EDiMA

Article 13 of the draft Directive for Copyright in the Digital Single Market would…

Drastically reinterpret and narrow the e-Commerce Directive:
Recital 38 claims that "active" hosting services can no longer rely on the e-Commerce Directive. This means that the limited liability protection in Article 14 of the e-Commerce Directive (eCD) would no longer apply to information society service providers (ISSPs). This is a dramatic reinterpretation of the eCD and CJEU case law (L'Oréal v. eBay), which state that being an active provider is not in itself cause for liability - knowledge is what matters. Hosting providers are NOT liable because they play an active role. They are liable when they have "knowledge or control of the data stored". This knowledge or control doesn't have to be the result of the provider's active role.

Dramatically broaden the scope of copyright to target user uploads and open platforms:
Article 13, when read with Recital 38, states that ISSPs which allow users to upload and share copyright-protected works are in themselves engaging in a copyright activity, i.e. a communication to the public. According to the proposal, it is sufficient that a service stores and provides access for it to be liable for infringement. Currently, under existing EU law (Directive 2001/29, Article 3), the court relies on numerous criteria to establish an infringement. It has never found that it was enough to show that a service "gives access" to establish infringement. Moreover, this means that both users who upload, and the platforms that host, would be liable for infringement (double liability). Concretely, linking would be a copyright infringement. In Svensson, the CJEU found that a hyperlink "gives access" to content, but that it did not amount to a communication to the public. Under the proposal, the finding that the link provides access to content is enough to establish an infringement.

Mandate licence agreements:
Article 13 and Recital 38 mandate that ISSPs conclude agreements with rightholders for user uploaded content. The breadth and diversity of content uploaded to online platforms means it is theoretically and practically impossible to license. The fact that most content uploaded to platforms is created by consumers – including 170 million EU citizens in 2016 – means that this measure is not justified. Making platforms liable for user uploads simply means that uploads will have to be restricted to content for which licenses can be checked. Moreover, if license agreements are a precondition for operating a platform or offering such a service, this will form an additional and prohibitive obstacle to European start-ups and SMEs who are attempting to scale-up.

Mandate content filters:
Article 13 states that ISSPs must take measures to prevent the availability of works identified by rightholders and refers to effective content recognition technologies. This is the only means available to proactively, ex-ante, prevent users from uploading infringing content online – and it is largely fallible and non-existent or unworkable for many types of content (pictures, text, music, gifs, etc.). This is not a special and specific monitoring obligation, it is a general monitoring obligation that is in direct contradiction to Article 15 eCD. By extending mandatory filtering systems to social media, communications applications and other types of online services, the proposal creates a general monitoring of the internet, as virtually all the services used in everyday life would be targeted within the scope. This is contrary to CJEU case law (See Scarlet v. SABAM, SABAM v. Netlog, Telekabel, L'Oréal v. eBay). The prohibition on general monitoring is not there to protect internet intermediaries and their revenues, it exists to protect fundamental rights including the right to conduct a business, the freedom of expression, and the right to protection of personal data (SABAM v. Netlog).

All of this, with no safeguards for users:

Finally, the proposal does not provide adequate redress mechanisms, in the inevitable instance that authorised and completely legal content and creations are removed. Instead, it requires ISSPs to put a redress mechanism in place – making ISSPs the judges of whether a particular user is infringing copyright. It fails to provide any limit on rightholders claiming content they do not own, public domain content, or content of a competitor. It is also so vague it would guarantee a highly cumbersome and fragmented approach to redress – the opposite of a digital single market, and the opposite of a guarantee of users' rights. This and the over-cautious filtering of the online space will impact users' freedom of expression. It will also place rightsholders and States in the position to define technological standards for how and what technologies are used on online platforms and to what extent the fundamental rights protected by copyright exceptions are safeguarded in the online space, which will effectively undermine the use of copyright exceptions and user rights.