



**Article 13, read together with recitals 38 and 39, would change the law in four key ways:**

They reinterpret the liability protections in the E-Commerce Directive in a way which exclude most of the services that it was designed to protect - at the same time as claiming not to change the Directive.

They assign editorial responsibility to the excluded web hosting services, making them directly liable for their users' activities.

They impose a mandatory upload filter for the badly defined services that they are trying to exclude from E-Commerce Directive protection.

They establish the principle that the upload filter can be used to overturn democratically agreed copyright flexibilities such as parody and quotation.

**Deconstructing the**

# **Article 13**

**of the Copyright proposal  
of the European Commission**

**REVISION 2**

# PROPOSAL



## THE PROPOSAL SAYS...

### PARAGRAPH 1 Sentence 1, part 1

Information society service providers that store and provide to the public access to large amounts of

works or other subject-matter uploaded by their users[...]



## THE COURT AND CURRENT LAW SAY...

- The concept of intermediary covers both internet ACCESS providers and online social networking platforms.
- There is a prohibition of general monitoring by intermediaries in Article 15(1) [Directive 2000/31](#) of the following services:
  - “mere conduit”: service that consists of the transmission in a communication network of information provided by a recipient of the service, or the provision of access to a communication network;
  - “caching”: transmission of information and automatic, intermediate and temporary storage of that information;
  - “hosting”: storage of information, including – as shown in the Court of Justice of the European Union (CJEU) ruling on [Netlog/Sabam](#), for example – where the stored information is accessible to the public.



## WE SAY...

The concept of “information society service provider” is too broad and would cover an almost unlimited number of online services. The Commission appears to have chosen this complicated wording as a way of not saying “hosting provider,” an activity protected by the E-Commerce Directive. “Hosting” covers any service (“cloud” storage, hosting a website, hosting a blog, etc).

The wording “store and provide to the public access” implies that the intermediary is a publisher and would therefore be liable for all infringements of all laws that may be committed by their users. This is confirmed by recital 38. This would overturn the approach taken in EU for the entire history of the internet and abandon international best practice. The impact of making internet hosting providers liable for activities about which they have no knowledge would be huge. It would, in reality, require both extensive monitoring of everything uploaded to the internet and deletion of any communications that generated a legal risk for the provider. This would result in a huge “chilling effect” on freedom of expression, and massive private censorship, undermining innovation and competition.

Web hosting is the storage of content with the purpose of this being available to the public. It is clear from CJEU case law that this is the settled legal understanding of “hosting” in the e-Commerce Directive (C-360/10, for example). The attempted redefinition of this activity in this Directive (most notably in recital 38) seeks to overturn or ignore such case law.

### PARAGRAPH 1 Sentence 1, part 2:

[...] 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.

- Within the limits of national constitutional law, the Charter of Fundamental Rights and the European Convention on Human Rights, national laws should allow for measures aimed to:
  - a. **bring to an end infringements** already committed against intellectual-property rights using their information-society services, and/or
  - b. **prevent further infringements**

This is reflected in:

- › Article 8(3) of [Directive 2001/29](#)
- › Article 11 of [Directive 2004/48](#)
- › [Case C-324/09 L'Oréal and Others](#) [2011]
- › [Case 314/12 Telekabel Wien GmbH v Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft](#)

- Preventive monitoring of this kind would require active observation. However, the CJEU ruled that a social network “**cannot be obliged to install a general filtering system, covering all its users, in order to prevent the unlawful use of musical and audio-visual work**”.

The Charter of Fundamental Rights of the European Union requires that restrictions on fundamental freedoms (freedom of communication and privacy, in this case) must be:

1. necessary and
2. genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.

- A fair balance must be achieved between the protection of the fundamental right to property, which includes the rights linked to the protection of “intellectual property” and the protection of other fundamental rights (freedom to conduct business, protection of personal data, freedom to receive or impart information). **Filtering has been repeatedly judged not to respect this balance** ([Case C275/06 Promusicae v Telefónica](#)).

The Commission does not mention what types of agreements it is referring to, nor is it clear which type(s) of provider are covered by this notion

The Commission proposal completely overturns the copyright enforcement system. Instead of respecting the clarifications and requirements of Court rulings, the proposal rejects them completely.

The requirements set by the CJEU are specifically designed to end and prevent infringements in a way which respects all rights – fundamental human rights, commercial rights and protection of intellectual property (IP) rights – to an appropriate degree. This proposal would turn the established approach on its head.

More problematic still, the wording appears to be little more than a description of Google’s ContentID filtering system, moving it from an ex post to an ex ante approach and broadening its scope both in terms of type of breach being addressed and the nature of the files (photo, text, video). In this system, legality – in the context of legitimate parody, education or quotation – is irrelevant. Worse still, the measure could be understood as skirting around the edges of the CJEU ruling by legitimising and mandating the use of the AudibleMagic filtering software, which the Court of Justice explicitly said could not be mandated by law.

The problems with ContentID (although the same analysis would apply to similar use of similar technologies) has been extensively researched by EDRi member Electronic Frontier Foundation: <https://www EFF.org/deeplinks/2010/03/youtubes-content-id-c-censorship-problem>

## PARAGRAPH 1

### Sentence 2

Those measures such as the use of effective content recognition technologies shall be appropriate and proportionate.

The “use” of content recognition technologies does not on its own equal to the measures in the previous sentence.

It appears that the Commission suggested that the provider find “appropriate and proportionate” solutions to avoid explicitly requiring the use of technology that the Court of Justice has already rejected.

Indeed, citizens’ fundamental rights are entirely ignored in this provision. This section is objectionable on different levels:

- Lack of clarity to where the responsibility lies when assessing whether the measures are effective, appropriate or proportionate
- What does “appropriate” mean? From recital 39, it appears to mean “appropriate” from the perspective of the rightholders (“the services should be transparent towards rightholders with regard to the deployed technologies, to allow the assessment of their appropriateness”).

## PARAGRAPH 1

### Sentence 3

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.

The proposed measures will require monitoring and filtering of anything that European citizens upload to content-sharing services. We are given no clues at all as regards what a “proportionate” approach might be. This is probably because it is impossible to implement a disproportionate measure in a proportionate way. The mandatory censorship technology required for this will have to ignore any freedoms to use somebody else’s creation: for example for the purpose of quotation, teaching, or parody, as already foreseen by the European legislator in the existing exceptions to copyright.

Confusingly, the first half of this sentence appears to refer to one technology (upload filtering), while the second half appears to refer to entirely different technology (statistical reporting).

## PARAGRAPH 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.

It is a basic principle in law that redress should be available to those whose rights have been infringed.

This paragraph recognises that the foreseen measures can result in unfair restrictions being imposed on internet users. This is welcome.

To offset this damage, the Commission foresees that the service providers should be required to invent some form of redress mechanism. However, when the service provider blocks uploads on the basis of alleged breaches of their terms of service, there is no mechanism in EU law (and this proposal does not create such a mechanism) to force them to host content which they do not want to host.

In order to avoid legal and bureaucratic burdens, most providers prefer to remove or block content on the basis of their terms of service, not on the basis of the law. This will obviously be easier for companies than trying to interpret and implement the 27 different laws that Member States will implement when transposing this Directive.

If the filtering is not done on the basis of the law (measures referred to in paragraph 1), then the redress mechanism provided for in the law will not be available for individuals.

## PARAGRAPH 3

Member States shall facilitate, where appropriate, the **cooperation** between the **information society service providers 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.

The proposal is about the removal of content on the basis of mandatory filtering of users content, even if that content is entirely legal.

In the context of this extreme intrusion into their freedom of communication, users are excluded from any “dialogue” to define any “best practice” in this globally “worst practice” of filtering and blocking of communications.

Software, such as content recognition technologies are neither proportionate or disproportionate, the issue is how it is used. Such technologies are also not a “practice”.

The lack of protection for entirely legal use of material is a clear breach of the Charter of Fundamental Rights of the European Union.

# RECITALS



## THE PROPOSAL SAYS...

### RECITAL 38

Where information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements with rightholders, unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council.

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.

In order to ensure the functioning of any licensing agreement, information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users should take appropriate and proportionate measures to ensure protection of works or other subject-matter, such as implementing effective technologies. This obligation should also apply when the information society service providers are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC.



## THE COURT AND CURRENT LAW SAY...

Limitations of liability of service providers who host content for their customers is provided for by Article 14 of the e-Commerce Directive. This includes situations where this data is accessible to the public ([Netlog/Sabam C-360/10](#)).

This seeks to transpose, without explanation or justification, the very specific logic used in a counterfeiting case (L'Oreal/Ebay case (C-324/09)) and apply it, in full, to the issue of copyright on badly-defined hosting services.



## WE SAY...

It is incoherent for the Commission to argue that the services covered by the E-Commerce Directive, "giving access to a communication network over which information made available by third parties" does not cover the services one used described in the Commission's proposal: "where information society service providers store and provide access to the public".

Web hosting is a passive activity in the E-Commerce Directive and the same activity is redefined as an active communication to the public in recital 38 of the Copyright Directive, accompanied by a claim that the E-Commerce Directive remains in force.

This means, in essence that, if the text is adopted, Member States would be obliged by the E-Commerce Directive to provide a liability exemption for web hosting companies and, at the same time, obliged by this Directive, NOT to provide an exception.

There is quite a blatant contradiction between the assertion in this proposal that "active role" includes **"optimising [...] irrespective of the nature of the means used therefor"** and the provisions of the E-Commerce Directive (recital 43) which says that active involvement does "not cover manipulations of a technical nature which take place in the course of the transmission as they do not alter the integrity of the information contained in the transmission"

The Commission says that the measures in the Directive do not change the provisions of the E-Commerce Directive. However, the Commission's proposal radically reinterprets the notion of "hosting" service, contrary to the approach taken by the Court of Justice of the European Union.

An even more obvious contradiction is the Commission's view that the obligation to implement filtering technology, which creates a general obligation to monitor content, does not contradict the E-Commerce Directive, which prohibits the imposition of a general obligation to monitor content.

### RECITAL 39

Collaboration between information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users and rightholders is essential for the functioning of technologies, such as content recognition technologies.

This assertion that cooperation is “essential” for the functioning of undefined “agreements” between badly-defined hosting companies and rightholders is spurious, at best.

In such cases...

The previous sentence did not refer to any “cases”, so the words “in such cases” are meaningless.

... 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.

This reference is helpful, albeit to explain a negative element of the proposal. When the Commission refers to the “appropriateness” of this filtering and blocking in the Article, this text makes it clear that it is referring to the commercial interests of the rightholders and not the privacy and freedom of communication rights of individuals.

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.

This text does not have a great deal of meaning. In particular, content recognition technology would be irrelevant in producing data on the usage of the files previously identified as owned by particular industry interests.

The proposal focuses on technology that would not be useful, and avoids mentioning technology for measuring use of content, which would be helpful for rightholders.

## WARNING!

### This document would be subject to filtering under the Commission’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:

Dr. Martin Husovec “Holey Cap! CJEU Drills (Yet) Another Hole in the E-Commerce Directive’s Safe Harbors”  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2843816](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2843816)

Dr Cristina Angelopoulos “EU Copyright Reform: Outside the Safe Harbours, Intermediary Liability Capsizes into Incoherence”  
<http://kluwercopyrightblog.com/2016/10/06/eu-copyright-reform-outside-safe-harbours-intermediary-liability-capsizes-incoherence/>

A Brief Exegesis of the Proposed Copyright Directive  
[https://papers.ssrn.com/sol3/papers.cfm?abstract\\_id=2875296](https://papers.ssrn.com/sol3/papers.cfm?abstract_id=2875296)

Open letter to the European Parliament:  
[http://www.create.ac.uk/wp-content/uploads/2017/02/OpenLetter\\_EU\\_Copyright\\_Reform\\_24\\_02\\_2017.pdf](http://www.create.ac.uk/wp-content/uploads/2017/02/OpenLetter_EU_Copyright_Reform_24_02_2017.pdf)