

WHITE PAPER

# < EUROPEAN COPYRIGHT REFORM >

IMPACT ON FREE AND OPEN SOURCE SOFTWARE AND DEVELOPER COMMUNITIES



by OpenForum Europe & FSFE



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## / Foreword

‘I do not think that anyone would disagree that creators and right holders should and must receive a fair and balanced compensation for the exploitation of their works. However, this should be achieved without negative impacts to open source’s contribution to the digital economy, nor to the internet freedoms of our European developers and consumers. With deliberations on the Copyright proposal having finally started in the Council and the European Parliament’s lead Legal Affairs Committee I hope to see that the final outcome of these deliberations strikes the right balance by: safeguarding the existing legal framework and established CJEU case law, adopting a technologically neutral approach and at the same time respecting and upholding end-user fundamental rights and freedoms’.

Catherine Stihler

< **MEP Catherine Stihler** is Vice Chair of the Committee for Internal Market and Consumer Protection (IMCO). She is the rapporteur for the IMCO [Opinion on the proposal for a directive on copyright in the Digital Single Market](#).



## / Executive Summary

*This document highlights an important aspect of the proposed Article 13 of the Copyright Directive that has so far not been sufficiently considered: namely, its likely impact on Free and Open Source Software<sup>1</sup> and collaborative software development, as well as on developer communities, which together underpin a software and software based services (SSBS) market which is worth EUR 229 billion in the EU (2009) and employs a workforce of 3.1 million (2013).*

*The proposed Copyright Directive has the clear potential to harm Europe's competitiveness and growth in this area. Importantly, it could also restrict important fundamental rights of developers and internet users, without achieving a proportionate benefit. In particular, the proposed Article 13 could create barriers for the development of source code by imposing liability on platforms used by developers, harming a sector fundamental for the Digital Single Market. Therefore, both OFE and the FSFE consider that the proposed Article 13 should be redrafted in order to be consistent with the existing legal framework around intermediary liability, as established by the e-Commerce Directive.*

*This paper reflects on these issues, explaining the matter at stake from a software development point of view and providing some guidance.*

## / Disclaimer

*This White Paper has been authored by **OpenForum Europe** and the **Free Software Foundation Europe**, and has been peer reviewed by Dr Christina Angelopoulos, Centre for Intellectual Property and Information Law, University of Cambridge.*

*Views expressed in this paper represent those of the FSFE and OFE, they do not necessarily reflect those of organisations or individuals that support or are members of the FSFE or OFE.*

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<sup>1</sup> Free and Open Source Software (FOSS) has the potential to develop into a unique strength of the European software sector, if supported accordingly. Although FOSS is very well suited for applications in the commercial context, many European companies, public administrations and users do not yet seem to know enough about its advantages. Thus, the authors of the current paper recommend focusing on policy actions that strengthen the FOSS knowledge base and the exchange of related best practices between private and public organisations.



# 1 / Introduction

**T**he **Copyright Communication**<sup>2 3</sup> released by the European Commission in September 2016 explains that the proposed Article 13 is intended to address the challenges posed by some of the new forms of online content distribution along the value chain, which are based on user-created content, without presenting solid evidence of the measures imposed by this new article.

The proposed Copyright Directive introduces a set of alternative obligations targeted at ‘information society service providers that store and provide access to large amounts of works or other subject-matter uploaded by their users.’ Considering the wording of the proposed provisions, in particular Article 13, these new legislative measures could apply to software development platforms. This paper explains how, and analyses the negative impact on business and innovation that this application could have.

The Copyright Directive Proposal, and in particular its Article 13, impacts heavily upon several fundamental rights, such as freedom of expression, the right to privacy, the freedom to conduct a business, and the presumption of innocence. Moreover, it disrupts the current legal framework, by changing the long-standing rules governing intermediary liability that were established through 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 (the ‘ECD’).

*Those kind of laws (the proposal) are destructive to the open source innovation.*

**Jean-Baptiste Kempf** : President \_ Videolan

What is true at a general level also applies to software development, especially development and European software communities. Free and Open Source Software (‘FOSS’) and open collaboration play a vital role in software development today. Software is often openly available for developers to view, edit, distribute; in addition, a wide range of developers contribute to improving this software, using various online services and tools efficiently to allow open and collaborative software development. Hugely popular examples include services such as GitHub, Gitlab and Stack Overflow; GitHub reports (as of April 2017) almost 20 million users, while Stack Overflow is reported (as of April 2014) to have over four million registered users.

2. “Modernization of the EU Copyright Rules”, <https://ec.europa.eu/digital-single-market/en/modernisation-eu-copyright-rules> (last accessed Sept. 1, 2017)

3. Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016) 593 final, <https://ec.europa.eu/transparency/regdoc/rep/1/2016/EN/1-2016-593-EN-F1-1.PDF> (last accessed 25 August 2017)

Under the current proposal, these tools would no longer be able to operate as they do today and software developers' ability to share source code and collaborate in its development would be hampered. In particular, each of the following fundamental rights would be impacted in the following ways:

- < **Freedom to conduct a business:** large businesses, SMEs and individuals relying on current tools to develop software, especially in FOSS or collaboratively, could be faced with automated filtering which could engender 'false positive' identifications of infringing software, which in turn could cause developers' dependencies randomly to disappear and so literally "break" their builds, resulting in lost business, lost productivity, less reliable software, and less resilient infrastructure.
- < **Right to privacy:** as in other areas, implementing this Directive would require active monitoring of the data and activities of software developers, whether individuals or businesses, in order to prevent any future infringement of copyright.
- < **Freedom of expression and information:** the general monitoring obligation imposed by this Directive could well result in more unjustified content removal, reflecting fear of potential liability for the actions of the users of the platform. Such content removal could even result in the taking down of whole code repositories, which in turn could disrupt software businesses in the most harmful way.
- < **Presumption of innocence:** a general monitoring obligation, as proposed in this Directive, does not provide for any meaningful redress mechanisms to challenge the removal of content requested by a rightholder. As such, this Directive would treat every user of the platform as a potential copyright infringer by default.

It is noteworthy that on numerous occasions the Court of Justice of the European Union (CJEU) has held that despite the protection of intellectual property being enshrined in Article 17(2) of the Charter of Fundamental Rights of the European Union, there is nothing in the wording of that provision or in the respective case-law to suggest that right is inviolable and therefore to be absolutely protected. Therefore, a proper balance needs to be struck between the protection of copyright and of other affected fundamental rights and freedoms.<sup>4</sup>

As currently drafted, the proposal would have negative consequences for software development and European software communities, especially for FOSS, and the use of software development platforms. This is also a concern for Europe's competitiveness and growth. A recent study for the European Commission highlights the importance of FOSS for European growth and competitiveness<sup>5</sup>. Moreover, the proposal would also fragment the European Union's legislative framework around relevant topics, such as intermediary liability.

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4. C-70/10 Scarlet Extended [2011] ECR I-11959

5. European Commission (2017). The Economic and Social Impact of Software and Services on Competitiveness and Innovation. Available at: <https://ec.europa.eu/digital-single-market/en/news/economic-and-social-impact-software-and-services-competitiveness-and-innovation>. Last accessed July 27, 2017.



Therefore, OFE and the FSFE consider that Article 13 is putting in danger the existing legal framework around intermediary liability, established by the ECD and confirmed in numerous instances by the CJEU. Unless its proposed provisions are brought in line with this existing framework, Article 13 should be entirely deleted, in order to maintain the legislative coherence of the EU's approach to intermediary liability, as reflected in the ECD.

In Section 2, this paper looks at how FOSS collaborative software development platforms work, showing their relevance in the economy. Section 3 explains how these particular types of platforms fall under Article 13. Section 4 explains the different ways in which Article 13 could disrupt the software development ecosystem in Europe, harming the Digital Single Market. Finally, before concluding, Section 5 details the legislative developments in the various EP committees, highlighting the amendments of the Copyright Directive which are relevant for this paper.

## 2 / What are Free and Open Source collaborative software platforms, and why do they matter?

**F**OSS is software that is often developed by collaborative networks of programmers. For FOSS, the licensing terms<sup>6</sup> encourage modifications and improvements by anyone. This implies allowing individual users to use the licensed software as they please, to study its source code, to be able to share it, and to customise it according to their needs. While the software itself may be freely available, there are a myriad of business models based on FOSS, which enable revenue and job creation. One of the biggest business success stories here is the Linux kernel: as shown in the Linux Kernel Development [Report](#) of 2016, over 13,500 developers from more than 1,300 companies have contributed to the Linux kernel since tracking began 11 years ago, including companies such as Intel, Red Hat, Linaro, Samsung, SUSE, IBM, Renesas, Google, AMD, Texas Instruments and ARM.

The Commission's proposal targets platforms which store, provide and give access to large amounts of works and other subject-matter uploaded by their users. One specific type of such platforms is that used for the collaborative development of software using version control systems (VCS), a fundamental tool that allows fine tracking of the development history of a software project. In fact, some of these collaborative platforms and version control systems are used not only by FOSS communities, companies and software developers<sup>7</sup>, but also by researchers and governments to store and share their software<sup>8</sup>. As this indicates, software development platforms are very important, because software can significantly increase Europe's industrial competitiveness and largely contribute to Europe's growth.

Indeed, the overall software and software-based services market in the EU28 region was worth EUR 229 billion in 2009, and by 2020 it is expected that this annual figure will have grown to nearly EUR 290 billion. Software sector employment in the EU grew by 16.1% between 2008 and 2013. This can be contrasted to the decline in employment in

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6. FOSS licences, as approved by the Open Source Initiative and the Free Software Foundation. Available at: <https://opensource.org/licenses/category>, and <https://www.gnu.org/licenses/license-list.html>

7. Wired (2015). How GitHub Conquered Google, Microsoft, and Everyone Else. Available at: <https://www.wired.com/2015/03/GitHub-conquered-google-microsoft-everyone-else/>. Last accessed April 19, 2017.

8. GitHub (n.d.). GitHub Government. Available at: <https://government.GitHub.com/community/>. Last accessed April 19, 2017.





the total business economy of about 3.4%. Also, software development companies are also characterised by high productivity (measured in value added per employee). According to the study, the average yearly growth of the software development industry in Europe is expected to be 2.9% between 2015 and 2020<sup>9</sup>.

It has also been estimated that due to the nearly universality of software development practices, hardly any new software product on the market is built without incorporating easily accessible and reusable FOSS code<sup>10</sup>. In addition, the overall contribution of FOSS to Europe's economy was estimated to have amounted to EUR 450 billion in 2012<sup>11</sup>. As such, the importance of FOSS and collaborative open development for modern software business must not be underestimated. Moreover, FOSS is fundamental not only for software companies per se, but FOSS is also increasingly included in virtually every product and every business, including the devices and production pipelines of media companies and publishers.

*Nowadays almost all companies and individuals in Free and Open Source Software are using version control systems to develop, plan, coordinate, and document their work. The information in those version control systems embodies precious technical and scientific knowledge and humanity cannot afford the risk of losing it.*

**Roberto Di Cosmo** : Founder/CEO \_ *Software Heritage*

There are a myriad of software platforms in existence today. Some of the most popular or relevant are listed below, together with a short description, in order to highlight the crucial role which these platforms play in software development.

< **Software Heritage.** Software Heritage is an initiative started in 2013, and was registered in France in 2016. Its goal is to collect, preserve, and share software that is across cultural heritage, industry, education, science, and research communities, to address the concern that without preservation software that is made up of technical and scientific knowledge will be lost. With source files counting over 3 billion, commits counting more than 820 million and 64 million projects, Software Heritage is the largest software archive in the world. The importance of promoting universal access to software source code has been internationally recognised in April this year<sup>12</sup>, when UNESCO and the National Institute for Research in Computer Science and

9. European Commission (2017). Ibid.

10. Milinkovich, M. (2015) How the Eclipse community works. Keynote presentation @ the 11th International Conference on Open Source Systems, Florence, Italy.

11. Daffara, C. (2012). Estimating the Economic Contribution of Open Source Software to the European Economy. Available at: <http://www.openforumacademy.org/library/ofa-research/first-conference-proceedingsA4.pdf>. Last accessed July 28, 2017.

12. <http://en.unesco.org/news/agreement-software-preservation-signed-unesco>. Last accessed Sept. 01, 2017.

Automation [signed](#) an agreement to contribute to the preservation of the technological and scientific knowledge contained in software.

< **GitHub.** GitHub provides a set of “social coding” tools built around the Git version control system, and incorporates social functionality that makes a developer’s identity and activities visible to other users. The GitHub site makes user identities, internal project artifacts and related actions publicly visible across a wide community. On the GitHub site, developers create profiles that can optionally be populated with identifying information, including an avatar (i.e., an image representing a user throughout the site), their name, email address, organisation/affiliation, location, and webpage. A developer’s profile is visible to other users and displays all the repositories that person is working on, as well as a list of their latest activities on the site. Currently GitHub has over 650 employees. As of August 2017, GitHub reports having over 23 million users and hosting 65 million repositories, making it the largest VCS platform in the world.

< **GitLab.** GitLab is a web-based Git repository manager with wiki and issue tracking features, using a FOSS licence developed by GitLab Inc. The software was written by Dmitriy Zaporozhets and Valery Sizov from Ukraine. As of December 2016, the company has 150 team members and more than 1400 FOSS contributors. It is used by organisations such as IBM, Sony, Jülich Research Center, NASA, Alibaba, Invincea, O’Reilly Media, Leibniz-Rechenzentrum (LRZ), CERN, and SpaceX.

< **Stack Overflow.** Stack Overflow is a privately held website, the flagship site of the Stack Exchange Network, created in 2008. It was created to be a more open alternative to earlier question-and-answer sites. The website serves as a platform for users to ask and answer questions on a wide range of topics in computer programming, including by posting snippets of source code, and, through membership and active participation, to vote questions and answers up or down, and edit questions and answers in a fashion similar to a wiki or Digg. All user-generated content is licensed under a Creative Commons Attribution-ShareAlike license.

< **GNU Savannah.** GNU Savannah is a project of the Free Software Foundation which serves as a collaborative software development management system for FOSS projects. Savannah currently offers features such as CVS, GNU arch, Subversion, Git, Mercurial, Bazaar, mailing list, web hosting, file hosting, and bug tracking services. Unlike SourceForge or GitHub, Savannah’s focus is on hosting only FOSS projects, and it has very strict hosting policies in place to ensure that only FOSS is hosted. Project submitters have to state which specific FOSS licence the project uses at the time when they registering a new project.

< **SourceForge.** SourceForge is a Web-based service that offers software developers a centralised online location to control and manage FOSS projects. It provides a source code repository, bug tracking, mirroring of downloads for load balancing, a wiki for documentation, developer and user mailing lists, user-support forums, user-written reviews and ratings, a news bulletin, a micro-blog for publishing project updates, and other features. As early as 1999, SourceForge was one of the first to offer this service



free of charge to FOSS projects. In March 2014, the SourceForge repository reported hosting more than 430,000 projects and more than 3.7 million registered users. The domain sourceforge.net attracted at least 33 million visitors by August 2009 according to a Compete.com survey.

Many European companies benefit from using these platforms. In France, for example, the FOSS market was valued at over 4.5 Billion euros in 2016 (PAC consulting), with over 400 companies systematically using collaborative development platforms and version control systems to develop and offer their products. These range from large generalist software service companies such as Smile, Alterway or Linagora, to specialised software editors like Alfresco or Nuxeo, to cite just a few. Founded in 1992 in Germany, SUSE develops and sells GNU/Linux-based products. With SUSE and openSUSE they have over 400 public repositories alone on GitHub, and run their own platforms (e.g. <https://build.opensuse.org/>).

*Almost all of our development is based on a web-based version control repository, and such tools play a key role in the processes of open source development and collaboration.*

**Richard Brown** : Chairman \_ openSUSE

However, software development platforms are not only used by companies at first associated with software development. The German e-commerce company Zalando is developing its software infrastructure on those platforms with 49 code repositories with FOSS<sup>13</sup>. The car manufacturer BMW for example has 31 code repositories through its subsidiary BMW Car IT, focusing on the design and development of software for future BMW automobiles and motorcycles<sup>14</sup>.

Other examples of European-based companies using such platforms can be found in the members' lists of FOSS business associations such as the French Conseil National du Logiciel Libre, which represents 400 companies<sup>15</sup>, the German Open Source Business Alliance (OSBA), and others, such as [ESOP](#) (Portugal), [ASOLIF](#) (Spain), [COSS](#) (Finland) or [OpenUK](#).

It is important to note not only that these platforms are used to share and develop software, but also that innovative products are being build on top of them. This is, for example, the case for the Spanish company **source{d}** which is building FOSS components to enable machine learning on source code. This has the potential of changing how software is developed, as they are aiming to enable programming that comes from teaching machines to understand and write code.

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13. <https://GitHub.com/zalando>

14. <https://GitHub.com/bmwcarit>

15. <http://www.cnll.fr/cnll/membres/>

## 3 / How are Free and Open Source collaborative software platforms targeted by the Copyright reform?

**A**rticle 13 of the proposed Copyright Directive targets “information society providers storing and giving access to large amounts of works and other subject-matter uploaded by their users”, which is precisely what software development and other code hosting platforms do:

< **Works and other subject matter:** Source code is any collection of computer instructions, possibly with comments, written using a human-readable programming language, usually as ordinary text. The users can also upload image files and audio files, e.g., icons and sound effects, as well as other assets, used with the computer program being developed. The source code is often transformed by an assembler or compiler into binary machine code, understood by the computer<sup>16</sup>. For almost all software projects, the source code that programmers develop is fundamental. Source code, text, image or audio files generally may fall under “copyright protected work or other subject matter”.

At the European level, Directive 2009/24 on the legal protection of computer programs harmonised Member States’ legislation in this field, including by defining a minimum level of protection and requiring Member States to protect computer software as such by copyright, applying to them the protection given to literary works within the meaning of the Berne Convention for the Protection of Literary and Artistic Works. EU Copyright law thus already protects any computer program, both as a whole and as regards its component parts, in the form written by a programmer, i.e., its source code, as long as it conveys a particular individual way to express the functionality of a computer program and hence is original.

< **Information society services storing and giving access:** According to the ECD, information society services are services “normally provided for remuneration, at a distance, by electronic means and at the individual request of a recipient of services”<sup>17</sup>.

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16. De Souza, Froelich & Dourish (2005). Seeking the source: software source code as a social and technical artifact. Available at: <http://dl.acm.org/citation.cfm?id=1099239>. Last accessed April 19, 2017.

17. Article 2, ECD.



Many of the tools commonly used for software development are information society services that generally store computer code in whole or in part, and allow users to share it. Users may also upload literary works or images, audio files, flow charts and other similar materials.

< **Large amounts:** Collaborative software development by its nature requires large numbers of individuals to access and edit protected works. The platforms with which they work store “large amounts” of works, i.e. source code. For example, as of April 2014, Stack Overflow had over 4,000,000 registered users, and in late August 2015 it exceeded 10,000,000 questions. As of August 2017, GitHub reports having over 23 million users and 65 million repositories. Software Heritage, with its more than 2.5 billion files, is the largest source code hosting platform in the world.

Based on this analysis, it seems clear to us that software platforms such as the ones mentioned above would fall within the scope of Article 13 of the proposed Directive.

*If the new copyright directive in any way hinders innovation for the modernization of the (...) public sector then the directive is defective and harmful.*

**Daniel Melin** : Senior Procurement Officer ICT \_ *Swedish National Procurement Services*

## 4 / What happens to software development if the proposal comes into force?

**R**ecital 38 of the proposed Directive states:

*‘where information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements with rightholders.’*

According to that Recital, this obligation to conclude agreements with rightholders is negated if the provider is eligible for the hosting safe harbour of Article 14 of the ECD. Recital 38 suggests that in order to ascertain whether the safe harbour applies or not, it is necessary to verify whether the service provider plays an active role, ‘including by optimising the presentation of the uploaded works or subject matter or promoting them, irrespective of the nature of the means used therefore’. Moreover, the idea of equating content optimisation with the platform being active is a very controversial reading of the CJEU’s case law in the area, as existing research shows<sup>18</sup>.

Article 13 of the proposed Directive, entitled ‘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’, states:

*‘Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders 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 subject-matter.’*

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18. Dr Christina Angelopoulos, “On Online Platforms and the Commission’s New Proposal for a Directive on Copyright in the Digital Single Market”, January 2017, available at: [https://juliareda.eu/wp-content/uploads/2017/03/angelopoulos\\_platforms\\_copyright\\_study.pdf](https://juliareda.eu/wp-content/uploads/2017/03/angelopoulos_platforms_copyright_study.pdf) (last accessed on 21 August 2017).



Applying the criterion of whether they “play an active role” to software development platforms and how they function, it might be considered that platforms optimise the presentation of uploaded works. For example: for every project, GitHub provides access control and several collaboration features, such as bug tracking, feature requests, task management and wikis. Stack Overflow serves as a platform for users to ask and answer questions, vote questions and answers up or down, and edit questions and answers in a fashion similar to a wiki. Users of Stack Overflow can earn reputation points and “badges”, assess the popularity of questions and of users, rank the most discussed topics, and so on – in addition, their questions are tagged, and so are searchable, based on those tags. All of these features can reflect ways of optimising content on platforms and, as such, might support the conclusion that software development platforms make copyright protected content or other subject matter available to the public.

The notion of an “active role” still remains a vague concept, which is highly dependent on the context, and impedes legislative provisions - such as those under discussion - from being easily applicable and valid over time, regardless of technological developments. It moreover raises the question of who decides what is “active” and what is not.

*Mozilla’s mission includes the principle that “free and open source software promotes the development of the internet as a public resource.” Many code hosting sites, some run by volunteers, participate in and enrich this ecosystem. For these sites, existing licensing systems, including open licensing, are effective. Requiring them all to create expensive scanning mechanisms and intrusive user monitoring, and deal with the resulting false positives, would establish a prohibitive environment for the development of open source software. This unintended negative consequence underlines just how broad, disproportionate, and dangerous the proposed Article 13 is for the health and vitality of the creative and open internet, and we continue to strongly oppose it.*

**Raegan MacDonald** : Senior EU Policy Manager \_ Mozilla

In the particular case of software development platforms, users who were not the initial creators of the published source code have the technical capability to distribute the code (or a derivative work based on the code) at a later stage in a manner that is not permitted by the terms and conditions of the specific licence under which the code was made available to them by the original author or right-holder on the platform. By way of illustration, some of the most widely used FOSS licences are the GNU General Public Licence (“GPL”) and the Berkeley Software Distribution (“BSD”) type of licence; whilst both permit redistribution of the licensed code, subject to specific terms and conditions, what may well not be permitted is distribution by the licensee of certain combinations of the code, when mixed (e.g., users are forbidden from distributing GPL-licensed code

as part of a final product to which they apply only the BSD license). Applying Article 13 to software development platforms would mean making the platforms liable for such kind of illegitimate distributions of derivative works in violation of the clear provisions of the applicable licence, without a real possibility for the platforms to audit or check the legitimacy of such distributions.

If the proposed Article 13 and Recital 38 as they stand were to be applied to these platforms, in practice this would mean that VCS platforms:

- < could be directly liable for copyright infringement if a user were to include (upload) any infringing software or other protected material;
- < could face potential liability for infringement in the event of subsequent redistribution by a platform user of protected material under a licence that was not permitted by the licensing terms applicable to the code as originally uploaded;
- < could be obliged to proactively implement filters
- < could be obliged to demonstrate that they have agreements in place with rightholders, or ex-ante prevent the appearance of content, based on specific information provided by rightholders.

If Article 13 as proposed is applied, software development platforms will need to undertake and implement permanent compliance assessment. This is usually a specialised activity, typically reserved only to software vendors for software included in their products, intended to assess the appropriate use of code, and respect for the applicable license terms and conditions. Such compliance is painstaking and expensive, and it includes extensive human assessment. Already a specialist consulting industry has grown up around such compliance assessment (such as BlackDuck, Nexb, and Triplecheck); moreover, it is not feasible fully to automate this activity or to apply it to any piece of content uploaded to a developer platform, ranging from source code to text, audio, video. In practical terms this would be impossible, especially because automated detection mechanisms do not exist for software as they do for audio-visual material. Licence compliance problems exist even for big companies, let alone the small ones. The impossibility of applying such recognition measures to software, and the associated legal uncertainty, could undermine the distribution ecosystem.

*To what extent KDE is directly impacted by the proposed regulation fully depends on whether the above setup would make us “information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users”. If yes, then we would probably need to move most of our infrastructure and organization outside of the EU.*

Thomas Pfeiffer : Board Member \_ KDE







Content recognition is not the core business of software development platforms, nor it should be. When more time and resources are spent in assessing the legality of the code uploads instead of actually developing the code, the correct balance between the legal framework and the business habitat has certainly not been achieved.

## 5 / How to avoid the fragmentation of Europe's intermediary liability legal system?

**C**urrently, intermediary liability is regulated in different pieces of EU legislation, while the cornerstone of its defences are provided in the ECD. Moreover, there is now extensive CJEU case law which has clarified the application of those safe harbours. With the introduction of a new copyright proposal as the draft Directive now stands, we face the alarming prospect of two or more conflicting EU frameworks applying to online platforms, without a clear list of criteria to justify which framework is to apply in which cases.

The obligation to “use effective content recognition technologies”, as proposed by Article 13 is incompatible with the prohibition of monitoring obligation, as enshrined in Article 15 of the ECD, and as extensively re-affirmed by the CJEU<sup>19</sup>. The proposed Recital 38 explicitly states that the obligation to implement “effective technologies” to ensure protection of works or other subject-matter also applies to those service providers which are eligible for the hosting safe harbour of Article 14 of the ECD. This obligation is not only contrary to the well-established principle of prohibition of monitoring, but is detrimental to collaborative software development, by threatening the existence of other code-hosting repositories that preserve FOSS code as cultural heritage (such as the Software Heritage initiative<sup>20</sup>, which solely provides physical facilities for source code, thus generally falling under the hosting safe harbour of the ECD).

Assuredly, if conflicting obligations apply to platforms, this will most likely not only disrupt the development of software, but also create important barriers for (or delays in) the completion of the European single market and the expansion of digital innovation.

The opinions issued by the parliamentary committees of the European Parliament vary on the topic, and unfortunately do not appropriately address the possible fragmentation of intermediary liability rules.

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19. C-70/10, *Scarlet v Sabam*; C-360/10 *Sabam v Netlog*.

20. <https://www.softwareheritage.org/>. Last accessed: July 28, 2017.



For example, Amendments 25<sup>21</sup>, 49 and 52 adopted in July 2017 by ITRE in their [Opinion](#) for the Directive proposal extend the applicability of the proposed Article 13 so as to cover all hosting providers “where [...] storage and [...] provision of access constitutes an essential part of their activities”, by requiring information service providers (i) to acquire licences to all user-generated content hosted on their platforms, regardless of whether they have editorial responsibility for that content and (ii) to cover all content generated by their users, including users that are acting for non-commercial purposes. This proposal goes beyond what is acceptable according to the CJEU, which stresses the need to strike a fair balance between the protection of copyright and the protection of other fundamental rights and freedoms.

CULT members of the European Parliament have led compromise negotiations. The Article 13 amendments adopted in their [Opinion](#) in July 2017 state (i) that platforms should conclude licensing agreements with rightholders requesting such agreements, and (ii) that platforms actively optimising content and commercially exploiting it can no longer benefit from the safe harbour of the E-Commerce Directive. Moreover, CULT states that in the absence of such agreements, platforms need to put effective technologies in place to ensure protection of works or other subject-matter.

A more positive approach is followed by IMCO, which adopted its Opinion in June 2017, which states that:

*“Regarding Article 13 (and corresponding recitals 37, 38 and 39) [...], the current wording is incompatible with the limited liability regime provided for in Directive 2000/31/EC (Electronic Commerce Directive), a piece of legislation that has proven to be enormously beneficial for the internal market in the digital sphere [...]. The Rapporteur firmly supports the notion that the value gap has to be addressed and emphasises that creators and rights holders are to receive a fair and balanced compensation for the exploitation of their works from online service providers. However, this should be achieved without negative impacts on the digital economy or internet freedoms of consumers. The current wording of Article 13 fails to achieve this. [...]”*

Amendments 23, 24, 25, 69 adopted by IMCO support the safe harbour provisions of the ECD, together with the fair balance test with other affected fundamental rights and freedoms, and the general prohibition of monitoring obligation. In addition, Amendment 72 proposes including an appropriate redress mechanism for users to appeal actions taken by the information service providers in light of Article 13 either before the courts or via another competent authority.

Similar direction has also been taken in the Draft Opinion of the LIBE Committee, which is to be voted upon in September 2017. LIBE supports not diverting from the existing intermediary liability as enshrined in the ECD when revising the role of platfor-

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21. Amendment 25: ‘An information society service provider shall be obliged to acquire licenses for copyright protected content regardless of whether they have editorial responsibility for that content. The licenses acquired by information society service providers from rightholders should be deemed to cover all user generated content by their users, including users that are acting for non-commercial purposes.’

ms in dissemination of copyrighted material. The way in which Amendment 9 rephrases Article 13.1 supports the coherence of the European legal framework of intermediary liability:

*[...] where information society service providers offer users content storage services and provide the public with access to content and **where such activity is not eligible for the liability exemptions provided for in Directive 2000/31/EC** [...] [emphasis added]*“

{ *These particular types of software development service or ‘platform’ do not belong in the proposed Copyright Directive. However, as a precautionary necessity, it is important for the European Parliament and Commission to provide legal clarity and reassurance early on in the first stage of the co-regulation procedure.* }

**James Lovegrove** : EMEA Public Affairs Director \_ Red Hat

Another LIBE amendment which would undoubtedly support the harmonisation of the EU’s legal framework is the one rephrasing Recital 38.1, by stating that information society service providers which offer users content storage services and provide the public with access to content should be obliged to conclude licensing agreements with rightholders, ‘unless they are eligible for the liability exemptions provided in Directive 2000/31/EC of the European Parliament and of the Council’. This establishes the ECD as the cornerstone of intermediary liability, and does not allow any artificial derogation from its status.

In the main parliamentary effort on copyright reform (i.e., the [Draft Report](#) issued by the JURI committee), the ex-rapporteur Therese Comodini Cachia had proposed amendments to the Commission’s proposal which relied on the ECD, and could have ensured a successful way to avoid legal fragmentation.

Amendments 22, 23, 28 and 56 of the JURI Draft Report avoid the proliferation of rules concerning intermediary liability treating the ECD and its relevant Articles 14 and 15 as the foundation for governing the liability of online platforms, with the proposed Copyright Directive in the Digital Single Market only being complementary to the ECD.

Amendments 58, 59 and 60 of that JURI Draft Report recognise the necessary balance between protecting rightholders’ intellectual property rights, and other concerned fundamental rights and freedoms of users of online services, whilst providing appropriate means of redress to challenge decisions taken by platforms at the request of rightholders. In particular, these amendments respect the lawful use of copyrighted material under exceptions and limitations to copyright by users, and a right to access the judicial system for the purpose of asserting the right of use under these exceptions.



As justified in amendment 809 to the JURI draft report, Internet today is the most crucial source of information available to many users.

*“Making online service providers responsible for the uploaded content, including texts, videos or images to be filtered and monitored is against users’ interests and the rights of creators. Monitoring and filtering large volume of materials before it is uploaded on the web will not only be only financially challenging for small companies, but it will change the Internet as we know. The eCommerce directive provides for a well balanced practice with removal of the illegal content following the notification.”*

It is especially noteworthy that legislation is not the place to define the particular measures for ensuring agreements concluded between platforms and rightholders for the use of their works, considering the rapidity of technological advancements and to ensure that the newly proposed Copyright Directive can still be applicable over time, when such technological advancements become reality. Considering the fact that the proposed Copyright Directive is targeted at modernising existing copyright rules for the digital age, it is especially important to maintain technological neutrality within any such Directive. Hence, any mention of specific technological measures should be abandoned, in order to establish future-proof rules for online environment and not to hamper innovation within the Digital Single Market. In this sense, Amendment 61<sup>23</sup> of the Draft Opinion goes in the right direction, by replacing any reference to content recognition technologies.

Before the legislative negotiations are concluded, the following points need to be addressed in a successful manner:

- < the lack of balance between the rightholders’ rights and the aforementioned fundamental rights;
- < the economic, technological and even legal challenges of content recognition technologies;
- < the practical impossibility of applying filters to control code being uploaded onto software platforms; and
- < the lack of justification for targeting literally all online platforms which store large amounts of content (including software development platforms), when the allegedly identified problem does not apply to them.

Unless this is achieved, the proposed Article 13 should be deleted, such as suggested by amendments 798, 799 and 800 in the JURI draft report.

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23. “Member States shall facilitate, where appropriate, the cooperation between the information society service providers and rightholders through stakeholder dialogues to define best practices for the implementation of appropriate and proportionate measures, taking into account, among others, the nature of the services, the availability of the technologies and their effectiveness in light of technological developments.”

## 6 / Conclusions

**T**he proposed **Copyright Directive** attempts to tackle the ‘value gap’ through the introduction of a set of alternative obligations targeted at ‘information society service providers that store and provide access to large amounts of works or other subject-matter uploaded by their users.’ Applying these key components of Article 13 to software platforms, this paper concludes that those platforms certainly fall under the scope of the provisions. Under the current proposal, software platforms would no longer be able to operate as they do today and software developers’ ability to share source code and collaborate in its development would be hampered. This will create important barriers for (or delays in) the completion of the European single market and the expansion of digital innovation.

*Article 13 creates a high level of uncertainty for the software industry and the free and open source software community, which are drivers of economic growth, jobs, education, innovation, and the democratization of technology. The article should be struck entirely, or at least tailored to exclude software development.*

Tal Niv : VP Law and Policy \_ [GitHub](#)

Currently, intermediary liability is regulated through different pieces of EU legislation, while the ECD provides the cornerstone of its defences. While formally stating that the ECD will not be opened for review, the Copyright proposal currently under review to a large extent narrows the scope of the ECD’s application, by modifying the definitions on which the very ECD is based. Although it is true that those definitions were agreed more than one decade ago, if there is an identified and evidenced need to update the ECD, then this should be done in a transparent way, not by ricochet, such as redefining concepts that ECD regulates and declaring that in certain very vaguely defined conditions, the ECD will not apply.

As shown in this paper, Article 13 as currently proposed shifts the responsibility for protecting allegedly infringed rights from rightholders to platforms. Various EP committees have adopted their opinions (IMCO, ITRE, CULT) and more will follow (LIBE, JURI). This paper highlights some of the amendments which support the safe harbour provisions of the ECD, together with the fair balance test, with other affected fundamental rights and freedoms, and the general prohibition of monitoring obligation.



If such an important economic sector as software development has been missed, there possibly are others that may be harmed by Article 13. Better understanding about the impact of Article 13 in the different application cases, and better awareness about where and how innovation takes place in the current market, are a first step in order to create a proper regulatory framework.

Unless special attention is paid, the current legislative discussions might end with the European Parliament adopting a report which has negative impact on an entire and substantial area of business activity which has very little to do with the Directive's intended subject matter.

# / About

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