



## OPINION

For the Committee of Legal Affairs

on **ARTICLE 13** of the proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016)0593 – C8-0383/2016 – 2016/0280(COD))



## **PREAMBLE**

The opinion of KENUP Foundation has been informed through the Foundation's work on MusicNow, a pan-European initiative endorsed by DG CONNECT and lead by the Republic of Malta, involving other Members States as well as 200+ stakeholders from the creative industries. MusicNow aims at fair and transparent compensation to creative rightholders for the digital exploitation of their rights.

MusicNow will be put forward as an application for a European Research Infrastructure Consortium (ERIC) by the Republic of Malta, the Republic of Slovenia under directive EC 723/2009 with amendment EC 1261/2013.

More information is publicly available under [www.musicNow.eu](http://www.musicNow.eu).

kENUP Foundation publishes its activities in the EU Transparency Register under ID 934996421910-13.

## **I. JUSTIFICATION**

Our opinion focuses on Article 13 of the proposal for a Directive and respective recitals. KENUP Foundation reserves its position on other aspects of the proposed Directive

- ❖ **SCOPE AND DEFINITION.** Article 13 seeks to regulate User Generated Content (“UGC”) platforms. UGC platforms are information society service providers (“ISSPs”) *hosting* and giving access to content uploaded by their users.
- ❖ A legal definition already exists in EU law for ‘*hosts*’ (in article 14 of the E-commerce Directive). For the sake of clarity, the legal definition of UGC platforms should be using the existing definition of a ‘host’ as its main building block.
- ❖ The quantity (whether large or small) of copyright-protected content present on a UGC platform should not be part of the legal definition of UGC platforms, but only come into play when looking at the appropriateness of measures that might be taken (see below).
- ❖ **BENEFITING FROM THE LIABILITY EXEMPTION.** UGC platforms are eligible for the liability exemption under Art. 14 of the E-commerce Directive, except where they gain either *knowledge or control* over information stored. These notions are central to the existing liability system and should not be modified.
- ❖ The notion of “active role” is flawed and technologically irrelevant. Algorithms are capable of automatically optimising the presentation of information and of promoting it based on its popularity, without ever gaining any knowledge or control over said information.
- ❖ **NEW CONTENT RECOGNITION OBLIGATION FOR UGC PLATFORMS.** A new obligation to prevent the availability of copyright-protected content shall be created, through the implementation of ‘appropriate and proportionate measures’ that might include technologies and/or other measures (the “Measures”). UGC Platforms shall inform rightholders of the Measures they choose to implement, including general information about the accuracy of their functioning.
- ❖ **WHERE THE MEASURES IMPLEMENTED AND DEEMED APPROPRIATE ARE CONTENT RECOGNITION TECHNOLOGIES.** The owners of content recognition technologies (“CRTech”) shall provide general information about the type of technology they use, the datasets required to enable their functioning, and the accuracy of their functioning. Unless they own or control CRTech themselves, UGC Platforms shall have no obligation in that respect.
- ❖ **CONCORDANT OBLIGATION TO POPULATE A DATABASE.** The new obligation to take measures should be coupled with the possibility for rightholders to populate

a database of the works or other subject-matter in respect of which they have the copyright, in accordance with industry standards. UGC platforms shall inform rightholders of the limitations and/or defects that might affect the Measures, if datasets are missing, incomplete or if the standards required are not met.

- ❖ **DISPUTE RESOLUTION / IMPARTIAL BODY.** An impartial body shall be appointed to monitor, provide assistance and resolve disputes regarding i) the appropriateness and effectiveness of Measures, ii) the redress and complaints mechanism available to users, ii) the negotiations of licences between UGC platforms and rightholders.

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**II. AMENDMENTS**

KENUP Foundation asks the Committee on Legal Affairs to take into account the following amendments:

**Amendment 1**  
**Proposal for a directive**  
**Recital 37 – paragraph 1**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
<p>Over the last years, the functioning of the online content marketplace has gained in complexity. Online services providing access to <b><i>copyright protected</i></b> content uploaded by their users without <b><i>the involvement of</i></b> rightholders have flourished and have become main sources of access to content online. This affects rightholders' possibilities to determine whether, and under which conditions, their work and other subject-matter are used as well as their possibilities to get an appropriate remuneration for it.</p>	<p>Over the last years, the functioning of the online content marketplace has gained in complexity. Online services providing access to content uploaded by their users, <b>embodying copyright protected material</b> without <b><i>prior approval from</i></b> rightholders have flourished and have become main sources of access to content online. This affects rightholders' possibilities to determine whether, and under which conditions, their work and other subject-matter are used as well as their possibilities to get an appropriate remuneration for it.</p>

Justification

This modification aims to clarify that online services providing access to content uploaded by their users ('UGC platforms'), are first and foremost tools to enable the sharing of content that is original and although it is the case that some of the UGC content embodies, adapts, remixes, parodies, etc. content otherwise protect by copyright, UGC platforms should not be portrayed as merely providing access to copyright-protected works.

**Amendment 2**  
**Proposal for a directive**  
**Recital 38 - paragraph 1**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
Where information society service providers <i>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</i> , they are obliged to conclude licensing agreements with rightholders, <i>unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council</i> <sup>1</sup> .	Where information society service providers <i>that consist of the storage of, and the means to give access to, information provided by a recipient of the service act in a way to either gain knowledge and/or exercise control over information stored through their service</i> , they are <i>no longer eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council. Where the information known and/or controlled embodies works or other subject matter</i> , they are obliged to <i>either comply with 14.1 b) of Directive 2000/31/EC of the European Parliament and of the Council, or to conclude licensing agreements with rightholders for the use of such works or other subject matter.</i>

Justification

Article 14 of the E-commerce Directive defines hosts as follows: “*information society service that consists of the storage of information provided by a recipient of the service*”. For the sake of clarity and consistency, the same definition should be used as a building block for defining UGC platforms. Our suggestion is to insert “**and the means to give access to**” to the existing definition.

It should be clarified that the central notion that shall be used to determine whether or not UGC Platforms are entitled to benefit from liability exemption under article 14 of the E-commerce Directive are the notions of ‘knowledge and control’. Other notions such as the concept of “physical facilities” are flawed and irrelevant.

UGC platforms may conclude licence agreements with rightholders, whose terms shall be fair and reasonable and include an obligation to accurately identify the works and

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<sup>1</sup> 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).



other subject matter covered by the agreement.

**Amendment 3**  
**Proposal for a directive**  
**Recital 38 – paragraph 2**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
<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><b><i>Deleted.</i></b></p>

Justification

The notion of “active role” is unclear and technologically irrelevant. Algorithms are capable of automatically optimising the presentation of information and of promoting it based on its popularity, without ever gaining any knowledge or control over said information.



**Amendment 4**  
**Proposal for a directive**  
**Recital 38 – paragraph 3**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
<p><i>In order to ensure the functioning of any licensing agreement, information society service providers <b>storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users</b> should take appropriate and proportionate measures to ensure protection of works or other subjectmatter, such as implementing effective technologies. <b>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.</b></i></p>	<p>Information society service providers <b>that consist of the storage of, and the means to give access to, information provided by a recipient of the service</b> should take appropriate and proportionate measures to ensure protection of works or other subject-matter, such as implementing effective technologies. <b><i>Such measures should respect the Charter of Fundamental Rights of the European Union and should not impose a general obligation on information society service providers to monitor the information which they transmit or store as referred to in Article 15 of Directive 2000/31/EC.</i></b></p>

Justification

The attempt to distinguish between UGC platforms storing *large* amounts of works and other subject matter (“Copyright-Protected Content”) and UGC platforms storing *small* amounts of Copyright-Protected Content is ill-suited and is amiss with the concept of legal certainty that has been recognised as one of the general principles of European Union law. The quantity of Copyright-Protected Content present on UGC platforms should not be part of the definition of UGC platforms but only come into play when looking at the appropriateness of measures that might be taken.

For the sake of technological neutrality and taking into account the technological capabilities of SMEs and start-ups, 'appropriate and proportionate measures' should be construed broadly as to include technologies and/or other measures. The measures applied shall respect fundamental rights and Article 15 of Directive 2000/31/EC.

**Amendment 5**  
**Proposal for a directive**  
**Recital 38 – paragraph 3 (a) (new)**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
	<p><i>Rightholders who want to prevent the availability of works or other subject matter on a service that consists of the storage of, and the means to give access to, information provided by a recipient of the service should populate databases made available by service providers with accurate information about the works or other subject-matter in respect of which they claim to have control the copyright. The information about the works shall be made available pursuant to industry standards. Rightholders should be informed of the limitations and defects that might affect the measures in the event where the information is missing, incomplete or where standards are not met.</i></p>

Justification

The recital was introduced to underline the necessity, for the measures to be implemented, that rightholders must accurately populate databases (and where the case may be, according to the specifications of the ‘manufacturer’ of the content recognition technology used).

**Amendment 6**  
**Proposal for a directive**  
**Recital 39**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
<p><i>Collaboration between information society service providers storing and providing access to the public to large amounts of copyright protected works or other subjectmatter uploaded by their users and rightholders is essential for the functioning of technologies, such as content recognition technologies. In such cases, rightholders should provide the necessary data to allow the services to identify their content and the services should be transparent towards rightholders with regard to the deployed technologies, to allow the assessment of their appropriateness. The services should in particular provide rightholders with information on the type of technologies used, the way they are operated and 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.</i></p>	<p><i>The service providers which own and market content recognition technologies should publish on their websites, information on the type of technologies they use, the way they are operated and the datasets required to enable their functioning for the recognition of rightholders' content. Unless they own or control the content recognition technology themselves, information society service providers shall have no obligation in that respect.</i></p>

**Justification**

Content recognition technologies are sophisticated and capital intensive technologies, often patented, which are extremely rarely developed in-house. To the best of our knowledge, only Alphabet's YouTube has been able to implement a proprietary content recognition technology. Therefore, obligations about the functioning of these technologies should be borne by the services operating, marketing and licensing these technologies, not by UGC platforms that are licensees of these technologies and dependent on the reliability of solutions they do not own or control.

**Amendment 7**  
**Proposal for a directive**  
**Chapter 2 - Title**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
Certain uses of <i>protected content by</i> online <i>services</i> .	Certain uses of <i>works and other subject-matter</i> online

Justification

The expression “protected content” is not defined in EU law. The expression ‘works and subject matter” is the traditional way of designating material protected by copyright and related rights under EU copyright law.

**Amendment 8**  
**Proposal for a directive**  
**Article 13 – title**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
Use of <b><i>protected content</i></b> by information society service providers <b><i>storing and giving access to large amounts of works and other subject-matter uploaded by their users.</i></b>	Use of <b><i>works and other subject-matter</i></b> by information society service providers <b>that consist of the storage of, and the means to give access to, information provided by a recipient of the service.</b>

**Amendment 9**  
**Proposal for a directive**  
**Article 13 – paragraph 0 (new)**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
	<p><i>Information society service providers that consist of the storage of, and the means to give access to, information provided by a recipient of the service shall provide to rightholders of copyright and other subject-matter the possibility to populate a database of the works or other subject-matter in respect of which they control the copyright, following industry standards. The information about the works shall be made available pursuant to industry standards. Rightholders should be informed of the limitations and defects that might affect the measures in paragraph 1 in the event where the information is missing, incomplete or where standards are not met.</i></p>

Justification

The new obligation to “take measures” should be combined and interconnected with the offering by UGC platforms to rightholders of the possibility to populate a database of the works or other subject-matter in respect of which they have the copyright, in accordance with industry standards.

The rightholders shall bear the consequence of not being able to accurately identify to information society service providers the works or other subject-matter in respect of which they have copyrights and UGC platforms shall not be liable if the measures are defective in respect of any works or other subject-matter where such identification has not been sufficiently provided.

**Amendment 10**  
**Proposal for a directive**  
**Article 13 – paragraph 1**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
<p>1. Information society service providers <i>that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers.</i> Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. <i>The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.</i></p>	<p>1. <i>In addition to the provisions of Article 14 of Directive 2000/31/EC of the European Parliament and of the Council<sup>2</sup>; where an information society service provider that consists of the storage of, and the means to give access to information provided by a recipient, they shall take appropriate and proportionate measures to prevent the availability on their services of works or other subject-matter identified by rightholders through the <b>population of the database.</b> Those measures, such as the use of effective content recognition technologies, shall be appropriate, proportionate <b>and always function of the quality of the data received pursuant to paragraph 0.</b> The implementation of such measures shall respect the fundamental rights of users and shall not impose a general obligation on information society service providers to monitor the information which they transmit or store, in accordance with Article 15 of Directive 2000/31/EC.</i></p>

Justification

A new obligation to “prevent the availability of works or other subject matter” shall be created for UGC platforms, through the implementation of ‘appropriate and proportionate measures’ that might include technologies and/or other measures. It shall be wholly dependent on its corollary to accurately populate a database here above described in (new) paragraph 0.

<sup>2</sup> 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).



The implementation of such measures shall respect the fundamental rights of users and shall not impose a general obligation on information society service providers to monitor the information which they transmit or store, in accordance with Article 15 of Directive 2000/31/EC. UGC platforms eligible for the liability exemptions under Directive 2000/31/EC shall abide by the new obligation to remain eligible.



**Amendment 11**  
**Proposal for a directive**  
**Article 13 – paragraph 1 (a) (new)**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
	<i>The service providers referred to in paragraph 0 may offer to make use of the measures in paragraph 1 when concluding licensing agreements with rightholders.</i>

Justification

Where the most appropriate measures are deemed to be content recognition technologies, these technologies may also be made available by UGC platforms to rightholders as a tool to help enforcing the provisions of license agreements, provided always that rightholders accurately identify the works and other subject matter covered by the agreement.

**Amendment 12**  
**Proposal for a directive**  
**Article 13 – paragraph 2**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
<p>2. Member States shall ensure that the service providers referred to in paragraph 1 put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1.</p>	<p>2. Member States shall ensure that the service providers referred to in paragraph 0 put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1.</p>

**Amendment 13**  
**Proposal for a directive**  
**Article 13 – paragraph 2a (new)**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
	<p><i>In addition, Member States shall ensure that users have access to court or to the impartial body referred to in paragraph 3 (a) for the purpose of asserting their right of use, as rightholders, or under an exception or limitation to copyright; and to appeal the effect of the measures implemented pursuant to paragraph 1.</i></p>

Justification

Member States shall ensure that users can enforce their rights efficiently, especially given the imbalance in resources and bargaining power between users and rightholders.

**Amendment 14**  
**Proposal for a directive**  
**Article 13 – paragraph 3**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
<p>Member States shall facilitate, where appropriate, the cooperation between <b><i>the information society service providers</i></b> and rightholders through stakeholder dialogues to define best practices, such as appropriate and proportionate content recognition technologies, taking into account, among others, the nature of the services, the availability of the technologies and their effectiveness in light of technological developments.</p>	<p>Member States shall facilitate, where appropriate, the cooperation between <b><i>the service providers referred to in paragraph 0, user representatives</i></b> and rightholders through stakeholder dialogues to define best practices <b><i>for the implementation of paragraph 0 and 1. The measures undertaken shall be</i></b> appropriate, proportionate, <b><i>and shall take</i></b> into account, among others, the nature <b><i>and size</i></b> of the services, <b><i>the quality of the data received pursuant to paragraph 0,</i></b> the availability of the technologies, and their effectiveness in light of technological developments.</p>

Justification

The appropriateness, proportionality and effectiveness of the measures shall be function of the size of the UGC platforms, the nature of the information hosted and the amount of works and other subject matter stored and given access to by each service provider (whether the amount of copyright protected content is small or large would come into play here).

**Amendment 15**  
**Proposal for a directive**  
**Article 13 (a) – (new)**

<i>Text proposed by the Commission</i>	<i>Amendment</i>
	<p><b><i>ARTICLE 13(a) – Impartial Body</i></b></p> <p><b><i>Member States shall ensure that an impartial body shall be created to monitor, provide assistance and resolve disputes regarding:</i></b></p> <ul style="list-style-type: none"> <li><b><i>a) the appropriateness and effectiveness of the measures referred to in article 13 paragraph 1,</i></b></li> <li><b><i>b) the redress and complaints mechanism available to users,</i></b></li> <li><b><i>c) the negotiations of licences between service providers referred to in article 13, paragraph 0 and rightholders.</i></b></li> </ul> <p><b><i>No later than [date mentioned in Article 21(1)] Member States shall notify to the Commission the body referred to in Article 13 (a).</i></b></p>

Justification

In KENUP Foundation’s experience, any attempt to create consensus between rightholders is met with resistance, and on matters as controversial as the “fairness of licensing terms”, “appropriateness, proportionality and effectiveness” of content recognition technologies, consensus amongst rightholders and between rightholders and service providers will be extremely challenging.

In contrast to Article 10, which provides for the assistance of “an impartial body with relevant experience” to assist parties that wish to conclude an agreement for the making available of audiovisual works on video-on-demand platforms, and Article 16, which provides for a dispute resolution mechanism for disputes concerning the transparency obligation in Article 14 and the contract adjustment mechanism in Article 15, Article 13 included no mechanism for resolving issues if collaboration between stakeholders ceases to be effective. This provision seeks to address that imbalance in an area where this mechanism will be acutely needed.

The impartial body appointed shall monitor, provide assistance and resolve disputes regarding i) the appropriateness and effectiveness of the measures, ii) the redress and complaints mechanism available to users, ii) the negotiations of licences between UGC platforms and rightholders.

The upcoming European Research Infrastructure Consortium (ERIC) on Fair and Transparent Compensation for Digital Exploitation of Content, an international organization of the European Union, may be a suitable legal entity to administer such impartial body.

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