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General Secretariat

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2016/0280(COD)**

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WK 12815/2018 INIT

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WORKING PAPER

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MEETING DOCUMENT

From:	Presidency
To:	Working Party on Intellectual Property (Copyright)
N° prev. doc.:	WK 12128/18, ST 12513/18
N° Cion doc.:	12254/16 + ADD1 + ADD2 + ADD3 + ADD4
Subject:	Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - Presidency compromise suggestions on Articles 7 to 10 and corresponding recitals (21) to (30)

In preparation of the discussions at the Copyright Attachés meeting on 30 October 2018, delegations will find attached Presidency compromise suggestions on Articles 7 to 10 and corresponding recitals (21) to (30), of the above mentioned proposal.

The Presidency suggestions are set out in the 4th column of the annexed table. Changes compared to the Council text set out in the 3rd column are indicated in **bold**.

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Some optional elements that we want to discuss are highlighted in the 4th column in [*italics*]. Comments and explanations are also included in the 4th column in [*italics*].



Proposal for a Directive of the European Parliament and of the Council
on copyright in the Digital Single Market
COM (2016) 593 final - 2016/0280 (COD)
Exploration of possible compromise solutions

ARTICLES 7 to 10

	Location	COMMISSION PROPOSAL COM(2016)593	EP TEXT	COUNCIL TEXT doc. 9134/18	POSSIBLE COMPROMISE SOLUTION
157.		TITLE III MEASURES TO IMPROVE LICENSING PRACTICES AND ENSURE WIDER ACCESS TO CONTENT	TITLE III MEASURES TO IMPROVE LICENSING PRACTICES AND ENSURE WIDER ACCESS TO CONTENT	TITLE III MEASURES TO IMPROVE LICENSING PRACTICES AND ENSURE WIDER ACCESS TO CONTENT	
158.		CHAPTER 1 Out-of-commerce works	CHAPTER 1 Out-of-commerce works	CHAPTER 1 Out-of-commerce works	
159.	Art. 7, title	<i>Article 7</i> <i>Use of out-of-commerce</i> <i>works by cultural heritage</i> <i>institutions</i>	<i>Article 7</i> <i>Use of out-of-commerce</i> <i>works by cultural heritage</i> <i>institutions</i>	<i>Article 7</i> <i>Use of out-of-commerce</i> <i>works by cultural heritage</i> <i>institutions</i>	<i>Article 7</i> <i>Use of out-of-commerce</i> <i>works by cultural heritage</i> <i>institutions</i>
160.	Art. 7, para 1,	1. Member States shall provide that when a collective management organisation, on behalf of	1. Member States shall provide that when a collective management organisation, on behalf of	1. Member States shall provide that when a collective management organisation, on behalf of	1. Member States shall provide that a collective management organisation, in accordance

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	introductory part	its members, concludes a non-exclusive licence for non-commercial purposes with a cultural heritage institution for the digitisation, distribution, communication to the public or making available of out-of-commerce works or other subject-matter permanently in the collection of the institution, such a non-exclusive licence may be extended or presumed to apply to rightholders of the same category as those covered by the licence who are not represented by the collective management organisation, provided that:	its members, concludes a non-exclusive licence for non-commercial purposes with a cultural heritage institution for the digitisation, distribution, communication to the public or making available of out-of-commerce works or other subject-matter permanently in the collection of the institution, such a non-exclusive licence may be extended or presumed to apply to rightholders of the same category as those covered by the licence who are not represented by the collective management organisation, provided that:	<u>in accordance with</u> its members, concludes <u>mandates, may conclude</u> a non-exclusive licence for non-commercial purposes with a cultural heritage institution for the digitisation <u>reproduction</u> , distribution, communication to the public or making available <u>to the public</u> of out-of-commerce works or other subject-matter permanently in the collection of the institution, such a non-exclusive licence may be extended or presumed to apply to rightholders of the same category as those <u>irrespective of whether all rightholders</u> covered by the licence who are not represented by <u>have mandated</u> the collective management organisation, provided that:	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 covered by the licence have mandated the collective management organisation, provided that:

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161.	Art. 7, para 1, point (a)	(a) the collective management organisation is, on the basis of mandates from rightholders, broadly representative of rightholders in the category of works or other subject-matter and of the rights which are the subject of the licence;	(a) the collective management organisation is, on the basis of mandates from rightholders, broadly representative of rightholders in the category of works or other subject-matter and of the rights which are the subject of the licence;	(a) the collective management organisation is, on the basis of mandates from rightholders, broadly sufficiently representative of rightholders in the category relevant type of works or other subject-matter and of the rights which are the subject of the licence;	(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;
162.	Art. 7, para 1, point (b)	(b) equal treatment is guaranteed to all rightholders in relation to the terms of the licence;	(b) equal treatment is guaranteed to all rightholders in relation to the terms of the licence;	(b) equal treatment is guaranteed to all rightholders in relation to the terms of the licence;	(b) equal treatment is guaranteed to all rightholders in relation to the terms of the licence.
163.	Art. 7, para 1, point (c)	(c) all rightholders may at any time object to their works or other subject-matter being deemed to be out of commerce and exclude the application of the licence to their works or other subject-matter.	(c) all rightholders may at any time object to their works or other subject-matter being deemed to be out of commerce and exclude the application of the licence to their works or other subject-matter.	(c) all rightholders may at any time object to exclude the possibility for collective management organisations to license their works or other subject-matter being deemed to be out of commerce and in	<i>[This point is moved to new paragraph 1b below – line 167]</i>

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				<u>accordance with this Article, either in general or in specific cases, or</u> exclude the application of the <u>any</u> licence <u>granted in accordance with this Article</u> to their works or other subject-matter.	
164.	Art. 7, para 1a		1a. <i>Member States shall provide for an exception or limitation to the rights provided for in Articles 2 and 3 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC, Article 4(1) of Directive 2009/24/EC, and Article 11(1) of this Directive, permitting cultural heritage institutions to make copies available online of out-of-commerce works that are located permanently in their collections for not-for-</i>		1a. Member States shall provide for an exception or limitation to the rights provided for in Articles 2 and 3 of Directive 2001/29/EC, Articles 5(a), (b), (d) and (e) and 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 cultural heritage institutions to make available out-of-commerce works or other subject-matter that are permanently in their collections for non-

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			<i>profit purposes, provided that:</i>		commercial purposes, provided that:
165.	Art. 7, para 1a, point (a)		(a) <i>the name of the author or any other identifiable rightholder is indicated, unless this turns out to be impossible;</i>		(a) <i>[the author or any other identifiable rightholder was informed individually at least six months before the use, unless this turns out to be impossible, and] the name of the author or any other identifiable rightholder is indicated, unless this turns out to be impossible;</i>
166.	Art. 7, para 1a, point (b)		(b) <i>all rightholders may at any time object to their works or other subject-matter being deemed to be out of commerce and exclude the application of the exception to their works or other subject-matter.</i>		(b) <i>such works or other subject-matter are made available on dedicated non-commercial portals [which are accessible on the premises of cultural heritage institutions].</i> <i>[Text of EP covered in new paragraph 1b below – line 167]</i>

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167.	Art. 7, para 1b		<p><i>1b. Member States shall provide that the exception adopted pursuant to paragraph 1a does not apply in sectors or for types of works where appropriate licensing-based solutions, including but not limited to solutions provided for in paragraph 1, are available. Member States shall, in consultation with authors, other rightholders, collective management organisations and cultural heritage institutions, determine the availability of extended collective licensing-based solutions for specific sectors or types of works.</i></p>		<p>1b. Member States shall provide that the exception or limitation referred to in the previous paragraph only applies to types of works or other subject-matter for which no collective management organisation exists that fulfils the conditions referred to in point (a) of paragraph 1.</p> <p>1c. Member States shall provide that all rightholders may at any time, easily and effectively, exclude their works or other subject-matter from the licensing mechanism referred to in paragraph 1 or from uses under the exception or limitation referred to in paragraph 1a, either in general or in specific cases, including after the conclusion of a licence or</p>

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					the beginning of the use concerned.
168.	Art. 7, para 2, sub-para 1	2. A work or other subject-matter shall be deemed to be out of commerce when the whole work or other subject-matter, in all its translations, versions and manifestations, is not available to the public through customary channels of commerce and cannot be reasonably expected to become so.	<p>2. A work or other subject-matter shall be deemed to be out of commerce when the whole work or other subject-matter, in all its translations, versions and manifestations, is not available to the public through customary channels of commerce and cannot be reasonably expected to become so.</p> <p><i>Member States may provide a cut-off date in relation to determining whether a work previously commercialised is deemed to be out of commerce.</i></p> <p><i>[See definition of out-of-commerce work in Parliament's Article 2(4a) (rows 122-126)]</i></p>	<p>2. A work or other subject-matter shall be deemed to be out-of-commerce when <u>it can be presumed in good faith that</u> the whole work or other subject-matter, in all its translations, versions and manifestations, is not available to the public through customary channels of commerce and cannot be reasonably expected to become so. <u>after a reasonable effort is made to determine such availability.</u></p>	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.

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169.	Art. 7, para 2, sub-para 2	Member States shall, in consultation with rightholders, collective management organisations and cultural heritage institutions, ensure that the requirements used to determine whether works and other subject-matter can be licensed in accordance with paragraph 1 do not extend beyond what is necessary and reasonable and do not preclude the possibility to determine the out-of-commerce status of a collection as a whole, when it is reasonable to presume that all works or other subject-matter in the collection are out of commerce.	Member States shall, in consultation with rightholders, collective management organisations and cultural heritage institutions, ensure that the requirements used to determine whether works and other subject-matter can be licensed in accordance with paragraph 1 <i>or used in accordance with paragraph 1a</i> do not extend beyond what is necessary and reasonable and do not preclude the possibility to determine the out-of-commerce status of a collection as a whole, when it is reasonable to presume that all works or other subject-matter in the collection are out of commerce.	Member States shall, in consultation with rightholders, collective management organisations and cultural heritage institutions, ensure that the <u>may provide for specific</u> requirements used to determine whether works and other subject-matter can be licensed in accordance with paragraph 1 do. <u>Such requirements shall</u> not extend beyond what is necessary and reasonable, and do <u>shall</u> not preclude the possibility to determine the out-of-commerce status of a <u>collection as set of works or other subject-matter as</u> a whole, when it is reasonable to presume that all works or other subject-matter in the collection are out-of-commerce.	Member States may provide for specific requirements to determine whether works and other subject-matter can be licensed in accordance with paragraph 1 or used under the exception or limitation referred to in paragraph 1a . 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.

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170.	Art. 7, para 3, introductory part	3. Member States shall provide that appropriate publicity measures are taken regarding:	3. Member States shall provide that appropriate publicity measures are taken regarding:	3. <i>[Moved to new Article 8a(2)]</i>	3. <i>[Moved to new Article 8a(2)]</i>
171.	Art. 7, para 3, point (a)	(a) the deeming of works or other subject-matter as out of commerce;	(a) the deeming of works or other subject-matter as out of commerce;		
172.	Art. 7, para 3, point (b)	(b) the licence, and in particular its application to unrepresented rightholders;	(b) the any licence, and in particular its application to unrepresented rightholders;		
173.	Art. 7, para 3, point (c)	(c) the possibility of rightholders to object, referred to in point (c) of paragraph 1;	(c) the possibility of rightholders to object, referred to in point (c) of paragraph 1 and point (b) of paragraph 1a;		
174.	Art. 7, para 3, closing phrase	including during a reasonable period of time before the works or other subject-matter are digitised, distributed, communicated to the public or made available.	including during a reasonable period of time at least six months before the works or other subject-matter are digitised, distributed, communicated to the public or made available.		

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175.	Art. 7, para 4, introductory part / Art. 7, para 4 (Council)	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:	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:	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: <u>the cultural heritage institution is established.</u>	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.
176.	Art. 7, para 5, introductory part (Council)			<u>5. This Article shall not apply to sets of out-of-commerce if, following the reasonable effort to determine commercial availability, there is evidence that such sets predominantly consist of:</u>	5. This Article shall not apply to sets of out-of-commerce if, on the basis of the reasonable effort referred to in paragraph 2, there is evidence that such sets predominantly consist of:
177.	Art. 7, para 4, point (a) (EP)/ Art. 7, para 5, point (a) (Council)	(a) the works or phonograms were first published or, in the absence of publication, where they were first broadcast, except for cinematographic and audiovisual works;	(a) the works or phonograms were first published or, in the absence of publication, where they were first broadcast, except for cinematographic and audiovisual works;	(a) the works or <u>other subject-matter</u> phonograms were first published or, in the absence of publication, where they were first broadcast <u>in a third country</u> , except for	(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;

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				cinematographic and or audiovisual works;	
178.	Art. 7, para 4, point (b) (EP)/ Art. 7, para 5, point (b) (Council)	(b) the producers of the works have their headquarters or habitual residence, for cinematographic and audiovisual works; or	(b) the producers of the works have their headquarters or habitual residence, for cinematographic and audiovisual works; or	(b) <u>cinematographic or audiovisual works</u> , the producers of the works <u>which</u> have their headquarters or habitual residence, for cinematographic and audiovisual works <u>in a third country</u> ; or	(b) cinematographic or audiovisual works, the producers of which have their headquarters or habitual residence in a third country; or
179.	Art. 7, para 4, point (c) (EP) /Art. 7, para 5, point (c) (Council)	(c) the cultural heritage institution is established, when a Member State or a third country could not be determined, after reasonable efforts, according to points (a) and (b).	(c) the cultural heritage institution is established, when a Member State or a third country could not be determined, after reasonable efforts, according to points (a) and (b).	c) the cultural heritage institution is established, <u>works or other subject- matter of third country nationals</u> when a Member State or a third country could not be determined, after <u>a</u> reasonable efforts <u>effort</u> , according to points (a) and (b).);	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);
180.	Art. 7, para 5 (EP)/ Art. 7, para 5, closing	5. Paragraphs 1, 2 and 3 shall not apply to the works or other subject- matter of third country nationals except where	5. Paragraphs 1, 2 and 3 shall not apply to the works or other subject- matter of third country nationals except where	5. Paragraphs 1, 2 and 3 shall not apply to <u>unless</u> the works or other subject- matter <u>collective management organisation</u>	unless the collective management organisation is sufficiently representative of rightholders of that third

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	phrase (Council)	points (a) and (b) of paragraph 4 apply.	points (a) and (b) of paragraph 4 apply.	<u>is sufficiently representative of rightholders of that</u> third country nationals except where points <u>in the meaning of point</u> (a) and (b) of paragraph 4 apply ¹ .	country in the meaning of point (a) of paragraph 1.
181.	Art. 8, title	<i>Article 8 Cross-border uses</i>	<i>Article 8 Cross-border uses</i>	<i>Article 8 Cross-border uses</i>	<i>Article 8 Cross-border uses</i>
182.	Art. 8, para 1	1. Works or other subject-matter covered by a licence granted in accordance with Article 7 may be used by the cultural heritage institution in accordance with the terms of the licence in all Member States.	1. Works <i>Out-of- commerce works</i> or other subject-matter covered by a licence granted in accordance with Article 7 <i>may be</i> used by the cultural heritage institution in accordance with the terms of the licence that Article in all Member States.	1. Works or other subject-matter covered by a <i>A</i> licence granted in accordance with Article 7 may be used <u>allow the use of out-of-commerce works or other subject- matter</u> by the cultural heritage institution in accordance with the terms of the licence in all Member States <u>State</u> .	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. <i>[2. The uses of works and other subject-matter under the exception or limitation referred to in Article 7(1a) shall be deemed to occur solely in the Member State where the cultural heritage institution undertaking that use is established.]</i>

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183.	Art. 8, para 2	2. Member States shall ensure that information that allows the identification of the works or other subject-matter covered by a licence granted in accordance with Article 7 and information about the possibility of rightholders to object referred to in Article 7(1)(c) are made publicly accessible in a single online portal for at least six months before the works or other subject-matter are digitised, distributed, communicated to the public or made available in Member States other than the one where the licence is granted, and for the whole duration of the licence.	2. Member States shall ensure that information that allows the identification of the works or other subject-matter covered by a licence granted in accordance with Article 7 and information about the possibility of rightholders to object referred to in <i>point (c) of Article 7(1) and point (b) of Article 7(1a)</i> are made publicly <i>permanently, easily and effectively</i> accessible in a <i>public</i> single online portal for at least six months before the works or other subject-matter are digitised, distributed, communicated to the public or made available in Member States other than the one where the licence is granted, <i>or in the cases covered by Article 7(1a), where the cultural heritage</i>	2. <i>[Moved to new Article 8a(1)]</i>	2. <i>[Moved to new Article 8a(1)]</i>

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			<i>institution is established</i> and for the whole duration of the licence.		
184.	Art. 8, para 3	3. The portal referred to in paragraph 2 shall be established and managed by the European Union Intellectual Property Office in accordance with Regulation (EU) No 386/2012.	3. The portal referred to in paragraph 2 shall be established and managed by the European Union Intellectual Property Office in accordance with Regulation (EU) No 386/2012.	3. [Moved to new Article 8a(1) second subparagraph]	3. [Moved to new Article 8a(1) second subparagraph]
185.	Art. 8a, title			<u><i>Article 8a</i></u> <u><i>Publicity measures</i></u>	<u><i>Article 8a</i></u> <u><i>Publicity measures</i></u>
186.	Art. 8a, para 1, sub-para 1			<u>1.</u> Member States shall ensure that information that allows for the purposes of the identification of the out-of-commerce works or other subject-matter covered by a licensee granted in accordance with Article 7 and as well as	1. Member States shall ensure that information from cultural heritage institutions, collective management organisations or relevant public authorities for the purposes of the identification of the out-of-

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				<p>information about the possibilitypossibilities of rightholders to object referred to in Article 7(1)(c) are, 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 forfrom at least six months before the works or other subject-matter are digitised, distributed, communicated to the public or made available in Member States other than the one where the licence is granted, and for the whole duration ofto the public in accordance with the licence.</p> <p><i>[Article 8(2) of the COM proposal, amended]</i></p>	<p>commerce works or other subject-matter covered by a licence granted in accordance with Article 7(1) or used under the exception or limitation referred to in Article 7(1a) as well as information about the possibilities of rightholders referred to in Article 7(1c), and, as soon as it is available and where relevant, information on the parties to the licence, the covered territories and the allowed uses is made permanently, easily and effectively accessible in a public 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</p>

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					<p>or under the exception or limitation.</p> <p><i>[Article 8(2) of the COM proposal, amended]</i></p>
187.	Art. 8a, para 1, sub-para 2			<p>3. — The portal referred to in paragraph 2 shall be established and managed by the European Union Intellectual Property Office in accordance with Regulation (EU) No 386/2012.</p> <p><i>[Article 8(3) of the COM proposal, amended]</i></p>	<p>The portal shall be established and managed by the European Union Intellectual Property Office in accordance with Regulation (EU) No 386/2012.</p> <p><i>[Article 8(3) of the COM proposal, amended]</i></p>
188.	Art. 8a, para 2			<p>2. Member States shall provide that, <u>if necessary for the general awareness of rightholders, further</u> appropriate publicity measures are taken regarding: (a) the deeming of works or other subject-matter as out of commerce; (b) the licence, and in particular its application to unrepresented rightholders;</p>	<p>2. Member States shall provide that, if necessary for the general 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,</p>

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				<p><u>the possibility for collective management organisations to license works or other subject-matter in accordance with Article 7, the licences granted and (e)</u> the possibilities to object of rightholders referred to in point (e) of paragraph 1 Article 7(1)(c).</p> <p>Including during a reasonable period of time before the works or other subject-matter are digitised, distributed, communicated to the public or made available.</p> <p><u>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</u></p>	<p>the licences granted, the uses under the exception or limitation referred to in Article 7(1a) and the possibilities of rightholders referred to in Article 7(1c).</p> <p>The additional appropriate publicity measures shall be taken in the Member State where the licence is sought in accordance to Article 7(1) or, for uses under the exception or limitation referred to in Article 7(1a), where the cultural heritage institution is established. 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</p>

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				<u>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.</u> <i>[Article 7(3) of the COM proposal, amended]</i>	those Member States and third countries. <i>[Article 7(3) of the COM proposal, amended]</i>
189.	Art. 9, title	<i>Article 9 Stakeholder dialogue</i>	<i>Article 9 Stakeholder dialogue</i>	<i>Article 9 Stakeholder dialogue</i>	<i>Article 9 Stakeholder dialogue</i>
190.	Art 9	Member States shall ensure a regular dialogue between representative users' and rightholders' organisations, and any other relevant stakeholder organisations, to, on a sector-specific basis, foster the relevance and usability of the licensing mechanisms referred to in Article 7(1), ensure the effectiveness of the safeguards for	Member States shall ensure a regular dialogue between representative users' and rightholders' organisations, and any other relevant stakeholder organisations, to, on a sector-specific basis, foster the relevance and usability of the licensing mechanisms referred to in Article 7(1) and the exception referred to in Article 7(1a) , ensure	Member States shall ensure <u>consult rightholders, collective management organisations and cultural heritage institutions in each sector before establishing specific requirements pursuant to Article 7(2), and encourage</u> a regular dialogue between representative users' and rightholders' organisations,	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 encourage a regular dialogue between representative users' and rightholders' organisations, including collective

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		rightholders referred to in this Chapter, notably as regards publicity measures, and, where applicable, assist in the establishment of the requirements referred to in the second subparagraph of Article 7(2).	the effectiveness of the safeguards for rightholders referred to in this Chapter, notably as regards publicity measures, and, where applicable, assist in the establishment of the requirements referred to in the second subparagraph of Article 7(2).	<u>including collective management organisations</u> , and any other relevant stakeholder organisations, to , on a sector-specific basis, <u>to</u> foster the relevance and usability of the licensing mechanisms referred to in Article 7(1); <u>and to</u> ensure the effectiveness of the safeguards for rightholders referred to in this Chapter, notably as regards publicity measures, and, where applicable, assist in the establishment of the requirements referred to in the second subparagraph of Article 7(2).	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.
191.				<u>CHAPTER 1a</u> <u>Measures to facilitate collective licensing</u>	CHAPTER 1a Measures to facilitate collective licensing
192.	Art. 9a, title			<u>Article 9a</u>	<i>Article 9a</i>

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				<u>Collective licensing with an extended effect</u>	<i>Collective licensing with an extended effect</i>
193.	Art. 9a, para 1			<p><u>1. Member States may provide, as far as the use within their national territory is concerned and subject to safeguards provided for in this Article, that when a collective management organisation, in accordance with its mandates from rightholders, enters into a licensing agreement for the exploitation of works or other subject-matter such an agreement 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, with respect to such an</u></p>	<p>1. Member States may provide, as far as the use within their national territory is concerned and subject to safeguards provided for in this Article, that when a collective management organisation, in accordance with its mandates from rightholders, enters into a licensing agreement for the exploitation of works or other subject-matter such an agreement 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, with respect to such an agreement, the organisation</p>

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				<u>agreement, the organisation has a legal mandate or is presumed to represent rightholders who have not authorised the organisation accordingly.</u>	has a legal mandate or is presumed to represent rightholders who have not authorised the organisation accordingly.
194.	Art. 9a, para 2			<u>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 from rightholders 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</u>	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 from rightholders 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.

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				<u>safeguards the legitimate interests of rightholders.</u>	
195.	Art. 9a, para 3			<u>3. The safeguards referred to in paragraph 1 must ensure that:</u>	3. The safeguards referred to in paragraph 1 must ensure that:
196.	Art. 9a, para 3, point (a)			<u>(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;</u>	(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;
197.	Art. 9a, para 3, point (b)			<u>(b) equal treatment is guaranteed to all rightholders in relation to the terms of the licence;</u>	(b) equal treatment is guaranteed to all rightholders in relation to the terms of the licence;
198.	Art. 9a, para 3, point (c)			<u>(c) rightholders who have not authorised the organisation operating the licence may at any time easily and effectively</u>	(c) rightholders who have not authorised the organisation operating the licence may at any time easily and effectively

	Location	COMMISSION PROPOSAL COM(2016)593	EP TEXT	COUNCIL TEXT doc. 9134/18	POSSIBLE COMPROMISE SOLUTION
				<u>exclude their works or other subject-matter from the licensing mechanism established in accordance with this Article;</u>	exclude their works or other subject-matter from the licensing mechanism established in accordance with this Article;
199.	Art. 9a, para 3, point (d)			<u>(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. Publicity measures should be effective without the need to</u>	(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. Publicity measures should be effective without the need to inform each rightholder individually.

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				<u>inform each rightholder individually.</u>	
200.	Art. 9a, para 4			<u>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 Union law, including those which allow exceptions or limitations, and shall not apply to mandatory collective management of rights.</u>	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 Union law, including those which allow exceptions or limitations, and shall not apply to mandatory collective management of rights.
201.	Art. 9a, para 5			<u>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 licences that may be</u>	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 licences that may be introduced under

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				<u>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.</u>	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.
202.	Art. 9a, para 6			<u>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</u>	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 10 April 2021 , 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

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				<u>shall be accompanied, if appropriate, by a legislative proposal, including</u> as regards publicity measures, and, where applicable, assist in the establishment of the requirements referred to in the second subparagraph of Article 7(2). <u>the cross-border effect of such national schemes.</u>	proposal, including as regards the cross-border effect of such national schemes.
204.	Art. 10, title	<i>Article 10 Negotiation mechanism</i>	<i>Article 10 Negotiation mechanism</i>	<i>Article 10 Negotiation mechanism</i>	<i>Article 10 Negotiation mechanism</i>
205.	Art. 10, sub-para 1	Member States shall ensure that where parties wishing to conclude an agreement for the purpose of making available audiovisual works on video-on-demand platforms face difficulties relating to the licensing of rights, they may rely on the assistance of an impartial body with relevant experience. That body shall	Member States shall ensure that where parties wishing to conclude an agreement for the purpose of making available audiovisual works on video-on-demand platforms face difficulties relating to the licensing of audiovisual rights, they may rely on the assistance of an impartial body with relevant experience. That	Member States shall ensure that where parties wishing <u>facing difficulties related to the licensing of rights when seeking</u> to conclude an agreement for the purpose of making available audiovisual works on video-on-demand platforms face difficulties relating to the licensing of rights, they <u>services</u> , may	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 of mediators. The impartial

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		provide assistance with negotiation and help reach agreements.	body <i>The impartial body created or designated by the Member State for the purpose of this Article</i> shall provide assistance <i>to the parties</i> with negotiation and help <i>them to</i> reach agreement.	rely on the assistance of an impartial body with relevant experience. That of mediators. The body or mediators shall provide assistance to the parties with negotiation their negotiations and help them reach agreements, including, where appropriate, by submitting proposals to the parties.	body created or designated by the Member State for the purpose of this Article or mediators shall provide assistance to the parties with their negotiations and help them reach agreements, including, where appropriate, by submitting proposals to the parties.
206.	Art. 10, sub-para 2	No later than [date mentioned in Article 21(1)] Member States shall notify to the Commission the body referred to in paragraph 1.	No later than [date mentioned in Article 21(1)] Member States shall notify to inform the Commission of the body referred to in paragraph 1. they create or designate pursuant to the first paragraph.	No later than [date mentioned in Article 21(1)] Member States shall notify to the Commission the body or mediators 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, the notification to the Commission shall at least	Member States shall notify to the Commission the body or mediators 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, the notification to the Commission shall at least include, when available, the source where relevant information on the

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				<u>include, when available, the source where relevant information on the entrusted mediators can be found.</u>	entrusted mediators can be found.
207.	Art. 10, sub-para 3		<i>To encourage the availability of audiovisual works on video-on-demand platforms, Member States shall foster dialogue between representative organisations of authors, producers, video-on-demand platforms and other relevant stakeholders.</i>		Member States shall encourage dialogue between representative organisations of authors, producers, video-on-demand platforms and other relevant stakeholders in order to promote the availability of audiovisual works on video-on-demand platforms.

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42.	(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 the cultural heritage institution, for example as a result of a transfer of ownership or licence agreements.	(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 <i>of such works or other subject matter</i> are owned or permanently held by the cultural heritage institution; <i>those organisations</i> , for example as a result of a transfer of ownership or licence agreements, <i>a legal deposit or a long-term loan . Works or other subject matter that cultural heritage institutions access temporarily via a third-party server are not considered as being permanently in their collections.</i>	(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 the cultural heritage institutions <u>such institutions</u> , for example as a result of a transfer of ownership or licence agreements <u>or permanent custody arrangements</u> .	(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 <u>of such works or other subject-matter</u> are owned or permanently held by <u>such institutions</u> , for example as a result of a transfer of ownership or licence agreements, <u>legal deposit obligations or permanent custody arrangements</u> .
46.	(22) Cultural heritage institutions should benefit from	(22) Cultural heritage institutions should benefit from	(22) Cultural heritage institutions should benefit from	(22) Cultural heritage institutions should benefit from

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	<p>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 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 licensing of rights in out-of-commerce works that are in the collections of cultural heritage institutions and thereby to allow the conclusion of agreements with cross-border effect in the internal market.</p>	<p>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 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 <i>or have never been in commerce</i>. It is therefore necessary to provide for measures to facilitate the licensing of rights in <i>use of</i> out-of-commerce works that are in the collections of cultural heritage institutions and thereby to allow the conclusion of agreements with cross-border effect in the internal market.</p>	<p>a clear framework for the digitisation and dissemination, including across borders, of out-of-commerce works or other subject-matter- <u>that are considered out of commerce for the purposes of this Directive.</u> However, the particular characteristics of the collections of out-of-commerce works, <u>together with the amount of works involved in mass digitisation projects,</u> 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 <u>collective</u> licensing of rights in out-of-commerce works that are</p>	<p>a clear framework for the digitisation and dissemination, including across borders, of works or other subject-matter that are considered out of commerce for the purposes of this Directive. However, the particular characteristics of the collections of out-of-commerce works, together with the amount of works and other subject-matter 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 or that they have never been exploited commercially. It is therefore necessary to provide for measures to facilitate certain uses of the collective</p>

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			permanently in the collections of cultural heritage institutions and thereby to allow the conclusion of agreements with cross-border effect in the internal market.	licensing of rights in out-of-commerce works and other subject-matter 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.
47.		<i>(22a) Several Member States have already adopted extended collective licencing regimes, legal mandates or legal presumptions facilitating the licencing of out-of-commerce works. However considering the variety of works and other subject-matter in the collections of cultural heritage institutions and the variance between collective management practices across Member States and sectors of cultural production, such measures may not provide a solution in all cases, for</i>		(22a) Legal mechanisms should therefore exist in all Member States allowing for licences issued by relevant and sufficiently representative collective management organisations to cultural heritage institutions, for certain uses of out-of-commerce works and other subject matter, to also apply to the rights of rightholders that have not mandated a representative collective management organisation in that regard. It should be legally possible for those

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		<p><i>example, because there is no practice of collective management for a certain type of work or other subject matter. In such particular instances, it is therefore necessary to allow cultural heritage institutions to make out-of-commerce works held in their permanent collection available online under an exception to copyright and related rights. While it is essential to harmonise the scope of the new mandatory exception in order to allow cross-border uses of out-of-commerce works, Member States should nevertheless be allowed to use or continue to use extended collective licencing arrangements concluded with cultural heritage institutions at national level for categories of works that are permanently in the collections of cultural</i></p>		<p>licences to cover all territories of the Union.</p> <p>(22b) An adapted legal framework applicable to collective licensing may not provide a solution for all the cases where cultural heritage institutions encounter difficulties in obtaining all the necessary authorisations of right holders for the use of out-of-commerce works and other subject-matter, for example, because there is no practice of collective management for a certain type of works or other subject-matter or because the relevant collective management organisation is not broadly representative for the category of the right holders and of the rights concerned. In such particular instances, it should be possible for cultural heritage institutions to make out-of-</p>

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		<p><i>heritage institutions The lack of agreement on the conditions of the licence should not be interpreted as a lack of availability of licensing-based solutions. Any uses under this exception should be subject to the same opt-out and publicity requirements as uses authorised by a licensing mechanism. In order to ensure that the exception only applies when certain conditions are fulfilled and to provide legal certainty, Member States should determine, in consultation with rightholders, collective management organisations and cultural heritage organisations, and at appropriate intervals of time, for which sectors and which types of works appropriate licence-based solutions are not available, in which case the exception should apply.</i></p>		<p>commerce works and other subject-matter that are permanently in their collection available online in all territories of the Union under a harmonised exception or limitation to copyright and related rights. It is important that uses under that exception or limitation only take place when certain conditions, notably as regards the availability of licensing solutions, are fulfilled. The lack of agreement on the conditions of the licence should not be interpreted as a lack of availability of licensing-based solutions.</p>

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48.	(23) Member States should, within the framework provided for in this Directive, have flexibility in choosing the specific type of mechanism allowing for licences for out-of-commerce works to extend to the rights of rightholders that are not represented by the collective management organisation, in accordance to their legal traditions, practices or circumstances. Such mechanisms can include extended collective licensing and presumptions of representation.	(23) Member States should, within the framework provided for in this Directive, have flexibility in choosing the specific type of mechanism allowing for licences for out-of-commerce works to extend to the rights of rightholders that are not represented by the relevant collective management organisation, in accordance to with their legal traditions, practices or circumstances. Such mechanisms can include extended collective licensing and presumptions of representation.	(23) Member States should, within the framework provided for in this Directive, have flexibility in choosing the specific type of mechanism, <u>such as extended collective licensing or presumption of representation,</u> allowing for licences for out-of-commerce works to extend to the rights of rightholders that are have not represented by the <u>mandated a representative</u> collective management organisation, in accordance to with with their legal traditions, practices or circumstances. Such mechanisms can include extended collective licensing and presumptions of representation. <u>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</u>	(23) Member States should, within the framework provided for in this Directive, have flexibility in choosing the specific type of licensing mechanism, such as extended collective licensing or presumptions of representation, that they put in place for the use of out-of-commerce works and other subject matter by cultural heritage institutions, 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

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			<u>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.</u>	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.
49.	(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	(24) For the purpose of those licensing mechanisms, a rigorous and well-functioning collective management system is important <i>and should be encouraged by the Member States</i> . That system includes in particular rules of good	(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	(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

Row	COMMISSION PROPOSAL COM(2016)593	EP TEXT P8_TA-PROV(2018)0337 A8-0245/2018	COUNCIL TEXT 9134/18	POSSIBLE COMPROMISE SOLUTION
	<p>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 to their works or other subject-matter. Conditions attached to those mechanisms should not affect their practical relevance for cultural heritage institutions.</p>	<p>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 <i>licensing</i> mechanisms <i>or of such exceptions</i> to their works or other subject-matter. Conditions attached to those mechanisms should not affect their practical relevance for cultural heritage institutions.</p>	<p>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 <u>in relation to all their works or other subject-matter or to all licences, or in relation to particular works or other subject-matter or to particular licences, at any time before or under the duration of the licence.</u> Conditions attached to those mechanisms should not affect their practical relevance for cultural heritage institutions. <u>It is important that when a rightholder excludes the application of such mechanisms to one or more of their works or other subject-</u></p>	<p>regular, diligent and accurate distribution and payment of amounts due to individual rightholders, as provided for by Directive 2014/26/EU.</p> <p>(24a) Additional appropriate safeguards should be available for all rightholders, who should be given the opportunity to exclude the application of these licensing mechanisms and the exception or limitation introduced by this Directive for the use of out-of-commerce works in relation to all their works or other subject-matter or in relation to all licences or all uses under the exception or limitation, or in relation to particular works or other subject-matter or in relation to particular licences or uses under the exception or limitation, at any time before or under the duration of the licence or the uses under the exception or limitation.</p>

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			<p><u>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 period. Such exclusion by the rightholder should not affect their claim to remuneration for the actual use of the work or other subject-matter.</u></p>	<p>Conditions attached to those licensing mechanisms should not affect their practical relevance for cultural heritage institutions. It is important that when a rightholder excludes the application of such mechanisms or of such exception or limitation 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 period, and, in the case they take place under a collective licence, that the informed collective management organisation does not continue to issue licences covering the relevant uses. Such exclusion by the rightholders should not affect their claims to remuneration for the actual use of the work or</p>

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				other subject-matter under the licence.
50.			<u>(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.</u>	(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.
51.	(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, sound recordings	(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, sound recordings	(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, <u>software,</u>	(25) Considering the variety of works and other subject-matter in the collections of cultural heritage institutions, it is important that the licensing mechanisms and the exception or limitation introduced by this Directive are available and can be used in practice for different types of works and other subject-matter, including

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	<p>and audiovisual works. In order to reflect the specificities of different categories of works and other subject-matter as regards modes of publication and distribution 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. It is appropriate that Member States consult rightholders, users and collective management organisations when doing so.</p>	<p>and audiovisual works. In order to reflect the specificities of different categories of works and other subject-matter as regards modes of publication and distribution and to facilitate the usability of those mechanisms, <i>the solutions on the use of out-of-commerce works introduced by this Directive</i>, specific requirements and procedures may have to be established by Member States for the practical application of those licensing mechanisms. It is appropriate that Member States consult rightholders, users <i>cultural heritage institutions</i> and collective management organisations when doing so.</p>	<p><u>phonograms, sound recordings and audiovisual 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</u></p>	<p>photographs, software, phonograms, audiovisual 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,</p>

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			<p><u>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 a given language.</u> In order to reflect the specificities of different categories 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, <u>such as a time period which needs to have been elapsed since the first commercial availability of the work.</u> It is appropriate that Member States consult rightholders, users and</p>	<p>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 a given language. In order to reflect the specificities of different <u>types</u> 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 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, cultural heritage institutionsusers and collective management organisations when doing so.</p>

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			collective management organisations when doing so.	
52.			<u>(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</u>	(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 should only be required when this is

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			<p><u>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 that a literary work was first published in a given language version in another Member State. 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</u></p>	<p>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 that a literary work was first published in a given language version in another Member State. 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</p>

Row	COMMISSION PROPOSAL COM(2016)593	EP TEXT P8_TA-PROV(2018)0337 A8-0245/2018	COUNCIL TEXT 9134/18	POSSIBLE COMPROMISE SOLUTION
			<u>theoretical possibility to obtain a licence to a work should not be considered as availability to the public in the customary channels of commerce.</u>	considered as availability to the public in the customary channels of commerce.
53.	(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 works or other subject-matter that are first published or, in the absence of publication, first broadcast in a third country or, in the case of cinematographic or audiovisual works, to works the producer of which has his headquarters or habitual residence in a third country. Those mechanisms should also not apply to works or other subject-matter of third country nationals except when they are	(26) For reasons of international comity, the licensing mechanisms and the exception for the digitisation and dissemination of out-of-commerce works provided for in this Directive should not apply to works or other subject-matter that are first published or, in the absence of publication, first broadcast in a third country or, in the case of cinematographic or audiovisual works, to works the producer of which has his headquarters or habitual residence in a third country. Those mechanisms should also not apply to works or other subject-matter of third country nationals except when	(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 works or other subject-matter that are first published or, in the absence of publication, first broadcast in a third country or, in the case of cinematographic or audiovisual works, to works the producer of which has his headquarters or habitual residence in a third country. Those mechanisms should also not apply to works or other subject-matter of third country nationals except when they are	(26) For reasons of international comity, the licensing mechanism and the exception or limitation provided for in this Directive 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 or other subject-matter when there is available evidence to presume that they predominantly consist of works or other subject-matter of third countries, unless the concerned collective management organisation is sufficiently representative for that third country, for example

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	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.	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.	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 <u>sets of out-of-commerce works or other subject-matter when there is available evidence to presume that they predominantly consist of works or other subject-matter of third countries, unless the concerned collective management organisation is sufficiently representative for that third country, for example via a representation agreement. This assessment can be based on the evidence available following the reasonable effort to determine the out-of-commerce status of the</u>	via a representation agreement. This assessment can be based on the evidence available following the reasonable effort to determine the out-of-commerce status of the works, without the need to search for further evidence. A work-by-work assessment of the origin of the out-of-commerce works should only be required insofar as it is also required for the reasonable effort to determine their commercial availability.

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			<u>works, without the need to search for further evidence. A work-by-work assessment of the origin of the out-of-commerce works should only be required insofar as it is also required for the reasonable effort to determine their commercial availability.</u>	
54.	(27) As mass digitisation projects can entail significant investments by cultural heritage institutions, any licences granted under the mechanisms provided for in this Directive should not prevent them from generating reasonable revenues in order to cover the costs of the licence and the costs of digitising and disseminating the works and other subject-matter covered by the licence.	(27) As mass digitisation projects can entail significant investments by cultural heritage institutions, any licences granted under the mechanisms provided for in this Directive should not prevent them from generating reasonable revenues in order to cover covering the costs of the licence and the costs of digitising and disseminating the works and other subject-matter covered by the licence.	(27) As mass 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	(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

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			<p>digitisation projects of the <u>collections of cultural heritage institutions</u> can entail significant investments by cultural heritage institutions, any licences granted under the mechanisms provided for in this Directive should not prevent them <u>cultural heritage institutions</u> from generating reasonable revenues in order to cover <u>for the purposes of covering</u> the costs of the licence and the costs of digitising and disseminating the works and other subject-matter covered by the licence.</p>	<p>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.</p>
55.	(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	(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 <i>or of the exception</i> provided for in this Directive and the arrangements in place for all	(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	(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

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	<p>the application of licences to their works or other subject-matter should be adequately publicised. This is particularly important when uses take place across borders in the internal market. 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 cross-border use takes place. Under Regulation (EU) No 386/2012 of the European Parliament and of the Council¹¹, the European Union Intellectual Property Office is entrusted with certain tasks and activities, financed by making use of its own budgetary measures, aiming at facilitating and supporting the activities of national authorities, the private sector and Union institutions in the fight against,</p>	<p>rightholders to exclude the application of licences <i>or of the exception</i> to their works or other subject-matter should be adequately publicised. This is particularly important when uses take place across borders in the internal market. 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 cross-border use takes place. Under Regulation (EU) No 386/2012 of the European Parliament and of the Council¹¹, the European Union Intellectual Property Office is entrusted with certain tasks and activities, financed by making use of its own budgetary measures, aiming at facilitating and supporting the activities of national authorities, the private</p>	<p>rightholders to exclude the application of licences to their works or other subject-matter should be adequately publicised- <u>both before a licence is granted and during the operation of the licence as appropriate.</u> 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 cross-border use takes place. <u>This portal should facilitate the possibility for rightholders to exclude the application of licences to their works or other subject-matter.</u> Under Regulation (EU) No 386/2012 of the European</p>	<p>the application of licences or of the exception or limitation to their works or other subject-matter should be adequately publicised both before a licence is granted and during the operation of the licence the use under a licence or the exception or limitation, 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 facilitate the possibility for rightholders to exclude the application of licences to their works or other subject-matter. Under Regulation (EU) No 386/2012 of the European</p>

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	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.	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.	Parliament and of the Council ¹ , the European Union Intellectual Property Office is entrusted with certain tasks and activities, financed by making use of its own budgetary measures 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. <u>In addition to making the information available through the portal,</u>	Parliament and of the Council ² , 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

¹ 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).

² 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).

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			<p><u>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.</u></p>	<p>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 or the type of use under the exception or limitation, and the existing practices in Member States. Publicity measures should be effective without the need to inform each rightholder individually.</p> <p>(-28a) In order to ensure that the licensing mechanisms established by this Directive</p>

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				for out-of-commerce works are relevant and function properly, that rightholders are adequately protected, that licences are properly publicised and that legal clarity is ensured with regard to the representativeness of collective management organisations and the categorisation of works, Member States should foster sector-specific stakeholder dialogue.
56.			<u>(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</u>	

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			<u>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. These measures should also be without prejudice to national mechanisms for the use of out of commerce works based on licences between collective management organisation and users other than cultural heritage institutions.</u>	
57.			<u>(28b) Mechanisms of collective licensing with an extended effect allow a collective management organisation to offer licences as a collective licensing body on behalf of rightholders irrespective of whether they have authorised the organisation to do so. Systems</u>	

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			<p><u>built on such mechanisms, such as extended collective licensing, legal mandates or presumptions of representation, are a well-established practice in several Member States and 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 potentially large volumes of works or other subject-matter for</u></p>	

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			<u>certain types of use, and distribute the revenue received to rightholders.</u>	
58.			<p><u>(28c) In the case of some uses, together with the usually large amount of works involved, the transaction cost of individual rights clearance with every concerned rightholder 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.</u></p> <p><u>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</u></p>	

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			<u>subject-matter to be used.</u> <u>These mechanisms serve as a</u> <u>complement to collective</u> <u>management based on</u> <u>individual mandates, by</u> <u>providing full legal certainty</u> <u>to users. At the same time,</u> <u>they provide a further</u> <u>opportunity to right holders</u> <u>to benefit from the legitimate</u> <u>use of their works.</u>	
59.			<u>(28d) Given the increasing</u> <u>importance of the ability to</u> <u>offer flexible licensing</u> <u>solutions in the digital age,</u> <u>and the increasing use of such</u> <u>schemes in Member States, it</u> <u>is beneficial to further clarify</u> <u>in Union law the status of</u> <u>licensing mechanisms</u> <u>allowing collective</u> <u>management organisations to</u> <u>conclude licences, on a</u> <u>voluntary basis, irrespective</u> <u>of whether all rightholders</u> <u>have authorised the</u>	

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			<p><u>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 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</u></p>	

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			<p><u>non-member rightholders. Such mechanisms may include extended collective licensing, legal mandate and presumptions of representation. The provisions of this Directive concerning collective licensing should not affect existing possibilities of Member States to apply mandatory collective management or other collective licensing mechanisms with an extended effect, such as the one included in Article 3 of Directive 93/83/EEC.</u></p>	
60.			<p><u>(28e) It is important that such mechanisms are only applied in well-defined areas of uses, where obtaining authorisations from rightholders on an individual basis is typically onerous and impractical to a degree that</u></p>	

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			<p><u>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.</u></p>	
61.			<p><u>(28f) Specifically, to justify the extended effect of the mechanisms, the organisation should be, on the basis of authorisations from</u></p>	

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			<p><u>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</u></p>	

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			<p><u>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.</u></p>	
62.			<p><u>(28g) 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</u></p>	

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			<p><u>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.</u></p>	
63.			<p><u>(28h) 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</u></p>	

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			<p><u>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</u></p>	

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			<u>information should be discussed with Member States in the contact committee referred to in Article 12(3) of Directive 2001/29) — On/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.</u>	
64.		<i>(28a) In order to ensure that the licensing mechanisms established for out-of-commerce works are relevant and function properly, that rightholders are adequately protected under those mechanisms, that licences are properly publicised and that legal clarity is ensured with regard to the representativeness of collective management organisations and the categorisation of</i>		<i>[EP proposal covered as recital -28a in line 55]</i>

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		<i>works, Member States should foster sector-specific stakeholder dialogue.</i>		
65.	(29) On-demand services have the potential to play a decisive role in the dissemination of European works across the European Union. However, agreements on the online exploitation of such works may face difficulties related to the licensing of rights. Such issues may, for instance, appear when the holder of the rights for a given territory is not interested in the online exploitation of the work or where there are issues linked to the windows of exploitation.	(29) On-demand services have the potential to play a decisive role in the dissemination of European works across the European Union. However, agreements on the online exploitation of such works may face difficulties related to the licensing of rights. Such issues may, for instance, appear when the holder of the rights for a given territory is not interested in the online exploitation of the work or where there are issues linked to the windows of exploitation.	(29) <u>Video</u> -on-demand services have the potential to play a decisive role in the dissemination of European audiovisual works across the European Union. However, agreements <u>the availability of those works, in particular European works, on video-on-demand services remains limited. Agreements</u> on the online exploitation of such works may <u>be difficult to conclude due to issues</u> face difficulties related to the licensing of rights. Such issues may, for instance, appear when the holder of the rights for a given territory is not interested in the <u>has low economic incentive to exploit a work</u> online exploitation of the work or where there are issues <u>and does not license or holds back</u>	(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

Row	COMMISSION PROPOSAL COM(2016)593	EP TEXT P8_TA-PROV(2018)0337 A8-0245/2018	COUNCIL TEXT 9134/18	POSSIBLE COMPROMISE SOLUTION
			<u>the online rights, which can lead to the unavailability of audiovisual works on video-on-demand services. Other issues may be</u> linked to the windows of exploitation.	linked to the windows of exploitation.
66.	(30) To facilitate the licensing of rights in audiovisual works to video-on-demand platforms, this Directive requires Member States to set up a negotiation mechanism allowing parties willing to conclude an agreement to rely on the assistance of an impartial body. The body should meet with the parties and help with the negotiations by providing professional and external advice. Against that background, Member States should decide on the conditions of the functioning of the negotiation mechanism, including the timing and duration of the assistance to	(30) To facilitate the licensing of rights in audiovisual works to video-on-demand platforms, this Directive requires Member States to <i>should</i> set up a negotiation mechanism, <i>managed by an existing or newly established national body</i> , allowing parties willing to conclude an agreement to rely on the assistance of an impartial body. <i>The participation in this negotiation mechanism and the subsequent conclusion of agreements should be voluntary. Where a negotiation involves parties from different Member States, those parties should agree beforehand on the competent Member State,</i>	(30) To facilitate the licensing of rights in audiovisual works to video-on-demand platforms <u>services</u> , this Directive requires Member States to set up <u>provide for</u> a negotiation mechanism allowing parties willing to conclude an agreement to rely on the assistance of an impartial body. The body <u>or of one or more mediators. 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 the mediators</u> should meet with the	(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 of one or more mediators. 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 the mediators should meet with the parties and help with the

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	<p>negotiations and the bearing of the costs. Member States should ensure that administrative and financial burdens remain proportionate to guarantee the efficiency of the negotiation forum.</p>	<p><i>should they decide to rely on the negotiation mechanism.</i> The body should meet with the parties and help with the negotiations by providing professional, <i>impartial</i> and external advice. Against that background, Member States should decide on the conditions of the functioning of the negotiation mechanism, including the timing and duration of the assistance to negotiations and the bearing <i>division</i> of the <i>any</i> costs <i>arising, and the composition of such bodies.</i> Member States should ensure that administrative and financial burdens remain proportionate to guarantee the efficiency of the negotiation forum.</p>	<p>parties and help with the negotiations by providing professional and external advice. <u>The body or the mediators 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.</u> Against that background, Member States should <u>be free to</u> decide on the conditions of <u>concrete</u> 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</p>	<p>negotiations by providing professional, impartial and external advice. Where a negotiation involves parties from different Member States, those parties should agree beforehand on the competent Member State, should they decide to rely on the negotiation mechanism. The body or the mediators 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 participation in this negotiation mechanism and the subsequent conclusion of agreements should be 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</p>

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			efficiency of the negotiation forum <u>mechanism</u> .	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.