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Minutes of the eighth meeting of the Copyright review Inter-Service Steering Group

Brussels, 26 July 2016

The Chair, [redacted] (SG.E2), opened the meeting and referred to the positive opinion just issued by the Regulatory Scrutiny Board on the draft impact assessment. The purpose of this meeting is to examine the draft legal texts ahead of the inter-service consultation, which will be held at the end of August (exact date to be confirmed), in view of their adoption on 21 September. The draft legal texts circulated prior to this meeting do not include the provisions related to the role of online intermediaries in the distribution of protected content (so-called 'value gap' issue). These provisions are still being drafted and will be added at a later stage. This issue was discussed at the meeting of the Commissioners project team, which took place on 20 July.

DG CNECT explained that these draft legal texts were reflecting the measures considered in the draft impact assessment. DG CNECT decided to address certain measures related to territoriality (application of country of origin principle to ancillary broadcasting services and collective management for retransmission rights) by way of a Regulation as it was more appropriate to ensure their swift and homogeneous application. Other issues, some of which affect the existing copyright acquis, are treated in a draft Directive. Discussions with the Legal Service already took place as regards the draft Regulation only. On the 'value gap' issue, Commissioners indicated a clear preference for the third alternative presented in the note prepared by the SG for this meeting, namely an obligation for certain types of platforms to deploy technological measures, coupled with an indication of the role they play in relation to the distribution of protected content.

The group reviewed the two draft legal texts article by article, as well as their corresponding recitals, and made the following principal comments:

1) Draft Directive on copyright in the Digital Single Market

Article 3 (text and data mining) and corresponding definitions in Article 2

DG CNECT briefly introduced the provisions.

DG RTD stressed the key importance of the definition of beneficiaries. This definition need to ensure that new collaborative entities, such as those set up to implement research public-private partnerships, can benefit from the exception. It would also be useful to bring certain elements mentioned in the recitals into the definition and to indicate clearly that both non-commercial and commercial purposes are covered.

DG JRC questioned the exclusion of situations where preferential treatment is granted to a private entity, since this could result in excluding de facto most cases of public-private partnerships.

As a preliminary feedback, DG EAC stressed the need for a clear and adequate definition of the beneficiaries, in particular in view of the absence of limitation related to the purpose of the research. DG EAC also asked about the meaning of 'widely disseminate of the results of such activity through educational activities' in Article 2.

DG GROW asked whether research organisations are covered or not by the exception when they do research: 1) in a PPP (but not private enterprises parties to a PPP); 2) under a contract with a private enterprise.

DG TRADE suggested clarifying in the definition that text and data mining (TDM) is an activity involving a large volume of text/data. DG TRADE also asked why the notion of 'public interest' did not appear in the exception. Making this exception conditional to the availability of licences could also have been done for this exception, as is the case for the proposed teaching exception.

LS expressed general doubts about the proposed approach, which in their view does not achieve the objective of ensuring legal certainty for users. In particular, the definition should be redrafted and made consistent with Recital 9. Clarifications were also asked in relation to the objective and need for Article 3.3 and corresponding Recital 10 (measures to ensure security and integrity of networks), which in any case need to be reformulated. In addition, Recital 10 may raise compatibility issues with EU legislation on data protection.

DG CNECT explained that the definition of beneficiaries was inspired by the State aid framework and drafted in a way that would allow research organisations fulfilling the requirements of Article 2 to benefit from the exception also when they are engaged in a public-private partnership. In line with the political guidelines, private companies taking part in PPPs would not be covered. The 'preferential treatment' safeguard has been included in order to avoid circumvention of the scope of the exception. The reference to the dissemination of results through educational activities in Article 2 is designed to include also universities. It would not be appropriate to add an indication of the volume of text/data involved in TDM activities since the mining activity may actually take place also on a few articles. Conditioning this exception to the availability of licences is not the approach that has been proposed in the draft impact assessment, in view of the nature of this exception and its limited impact on right holders. The main safeguard for right holders in this context is the lawful access requirement. As regards Article 3.3, it refers to measures that may be put in place by right holders to avoid technical problems arising from massive amounts of TDM requests that could affect the stability of their service, as well as to be able to verify that the user is affiliated with the entity that benefits from the exception. Research carried out under a contract would be covered if it is part of a specific PPP but not if there is a more structural contractual relationship with a private company which would amount to a circumvention of the scope of the exception.

Article 4 (teaching exception)

Legal Service enquired about the link with the Article 114 legal base and raised concerns about paragraph 2 (flexibility for MS to make the exception subject to the non-availability of licences).

DG EAC asked whether the formulation of the exception was broad enough to cover all teaching activities, including those taking place outside the classroom. In terms of beneficiaries, 'pupils and teaching staff' should be replaced by 'learners and educators'. Article 4.2 (flexibility mechanism) should specify that the licences should be practicable, usable and affordable.

DG TRADE supported the approach and suggested adding examples of existing types of licences in the relevant recital.

DG EMPL regretted the absence of a wider self-standing exception for all disabled persons and all digital activities, as a complement to the implementation of the Marrakesh Treaty. As far as the teaching exception is concerned, it needs to clearly mention that adaptations (e.g. additional features such as sub-titles) required for the use of the works in teaching material for disabled people are also covered by the exception, otherwise they would not be able to benefit from it. These adaptations are often provided by institutions different from educational establishments and should thus they also be included in the list of beneficiaries.

DG CNECT indicated that the Article 4.2 provides that licences must be 'adequate', which addresses the issue of usability raised by DG EAC. As far as affordability is concerned, this aspect is not covered yet but could be explored. Examples of existing licences could be added to the Recital. Concerning disabled persons, they can of course benefit from the teaching exception. Going beyond what is provided would however amount to a general extension of the disability exception, which is not the objective of this measure.

Article 5 (preservation exception)

DG EAC asked to clarify that the purpose of the exception is to enable long-term preservation.

SG asked why there was no provision preventing contractual override of the exception.

LS supported the addition of a ban on contractual override.

DG CNECT indicated that, as to the scope of the exception, it was already framed in a very precise way and should thus not be further restricted. Moreover, no situation where a risk of contractual override could occur had been identified hence there appears to be no need for a specific provision on this matter.

Article 6 (link with other Directives)

LS will suggest alternative approach and drafting ('*This Directive shall not affect Directive 2001/29/EC…*').

Articles 7 and 8 (out-of-commerce works)

LS expressed disagreement with the approach, in view of the position taken by the Commission in front of the Court in a pending case. A careful approach is also necessary in order to comply with international obligations and to safeguard the interests of authors.

DG TRADE asked whether right holders that were represented by the collective management organisation also had the possibility to opt-out form the system. The publicity requirement should apply across borders and beyond the EU.

DG EMPL reiterated the comments made concerning the teaching exception: it should be specified that the exception also covers the act of enriching the material with special features aimed at making it accessible to disabled persons.

DG CNECT clarified that the chosen approach offered a practical solution through which all right holders, including outsiders, would be covered.

Articles 10, 11 and 12 (rights in publications)

DG RTD asked why scientific publishers were singled out in Recital 30 and expressed concern that, with the current wording, TDM could constitute an exception that may be subject to compensation as foreseen in Article 12.

DG COMP expressed support for the creation of a neighbouring right for news publishers. The idea of adding a requirement for parties to negotiate in good faith could also be considered.

LS expressed serious doubts about the justification for the creation of a new neighbouring right for news publishers, in particular since no such right exists at international level. The LS also raised number of concerns about the proposed approach of granting news publishers the same rights as authors, about the unduly wide scope of the definition of news publications and the absence of safeguard to guarantee that the rights of authors will not be negatively affected. The object of the protection should also be more clearly defined.

SG stated that the duration of the protection for news publishers should be proportionate to the objective of the intervention and nature of the protected content.

DG CNECT clarified that the reference to scientific publishers in Recital 30 was meant to identify them clearly as potential beneficiaries of a compensation for private copy since they are strongly affected by this issue. Article 12 does not apply to the TDM exception since Member States are not allowed to introduce a compensation mechanism in the case of TDM. DG COMP's recommendation to introduce an obligation of good faith negotiation has been considered and discarded as right holders themselves are not calling for it and even fear that, by putting conditions on the way it should be exercised, such measure could weaken their exclusive right. As regards the impact on authors of a new neighbouring right for news publishers, Article 10.2 clearly states that authors' rights shall not be affected. If considered insufficient, ways to strengthen this safeguard could be explored. As regards the term of the neighbouring right, various options are under consideration and will be subject to a political decision.

2) Draft Regulation on rules concerning exercising copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of televisions and radio programmes.

SG asked why 'broadcasting organisation' were not defined in Article 1. SG also noted the lack of clarity as regards the period of time after the initial broadcast during which a service qualifies as ancillary. Leaving this open makes it possible for broadcasting organisations to rely on the country of origin principle for programmes offered during potentially very long periods of time, which would be very similar to an on-demand service. SG also asked whether sports programmes were covered by Article 2 and whether the possibility to have more precise rules on the definition of the place of establishment of the broadcasting organisation, for instance along the lines of the AVMSD rules on establishment, could be considered.

DG EAC asked for the addition of a definition of the 'main service', i.e. the initial broadcasting transmission. DG EAC also stressed the lack of clarity regarding the definition of catch-up services and the risk of overlap with video-on-demand services. Further clarity should also be provided as regards the definition of additional ancillary services. Overall, the scope of Article 2 should be more precisely defined in order to achieve better legal certainty. As regards the definition of 'retransmission', it should state that it only covers 'closed networks of users'.

DG COMP suggested deleting the last sentence of Recital 10, as there is no basis to state that a distortion of competition could occur between the mentioned services. DG COMP also enquired whether the case where a piece of content is made available online first and broadcast linearly later had been envisaged. The definitions of catch-up and additional ancillary services should not be too strictly formulated in order to remain future-proof. The review clause should refer specifically to a possible extension in the light of market developments. DG COMP also questioned the need for a transition period and stated that if one was included it should be shorter than the proposed 3 years.

DG JUST echoed the comments made by DG COMP as regards the need to keep definitions of catch-up and additional ancillary services as open as possible and as regards the scope of the review.

LS stressed the need to strengthen the justification for imposing mandatory collective management.

DG CNECT responded that it had not been considered necessary to include a definition of broadcasting organisation, reflecting the approach followed in other copyrights instruments. More precise rules on their establishment were also not considered appropriate in this context. The reference to their principal establishment, to be interpreted in light of the Court's case law, provides sufficient legal certainty for the purpose of this measure. The instrument only concerns copyright-protected content so the main assumption is that it does not cover sports programmes, even though there is a degree of uncertainty as to their status under copyright law. As regards catch-up services, the definition and corresponding recital are striking an appropriate balance by relying on the concept of the 'ancillary' nature of the service, which implies a link with the initial broadcast and should thus allow avoiding overlaps with other types of services. As regards the last sentence of Recital 10 (currently referring to distortion of competition), its aim is to further establish the distinction between catch-up and on-demand services. Its drafting can however be adjusted in order to avoid any confusion from a competition perspective. Thoughts will be given to the potential case mentioned by DG COMP where the first transmission would be done online first. Concerning the definition of retransmission, it does not contain the wording 'closed network of users' but the current text already describes the scope with a similar effect.

Next steps

DGs were invited to send their comments or contributions to DG CNECT ([redacted]), with copy to the SG ([redacted]) by 29 July cob. The inter-service consultation (fast-track) is planned to be launched at the end of August, in order to enable adoption on 21 September.

[e-signed]
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