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Commission claims that general monitoring is not general monitoring (https://edri.org/commission-claims-that-general-monitoring-is-not-general-monitoring/)

By Modern Poland Foundation

Will everything we do on the internet be monitored and checked against by a non-

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transparent mechanism that decides what can be published? It is a real threat, and currently it is coming from an area that patently does not require such draconian measures: EU copyright law. This threat is a peculiar one, because there are actually explicit safeguards in existing EU law designed to prevent general monitoring of users' communications.

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Specifically, EU Member States are not allowed to impose a general obligation to monitor the information that users transmit or store, as stated in the Article 15 of the e-Commerce Directive (2000/31/EC). So how to introduce a general monitoring obligation if this is explicitly forbidden? Well, it is currently being done by a mix of sophisticated legal interpretation, a splash of sophistry and clever legal drafting that is hard to comprehend for non-experts in the field. Below, we try to explain the details in a more easily understandable way.

The starting point are Recitals (explanatory notes) 47 and 48 of the e-Commerce Directive. Recital 47 clarifies that the prohibition of general monitoring leaves room for monitoring in "specific cases". Recital 48 gives Member States an option to apply "duties of care" in order to detect and prevent certain types of illegal activities.

We are now observing an attempt to fit a de

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CPDP2018: Internet of bodies

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facto general monitoring obligation into the room created by Recital 47 in a misrepresentation of the notion of "duty of care" from Recital 48. The attempt is constructed of two parts: the first is the recently published "Guidance" on certain aspects of "IPR Enforcement Directive" (IPRED) and the second is the mix of Articles 11 (ancillary copyright (https://edri.org/copyfail-6/)) and Article 13 (https://edri.org/files/copyright/copyright_p (licensing, liability, upload filtering, redress, cooperation) of the European Commission's Proposal for a Copyright Directive (http://ec.europa.eu/transparency/regdoc/r 2016-593-EN-F1-1.PDF).

IPRED (Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights), is a legal instrument which requires Member States to ensure that courts may issue injunctions against intermediaries intended to prevent infringements (duplicating similar provisions in the 2000 E-Commerce Directive and the 2001 Copyright Directive). Injunctions are court orders requiring a party to do something or to refrain from doing something, subject to a penalty for non-compliance.

As we already know, it is not legal to impose a general monitoring obligation, and this holds for obligations imposed in injunctions. In fact, the "filtering systems"

section of the IPRED Guidance mentioned above starts with that observation. It even stresses that it would be incompatible with fairness and proportionality, and excessively costly. Moreover, it references two Court of Justice of the European Union (CJEU) rulings, Scarlet and Netlog, in which the Court found that general filtering systems are incompatible with EU law. However, it then invokes the possibility of monitoring obligations in "specific" cases (Recital 47), and links it with the newly re-invented "duty of care" in order to detect and prevent infringements (Recital 48). This is an important part, because contemporaneous documents indicate the "duties of care" were meant to refer only to measures to enforce the rules in the Articles of the Directive and were not introducing nor facilitating the implementation of a separate "duty" [https://www.asktheeu.org/en/request/225(The Commission's new interpretation of the 2000 Directive is therefore demonstrably misleading.

However, the Guidance ignores the facts and concludes that it is possible to use both Recitals to impose obligations on service providers to prevent the upload of infringing content identified by rightholders and in cooperation with them. In other words, filtering is forbidden by EU law, but also, following this logic, permitted by it.

Such an interpretation is contrary to the most basic principles of legal

interpretation. Directives consist of operative "Articles" and explanatory "recitals". The relevant Article (15) has, as its title "no general obligation to monitor". For the Commission's current interpretation to be correct, this text must be interpreted in a way that permits a general obligation to monitor. It seems absurd to have to explain that this interpretation is not valid. However, for the sake of completeness, Article 31.1 of the Vienna Convention on the Law of Treaties establishes that s "treaty shall be interpreted in good faith in accordance with the ordinary meaning to be given to the terms of the treaty in their context and in the light of its object and purpose". The (somewhat unsurprising) concept that the "ordinary meaning to be given to the terms" should be used when interpreting law has been carried across into EU law multiple times by the CJEU.

When you put all these parts together, you come up with a system that can be used by the publishers to require service providers to take down and prevent upload of virtually any content using a mechanism that could not and would not be expected to distinguish such exceptions as quotation, critique, parody, panorama, inspiration, or independent creation. The system is, in the ordinary meaning of the words, a "general obligation to monitor" and will, by causing the deletion of content protected by copyright exceptions, a restriction on fundamental rights that is not necessary, proportionate or achieving objectives of

general interest, as required by the EU Charter.

Nonetheless, this kind of censorship will be virtually impossible to challenge before a court. First, if the content is prevented from being uploaded and published, the user will find it very hard to construct a legal case. Secondly, there are virtually no mechanisms in the copyright laws of Member States which would allow users to assert their rights, mostly because user freedoms are constructed as "limitations and exceptions", not as independent user rights.

Separately, a court case would not be possible until after the Directive is implemented, and it could, for the reasons described above, only come from a service provider. After going through the national courts, it would take at least a further 18 months to get a ruling against the mandatory filters. At that stage, virtually all providers in Europe would already have had to invest in the filtering systems and would, due to the weakened liability regime, opt to keep them in any case.

Would an injunction requiring to monitor specifically for all such content materially differ from a general monitoring injunction? It probably would not. General monitoring means searching everything. Specific monitoring means searching everything, looking for millions of "specific cases". It will not solve any problems, but introduces a threat to freedom of

expression.

It is still not too late to stop decision-makers from letting this happen. Visit savethememe.net for information on how to have your say!

Vienna Convention on the Law of Treaties https://treaties.un.org/doc/publication/unts 1155-i-18232-english.pdf (https://treaties.un.org/doc/publication/unt 1155-i-18232-english.pdf)

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