Suggestions for changes to article 13 of the proposed DSM directive including a proposal for a new exception for transformative uses of copyrighted works.

Article 13 “Use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users” should be removed from the proposal.

The EU legislator needs to provide a clear positive definition of the rights available to use existing content. In the first table (1) we propose a new, mandatory exception to copyright that allows noncommercial transformative uses of copyrighted works by private individuals. Rightsholders must not be granted any authority to remove or block user uploads that fall within the scope of such an exception, or any other exception.

If the EU legislator decides to keep article 13 in the proposal, it should take into account the following safeguard. All references to content recognition technologies should be removed from the proposal, because these are ill equipped to deal with copyright. The current technology is unable to implement limitations and exceptions. Within the current technological environment, the content recognition system proposed by the Directive is equal to a “system for filtering information” and contrary to EU case law.

In the second table (2) we provide suggestions for changes to the proposal concerning recitals 37, 38 and 39 and article 13 that fulfils all these requirements. You can find our comprehensive analysis of article 13 of the proposal in our position paper ‘EU copyright should protect users’ rights and prevent content filtering’.

(1) Introduction of a mandatory exception to copyright for transformative uses of copyrighted works by private individuals		
COMMISSION	**AMENDMENT**	**Justification**
Recital [new]		
	Over the last years internet users have used digital production and dissemination technologies to express their creativity in the form of remixes, memes and other forms of so called user generated content. In many cases these expressions of creativity include the use of existing works or subject matter protected under copyright and or neighbouring rights. The existing EU copyright framework does not contain clear and harmonized rules that specify under what circumstances such use is permissible. Instead, users have to rely on exceptions for citation or parody that vary greatly across the member states and on rightholders' willingness not to take action against such uses of existing works. This has created a situation of legal uncertainty that is affecting a growing number of internet users who are engaging in such creative practices.	
Recital [new]		
	Member States should therefore be required to provide for an exception that permits individuals to use existing works and other subject-matter for non-commercial creative purposes. This exception should only apply to uses that are taking place in the creation of a new work or other subject-matter, that are non-commercial in nature and that do not conflict with the normal exploitation of the existing works by their rightholders. The purpose of this new exception is to delineate permissible transformative uses of existing works from the simple	

	online sharing of existing works or parts of existing works. In doing so the new exceptions provides more legal certainty for internet users engaging in creative re-use of existing works.	
Article 4 bis (new after existing article 4) Use of works and other subject-matter for non-commercial creative purposes		
	Member States shall provide for an exception to the rights provided for in Articles 2, 3 and 4 of Directive 2001/29/EC, Articles 5 and 7(1) of Directive 96/9/EC, Article 4(1) of Directive 2009/24/EC, Articles 7(1) and 8(1) of Directive 2006/115/EC and Article 11(1) of this Directive in order to allow a natural person to use an existing work or other subject matter in the creation of a new work or other subject-matter and use the new work or other subject matter, provided that: **(a) the work or other subject-matter has already been lawfully made available to the public;** **(b) the use of the new work or other subject-matter is done solely for non-commercial purposes;** **(c) the source - including, if available, the name of the author, performer, producer, or broadcaster - is indicated, except where this turns out to be impossible;** **(d) the use of the new work or other subject-matter does not conflict, with the normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the author.**	The Commission's proposal clearly aims at platforms that host so called "user-generated content" (UGC). The emergence of the internet in general—and UGC platforms in particular—have resulted in an explosion of creativity that is fueled by creative expression through the re-use of existing materials. The European copyright framework does not provide clear and harmonized rules that define how users can re-use protected works when creating remixes and other types of UGC. Introducing filtering requirements to deal with infringing uses on these platforms without first defining what constitutes legitimate uses is harmful to users, and ultimately limits the way internet users in Europe can express themselves online. Therefore, we have implemented a new article that does define how users can re-use protected works. This exception would legitimise how content and culture is remixed and shared in myriad ways by everyone everyday.

(2) Suggestions for changes to the proposal concerning recitals 37-39 and article 13		
COMMISSION	**AMENDMENT**	**Justification**
Recital 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** without the involvement of right holders have flourished and have become **main** sources of access to content online. This **affects** rightholders' possibilities to determine whether, and under which conditions, their work and other subject-matter are used as well as their possibilities to get an appropriate remuneration for it.	Over the last years, the functioning of the online content marketplace has gained in complexity. Online **hosting services being used by users to upload material** without the involvement of right holders have flourished and have become one of the sources of access to content online. This **can affect** rightholders' possibilities to determine whether, and under which conditions, their work and other subject-matter are used as well as their possibilities to get an appropriate remuneration for it.	Recital 37, 38 and 39 and article 13 defines communication to the public as *storing* and providing access to the public to copyright-protected works or other subject matter uploaded by users. Meanwhile, the E-Commerce Directive notes that where Internet Society Service Providers provide services that *store* information provided by a recipient of the service, "Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service". It is not clear whether the Commission's proposal widens the definition of "communication to the public". We have therefore proposed to use language that is consistent with the E-Commerce directive and removed 'providing access to the public' and replaced it with hosting services.
Recital 38		
Where information society service providers **store and provide access to the public to** copyright protected works or other subject-matter uploaded by their users, **thereby going beyond the mere provision of physical facilities and performing an act of communication to the public,** they are obliged to conclude licensing agreements with rightholders, unless they are	I~~Where~~ information society service providers which host ~~**host large amounts of**~~ unauthorised copyright protected works or other subject-matter uploaded by their users, ~~they~~ ~~**should**~~**may** be obliged to conclude licensing agreements with rightsholders, unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council.	Recital 38 attempts to build further on the L'oreal/ebay-case (C-324/09) by generalising the definition of an active role of an internet service society provider. It attempts to generalise the definition with the result of further reducing the liability exemption to all online platforms, instead of the referred online marketplaces in L'Oreal/Ebay-case. Due to the diverse technological nature of

eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council 34. **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.** **In order to ensure the functioning of any licensing agreement, information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users should take appropriate and proportionate measures to ensure protection of works or other subject- matter, such as implementing effective technologies. This obligation should also apply when the information society service providers are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC.**	**These licensing agreements shall not cover uses of works and other subject-matter made under any exception or limitation provided for under Title II of this Directive, article 5 of the Directive 2001/29/ EC, articles 6 and 9 of the Directive 96/9/EC, or article 5 of Directive 2009/24/EC.**	online platforms, this is an unwelcome generalization. Therefore we have removed it from the recital. We have included the second paragraph to prevent the contractual overridability of limitation and exceptions by licensing agreements.
Recital 39		
Collaboration between information society service providers storing **and providing access to the public to** large amounts of copyright protected works or other subject-matter uploaded by their users and rightholders is **essential** for the functioning **of technologies, such as content recognition technologies. In such cases, rightholders should provide the necessary data to allow the services to identify their content and the services should be transparent towards rightholders with regard to the deployed technologies, to allow the assessment of their appropriateness. The services should in particular provide rightholders with information on the type of technologies used, the way they are operated and**	Collaboration between information society services providers **storing** large amounts of unauthorised copyright protected works or other subject-matter uploaded by their users and rightsholders is **important** for the functioning of licensing agreements. **Information society service providers should be transparent towards rightholders and users with regard to the deployed measures to allow the assessment of their appropriateness. There should be mechanisms in place that enable users to appeal decisions made by information society service providers with regard to works uploaded by users.**	We have removed all references to the functioning of technologies, such as content recognition technologies, because these are ill equipped to deal with copyright. Within the current technological environment, the content recognition system proposed by the Directive is equal to a “system for filtering information” considered by the CJEU. They are unable to implement limitation and exception. From the perspective of European case law, upload filtering goes against existing CJEU rulings, in particular the Sabam /Netlog-case (C-360/10). The Commission’s proposal may apply to hosting providers, which are explicitly excluded from any broad obligations to filter content in the Sabam ruling. In that case, the CJEU made a point to note that

their success rate for the recognition of rightholders' content. Those technologies should also allow rightholders to get information from the information society service providers on the use of their content covered by an agreement.		filtering threatens freedom of expression. We have included a paragraph to make sure users have access to transparent information about the functioning of measures applied by platform. This information must be verifiable by the affected users, and uploaders need to have meaningful ways to contest any removal or filtering actions.
Article 13		
Use of protected content by information society providers **Storing and Giving Access to Large Amounts of Works and Other Subject-Matter Uploaded by their Users**	Unauthorized Copyright protected Content uploaded by users of ~~Use of protected content by~~ information society providers ~~storing large amount of unauthorized copyright protected~~ Works and Other ~~Subject-Matter Uploaded by their Users~~	We have therefore proposed to use language that is consistent with the E-Commerce directive and removed 'providing access to the public'.
Article 13(1)		
Information society service providers that store **and provide to the public access to** large amounts of works or other subject-matter uploaded by their users shall, **in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when EN29 EN relevant, adequate reporting on the recognition and use of the works and other subject-matter.**	Information society service providers ~~that store large amounts of works or other subject-matter uploaded by their~~ whose users upload copyright protected content without the authorization of rightsholders, if that authorization is required, shall **engage in economic agreements with rightholders in order to agree compensation for the public availability and use of such works,** unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council.**. Where agreements cannot be reached bilaterally, negotiations shall be supervised by an arbitrator, appointed jointly by the service provider and the rightsholder, or their representatives.**	We have removed all references to the functioning of technologies, such as content recognition technologies, because these are ill equipped to deal with copyright including its limitations and exceptions and users' rights. We specified the kind of agreements internet society service providers and rightsholders should engage in, namely economic agreements for compensation of the use of works, and how these agreements should be reached to create clarity.
Article 13(2)		

Member States shall ensure that the service providers referred to in paragraph 1 put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1.	**These agreements shall not cover uses of works and other subject-matter made under any exception or limitation provided for under Title II of this Directive, article 5 of the Directive 2001/29/EC, articles 6 and 9 of the Directive 96/9/EC, or article 5 of Directive 2009/24/EC**	We have included this paragraph to prevent the contractual overridability of limitation and exceptions, including article 4 bis, by licensing agreements.
Article 13(2 bis) new		
	Information Society Service providers shall ensure that uses covered by the exceptions or limitations identified in paragraph 2 shall not be limited by any measures following from the agreements identified in paragraph 1.	We have included this paragraph to prevent the contractual overridability of limitation and exceptions, including article 4 bis, by licensing agreements.
Article 13(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 appropriate and proportionate content recognition technologies, taking into account, among others, the nature of the services, the availability of the technologies and their effectiveness in light of technological developments.**	Member States shall facilitate, where appropriate, cooperation between the information society service providers **referred to in paragraph 1** and rightholders through stakeholder dialogues, to define best practices **for the negotiation, implementation, monitoring and review of such agreements.**	We have removed all references to the functioning of technologies, such as content recognition technologies, because these are ill equipped to deal with copyright including its limitations and exceptions and users' rights.