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NOTE

From: General Secretariat of the Council
To: Delegations

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Subject: Proposal for a Directive of the European Parliament and of the Council on
copyright in the Digital Single Market
- Questions by the German delegation to the Council Legal Service
regarding Article 13

At the request of the German delegation, delegations will find attached the questions submitted by that delegation to the Council's Legal Service.

We welcome the fact that the Commission has addressed the matter of how to fairly distribute the value created by internet platforms. We must ensure that creative individuals receive fair pay, also if their work is available on the internet. Concurrently, platforms must not be jeopardised in their function as a societal medium of communication. Moreover, it must be ensured that the competitiveness of European enterprises and the freedom of scientific communication are not impaired.

Article 13 of the proposal and its appurtenant Recital 38 interface with the InfoSoc Directive 2001/29/EC and with the E-Commerce Directive 2000/31/EC. For the further negotiations of the Council Working Party, it will thus be decisive to clear up the reach of these existing acts. Moreover, clarity must be obtained as to how to adequately reflect in the proposal the right enjoyed by authors and performers to fair remuneration.

For this reason, we would ask the Council Legal Service for its observations on the following questions:

- *To what extent are the actions by the service providers set out in Article 13 paragraph 1 of the draft governed, already under applicable law, by the right of communication to the public within the meaning of Article 3 of the InfoSoc Directive – and all the more so in light of the most recent adjudication by the CJEU, inter alia in the legal matter C-527/15 (“Filmspeler”), legal matter C-160/15 (“GS Media”) and legal matter C-610/15 (“The Pirate Bay”)?*

Background: In a number of decisions, the CJEU has further structured and put into more specific terms the right of communication to the public; at the time the Commission elaborated its proposals in September of 2016, these decisions were not yet apparent. Accordingly, it is necessary, as a matter of urgency, to clear up their impacts on the proposed directive.

- *How do Article 13 and Recital 38 of the draft relate to the liability privileges for service providers that have been established in the Directive on electronic commerce (2000/31/EC)? How could Article 13 of the draft be put in more clear terms?*

Background: It is doubtful that the Commission's proposal concerning the requirements made on service providers in terms of the care they are to exercise pursuant to Article 13 and Recital 38 of the proposal will not interfere with the prohibition of a general obligation to monitor as stipulated by Article 15 of the Directive on electronic commerce 2000/31/EC. In this context, the liability privilege granted to host providers in Article 14 of the Directive on electronic commerce 2000/31/EC should be taken into account.

- *How can it be assured that authors and performers obtain a reasonable share of the income resulting from the online use of the content they have created? Are there any legal concerns against providing for a direct claim to remuneration for authors and performers?*

Background: Since Article 13 of the draft already works to strengthen the position of holders of derivative rights (music labels, film studios), the legitimate interest of authors and performers in obtaining fair remuneration should also be taken into account. Especially where the music industry and cinema are concerned, the exploitation scenarios will often be complex and will not include any direct contractual claim on the part of the authors against the parties essentially determining the exploitation in economic terms. However, it should be taken into account in this context whether the rightholders are uploading their content themselves or whether this action is taken by third parties.

- *Would Article 13 of the draft also be applicable to providers who do not have a branch in the Union, but who are pursuing their activities within the Union (such as YouTube)?*

Background: At the Council Working Party session of 15 and 16 February 2017, the Commission took the position that the principle applies of where the service provider is established, as stipulated by the Directive on electronic commerce 2000/31/EC. Accordingly, Article 13 of the draft placed solely those providers under obligation, the Commission held, who have their registered seat in the EU, in which context a “secondary establishment” was sufficient in the Commission’s view.

- *Would it be possible to introduce a provision on “notice and takedown” having applicability throughout the European Union? And would such a provision potentially be suited to likewise protect the interests of rightholders?*

Background: A provision on notice and takedown having applicability throughout the European Union has the potential to likewise be an effective means of combating violations of rights. With regard to the freedom of information, this might be a gentler means. However, in this context as well, the objective should be pursued of giving authors and performers a reasonable share of the income generated by the platforms.

- *How is it possible to ensure that platforms onto which authors upload mainly their own works, or on which mostly public-domain works are stored, will not be encumbered with the costs of installing monitoring systems, should any such systems be introduced? How can it be made clear, should this be needed, that the provision does not apply to platforms serving non-commercial or scientific purposes?*

Background: The proposal obviously is primarily intended to target commercial platforms. However, particularly in the field of academia, there will be platforms onto which researchers and scientists will upload their texts or data sets. The European Union itself is among those operating such platforms by its OpenAire. A constant monitoring and the resulting costs cannot be brought in line with the freedom of science.
