Trying to understand the article formerly known as '13' ('AFKA 13')

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[draft – work in progress, version of 28 March 2019 – comments welcome]

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A. Introduction

Article 17, formerly known as article 13, is the most important and most controversial provision of the EU Directive on Copyright in the Digital Single Market on which the EU member states and institutions have reached agreement in principle in February 2019.[2] The European Parliament voted in favour on 26 March 2019. The council of ministers is expected to accept the final text on 9 April 2019.

This paper aims at analysing what the idea of article 17 is and how it might work out in practice. Which legal issues will arise, which preliminary questions will be put to the CJEU? It is not meant to argue for or against article 17. The article itself is taken as a given. This paper is merely a first attempt to look ahead and find out what could happen in practice.

It is obvious that article 17 is a compromise between many interests and wishes and that is quite contradictory at some points. But that in itself is nothing new. Much of the EU legislation consist of partly contradictory or incomprehensible clauses, because compromise apparently was the only option for reaching consensus. Consequently, it is often up to commentators, practitioners and judges to make the best of it.

The directive contains a large number of recitals on the issue article 17 addresses, and article 17 itself contains many subsections.

B. What is the aim of article 17?

The aim of article 17 is twofold, but the target is the same: the *large* 'online content sharing service providers' ('OCSSPs'), notably Google (YouTube) and Facebook. The first aim is to make these OCSSPs pay to rightholders, on the basis of content licenses, to the extent rights owners are willing to give them licenses. This would diminish the so called 'value gap' between the amount of money the OCSSPs make out of advertising in and around the content uploaded by their users (a lot of money) and the amount of money rights holders get in return (not enough money). The second aim is to make those OCSSPs take down, block and filter all content for which the rightholders are not willing to grant a license to such platforms, but which users nevertheless (try to) upload onto these platforms.

The main concerns are

a) that rightholders will not be willing to license these OCSSPs, or not on reasonable terms,
b) that the blocking and filtering will amount to abuse by rightholders and fraudsters,
c) that it will lead to over blocking of legitimate use, involving all kinds of free speech issues, and
d) that it will be very costly for the OCSSPs. For smaller and non-commercial OCSSPs it might even be prohibitively costly, thus making it impossible for them to stay on the web, or for new OCSSPs to enter the market.

The many recitals and subsections of article 17 try to cater for all these concerns.

C. The definition of OCSSP

In article 2(6) OCSSP is defined as 'a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-

[2] Proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market.

protected works or other protected subject matter uploaded by its users, which it organises and promotes for profitmaking purposes'.

Recital 62 explains:

> 'The definition of an online content-sharing service provider laid down in this Directive should target only online services that 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 Directive are services, the main or one of the main purposes of which is to store and enable users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit therefrom, either directly or indirectly, by organising it and promoting it in order to attract a larger audience, including by categorising it and using targeted promotion within it.'.

The second part of art. 2(6) states:

> 'Providers of services, such as not-for-profit online encyclopaedias, not-for-profit educational and scientific repositories, open source software-developing and -sharing platforms, electronic communication service providers as defined in Directive (EU) 2018/1972 [internet access providers, telecom service providers][3], online marketplaces and business-to-business cloud services and cloud services that allow users to upload content for their own use, are not 'online content-sharing service providers' within the meaning of this Directive'.

Wikipedia, open access repositories and open source sharing platforms or not covered by this definition, because and to the extent they operate not for profit. Internet access providers and telecom service providers are not covered, because it is not their main purpose to give the public access to a large amount of copyright protected works. Online marketplaces, such as eBay, whose main activity is online retail, are not covered for the same reason.

Cloud service providers which allow users to upload content for their own use, for instance in so-called cyberlockers, also, in general, do not have as their (main) purpose to give the public access to a large amount of copyright protected works. Cloud services are, however, also (ab)used to do exactly that: by illegally uploading works in the cloud and consequently sharing the link to those works on platforms, large amounts of copyright protected works are being made available to the public illegally. Therefore, as the final paragraph of recital 62 stresses: 'the liability exemption mechanism provided for in this Directive should not apply to service providers the main purpose of which is to engage in or to facilitate copyright piracy'.

This definition does not clarify what 'a large amount of copyright protected works' is, nor which providers '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'. (As we

[3] According to article 2(4) of that Directive, an 'electronic communications service' means a service normally provided for remuneration via electronic communications networks, which encompasses, with the exception of services providing, or exercising editorial control over, content transmitted using electronic communications networks and services, the following types of services:
(a) 'internet access service' as defined in point (2) of the second paragraph of Article 2 of Regulation (EU) 2015/2120;
(b) interpersonal communications service; and
(c) services consisting wholly or mainly in the conveyance of signals such as transmission services used for the provision of machine-to-machine services and for broadcasting;

will see further on, art. 17(5a) attempts to make a clear distinction in age and size of OCSSPs which influences the extent of their obligations).

But recital 63 simply states:

'The assessment of whether an online content-sharing service provider stores and gives access to a large amount of copyright-protected content should be made on a case-by-case basis and should take account of a combination of elements, such as the audience of the service and the number of files of copyright-protected content uploaded by the users of the services'.It is clear that this will create considerable uncertainty. The courts will have to decide, on a case-by-case basis, what constitutes 'a large amount'.

D. Primary liability for OCSSPs

Article 17(1) is the legal core of the new regime and introduces primary copyright infringement liability for OCSSPs:

> 'Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.
>
> An online content-sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licencing agreement, in order to communicate to the public or make available to the public works or other subject matter'.

Obviously, obtaining authorisation from the rightholders is easier said than done. As OCSSPs typically have no idea what their users upload and have no control over what they upload, they would in principle, under a strict liability regime, have to obtain authorisation from all the rightsholders in all copyright-protected content. Obviously, that would be impossible. Therefore, as we will see further on, OCSSPs are only liable for unauthorised acts of communication to the public of copyright protected works if they do not meet certain requirements, including making 'best efforts to obtain an authorisation'.

Recital 64 (last sentence) states that 'This does not affect the concept of communication to the public or of making available to the public elsewhere under Union law, nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other service providers using copyright-protected content'. It might, however, have an influence on how the court will *interpret* those existing articles 2 and 3…

E. Non-commercial users are then covered

Article 17(2) explains that where 'an online content-sharing service provider obtains an authorisation, for instance by concluding a licensing agreement, that authorisation shall also cover acts carried out by users of the services falling within the scope of Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or where their activity does not generate significant revenues'.

So, if authorisation has been obtained from, for instance, the relevant collective management organisations for music rights, individual users of the service can upload whatever and as much music as they like, as long as 'they are not acting on a commercial basis or their activity does not generate significant revenues'.

If users *do* act on a commercial basis or their activity *does* generate significant revenues, the authorisation obtained by the OCSSPs does *not* cover their uploading activities and they still have to clear the relevant rights themselves. It is, of course, quite important to define 'significant revenues'. Apparently, if OCSSPs allow users to upload (i.e. make available) works on a commercial basis or generate significant revenues, *both* the OCSSP and the user need to get an authorisation from the rightholders. And possibly both have to pay for the same communication to the public?

F. Music, film and other works

It is likely that OCSSPs *will* be able to get licenses from the relevant collective management organisations ('CMO's') for *music* rights and/or the large *music* publishers and *music* producers, the so-called Majors. Those rightholders will probably accept a share of the advertising income as part of a licensing deal, allowing users of OCSSPs to upload all music they like. The CMO's will have to figure out how to determine *which* CMO collects for which territory, but they should be able to sort that out.

Rights owners in *audio-visual works*, especially feature films, most probably will *not* give authorisation, simply because their business model is based on exclusivity and use against payment. For other works then music and film, it is not clear whether collective management organisations will be able to secure the rights to grant licenses to OCSSPs. But it is likely that CMO's dealing with literary works or pictorial works, are going to try hard to acquire these rights.

G. No more limitation of liability based on article 14 e-commerce directive

Article 17(3) adds that

> 'When an online content-sharing service provider performs an act of communication to the public or an act of making available to the public under the conditions laid down in this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article'.

This is an important and logical addition. If the OCSSPs are to be liable on the basis of direct primary liability for acts relevant under copyright, they should of course not be able to invoke the limitation of liability under article 14 of the e-commerce directive.[4] If they would be able to do so, article 17 would be meaningless. On the other hand article 17(3) also, and not surprisingly, states that: 'The first subparagraph of this paragraph shall not affect the possible application of Article 14(1) of Directive 2000/31/EC to these service providers for purposes falling outside the scope of this Directive.'

H. Best efforts, blocking and filtering, notice and stay down

Article 17 goes on to address the issue that inevitably OCSSPs will not be able to obtain authorisation from all the rightsholders in all copyright-protected content.

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[4] Article 14 (Hosting) of 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 ('Directive on electronic commerce'):
1. Where an information society service is provided that consists of the storage of information provided by a recipient of the service, Member States shall ensure that the service provider is not liable for the information stored at the request of a recipient of the service, on condition that:
(a) the provider does not have actual knowledge of illegal activity or information and, as regards claims for damages, is not aware of facts or circumstances from which the illegal activity or information is apparent; or
(b) the provider, upon obtaining such knowledge or awareness, acts expeditiously to remove or to disable access to the information.

Article 17(4) states

> 'If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that they have:
>
> (a) made best efforts to obtain an authorisation, and
>
> (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the rightholders have provided the service providers with the relevant and necessary information, and in any event
>
> (c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from, their websites the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with paragraph (b)'.

So there are three conditions:

Firstly, OCSSPs must make 'best efforts to obtain an authorisation'. That means that they will have to obtain a license from anyone who is willing to give it to them on reasonable terms (whatever that may be). Probably, some FRAND (fair, reasonable and non-discriminatory) licensing requirement will develop. Again: it is likely that the music industry, including the music CMO's, is willing to grant licenses and the film industry is not. For all other rights and works this is yet rather unclear. There will be a lot of discussion as to what 'best effort' means in this context.

Secondly, and that is the most controversial part of article 17, OCSSPs have to make 'best efforts' 'to ensure the unavailability', in other words: filter and block any 'specific works' for which they did not get authorisation *and* for which the right holders have provided the OCSSPs with 'the relevant and necessary information'. This means that the OCSSPs *only* have to filter and block those works for which the right holders provide them with the 'fingerprinting'- and other information which is necessary to filter and block. And they have to make 'best efforts', 'in accordance with high industry standards of professional diligence'. Article 17(5) elaborates on that, see below. Currently, YouTube and Facebook already do a lot of filtering on request of the music and film industry. But they might have to do more.

Thirdly, they have to maintain an effective 'notice-and-take-down'-mechanism, *and* a 'notice-and-stay down'-mechanism based on information provided by the right holders. 'Making best efforts to prevent future uploads' means filtering and blocking of works which have previously been uploaded.

I. Means and costs

But then article 17(5) adds:

> 'In determining whether the service provider has complied with its obligations under paragraph 4, and in the light of the principle of proportionality, the following elements, among others, shall be taken into account:
>
> (a) the type, the audience and the size of the service and the type of works or other subject matter uploaded by the users of the service; and
>
> (b) the availability of suitable and effective means and their cost for service providers'.

All ‘the best efforts’, the ‘high industry standards’ and ‘professional diligence’ required from OCSSPs under article 17(4) have to be interpreted in the light of ‘the availability of suitable and effective means and their cost for service providers’. If there are no suitable and effective means, they do not have to it. If it is too expensive, they do not have to do it either. And the obligation may differ with ‘the type, the audience and the size of services and the type of works’.

Recital (66) repeats the same thing in many words, also mentioning proportionality:

> ‘When assessing whether an online content-sharing service provider has made its best efforts in accordance with the high industry standards of professional diligence, account should be taken of whether the service provider has taken all the steps that would be taken by a diligent operator to achieve the result of preventing the availability of unauthorised works or other subject matter on its website, taking into account best industry practices and the effectiveness of the steps taken in light of all relevant factors and developments, as well as the principle of proportionality’.

That does leave a lot to be determined, ultimately by the courts.

But the softening factors and proportionality-tests of article 17(5) are not enough.

J. Exemption for young and small OCSSPs

Article 17(6) exempts whole groups of (smaller) OCSSPs from the most important obligations of article 17(4) altogether:

> ‘Member States shall provide that, in respect of new online content-sharing service providers the services of which have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million, calculated in accordance with Commission Recommendation 2003/361/EC, the conditions under the liability regime set out in paragraph 4 are limited to the compliance with point (a) of paragraph 4 and to acting expeditiously, upon receiving a sufficiently substantiated notice, to disable access to the notified works or subject matter or to remove those works or other subject matter from their websites.
>
> Where the average number of monthly unique visitors of such service providers exceeds 5 million, calculated on the basis of the previous calendar year, they shall also demonstrate that they have made best efforts to prevent further uploads of the notified works and other subject matter for which the rightholders have provided relevant and necessary information’.

So, if an OCSSP exists for less than three years *and* its annual turnover is below EUR 10 million – these seem to be *cumulative*, not *alternative* conditions – , they *do* have to try get licenses, but they do *not* have to filter and block. They *do* need to have a ‘notice-and-take-down’-mechanism, but *not* a ‘notice-and-*stay* down’-mechanism. However, if their number of monthly unique visitors exceeds 5 million, they *do* have to have a ‘notice-and-*stay* down’-mechanism.

K. Limitations *shall* be respected (1)

We now come to a problem that will certainly occur: *over blocking*. Things will get blocked which should not be blocked, either because the material is not protected or because there is no infringement, for instance because a limitation to copyright applies. The first paragraph of article 17(7), interestingly, simply states that this ‘shall’ not happen.

> ‘The cooperation between online content-sharing 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 other subject matter are covered by an exception or limitation'.

The article does not make clear *how* the member states *shall* make this *not* happen. But, as we will see below 'Member States shall ensure that users have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright and related rights', if it does happen.

L. Limitations *shall* be respected (2)

The second paragraph of article 17(7) is more precise, introducing two mandatory limitations and suggesting that concrete measures must be taken:

> 'Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions and limitations when uploading and making available content generated by users on online content-sharing services:
>
> (a) quotation, criticism, review;
>
> (b) use for the purpose of caricature, parody or pastiche.

These limitations are so important, that member states shall *ensure* that users can rely on them. But again, the article does not make clear *how* the member states shall ensure this. It is interesting to note that article 17(7) contains an obligation to ensure the *availability* of certain works (covered by a limitation of exception), where article 17(4) requires 'best efforts' to ensure the *unavailability* of other works (not covered by a limitation of exception). It might argued that the obligation of article 17(7) ('ensuring availability') is just as important as the one in article 17(4) ('ensuring unavailability').

As we shall see in article 17(9), it is anticipated that (nevertheless) much will be blocked that should not be blocked and that many complains and disputes will arise, which will then have to be dealt with.

Article 17(8) suggests:

> 'The application of this Article shall not lead to any general monitoring obligation'.

This seems an untenable statement. Blocking and filtering as required by article 17(4)b amounts to a pretty general monitoring obligation for the OCSSPs regarding their platform, unless they have authorisation for the use of all copyright protected works form all rights holders, which they will not have. The only interpretation which leads to the article not being a general monitoring obligation, is to assume that it is not a *general* obligation, because it only applies *to the extent that the rightholders have provided him with the necessary information to monitor*. That is a difference with the situation under the Sabam-decisions by the CJEU (*Scarlet Extended/Sabam, C-70/10, ECLI:EU:C:2011:771 & Sabam/Netlog, C-360/10, ECLI:EU:C:2012:85*).

Article 17(8) continues:

> 'Member States shall provide that online content-sharing service providers provide rightholders, at their request, with adequate information on the functioning of their practices with regard to the cooperation referred to in paragraph 4 and, where licensing agreements are concluded between service providers and rightholders, information on the use of content covered by the agreements'.

Not surprisingly, the OCSSPs will have to prove that they do what they are supposed to do. Otherwise they would be directly liable for the copyright relevant acts occurring on their platforms.

M. Effective and expeditious complaint and redress mechanism

Article 17(9) par. 3 states:

> 'Member States shall provide that an online sharing service provider puts in place an effective and expeditious complaint and redress mechanism that is available to users of the service in case of disputes over the removal of or disabling access to works or other subject matter uploaded by them'.

It is inevitable that thousands of disputes over the removal of or disabling access to works will occur. And those shall all be subject to human review as article 17(9) par.2 adds:

> 'Where rightholders request to have access to their specific works or other subject matter disabled or those works or other subject matter removed, they shall duly justify the reasons for their requests. Complaints submitted under the mechanism provided for in the first subparagraph shall be processed without undue delay, and decisions to disable access to or remove uploaded content shall be subject to human review'.

Recital 70 elaborates on this:

> 'That is particularly important for the purposes of striking a balance between fundamental rights laid down in the Charter of Fundamental Rights of the European Union ("the Charter"), in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property. Those exceptions and limitations should, therefore, be made mandatory in order to ensure that users receive uniform protection across the Union. It is important to ensure that online content-sharing service providers operate an effective complaint and redress mechanism to support use for such specific purposes. Online content-sharing service providers should also put in place effective and expeditious complaint and redress mechanisms allowing users to complain about the steps taken with regard to their uploads, in particular when they could benefit from an exception or limitation to copyright in relation to an upload to which access has been disabled or that has been removed. Any complaint filed under such mechanisms should be processed without undue delay and be subject to human review'.

This last part is quite important. It seems likely that the sense of humour of a computer is very limited and that an automatic filtering system will not be able to recognize a parody. A decision by a human is needed. But it remains to be seen how 'effective and expeditious' these complaint-and-redress mechanisms will be in practice, as the numbers to deal with will be huge. There will probably be lot of focus on this.

N. Out-of-court redress mechanisms

But on top of these dispute settlement mechanisms to be offered by the OCSSPs, the Member-States have to create additional 'out-of-court redress mechanisms', according to article 17(9) par. 2

> 'Member States shall also ensure that out-of-court redress mechanisms are available for the settlement of disputes. Such mechanisms shall enable disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law, without prejudice to the rights of users to have recourse to efficient judicial remedies. In particular, Member

States shall ensure that users have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright and related rights'.

Creating these 'mechanisms' will probably require a very substantial investment by the member-states, because there will most likely be many disputes.

O. Limitations *shall* be respected (3)

And then, *again*, article 17 'guarantees' legitimate uses will not be affected in article 17(9) par. 3:

> 'This Directive shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law, and shall not lead to any identification of individual users nor to the processing of their personal data, except in accordance with Directive 2002/58/EC and Regulation (EU) 2016/679'.

It *shall* not happen. And it *shall* not lead to any identification of individual users. And users *shall* be properly informed by their OCSSPs according to article 17(9) par. 4.

> 'Online content-sharing service providers shall inform their users in their terms and conditions that they can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law'.

P. Stakeholder dialogues

And finally, despite all these assurances, 'stakeholder dialogues' shall be organised to discuss best practices, according article 17(10)

> 'As of … *[date of entry into force of this Directive]* the Commission, in cooperation with the Member States, shall organise stakeholder dialogues to discuss best practices for the cooperation between online content-sharing service providers and rightholders. The Commission shall, in consultation with online content-sharing service providers, rightholders, users' organisations and other relevant stakeholders, and taking into account the results of the stakeholder dialogues, issue guidance on the application of this Article, in particular regarding the cooperation referred to in paragraph 4. When discussing best practices, special account shall be taken, among other things, of the need to balance fundamental rights and of the use of exceptions and limitations. For the purpose of the stakeholders dialogues, users' organisations shall have access to adequate information from online content-sharing service providers on the functioning of their practices with regard to paragraph 4'.

Q. What will happen?

The collective management organisations and other rightholders that have a mandate to do so, will contact the main OCSSPs, Google and Facebook, in order to negotiate a licensing agreement. And as far as *music* is concerned, they will probably be able to reach an agreement. For any other kind of works and rights, it is very hard to predict whether licenses will be agreed upon. But CMO's will try to acquire the relevant rights and try to provide licenses.

The rightholders that do not want to authorise any use by the OCSSPs, will provide them with 'the relevant and necessary information' to enable them to filter and block their works form the platforms.

The OCSSPs themselves will formally invite everyone and anyone to provide them with a license.

The OCSSPs *might* choose to start filtering *everything* for which they receive 'the relevant and necessary information' and *not* try to make any effort to decide *in advance* whether anything is

actually protected or not covered by exceptions or limitations to copyright. They could counterbalance this by accepting or reinstating the upload as soon as an *uploader states* that his upload is not protected or covered by exception or limitation. *Or* they might allow *uploaders* to state *in advance* that their upload is not protected or covered by exception or limitation, and balance this by blocking the material as soon as a rightholder states that that is not true.

The OCSSPs might argue that these are the only available and suitable solutions in view of the costs, also 'in the light of the principle of proportionality'.

Following that, the OCSSPs must allow either the uploader or the rightholder to complain, and have a human make a decision. That decision can then be appealed through an 'out-of-court redress mechanism', to be provided by the Member-States. And that decision can then be contested in a regular court.

Furthermore, it is imaginable that start-ups might try to remain below the thresholds of an annual turnover of EUR 10 million and the number of monthly unique visitors of 5 million, in order to avoid being submitted to all the obligations of an OCSSP.

It is quite certain that OCSSPs, and the rightholders involved, should not wait until the date of entry into force of the Directive before organising 'stakeholder dialogues to discuss best practices for the cooperation' between them.

R. What can internet intermediaries reasonably be expected to do?

In the end the courts will have to decide what the OCSSPs and other providers *can reasonably be expected to do*. Unfortunately, article 17 gives very little guidance for this. It rather describes and creates very elaborate contradicting objectives and obligations.

The issues addressed in article 17 also show that the concepts of primary and secondary liability seem to get mixed up. Maybe this is inevitable. It is likely that this approach of liability of OCSSPs for copyright infringement will have its spill over effects on all kinds of other internet intermediaries. On the other hand it also is a continuation of approach visible in the case law of the CJEU.

Since *Promusicae* (*C-275/06, ECLI:EU:C:2008:54*) intermediaries have been obliged to cooperate with rightholders. Too strict a monitoring obligation goes too far *(Scarlet Extended/Sabam, C-70/10, ECLI:EU:C:2011:771 & Sabam/Netlog, C-360/10, ECLI:EU:C:2012:85).* But intermediaries have to take 'all reasonable measures, provided that (i) the measures taken do not unnecessarily deprive internet users of the possibility of lawfully accessing the information available and (ii) that those measures have the effect of preventing unauthorised access to the protected subject-matter or, at least, of making it difficult to achieve and of seriously discouraging internet users who are using the services of the addressee of that injunction from accessing the subject-matter that has been made available to them in breach of the intellectual property right' (*UPC Telekabel Wien, C-314/12, ECLI:EU:C:2014:192*). If intermediaries become too much involved, they become primary infringers with full liability (*Stichting Brein/Ziggo, C-610/15, ECLI:EU:C:2017:456*).

There will be much interesting caselaw of the CJEU to come, firstly in the two cases from Germany, *YouTube (C-682/18)*[5] and *Elsevier (C-683/18)*[6].

There will be a continuing discussion all over the world about what which kind of 'reasonable' internet intermediary can 'reasonably' be expected to do: pay (share advertising income or other income) and/or take preventive or repressive action regarding copyright infringement, while balancing fundamental rights, especially free speech. The same, probably even more important, discussion will continue regarding hate speech, fake news and any other kind of 'undesirable' information.

[5] 'Does the operator of an internet video platform on which videos containing content protected by copyright are made publicly accessible by users without the consent of the rightholders carry out an act of communication within the meaning of Article 3(1) of Directive 2001/29/EC if …'

[6] 'Does the operator of a shared hosting service via which files containing content protected by copyright are made publicly accessible by users without the consent of the rightholders carry out an act of communication within the meaning of Article 3(1) of Directive 2001/29/EC 1 if …'

Annex*:*

Relevant recitals

(61) In recent years, the functioning of the online content market has gained in complexity. Online content-sharing services providing access to a large amount of copyright-protected content uploaded by their users have become main sources of access to content online. Online services are means of providing wider access to cultural and creative works and offer great opportunities for cultural and creative industries to develop new business models. However, although they enable diversity and ease of access to content, they also generate challenges when copyright protected content is uploaded without prior authorisation from rightholders. Legal uncertainty exists as to whether the providers of such services engage in copyright-relevant acts, and need to obtain authorisation from rightholders for content uploaded by their users who do not hold the relevant rights in the uploaded content, without prejudice to the application of exceptions and limitations provided for in Union Law. That uncertainty affects the ability of rightholders to determine whether, and under which conditions, their works and other subject-matter are used, as well as their ability to obtain appropriate remuneration for such use. It is therefore important to foster the development of the licensing market between rightholders and online content-sharing service providers. Those licensing agreements should be fair and keep a reasonable balance for both parties. Rightholders should receive appropriate remuneration for the use of their works or other subject matter. However, as contractual freedom should not be affected by those provisions, rightholders should not be obliged to give an authorisation or to conclude licensing agreements.(62) 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 laid down in this Directive should target only online services that 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 Directive are services, the main or one of the main purposes of which is to store and enable users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit therefrom, either directly or indirectly, by organising it and promoting it in order to attract a larger audience, including by categorising it and using targeted promotion within it. Such services should not include services that have a main purpose other than that of enabling users to upload and share a large amount of copyright-protected content with the purpose of obtaining profit from that activity. The latter services include, for instance, electronic communication services within the meaning of Directive 2018/1972 of the European Parliament and of the Council, as well as providers of business-to-business cloud services and cloud services, which allow users to upload content for their own use, such as cyberlockers, or online marketplaces the main activity of which is online retail, and not giving access to copyright protected content.

Providers of services such as open source software development and sharing platforms, not-for-profit scientific or educational repositories as well as not-for-profit online encyclopedias should also be excluded from the definition of online content-sharing service provider. Finally, in order to ensure a high level of copyright protection, the liability exemption mechanism provided for in this Directive should not apply to service providers the main purpose of which is to engage in or to facilitate copyright piracy.

(63) The assessment of whether an online content-sharing service provider stores and gives access to a large amount of copyright-protected content should be made on a case-by-case basis and

should take account of a combination of elements, such as the audience of the service and the number of files of copyright-protected content uploaded by the users of the service.

(64) It is appropriate to clarify that online content-sharing service providers perform an act of communication to the public or making available to the public when they give the public access to copyright-protected works or other protected subject matter uploaded by their users. Consequently, online content-sharing service providers should obtain an authorisation, including via a licencing agreement, from the relevant rightholders. This does not affect the concept of communication to the public or of making available to the public elsewhere under Union law, nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other service providers using copyright-protected content.

(65) When online content-sharing service providers are liable for acts of communication to the public or making available to the public under the conditions laid down in this Directive, Article 14(1) of Directive 2000/31/EC should not apply to the liability arising from the provision of this Directive on the use of protected content by online content-sharing service providers. That should not affect the application of Article 14(1) of Directive 2000/31/EC to such service providers for purposes falling outside the scope of this Directive.

(66) Taking into account the fact that online content-sharing service providers give access to content which is not uploaded by them but by their users, it is appropriate to provide for a specific liability mechanism for the purposes of this Directive for cases in which no authorisation has been granted. That should be without prejudice to remedies under national law for cases other than liability for copyright infringements and to national courts or administrative authorities being able to issue injunctions in compliance with Union law. In particular, the specific regime applicable to new online content-sharing service providers with an annual turnover below EUR 10 million, of which the average number of monthly unique visitors in the Union does not exceed 5 million, should not affect the availability of remedies under Union and national law. Where no authorisation has been granted to services providers, they should make their best efforts in accordance with high industry standards of professional diligence to avoid the availability on their services of unauthorised works and other subject matter, as identified by the relevant rightholders. For that purpose, rightholders should provide the service providers with relevant and necessary information taking into account, among other factors, the size of rightholders and the type of their works and other subject matter. The steps taken by online content-sharing service providers in cooperation with rightholders should not lead to the prevention of the availability of non-infringing content, including works or other protected subject matter the use of which is covered by a licencing agreement, or an exception or limitation to copyright and related rights. Steps taken by such service providers should, therefore, not affect users who are using the online content-sharing services in order to lawfully upload and access information on such services.

In addition, the obligations established in this Directive should also not lead to Member States imposing a general monitoring obligation. When assessing whether an online content sharing service provider has made its best efforts according to the high industry standards of professional diligence, account should be taken of whether the service provider has taken all the steps that would be taken by a diligent operator to achieve the result of preventing the availability of unauthorised works or other subject matter on its website, taking into account best industry practices and the effectiveness of the steps taken in light of all relevant factors and developments, as well as the principle of proportionality. For the purposes of that assessment, a number of elements should be considered, such as the size of the service, the

evolving state of the art as regards existing means, including potential future developments, to avoid the availability of different types of content and the cost of such means for the services. Different means to avoid the availability of unauthorised copyright-protected content could be appropriate and proportionate depending on the type of content and, therefore, it cannot be excluded that in some cases availability of unauthorised copyright-protected content can only be avoided upon notification of rightholders. Any steps taken by service providers should be effective with regard to the objectives pursued but should not go beyond what is necessary to achieve the objective of avoiding and discontinuing the availability of unauthorised works and other subject matter. If unauthorised works and other subject matter become available despite the best efforts made in cooperation with rightholders, as required by this Directive, the online content-sharing service providers should be liable in relation to the specific works and other subject matter for which they have received the relevant and necessary information from rightholders, unless those providers demonstrate that they have made their best efforts in accordance with high industry standards of professional diligence.

In addition, where specific unauthorised works or other subject matter have become available on online content-sharing services, including irrespective of whether the best efforts were made and regardless of whether rightholders have made available the relevant and necessary information in advance, the online content-sharing service providers should be liable for unauthorised acts of communication to the public of works or other subject matter, when, upon receiving a sufficiently substantiated notice, they fail to act expeditiously to disable access to, or to remove from their websites, the notified works or subject matter. Additionally, such online content-sharing service providers should also be liable if they fail to demonstrate that they have made their best efforts to prevent the future uploading of specific unauthorised works, based on relevant and necessary information provided by rightholders for that purpose. Where rightholders do not provide online content-sharing service providers with the relevant and necessary information on their specific works or other subject matter, or where no notification concerning the disabling of access to, or the removal of, specific unauthorised works or other subject matter has been provided by rightholders and, as a result, those service providers cannot make their best efforts to avoid the availability of unauthorised content on their services, in accordance with high industry standards of professional diligence, such service providers should not be liable for unauthorised acts of communication to the public or of making available to the public of these unidentified works and other subject matter.

(67) Similar to Article 16(2) of Directive 2014/26/EU, this Directive provides for rules as regards new online services. The rules provided for in this Directive are intended to take into account the specific case of start-up companies working with user uploads to develop new business models. The specific regime applicable to new service providers with a small turnover and audience should benefit genuinely new businesses, and should therefore cease to apply three years after their services first became available online in the Union. That regime should not be abused by arrangements aiming at extending its benefits beyond the first three years. In particular, it should not apply to newly created services or to services provided under a new name but which pursue the activity of an already existing online content-sharing service provider which could not benefit or no longer benefits from that regime.

(68) Online content-sharing service providers should be transparent towards rightholders with regard to the steps taken in the context of cooperation. As various actions could be undertaken by online content-sharing service providers, they should provide rightholders, at the request of rightholders, with adequate information on the type of actions undertaken and

the way in which they are undertaken. Such information should be sufficiently specific to provide enough transparency to rightholders, without affecting business secrets of online content-sharing service providers. Service providers should, however, not be required to provide rightholders with detailed and individualised information for each work or other subject matter identified. That should be without prejudice to contractual arrangements, which could contain more specific provisions on the information to be provided where agreements are concluded between service providers and rightholders.

(69) Where online content-sharing service providers obtain authorisations, including through licensing agreements, for the use on their service of content uploaded by the users of the service, those authorisations should also cover the copyright relevant acts in respect of uploads by users within the scope of the authorisation granted to the service providers, but only in cases where those users act for non-commercial purposes, such as sharing their content without any profit-making purpose, or where the revenue generated by their uploads is not significant in relation to the copyright relevant act of the users covered by such authorisations. Where rightholders have explicitly authorised users to upload and make available works or other subject-matter on an online content-sharing service, the act of communication to the public of the service provider is authorised within the scope of the authorisation granted by the rightholder. However, there should be no presumption in favour of online content-sharing service providers that their users have cleared all relevant rights.

(70) The steps taken by online content-sharing service providers in cooperation with rightholders should be without prejudice to the application of exceptions or limitations to copyright, including in particular, those which guarantee the freedom of expression of users. Users should be allowed to upload and make available content generated by users for the specific purposes of quotation, criticism, review, caricature, parody or pastiche. This is particularly important for the purposes of striking a balance between fundamental rights laid down in the Charter of Fundamental Rights of the European Union ("the Charter"), in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property. Those exceptions and limitations should, therefore, be made mandatory in order to ensure that users receive uniform protection across the Union. It is important to ensure that online content-sharing services providers operate an effective complaint and redress mechanism to support use for such specific purposes.

Online content-sharing service providers should also put in place effective and expeditious complaint and redress mechanisms allowing users to complain about the steps taken with regard to their uploads, in particular when they could benefit from an exception or limitation to copyright in relation to an upload to which access has been disabled or that has been removed. Any complaint filed under such mechanisms should be processed without undue delay and be subject to human review. When rightholders request the service providers to take action against uploads by users, such as disabling access to or removing content uploaded, such rightholders should duly justify their requests. Moreover, cooperation should not lead to any identification of individual users nor to the processing of their personal data, except in accordance with Directive 2002/58/EC of the European Parliament and of the Council and Regulation (EU)2016/679 of the European Parliament and of the Council. Member States should also ensure that users have access to out-of-court redress mechanisms for the settlement of disputes. Such mechanisms should allow disputes to be settled impartially. Users should also have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright and related rights.

(71) As soon as possible after the date of entry into force of this Directive, the Commission, in cooperation with Member States, should organise dialogues between stakeholders ensure uniform application of the obligation of cooperation between online content-sharing service providers and rightholders and to establish best practices with regard to the appropriate industry standards of professional diligence. For that purpose, the Commission should consult relevant stakeholders, including users' organisations and technology providers, and take into account the developments on the market. Users' organisations should also have access to information on actions carried out by online content-sharing service providers to manage content online.

Full text of article 17

Art. 2(6) [Definition]

'online content-sharing service provider' means a provider of an information society service of which the main or one of the main purposes is to store and give the public access to a large amount of copyright-protected works or other protected subject-matter uploaded by its users, which it organises and promotes for profit-making purposes.

Providers of services, such as not-for-profit online encyclopedias, not-for-profit educational and scientific repositories, open source software-developing and -sharing platforms, electronic communication service providers as defined in Directive (EU) 2018/1972, online marketplaces and business-to-business cloud services and cloud services that allow users to upload content for their own use, are not 'online content-sharing service providers' within the meaning of this Directive.

Article 17 Use of protected content by online content-sharing service providers

1. Member States shall provide that an online content-sharing service provider performs an act of communication to the public or an act of making available to the public for the purposes of this Directive when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users.

   An online content sharing service provider shall therefore obtain an authorisation from the rightholders referred to in Article 3(1) and (2) of Directive 2001/29/EC, for instance by concluding a licencing agreement, in order to communicate to the public or make available to the public works or other subject matter.

2. Member States shall provide that, where an online content-sharing service provider obtains an authorisation, for instance by concluding a licensing agreement, that authorisation shall also cover acts carried out by users of the services falling within the scope of Article 3 of Directive 2001/29/EC when they are not acting on a commercial basis or where their activity does not generate significant revenues.

3. When an online content-sharing service provider performs an act of communication to the public or an act of making available to the public under the conditions laid down in this Directive, the limitation of liability established in Article 14(1) of Directive 2000/31/EC shall not apply to the situations covered by this Article.

   The first subparagraph of this paragraph shall not affect the possible application of Article 14(1) of Directive 2000/31/EC to those service providers for purposes falling outside the scope of this Directive.

4. If no authorisation is granted, online content-sharing service providers shall be liable for unauthorised acts of communication to the public, including making available to the public, of copyright-protected works and other subject matter, unless the service providers demonstrate that they have:

   (a) made best efforts to obtain an authorisation, and
   (b) made, in accordance with high industry standards of professional diligence, best efforts to ensure the unavailability of specific works and other subject matter for which the

rightholders have provided the service providers with the relevant and necessary information, and in any event

(c) acted expeditiously, upon receiving a sufficiently substantiated notice from the rightholders, to disable access to, or to remove from, their websites the notified works or other subject matter, and made best efforts to prevent their future uploads in accordance with point (b).

5. In determining whether the service provider has complied with its obligations under paragraph 4, and in the light of the principle of proportionality, the following elements, among others, shall be taken into account:

(a) the type, the audience and the size of the services and the type of works or other subject matter uploaded by the users of the service; and
(b) the availability of suitable and effective means and their cost for service providers.

6. Member States shall provide that , in respect of new online content-sharing service providers the services of which have been available to the public in the Union for less than three years and which have an annual turnover below EUR 10 million, calculated in accordance with Commission Recommendation 2003/361/EC, the conditions under the liability regime set out in paragraph 4 are limited to compliance with point (a) of paragraph 4 and to acting expeditiously, upon receiving a sufficiently substantiated notice, to disable access to the notified works or other subject matters from their websites.

Where the average number of monthly unique visitors of these service providers exceeds 5 million, calculated on the basis of the previous calendar year, they shall also demonstrate that they have made best efforts to prevent further uploads of the notified works and other subject matter for which the rightholders have provided relevant and necessary information.

7. The cooperation between online content-sharing 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 other subject matter are covered by an exception or limitation.

Member States shall ensure that users in each Member State are able to rely on any of the following existing exceptions or limitations when uploading and making available content generated by users on online content-sharing services:

(a) quotation, criticism, review;
(b) use for the purpose of caricature, parody or pastiche.

8. The application of this Article shall not lead to any general monitoring obligation.

Member States shall provide that online content-sharing service providers provide rightholders, at their request, with adequate information on the functioning of their practices with regard to the cooperation referred to in paragraph 4 and, where licensing agreements are concluded between service providers and rightholders, information on the use of content covered by the agreements.

9. Member States shall provide that an online content-sharing service providers put in place an effective and expeditious complaint and redress mechanism that is available to users of their

services in the event of disputes over the disabling of access to, or the removal of, works or other subject matter uploaded by them.

Where rightholders request to have access to their specific works or other subject matter disabled or those works or other subject matter removed, they shall duly justify the reasons for their requests. Complaints submitted under the mechanism provided for in the first subparagraph shall be processed without undue delay, and decisions to disable access to or remove uploaded content shall be subject to human review. Member States shall also ensure that out-of-court redress mechanisms are available for the settlement of disputes. Such mechanisms shall enable disputes to be settled impartially and shall not deprive the user of the legal protection afforded by national law, without prejudice to the rights of users to have recourse to efficient judicial remedies. In particular, Member States shall ensure that users have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright and related rights.

This Directive shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law, and shall not lead to any identification of individual users nor to the processing of their personal data, except in accordance with Directive 2002/58/EC and Regulation (EU) 2016/679.

Online content-sharing service providers shall inform their users in their terms and conditions that they can use works and other subject matter under exceptions or limitations to copyright and related rights provided for in Union law.

10. As of … *[date of entry into force of this Directive]* the Commission, in cooperation with the Member States, shall organise stakeholder dialogues to discuss best practices for cooperation between online content-sharing service providers and rightholders. The Commission shall, in consultation with online content-sharing service providers, rightholders, users' organisations and other relevant stakeholders, and taking into account the results of the stakeholder dialogues, issue guidance on the application of this Article, in particular regarding the cooperation referred to in paragraph 4. When discussing best practices, special account shall be taken, among other things, of the need to balance fundamental rights and of the use of exceptions and limitations. For the purpose of the stakeholder dialogues, users' organisations shall have access to adequate information from online content-sharing service providers on the functioning of their practices with regard to paragraph 4.