

Non-paper to facilitate discussions on Article 13

This non-paper has been drafted by the Commission services following a request by the Parliament, with the agreement of the Council, in the copyright Directive trilogue of 3 December 2018. It aims at facilitating discussions on Article 13 of the Directive ahead of the next trilogue on 13 December. It does not represent a formal position of the Commission.

At the trilogue of 3 December 2018 the co-legislators tasked the Commission with the drafting of a paper on the mitigation of liability in the absence of a licence.

As a starting point it was considered that online content sharing service providers, as defined in the directive, communicate to the public and need to obtain licences from the relevant rightholders.

The Commission was requested to follow these guidelines indicated by the Rapporteur:

- 1. Platforms should follow high standards of duty of care;*
- 2. Cooperation should not be unidirectional;*
- 3. Non infringing content should remain on the platform online;*
- 4. Automatic blocking, albeit non forbidden, should be avoided as much as possible*
- 5. Existing measures should not be excluded*
- 6. Platforms should not always be released from liability by merely applying content identification measures*
- 7. Rightholders should not be in a worse position than they are currently. In this context the audiovisual sector was singled out. On this basis, the following ideas, which are based on a logical grouping of the above guidelines, are outlined for the consideration of the co-legislators:*

A. High standard of duty of care and bilateral cooperation (1 + 2) *Online content sharing service providers, as defined in the directive, are considered to communicate to the public and as such need to obtain licences from the relevant rightholders. Where no licences are granted, online content sharing service providers and rightholders should cooperate in good faith to prevent the availability of protected content online.*

Cooperation should take place according to appropriate standards of professional diligence, which ought to take into account the size of the service, the number and type of works or other subject matter uploaded by users, the potential economic harm caused to rightholders, the availability of suitable and effective technologies and their cost for service providers. In practice, this means that the standards of cooperation should be particularly high for high value content. Cooperation should not lead to a general monitoring obligation as defined under the e-Commerce Directive.

Rightholders should provide content sharing service providers with specific information (e.g. metadata) allowing identification of their content.

The cooperation could include content identification measures (e.g. for high value content) but should not prevent other forms of cooperation if agreed by the parties (e.g. ex post content moderation for low value content, see also letter B).

When unauthorised content becomes available on their websites, content sharing service providers would in general not be liable if they have cooperated in good faith according to the relevant standards of professional diligence. However, within an adequate framework to ensure legal certainty, when despite such cooperation the availability of content online has caused significant economic harm to rightholders the Directive could consider the provider liable in any event, but at a reduced level taking into account the good faith of the provider. Alternatively, the Directive could allow rightholders to claim restitution of the benefits appropriated by the providers (e.g. using unjust enrichment claims under national law) (see point C below).

B. Non infringing content should remain online and automatic blocking to be avoided as much as possible (3+4)

Content that does not infringe copyright, for example because it is covered by exceptions, should stay on the services' websites. In addition, the co-legislators could provide that minor uses of content by amateur uploaders should not be automatically blocked (in the context of the cooperation and professional diligence referred to under A) nor trigger the liability of the uploader. This should be without prejudice to the remedies under point C and the rules on liability of the providers and cooperation under A.

The need to allow legitimate content to remain available, should be strengthened through a robust redress mechanism which should ensure that users can contest measures taken against their legitimate uploads. The Commission already provided possible suggestions to the co-legislators which are currently under discussions in the trilogue process.

C. Rightholders should keep benefiting from existing measures; and platforms not released from liability by merely applying content identification technologies. Rightholders, notably audiovisual sector, not worse off (5+6+7)

Rightholders should in any event retain the ability to request removal of infringing content from the websites of the content sharing services. Building on and complementing the current ecommerce rules, rightholders should be allowed to request that unauthorised content is expeditiously removed and that best efforts are made to ensure that it stays down. As indicated in A, the co-legislators may provide for an additional safeguard for rightholders when despite the good faith cooperation the availability of content online causes significant economic harm to them.