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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 regarding Articles 1, 2 and 10 to 16

Delegations will find in :

- a) Annex I, a Presidency compromise proposals on Articles 1, 2 and 10 to 16 (including on relevant recitals) except on Articles 11 and 13;
- b) Annex II, two alternative Presidency compromise proposals on Article 11 (including on relevant recitals);
- c) Annex III, two alternative Presidency compromise proposals on Article 13 (including on relevant recitals).

These proposals will be discussed at the meeting of the Working Party on Intellectual Property (Copyright) on 11/12 September.

Proposal for a
DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on copyright in the Digital Single Market

- (29) **Video-on-demand** services have the potential to play a decisive role in the dissemination of **audiovisual** works across the European Union. **However, the availability of those works, in particular European works, on video-on-demand services remains limited.** Agreements on the online exploitation of such works may **be difficult to conclude due to issues** related to the licensing of rights. Such issues may, for instance, appear when the holder of the rights for a given territory is not interested in the online exploitation of the work **and does not license or holds back the online rights, which can lead to the unavailability of audiovisual works on video-on-demand services. Other issues may be** linked to the windows of exploitation.
- (30) To facilitate the licensing of rights in audiovisual works to video-on-demand **services**, this Directive requires Member States to **provide for** a negotiation mechanism allowing parties willing to conclude an agreement to rely on the assistance of an impartial body. **For that purpose, Member States may either create a new body or rely on an existing one that fulfils the conditions established by this Directive.** The body should meet with the parties and help with the negotiations by providing professional and external advice. **The use of and the participation in the negotiation mechanism should remain voluntary.** Against that background, Member States should **be free to** decide on the **concrete** functioning of the negotiation mechanism, including the timing and duration of the assistance to negotiations and the bearing of the costs. Member States should ensure that administrative and financial burdens remain proportionate to guarantee the efficiency of the negotiation **mechanism.**

Recitals 31 to 35 see Annex II

(36) Publishers, including those of press publications, books or scientific publications, often operate on the basis of the transfer of authors' rights by means of contractual agreements or statutory provisions. In this context, publishers make an investment with a view to the exploitation of the works contained in their publications and may in some instances be deprived of revenues where such works are used under exceptions or limitations, such as the ones for private copying and reprography, **or under public lending schemes**. In a number of Member States **the compensation or remuneration for such uses** is shared between authors and publishers. In order to take account of this situation and improve legal certainty for all concerned parties, Member States should be allowed to determine that, when an author has transferred or licensed his rights to a publisher or otherwise contributes with his works to a publication and there are systems in place to compensate for the harm caused by an exception or limitation, publishers are entitled to claim a share of such compensation. **The same possibility should exist for remuneration for public lending**. The burden on the publisher to substantiate his claim for the compensation or remuneration should not exceed what is required under the system in place. **Member States should remain free to lay down the conditions as to the sharing of this compensation or remuneration between authors and publishers in accordance with their national systems.**

Recitals 37 to 39 see Annex III

(40) [...] Authors and performers need information to assess the economic value of their rights which are harmonised under Union law. This is especially the case where such rightholders grant a licence or a transfer of rights **for the purposes of exploitation** in return for remuneration. **This need does not arise to the same extent when the work or performance is merely used by the contractual partner for activities the main purpose of which is not the exploitation of the work or performance itself, such as for administrative purposes or in the context of the use of logos or house styles and also in cases where the author has granted an indefinite license to the public without remuneration.**

(40a) As authors and performers tend to be in a weaker contractual position when they grant licences or transfer their rights, they need information, to assess the continued economic value of their rights, compared to the remuneration received for their licence or transfer, but they often face a lack of transparency. Therefore, the sharing of adequate information by their contractual counterparts or their successors in title is important for the transparency and balance in the system that governs the remuneration of authors and performers.

In order to ensure that exploitation-related information is provided to authors and performers also in cases where the rights have been sublicensed by the first contractor to other parties who exploit the rights, this Directive obliges the sublicensees to provide the licensors at their request relevant information on the exploitation of the rights.

Member States should have the option, in compliance with Union law, to provide authors and performers a higher level of transparency through national provisions.

(41) When implementing transparency obligations, the specificities of different content sectors and of the rights of the authors and performers in each sector **as well as the significance of the contribution of authors and performers to the overall work or performance** should be considered. Member States should consult all relevant stakeholders **when determining** sector-specific requirements. Collective bargaining should be considered as an option to reach an agreement between the relevant stakeholders regarding transparency. **Members States should be free to implement the transparency obligations by providing that agreements between authors, performers and their contractual counterparts subject to or based on collective bargaining agreements are considered compliant with the national provisions implementing this Directive when the relevant collective agreement provides for regular reporting to authors and performers on the exploitations of their works and performances in compliance with this Directive.** To enable the adaptation of current reporting practices to the transparency obligations, a transitional period should be provided for. The transparency obligations do not need to apply to agreements concluded with collective management organisations as those are already subject to transparency obligations under Directive 2014/26/EU.

- (42) Certain contracts for the exploitation of rights harmonised at Union level are of long duration, offering few possibilities for authors and performers to renegotiate them with their contractual counterparts or their successors in title **when the economic value of the rights turns out to be significantly higher than initially estimated**. Therefore, without prejudice to the law applicable to contracts in Member States, a remuneration adjustment mechanism **should be provided** for cases where the remuneration originally agreed under a licence or a transfer of rights is disproportionately low compared to the relevant revenues and benefits derived from the **subsequent** exploitation of the work or fixation of the performance. [...] The assessment of the situation should take account of the specific circumstances of each case as well as of the specificities and practices of the different content sectors, **including whether the contract is based on a collective bargaining agreement**. Where the parties do not agree on the adjustment of the remuneration, the author or performer should be entitled to bring a claim before a court or other competent authority.
- (43) Authors and performers are often reluctant to enforce their rights against their contractual partners before a court or tribunal. Member States should therefore provide for an alternative dispute resolution procedure that addresses claims **by authors and performers or their representatives** related to obligations of transparency and the contract adjustment mechanism. **For that purpose, Member States may either create a new body or rely on an existing one that fulfils the conditions established by this Directive. This alternative dispute resolution procedure should be without prejudice to the right of parties to assert and defend their rights by bringing an action before a court.**
- (43a) As a consequence of the mandatory nature of the obligations provided for in Articles 14 and 15 of this Directive, the rules set out in Article 3(4) of the Regulation (EC) No 593/2008 of the European Parliament and of the Council¹ should apply to the effect that where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of Articles 14 and 15, as implemented in the Member State of the forum.**

¹ Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6–16).

TITLE I
GENERAL PROVISIONS

Article 1
Subject matter and scope

- (2) Except in the cases referred to in Article 6, this Directive shall leave intact and shall in no way affect existing rules laid down in the Directives currently in force in this area, in particular Directives 96/9/EC, 2001/29/EC, 2006/115/EC, 2009/24/EC, 2012/28/EU and 2014/26/EU, **nor shall it affect the rules laid down in Directive 2000/31/EC.**

Article 2
Definitions

For the purposes of this Directive, the following definitions shall apply:

- (4) ‘press publication’ means [...] a collection **composed mainly** of literary works of a journalistic nature which:
- (a) may also **include** other works or subject-matter;
 - (b) constitutes an individual item within a periodical or regularly-updated publication under a single title, such as a newspaper or a general or special interest magazine;
 - (c) **has** the purpose of providing **the general public with** information related to news or other topics; and
 - (d) is published in any media under the initiative, editorial responsibility and control of a service provider.
- (5) **‘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 Council².**

² 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 III
MEASURES TO IMPROVE LICENSING PRACTICES AND ENSURE WIDER ACCESS
TO CONTENT

CHAPTER 2
Access to and availability of audiovisual works on video-on-demand platforms

Article 10
Negotiation mechanism

Member States shall ensure that parties **facing difficulties related to** the licensing of rights **when seeking to** conclude an agreement for the purpose of making available audiovisual works on video-on-demand services, may rely on the assistance of an impartial body with relevant experience. The body shall provide assistance **to the parties** with **their** negotiations and help **them** reach agreements, **including, where appropriate, by submitting proposals to the parties.**

Member States shall notify to the Commission the body referred to in paragraph 1 no later than [date mentioned in Article 21(1)].

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

CHAPTER 1
Rights in publications

Article 11

see Annex II

Article 12

Claims to fair compensation

Member States may provide that where an author has transferred or licensed a right to a publisher, such a transfer or a licence constitutes a sufficient legal basis for the publisher to **be entitled to** a share of:

- (a) the compensation for the uses of the work made under an exception or limitation to the transferred or licensed right; **and**
- (b) **the remuneration for public lending provided for in Article 6(1) of Directive 2006/115/EC.**

CHAPTER 2
Certain uses of protected content by online services

Article 13

see Annex III

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

CHAPTER 3
Fair remuneration in exploitation contracts of authors and performers

Article 14
Transparency obligation

1. Member States shall ensure that authors and performers receive on a regular basis and taking into account the specificities of each sector, timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights **or their successors in title**, notably as regards modes of exploitation, revenues generated and remuneration due.
 - 1a. Member States shall ensure that where the rights referred to in paragraph 1 have subsequently been licensed to another party, such party shall upon the request of the licensor share with it relevant information on the exploitation of the rights for the purposes of information provision provided for in paragraph 1.**
2. The obligation in paragraph 1 shall be proportionate and effective and shall ensure an appropriate level of transparency in every sector. However, in those cases where the administrative burden resulting from the obligation would be disproportionate in view of the revenues generated by the exploitation of the work or performance, Member States may adjust the obligation in paragraph 1, provided that the obligation remains effective and ensures an appropriate level of transparency.
3. Member States may decide that the obligation in paragraph 1 does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance.
4. Paragraph 1 shall not be applicable to entities subject to the transparency obligations established by Directive 2014/26/EU.

Article 15
Contract adjustment mechanism

- 1.** Member States shall ensure that authors and performers **or their representatives** are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights **or their successors in title**, when the remuneration originally agreed turns out to be disproportionately low compared to the [...] relevant revenues and benefits derived from the **actual** exploitation of the works or performances.
- 2. Paragraph 1 shall not be applicable to entities defined in Article 3(a) and 3(b) of Directive 2014/26/EU, except when they are engaged in individual management of rights.**

Article 16
Dispute resolution procedure

1. Member States shall provide that disputes concerning the transparency obligation under Article 14 and the contract adjustment mechanism under Article 15 may be submitted to a voluntary, alternative dispute resolution procedure.
- 2. Member States shall ensure that representative organisations of authors and performers, including collective management organisations, may initiate such disputes on behalf of one or more authors and performers.**

Article 16a
Contractual provisions

Member States shall ensure that any contractual provision between authors and performers and those to whom they have licensed or transferred their rights, which are contrary to the provisions in Articles 14 and 15 of this Directive, shall be unenforceable.

ARTICLE 11 (plus relevant recitals)

OPTION A (new neighbouring right)

- (31) A free and pluralist press is essential to ensure quality journalism and citizens' access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society. In the transition from print to digital, publishers of press publications are facing problems in licensing the online use of their publications and recouping their investments. In the absence of recognition of publishers of press publications as rightholders, licensing and enforcement in the digital environment **are** often complex and inefficient.
- (32) The organisational and financial contribution of publishers in producing press publications needs to be recognised and further encouraged to ensure the sustainability of the publishing industry. It is therefore necessary to provide at Union level a harmonised legal protection for press publications in respect of digital uses. Such protection should be effectively guaranteed through the introduction, in Union law, of rights related to copyright for the reproduction and making available to the public of press publications in respect of digital uses.
- (33) For the purposes of this Directive, it is necessary to define the concept of press publication in a way that embraces only journalistic publications, published [...] in any media, **including on paper, in the context of an economic activity which constitutes a provision of services under EU law. The press publications to be covered are those whose purpose is to inform the general public and which are periodically or regularly updated.** Such publications would include, for instance, daily newspapers, weekly or monthly magazines of general or special interest and news websites. **Press publications contain mostly literary works but increasingly include other types of works and subject-matter, notably photographs and videos.** Periodical publications [...] published for scientific or academic purposes, such as scientific journals, should not be covered by the protection granted to press publications under this Directive. This protection does not extend to acts of hyperlinking **when they** do not constitute communication to the public.

- (34) The rights granted to the publishers of press publications under this Directive should have the same scope as the rights of reproduction and making available to the public provided for in Directive 2001/29/EC, insofar as digital uses are concerned. They should also be subject to the same provisions on exceptions and limitations as those applicable to the rights provided for in Directive 2001/29/EC including the exception on quotation for purposes such as criticism or review laid down in Article 5(3)(d) of that Directive.
- (35) The protection granted to publishers of press publications under this Directive should not affect the rights of the authors and other rightholders in the works and other subject-matter incorporated therein, including as regards the extent to which authors and other rightholders can exploit their works or other subject-matter independently from the press publication in which they are incorporated. Therefore, publishers of press publications should not be able to invoke the protection granted to them against authors and other rightholders **or against other authorised users of the same works and other subject-matter.** This is without prejudice to contractual arrangements concluded between the publishers of press publications, on the one side, and authors and other rightholders, on the other side.

Article 11

Protection of press publications concerning digital uses

1. Member States shall provide publishers of press publications with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the digital use of their press publications.

The rights referred to in the first subparagraph shall also apply in respect of extracts of a press publication provided that the extracts are the expression of the intellectual creation of their authors.

2. The rights referred to in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject-matter incorporated in a press publication. **The rights referred to in paragraph 1** may not be invoked against those authors and other rightholders and, in particular, may not deprive them of their right to exploit their works and other subject-matter independently from the press publication in which they are incorporated.

When an author or a rightholder has concluded licences with different persons in respect of a work or other subject-matter incorporated in a press publication, the rights referred to in paragraph 1 may not be invoked to prohibit the use by other authorised users of such a work or other subject-matter. The rights referred to in paragraph 1 may not be invoked to prohibit the use of works or other subject-matter that are in the public domain.

3. Articles 5 to 8 of Directive 2001/29/EC and Directive 2012/28/EU shall apply *mutatis mutandis* in respect of the rights referred to in paragraph 1.
4. The rights referred to in paragraph 1 shall expire 20 years after the publication of the press publication. This term shall be calculated from the first day of January of the year following the date of publication.

OPTION B (Presumption for publishers of press publications)

(31) A free and pluralist press is essential to ensure quality journalism and citizens' access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society. [...] **The sustainability of the press publishing industry should therefore be ensured.**

(31a) In the transition from print to digital, publishers of press publications are **increasingly** facing problems in licensing the online use of their publications and recouping their investments. **Press publications contain mostly literary works but increasingly include other types of works and subject-matter, notably photographs and videos. Due to the large number of authors and rightholders involved in the creation of a press publication, licensing and enforcement of the rights in press publications are often complex and inefficient in the digital environment. Publishers may notably face difficulties when proving that they have been transferred or licensed the rights in such works and other subject-matter for the purposes of concluding licences or enforcing the rights in respect of their press publications.**

(31b) **Publishers of press publications need to acquire all the relevant economic rights from the authors and rightholders to incorporate their works or other subject-matter in a press publication. This principle should continue to apply. However, without prejudice to contractual arrangements concluded between the publishers of press publications, on the one side, and the authors and other rightholders, on the other side, the licensing and enforcement of the rights acquired vis-à-vis third parties should be facilitated. It is therefore necessary to provide at Union level a rebuttable presumption to allow the publisher to be regarded as the person entitled to conclude licences on and enforce the rights of reproduction and making available to the public concerning the digital use of works and other subject-matter contained in the press publication provided that the name of the publisher appears on the publication.**

(32) **Deleted.**

- (33) For the purposes of this Directive, it is necessary to define the concept of press publication in a way that embraces only journalistic publications, published [...] in any media, **including on paper, in the context of an economic activity which constitutes a provision of services under EU law. The press publications to be covered are those whose purpose is to inform the general public and which are periodically or regularly updated.** Such publications would include, for instance, daily newspapers, weekly or monthly magazines of general or special interest and news websites. Periodical publications [...] published for scientific or academic purposes, such as scientific journals, should not be covered by the **presumption of rights granted to publishers for** press publications laid down in this Directive. [...]
- (34) *Deleted.*
- (35) The **presumption for publishers of press publications laid down in** this Directive should not affect the rights of the authors and other rightholders in the works and other subject-matter incorporated therein, including as regards the extent to which authors and other rightholders can exploit their works or other subject-matter independently from the press publication in which they are incorporated. Therefore, publishers of press publications should not be able to invoke the **presumption laid down in this Directive** against authors and other rightholders **or against other authorised users of the same works and other subject-matter.**

Article 11

Licensing and enforcement of rights in press publications concerning digital uses

1. Member States shall provide that, **in the absence of proof to the contrary,** the publisher of a press publication **shall be regarded as the person entitled to conclude licences and to seek application of the measures, procedures and remedies referred to in Directive 2004/48/EC and Article 8 of Directive 2001/29/EC in respect of the rights provided for in Article 2 and 3(2) of Directive 2001/29/EC concerning the digital use of the works and other subject-matter incorporated in such a press publication, provided that the name of the publisher appears on the publication.**

2. The presumption provided for in paragraph 1 shall not affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject-matter incorporated in a press publication. The presumption may not be invoked against the authors and other rightholders and, in particular, may not deprive them of their right to exploit their works and other subject-matter independently from the press publication in which they are incorporated.

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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