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WORKING PAPER

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WORKING DOCUMENT

From:	Presidency
To:	Working Party on Intellectual Property (Copyright)
N° prev. doc.:	WK 15629/2018, WK 202/2019
N° Cion doc.:	12254/16
Subject:	Proposal for a Directive of the European Parliament and of the Council on Copyright in the Digital Single Market - Compromise suggestions on Article 13 and proposal for new Article on exclusion of software developers

Delegations will find attached, for discussion by Copyright Attachés at their meeting on 15 January 2019, compromise suggestions on Article 13 and related recitals (37) to (39b) of the above mentioned proposal, as well as a drafting suggestion for a new Article on the exclusion of software developers.

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I. POSSIBLE COMPROMISE SOLUTION

Article 13

Use of protected content by online content sharing service providers

1. *(as in WK 15629/2018, row 237A)*
 2. *(as in WK 15629/2018, row 237A)*
 3. *(as in WK 15629/2018, row 237A)*
 4. If no authorisation is granted, online content sharing service providers shall be liable for unauthorised acts of communication to the public of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information or submitted a notice, unless the service providers demonstrate that they have:
 - [(a) made best efforts to obtain an authorisation]
 - (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information
 - (c) acted expeditiously, upon receiving a sufficiently substantiated notice by the rightholders, to remove from their websites or to disable access to the notified works and subject matters, and made best efforts to prevent their future uploads in accordance with paragraph (b).
- 4a. *(this paragraphs corresponds to the second subparagraph of paragraph 4 in WK 15629/2018, row 237A)*
- In determining whether the service has complied with its obligations under paragraph 4, in the light of the principle of proportionality, the following factors should, among others, be taken into account:
- (a) the type, the audience and the size of the service [including whether they are provided by a microenterprise or a small-sized enterprise within the meaning of Title I of the Annex to Commission Recommendation 2003/361/EC (*Role of SMEs to be discussed in relation to the scope -- discussion is still open on this point - see Article 2(5), row 125*)];
 - (b) the number and type of works or other subject matter uploaded by the users of the service;
 - (c) the availability of suitable and effective means and their cost for service providers.

5. The cooperation between online content service providers and rightholders referred to in paragraph 4 shall not result in the prevention of the availability of works or other subject matter uploaded by users, which do not infringe copyright and related rights, including where such works or subject matter are covered by an exception or limitation.

Users shall be allowed to upload and make available content that they have generated themselves and which includes parts of existing protected works and subject matter for purposes such as illustration, quotation, criticism, review, caricature, parody or pastiche.

[...]

6. (paragraph 6 of WK 15629/2018, row 237A, deleted/merged into paragraph 4)

7. (as in WK 15629/2018, row 237A)

8. (as in WK 15629/2018, row 237A)

9. (as in WK 15629/2018, row 237A)

II. Recitals on Article 13 – POSSIBLE COMPROMISE SOLUTION

Row	COMMISSION PROPOSAL COM(2016)593	EP TEXT P8_TA-PROV(2018)0337 A8-0245/2018	COUNCIL TEXT 9134/18	POSSIBLE COMPROMISE SOLUTION
76.	(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	(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 copyright protected	(37) Over the last years, the functioning of the online content marketplace has gained in complexity. Online content sharing services providing access to a large amount of copyright-protected content uploaded by their users without the involvement of right holders have flourished developed and have	(37) Over the last years, the functioning of the online content market has gained in complexity. Online content sharing services providing access to a large amount of copyright protected content uploaded by their users have become main sources of access to content online. Online services are means of providing wider access to

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	<p>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.</p>	<p>content online. <i>Online services are means of providing wider access to cultural and creative works and offer great opportunities for cultural and creative industries to develop new business models. However, although they allow for diversity and ease of access to content, they also generate challenges when copyright protected content is uploaded without prior authorisation from rightholders.</i> 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, <i>since some user uploaded content services do not enter into licensing agreements on the basis that they claim to be covered by the "safe-harbour" exemption set out in Directive 2000/31/EC.</i></p>	<p>become main sources of access to content online. ThisLegal <u>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, without prejudice to the application of exceptions and limitations provided for in Union Law. This situation affects rightholders' possibilities to determine whether, and under which conditions, their work and other subject-matter are content is used as well as their possibilities to get appropriate remuneration for it. It is therefore important to foster the development of the licensing market between rightholders and online content sharing service providers. These licensing agreements should be fair and keep a reasonable balance for both parties. Rightholders should receive an appropriate reward for the use of their works or other subject matter.</u></p>	<p><i>cultural and creative works and offer great opportunities for cultural and creative industries to develop new business models. However, although they allow for diversity and ease of access to content, they also generate challenges when copyright protected content is uploaded without prior authorisation from rightholders.</i> 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, without prejudice to the application of exceptions and limitations provided for in Union Law. This uncertainty affects rightholders' possibilities to determine whether, and under which conditions, their works and other subject-matter are used as well as their possibilities to get an appropriate remuneration for it. It is therefore important to foster the development of the licensing market between rightholders and</p>

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77.		<p><i>(37a) Certain information society services, as part of their normal use, are designed to give access to the public to copyright protected content or other subject-matter uploaded by their user. The definition of an online content sharing service provider under this Directive shall cover information society service providers one of the main purposes of which is to store and give access to the public or to stream significant amounts of copyright protected content uploaded / made available by its users, and that optimise content, and promote for profit making purposes, including amongst others displaying, tagging, curating, sequencing, the uploaded works or other subject-matter, irrespective of the means used therefor, and therefore act in an active way. As a consequence, they</i></p>	<p><u>(37a) The definition of an online content sharing service provider under this Directive targets only online services which play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences. The services covered by this intervention are those the main or one of the main purposes of which is to provide access to a large amount of copyright-protected content uploaded by their users with the purpose of obtaining profit therefrom, either directly or indirectly, by organising it and promoting it in order to attract more audiences. Organising and promoting content involves for example indexing the content, presenting it in a certain manner</u></p>	<p>online content sharing service providers. These licensing agreements should be fair and keep a reasonable balance for both parties. Rightholders should receive an appropriate reward for the use of their works or other subject matter.</p> <p><i>(37a) Certain information society services, as part of their normal use, are designed to give access to the public to copyright protected content or other subject-matter uploaded by their user. The definition of an online content sharing service under this Directive should target only online services which play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences. The services covered by this Directive are those services, the main or one of the main purposes of which is to store and enable users to upload and share a large amount of copyright protected content with the purpose of obtaining profit therefrom, either directly or indirectly, by organising it and promoting it in order to attract a</i></p>

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	<p><i>cannot benefit from the liability exemption provided for in Article 14 of Directive 2000/31/EC. The definition of online content sharing service providers under this Directive does not cover microenterprises and small sized enterprises within the meaning of Title I of the Annex to Commission Recommendation 2003/361/EC and service providers that act in a non-commercial purpose capacity such as online encyclopaedia, and providers of online services where the content is uploaded with the authorisation of all right holders concerned, such as educational or scientific repositories. Providers of cloud services for individual use which do not provide direct access to the public, open source software developing platforms, and online market places whose main activity is online retail of physical goods, should not be considered online content sharing service providers within the meaning of this Directive.</i></p>	<p><u>and categorising it, as well as using targeted promotion on it. The definition does not include services whose main purpose is not to provide access to copyright protected content with the purpose of obtaining profit from this activity. These include, for instance, electronic communication services within the meaning of Regulation 2015/2120/EU, including internet access providers, as well as providers of cloud services which allow users, to upload content for their own use, such as cyberlockers, or online marketplaces whose main activity is online retail and not giving access to copyright protected content. Nor does this definition cover websites which store and provide access to content for non-profit purposes, such as online encyclopaedias, scientific or educational repositories or open source software developing platforms which do not store and give access to content for profit making purposes. In order to ensure the high level of copyright</u></p>	<p>larger audience, including by categorising it and using targeted promotion within it. The definition does not include services which have another main purpose than enabling users to upload and share a large amount of copyright protected content with the purpose of obtaining profit from this activity. These include, for instance, electronic communication services within the meaning of Directive 2018/1972 establishing the European Electronic Communications Code, as well as providers of business to-business cloud services and cloud services, which allow users to upload content for their own use, such as cyberlockers, or online marketplaces whose main activity is online retail and not giving access to copyright protected content. Providers of services such as open source software development and sharing platforms, not for profit scientific or educational repositories as well as not-for-profit online encyclopedias are also excluded from this definition.</p>	

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			<p><u>protection and to avoid the possible application of the liability exemption mechanism provided for in this Directive, this Directive should not apply to services the main purpose of which is to engage in or to facilitate copyright piracy.</u></p>	<p>[IF SMES ARE EXCLUDED <i>Microenterprises and small-sized enterprises within the meaning of Title I of the Annex to Commission Recommendation 2003/361/EC should also be excluded from this definition since they are not considered as significantly affecting the online content market and do not compete with major licence-based online services. These enterprises remain subject to the possible application of the existing rules on copyright, in particular to Articles 3(1) and 3(2) of Directive 2019/29/EC as well as to of the provisions of Directive 2000/31/EC].</i> Finally, in order to ensure a high level of copyright protection, the liability exemption mechanism provided for in Article 13 should not apply to service providers the main purpose of which is to engage in or to facilitate copyright piracy.</p>
78.			<p><u>(37b) The assessment of whether an online content sharing service provider stores and gives access to a large amount of copyright-protected content needs to be made on a case-by-case basis and take account of a combination of</u></p>	<p>(37b) The assessment of whether an online content sharing service provider stores and gives access to a large amount of copyright-protected content needs to be made on a case-by-case basis and take account of a combination of</p>

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79.	<p>(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 eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council¹.</p>	<p>(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 and therefore are responsible for their content and should therefore conclude fair and appropriate licensing agreements with rightholders, unless they are eligible for. Where licensing agreements are concluded, they should also cover, to the same extent and scope, the liability exemption provided in of users when they are acting in a non-commercial capacity. In accordance with Article 14 of</p>	<p><u>elements, such as the audience of the service and the number of files of copyright-protected content uploaded by the users of the services.</u></p> <p>(38) <u>This Directive clarifies under which conditions the online content sharing service providers store and provide access 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 or making available to the public</u></p>	<p>elements, such as the audience of the service and the number of files of copyright-protected content uploaded by the users of the services.</p> <p>(38) This Directive clarifies that online content sharing service providers engage in an act of communication to the public or making available to the public when they give the public access to copyright protected works or other protected subject matter uploaded by their users. Consequently, the online content sharing service providers should obtain an authorisation, including via a licencing agreement, from the relevant rightholders. This does not affect the concept of communication to the public or of making available to the public elsewhere under Union law nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other service providers using copyright-protected content¹, including to the</p>

¹ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ L 178, 17.7.2000, p. 1–16).

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		<p>Directive 2000/31/EC of the European Parliament and of the Council 11(2a) the responsibility of online content sharing providers pursuant to Article 13 does not extend to acts of hyperlinking in respect of press publications. The dialogue between stakeholders is essential in the digital world. They should define best practices to ensure the functioning of licensing agreements and cooperation between online content sharing service providers and rightholders. Those best practices should take into account the extent of the copyright infringing content on the service.</p>	<p><u>of making available to the public under Union law nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other services using copyright-protected content.</u></p>	<p>micro and small enterprises or other service providers which are excluded from the scope of this Directive].</p> <p>[Uses being covered by licences is covered in recital 38(d)]</p>
80.	<p>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.</p>	<p>Deleted</p>	<p>Deleted, partly moved to recital (37a) Council's text – see row 77</p>	<p>Deleted</p>
81.	<p>In order to ensure the functioning of any licensing agreement, information society service providers storing and providing access to the public to large</p>	<p>Deleted</p>	<p>Deleted, partly moved to recital (38c) Council's text – see row 84</p>	<p>Deleted</p>

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82.	<p>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.</p>			
			<p>(38a) <i>[Renumbered - in ST 9134/18 recital 38(b)]</i> <u>When online content sharing service providers communicate to the public, they should not benefit from the limited liability provided for in Article 14 of Directive 2000/31/EC for the purposes of copyright relevant acts. This should not affect the possibility for the same online content sharing providers to benefit from such exemption of liability for other purposes than copyright when they are providing their services and host content at the request of their</u></p>	<p>YELLOW <i>[See comment in row 77, and comment on Article 13(3) in row 237A]</i> <i>[Commission's text proposed at the trilogue 13/12/2018, to be further discussed]</i> (38a) "When online content sharing service providers are liable for acts of communication to the public or making available to the public under the conditions established under this Directive, Article 14(1) of Directive 2000/31/EC should not apply to the liability arising from Article 13 of this Directive. This should not affect the possible application of</p>

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83.			<p><u>(38b) [Renumbered - in ST 9134/18 recital (38c)]</u></p> <p><u>Taking into account the fact that online content sharing service providers give access to content which is not uploaded by them but by their users, it is appropriate to provide that, for cases where no authorisation has been obtained by the services and, for the purpose of this Directive, they should not be liable for unauthorised acts in specific, well-defined circumstances, when they demonstrate that they have acted in a diligent manner with the objective to prevent such unauthorised acts, without prejudice to remedies under national law for cases other than liability for infringements and to the possibility for national courts or administrative authorities of issuing injunctions in compliance with Union law.</u></p> <p><u>Where no authorisation has been granted to the services providers, they should make their best efforts in cooperation with rightholders and in accordance with high industry standards of professional</u></p>	<p><i>Article 14(1) of Directive 2000/31/EC to these service providers for purposes falling outside the scope of this Directive.</i></p> <p>(38b) TO BE ADAPTED TO THE FINAL TEXT of Article 13</p> <p>Taking into account the fact that online content sharing service providers give access to content which is not uploaded by them but by their users, it is appropriate to provide for a specific liability mechanism for the purposes of this Directive for cases where no authorisation has been granted. This should be without prejudice to remedies under national law for cases other than liability for copyright infringements and to the possibility for national courts or administrative authorities of issuing injunctions in compliance with Union law.</p> <p>Where no authorisation has been granted to the services providers, they should make their best efforts in cooperation with rightholders and in accordance with high industry standards of professional</p>

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			<p><u>they should not be liable if some unauthorised content is available on their services despite their best efforts to prevent its availability by applying effective and proportionate measures based on the information provided by rightholders. In addition, for the online content sharing service providers not to be liable, they should also in any case, upon notification by rightholders of specific unauthorised works or other subject-matter, act expeditiously to remove or disable access to these and make their best efforts to prevent their future availability.</u></p>	<p>diligence to avoid the availability on their services of unauthorised works and other subject matter, as identified by the relevant rightholders. For that purpose rightholders should provide the service providers with necessary and relevant data taking into account, among other factors, the size of rightholders and the type of their works and other subject matter. The steps taken by the online content sharing service providers in cooperation with rightholders should not lead to the prevention of the availability of non-infringing content, including the use of works or other protected subject matter covered by a licensing agreement, exception or limitation to copyright. Thereby it should not affect users who are using the online content sharing providers' services in order to lawfully upload and access information on these services. The obligations established in Article 13 should also not lead to Member States imposing a general monitoring obligation.</p>

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				<p>When assessing whether an online content sharing service provider has made its best efforts according to the high industry standards of professional diligence, account should be taken of the principle of proportionality. For the purposes of this assessment, a number of elements should be considered, such as the size of the service, the state of the art of existing means for avoiding the availability of different types of content and their cost for the services. Different means to avoid the availability of unauthorised copyright protected content may be appropriate and proportionate per type of content and it is therefore not excluded that in some cases unauthorised content may only be avoided upon notification of rightholders.</p> <p>Any steps taken by the service providers should be effective with regard to the objectives sought but should not go beyond what is necessary to achieve the objective of avoiding and discontinuing the availability of unauthorised works and other subject matter.</p>

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				<p>[IF SMEs are not excluded: It is not excluded that in some cases unauthorised content may only be avoided upon notification of rightholders. In particular, small and micro enterprises as defined in Title I of the Annex to Commission Recommendation 2003/361/EC, should be expected to be subject to less burdensome obligations than larger service providers. Therefore, in specific cases it may not be proportionate to expect small and micro enterprises to apply preventive measures and in such cases these enterprises should only be expected to expeditiously remove specific unauthorised works and other subject matter upon notification by rightholders.]</p> <p>If unauthorised works and other subject matter become available despite the best efforts made in cooperation with rightholders as required by this Directive, the online content sharing service providers should be liable in relation to the specific works and other subject matter for which they</p>

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				<p>have received the relevant and necessary information from rightholders unless they demonstrate that they have made their best efforts pursuant to high industry standards of professional diligence. In addition, where specific unauthorised works or other subject matter have become available on the services, including despite the best efforts made, the online content sharing service providers should be liable for unauthorised acts of communication to the public of works and other subject matter, when upon receiving a sufficiently substantiated notice, they fail to act expeditiously to remove from their websites or disable access to the notified works and subject matter and if they fail to demonstrate that they have made their best efforts to prevent their future uploads. When rightholders do not provide the service providers with the necessary and relevant data on their specific works and other subject matter or when no notification concerning the removal or disabling access to specific</p>

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				<p>unauthorised works or other subject matter has been provided by rightholders and, as a result, online content sharing service providers cannot make their best efforts to avoid on their services the availability of unauthorised content in accordance with the high standard of professional diligence, the service providers should not be liable for unauthorised acts of communication to the public or of making available to the public of these unidentified works and other subject matter.</p>
84.			<p>(38c) <i>[Renumbered - in ST 9134/18 recital (38ca)]</i> <u>Appropriate collaboration carried out in good faith between online content sharing service providers and rightholders is essential for the effective application of the measures by the online content sharing service providers. These service providers should be transparent towards rightholders with regard to the deployed measures. As different measures may be used</u></p>	<p>38(c) The online content sharing service providers should be transparent towards rightholders with regard to the steps taken in the context of the cooperation. As different actions may be undertaken by the online content sharing service providers, they should provide rightholders, at their request, with adequate information on the type of actions undertaken and the way they are implemented. Such information should be sufficiently specific to provide enough transparency to</p>

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			<p><u>by the online content sharing service providers, they should provide rightholders with appropriate information on the type of measures used and the way they operate, including for example information on the success rate of the measures. Such information should be sufficiently specific to provide enough transparency for rightholders and allow cooperation to ensure effective functioning of the measures, without prejudice to the business secrets of service providers. Service providers should however not be required to provide rightholders with detailed and individualised information for each work and other subject matter 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 service providers and rightholders.</u></p>	<p>rightholders, without prejudice to the business secrets of online content sharing service providers. Service providers should however not be required to provide rightholders with detailed and individualised information for each work and other subject matter 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 service providers and rightholders.</p>

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			<p>and relevant data for the <u>application of the measures to their specific unauthorised works or other subject matter taking also into account the size of rightholders and the type of their works and other subject matter.</u> <u>As long as no data for the application of the measures or no notification concerning removal or disabling access to specific unauthorised works or other subject matter has been provided by rightholders and, as a result, online content sharing service providers cannot take the measures or expeditious action as set out in this Directive, these service providers should not be liable for unauthorised acts of communication to the public or of making available to the public.</u></p>	
85.			<p><u>Where online content sharing service providers obtain authorisations, including via licensing agreements, for the use on the service of content uploaded by the users of the services, these authorisations should also cover the copyright relevant acts in respect of</u></p>	<p><i>Presidency compromise proposal (replacing the Commission's text proposed at the trilogue on 13/12/2018 that was set out in WK 15629/2018, row 85):</i></p> <p>(38d) The steps taken by the online content sharing service providers should be without prejudice to the</p>

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			<p><u>uploads by the users but only in cases where the users act in their private capacity and for non-commercial purposes, such as sharing their content without any profit making purpose.</u></p>	<p>application of exceptions and limitations to copyright, including in particular those which guarantee the freedom of expression of users. In this respect, users should not be prevented from uploading and making available content that they have produced and contains existing works or other protected subject matter for purposes such as illustration, quotation, criticism, review, caricature, parody or pastiche, when these uses do not create significant harm to rightholders.</p>
86.	<p>(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</p>	<p>(39) Collaboration between information society Member States should provide that where right holders do not wish to conclude licensing agreements, online content sharing service providers storing and providing access to the public to large amounts of copyright and right holders should cooperate in good faith in order to ensure that unauthorised protected works or other subject matter uploaded by, are not available on their users and rightholders is</p>	<p><u>(39)</u> <i>Moved up to recital (38c) [which was recital (38ca) in ST 9134/18]</i></p>	

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	<p>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 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.</p>	<p>essential for the functioning of technologies, such as content recognition technologies. In such cases, rightholders should provide the necessary data to allow the services. <i>Cooperation between online</i> 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 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 and rightholders should not lead to preventing the availability of non-infringing works or other protected subject matter, including those covered by an agreement exception or limitation to copyright.</p>		

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87.		<p><i>(39a) Members States should ensure that online content sharing service providers referred to in paragraph 1 put in place effective and expeditious complaints and redress mechanisms that are available to users in case the cooperation referred to in paragraph 2a leads to unjustified removals of their content. Any complaint filed under such mechanisms should be processed without undue delay. Right holders should reasonably justify their decisions to avoid arbitrary dismissal of complaints. Moreover, in accordance with Directive 95/46/EC, Directive 2002/58/EC and the General Data Protection Regulation, the cooperation should not lead to any identification of individual users nor the processing of their personal data. Member States should also ensure that users have access to an independent body for the resolution of disputes as well as to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright rules.</i></p>	<p><u>(39a) [Renumbered - in ST 9134/18 recital (39b)]</u></p> <p><u>The measures taken by the online content sharing service providers should be without prejudice to the application of exceptions and limitations to copyright, including in particular those which guarantee the freedom of expression of users. Users acting for non-commercial purposes or users whose activities do not generate significant revenues should not be prevented from uploading and making available content that they have produced and that contains existing works or other protected subject matter for specific purposes such as illustration or parody when these uses do not create significant harm to rightholders.</u></p> <p><u>The online content sharing service providers should also put in place effective and expeditious complaint and redress mechanisms allowing users to complain on the steps taken with regard to their uploads, in particular when they could benefit from an exception or limitation to copyright in relation to an upload that is removed or to which access is disabled. Any complaint filed under such mechanisms should be</u></p>	<p><u>(39a) The steps taken by the online content sharing service providers should be without prejudice to the application of exceptions and limitations to copyright, including in particular those which guarantee the freedom of expression of users. Users acting for non-commercial purposes or users whose activities do not generate significant revenues should not be prevented from uploading and making available content that they have produced and that contains existing works or other protected subject matter for specific purposes such as illustration or parody when these uses do not create significant harm to rightholders.</u></p> <p><u>The online content sharing service providers should also put in place effective and expeditious complaint and redress mechanisms allowing users to complain on the steps taken with regard to their uploads, in particular when they could benefit from an exception or limitation to copyright in relation to an upload that is removed or to which access is disabled. Any complaint filed under such mechanisms should be</u></p>

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			<p><u>redress mechanism should be without prejudice to the right of the parties to take action before a court.</u></p>	<p>processed without undue delay and be subject to a decision by a human. When rightholders request the services to take action against the uploads by users, such as disabling access to or removing content uploaded, the rightholders should duly justify their requests. Moreover, in accordance with Directive 2002/58/EC² and Regulation (EU)2016/679³, the cooperation should not lead to any identification of individual users nor the processing of their personal data. Member States should also ensure that users have access to out-of-court redress mechanisms for the settlement of disputes. Such mechanisms should allow disputes to be settled impartially. Users should also have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright rules.</p>

² ePrivacy-Directive: Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), *OJL 201, 31.7.2002, p. 37–47*.

³ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *OJL 119, 4.5.2016, p. 1–88*.

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88.		<p><i>(39b) As soon as possible after the entry into force of this Directive, the Commission and the Member States should organise dialogues between stakeholders to harmonise and to define best practices. They should issue guidance to ensure the functioning of licensing agreements and on cooperation between online content sharing service providers and right holders for the use of their works or other subject matter within the meaning of this Directive. When defining best practices, special account should be taken of fundamental rights, the use of exceptions and limitations. Special focus should also be given to ensuring that the burden on SMEs remains appropriate and that automated blocking of content is avoided.</i></p>	<p><u>(39b) [Renumbered - in ST 9134/18 recital (39c)]</u> <u>In order to foster best practices with regard to the measures to be taken by online content sharing service providers to avoid liability for unauthorised copyright acts, stakeholder dialogues should be encouraged by the Member States and the Commission. In order to give more clarity to the parties some guidance should also be provided by the Commission on the implementation of the measures including as to which measures could be considered to be proportionate for different types of content. For the purposes of the guidance the Commission should consult relevant stakeholders, including user organisations and technology providers, and take into account the developments on the market.</u></p>	<p>(39b) As soon as possible after the entry into force of this Directive, the Commission, in collaboration with Member States, should organise dialogues between stakeholders to arrive to a uniform application of the obligation of cooperation and to define best practices with regard to the appropriate industry standards of professional diligence. For this purpose the Commission should consult relevant stakeholders, including user organisations and technology providers, and take into account the developments on the market. User organisations should also have access to information on actions carried out by online content sharing service providers to manage content online.</p>

III. New Article

Exclusion of software developers

Member States shall provide that Articles -14 to 16a of this Directive do not apply to authors of a computer program in the sense of Article 2 of Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs*.

* Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version), OJ L 111, 5.5.2009, p. 16–22.