

ETNO and GSMA joint position paper on Article 13 of the proposed Directive on Copyright in the Digital Single Market

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Introduction

The core aim of Article 13 of the proposed Directive on Copyright in the Digital Single Market is to consider the legal relationship between content rights-holders and a new class of information society service provider termed a 'online content sharing service provider' ("**OCSSP**") that stores and gives public access to copyright works such as music/audiovisual content. Article 13 represents a focussed sector-specific approach to addressing the so-called 'value gap' by requiring that OCSSPs obtain necessary authorisations from relevant rights-holders.

ETNO and the GSMA believes in the importance of the creative content industries and in the principle underlying Article 13 that content rights-holders should receive fair revenue from copyright users, including OCSSPs, when their works are exploited. However, as a focussed sector-specific intervention, it is critical that Article 13 strikes a fair and proportionate balance between the interests of all affected parties and that its scope is strictly limited to avoid risking a detrimental effect on the larger digital economy. Against this background, three key issues are considered below:

- a) The scope of Article 13 must be strictly limited and should include express exclusions for internet access providers and cloud service providers (see *Section A below*).
- b) The core aim of Article 13 to impose a licensing obligation on OCSSPs can be achieved without engaging the communication to the public right and the hosting defence (see *Section B and Annex 1 below*).
- c) Close scrutiny on the drafting of the Technical Measures Obligation (as defined further below) is necessary to avoid any inadvertent risk of conflict between Article 13 and Article 15 of the E-Commerce Directive ("ECD") which is a fundamental provision to the proportionate balancing of rights and core to the continued provision of digital economy services by mere conduits, caches and hosts. This also requires that the ECD is included in the list of directives at Article 1(2) and Recital 4. (see *Section C below and Annex 2 below*).

A. Scope of Article 13 / definition of an OCSSP

Article 13 is a sector-specific intervention to address the perceived 'value gap' and its scope must be strictly limited to avoid risking a detrimental effect on the larger digital economy. In summary:

- a) ETNO/GSMA supports the principle of using a specific term e.g. 'online content sharing service provider' to describe who falls within the scope of Article 13, and to include that term in Article 2 (definitions).¹
- b) The OCSSP definition must retain a cumulative requirement that the service provider stores and gives direct access to user-uploaded works. The qualifier of 'direct' access is necessary and appropriate to avoid catching services that are further removed from the user's access to protected works without justification.
- c) The definition should also specify that it is the OCSSP's 'predominant' purpose to store and give direct access.

¹ The principle of having an express definition was not present in the Commission's original proposal but is present in the JURI (version 4, 28 March 2018) and Council (23 March 2018 and 13 April 2018) compromise texts as a new Article 2(5).

- d) Any additional OCSSP criterion should be aligned with existing CJEU case law² and should therefore be limited to any of the following acts: “... and who edits, composes, optimises, or promotes such uploaded works.”
- e) Internet access providers (IAPs) should be expressly excluded from scope³:
- In providing internet access services, an IAP will often use caching technology on its network to allow more efficient content transmission.
 - Cached content (i.e. temporarily stored) by the IAP could, in principle, contain copyright-protected works uploaded by its users. This creates material uncertainty whether IAPs might inadvertently be caught within Article 13’s scope without justification.
- f) Cloud storage providers whose services are used primarily on a closed-basis (i.e. not generally for public access) should be expressly excluded from scope:
- It is commonplace for cloud service providers, whose services are primarily intended and used by end-users for individual private and/or business use, to provide their users with the function to share uploaded content with a limited range of other persons, such as colleagues, family and friends (thus in a non-public setting).
- f) Express exclusions from scope for internet access providers and cloud service providers should be set out in Article 2(5) and be consistent with the relevant recital.

Proposed definition of an OCSSP	
Article 2(5)	The definition of an OCSSP should read: <i>“online content sharing service provider” means a provider of an information society service whose predominant purpose is to store and give direct access to the public to large amounts of copyright protected works or other protected subject-matter uploaded by its users. Providers of cloud services and internet access service providers should not be considered online content sharing service providers within the meaning of this Directive”.</i>

B. Article 13, the hosting defence and the communication to the public right

A core aspect of Article 13 is to require OCSSPs to seek necessary authorisations, primarily in the form of a licence agreement, from relevant rights-holders (the “**Licensing Obligation**”). However, this has raised contentious issues around a) whether OCSSPs should be deemed to perform an act of communication to the public (CTP) and b) whether their ability to rely on the hosting safe harbour under Article 14 of the E-Commerce Directive (“**ECD**”) should be limited.

Given the wider importance of the CTP right and the ‘safe harbours’ under the ECD to the digital economy, it is critical that Article 13 goes no further than required to achieve its stated objective of addressing the so-called ‘value gap’ in a very specific area of application.

ETNO/GSMA proposes that Article 13 should go directly to the Licensing Obligation without engaging the scope of the hosting safe harbour and the CTP right; for example, there is no need to stipulate that an OCSSP performs an act of CTP to introduce the Licensing Obligation. This ‘direct’ approach avoids introducing issues of considerable complexity unnecessarily (*see further, Annex 1*) whilst still attaining the key objectives of Article 13.

² See for example Case C-324/09 *L’Oreal v eBay* at [116].

³ As proposed at Article 2(5) of the Council compromise text of 13 April 2018, but is absent from JURI compromise text v4.

Proposed approach to the Licensing Obligation	
Recital (4) and Article 1(2)	Expressly include the ECD in the list of directives at recital (4) and Article 1(2) to make clear that that the proposed Copyright Directive is based upon, and complements / leaves intact and will not affect the ECD. ⁴
Article 13 and relevant recitals (37) to (39)	Delete references to the OCSSP engaging in an act of CTP or being precluded from relying on the hosting defence and instead, go directly to the Licensing Obligation. The Licensing Obligation could be met by the following provision: <i>“Member States shall provide that an online content sharing service provider shall obtain necessary authorisations from relevant rights-holders in respect of all copyright protected works...”</i>

C. “Technical measures” under Article 13 and potential conflict with Article 15 ECD

Whilst the core aim of Article 13 is to introduce a Licensing Obligation, an ancillary element⁵ is the proposed obligation that the OCSSP takes certain measures to reduce infringing activity by their users - and thereby to protect the rights-holders’ interests and to facilitate the functioning of concluded licence agreements (the “**Technical Measures Obligation**”).

ETNO/GSMA is concerned that approaches to the Technical Measures Obligation in JURI and Council proposed compromise texts may inadvertently conflict with Article 15 ECD⁶ (see *Example 1 in Annex 2 below*). In this regard, ETNO/GSMA highlights the following:

- a) Article 15 ECD is a fundamental provision to the proportionate balancing of rights and is core to the continued provision of digital economy services, inter alia by mere conduits, caches and hosts.⁷ It is critical that the Technical Measures Obligation is defined in clear and certain terms and avoids potential conflict with Article 15 ECD.
- b) Any potential conflict between Article 13 and Article 15 ECD risks undermining the protective scope of Article 15 ECD in other contexts for other types of ISS providers without justification or need, i.e. affecting mere conduits, caches and hosting providers who do not constitute an OCSSP. This risks adversely affecting the digital economy at large.
- c) Any such potential conflict cannot be simply ‘fixed’ by wording that the Technical Measures Obligation is compatible with Article 15 ECD, if in substance it is not.⁸
- d) The ECD should be included in the list of directives at recital (4) and Article 1(2) to make clear that that the proposed Copyright Directive is based upon, and complements / leaves intact and will not affect the ECD.

⁴ As proposed in the Council compromise text dated 13 April 2018.

⁵ There are further Union measures aimed at the effective enforcement of intellectual property rights (IPR), e.g. the Commission Recommendation on measures to effectively tackle illegal content online (which includes IP infringement) (C(2018) 1177 of 1 March 2018) - see [Commission Press Release](#) of 1 March 2018; also, the Commission’s measures to protect IPR, including a Communication “A balanced IP enforcement system responding to today’s societal challenges” - see [Commission Press Release](#) of 29 November 2017.

⁶ Article 15(1) ECD provides that an information society service provider who qualifies for the exemptions from liabilities under Articles 12 to 14 (mere conduits, caches, hosts) cannot be subject to a general obligation to either monitor the information which they transmit or store, or actively to seek facts or circumstances indicating illegal activity.

⁷ For example, without Article 15 ECD, an Information Society Service (ISS) provider could be required to monitor all traffic passing through its network which risks: a) creating an unreasonable burden that is disproportionate to the enforcement of private rights in copyright works; b) undermining privacy rights, because users’ data protection and privacy rights in data may be engaged by the general monitoring of traffic; c) imposing an unduly complicated and costly obligation and/or a barrier to legitimate trade contrary to Article 3 of Directive 2004/48/EC on the Enforcement of Intellectual Property Rights.

⁸ This is particularly important because where the Technical Measures Obligation provision arguably conflicts with Article 15 ECD – and yet another paragraph says that this obligation is consistent with Article 15 ECD (when it is not) – this could arguably narrow the effective scope of protection that Article 15 ECD confers on all ISSPs.

Proposed approach to the Technical Measures Obligation	
Recital (4) and Article 1(2)	<u>Expressly include the ECD</u> in the list of directives to make clear that that the proposed Copyright Directive is based upon, and complements / leaves intact and will not affect the ECD.
Article 13 and relevant recitals (37) to (39)	<p>When considering the principles underlying the Technical Measures Obligation, to ensure consistency with Article 15 ECD, the obligation must be limited to the OCSSP:</p> <ul style="list-style-type: none"> • taking <u>appropriate and proportionate measures</u>; • <u>aimed at removing or disabling access to</u>; • <u>specifically identified</u> infringing content; • regarding which the OCSSP has been <u>notified</u>; AND • which is not conditional upon an outcome (such as ‘non-availability’) being achieved before a reasonable period after notification. <p>The Technical Measures Obligation should be <u>self-contained</u> within the relevant paragraph – i.e. without needing to read across any qualifiers or limitations set out in the recitals or from other paragraphs in the Articles.</p> <p>For example, the Technical Measures Obligation could read: <i>“Upon provision by rights-holders of information on specific unauthorised works or other subject matter available from its service, an online content sharing service provider shall within a reasonable period take appropriate and proportionate measures aimed at removing or disabling access to the specific and duly notified copyright protected works or other subject-matter, while non-infringing works and other subject matter shall remain available.”</i></p> <p>This avoids imposing any obligation which</p> <ul style="list-style-type: none"> • has the substantive effect of requiring the OCSSP to exercise general and permanent oversight over its customers⁹ to either monitor information or actively to seek facts or circumstances indicating illegal activity, in deviation of Article 15 ECD; • goes beyond the scope of future injunctive relief which the CJEU has held to be available under Article 11 of Directive 2004/48/EC against online platforms and other intermediaries.¹⁰



⁹ See C-324/09 [L’Oreal v eBay](#) in particular at [139]-[144] and Case C-494/15 [Tommy Hilfiger](#), at [34].

¹⁰ In C-324/09 [L’Oreal v eBay](#) in particular, at [141] the CJEU made clear that, upon being notified of specific infringing content, the platform in question (eBay) could be ordered by means of an injunction (available under Article 11 of Directive 2004/48/EC against online platforms and other intermediaries) to prevent further infringements of the same kind (e.g. IP infringement) in respect of the same work (e.g. a specific trade mark) and by the same user (e.g. a particular seller).