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

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 8 March.

Article 2

- (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 the public access to a significant amount of copyright protected works or other protected subject-matter uploaded by its users; non-for profit online encyclopaedia and educational or scientific material shall not be considered online content sharing service providers within the meaning of this Directive.
- (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.

Article 13

Use of protected content by online content sharing service providers

1. Without prejudice to Article 3(1) and (2) of Directive 2001/29/EC, Member States shall provide that an online content sharing service provider pursuant to Article 2(5) is capable of performing an act of communication to the public or an act of making available to the public within the meaning of Article 3(1) and (2) of Directive 2001/29/EC when it gives the public access to copyright protected works or other protected subject matter uploaded by its users.
2. When online content sharing services communicate to the public they shall not be eligible for the limited liability provided for in Article 14 of Directive 2001/31/EC for unauthorised acts of communication to the public and acts of making available to the public.

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).

3. An online content sharing service shall be deemed to perform an act of communication to the public or an act of making available to the public
 - (a) when upon provision by rightholders of information on specific unauthorised works or subject matter it does not take effective measures to prevent the availability on its services of these unauthorised works or other subject-matter identified by rightholders;
 - (b) when upon notification by rightholders of a specific unauthorised work or other subject matter, it does not act expeditiously to remove or disable access to the specific unauthorised work or other subject matter and does not take steps to prevent its future availability through the measures referred to in point (a).
4. The measures referred to in paragraph 3 shall be appropriate and proportionate, taking into account, among other factors, the nature of the services, the amount and the type of works or other protected subject-matter uploaded by the users of the services, their availability and costs as well as their effectiveness in light of technological developments.
5. Member States shall ensure that for the purpose of the application of the measures referred to in paragraph 3 to specific works or other subject-matter of rightholders, online content sharing service providers collaborate with rightholders in order to ensure the functioning of the measures. Rightholders shall provide online content sharing service providers with the necessary and relevant data for the application of the measures and the online content sharing service providers shall provide rightholders, at their request, with adequate information on deployment and functioning of the measures to allow the assessment of their effectiveness. The online content sharing service providers shall in particular provide rightholders with information on the type of measures used and also information on the use of the content covered by the agreement in cases where agreements are concluded between the service providers and rightholders.

6. Member States shall ensure that the measures referred to in paragraph 3 are implemented by the online content sharing service provider without prejudice to the possibility for their users to benefit from exceptions or limitations to copyright, including in particular those which guarantee their freedom of expression and access to information. 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.
7. Member States shall provide that when licensing agreements are concluded between online content sharing service providers and rightholders these agreements shall cover the liability of the users of the online content sharing services when they are not acting in a professional capacity, for acts falling within Articles 2 and 3 of Directive 2001/29/EC.
8. Member States and the Commission shall facilitate, where appropriate, the cooperation between the information society service providers referred to in paragraph 1 and rightholders through stakeholder dialogues to define best practices, such as the use of appropriate and proportionate measures.

RECITALS

- (37) Over the last years, the functioning of the online content marketplace has gained in complexity. Online content sharing 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 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.

- (37a) The definition of an online content sharing service provider under this Directive targets online services whose main or one of the main purposes is providing access to a significant amount of copyright protected content uploaded by their users. It does not include services such as internet access providers, providers of cloud services which do not provide access to the public but exclusively allow users to upload content for their individual users, such as cyberlockers or online marketplaces whose main activity is not giving access to copyright protected content but online retail. Nor does this definition cover websites which store and provide access to authorised content for non for profit purposes, such as scientific or educational repositories or online encyclopedia.
- (37b) The assessment of whether an online content sharing 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.
- (38) This directive clarifies that online content sharing services, as defined in the directive, are capable of performing an act of communication to the public or an act of making available to the public. At the same time, it specifies certain situations where these services perform such copyright relevant acts, without affecting the possible application of Article 3(1) and (2) of Directive 2001/29/EC of the European Parliament and of the Council to those services communicating in other situations, or the scope of the right of communication to the public itself. These services are also capable of communicating to the public, as indicated by the Court of Justice of the European Union. In particular, it is appropriate to clarify that such services engage into acts of communication to the public or making available to the public when rightholders have provided the service providers with information on specific unauthorised works or other subject matter and the service does not take effective measures to avoid the availability on its service of these works or when the service does not act expeditiously to remove or disable access to the content and does not take steps to prevent its future availability by putting in place effective measures.

- (38b) When an online content sharing service provider engages into acts of communication to the public or making available to the public, it should obtain an authorisation from rightholders for the use of the copyright protected content or other subject. Where authorisations are granted by rightholders to online content sharing services for the use of their content uploaded by the 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
- (38ab) For the purposes of assessing whether an online content sharing service provider is taking effective measures, the appropriateness and proportionality of measures taken by the online content sharing service providers needs to be assessed taking into account, among other things, the type of content uploaded by their users, the state of the art of existing technologies and the size of the service. Where different categories of content are uploaded, such as music, audiovisual content or text, different measures may be appropriate and proportionate per type of content.
- (39) Collaboration between online content sharing service providers and rightholders is essential, for the application of the measures by the online content sharing service providers. In particular, rightholders should provide the service providers the necessary and relevant data on specific works and other subject-matter to be removed or to prevent its future availability.
- (39a) Online content sharing service providers should be transparent towards rightholders with regard to the deployed measures. 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 operate 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 where agreements are concluded between the services and rightholders.

(39b) The measures taken by the service providers should 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. The redress mechanism will be without prejudice to the right of the parties to take action before a court.

(39c) The Member States and the Commission should facilitate the collaboration between rightholders and service providers in view of defining best practices.
