Trying to understand article 13

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A. Introduction

Article 13 is the most important and most controversial provision of the proposed EU Directive on Copyright in the Digital Single Market on which the EU member states and institutions have reached agreement in principle in February 2019.[2] The final vote will be in the European Parliament in late March 2019.

This paper aims at analysing what the idea of article 13 is and how it might work out in practice. Which legal issues will arise, which preliminary questions will be put to the CJEU? It is not meant to argue for or against article 13. The article itself is taken as a given. This paper is merely a first attempt to look ahead and find out what could happen in practice.

It is obvious that article 13 is a compromise between many interests and wishes and that is quite contradictory at some points. But that in itself is nothing new. Much of the EU legislation consist of partly contradictory or incomprehensible clauses, because compromise apparently was the only option for reaching consensus. Consequently, it is often up to commentators, practitioners and judges to make the best of it.

The directive contains a large number of recitals on the issue article 13 addresses, and article 13 itself contains many subsections.

B. What is the aim of article 13?

The aim of article 13 is twofold, but the target is the same: the *large* 'online content sharing service providers' ('OCSSP's'), notably Google (YouTube) and Facebook. The first aim is to make these OCSSP's pay to rightholders, on the basis of content licenses, to the extent rights owners are willing to give them licenses. This would diminish the so called 'value gap' between the amount of money the OCSSP's make out of advertising in and around the content uploaded by their users (a lot of money) and the amount of money rights holders get in return (not enough money). The second aim is to make those OCSSP's take down, block and filter all content for which the rightholders are not willing to grant a license to such platforms, but which users nevertheless (try to) upload onto these platforms.

The main concerns are

a) that rightholders will not be willing to license these OCSSP's, or not on reasonable terms,
b) that the blocking and filtering will amount to abuse by rightholders and fraudsters,
c) that it will lead to over blocking of legitimate use, involving all kinds of free speech issues, and
d) that it will be very costly for the OCSSP's. For smaller and non-commercial OCSSP's it might even be prohibitively costly, thus making it impossible for them to stay on the web, or for new OCSSP's to enter the market.

The many recitals and subsections of article 13 try to cater for all these concerns.

C. The definition of OCSSP

In article 2(5)* OCSSP is defined as '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 copyright protected

[2] Proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market. This text was approved in a Coreper meeting of representatives of the EU member states on Wednesday 20 February and by the JURI commission of the EU Parliament (30 MEPs) on Tuesday 26 February 2019.

works or other protected subject-matter uploaded by its users which it organises and promotes for profit-making purposes'.

Recital 37a* explains:

> 'The definition of an online content sharing service under this Directive should target 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 Directive are those services, the main or one of the main purposes of which is to store and enable users to upload and share a large amount of copyright protected content with the purpose of obtaining profit therefrom, either directly or indirectly, by organising it and promoting it in order to attract a larger audience, including by categorising it and using targeted promotion within it.'.

The second part of art. 2(5)* states:

> 'Providers of services such as not-for profit online encyclopedias, not-for profit educational and scientific repositories, open source software developing and sharing platforms, electronic communication service providers [internet access providers, telecom service providers][3] , online marketplaces and business-to business cloud services and cloud services which allow users to upload content for their own use shall not be considered online content sharing service providers within the meaning of this Directive'.

Wikipedia, open access repositories and open source sharing platforms or not covered by this definition, because and to the extent they operate not for profit. Internet access providers and telecom service providers are not covered, because it is not their main purpose to give the public access to a large amount of copyright protected works. Online marketplaces, such as eBay, whose main activity is online retail, are not covered for the same reason.

Cloud service providers which allow users to upload content for their own use, for instance in so-called cyberlockers, also, in general, do not have as their (main) purpose to give the public access to a large amount of copyright protected works. Cloud services are, however, also (ab)used to do exactly that: by illegally uploading works in the cloud and consequently sharing the link to those works on platforms, large amounts of copyright protected works are being made available to the public illegally. Therefore, as the final paragraph of recital 37a* stresses: 'the liability exemption mechanism provided for in Article 13 should not apply to service providers the main purpose of which is to engage in or to facilitate copyright piracy'.

This definition does not clarify what 'a large amount of copyright protected works' is, nor which providers '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'. (As we

[3] 'electronic communications service' means a service normally provided for remuneration via electronic communications networks, which encompasses, with the exception of services providing, or exercising editorial control over, content transmitted using electronic communications networks and services, the following types of services:
(a) 'internet access service' as defined in point (2) of the second paragraph of Article 2 of Regulation (EU) 2015/2120;
(b) interpersonal communications service; and
(c) services consisting wholly or mainly in the conveyance of signals such as transmission services used for the provision of machine-to-machine services and for broadcasting;

will see further on, art. 13(4aa*) attempts to make a clear distinction in age and size of OCSSP's which influences the extent of their obligations).

But recital 37b* simply states:

> 'The assessment of whether an online content sharing service provider stores and gives access to a large amount of copyright-protected content needs to be made on a case-by-case basis and take account of a combination of elements, such as the audience of the service and the number of files of copyright-protected content uploaded by the users of the services'.

It is clear that this will create considerable uncertainty. The courts will have to decide, on a case-by-case basis, what constitutes 'a large amount'.

D. Primary liability for OCSSP's

Article 13(1)* is the legal core of the new regime and introduces primary copyright infringement liability for OCSSP's:

> 'Member States shall provide that an online content sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this directive when it gives the public access to copyright protected works or other protected subject matter uploaded by its users.
>
> An online content sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licencing agreement, in order to communicate or make available to the public works or other subject matter'.

Obviously, obtaining authorisation from the rightholders is easier said than done. As OCSSP's typically have no idea what their users upload and have no control over what they upload, they would in principle, under a strict liability regime, have to obtain authorisation from all the rightsholders in all copyright-protected content. Obviously, that would be impossible. Therefore, as we will see further on, OCSSP's are only liable for unauthorised acts of communication to the public of copyright protected works if they do not meet certain requirements, including making 'best efforts to obtain an authorisation'.

Recital 38* (last sentence) states that 'This does not affect the concept of communication to the public or of making available to the public elsewhere under Union law nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other service providers using copyright-protected content'. It might, however, have an influence on how the court will *interpret* those existing articles 2 and 3…

E. Non-commercial users are then covered

Article 13(2)* explains that when 'an authorisation has been obtained, including via a licensing agreement, by an online content sharing service provider, this authorisation shall also cover acts carried out by users of the services falling within Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or their activity does not generate significant revenues'.

So, if authorisation has been obtained from, for instance, the relevant collective management organisations for music rights, individual users of the service can upload whatever and as much music as they like, as long as 'they are not acting on a commercial basis or their activity does not generate significant revenues'.

If users *do* act on a commercial basis or their activity *does* generate significant revenues, the authorisation obtained by the OCSSP's does *not* cover their uploading activities and they still have to clear the relevant rights themselves. It is, of course, quite important to define 'significant revenues'. Apparently, if OCSSP's allow users to upload (i.e. make available) works on a commercial basis or generate significant revenues, *both* the OCSSP and the user need to get an authorisation from the rightholders. And possibly both have to pay for the same communication to the public?

F. Music, film and other works

It is likely that OCSSP's *will* be able to get licenses from the relevant collective management organisations ('CMO's') for *music* rights and/or the large *music* publishers and *music* producers, the so-called Majors. Those rightholders will probably accept a share of the advertising income as part of a licensing deal, allowing users of OCSSP's to upload all music they like. The CMO's will have to figure out how to determine *which* CMO collects for which territory, but they should be able to sort that out.

Rights owners in *audio-visual works*, especially feature films, most probably will *not* give authorisation, simply because their business model is based on exclusivity and use against payment. For other works then music and film, it is not clear whether collective management organisations will be able to secure the rights to grant licenses to OCSSP's. But it is likely that CMO's dealing with literary works or pictorial works, are going to try hard to acquire these rights.

G. No more limitation of liability based on article 14 e-commerce directive

Article 13(3)* adds that

> 'When an online content sharing service provider performs an act of communication to the public or an act of making available to the public, under the conditions established under this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article'.

This is an important and logical addition. If the OCSSP's are to be liable on the basis of direct primary liability for acts relevant under copyright, they should of course not be able to invoke the limitation of liability under article 14 of the e-commerce directive.[4] If they would be able to do so, article 13 would be meaningless. On the other hand article 13(3) also, and not surprisingly, states that: 'this shall not affect the possible application of Article 14(1) of Directive 2000/31/EC to these service providers for purposes falling outside the scope of this Directive.'

H. Best efforts, blocking and filtering, notice and stay down

Article 13 goes on to address the issue that inevitably OCSSP's will not be able to obtain authorisation from all the rightsholders in all copyright-protected content.

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[4] Article 14 (Hosting) of 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'):
1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:
(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

Article 13(4)* states

> 'If no authorisation is granted, online content sharing service providers shall be liable for unauthorised acts of communication to the public of copyright protected works and other subject matter, unless the service providers demonstrate that they have:
>
> (a) made best efforts to obtain an authorisation, and
>
> (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information, and in any event
>
> (c) acted expeditiously, upon receiving a sufficiently substantiated notice by the rightholders, to remove from their websites or to disable access to the notified works and subject matters, and made best efforts to prevent their future uploads in accordance with paragraph (b)'.

So there are three conditions:

Firstly, OCSSP's must make 'best efforts to obtain an authorisation'. That means that they will have to obtain a license from anyone who is willing to give it to them on reasonable terms (whatever that may be). Probably, some FRAND (fair, reasonable and non-discriminatory) licensing requirement will develop. Again: it is likely that the music industry, including the music CMO's, is willing to grant licenses and the film industry is not. For all other rights and works this is yet rather unclear. There will be a lot of discussion as to what 'best effort' means in this context.

Secondly, and that is the most controversial part of article 13, OCSSP's have to make 'best efforts' 'to ensure the unavailability', in other words: filter and block any 'specific works' for which they did not get authorisation *and* for which the right holders have provided the OCSSP's with 'the relevant and necessary information'. This means that the OCSSP's *only* have to filter and block those works for which the right holders provide them with the 'fingerprinting'- and other information which is necessary to filter and block. And they have to make 'best efforts', 'in accordance with high industry standards of professional diligence'. Article 13(4a*) elaborates on that, see below. Currently, YouTube and Facebook already do a lot of filtering on request of the music and film industry. But they might have to do more.

Thirdly, they have to maintain an effective 'notice-and-take-down'-mechanism, *and* a 'notice-and-stay down'-mechanism based on information provided by the right holders. 'Making best efforts to prevent future uploads' means filtering and blocking of works which have previously been uploaded.

I. Means and costs

But then article 13(4a*) adds:

> 'In determining whether the service has complied with its obligations under paragraph 4 and in the light of the principle of proportionality the following should, among others be taken into account:
>
> (a) the type, the audience and the size of services and the type of works or other subject matter uploaded by the users
>
> (b) the availability of suitable and effective means and their cost for service providers'.

All ‘the best efforts’, the ‘high industry standards’ and ‘professional diligence’ required from OCSSP’s under article 13(4)* have to be interpreted in the light of ‘the availability of suitable and effective means and their cost for service providers’. If there are no suitable and effective means, they do not have to it. If it is too expensive, they do not have to do it either. And the obligation may differ with ‘the type, the audience and the size of services and the type of works’.

Recital (38b*) repeats the same thing in many words, also mentioning proportionality:

> ‘When assessing whether an online content sharing service provider has made its best efforts according to the high industry standards of professional diligence, account should be taken of whether the service provider has taken all the steps that would be taken by a diligent operator to achieve the result of preventing the availability of unauthorised works or other subject matter on its website, taking into account best industry practices and the effectiveness of the steps taken in light of all relevant factors and developments, as well as the principle of proportionality’.

That does leave a lot to be determined, ultimately by the courts.

But the softening factors and proportionality-tests of article 13(4a*) are not enough.

J. Exemption for young and small OCSSP’s

Article 13(4aa*) exempts whole groups of (smaller) OCSSP’s from the most important obligations of article 13(4*) altogether:

> ‘Member States shall provide that when new online content sharing service providers whose services have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million within the meaning of the Commission Recommendation 2003/361/EC, the conditions applicable to them under the liability regime set out in paragraph 4 are limited to the compliance with point (a) of paragraph 4 and to acting expeditiously, upon receiving a sufficiently substantiated notice, to remove the notified works and subject matters from its website or to disable access to them.
>
> Where the average number of monthly unique visitors of these service providers exceeds 5 million, calculated on the basis of the last calendar year, they shall also demonstrate that they have made best efforts to prevent further uploads of the notified works and other subject matter for which the rightholders have provided relevant and necessary information’.

So, if an OCSSP exists for less than three years *and* its annual turnover is below EUR 10 million – these seem to be *cumulative*, not *alternative* conditions – , they *do* have to try get licenses, but they do *not* have to filter and block. They *do* need to have a ‘notice-and-take-down’-mechanism, but *not* a ‘notice-and-*stay* down’-mechanism. However, if their number of monthly unique visitors exceeds 5 million, they *do* have to have a ‘notice-and-*stay* down’-mechanism.

K. Limitations *shall* be respected (1)

We now come to a problem that will certainly occur: *over blocking*. Things will get blocked which should not be blocked, either because the material is not protected or because there is no infringement, for instance because a limitation to copyright applies. The first paragraph of article 13(5*), interestingly, simply states that this ‘shall’ not happen.

> ‘The cooperation between online content service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users which

do not infringe copyright and related rights, including where such works or subject matter are covered by an exception or limitation'.

The article does not make clear *how* the member states *shall* make this *not* happen. But, as we will see below 'Member States shall ensure that users have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright rules', if it does happen.

L. Limitations *shall* be respected (2)

The second paragraph of article 13(5*) is more precise, introducing two mandatory limitations and suggesting that concrete measures must be taken:

> 'Member States shall ensure that users in all Member States(*) are able to rely on the following existing exceptions and limitations when uploading and making available content generated by users on online content sharing services:
>
> (a) quotation, criticism, review;
>
> (b) use for the purpose of caricature, parody or pastiche.

These limitations are so important, that member states shall *ensure* that users can rely on them. But again, the article does not make clear *how* the member states shall ensure this.

As we shall see in article 13(8*), it is anticipated that much will be blocked that should not be blocked and that many complains and disputes will arise, which will then have to be dealt with.

Article 13(7*) suggests:

> 'The application of the provisions in this article shall not lead to any general monitoring obligation'.

This seems an untenable statement. Blocking and filtering as required by article 13(4)b* amounts to a pretty general monitoring obligation for the OCSSP's regarding their platform, unless they have authorisation for the use of all copyright protected works form all rights holders, which they will not have. The only interpretation which leads to the article not being a general monitoring obligation, is to assume that it is not a *general* obligation, because it only applies *to the extent that the rightholders have provided him with the necessary information to monitor*. That is a difference with the situation under the Sabam-decisions by the CJEU (*Scarlet Extended/Sabam, C-70/10, ECLI:EU:C:2011:771 & Sabam/Netlog, C-360/10, ECLI:EU:C:2012:85*).

Article 13(7*) continues:

> 'Member States shall provide that online content sharing service providers shall provide rightholders, at their request, with adequate information on the functioning of their practices with regard to the cooperation referred to in paragraph 4 and, where licensing agreements are concluded between service providers and rightholders, information on the use of content covered by the agreements'.

Not surprisingly, the OCSSP's will have to prove that they do what they are supposed to do. Otherwise they would be directly liable for the copyright relevant acts occurring on their platforms.

M. Effective and expeditious complaint and redress mechanism

Article 13(8*) par. 1 states:

> ‘Member States shall provide that an online sharing service provider puts in place an effective and expeditious complaint and redress mechanism that is available to users of the service in case of disputes over the removal of or disabling access to works or other subject matter uploaded by them’.

It is inevitable that thousands of disputes over the removal of or disabling access to works will occur. And those shall all be subject to human review as article 13(8*) par.2 adds:

> ‘When rightholders request to remove or disable access to their specific works or other subject matter, they shall duly justify the reasons for their requests. Complaints submitted under this mechanism shall be processed without undue delay and decisions to remove or disable access to uploaded content shall be subject to human review’.

Recital 39a* elaborates on this:

> ‘This is particularly important to strike a balance between fundamental rights in the Charter of Fundamental Rights of the European Union, in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property. For these reasons, these exceptions should be made mandatory in order to ensure that users receive uniform protection across the Union. It is important to ensure that online content sharing services operate an effective complaint and redress mechanism to support these uses. The online content sharing service providers should also put in place effective and expeditious complaint and redress mechanisms allowing users to complain on the steps taken with regard to their uploads, in particular when they could benefit from an exception or limitation to copyright in relation to an upload that is removed or to which access is disabled. Any complaint filed under such mechanisms should be processed without undue delay and be subject to a decision by a human’.

This last part is quite important. It seems likely that the sense of humour of a computer is very limited and that an automatic filtering system will not be able to recognize a parody. A decision by a human is needed. But it remains to be seen how ‘effective and expeditious’ these complaint-and-redress mechanisms will be in practice, as the numbers to deal with will be huge. There will probably be lot of focus on this.

N. Out-of-court redress mechanisms

But on top of these dispute settlement mechanisms to be offered by the OCSSP’s, the Member-States have to create additional ‘out-of-court redress mechanisms’, according to article 13(8*) par. 3

> ‘Member States shall also ensure that out-of-court redress mechanisms are available for the settlement of disputes. Such mechanisms shall enable disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law, without prejudice to the rights of users to have recourse to efficient judicial remedies. In particular, Member States shall ensure that users have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright rules’.

Creating these ‘mechanisms’ will probably require a very substantial investment by the member-states, because there will most likely be many disputes.

O. Limitations *shall* be respected (3)

And then, *again*, article 13 ‘guarantees’ legitimate uses will not be affected in article 13(8*) par. 4:

> 'This Directive shall in no way affect legitimate uses, such as uses under exceptions and limitations provided for in Union law, and shall not lead to any identification of individual users nor to the processing of their personal data, in accordance with Directive 95/46/EC, Directive 2002/58/EC and the General Data Protection Regulation'.

It *shall* not happen. And it *shall* not lead to any identification of individual users. And users *shall* be properly informed by their OCSSP's according to article 13 (8*) par. 5

> 'Online content sharing service providers shall inform the users in their terms and conditions about the possibility for them to use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law'.

P. Stakeholder dialogues

And finally, despite all these assurances, 'stakeholder dialogues' shall be organised to discuss best practices, according article 13(9*)

> 'As of *[date of entry into force of this Directive]* the Commission in cooperation with the Member States shall organise stakeholder dialogues to discuss best practices for the cooperation between the online content sharing service providers and rightholders. The Commission shall, in consultation with online content sharing service providers, rightholders, users associations and other relevant stakeholders and taking into account the results of the stakeholder dialogues, issue guidance on the application of Article 13 in particular regarding cooperation referred to in paragraph 4. When discussing the best practices, special account shall be taken, among others, of the need to balance the fundamental rights and the use of exceptions and limitations shall be taken into account. For the purpose of this stakeholders dialogue, users associations shall have access to adequate information from online content sharing service providers on the functioning of their practices with regard to paragraph 4'.

Q. What will happen?

The Collective Management Organisations and other rightholders that have a mandate to do so, will contact the main OCSSP's, Google and Facebook, in order to negotiate a licensing agreement. And as far as *music* is concerned, they will probably be able to reach an agreement. For any other kind of works and rights, it is very hard to predict whether licenses will be agreed upon. But CMO's will try to acquire the relevant rights and try to provide licenses.

The rightholders that do not want to authorise any use by the OCSSP's, will provide them with 'the relevant and necessary information' to enable them to filter and block their works form the platforms.

The OCSSP's themselves will formally invite everyone and anyone to provide them with a license.

The OCSSP's *might* choose to start filtering *everything* for which they receive 'the relevant and necessary information' and *not* try to make any effort to decide *in advance* whether anything is actually protected or not covered by exceptions or limitations to copyright. They could counterbalance this by accepting or reinstating the upload as soon as an *uploader states* that his upload is not protected or covered by exception or limitation. *Or* they might allow *uploaders* to state *in advance* that their upload is not protected or covered by exception or limitation, and balance this by blocking the material as soon as a rightholder states that that is not true.

The OCSSP's might argue that these are the only available and suitable solutions in view of the costs, also 'in the light of the principle of proportionality'.

Following that, the OCSSP's must allow either the uploader or the rightholder to complain, and have a human make a decision. That decision can then be appealed through an 'out-of-court redress mechanism', to be provided by the Member-States. And that decision can then be contested in a regular court.

Furthermore, it is imaginable that start-ups might try to remain below the thresholds of an annual turnover of EUR 10 million and the number of monthly unique visitors of 5 million, in order to avoid being considered an OCSSP.

It is quite certain that OCSSP's, and the rightholders involved, should not wait until the date of entry into force of the Directive before organising 'stakeholder dialogues to discuss best practices for the cooperation' between them.

R. What can internet intermediaries reasonably be expected to do?

In the end the courts will have to decide what the OCSSP's and other providers *can reasonably be expected to do*. Unfortunately, article 13 gives very little guidance for this. It rather describes and creates very elaborate contradicting objectives and obligations.

The issues addressed in article 13 also show that the concepts of primary and secondary liability seem to get mixed up. Maybe this is inevitable. It is likely that this approach of liability of OCSSP's for copyright infringement will have its spill over effects on all kinds of other internet intermediaries. On the other hand it also is a continuation of approach visible in the case law of the CJEU.

Since *Promusicae* (*C-275/06, ECLI:EU:C:2008:54*) intermediaries have been obliged to cooperate with rightholders. Too strict a monitoring obligation goes too far *(Scarlet Extended/Sabam, C-70/10, ECLI:EU:C:2011:771 & Sabam/Netlog, C-360/10, ECLI:EU:C:2012:85).* But intermediaries have to take 'all reasonable measures, provided that (i) the measures taken do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available and (ii) that those measures have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter that has been made available to them in breach of the intellectual property right' (*UPC Telekabel Wien, C-314/12, ECLI:EU:C:2014:192*). If intermediaries become too much involved, they become primary infringers with full liability (*Stichting Brein/Ziggo, C-610/15, ECLI:EU:C:2017:456*).

There will be much interesting caselaw of the CJEU to come, firstly in the two cases from Germany, *YouTube (C-682/18)*[5] and *Elsevier (C-683/18)*[6].

There will be a continuing discussion all over the world about what which kind of 'reasonable' internet intermediary can 'reasonably' be expected to do: pay (share advertising income or other income) and/or take preventive or repressive action regarding copyright infringement, while balancing fundamental rights, especially free speech. The same, probably even more important, discussion will continue regarding hate speech, fake news and any other kind of 'undesirable' information.

[5] 'Does the operator of an internet video platform on which videos containing content protected by copyright are made publicly accessible by users without the consent of the rightholders carry out an act of communication within the meaning of Article 3(1) of Directive 2001/29/EC if …'

[6] 'Does the operator of a shared hosting service via which files containing content protected by copyright are made publicly accessible by users without the consent of the rightholders carry out an act of communication within the meaning of Article 3(1) of Directive 2001/29/EC 1 if …'

Annex*:*

Relevant recitals

(37) Over the last years, the functioning of the online content market has gained in complexity. Online content sharing services providing access to a large amount of copyright protected content uploaded by their users have become main sources of access to content online. Online services are means of providing wider access to cultural and creative works and offer great opportunities for cultural and creative industries to develop new business models. However, although they allow for diversity and ease of access to content, they also generate challenges when copyright protected content is uploaded without prior authorisation from rightholders.

Legal uncertainty exists as to whether such services engage in copyright relevant acts and need to obtain authorisations from rightholders for the content uploaded by their users who do not hold the relevant rights in the uploaded content, without prejudice to the application of exceptions and limitations provided for in Union Law. This uncertainty affects rightholders' possibilities to determine whether, and under which conditions, their works and other subject-matter are used as well as their possibilities to get an appropriate remuneration for it.

It is therefore important to foster the development of the licensing market between rightholders and online content sharing service providers. These licensing agreements should be fair and keep a reasonable balance for both parties. Rightholders should receive an appropriate reward for the use of their works or other subject matter.

However, as contractual freedom is not affected by these provisions, the right holders should not be obliged to give an authorisation or to conclude licensing agreements.

(37a) Certain information society services, as part of their normal use, are designed to give access to the public to copyright protected content or other subject-matter uploaded by their user. The definition of an online content sharing service under this Directive should target 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 Directive are those services, the main or one of the main purposes of which is to store and enable users to upload and share a large amount of copyright protected content with the purpose of obtaining profit therefrom, either directly or indirectly, by organising it and promoting it in order to attract a larger audience, including by categorising it and using targeted promotion within it. The definition does not include services which have another main purpose than enabling users to upload and share a large amount of copyright protected content with the purpose of obtaining profit from this activity. These include, for instance, electronic communication services within the meaning of Directive 2018/1972 establishing the European Electronic Communications Code, as well as providers of business to-business cloud services and 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. Providers of services such as open source software development and sharing platforms, not for profit scientific or educational repositories as well as not-for-profit online encyclopedias are also excluded from this definition.

Finally, in order to ensure a high level of copyright protection, the liability exemption mechanism provided for in Article 13 should not apply to service providers the main purpose of which is to engage in or to facilitate copyright piracy.

(37b) The assessment of whether an online content sharing service provider stores and gives access to a large amount of copyright-protected content needs to be made on a case-by-case basis and take account of a combination of elements, such as the audience of the service and the number of files of copyright-protected content uploaded by the users of the services.

(38) This Directive clarifies that online content sharing service providers engage in an act of communication to the public or making available to the public when they give the public access to copyright protected works or other protected subject matter uploaded by their users. Consequently, the online content sharing service providers should obtain an authorisation, including via a licencing agreement, from the relevant rightholders. This does not affect the concept of communication to the public or of making available to the public elsewhere under Union law nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other service providers using copyright-protected content.

(38a) When online content sharing service providers are liable for acts of communication to the public or making available to the public under the conditions established under this Directive, Article 14(1) of Directive 2000/31/EC should not apply to the liability arising from Article 13 of this Directive. This should not affect the application of Article 14(1) of Directive 2000/31/EC to these service providers for purposes falling outside the scope of this Directive.

(38b) Taking into account the fact that online content sharing service providers give access to content which is not uploaded by them but by their users, it is appropriate to provide for a specific liability mechanism for the purposes of this Directive for cases where no authorisation has been granted. This should be without prejudice to remedies under national law for cases other than liability for copyright infringements and to the possibility for national courts or administrative authorities of issuing injunctions in compliance with Union law. In particular, the specific regime applicable to new online content sharing service providers with an annual turnover below 10 million euros, whose average number of monthly unique visitors in the Union does not exceed 5 million should not affect the availability of remedies under national law and EU law.

Where no authorisation has been granted to the services providers, they should make their best efforts in accordance with high industry standards of professional diligence to avoid the availability on their services of unauthorised works and other subject matter, as identified by the relevant rightholders. For that purpose rightholders should provide the service providers with necessary and relevant information taking into account, among other factors, the size of rightholders and the type of their works and other subject matter. The steps taken by the online content sharing service providers in cooperation with rightholders should not lead to the prevention of the availability of non-infringing content, including the use of works or other protected subject matter covered by a licencing agreement, exception or limitation to copyright. Thereby it should not affect users who are using the online content sharing providers' services in order to lawfully upload and access information on these services.

The obligations established in Article 13 should also not lead to Member States imposing a general monitoring obligation.

When assessing whether an online content sharing service provider has made its best efforts according to the high industry standards of professional diligence, account should be taken of whether the service provider has taken all the steps that would be taken by a diligent operator to achieve the result of preventing the availability of unauthorised works or other subject matter on its website, taking into account best industry practices and the effectiveness of the

steps taken in light of all relevant factors and developments, as well as the principle of proportionality. For the purposes of this assessment, a number of elements should be considered, such as the size of the service, the evolving state of the art of existing means, including future developments, for avoiding the availability of different types of content and their cost for the services. Different means to avoid the availability of unauthorised copyright protected content 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.

Any steps taken by the service providers should be effective with regard to the objectives sought but should not go beyond what is necessary to achieve the objective of avoiding and discontinuing the availability of unauthorised works and other subject matter.

If unauthorised works and other subject matter become available despite the best efforts made in cooperation with rightholders as required by this Directive, the online content sharing service providers should be liable in relation to the specific works and other subject matter for which they have received the relevant and necessary information from rightholders, unless they demonstrate that they have made their best efforts pursuant to high industry standards of professional diligence.

In addition, where specific unauthorised works or other subject matter have become available on the services, including irrespective of whether the best efforts were made and regardless of whether right holders have made available the necessary information in advance, the online content sharing service providers should be liable for unauthorised acts of communication to the public of works and other subject matter, when upon receiving a sufficiently substantiated notice, they fail to act expeditiously to remove from their websites or disable access to the notified works and subject matter. Additionally, these services should also be liable if they fail to demonstrate that they have made their best efforts to prevent the future uploads of specific unauthorised works, based on relevant and necessary information provided by rightholders for that purpose.

When rightholders do not provide the service providers, with the necessary and relevant information on their specific works and other subject matter or when no notification concerning the 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 make their best efforts to avoid on their services the availability of unauthorised content in accordance with the high standard of professional diligence, the service providers should not be liable for unauthorised acts of communication to the public or of making available to the public of these unidentified works and other subject matter.

(38ba) Article 13(4aa) applies to new online services. A similar provision is foreseen in Article 16(2) of Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. The rules set in this Directive are intended to take into account the specific case of start-up companies working with user uploads to develop new business models.

The modified regime applicable to new service providers with a small turnover and audience should benefit genuine new enterprises and should therefore cease to apply three years after they became first available online in the Union. It should not be abused by arrangements aiming at extending the benefit of this modified regime beyond the first three years. In particular, it should not apply to services newly created or to services provided under a new

name but which are pursuing the activity of an already existing online content sharing service provider which could not or does not longer benefit from this regime.

(38c) The online content sharing service providers should be transparent towards rightholders with regard to the steps taken in the context of the cooperation. As different actions may be undertaken by the online content sharing service providers, they should provide rightholders, at their request, with adequate information on the type of actions undertaken and the way they are implemented. Such information should be sufficiently specific to provide enough transparency to rightholders, without prejudice to the business secrets of online content sharing 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.

(38d) Where online content sharing service providers obtain authorisations, including via licensing agreements, for the use on the service of content uploaded by the users of the service, these should also cover the copyright relevant acts in respect of uploads by the of users within the scope of the authorisation granted to the service providers, but only in cases where the users act for non-commercial purposes, such as sharing their content without any profit making purpose, or when the revenue generated by their uploads are not significant in relation to the copyright relevant act of the users for which they are covered.

When rightholders have explicitly authorised users to upload and make available works or other subject-matter on an online content sharing service, the act of communication to the public of the service is authorised within the scope of the authorisation granted by the rightholder. However, there should be no presumption in favour of the online content sharing service providers that their users have cleared all the relevant rights.

(39a) The steps 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.

Users should be allowed to upload and make available content generated by users for specific purposes of quotation, criticism, review, caricature, parody or pastiche. This is particularly important to strike a balance between fundamental rights in the Charter of Fundamental Rights of the European Union, in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property. For these reasons, these exceptions should be made mandatory in order to ensure that users receive uniform protection across the Union. It is important to ensure that online content sharing services operate an effective complaint and redress mechanism to support these uses.

The online content sharing service providers should also put in place effective and expeditious complaint and redress mechanisms allowing users to complain on the steps taken with regard to their uploads, in particular when they could benefit from an exception or limitation to copyright in relation to an upload that is removed or to which access is disabled. Any complaint filed under such mechanisms should be processed without undue delay and be subject to a decision by a human. When rightholders request the services to take action against the uploads by users, such as disabling access to or removing content uploaded, the rightholders should duly justify their requests. Moreover, in accordance with Directive

2002/58/EC14 and Regulation (EU)2016/67915, the cooperation should not lead to any identification of individual users nor the processing of their personal data.

Member States should also ensure that users have access to out-of-court redress mechanisms for the settlement of disputes. Such mechanisms should allow disputes to be settled impartially. Users should also have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright rules.

(39b) As soon as possible after the entry into force of this Directive, the Commission, in collaboration with Member States, should organise dialogues between stakeholders to arrive to a uniform application of the obligation of cooperation and to define best practices with regard to the appropriate industry standards of professional diligence. For this purpose the Commission should consult relevant stakeholders, including user organisations and technology providers, and take into account the developments on the market. User organisations should also have access to information on actions carried out by online content sharing service providers to manage content online.

Full text of article 13

Art. 2 (5) [Definition]

'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 copyright protected works or other protected subject-matter uploaded by its users which it organises and promotes for profit-making purposes.

Providers of services such as not-for profit online encyclopedias, not-for profit educational and scientific repositories, open source software developing and sharing platforms, electronic communication service providers as defined in Directive 2018/1972 establishing the European Electronic Communication Code, online marketplaces and business-to business cloud services and cloud services which allow users to upload content for their own use shall not be considered online content sharing service providers within the meaning of this Directive.

Article 13 Use of protected content by online content sharing service providers

1. Member States shall provide that an online content sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this directive when it gives the public access to copyright protected works or other protected subject matter uploaded by its users.

   An online content sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licencing agreement, in order to communicate or make available to the public works or other subject matter.

2. Member States shall provide that when an authorisation has been obtained, including via a licensing agreement, by an online content sharing service provider, this authorisation shall also cover acts carried out by users of the services falling within Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or their activity does not generate significant revenues.

3. When an online content sharing service provider performs an act of communication to the public or an act of making available to the public, under the conditions established under this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article. This shall not affect the possible application of Article 14(1) of Directive 2000/31/EC to these service providers for purposes falling outside the scope of this Directive.

4. If no authorisation is granted, online content sharing service providers shall be liable for unauthorised acts of communication to the public of copyright protected works and other subject matter, unless the service providers demonstrate that they have:

   (a) made best efforts to obtain an authorisation, and
   (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information, and in any event

(c) acted expeditiously, upon receiving a sufficiently substantiated notice by the rightholders, to remove from their websites or to disable access to the notified works and subject matters, and made best efforts to prevent their future uploads in accordance with paragraph (b).

4a. In determining whether the service has complied with its obligations under paragraph 4 and in the light of the principle of proportionality the following should, among others be taken into account:

(a) the type, the audience and the size of services and the type of works or other subject matter uploaded by the users
(b) the availability of suitable and effective means and their cost for service providers.

4aa. Member States shall provide that when new online content sharing service providers whose services have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million within the meaning of the Commission Recommendation 2003/361/EC, the conditions applicable to them under the liability regime set out in paragraph 4 are limited to the compliance with point (a) of paragraph 4 and to acting expeditiously, upon receiving a sufficiently substantiated notice, to remove the notified works and subject matters from its website or to disable access to them.

Where the average number of monthly unique visitors of these service providers exceeds 5 million, calculated on the basis of the last calendar year, they shall also demonstrate that they have made best efforts to prevent further uploads of the notified works and other subject matter for which the rightholders have provided relevant and necessary information.

5. The cooperation between online content service providers and rightholders shall not result in the prevention of the availability of works or other subject matter uploaded by users which do not infringe copyright and related rights, including where such works or subject matter are covered by an exception or limitation.

Member States shall ensure that users in all Member States(*) are able to rely on the following existing exceptions and limitations when uploading and making available content generated by users on online content sharing services:

(a) quotation, criticism, review;
(b) use for the purpose of caricature, parody or pastiche.

[exact wording of "in all Member States to be revised by lawyer-linguists]*

7. The application of the provisions in this article shall not lead to any general monitoring obligation.

Member States shall provide that online content sharing service providers shall provide rightholders, at their request, with adequate information on the functioning of their practices with regard to the cooperation referred to in paragraph 4 and, where licensing agreements are concluded between service providers and rightholders, information on the use of content covered by the agreements.

8. Member States shall provide that an online sharing service provider puts in place an effective and expeditious complaint and redress mechanism that is available to users of the service in

case of disputes over the removal of or disabling access to works or other subject matter uploaded by them.

When rightholders request to remove or disable access to their specific works or other subject matter, they shall duly justify the reasons for their requests. Complaints submitted under this mechanism shall be processed without undue delay and decisions to remove or disable access to uploaded content shall be subject to human review.

Member States shall also ensure that out-of-court redress mechanisms are available for the settlement of disputes. Such mechanisms shall enable disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law, without prejudice to the rights of users to have recourse to efficient judicial remedies. In particular, Member States shall ensure that users have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright rules.

This Directive shall in no way affect legitimate uses, such as uses under exceptions and limitations provided for in Union law, and shall not lead to any identification of individual users nor to the processing of their personal data, in accordance with Directive 95/46/EC, Directive 2002/58/EC and the General Data Protection Regulation.

Online content sharing service providers shall inform the users in their terms and conditions about the possibility for them to use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law.

9. As of *[date of entry into force of this Directive]* the Commission in cooperation with the Member States shall organise stakeholder dialogues to discuss best practices for the cooperation between the online content sharing service providers and rightholders. The Commission shall, in consultation with online content sharing service providers, rightholders, users associations and other relevant stakeholders and taking into account the results of the stakeholder dialogues, issue guidance on the application of Article 13 in particular regarding cooperation referred to in paragraph 4. When discussing the best practices, special account shall be taken, among others, of the need to balance the fundamental rights and the use of exceptions and limitations shall be taken into account. For the purpose of this stakeholders dialogue, users associations shall have access to adequate information from online content sharing service providers on the functioning of their practices with regard to paragraph 4.