

**Proposal for a directive of the European Parliament and of the Council
on copyright in the Digital Single Market
COM (2016) 593 final - 2016/0280 (COD)
[PART I: CITATIONS AND RECITALS](#)**

Cell in green: The text can be deemed as already agreed

Cell in yellow: The issue needs further discussion at technical level

Cell in red: The issue needs further discussion in depth at the trilogue meetings

Note:

Differences between the EP's position and the Commission's proposal are highlighted in Bold/Italics. Deletions are marked with strikethrough.

Differences between the Council's position and the Commission's proposal are highlighted in Bold/Underlined. Deletions are marked with strikethrough.

Row	COMMISSION PROPOSAL	EP TEXT	COUNCIL TEXT	POSSIBLE COMPROMISE SOLUTION
	COM(2016)593	P8_TA-PROV(2018)0337 A8-0245/2018	9134/18	
1.	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market (Text with EEA relevance)	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market (Text with EEA relevance)	Proposal for a DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL on copyright in the Digital Single Market (Text with EEA relevance)	

(Text with EEA relevance)

2. THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

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

4. Having regard to the proposal from the European Commission,

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

6. Having regard to the opinion of the European Economic and Social Committee¹,

7. Having regard to the opinion of the Committee of the Regions²,

8. Acting in accordance with the ordinary legislative procedure,

9. Whereas:

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

11. (2) The directives which

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Whereas:

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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 53(1), 62 and 114 thereof

Having regard to the proposal from the European Commission,

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

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models and new actors continue to emerge. The objectives and the principles laid down by the Union copyright framework remain sound. However, legal uncertainty remains, for both rightholders and users, as regards certain uses, including cross-border uses, of works and other subject-matter in the digital environment. As set out in the Communication of the Commission entitled 'Towards a modern, more European copyright framework', in some areas it is necessary to adapt and supplement the current Union copyright framework. This Directive provides for rules to adapt to certain exceptions and limitations to digital and cross-border environments, as well as measures to facilitate certain licensing practices as regards the dissemination of out-of-commerce works and the online availability of audiovisual works on video-on-demand platforms with a view to ensuring wider access to content. In order to achieve a well-functioning marketplace for copyright, there should also be rules on rights in publications, on the use of works and other subject-matter by online service providers storing and giving access to user uploaded content and on the transparency of authors' and performers' contracts.

legislation needs to be future proof so as not to restrict technological development. New business models and new actors continue to emerge. The objectives and the principles laid down by the Union copyright framework remain sound. However, legal uncertainty remains, for both rightholders and users, as regards certain uses, including cross-border uses, of works and other subject-matter in the digital environment. As set out in the Communication of the Commission entitled 'Towards a modern, more European copyright framework', in some areas it is necessary to adapt and supplement the current Union copyright framework. This Directive provides for rules to adapt to certain exceptions and limitations to digital and cross-border environments, as well as measures to facilitate certain licensing practices as regards the dissemination of out-of-commerce works and the online availability of audiovisual works on video-on-demand platforms with a view to ensuring wider access to content. In order to achieve a well-functioning marketplace for copyright, there should also be rules on rights in publications, on the use of works and other subject-matter by online service providers storing and giving access to user uploaded content and on the transparency of authors' and performers' contracts.

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exercise and enforcement of the use of works and other subject-matter **by on** line service providers ~~storing and giving access to user uploaded content~~ **providers' platforms**

~~content providers' platforms~~
and on the transparency of
authors' and performers'
contracts **and of the
accounting linked with the
exploitation of protected
works in accordance with
those contracts.**

13. (4) This Directive is based upon, and complements, the rules laid down in the Directives currently in force in this area, in particular Directive 96/9/EC of the European Parliament and of the Council⁴, Directive **2000/31/EC of the European Parliament and of the Council⁶, Directive 2006/115/EC of the European Parliament and of the Council⁷, Directive 2009/24/EC of the European Parliament and of the Council⁸, Directive 2012/28/EU of the European Parliament and of the Council⁹ and Directive 2014/26/EU of the European Parliament and of the Council¹⁰.**
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14. (5) In the fields of research, education and preservation of cultural heritage, digital technologies permit new types of uses that are not clearly covered by the current Union rules on exceptions and limitations. In addition, the optional nature of exceptions and limitations provided for in Directives 2001/29/EC, 96/9/EC and 2006/115/EC of the European Parliament and of the Council⁶, Directive 2009/24/EC of the European Parliament and of the Council⁸, Directive 2012/28/EU of the European Parliament and of the Council⁹ and Directive 2014/26/EU of the European Parliament and of the Council¹⁰.
- (5) In the fields of research, education and preservation of cultural heritage, digital technologies permit new types of uses that are not clearly covered by the current Union rules on exceptions and limitations. In addition, the optional nature of exceptions and limitations provided for in Directives 2001/29/EC, 96/9/EC and 2006/115/EC of the European Parliament and of the Council⁶, Directive 2009/24/EC of the European Parliament and of the Council⁸, Directive 2012/28/EU of the European Parliament and of the Council⁹ and Directive 2014/26/EU of the European Parliament and of the Council¹⁰.

provided for in Directives 2001/29/EC, 96/9/EC and 2009/24/EC in these fields may negatively impact the functioning of the internal market. This is particularly relevant as regards cross-border uses, which are becoming increasingly important in the digital environment. Therefore, the existing exceptions and limitations in Union law that are relevant for scientific research, teaching and preservation of cultural heritage should be reassessed in the light of those new uses. Mandatory exceptions or limitations for uses of text and data mining technologies in the field of scientific research, illustration for teaching in the digital environment and for preservation of cultural heritage should be introduced. For uses not covered by the exceptions or the limitation provided for in this Directive, the exceptions and limitations existing in Union law should continue to apply. **Therefore, existing well-functioning exceptions in those fields should be allowed to continue to be available in Member States, as long as they do not restrict the scope of the exceptions or limitations provided for in this Directive.** Directives 96/9/EC and 2001/29/EC should be adapted.

provided for in Directives 2001/29/EC, 96/9/EC and 2009/24/EC in these fields may negatively impact the functioning of the internal market. This is particularly relevant as regards cross-border uses, which are becoming increasingly important in the digital environment. Therefore, the existing exceptions and limitations in Union law that are relevant for scientific research, teaching and preservation of cultural heritage should be reassessed in the light of those new uses. Mandatory exceptions or limitations for uses of text and data mining technologies in the field of scientific research, illustration for teaching in the digital environment and for preservation of cultural heritage should be introduced. For uses not covered by the exceptions or the limitation provided for in this Directive, the exceptions and limitations existing in Union law should continue to apply, **including to education and preservation activities, as long as they do not limit the scope of the mandatory exceptions laid down in this Directive and on condition that their application does not adversely affect nor circumvent the mandatory rules set out in this Directive.** Directives 96/9/EC and

15. (6) 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.
- (6) The exceptions and the ~~limitation~~ **limitations** 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.
- (6) The exceptions and the limitation set out ~~at~~ **provided for** in this Directive seek to achieve a fair balance between the rights and interests of authors and other rightholders on the one hand, and of users on the other. They can be applied only in certain special cases which do not conflict with the normal exploitation of the works or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholders.
16. (7) The protection of technological measures established in Directive 2001/29/EC remains essential to ensure the protection and the effective exercise of the rights granted to authors and to other rightholders under Union law. This protection should be maintained while ensuring that the use of technological measures does not prevent the enjoyment of the exceptions and the limitation established in this Directive, which are particularly relevant in the online environment. Rightholders should have the opportunity to ensure this through voluntary measures. They should remain free to choose the format and the modalities to provide the beneficiaries of the exceptions and the limitation established in this Directive with the means to the exceptions and the
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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.

which they can perform text and data mining of content. In certain instances, text and data mining may involve acts protected by copyright and/or by the *sui generis* database right, notably the reproduction of works or other subject-matter and/or the extraction of contents from a database. Where there is no exception or limitation which applies, an authorisation to undertake such acts would be required from rightholders. 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.

[Last phrase of recital (8) of the COM proposal was moved to new recital (8a) Council's text - see following row 18]

(8a) Text and data mining may also be carried out in relation to mere facts or data which are not protected by copyright and in such instances no authorisation ~~would be~~ is required **under copyright law.**

There may also be instances of text and data mining which do not involve acts of reproduction or where the reproductions made fall under the ~~The new exception should be without prejudice to the existing~~ mandatory exception for temporary acts of

exception for temporary acts of reproduction laid down in Article 5(1) of Directive 2001/29/EC, which should continue to apply to text and data mining techniques which do not involve the making of copies beyond the scope of that exception.

[First phrase of new recital (8a) was taken from recital (8) (last phrase), second phrase of new recital (8a) was taken from recital (10) (second phrase)]

19.

(8a) For text and data mining to occur, it is in most cases necessary first to access information and then to reproduce it. It is generally only after that information is normalised that it can be processed through text and data mining. Once there is lawful access to information, it is when that information is being normalised that a copyright-protected use takes place, since this leads to a reproduction by changing the format of the information or by extracting it from a database into a format that can be subjected to text and data mining. The copyright-relevant processes in the use of text and data mining technology is, consequently, not the text and data mining process itself which consists of a reading and analysis of digitally stored, normalised information, but the process of

information, but the process of accessing and the process by which information is normalised to enable its automated computational analysis, insofar as this process involves extraction from a database or reproductions. The exceptions for text and data mining purposes provided for in this Directive should be understood as referring to such copyright-relevant processes necessary to enable text and data mining. Where existing copyright law has been inapplicable to uses of text and data mining, such uses should remain unaffected by this Directive.

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

as a research area will suffer from the Union's competitive position unless steps are taken to address the legal uncertainty for text and data mining.

21. (10) 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. 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) This legal uncertainty should be addressed by providing for a mandatory **for research organisations** to the right of reproduction and also to the right to prevent extraction from a database. 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. Educational establishments and cultural heritage institutions that conduct scientific research should also be covered by the text and data mining exception, provided that the results of the research do not benefit an undertaking exercising a decisive influence upon such organisations in particular. In the event that the research is carried out in the framework of a public-private partnership, the beneficiaries of the exception, they should be able to rely on

research institutes to develop collaborations with the private sector. Research organisations should also benefit from the exception when they engage into their research activities are carried out in the framework of public-private partnerships. While research organisations and cultural heritage institutions should remain the beneficiaries of the exception, they should be able to rely on

private partnership, the undertaking participating in the public-private partnership should also have lawful access to the works and other subject matter. The reproductions and extractions made for text and data mining purposes should be stored in a secure manner and in a way that ensures that the copies are only used for the purpose of scientific research.

[The second phrase of recital (10) of the COM proposal was moved to new recital (8a) - see row 18]

22. (11) Research organisations across the Union encompass a wide variety of entities the primary goal of which is to conduct scientific research or to do so together with the provision of educational services. 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 allowing them to exercise
- (11) Research organisations across the Union encompass a wide variety of entities the primary goal of which is to conduct scientific research or to do so together with the provision of educational services. The term "scientific research" within the meaning of this Directive covers both the natural sciences and the human sciences. Due to the diversity of such entities, it is important to have a common understanding of the beneficiaries of the exception: research organisations. They should for example cover entities such as research institutes, hospitals carrying out research, universities, including university libraries, or other higher education institutions. Despite different legal forms and structures, research organisations across the Member States generally have in common that they act

allowing them to exercise control because of structural situations such as their quality of shareholders or members, which may result in preferential access to the results of the research, should not be considered research organisations for the purposes of this Directive.

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~~**Conversely**, organisations upon which commercial undertakings have a decisive influence allowing them to exercise control because of structural situations such as their quality of shareholders or members, which may result in preferential access to the results of the research, should not be considered research organisations for the purposes of this Directive.

(11a) Cultural heritage institutions should be understood as covering publicly accessible libraries, museums and archives regardless of the type of works and other subject matter which they hold in their permanent collections, as well as film or audio heritage institutions. They should include, among others, national libraries and national archives. They should also include educational establishments and public sector broadcasting organisations, as far as their archives and publicly accessible libraries

publicly accessible libraries as far as their archives and are concerned.

24. (11b) Research organisations and cultural heritage institutions, including the persons attached thereto, should be covered by the text and data mining exception regarding content to which they have lawful access. Lawful access should be understood as covering access to content based on open access policy or through contractual arrangements between rightholders and research organisations or cultural heritage institutions, such as subscriptions, or through other lawful means. For instance, in cases of subscriptions taken by research organisations or cultural heritage institutions, the persons attached thereto covered by these subscriptions would be deemed to have lawful access. Lawful access also covers access to content that is freely available online.

25. (11c) Research organisations and cultural heritage institutions may in certain cases, for example for subsequent verification of scientific research results, need to retain the copies made under the exception for the purposes of carrying out

the purposes of carrying out text and data mining. In such cases, the copies should be stored in a secure environment and not be retained for longer than necessary for the scientific research activities. Member States may determine, at national level and after discussions with relevant stakeholders, further concrete modalities for retaining the copies, including the possibility to appoint trusted bodies for the purpose of storing such copies. In order not to unduly restrict the application of the exception, these modalities should be proportionate and limited to what is needed for retaining the copies in a safe manner and preventing unauthorised uses. Uses for the purpose of scientific research other than text and data mining, such as scientific peer review and joint research, should remain covered, where applicable, by the exception or limitation provided for in Article 5(3)(a) of Directive 2001/29/EC.

26. (12) In view of a potentially high number of access requests to and downloads of their works or other subject-matter, rightholders should be allowed to apply measures where there is risk that the security and integrity of the system or
- (12) In view of a potentially high number of access requests to and downloads of their works or other subject-matter, rightholders should be allowed to apply measures ~~where~~**when** there is a risk that the security and integrity of ~~the system~~**their**

is risk that the security and integrity of the system or databases where the works or other subject-matter are hosted would be jeopardised. Those 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.

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measures could for example be used to ensure that only persons having lawful access to their data can access it, including through IP address validation or user authentication. These measures should not exceed what is necessary to pursue the objective of ensuring the security and integrity of the system however remain proportionate to the risks involved and should not undermine the effective application of the exception prevent or make excessively difficult text and data mining carried out by researchers.

(13) There is no need to In view of the nature and scope of the exception, which is limited to entities carrying out scientific research any potential harm to rightholders created through this exception should be minimal. Therefore, Member States should not provide for compensation for rightholders as regards uses under the text and data mining exception introduced by this Directive given that in view of the nature and scope of the exception the harm should be minimal.

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(13a) In addition to their significance in the context of scientific research, text and data mining techniques are widely used both by private and public entities to analyse large amounts of data in different areas of life and for various purposes, including for government services, complex business decisions and the development of new applications or technologies. Rightholders should remain able to license the uses of their works and other subject-matter falling outside the scope of the mandatory exception provided for in this Directive and the existing exceptions and limitations provided for in Directive 2001/29/EC. At the same time, consideration should be given to the fact that users of text and data mining techniques may be faced with legal uncertainty as to whether temporary reproductions and extractions which are a part of the process of text and data mining may be carried out on publicly available and lawfully accessed works and other subject-matter, in particular when the reproductions or extractions made for the purposes of the technical process may not fulfil all the conditions of the

technical process may not fulfil all the conditions of the existing exception for temporary acts of reproduction in Article 5(1) of Directive 2001/29/EC. In order to provide for more legal certainty in such cases, this Directive should enable the Member States to provide under certain conditions for an exception or limitation for temporary reproductions and extractions of works and other subject-matter, insofar as these form a part of the text and data mining process and the copies made are not kept beyond that process. This optional exception or limitation should only apply when the work or other subject-matter is accessed lawfully by the beneficiary, including when it has been made available to the public online, and insofar as the rightholders have not reserved the right to make reproductions and extractions for text and data mining, for example by agreement, unilateral declaration, including through the use of machine readable metadata or by the use of technical means. Rightholders should be able to apply measures to ensure that their reservations in this regard are respected. This optional exception or limitation should leave intact the mandatory exception for

the mandatory exception for text and data mining for research purposes laid down in this Directive.

(13a) To encourage innovation also in the private sector, Member States should be able to provide for an exception going further than the mandatory exception, provided that the use of works and other subject matter referred to therein has not been expressly reserved by their rightholders including by machine readable means.

29.

30. (14) Article 5(3)(a) of Directive 2001/29/EC allows Member States to introduce an exception or limitation to the rights of reproduction, communication to the public and making available to the public for the sole purpose of, among others, 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 those exceptions or limitations as they apply to digital uses is unclear. In addition, there is a lack of clarity as to whether those exceptions or limitations would apply where teaching is provided online and thereby at a distance. Moreover, the existing framework does not
- (14) Article 5(3)(a) of Directive 2001/29/EC allows Member States to introduce an exception or limitation to the rights of reproduction, communication to the public and making available to the public **of works and other subject matter in such a way that members of the public may access them from a place and a time individually chosen by them ('making available to the public')**, for the sole purpose of, among others, 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 those exceptions or limitations as they apply to digital uses is unclear. In addition, there is a lack of clarity as to whether those exceptions or limitations would apply where teaching is provided online and thereby at a distance. Moreover, the existing framework does not

a distance. Moreover, 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.

digital uses is unclear. In addition, there is a lack of clarity as to whether those exceptions or limitations would apply where teaching is provided online and thereby at a distance. Moreover, the existing **legal** framework does not provide for a cross-border effect. This situation may hamper the development of digitally-supported teaching activities and distance learning. Therefore, the introduction of a new mandatory exception or limitation is necessary to ensure that educational establishments benefit from full legal certainty when using works or other subject-matter in digital teaching activities, including online and across borders.

31. (15) While distance learning and cross-border education programmes are mostly developed at higher education level, digital tools and resources are increasingly used at all education levels, in particular to improve and enrich the learning experience. The exception or limitation provided for in this Directive should therefore benefit all educational establishments 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 programme 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. **It should apply only** to the extent they pursue their educational activity for a **that the uses are**

~~activity for a that the uses are justified by the non-commercial purpose: of the particular teaching activity.~~
The organisational structure and the means of funding of an educational establishment ~~are~~**should** not ~~be~~ the decisive factors to determine the non-commercial nature of the activity.

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The organisational structure and the means of funding of an educational establishment ~~are~~**should** not ~~be~~ the decisive factors to determine the non-commercial nature of the activity.

means of funding of an educational establishment are not the decisive factors to determine the non-commercial nature of the activity. *Where cultural heritage institutions pursue an educational objective and are involved in teaching activities, it should be possible for Member States to consider those institutions as an educational establishment under this exception in so far as their teaching activities are concerned.*

32. (16) 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 exception or limitation of use should be granted as long as the work or other subject-matter used indicates the source, including the authors' name, unless that turns out to be impossible for reasons of practicability.* 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, and be limited to what is necessary for the purpose of such activities. 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 cover both uses through

(16) The exception or limitation ~~for the sole purpose of illustration for teaching provided for in this Directive~~ should ~~ever~~ **be understood as covering** 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. [...]*

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In most cases, the concept of illustration would therefore imply uses of parts or extracts of works only, which should not substitute the purchase of materials primarily intended for educational markets. When implementing the exception or limitation, Member States should remain free to specify, for the different categories of works or other subject-matter and in a balanced manner, the proportion of a work or other

exception or limitation should be understood as covering the specific accessibility needs of persons with a disability in the context of teaching. The illustration for teaching. The illustration for teaching. The illustration for teaching.

**[The second and third phrase of recital (16) of the COM proposal were moved to new recital (16a) Council's text - see row 33]*

exception or limitation should be understood as covering the specific accessibility needs of persons with a disability in the context of teaching. The illustration for teaching. The illustration for teaching. The illustration for teaching.

exception or limitation should be understood as covering the specific accessibility needs of persons with a disability in the context of teaching. The illustration for teaching. The illustration for teaching. The illustration for teaching.

(16a) The use of the works or other subject-matter under the exception or limitation should be only in the context of teaching and learning activities carried out under the responsibility of educational establishments, including during examinations **or teaching activities taking place outside the premises of educational establishments, for example in a museum, library or another cultural heritage institution**, and be limited to what is necessary for the purpose of such activities. The exception or limitation should cover both uses ~~through digital means~~ **of works and other**

35. (17) Different arrangements, based on the implementation of the exception provided for in Directive 2001/29/EC or on licensing agreements covering further uses, are in place in a number of Member States in order to facilitate educational uses of works and other subject-matter. Such arrangements have usually been developed taking account of the needs of educational establishments and different levels of education. Whereas it is essential to harmonise the scope of the new mandatory exception or limitation in relation to digital uses and cross-border teaching activities, the modalities of implementation may differ from a Member State to another, to the extent they do not hamper the effective application of the exception or limitation or cross-border uses. This should allow Member States to build on the existing arrangements concluded at national level. In particular, Member States could decide to subject the application of the exception or limitation, fully or partially, to the availability of adequate licences, covering. ***Such licences can take the form of collective licensing agreements, extended collective licensing that would, for example, allow giving precedence to licences for***
- (17) Different arrangements, based on the implementation of the exception provided for in Directive 2001/29/EC or on licensing agreements covering further uses, are in place in a number of Member States in order to facilitate educational uses of works and other subject-matter. Such arrangements have usually been developed taking account of the needs of educational establishments and different levels of education. Whereas it is essential to harmonise the scope of the new mandatory exception or limitation in relation to digital uses and cross-border teaching activities, the modalities of implementation may differ from a Member State to another, to the extent they do not hamper the effective application of the exception or limitation or cross-border uses. **Member States should for example remain free to require that the use of works and other subject matter should respect moral rights of authors and performers.** 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, concluded at national level. In particular, Member States could decide to subject the application of the exception or limitation, fully or partially, to the

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.

are negotiated collectively such as “blanket licences”, in order to avoid educational establishments having to negotiate individually with rightholders. Such licences should be affordable and cover at least 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, **or for teaching in educational establishments or sheet music.** In order to avoid that such mechanism results in legal uncertainty or administrative burden for educational establishments, Member States adopting this approach should take concrete measures to ensure that **rightholders make the** licensing schemes allowing digital uses of works or other subject-matter for the purpose of illustration for teaching are easily available and that educational establishments are aware of the existence of such licensing schemes. **Such measures may include the development of licensing schemes tailored to the needs of educational establishments and the development of information tools aimed at ensuring the visibility of the existing licensing schemes.**

States should be able to provide for systems to ensure that there is fair compensation for rightholders for uses under those exceptions or limitations. Member States should be encouraged to use systems that do not create an administrative burden, such as systems that provide for one-off payments

as systems that provide for one-off payments.

[See Council's recital (17a) - row 36]

36. (17a) Member States should remain free to provide that rightholders receive fair compensation for the digital uses of their works or other subject-matter under the exception or limitation for illustration for teaching provided for in this Directive. For the purposes of determining the possible level of fair compensation, due account should be taken, inter alia, of Member States' educational objectives and of the harm to rightholders.

37. (17 a) *In order to guarantee legal certainty when a Member State decides to subject the application of the exception to the availability of adequate licences, it is necessary to specify under which conditions an educational establishment may use protected works or other subject-matter under that exception and, conversely, when it should act under a licensing scheme.*

38. (18) An act of preservation may 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 preservation may require a reproduction of a work or other subject-matter in the collection of a cultural heritage institution may require a reproduction and consequently the

and consequently the authorisation of the relevant rightholders. Cultural heritage institutions are engaged in the preservation of their collections for future generations. Digital technologies offer new ways to preserve the heritage contained in those collections but they also create new challenges. In view of these new challenges, it is necessary to adapt the current legal framework by providing a mandatory exception to the right of reproduction in order to allow those acts of preservation.

the collection of a cultural heritage institution and consequently **require** the authorisation of the relevant rightholders. Cultural heritage institutions are engaged in the preservation of their collections for future generations. Digital technologies offer new ways to preserve the heritage contained in those collections but they also create new challenges. In view of these new challenges, it is necessary to adapt the current legal framework by providing a mandatory exception to the right of reproduction in order to allow those acts of preservation **by such institutions.**

39. (19) Different approaches in the Member States for acts of preservation by cultural heritage institutions hamper cross-border cooperation and the sharing of means of preservation by cultural heritage institutions in the internal market, leading to an inefficient use of resources.
- (19) Different approaches in the Member States for acts of preservation by cultural heritage institutions hamper cross-border cooperation and the sharing of means of preservation by cultural heritage institutions in the internal market, leading to an inefficient use of resources.
- (19) Member States should **reproduction for preservation** by cultural heritage institutions hamper cross-border cooperation and the sharing of means of preservation by cultural heritage institutions in the internal market, **and the establishment of cross-border preservation networks in the internal market organisations that are engaged in preservation**, leading to an inefficient use of resources. **This can have a negative impact on the preservation of cultural heritage.**
- (20) Member States should therefore be required to provide for an exception to permit those acts of preservation by cultural heritage institutions in the internal market, leading to an inefficient use of resources.
- (20) Member States should therefore be required to provide for an exception to permit those acts of preservation by cultural heritage institutions in the internal market, leading to an inefficient use of resources.

40. (20) Member States should therefore be required to provide for an exception to permit those acts of preservation by cultural heritage institutions in the internal market, leading to an inefficient use of resources.
- (20) Member States should therefore be required to provide for an exception to permit those acts of preservation by cultural heritage institutions in the internal market, leading to an inefficient use of resources.

provide for an exception to permit cultural heritage institutions to reproduce works and other subject-matter permanently in their collections for preservation purposes, for example to address technological obsolescence or the degradation of original supports. Such an exception should allow for the making of copies by the appropriate preservation tool, means or technology, in the required number and at any point in the life of a work or other subject-matter to the extent required in order to produce a copy for preservation purposes only.

for an exception to permit cultural heritage institutions to reproduce works and other subject-matter permanently in their collections for preservation purposes, for example to address technological obsolescence or the degradation of original supports **or to insure works.** Such an exception should allow for the making of copies by the appropriate preservation tool, means or technology, **in any format or medium**, in the required number, at any point in the life of a work or other subject-matter **and** to the extent required in order to produce a copy for preservation purposes only.

Acts of reproduction undertaken by cultural heritage institutions for purposes other than the preservation of works and other subject-matter in their permanent collections should remain subject to the authorisation of rightholders, unless permitted by other exceptions or limitations provided for by Union law.

(20a) Cultural heritage institutions do not necessarily have the technical means or expertise to undertake the acts required to preserve their collections themselves, particularly in the digital environment, and may therefore have recourse to the assistance of other cultural institutions and

for an exception to permit cultural heritage institutions to reproduce works and other subject-matter permanently in their collections for preservation purposes, for example to address technological obsolescence or the degradation of original supports **or to insure works.** Such an exception should allow for the making of copies by the appropriate preservation tool, means or technology, **in any format or medium**, in the required number, at any point in the life of a work or other subject-matter **and** to the extent required in order to produce a copy for preservation purposes only.

only. **The archives of research organisations or public-service broadcasting organisations should be considered cultural heritage institutions and therefore beneficiaries of this exception. Member States should, for the purpose of this exception, be able to maintain provisions to treat publicly accessible galleries as museums.**

Cultural heritage institutions do not necessarily have the technical means or expertise to undertake the acts required to preserve their collections themselves, particularly in the digital environment, and may therefore have recourse to the assistance of other cultural institutions and

to the assistance of other cultural institutions and other third parties for that purpose. Under this exception, cultural heritage institutions should therefore be allowed to rely on third parties acting on their behalf and under their responsibility, including those that are based in other Member States, for the making of copies.

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

(21) For the purposes of this Directive, works and other subject-matter should be considered to be permanently in the collection of a cultural heritage institution when copies are owned or permanently held by the cultural heritage institution, for example as a result of a transfer of ownership or licence agreements or permanent custody arrangements.

of such works or other subject matter are owned or permanently held by the cultural heritage institution, for example as a result of a transfer of ownership or licence agreements, *a legal deposit or a long-term loan . Works or other subject matter that cultural heritage institutions access temporarily via a third-party server are not considered as being permanently in their collections.*

43. (21a) *Technological developments have given rise to information society services enabling their users to upload content and make it available in diverse forms and for various purposes, including to*

various purposes, including to illustrate an idea, criticism, parody or pastiche. Such content may include short extracts of pre-existing protected works or other subject-matter that such users might have altered, combined or otherwise transformed.

44.

(21b) Despite some overlap with existing exceptions or limitations, such as the ones for quotation and parody, not all content that is uploaded or made available by a user that reasonably includes extracts of protected works or other subject-matter is covered by Article 5 of Directive 2001/29/EC. A situation of this type creates legal uncertainty for both users and rightholders. It is therefore necessary to provide a new specific exception to permit the legitimate uses of extracts of pre-existing protected works or other subject-matter in content that is uploaded or made available by users.

Where content generated or made available by a user involves the short and proportionate use of a quotation or of an extract of a protected work or other subject-matter for a legitimate purpose, such use should be protected by the exception provided for in this Directive. This exception should only be applied in certain special cases which do not conflict

applied in certain special cases which do not conflict with normal exploitation of the work or other subject-matter concerned and do not unreasonably prejudice the legitimate interests of the rightholder. For the purpose of assessing such prejudice, it is essential that the degree of originality of the content concerned, the length/extent of the quotation or extract used, the professional nature of the content concerned or the degree of economic harm be examined, where relevant, while not precluding the legitimate enjoyment of the exception. This exception should be without prejudice to the moral rights of the authors of the work or other subject-matter.

45.

(21c) Information society service providers that fall within the scope of Article 13 of this Directive should not be able to invoke for their benefit the exception for the use of extracts from pre-existing works provided for in this Directive, for the use of quotations or extracts from protected works or other subject-matter in content that is uploaded or made available by users on those information society services, to reduce the scope of their obligations under Article 13 of this Directive.

46. (22) Cultural heritage institutions should benefit from a clear framework for the digitisation and dissemination, including across borders, of out-of-commerce works or other subject-matter. However, the particular characteristics of the collections of out-of-commerce works mean that obtaining the prior consent of the individual rightholders may be very difficult. This can be due, for example, to the age of the works or other subject-matter, their limited commercial value or the fact that they were never intended for commercial use. It is therefore necessary to provide for measures to facilitate the licensing of rights in out-of-commerce works that are in the collections of cultural heritage institutions and thereby to allow the conclusion of agreements with cross-border effect in the internal market.
- (22) Cultural heritage institutions should benefit from a clear framework for the digitisation and dissemination, including across borders, of out-of-commerce works or other subject-matter. However, the particular characteristics of the collections of out-of-commerce works mean that obtaining the prior consent of the individual rightholders may be very difficult. This can be due, for example, to the age of the works or other subject-matter, their limited commercial value or the fact that they were never intended for commercial use **or have never been in commerce**. 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.
- (22) Cultural heritage institutions should benefit from a clear framework for the digitisation and dissemination, including across borders, of out-of-commerce works or other subject-matter: **that are considered out of commerce for the purposes of this Directive**. However, the particular characteristics of the collections of out-of-commerce works, **together with the amount of works involved in mass digitisation projects**, mean that obtaining the prior consent of the individual rightholders may be very difficult. This can be due, for example, to the age of the works or other subject-matter, their limited commercial value or the fact that they were never intended for commercial use. It is therefore necessary to provide for measures to facilitate the **collective** licensing of rights in out-of-commerce works that are **permanently** in the collections of cultural heritage institutions and thereby to allow the conclusion of agreements with cross-border effect in the internal market.

47. (22a) *Several Member States have already adopted extended collective licencing regimes, legal mandates or legal presumptions facilitating the licencing of out-of-commerce works.*

facilitating the licencing of out-of-commerce works. However considering the variety of works and other subject-matter in the collections of cultural heritage institutions and the variance between collective management practices across Member States and sectors of cultural production, such measures may not provide a solution in all cases, for example, because there is no practice of collective management for a certain type of work or other subject matter. In such particular instances, it is therefore necessary to allow cultural heritage institutions to make out-of-commerce works held in their permanent collection available online under an exception to copyright and related rights. While it is essential to harmonise the scope of the new mandatory exception in order to allow cross-border uses of out-of-commerce works, Member States should nevertheless be allowed to use or continue to use extended collective licencing arrangements concluded with cultural heritage institutions at national level for categories of works that are permanently in the collections of cultural heritage institutions. The lack of agreement on the conditions of the licence should not be interpreted as a

should not be interpreted as a lack of availability of licensing-based solutions. Any uses under this exception should be subject to the same opt-out and publicity requirements as uses authorised by a licensing mechanism. In order to ensure that the exception only applies when certain conditions are fulfilled and to provide legal certainty, Member States should determine, in consultation with rightholders, collective management organisations and cultural heritage organisations, and at appropriate intervals of time, for which sectors and which types of works appropriate licence-based solutions are not available, in which case the exception should apply.

48. (23) Member States should, within the framework provided for in this Directive, have flexibility in choosing the specific type of mechanism allowing for licences for out-of-commerce works to extend to the rights of rightholders that are not represented by the collective management organisation, in accordance to their legal traditions, practices or circumstances. Such mechanisms can include extended collective licensing and presumptions of representation.

(23) Member States should, within the framework provided for in this Directive, have flexibility in choosing the specific type of mechanism, allowing for licences for out-of-commerce works to extend to **licensing or presumption of representation**, allowing for licences for out-of-commerce works to extend to the rights of rightholders that are not represented by the **relevant** collective management organisation, in accordance to their legal traditions, practices or circumstances. Such mechanisms can include extended collective licensing and presumptions of representation. ~~Such mechanisms can include~~

mechanisms can include extended collective licensing and presumptions of representation. Member States should also have flexibility in determining the requirements for collective management organisations to be sufficiently representative, as long as this is based on a significant number of rightholders in the relevant type of works or other subject-matter who have given a mandate allowing the licensing of the relevant type of use. Member States should be free to establish specific rules applicable to cases where more than one collective management organisation is representative for the relevant works or other subject matter, requiring for example joint licences or an agreement between the relevant organisations.

representation. (24) For the purpose of those licensing mechanisms, a rigorous and well-functioning collective management system is important **and should be encouraged by the Member States**. That system includes in particular rules of good governance, transparency and reporting, as well as the regular, diligent and accurate distribution and payment of amounts due to individual rightholders, as provided for by Directive 2014/26/EU. Additional appropriate

representation. (24) For the purpose of those licensing mechanisms, a rigorous and well-functioning collective management system is important. That system includes in particular rules of good governance, transparency and reporting, as well as the regular, diligent and accurate distribution and payment of amounts due to individual rightholders, as provided for by Directive 2014/26/EU. Additional appropriate

49. (24) For the purpose of those licensing mechanisms, a rigorous and well-functioning collective management system is important. That system includes in particular rules of good governance, transparency and reporting, as well as the regular, diligent and accurate distribution and payment of amounts due to individual rightholders, as provided for by Directive 2014/26/EU. Additional appropriate

Additional appropriate safeguards should be available for all rightholders, who should be given the opportunity to exclude the application of such mechanisms **in relation to all** their works or other subject-matter **or to all licences, or in relation to particular works or other subject-matter or to particular licences, at any time before or under the duration of the licence.** Conditions attached to those mechanisms should not affect their practical relevance for cultural heritage institutions. **It is important that when a rightholder excludes the application of such mechanisms to one or more of their works or other subject-matter, the informed collective management organisation does not continue to issue licences covering the relevant uses and any ongoing uses are terminated within a reasonable period. Such exclusion by the rightholder should not affect their claim to remuneration for the actual use of the work or other subject-matter.**

rightholders, as provided for by Directive 2014/26/EU. Additional appropriate safeguards should be available for all rightholders, who should be given the opportunity to exclude the application of such mechanisms **or of licensing mechanisms or of such exceptions** to their works or other subject-matter. Conditions attached to those mechanisms should not affect their practical relevance for cultural heritage institutions.

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.

(24a) This Directive does not affect the possibility for Member States to determine the allocation of legal responsibility for the compliance of the licensing and the use of out-of-commerce works with the

and the use of out-of-commerce works with the conditions set out in this Directive and for the compliance of the parties with the terms of those licenses.

51. (25) Considering the variety of works and other subject-matter in the collections of cultural heritage institutions, it is important that the licensing mechanisms introduced by this Directive are available and can be used in practice for different types of works and other subject-matter, including photographs, sound recordings and audiovisual works. In order to reflect the specificities of different categories of works and other subject-matter as regards modes of publication and distribution and to facilitate the usability of those mechanisms, specific requirements and procedures may have to be established by Member States for the practical application of those licensing mechanisms. It is appropriate that Member States consult rightholders, users and collective management organisations when doing so.
- (25) Considering the variety of works and other subject-matter in the collections of cultural heritage institutions, it is important that the licensing mechanisms introduced by this Directive are available and can be used in practice for different types of works and other subject-matter, including photographs, software, phonograms, sound recordings and audiovisual works: and unique works of art, irrespective of whether they have ever been commercially available. Never-in-commerce works may include posters, leaflets, trench journals or amateur audiovisual works, but also unpublished works or other subject-matter, without prejudice to other applicable legal constraints, such as national rules on moral rights. When a work is available in any of its different versions, such as subsequent editions of literary works and alternate cuts of cinematographic works, or in any of its different manifestations, such as digital and printed formats of the same work, this work or other subject-matter

or other subject-matter should not be considered out of commerce. Conversely, the commercial availability of adaptations, including other language versions or audiovisual adaptations of a literary work, should not preclude the determination of the out-of-commerce status of a work in a given language. In order to reflect the specificities of different categories-types of works and other subject-matter as regards modes of publication and distribution and to facilitate the usability of those mechanisms, specific requirements and procedures may have to be established by Member States for the practical application of those licensing mechanisms, such as a time period which needs to have been elapsed since the first commercial availability of the work. It is appropriate that Member States consult rightholders, users and collective management organisations when doing so.

52.

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

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

should not be considered as availability to the public in the customary channels of commerce.

53. (26) For reasons of international comity, the licensing mechanisms for the digitisation and dissemination of out-of-commerce works provided for in this Directive should not apply to works or other subject-matter that are first published or, in the absence of publication, first broadcast in a third country or, in the case of cinematographic or audiovisual works, to works the producer of which has his headquarters or habitual residence in a third country. Those mechanisms should also not apply to works or other subject-matter of third country nationals except when they are first published or, in the absence of publication, first broadcast in the territory of a Member State or, in the case of cinematographic or audiovisual works, to works of which the producer's headquarters or habitual residence is in a Member State.
- (26) For reasons of international comity, the licensing mechanisms for the digitisation and dissemination of out-of-commerce works provided for in this Directive should not apply to works or other subject-matter that are first published or, in the absence of publication, first broadcast in a third country or, in the case of cinematographic or audiovisual works, to works the producer of which has his headquarters or habitual residence in a third country. Those mechanisms should also not apply to works or other subject-matter of third country nationals except when they are first published or, in the absence of publication, first broadcast in the territory of a Member State or, in the case of cinematographic or audiovisual works, to works of which the producer's headquarters or habitual residence is in a Member State.
- commerce works or other subject-matter when there is available evidence to presume that they predominantly consist of works or other subject-matter of third countries, unless the concerned collective management organisation is sufficiently representative for that third

organisational is sufficiently representative for that third country, for example via a representation agreement. This assessment can be based on the evidence available following the reasonable effort to determine the out-of-commerce status of the works, without the need to search for further evidence. A work-by-work assessment of the origin of the out-of-commerce works should only be required insofar as it is also required for the reasonable effort to determine their commercial availability.

54. (27) As mass digitisation projects can entail significant investments by cultural heritage institutions, any licences granted under the mechanisms provided for in this Directive should not prevent them from generating reasonable revenues in order to cover the costs of the licence and the costs of digitising and disseminating the works and other subject-matter covered by the licence.
- (27) As mass digitisation projects can entail significant investments by cultural heritage institutions, any licences granted under the mechanisms provided for in this Directive should not prevent them from generating reasonable revenues in order to cover the costs of the licence and the costs of digitising and disseminating the works and other subject-matter covered by the licence.
- 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.
- The contracting cultural heritage institutions and collective management organisations should remain free to agree on the territorial scope of the licence, the licence fee and the allowed uses. Uses covered by such licence should not be for profit making purpose, including when copies are distributed by the cultural heritage institution, such as in the case of promotional material about an exhibition. At the same time, as the digitisation projects of the collections of cultural heritage institutions can entail significant investments by cultural heritage institutions, any licences granted under the mechanisms provided for in this Directive

provided for in this Directive should not prevent ~~them~~**cultural heritage institutions** from generating reasonable revenues ~~in order to cover~~**for the purposes of covering** the costs of the licence and the costs of digitising and disseminating the works and other subject-matter covered by the licence.

55. (28) Information regarding the future and ongoing use of out-of-commerce works and other subject-matter by cultural heritage institutions on the basis of the licensing mechanisms provided for in this Directive and the arrangements in place for all rightholders to exclude the application of licences to their works or other subject-matter should be adequately publicised. This is particularly important when uses take place across borders in the internal market. It is therefore appropriate to make provision for the creation of a single publicly accessible online portal for the Union to make such information available to the public for a reasonable period of time before the cross-border use takes place. Under Regulation (EU) No 386/2012 of the European Parliament and of the Council¹¹, the European Union Intellectual Property Office is entrusted with certain tasks and activities, financed by making use of its own budgetary measures, aiming at making use of its own
- (28) Information regarding the future and ongoing use of out-of-commerce works and other subject-matter by cultural heritage institutions on the basis of the licensing mechanisms provided for in this Directive and the arrangements in place for all rightholders to exclude the application of licences to their works or other subject-matter should be adequately publicised: **both before a licence is granted and during the operation of the licence as appropriate.** This is particularly important when uses take place across borders in the internal market. It is therefore appropriate to make provision for the creation of a single publicly accessible online portal for the Union to make such information available to the public for a reasonable period of time before the cross-border use takes place. **This portal should facilitate the possibility for rightholders to exclude the application of licences to their works or other subject-**

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 that Office to establish and manage the European portal making such information available.

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States. Publicity measures should be effective without the need to inform each rightholder individually.

56.

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

57.

(28b) Mechanisms of collective licensing with an extended effect allow a collective management organisation to offer licences as a collective licensing body on behalf of rightholders irrespective of whether they have authorised the organisation to do so. Systems

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

(28c) In the case of some uses, together with the usually large amount of works involved, the transaction cost of individual rights clearance with every concerned rightholder is prohibitively high and without effective collective licensing mechanisms all the required transactions in

required transactions in these areas to enable the use of these works or other subject matter are unlikely to take place. Extended collective licensing and similar mechanisms have made it possible to conclude agreements in areas affected by this market failure where traditional collective licensing does not provide an exhaustive solution for covering all works and other subject-matter to be used. These mechanisms serve as a complement to collective management based on individual mandates, by providing full legal certainty to users. At the same time, they provide a further opportunity to right holders to benefit from the legitimate use of their works.

59.

(28d) Given the increasing importance of the ability to offer flexible licensing solutions in the digital age, and the increasing use of such schemes in Member States, it is beneficial to further clarify in Union law the status of licensing mechanisms allowing collective management organisations to conclude licences, on a voluntary basis, irrespective of whether all rightholders have authorised the organisation to do so. Member States should have the ability to maintain and

Member States should have the ability to maintain and introduce such schemes in accordance with their legal traditions, practices or circumstances, subject to the safeguards provided for in this Directive and in full respect of Union law and their international obligations related to copyright. These schemes would only have effect in the territory of the Member State concerned, unless otherwise provided for in Union law. Member States should have flexibility in choosing the specific type of mechanism allowing licences for works or other subject-matter to extend to the rights of rightholders that have not authorised the organisation that concludes the agreement, as long as it guarantees sufficient protection of the non-member rightholders. Such mechanisms may include extended collective licensing, legal mandate and presumptions of representation. The provisions of this Directive concerning collective licensing should not affect existing possibilities of Member States to apply mandatory collective management or other collective licensing mechanisms with an extended effect, such as the one included in Article 3 of Directive 93/83/EEC.

60. (28e) It is important that such mechanisms are only applied in well-defined areas of uses, where obtaining authorisations from rightholders on an individual basis is typically onerous and impractical to a degree that makes the required licensing transaction, i.e. a licence that covers all the involved rightholders unlikely to occur due to the nature of the use or of the types of works concerned. It is equally important that the licensed use neither affects adversely the economic value of the relevant rights nor deprives rightholders of significant commercial benefits. Moreover, Member States should ensure that appropriate safeguards are in place to protect the legitimate interests of rightholders that are not represented by the organisation offering the licence.

61. (28f) Specifically, to justify the extended effect of the mechanisms, the organisation should be, on the basis of authorisations from rightholders, sufficiently representative of the types of works or other subject-matter and of the rights which are the subject of the licence. To ensure legal

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

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

(28h). Given the different traditions and experiences with extended collective licensing across Member States and their applicability to rightholders irrespective of their nationality or their Member State of residence, it is important to ensure transparency and dialogue at Union level about the practical functioning of these mechanisms, including as regards the effectiveness of safeguards for rightholders, their usability and the potential need to lay down

potential need to lay down rules to give such schemes cross-border effect within the internal market. To ensure transparency, information about the use of such mechanisms under this Directive should be regularly published by the Commission. Member States that have introduced such mechanisms should therefore inform the Commission about relevant national legislation and its application in practice, including scopes and types of licensing introduced on the basis of general legislation, the scale of licensing and the collective management organisations involved. Such information should be discussed with Member States in the contact committee referred to in Article 12(3) of Directive 2001/29) ~~04/EC~~. The Commission should publish a report by 31 December 2020 on the use of such mechanisms in the Union and their impact on licensing and rightholders.

(28a) In order to ensure that the licensing mechanisms established for out-of-commerce works are relevant and function properly, that rightholders are adequately protected under those mechanisms, that licences are properly publicised and that

oo. (30) to facilitate the licensing of rights in audiovisual works to video-on-demand platforms, this Directive requires Member States to set up a negotiation mechanism allowing parties willing to conclude an agreement to rely on the assistance of an impartial body. The body should meet with the parties and help with the negotiations by providing professional and external advice. Against that background, Member States should decide on the conditions of the functioning of the negotiation mechanism, including the timing and duration of the assistance to 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.

(30) to facilitate the licensing of rights in audiovisual works to video-on-demand platforms, this Directive requires Member States to set up a negotiation mechanism, **managed by an existing or newly established national body**, allowing parties willing to conclude an agreement to rely on the assistance of an impartial body. **The participation in this negotiation mechanism and the subsequent conclusion of agreements should be voluntary. Where a negotiation involves parties from different Member States, those parties should agree beforehand on the competent Member State, should they decide to rely on the negotiation mechanism.** The body should meet with the parties and help with the negotiations by providing professional, **impartial** and external advice. Against that background, Member States should decide on the conditions of the functioning of the negotiation mechanism, including the timing and duration of the assistance to negotiations and the bearing of the costs. Member States should ensure that administrative and financial burdens remain proportionate to guarantee the efficiency of the negotiation forum.

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

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~~mechanism.

67.

(30a) The preservation of the Union's heritage is of the utmost importance and should be strengthened for the benefit of future generations. This should be achieved notably through the protection of published heritage. To this end, a Union legal deposit should be created in order to ensure that publications concerning the Union, such as Union law, Union history and integration, Union policy and Union democracy, institutional and parliamentary affairs, and politics, and, thereby, the Union's intellectual record and future published heritage, are collected systematically. Not only should such heritage be preserved through the creation of a Union archive for publications dealing with Union-related matters, but it should also be made available to Union citizens and future generations. The European Parliament Library, as the Library of the only Union institution directly representing Union citizens, should be designated as the Union depository library. In order not to create an

order not to create an excessive burden on publishers, printers and importers, only electronic publications, such as e-books, e-journals and e-magazines should be deposited in the European Parliament Library, which should make available for readers publications covered by the Union legal deposit at the European Parliament Library for the purpose of research or study and under the control of the European Parliament Library. Such publications should not be made available online externally.

68. (31) A free and pluralist press is essential to ensure quality journalism and citizens' access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society. In the transition from print to digital, publishers of press publications are facing problems in licensing the online use of their publications and recouping their investments. In the absence of recognition of publishers of press publications as rightholders, licensing and enforcement in the digital environment is often complex and inefficient.
- (31) A free and pluralist press is essential to ensure quality journalism and citizens' access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society. ~~In the transition from print to digital, publishers~~ **The wide availability of press publications online has given rise to the emergence of new online services, such as news aggregators or media monitoring services, for which the reuse of press publications constitutes an important part of their business models and a source of revenues. Publishers** of press publications are facing publishers of press publications problems in licensing the online

publishers of press publications as rightholders, licensing and enforcement in the digital environment is often complex and inefficient.

recouping to the providers of these kind of services, making it more difficult for them to recoup their investments. In the absence of recognition of publishers of press publications as rightholders, licensing and enforcement **of rights in press publications regarding online uses by information society service providers** in the digital environment ~~is~~are often complex and inefficient.

69. (32) The organisational and financial contribution of publishers in producing press publications needs to be recognised and further encouraged to ensure the sustainability of the publishing industry. It is therefore necessary to provide at Union level a harmonised legal protection for press publications in respect of digital uses. Such protection should be effectively guaranteed through the introduction, in Union law, of rights related to copyright for the reproduction and making available to the public of press publications in respect of digital uses **in order to obtain fair and proportionate remuneration for such uses. Private uses should be excluded from this reference. In addition, the**
- (32) The organisational and financial contribution of publishers in producing press publications needs to be recognised and further encouraged to ensure the sustainability of the publishing industry **and thereby to guarantee the availability of reliable information.** It is therefore necessary **for Member States** to provide at Union level a harmonised legal protection for press publications in respect of **the introduction, in Union law, of rights related to copyright for the reproduction and making available to the public of press publications in respect of digital uses in order to obtain fair and proportionate remuneration for such uses. Private uses should be excluded from this reference. In addition, the**
- information society service providers, leaving unaffected current copyright rules in Union law applicable to uses of press publications by other users, including individual users.** Such protection should be effectively guaranteed through the introduction, in Union law, of rights related to copyright for the reproduction and making available to the public of press publications in respect of digital uses **in order to obtain fair and proportionate remuneration for such uses. Private uses should be excluded from this reference. In addition, the**

should be excluded from this reference. In addition, the listing in a search engine should not be considered as fair and proportionate remuneration.

~~uses published by publishers established in a Member State in respect of online uses by information society service providers within the meaning of Directive (EU) 2015/1535 of the European Parliament and of the Council. The legal protection for press publications provided for by this directive should only benefit publishers established in a Member State in the meaning of the Treaty of the functioning of the European Union, i.e. when they have their registered office, central administration or principal place of business within the Union.~~

70. (33) For the purposes of this Directive, it is necessary to define the concept of press publication in a way that embraces only journalistic publications, published by a service provider, periodically or regularly updated in any media, for the purpose of informing or entertaining. Such publications would include, for instance, daily newspapers, weekly or monthly magazines of general or special interest 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 press publications under this Directive. This
- (33) For the purposes of this Directive, it is necessary to define the concept of press publication in a way that embraces only journalistic publications, published by a service provider, periodically or regularly updated in any media, for the purpose of informing or entertaining. Such publications would include, for instance, daily newspapers, weekly or monthly magazines of general or special interest 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 press publications under this Directive. This

- (33) For the purposes of this Directive, it is necessary to define the concept of press publication in a way that embraces only journalistic publications, published by a service provider, periodically or regularly updated in any media, for the purpose of informing or entertaining. in any media, including on paper, in the context of an economic activity which constitutes a provision of services under Union law. The press publications to be covered are those whose purpose is to inform the general public and which are periodically or regularly updated. Such publications would include, for instance, daily newspapers,

under this Directive. This protection does not extend to acts of hyperlinking which do not constitute communication to the public.

under this Directive. This protection does not extend to acts of hyperlinking which do not constitute communication to the public. ***The protection shall also not extend to factual information which is reported in journalistic articles from a press publication and will therefore not prevent anyone from reporting such factual information.***

instance, daily newspapers, weekly or monthly magazines of general or special interest and news websites. **Press publications contain mostly literary works but increasingly include other types of works and subject-matter, notably photographs and videos.** Periodical publications which are published for scientific or academic purposes, such as scientific journals, should not be covered by the protection granted to press publications under this Directive. ~~This protection does not extend to acts of hyperlinking which do not constitute communication to the public.~~

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

(34) The rights granted to the publishers of press publications under this Directive should have the same scope as the rights of reproduction and making available to the public provided for in Directive 2001/29/EC, insofar as digital uses are concerned. ~~They Member States should also be able to subject those rights 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) of that Directive.~~ **Member States should also be able to subject those rights 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) of that Directive.**

exception on quotation for purposes such as criticism or review laid down in Article 5(3)(d) of that Directive.

72.

(34a) Uses of press publications by information society service providers can consist of the use of entire publications or articles but also of parts of press publications. Such uses of parts of press publications have also gained economic relevance. At the same time, where such parts are insubstantial, the use thereof by information society service providers may not undermine the investments made by publishers of press publications in the production of content. Furthermore, insubstantial parts of press publications are not usually the expression of the intellectual creation of their authors, in accordance with the case law of the Court of Justice of the European Union. Therefore, it is appropriate to provide that the use of insubstantial parts of press publications should not fall within the scope of the rights provided for in this Directive. To determine the insubstantial nature of parts of press publications for the purposes of this Directive, Member States may take into account whether these parts are the expression of the

are the expression of the intellectual creation of their authors or whether these parts are limited to individual words or very short excerpts, without independent economic significance, or both criteria.

73. (35) The protection granted to publishers of press publications under this Directive should not affect the rights of the authors and other rightholders in the works and other subject-matter incorporated therein, including as regards the extent to which authors and other rightholders can exploit their works or other subject-matter independently from the press publication in which they are incorporated. Therefore, publishers of press publications should not be able to invoke the protection granted to them against authors and other rightholders. This is without prejudice to contractual arrangements concluded between the publishers of press publications, on the one side, and authors and other rightholders, on the other side. ***Notwithstanding the fact that authors of the works incorporated in a press publication receive an appropriate reward for the use of their works on the basis of the terms for licensing of their work to the press publisher, authors whose work is incorporated in a press***
- (35) The protection granted to publishers of press publications under this Directive should not affect the rights of the authors and other rightholders in the works and other subject-matter incorporated therein, including as regards the extent to which authors and other rightholders can exploit their works or other subject-matter independently from the press publication in which they are incorporated. Therefore, publishers of press publications should not be able to invoke the protection granted to them against authors and other rightholders. This is without prejudice to contractual arrangements concluded between the publishers of press publications, on the one side, and authors and other rightholders, on the other side. ***Notwithstanding the fact that authors of the works incorporated in a press publication receive an appropriate reward for the use of their works on the basis of the terms for licensing of their work to the press publisher, authors whose work is incorporated in a press***

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

(35) The protection granted to publishers of press publications under this Directive should not affect the rights of the authors and other rightholders in the works and other subject-matter incorporated therein, including as regards the extent to which authors and other rightholders can exploit their works or other subject-matter independently from the press publication in which they are incorporated. Therefore, publishers of press publications should not be able to invoke the protection granted to them against authors and other rightholders. This is without prejudice to contractual arrangements concluded between the publishers of press publications, on the one side, and authors and other rightholders, on the other side. ***Notwithstanding the fact that authors of the works incorporated in a press publication receive an appropriate reward for the use of their works on the basis of the terms for licensing of their work to the press publisher, authors whose work is incorporated in a press***

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

publication should be entitled to an appropriate share of the new additional revenues press publishers receive for certain types of secondary use of their press publications by information society service providers in respect of the rights provided for in Article 11(1) of this Directive. The amount of the compensation attributed to the authors should take into account the specific industry licensing standards regarding works incorporated in a press publication which are accepted as appropriate in the respective Member State; and the compensation attributed to authors should not affect the licensing terms agreed between the author and the press publisher for the use of the author's article by the press publisher.

74. (36) Publishers, including those (36) Publishers, including those of press publications, books or scientific publications, often operate on the basis of the **and music publications**, 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 **publishers**, with a view to the limitations, such as the ones for

private copying and reprography. In a number of Member States compensation for uses under those exceptions is shared between authors and publishers. In order to take account of this situation and improve legal certainty for all concerned parties, Member States should be allowed to determine that, when an author has transferred or licensed his rights to a publisher or otherwise contributes with his works to a publication and there are systems in place to compensate for the harm caused by an exception or limitation, publishers are entitled to claim a share of such compensation, whereas the burden on the publisher to substantiate his claim should not exceed what is required under the system in place.

publishers, with a view to the exploitation of the works contained in their publications and may in some instances be **therefore also find themselves being** deprived of revenues where such works are used under exceptions or limitations such as the ones for private copying and reprography. In a **large** number of Member States compensation for uses under those exceptions is shared between authors and publishers. In order to take account of this situation and **to** improve legal certainty for all concerned parties, Member States should be allowed to **determine that, when an author has transferred or licensed his rights to a publisher or otherwise contributes with his works to a publication and there are systems in place to compensate for the harm caused by an exception or limitation, publishers are entitled to claim a share of such compensation, whereas the burden on the publisher to substantiate his claim should not exceed what is required under the system in place.** **provide an equivalent compensation-sharing system if such a system was in operation in that Member State before 12 November 2015. The share between authors and publishers of such compensation could be set in the internal distribution rules of the collective management** limitations, such as the ones for private copying and reprography; **including the corresponding existing national schemes for reprography in the Member States, or under public lending schemes.** In a number of Member States **the compensation or remuneration for such uses under those exceptions is shared between authors and publishers.** In order to take account of this situation and improve legal certainty for all concerned parties, Member States should be allowed **but not obliged** to determine that, when an author has transferred or licensed his rights to a publisher or a **collective management organisation that jointly represents authors and publishers** or otherwise contributes with his works to a publication and there are systems in place to compensate for the harm caused by an exception or limitation, publishers are entitled to claim a share of such compensation, ~~whereas.~~ **The same possibility should exist for remuneration for public lending, while Member States should remain free to decide not to provide publishers with such remuneration. Member States should remain free to determine the burden on the publisher to substantiate his claim should not exceed what is required under for the**

~~the internal distribution rules~~ ~~what is required under~~ ~~for the~~ ~~system~~ ~~compensation or~~ ~~remuneration and to lay~~ ~~down the conditions as to the~~ ~~sharing of this compensation~~ ~~or remuneration between~~ ~~authors and publishers in~~ ~~place~~ ~~accordance with their~~ ~~national systems.~~

of the collective management organisation acting jointly on behalf of authors and publishers, or set by Members States in law or regulation, in accordance with the equivalent system that was in operation in that Member State before 12 November 2015. This provision is without prejudice to the arrangements in the Member States concerning public lending rights, the management of rights not based on exceptions or limitations to copyright, such as extended collective licensing schemes, or concerning remuneration rights on the basis of national law.

75.

(36 a) Cultural and creative industries (CCIs) play a key role in reindustrialising Europe, are a driver for growth and are in a strategic position to trigger innovative spill-overs in other industrial sectors. Furthermore CCIs are a driving force for innovation and development of ICT in Europe. Cultural and creative industries in Europe provide more than 12 million full-time jobs, which amounts to 7,5 % of the Union's work force, creating approximately EUR 509 billion in value added to GDP (5,3 % of the EU's total GVA). The protection of copyright and related rights are at the core of the CCI's

are at the core of the CCI's revenue.

76. (37) 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 **copyright protected** content online. **Online services are means of providing wider access to cultural and creative works and offer great opportunities for cultural and creative industries to develop new business models.** However, although they allow for diversity and ease of access to content, they also generate challenges when copyright protected content is uploaded without prior authorisation from rightholders. 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.
- (37) Over the last years, the functioning of the online content marketplace has gained in complexity. Online content **sharing** services providing access to **a large amount of** 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 Legal uncertainty exists as to whether such services engage in copyright relevant acts and need to obtain authorisations from rightholders for the content uploaded by their users who do not hold the relevant rights in the uploaded content, without prejudice to the application of exceptions and limitations provided for in Union Law. This situation** 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.** **It is therefore important to foster the development of the licensing market between rightholders and online content sharing service providers. These licensing agreements should be fair and keep a reasonable**

agreements should be fair and keep a reasonable balance for both parties. Rightsholders should receive an appropriate reward for the use of their works or other subject matter.

77.

(37a) Certain information society services, as part of their normal use, are designed to give access to the public to copyright protected content or other subject-matter uploaded by their users. The definition of an online content sharing service provider under this Directive shall cover information society service providers one of the main purposes of which is to store and give access to the public or to stream significant amounts of copyright protected content uploaded / made available by its users, and that optimise content, and promote for profit making purposes, including amongst others displaying, tagging, curating, sequencing, the uploaded works or other subject-matter, irrespective of the means used therefor, and therefore act in an active way. As a consequence, they cannot benefit from the liability exemption provided for in Article 14 of Directive 2000/31/EC. The definition of online content sharing service providers under this Directive does not cover microenterprises and small

(37a) The definition of an online content sharing service provider under this Directive targets only online services which play an important role on the online content market by competing with other online content services, such as online audio and video streaming services, for the same audiences. The services covered by this intervention are those the main or one of the main purposes of which is to provide access to a large amount of copyright-protected content uploaded by their users with the purpose of obtaining profit therefrom, either directly or indirectly, by organising it and promoting it in order to attract more audiences. Organising and promoting content involves for example indexing the content, presenting it in a certain manner and categorising it, as well as using targeted promotion on it. The definition does not include services whose main purpose is not to provide access to copyright protected content with the purpose of obtaining

microenterprises and small sized enterprises within the meaning of Title I of the Annex to Commission Recommendation 2003/361/EC and service providers that act in a non-commercial purpose capacity such as online encyclopaedia, and providers of online services where the content is uploaded with the authorisation of all right holders concerned, such as educational or scientific repositories. Providers of cloud services for individual use which do not provide direct access to the public, open source software developing platforms, and online market places whose main activity is online retail of physical goods, should not be considered online content sharing service providers within the meaning of this Directive.

with the purpose of obtaining profit from this activity. These include, for instance, electronic communication services within the meaning of Regulation 2015/2120/EU, including internet access providers, as well as providers of cloud services which allow users, to upload content for their own use, such as cyberlockers, or online marketplaces whose main activity is online retail and not giving access to copyright protected content. Nor does this definition cover websites which store and provide access to content for non-for-profit purposes, such as online encyclopaedias, scientific or educational repositories or open source software developing platforms which do not store and give access to content for profit making purposes. In order to ensure the high level of copyright protection and to avoid the possible application of the liability exemption mechanism provided for in this Directive, this Directive should not apply to services the main purpose of which is to engage in or to facilitate copyright piracy.

(37b) The assessment of whether an online content sharing service provider stores and gives access to a large amount of copyright-protected content needs to be

large amount of copyright-protected content needs to be made on a case-by-case basis and take account of a combination of elements, such as the audience of the service and the number of files of copyright-protected content uploaded by the users of the services.

(38) This Directive clarifies under which conditions the Where information society online content sharing service providers store and provide access to copyright-protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing are engaging in an act of communication to the public or making available to the public within the meaning of Article 3(1) and (2) of Directive 2001/29/EC 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. It does not change the concept of communication to the public or of making available to the public under Union law nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other services using copyright-protected

(38) Where information society **Online content sharing** 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 **perform** an act of communication to the public; they are obliged to **and therefore are responsible for their content and should therefore conclude fair and appropriate** licensing agreements with rightholders; unless they are eligible for. **Where licensing agreements are concluded, they should also cover, to the same extent and scope, the liability exemption provided in of users when they are acting in a non-commercial capacity. In accordance with Article 14 of Directive 2000/31/EC of the European Parliament and of the Council 11(2a) the responsibility of online content sharing providers pursuant to Article 13 does not extend to acts of**

(38) Where information society 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.

79.

extend to acts of hyperlinking in respect of press publications. The dialogue between stakeholders is essential in the digital world. They should define best practices to ensure the functioning of licensing agreements and cooperation between online content sharing service providers and rightholders. Those best practices should take into account the extent of the copyright infringing content on the service.

Deleted

80. 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, irrespective of the nature of the means used therefor.

Deleted, partly moved to recital (37a) Council's text – see row 77

Deleted

81. In order to ensure the functioning of any licensing agreement, information society 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. This obligation should also apply when the information society service providers are eligible for

Deleted, partly moved to recital (38c) Council's text – see row 84

when the information society
service providers are eligible for
the liability exemption provided
in Article 14 of Directive
2000/31/EC.

82.

(38a) *[Renumbered - in
ST 9134/18 recital 38(b)]*

When online content sharing
service providers
communicate to the public,
they should not benefit from
the limited liability provided
for in Article 14 of Directive
2000/31/EC for the purposes
of copyright relevant acts.
This should not affect the
possibility for the same
online content sharing
providers to benefit from
such exemption of liability for
other purposes than
copyright when they are
providing their services and
host content at the request of
their users in accordance
with Article 14 of Directive
2000/31/EC.

83.

(38b) *[Renumbered - in ST
9134/18 recital (38c)]*

Taking into account the
fact that online content
sharing service providers give
access to content which is not
uploaded by them but by
their users, it is appropriate
to provide that, for cases
where no authorisation has
been obtained by the services
and, for the purpose of this
Directive, they should not be
liable for unauthorised acts in

liable for unauthorised acts in specific, well-defined circumstances, when they demonstrate that they have acted in a diligent manner with the objective to prevent such unauthorised acts, without prejudice to remedies under national law for cases other than liability for copyright infringements and to the possibility for national courts or administrative authorities of issuing injunctions. In particular, they should not be liable if some unauthorised content is available on their services despite their best efforts to prevent its availability by applying effective and proportionate measures based on the information provided by rightholders. In addition, for the online content sharing service providers not to be liable, they should also in any case, upon notification by rightholders of specific unauthorised works or other subject-matter, act expeditiously to remove or disable access to these and make their best efforts to prevent their future availability.

(38c) *[Renumbered - in ST 9134/18 recital (38ca)]*

Appropriate collaboration carried out in good faith between online content

carried out in good faith
between online content sharing service providers and rightholders is essential for the effective application of the measures by the online content sharing service providers. These service providers should be transparent towards rightholders with regard to the deployed measures. As different measures may be used by the online content sharing service providers, they should provide rightholders with appropriate information on the type of measures used and the way they operate, including for example information on the success rate of the measures. Such information should be sufficiently specific to provide enough transparency for rightholders and allow cooperation to ensure effective functioning of the measures, without prejudice to the business secrets of service providers. Service providers should however not be required to provide rightholders with detailed and individualised information for each work and other subject matter identified. This is without prejudice to contractual arrangements, which may contain more specific provisions on the information to be provided where

to be provided where agreements are concluded between service providers and rightholders. On the other hand, rightholders should provide the service providers with necessary and relevant data for the application of the measures to their specific unauthorised works or other subject matter taking also into account the size of rightholders and the type of their works and other subject matter. As long as no data for the application of the measures or no notification concerning removal or disabling access to specific unauthorised works or other subject matter has been provided by rightholders and, as a result, online content sharing service providers cannot take the measures or expeditious action as set out in this Directive, these service providers should not be liable for unauthorised acts of communication to the public or of making available to the public.

85. (38d) Where online content sharing service providers obtain authorisations, including via licensing agreements, for the use on the service of content uploaded by the users of the services, these authorisations should also cover the copyright relevant acts in respect of uploads by the

respect of uploads by the users but only in cases where the users act in their private capacity and for non-commercial purposes, such as sharing their content without any profit making purpose.

86. (39) Collaboration between information society 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 technologies, such as content recognition technologies. In such cases, rightholders should provide the necessary data to allow the services to identify their content and the services should be transparent towards rightholders with regard to the deployed technologies, to allow the assessment of their appropriateness. 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 recognition of rightholders' content. Those technologies should also allow rightholders to get information from the information society service providers on the use of their content covered by an agreement.
- (39) Collaboration between information society **Member States should provide that where rightholders do not wish to conclude licensing agreements, online content sharing** service providers storing and providing access to the public to large amounts of ~~copyright~~ **and rightholders should cooperate in good faith in order to ensure that unauthorised** protected works or other subject matter uploaded by, **are not available** on their users and rightholders is essential for the functioning of technologies, such as content recognition technologies. In such cases, rightholders should provide the necessary data to allow the services to identify their content and the services should be transparent towards rightholders with regard to the deployed technologies, to allow the assessment of their appropriateness. 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 recognition of rightholders' content. Those technologies should also allow rightholders to get information from the information society service providers on the use of their content covered by an agreement.

(39). *Moved up to recital (38c) [which was recital (38ca) in ST 9134/18]*

used, and they are operated and their success rate for the recognition of rightholders' content. Those technologies should also allow rightholders to get information from the information-society service providers on the use of their content **and right holders should not lead to preventing the availability of non-infringing works or other protected subject matter, including those** covered by an agreement **exception or limitation to copyright.**

87.

(39a) Members States should ensure that online content sharing service providers referred to in paragraph 1 put in place effective and expeditious complaints and redress mechanisms that are available to users in case the cooperation referred to in paragraph 2a leads to unjustified removals of their content. Any complaint filed under such mechanisms should be processed without undue delay. Right holders should reasonably justify their decisions to avoid arbitrary dismissal of complaints. *[Renumbered - in ST 9134/18 recital (39b)]*

The measures taken by the service providers should be without prejudice to the application of exceptions and limitations to copyright, including in particular those which guarantee the freedom of expression of users. For that purpose the service providers should put in place mechanisms allowing users to complain about the blocking or removal of uploaded content that could benefit from an exception or limitation to copyright. Replies to the users' complaints should be provided in a timely manner. To make these mechanisms function, cooperation from rightholders is needed, in particular with regard to the

processing of their personal data. Member States should also ensure that users have access to an independent body for the resolution of disputes as well as to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright rules.

rightholders is needed, in particular with regard to the assessment of the complaints submitted and justifications for the removal of users' content. Member States should remain free to put in place independent authorities for assessing the complaints submitted by users and making decisions on their validity. The redress mechanism should be without prejudice to the right of the parties to take action before a court.

88.

(39b) As soon as possible after the entry into force of this Directive, the Commission and the Member States should organise dialogues between stakeholders to harmonise and to define best practices. They should issue guidance to ensure the functioning of licensing agreements and on cooperation between online content sharing service providers and right holders for the use of their works or other subject matter within the meaning of this Directive. When defining best practices, special account should be taken of fundamental rights, the use of exceptions and limitations. Special focus should also be given to ensuring that the burden on SMEs remains appropriate and that automated blocking of content is avoided.

(39b). *[Renumbered - in ST 9134/18 recital (39c)]*

In order to foster best practices with regard to the measures to be taken by online content sharing service providers to avoid liability for unauthorised copyright acts, stakeholder dialogues should be encouraged by the Member States and the Commission. In order to give more clarity to the parties some guidance should also be provided by the Commission on the implementation of the measures including as to which measures could be considered to be proportionate for different types of content. For the purposes of the guidance the Commission should consult relevant stakeholders, including user organisations and technology providers.

89.

(39c) Member States should ensure that an intermediate mechanism exists enabling service providers and rightholders to find an amicable solution to any dispute arising from the terms of their cooperation agreements. To that end, Member States should appoint an impartial body with all the relevant competence and experience necessary to assist the parties in the resolution of their dispute.

90.

(39d) As a principle, rightholders should always receive fair and appropriate remuneration. Authors and performers who have concluded contracts with intermediaries, such as labels and producers, should receive fair and appropriate remuneration from them, either through individual agreements and/ or collective bargaining agreements, collective management agreements or rules having a similar effect, for example joint remuneration rules. This remuneration should be mentioned explicitly in the contracts according to each mode of exploitation, including online exploitation. Members States should look

be proportionate and cover all modes of exploitation, direct and indirect revenue generated, including revenues from merchandising, and the remuneration due. The information on the exploitation should also include information about the identity of any sub-licensee or sub-transferee. The transparency obligation should nevertheless apply only where copyright relevant rights are concerned.

[See Council's recital (40a) -row 92]

92.

(40a) As authors and performers tend to be in a weaker contractual position when they grant licences or transfer their rights, they need information to assess the continued economic value of their rights, compared to the remuneration received for their licence or transfer; but they often face a lack of transparency. Therefore, the sharing of adequate information by their contractual counterparts or their successors in title is important for the transparency and balance in the system that governs the remuneration of authors and performers. **The information should be: timely to allow access to recent data; adequate to include information relevant to the exploitation of the work or performance in a manner that**

performance in a manner that is comprehensible to the author or performer; and sufficient to assess the economic value of the rights in question. As long as exploitation is ongoing, contractual counterparts of authors and performers should provide information available to them on all modes of exploitation and on all relevant revenues with a regularity which is appropriate in the relevant sector, but at least annually. The processing of personal data, such as contact details and information on remuneration, that are necessary to keep authors and performers informed on the exploitation of their works and performances should be carried out by those who need to comply with the transparency obligation on the basis of Article 6(1)(c) of Regulation (EU) 2016/679 on the protection of natural persons with regard to the processing of personal data and the free movement of such data (General Data Protection Regulation).

(40b) In order to ensure that exploitation-related information is duly provided to authors and performers also in cases where the rights have been sublicensed by the

practices to the transparency obligations, a transitional period should be provided for. The transparency obligations do not need to apply to agreements concluded with collective management organisations as those are already subject to transparency obligations under Directive 2014/26/EU.

the contribution of authors and performers to the overall work or performance should also be considered. Collective bargaining should be considered as an option to reach an agreement between the relevant stakeholders regarding transparency: which should ensure authors and performers the same or higher level of transparency as the minimum requirements provided for in this Directive. To enable the adaptation of current reporting practices to the transparency obligations, a transitional period should be provided for. The transparency obligations do not need to apply to agreements concluded with collective management organisations and independent management entities or by other entities subject to the national rules implementing Directive 2014/26/EU as those are already subject to transparency obligations under Directive 2014/26/EU.

95. (42) Certain contracts for the exploitation of rights harmonised at Union level are of long duration, offering few possibilities for authors and performers to renegotiate them with their contractual counterparts or their successors in title. Therefore, without prejudice to the law applicable to contracts in Member States, certain contracts for the exploitation of rights harmonised at Union level are of long duration, offering few possibilities for authors and performers to renegotiate them with their contractual counterparts or their successors in title: when the economic value of the rights turns out to be significantly higher than

96. (43) Authors and performers are often reluctant to enforce their rights against their contractual partners before a court or tribunal. Member States should therefore provide for an alternative dispute resolution procedure that addresses claims related to obligations of transparency and the contract adjustment mechanism.
- (43) Authors and performers are often reluctant to enforce their rights against their contractual partners before a court or tribunal. Member States should therefore provide for an alternative dispute resolution procedure that addresses claims related to obligations of transparency and the contract adjustment mechanism. ***Representative organisations of authors and performers, including collective management organisations and trade unions, should be able to initiate such procedures at the request of authors and performers. Details about who initiated the procedure should remain undisclosed.***
- For that purpose, Member States may either create a new body or mechanism or rely on an existing one that fulfils the conditions established by this Directive irrespective of whether these are industry-led or public, including when incorporated in the national judiciary system. Member States should have flexibility in deciding how the costs of the dispute resolution procedure should be allocated. This alternative dispute resolution procedure should be without prejudice to the right of parties to assert and defend their rights by bringing an action before a court.***

their rights, they expect their work or performance to be exploited. However, it happens that works or performances that have been licensed or transferred are not exploited at all. When these rights have been transferred on an exclusive basis, authors and performers cannot turn to another partner to exploit their work. In such a case, and after a reasonable period of time has lapsed, authors and performers should have a right of revocation allowing them to transfer or license their right to another person. Revocation should also be possible when the transferee or licensee has not complied with his or her reporting/transparency obligation provided for in Article 14 of this Directive. The revocation should only be considered after all the steps of alternative dispute resolution have been completed, particularly with regard to reporting. As exploitation of works can vary depending on the sectors, specific provisions could be taken at national level in order to take into account the specificities of the sectors, such as the audiovisual sector, or of the works and the anticipated exploitation periods, notably providing for time limits for the right of revocation. In order to prevent abuses and take into account

abuses and take into account that a certain amount of time is needed before a work is actually exploited, authors and performers should be able to exercise the right of revocation only after a certain period of time following the conclusion of the license or of the transfer agreement. National law should regulate the exercise of the right of revocation in the case of works involving a plurality of authors or performers, taking into account the relative importance of the individual contributions.

98.

(43b) To support the effective application across Member States of the relevant provisions of this Directive, the Commission should, in cooperation with Member States, encourage the exchange of best practices and promote dialogue at Union level.

99.

(43a) The obligations laid down in Articles 14 and 15 of this Directive should be of a mandatory nature and parties should not be able to derogate from these contractual provisions, whether included in the contracts between authors, performers and their contractual counterparts or in agreements between those counterparts and third

counterparts and third parties such as non-disclosure agreements. As a consequence, the rules set out in Article 3(4) of the Regulation (EC) No 593/2008 of the European Parliament and of the Council should apply to the effect that where all other elements relevant to the situation at the time of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of Articles 14 and 15, as implemented in the Member State of the forum.

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

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

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

102. (46) Any processing of personal data under this Directive should respect fundamental rights, including the right to respect for private and family life and the right to protection of personal data under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union and must be in compliance with Directive 95/46/EC of the European Parliament and of the Council¹⁵ and Directive 2002/58/EC of the European Parliament and of the Council¹⁶.

(46) Any processing of personal data under this Directive should respect fundamental rights, including the right to respect for private and family life and the right to protection of personal data under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union and must be in compliance with Directive 95/46/EC of the European Parliament and of the Council¹⁵ and Directive 2002/58/EC of the European Parliament and of the Council¹⁶.

The provisions of the General Data Protection Regulation, including the "right to be forgotten" should be respected.

103. (46 a) ***It is important to stress the importance of anonymity, when handling personal data for commercial purposes. Additionally, the "by default" not sharing option***

***default" not sharing option
with regards to personal data
while using online platform
interfaces should be
promoted.***

104. (47) In accordance with (47) In accordance with (47) In accordance with the Joint Political Declaration of the Joint Political Declaration of the Joint Political Declaration of 28 September 2011 of Member States and the Commission on 28 September 2011 of Member States and the Commission on 28 September 2011 of Member States and the Commission on explanatory documents¹⁷, explanatory documents¹⁷, explanatory documents, Member States have undertaken Member States have undertaken Member States have undertaken to accompany, in justified cases, to accompany, in justified cases, to accompany, in justified cases, the notification of their the notification of their the notification of their transposition measures with transposition measures with transposition measures with one or more documents one or more documents one or more documents explaining the relationship explaining the relationship explaining the relationship between the components of a between the components of a between the components of a directive and the corresponding directive and the corresponding directive and the corresponding parts of national transition parts of national transition parts of national transition instruments. With regard to this instruments. With regard to this instruments. With regard to this Directive, the legislator Directive, the legislator Directive, the legislator considers the transmission of considers the transmission of considers the transmission of such documents to be justified, such documents to be justified, such documents to be justified,