

**Non- paper containing proposals for a possible compromise text on selected issues of Article 13 of the copyright directive, with the aim to facilitate the discussion at the trilogue of 13/12/2018**

*This text, which builds on the Commission's non-paper sent to the co-legislators on the 5/12/2018 - and annexed to fiche SI (2018) 713, has been drafted by the services of the Commission following a request of the EP rapporteur, with the agreement of the Council. It does not represent the formal position of the Commission. It proposes a possible compromise for the provisions related to the "mitigation of liability" mechanisms in Article 13 of the copyright directive. Its aim is to facilitate the discussion at the trilogue of 13/12/2018. The text below contains some options for the consideration of the co-legislators (text between brackets). These options are not mutually exclusive. Other parts of Article 13, notably the provisions related to the "communication to the public", the licences, transparency, redress mechanism and stakeholder dialogues, as well as the definition of services covered in Article 2, are not covered in this document. These issues have been addressed in a previous non-paper. Reference is made to the four column document which reflects the state of the discussions in the trilogue on these points as well as to the legal texts in the previous non-paper for the paragraphs where there is no text yet in the four column document.*

**(...) The text below should be preceded and followed by other parts of Article 13 as indicated above. Therefore the numbering below may change depending on the structure of the final text.**

**13.4** If no authorisation is granted, service providers and rightholders shall cooperate in good faith and in accordance with the appropriate industry standards of professional diligence to ensure the non-availability on the websites of the service providers of unauthorised works or other subject matter identified and notified to them by rightholders. For this purpose, rightholders shall provide service providers with the relevant and necessary information. These standards of professional diligence shall be applied in the light of the principle of proportionality and by taking into account, among other factors:

- the type, the audience and the size of the service [**Role of Small and Micro enterprises to be discussed in relation to the scope – discussion is still open on this point: including whether they are provided by a microenterprise or a small-sized enterprise within the meaning of Title I of the Annex to Commission Recommendation 2003/361/EC**]
- the number and type of works or other subject matter uploaded by the users of the service;
- the potential economic harm caused to the rightholder;
- the availability of suitable and effective technologies and their cost for service providers;
- the number of notices received by the service provider under para 6.

Service providers shall be liable for unauthorised acts of communication to the public in relation to the works and other subject matter identified and notified to them by rightholders unless they demonstrate that

- a) despite best efforts of all parties to reach a licencing agreement, no authorisation from rightholders has been obtained
- b) they have cooperated with rightholders in accordance with this paragraph.

**13.5** 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 .

**[As an option, this paragraph could be added: 13.5 bis** The cooperation between online content service providers and rightholders shall not prevent users that act for non-commercial purposes, or whose activity does not generate significant revenues, from uploading and making available content that they have produced themselves, where it includes, in whole or in part, existing protected works and subject matter for purposes such as illustration, criticism, review, caricature, parody or pastiche. This paragraph is without prejudice to requests formulated under 13.6 a) and b). ]

**13.6** Notwithstanding paragraph 4, where unauthorised works and subject matter become available on the websites of the service providers, the rightholders may in any case:

a) request service providers, by means of a sufficiently substantiated notice, to remove from their websites or disable access to the unauthorised works or other subject-matter identified in the notice. **[If paragraph 5bis is retained, the following text between brackets could be added:** For the content described in 13.5 bis, rightholders shall be required to demonstrate persistent economic harm]. Online content sharing service providers shall be liable for unauthorised acts of communication to the public if, upon receiving the notice referred to above, they fail to act expeditiously to remove from their websites or disable access to the notified works and subject matter **[As an option, the following could be added:** and to make best efforts to prevent their future availability in cooperation with rightholders].

b) claim from service providers the payment of an amount corresponding to the benefits gained by the latter from the availability of the unauthorised content if this availability has caused appreciable significant economic harm to the rightholders

**13.7** 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.

**(...) The text above should be preceded and followed by other parts of Article 13 as indicated above.**