stage, a limitation should allow private users to share works with other private users on Internet platforms as long as such use is in accordance with fair practice and does not conflict with the exploitation of the work on the primary market. Rightholders should receive a fair compensation for such use of their works. At first glance, such a limitation may appear far reaching. However, on closer examination, a limitation appears to be necessary as an answer to the declining acceptance of copyright and the alarming reality of daily massive copyright violations committed by anonymous users.

A comparable approach was chosen by the German legislator in 1965. At the time, the legislator exempted private copying from liability but imposed at the same time a levy on copy machines, blank tapes and other media used for private copies. These levies are collected by collecting societies and distributed among the rightholders. A similar solution could be worked out for private uses on Internet platforms. Private users should be free to share copyright protected materials on Internet platforms with other private users, provided that such use is in accordance with fair practice. This would imply the freedom to make the necessary copies and to make those copies available to a limited public, e.g. to a group of other private users connected over a social media network or hosting platform. Such sharing of content should, however, not result in damage on a commercial scale for rightholders. Therefore, entire movies or episodes of series or longer pieces of music should not be exempted. Furthermore, the legislator should combine the limitation with a compensation to be paid for such uses to be collected by collecting societies and distributed among the rightholders. Since a collection of these claims from individual users would be complicated and expensive, the Internet platforms – and possibly also access providers – should pay the compensation on behalf of their users. Platform providers would then have to consider these payment duties within their business model and pass on the costs to private users, e.g. by offering premium services against payment or placing advertisements.

At the second stage, the legal situation of different categories of platforms with regard to the right of communication to the public should be clarified. In essence, it should be confirmed that platforms do carry out a communication to the public in their own right if they effectively offer an autonomous, content-related service to a receptive public that competes with the normal exploitation of the work by the rightholders, in particular by promoting, selecting, structuring or optimizing the presentation of the works or other subject-matter to a targeted public irrespective of the nature of the means used therefor. The "structured" content of typical video, music or image platforms would be an example in point for such acts of communication to the public by platforms themselves. The different categories of social platforms, share hosters, cloud services as well as news and other aggregators would have to be assessed individually and structured in different typological categories according to the crucial question, whether the platform presents the material to a receptive public in the context of an autonomous, structured, content-related service that competes with the normal exploitation of the protected subject-matter. If this is the case, such as with regard to the typical video, music and image platforms, the platform operators would have to acquire licenses for their acts of use. Admittedly, the rights clearance process with regard to such licenses might be cumbersome and difficult, in particular for smaller and medium-sized platforms. Therefore, it could be considered to effectively foster the grant of licenses by different mechanisms, such as compulsory licenses (with certain reservation periods to protect the primary exclusive exploitation of the works for a specific period of time), mandatory collective administration of the rights with regard to platform uses, or even a statutory exception for certain mass-aggregating platform uses on the condition that no fair, reasonable and non-discriminatory license offers have obviously been made by the respective rightholders. Elements of an extended collective licensing regime, such as in the Scandinavian EU Member States could support this system with regard to smaller, protected content created by individual users.

The two-stage-solution outlined here should provide a reliable legal framework to the existing social reality of typical Internet uses. Use and exploitation of exclusive premium content can continue to be mainly carried out by way of access-restricted streaming (and download) services, which are already a commercial success today. In addition, the typical "social" uses on the Internet, which form part of a widely accepted social reality and do not conflict with the normal exploitation of the works, would be legally covered by the new exception for private, non-commercial, so-called "social" forms of use by individual Internet users. Ultimately, different legal mechanisms, such as either a carefully drafted exception for aggregating platform uses under certain conditions or possibly a limited compulsory licensing regime or a provision on mandatory collective administration of rights could be considered in order to foster the establishment of functioning and comprehensive licensing schemes in the market.

It is hoped that this ambitious but feasible approach will be followed up in the ongoing negotiations in the Parliament and in the Council on the Proposal for a Directive on copyright in the Digital Single Market. An equally good opportunity for such a project to genuinely adapt European copyright law to the realities of Internet use may not come again soon.