PROPOSAL FOR A DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL ON COPYRIGHT IN THE DIGITAL SINGLE MARKET

14 September 2014

TITLE 1 GENERAL PROVISIONS

Article 1 Subject matter and scope

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


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-profit basis or by reinvesting all the profits in its scientific research; or

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

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

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

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

(4) "press publication" means a 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 general or special interest magazine, having the purpose of providing information related to news or other topics and published in any media under the initiative, editorial 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. Rightsholders 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;

(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 where the educational establishment is established.

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 2001/28/EC, Article 5(a) and 7(1) of Directive 2006/116/EC, Article 4(1)(a) of Directive 2009/41/EC and Article 15(1) of this Directive, permitting cultural heritage institutions, to make copies of any works or other subject-matter that are permanently in their collection, in any format or medium, for the sole purpose of the preservation of such works or other subject-matter and to the extent necessary for such preservation.

Article 6 Common provisions

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.

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 permanently in the collection of the institution, such a non-exclusive licence may be extended or presumed to apply to rightsholders 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 rightsholders, broadly representative of rightsholders 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 rightsholders in relation to the terms of the licence;

(c) all rightsholders may at any time object to their works or other subject-matter being deemed to be out of commerce and exclude the application of the licence to their works or other subject-matter.

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

Commented [16]:
Member States may introduce compensation schemes for repairing right holders (authors or more commonly publishers) whose works are used free-of-charge in educational settings.

Commented [17]:
Libraries and museums should be able to make copies of works in order to preserve them without infringing copyright. For example, they may wish to make scanned copies of books which are in poor condition so that they can be preserved.

Commented [18]:
The exceptions so far created in this Directive have to comply with the so-called “three step test”. This test says that new exceptions can only apply in certain special cases, which do not conflict with a normal exploitation of the work and do not unreasonably prejudice the legitimate interest of the right holders (e.g. the copyright holder should still be able to use/adapt/licence etc. their work in a fair manner). This is a general rule that applies to all other European copyright exceptions and offers some (vague) guidance to national legislators and courts when implementing and considering these exceptions. When copyright holders apply a technological protection measure (“TPM”), such as encryption, this may limit the use of a work in such a way that a user can’t do something they’re entitled to do under an exception (e.g. such as using the work for the purposes of research). If the copyright holder doesn’t rectify this for the user, then national states have an obligation to make this happen. For instance, the UK Intellectual Property Office has put in place a specific procedure for this (very complex) scenario, which since 2001 (the date of the Directive) has received only two requests.

Commented [19]:
These are works where the owner is identifiable and it is still protected by copyright, but their work is unavailable (e.g. they’ve stopped selling it or printing it).

Commented [20]:
Collective Management Organisations are bodies which represent many copyright owners. They can grant “blanket” licences for the use of multiple works. Collective Management Organisations will now be able to grant these licences to libraries and museums in respect of Out of Commerce works. As such, these Out of Commerce works could be preserved digitally by libraries and museums without infringing copyright, provided the digital content isn’t used for commercial purposes (e.g. profit-making).

Commented [21]:
Out of Commerce works that are owned by an author outside of the organisation may still be covered by this licence. There are some rules for this: the Collective Management Organisation must represent a specific type of work (e.g. music), and the work in question is also this specific type; all of the copyright owners (both in and outside of the Collective Management Organisation) should be treated equally; and the person who owns the Out of Commerce work can stop the work being used if they like. This is known as “extended collective licensing”.

Commented [22]:
If even one copy of a work is available to buy (online or offline), in any language, then the new law won’t apply.
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.

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;

(c) the possibility of rightholders to object, 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 the licences referred to in paragraph 1 are sought from a collective management organisation that is representative for the Member State where:

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

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

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

5 Paragraphs 1, 2 and 3 shall not apply to the works or other subject-matter of a third country national except where points (a) and (b) of paragraph 4 apply.

Article 8 Cross-border uses

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

2 Member States shall ensure that information that allows the identification of the works or other subject-matter covered by a licence granted in accordance with Article 7 and information about the 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.

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.

Commented [23]:
Governments should find a way of communicating the new rules about Out of Commerce works (e.g. advertising via mass media).

Commented [24]:
Only Collective Management Organisations that are based in the EU are subject to the new rules. This is the case if the works represented by the Collective Management Organisation were first published or broadcast in a certain state; or if the publisher or broadcaster has a headquarters, or regular residence, in a certain state; or, if the library or museum requesting the rights is established (and no one can figure out where the works/producers etc. are based).

Commented [25]:
The new laws for cultural heritage institutions shouldn’t apply to authors from countries outside of the EU, unless their work was initially published or broadcast in an EU state, or if their headquarters are in an EU state.

Commented [26]:
The licences obtained as for Out of Commerce Works may be used by that cultural heritage institution/museum etc. anywhere in the EU.

Commented [27]:
A new database should be created that holds details of all the identified Out Of Commerce works. All Out Of Commerce works should be registered on this new database. When those works are going to be digitised, libraries and museums will need to advertise about this 6 months in advance. This is important so that the author of the Out of Commerce work can object to the work being digitised.
Article 9 Stakeholder dialogue

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 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).

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

Article 10 Negotiation mechanism

Member States shall ensure that where parties wishing to conclude an agreement for the purpose of making available audiovisual works on video-on-demand platforms face difficulties relating to the licensing of rights, they may rely on the assistance of an impartial body with relevant experience. That body shall provide assistance with negotiation and help reach agreements.

No later than [date mentioned in Article 2(1)] Member States shall notify to the Commission the body referred to in paragraph 1.

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

CHAPTER 1 Rights in publications

Protection of press publications concerning digital uses

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

2. The rights referred to in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject-matter incorporated in a press publication. Such rights may not be invoked against those authors and other rightholders and, in particular, may not deprive them of their right to exploit their works and other subject-matter independently from the press publication in which they are incorporated.


4. The rights referred to in paragraph 1 shall expire 20 years after the publication of the press publication. This term shall be calculated from the first day of January of the year following the date of publication.

Article 12
Claims to fair compensation

Commented [28]:
Similarly to articles 3, 9 and 13, a high degree of cooperation is needed between Collective Management Organisations and libraries, museums etc.

Commented [28]:
An independent and impartial body should be created that can help resolve issues faced by parties looking to start video on demand/streaming services (Netflex etc.). They may face issues trying to get all the rights in place for the multiple TV shows/movies they make available.

Commented [30]:
This is one of the most controversial articles in the new law and is sometimes referred to as the “link tax” (though this is not a completely accurate term). In essence, article 11 intends to create a new “neighbouring” right in favour of press publishers over “press items” and their digital use (detailed further below).

Commented [31]:
Publishers of journalistic pieces, for example, newspapers, will now own a right related to copyright or a “neighbouring” right in respect of their online publications. This new right applies in addition to any other underlying copyright existing in the article being published, which originally belongs to the author (e.g. a journalist). The underlying copyright can still be transferred from the author to the publisher on the basis of an employment contract, a copyright transfer, or a copyright licence. Now publishers will own a right independently from any contract with journalists and authors. This new neighbouring right gives publishers the right of controlling the reproduction (e.g. copying) and making available to the public (e.g. displaying the content online).

Commented [32]:
Anyone who uses a press publisher’s content online (e.g. by making a copy of it or making it available online) will be infringing the new related right unless they have bought the appropriate licence. The new law does not give any limit to how much or how little can be used, so could apply to headlines or “snippets” (very small portions of the journalistic piece). This is an important aspect, because the online use of these articles is already prohibited by law, as it infringes the copyright that journalists have in the article (noting that this may be a copyright that has already been acquired by the publisher). That being said, general copyright rules suggest that short titles or excerpts and factual information are not protected (such as snippets, or details of a factual event). The intention of this new provision is to prohibit the reuse of such short pieces of information. Whilst this may primarily impact news aggregation sites, such as Google News, this could also apply to e.g. bloggers who link to or frame a journalistic piece on their blog.

Commented [33]:
Any authors in the journalistic piece (such as the author, but also a photographer who provides an image) still hold their copyright in their work (if they don’t transfer it as part of the employment contract, a copyright transfer or a licence). They can still use or sell their work elsewhere.

Commented [34]:
The new press publishers right has some limits, which means that users are able to use the journalistic pieces where this is for e.g. quotation or parody, if this is implemented into domestic law. Importantly, these types of uses (known as “copyright exceptions”) are not the same across all EU states. For example, in Germany there is a very similar neighbouring right to the one proposed here, which allows press publishers to collect royalties when their content is used on news aggregation sites, like Google. Royalties can be collected where the news aggregator uses a short quote of more than seven words (e.g. a snippet). Under these special circumstances, this snippet cannot be used under a copyright exception, even though it may at first appear to be fair quotation. The reference to articles 5-8 means that the general copyright principles of the “InfoSoc” Directive (e.g. three step test, technological protection measures, rights management information, etc) apply to this right as well.

Commented [35]:
The new right is also subject to rules about “orphan works”, which are works where the owner can’t be identified. Confirmed orphan works can be used by libraries and museums for public interest purposes (so a library could preserve a newspaper piece without paying the publisher provided they can prove it’s an orphan work).

Commented [36]:
The new right lasts for 20 years following the publication of the journalistic piece.
CHAPTER 2
Certain uses of protected content by online services

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

1 Information society service providers 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 measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.

2. Member States shall ensure that the service providers referred to in 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 service providers and rightholders through stakeholder dialogues to define best practices, such as appropriate and proportionate content recognition technologies, taking into account, among others, 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 significant 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:

2. The obligation in paragraph 1 shall be proportionate and effective and shall ensure an appropriate level of transparency in every sector. However, in those cases where the administrative burden resulting from the obligation would be disproportionate in view of the revenues generated by the exploitation of the work or performance, Member States may adjust the obligation in paragraph 1, provided that the obligation remains effective and ensures an appropriate level of transparency.
3. Member States may decide that the obligation in paragraph 1 does not apply when the contribution of the author or performer is not significant having regard to the overall work or performance.

4. 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 request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant 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

Articles 17–24