

EUROPEAN
COMMISSION

Brussels, **XXX**
[...](2016) **XXX** draft

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on copyright in the Digital Single Market

(Text with EEA relevance)

EXPLANATORY MEMORANDUM

1. CONTEXT OF THE PROPOSAL

• Reasons for and objectives of the proposal

The evolution of digital technologies has changed the way works and other protected subject-matter are created, produced, distributed and exploited. New uses have emerged as well as new actors and new business models. In the digital environment, cross-border uses have also intensified and new opportunities for consumers to access copyright-protected content have materialised. Even though the objectives and principles laid down by the EU copyright framework remain sound, there is a need to adapt it to these new realities. Intervention at EU level is also needed to avoid fragmentation in the internal market. Against this background, the Digital Single Market Strategy¹ adopted in May 2015 identified the need “to reduce the differences between national copyright regimes and allow for wider online access to works by users across the EU”. This Communication highlighted the importance to enhance cross-border access to copyright-protected content services, facilitate new uses in the fields of research and education, and clarify the role of online services in the distribution of works and other subject-matter. In December 2015, the Commission issued a Communication ‘Towards a modern, more European copyright framework’². This Communication outlined targeted actions and a long-term vision to modernise EU copyright rules. This proposal is one of the measures aiming at addressing specific issues identified in that Communication.

Exceptions and limitations to copyright and neighbouring rights are harmonised at EU level. Some of these exceptions aim at achieving public policy objectives, such as research or education. However, as new types of uses have recently emerged, it remains uncertain whether these exceptions are still adapted to achieve a fair balance between the rights and interests of authors and other rightholders on the one hand, and of users on the other. In addition, these exceptions remain national and legal certainty around cross-border uses is not guaranteed. In this context, the Commission has identified three areas of intervention: digital and cross-border uses in the field of education, text and data mining in the field of scientific research and preservation of cultural heritage. The objective is to guarantee the legality of certain types of uses in these fields, including across borders. As a result of a modernised framework of exceptions and limitations, researchers will benefit from a clearer legal space to use innovative text and data mining research tools, teachers and students will be able to take advantage from digital technology in education and cultural heritage institutions (i.e. publicly accessible libraries or museums, archives or film or audio heritage institutions) will be supported in their efforts to preserve the cultural heritage, to the ultimate advantage of EU citizens.

Despite the fact that digital technologies should facilitate cross-border access to works and other subject-matter, obstacles remain, in particular for uses and works where clearance of rights is complex. This is the case for cultural heritage institutions wanting to provide online access, including across borders, to out-of-commerce works contained in their catalogues. As a consequence of these obstacles European citizens miss opportunities to access cultural heritage. The proposal addresses these problems by introducing a specific mechanism to facilitate the conclusion of licences for the dissemination of out-of-commerce works by cultural heritage institutions. As regards audiovisual works, despite the growing importance of video-on-demand platforms, EU audiovisual works only constitute one third of works

¹ COM(2015) 192 final.

² COM(2015) 626 final.

available to consumers on those platforms. Again, this lack of availability partly derives from a complex clearance process. This proposal provides for measures aiming at facilitating the licensing and clearance of rights process. This would ultimately facilitate consumers' cross-border access to copyright-protected content.

Evolution of digital technologies has led to the emergence of new business models and reinforced the role of the Internet as the main marketplace for the distribution and access to copyright-protected content. In this new framework, rightholders face difficulties when seeking to license their rights and be remunerated for the online distribution of their works. This could put at risk the development of European creativity and production of creative content. It is therefore necessary to guarantee that authors and rightholders receive a fair share of the value that is generated by the use of their works and other subject-matter. Against this background, this proposal provides for measures aiming at improving the position of rightholders to negotiate and be remunerated for the exploitation of their content by online services giving access to user-uploaded content. A fair sharing of value is also necessary to ensure the sustainability of the news publications sector. News publishers are facing difficulties in licensing their publications online and obtaining a fair share of the value they generate. This could ultimately affect citizens' access to information. This proposal provides for a new right for news publishers aiming at facilitating online licensing of their publications, the recoupment of their investment and the online enforcement of their rights. It also addresses existing legal uncertainty as regards the possibility for all publishers to receive a share in the compensation for uses of works under an exception. Finally, authors and performers often have a weak bargaining position in their contractual relationships, when licensing their rights. In addition, transparency on the revenues generated by the use of their works or performances often remains limited. This ultimately affects the remuneration of the authors and performers. This proposal includes measures to improve transparency and better balanced contractual relationships between authors and performers and those to whom they assign their rights. Overall, the measures proposed in title IV of the proposal aiming at achieving a well-functioning market place for copyright are expected to have in the medium term a positive impact on the production and availability of content and on media pluralism, to the ultimate benefit of consumers.

- **Consistency with existing policy provisions in the policy area**

The Digital Single Market Strategy puts forward a range of initiatives with the objective of creating an internal market for digital content and services. In December 2015, a first step has been undertaken by the adoption by the Commission of a proposal for a Regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market³.

The present proposal aims at addressing several of the targeted actions identified in the Communication 'Towards a modern, more European copyright framework'. Other actions identified in this Communication are covered by the 'Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes'⁴, the 'Proposal for a Regulation of the European Parliament and of the Council on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or

³ COM(2015) 627 final.

⁴ [Reference to be included]

otherwise print disabled’⁵ and the ‘Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society’⁶, adopted on the same date of this proposal for a Directive.

This proposal is consistent with the existing EU copyright legal framework. This proposal is based upon, and complements the rules laid down in Directive 96/9/EC⁷, Directive 2001/29/EC⁸, Directive 2006/115/EC⁹, Directive 2009/24/EC¹⁰, Directive 2012/28/EU¹¹ and Directive 2014/26/EU¹². Those Directives, as well as this proposal, contribute to the functioning of the internal market, ensure a high level of protection for right holders and facilitate the clearance of rights.

This proposal complements Directive 2010/13/EU¹³ and the proposal¹⁴ amending it.

- **Consistency with other Union policies**

This proposal would facilitate education and research, improve dissemination of European cultures and positively impact cultural diversity. This Directive is therefore consistent with Articles 165, 167 and 179 of the Treaty on the Functioning of the European Union (TFEU). Furthermore, this proposal contributes to promoting the interests of consumers, in accordance with the EU policies in the field of consumer protection and Article 169 TFEU, by allowing a wider access to and use of copyright-protected content.

2. LEGAL BASIS, SUBSIDIARITY AND PROPORTIONALITY

- **Legal basis**

The proposal is based on Article 114 TFEU. This Article confers on the EU the power to adopt measures which have as their object the establishment and functioning of the internal market.

⁵ [Reference to be included]

⁶ [Reference to be included]

⁷ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 077, 27.03.1996, p. 20-28).

⁸ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10-19).

⁹ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 376, 27.12.2006, p. 28-35).

¹⁰ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ L 111, 5.5.2009, p. 16-22).

¹¹ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (OJ L 299, 27.10.2012, p. 5-12).

¹² Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (OJ L 84, 20.3.2014, p. 72-98).

¹³ Directive 2010/13/EU of the European Parliament and of the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services (Audiovisual Media Services Directive) (OJ L 95, 15.4.2010, p. 1-24).

¹⁴ COM(2016) 287 final.

- **Subsidiarity (for non-exclusive competence)**

Since exceptions and limitations to copyright and related rights are harmonised at EU level, the margin of manoeuvre of Member States in creating or adapting them is limited. In addition, intervention at national level would not be sufficient in view of the cross-border nature of the identified issues. EU intervention is therefore needed to achieve full legal certainty as regards cross-border uses in the fields of research, education and cultural heritage.

Some national initiatives have already been developed to facilitate dissemination of and access to out-of-commerce works. However, these initiatives only exist in some Member States and are only applicable on the national territory. EU intervention is therefore necessary to ensure that licensing mechanisms for the access and dissemination of out-of-commerce works are in place in all Member States and to ensure their cross-border effect. As regards online exploitation of audiovisual works, to foster the availability of European works on video-on-demand platforms across the EU, there is a need to facilitate negotiations of licensing agreements in all Member States.

Online distribution of copyright-protected content is by essence cross-border. Only mechanisms decided at European level could ensure a well-functioning marketplace for the distribution of works and other subject-matter and to ensure the sustainability of the publishing sector in the face of the challenges of the digital environment. Finally, authors and performers should enjoy in all Member States the high level of protection established by EU legislation. In order to do so and to prevent discrepancies across Member States, it is necessary to set an EU common approach to transparency requirements and mechanisms allowing for the adjustment of contracts in certain cases as well as for the resolution of disputes.

- **Proportionality**

The proposal provides for mandatory exceptions for Member States to implement. These exceptions target key public policy objectives and uses with a cross-border dimension. Exceptions also contain conditions that ensure the preservation of functioning markets and rightholders' interests and incentives to create and invest. **When relevant, room for national decision has been preserved.** LS: to be reviewed in line with LS comments in note: " When possible without endangering the aim of the directive , room for national approaches has been preserved" or some such wording

The proposal requires Member States to establish mechanisms aiming at facilitating the clearance of copyright and related rights in the fields of out-of-commerce works and online exploitation of audiovisual works. Whereas the proposal aims at ensuring a wider access and dissemination of content, it does so while preserving the rights of authors and other rightholders. Several conditions=? out-out possibilities are not conditions and generally: see above comment are put in place to that effect (e.g. opt-out possibilities, preservation of licensing possibilities, participation in the negotiation forum on a voluntary basis). The proposal leaves sufficient room= sufficient room? If at all (but see LS general issue on this matter) turn round and say something along the lines of "the proposal does not go further than necessary for achieving the intended aim, leaving MS a degree room.." for Member States to make decisions as regards the specifics of these mechanisms and does not impose disproportionate costs.

The proposal imposes obligations on some information society services. However, these obligations remain reasonable in view of the nature of the services covered, the significant impact of these services on the online content market and the large amounts of copyright-protected content stored by these services. The introduction of a related right for news

publishers would improve legal certainty and their bargaining position, which is the pursued objective. The proposal is proportionate as it only covers news publications and digital uses. The transparency obligation contained in the proposal only aims at rebalancing contractual relationships between creators and their contractual counterparts while respecting contractual freedom.

- **Choice of the instrument**

The proposal relates to, and in some instances modifies, existing Directives. It also leaves, when appropriate and taking into account the aim to be achieved, margin of manoeuvre for Member States while ensuring that the objective of a functioning internal market is met. The choice of a Directive is therefore adequate.

3. RESULTS OF EX-POST EVALUATIONS, STAKEHOLDER CONSULTATIONS AND IMPACT ASSESSMENTS

- **Ex-post evaluations/fitness checks of existing legislation**

The Commission carried out a review of the existing copyright rules between 2013 and 2016 with the objective to “ensure that copyright and copyright-related practices stay fit for purpose in the new digital context”¹⁵. Even if it started before the adoption of the Commission's Better Regulation Agenda in May 2015¹⁶, this review process was carried out in the spirit of the Better Regulation guidelines. The review process highlighted, in particular, problems with the implementation of certain exceptions and their lack of cross-border effect¹⁷ and pointed out to difficulties in the use of copyright-protected content, notably in the digital and cross-border context that have emerged in recent years.

- **Stakeholder consultations**

Several public consultations were held by the Commission. The consultation on the review of the EU copyright rules carried out between 5 December 2013 and 5 March 2014¹⁸ provided the Commission with an overview of stakeholders' views on the review of the EU copyright rules, including on exceptions and limitations and on the remuneration of authors and performers. The public consultation carried out between 24 September 2015 and 6 January 2016 on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy¹⁹ provided evidence and views from all stakeholders on the role of intermediaries in the online distribution of works and other subject-matter. Finally, a public consultation was held between the 23 March 2016 and 15 June 2016 on the role of publishers in the copyright value chain and on the 'panorama exception'. This consultation allowed collecting views notably on the possible introduction in EU law of a new related right for publishers.

In addition, between 2014 and 2016, the Commission had discussions with the relevant stakeholders on the different topics addressed by the proposal.

¹⁵ COM(2012) 789 final.

¹⁶ COM(2015) 215 final.

¹⁷ Covering, respectively, the exception on illustration for teaching and research (as it relates to text and data mining) and on specific acts of reproduction (as it relates to preservation).

¹⁸ Reports on the responses to the consultation available on:

http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf

¹⁹ First results available on <https://ec.europa.eu/digital-single-market/news/first-brief-results-public-consultation-regulatory-environment-platforms-online-intermediaries>

- **Collection and use of expertise**

Legal²⁰ and economic²¹ studies have been conducted on the application of Directive 2001/29/EC, on the economic impacts of adapting some exceptions and limitations, on the legal framework of text and data mining and on the remuneration of authors and performers.

- **Impact assessment**

An impact assessment was carried out for this proposal²². On 22 July 2016, the Regulatory Scrutiny Board gave a positive opinion on the understanding that the impact assessment will be further improved.²³ The final Impact Assessment takes into account comments contained in that opinion.

The Impact Assessment examines the baseline scenarios, policy options and their impacts for eight topics regrouped under three chapters, namely (i) ensuring wider access to content, (ii) adapting exceptions to digital and cross-border environment and (iii) achieving a well-functioning marketplace for copyright. The impact on the different stakeholders was analysed for each policy option; taking in particular into account the predominance of SMEs in the creative industries the analysis concludes that introducing a special regime would not be appropriate as it would defeat the purpose of the intervention. The policy options of each topic are shortly presented below.

Access and availability of audiovisual works on video-on-demand platforms: A non-legislative option (Option 1), consisting in the organisation of a stakeholder dialogue on licensing issues, was not retained as it was deemed insufficient to address individual cases of blockages. The chosen option (Option 2) combines the organisation of a stakeholder dialogue with the obligation for Member States to set up a negotiation mechanism.

Out-of-commerce works: Option 1 required Member States to put in place legal mechanisms, with cross-border effect, to facilitate licensing agreements for out-of-commerce books and learned journals and to organise a stakeholder dialogue at national level to facilitate the implementation of that mechanism. Option 2 went further since it applied to all types of out-of-commerce works. This extension was deemed necessary to address the licensing of out-of-commerce works in all sectors. Option 2 was therefore chosen.

²⁰ Study on the application of Directive 2001/29/EC on copyright and related rights in the information society: http://ec.europa.eu/internal_market/copyright/studies/index_en.htm; Study on the legal framework of text and data mining: http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study2_en.pdf; Study on the making available right and its relationship with the reproduction right in cross-border digital transmissions: http://ec.europa.eu/internal_market/copyright/docs/studies/141219-study_en.pdf; Study on the remuneration of authors and performers for the use of their works and the fixation of their performances: <https://ec.europa.eu/digital-single-market/en/news/commission-gathers-evidence-remuneration-authors-and-performers-use-their-works-and-fixations>; Study on the remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works: [\[hyperlink to be included – publication pending\]](#)

²¹ Study “Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU”: http://ec.europa.eu/internal_market/copyright/docs/studies/131001-study_en.pdf and “Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU – Analysis of specific policy options”: http://ec.europa.eu/internal_market/copyright/docs/studies/140623-limitations-economic-impacts-study_en.pdf

²² Add link to IA and Executive Summary.

²³ Add link to RSB opinion.

Use of works and other subject-matter in digital and cross-border teaching activities: Option 1 consisted in providing guidance to Member States on the application of the existing teaching exception in the digital environment and the organisation of a stakeholder dialogue. This was considered not sufficient to ensure legal certainty, in particular as regards cross-border uses. Option 2 required the introduction of a mandatory exception with a cross-border effect covering digital and online uses. Option 3 is similar to Option 2 but leaves some flexibility to Member States that can decide to apply the exception depending on the availability of licences. This option was deemed to be the most proportionate one.

Text and data mining: Option 1 consisted in self-regulation initiatives from the industry. Other options consisted in the introduction of a mandatory exception covering text and data mining. In Option 2, the exception only covered uses pursuing a non-commercial scientific research purpose. Option 3 allowed uses for commercial scientific research purpose but limited the benefit of the exception to some beneficiaries. Option 4 went further as it did not restrict beneficiaries. Option 3 was deemed to be the most proportionate one.

Preservation of cultural heritage: Option 1 consisted in the provision of guidance to Member States on the implementation of the exception on specific acts of reproduction for preservation purposes. This Option was rejected as it was deemed insufficient to achieve legal certainty in the field. Option 2, consisting in a mandatory exception for preservation purposes by cultural heritage institutions, was chosen.

Use of copyright-protected content by information society services storing and giving access to large amounts of works and other subject-matter uploaded by their users: Option 1 consisted in the organisation of a stakeholder dialogue. This approach was rejected as it would have a limited impact on the possibility for rightholders to determine the conditions of use of their works and other subject-matter. The chosen option (Option 2) goes further and provides for an obligation for certain service providers to put in place appropriate technologies and fosters the conclusion of agreements with rightholders.

Rights in publications: Option 1 consisted in the organisation of a stakeholder dialogue to find solutions for the dissemination of news publishers' content. This option was deemed insufficient to ensure legal certainty across the EU. Option 2 consisted in the introduction of a related right covering online uses of news publications. In addition to this, Option 3 leaves the option for Member States to enable publishers, to which rights have been transferred by an author, to claim a share in the compensation for uses under an exception. This last option was the one retained as it addressed all relevant problems.

Fair remuneration in contracts of authors and performers: Option 1 consisted in providing a recommendation to Member States and organising a stakeholder dialogue. This option was rejected since it would not be efficient enough. Option 2 foresaw the introduction of transparency obligations on the contractual counterparts of creators. On top of that, Option 3 proposed the introduction of a contract adjustment mechanism and a dispute resolution mechanism. This option was the one retained since Option 2 would not have provided enforcement means to creators to support the transparency obligation.

- **Regulatory fitness and simplification**

For the uses covered by the exceptions, the proposal will allow educational establishments, public-interest research institutions and cultural heritage institutions to reduce transaction costs. This reduction of transaction costs does not necessarily mean that rightholders would suffer a loss of income or licensing revenues: the scope and conditions of the exceptions

ensure that rightholders would suffer minimal harm. The impact on SMEs in these fields (in particular scientific and educational publishers) and on their business models should therefore be limited.

Mechanisms aiming to improve licensing practices are likely to reduce transaction costs and increase licensing revenues for rightholders. SMEs in the fields (producers, distributors, publishers, etc.) would be positively affected. Other stakeholders, such as VoD platforms, would also be positively affected. The proposal also includes several measures (transparency obligation on rightholders' counterparts, introduction of a new right for news publishers and obligation on some online services) that would improve the bargaining position of rightholders and the control they have on the use of their works and other subject-matter. It is expected to have a positive impact on rightholders' revenues.

The proposal includes new obligations on some online services and on those to which authors and performers transfer their rights. These obligations may impose additional costs. However, the proposal ensures that the costs will remain proportionate and that, when necessary, some actors would not be subject to the obligation. For instance, the transparency obligation will not apply when the administrative costs it implies are disproportionate in view of the generated revenues. As for the obligation on online services, it only applies to information society services storing and giving access to large amounts of copyright-protected content uploaded by their users.

The proposal foresees the obligation for Member States to implement negotiation and dispute resolution mechanisms. This implies compliance costs for Member States. However, they could rely in most cases on existing structures, which would limit the costs. The teaching exception can also entail some costs for Member States linked to the measures ensuring the availability and visibility of licences for educational establishments.

New technological developments have been carefully examined. The proposal includes several exceptions that aim at facilitating the use of copyright-protected content via new technologies. This proposal also includes measures to facilitate access to content, including via digital networks. Finally, it ensures a balanced bargaining position between all actors in the digital environment.

- **Fundamental rights**

By improving the bargaining position of authors and performers and the control rightholders have on the use of their copyright-protected content, the proposal will have a positive impact on copyright as a property right, protected under Article 17 of the Charter of Fundamental Rights of the European Union ('the Charter'). This positive impact will be reinforced by the measures to improve licensing practices, and ultimately rightholders' revenues. New exceptions that reduce to some extent the rightholders' monopoly are justified by other public interest objectives. These exceptions are likely to have a positive impact on the right to education and on cultural diversity. Finally, the Directive has a limited impact on the freedom to conduct a business and on the freedom of expression and information, as recognised respectively by Articles 16 and 11 of the Charter, due to the mitigation measures put in place and a balanced approach to the obligations set on the relevant stakeholders.

4. BUDGETARY IMPLICATIONS

The proposal has no impact on the European Union budget.

5. OTHER ELEMENTS

- **Implementation plans and monitoring, evaluation and reporting arrangements**

In accordance with Article 20, the Commission shall carry out an evaluation of the Directive no sooner than [five] years after the date of [transposition].

- **Explanatory documents**

In compliance with recital 49 of the proposal, Member States will notify the Commission of their transposition measures with explanatory documents. This is necessary given the complexity of rules laid down by the proposal and the importance to keep a harmonised approach of rules applicable to the digital and cross-border environment.

- **Detailed explanation of the specific provisions of the proposal**

The first title contains general provisions which (i) specify the subject-matter and the scope of the Directive and (ii) provide definitions that will need to be interpreted in a uniform manner in the Union.

The second title concerns measures to adapt exceptions and limitations to the digital and cross-border environment. This title includes three articles which require Member States to provide for mandatory exceptions or a limitation allowing (i) text and data mining carried out by research organisations for the purposes of scientific research (Article 3); (ii) digital uses of works and other subject-matter for the sole purpose of illustration for teaching (Article 4) and (iii) cultural heritage institutions to make copies of works and other subject-matter that are permanently in their collections to the extent necessary for their preservation (Article 5). Article 6 clarifies the link between the Directive and Directives 96/9/EC and 2001/29/EC.

The third title concerns measures to improve licensing practices and ensure wider access to content. Article 7 requires Member States to put in place a legal mechanism to facilitate licensing agreements of out-of-commerce works and other subject-matter. Article 8 guarantees the cross-border effect of such licensing agreements. Article 9 requires Member States to put in place a stakeholder dialogue on issues relating to Articles 7 and 8. Article 10 creates an obligation for Member States to put in place a negotiation mechanism to facilitate negotiations on the online exploitation of audiovisual works.

The fourth title concerns measures to achieve a well-functioning marketplace for copyright. Articles 11 and 12(i) extend the rights provided for in Articles 2 and 3(2) of Directive 2001/29/EC to publishers of news publications for the online use of their publications and (ii) provide for the option for Member States to provide all publishers with the possibility to claim a share in the compensation for uses made under an exception. Article 13 creates an obligation on information society services storing and giving access to large amounts of works and other subject-matter uploaded by their users to take appropriate and proportionate measures to ensure the functioning of agreements concluded with rightholders and to prevent the availability on their services of content not covered by an agreement. Article 14 requires Member States to include transparency obligations to the benefit of authors and performers. Article 15 requires Member States to establish a contract adjustment mechanism, in support of the obligation provided for in Article 14. Article 16 requires Member States to set up a dispute resolution mechanism for issues arising from the application of Articles 14 and 15.

The fifth title contains final provisions on the application in time, transitional provisions, the protection of personal data, the implementation, the evaluation, the expert group and the entry into force.

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on copyright in the Digital Single Market

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee²⁴,

Having regard to the opinion of the Committee of the Regions²⁵,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) [please remember to take these titles out in the final version]The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights should contribute further to the achievement of those objectives.
- (2) [The directives which have been adopted in the area of copyright and related rights provide for a high level of protection for right holders and create a framework wherein the exploitation of works and other protected subject-matter can take place. This Directive provides a harmonised legal framework which contributes to the good functioning of the internal market and to the Union's objective of respecting and promoting cultural diversity while at the same time bringing the European common cultural heritage to the fore.
- (3) **[General – Background and aim – December communication]** Rapid technological developments continue to transform the way works and other subject-matter are created, produced, distributed and exploited. New business models and new actors continue to emerge. Although the objectives and the principles laid down by the Union copyright framework are sound there is still some legal uncertainty, for both rightholders and users, mainly as regards cross-border uses of works and other subject-matter in the digital environment. Therefore, in those areas, it is necessary to adapt and supplement the current Union copyright framework. There should be rules to adapt certain exceptions and limitations to digital and cross-border environments as well as measures to facilitate certain licensing practices as regards the dissemination of

²⁴ OJ C [...], [...], p. [...].

²⁵ OJ C [...], [...], p. [...].

out-of commerce works and the online availability of audiovisual works on video-on-demand platforms with a view to ensuring wider access to content. In order to achieve a well-functioning marketplace for copyright, there should also be rules on rights in publications, on the use of works and other subject-matter by online services storing and giving access to user uploaded content and on the transparency of authors' and performers' contracts.

- (4) **[General – Current legal background – Not affected]** This Directive is based upon, and complements, the rules laid down in the Directives currently in force in this area, in particular Directive 96/9/EC of the European Parliament and of the Council²⁷, Directive 2001/29/EC of the European Parliament and of the Council²⁸, Directive 2006/115/EC of the European Parliament and of the Council²⁹, Directive 2009/24/EC of the European Parliament and of the Council³⁰, Directive 2012/28/EU of the European Parliament and of the Council³¹ and Directive 2014/26/EU of the European Parliament and of the Council³².
- (5) **[Exceptions – Legal uncertainty as regards new uses – Need for mandatory exceptions]** In the fields of research, education and preservation of cultural heritage, digital technologies permit new types of uses that are not clearly covered by the current EU rules on exceptions and limitations. In addition, the optional nature of exceptions and limitations provided for in Directives 2001/29/EC, 96/9/EC and 2009/24/EC in these fields may negatively impact the functioning of the internal market. This is particularly relevant as regards cross-border uses, which are becoming increasingly important in the digital environment. Therefore, the existing exceptions and limitations in Union law that are relevant for scientific research, teaching and preservation of cultural heritage should be reassessed in the light of new uses not covered by Union legislation. Namely new mandatory exceptions or limitations for uses of text and data mining technologies in the field of scientific research, illustration for teaching in the online environment and for preservation of cultural heritage should be introduced. For uses not covered by the exceptions or the limitation provided in this Directive, the exceptions and limitations existing in Union law will continue to apply. Directives 96/9/EC of the European Parliament and of the Council³³ and 2001/29/EC should also be adapted.
- (6) **[Exceptions – Fair balance of rights]** The exceptions and the limitations set out in this Directive seek to achieve a fair balance between the rights and interests of authors and other rightholders on the one hand, and of users on the other. They can be applied only in certain special cases which do not conflict with the normal exploitation of the works or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholders.
- (7) **[TDM – Rationale]** New technologies have made the automated computational analysis of information in digital form, such as text, sounds, images or data, generally

³³ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p. 20).





³³ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p. 20).

³³ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p. 20).

known as text and data mining faster. Those technologies allow researchers to process large amounts of information to gain new knowledge and discover new trends. However there is still, in the Union, research organisations such as universities and research institutes are confronted with legal uncertainty as to to extend to which text and data mining of content can be performed without impinging on copyright and database rights That legal uncertainty should be addressed by providing for a mandatory exception to the right of reproduction and also to the right to prevent extraction from a database in order to allow data mining to be carried out even if it requires the reproduction of works, or other subject matter, or of parts thereof; or the extraction of the whole or a substantial part of the contents of a database protected by the sui generis right. Text and data mining may also be carried out in relation to mere facts data not protexcted by compyright an din such instacnes no authorisation would be required. Research organisations should also benefit from that exception when they engage in public-private partnerships.

- (8) [
- (9) **[TDM]** In certain instances, text and data mining may involve acts protected by copyright and/or by the sui generis database right, notably the reproduction of works or other subject-matter and/or the extraction of contents from a database. Where there is no exception or limitation which applies, an authorisation to undertake such acts would be required from rightholders. Text and data mining may also be carried out in relation to mere facts or data which are not protected by copyright and in such instances no authorisation would be required. This legal uncertainty should be addressed by providing for a mandatory exception to the right of reproduction and also to the right to prevent extraction from a database. Such an exception would seek to ensure that text and data mining can be carried out even if it requires the reproduction of works, or other subject matter, or of parts thereof; or the extraction of the whole or a substantial part of the contents of a database protected by the sui generis right. The new exception should be without prejudice[stands to reason] to the existing mandatory exception on temporary acts of reproduction laid down in Article 5(1) of Directive 2001/29, which should continue to apply to text and data mining techniques which do not involve the making of copies going beyond the scope of that exception.
- (10) **[TDM – Scientific research]** The term ‘scientific research’ within the meaning of this Directive should cover both the natural sciences and the human sciences [REDACTED]
[REDACTED]
[REDACTED]
- (11) **[TDM – Beneficiaries]** Research organisations across the Union encompass a wide variety of entities, irrespective of their legal status or way of financing whose primary goal is to independently conduct scientific research and to widely disseminate the results of such research or together with the provision of educational services. Due to the diversity of such entities, it is important to have a common understanding of the beneficiaries of the exception. Despite different legal forms and structures, research organisations across Member States generally have in common that they act either on a not for profit basis or in the context of a public-interest mission recognised by the State. Such a public-interest mission may, for example, be reflected through public funding or through provisions in national laws or public contracts. At the same time, However, organisations upon which commercial undertakings have a decisive influence, notably because of structural situations such as their quality of shareholders or members, which might give them preferential access to the results of the research

should not be considered research organisations for the purposes of this Directive. To be adapted in line with LS comments in Note to new State Aid approach.

- (12) **[TDM – Technical safeguards]** In view of a potentially high number of access requests to and downloads of their works or other subject-matter, rightholders should be allowed to apply measures where there is risk that the security and integrity of the system or databases where the works or other subject-matter are hosted would be jeopardised. Those measures should not exceed what is necessary to pursue the objective of ensuring the security and integrity of the system and should not undermine the effective application of the exception.
- (13) **[TDM]** In view of its nature and scope, the text and data mining exception results in negligible prejudice to the rightholders, therefore compensation should not be envisaged.
- (14) **[Teaching – Rationale for introducing a mandatory exception for digital uses]** While existing legislation already provides for an exception or limitation to the rights of reproduction, communication to the public and making available to the public, as well as database extraction rights for the sole purpose of illustration for teaching. In addition, Articles 6(2)(b) and 9(b) of Directive 96/9/EC permit the use of a database and the extraction or re-utilization of a substantial part of its contents for the purpose of illustration for teaching. The scope of these exceptions or limitations as they apply to digital uses is unclear. In addition, there is a lack of clarity as to whether those exceptions or limitations would apply where teaching is provided online and thereby at a distance. Moreover, the existing framework does not provide for a cross-border effect. That can hamper the development of digitally-supported teaching activities and distance learning. Therefore, the introduction of a new mandatory exception or limitation is necessary to ensure that educational establishments benefit from full legal certainty when using works or other subject-matter in digital teaching activities, including online and cross-border.
- (15) **[Teaching – Beneficiaries]** Digital tools and resources are increasingly used at all education levels, in particular to improve and enrich the learning experience, therefore the exception or limitation provided for in this Directive should benefit all educational establishments in primary, secondary, vocational and higher education to the extent they pursue their educational activity for a non-commercial purpose. 



- (16) **[Teaching – Illustration for teaching]** The use of the works or other subject-matter under the exception or limitation should be only in the context of teaching and learning activities carried out under the responsibility of educational establishments, including during examinations. The exception or limitation should cover both uses through digital (see above comment) means in the classroom and online uses through the educational establishment's secure electronic network, the access to which should be protected, notably by authentication procedures. The exception or limitation should be understood as covering the specific accessibility needs of persons with a disability in the context of illustration for teaching.
- (17) **[Teaching – Flexibility for MS]** Whereas it is essential to harmonise the scope of the new mandatory exception or limitation in relation to digital uses and cross-border teaching activities, the modalities of implementation can differ from a Member State to another, in order for them not to hamper the effective application of the exception or

limitation or cross-border uses. That should allow Member States to build on the existing arrangements concluded at national level. In particular, Member States could decide to subject the application of the exception or limitation, fully or partially, to the availability of adequate licences, covering the same uses as those allowed under the exception. This mechanism would, for example, allow giving precedence to licences for materials which are primarily intended for the educational market. In order to avoid that such mechanism results in legal uncertainty or administrative burden for educational establishments, Member States adopting this approach should take concrete measures to ensure that licensing schemes allowing digital uses of works or other subject-matter for the purpose of illustration for teaching are easily available and that educational establishments are aware of the existence of such licensing schemes.

- (18) [Redacted]
- (19) **[Preservation – Rationale for intervention]** Cultural heritage institutions are engaged in the preservation of their collections for future generations. Digital technology offers new ways to preserve the heritage contained in those but they also create new challenges. An act of preservation would require a reproduction of a work or other subject-matter in the collection of a cultural heritage institution and consequently the authorisation of the relevant rightholders. In view of these new challenges, it is necessary to adapt the current legal framework by providing a mandatory exception to the right of reproduction in order to allow those acts of preservation.
- (20) **[Preservation – Single market rationale]** Different approaches in the Member States for acts of preservation by cultural heritage institutions hamper cross-border cooperation and the sharing of best practice including the means of preservation by cultural heritage institutions in the internal market, leading to an inefficient use of resources.
- (21) **[Preservation – Better qualification of the exception / what we intend for preservation]** Member States should therefore be required to provide for an exception to permit cultural heritage institutions to reproduce works and other subject-matter permanently in their collections when that reproduction is solely for preservation purposes in situations of technological obsolescence or the degradation of the original. Such an exception should allow for the making of copies by the appropriate preservation tool, means or technology, in the required quantity and at any point in the life of a work or other subject-matter to the extent required in order to produce a copy for preservation purposes only.
- (22) **[Preservation – Permanent collection]** For the purposes of this Directive, works and other subject-matter should be considered to be permanently in the collection of a cultural heritage institution when copies are owned or permanently held by the cultural heritage institution, for example as a result of a transfer of ownership or licence agreements.
- (23) **[OoC – Main rationale for intervention]** Cultural heritage institutions should benefit from a clear framework for the digitisation and dissemination, including across borders, of out-of-commerce works or other subject-matter. In view that obtaining the prior consent of the right holders of out-of-commerce works might not always be

possible, there should be measures to facilitate the licensing of rights in out-of-commerce works that are in the collections of cultural heritage institutions and thereby to allow the conclusion of agreements with cross-border effect in the internal market.

- (24) **[OoC – Mechanism, flexibility for MS in type of technique to be used]** Member States should, within the framework provided for in this Directive, have flexibility in choosing the specific type of mechanism allowing for licences for out-of-commerce works to extend to the rights of rightholders that are not represented by the collective management organisation, in accordance to their legal traditions, practices or circumstances. Such mechanisms can include extended collective licensing and presumptions of representation.
- (25) **[OoC – Importance of compliance with CRM Directive and additional measures]** For the purpose of those licensing mechanisms, a rigorous and well-functioning collective management system is important. That system should include in particular rules of good governance, transparency and reporting, as well as the regular, diligent and accurate distribution and payment of amounts due to individual right holders, as provided for by Directive 2014/26/EU of the European Parliament and of the Council³⁷. [no need to state what the other directive covers] Additional appropriate safeguards should be available for all rightholders, who should be given the opportunity to exclude the application of such mechanisms to their works or other subject-matter. Conditions attached to those mechanisms should not affect their practical relevance for cultural heritage institutions.
- (26) **[OoC – Recognition of specificities of different categories of works]** Given the variety of works and other subject-matter in the collections of cultural heritage institutions, it is important that mechanisms are available and can be used in practice for different types of works and other subject-matter, including photographs, sound recordings and audiovisual works. In order to reflect the specificities of different categories of works and other subject-matter as regards modes of publication and distribution, it is appropriate that Member States are allowed to establish criteria at national level, in consultation with rightholders and users, for works or other subject-matter to qualify as out-of-commerce in that country.
- (27) **[OoC – Third countries]** For reasons of international comity, the licensing mechanisms for the digitisation and dissemination of out-of-commerce works provided for in this Directive should not apply to works or other subject-matter that are first published or, in the absence of publication, first broadcast in a third country or, in the case of cinematographic or audiovisual works, to works the producer of which has his headquarters or habitual residence in a third country. Those mechanisms should also not apply to works or other subject-matter of third country nationals except when they are first published or, in the absence of publication, first broadcast in the territory of a Member State or, in the case of cinematographic or audiovisual works, to works of which producer's headquarters or habitual residence is in a Member State.
- (28) **[OoC – Possibility to recoup costs]** As mass digitisation projects can entail significant investments by cultural heritage institutions, any licences granted under the mechanisms provided for in this Directive should not prevent them from generating

³⁷ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (OJ L 84, 20.3.2014, p. 72.)

reasonable revenues in order to cover the costs of the licence and the costs of digitising and disseminating the works and other subject-matter covered by the licence.

- (29) **[OoC – EUIPO register]** Information regarding the future and ongoing by cultural heritage institutions on the basis of the licensing mechanisms provided for in this Directive and the arrangements in place for all rightholders to exclude the application of licences to their works or other subject-matter should be adequately publicised. This is particularly important when uses take place across borders in the internal market. In order to make information about the use of out-of-commerce works and other subject-matter by cultural heritage institutions publicly accessible, it is appropriate to make provision for the creation of a single publicly accessible online portal for the Union for a reasonable period of time before the cross-border use takes place. Under Regulation (EU) No 386/2012 of the European Parliament and of the Council³⁸, the European Union Intellectual Property Office is entrusted with certain tasks and activities, financed by making use of its own budgetary measures, aiming at facilitating and supporting the activities of national authorities, the private sector and Union institutions in the fight against, including the prevention of, infringement of intellectual property rights. It is therefore appropriate to rely on that Office to establish and manage the European portal making such information available.
- (30) **[VoD – Background]** However, agreements on the online exploitation of on-demand services can face difficulties related to the licensing of rights in the form of lack of interest of the holder of the rights for a given territory in the online exploitation of the work [elsewhere?] or issues linked to the windows of exploitation [is this clear enough?].
- (31) **[VoD – Room of manoeuvre for MS]** To facilitate the licensing of rights in audiovisual works to video-on-demand platforms, this Directive requires Member States to set up a negotiation mechanism allowing parties willing to conclude an agreement to rely on the assistance of an impartial body. The participation in the negotiation mechanism should be voluntary. The body should meet with the parties and help with the negotiations by providing professional and external advice. Against that background, Member States should decide on the conditions of the functioning of the negotiation mechanism, including the timing and duration of the assistance to negotiations and the bearing of the costs. Member States should ensure that administrative and financial burdens remain proportionate to guarantee the efficiency of the negotiation forum.
- (32) **[Publishers]** A free and pluralist press is essential to ensure quality journalism and citizens' access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society. In the transition from print to digital, publishers of news publications are facing problems in licensing the online use of their news publications and recouping their investments. In the absence of recognition of publishers of news publications as rightholders, licensing in the digital environment and online enforcement is often complex and inefficient.
- (33) **[Publishers]** In the transition from print to digital, publishers of news publications are facing problems in licensing the online use of their news publications and recouping

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Regulation (EU) No 386/2012 of the European Parliament and of the Council of 19 April 2012 on entrusting the Office for Harmonization in the Internal Market (Trade Marks and Designs) with tasks related to the enforcement of intellectual property rights, including the assembling of public and private-sector representatives as a European Observatory on Infringements of Intellectual Property Rights (OJ L 129, 16.5.2012, p. 1).

their investments. The organisational and financial contribution of publishers in producing news publications needs to be recognised and further encouraged to ensure the sustainability of the publishing industry. It is therefore necessary to provide a harmonised legal protection for news publications in respect of online uses within the Union. Such protection should be effectively guaranteed through the introduction, in Union law, of rights related to copyright for the reproduction and making available to the public of news publications in respect of online uses.

- (34) **[Publishers]** For the purposes of this Directive, it is necessary to define the concept of news publication, in particular digital online publications, in a way that embraces only journalistic publications, published by a service provider, periodically or regularly updated in any media, for the purpose of informing the general public. Such publications would include, for instance, daily newspapers, weekly magazines and news websites. Periodical publications which are published for scientific or academic purposes, such as scientific journals, should not (why not scientific?) be covered by the protection granted to news publications under this Directive. The protection should not extend to news of the day as such or to miscellaneous facts having the character of mere items of press information which do not constitute the expression of the intellectual creation of their authors.
- (35) **[Publishers]** The rights granted to the publishers of news publications under this Directive should have the same scope as the rights of reproduction and making available to the public provided for in Directive 2001/29/EC of the European Parliament and of the Council³⁹, insofar as online uses are concerned. They should also be subject to the same provisions on exceptions and limitations as those applicable to the rights provided for in Directive 2001/29/EC including the exception on quotation for purposes such as criticism or review laid down in Article 5(3)(d) of that Directive.
- (36) **[Publishers]** The protection granted to publishers of news publications under this Directive should not affect the rights of the authors and other rightholders in the works and other subject-matter incorporated therein, including as regards the extent to which authors and other rightholders can exploit their works or other subject-matter independently from the news publication in which they are incorporated. Therefore, publishers of news publications should not be able to bring up the protection granted to them against authors and other rightholders. This is without prejudice to contractual arrangements concluded between the publishers of news publications, on the one side, and authors and other rightholders, on the other side.
- (37) **[Publishers – Reprobel]** Publishers, including those of news publications, books or scientific publications, often operate on the basis of the transfer of authors' rights by means of contractual agreements or statutory provisions. In order to take account of this situation, [REDACTED].
- (38) **[Value Gap – Rationale]** The online content marketplace has become complex. Online services providing access to copyright protected content uploaded by their users without the authorisation of the right holders have flourished and have become main sources of access to content online affecting the rightholders' possibilities of determining whether, and under which conditions, their work and other subject-matter are used as well of receiving appropriate remuneration for it.

³⁹ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10).

- (39) **[Value Gap]** Where online service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users and go beyond the mere provision of physical facilities thereby performing an act of communication to the public, they are obliged to conclude licensing agreements with rightholders, unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council⁴⁰ [REDACTED]

In view of the possible obligation to conclude a licensing agreement, online service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users should take appropriate and proportionate measures to ensure protection of works or other subject-matter, such as implementing effective technologies and a high level of transparency towards rights holders, including when, in accordance with Article 15 of Directive 2000/31/EC, the online service providers do not have a general obligation to monitor the information which they transmit or store or to actively seek facts or circumstances indicating illegal activity.

- (40) **[Value Gap]** Collaboration between online service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users and rightholders is essential for the functioning of the technologies. While the rightholders should provide the necessary data to allow the services to identify their content, the services have to be transparent towards rightholders with regard to the deployed technologies, to allow them to assess the appropriateness of the technologies. The services should in particular provide rightholders with information on the type of technologies used, the way they are operated and their success rate for the identification of rightholders' content. Those technologies should also allow rightholders to get information from the services on the use of their content covered by an agreement.
- (41) **[Remuneration – Rationale for intervention]** Certain rightholders such as authors and performers need information to assess the economic value of their rights which are harmonised under Union law. This is especially the case where such rightholders grant a licence or a transfer of rights in return for remuneration. As authors and performers tend to be in a weaker contractual position when they grant licences or transfer their rights, they need information to assess the continued economic value of their rights, compared to the remuneration received for their licence or transfer, but they often face a lack of transparency. Therefore, the sharing of adequate information by their contractual counterparts or their successors in title is important for the transparency and balance in the system that governs the remuneration of authors and performers.
- (42) **[Remuneration – Transparency obligations]** When implementing transparency obligations, the specificities of different content sectors and of the rights of the authors and performers in each sector should be considered. Member States should consult all

⁴¹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31). This Directive is repealed with effect from 25 May 2018 and shall be replaced by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1). [please replace the reference to Directive 95/46/EC by reference to Regulation (EU) 2016/679 if the transposition date falls after 25 May 2018.]

relevant stakeholders as that should help determine sector-specific requirements. Collective bargaining should be considered as an option to reach an agreement between the relevant stakeholders regarding transparency. To enable the adaptation of current reporting practices to the transparency obligations, a transitional period should be provided for. The transparency obligations do not need to apply to agreements concluded with collective management organisations as those are already subject to transparency obligations under Directive 2014/26/EU.

- (43) **[Remuneration – Contract adjustment mechanism]** Certain contracts for the exploitation of rights harmonised at Union level are of long duration offering few possibilities for authors and performers to renegotiate them with their contractual counterparts or their successors in title. Therefore, without prejudice to the law applicable to contracts in Member States, there should be a contract adjustment mechanism for cases where the remuneration agreed under a licence of rights is disproportionately low compared to the revenues and the benefits derived from the exploitation of the work or the fixation of the performance, including in light of the transparency ensured by this Directive. Where the parties do not agree on the adjustment of the remuneration, the author or performer should be entitled to bring a claim before a court or other competent authority.
- (44) **[Remuneration – Dispute resolution mechanism]** Authors and performers are often reluctant to enforce their rights against their contractual partners before a court or tribunal. Member States should therefore provide for an alternative dispute resolution procedure that addresses claims related to obligations of transparency and the contract adjustment mechanism.
- (45) **[General – Proportionality]** The objectives of this Directive, namely the modernisation of certain aspects of the Union copyright framework to take account of technological developments and new channels of distribution of protected content in the internal market, cannot be sufficiently achieved by Member States but can rather, by reason of their scale, effects and cross-border dimension, be better achieved at Union level. Therefore, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.
- (46) [no need to state]

[General – Data protection] Any processing of personal data under this Directive should respect fundamental rights, including the right to respect for private and family life and the right to protection of personal data under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union and must be in compliance with Directive 95/46/EC of the European Parliament and of the Council⁴¹ and Directive 2002/58/EC of the European

⁴¹ Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31). This Directive is repealed with effect from 25 May 2018 and shall be replaced by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1). [please replace the reference to Directive 95/46/EC by reference to Regulation (EU) 2016/679 if the transposition date falls after 25 May 2018.]

Parliament and of the Council⁴².

(47)

(48) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents⁴³, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

(49) In order to ensure a level playing field across the Union for [.....] in the application of the relevant rules, this Directive should enter into force as a matter of urgency,

HAVE ADOPTED THIS DIRECTIVE:

⁴² Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37).

⁴³ OJ C 369, 17.12.2011, p. 14.

TITLE I

GENERAL PROVISIONS

Article 1

Subject matter and scope

1. This Directive lays down rules which aim at further harmonising the Union law applicable to copyright and related rights in the framework of the internal market, taking into account, in particular, digital and cross-border uses of protected content. It also lays down rules on exceptions and limitations, on the facilitation of licences as well as rules aiming at ensuring a well-functioning marketplace for the exploitation of works and other subject matter[.
2. Except in the cases referred to in Article 6, this Directive shall leave intact and shall in no way affect existing rules laid down in the Directives currently in force in this area, in particular Directives 96/9/EC, 2001/29/EC, 2006/115/EC, 2009/24/EC, 2012/28/EU and 2014/26/EU.[this is not a definition of scope and should be deleted or moved: aslo concerns comment in note on the (general) need to clarify relation to other Instruments: better to have in a separate article "*relation to other Instruments*"to have separate. Rather, here scope should be defined by describing what and whom does the directive concern.]

Article 2

Definitions

For the purposes of this Directive, the following definitions shall apply:

- (1) [REDACTED]
- (2) 'text and data mining' means any automated analytical technique aiming to analyse text and data in digital form in order to generate information such as patterns, trends and correlations;
- (3) 'cultural heritage institution' means a publicly accessible [REDACTED] library or museum, an archive or a film or audio heritage institution;
- (4) 'news publication' means a fixation [REDACTED] of a collection of literary works of a journalistic nature, even in digital format, which may also comprise other works or subject-matter and constitutes an individual item within a periodical or regularly-updated publication under a single title, such as a newspaper or a magazine, having the purpose of

providing information to the general public related to news or other general-interest topics and published in any type of media under the initiative, responsibility and control of a service provider.

TITLE II

MEASURES TO ADAPT EXCEPTIONS AND LIMITATIONS TO THE DIGITAL AND CROSS- BORDER ENVIRONMENT

Article 3 *Text and data mining*

1. Member States shall provide for an exception to the reproduction rights provided for in Article 2 of Directive 2001/29/EC and point (a) of Article 5 of Directive 96/9/EC, the right for the maker of a database provided for in Article 7(1) of Directive 96/9/EC and the rights in publications provided for in Article 11(1) of this Directive for reproductions and extractions made by research organisations in order to carry out text and data mining of works or other subject-matter to which they have [REDACTED] [REDACTED] access for the purposes of scientific research. [REDACTED]
[REDACTED]
2. Any contractual provision contrary to the exception provided for in paragraph 1 shall be unenforceable.
3. Right holders shall be allowed to apply measures to ensure the security and integrity of the networks and databases where the works or other subject matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective.
4. Member States shall encourage right holders and research organisations to define commonly-agreed best practices concerning the application of the measures referred to in paragraph 3.
5. The exception referred to in paragraph 1 shall be subject to the provisions of Article 5(5) and the first, third and fifth subparagraphs of Article 6(4) of Directive 2001/29/EC. [REDACTED]
[REDACTED]

Article 4 *Use of works and other subject-matter in digital and cross-border teaching activities*

1. Member States shall provide for an exception or limitation to the reproduction rights provided for in Articles 2 and 3 of Directive 2001/29/EC and point (a) of Article 5 of Directive 96/9/EC, the right for the maker of a database provided for in Article 7(1) of Directive 96/9/EC, the exclusive rights of the rightholder provided for in Article 4(1) [REDACTED] of Directive 2009/24/EC of the European Parliament and of the Council⁴⁵ and the rights in publications provided for in Article 11(1) of this Directive in order to allow for the digital use of works and other subject-matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved, provided that the use:
 - (a) takes place on the premises of an educational establishment or through a secure electronic network accessible only by the educational establishment's pupils or students and teaching staff;

⁴⁵ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ L 111, 5.5.2009, p. 16–22).

(b) is accompanied, wherever possible, by the indication of the source, including the author's name.

2. Member States may provide [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

Member States availing themselves of the provision of the first subparagraph shall take the necessary measures to ensure appropriate availability and visibility of the licences authorising the acts described in paragraph 1 for educational establishments. [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

3. The use of works and other subject-matter for the sole purpose of illustration for teaching through secure electronic networks undertaken in compliance with [REDACTED] this Article shall be deemed to occur solely in the Member State where the educational establishment is established.

4. Member States may provide for fair compensation [REDACTED]
[REDACTED]
[REDACTED]
[REDACTED]

5. The exception or limitation referred to in paragraph 1 shall be subject to the provisions of Article 5(5) and the first, third and fifth subparagraphs of Article 6(4) of Directive 2001/29/EC.

Article 5

Preservation of cultural heritage

1. Member States shall provide for an exception to the reproduction rights provided for in Article 2 of Directive 2001/29/EC and point (a) of Article 5 of Directive 96/9/EC, the right for the maker of a database provided for in Article 7(1) of Directive 96/9/EC, exclusive rights of the rightholder provided for in Article 4(1)(a) of Directive 2009/24/EC and the rights in publications provided for in Article 11(1) of this Directive, in order for cultural heritage institutions to be able to make copies of any works or other subject-matter that are permanently in their collections, in any format or medium, for the sole purpose of the preservation of such works or other subject-matter and to the extent necessary for such preservation.
2. The exception referred to in paragraph 1 shall be subject to the provisions of Article 5(5) and the first, third and fifth subparagraphs of Article 6(4) of Directive 2001/29/EC.

Amendments to other directives

1. Directive 96/9/EC is amended as follows:
 - (a) In Article 6(2), point (b) is replaced by the following:

"(b) where there is use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and the limitation provided for in Directive [this Directive(2)];";
 - (b) In Article 9, point (b) is replaced by the following:

"(b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and the limitation provided for in Directive [this Directive(2)];".
2. Directive 2001/29/EC is amended as follows:
 - (a) In Article 5(2), point (c) is replaced by the following:

"(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage, without prejudice to the exceptions and the limitation provided for in Directive [this Directive(2)];";
 - (b) In Article 5(3), point (a) is replaced by the following:

"(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and the limitation provided for in Directive [this Directive(2)];";
 - (c) In Article 12(4) the following points are added: [from article 22]

"(e) to examine the impact of the transposition of Directive ... [this Directive] on the functioning of the internal market and to highlight any transposition difficulties;

(f) to facilitate the exchange of information on the relevant developments in legislation and case law as well as on the practical application of the measures taken by Member States to implement Directive ... [this Directive];

(g) to discuss any other questions arising from the application of Directive ... [this Directive]."

TITLE III

MEASURES TO IMPROVE LICENSING PRACTICES AND ENSURE WIDER ACCESS TO CONTENT

CHAPTER 1

Out-of-commerce works

Article 7

Use of out-of-commerce works by cultural heritage institutions

1. Member States shall provide that when a collective management organisation, on behalf of its members, concludes a non-exclusive licence for non-commercial purposes with a cultural heritage institution for the digitisation, distribution, communication to the public or making available of out-of-commerce works or other subject matter in the permanent collection of the institution, such a non-exclusive licence may be extended or presumed to apply to right holders of the same category as those covered by the licence who are not represented by the collective management organisation, provided that:
 - (a) the collective management organisation is, on the basis of mandates from right holders, broadly representative of right holders in the category of works or other subject matter and of the rights which are the subject of the licence;
 - (b) equal treatment is guaranteed to all right holders in relation to the terms of the licence;
 - (c) all right holders may at any time object to their works or other subject matter being deemed to be out-of-commerce and exclude the application of the licence to their works or other subject matter.
2. A work or other subject matter shall be deemed to be out-of-commerce when the whole work or other subject matter, in all its translations, versions and manifestations, is not available to the public through customary channels of commerce and cannot be reasonably expected to become so.
3. Member States shall provide, in sufficient time before the works or other subject-matter are digitised, distributed, communicated to the public or made available, for appropriate publicity measures regarding:
 - (a) works or other subject-matter deemed to be out-of-commerce;
 - (b) the non-exclusive licence, and in particular its application to unrepresented rightholders; and
 - (c) the right of rightholders to object, referred to in point (c) of paragraph 1;

4. Member States shall ensure that the licences referred to in paragraph 1 are sought from a collective management organisation [REDACTED] for the Member State where:
- (a) the works or phonograms were first published or, in the absence of publication, where they were first broadcast, except for cinematographic and audiovisual works;
 - (b) the producers of the works have their headquarters or habitual residence, for cinematographic and audiovisual works; or
 - (c) the cultural heritage institution is established, when a Member State or a third country could not be determined, after reasonable efforts, according to points (a) and (b).
5. Paragraphs 1, 2 and 3 shall not apply to the works or other subject-matter of third country nationals except where points (a) and (b) of paragraph 4 apply.

Article 8
Cross-border uses

1. Works or other subject-matter covered by a licence granted in accordance with Article 7 may be used by the cultural heritage institution in accordance with the terms of the licence in all Member States.
2. Member States shall ensure that information that allows the identification of the works or other subject-matter covered by a licence granted in accordance with Article 7 and information about the right of rightholders to object referred to in Article 7(1)(c), are made publicly accessible in a single online portal for at least six months before the works or other subject-matter are digitised, distributed, communicated to the public or made available in Member States other than the one where the licence is granted, and for the whole duration of the licence.
3. The portal referred to in paragraph 2 shall be established and managed by the European Union Intellectual Property Office in accordance with Regulation (EU) No 386/2012.

Article 9
Stakeholder dialogue

Member States shall ensure a regular dialogue between representative users' and right holders' organisations, and any other relevant stakeholder organisations, to, on a sector-specific basis, foster the relevance and usability of the licensing mechanisms referred to in Article 7(1), ensure the effectiveness of the safeguards for right holders referred to in this Chapter, notably as regards publicity measures, and, where applicable, assist in the establishment of the specific criteria referred to in the second subparagraph of Article 7(2).

CHAPTER 2

Access to and availability of audiovisual works on video-on-demand platforms

Article 10
Negotiation mechanism

Member States shall ensure that where parties wishing to conclude an agreement for the purpose of making available audiovisual works on video-on-demand platforms face

difficulties relating to the licensing of rights, they may rely on the assistance of an impartial body with relevant experience. That body shall provide assistance with negotiation and help reach agreements.

Not later than [date mentioned in Article 20(1)] Member States shall notify to the Commission the body referred to in paragraph 1.

TITLE IV

MEASURES TO ACHIEVE A WELL-FUNCTIONING MARKETPLACE FOR COPYRIGHT

CHAPTER 1

Rights in publications

Article 11

Protection of news publications concerning online uses

1. Member States shall provide publishers of news publications with the rights provided for in Article 2 and Article 3(2) [REDACTED]
[REDACTED]
2. 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 news publication. Such rights 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 news publication in which they are incorporated.
3. Articles 5 to 8 of Directive 2001/29/EC and Directive 2012/28/EU [REDACTED]
[REDACTED] shall apply *mutatis mutandis* in respect of the rights referred to in paragraph 1.
4. The rights referred to in paragraph 1 shall expire 20 [REDACTED]
[REDACTED] after the publication of the news publication. That time-limit shall be calculated from the first day of January of the year following the year of publication.

LS : relation to existing rights – exclusion of double banking?

Article 12

Claims to fair compensation

Member States shall [REDACTED] provide that where an author has transferred a right to a publisher, such a transfer constitutes a sufficient legal basis for the publisher to claim a share of the compensation for the uses of the work made under an exception or limitation to the transferred right.

CHAPTER 2

Use of protected content by online services

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

1. Information society services 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 appropriate and proportionate measures to ensure the functioning of agreements concluded with rightholders in particular to prevent the availability on their services of works or other subject-matter not covered by such agreements, including through the use of effective content identification technologies. The services shall provide rightholders with adequate information on the functioning and the deployment of those measures, as well as, when relevant, adequate reporting on the identification and use of the works and other subject matter. Member States shall ensure that the services referred to in paragraph 1 include complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1.
2. Member States shall facilitate, where appropriate, the cooperation between the information society services and rightholders through stakeholder dialogues to define best practices, such as appropriate and proportionate content identification technologies, taking into account, among others [avoid Latin in legislative texts], the nature of the services, the availability of the technologies and their effectiveness in light of technological developments.

CHAPTER 3

Fair remuneration

Article 14 *Transparency obligation*

1. Member States shall ensure that authors and performers receive on a regular basis and taking into account the specificities of each sector, timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, notably as regards modes of exploitation, revenues generated and remuneration due. Transparency obligations shall be proportionate but effective, ensuring an appropriate level of transparency in every sector.
2. [REDACTED]
[REDACTED]
[REDACTED] having regard to the overall work or performance. Member States may adjust the obligation in paragraph 1 in those instances where the resulting administrative burden would be disproportionate to the revenues generated by the exploitation of the work or performance, provided that an appropriate level of transparency is nevertheless ensured.
3. Paragraph 1 shall not be applicable to entities subject to the transparency obligations established by Directive 2014/26/EU.

Article 15
Contract adjustment mechanism

Member States shall ensure that authors and performers are entitled to claim additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the agreed remuneration is disproportionately low compared to the subsequent revenues and benefits derived from the exploitation of the works or performances.

Article 16
Dispute resolution mechanism

Member States shall provide that disputes concerning the transparency obligation under Article 14 and the contract adjustment mechanism under Article 15 may be submitted to a voluntary, alternative dispute resolution procedure.

TITLE V

FINAL PROVISIONS

Article 17

Application

1. This Directive shall apply in respect of all works and other subject-matter which are protected by the Member States' legislation in the field of copyright on or after [the date mentioned in Article 20(1)]. [REDACTED]

[REDACTED]

However, Article 11 shall apply to news publications published before [the date mentioned in Article 20(1)].

2. [REDACTED]

Article 18

Transitional provision

Agreements for the licence of transfer of rights of authors and performers shall be subject to the transparency obligation in Article 14 as from [one year after the date mentioned in Article 20(1)].

Article 19

Protection of personal data SEE LS Note

The processing of personal data carried out within the framework of this Directive shall be carried out in compliance with Directives 95/46/EC and 2002/58/EC. [REDACTED]

[REDACTED]

Article 20

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [12 months after entry into force] at the latest. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 21

Evaluation

By [five years after the date mentioned in Article 20(1)], the Commission shall carry out an evaluation of this Directive and present a report on the main findings to the European Parliament, the Council and the European Economic and Social Committee. [REDACTED]

[REDACTED]

Member States shall provide the Commission with the necessary information for the preparation of that report.

Article 22

Entry into force

This Directive shall enter into force on [REDACTED] in the *Official Journal of the European Union*.

[as a general rule, acts enter into force on the twentieth day following that of their publication. Earlier entry into force needs to be justified with a recital on grounds of urgency. An example of an urgency recital has been added at the end of the recitals. Please either add an urgency recital or make entry into force on the twentieth day following that of publication.]

Article 24

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President