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#### **NOTE**

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Subject:	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market - Presidency compromise proposal (consolidated version) and state of play

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#### **I. INTRODUCTION**

The Commission presented the proposal for a Directive on copyright in the Digital Single Market to the Council on 14 September 2016. This proposal is one of the Commission's initiatives under the Digital Single Market Strategy. As agreed by the 'Joint Declaration on the EU's legislative priorities for 2017'<sup>1</sup> the proposal is subject to "priority treatment in the legislative process to ensure substantial progress and, where possible, their delivery before the end of 2017".

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<sup>1</sup> <http://data.consilium.europa.eu/doc/document/ST-15375-2016-INIT/en/pdf>

The proposed Directive aims to further harmonise 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. Under the Estonian Presidency, the proposal has been discussed at eight meetings of the Working Party on Intellectual Property (Copyright) and six compromise proposals (either on the whole text or addressing parts of it) have been issued. The purpose of this Note is to inform the delegations about the progress achieved and to indicate which elements of the proposal, in the Presidency's view, need political guidance in order to continue discussions with a view to reach a political agreement. Thereby, to reflect the work carried out in the Working Party, the Presidency submits its seventh compromise proposal, as contained in the Annex to this Note.

## **II. STATE OF PLAY AND KEY OUTSTANDING ISSUES**

### **1. OVERVIEW OF PROGRESS MADE**

The Estonian Presidency believes that significant progress has been achieved as regards most of the provisions of the Directive, especially regarding the mandatory exceptions for text and data mining, preservation and teaching, the licensing mechanism for out of commerce works, the negotiation mechanism for VOD and remuneration related provisions of the proposal.

To point out some of the main amendments, besides a number of clarifications made on the whole text it is to be noted that in the Chapter of mandatory **exceptions and limitations**, the scope of the beneficiaries of the exception for text and data mining has been extended beyond the research organisations and now also covers cultural heritage institutions. A new provision has also been added allowing the retention of copies of works or other subject-matter made in the context of text and data mining for no longer than is necessary for achieving the purposes of scientific research. The additional paragraph is supported by the majority of the delegations. Regarding the mandatory teaching exception, the scope of the exception and the obligations of the educational establishments concerning secure digital teaching and learning environments have been extensively clarified. At the request of delegations, it has been clarified that works and other subject matter under the permanent custody of cultural heritage institutions also fall under the exception for the preservation of cultural heritage.

The licensing mechanism for **out-of-commerce works** has been simplified so that all the licences for out-of-commerce works need to be sought in the Member State where the cultural institution is established. The structure of the relevant Articles has also been slightly modified for the sake of clarity. At the request of the majority of the delegations, the EUIPO single online portal is to be used as the primary publicity measure and therefore all provisions relating to publicity measures have been moved to the same Article. As the licences for out-of-commerce works are now sought from the collective management organisation representative for the Member State where the cultural institution is established compared to the country of first publication or the headquarters or habitual residence of the producer of the works as in the original proposal, the compromise proposal also addresses the situation regarding works from third countries. The compromise proposal also offers flexibility for the Member States regarding the possibility to provide for specific requirements for works or other subject matter to be considered out-of-commerce, to establish rules where more than one collective management organisation is representative for the relevant works or other subject matter and the allocation of legal responsibility for the compliance of the licensing and use of such works. Finally, the commercial availability of works in other language version does not preclude the determination of the out-of-commerce status of a work.

As regards the **provisions on fair remuneration**, the Presidency has extended the transparency obligation to allow an author or a performer to get additional exploitation related information where the works have been sublicensed and the contractual counterpart does not hold all the information itself. It is left for the Member States to decide whether the author or performer can turn to those sublicensees directly or through the first contractual partner. Additionally, flexibility is left for the Member States to use collective bargaining agreements when implementing the transparency obligation. The right for representative organisations to represent authors and performers in the dispute resolution procedure has been added. Finally, the consolidated compromise includes a new provision to ensure that the mandatory obligations cannot be derogated by contractual arrangements.

With regard to the final provisions, the Presidency has extended **the transposition deadline** up to 24 months, at the request of the majority of the delegations.

The Presidency would also like to draw the Delegation's attention to the fact that **two new Articles have been added to the Commission's proposal as a result of the discussions in the Working Party**. These relate to a new optional exception for text and data mining (Article 3a) and collective licensing mechanism with an extended effect (Article 9a). Please find below a brief summary of these Articles where further discussions may be needed.

#### **A. Optional exception on text and data mining**

This additional Article would allow Member States to provide for an exception or limitation for temporary reproductions and extractions of works and other subject-matter in order to carry out text and data mining, in cases where the use of the works or other subject-matter for text and data mining is not expressly reserved by the right holders, in particular when the reproductions or extractions made for the purposes of the technical process may not fulfil all the conditions of the existing exception for temporary acts of reproduction in Article 5(1) of Directive 2001/29/EC. The latter would for example apply in cases where content is publicly available online and where temporary copies may be needed as part of the process of the text and data mining of such content, without any permanent copies being made. The new optional exception complements and is without prejudice to the mandatory exception of text and data mining provided for in the Commission's proposal. A number of delegations have expressed their support for the main thrust of this new exception, subject to further amendments to the text, whereas a couple of delegations have expressed their opposition to this new optional exception.

#### **B. Collective licensing with an extended effect**

The new Article grants Member States the possibility to maintain or introduce in their legal systems, under certain conditions and for uses of protected content taking place in their territory, the so-called 'extended collective licensing' ('ECL') 'presumptions of representation' or similar mechanisms. These mechanisms are today used in a number of Member States and allow the effect of licensing agreements concluded by a collective management organisation to be extended to right holders, who are not members of the collective management organisation, subject to appropriate safeguards to protect the interests of such rightholders.

This new Article is without prejudice to the licensing mechanism for the use of out-of-commerce works provided for in Articles 7 to 9 of the Directive. Overall, there is support for this new proposal, with some requests for a less detailed provisions, while some delegations have expressed their opposition to this new Article.

## **2. KEY OUTSTANDING ISSUES**

At the same time, the Presidency considers that there are two main elements of the proposal where the Delegations views diverge and where political guidance is needed in order to finalise the discussions in the Council in view of obtaining a negotiation mandate. These elements concern the press publishers' right (Article 11) and user uploaded content platforms (the so-called 'value gap' issue in Article 13).

### **A. Protection of press publishers**

Delegations have acknowledged that press publishers face problems in exploiting and enforcing their rights in press publications in the digital environment but the views diverge as to the underlying reasons for the problems and possible solutions as reflected in Options A and B of the Annex II.

Discussions on the Commission's proposal to grant exclusive rights to publishers of press publications have resulted in amendments to clarify the scope of the rights granted and to ensure that the protection granted to press publishers affects neither the public-domain status nor the protection granted to the of the content contained in a press publication (Option A of Annex II).

A number of delegations have, however, expressed their doubts about the approach taken in the Commission's proposal and suggested an alternative solution, based on providing publishers with a presumption of entitlement to license and enforce the rights in their press publications (Option B of Annex II).

Press publishers would be presumed to have the right to exploit and enforce their rights in their press publications for online uses, with no need to prove that they have been transferred or licensed the underlying rights in the works or other subject matter contained in these press publications. This presumption would cover the same rights and uses as the Commission's proposal and would operate vis-à-vis third parties, excluding the authors of the content contained in a press publication.

*The Presidency proposes that political guidance be sought on the direction to be taken, in view of the two options presented above. The chosen option remains subject to further amendments as considered necessary.*

## **B. Value gap provisions**

The Commission's proposal includes self-standing measures to be taken by information society service providers storing and giving access to large amounts of content uploaded by their users (the so-called 'duty of care'). However, references to the communication to the public and the E-Commerce Directive were made in recital 38. The proposal has triggered different views from delegations: some have suggested removing the reference to the communication to the public from the proposal and raised concerns as to the compatibility of the proposed approach with fundamental rights and the interplay with the E-Commerce Directive, asking for an opinion of the Council's Legal Service on these points, others have indicated that Article 13 should be used to clarify under which conditions the user uploaded content platforms communicate to the public. The Council Legal Service opinion was provided on 11 October 2017<sup>2</sup>.

Three draft compromise proposals by the Presidency with different options on Article 13 have been discussed in the Working Party. In the first option<sup>3</sup> the Presidency proposed to clarify under which conditions information society services providers storing and giving access to user uploaded content are communicating to the public, using the criteria suggested by some delegations. A number of delegations showed support to the idea of the clarification itself but some of them raised concerns about the criteria used, which they found to be too similar to those used under Article 14 of the E-Commerce Directive and expressed their preference for copyright relevant criteria based on the case law of the CJEU.

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<sup>2</sup> Document 13140/17.

<sup>3</sup> Document 11783/17.

It was also indicated that the clarification should be a targeted one. Other delegations stated their preference for the initially proposed stand-alone obligation of measures, without any clarification on the communication to the public in the Article. With regard to the measures, a number of delegations continued to raise some concerns even though it was also recognised that some improvements had been made.

Based on these comments, the Presidency tabled a second compromise proposal<sup>4</sup>. In this proposal the Presidency used criteria from the CJEU as requested by the delegations. However, even though the direction taken was considered to be the right one, further comments were made by the delegations with regard to some of the criteria used. Additionally, some delegations asked for a clarification on the link between the communication to the public and the E-Commerce Directive by providing that Article 14 of the E-Commerce Directive does not apply to the service providers regulated by Article 13. At the same time, concerns were raised on whether this approach would lead to excessive liability of such providers, as they would be considered primarily liable for copyright infringements in cases where their users upload content in which they do not hold any rights and without having been authorised by rightholders to do so. Questions were also raised with regard to the link between the clarification on communication to the public and the measures to be taken, where it was felt that more clarity was needed on which service providers should take the measures.

In the third compromise proposal<sup>5</sup>, which can be found in the Annex II, the Presidency maintained the clarification of communication to the public in Article 13 as in the previous version, while providing for further clarifications, including a new definition of user uploaded content service. At this stage the compromise proposal did not provide for a clarification in Article 13 that user uploaded content services could not rely on Article 14 of E-Commerce Directive due to the need for further guidance by the delegations on this issue. At the same time the compromise proposal, acknowledging that the services which communicate to the public are likely not to be eligible for the limited liability regime under the E-Commerce Directive, and taking into account some of the concerns raised with regard to full liability, tried to provide for some liability mitigation for the specific cases where no agreements are concluded between rightholders and the service providers.

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<sup>4</sup> Document 13842/17.

<sup>5</sup> Document 14482/17.

Under this proposal, service providers that communicate to the public and are not eligible for the limited liability regime under Article 14 of the E-Commerce Directive would not be liable for unauthorised acts of communication to the public of content uploaded by their users under the condition that they take effective measures with regard to the content identified by rightholders and, if ex ante identification of the content is impossible, remove such uploaded content upon a notification by rightholders and avoid future uploads of this specific content.

Furthermore, these service providers would not be liable for the specific unauthorised content uploaded by their users if no relevant data is provided by rightholders to allow the service providers to apply the measures. A significant number of delegations expressed their concerns that this approach would add a new liability exemption, thus not achieving the objective of strengthening the rightholders' position. A few delegations found this approach to be a balanced one and other delegations did not express their views.

Additionally, it should be noted that among the delegations willing to clarify the communication to the public there seems to be divergent views on the scope of application of the proposed clarification and the criteria to be used. Some delegations favour a broader approach according to which those service providers that store and give access to user uploaded content would communicate to the public, while other delegations seem to favour a very targeted approach, which would specifically address service providers that operate for profit and give access to a significant amount of works uploaded without the authorisation from rights holders. Other delegations maintain their preference for the initially proposed stand-alone obligation without any clarifications on the communication to the public in the article.



*Taking into account the different approaches by the delegations and the difficulties to reach agreement on some fundamental elements of Article 13, the Presidency considers that political guidance should be sought on certain questions in order to be able to progress with the discussions on Article 13. The Presidency proposes the following elements for a political guidance.*

*(1) On communication to the public:*

- (a) should there be a clarification in Article 13 that service providers that store and give access to user uploaded content perform, under certain conditions, an act of communication to the public or should Article 13 be limited to self-standing measures, applying to user uploaded content platforms with a significant amount of uploaded content, without any clarification on communication to the public, as in the Commission proposal?*
- (b) should there also be an explicit provision in Article 13 clarifying that such services are not eligible for the limited liability regime under Article 14 of the E-Commerce Directive, meaning that they would be taken out of Article 14 of E-Commerce Directive and be primarily liable for copyright infringements when their users upload content not authorised by rightholders?*
- (c) If the user uploaded content platforms should be liable, should they be liable in all cases or should there still be some targeted liability mitigation provided for to avoid potentially excessive impact on platforms storing and giving access to user uploaded content?*

*(2) If there is a clarification of the communication to the public, should there also be an obligation to apply measures as an additional provision, and if so, should it apply to the same service providers as those concerned by the clarification on communication to the public or should the scope of this obligation be different, potentially wider?*

### **III. CONCLUSION**

The Delegations are invited to take note of the present Presidency's report on the state-of-play, including the latest Presidency's compromise proposal contained in the two Annexes to this Note. Then, during the Bulgarian Presidency, delegations will be invited to express their views on the outstanding issues and to provide political guidance for the main outstanding issues under Articles 11 and 13.

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**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 Committee<sup>6</sup>,

Having regard to the opinion of the Committee of the Regions<sup>7</sup>,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) 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.

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<sup>6</sup> OJ C , , p. .

<sup>7</sup> OJ C , , p. .

- (2) The directives which have been adopted in the area of copyright and related rights provide for a high level of protection for rightholders and create a framework wherein the exploitation of works and other protected subject-matter can take place. This harmonised legal framework contributes to the good functioning of the internal market; it stimulates innovation, creativity, investment and production of new content, also in the digital environment. The protection provided by this legal framework also contributes 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. Article 167(4) of the Treaty on the Functioning of the European Union requires the Union to take cultural aspects into account in its action.
- (3) 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. The objectives and the principles laid down by the Union copyright framework remain sound. However, legal uncertainty remains, for both rightholders and users, as regards certain uses, including cross-border uses, of works and other subject-matter in the digital environment. As set out in the Communication of the Commission entitled 'Towards a modern, more European copyright framework'<sup>8</sup>, in some areas it is necessary to adapt and supplement the current Union copyright framework. This Directive provides for 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 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 service providers storing and giving access to user uploaded content and on the transparency of authors' and performers' contracts.

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<sup>8</sup> COM(2015) 626 final.

- (4) 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 Council<sup>9</sup>, Directive 2001/29/EC of the European Parliament and of the Council<sup>10</sup>, Directive 2006/115/EC of the European Parliament and of the Council<sup>11</sup>, Directive 2009/24/EC of the European Parliament and of the Council<sup>12</sup>, Directive 2012/28/EU of the European Parliament and of the Council<sup>13</sup> and Directive 2014/26/EU of the European Parliament and of the Council<sup>14</sup>.

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<sup>9</sup> 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. 20–28).

<sup>10</sup> 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).

<sup>11</sup> 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).

<sup>12</sup> 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).

<sup>13</sup> 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).

<sup>14</sup> 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).

- (5) 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 Union 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 those new uses. Mandatory exceptions or limitations for uses of text and data mining technologies in the field of scientific research, illustration for teaching in the digital environment and for preservation of cultural heritage should be introduced. The exceptions and limitations existing in Union law should continue to apply, including to text and data mining, education and preservation activities, as long as they do not limit the scope of the mandatory exceptions laid down in this Directive and on condition that their application does not adversely affect nor circumvent the mandatory rules set out in this Directive. Directives 96/9/EC and 2001/29/EC should be adapted.
- (6) The exceptions and the limitation provided for 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) The protection of technological measures established in Directive 2001/29/EC remains essential to ensure the protection and the effective exercise of the rights granted to authors and to other rightholders under Union law. This protection should be maintained while ensuring that the use of technological measures does not prevent the enjoyment of the exceptions and the limitation established in this Directive. Rightholders should have the opportunity to ensure this through voluntary measures. They should remain free to choose the appropriate means of enabling the beneficiaries of the exceptions and the limitation established in this Directive to benefit from them. In the absence of voluntary measures, Member States should take appropriate measures in accordance with the first subparagraph of Article 6(4) of Directive 2001/29/EC, including where works and other subject-matter are made available through on-demand services.
- (8) New technologies enable the automated computational analysis of information in digital form, such as text, sounds, images or data, generally known as text and data mining. Those technologies allow researchers to process large amounts of information with a view to gaining new knowledge and discovering new trends. Whilst text and data mining technologies are prevalent across the digital economy, there is widespread acknowledgment that text and data mining can in particular benefit the research community and in so doing support innovation. These technologies benefit research organisations as well as cultural heritage institutions, which may also carry out research in the context of their main activities. However, in the Union, such organisations and institutions are confronted with legal uncertainty as to the extent to which they can perform text and data mining of content. 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.

- (8a) 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 is required under copyright law. There may also be instances of text and data mining which do not involve acts of reproduction or where the reproductions made fall under the mandatory exception for temporary acts of reproduction laid down in Article 5(1) of Directive 2001/29/EC, which should continue to apply to text and data mining techniques which do not involve the making of copies beyond the scope of that exception.
- (9) Union law provides for certain exceptions and limitations covering uses for scientific research purposes which may apply to acts of text and data mining. However, those exceptions and limitations are optional and not fully adapted to the use of technologies in scientific research. Moreover, where researchers have lawful access to content, for example through subscriptions to publications or open access licences, the terms of the licences may exclude text and data mining. As research is increasingly carried out with the assistance of digital technology, there is a risk that the Union's competitive position as a research area will suffer unless steps are taken to address the legal uncertainty for text and data mining.
- (10) This legal uncertainty should be addressed by providing for a mandatory exception to the exclusive right of reproduction and also to the right to prevent extraction from a database. In line with the existing European research policy, which encourages universities and research institutes to develop collaborations with the private sector, research organisations should also benefit from the exception when their research activities are carried out in the framework of public-private partnerships. While research organisations and cultural heritage institutions should remain the beneficiaries of the exception, they should be able to rely on their private partners for carrying out text and data mining, including by using their technological tools.



- (11) Research organisations across the Union encompass a wide variety of entities the primary goal of which is to conduct scientific research or to do so together with the provision of educational services. The term "scientific research" within the meaning of this Directive covers both the natural sciences and the human sciences. Due to the diversity of such entities, it is important to have a common understanding of research organisations. They should for example cover entities such as research institutes, **hospitals carrying out research,** universities, including university libraries, or other higher education institutions. Despite different legal forms and structures, research organisations across the 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. Conversely, organisations upon which commercial undertakings have a decisive influence allowing them to exercise control because of structural situations such as their quality of shareholders or members, which may result in preferential access to the results of the research, should not be considered research organisations for the purposes of this Directive.
- (11a) Cultural heritage institutions should be understood as **covering publicly accessible libraries, museums and archives, regardless of the type of works and other subject matter which they hold in their permanent collections, as well as film or audio heritage institutions.** **They should include,** among others, national libraries and national archives. They should also include educational establishments and public sector broadcasting organisations, as far as their archives and publicly accessible libraries are concerned.

- (11b) Research organisations and cultural heritage institutions, including the persons attached thereto, should be covered by the text and data mining exception regarding content to which they have lawful access. Lawful access should be understood as covering access to content based on open access policy or through contractual arrangements between rightholders and research organisations or cultural heritage institutions, such as subscriptions, or through other lawful means. For instance, in cases of subscriptions taken by research organisations or cultural heritage institutions, the persons attached thereto covered by these subscriptions would be deemed to have lawful access. Lawful access also covers access to content that is freely available online.
- (11c) Research organisations and cultural heritage institutions may in certain cases, for example for subsequent verification of scientific research results, need to retain the copies made under the exception for the purposes of carrying out text and data mining. In such cases, the copies ~~made~~ should **be stored in a secure environment and** not be retained for longer than is necessary for the scientific research activities. Member States may determine, at national level and after discussions with relevant stakeholders, ~~the~~ **further** concrete modalities for retaining the copies, including the possibility to appoint trusted bodies for the purpose of storing such copies. In order not to unduly restrict the application of the exception, these modalities should be proportionate and limited to what is needed for retaining the copies in a safe manner and preventing unauthorised uses. Uses for the purpose of scientific research other than text and data mining, such as scientific peer review and joint research, should remain covered, where applicable, by the exception or limitation provided for in Article 5(3)(a) of Directive 2001/29/EC.
- (12) 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 when there is a risk that the security and integrity of their systems or databases could be jeopardised. Such measures could for example be used to ensure that only persons having lawful access to their data can access it, including through IP address validation or user authentication. These measures should however remain proportionate to the risks involved and should not prevent or make excessively difficult text and data mining carried out by researchers.

- (13) In view of the nature and scope of the exception, which is limited to entities carrying out scientific research any potential harm to rightholders created through this exception should be minimal. Therefore, Member States should not provide for compensation for rightholders as regards uses under the text and data mining exception introduced by this Directive.
- (13a) In addition to their significance in the context of scientific research, text and data mining techniques are widely used both by private and public entities to analyse large amounts of data in different areas of life and for various purposes, including for government services, complex business decisions **and** ~~or~~ the development of new applications or technologies. Rightholders should remain able to license the uses of their works and other subject-matter falling outside the scope of the mandatory exception provided for in this Directive and the existing exceptions and limitations provided for in Directive 2001/29/EC. At the same time, consideration should be given to the fact that users of text and data mining techniques may be faced with legal uncertainty as to whether temporary reproductions and extractions which are an integral part of the process of text and data mining may be carried out on publicly available and lawfully accessed works and other subject-matter, in particular when the reproductions or extractions made for the purposes of the technical process may not fulfil all the conditions of the existing exception for temporary acts of reproduction in Article 5(1) of Directive 2001/29/EC. In order to allow for more legal certainty in such cases, this Directive should enable the Member States to provide under certain conditions for an exception or limitation for temporary reproductions and extractions of works and other subject-matter, insofar as these form an ~~integral~~ part of the text and data mining process and the copies made are not kept beyond that process. This optional exception or limitation should only apply when the work or other subject-matter is accessed lawfully by the beneficiary, including when it has been made available to the public online, and insofar as the rightholders have not reserved the right to make reproductions and extractions for text and data mining, for example by agreement, unilateral declaration, including through the use of machine readable metadata or by the use of technical means. Rightholders should be able to apply measures to ensure that their reservations in this regard are respected. The optional exception or limitation should leave intact the mandatory exception for text and data mining for research purposes laid down in this Directive.

- (14) Article 5(3)(a) of Directive 2001/29/EC allows Member States to introduce an exception or limitation to the rights of reproduction, communication to the public and making available to the public of works and other subject matter in such a way that members of the public may access them from a place and a time individually chosen by them (**‘making available to the public’**), 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 of a substantial part of its contents for the purpose of illustration for teaching. The scope of those 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 at a distance. Moreover, the existing legal framework does not provide for a cross-border effect. This situation may 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 across borders.
- (15) While distance learning and cross-border education programmes are mostly developed at higher education level, digital tools and resources are increasingly used at all education levels, in particular to improve and enrich the learning experience. The exception or limitation provided for in this Directive should therefore benefit all educational establishments recognised by a Member State, including primary, secondary, vocational and higher education. It should apply only to the extent that the uses are justified by the non-commercial purpose of the particular teaching activity. The organisational structure and the means of funding of an educational establishment should not be the decisive factors to determine the non-commercial nature of the activity.

(16) The exception or limitation for the sole purpose of illustration for teaching provided for in this Directive should be understood as covering digital uses of works and other subject-matter to support, enrich or complement the teaching, including learning activities. In most cases, the concept of illustration would therefore imply uses of parts or extracts of works only, **which should not substitute the purchase of materials primarily intended for educational markets**. When implementing the exception or limitation, Member States should remain free to specify, for the different categories of works or other subject-matter and in a balanced manner, the proportion of a work or other subject-matter that may be used for the sole purpose of illustration for teaching. Uses allowed under the exception or limitation should be understood to cover the specific accessibility needs of persons with a disability in the context of illustration for teaching.

(16a) 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 or teaching activities taking place outside the premises of educational establishments, **for example in a museum, library or another cultural heritage institution**, and be limited to what is necessary for the purpose of such activities. The exception or limitation should cover both uses of works and other subject matter made in the classroom or in other venues through digital means, for example electronic whiteboards or digital devices which may be connected to the Internet, as well as uses made at a distance through secure electronic networks, such as online courses or access to teaching material complementing a given course. Secure electronic networks should be understood as digital teaching and learning environments access to which is limited to the educational establishment's teaching staff and to the pupils or students enrolled in a study programme, notably through appropriate authentication procedures, **including password based authentication**.

- (17) Different arrangements, based on the implementation of the exception provided for in Directive 2001/29/EC or on licensing agreements covering further uses, are in place in a number of Member States in order to facilitate educational uses of works and other subject-matter. Such arrangements have usually been developed taking account of the needs of educational establishments and different levels of education. 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 may differ from a Member State to another, to the extent they do not hamper the effective application of the exception or limitation or cross-border uses. This 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 at least the same uses as those allowed under the exception. Member States could notably use this mechanism to give precedence to licences for materials which are primarily intended for the educational market or for sheet music. In order to avoid that such mechanism results in legal uncertainty or administrative burden for educational establishments, Member States adopting this approach should take measures to ensure that rightholders make the licensing schemes allowing digital uses of works or other subject-matter for the purpose of illustration for teaching easily available and that educational establishments are aware of the existence of such licensing schemes. Such measures may include the development of licensing schemes tailored to the needs of educational establishments and the development of information tools aimed at ensuring the visibility of the existing licensing schemes.
- (17a) Member States should remain free to provide that rightholders receive fair compensation for the digital uses of their works or other subject-matter under the exception or limitation for illustration for teaching provided for in this Directive. For the purposes of determining the possible level of fair compensation, due account should be taken, inter alia, of Member States' educational objectives and of the harm to rightholders.

- (18) An act of preservation of a work or other subject-matter in the collection of a cultural heritage institution may require a reproduction and consequently the authorisation of the relevant rightholders. Cultural heritage institutions are engaged in the preservation of their collections for future generations. Digital technologies offer new ways to preserve the heritage contained in those collections but they also create new challenges. 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.
- (19) Different approaches in the Member States for acts of preservation by cultural heritage institutions hamper cross-border cooperation and the sharing of means of preservation by such institutions in the internal market, leading to an inefficient use of resources.
- (20) 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 for preservation purposes, for example to address technological obsolescence or the degradation of original supports. Such an exception should allow for the making of copies by the appropriate preservation tool, means or technology, in the required number and at any point in the life of a work or other subject-matter to the extent required for preservation purposes. Acts of reproduction undertaken by cultural heritage institutions for purposes other than the preservation of works and other subject-matter in their permanent collections should remain subject to the authorisation of rightholders, unless permitted by other exceptions or limitations provided for by Union law.
- (20a) Cultural heritage institutions do not necessarily have the technical means or expertise to undertake the acts required to preserve their collections themselves, particularly in the digital environment, and may therefore have recourse to the assistance of other cultural institutions and other third parties for that purpose. Under this exception, cultural heritage institutions should therefore be allowed to rely on third parties acting on their behalf and under their responsibility, including those that are based in other Member States, for the making of copies.

- (21) 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 such institutions, for example as a result of a transfer of ownership or licence agreements or permanent custody arrangements.
- (22) 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. However, the particular characteristics of the collections of out-of-commerce works, together with the amount of works involved in mass digitisation projects, mean that obtaining the prior consent of the individual rightholders may be very difficult. This can be due, for example, to the age of the works or other subject-matter, their limited commercial value or the fact that they were never intended for commercial use. It is therefore necessary to provide for measures to facilitate the collective licensing of rights in out-of-commerce works that are permanently in the collections of cultural heritage institutions and thereby to allow the conclusion of agreements with cross-border effect in the internal market.
- (23) Member States should, within the framework provided for in this Directive, have flexibility in choosing the specific type of mechanism, such as extended collective licensing or presumption of representation, allowing for licences for out-of-commerce works to extend to the rights of rightholders that have not mandated a representative collective management organisation, in accordance with their legal traditions, practices or circumstances. Member States should also have flexibility in determining the requirements for collective management organisations to be sufficiently representative, as long as this is based on a significant number of rightholders in the relevant type of works or other subject-matter who have given a mandate allowing the licensing of the relevant type of use. Member States should be free to establish specific rules applicable to cases where more than one collective management organisation is representative for the relevant works or other subject matter, requiring for example joint licences or an agreement between the relevant organisations.



- (24) For the purpose of those licensing mechanisms, a rigorous and well-functioning collective management system is important. That system includes 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 rightholders, as provided for by Directive 2014/26/EU. Additional appropriate safeguards should be available for all rightholders, who should be given the opportunity to exclude the application of such mechanisms **in relation to all** their works or other subject-matter **or to all licences,** ~~general or~~ other subject-matter or to particular licences at any time before or under the duration of the licence. Conditions attached to those mechanisms should not affect their practical relevance for cultural heritage institutions. It is important that when a rightholder excludes the application of such mechanisms to one or more of their works or other subject-matter, the informed collective management organisation does not continue to issue licences covering the relevant uses and any ongoing uses are terminated within a reasonable ~~short~~ period. Such exclusion by the rightholder should not affect their claim to remuneration for the actual use of the work or other subject-matter.
- (24a) This Directive does not affect the possibility for Member States to determine the allocation of legal responsibility for the compliance of the licensing and the use of out-of-commerce works with the conditions set out in this Directive and for the compliance of the parties with the terms of those licenses.

(25) Considering the variety of works and other subject-matter in the collections of cultural heritage institutions, it is important that the licensing mechanisms introduced by this Directive are available and can be used in practice for different types of works and other subject-matter, including photographs, software, phonograms, audio-visual works and unique works of art, irrespective of whether they have ever been commercially available. Never-in-commerce works may include posters, leaflets, trench journals or amateur audiovisual works, but also unpublished works or other subject-matter, without prejudice to other applicable legal constraints, **such as national rules on moral rights**. When a work is available in any of its different versions, such as subsequent editions of literary works and alternate cuts of cinematographic works, or in any of its different manifestations, such as digital and printed formats of the same work, this work or other subject-matter should not be considered out-of-commerce. Conversely, the commercial availability of adaptations, including other language versions or audiovisual adaptations of a literary work, should not preclude the determination of the out-of-commerce status of a work. In order to reflect the specificities of different types of works and other subject-matter as regards modes of publication and distribution and to facilitate the usability of those mechanisms, specific requirements and procedures may have to be established ~~by Member States~~ for the practical application of those licensing mechanisms, such as a time period which needs to have been elapsed since the first commercial availability of the work. It is appropriate that Member States consult rightholders, users and collective management organisations when doing so.

(25a) When determining whether works and other subject-matter are out-of-commerce, a reasonable effort should be required to assess their availability to the public in the customary channels of commerce, taking into account the characteristics of the particular work or set of works.

**Member States should be free to determine the allocation of responsibilities for making the reasonable effort.** The reasonable effort should not have to be repeated over time but it should also take account of any easily accessible evidence of upcoming availability of works in the customary channels of commerce. A work-by-work assessment ~~or a verification of availability also across borders~~ should only be required when this is considered reasonable **in view of the availability of relevant information, the likelihood of commercial availability and the expected transaction cost. The verification of availability should normally take place in the Member State where the cultural heritage institution is established, unless verification across borders is considered reasonable,** for example when **there is easily available** information ~~on the Member State in which~~**that** a literary work was first published in a given language version **in another Member State is easily available and that Member State is different from the one in which the cultural heritage institution is established.** In many cases the out-of-commerce status of a set of works could be determined through a proportionate mechanism, such as sampling. The limited availability of a work, such as its availability in second-hand shops, or the theoretical possibility to obtain a licence to a work should not be considered as availability to the public in the customary channels of commerce.

- (26) 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 ~~sets of out-of-commerce works when there is available evidence to presume that they predominantly consist of 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, **and to sets of out-of-commerce works when there is available evidence to presume that they predominantly consist of such works or other subject-matter.** Those mechanisms should also not apply to ~~sets of out-of-commerce works when there is available evidence to presume that they predominantly consist of 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 the producer's headquarters or habitual residence is in a Member State, **and to sets of out-of-commerce works when there is available evidence to presume that they predominantly consist of such works or other subject-matter.**
- (27) The contracting cultural heritage institutions and collective management organisations should remain free to agree on the territorial scope of the licence, the licence fee and the allowed uses. Uses covered by such licence should not be for profit making purpose, including when copies are distributed by the cultural heritage institution, such as in the case of promotional material about an exhibition. At the same time, as the digitisation of the collections of cultural heritage institutions can entail significant investments, any licences granted under the mechanisms provided for in this Directive should not prevent cultural heritage institutions from generating reasonable revenues for the purposes of covering the costs of the licence and the costs of digitising and disseminating the works and other subject-matter covered by the licence.

(28) Information regarding the future and ongoing use of out-of-commerce works and other subject-matter 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 both before a licence is granted and during the operation of the licence as appropriate. This is particularly important when uses take place across borders in the internal market. It is therefore appropriate to make provision for the creation of a single publicly accessible online portal for the Union to make such information available to the public for a reasonable period of time before the use takes place. This portal should provide rightholders with a **direct possibility** ~~possibility~~ **means** to exclude the application of licences to their works or other subject-matter. Under Regulation (EU) No 386/2012 of the European Parliament and of the Council<sup>15</sup>, the European Union Intellectual Property Office is entrusted with certain tasks and activities, financed by making use of its own budgetary means, 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. In addition to making the information available through the portal, further appropriate publicity measures may need to be taken on a case-by-case basis in order to increase the awareness of affected rightholders, for example through the use of additional channels of communication to reach a wider public. The necessity, the nature and the geographic scope of the additional publicity measures should depend on the characteristics of the relevant out-of-commerce works or other subject-matter, the terms of the licences and the existing practices in Member States. Publicity measures should be effective without the need to inform each rightholder individually.

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<sup>15</sup> 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. 1–6).

(28a) The measures provided for in this Directive to facilitate the collective licensing of rights in out-of-commerce works or other subject-matter that are permanently in the collections of cultural heritage institutions should be without prejudice to the use of such works or other subject-matter under exceptions or limitations provided for in Union law or under other licences with an extended effect, where such licensing is not based on the out-of-commerce status of the covered works or other subject matter.

(28~~b~~aa) Systems such as extended collective licensing or presumptions of representation are a well-established practice in several Member States and can may be used in different areas. A functioning copyright framework that works for all parties requires the availability of these proportionate, legal mechanisms for the licensing of works. Member States should therefore be able to rely on solutions, allowing relevant licensing organisations, which are owned or controlled by their rightholder members (or entities representing rightholders) or organised on a not for profit basis, to offer licences covering large volumes of works or other subject-matter for certain types of use, and distribute the revenue received to rightholders.

(28~~b~~c) In the case of some uses, together with the large amount of works involved, the transaction cost of individual rights clearance is prohibitively high and without effective collective licensing mechanisms all the required transactions in these areas to enable the use of these works or other subject matter are unlikely to take place. Extended collective licensing and similar mechanisms have made it possible to conclude agreements in areas affected by this market failure where traditional collective licensing does not provide an exhaustive solution for covering all works and other subject-matter to be used. These mechanisms serve as a complement to collective management based on individual mandates, by providing full legal certainty to users. At the same time, they provide a further opportunity to right holders to benefit from the legitimate use of their works.

(28~~ed~~de) Given the increasing importance of the ability to offer flexible licensing solutions in the digital age, and the increasing use of such schemes in Member States, it is beneficial to further clarify in Union law the status of licensing mechanisms allowing collective management organisations to conclude licences, on a voluntary basis, irrespective of whether all rightholders have authorised the organisation to do so. Member States should have the ability to maintain and introduce such schemes in accordance with their legal traditions, practices or circumstances, subject to the safeguards provided for in this Directive and in full respect of Union law and their international obligations related to copyright. These schemes would only have effect in the territory of the Member State concerned, unless otherwise provided for in Union law. Member States should have flexibility in choosing the specific type of mechanism allowing for licences for works or other subject-matter to extend to the rights of rightholders that have not authorised the organisation that concludes the agreement, as long as it guarantees sufficient protection of the non-member rightholders. Such mechanisms may include extended collective licensing and presumptions of representation.

(28~~ed~~ed) It is important that such mechanisms are only applied in well-defined areas of uses, where obtaining authorisations on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction, i.e. a licence that covers all the involved rightholders unlikely to occur due to the nature of the use or of the types of works concerned. It is equally important that the licensed use neither affects adversely the economic value of the relevant rights nor deprives rightholders of significant commercial benefits. Moreover, Member States should ensure that appropriate safeguards are in place to protect the legitimate interests of rightholders that are not represented by the organisation offering the licence.

(28f~~e~~) Specifically, to justify the extended effect of the mechanisms, the organisation should be, on the basis of authorisations from rightholders, sufficiently representative of the types of works or other subject-matter and of the rights which are the subject of the licence. To ensure legal certainty and confidence in the mechanisms Member States may determine the allocation of legal responsibility for uses authorised by the licence agreement. Equal treatment should be guaranteed to all rightholders whose works are exploited under the licence as regards, notably, access to information on the licensing and the distribution of remuneration. Publicity measures should be effective throughout the duration of the licence without the need to inform each rightholder individually. In order to ensure that rightholders can easily retain control of their works, and prevent any uses of their works that would be prejudicial to their interests, rightholders must be given an effective opportunity to exclude the application of such mechanisms to their works or other subject-matter for all uses and works or other subject-matter or for specific uses and works or other subject-matter. In such cases, any ongoing uses should be terminated within a reasonable period. Member States may also decide that additional measures are appropriate to protect rightholders.

(28g~~f~~) Member States should ensure that the purpose and scope of any licence granted as a result of these mechanisms, as well as the possible users, should always be carefully and clearly defined in national legislation or, if the underlying legislation is a general provision, in the licensing practices applied as a result of such general provisions, or in the licences granted. The ability to operate a licence under these mechanisms should also be limited to organisations which are either owned or controlled by their right holder members or which operate on a not for profit basis, regulated by national law implementing Directive 2014/26/EU.



- (28gh) Given the different traditions and experiences with extended collective licensing across Member States and their applicability to rightholders irrespective of their nationality or their Member State of residence, it is important to ensure transparency and dialogue at Union level about the practical functioning of these mechanisms, including as regards the effectiveness of safeguards for rightholders, their usability and the potential need to lay down rules to give such schemes cross-border effect within the internal market. To ensure transparency, information about the use of such mechanisms under this Directive should be regularly published by the Commission. Member States that have introduced such mechanisms should therefore inform the Commission about relevant national legislation and its application in practice, including scopes and types of licensing introduced on the basis of general legislation, the scale of licensing and the collective management organisations involved. Such information should be discussed with Member States in the contact committee referred to in Article 12(3) of Directive 2001/29/EC. The Commission should publish a report by 31 December 2020 on the use of such mechanisms in the Union and their impact on licensing and rightholders.
- (29) Video-on-demand services have the potential to play a decisive role in the dissemination of audiovisual works across the European Union. However, the availability of those works, in particular European works, on video-on-demand services remains limited. Agreements on the online exploitation of such works may be difficult to conclude due to issues related to the licensing of rights. Such issues may, for instance, appear when the holder of the rights for a given territory has low economic incentive to exploit a work online and does not license or holds back the online rights, which can lead to the unavailability of audiovisual works on video-on-demand services. Other issues may be linked to the windows of exploitation.

(30) To facilitate the licensing of rights in audiovisual works to video-on-demand services, this Directive requires Member States to provide for a negotiation mechanism allowing parties willing to conclude an agreement to rely on the assistance of an impartial body or mediator. For that purpose, Member States may either create a new body or rely on an existing one that fulfils the conditions established by this Directive. Member States may designate one or more competent bodies or mediators. The body **or mediator** should meet with the parties and help with the negotiations by providing professional and external advice. The body **or mediator** could meet with the parties to facilitate the start of negotiations or in the course of the negotiations to facilitate the conclusion of an agreement. The use of and the participation in the negotiation mechanism should remain voluntary and should not affect the parties' contractual freedom. Against that background, Member States should be free to decide on the concrete 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 mechanism.

*Recitals 31 to 35 see Annex II*

(36) Publishers, including those of press 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 this context, publishers make an investment with a view to the exploitation of the works contained in their publications and may in some instances be deprived of revenues where such works are used under exceptions or limitations, such as the ones for private copying and reprography, including the corresponding existing national schemes for reprography in the Member States, or under public lending schemes. In a number of Member States the compensation or remuneration for such uses is shared between authors and publishers. In order to take account of this situation and improve legal certainty for all concerned parties, Member States should be allowed to determine that, when an author has transferred or licensed his rights to a publisher or otherwise contributes with his works to a publication and there are systems in place to compensate for the harm caused by an exception or limitation, publishers are entitled to claim a share of such compensation. The same possibility should exist for remuneration for public lending. Member States should remain free to determine the burden on the publisher to substantiate his claim for the compensation or remuneration and to lay down the conditions as to the sharing of this compensation or remuneration between authors and publishers in accordance with their national systems.

[(37) Over the last years, the functioning of the online content marketplace has gained in complexity. Online services providing access to a significant amount of copyright protected content uploaded by their users have flourished and have become main sources of access to content online. Legal uncertainty exists as to whether such online content sharing services engage in copyright relevant acts and need to obtain authorisations from rightholders for the content uploaded by their users who do not hold the relevant rights in the uploaded content. This situation affects rightholders' possibilities to determine whether, and under which conditions, their content is used as well as their possibilities to get an appropriate remuneration for it. It is therefore necessary to clarify the copyright relevant obligations applicable to online content sharing services without affecting other services, such as internet access, providers of cloud services, which allow users to upload content for their individual use, such as cyber lockers or online marketplaces whose main activity is not giving access to copyright protected content but online retail. Nor should the clarification apply to providers of online services which store and provide access to content that is mainly uploaded by the rightholders themselves or is authorised by them, including scientific or educational repositories where the content uploaded is authorised. Nor should the clarification affect the use or works and other subject matter under an exception or limitation to copyright and related rights. The clarification should be targeting the specific situation of online content sharing services, defined for the purposes of this Directive as information society service providers whose main or one of the main purposes is to provide access to copyright protected content uploaded by their users, without affecting the application of Article 3(1) and (2) of Directive 2001/29/EC and Article 8 (2) of Directive 2006 /115/EC in other situations.

- (38) This directive clarifies, taking into account the case law of the Court of Justice of the European Union, under which conditions the online content sharing services are engaging in an act of communication to the public. When assessing whether there is an act of communication to the public, two cumulative criteria need to be assessed, namely whether there is an act of communication of a copyright protected work or other subject matter and whether there is a public. In line with the case law of the Court of Justice of the European Union the concept of communication to the public needs to be assessed on an individual basis and taking into account complementary criteria which are not autonomous and are interdependent. The Court has for example indicated that there is an act of communication to the public when one intervenes, in full knowledge of the consequences of its action, to give access to a copyright-protected work. The Court has also underlined the relevance of the profit-making nature of the activity when assessing whether a person is engaging in an act of communication to the public.
- (38a) Taking into account the fact that certain online content sharing services have become main sources of access to protected content online and have developed their activity around such access, and the case law of the Court of Justice of the European Union, it is appropriate to clarify that online content sharing services are engaging into acts of communication to the public and making available to the public when they intervene in full knowledge of the consequences of their action to provide access to protected content with the purpose of obtaining profit therefrom by organising it in such a manner that it is easily findable on their services. Organising content involves for example indexing the content, presenting it in a certain manner and categorizing it.
- (38b) Where authorisations are granted by rightholders to online content sharing services for the use of their content uploaded by the users of the services, these authorisations should also cover the liability of the users for copyright relevant acts but only in cases where the users do not act in their professional capacity.

(38ba) There may be situations where rightholders or online content sharing service providers choose not to conclude any agreements and the service provider decides to prevent the availability of the content to avoid potential copyright infringements. In some cases the online service provider may however be unable to prevent specific protected content even if it has relevant measures in place, notably when rightholders have not provided them the necessary data for the application of the measures to their specific content. It is therefore necessary to provide that in such specific cases online content sharing service providers should not be liable for copyright infringements, provided that they take appropriate and proportionate measures to prevent unauthorised content and that they remove and prevent future uploads of already available unauthorised content upon a notification from rightholders.

(38c) *Deleted.*

(38d) *Deleted.*

(38e) The assessment of whether an information society service provider stores and gives access to a significant amount of content needs to be made on a case-by-case basis and take account of a combination of elements, such as the total number of files of copyright-protected content uploaded by the users of the services and the proportion of the protected content uploaded by the users in the overall amount of content available on the service.

(38f) The assessment of the appropriateness and proportionality of measures to be taken by the online content sharing service providers-should among other things take account of the type of content uploaded by their users, without the authorisation of the right holders, the state of the art of existing technologies and the size of the service. Where different categories of content are uploaded, such as music, text and audiovisual content, different measures may be appropriate and proportionate per type of content, including content recognition technologies.

(39) Collaboration between online content sharing service providers and rightholders is essential for the functioning of the measures. In particular, rightholders who wish to prevent the availability of their content on online content sharing services, should provide the service providers the necessary data on specific works and other subject-matter to be prevented.

- (39a) Online content sharing service providers should be transparent towards rightholders with regard to the deployed measures, to allow the assessment of their appropriateness. As different measures may be used by service providers, they should provide rightholders with appropriate information on the type of measures used and the way they are operated without prejudice to their business secrets. The level of information given by the service providers should as a minimum be sufficient to allow rightholders to assess the effectiveness of the measures used without requiring the service providers to provide them with detailed and individualised information for each content identified. This is without prejudice to contractual arrangements, which may contain more specific provisions on the information to be provided.
- (39b) In order to facilitate the assessment by the service providers of what could constitute appropriate and proportionate measures, collaboration between rightholders and service providers is to be encouraged by the Member States in view of defining best practices.
- (39c) The measures taken by the service providers should respect the freedom of expression and freedom to information of their users and be without prejudice to the application of the exceptions and limitations to copyright. For that purpose the service providers should put in place mechanisms allowing users to complain about the blocking or removal of uploaded content that could benefit from an exception or limitation to copyright. Replies to the users' complaints should be provided in a timely manner. To make these mechanisms function, cooperation from rightholders is needed, in particular with regard to the assessment of the complaints submitted and justifications for the prevention. Protected content uploaded by the users which has been blocked preliminarily by the services, should be made available on the service following a complaint by the user. The content should remain available until the parties find an agreement or until the complaint is dealt with. Member States should remain free to put in place independent authorities for assessing the complaints submitted by users and taking decisions on their validity. The redress mechanism will be without prejudice to the right of the parties to take action before a court.]

(40) 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 individual~~such~~ rightholders grant a licence or a transfer of rights for the purposes of exploitation in return for remuneration. This need does not arise when the contractual counterpart acts as end user of the work and does not exploit the work or performance itself, which could among others be the case in some employment contracts. Additionally, this need does not arise when the exploitation has ceased, or when the author has granted an ~~indefinite~~ licence to the general public without remuneration.

(40a) 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. The information should be timely to allow access to recent data; adequate to include information relevant to the exploitation of the work or performance in a manner that is comprehensible to the author or performer; and sufficient to assess the economic value of the rights in question. As long as exploitation is ongoing, contractual counterparts of authors and performers should provide information available to them on all modes of exploitation and on all relevant revenues with a regularity which is appropriate in the relevant sector, but at least annually.

(40b) In order to ensure that exploitation-related information is duly provided to authors and performers also in cases where the rights have been sublicensed by the first contractor to other parties who exploit the rights, this Directive entitles authors and performers, in cases where the contractual partner has provided the information available to them, but the received information is not sufficient to assess the economic value of their rights, to request additional relevant information on the exploitation of the rights. This can be ensured either directly or through the contractual counterparts of authors and performers.

Member States should have the option, in compliance with Union law, to provide for further measures through national provisions to ensure transparency for authors and performers.



(41) When implementing transparency obligations, Member States shall~~should~~ take into account the specificities of different content sectors, and such as those of the music sector, the audiovisual sector and the publishing sector and all relevant stakeholders should be involved when determining such sector-specific requirements. ~~and of the rights of the authors and performers in each sector as well as, w~~Where relevant, the significance of the contribution of authors and performers to the overall work or performance should also be considered. ~~Member States should consult all relevant stakeholders when determining sector-specific requirements.~~ Collective bargaining should be considered as an option to reach an agreement between the relevant stakeholders regarding transparency which should ensure authors and performers the same or higher level of transparency as the minimum requirements provided for in this Directive. 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.

- (42) 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 when the economic value of the rights turns out to be significantly higher than initially estimated. Therefore, without prejudice to the law applicable to contracts in Member States, a remuneration adjustment mechanism should be provided for cases where the remuneration originally agreed under a licence or a transfer of rights clearly becomes disproportionately low compared to the relevant revenues and benefits derived from the subsequent exploitation of the work or fixation of the performance by the contractual counterpart of the author or performer. The assessment of the situation should take account of the specific circumstances of each case, including the contribution of the author or performer, as well as of the specificities and remuneration practices of the different content sectors, and whether the contract is based on a collective bargaining agreement. 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. This mechanism should not apply to contracts concluded by entities defined in Article 3(a) and (b) of Directive 2014/26/EU; ~~except when they act as individual agents of authors and performers.~~
- (43) 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 by authors and performers or their representatives on their behalf related to obligations of transparency and the contract adjustment mechanism. For that purpose, Member States may either create a new body **or a mechanism** or rely on an existing one that fulfils the conditions established by this Directive: irrespective of whether these are industry-led or **public, including when** incorporated in the national judiciary system. Member States should have flexibility in deciding how the costs of the dispute resolution procedure should be allocated. This alternative dispute resolution procedure should be without prejudice to the right of parties to assert and defend their rights by bringing an action before a court.

- (43a) The obligations laid down in Articles 14 and 15 of this Directive should be of a mandatory nature and parties should not be able to derogate from these contractual provisions, whether included in the contracts between authors, performers and their contractual counterparts or in agreements between those counterparts and third parties such as non-disclosure agreements. As a consequence, the rules set out in Article 3(4) of the Regulation (EC) No 593/2008 of the European Parliament and of the Council<sup>16</sup> should apply to the effect that where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of Articles 14 and 15, as implemented in the Member State of the forum.
- (44) 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.
- (45) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Directive should be interpreted and applied in accordance with those rights and principles.

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<sup>16</sup> Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) (OJ L 177, 4.7.2008, p. 6–16).

- (46) 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 Council<sup>17</sup> and Directive 2002/58/EC of the European Parliament and of the Council<sup>18</sup>.
- (47) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents<sup>19</sup>, 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,

HAVE ADOPTED THIS DIRECTIVE:

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<sup>17</sup> 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. 31–50). 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. 1–88).

<sup>18</sup> 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. 37–47), called, as amended by Directives 2006/24/EC and 2009/136/EC, the “e-Privacy Directive”.

<sup>19</sup> 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 17, 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, nor shall it affect the rules laid down in Directive 2000/31/EC.

*Article 2*

*Definitions*

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

- (1) ‘research organisation’ means an entity, the primary goal of which is to conduct scientific research or to provide educational services involving also the conduct of scientific research;
  - (a) on a non-for-profit basis or by reinvesting all the profits in its scientific research; or
  - (b) pursuant to a public interest mission recognised by a Member State;in such a way that the access to the results generated by the scientific research cannot be enjoyed on a preferential basis by an undertaking exercising a decisive influence upon such organisation;

- (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 library or museum, an archive or a film or audio heritage institution;
- [(4) ‘press publication’ means a collection composed mainly of literary works of a journalistic nature which:
- (a) may also include other works or subject-matter;
  - (b) constitutes an individual item within a periodical or regularly-updated publication under a single title, such as a newspaper or a general or special interest magazine;
  - (c) has the purpose of providing the general public with information related to news or other topics; and
  - (d) is published in any media under the initiative, editorial responsibility and control of a service provider;]

[(5) ‘Online content sharing service provider’ within the meaning of this Directive is a provider of an information society service whose main or one of the main purposes is to store and give access to the public of a significant amount of copyright protected works or other protected subject- matter uploaded by its users who do not hold the rights in the content uploaded;

(5a) ‘Information society service’ is a service within the meaning of Article 1(1)(b) of Directive (EU) 2015/1535 of the European Parliament and of the Council<sup>20</sup>.]

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<sup>20</sup> Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1–15).

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

*Article 3*

*Text and data mining **for the purposes of scientific research***

1. Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC [and Article 11(1) of this Directive] for reproductions and extractions made by research organisations and cultural heritage institutions in order to carry out text and data mining of works or other subject-matter to which they have lawful access, for the purposes of scientific research.
  - 1a. Copies of works or other subject-matter made in compliance with paragraph 1 shall **be stored with an appropriate level of security and** not be retained for longer than necessary for achieving the purposes of scientific research.
2. *Moved to Art. 6(1).*
3. Rightholders 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 rightholders, research organisations and cultural heritage institutions to define commonly-agreed best practices concerning the application of the obligation and measures referred to respectively in paragraphs 1**a** and 3.
5. *Moved to Article 3a.*

### Article 3a

#### Optional exception or limitation for text and data mining

**Without prejudice to Article 3 of this Directive** Member States may provide for an exception or a limitation to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC [and Article 11(1) of this Directive] for temporary reproductions and extractions of **lawfully accessible** works and other subject-matter that form ~~an integral~~ part of the process of text and data mining, provided that ~~the works and other subject-matter are accessed lawfully and that the use of the works or other subject-matter for text and data mining is~~ **such use is** not expressly reserved by the rightholder.

Rightholders shall be allowed to apply measures to ensure that any reservation of use referred to in subparagraph 1 is respected.

### *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 rights provided for in Articles 2 and 3 of Directive 2001/29/EC, Article 5(a), (b), (d) and (e) and Article 7(1) of Directive 96/9/EC, Article 4(1)(a) and (b) of Directive 2009/24/EC [and 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 such use:
  - (a) takes place under the responsibility of an educational establishment, on its premises or other venues, or through a secure electronic network accessible only by the educational establishment's pupils or students and teaching staff; and
  - (b) is accompanied by the indication of the source, including the author's name, unless this turns out to be impossible.



2. Member States may provide that the exception adopted pursuant to paragraph 1 does not apply generally or as regards specific **uses or** types of works or other subject-matter, to the extent that licences covering the needs of educational establishments and authorising the acts described in paragraph 1 are easily available in the market.

Member States availing themselves of the provision of the first subparagraph shall take the necessary measures to ensure that rightholders make the licences authorising the acts described in paragraph 1 available and visible for educational establishments.

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 the provisions of national law adopted pursuant to 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 ~~for the harm incurred by the~~**to** rightholders due to the use of their works or other subject-matter pursuant to paragraph 1.

#### *Article 5*

##### *Preservation of cultural heritage*

1. Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC, Article 4(1)(a) of Directive 2009/24/EC [and Article 11(1) of this Directive], permitting cultural heritage institutions to make copies of any works or other subject-matter that are permanently in their collections, in any format or medium, for the purpose of the preservation of such works or other subject-matter and to the extent necessary for such preservation.
2. *Moved to Art. 6(1).*

*Article 6*  
*Common provisions*

1. Any contractual provision contrary to the exceptions provided for in Articles 3, 4(1) and 5 shall be unenforceable.
2. **Article 5(5) of Directive 2001/29/EC shall apply to the exceptions and the limitation provided for under this Title. The first, third and fifth subparagraphs of Article 6(4) of Directive 2001/29/EC shall apply to Articles 3, 4(1) and 5 of this Directive.**~~Article 5(5) and the first, third and fifth subparagraphs of Article 6(4) of Directive 2001/29/EC shall apply to the exceptions and the limitation provided for under this Title.~~

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 a collective management organisation, in accordance with its mandates, may conclude a non-exclusive licence for non-commercial purposes with a cultural heritage institution for the reproduction, distribution, communication to the public or making available to the public of out-of-commerce works or other subject-matter permanently in the collection of the institution, irrespective of whether all rightholders have mandated the collective management organisation, provided that:
  - (a) the collective management organisation is, on the basis of mandates from rightholders, sufficiently representative of rightholders in the relevant type of works or other subject-matter and of the rights which are the subject of the licence;
  - (b) equal treatment is guaranteed to all rightholders in relation to the terms of the licence;
  - (c) all rightholders may at any time exclude the possibility for collective management organisations to license their works or other subject-matter in accordance with this Article, either in general or in specific cases, or exclude the application of any licence granted in accordance with this Article to their works or other subject-matter.

2. A work or other subject-matter shall be deemed to be out-of-commerce when it can be presumed in good faith that the whole work or other subject-matter is not available to the public through customary channels of commerce after a reasonable effort is made to determine such availability.

Member States may provide for specific requirements to determine whether works and other subject-matter can be licensed in accordance with paragraph 1. Such requirements shall not extend beyond what is necessary and reasonable, and shall not preclude the possibility to determine the out-of-commerce status of a set of works or other subject-matter as a whole, when it is reasonable to presume that all works or other subject-matter are out-of-commerce.

3. *Moved to Art. 8a(2)*
4. Member States shall ensure that the licences referred to in paragraph 1 are sought from a collective management organisation that is representative for the Member State where the cultural heritage institution is established.
5. This Article shall not apply to ~~sets of out-of-commerce works if there is evidence to presume that they predominantly consist of:~~
  - (a) works or other subject-matter first published or, in the absence of publication, first broadcast in a third country, except for cinematographic or audiovisual works;
  - (b) cinematographic or audiovisual works, the producers of which have their headquarters or habitual residence in a third country;
  - (c) works or other subject-matter of third country nationals when a Member State or a third country could not be determined, after a reasonable effort, according to points (a) and (b).
  - (d) sets of out-of-commerce works if there is evidence to presume that they predominantly consist of works or other subject-matter referred to in points (a)-(c) above.**

*Article 8*  
*Cross-border uses*

1. A licence granted in accordance with Article 7 may allow the use of out-of-commerce works or other subject-matter by the cultural heritage institution in any Member State.
2. *Moved to Art. 8a(1)*
3. *Moved to Art. 8a(1)*

*Article 8a*  
*Publicity measures*

1. Member States shall ensure that information for the purposes of the identification of the out-of-commerce works or other subject-matter as well as information about the possibilities of rightholders referred to in Article 7(1)(c), and, as soon as it is available, information on the parties to the licence, the covered territories and the allowed uses is made publicly accessible in a single online portal from at least six months before the works or other subject-matter are distributed, communicated to the public or made available to the public in accordance with the licence.

The portal shall be established and managed by the European Union Intellectual Property Office in accordance with Regulation (EU) No 386/2012.

2. Member States shall provide that, if necessary for the awareness of rightholders, further appropriate publicity measures are taken regarding the possibility for collective management organisations to license works or other subject-matter in accordance with Article 7, the licences granted and the possibilities of rightholders referred to in Article 7(1)(c).

The additional appropriate publicity measures shall be taken in the Member State where the licence is sought. If there is evidence, such as the origin of the works or other subject-matter, to suggest that the awareness of rightholders could be more efficiently raised in other Member States or third countries, such publicity measures shall also cover those Member States and third countries.

*Article 9*  
*Stakeholder dialogue*

Member States shall consult rightholders, collective management organisations and cultural heritage institutions in each sector before establishing specific requirements pursuant to Article 7(2), and ensure a regular dialogue between representative users' and rightholders' organisations, including collective management organisations, and any other relevant stakeholder organisations, on a sector-specific basis, to foster the relevance and usability of the licensing mechanisms referred to in Article 7(1) and to ensure the effectiveness of the safeguards for rightholders referred to in this Chapter.

## CHAPTER 1a

### Measures to facilitate collective licensing

#### *Article 9a*

#### *Collective licensing with an extended effect*

1. When a collective management organisation, in accordance with its mandates, enters into a collective licensing agreement for the exploitation of works or other subject-matter Member States may provide, subject to safeguards provided for in this Article, that such an agreement, as far as the use within their national territory is concerned, may be extended to apply to the rights of rightholders who have not authorised the organisation to represent them by way of assignment, licence or any other contractual arrangement, or that the organisation is presumed to represent rightholders who have not authorised the organisation accordingly.
2. Member States shall ensure that the licensing mechanism referred to in paragraph 1 is only applied within well-defined areas of use where obtaining authorisations on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction unlikely due to the nature of the use or of the types of works or other subject-matter concerned and that such mechanism safeguards the legitimate interests of rightholders.

3. The safeguards referred to in paragraph 1 must ensure that:
  - (a) the organisation is, on the basis of mandates from rightholders, sufficiently representative of rightholders in the relevant type of works or other subject-matter and of the rights which are the subject of the licence for the relevant Member State;
  - (b) equal treatment is guaranteed to all rightholders in relation to the terms of the licence;
  - (c) rightholders who have not authorised the organisation operating the licence may at any time easily and effectively exclude their works or other subject-matter from the licensing mechanism established in accordance with this Article;
  - (d) appropriate publicity measures are taken to raise the awareness of rightholders regarding the possibility for organisations to license works or other subject-matter and the licensing taking place in accordance with this Article, and the possibilities of rightholders referred to in point (c) starting from a reasonable period before the works or other subject-matter are used under the licence.
  
4. The rules provided for in this Article are without prejudice to the application of collective licensing mechanisms with an extended effect in conformity with other provisions of European Union law which allow for exceptions or limitations and mandatory collective management of rights.



5. Where the law of a Member State provides for a licensing mechanism in accordance with this Article, the Member State concerned shall inform the Commission about the scope of that law, purposes and types of licenses introduced under that law as well as contact details for organisations issuing licences in accordance with the mechanism in paragraph 1. The Commission shall publish this information on the online portal referred to in Article 8a.
6. Based on the information received pursuant to paragraph 5 and on the discussions in the contact committee referred to in Article 12(3) of Directive 2001/29/EC, the Commission shall, by 31 December 2020, submit to the European Parliament and to the Council a report on the use of such mechanisms referred to in paragraph 1 in the EU and their impact on licensing and rightholders. The Commission's report shall be accompanied, if appropriate, by a legislative proposal, including as regards the cross-border effect of such national schemes.

## CHAPTER 2

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

#### *Article 10*

#### *Negotiation mechanism*

Member States shall ensure that parties facing difficulties related to the licensing of rights when seeking to conclude an agreement for the purpose of making available audiovisual works on video-on-demand services, may rely on the assistance of an impartial body or mediator with relevant experience. The body **or mediator** shall provide assistance to the parties with their negotiations and help them reach agreements, including, where appropriate, by submitting proposals to the parties.

Member States shall notify to the Commission the body or mediator referred to in paragraph 1 no later than [date mentioned in Article 21(1)]. **In cases where Member States have chosen to rely on mediation notification to the Commission shall only be required where relevant information on the entrusted mediators can be found.**

TITLE IV  
MEASURES TO ACHIEVE A WELL-FUNCTIONING MARKETPLACE FOR COPYRIGHT  
CHAPTER 1  
Rights in publications

*Article 11*  
*see Annex II*

*Article 12*  
*Claims to fair compensation*

Member States may provide that where an author has transferred or licensed a right to a publisher, such a transfer or a licence constitutes a sufficient legal basis for the publisher to be entitled to claim a share of:

- (a) the compensation for the uses of the work made under an exception or limitation to the transferred or licensed right; and
- (b) the remuneration for public lending provided for in Article 6(1) of Directive 2006/115/EC.

## [CHAPTER 2

### Certain uses of protected content by online services

#### *Article 13*

##### *Use of protected content by online content sharing service providers*

1. Member States shall provide that an online content sharing service provider is performing an act of communication to the public or an act making available to the public within the meaning of Article 3(1) and (2) of Directive 2001/29/EC and Article 8 (2) of Directive 2006/115/EC when it intervenes in full knowledge of the consequences of its action to give the public access to the copyright protected works or other protected subject matter uploaded by their users by organising these works or other subject matter with the aim of obtaining profit from their use.
  - 1a. Member States shall provide that an online content sharing service provider referred to in paragraph 1, when it is not eligible for the limited liability provided for in Article 14 of Directive 2000/31/EC, shall not be liable for unauthorised acts of communication to the public and acts of making available provided that it
    - (a) takes effective measures to prevent the availability on its services of unauthorised works or other subject-matter identified by rightholders, and
    - (b) upon notification by rightholders of a specific unauthorised work or other subject matter, acts expeditiously to remove or disable access to the specific unauthorised work or other subject matter and prevent its future availability through the measures referred to in sub-paragraph (a).

Where rightholders have not provided the online content sharing service provider data on unauthorised works or other subject-matter to be prevented through the application of the measures referred to in sub-paragraph (a), an online content sharing service provider which have taken such measures shall not be liable for the unauthorised acts of communication to the public and acts of making available of these works and other subject matter.

- 1ab. Member States shall ensure that the measures referred to in paragraph 1(a) shall be appropriate and proportionate, taking into account, among others, the nature of the services, the amount and the type of works or other protected subject-matter uploaded by the users of the services without the authorisation of rightholders, the availability and costs of relevant technologies and their effectiveness in light of technological developments. The service provider shall provide rightholders at their request with adequate information on the functioning and deployment of the measures.
2. Member States shall provide that that the measures referred to in paragraph 1a (a) and the action taken following a notification by rightholders referred to in paragraph 1a (b) shall be implemented by an online content sharing service provider without prejudice to the freedom of expression and information of their users and the possibility for the users to benefit from an exception or limitation to copyright. For that purpose the service provider shall put in place a complaint and redress mechanism that is available to users of the service in case of disputes over the application of the measures. Complaints submitted under this mechanism shall be processed in collaboration with rightholders within a reasonable period of time. This mechanism shall allow the preliminarily blocked content to be made publicly available until the parties agree on the action to follow or the complaint is otherwise dealt with. Relevant rightholders shall be appropriately notified about these uploads to allow them to enforce their rights with regard to infringing works or other subject matter, as appropriate.
3. Member States shall facilitate, where appropriate, the cooperation between the online content sharing service providers and rightholders through stakeholder dialogues to define best practices, such as the use of appropriate and proportionate measures.
4. *Deleted.*
5. Member States shall provide that licencing agreements concluded between online content sharing service providers and relevant rightholders, shall cover the acts of the users of the services falling within Article 3(1) and (2) of Directive 2001/29/EC and Article 8 (2) of Directive 2006/115/EC, when the users are not acting in a professional capacity.↓

TITLE IV  
MEASURES TO ACHIEVE A WELL-FUNCTIONING MARKETPLACE FOR COPYRIGHT

CHAPTER 3  
Fair remuneration in exploitation contracts of authors and performers

*Article 14*  
*Transparency obligation*

1. Member States shall ensure that authors and performers receive on a regular basis, at least once a year, 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 or their successors in title, notably as regards modes of exploitation, revenues generated and remuneration due.
  - 1a. Member States shall ensure that where the rights referred to in paragraph 1 have subsequently been licensed to another party, authors and performers may, **at their request, receive** from those third parties additional information if their first contractual counterpart does not hold all the information that would be necessary for the purposes of the information provision set out in paragraph 1. Member States may provide that such request to those third parties is made directly by the author or performer or indirectly through the contractual counterpart of the author or the performer.
2. The obligation in paragraph 1 shall be proportionate and effective and shall ensure an appropriate level of transparency in every sector. Member States may provide that in duly justified cases where the administrative burden resulting from the obligation in paragraph 1 would become disproportionate in view of the revenues generated by the exploitation of the work or performance, the obligation is limited to the types and level of information that can reasonably be expected in such cases.

3. Member States may decide that the obligation in paragraph 1 does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance.
- 3a. Member States may provide that for agreements subject to or based on collective bargaining agreements the transparency rules of the relevant collective bargaining agreement are applicable instead of the national provisions implementing the transparency obligation, on the condition that they provide for regular reporting to authors and performers on the exploitation of their works and performances pursuant to the requirements of **this Directive paragraphs 1 to 3.**
4. Paragraph 1 shall not be applicable to agreements concluded by entities ~~subject to the transparency obligations established by Directive 2014/26/EU~~ **defined in Article 3(a) and (b) of Directive 2014/26/UE.**

#### *Article 15*

##### *Contract adjustment mechanism*

1. 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 or their successors in title, when the remuneration originally agreed turns out to be disproportionately low compared to the relevant revenues and benefits derived from the actual exploitation of the works or performances.
- 1a. Member States may **provide that for agreements subject to or based on collective bargaining agreements the rules of the relevant collective bargaining agreement for the adjustment of remuneration are applicable instead of the national provisions implementing** ~~choose not to apply the contract adjustment mechanism to agreements subject to or based on collective bargaining agreements when the relevant collective bargaining agreement provides for a mechanism comparable to the one provided for in this Article.~~

2. Paragraph 1 shall not be applicable to agreements concluded by entities defined in Article 3(a) and 3(b) of Directive 2014/26/EU.

*Article 16*

*Dispute resolution procedure*

1. 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.
2. Member States shall ensure that representative organisations of authors and performers, including **collective management organisations**, may initiate such disputes on behalf of one or more authors and performers at their request.

*Article 16a*

*Contractual provisions*

Member States shall ensure that any contractual provision which prevents the compliance with the provisions in Articles 14 and 15 of this Directive shall be unenforceable in relation to authors and performers.

TITLE V  
FINAL PROVISIONS

*Article 17*

*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 Articles 3 and 4 of Directive [this Directive];"

(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 Articles 3 and 4 of Directive [this Directive];"



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 exception provided for in Article 5 of Directive [this Directive];"

(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 Articles 3 and 4 of Directive [this Directive];"

(c) In Article 12(4), the following points are added:

"(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]."

*Article 18*  
*Application in time*

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 21(1)].
- [2. The provisions of Article 11 shall also apply to press publications published before [the date mentioned in Article 21(1)].]
3. This Directive shall apply without prejudice to any acts concluded and rights acquired before [the date mentioned in Article 21(1)].

*Article 19*  
*Transitional provision*

Agreements for the licence or 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 21(1)].

*Article 20*  
*Protection of personal data*

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.

*Article 21*  
*Transposition*

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by [~~12~~24 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 22*  
*Review*

1. No sooner than [five years after the date mentioned in Article 21(1)], the Commission shall carry out a review of this Directive and present a report on the main findings to the European Parliament, the Council and the European Economic and Social Committee.
2. Member States shall provide the Commission with the necessary information for the preparation of the report referred to in paragraph 1.

*Article 23*  
*Entry into force*

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

*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*

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## [ARTICLE 11 (plus relevant recitals)]

OPTION A (*new neighbouring right*)

- (31) 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 press publications are facing problems in licensing the online use of their publications and recouping their investments. In the absence of recognition of publishers of press publications as rightholders, licensing and enforcement in the digital environment are often complex and inefficient.
- (32) The organisational and financial contribution of publishers in producing press publications needs to be recognised and further encouraged to ensure the sustainability of the publishing industry. It is therefore necessary to provide at Union level a harmonised legal protection for press publications in respect of digital uses. 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 press publications in respect of digital uses.

- (33) For the purposes of this Directive, it is necessary to define the concept of press publication in a way that embraces only journalistic publications, published in any media, including on paper, in the context of an economic activity which constitutes a provision of services under EU law. The press publications to be covered are those whose purpose is to inform the general public and which are periodically or regularly updated. Such publications would include, for instance, daily newspapers, weekly or monthly magazines of general or special interest and news websites. Press publications contain mostly literary works but increasingly include other types of works and subject-matter, notably photographs and videos. Periodical publications published for scientific or academic purposes, such as scientific journals, should not be covered by the protection granted to press publications under this Directive. This protection does not extend to acts of hyperlinking when they do not constitute communication to the public.
- (34) The rights granted to the publishers of press 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, insofar as digital 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.
- (35) The protection granted to publishers of press 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 press publication in which they are incorporated. Therefore, publishers of press publications should not be able to invoke the protection granted to them against authors and other rightholders or against other authorised users of the same works and other subject-matter. This is without prejudice to contractual arrangements concluded between the publishers of press publications, on the one side, and authors and other rightholders, on the other side.

## Article 11

### *Protection of press publications concerning digital uses*

1. Member States shall provide publishers of press publications with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the digital use of their press publications.

The rights referred to in the first subparagraph shall also apply in respect of extracts of a press publication provided that the extracts are the expression of the intellectual creation of their authors.

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 press publication. The rights referred to in paragraph 1 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 press publication in which they are incorporated.

When an author or a rightholder has concluded licences with different persons in respect of a work or other subject-matter incorporated in a press publication, the rights referred to in paragraph 1 may not be invoked to prohibit the use by other authorised users of such a work or other subject-matter. The rights referred to in paragraph 1 may not be invoked to prohibit the use of works or other subject-matter that are in the public domain.

3. Articles 5 to 8 of Directive 2001/29/EC and Directive 2012/28/EU 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 years after the publication of the press publication. This term shall be calculated from the first day of January of the year following the date of publication.

OPTION B (*Presumption for publishers of press publications*)

- (31) 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. The sustainability of the press publishing industry should therefore be ensured.
- (31a) In the transition from print to digital, publishers of press publications are increasingly facing problems in licensing the online use of their publications and recouping their investments. Press publications contain mostly literary works but increasingly include other types of works and subject-matter, notably photographs and videos. Due to the large number of authors and rightholders involved in the creation of a press publication, licensing and enforcement of the rights in press publications are often complex and inefficient in the digital environment. Publishers may notably face difficulties when proving that they have been transferred or licensed the rights in such works and other subject-matter for the purposes of concluding licences or enforcing the rights in respect of their press publications.
- (31b) Publishers of press publications need to acquire all the relevant economic rights from the authors and rightholders to incorporate their works or other subject-matter in a press publication. This principle should continue to apply. However, without prejudice to contractual arrangements concluded between the publishers of press publications, on the one side, and the authors and other rightholders, on the other side, the licensing and enforcement of the rights acquired vis-à-vis third parties should be facilitated. It is therefore necessary to provide at Union level a rebuttable presumption to allow the publisher to be regarded as the person entitled to conclude licences on and enforce the rights of reproduction and making available to the public concerning the digital use of works and other subject-matter contained in the press publication provided that the name of the publisher appears on the publication.
- (32) *Deleted.*



- (33) For the purposes of this Directive, it is necessary to define the concept of press publication in a way that embraces only journalistic publications, published in any media, including on paper, in the context of an economic activity which constitutes a provision of services under EU law. The press publications to be covered are those whose purpose is to inform the general public and which are periodically or regularly updated. Such publications would include, for instance, daily newspapers, weekly or monthly magazines of general or special interest and news websites. Periodical publications published for scientific or academic purposes, such as scientific journals, should not be covered by the presumption of rights granted to publishers for press publications laid down in this Directive.
- (34) *Deleted.*
- (35) The presumption for publishers of press publications laid down in 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 press publication in which they are incorporated. Therefore, publishers of press publications should not be able to invoke the presumption laid down in this Directive against authors and other rightholders or against other authorised users of the same works and other subject-matter.

*Article 11*

*Licensing and enforcement of rights in press publications concerning digital uses*

1. Member States shall provide that, in the absence of proof to the contrary, the publisher of a press publication shall be regarded as the person entitled to conclude licences and to seek application of the measures, procedures and remedies referred to in Directive 2004/48/EC and Article 8 of Directive 2001/29/EC in respect of the rights provided for in Article 2 and 3(2) of Directive 2001/29/EC concerning the digital use of the works and other subject-matter incorporated in such a press publication, provided that the name of the publisher appears on the publication.
  2. The presumption provided for in paragraph 1 shall not 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 press publication. The presumption may not be invoked against the 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 press publication in which they are incorporated.]
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