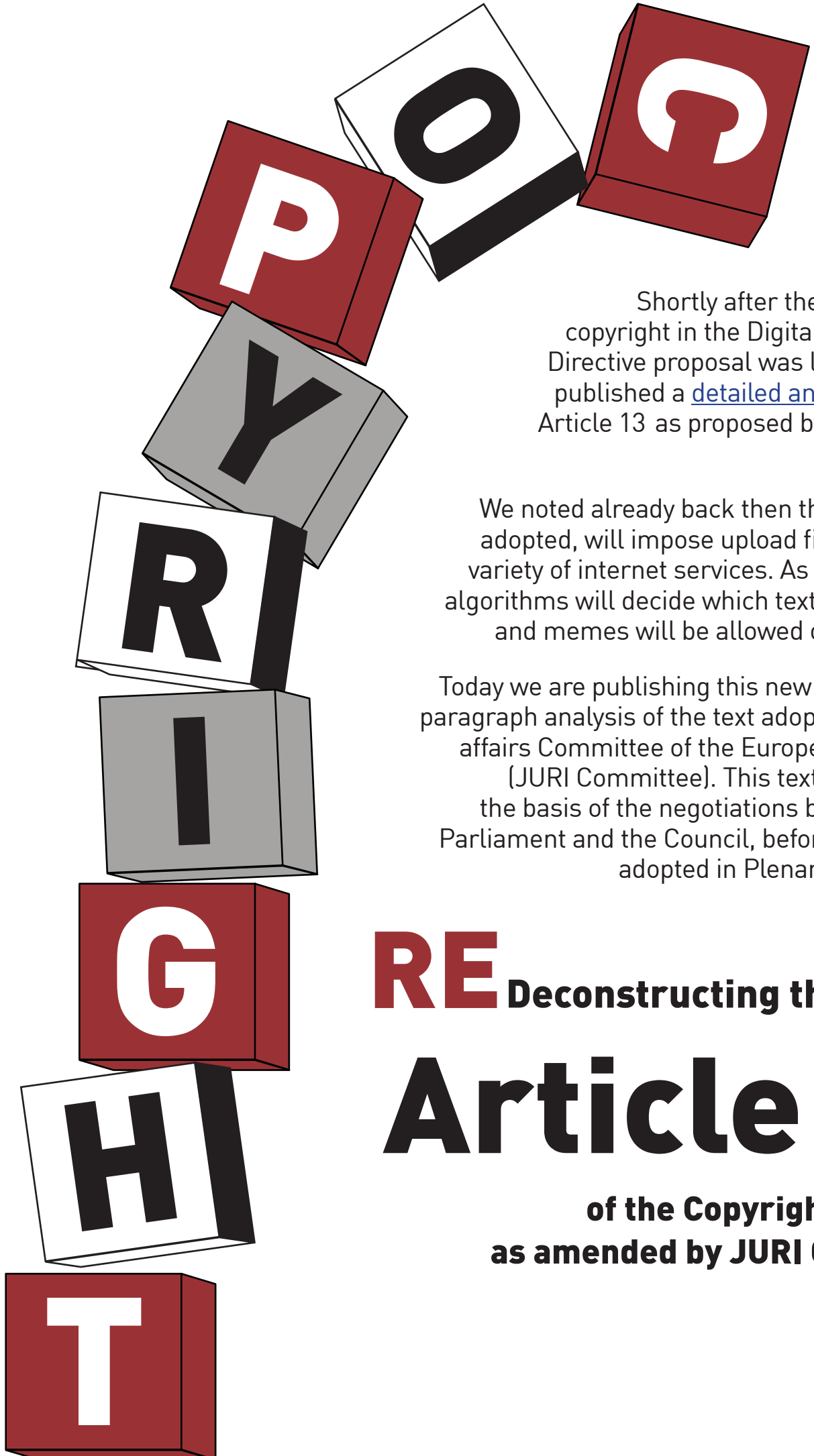

Shortly after the proposal for a copyright in the Digital Single Market Directive proposal was launched, EDRi published a detailed analysis about its Article 13 as proposed by the European Commission.

We noted already back then that Article 13, if adopted, will impose upload filters on a wide variety of internet services. As a result of this, algorithms will decide which texts, video, music and memes will be allowed on the internet.

Today we are publishing this new paragraph-by-paragraph analysis of the text adopted in the legal affairs Committee of the European Parliament (JURI Committee). This text could become the basis of the negotiations between the EU Parliament and the Council, before a final text is adopted in Plenary later in 2018.

RE Deconstructing the Article 13

of the Copyright proposal as amended by JURI Committee

REVISION 3

EDRi

JURI TEXT

THE JURI TEXT SAYS...

THIS MEANS...

ARTICLE 2, PARAGRAPH 1 POINTS 4 B (NEW)

'online content sharing service provider' means a provider of an information society service one of the main purposes of which is to store and give access to the public to copyright protected works or other protected subject-matter uploaded by its users, which the service optimises.

All internet hosting services have a main purpose of storing and providing access to works which may or may not be subject to protection under copyright or other rights. Elsewhere in the text, it is explained that literally any form of "optimisation" (such as the information being searchable) would mean that the provider is covered.

Services acting 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 concerned rightholders, such as educational or scientific repositories, should not be considered online content sharing service providers within the meaning of this Directive.

The definition is so broad and unpredictable, that narrow exceptions, based on current models of specific services (Wikipedia) are included here. The fact that current services have to be carved out in this way shows how future services are endangered.

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.

"Individual use" is unclear, as accounts which can be used by several people might fall outside the scope. Again there is a specific and, importantly, incorrectly drafted exception for a specific company (Github).

The lack of clarity of the definition is clearly demonstrated by the fact that it was necessary to explain that online marketplaces needed to be specifically excluded. For example Heroku, a mobile application publishing platform run by SalesForce.com would still be covered by this Directive. Likewise, any hotel booking platform that allows for uploading of photographs to be included in user created hotel reviews would still be covered by this Directive. There are thousands of (niche) platforms, large and small, that are commercial in nature, do not involve physical goods and still involve content sharing. The online ecosystem is much more multi-faceted than the broad strokes of this article allow for.

ARTICLE 13

Use of protected content by **online content sharing service providers**

"Use of the work by online content sharing service provider" clearly indicates that it is their use (rather than use by their user). If it is their use, they are directly liable for it, pushing them to implement severe filters to avoid any risk.

1a. Without prejudice of Art. 3 (1) and (2) of the Directive 2001/29/EC online content sharing service providers perform an act of communication to the public

This repeats the logic of the title of Article 13, namely that "online content sharing service providers" should be considered to be the publishers of the material being uploaded by their users, confirming that the provider becomes directly liable for users' uploads.

and shall conclude fair and appropriate licensing agreements with rightholders, unless the rightholder does not wish to grant a license or licenses are not available.

It is rather odd for the European legislator to instruct private parties about their private contractual agreements. It is not clear for whom the measures should be "fair" or "proportionate" - normally, it would be understood as being fair and proportionate for the two parties to the agreement – the service provider and/or the rightsholder.

Licensing agreements concluded by the online content sharing service providers with rights holders shall cover the liability for works uploaded by the users of their services in line with terms and conditions set out in the licensing agreement,	If the service provider is considered to be the publisher of the material being uploaded, and if the service provider is paying for this material to be online, and if the provider has permitted this in their terms and conditions, then someone would (not) be liable for (allowing) uploading the content...
provided that these users do not act for commercial purposes or are not the rightholder or his representative.	... if they are not acting in for commercial purposes. The exemption from liability would therefore not cover a user who is a teacher in a private school uploading video of a performance that includes some copyrighted content. In such circumstances, they would be liable, even though the availability of the content had already been paid for. Likewise if the rightholder has published the content under a creative commons or open source software license (for example a creative commons video on Vimeo), in such cases users are still not exempted from this article.
1. **Online content sharing service providers referred to in paragraph -1a** shall, in cooperation with rightholders, take **appropriate and proportionate** measures to ensure the functioning of **licensing** agreements **where** concluded with rightholders for the use of their works or other subject-matter **on those services.**	This is the first element of the upload filter. What is meant here is impossible to achieve without the provision of identification "hashes" (or other fingerprinting data) of copyrighted content, in line with Google's ContentID. The "appropriate and proportionate" wording has no meaning, as neither party (the rightsholder and the service provider) would be expected to agree to measures which they did not consider to be appropriate or proportionate. There is no clarity about for whom or to what the measures are meant to be appropriate or proportionate. It certainly seems highly unlikely that third parties that are not parties to the contract (the users) would be covered by this wording.
In the absence of licensing agreements with rightsholders online content sharing service providers shall take, in cooperation with rightholders, appropriate and proportionate measures leading to the non-availability of copyright or related-right infringing works or other subject-matter on those services, while non-infringing works and other subject matter shall remain available.	This is the second element of the upload filter, which is imposed on virtually all internet services. Providers that do not have a licensing agreement cannot meet this obligation without implementing upload filters, while those who do have licenses must implement filters to monitor usage of the licensed content. The reference to "appropriate and proportionate" has no particular meaning in relation to how private companies manage their services. The provider has no obligation (as made clear by the "terms and conditions" reference above) to host any content, so the final words ("shall remain available") of the paragraph have no legal meaning.
1a. Member States shall ensure that the online content sharing service providers referred to in the previous sub-paragraphs shall apply the above mentioned measures based on the relevant information provided by rightholders.	The "relevant information provided by rightholders" refers for all intents and purposes to the identification files ("hashes") that rightsholders would provide to service providers, in order for the upload filters to function. Rightsholders would also be free to "identify" the content in a non-standard format, leaving it to the provider to pay to transfer the files into the appropriate format.
The online content sharing service providers shall be transparent towards rightholders and shall inform rightholders of the measures employed, their implementation, as well as when relevant, shall periodically report on the use of the works and other subject-matter.	As filtering technology is imperfect and continues to evolve, this text places an obligation on service providers to provide data on how the particular text, image, audio, audiovisual and other filters that have been implemented are working, and, by extension, statistics on works shared by their users. It is foreseeable that this will in practice allow rightsholders to continually coerce service providers to invest in more and more invasive filters.
1.b Members States shall ensure that the implementation of such measures shall be proportionate and strike a balance between the fundamental rights of users and rightholders and shall in accordance with Article 15 of Directive 2000/31/EC, where applicable not impose a general obligation on online content sharing service providers to monitor the information which they transmit or store.	It is rather odd for the European legislator to instruct private parties about private contractual agreements. It is not clear for whom the measures should be "appropriate" or "proportionate". As this refers to an agreement between rightsholders and service providers, logically, it refers to them, and not users. The term "where "applicable" only adds more legal uncertainty. Article 15 of Directive 2000/31/EC applies to Member States imposing obligations on service providers while this text refers to agreements between private parties. Logically, this means that Article 15 of 2000/31/EC is never applicable.

2. To prevent misuses or limitations in the exercise of exceptions and limitations to copyright law, Member States shall ensure that the service providers referred to in paragraph 1 put in place **effective and expeditious** complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1.	This provision means that, if a service provider filters out content and if the service provider admits that this was because of the filter and that the filter was installed to comply with one of its multiple licensing agreements, then it would need to offer a complaints mechanism. If the provider simply says that the filtered content was a terms of service violation (in line with the reference to the "terms and conditions" above), they would have no obligation to provide any complaints or redress system – meaning there will be no meaningful protection against abuse by either service provider or rightholder, or both.
Any complaint filed under such mechanisms shall be processed without undue delay. The rightholders should reasonably justify their decisions to avoid arbitrary dismissal of complaints.	The service provider is expected to delete content based on information from the rightholders and then manage complaints about decisions that were taken by rightholders, who have no legal liability whatsoever for the deletion of legal content. It is also unclear to who the rightholder should justify a contested deletion request. Would that be the user or the service provider?
Moreover, in accordance with Directive 95/46/EC, Directive 2002/58/EC and the General Data Protection Regulation, the measures referred to in paragraph 1 should not require the identification of individual users and the processing of their personal data.	The complaint redress mechanism will not function if users are not identified. How can a service provider deal with a complaint about content blocked after being uploaded by a user, if the service provider cannot identify the user that uploaded the content in the first place?
Member States shall also ensure that, in the context of the application of the measures referred to above, users have access to a court or other relevant judicial authority to assert the use of an exception or limitation to copyright.	Given the fact that in most cases online service providers will block content based on alleged violation of their terms and conditions, this safeguard is unlikely to have any real meaning in practice.
3. Member States shall facilitate, where appropriate, the cooperation between the **online content sharing service providers, users** and rightholders through stakeholder dialogues to define best practices **for the implementation of the measures referred to in paragraph 1 in a manner that is proportionate and efficient,** taking into account, among others, the nature of the services, the availability of technologies and their effectiveness in light of technological developments.	Users would get the right to have a chat with rightholders and service providers about the filtering that would be imposed. What would this mean in practice?

RECITALS

THE JURI TEXT SAYS...

THIS MEANS...

EXPLANATORY RECITAL 38

Online content sharing service providers **perform an act of communication to the public and therefore are responsible for their content. As a consequence, they should conclude fair and appropriate** licensing agreements with rightholders. **Therefore they cannot benefit from** the liability exemption provided for in Article 14 of Directive 200/31/EC **of the European Parliament and of the Council.**	This contradicts the main article, arguing that online content sharing service providers (hosting services and social media companies) are actually publishers of the content of their users and are, therefore, directly liable for any infringements.
The rightholder should not be obliged to conclude licensing agreements.	This means that the "negotiation" of any licensing agreements are between a service provider **that must agree a deal in order to be allowed to function** (or impose highly effective filters, that currently do not exist and are unlikely to ever exist. It is even less likely that any such filter would recognise the various legitimate copyright exceptions and limitations provided for in national law) and the rightholder, **who is free not to conclude an agreement.** This means that the law creates an impossible legal barrier for balanced agreements to be reached.
In respect of Article 14 **of the Directive 2000/31/EC of the European Parliament and of the Council,** 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 therefore.	Having said that the relevant companies are not covered by Article 14 of Directive 2000/31/EC, the text goes on to explain the legislation. The text, in essence, says that any intervention (to make content searchable, for example) excludes a provider from protection from liability. In a rather unusual – and legally questionable – move, the text instructs judges not to apply common sense, arguing that any optimisation of any kind would constitute "active" treatment of the content that would imply knowledge of its copyright status.
Where licensing agreements are concluded, these should also cover, to the same extent and scope the liability of the users when they are acting in a non-commercial capacity.	If the service provider has been paid for the use of particular content on its service, the user is not committing an infringement (obviously?). However, even though the provider would have paid a license for the content to be available, a teacher in a private school (acting in a commercial capacity), for example, would still be liable for an infringement if they uploaded copyrighted content. Furthermore, this does not take into account the availability of broadly licensed works, such as under creative commons or open source software licenses.
In order to ensure the functioning of any licensing agreement, **online content sharing service** providers should take appropriate and proportionate measures to ensure **the** protection of works or other subject-matter **uploaded by their users**, such as implementing effective technologies.	Although the Parliament's amendments have the effect of turning removing all meaning from this sentence, this is clearly meant to refer to upload filtering.
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.	Upload filters should also be implemented by hosting providers not otherwise regulated by this legislation.
In the absence of agreements with the rightsholders it is also reasonable to expect from online content sharing service providers to take appropriate and proportionate measures leading to the non-availability of copyright or related-right infringing works or other subject matter.	Providers that do not have a licensing agreement should implement upload filters. While this sentence could be understood as referring to "notice and takedown") the sentence two lines further down removes this ambiguity. The reference to "appropriate and proportionate" has no particular meaning in relation to commercial agreements reached between private parties.
Such service providers are important content distributors, thereby impacting on the exploitation of copyright-protected content.	This kind of vague editorialising is the hallmark of poor legislation. Furthermore, all empirical evidence so far, and the economic indicators of the creative industries, actually suggest that the effect on rightsholders is positive.

Such service providers should take appropriate and proportionate measures to ensure the non-availability of works or other subject matter as identified by right holders.	This refers to the provision of content identifiers ("file hashes") that providers would use to filter uploads.
These measures should however not lead to the non-availability of non-infringing works or other subject matter uploaded by users.	This is an aspiration and, even after getting past the triple negative, is entirely unenforceable.

EXPLANATORY RECITAL 39

Cooperation between **online content sharing service providers** and rightholders is essential for the functioning of **the measures.**	This is the first element of the upload filter. What is intended here is the provision of identification "hashes" of copyrighted content, in line with Google's ContentID.
In particular, rightholders should provide the **relevant information to the services** to allow **them** to identify their content **when applying the measures.**	As "notice and takedown" is a long-established already part of EU law, this must mean something additional. This reinforces the previous sentence and can only mean, at best, the provision of identification "hashes" of copyrighted content, in line with Google's ContentID and, at worst, simply a catalogue of files, with the service provider paying to convert the content into the "hash" files necessary to run the upload filter.
The service providers should be transparent towards rightholders with regard to the deployed **measures,** to allow the assessment of their appropriateness.	As filtering technology is imperfect and continues to evolve, this places an obligation on service providers to provide data on how the particular text, image, audio, audiovisual and other filters that have been implemented are working. This would allow rightsholders to continually coerce service providers to invest in more and more invasive filters.
When assessing the proportionality and effectiveness of the measures implemented, technological constraints and limitations as well as the amount or the type of works or other subject matter uploaded by the users of the services should be taken into due consideration.	This means that any service provider (regardless of its size) would need to continuously assess issues such as: a. the amount of content being uploaded by its users (meaning to monitor its users). b. The various file formats (text, video, etc) that are being uploaded. c. The effectiveness of filtering technologies currently on the market.
In accordance with Article 15 of Directive 2000/31/EC, where applicable, the implementation of measures by service providers should not consist in a general monitoring obligation and should be limited to ensuring the non-availability of unauthorised uses on their services of specific and duly notified copyright protected works or other subject-matter.	Article 15 of Directive 2000/31/EC prohibits Member States of the EU from imposing a. a general obligation to monitor and b. an obligation to search for facts or circumstances indicating illegal activity. The agreed wording is disturbing from two perspectives: a. An agreement between private parties logically will always be in accordance with a law that only applies to governments. This looks like a safeguard but has no legal meaning. b. Why mention one of the restrictions (general monitoring) but not the other (to seek facts or circumstances indicating illegal activity)?
When implementing such measures, the service providers shall also strike a balance between the rights of users and those of the rightholders under the Charter of Fundamental Rights of the European Union.	Service providers are not subject to the Charter, so this sentence has no legal meaning.
The measures applied should not require the identification of individual users that upload content and should not involve the processing of data relating to individual users, in accordance with Directive 95/46/EC and Directive 2002/58/EC.	It is difficult to imagine that a redress mechanism can be designed that does not identify the user that is complaining. If there is no personally identifiable date stored about the filtering that took place, the user will not be able to identify what was filtered. In any event, providers will remove content under 'terms and conditions" and not this legislation, meaning that such "safeguards" will have no meaning.
Since the measures deployed by online content sharing service providers in application of this Directive could have a negative or disproportionate effect on legitimate content that is uploaded or displayed by users, in particular where the concerned content is covered by an exception or limitation, online content sharing service providers should be required to offer a complaints mechanism for the benefit of users whose content has been affected by the measures.	This provision means that, if a service provider filters out content and if the service provider admits that this was because of the filter and that the filter was installed because of one multiple licensing agreements, then it would need to offer a complaints mechanism. If, on the other hand, the provider simply says that the filtered content was a violation of terms of and conditions, they would have no obligations.

Such a mechanism should enable the user to ascertain why the content concerned has been subject to measures and include basic information on the relevant exceptions and limitations applicable.	Exceptions and limitations are not harmonised in Europe and even experts asked by EUIPO cannot give concrete answers about specific uses of copyrighted content. (https://euipo.europa.eu/ohimportal/en/web/observatory/faqs-on-copyright **).** It is uncertain how an algorithm will be able to do this better than IP experts. In any event, content will be filtered on the basis of "terms and conditions" and not the law, meaning that this provision will not be operational.
It should prescribe minimum standards for complaints to ensure that rightholders are given sufficient information to assess and respond to complaints.	Rightholders have all the power (to ask for content to be removed) and no responsibility (even if 100% of a rightholders' claims about what they claim to own are incorrect, they are not liable for making false claims). They also have no obligation to respond quickly to complaints (although service providers would have such obligations, if they choose the difficult option of saying that the filtering was done on the basis of law and not "terms and conditions")
Rightholders or a representative should reply to any complaints received within a reasonable amount of time. The platforms or a trusted third party responsible for the redress mechanism should take corrective action without undue delay where measures prove to be unjustified.	A "reply" is not a comprehensive response. Corrective action (putting content back) is not compensation. Entire YouTube channels are frequently taken offline due to incorrect complaints and there is no meaningful redress for victims. Nothing in this text would change that.
ARTICLE 13 (A)	
Member States should ensure that an intermediate mechanism exists enabling service providers and rightholders to find an amicable solution to any dispute arising from the terms of their cooperation agreements. To that end, Member States should appoint an impartial body with all the relevant competence and experience necessary to assist the parties in the resolution of their dispute.	If such arrangements could be set up (and this does seem possible), they would negate the entire justification for Article 13 and the associated recitals.
ARTICLE 13 (B)	
The content recognition technologies market is well developed already and expected to grow in a data-based economy.	This statement is not based in any evidence. The only "well developed" technology for upload filters is the one related to music and not to video, text, memes, or images containing text. The expectation to "grow in a data-based economy" is political spin, which has no place in legislation.
The existence of technologies of this kind and competition among suppliers thereof should therefore create a market that is fair for all undertakings, irrespective of their size, ensuring that SME access thereto is affordable and simple.	This is another expectation based on pure hope to try to avoid criticism of the high costs of content recognition technologies.
However, the absence of clear legal obligations to use these technologies enables dominant market operators in particular to refuse to use those tools which are appropriate for the purposes of licensing and management of rights.	Firstly, dominant market operators are using such tools, so this is simply false. Secondly, this implies that all providers, not just the dominant ones, will be expected to use these tools, contrary to what the rapporteurs and others have been saying.

WARNING!

This document would be subject to filtering under the JURI's proposal.

If you still need proof that the Commission's proposal would limit free speech, how about this?

The first page of this document is a remix of the poster from a Woody Allen film. The copyright remains the property of the rightholder and could easily be "identified" by the rightholder for deletion. Filtering will inevitably be done under "terms of service" and not the law, so the content would be blocked, with no meaningful right of appeal.

Further reading:

We can still win: Next steps for the Copyright Directive
https://edri.org/next-steps-copyright-directive-article-13

Censorship Machine: Busting the myths
https://edri.org/censorship-machine-busting-myths/

When Lies are Told...or How the Meme Illustration Shows its Merits
http://copybuzz.com/copyright/when-lies-are-told-or-how-the-meme-illustration-shows-its-merits/

Save Your Internet
www.saveyourinternet.eu