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CONTRIBUTION OF THE LEGAL SERVICE[1]

To:	Working Party on Intellectual Property
Subject:	Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (doc.12254/16) - legal issues on Article 13 and recital 38 of the proposal

I. INTRODUCTION

1. In the context of the Intellectual Property Working Party's (IP WP) discussions on the above mentioned proposed Directive, the Council Legal Service (CLS) was requested by several delegations to present its views on a number of issues related to Article 13 and recital 38 of that proposal for a Directive. Those issues may be summarised as follows : compatibility of the proposed Article 13 with the Charter of Fundamental Rights (the Charter), relevance and legal impact of recital 38 in the relationship of that Article with Article 14 of Directive 2000/31/EC (e-commerce Directive[2]), and relationship of the proposed Article 13 with Article 15 of the e-commerce Directive.

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[2] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market ('Directive on electronic commerce'), OJ L 178 , 17/07/2000 P. 0001 - 0016.

2. This contribution reflects and further develops the oral statement made by the representative of the CLS at the meeting of the IP WP on 11 September 2017. The CLS underlines that the considerations below are general and preliminary due to the fact that fundamental policy choices and clarifications related to the proposal will still have to be made by the delegations at the stage of the analysis of the Presidency's compromise. The CLS will therefore comment on the issues raised in the IP WP in respect of the Commission's proposal, without prejudice to the improvements/adjustments that will need to be made following further discussions, on the basis of the necessary policy choices.

II. LEGAL BACKGROUND

3. The Commission presented its proposal in the framework of the modernisation of EU copyright rules in the digital environment. As it follows from the preamble of the proposal (recitals 2, 3, 37 and 39) and the impact assessment[3], the problem that Article 13[4] aims at addressing in the context of the functioning of the "*online content marketplace*" is, on the one hand, the right holders' difficulty "*to determine whether, and under which conditions,*" their copyright protected works are used and, on the other hand, the loss of opportunities "*to get an appropriate remuneration*" when users of information society services providing access to copyright protected works upload those works "*without the involvement of right holders*".

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3 Impact Assessment pp. 152-170 (doc. 12254/16 ADD1).

4 *Article 13 - Use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users*

1. Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.

2. Member States shall ensure that the service providers referred to in paragraph 1 put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1.

3. Member States shall facilitate, where appropriate, the cooperation between the information society service providers and rightholders through stakeholder dialogues to define best practices, such as appropriate and proportionate content recognition technologies, taking into account, among others, the nature of the services, the availability of the technologies and their effectiveness in light of technological developments.(emphasis added).

4. According to the proposed Article 13 and its corresponding recitals, and as it flows from the impact assessment and the structure of the proposed Directive, upon its transposition, the Member States will have ensured that "*the information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users*" will have the specific obligation to take measures, "*such as the use of effective content recognition technologies*", which will have to be "*appropriate and proportionate*", in order to "*ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers*". Modalities are further foreseen aiming at framing the cooperation between right holders and the information society service providers (ISSPs) concerned[5]. Finally, when the Directive has been transposed, those ISSPs will be meant to have put in place and made available to the users of their services "*complaints and redress mechanisms (...) in case of disputes over the application*" of the required measures.

[5] The CLS notes that according to the impact assessment, the ISSPs that are likely to be concerned by the proposed Article 13 are on line platforms such as Youtube, Daily Motion,Vimeo, Pintinterest - Impact Assessment pp.152-156 and 167.

5. Various delegations considered that the possibility to use mechanisms such as content recognition technologies (or filtering systems) raises the issue of the compatibility of the use of those mechanisms with Articles **8** (protection of personal data), **11** (freedom of expression and information) and **16** (freedom to conduct a business) of the Charter. More specifically, those delegations found that the proposed Article 13 interferes both with the rights of the ISSPs (Article 16) and with those of the users of their services (Articles 8 and 11) in the following way : on the one hand, it places a burden on the ISSPs while exercising their economic activity and, on the other hand, it restricts the freedom of expression and information of the users of their services by preventing them from benefiting from the possibility to upload /enjoy protected content; it also interferes with their right to protection of their personal data, to the extent that mechanisms such as content recognition technologies could lead to their identification. Those concerns stemmed from the judgments in the *Netlog* and *Scarlet Extended* cases[6], where the Court found, under the specific and particular circumstances of those cases, that the injunction to use the filtering system at stake could not respect the requirement that a fair balance be struck between the fundamental rights which were competing in those cases (and which were the same as in the present proposal).

[6] See judgments in *Sabam/Netlog NV*, C-360/10, EU:C:2012:85, and in *Sabam/Scarlet Extended SA*, C-70/10, EU:C:2011:771.

6. With regard to the proposed Article 13 read together with the first and second indent of recital 38[7], concerns are raised because of the unclear terms in which those indents are drafted and because of the fact that they make explicit reference to the notions of "*communication to the public*" (CTP), and of "*liability exemption*" provided for in **Article 14** of the e-commerce Directive (the so called "safe harbour" clause from which only ISSPs falling within the scope of that Article may benefit and only under the conditions set out therein).

Given that in the enacting terms there is no further explicit reference to those notions, doubts are cast as to the guidance that recital 38 intends to give on the relationship between the proposed Article 13, CTP and the e-commerce Directive. In particular, the following questions arise :

- does that recital aim to qualify the actions performed by the ISSPs falling under the scope of the proposed Article 13 as acts of CTP?
- does it, in that case, mean to deprive those providers of the benefit of the liability exemption provided for in the e-commerce Directive?

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7 *(38) 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 liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council.*

In respect of Article 14, it is necessary to verify whether the service provider plays an 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.

In order to ensure the functioning of any licensing agreement, information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users should take appropriate and proportionate measures to ensure protection of works or other subject-matter, such as implementing effective technologies. This obligation should also apply when the information society service providers are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC.

- or does it imply that, even if the actions performed by those providers were to be considered as acts of CTP, those providers would be eligible for the liability exemption?
- on the other hand, given that on its face, the proposed Article 13 deals only with a specific obligation upon the ISSPs falling under its scope, what is the purpose of a recital recalling (moreover incompletely and not clearly) the case law on CTP and on the "safe harbour" clause, issues that the proposed Article 13 does not in whatsoever manner address?
- what is, then, the impact of a recital which in reality neither sets reasons nor corresponds to the rules set out in the proposed enacting terms? Would it merely constitute an (incomplete) reminder of the case law on CTP and on the "safe harbour" clause, in which case it could be considered that the legislator leaves it to the Court to decide in the future what the exact relationship between the proposed Article 13, the acts of CTP and Article 14 of the e-commerce Directive will be?

7. As to the relationship of the proposed Article 13 with **Article 15** of the e-commerce Directive (general monitoring obligations), various delegations wondered whether the proposed obligation to implement mechanisms such as effective recognition technologies is to be seen as a general monitoring obligation in the sense of Article 15 and, should that be the case, whether the obligation under the proposed Article 13 would be "*infringing*" or "*incompatible*" with the e-commerce Directive which prohibits general monitoring obligations.

III. LEGAL ANALYSIS

Compatibility with the Charter

8. As described in paragraph 3 of the present contribution, the measures envisaged by the proposed Article 13 aim at strenghtening the protection of copyright, which is an intellectual property right, which may be infringed by the nature and content of certain information stored and made in "*large amounts*" accessible to the public via uploads by the users of the services of certain ISSPs. The protection of the right to intellectual property as a fundamental right is enshrined in Article 17(2) of the Charter[8].

   At the same time, those measures are susceptible to affect the fundamental rights of the ISSPs concerned or those of the users of their services, in the way described in paragraph 5 of the present contribution. The CLS notes that there is nothing in the wording either of Article 17 or of Articles 16, 11 and 8 of the Charter or in the Court's case law to suggest that any of those rights is inviolable and must for that reason be absolutely protected. On the contrary, Article 52(1) of the Charter accepts that limitations may be imposed "*on the exercise of the rights and freedoms recognised by this Charter*" under the conditions set out therein[9]. In that respect, according to the Court, when different fundamental rights protected under EU law are competing, it is required that a fair balance be struck between the rights at stake, in order for them to be reconciled. It is therefore necessary, for the balance to be fair and the limitations acceptable, that the principle of proportionality be respected[10].

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8 See judgment in *Mc Fadden*, C-484/14, EU:C:2016:689, paragraph 81.

9 Article 52(1) of the Charter :

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

10 See judgments in *Mc Fadden*, C-484/14, EU:C:2016:689, paragraph 83, and in *Promusicae*, C-275/06, EU:C:2008:54, paragraphs 68 and 70.

9. In the present context of evolving discussions in the IP WP on the fundamental question whether, to what extent and how the protection of copyright protected works should be further ensured, an assessment of the respect of the principle of proportionality involves an evaluation of different policy options which the legislator will need to consider before making its final policy choice.

In the following paragraphs, the CLS will assess at their face value elements of the policy option proposed by Article 13 which the Court, if ever that Article were to be adopted as such, could consider important when assessing the proportionality.

10. With regard to the **freedom to conduct a business**, the delegations that raise the issue of the compatibility of Article 13 with the Charter rely upon the findings of the Court in the *Sabam/Netlog NV* case, where the introduction of the contested filtering system would lead to an obligation on the ISSPs to proceed to a monitoring which would be unlimited in time, directed at all future infringements and intended to protect not only existing works, but also works that have not yet been created at the time of the introduction of that system. Such a system would also require that the service providers determine themselves whether a specific content is uploaded unlawfully or not[11].

11. Although the Court did not rule that filtering systems were as such prohibited, it found under the specific circumstances of that case that the use of that filtering system "*would result in a serious infringement of the freedom of the hosting service provider to conduct its business since it would require that hosting service provider to install a complicated, costly, permanent computer system at its own expense,* (...)."[12] (emphasis added).

[11] See judgment in *Sabam/Netlog NV*, C-360/10, EU:C:2012:85, paragraphs 36 and 45.
[12] See judgment in *Sabam/Netlog NV*, C-360/10, EU:C:2012:85, paragraph 46.

12. It does not flow though from the proposed Article 13 that the measures envisaged would be necessarily filtering systems[13] and, should that be the case, that those systems would be of the same type as in *Sabam/Netlog NV*, thus overly "*costly*" or "*complicated*" for businesses. On the contrary, on the face of the proposed Article 13 and its corresponding recital 39, elements that could be considered as guarantees by the Court, if ever seized, are provided, so that the envisaged measures could be seen as different and less burdensome than the filtering system set in the context of *Sabam/Netlog NV*. Indeed, according to the proposal :

- the obligation to take measures is confined only to subject matter identified by right holders through the cooperation with the ISSPs. This means that the latter will not have to determine themselves whether a specific content is uploaded unlawfully (as in *Sabam/Netlog NV*), but only to identify protected content at the moment of the upload on the basis of the identification data that will have been provided by the right holders[14]. And since the right holders will have to produce themselves the data needed (in order to provide them to the service providers), the right holders will have participated in the cost of the measures to be taken by the ISSPs in such a way as to reduce the logistic and financial burden of the mechanism for the ISSPs.

13 The proposal refers to content recognition technologies as indicative measures (see the use of "*such as*" throughout Article 13).

14 Such as the so called "fingerprints" - see Impact Assessment p. 156.

- Moreover, the Member States will have to ensure that those ISSPs that store and provide access to the public "*to large amounts*" of works and other subject matter will be able to choose the measures to use and that their choice will be "*appropriate and proportionate*" (which was not the case in *Sabam/Netlog NV*). Such an open option may be considered by the Court as allowing the ISSPs concerned to avoid systems that would appear, for instance, complicated to install, and at the same time, to opt for the most affordable and effective ones amongst those available, taking into account elements such as "*the resources and abilities available*"[15] to them, the specificities and the needs of their services, as well as their size[16].

- Finally, in addition to the previous element, the proposed Article 13(3) provides for the facilitation of the involved stakeholders' cooperation through dialogues between them, in order to define best practices "*such as appropriate and proportionate content recognition technologies taking into account, among others, the nature of the services, the availability of the technologies and their effectiveness in light of technological developments*". On the face of that provision, there will be no obligation on the ISSPs to use any given content recognition technology that could appear inappropriate to their businesses; instead best practices will be defined together with the right holders, so that the technology that is most suitable to their business model is chosen.

15 See in that regard judgment in *Telekabel*, C-314/12, EU:C:2014:192, paragraphs 50-52 : "*(50) An injunction such as that at issue in the main proceedings constrains its addressee in a manner which restricts the free use of the resources at his disposal because it obliges him to take measures which may represent a significant cost for him, have a considerable impact on the organisation of his activities or require difficult and complex technical solutions. (51) However, such an injunction does not seem to infringe the very substance of the freedom of an internet service provider such as that at issue in the main proceedings to conduct a business. (52) First, an injunction such as that at issue in the main proceedings leaves its addressee to determine the specific measures to be taken in order to achieve the result sought, with the result that he can choose to put in place measures which are best adapted to the resources and abilities available to him and which are compatible with the other obligations and challenges which he will encounter in the exercise of his activity.*" (emphasis added).

16 Impact assessment p.167.

13. The above elements tend to support the view that the Court would be likely to find the proposed Article 13 together with its recitals 37 and 39 as reflecting a fair balance between the fundamental rights at stake (ie the protection of intellectual property and the freedom to conduct a business) : while that Article would allow right holders to control the unauthorised upload of their copyright protected content, it does not appear to impose on the ISSPs concerned any burden as in the *Sabam/Netlog NV* case, so as to excessively impair the overall exercise of their economic activity ; by removing the absolute terms and compulsory aspect that were typical of the filtering system in that case, the proposal leaves to the ISSPs at stake the possibility to choose, through cooperation with the right holders, the most appropriate and proportionate measure to achieve the objective pursued[17].

14. As to **the freedom of expression and information** of the users of the services of the ISSPs concerned, the delegations that have doubts on the compatibility of the proposed Article 13 with the Charter rely on the following findings of the Court in the *Sabam/Netlog NV* case : the risk that filtering systems might not distinguish adequately between unlawful and lawful content, and thus block lawful communications. According to the Court, a communication is lawful when "*statutory exceptions to copyright*" apply or when "*in some Member States certain works fall within the public domain*" or when works are "*posted online free of charge by the authors concerned*"[18].

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[17] Idem.
[18] See judgment in *Sabam/Netlog NV*, C-360/10, EU:C:2012:85, paragraph 50.

15. As pointed out previously, the envisaged measures will only apply in respect of copyright protected works and other subject matter identified by right holders. Obviously, this may lead to a substantial decrease of the possibility that lawful content be blocked, since the right holders themselves will have identified those of their protected works to which they want to limit access. It is true, however, that, in the case that the envisaged measures fail to identify precisely the protected content which is uploaded, the freedom of expression or information of users that benefit either from an exception or limitation to copyright protection[19] (for instance, caricature or parody), or from the fact that a work has fallen in the public domain[20], will be affected in an unjustified manner, along the lines of the findings of the Court in *Sabam/Netlog NV.*

16. Thus, in order to address the conflict between the two fundamental rights at stake, the proposed Article 13(2) provides for the Member States' obligation to ensure that the ISSPs concerned will put in place complaints and redress mechanisms, so that the users of their services are enabled to contest situations where access to lawful content is limited, and that lawful content does not remain blocked by the inadequate application of the envisaged technologies.

17. Under those conditions, it can be considered that the obligation foreseen in the proposal to introduce complaints and redress mechanisms is an appropriate means for the legislator to strike a balance between the competing fundamental rights, especially as, on the basis of the impact assessment, the current practice, where right holders ask to take down each individual uploaded protected content "*which can be infringed thousands of times*" (...), "*leads to significant costs for them and appears insufficient given the large scale of uploads*" [21].

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[19] Article 5(3) of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society *OJ L 167, 22/06/2001 P. 0010 - 0019* (Infosoc Directive).

[20] However, from a logical point of view, it is quite unlikely that works in the public domain or used free of charge might be blocked, since the right holders would not provide the identification data of those works to the ISSPs, either because they know that the rights have lapsed or because they have agreed to uses of those works free of charge.

[21] Impact assessment, pp.155 and 157.

18. Finally, concerning the **right to personal data protection**, the delegations that were concerned with the compatibility of the proposed Article 13 with the Charter refer again to the *Sabam/Netlog NV* case, where the Court found that there could be interference with the right to the users' personal data protection, since "*the installation of the contested filtering system would involve the identification, systematic analysis and processing of information connected with the profiles created on the social network by its users. The information connected with those profiles is protected personal data because, in principle, it allows those users to be identified*" [22] (emphasis added).

19. The CLS recalls that the contested filtering system in *Sabam/Netlog NV* entailed the active observation of almost all of the information stored by all the users of the services provided, and the monitoring of all the data relating to those users[23].

20. That said, it does by no means flow from the proposed Article 13, the impact assessment or the structure of the proposal that the envisaged measures would entail the processing of information on all users or the systematic analysis of their profiles, so that those users can be identified, as was the case in *Sabam/Netlog NV*. Indeed, the proposed Article 13 concerns exclusively uploaded (and not downloaded or streamed) copyright protected content which, as already previously indicated[24], will have to be identified once, at the moment of the upload, on the basis, for instance, of the "fingerprints" provided by the right holders. There is no requirement whatsoever to check other data related to the uploaded content, such as the identity or IP address of individual "uploaders" or the date, time or location of their upload.

22 See judgment in *Sabam/Netlog NV*, C-360/10, EU:C:2012:85, paragraph 49.
23 Idem, paragraph 38.
24 Paragraph 12 of the present opinion.

21. However, if it appears, during further technical discussions at the level of the IP WP, that, in view of any technological developments, the envisaged proposed measures may lead to an interference with the right to personal data protection, further guarantees will need to be foreseen both in the enacting terms and in the preamble of the act[25].

22. In the light of the analysis of all the above elements, the CLS is of the view that the policy option reflected in the proposed Article 13 responds to the Court's requirement of ensuring a fair balance between the competing fundamental rights which must be reconciled, and that the limitations to those fundamental rights do not appear to be disproportionate.

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[25] Those guarantees will have to focus at least on the proportionality of the interference, its limitation to the purpose of the Directive, the duration of any storage of personal data and their destruction at the end of that duration. In any event, the CLS recalls that the preamble of the proposal contains in its recitals 45 and 46 general safeguards on the respect of the Charter, on the requirement to interpret and apply the Directive in accordance with the fundamental rights guaranteed therein, and on the requirement to comply with Union law on personal data protection, should any processing of personal data appear to take place.

The relationship with Articles 14 and 15 of Directive 2000/31/EC (e-commerce Directive)

23. As a preliminary general remark on the relationship between acts of secondary law, the CLS wishes to stress the following.
Subject to the Treaties, the Charter, international law and general principles of law, the legislator, as a policy-making instance and in order to achieve a certain policy result, is free to adopt acts of secondary law and to decide upon their specific content, taking into account any relevant developments in the area in which it wishes to intervene.
In that respect, if the legislator intends, through a specific act of secondary law, to regulate a certain issue in a manner that appears to be different from how that issue would be tackled under existing legislation, and given that there is no hierarchy between the legislator's acts of secondary law, the relationship between those acts is *a priori* to be defined, in the absence of any further indication by the legislator, in accordance with the principles "*lex specialis derogat legi generali*" and "*lex posterior derogat legi priori*" : the rule of a more recent act governing a specific subject matter will override a rule in an existing act governing relevant subject matter in a general manner.

24. In view of the above, the use by various delegations of qualifications such as "*not in accordance with*" or "*incompatible*" or even "*infringing*", in order to define the relationship between acts of secondary law, is not, as a matter of law, correct.

25. On the other hand, the CLS recalls that, in accordance with the principle of legal certainty, the rules set out in an act must "*be clear and precise and predictable in their effect, so that interested parties can ascertain their position in situations and legal relationships governed by EU law (see the judgments in France Télécom v Commission, C-81/10 P, EU:C:2011:811, paragraph 100 and case-law cited, and LVK — 56, C-643/11, EU:C:2013:55, paragraph 51)*".[26] Thus, in order to avoid confusion or lack of clarity due to the coexistence in the Union legal order of acts of secondary law that risk to regulate differently a certain situation, or in order to shed light on the precise relationship that the legislator wishes to establish between those acts, should this relationship risk to appear to be unclear or controversial, it is appropriate to state clearly in the most recent or specific act the political choice that reflects the will of the legislator. In that respect, the preamble of that act is the appropriate place to give reasons, explain, guide the interpretation or indicate the meaning of the particular provision that risks to be seen as not consistent or unclear with regard to its relationship with existing legislation.

26. It is in the light of the above general considerations that the CLS will further assess the concerns of certain delegations on the relationship of the proposed Article 13 and its recital 38 with Articles 14 and 15 of the e-commerce Directive.

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[26] See judgment of 5 May 2015 in *Spain v Council*, C-147/13, EU:C:2015:299,paragraph 79.

27. As already mentioned in paragraph 6 of the present contribution, the proposed Article 13 does not refer either to the CTP or to the "safe harbour" clause foreseen in Article 14 of the e-commerce Directive. It only contains the terms "*store*" and "*provide to the public access*" that point to the wording of Article 14 ("*store*") and to the notion of CTP ("*provide to the public access*") as interpreted by the Court. This is not the case though of its corresponding recital 38 which refers explicitly to those notions.

The issue thus presents itself as follows.

In the absence of any legislative definition of CTP, the Court has followed throughout its judgments a case-by-case individual approach as to when an operator's behaviour may constitute CTP and thus most likely an infringement of the copyright of a right holder. In that regard, the explicit reference in recital 38 to CTP, read together with Article 13 and taking into account the recent trend of the case law of the Court[27], could be seen as an indication that the ISSPs falling under the scope of the proposed Article 13 could be treated as engaging in an act of CTP.

On the other hand, it is not clear, either from the terms of Article 14 of the e-commerce Directive or from the case law interpreting it[28], whether ISSPs such as those falling under the scope of the proposed Article 13 would necessarily fall also under the scope of Article 14; and should that be the case, given that neither the legislator nor the Court has ever established whether the situations of CTP and "safe harbour" may apply simultaneously, it is not clear whether ISSPs engaging in acts of CTP would fulfil the conditions set out in Article 14 (a) and (b), as interpreted by the Court, in order to benefit from the "safe harbour" clause and thus not to be liable for any copyright infringement[29].

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27 See judgments in *Filmspeler*, C-527/15, EU:C:2017:300, in *GS media*, C-160/15, EU:C:2016:644, and in *"The Pirate Bay"*, C-610/15, EU:C:2017:456.

28 See judgments in *Mc Fadden*, C-484/14, EU:C:2016:689, in *Pappasavvas*, C-291/13, EU:C:2014:2209, in *L'Oréal v e-Bay*, C-324/09, EU:C:2011:474, and in *Google v Louis Vuitton*, C-236/08 and C-238/08, EU:C:2010:159.

29 If ISSPs are considered to communicate to the public, it is possible that they could no longer be considered to play only a "neutral role" and to have "*merely technical, automatic and passive*" conduct, which are the criteria used by the Court in order to ascertain whether the conditions required by Article 14 (a) and (b) of the e-commerce Directive (ie lack of control over the content in question, of actual knowledge - awareness of the illegal activity) are fulfilled, so that an ISSP can benefit from the "safe harbour" clause.

28. The CLS considers that, with regard to the subject matter in which the legislator wishes to intervene (ie protection of uploaded copyright protected material), recital 38 highlights all the above mentioned uncertain parameters without, at the same time, providing any explanation as to the content of the enacting terms of the proposed Article 13, or any clarity on its relationship with the e-commerce Directive and CTP, or as to how that Article should be understood by the Member States and the stakeholders concerned, or even interpreted by the Court. On the contrary, the confusing terms in which that recital is drafted raise various legitimate questions[30] to which, regrettably, no clear answers are given.

29. On the basis of all the above mentioned considerations[31], the CLS is of the view that, should the legislator decide that the questions raised by the proposed recital 38 must be - as suggested by the Commission - explicitly addressed, the legislator will have to provide the relevant answers when making the fundamental policy choices and clarifications on the objective pursued by Article 13, CTP and its relationship with the e-commerce Directive. Recital 38 should therefore be redrafted in order to reflect and explain <u>clearly</u> those policy choices (for instance, whether or not there is CTP and whether or not the ISSPs concerned by the proposed Article 13 are in any case meant to benefit from the "safe harbour" clause)[32].

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[30] See paragraph 6 of the present contribution.

[31] In particular paragraph 25 of the present contribution.

[32] There are various ways of legislative technique to achieve the expected result; should, for instance, the legislator wish to give precedence to the present proposal over Directive 2000/31/EC, a recital and corresponding article could be drafted along the following lines : "*In accordance with the lex specialis principle, insofar as the provisions of this Directive conflict with the provisions of Directive 2000/31/EC, the provisions of this Directive should prevail*" and "*Directive 2000/31/EC applies unless otherwise provided for in this Directive. In the event of a conflict between a provision of Directive 2000/31/EC and a provision of this Directive, the provisions of this Directive should prevail, unless otherwise provided for in this Directive*". On the contrary, should the legislator wish to preserve the applicability of Articles 14 and 15, a recital and corresponding article could be drafted as follows : "*without prejudice to Articles 14 and 15 of Directive 2000/31/EC,...*" and "*for the purposes of this Directive, Articles 14 and 15 of Directive 2000/31/EC shall apply to ISSPs....*".

30. As to the relationship of the proposed Article 13 with Article 15 of the e-commerce Directive[33], the CLS is of the view, on the basis of the considerations in paragraphs 23 and 24 above, that, subject to the Treaties and the Charter[34], the introduction of the envisaged measures is not legally problematic. Whether the legislator wishes, for the purposes of the present proposal, to consider them explicitly as a *lex specialis* or as a "*monitoring obligation in a specific case*" and "*duty of care*"[35] for the ISSPs concerned, should they be considered to fall under the scope of Article 14, is a question to be settled during the discussions in the appropriate political instances[36].

31. In view of the further drafting that the Presidency will necessarily need to carry out once decisions on the policy issues have been made, the CLS will be ready, as always, to provide assistance in order to ensure the highest degree of legal certainty of the text.

IV. CONCLUSION

32. The CLS is of the view that :

- the policy option reflected in the proposed Article 13 responds to the Court's requirement of ensuring a fair balance between the competing fundamental rights which must be reconciled, and the limitations to those fundamental rights do not appear to be disproportionate;

- for reasons of legal certainty, should the legislator decide that the questions raised by the proposed recital 38 must be explicitly addressed, that recital should be redrafted in order to provide clear explanations as to the final content of the enacting terms of Article 13 and clarity on its relationship with the e-commerce Directive and CTP. A thus redrafted recital 38 will contribute to ensuring transparency, legitimacy, predictability and acceptability of Union law.

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33 See paragraph 7 of the present contribution.
34 See CLS assessment in paragraphs 8 to 22 of the present contribution.
35 Recitals 47 and 48 of the e-commerce Directive.
36 *Supra* footnote 32.