

## **Explanatory Statement**

### **Copyright in the digital single market**

#### **Scope and purpose**

The proposed Directive is aimed at addressing the challenge of ensuring protection of copyright in the digital single market. Several actions need to be taken into consideration including, for example, the digital use or transformation of works and other subject matter protected by copyright such as the digitisation of those works, the application of digital technological processes to works such as the application of text and data mining to a reproduction or extraction of copyrighted works, and the ease of access to such works that digital technology provides European citizens with.

Rightholders face a number of challenges some of which are copyright related even if they occur within a continuously changing market dependent on fluid user patterns. Business models in the creative and cultural sectors face similar challenges as other sectors due to developments in digital technology. These challenges can be compounded where rightholders also face difficulties in exercising their rights over works or other subject matter. It is where copyright relevant acts are involved in these challenges that amendments to copyright can make an effective change.

There are instances where the creative and cultural sectors have already responded to such challenges and together with other service providers or stakeholders have found market led solutions. Solutions need to be balanced in such a way that ensures protection of rightholders while still making it possible for other stakeholders to continue to distribute their works and also ensuring that the works of rightholders reach consumers in different ways. In this respect, one finds numerous stakeholders on any value chain in any sector, each being interdependent. It is not for the legislator to interfere in contractual relations, but for it to ensure respect for copyright.

In doing so, however, it may be fallacious to think that the acts relevant to copyright in the analogue dimension are identical in the digital dimension and that a rule that works in the analogue dimension will necessarily work without any change in the digital dimension. For copyright to work in the digital single market the copyright relevant acts in the digital dimension need to be addressed in equally a balanced way as copyright relevant acts in the analogue dimension are addressed through current legislation. The exceptions and limitations and the licensing agreements processes together with the clarification of the applicability of copyright to digital uses proposed in this Directive also reflect its complementarity to other Union legislation.

Legal certainty and closer harmonisation in the applicability of copyright are fundamentally important to ensure a more effective functioning not only of the digital single market, but of copyright within that market.

activities and programmes. Member States have put in place systems which accredit or provide recognition to educational establishments as well as to the programmes of studies that are provided. An exception for illustration in teaching needs to cover everything that happens in formal schooling as school/university structures, as structures recognised or accredited by Member States as educational establishments. But such an exception is also needed to cover that education that is given outside formal school structures formally recognised as educational establishments but which education (as programmes) is accredited with the national authority. The exception is about teaching and not about educational establishments and therefore making the exception on teaching subject to the venue where that teaching takes place is out of sync with the education concept of lifelong learning. For this purpose, the exception is directly linked to ‘teaching activities’ irrespective of the teaching frameworks within which that teaching activity takes place. Teaching activities can be defined as ‘an educational process taking place either (i) on the premises of an establishment recognised or accredited by the relevant national authority as an educational establishment or (ii) within the framework of an education programme recognised or accredited by the relevant national authority’. The restriction that is to be placed for the use allowed under this exception is therefore one of restricting the use to the specifically limited circle of those taking part in the teaching activity such as pupils or students or teaching staff.

Where however teaching, even if accredited or recognised by the national authority, is run on business commercial basis, Member States may choose to impose an obligation of compensation for use of materials.

Several Member States have already put in place systems and structures implementing an exception or limitation for illustration for teaching including licensing agreement structures.

## **Out of commerce works**

### **i. Legal certainty**

Title III Chapter 1 of the proposed Directive proposes solutions to the use of out of commerce works with the purpose of strengthening the role and the cultural purpose of cultural heritage institutions. In doing so legal certainty requires that terminology that is already defined in other Union law is retained. For this purpose it is being proposed that the definition of ‘cultural heritage institutions’ in this Directive be the same as that found in the Orphan Works Directive in recitals 1 and 23, and articles 1(1) and 2(a)(b), as well as in the InfoSoc Directive in article 5(2)(c). At the same time the definition of out of commerce works is being taken to reflect the same definition upon which the Commission and rightholders entered in a dialogue. Consistency in the definition of these institutions is needed for legal certainty and for clarity both definitions are proposed to be included in Article 2 of this Directive, the definition article.

At the same time, Article 5 already provides cultural heritage institutions with an exception to digitise any work, including out of commerce works or other subject matter,

in press publications is not necessarily disproportionately harmful to the financial interests of press publishers and in some cases it is these linking or referencing systems (such as hyperlinks) that facilitate the finding by users of news online portals.

It is important that the challenges which press publishers face in enforcing the derivative rights upon which they depend to protect the investment made in their publication are addressed in a manner that while strengthening the position of press publishers the measure taken does not disrupt other industries. For this purpose, press publishers are given the right to bring proceedings in their own name before tribunals against infringers of the rights held by the authors of the works contained in their press publication. This measure is necessary, adequate and proportionate in that it solidifies the rights already held by press publishers and strengthens their standing in seeking the enforcement and consequently the value of those rights.

Within this context it is also important to consider that plurality of news and opinions and wide access to these news and opinions is important for public debate in a democratic society. Similarly, non-commercial sharing of such news or opinions is also important in modern democratic societies.

Once a new status for legal standing is being provided to press publishers, the application of new rights established in this Directive to uses carried out in the past would unjustly apply a new law which was not foreseeable with certainty. However the application of such new right to uses of works contained in press publications published even prior to the coming into force of this Directive but which uses are made after the coming into force of this new right is foreseeable and in accordance with law.

## **Certain Uses of protected content on online services**

### **i. Inclusion of a reference to Directive 2000/13/EC in Article 1**

The subjects of Article 13 of the proposed Directive are specifically information society service providers and concerns the responsibilities they are expected to shoulder when implementing agreements contracted with rightholders in relation to the use of works protected by copyright. In this sense, article 13 compliments the rules laid down in the Directive on electronic commerce. Legal clarity and certainty therefore requires this proposed Directive to indicate its complimentary role to the Directive on electronic commerce, hence the inclusion of a reference to it in this article 1.2.

### **ii. Clarity and Legal Certainty in Article 13**

The liability of platforms is already established in Directive 2000/31/EC and article 13 is of a complimentary nature to the regimes already established in Directive 2000/13EC to the extent that article 13 seeks to ensure the effective implementation of agreements concluded between online service providers and rightholders for the use of works. In doing so, the text needs to provide clarity as to which online service providers it is referring to and in doing so legal clarity and certainty requires the use of the same

authors and performers to better enable the effective implementation of articles 14, 15 and 16 of this Directive.