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Subject: Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market
- Revised Presidency compromise proposal on Articles 2 and 13 and relevant recitals

Delegations will find in Annex a revised Presidency compromise proposal on Articles 2 and 13 and relevant recitals, to be discussed at the meeting of the Working Party on Intellectual Property (Copyright) on 23 November.

Changes in relation to previous version are in ~~striketrough~~ and **bold/underlined**.

TITLE I
GENERAL PROVISIONS

Article 2

Definitions

....

5. **‘Online content sharing service provider’ within the meaning of this Directive is a provider of an information society service whose main or one of the main purposes is to store and give access to the public of a significant amount of copyright protected works or other protected subject- matter uploaded by its users who do not hold the rights in the content uploaded;**

5a. ‘Information society service’ is a service within the meaning of Article 1(1)(b) of Directive (EU) 2015/1535 of the European Parliament and of the Council¹.

¹ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1–15).

TITLE IV
MEASURES TO ACHIEVE A WELL-FUNCTIONING MARKETPLACE FOR COPYRIGHT

CHAPTER 2

Certain uses of protected content by online services

Article 13

*Use of protected content by **online content sharing service providers**~~information society service providers storing and giving access to large amounts of works and other subject matter uploaded by their users~~*

1. Member States shall provide that an **online content sharing service provider**~~information society service providers that provider whose main or one of the main purposes is to store and provide~~ ~~give access to the public access to large amounts of copyright protected works or other protected subject matter uploaded by their users shall,~~ is performing an act of communication to the public or an act making available to the public within the meaning of Article 3(1) and (2) of Directive 2001/29/EC **and Article 8 (2) of Directive 2006/115/EC** when it intervenes in full knowledge of the consequences of its action to give the public access to ~~those~~ **the** copyright protected works or other protected subject matter uploaded by their users by organising these works or other subject matter with the aim of obtaining profit from their use.

1a. Member States shall provide that an online content sharing service provider referred to in paragraph 1, when it is not eligible for the limited liability provided for in Article 14 of Directive 2000/31/EC, shall not be liable for unauthorised acts of communication to the public and acts of making available provided that it

(a) takes effective measures to prevent the availability on its services of unauthorised works or other subject-matter identified by rightholders, and

(b) upon notification by rightholders of a specific unauthorised work or other subject matter, acts expeditiously to remove or disable access to the specific unauthorised work or other subject matter and prevent its future availability through the measures referred to in sub-paragraph (a).

Where rightholders have not provided the online content sharing service provider data on unauthorised works or other subject-matter to be prevented through the application of the measures referred to in sub-paragraph (a), an online content sharing service provider which have taken such measures shall not be liable for the unauthorised acts of communication to the public and acts of making available of these works and other subject matter.

1ab. Member States shall ensure that the measures referred to in paragraph 1(a) shall be appropriate and proportionate, taking into account, among others, the nature of the services, the amount and the type of works or other protected subject-matter uploaded by the users of the services without the authorisation of rightholders, the availability and costs of relevant technologies and their effectiveness in light of technological developments. The service provider shall provide rightholders at their request with adequate information on the functioning and deployment of the measures.

2. Member States shall **provide that** that the measures referred to in paragraph 1a **(a) and the action taken following a notification by rightholders referred to in paragraph 1a (b)** shall be implemented by an ~~information society~~**online content sharing** service provider without prejudice to the freedom of expression and information of their users and the possibility for the users to benefit from an exception or limitation to copyright. For that purpose the service provider shall put in place a complaint and redress mechanism that is available to users of the service in case of disputes over the **application** of the measures. Complaints submitted under this mechanism shall be processed ~~by the relevant rightholders~~**in collaboration with rightholders** within a reasonable period of time. ~~and any prevention by the service provider will be subject to~~. The rightholder shall duly justify its decision ~~by rightholders~~**. This mechanism shall allow the preliminarily blocked content to be made publicly available until the parties agree on the action to follow or the complaint is otherwise dealt with. Relevant rightholders shall be appropriately notified about these uploads to allow them to enforce their rights with regard to infringing works or other subject matter, as appropriate.**

~~2a. Member States shall ensure that the obligations set out in this Article apply to information society service providers established in their territory in accordance with Directive 2000/31/EC and to information society service providers of third countries who offer their services of storing and providing access to works or other protected subject matter uploaded by their users who do not hold relevant rights in the content in the European Union.~~

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

4. ~~Member States shall determine the sanctions applicable to infringements of the obligations set in this Article. The sanctions provided shall be effective, proportionate and dissuasive and shall be without prejudice to European Union and national applicable laws on enforcement of intellectual property rights.~~
5. Member ~~S~~states shall provide that **licencing** agreements concluded between ~~information society~~ **online content sharing** service providers which store and give access to works and other protected subject matter uploaded by their users referred in paragraphs 1 and 1a above, and relevant rightholders, shall cover the **acts of the users of the services falling, for acts falling within Article 3(1) and (2) Article 3 of Directive 2001/29/EC and Article 8 (2) of Directive 2006/115/EC,** when **the users** are not acting in a professional capacity, ~~for acts falling within Article 3 of Directive 2001/29/EC.~~

(37) Over the last years, the functioning of the online content marketplace has gained in complexity. Online services providing access to **a significant amount of** copyright protected content uploaded by their users have flourished and have become main sources of access to content online. Legal uncertainty exists as to whether such online **content sharing** 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. This situation affects rightholders' possibilities to determine whether, and under which conditions, their content is used as well as their possibilities to get an appropriate remuneration for it. It is therefore necessary to clarify the copyright relevant obligations applicable to online **content sharing** services ~~storing and providing access to copyright protected content uploaded by their users,~~ without affecting other services, such as internet access, providers of cloud services, which allow users to upload content for their individual use, such as cyber lockers or online marketplaces **whose main activity is not giving access to copyright protected content but online retail. Nor should the clarification apply to providers of online services which store and provide access to content that is mainly uploaded by the rightholders themselves or is authorised by them, including scientific or educational repositories where the content uploaded is authorised. Nor should the clarification affect the use or works and other subject matter under an exception or limitation to copyright and related rights.** The clarification should be targeting the specific situation of online **content sharing** services, **defined for the purposes of this Directive as information society service providers** whose main or one of the main purposes is to provide access to copyright protected content uploaded by their users, without affecting the application of Article 3(1) and (2) of Directive 2001/29/EC **and Article 8 (2) of Directive 2006 /115/EC** in other situations.

(38) This directive clarifies, taking into account the case law of the Court of Justice of the European Union, under which conditions the online content sharing services ~~information society service providers whose main or one of the main purposes is to store and provide access to the public to copyright-protected works or other protected subject matter uploaded by their users~~ are engaging in an act of communication to the public and, as a consequence, are required to obtain an authorisation from the relevant rightholders for the use of the ~~content~~. When assessing whether there is an act of communication to the public, two cumulative criteria need to be assessed, namely whether there is an act of communication of a copyright protected work or other subject matter and whether there is a public. In line with the case law of the Court of Justice of the European Union the concept of communication to the public needs to be assessed on an individual basis and taking into account complementary criteria which are not autonomous and are interdependent. The Court has for example indicated that there is an act of communication to the public when one intervenes, in full knowledge of the consequences of its action, to give access to a copyright-protected work. The Court has also underlined the relevance of the profit-making nature of the activity when assessing whether a person is engaging in an act of communication to the public.

(38a) Taking into account the fact that certain online content sharing services have become main sources of access to protected content online and have developed their activity around such access, and the case law of the Court of Justice of the European Union, it is appropriate to clarify that online content sharing services, ~~whose main or one of the main purposes is to provide access to copyright protected content uploaded by their users~~ are engaging into acts of communication to the public and making available to the public when they intervene in full knowledge of the consequences of their action to provide access to protected content, with the purpose of obtaining profit therefrom by organising it in such a manner that it is easily findable on their services. Organising content involves for example indexing the content, presenting it in a certain manner and categorizing it.

(38b) Where authorisations are granted by rightholders to ~~information society services~~online content sharing services for the use of their content uploaded by their users of the services, these authorisations should also cover the liability of the users for copyright relevant acts but only in cases where the users do not act in their professional capacity.

(38ba) There may be situations where rightholders or online content sharing service providers choose not to conclude any agreements and the service provider decides to prevent the availability of the content to avoid potential copyright infringements. In some cases the online service provider may however be unable to prevent specific protected content even if it has relevant measures in place, notably when rightholders have not provided them the necessary data for the application of the measures to their specific content. It is therefore necessary to provide that in such specific cases online content sharing service providers should not be liable for copyright infringements, provided that they take appropriate and proportionate measures to prevent unauthorised content and that they remove and prevent future uploads of already available unauthorised content upon a notification from rightholders.

~~(38c) In order to ensure that rightholders can exercise their rights, they should be able to prevent the functioning availability of any licensing agreement, their content on the online services which allow users to upload copyright protected content, regardless of whether such services are engaging into acts of communication to the public or acts of making available to the public, when these services give access to a significant amount of copyright protected content and thereby compete on the online content services' market. It is therefore necessary to provide that information society service providers storing that store and providing give access to the public to large amounts a significant amount of copyright protected works or other subject-matter uploaded by their users should take appropriate and proportionate measures to ensure the protection of works or other subject-matter copyright protected content, such as implementing effective technologies. This It is reasonable to expect that this obligation should also apply applies when the information society service providers are eligible for the limited liability exemption regime provided for in Article 14 of Directive 2000/31/EC, due to their role in giving access to copyright protected content. The obligation of measures should apply to service providers established in the Union but also to service providers established in third countries, which offer their services to users in the Union.~~

~~(38d) The obligation to take measures to ensure the protection of copyright protected content should not apply to information society service providers which only store but do not give access to the public to copyright protected content, such as internet access providers, or providers of cloud services which are used by users to upload content for their individual use or to online marketplaces which are not used by users to access and consume digital content online but rather to provide access to works in the context of their main activity. Nor should it apply to providers of online services where the content is mainly uploaded by the rightholders themselves or is authorised by them.~~

- (38e) The assessment of whether an information society service provider stores and gives access to a significant amount of content needs to be made on a case-by-case basis and take account of a combination of elements, such as the total number of files of copyright-protected content uploaded by the users of the services and the proportion of the protected content uploaded by the users in the overall amount of content available on the service.
- (38f) The assessment of the appropriateness and proportionality of measures to be taken by the ~~information society~~**online content sharing** service providers should among other things take account of the type of content uploaded by their users, **without the authorisation of the right holders**, the state of the art of existing technologies ~~per type of content~~ and the size of the service. Where different categories of content are uploaded, such as music, text and audiovisual content, different measures may be appropriate and proportionate per type of content, including content recognition technologies.
- (39) Collaboration between ~~information society~~**online content sharing** service providers and rightholders is essential for the functioning of the measures, ~~such as content recognition technologies. These measures should be applied with regard to works and other subject-matter identified by rightholders at the request of such rightholders and in cooperation with them. In particular, the rightholders~~ **who wish to prevent the availability of their content on online content sharing services**, should provide **the service providers** the necessary data on **specific** works and other subject-matter **to be prevented**. ~~The data should be provided by rightholders in a format allowing the service providers to apply the measures in an effective manner to the specific works or other subject-matter identified by rightholders.~~

- (39a) **Online content sharing s**Service providers should be transparent towards rightholders with regard to the deployed measures, to allow the assessment of their appropriateness. As different measures may be used by service providers, they should provide rightholders with appropriate information on the type of measures used and the way they are operated. ~~Where relevant, notably where agreements have been concluded with rightholders for the use of the protected content, the service providers should also provide information on the success rates for the recognition of rightholders' content~~ without prejudice to their business secrets. The level of information given by the service providers should as a minimum be sufficient to allow rightholders to assess the effectiveness of the measures used without requiring the service providers to provide them with detailed and individualised information for each content identified. This is without prejudice to contractual arrangements, which may contain more specific provisions on the information to be provided.
- (39b) In order to facilitate the assessment by the service providers of what could constitute appropriate and proportionate measures, collaboration between rightholders and service providers is to be encouraged by the Member States in view of defining best practices.
- (39c) The measures taken by the service providers should respect the freedom of expression and freedom to information of their users and be without prejudice to the application of the exceptions and limitations to copyright. 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. Replies to the users' complaints should be provided in a timely manner. 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 prevention. Protected content uploaded by the users which has been blocked preliminarily by the services, should be made available on the service following a complaint by the user. The content should remain available until the parties find an agreement or until the complaint is dealt with. Member States should remain free to put in place independent authorities for assessing the complaints submitted by users and taking decisions on their validity. The redress mechanism will be without prejudice to the right of the parties to take action before a court.**