



Article 13: Protecting the rightholders in online content sharing services without harming Europe's research institutions

19 October 2018

The issue

While Art 13 was crafted to protect rightholders from large, for-profit online content sharing service providers, as currently drafted in its three different versions it also risks harming education, research and cultural heritage institutions. We believe that greater clarity could eliminate this risk without affecting the article's objective.

A critical distinction: "mission-driven" versus "for-profit"

Europe's educational establishments, research organisations and cultural heritage institutions share research and educational outputs to improve the visibility, quality and impact of European research, education and heritage, all the while following good practices and respecting the legitimate interests of rightholders. Among the tools for doing this, educational and scientific repositories where staff and students can upload relevant materials for public access, play an essential role in delivering our goals.

Below, we set out six clear reasons why our institutions should be explicitly and fully excluded from the definition of "online content sharing service provider" applicable to Article 13:

1. **The public good versus generating profits:** the end-goal of public interest mission-driven educational establishments, research organisations and cultural heritage institutions stands in stark contrast to that of profit-focused private companies like Facebook, YouTube, and Google. They should not be subject to the same rules and burdens.
2. Educational establishments, research organisations and cultural heritage institutions host educational and academic repositories to support schools, universities and library users. Their **content is on a tiny scale compared to massive online platforms such as Facebook, YouTube and Google.**

3. Greater access to publicly funded research **helps increase the visibility and impact of Europe's research results**, a key goal of the **Open Access commitment** made by Europe's ministers of science, innovation, trade, and industry at the Competitiveness Council in 2016. Sharing of research results spurs innovation, helps grow new and emerging businesses, and above all helps solve problems of financial, health, industrial, and societal significance more rapidly while also informing citizens. Unlike YouTube etc where consumers are uploading commercial materials belonging to others, the material we are dealing with is predominantly text and pure data, and its copyright status is complex and subject to various publisher and funder policies, as well as member state laws on open access, exceptions, etc. Research into rights clearances shows that it takes many months, or longer, to clear third party rights in material such as photographs or text extracts embedded within works. This would give a major advantage to countries that rely on fair use, such as **the USA, which would overnight gain a clear advantage; their ability to share research immediately - being the first to do so would ultimately translate to greater impact.**

4. **Sharing research via open repositories or similar non-commercial services helps organisations monitor and assess the academic output of our institutions.** This can serve a dual role, functioning as the institution's Current Research Information System (CRIS). For example, the UK's Research Excellence Framework insists on the aggregation and upload of research outputs to enable them to assess the quality of UK institutions' research as a condition of funding.

5. **Research and educational communities are already under significant and mounting financial pressure.** New administrative and resource burdens related to monitoring uploaded content would further disenfranchise the research and education communities.

6. UNESCO has underlined the strong potential of Open Educational Resources (OER) to complement existing resources, allowing for the creation and sharing of learning materials tailored to the needs of students. **OER relies heavily on repositories of such materials, which unlike multinational technology companies are not equipped to implement onerous and costly monitoring requirements,** especially given their public service objectives. Given that Europe is already lagging in this field, it needs to invest in the creation and sharing of resources rather than administrative and legal processes that slow down progress in this area.

To conclude, to offer education, research and cultural heritage institutions greater certainty, we ask you to specify that none of the non-commercial online platform activities of educational establishments, research organisations and cultural heritage institutions should fall under the definition of Online Content Sharing Service Provider and are clearly excluded from the obligations created in Article 13.

Text suggested for insertion

The texts overleaf reflect our position. . Taken from the Parliament amendment, Council amendment and from the original draft.

LEGEND

Council Text

Council and Parliament Text

New Proposed Text

COMMISSION PROPOSAL COM(2016)593	EP TEXT	COUNCIL TEXT doc. 9134/18	POSSIBLE COMPROMISE SOLUTION	COMMENTS
ARTICLE 2				
	<p><i>(4b) ‘online content sharing service provider’ means a provider of an information society service one of the main purposes of which is to store and give access to the public to a significant amount of copyright protected works or other protected subject-matter uploaded by its users, which the service optimises and promotes for profit making purposes. Microenterprises and small-sized enterprises within the meaning of Title I of the Annex to Commission Recommendation 2003/361/EC and services acting in a non-commercial purpose capacity such as online encyclopaedia, and providers of online services where the content is uploaded with the authorisation of all right holders concerned, such as educational or scientific repositories, shall not be considered online content sharing service providers within the meaning of this Directive.</i></p>	<p>(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 works or other subject-matter uploaded by its users which it organises and promotes for profit-making purposes.</p> <p>Providers of services such as non-for-profit online encyclopaedias, non-for-profit educational and scientific repositories, non-for-profit open source software developing platforms, as well as internet access service providers, online marketplaces and providers of cloud services which allow users, including businesses for their internal purposes, to upload content for their own use shall not be considered online</p>	<p>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 works or other subject-matter uploaded by its users which it organises and promotes for profit-making purposes.</p> <p>Providers of services such as non-for-profit online encyclopaedias, non-for-profit educational and scientific repositories, non-for-profit open source software developing platforms, as well as internet access service providers, educational establishments, research organisations and cultural heritage institutions, online marketplaces and providers of cloud services which allow users, including businesses for their internal purposes,</p>	<p>We support the Council text since it recognises the importance of the widespread sharing of research. It demonstrates Member States’ understanding of the stark differences between non-commercial educational and research mission-driven organisations and their repositories. In order to provide further clarity, we suggest ensuring that all activities of education establishments, research organisations and cultural heritage institutions are exempted from this Article, and continue to fall under the notice-and-take-down regime. We only suggest to make a small addition to ensure that the wider activities of educational establishments, research organisations and cultural heritage institutions do not fall within the definition</p>

	<i>Providers of cloud services for individual use which do not provide direct access to the public, open source software developing platforms, and online market places whose main activity is online retail of physical goods, should not be considered online content sharing service providers within the meaning of this Directive;</i>	content sharing service providers within the meaning of this Directive;	to upload content for their own use shall not be considered online content sharing service providers within the meaning of this Directive;	given.
COMMISSION PROPOSAL COM(2016)593	EP TEXT	COUNCIL TEXT doc. 9134/18	POSSIBLE COMPROMISE SOLUTION	COMMENTS
ARTICLE 13				COMMENTS
		4. In the absence of the authorisation referred to in the second subparagraph of paragraph 1, Member States shall provide that an online content sharing service provider shall not be liable for acts of communication to the public or making available to the public within the meaning of this Article when:	4. In the absence of the authorisation referred to in the second subparagraph of paragraph 1, Member States shall provide that an online content sharing service provider shall not be liable for acts of communication to the public or making available to the public within the meaning of this Article when:	We support this Council paragraph to follow current lawful and responsible good practices under the condition that either subparagraph (a) is removed or that educational establishments, research organisations and cultural heritage institutions are exempted from it. To implement (a), significant additional administrative and financial burdens would be incurred to institutions who are running non-profit services; this to our mind seems therefore inappropriate and

				undeserved.
		<p>(a) it demonstrates that it has made best efforts to prevent the availability of specific works or other subject matter by implementing effective and proportionate measures, in accordance with paragraph 5, to prevent the availability on its services of the specific works or other subject matter identified by rightholders and for which the rightholders have provided the service with relevant and necessary information for the application of these measures; and</p>	<p>(a) it demonstrates that it has made best efforts to prevent the availability of specific works or other subject matter by implementing effective and proportionate measures, in accordance with paragraph 5, to prevent the availability on its services of the specific works or other subject matter identified by rightholders and for which the rightholders have provided the service with relevant and necessary information for the application of these measures; and</p>	<p>We ask for the deletion of this sub-paragraph. Or else, that educational establishments, research organisations and cultural heritage institutions are exempted from it. To implement (a), significant additional administrative and financial burdens would be incurred to institutions who are running non-profit services; this to our mind seems therefore inappropriate and undeserved.</p> <p>In summary, delete or</p> <p>Exclude educational establishments, research organisations and cultural heritage institutions</p>

COMMISSION PROPOSAL COM(2016)593	EP TEXT	COUNCIL TEXT doc. 9134/18	POSSIBLE COMPROMISE SOLUTION	COMMENTS
		<p>5. The measures referred to in point (a) of paragraph 4 shall be effective and proportionate, taking into account, among other factors:</p>		<p>We ask for the deletion of this paragraph since it adds complexity to the monitoring and filtering of uploaded content, and would need further definition to work in practice</p>
		<p>(a) the nature and size of the services, in particular 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, and their audience;</p>		<p>See comments above</p>
		<p>(b) the amount and the type of works or other subject matter uploaded by the users of the services;</p>		<p>See comments above</p>

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		<p>(c) the availability and costs of the measures as well as their effectiveness in light of technological developments in line with the industry best practice referred to in paragraph 8.</p>		See comments above
		<p>6. Member States shall ensure that online content sharing service providers and rightholders cooperate with each other in a diligent manner to ensure the effective functioning of the measures referred to in point (a) of paragraph 4 over time. Online content sharing service providers shall provide rightholders, at their request, with adequate information on the deployment and functioning of these measures to allow the assessment of their effectiveness, in particular information on the type of measures used and, where licensing agreements are concluded between service providers and rightholders, information on the use of</p>		We ask for the deletion of this paragraph since we do not support sub-para 4 (a). See above for details.

		content covered by the agreements.		
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RECITALS

COMMISSION PROPOSAL COM(2016)593	EP TEXT P8_TA-PROV(2018)0337 A8-0245/2018	COUNCIL TEXT 9134/18	POSSIBLE COMPROMISE SOLUTION	COMMENTS
	<i>(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 users. The definition of an online content sharing service provider under this Directive shall cover information society service providers one of the main purposes of which is to store and give access to the public or to stream significant amounts of copyright protected content uploaded / made available by its users, and that optimise content, and promote for profit making purposes, including amongst others displaying, tagging, curating, sequencing, the uploaded works or other subject-matter, irrespective of the means used therefor, and therefore act in an active way. As a consequence, they cannot</i>	(37a) The definition of an online content sharing service provider under this Directive targets 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 intervention are those the main or one of the main purposes of which is to provide access to a large amount of copyright-protected content uploaded by their users with the purpose of obtaining profit therefrom, either directly or indirectly, by organising it and promoting it in order to attract more audiences. Organising and promoting content involves for	(37a) The definition of an online content sharing service provider under this Directive targets 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 intervention are those the main or one of the main purposes of which is to provide access to a large amount of copyright-protected content uploaded by their users with the purpose of obtaining profit therefrom, either directly or indirectly, by organising it and promoting it in order to attract more audiences. Organising and promoting content involves for example	<p>The Council’s text clearly defines an online content sharing service provider as one “with the purpose of obtaining profit”. This definition also explicitly excludes “scientific or educational repositories or open source software developing platforms which do not store and give access to content for profit-making purposes.” It makes a clear stand to support the many activities of the Commission and Council to support the non-profit work of educational establishments, research organisations and cultural heritage institutions by excluding them.</p> <p>For clarity and to future proof the legislation we would ask the wording is</p>

	<p><i>benefit from the liability exemption provided for in Article 14 of Directive 2000/31/EC. The definition of online content sharing service providers under this Directive does not cover microenterprises and small sized enterprises within the meaning of Title I of the Annex to Commission Recommendation 2003/361/EC and service providers that act in a non-commercial purpose capacity such as online encyclopaedia, and providers of online services where the content is uploaded with the authorisation of all right holders concerned, such as educational or scientific repositories. Providers of cloud services for individual use which do not provide direct access to the public, open source software developing platforms, and online market places whose main activity is online retail of physical goods, should not be considered online content sharing service providers within the meaning of this Directive.</i></p>	<p>example indexing the content, presenting it in a certain manner and categorising it, as well as using targeted promotion on it. The definition does not include services whose main purpose is not to provide access to copyright protected content with the purpose of obtaining profit from this activity. These include, for instance, electronic communication services within the meaning of Regulation 2015/2120/EU, including internet access providers, as well as providers of 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. Nor does this definition cover websites which store and provide access to content for non-for-profit purposes, such as online encyclopaedias, or open source software developing platforms which do not store and give access</p>	<p>indexing the content, presenting it in a certain manner and categorising it, as well as using targeted promotion on it. The definition does not include services whose main purpose is not to provide access to copyright protected content with the purpose of obtaining profit from this activity. These include, for instance, electronic communication services within the meaning of Regulation 2015/2120/EU, including internet access providers, as well as providers of 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. Nor does this definition cover websites which store and provide access to content for non-for-profit purposes, such as online encyclopaedias, scientific, educational or cultural heritage repositories and platforms or open source software developing</p>	<p>amended to explicitly state the following:</p> <p>“Scientific, educational, cultural heritage repositories and platforms”</p>
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		<p>to content for profit making purposes. In order to ensure the high level of copyright protection and to avoid the possible application of the liability exemption mechanism provided for in this Directive, this Directive should not apply to services the main purpose of which is to engage in or to facilitate copyright piracy.</p>	<p>platforms which do not store and give access to content for profit making purposes. In order to ensure the high level of copyright protection and to avoid the possible application of the liability exemption mechanism provided for in this Directive, this Directive should not apply to services the main purpose of which is to engage in or to facilitate copyright piracy.</p>	
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