

Article 13 + related definition

Article 2
Definitions

(5) ‘online content sharing service provider’ means a provider of an information society service whose main or one of the main purposes is to store and give the public access to a large amount of copyright protected works or other protected subject-matter uploaded by its users which it organises and promotes for profit-making purposes. Providers of services such as not-for profit online encyclopedias, not-for profit educational and scientific repositories, open source software developing and sharing platforms, electronic communication service providers as defined in Directive 2018/1972 establishing the European Communications Code, online marketplaces and business-to business cloud services and cloud services which allow users to upload content for their own use shall not be considered online content sharing service providers within the meaning of this Directive.

Article 13

Use of protected content by online content sharing service providers

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.
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.
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.
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 shall not

affect the possible application of Article 14(1) of Directive 2000/31/EC to these service providers for purposes falling outside the scope of this Directive.

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:
 - (a) made best efforts to obtain an authorisation, and
 - (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
 - (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. 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:

- (a) the type, the audience and the size of the service and type of works or other subject matter uploaded by the users;
- (b) the availability of suitable and effective means and their cost for service providers

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.

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:

- a) quotation, criticism, review,
- b) use for the purpose of caricature, parody or pastiche.

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.

Member States shall provide that online content sharing service providers shall provide rightholders, at their request, with adequate information on the functioning of their practices with regard to the cooperation referred to in paragraph 4 and, where licensing agreements are concluded between service providers and rightholders, information on the use of content covered by the agreements.

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.

When rightholders request to remove or disable access to their specific works or other subject matter, they shall duly justify the reasons for their requests. Complaints submitted under this mechanism shall be processed without undue delay and decisions to remove or disable access to uploaded content shall be subject to human review.

Member States shall also ensure that out-of-court redress mechanisms are available for the settlement of disputes. Such mechanisms shall enable disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law, without prejudice to the rights of users to have recourse to efficient judicial remedies. In particular, Member States shall ensure that users have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright rules.

This Directive shall in no way affect legitimate uses, such as uses under exceptions and limitations provided for in Union law, and shall not lead to any identification of individual users nor to the processing of their personal data, in accordance with Directive 95/46/EC, Directive 2002/58/EC and the General Data Protection Regulation.

Online content sharing service providers shall inform the users in their terms and conditions about the possibility for them to use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law.

9. As of [date of entry into force of this Directive] the Commission in cooperation with the Member States shall organise stakeholder dialogues to discuss best practices for the cooperation between the online content sharing service providers and rightholders. The Commission shall, in consultation with online content sharing service providers, rightholders, users associations and other relevant stakeholders and taking into account the results of the stakeholder dialogues, issue guidance on the application of Article 13 in particular regarding cooperation referred to in paragraph 4. When discussing the best practices, special account shall be taken, among others of the need to balance fundamental rights and the use of exceptions and limitations. For the purpose of this stakeholders dialogue, users associations shall have access to adequate information from online content sharing service providers on the functioning of their practices with regard to in paragraph 4.

Recitals

(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 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. 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 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.

However, as contractual freedom is not affected by these provisions, the right holders should not be obliged to give an authorisation or to conclude licensing agreements.

(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 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.

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.

(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 elements, such as the audience of the service and the number of files of copyright-protected content uploaded by the users of the services.

(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 content, including to the micro and small enterprises or other service providers which are excluded from the scope of this Directive.

(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 application of Article 14(1) of Directive 2000/31/EC to these service providers for purposes falling outside the scope of this Directive.

(38b) 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.

In particular, the specific regime applicable to new online content sharing service providers with an annual turnover below 10 million euros, whose average number of monthly unique visitors in the Union does not exceed 5 million should not affect the availability of remedies under national and EU law.

Where no authorisation has been granted to the services providers, they should make their best efforts in accordance with high industry standards of professional 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 information 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 right holders 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 licencing 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.

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 whether the service provider has taken all the steps that would be taken by a diligent operator to achieve the result of preventing the availability of unauthorised works or other subject matter on its website, taking into account best industry practices and the effectiveness of the steps taken in light of all relevant factors and developments, as well as 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 evolving state of the art of existing means, including future developments, 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.

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.

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 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 irrespective of whether the best efforts were made and regardless of whether right holders have made available the necessary information in advance, 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. Additionally, these services should also be liable if they fail to demonstrate that they have made their best efforts to prevent the future uploads of specific unauthorised works, based on relevant and necessary information provided by rightholders for that purpose.

When rightholders do not provide the service providers, with the necessary and relevant information on their specific works and other subject matter or when no notification concerning the 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 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.

(38ba) Article 13(4aa) applies to new online services. A similar provision is foreseen in Article 16(2) of Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. The rules set in this Directive are intended to take into account the specific case of start-up companies working with user uploads to develop new business models.

The modified regime applicable to new service providers with a small turnover and audience should benefit genuine new enterprises and should therefore cease to apply three years after they became first available online in the Union. It should not be abused by arrangements aiming at extending the benefit of this modified regime beyond the first three years. In particular, it should not apply to services newly created or to services provided under a new name but which are pursuing the activity of an already existing online content sharing service provider which could not or does not longer benefit from this regime.

(38c) 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 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.

(38d) 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 service, these should also cover the copyright relevant acts in respect of uploads by the users within the scope of the authorisation granted to the service providers, but only in cases where

the users act for non-commercial purposes, such as sharing their content without any profit making purpose, or when the revenue generated by their uploads are not significant in relation to the copyright relevant act of the users for which they are covered. When rightholders have explicitly authorised users to upload and make available works or other subject-matter on an online content sharing service, the act of communication to the public of the service is authorised within the scope of the authorisation granted by the rightholder. However, there should be no presumption in favour of the online content sharing service providers that their users have cleared all the relevant rights.

(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 should be allowed to upload and make available content generated by users for specific purposes of quotation, criticism, review, caricature, parody or pastiche. This is particularly important to strike a balance between fundamental rights in the Charter of Fundamental Rights of the European Union, in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property. For these reasons, these exceptions should be mandatory in order to ensure that users receive uniform protection across the Union. It is important to ensure that online content sharing services operate an effective complaint and redress mechanism to support these uses.

(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.