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WORKING PAPER

INFORMATION

From:	Presidency
To:	Working Party on Intellectual Property (Copyright)
Subject:	Presidency Flash - Intellectual Property (Copyright) WP on 17/18 October 2017

In view of the Intellectual Property (Copyright) Working Party meeting on 17 and 18 October 2017, delegations will find in Annex the Presidency Flash.



Presidency Flash

Copyright Working Party 17 and 18 October 2017

Dear Colleagues,

We would like to inform you that at the Working Party of 17 September we will continue discussions on Article 13 and the main policy elements to be considered, as well as Article 17 of the DSM Directive. On the 18th we will discuss the second Presidency compromise proposal for the Regulation on online transmissions of broadcasting organisations and retransmissions of television and radio programmes.

Regarding Article 13, we would like to get further indications from the delegations as to which elements they consider crucial and should be included in the text. We would invite you to focus on the following main elements, keeping in mind that these elements can be used separately and in combination:

- (1) The need to clarify the act of communication to the public for the services targeted by Article 13. If such a clarification is considered necessary, would you agree that the criteria to be used should be copyright specific and avoid confusion with the criteria to be used for assessing whether a hosting service provider can benefit from the limited liability regime provided for in Article 14 of the e-commerce directive? Possible criteria for consideration could be those used by the CJEU (e.g. indispensable role, knowledge of the consequences of one's acts).
- (2) If the communication to the public is to be clarified, should the interplay with Article 14 of e-commerce directive be clarified (liability question), notably:
 - should it be explicitly clarified how services that communicate to the public are to be considered under Article 14 of the e-commerce directive , or
 - should it be left open, while recalling that even if such services communicate to the public, the possibility for them to benefit from the limited liability regime under Article 14 ECD will continue to be assessed case by case, in accordance with the criteria set in Article 14





ECD (in essence making it clear that the concept of communication to the public and the assessment of the status of the services under Article 14 ECD are two different legal concepts and can be applied in parallel)?

(3) The need to provide for measures to prevent certain content:

- either as an additional provision, i.e. combined with the clarification on communication to the public and limited to those services that may still be covered by Article 14 ECD, but who have a significant amount of protected content on their services, or
- as a self-standing measure, as provided by the COM proposal.

(4) Any other element you consider important

We would like to remind the delegations that even if the first Presidency compromise proposal regarding Articles 1, 2 and 10-16, discussed on 11 and 12 September, already included some drafting suggestions on the elements above, these would be further modified and improved taking into account the discussion at the Working Party of 17 October.

With regard to Article 17, which regulates the relationship between the new mandatory exceptions and the existing ones, we invite the delegations to focus on the main substantive problems they see with the approach taken, and in particular on their specific concerns with regard to the new exceptions. As a reminder, Article 17 introduces targeted amendments to the exceptions for illustration for teaching and research in Directives 2001/29/EC and 96/9/EC and the exception on specific acts of reproduction in Directive 2001/29/EC aiming at clarifying that these optional exceptions will continue to apply "without prejudice" to the new ones introduced by the DSM Directive. As explained by the Commission, the rationale behind Article 17 is to clarify that the existing exceptions continue to apply but that within the scope of the new exceptions (i.e. within the scope of Articles 3 to 5) the new exceptions will prevail over the existing ones. This approach is illustrated by recital 5 of the Directive, which explains the relationship between new and existing





exceptions as follows: *"Mandatory exceptions or limitations for uses of text and data mining technologies in the field of scientific research, illustration for teaching in the digital environment and for preservation of cultural heritage should be introduced. For uses not covered by the exceptions or the limitation provided for in this Directive, the exceptions and limitations existing in Union law should continue to apply. Directives 96/9/EC and 2001/29/EC should be adapted."*

At the Working Party of 17 October we will also have a presentation by the Commission of the *Communication on Tackling Illegal Content Online - Towards an enhanced responsibility of online platforms* COM(2017) 555 final), adopted on 28 September.

At the second Working Party day of 18 October we discuss the second Presidency compromise proposal for the Regulation on online transmissions of broadcasting organisations and retransmissions of television and radio programmes contained in document 13050/17. The most significant changes in the text concern the country of origin principle, where we have tried to take into account the concerns of several delegations through a number of modifications. First and most importantly, we have reduced the scope of this principle in Article 2(1a) by limiting its application to works or other protected subject matter, which are produced, commissioned and fully financed or co-produced by the broadcasting organisation and to works and other protected subject matter which have been licensed to the broadcasting organisation by a third party, with the exception of films, series and works and other protected subject matter included in the transmissions of sport events. Additionally, we have reintroduced the term 'ancillary online service' as in the Commission's proposal, to avoid some misunderstandings that the clarifications made in the first compromise proposal seemed to raise. We have also tried to further clarify the definition in Article 1(a) and relevant recital 8. Finally, we have re-inserted the paragraph on fixing the amount of license fees back into Article 2(2) to explain further that all aspects of the ancillary online service need to be taken into account when determining the license fees under the country of origin principle.





With regard to the retransmissions part of the Regulation and notably the inclusion of retransmissions through internet access services (Articles 3 and 1(b) and relevant recitals 12-14), we have sought to clarify under which condition such services are to be covered, by referring to a controlled circle of users. We have also further reflected the possibility for the Member States to continue applying certain national provisions concerning the collective management of retransmission rights to the extent they are in compliance with Union law.

We look forward to constructive discussions and to seeing you all at the working party.

Kind Regards

The Presidency

Kärt N, Merili, Anneli, Kärt K and Maarja

