AMENDMENT PROPOSED BY THE FRENCH, SPANISH & PORTUGUESE DELEGATIONS	CONSOLIDATED ESTONIAN PRESIDENCY COMPROMISE PROPOSAL	IMPACT OF THE PROPOSED CHANGES
Article 13	Article 13	
Use of protected content by information society service providers storing and giving access to works and other subject-matter uploaded by their users	Use of protected content by information society service providers storing and giving access to ~~large amounts of~~ works and other subject-matter uploaded by their users	**Both proposals** While the distinction of 'large amounts' is questionable as a criteria, at least it places some limits to the scope of Article 13. Removing this means that all platforms, big or small, are covered by this provision. There is text implementing a form of size limit introduced in the paragraphs of the article (see below). The text also suggests that platforms 'use' content that is upload by third parties.
1. Member States shall provide that information service providers that store works or other subject-matter uploaded by their users and are actively involved in providing access to the public to such contents, including by optimizing the presentation of the uploaded works or subject-matter or promoting them, perform an act of communication to the public within the meaning of Article 3 of Directive 2001/29/EC and are deemed not to fall under Article 14 of Directive 2000/31/EC.	**1. Member States shall provide that an information** society service ~~providers that~~ **provider whose main or one of the main purposes is to** store and ~~provide~~ **give access** to the public ~~access~~ to ~~large amounts of~~ **copyright protected** works or other **protected** subject-matter uploaded by ~~their~~ **its** users ~~shall,~~ **is performing an act of communication to the public or an act making available to the public within the meaning of Article 3(1) and (2) of Directive 2001/29/EC when it intervenes** in ~~cooperation~~ **full knowledge of the consequences of its action to give the public access to those copyright protected works or other protected subject matter by organising these works or other subject matter** with ~~rightholders,~~ **the aim of obtaining profit from their use.**	**The Estonian proposal** Both proposals are redefining when online platforms engage in a communication to the public. However, the Estonian proposal introduces many subtleties by, amongst other things: • categorising platforms according to their main purpose or one of their main purposes (who's going to judge this?); and, • punishing service providers for organising content in a findable manner. The result is a bonanza of legal uncertainty. **The FR, ES, PT proposal** This provision **creates the risk for online platform hosting and giving access to any form of user-uploaded content to (1) engage in a communication to the public and (2) lose their intermediary liability exemption under the e-commerce Directive**.

AMENDMENT PROPOSED BY THE FRENCH, SPANISH & PORTUGUESE DELEGATIONS	CONSOLIDATED ESTONIAN PRESIDENCY COMPROMISE PROPOSAL	IMPACT OF THE PROPOSED CHANGES
		Only 2 conditions have to be met, namely to: 1. store works or other subject-matter uploaded by their users; and be, 2. actively involved in providing access to the public to such contents. Suddenly Wikimedia is communicating to the public and is no longer protected under the intermediary liability exemption. But, so is a university hosting a repository for its researchers to make their publications available, or a newspaper with a comments section.
They should negociate with rightholders and conclude licensing agreements. These agreements might cover the liability of the uploaders when they are not acting in a professional capacity, for such acts falling within Articles 2 and 3 of Directive 2001/29/EC.		**The FR, ES, PT proposal** This imposes a mandatory obligation to conclude licensing agreements. To us that seems **contrary to contractual freedom.** What if both parties prefer another form of agreement than a license? What if the terms of the only agreement proposed are absurd?
2. **Without prejudice to paragraph 1, Member States shall ensure that all** information society service providers that store and **give access to significant amounts of copyright protected** works or other subject-matter uploaded by their users, **upon request from rightholders and subject to supply of the necessary data to allow the identification of their content by service providers, take measures** to prevent the availability on their services of works or	**1a. Without prejudice to paragraph 1, Member States shall ensure that an information society service provider that stores and provides access to the public to a significant amount of works or other protected subject-matter uploaded by their users who do not hold the relevant rights in the content uploaded** take **effective** measures**:** **a)** to ensure the functioning of agreements concluded with rightholders for the use of their	**Both proposals** The notion of 'large amounts' is being turned into 'significant amounts'. However, this does not solve anything, as this remains an undefined legal concept that has been criticised by academics, such as the Max Planck Institute.

AMENDMENT PROPOSED BY THE FRENCH, SPANISH & PORTUGUESE DELEGATIONS	CONSOLIDATED ESTONIAN PRESIDENCY COMPROMISE PROPOSAL	IMPACT OF THE PROPOSED CHANGES
other subject-matter identified by rightholders. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. **This is without prejudice to the possibility for rightholders and information service providers of entering into voluntary agreements allowing for the use of the protected content.**	works or other subject-matter; or **b) in the absence of an agreement,** to prevent the availability on their services of works or other subject-matter identified by rightholders ~~through the cooperation with.~~ **The measures shall be applied by** the **information society** service providers~~. Those measures, such as~~ at the ~~use of effective content recognition technologies,~~ **request of rightholders to specific works and other subject-matter as identified by them. The measures** shall be appropriate and proportionate**, taking into account, among others, the nature of the services, the type of works or other protected subject-matter uploaded by the users of the services, the availability and costs of relevant technologies and their effectiveness in light of technological developments.**	**The Estonian proposal** The Estonians are trying to obfuscate the fact that Article 13 remains a censorship filter by removing the reference to the use of effective content recognition technologies. However, online platforms still need to take 'effective' measures to uphold their agreements with rightholders (which could contain requirements for platforms to use effective content recognition technologies), or in the absence of an agreement they still need to prevent the availability on their services of works or other subject-matter identified by rightholders. The latter will be very hard to achieve for online platform without the use of effective content recognition technologies! The fact that the paragraph keeps referring to the use technologies leaves no doubt about this. Here again the Estonians try to add lots of words (e.g. availability, costs, effectiveness, etc.) that in their view seems to ease the pain at first sight. However, these criteria do not acknowledge that the market for filtering technologies only has a limited number of players and even less who provide 'effective' solutions. It also forgets that the discussions on implementing these measures will start at a level of 'rightholder threatens to sue platform', where the platform is likely to pretty much do anything to avoid liability and court cases in general.

AMENDMENT PROPOSED BY THE FRENCH, SPANISH & PORTUGUESE DELEGATIONS	CONSOLIDATED ESTONIAN PRESIDENCY COMPROMISE PROPOSAL	IMPACT OF THE PROPOSED CHANGES
		<u>The FR, ES, PT proposal</u> This provision then ensures that **<u>all</u> online platform storing and giving access to user uploaded content are being pushed into implementing effective content recognition technologies**, as they need to <u>prevent</u> the availability of any content identified by the rightholders. Even if an online platform would conclude voluntary agreements with rightholders for the use of their content, this provision clearly does not safeguard them from being pushed into implementing effective content recognition technologies on their platform. So, as a platform you are going to be bullied in all directions, from bad agreements to even worse filtering measures. Moreover, the logic still remains one of pushing the handling of EU citizens fundamental freedoms outside the rule of law, as the measures taken will be done so under the terms and conditions of the platforms.
3. **Member States shall ensure that information society service providers** shall provide rightholders with adequate information on the functioning and the deployment of the measures **referred to in paragraph 2.**	**<u>1b.</u>** The **<u>information society</u>** service ~~providers~~ **<u>provider</u>** shall provide rightholders**<u>, at their request,</u>** with adequate information on the functioning and ~~the~~ deployment of the measures, as well as, when relevant, adequate reporting on the ~~recognition and~~ use of the works and other **<u>protected</u>** subject-matter.	**<u>The Estonian proposal</u>** The Estonians are adding some burden on the rightholders, as they now have to request online platforms to give information them about their filtering efforts.

AMENDMENT PROPOSED BY THE FRENCH, SPANISH & PORTUGUESE DELEGATIONS	CONSOLIDATED ESTONIAN PRESIDENCY COMPROMISE PROPOSAL	IMPACT OF THE PROPOSED CHANGES
		The provision also removes the reference to information on the recognition of works, but still remains more detailed than the vague provision put forward by the French, Spanish and Portuguese Troika. **The FR, ES, PT proposal** Where initially it was up to the online platform to give information about their filtering efforts to the rightholders, Member States are now being dragged in to ensure that they do so. We can imagine that Spain, France and Portugal are keen on taking up this role as 'whip' to ensure discipline amongst online platforms. However, it remains to be seen if other Member States are as comfortable with it.
	~~2~~**1c.** Member States shall ensure that **for** the ~~service providers referred to in paragraph 1 put in place complaints and redress mechanisms that are available to users in case~~ **purpose** of ~~disputes over~~ the application of the measures referred to in paragraph ~~1~~**1a to specific works or other subject-matter of rightholders, the rightholders shall provide an information society service provider with the necessary data.**	

AMENDMENT PROPOSED BY THE FRENCH, SPANISH & PORTUGUESE DELEGATIONS	CONSOLIDATED ESTONIAN PRESIDENCY COMPROMISE PROPOSAL	IMPACT OF THE PROPOSED CHANGES
4. Member States shall ensure that the **information** service providers referred to in paragraph 1 and **paragraph 2** put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 2. **Any complaint filed by a user under the mechanism shall be processed by the relevant rightholder within a reasonable period of time. The rightholder shall duly justify his/her decision.**	2. **Member States shall ensure that the measures referred to in paragraph 1a shall be implemented by an information society service provider without prejudice to the freedom of expression and information of their users and the possibility for the users to benefit from an exception or limitation to copyright. For that purpose the service provider shall put in place a complaint and redress mechanism that is available to users of the service in case of disputes over the implementation of the measures. Complaints submitted under this mechanism shall be processed by the relevant rightholders within a reasonable period of time. The rightholder shall duly justify its decision.**	**Both proposals** The recent recommendation of 56 academic already criticised the idea of promoting the rightholders to judge, jury, and executioner. Because **the rightholder is "a party with strong incentives to disallow use"** (p. 13). Their comment was made in the context of the Estonian Presidency's compromise proposal, which coincidentally also proposed to do the same. Ensuring that the "rightholder shall duly justify his/her decision" is just putting a band-aid over bad legislation that will severely hamper citizens freedom of expression online. Neither the service providers nor the user will likely be tempted to pick a fight with the rightholder over their decision. Oh, and still no courts involved: remember, this is all happening outside the rule of law!
	2a. Member States shall ensure that the obligations set out in this Article apply to information society service providers established in their territory in accordance with Directive 2000/31/EC and to information society service providers of third countries who offer their services of storing and providing access to works or other protected subject-matter uploaded by their users who do not hold relevant rights in the content in the European Union.	**The Estonian proposal** The Estonians want to remind everyone that there is no escape to this legislation by establishing one's business outside of the EU. However, we have serious doubts about the enforcement of this provision against rogue websites based in 3rd countries. Therefore, we fear that this provision will remain toothless against the real infringing websites, whilst breaking the Internet for all users and for law abiding online platforms.

AMENDMENT PROPOSED BY THE FRENCH, SPANISH & PORTUGUESE DELEGATIONS	CONSOLIDATED ESTONIAN PRESIDENCY COMPROMISE PROPOSAL	IMPACT OF THE PROPOSED CHANGES
5. Member States shall facilitate, where appropriate, the cooperation between the service providers and rightholders through stakeholder dialogues to define best practices, such as **the use of** appropriate and proportionate content recognition technologies, taking into account, among others, the nature of the services, the availability **and costs** of the technologies and their effectiveness in light of technological developments.	3. Member States shall facilitate, where appropriate, the cooperation between the information society service providers and rightholders through stakeholder dialogues to define best practices, such as **the use of** appropriate and proportionate ~~content recognition~~ technologies~~, taking into account, among others, the nature of the services, the availability of the technologies and their effectiveness in light of technological developments~~.	**The Estonian proposal** Just as in paragraph 1 the Estonians think they can alleviate a lot of the concerns surrounding the proposal by no longer explicitly talking about content recognition. This makes us wonder which 'appropriate and proportionate technologies' Estonian companies have invented that will magically do everything required by this Article without applying content recognition? The explicit reference to 'technologies' leaves very little room for alternative measures. **The FR, ES, PT proposal** Talking about the cost of filtering technologies is the delegations' attempt at throwing in an artificial sweetener to make it easier to swallow this bitter pill for online platforms. However, doing so neglects the fact that implementing 'effective content recognition technologies' it's not that easy as throwing a couple of bucks at it, as we have previously explained. Moreover, effective is just another word for 'when in doubt, block'.

AMENDMENT PROPOSED BY THE FRENCH, SPANISH & PORTUGUESE DELEGATIONS	CONSOLIDATED ESTONIAN PRESIDENCY COMPROMISE PROPOSAL	IMPACT OF THE PROPOSED CHANGES
	4. Member States shall determine the sanctions applicable to infringements of the obligations set in this Article. The sanctions provided shall be effective, proportionate and dissuasive and shall be without prejudice to European Union and national applicable laws on enforcement of intellectual property rights.	**The Estonian proposal** The reform claims to harmonise copyright in the digital single market, but instead this provision encourages the creation of 27 different sets of sanctions. Talk about missing the boat entirely!
	5. Member states shall provide that agreements concluded between information society service providers which store and give access to works and other protected subject-matter uploaded by their users referred in paragraphs 1 and 1a above, and relevant rightholders, shall cover the liability of the users of the information society services, when they are not acting in a professional capacity, for acts falling within Article 3 of Directive 2001/29/EC.	**The Estonian proposal** This notion of 'professional capacity' is very difficult for online platforms to assess. Should they start asking all their users to provide their VAT or company number if they have one in order to define who's 'acting in a professional capacity'?