# Copyright Bot Killed the **Environmentalist Star**


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**All over Europe people young people are demonstrating for their future. You wonder what this has to do with copyright? A lot!**

Europe is under immense pressure and large parts of the populations have the feeling they are not being heard.

One of those protests last week was in Ålborg, Denmark, where hundreds of Danish students took to the streets, to fight for their right for a future. The protests in Ålborg were of course of interest, not only for the students themselves, but the press. A reporter tried to upload a video of the protest on a Facebook page. The video was quickly taken down, after being detected as a "copyright infringement". Why was that?

Somewhere in the background, someone, maybe a shop, maybe the students, were playing a song which was recognised as copyright infringement. The Copyright Bot, which automatic content recognition technologies effectively are, found a match and subsequently took down the video of the protest. Never mind that news reporting enjoys liberal copyright exceptions in order to ensure the rights of journalists to create and the public to access news, or that Danish media outlets have already paid their copyright fees according to their national laws in order to be able to use clips that happen to have copyrighted material in the background.

The Copyright Bot doesn't know this. The Copyright Bot cannot distinguish legitimate use, according to complicated social and legal situations in different countries, from illegitimate use. The only thing a Copyright Bot can do is detect whether a piece of music or film matches with all the other pieces of music or films in their database. It is black and white.

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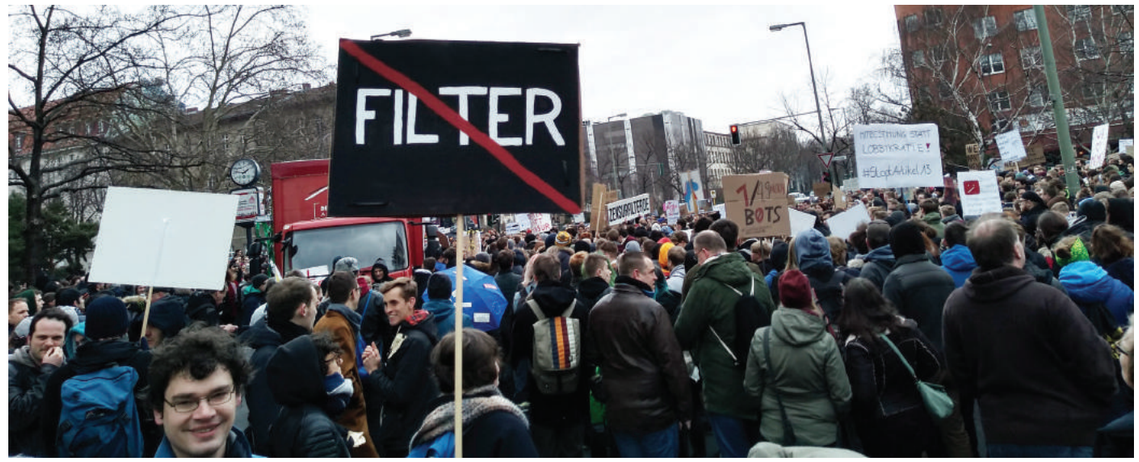


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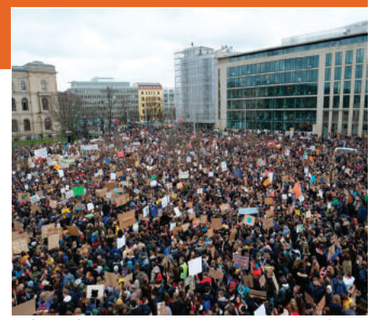
# Say **YES** to Copyright and **NO** to Article 13



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**Article 13 of the proposed Copyright Directive will put even more control over European culture and knowledge into the hands of online monopolies.**

**As organisations representing digital creators and knowledge workers, we urge you to reject this provision that will replace the rule of law with proprietary algorithms controlled by big tech companies.**

It is high time that Europe adapts its copyright framework to meet the needs of the digital age.

The proposed directive contains many measures that take steps in the right direction, such as improving the negotiation position of authors and performers, better safeguarding the public domain, and by allowing researchers and cultural heritage institutions to make better use the opportunities created by the digital environment.

In spite of widespread opposition from academics, internet users and millions of concerned citizens, the directive still contains provisions that will force most internet platforms to filter all content uploaded by their users to remove any copyrighted works flagged by rightsholders. This will cost European companies and new startups millions, and what's worse, it won't work.

The idea that technology can reliably differentiate between legitimate and unauthorised uses of copyrighted material has been credibly disputed by experts across the spectrum.


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**Putting the regulation of speech and creative expression in the hands of private corporations lacks public support.**

**Instead of taking the right step toward a Digital Single Market that works for all**, a directive that includes Article 13 would sow even more legal uncertainties.

**Instead of empowering European creators,** it will entrench the position of dominant platforms.

**Instead of balancing fundamental rights**, it will weaken the law, by shifting power towards algorithms and away from crucial users' rights upholding freedom of expression.

**We support the objective to ensure that creators are rewarded adequately for their creativity. Upload filters themselves will not achieve this objective. This directive needs to take the interests of all stakeholders into account, not only "big tech" and "big content". Copyright should be a matter of social contract that upholds the public interest, not of secret algorithms controlled by private actors. We therefore ask you to reject the text of the directive as long as it includes Article 13.**

# Detailed legal commentary of Article 13



| Proposed text | Analysis |
|---|---|
| (a) the type, the audience and the size of the service and type of works or other subject matter uploaded by the users;<br>(b) the availability of suitable and effective means and their cost for service providers | These letters (a) and (b) give some guidance, but will nevertheless require a lot of jurisdiction to come to at least some legal clarity. |
| 4aa. Member States shall provide that when new online content sharing service providers whose services have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million within the meaning of the Commission recommendation 2003/361/EC, the conditions applicable to them under the liability regime set out in paragraph 4 are limited to the compliance with the point (a) of paragraph 4 and to acting expeditiously, upon receiving a sufficiently substantiated notice, to remove the notified works and subject matters from its website or to disable access to them. Where the average number of monthly unique visitors of these service providers exceeds 5 million, calculated on the basis of the last calendar year, they shall also demonstrate that they have made best efforts to prevent further uploads of the notified works and other subject matter for which the rightholders have provided relevant and necessary information. | This mitigating condition in 4aa. is a result of trilogue quarrels between the DE and FR delegations, and in effect has become **largely irrelevant, because only very few platforms will be covered by it**. Any platform, no matter how successful or small, will have to comply with the full set of obligations after 3 years in the EU internal market. |
| 5. The cooperation between online content service providers and rightholders 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. Member States shall ensure that users in all Member States are able to rely on the following existing exceptions and limitations when uploading and making available content generated by users on online content sharing services:<br>a) quotation, criticism, review,<br>b) use for the purpose of caricature, parody or pastiche. | A rule that fosters cooperation between stakeholders is always beneficial.<br><br>The rest of this para (5) **demands something impossible**: To ensure unimpeded functionality of copyright exceptions and limitations, while further up in paras (1), (3) and (4) a tech-based diligence is required that can only be complied with by means of technology that cannot differentiate between legitimate uses covered by exceptions, and copyright infringement. Paras 4 (b) and (5) produce a deep contradiction that is impossible to resolve through interpretation. |
| 7. The application of the provisions in this article shall not lead to any general monitoring obligation as defined in Article 15 of Directive 2000/31/EC. | Just as para (5) above, **this rule is impossible to have next to the rule in para 4 (b)**. To even prevent uploads of only a few works, the entire upload traffic of a given platform has to scanned. |
| 8. Member States shall provide that an online sharing service provider puts in place an effective and expeditious complaint and redress mechanism that is available to users of the service in case of disputes over the removal of or blocking access to works or other subject matter uploaded by them. | These are important mechanisms, but they **can only be activated after a post has already been removed**. This means that the functioning of fundamental rights is sent into mechanisms, while remuneration interests come first by default. So far, it is and always should be the other way round. |



# Detailed legal commentary of Article 13



| Proposed text | Analysis |
|---|---|
| 1. Member States shall provide that an online content sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this directive when it gives the public access to copyright protected works or other protected subject matter uploaded by its users. | This rule aims at removing legal uncertainty about whether a platform is an active infringer, even though it only provides the online space for its users. This clarification in itself is not an issue, as case law has already established in many scenarios that hosting platforms are actively involved in the legal sense.<br><br>This sentence is a prerequisite for the following one.<br><br>The "online content sharing service providers" as addressees are defined in Art. 2 of the proposal. Although some platforms are exempt in this definition (like the text parts of Wikipedia), countless platforms are not, even though they are in no way the actual targets of this legislation.<br><br>The legislation, according to its proponents, wants to target the giants among platforms, mainly YouTube and Facebook, which have a market power that lets fair negotiations with creators fail. **Instead of defining those platforms positively, to limit side effects, Art. 2 employs a negative approach** using exceptions, one that is both incomplete and prone to become outdated through digital innovation. |
| An online content sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licencing agreement, in order to communicate or make available to the public works or other subject matter. | This sentence builds on the previous one and executes a complete departure from the liability regime that the internet as we know it was built upon: It removes the liability exception of the EU's well-balanced eCommerce Directive 2000/31/EC.<br><br>The law as it still stands, under the eCommerce Directive, provides that platforms only after proper notice become fully liable for content uploaded to them by their users. This ensures that no general monitoring obligation exists, which is a crucial safeguard for fundamental rights on the internet. By removing the liability privileges granted by the eCommerce Directive, the present proposal not only removes this safeguard. **It positively requires platforms to scan all upload traffic.** Under the rule proposed here, a single rightsholder unwilling or unable to grant a license for her works would be enough to require scanning / monitoring of all upload traffic<br><br>If the current proposal would allow for statutory licenses to securely substitute private, individual licenses, then general monitoring, scanning and filtering obligations could be avoided. But it doesn't, and instead follows the private licensing approach, making platforms de-facto into a private copyright police force. The extended collective licensing rules in Art. 9a of the proposal do not fix this, as they also allow for individual opt-out of rightsholders.<br><br>**Only a proper, reliable statutory license (a remunerated exception to copyright for user-generated content) would allow Europe to protect its citizens against automated content x-ray systems all over**. According to virtually all legal experts, the current proposal does NOT allow for such a new UGC exception. |

# Detailed legal commentary of Article 13



| Proposed text | Analysis |
|---|---|
| 2. Member States shall provide that when an authorisation has been obtained, including via a licensing agreement, by an online content sharing service provider, this authorisation shall also cover acts carried out by users of the services falling within Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or their activity does not generate significant revenues. | This rule is meant to take private users out of platform liability, where otherwise both the platform and the uploading user are liable for copyright infringement.<br><br>However, **as the entire proposal turns on authorisation that "has been obtained", the users remain under liability risks** as far as this obtaining of authorisation through acquisition of licenses isn't done by the platform or fails for whatever reason.<br><br>Here again, if the proposal had chosen a language that would have allowed for a real, fail-proof statutory license (i.e. an exception to copyright, remunerated via levies or other means), things would be different and private users of platforms would securely be off the hook of lawsuits. |
| 3. When an online content sharing service provider performs an act of communication to the public or an act of making available to the public, under the conditions established under this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article. | This rule is probably not necessary, as it only spells out from a different perspective what follows anyway from sentence two of section 1. above. The proponents of the legislation, however, wanted to make extra sure the the current liability privileged for platforms (sometimes called a "safe harbor provision") are entirely removed for platform defined in Art. 2 of the proposal, producing the effects mentioned above at section 1., especially a general monitoring obligation.<br><br>Several attempts are made further down in the proposal to mitigate such effects, which leads to internal contradictions in the proposal that cannot be solved meaningfully. |
| 4. If no authorisation is granted, online content sharing service providers shall be liable for unauthorised acts of communication to the public of copyright protected works and other subject matter, unless the service providers demonstrate that they have: | This as well is a largely unnecessary rule, as its statement follows already from sections 1. and 3. above. It is used here to enter, just as with the platform definition in Art. 2, into a problematic rule with exceptions approach. |



# Detailed legal commentary of Article 13



| Proposed text | Analysis |
|---|---|
| (a) made best efforts to obtain an authorisation, and | "Best efforts" are an entirely vague standard, leaving the addressees of the proposal with a **double-layer legal uncertainty** (both the national implementation and the following case law are impossible to calculate) and leaving European citizens with years of varying effects of this uncertainty, changing with every new landmark decision for countless new scenarios to clarify. |
| (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, and in any event | Apart from "high industry standards" again being an entirely vague term, this command to "**ensure the unavailability" is what in most scenarios would make automated systems unavoidable.** Such systems may become better at accurately identifying protected works, but they **cannot** accurately assess the legal merits of specific uses, whether these are covered by exceptions and limitations to copyright or not. And they should never be the main tool for rights enforcement, which they would become de-facto under this rule. And again: A single rightsholder demanding "unavailability" of their works on the platform would require scanning of the entire upload traffic. |
| (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). | This rule (c) re-iterates in a nutshell what is the law already today, without this Directive, based on the InfoSoc and eCommerce Directives plus case law handed down by courts.<br><br>Instead of picking up the already problematic "prevent future uploads" approach here and above in 1. and 3., the EU lawmaker should rather regulate when such preemptive measures are unreasonable, thereby countering some of the court decisions of the past years. |
| 4a. In determining whether the service has complied with its obligations under paragraph 4, and in the light of the principle of proportionality the following should, among others be taken into account: | This rule is meant as a safeguard against overly onerous obligations for smaller platforms. It would be necessary probably under any new liability regime. |

# A final x-ray of Article 13:

## legislative wishful thinking that will hurt user rights

This flowchart illustrates the main operative elements of Article 13. These include the definition of the affected services, the types of services that are explicitly excluded from its scope (the turquiose box in the top right corner) and the reversal of the liability rules for the services covered by Article 13.

It further details the obligations imposed on the services. These include an obligation to seek licenses for all copyrighted works uploaded by users (the yellow box) and the requirements to ensure the unavailability of certain works that will force platforms to implement upload filters (the two orange boxes). The yellow box at the bottom contains the measures that platforms must take to ensure that the upload filters don't negatively affect users' rights.

For a legal analysis of the Article 13 text, please read our four-page centrefold.  It is also perfect for hanging up on your office wall.

### Key elements Article 13
**(Trilogue compromise version)**

**Article 13 applies to**: Information society services whose main or one of the main purposes is to store and give the public access to a large amount of copyright protected works uploaded by its users which it organises and promotes for profit-making purposes

↓

**Liability reversal:** The services perform an act of communication to the public when they give the public access to copyright protected works uploaded by its users and the limitaion of liability established in Article 14(1) of the E-commerce directive does not apply to such acts

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**Obligation to license:** The services must make best efforts to license all copyrighted works uploaded by its users

↓

**Notice and take down:** The services make best efforts to take down works upon notice from rightholders

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**Notice and Stay down:** Services must make best efforts to prevent their future uploads of works that have been taken down after a notice from rightholders

↓

**Upload filters:** Services must make best efforts to ensure the unavailability of specific works for which the rightholders have provided the service provider with the relevant and necessary information and made best efforts to prevent future uploads of works that have been taken down after a notice from rightsholders

↓

**User rights safeguard:** The services must ensure that these measures do not result in the prevention of the availability of works uploaded by users which do not infringe copyright and related rights, including where such works are covered by an exception or limitation (inluding mandatory exceptions for quotation and parody)

**Article 13 does not apply to:** not-for-profit online encyclopaedias, not-for profit educational and scientific repositories, open source software developing and sharing platforms, electronic communication service providers, online marketplaces and business-to business cloud services and cloud services and cloud services which allow users to upload content for their own use

These two requirements apply to **all platforms covered by Article 13**

Applies to **all platforms covered by Article 13 that have more than 5 million visitors per month**

This requirement applies to **all platforms covered by Article 13 that are more than 3 years old or have more than 10 million Euro in yearly revenue.**



> 
> [1]
>
> I am very seriously concerned that the proposed Directive would establish a regime of active monitoring and prior censorship of user-generated content.
>
> **David Kaye**
> UN Special Rapporteur on freedom of expression

> 
> [2]
>
> Ultimately, this would create an oligopoly of only a few providers of filtering technologies, through which more or less all the internet traffic of relevant platforms and services would run. The amount of  even more far-reaching personal information these providers would have about each and every user can be observed on the basis of the current data transmission of health apps to Facebook.
>
> **Ulrich Kleber**
> German Federal Commissioner for Data Protection and Freedom of Information

> Most notably we regret that the Directive does not strike the right balance between the protection of right holders and the interests of EU citizens and companies. It therefore risks to hinder innovation rather than promote it and to have a negative impact the competitiveness of the European Digital Single Market.
>
> Statement of the governments of the **Netherlands, Luxembourg, Poland, Italy** and **Finland**

> 
> [5]
>
> The proposal sets clear incentives to over-block content for platforms to minimise their liability risk. [...] This will have negative and disproportionate effects on science and on user-generated content and creative expression from the Internet.
>
> **Dorothee Bär**
> German State Secretary for Digitisation

> We support the consideration of measures that would improve the ability for creators to receive fair remuneration for the use of their works online. But we cannot support Article 13, which would mandate Internet platforms to embed an automated infrastructure for monitoring and censorship deep into their networks. For the sake of the Internet's future, we urge you to vote for the deletion of this proposal.
>
> **Tim Berners-Lee**
> **inventor of the World Wide Web**
> **Robert Oliver,**
> **Solution Architect, Dassault Systèmes**
> **et al.**

> 
> [3]
>
> I'm not aware of any other technical measures that could prevent licensing violations. So it boils down to filters
>
> **Katharina Barley,**
> German Federal Minister of Justice

> 
> [4]
>
> Article 13 threatens EU creators, leaving us vulnerable to censorship in copyright's name. Don't believe the creepy pretence that it's there to protect copyright holders. It's about putting power in the hands of media corporations.
>
> **Stephen Fry**
> comedian, actor, writer, presenter, director & journalist

> 
> [6]
>
> Article 13 does not require that the creatives - i.e. the authors themselves - should receive more royalties.
>
> **Prof. Dr. Reto M. Hilty**
> Managing Director Max Planck Institute for Innovation and Competition

> 
> [7]
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> The web gives anyone the power to speak without asking for permission. But, if we allow the EU Copyright Directive to establish upload filters, this freedom will be threatened. Our right to free expression must not be subject to a flawed technology.
>
> **Tim Berners-Lee**
> inventor of the World Wide Web

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