

Article 13 and Corresponding Recitals

CDT Amendments based on Council's Negotiation Mandate (doc. 9134/18 – 25/5/2018)	Justification
<p>(37a) The definition of an online content sharing service provider under this Directive targets only online services which play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences. The services covered by this intervention are those the main or one of the main purposes of which is to provide access to a large amount of copyright-protected content uploaded by their users with the purpose of obtaining profit therefrom, either directly or indirectly, by organising it and promoting it in order to attract more audiences. Organising and promoting content involves for example indexing the content, presenting it in a certain manner and categorising it, as well as using targeted promotion on it. The definition does not include services which whose main purpose is not to provide access to copyright protected content but whose with the purpose of obtaining profit-making is untethered from this activity. These include, for instance, electronic communication services within the meaning of Regulation 2015/2120/EU, including internet access providers, as well as providers of cloud services which allow users, to upload content for their own use, such as cyberlockers, or online marketplaces whose main activity is online retail and not giving access to copyright protected content. Nor does this definition cover websites which store and provide access to content for non-for-profit purposes, such as online encyclopaedias, scientific or educational repositories or open source software developing platforms which do not store and give access to content for profit making purposes or when these websites derive profit value from other services that are untethered from access to content. In order to ensure the high level of copyright protection and to avoid the possible application</p>	<p>Article 13 and the associated recitals are intended to give record labels better leverage in negotiations. Narrowing the definition of an online content sharing service provider to target mainly online audio and video streaming services would bring this Directive in line with the European Commission's stated initial goal of tackling the so-called 'value gap'. This would bring about proportionality to the proposal. Moreover, narrowing the scope to online audio-visual services would be more proportionate vis-a-vis the state of art of current content recognition technologies which are more advanced (yet imperfect) in the audio-visual domain.</p> <p>In relation to the services which this recital intends to explicitly exclude, it is important to clarify what is meant by "for profit". Certain services, which are normally classified as storing or providing access to user-uploaded content for non-for-profit purposes, do derive profit value from other services that are untethered from access to content (e.g. where an open source software repository offers private hosting for a fee, premium accounts, donate buttons). These online services should also be excluded from the scope of this proposal as they do not derive value directly from access to content uploaded by users.</p> <p><u>Recommendation</u>: it is crucial to bring the language of this recital into Article 2(5) (definitions).</p>

<p>of the liability exemption mechanism provided for in this Directive, this Directive should not apply to services the main purpose of which is to engage in or to facilitate copyright piracy.</p>	
<p>(38ca) Appropriate collaboration carried out in good faith between online content sharing service providers and rightholders is essential for the effective application of the measures by the online content sharing service providers. These service providers should be transparent towards rightholders rightholders with regard to the deployed measures. As different measures may be used by the online content sharing service providers, they should provide rightholders with appropriate information on the type of measures used and the way they operate, including for example information on the success rate of the measures. Such information should be sufficiently specific to provide enough transparency for rightholders and allow cooperation to ensure effective functioning of the measures, without prejudice to the business secrets of service providers. Service providers should however not be required to provide rightholders with detailed and individualised information for each work and other subject matter identified. This is without prejudice to contractual arrangements, which may contain more specific provisions on the information to be provided where agreements are concluded between service providers and rightholders. On the other hand, rightholders should provide the service providers with necessary and relevant data for the application of the measures to their specific unauthorised works or other subject matter taking also into account the size of rightholders and the type of their works and other subject matter. As long as insufficient no data for the application of the measures or insufficient no notification concerning removal or disabling access to specific unauthorised works or other subject matter has been provided by rightholders and, as a result, online content sharing service providers cannot take the measures or expeditious action as set out in this Directive, these service providers should not be liable for unauthorised acts of</p>	<p>The language in this recital highlights the fact that it is key for right holders to provide online content sharing service providers with the sufficient and relevant information to identify their works. It is paramount that service providers falling within the scope of this Directive benefit from intermediary liability protections when they have not received sufficient relevant information from rightholders in relation to specific works.</p> <p><u>Recommendation:</u> transparency of the deployed measures to prevent unauthorised use of protected works should be aimed not only towards rightholders, but towards users and the general public as well.</p>

<p>communication to the public or of making available to the public.</p>	
<p>(38e) The measures taken by the online content sharing service providers to prevent the availability of unauthorised works or other subject-matter should be effective but remain proportionate, in particular with regard to the size of the online content sharing service provider. While this Directive is expected to foster the development of effective technologies on the market, the availability of the measures may differ according to the type of content for which the measures are applied. Having regard to the technological developments in line with industry best practices, those measures should consequently ensure a level of efficiency appropriate to the amount and the type of works or other subject matter uploaded by the users of the services. For the purposes of assessing the proportionality of measures to be taken by the online content sharing service providers, the state of the art of existing technologies for the different types of content as well as the size of the services should be taken into account notably whether they are small and micro enterprises. Different measures may be appropriate and proportionate per type of content and it is therefore not excluded that in some cases unauthorised content may only be avoided upon notification of rightholders. The measures should be proportionate in order to avoid imposing disproportionately complicated or costly obligations on certain online content sharing service providers, taking into account notably their small size. In particular, small and micro enterprises as defined in Title I of the Annex to Commission Recommendation 2003/361/EC, should be expected to be subject to less burdensome obligations than larger service providers. Therefore, taking into account the state of the art and the availability of technologies and their costs, in specific cases it may not be proportionate to expect small and micro enterprises to apply preventive measures and that therefore in such cases these enterprises should only be expected to expeditiously remove</p>	<p>The language in this recital is extremely important, as it puts emphasis on the need for proportionality regarding the measures taken by the online content sharing service providers to prevent the availability of unauthorised works. The recital reflects the fact that there is no ‘one-size-fits-all’ technology for the different types of content. Regard must be taken to size of the service provider; amount and type of uploaded works; and technical feasibility. Moreover, the recital acknowledges that there are certain cases where unauthorised use of copyright protected works may only be prevented upon notification of rightholders; thus maintaining the current notice and action regime in Article 14 of the E-Commerce Directive (ECD).</p> <p><u>Recommendation</u>: bring language of this recital into Article 2 (definitions).</p>

<p>specific unauthorised works and other subject matter upon notification by rightholders.</p>	
<p>(39b) The measures taken by the online content sharing service providers should be without prejudice to the application of exceptions and limitations to copyright, including in particular those which guarantee the freedom of expression of users. For that purpose the service providers should put in place mechanisms allowing users to complain about the blocking or removal of uploaded content that could benefit from an exception or limitation to copyright, is not subject to copyright or neighbouring rights, or for which the user is the rightholder. Responses plies to the users' complaints should be provided in a timely manner, including, where appropriate, reposting the removed content. To make these mechanisms function, cooperation from rightholders is needed, in particular with regard to the assessment of the complaints submitted and justifications for the removal of users' content. Member States should remain free to put in place independent authorities for assessing the complaints submitted by users and making decisions on their validity. The redress mechanism should be without prejudice to the right of the parties to take action before a court.</p>	<p>This recital correctly highlights the need to take into account the application of exceptions and limitations to copyright in regards the measures taken by the online sharing service providers. This is key in protecting users' free speech online. However, there are also reported cases where providers and/or the technology implemented by providers simply erroneously takes down content for which the user is the rightholder or which is not protected by copyright. Mechanisms should also be in place to allow users to complain about erroneous takedowns of their content and to require online sharing service providers to replace erroneously removed content.</p>
<p>Article 2(5) 'online content sharing service provider' means a provider of an information society service whose main or one of the main purposes is to store and give the public access to a large amount of works or other subject-matter uploaded by its users which it organises and promotes for profit-making purposes. Providers of services such as non-for-profit online encyclopaedias, non-for-profit educational and scientific repositories, non-for-profit open source software developing platforms, or other services whose profits are not tethered to access to the publicly available content, as well as internet access service providers, online marketplaces and providers of cloud services which allow users, including businesses for their internal purposes, to upload content for their own use shall not be</p>	<p><u>Recommendation:</u> incorporate language of Recital 37a into the definition of 'online content sharing service provider'.</p>

<p>considered online content sharing service providers within the meaning of this Directive;</p>	
<p>Article 13(4) In the absence of the authorisation referred to in the second subparagraph of paragraph 1, Member States shall provide that an online content sharing service provider shall not be liable for acts of communication to the public or making available to the public within the meaning of this Article when:</p> <p>(a) it demonstrates that it has made best efforts to prevent the availability of specific <i>infringing uses of</i> works or other subject matter by implementing effective and proportionate measures, in accordance with paragraph 5, to prevent the <i>upload availability</i> on its services of the specific <i>infringing uses of</i> works or other subject matter identified by rightholders and for which the rightholders have provided the service with relevant and necessary information for the application of these measures; and</p> <p>(b) upon notification by rightholders of <i>infringing uses of</i> works or other subject matter, it has acted expeditiously to remove or disable access to these works or other subject matter and <i>based on the same notice</i> it demonstrates that it has made its best efforts to prevent their future <i>upload availability</i> through the measures referred to in point (a).</p>	<p>The mitigation measures for liability offered in case of absence of a licencing agreement are extremely important to maintain in order to bring proportionality into Article 13. The mitigation measures described in paragraph (b) are based on notice and action framework, maintaining the current intermediary liability regime in the E-Commerce Directive (ECD). The position adopted in the European Parliament does not include any mitigation measures for liability.</p>
<p>Article 13(5) The measures referred to in point (a) of paragraph 4 shall be effective and proportionate, taking into account, among other factors:</p> <p>(a) the nature and size of the services, in particular whether they are provided by a microenterprise or a small-sized enterprise within the meaning of Title I of the Annex to Commission Recommendation 2003/361/EC, and their audience;</p> <p>(b) the amount and the type of <i>infringing uses of</i> works or other subject matter uploaded by the users of the services;</p> <p>(c) the availability and costs of the measures as well as their effectiveness in light of</p>	<p>The mitigation measures for liability offered in case of absence of a licencing agreement are extremely important to maintain in order to bring proportionality into Article 13. This provision incorporates the language of Recital 38ca highlighting the fact that it is key for right holders to provide online content sharing service providers with the sufficient and relevant information of their works, and that due account should be taken of various factors to judge the effectiveness and proportionality of the measures. It therefore acknowledges that not all online content sharing service providers operate in the same way, providing certain flexibility to take account of those differences.</p>

technological developments in line with the industry best practice referred to in paragraph 8.