Annex 1

Scope of Article 13 (i.e. the definition of an OCSSP)

Going directly to the Licensing Obligation avoids introducing issues of considerable complexity around the hosting defence and the CTP right (summarised below) which raise serious issues of concern and disagreement among stakeholders.

	Approaches proposed in JURI or Council texts	**Issues of concern**
1)	Definitively states that an OCSSP performs an act of CTP[1]	• This materially risks amending the scope of the CTP right in other contexts and substantially expands its scope which goes far beyond any 'clarification' of the right. • Any such amendment creates a significant risk of adversely affecting the digital economy on a much broader scale that has implications going far beyond OCSSPs. • There is no need to mandate that an OCSSP performs an act of CTP to introduce the Licensing Obligation.
2)	Use of 'without prejudice' wording to limit the potential broadening of the CTP right to Article 13 only[2]	• Such wording does not 'fix' the issue or lead to legal certainty. • It risks creating uncertainty over whether the CTP right under Article 3 of Directive 2001/29 would be interpreted by reference to the approach taken in Article 13 – and in doing so, creates uncertainty over the scope of application of the CTP right generally. • For example, in Case C-117/15 *Reha Training*, the CJEU reasoned that the scope of the CTP right under Directive 2001/29 must be affected by how that right was referred to in subsequent legislation (namely Directive 2006/115) as there was no evidence that the EU legislature wished to confer a different meaning upon CTP in the respective contexts.[3] • Therefore, there is a real risk, under the current drafting, that 'without prejudice' wording will simply be interpreted to mean that the existing CTP right should be interpreted consistently with Article 13, even outside the context of OCSSPs.

[1] E.g. See JURI compromise text (v4 - 28 March 2018): "*Without prejudice of Art. 3 (1) and (2) of the Directive 2001/29/EC, online content sharing service providers perform an act of communication to the public and shall conclude fair and appropriate licensing agreements with rightholders, unless the rightholder does not wish to grant a license.*." and Council compromise text (13 April 2018), Article 13(1): "*Without prejudice to the application of Article 3(1) and (2) of Directive 2001/29/EC, 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 within the meaning of Article 3(1) and (2) of Directive 2001/29/EC when it intervenes in full knowledge of the consequences of its action to give the public access to copyright protected works or other protected subject matter uploaded by its users*."

[2] Ibid.

[3] Case C-117/15, *Reha Training*, at [30]–[34].

	Approaches proposed in JURI or Council texts	**Issues of concern**
3)	Prevent an OCSSP from relying on the hosting defence where it performs an act of CTP[4]	• The very purpose of Article 14 ECD is to provide protection where the OCSSP would otherwise have engaged in an unlawful act. Removing an act of CTP from the protective scope of Article 14 ECD is unnecessary to achieve the objectives of Article 13, particularly if a licensing obligation (or technical measures obligation) is imposed on the OCSSP. • The legal uncertainty arising from changing the scope of Article 14 'by the back door' is disproportionate and risks adversely affecting the digital economy.
4)	Putting the burden of proof onto the OCSSP to prove that it has made best efforts to prevent the availability of unauthorised works[5]	• It is unreasonable and impractical to reverse the conventional onus of proof to require the OSSP to prove a negative act – namely, to have prevented a specific work from being made available. • To the extent that any liability for an act of CTP or making available is to be addressed by Article 13, it is more appropriate to require the OCSSP to take the requisite degree of effort (whether it is "reasonable efforts" or "best efforts") without any requirement on the OCSSP to prove the consequences of its actions.

[4] E.g. see Council compromise text dated 13 April 2018, Article 13(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, it shall not be eligible for the exemption of liability provided for in Article 14 of Directive 2000/31/EC for unauthorised acts of communication to the public and making available to the public, without prejudice to the possible application of Article 14 of Directive 2000/31/EC to those services for purposes other than copyright relevant acts.*" and recital (38c).

[5] See Council compromise text (13 April 2018) at clause 13(4)(a): *"Member States shall provide that an [OCSSP] shall not be liable for unauthorised acts of [CTP] or making available to the public when (a) it proves that it has made best efforts to prevent the availability of specific unauthorised works or other subject matter for which rightholders have provided it with information by implementing effective measures to prevent the availability on its services of the specific unauthorised works or other subject matter identified by rightholders; and (b) upon notification by rightholders of works or other subject matter, it has acted expeditiously to remove or disable access to these specific unauthorised works or other subject matter and it proves that it has made its best efforts to prevent their future availability through the measures referred to in point (a)."* (emphasis added)

Annex 2

"Technical measures" under Article 13 and potential conflict with Article 15 ECD

Example 1 - JURI compromise text (version 4) of 28 March 2018

Article 13(1) reads:

> "*In the absence of licensing agreements with rightsholders online content sharing service providers shall take, in cooperation with rightholders, appropriate and proportionate measures leading to the non-availability of copyright or related-right infringing works or other subject-matter on those services, while non-infringing works and other subject matter shall remain available*." [emphasis added]

If read in isolation[6], Article 13(1) could arguably be interpreted as imposing an absolute, outcome-based obligation on the OCSSP to take measures that must lead to the non-availability of all infringing works on their platforms – even those of which the OCSSP has not been specifically notified by rightholders.

Such an interpretation would contradict Article 15 ECD because it effectively imposes a general obligation on the OCSSP to monitor and detect copyright-infringing works.[7] It would also be impossible to comply with, since no OCSSP could ensure a 100% success rate in removing infringing works using currently available technical measures. This is perhaps not what was intended, but highlights the importance of clear drafting.

[6] For instance, Article 13(1) fails to carry across the reference contained in Recital (39) to the technical measures obligation being limited to works of which the OSCCP has been specifically and duly notified.

[7] The fact that technical measures are to be used rather than individual human monitoring does not alter the fact that a general monitoring obligation is being imposed, as the CJEU confirmed in Case C-70/10 *Scarlet Extended SA v SABAM*, at [40].