

ARTICLE 13 (plus relevant recitals)**OPTION A (self-standing obligation of measures)**

- (37) Over the last years, the functioning of the online content marketplace has gained in complexity. Online services **storing and** providing access to copyright protected content uploaded by their users [...] have flourished and have become main sources of access to content online. **When the content is uploaded by users who do not own the relevant rights in the whole or parts of the content they upload, 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 provide for certain measures that these service providers should take to protect the content.**
- (38) **Depending on the role played by information society service providers that** store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, **which is to be assessed on a case by case basis by the courts, these services may perform an act of communication to the public. In cases where they communicate to the public copyright protected works or other protected subject matter, the service providers are obliged to ask for an authorisation from rightholders for the use of the works or other protected subject-matter,** unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament.

Regardless of whether an information society service provider is engaged in an act of communication to the public or not, rightholders should be able to exercise their rights and prevent the availability of their content on such services, in particular when the 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 services that store and give access to a **significant** amount of copyright-protected works or other subject-matter uploaded by their users take appropriate and proportionate measures to ensure the protection of copyright protected content, such as implementing effective technologies.

It is reasonable to expect that this obligation **also applies** when information society service providers are eligible for the **limited liability regime** provided 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 services established in third countries, which offer their services to users in the Union.**

(38a) 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.

- (38b) 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.**
- (38c) The assessment of the appropriateness and proportionality of measures to be taken by the information society service providers should among other things take account of the type of content uploaded by their users, 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 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 should provide the necessary data on works and other subject-matter. 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) 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.

Article 13

Use of protected content by information society service providers storing and giving access to works and other subject-matter uploaded by their users

1. Member States shall ensure that an information society service provider that stores and provides access **to the public** to **a significant amount** of **copyright protected** works or other subject-matter uploaded by their users **who do not hold the relevant rights in the content uploaded** shall take **effective** measures:

- (a)** to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or
- (b) in the absence of an agreement,** to prevent the availability on their services of works or other subject-matter identified by rightholders. [...]

The measures shall be applied by the information society service providers at the request of rightholders to specific works and other subject-matter as identified by them.
The measures [...] shall be appropriate and proportionate, **taking into account, among others, the nature of the services, the type of works or other protected subject-matter uploaded by the users of the services, the availability and costs of relevant technologies and their effectiveness in light of technological developments.**

1a. The **information society** service provider shall provide rightholders, **at their request**, with adequate information on the functioning and deployment of the measures, as well as, when relevant, adequate reporting on the [...] use of the works and other **protected** subject-matter.

1b. Member States shall ensure that for the purpose of the application of the measures referred to in paragraph 1 to specific works or other protected subject-matter, the rightholders shall provide an information society service provider with the necessary data.

2. **Member States shall ensure that the measures referred to in paragraph 1 shall be implemented by an information society 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 information society 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 implementation of the measures. Complaints submitted under this mechanism shall be processed by the relevant rightholders within a reasonable period of time. The rightholder shall duly justify its decision.**
- 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 service providers and rightholders through stakeholder dialogues to define best practices, such as the use of appropriate and proportionate [...] technologies. [...]
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.**

OPTION B (clarification of communication to the public in the text)

- (37) Over the last years, the functioning of the online content marketplace has gained in complexity. Online services providing access to 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 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 services providing access to copyright protected content uploaded by their users.**
- (38) **This directive clarifies, taking into account the case law of the Court of Justice of the European Union, under which conditions information society service providers that 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.**

Certain information society service providers which store and provide access to content uploaded by their users, may benefit from the limited liability regime provided in Article 14 of Directive 2000/31/EC under certain conditions. In respect of Article 14, it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor.

Where authorisations are granted by rightholders to information society 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.

(38a) In order to ensure that rightholders can exercise their rights, they should be able to prevent the availability of their content on such services, in particular when the 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 that store and give access to a significant amount of works or other subject-matter uploaded by their users take appropriate and proportionate measures to ensure the protection of copyright protected content, such as implementing effective technologies.

It is reasonable to expect that this obligation also applies when information society service providers are eligible for the limited liability 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.

(38b) 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.

(38c) 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.

(38d) The assessment of the appropriateness and proportionality of measures to be taken by the information society service providers should among other things take account of the type of content uploaded by their users, 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 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 should provide the necessary data **on works and other subject-matter. 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) 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.

Article 13

Use of protected content by information society service providers storing and giving access to works and other subject-matter uploaded by their users

1. **Member States shall provide that** an information society service provider that stores **and is actively involved in providing access to the public to copyright protected** works or other **protected** subject matter uploaded by its users, **including through the optimisation of the presentation and promotion of these works and other subject matter, is performing an act of communication to the public.**
- 1a. **Without prejudice to paragraph 1,** Member States shall ensure that an **information society** service provider that stores and **provides access to the public to a significant** amount of works or other protected subject-matter uploaded by their users **who do not hold the relevant rights in the content uploaded** take **effective** measures:

- a) to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter; or
- b) **in the absence of an agreement**, to prevent the availability on their services of works or other subject-matter identified by rightholders. [...]

The measures shall be applied by the information society service providers at the request of rightholders to specific works and other subject-matter as identified by them. The measures shall be appropriate and proportionate, taking into account, among others, the nature of the services, the type of works or other protected subject-matter uploaded by the users of the services, the availability and costs of relevant technologies and their effectiveness in light of technological developments.

- 1b.** The **information society** service provider shall provide rightholders, **at their request**, with adequate information on the functioning and deployment of the measures, as well as, when relevant, adequate reporting on the use of the works and other **protected** subject-matter.
- 1c.** **Member States shall ensure that for the purpose of the application of the measures referred to in paragraph 1a to specific works or other subject-matter of rightholders, the rightholders shall provide an information society service provider with the necessary data.**
2. **Member States shall ensure that the measures referred to in paragraph 1a shall be implemented by an information society 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 **implementation** of the measures . **Complaints submitted under this mechanism shall be processed by the relevant rightholders within a reasonable period of time. The rightholder shall duly justify its decision.**

- 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 service providers and rightholders through stakeholder dialogues to define best practices, such as **the use of** appropriate and proportionate [...] technologies. [...]
- 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 states shall provide that agreements concluded between information society 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 liability of the users of the information society services, when they are not acting in a professional capacity, for acts falling within Article 3 of Directive 2001/29/EC.**
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