

Non-paper to facilitate the discussions at the Copyright Directive trilogue on 26 November 2018

As requested by the co-legislators, the services of the Commission have prepared this technical non-paper to facilitate the discussions on some specific aspects of articles 11 and 13 at the 26 November trilogue. This non-paper focuses on some specific aspects of these provisions where the texts of the Council and of the EP significantly converge. Other important aspects of articles 11 and 13 are not covered by this non-paper. The Commission is willing to engage in a discussion with the co-legislators on the entirety of these articles at the trilogue. The possible drafting suggestions proposed below do not represent the formal position of the Commission.

Article 11

1. Definition of ‘press publication’ (Article 2(4) – [rows 117-121])

Both co-legislators appear to broadly agree on the notion of ‘press publication’. A possible compromise is proposed below. The role of news agencies could be clarified in a recital.

(4) ‘press publication’ means a collection composed mainly of literary works of a journalistic nature which:

(a) may also include other works or subject matter;

(b) constitutes an individual item within a periodical or regularly updated publication under a single title, such as a newspaper or a general or special interest magazine;

(c) has the purpose of providing the general public with information related to news or other topics; and

(d) is published in any media under the initiative, editorial responsibility and control of a service provider.

Periodicals which are published for scientific or academic purposes, such as scientific journals, shall not be considered as press publications for the purposes of this Directive.

A clarification could be added to recital 32 [row 69] with regard to news agencies as follows:

(32) [row 69]

[...]

The concept of publisher of press publications should be understood as covering service providers, such as news publishers or news agencies, when they publish press publications within the meaning of this Directive.

2. Scope (Article 11(1, 1a, 2a) – [rows 218, 220 and 223])

With regard to the elements where the co-legislators converge to a large extent, a possible text could read as follows

Member States shall provide publishers of press publications established in a Member State with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the online use of their press publications by information society service providers. As a consequence, these rights shall not apply to uses of press publications carried out by individual users when they do not act as information society service providers.

[Council's paragraph on snippets to be discussed further]

The protection granted under the first subparagraph shall not apply to acts of hyperlinking.
[the EP text on individual words to be discussed further together with the treatment of snippets]

3. *Interplay with the copyright of the underlying works in a press publication (Article 11(2) – [rows 221 and 222])*

The Parliament has not proposed amendments to this paragraph and the Council has made technical amendments to the Commission's proposal. A possible text

The rights referred to in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject-matter incorporated in a press publication. The rights referred to in paragraph 1 may not be invoked against those authors and other rightholders and, in particular, may not deprive them of their right to exploit their works and other subject-matter independently from the press publication in which they are incorporated.

When a work or other subject-matter is incorporated in a press publication on the basis of a non-exclusive licence, the rights referred to in paragraph 1 may not be invoked to prohibit the use by other authorised users. The rights referred to in paragraph 1 may not be invoked to prohibit the use of works or other subject matter whose protection has expired.

4. *Application of other Directives to the press publishers' rights (Article 11(3) – [row 224])*

None of the co-legislators has adopted amendments to this paragraph. A technical addition following the adoption of the Marrakesh Directive ((EU) 2017/1567) is proposed as follows:

Articles 5 to 8 of Directive 2001/29/EC and Directives 2012/28/EU and (EU) 2017/1564 shall apply mutatis mutandis in respect of the rights referred to in paragraph 1.

5. *No-retroactive protection of press publications (Article 11 para (5) new – [row 225 EP and 227 Council])*

Both co-legislators agree that press publications published before the entry into force of the Directive should not be covered by Article 11. A possible text

Paragraph 1 shall not apply to press publications first published before [entry into force of the Directive].

6. *Term of protection (Article 11, para 4 – [Row 225]) and Remuneration of journalists (authors of the works contained in a press publication) (Article 11(4a)) – [row 226])*

To be discussed at the trilogue. No text is proposed in this non-paper.

Article 13

1. Definition/scope of services covered (Article 2.5 – row 125)

Both co-legislators converge to a large extent with regard to the definition of "online content sharing services" and the exclusions from this definition. The main difference is the treatment of micro and small enterprises, which are excluded from the definition in the Parliament's text and not in the Council's (which however makes them subject to a specific treatment according to the principle of proportionality in Article 13). A possible compromise text with open issues in brackets:

'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 enable users to share [a "significant amount" or "large amount of" to be further discussed] works or other protected subject-matter which the service organises and promotes for profit-making purposes.

Notwithstanding the subparagraph above, [EP: "Microenterprises and small-sized enterprises within the meaning of Title I of the Annex to Commission Recommendation 2003/361/EC providers of services such as [Council "non-for-profit" or EP "acting in a non-commercial purpose"] online encyclopaedias, [Council "non for profit or EP "acting in a non-commercial purpose"] [Council "non-for-profit"/ EP "acting in a non-commercial purpose"] educational and scientific repositories, open source software developing and sharing platforms, electronic communication service providers as defined in (ref to new telecom code when adopted/COM(2016) 590), online marketplaces and business to-business cloud services and cloud services which allow users to upload content for their own use shall not be considered online content sharing service providers within the meaning of this Directive.

2. Communication to the public and obligation to conclude licences: Article 13.1 [row 238]; Relationship with the limitation of liability in the e-Commerce Directive: recital 37a [row 77], Article 13(3) [row 243]

Both co-legislators have introduced a provision laying down that online content sharing services, as defined in Article 2, communicate to the public and thus need to obtain an authorisation/take a license from rightholders. A possible text

Member States shall provide that an online content sharing service provider is liable for communication to the public or 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.

[Formulation on the relationships with article 14 of the ECD to be discussed including whether this issue should be dealt with in the article or in a recital]

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

3. Users of online content sharing service providers - Article 13.1 in the Council's text (row 238) and 13.2 of the Parliament's text (row 239)

The texts of both co-legislators provide that the licensing agreements that online content sharing service providers conclude with rightholders under Article 13 should cover the acts carried out by users who upload content on the website of the service providers under certain conditions. A possible text

Member States shall provide that any authorisation obtained by the online content sharing service providers in accordance with Article 13 shall also cover the acts carried out by the users of these services falling within Article 3 of Directive 2001/29/EC.

4. Rules applicable to content not covered by a licence and mitigation of liability (paras 4-6 in the Council's text [rows 244-251] and para 2a in the EP's text [row 240])

To be discussed at the trilogue. No text is proposed in this non-paper.

5. Redress mechanism (Council row 252; EP row 241)

Both co-legislators provide for a complaint and redress mechanism for users whose content is removed or blocked for unjustified reasons. A possible text

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 or blocking of works or other subject matter uploaded by them.

When rightholders request to remove or disable access to their specific works or other subject matter, they shall duly justify the reasons for their requests. Complaints submitted under this mechanism shall be processed without undue delay and decisions to remove or disable access to uploaded content shall be subject to human review. Member States shall also ensure that users have access to an independent body for the resolution of disputes and that there are national procedural rules in place to allow users to assert their rights before a court.

This Directive shall in no way affect legitimate uses, such as uses under exceptions and limitations provided for in Union law, and shall not lead to any identification of individual users nor to the processing of their personal data, in accordance with Directive 95/46/EC, Directive 2002/58/EC and the General Data Protection Regulation.

6. Transparency/reporting obligation for the services (Council row 251)

The Council's text includes an obligation on online content service providers to be transparent towards rightholders, also in the Commission's proposal. The Parliament has a general provision on cooperation between rightholders and services but no specific text on transparency. Subject to further discussions, if co-legislators agree to be more specific on transparency this could be done with the text below.

Member States shall provide that online content sharing service providers shall provide rightholders, at their request, with adequate information on the functioning of their practices with regard to [reference to what will be decided on a possible mitigation mechanism] and, where licensing agreements are concluded between service providers and rightholders, information on the use of content covered by the agreements.

7. Stakeholder dialogues and guidance by the Commission (Parliament row 242, Council row 253)

Both co-legislators provide for a stakeholder dialogue and guidance from the Commission.

A possible text

As of [date of entry into force of this directive] the Commission and the Member States shall organise stakeholder dialogues to discuss best practices for the cooperation between the online content sharing service providers and rightholders. The Commission shall, in consultation with online content sharing service providers, rightholders, users associations and other relevant stakeholders and taking into account the results of the stakeholder dialogues, issue guidance on the application of Article 13. When discussing the best practices, the need to balance the fundamental rights shall be taken into account.