EUROPEAN
COMMISSION

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

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on copyright in the Digital Single Market

(Text with EEA relevance)

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THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

Having regard to the proposal from the European Commission,

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

Having regard to the opinion of the European Economic and Social Committee[24],

Having regard to the opinion of the Committee of the Regions[25],

Acting in accordance with the ordinary legislative procedure,

Whereas:

(1) **[*General* – InfoSoc]** The Treaty provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Harmonisation of the laws of the Member States on copyright and related rights should contribute further to the achievement of these objectives.

(2) **[*General* – Necessity of a high level of protection for copyright (as previously mentioned in other Directives)]** The Union Directives which have been adopted in the area of copyright and related rights provide for a high level of protection for rightholders and thereby create a framework wherein the exploitation of works and other protected subject-matter can take place. This harmonised legal framework contributes to the good functioning of the internal market; it stimulates innovation, creativity, investment and production of new content, also in the digital environment. The protection provided by this legal framework also contributes to the Union's objective of respecting and promoting cultural diversity while at the same time bringing the European common cultural heritage to the fore. Article 167(4) of the Treaty on the Functioning of the European Union requires the Union to take cultural aspects into account in its action.

(3) **[*General* – Background and aim – December communication]** Rapid technological developments continue to transform the way works and other subject-matter are created, produced, distributed and exploited. New business models and new actors continue to emerge. The objectives and the principles laid down by the EU copyright framework remain sound. However, legal uncertainty remains, for both rightholders and users, as regards certain uses, including cross-border uses, of works and other

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24 OJ C [...], [...], p. [...].

25 OJ C [...], [...], p. [...].

subject-matter in the digital environment. As set out in the Communication of the Commission entitled 'Towards a modern, more European copyright framework'[26], there is a need, in some areas, to adapt and supplement the current EU copyright framework. This Directive provides for rules to adapt certain exceptions and limitations to digital and cross-border environments. It also provides for measures to facilitate certain licensing practices as regards the dissemination of out-of commerce works and the online availability of audiovisual works on video-on-demand platforms with a view to ensuring wider access to content. Finally, to achieve a well-functioning marketplace for copyright, this Directive provides for rules on rights in publications, on the use of works and other subject-matter by online services storing and giving access to user uploaded content and on the transparency of authors' and performers' contracts.

(4) **[*General* – Current legal background – Not affected]** This Directive is based upon, and complements, the rules laid down in the Directives currently in force in this area, in particular Directive 96/9/EC of the European Parliament and of the Council[27], Directive 2001/29/EC of the European Parliament and of the Council[28], Directive 2006/115/EC of the European Parliament and of the Council[29], Directive 2009/24/EC of the European Parliament and of the Council[30], Directive 2012/28/EU of the European Parliament and of the Council[31] and Directive 2014/26/EU of the European Parliament and of the Council[32].

(5) **[*Exceptions* – Legal uncertainty as regards new uses – Need for mandatory exceptions]** In the fields of research, education and preservation of cultural heritage, digital technologies permit new types of uses that are not clearly covered by the current EU rules on exceptions and limitations. In addition, the optional nature of exceptions and limitations provided for in Directives 2001/29/EC, 96/9/EC and 2009/24/EC in these fields may negatively impact the functioning of the internal market. This is particularly relevant as regards cross-border uses, which are becoming increasingly important in the digital environment. Therefore, the existing exceptions and limitations in Union law that are relevant for scientific research, teaching and preservation of cultural heritage have to be reassessed in the light of these new uses. There is a need to introduce mandatory exceptions or limitations for uses of text and data mining technologies in the field of scientific research, illustration for teaching in the online environment and for preservation of cultural heritage. For uses not covered by the exceptions or the limitation provided in this Directive, the exceptions and

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26 COM(2015) 626 final.

27 Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p. 20–28).

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

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

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

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

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

limitations existing in Union law will continue to apply. When required, this Directive provides for technical adaptations to Directives 96/9/EC and 2001/29/EC.

(6) **[*Exceptions* – Fair balance of rights]** The exceptions and the limitation set out in this Directive seek to achieve a fair balance between the rights and interests of authors and other rightholders on the one hand, and of users on the other. They can be applied only in certain special cases which do not conflict with the normal exploitation of the works or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholders.

(7) **[*TDM* – Rationale]** New technologies enable the automated computational analysis of information in digital form, such as text, sounds, images or data, generally known as text and data mining, faster than if done by individuals. Those technologies allow researchers to process large amounts of information to gain new knowledge and discover new trends. Whilst text and data mining technologies are prevalent across the digital economy, there is widespread acknowledgment that text and data mining can in particular benefit the research community and in so doing encourage innovation. However, in the Union, research organisations such as universities and research institutes are confronted with legal uncertainty as regards their ability to perform text and data mining of content. In certain instances, text and data mining may involve acts protected by copyright and/or by the sui generis database right, notably the reproduction of works or other subject-matter and/or the extraction of contents from a database. Where there is no exception or limitation which applies, an authorisation to undertake such acts would be required from rightholders. Text and data mining may also be carried out in relation to mere facts or data which are not protected by copyright and in such instances no authorisation would be required.

(8) **[*TDM*]** Union law already provides certain exceptions and limitations covering uses for scientific research purposes which may apply to acts of text and data mining. However, these exceptions and limitations are optional and not fully adapted to the current use of technologies in scientific research. Moreover, where researchers have lawful access to content, for example through subscriptions to publications or open access licences, the terms of the licences may exclude text and data mining. As research is increasingly carried out with the assistance of digital technology, there is a risk that the Union's competitive position as a research area will suffer unless steps are taken to address the legal uncertainty for text and data mining.

(9) **[*TDM*]** This legal uncertainty should be addressed by providing for a mandatory exception to the right of reproduction and also to the right to prevent extraction from a database. Such an exception would seek to ensure that text and data mining can be carried out even if it requires the reproduction of works, or other subject matter, or of parts thereof; or the extraction of the whole or a substantial part of the contents of a database protected by the sui generis right. The new exception should be without prejudice to the existing mandatory exception on temporary acts of reproduction laid down in Article 5(1) of Directive 2001/29, which should continue to apply to text and data mining techniques which do not involve the making of copies going beyond the scope of that exception. Research organisations should also benefit from the exception when they engage into public-private partnerships.

(10) **[*TDM* – Scientific research]** The term 'scientific research' within the meaning of this Directive should cover both the natural sciences and the human sciences.

(11) **[*TDM* – Beneficiaries]** Research organisations across the EU encompass a wide variety of entities and include those whose primary goal is to conduct scientific

research or to do so together with the provision of educational services. Due to the diversity of such entities, it is important to have a common understanding of the beneficiaries of the exception. Despite different legal forms and structures, research organisations across Member States generally have in common that they act either on a not for profit basis or in the context of a public-interest mission recognised by the State. Such a public-interest mission may, for example, be reflected through public funding or through provisions in national laws or public contracts. At the same time, organisations upon which commercial undertakings have a decisive influence, notably because of structural situations such as their quality of shareholders or members, which may result in them enjoying preferential access to the results of the research should not be considered research organisations for the purposes of this Directive.

(12) **[*TDM* – Technical safeguards]** In view of a potentially high number of access requests to and downloads of their works or other subject-matter, rightholders should be allowed to apply measures where there is risk that the security and integrity of the system or databases where the works or other subject-matter are hosted would be jeopardised. These measures should not exceed what is necessary to pursue the objective of ensuring the security and integrity of the system and should not undermine the effective application of the exception.

(13) **[*TDM*]** There should be no need to provide for compensation for rightholders as regards uses under the text and data mining exception introduced by this Directive given that in view of the nature and scope of the exception the harm should be minimal.

(14) **[*Teaching* – Rationale for introducing a mandatory exception for digital uses]** Article 5(3)(a) of Directive 2001/29/EC allows Member States to introduce an exception or limitation to the rights of reproduction, communication to the public and making available to the public for the sole purpose of, inter alia, illustration for teaching. In addition, Articles 6(2)(b) and 9(b) of Directive 96/9/EC permit the use of a database and the extraction or re-utilization of a substantial part of its contents for the purpose of illustration for teaching. The scope of these exceptions or limitations as they apply to digital uses is unclear. In addition, there is a lack of clarity as to whether these exceptions or limitations would apply where teaching is provided online and thereby at a distance. Finally, the existing framework does not provide for a cross-border effect. This situation may hamper the development of digitally-supported teaching activities and distance learning. Therefore, the introduction of a new mandatory exception or limitation is necessary to ensure that educational establishments benefit from full legal certainty when using works or other subject-matter in digital teaching activities, including online and across borders.

(15) **[*Teaching* – Beneficiaries]** While distance learning and cross-border education programmes are mostly developed at higher education level, digital tools and resources are increasingly used at all education levels, in particular to improve and enrich the learning experience. The exception or limitation provided for in this Directive should therefore benefit all educational establishments in primary, secondary, vocational and higher education to the extent they pursue their educational activity for a non-commercial purpose. The organisational structure and the means of funding of an educational establishment are not the decisive factors to determine the non-commercial nature of the activity.

(16) **[*Teaching* – Illustration for teaching]** The exception or limitation should cover digital uses of works and other subject-matter such as the use of parts or extracts of

works to support, enrich or complement the teaching, including the related learning activities. The use of the works or other subject-matter under the exception or limitation should be only in the context of teaching and learning activities carried out under the responsibility of educational establishments, including during examinations. The exception or limitation should cover both uses through digital means in the classroom and online uses through the educational establishment's secure electronic network, the access to which should be protected, notably by authentication procedures. The exception or limitation should be understood as covering the specific accessibility needs of persons with a disability in the context of illustration for teaching.

(17) **[*Teaching* – Flexibility for MS]** Different arrangements, based on the implementation of the exception provided for in Directive 2001/29/EC or on licensing agreements covering further uses, are in place in a number of Member States in order to facilitate educational uses of works and other subject-matter. Such arrangements have usually been developed taking account of the needs of educational establishments and different levels of education. Whereas it is essential to harmonise the scope of the new mandatory exception or limitation in relation to digital uses and cross-border teaching activities, the modalities of implementation may differ from a Member State to another, to the extent they do not hamper the effective application of the exception or limitation or cross-border uses. This should allow Member States to build on the existing arrangements concluded at national level. In particular, Member States could decide to subject the application of the exception or limitation, fully or partially, to the availability of adequate licences, covering the same uses as those allowed under the exception. This mechanism would, for example, allow giving precedence to licences for materials which are primarily intended for the educational market. In order to avoid that such mechanism results in legal uncertainty or administrative burden for educational establishments, Member States adopting this approach should take concrete measures to ensure that licensing schemes allowing digital uses of works or other subject-matter for the purpose of illustration for teaching are easily available and that educational establishments are aware of the existence of such licensing schemes.

(18) **[*Preservation/OoC* – Recalling that this is existing EU policy]** A legal, financial, organisational and technical environment that is conducive to the preservation of works and other subject-matter in the digital environment, as well as their digitisation and dissemination by cultural heritage institutions, is dependent on a variety of factors, as reflected in the Recommendation of the European Parliament and of the Council of 16 November 2005 on film heritage and the competitiveness of related industrial activities[33], the Commission Recommendation of 27 October 2011 on the digitisation and online accessibility of cultural material and digital preservation[34] and in the Council conclusions of 10 May 2012 on the digitisation and online accessibility of cultural material and digital preservation[35]. These factors include ensuring the necessary legal framework conditions for long-term digital preservation in terms of multiple copying and migration of digital cultural material by public institutions for preservation purposes, in full respect of Union and international law on copyright; and the need to actively promote agreements on the large scale digitisation and online availability of out-of-commerce works and to take the necessary measures to provide for the required legal certainty in a national and cross-border context.

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33 OJ L 323, 9.12.2005, p. 57–61.
34 OJ L 283, 29.10.2011, p. 39–45.
35 OJ C 169, 15.6.2012, p. 5–8.

(19) **[*Preservation* – Rationale for intervention]** Cultural heritage institutions are engaged in the preservation of their collections for future generations. Digital technology offers new ways to preserve the heritage contained in those collections but they also create new challenges. An act of preservation would require a reproduction of a work or other subject-matter in the collection of a cultural heritage institution and consequently the authorisation of the relevant rightholders. Therefore, it is necessary to adapt the current legal framework by providing a mandatory exception to the right of reproduction in order to allow these acts of preservation.

(20) **[*Preservation* – Single market rationale]** Different approaches in the Member States for acts of preservation by cultural heritage institutions hamper cross-border cooperation and the sharing of best practice including the means of preservation by cultural heritage institutions in the internal market, preventing an efficient use of resources.

(21) **[*Preservation* – Better qualification of the exception / what we intend for preservation]** Member States should therefore be required to provide for an exception to permit cultural heritage institutions to reproduce works and other subject-matter permanently in their collections when done for preservation purposes, for example to address technological obsolescence or the degradation of original supports. Such an exception should allow for the making of copies by the appropriate preservation tool, means or technology, in the requisite number and at any point in the life of a work or other subject-matter to the extent required in order to produce a copy for preservation purposes only.

(22) **[*Preservation* – Permanent collection]** For the purposes of this Directive, works and other subject-matter should be considered to be permanently in the collection of a cultural heritage institution when copies are owned or permanently held by the cultural heritage institution, for example as a result of a transfer of ownership or licence agreements.

(23) **[*OoC* – Main rationale for intervention]** Cultural heritage institutions should benefit from a clear framework for the digitisation and dissemination, including across borders, of out-of-commerce works or other subject-matter. The Council conclusions of 12 May 2012 stress the need to actively promote agreements on the large scale digitisation and online availability of out-of-commerce works as the prior consent of rightholders is required for any act of reproduction, communication to the public including making available and distribution. However, the particular characteristics of the collections of out-of-commerce works mean that obtaining the prior consent of the individual rightholders may not be possible. 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. At the same time, it would not be justified to introduce an exception or limitation as in the case of orphan works. 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.

(24) **[*OoC* – Mechanism, flexibility for MS in type of technique to be used]** Member States should, within the framework provided for in this Directive, retain flexibility in choosing the specific type of mechanism allowing for licences for out-of-commerce works to extend to the rights of rightholders that are not represented by the collective management organisation, in accordance to their legal traditions, practices or

circumstances. Such mechanisms can include extended collective licensing and presumptions of representation.

(25) **[*OoC* – Importance of compliance with CRM Directive and additional measures]** For the purpose of those licensing mechanisms, a rigorous and well-functioning collective management system is important. This includes in particular rules of good governance, transparency and reporting, as well as the regular, diligent and accurate distribution and payment of amounts due to individual rightholders, as provided for by Directive 2014/26/EU. Pursuant to that Directive, where the amounts cannot be timely distributed to the relevant rightholders, because they cannot, after reasonable and diligent research, be identified or located by the collective management organisations, they should be kept separately in their accounts. Additional appropriate safeguards should be available for all rightholders, who should be given the opportunity to exclude the application of such mechanisms to their works or other subject-matter. Conditions attached to those mechanisms should not affect their practical relevance for cultural heritage institutions.

(26) **[*OoC* – Recognition of specificities of different categories of works]** Given the variety of works and other subject-matter in the collections of cultural heritage institutions, it is important that mechanisms are available and can be used in practice for different types of works and other subject-matter, including photographs, sound recordings and audiovisual works. In order to reflect the specificities of different categories of works and other subject-matter as regards modes of publication and distribution, it is appropriate that Member States are allowed to establish criteria at national level, in consultation with rightholders and users, for works or other subject-matter to qualify as out-of-commerce in that country.

(27) **[*OoC* – Third countries]** For reasons of international comity, the licensing mechanisms for the digitisation and dissemination of out-of-commerce works provided for in this Directive should not apply to works or other subject-matter that are first published or, in the absence of publication, first broadcast in a third country or, in the case of cinematographic or audiovisual works, to works the producer of which has his headquarters or habitual residence in a third country. These mechanisms should also not apply to works or other subject-matter of third country nationals except when they are first published or, in the absence of publication, first broadcast in the territory of a Member State or, in the case of cinematographic or audiovisual works, to works the producer of which has his headquarters or habitual residence in a Member State.

(28) **[*OoC* – Possibility to recoup costs]** As mass digitisation projects can entail significant investments by cultural heritage institutions, any licences granted under the mechanisms provided for in this Directive should not prevent them from generating reasonable revenues in order to cover the costs of the licence and the costs of digitising and disseminating the works and other subject-matter covered by the licence.

(29) **[*OoC* – EUIPO register]** Information regarding the future and ongoing use of out-of-commerce works and other subject-matter by cultural heritage institutions on the basis of the licensing mechanisms provided for in this Directive and the arrangements in place for all rightholders to exclude the application of licences to their works or other subject-matter should be adequately publicised. 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 Council[36], the European Union Intellectual Property Office ('the Office') is entrusted with certain tasks and activities, financed by making use of its own budgetary measures, aiming at facilitating and supporting the activities of national authorities, the private sector and Union institutions in the fight against, including the prevention of, infringement of intellectual property rights. It is therefore appropriate to rely on the Office to establish and manage the European portal making such information available.

(30) [***VoD* – Background**] On-demand services are increasingly important in terms of access of citizens to audiovisual works. These 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.

(31) [***VoD* – Room of manoeuver for MS**] To facilitate the licensing of rights in audiovisual works to video-on-demand platforms, this Directive requires Member States to set up a negotiation mechanism. This mechanism would allow parties willing to conclude an agreement to rely on the assistance of an impartial body. The participation in the negotiation mechanism should be voluntary. The body should meet with the parties and help with the negotiations by providing professional and external advice. Against this background, Member States should decide on the conditions of the functioning of the negotiation mechanism, including the timing and duration of the assistance to negotiations and the bearing of the costs. Member States should ensure that administrative and financial burdens remain proportionate to guarantee the efficiency of the negotiation forum.

(32) [***Publishers***] A free and pluralist press is essential to ensure quality journalism and citizens' access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society. In the transition from print to digital, publishers of news publications are facing problems in licensing the online use of their news publications and recouping their investments. In the absence of recognition of publishers of news publications as rightholders, licensing in the digital environment and online enforcement is often complex and inefficient.

(33) [***Publishers***] The organisational and financial contribution of publishers in producing news publications needs to be recognised and further encouraged to ensure the sustainability of the publishing industry. It is necessary to provide a harmonised legal protection for news publications in respect of online uses within the European Union. Such protection can be effectively guaranteed through the introduction, in Union law, of rights related to copyright for the reproduction and making available to the public of news publications in respect of online uses.

(34) [***Publishers***] For the purposes of this Directive, it is necessary to define the concept of news publication in a way that embraces only journalistic publications, published by a service provider, periodically or regularly updated in any media, for the purpose of

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36 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).

informing or entertaining the general public. Such publications would include, for instance, daily newspapers, weekly magazines and news websites. Periodical publications which are published for scientific or academic purposes, such as scientific journals, should not be covered by the protection granted to news publications under this Directive. This protection should not extend to news of the day as such or to miscellaneous facts having the character of mere items of press information which do not constitute the expression of the intellectual creation of their authors.

(35) [***Publishers***] The rights granted to the publishers of news publications under this Directive should have the same scope as the rights of reproduction and making available to the public provided for in Directive 2001/29/EC, insofar as online uses are concerned. They should also be subject to the same provisions on exceptions and limitations as those applicable to the rights provided for in Directive 2001/29/EC including the exception on quotation for purposes such as criticism or review laid down in Article 5(3)(d) of that Directive.

(36) [***Publishers***] The protection granted to publishers of news publications under this Directive should not affect the rights of the authors and other rightholders in the works and other subject-matter incorporated therein, including as regards the extent to which authors and other rightholders may exploit their works or other subject-matter independently from the news publication in which they are incorporated. Therefore, publishers of news publications should not be able to invoke the protection granted to them against authors and other rightholders. This is without prejudice to contractual arrangements concluded between the publishers of news publications, on the one side, and authors and other rightholders, on the other side.

(37) [***Publishers* – Reprobel**] Publishers, including those of news publications, books or scientific publications, often operate on the basis of the transfer of authors' rights by means of contractual agreements or statutory provisions. In this context, publishers make an investment with a view to the exploitation of the works contained in their publications and may in some instances be deprived of revenues where such works are used under exceptions or limitations such as the ones for private copying and reprography. In order to take account of this situation, Member States should be allowed to determine that when an author has transferred his rights to a publisher and there are systems in place to compensate for the harm caused by an exception or limitation publishers may be entitled to claim a share of such compensation.

(38) [***Value Gap* – Rationale**] Over the last years, the functioning of the online content marketplace has gained in complexity. Online services providing access to copyright protected content uploaded by their users without the involvement of right holders have flourished and have become main sources of access to content online. This affects rightholders' possibilities to determine whether, and under which conditions, their work and other subject-matter are used as well as their possibilities to get an appropriate remuneration for it.

(39) [***Value Gap***] Where online service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements with

rightholders, unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council[37].

In respect of Article 14, it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them.

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

(40) [*Value Gap*] Collaboration between online service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users and rightholders is essential for the functioning of the technologies. While the rightholders should provide the necessary data to allow the services to identify their content, the services must be transparent towards rightholders with regard to the deployed technologies, to allow them to assess the appropriateness of the technologies. The services should in particular provide rightholders with information on the type of technologies used, the way they are operated and their success rate for the identification of rightholders' content. These technologies should also allow rightholders to get information from the services on the use of their content covered by an agreement.

(41) [*Remuneration* – **Rationale for intervention**] Certain rightholders such as authors and performers need information to assess the economic value of their rights which are harmonised under Union law. This is especially the case where such rightholders grant a licence or a transfer of rights in return for remuneration. As authors and performers tend to be in a weaker contractual position when they grant these licences or transfer their rights, they need information to assess the continued economic value of their rights, compared to the remuneration received for their licence or transfer, but they often face a lack of transparency. Therefore, the sharing of adequate information by their contractual counterparts or their successors in title is important for the transparency and balance in the system that governs the remuneration of authors and performers.

(42) [*Remuneration* – **Transparency obligations**] When implementing transparency obligations, the specificities of different content sectors and of the rights of the authors and performers in each sector should be considered. Member States should consult all relevant stakeholders as this will help determine sector-specific requirements. Collective bargaining should be considered as an option to reach an agreement between the relevant stakeholders regarding transparency. To enable the adaptation of current reporting practices to the transparency obligations, a transitional period should be provided for. The transparency obligations do not need to apply to agreements

[37] Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ L 178, 17.7.2000, p. 1–16).

concluded with collective management organisations as these are already subject to transparency obligations under Directive 2014/26/EU.

(43) [*Remuneration* – **Contract adjustment mechanism**] Certain contracts for the exploitation of rights harmonised at Union level are of long duration and there are few possibilities for authors and performers to renegotiate them with their contractual counterparts or their successors in title. Therefore, without prejudice to the law applicable to contracts in Member States, there should be a contract adjustment mechanism for cases where the remuneration agreed under a licence or a transfer of rights is disproportionately low compared to the revenues and the benefits derived from the exploitation of the work or the fixation of the performance, including in light of the transparency ensured by this Directive. Where the parties do not agree on the adjustment of the remuneration, the author or performer should be entitled to bring a claim before a court or other competent authority.

(44) [*Remuneration* – **Dispute resolution mechanism**] Authors and performers are often reluctant to enforce their rights against their contractual partners before a court or tribunal. Member States should therefore provide for an alternative dispute resolution procedure that addresses claims related to obligations of transparency and the contract adjustment mechanism.

(45) [*General* – **Proportionality**] The objectives of this Directive, namely the modernisation of certain aspects of the EU copyright framework to take account of technological developments and new channels of distribution of protected content in the internal market, cannot be sufficiently achieved by Member States but can rather, by reason of their scale, effects and cross-border dimension, be better achieved at Union level. Therefore, the Union may adopt measures, in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality, as set out in that Article, this Directive does not go beyond what is necessary in order to achieve those objectives.

(46) [*General* – **Fundamental rights**] This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter of Fundamental Rights of the European Union. Accordingly, this Directive should be interpreted and applied in accordance with those rights and principles.

(47) [*General* – **Data protection**] Any processing of personal data under this Directive should respect fundamental rights, including the right to respect for private and family life and the right to protection of personal data under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union and must be in compliance with Directive 95/46/EC of the European Parliament and of the Council[38] and Directive 2002/58/EC of the European Parliament and of the Council[39].

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38 Directive 95/46/EC of the European Parliament and of the Council of 24 October 1995 on the protection of individuals with regard to the processing of personal data and on the free movement of such data (OJ L 281, 23.11.1995, p. 31–50). This Directive is repealed with effect from 25 May 2018 and shall be replaced by Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1–88).

39 Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37–47), called, as amended by Directives 2006/24/EC and 2009/136/EC, the "e-Privacy Directive".

(48) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents[40], Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

HAVE ADOPTED THIS DIRECTIVE:

[40] OJ C 369, 17.12.2011, p. 14.

TITLE I
GENERAL PROVISIONS

Article 1
Subject matter and scope

1. This Directive concerns certain rules which aim at further harmonising the Union law applicable to copyright and related rights in the framework of the internal market, taking into account in particular digital and cross-border uses of protected content. It lays down rules on exceptions and limitations, on the facilitation of licences as well as rules aiming at ensuring a well-functioning marketplace for the exploitation of works and other subject-matter.

2. Except in the cases referred to in Article 6, this Directive shall leave intact and shall in no way affect existing rules laid down in the Directives currently in force in this area, in particular Directives 96/9/EC, 2001/29/EC, 2006/115/EC, 2009/24/EC, 2012/28/EU and 2014/26/EU.

Article 2
Definitions

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

(1) 'research organisation' means a university, a research institute or any other organisation the primary goal of which is to conduct scientific research or to conduct scientific research and provide educational services:

(a) on a non-for-profit basis or by reinvesting all the profits in its scientific research; or

(b) pursuant to a public interest mission recognised by a Member State;

in such a way that the access to the results generated by the scientific research cannot be enjoyed on a preferential basis by an undertaking exercising a decisive influence upon such organisation;

(2) 'text and data mining' means any automated analytical technique aiming to analyse text and data in digital form in order to generate information such as patterns, trends and correlations;

(3) 'cultural heritage institution' means a publicly accessible library or museum, an archive or a film or audio heritage institution;

(4) 'news publication' means a fixation of a collection of literary works of a journalistic nature, which may also comprise other works or subject-matter and constitutes an individual item within a periodical or regularly-updated publication under a single title, such as a newspaper or a magazine, having the purpose of providing information to the general public related to news or other general-interest topics and published in any media under the initiative, responsibility and control of a service provider.

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

Article 3
Text and data mining

1. Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC and Article 11(1) of this Directive for reproductions and extractions made by research organisations in order to carry out text and data mining of works or other subject-matter to which they have lawful access for the purposes of scientific research.

2. Any contractual provision contrary to the exception provided for in paragraph 1 shall be unenforceable.

3. Rightholders shall be allowed to apply measures to ensure the security and integrity of the networks and databases where the works or other subject-matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective.

4. Member States shall encourage rightholders and research organisations to define commonly-agreed best practices concerning the application of the measures referred to in paragraph 3.

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

1. Member States shall provide for an exception or limitation to the rights provided for in Articles 2 and 3 of Directive 2001/29/EC, 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 in order to allow for the digital use of works and other subject-matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved, provided that the use:

   (a) takes place on the premises of an educational establishment or through a secure electronic network accessible only by the educational establishment's pupils or students and teaching staff; and

   (b) is accompanied by the indication of the source, including the author's name, unless this turns out to be impossible.

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

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

3. The use of works and other subject-matter for the sole purpose of illustration for teaching through secure electronic networks undertaken in compliance with the

provisions of national law adopted pursuant to this Article shall be deemed to occur solely in the Member State of establishment of the educational establishment.

4. Member States may provide for fair compensation for the harm incurred by the rightholders due to the use of their works or other subject-matter pursuant to paragraph 1.

Article 5
Preservation of cultural heritage

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

Article 6
Link with other Directives

1. Directive 96/9/EC is hereby amended as follows:

   (a) Article 6(2)(b) shall be replaced by the following:

   '(b) where there is use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and the limitation provided for in Directive [...];'

   (b) Article 9(b) shall be replaced by the following:

   '(b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and the limitation provided for in Directive [...];'

2. Directive 2001/29/EC is hereby amended as follows:

   (a) Article 5(2)(c) shall be replaced by the following:

   '(c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage, without prejudice to the exceptions and the limitation provided for in Directive [...];'

   (b) Article 5(3)(a) shall be replaced by the following:

   '(a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved, without prejudice to the exceptions and the limitation provided for in Directive [...];'

3. Article 5(5) and the first, third and fifth subparagraphs of Article 6(4) of Directive 2001/29/EC shall apply to the exceptions and the limitation provided for under this Title.

TITLE III
MEASURES TO IMPROVE LICENSING PRACTICES AND ENSURE WIDER ACCESS TO CONTENT

CHAPTER 1
Out-of-commerce works

Article 7
Use of out-of-commerce works by cultural heritage institutions

1. Member States shall provide that when a collective management organisation, on behalf of its members, concludes a non-exclusive licence for non-commercial purposes with a cultural heritage institution for the digitisation, distribution, communication to the public or making available of out-of-commerce works or other subject-matter in the permanent collection of the institution, such a non-exclusive licence may be extended or presumed to apply to rightholders of the same category as those covered by the licence who are not represented by the collective management organisation, provided that:

   (a) the collective management organisation is, on the basis of mandates from 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;

   (b) equal treatment is guaranteed to all rightholders in relation to the terms of the licence; and

   (c) all rightholders have, at any time, the possibility of objecting to their works or other subject-matter being deemed to be out of commerce and of excluding the application of the licence to their works or other subject-matter.

2. A work or other subject-matter shall be deemed to be out of commerce when the whole work or other subject-matter, in all its translations, versions and manifestations, is not available to the public through customary channels of commerce and cannot be reasonably expected to become so.

   Member States may establish specific criteria at national level, in consultation with rightholders, collective management organisations and cultural heritage institutions, for works or other subject-matter to qualify as out of commerce.

   Member States shall ensure that requirements and procedures used to determine whether works and other subject-matter are out of commerce 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.

3. Member States shall provide that 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; and

   (c) the possibility referred to in point (c) of paragraph 1;

   including during a reasonable period of time before the works or other subject-matter are digitised, distributed, communicated to the public or made available.

4. Member States shall ensure that licences referred to in paragraph 1 are sought from a collective management organisation that is representative for the Member State:

   (a) where the works or phonograms were first published or, in the absence of publication, where they were first broadcast, except for cinematographic and audiovisual works;

   (b) where the producers of the works have their headquarters or habitual residence, for cinematographic and audiovisual works; or

   (c) where the cultural heritage institution is established, when a Member State or a third country could not be determined, after reasonable efforts, according to points (a) and (b).

5. This Article shall not apply to the works or other subject-matter of third country nationals except where points (a) and (b) of paragraph 4 apply.

Article 8
Cross-border uses

1. Works or other subject-matter covered by a licence granted in accordance with Article 7 may be used by the cultural heritage institution in accordance with the terms of the licence in all Member States.

2. Member States shall ensure that information that allows the identification of the works or other subject-matter covered by a licence granted in accordance with Article 7 and information on the possibility referred to in Article 7(1)(c) are made publicly accessible in a single online portal for at least six months before the works or other subject-matter are digitised, distributed, communicated to the public or made available in Member States other than the one where the licence is granted, and for the whole duration of the licence.

3. The portal referred to in paragraph 2 shall be established and managed by the European Union Intellectual Property Office (EUIPO) in accordance with Regulation (EU) No 386/2012.

Article 9
Stakeholder dialogue

Member States shall put in place 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 rightholders referred to in this Chapter, notably as regards publicity measures, and, where applicable, assist in the establishment of the specific criteria referred to in the second subparagraph of Article 7(2).

CHAPTER 2
Access and availability of audiovisual works on video-on-demand platforms

Article 10
Negotiation mechanism

Member States shall ensure that parties wishing to conclude an agreement for the purpose of making available audiovisual works on video-on-demand platforms, when facing difficulties relating to the licensing of rights, may rely on the assistance of an impartial body with

relevant experience. The task of this body shall be to provide assistance with negotiation and help achieving agreements.

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

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

CHAPTER 1
Rights in publications

Article 11
Protection of news publications concerning online uses

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

2. The rights granted in accordance with this Article shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject-matter incorporated in a news publication. Such rights may not be invoked against these authors and other rightholders and, in particular, may not deprive them of their right to exploit their works and other subject-matter independently from the news publication in which they are incorporated.

3. Articles 5 to 8 of Directive 2001/29/EC and Directive 2012/28/EU shall apply *mutatis mutandis* in respect of the rights set out in this Article.

4. The rights provided for in this Article shall expire 20 years after the publication of the news publication. This term shall be calculated from the first day of January of the year following the date of the publication.

Article 12
Claims to fair compensation

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

CHAPTER 2
Certain uses of protected content by online services

Article 13
Use of protected content by information society services storing and giving access to large amounts of works and other subject-matter uploaded by their users

1. Information society services that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take appropriate and proportionate measures to ensure the functioning of agreements concluded with rightholders and to prevent the availability on their services of works or other subject-matter not covered by such agreements, including through the use of effective content identification technologies. The services shall provide rightholders with adequate information on

the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the identification and use of the works and other subject-matter.

2. Member States shall ensure that the services referred to under paragraph 1 put in place complaints and redress mechanisms that are available to users in case of disputes over the application of the measures referred to in paragraph 1.

3. Member States shall facilitate, where appropriate, the cooperation between the information society services and rightholders through stakeholder dialogues to define best practices, such as appropriate and proportionate content identification technologies, taking into account, inter alia, the nature of the services, the availability of the technologies and their effectiveness in light of technological developments.

CHAPTER 3
Fair remuneration in contracts of authors and performers

Article 14
Transparency obligation

1. Member States shall ensure that authors and performers receive on a regular basis and taking into account the specificities of each sector, timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, notably as regards modes of exploitation, revenues generated and remuneration due. Transparency obligations shall be proportionate but effective, ensuring an appropriate level of transparency in every sector.

2. Member States may establish that the obligation in paragraph 1 does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance. Member States may adjust the obligation in paragraph 1 in those instances where the resulting administrative burden would be disproportionate to the revenues generated by the exploitation of the work or performance, provided that an appropriate level of transparency is nevertheless ensured.

3. Paragraph 1 shall not be applicable to entities subject to the transparency obligations established by Directive 2014/26/EU.

Article 15
Contract adjustment mechanism

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

Article 16
Dispute resolution mechanism

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

TITLE V
FINAL PROVISIONS

Article 17
Application in time

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

2. The provisions of Article 11 shall also apply to news publications published before [the date mentioned in Article 20(1)].

3. This Directive shall apply without prejudice to any acts concluded and rights acquired before [the date mentioned in Article 20(1)].

Article 18
Transitional provision

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

Article 19
Protection of personal data

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

Article 20
Transposition

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

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

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

Article 21
Evaluation

No sooner than [five years after the date mentioned in Article 20(1)], the Commission shall carry out an evaluation of this Directive and present a report on the main findings to the European Parliament, the Council and the European Economic and Social Committee. The evaluation shall be conducted according to the Commission's Better Regulation Guidelines*.

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

Article 22
Contact Committee

The committee established by Article 12(3) of Directive 2001/29/EC should have the following additional tasks:

(a) to examine the impact of the transposition of this Directive on the functioning of the internal market and to highlight any difficulties;

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

(c) to discuss any other questions arising from the application of this Directive.

Article 23
Entry into force

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

Article 24
Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament
The President

For the Council
The President