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Subject: Proposal for a Directive of the European Parliament and of the Council on
Copyright in the Digital Single Market
- Outcome of proceedings

Delegations will find attached the compromise text on the above mentioned proposal as approved by the Permanent Representatives Committee on 20 February 2019.

Proposal for a

DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

on copyright in the Digital Single Market

(Text with EEA relevance)

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 Articles 53(1), 62 and 114 thereof,

Having regard to the proposal from the European Commission,

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

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

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

Acting in accordance with the ordinary legislative procedure,

¹ OJ C , , p..

² OJ C , , p..

Whereas:

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

- (3) Rapid technological developments continue to transform the way works and other subject-matter are created, produced, distributed and exploited. New business models and new actors continue to emerge. Relevant legislation needs to be future proof so as not to restrict technological development. 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'³, in some areas it is necessary to adapt and supplement the current Union copyright framework keeping a high level of protection of copyright and related rights. This Directive provides for rules to adapt certain exceptions and limitations to digital and cross-border environments, as well as measures to facilitate certain licensing practices notably but not only 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. It also contains rules to facilitate the use of content in the public domain. In order to achieve a well-functioning and fair 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, on the transparency of authors' and performers' contracts, on authors' and performers' remuneration, as well as a mechanism for the revocation of the rights that authors and performers have transferred on an exclusive basis.

³ COM(2015) 626 final.

- (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 Council⁵, Directive 2001/29/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.

⁴ Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p. 20–28).

⁵ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ L 178, 17.07.2000, p. 1–16).

⁶ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10–19).

⁷ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 376, 27.12.2006, p. 28–35).

⁸ Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (OJ L 111, 5.5.2009, p. 16–22).

⁹ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works (OJ L 299, 27.10.2012, p. 5–12).

¹⁰ Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (OJ L 84, 20.3.2014, p. 72–98).

- (5) In the fields of research, innovation, 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 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 innovation, 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, illustration for teaching in the digital environment and for preservation of cultural heritage should be introduced. The exceptions and limitations existing in Union law should continue to apply, including to text and data mining, education and preservation activities, as long as they do not limit the scope of the mandatory exceptions laid down in this Directive, which need to be implemented by Member States in their national law. Directives 96/9/EC and 2001/29/EC should be adapted.
- (6) The exceptions and limitations 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.

- (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 limitations established in this Directive. Rightholders should have the opportunity to ensure this through voluntary measures. They should remain free to choose the appropriate means of enabling the beneficiaries of the exceptions and limitations established in this Directive to benefit from them. In the absence of voluntary measures, Member States should take appropriate measures in accordance with the first subparagraph of Article 6(4) of Directive 2001/29/EC, including where works and other subject-matter are made available through on-demand services.
- (8) New technologies enable the automated computational analysis of information in digital form, such as text, sounds, images or data, generally known as text and data mining. Text and data mining allows the processing of large amounts of information with a view to gaining new knowledge and discovering new trends. Whilst text and data mining technologies are prevalent across the digital economy, there is widespread acknowledgment that text and data mining can in particular benefit the research community and in so doing support innovation. These technologies benefit universities and other research organisations as well as cultural heritage institutions, which may also carry out research in the context of their main activities. However, in the Union, such organisations and institutions are confronted with legal uncertainty as to the extent to 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, which for example happens when the data is normalised in the process of text and data mining. Where there is no exception or limitation which applies, an authorisation to undertake such acts would be required from rightholders.

- (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 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 mandatory 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.
- (9) Union law 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 unless steps are taken to address the legal uncertainty for text and data mining.
- (10) This legal uncertainty should be addressed by providing for a mandatory exception for universities and other research organisations, as well as cultural heritage institutions to the exclusive right of reproduction and also to the right to prevent extraction from a database. In line with the existing European research policy, which encourages universities and research institutes to develop collaborations with the private sector, research organisations should also benefit from the exception when 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 their private partners for carrying out text and data mining, including by using their technological tools.

- (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 research organisations. They should for example cover, besides universities or other higher education institutions and their libraries, also entities such as research institutes, hospitals carrying out research. Despite different legal forms and structures, research organisations across the 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. 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 and museums regardless of the type of works and other subject matter which they hold in their permanent collections, as well as archives, film or audio heritage institutions. They should include, among others, national libraries and national archives. They should also include educational establishments, public sector broadcasting organisations and research organisations, as far as their archives and publicly accessible libraries are concerned.
- (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.

- (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 text and data mining. In such cases, the copies should be stored in a secure environment. 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.
- (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 when there is a risk that the security and integrity of their systems or databases could be jeopardised. Such 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. Those measures should remain proportionate to the risks and should not exceed what is necessary to pursue the objective of ensuring the security and integrity of the system and should not undermine the effective application of the exception.
- (13) 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 exceptions introduced by this Directive.

(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 reproductions and extractions made for the purposes of text and data mining may be carried out on 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 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 and to encourage innovation also in the private sector, this Directive should provide under certain conditions for an exception or limitation for reproductions and extractions of works and other subject-matter, for the purposes of text and data mining and allow the copies made to be kept as long as necessary for the text and data mining purposes. This 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 rights to make reproductions and extractions for text and data mining in an appropriate manner. In the case of content that has been made publicly available online, it should only be considered appropriate to reserve the rights by the use of machine readable means, including metadata and terms and conditions of a website or a service. Other uses shall not be affected by the reservation of rights for the purposes of text and data mining. In other cases, it may be appropriate to reserve the rights by other means, such as contractual agreements or unilateral declaration. Rightholders should be able to apply measures to ensure that their reservations in this regard are respected. This exception or limitation should leave intact the mandatory exception for text and data mining for research purposes laid down in this Directive, as well as the existing exception for temporary acts of reproduction in Article 5(1) of Directive 2001/29/EC.

- (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 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 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 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.
- (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 recognised by a Member State, including in primary, secondary, vocational and higher education. It should apply only to the extent 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 should not be the decisive factors to determine the non-commercial nature of the activity.

- (16) The exception or limitation for the sole purpose of illustration for teaching provided for in this Directive should be understood as covering digital uses of works and other subject-matter to support, enrich or complement the teaching, including learning activities. The distribution of software allowed under the exception is limited to digital transmission of software. 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 subject-matter that may be used for the sole purpose of illustration for teaching. Uses allowed under the exception or limitation should be understood to cover the specific accessibility needs of persons with a disability in the context of 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 of works and other subject matter made in the classroom or in other venues through digital means, for example electronic whiteboards or digital devices which may be connected to the Internet, as well as uses made at a distance through secure electronic environments, such as online courses or access to teaching material complementing a given course. Secure electronic environments should be understood as digital teaching and learning environments access to which is limited to the educational establishment's teaching staff and to the pupils or students enrolled in a study programme, notably through appropriate authentication procedures, including password based authentication.

(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 covering at least the same uses as those allowed under the exception. Member States should ensure that where licenses cover only partially the uses allowed under the exception, all the other uses remain subject to the exception. Member States could for example use this mechanism to give precedence to licences for materials which are primarily intended for the educational market or for sheet music.

In order to avoid that the possibility to subject the application of the exception to the availability of licences 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. Such licensing schemes should meet the needs of educational establishments. Information tools aiming at ensuring the visibility of the existing licensing schemes could also be developed.

Such schemes could, for example, be based on collective licensing or on extended collective licensing in order to avoid educational establishments having to negotiate individually with rightholders. In order to guarantee legal certainty, Member States should 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.

- (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. Member States deciding to provide for fair compensation should encourage the use of systems, which do not create administrative burden for educational establishments.
- (18) Cultural heritage institutions are engaged in the preservation of their collections for future generations. An act of preservation of a work or other subject-matter in the collection of a cultural heritage institution may require a reproduction and consequently require the authorisation of the relevant rightholders. 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.
- (19) Different approaches in the Member States for acts of reproduction for preservation by cultural heritage institutions hamper cross-border cooperation, the sharing of means of preservation and the establishment of cross-border preservation networks in the internal market by such institutions 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 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 and other subject-matter. Such an exception should allow the making of copies by the appropriate preservation tool, means or technology, in any format or medium, in the required number and at any point in the life of a work or other subject-matter and to the extent required for preservation purposes. 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 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.
- (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 of such works or other subject-matter are owned or permanently held by such institutions, for example as a result of a transfer of ownership or licence agreements, legal deposit obligations or permanent custody arrangements.

- (22) Cultural heritage institutions should benefit from a clear framework for the digitisation and dissemination, including across borders, of works or other subject-matter that are considered out of commerce for the purposes of this Directive. However, the particular characteristics of the collections of out-of-commerce works, together with the amount of works and other subject-matter involved in mass digitisation projects, mean that obtaining the prior consent of the individual rightholders may be very difficult. This can be due, for example, to the age of the works or other subject-matter, their limited commercial value or the fact that they were never intended for commercial use or that they have never been exploited commercially. It is therefore necessary to provide for measures to facilitate certain uses of out-of-commerce works and other subject-matter that are permanently in the collections of cultural heritage institutions.
- (22a) Legal mechanisms should therefore exist in all Member States allowing for licences issued by relevant and sufficiently representative collective management organisations to cultural heritage institutions, for certain uses of out-of-commerce works and other subject matter, to also apply to the rights of rightholders that have not mandated a representative collective management organisation in that regard. It should be legally possible for those licences to cover all territories of the Union.
- (22b) An adapted legal framework applicable to collective licensing may not provide a solution for all the cases where cultural heritage institutions encounter difficulties in obtaining all the necessary authorisations of right holders for the use of out-of-commerce works and other subject-matter, for example, because there is no practice of collective management for a certain type of works or other subject-matter or because the relevant collective management organisation is not broadly representative for the category of the right holders and of the rights concerned. In such particular instances, it should be possible for cultural heritage institutions to make out-of-commerce works and other subject-matter that are permanently in their collection available online in all territories of the Union under a harmonised exception or limitation to copyright and related rights. It is important that uses under that exception or limitation only take place when certain conditions, notably as regards the availability of licensing solutions, are fulfilled. The lack of agreement on the conditions of the licence should not be interpreted as a lack of availability of licensing-based solutions.

- (23) Member States should, within the framework provided for in this Directive, have flexibility in choosing the specific type of licensing mechanism, such as extended collective licensing or presumptions of representation, that they put in place for the use of out-of-commerce works and other subject matter by cultural heritage institutions, in accordance with their legal traditions, practices or circumstances. Member States should also have flexibility in determining the requirements for collective management organisations to be sufficiently representative, as long as this is based on a significant number of rightholders in the relevant type of works or other subject-matter who have given a mandate allowing the licensing of the relevant type of use. Member States should be free 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.
- (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.
- (24a) Appropriate safeguards should be available for all rightholders, who should be given the opportunity to exclude the application of the licensing mechanisms and the exception or limitation introduced by this Directive for the use of out-of-commerce works to all their works or other subject-matter or in relation to all licences or all uses under the exception or limitation, or to particular works or other subject-matter or in relation to particular licences or uses under the exception or limitation, at any time before or under the duration of the licence or the uses under the exception or limitation. Conditions attached to those licensing mechanisms should not affect their practical relevance for cultural heritage institutions. It is important that when a rightholder excludes the application of such mechanisms or of such exception or limitation to one or more of their works or other subject-matter, any ongoing uses are terminated within a reasonable period, and, in the case they take place under a collective licence, that the informed collective management organisation does not continue to issue licences covering the relevant uses. Such exclusion by the rightholders should not affect their claims to remuneration for the actual use of the work or other subject-matter under the licence.

- (24a) This Directive does not affect the possibility for Member States to determine the allocation of legal responsibility for the compliance of the licensing and the use of out-of-commerce works with the conditions set out in this Directive and for the compliance of the parties with the terms of those licenses.
- (25) Considering the variety of works and other subject-matter in the collections of cultural heritage institutions, it is important that the licensing mechanisms and the exception or limitation introduced by this Directive are available and can be used in practice for different types of works and other subject-matter, including photographs, software, phonograms, audiovisual works and unique works of art, irrespective of whether they have ever been commercially available. Never-in-commerce works may include posters, leaflets, trench journals or amateur audiovisual works, but also unpublished works or other subject-matter, without prejudice to other applicable legal constraints, such as national rules on moral rights. When a work is available in any of its different versions, such as subsequent editions of literary works and alternate cuts of cinematographic works, or in any of its different manifestations, such as digital and printed formats of the same work, this work or other subject-matter should not be considered out of commerce. Conversely, the commercial availability of adaptations, 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 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 for the practical application of those licensing mechanisms, such as a time period which needs to have been elapsed since the first commercial availability of the work. It is appropriate that Member States consult rightholders, cultural heritage institutions and collective management organisations when doing so.

- (25a) When determining whether works and other subject-matter are out of commerce, a reasonable effort should be required to assess their availability to the public in the customary channels of commerce, taking into account the characteristics of the particular work or set of works. Member States should be free to determine the allocation of responsibilities for making the reasonable effort. The reasonable effort should not have to be repeated over time but it should also take account of any easily accessible evidence of upcoming availability of works in the customary channels of commerce. A work-by-work assessment should only be required when this is 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 availability to the public in the customary channels of commerce.
- (26) For reasons of international comity, the licensing mechanism and the exception or limitation provided for in this Directive for the digitisation and dissemination of out-of-commerce works should not apply to sets of out-of-commerce works or other subject-matter when there is available evidence to presume that they predominantly consist of works or other subject-matter of third countries, unless the concerned collective management organisation is sufficiently representative for that third country, for example 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.

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

(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 this Directive and the arrangements in place for all rightholders to exclude the application of licences or of the exception or limitation to their works or other subject-matter should be adequately publicised both before and during the use under a licence or the exception or limitation, as appropriate. This is particularly important when uses take place across borders in the internal market. It is therefore appropriate to make provision for the creation of a single publicly accessible online portal for the Union to make such information available to the public for a reasonable period of time before the use takes place. This portal should facilitate the possibility for rightholders to exclude the application of licences to their works or other subject-matter. Under Regulation (EU) No 386/2012 of the European 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 means, aiming at facilitating and supporting the activities of national authorities, the private sector and Union institutions in the fight against, including the prevention of, infringement of intellectual property rights. It is therefore appropriate to rely on that Office to establish and manage the European portal making such information available. In addition to making the information available through the portal, further appropriate publicity measures may need to be taken on a case-by-case basis in order to increase the awareness of affected rightholders, for example through the use of additional channels of communication to reach a wider public. The necessity, the nature and the geographic scope of the additional publicity measures should depend on the characteristics of the relevant out-of-commerce works or other subject-matter, the terms of the licences or the type of use under the exception or limitation, and the existing practices in Member States. Publicity measures should be effective without the need to inform each rightholder individually.

¹¹ Regulation (EU) No 386/2012 of the European Parliament and of the Council of 19 April 2012 on entrusting the Office for Harmonization in the Internal Market (Trade Marks and Designs) with tasks related to the enforcement of intellectual property rights, including the assembling of public and private-sector representatives as a European Observatory on Infringements of Intellectual Property Rights (OJ L 129, 16.5.2012, p. 1–6).

- (-28a) In order to ensure that the licensing mechanisms established by this Directive for out-of-commerce works are relevant and function properly, that rightholders are adequately protected, that licences are properly publicised and that legal clarity is ensured with regard to the representativeness of collective management organisations and the categorisation of works, Member States should foster sector-specific stakeholder dialogue.
- (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.
- (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 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 proportionate, legal mechanisms for the licensing of works. Member States should therefore be able to rely on solutions, allowing collective management organisations 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, in accordance with Directive 2014/26/EU.

- (28c) In the case of some uses, together with the usually large amount of works involved, the transaction cost of individual rights clearance with every concerned rightholder is prohibitively high and without effective collective licensing mechanisms all the required transactions in these areas to enable the use of these works or other subject matter are unlikely to take place. Extended collective licensing by collective management organisations and similar mechanisms may make it possible to conclude agreements in these areas where collective licensing based on an authorisation by rightholders does not provide an exhaustive solution for covering all works and other subject-matter to be used. These mechanisms complement collective management based on individual authorisation by rightholders, by providing full legal certainty to users in certain cases. At the same time, they provide an opportunity to rightholders to benefit from the legitimate use of their works.
- (28d) Given the increasing importance of the ability to offer flexible licensing solutions in the digital age, and the increasing use of such schemes, Member States should be able to provide for licensing mechanisms which permit 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 introduce such schemes in accordance with their national traditions, practices or circumstances, subject to the safeguards provided for in this Directive and in full respect of Union law and the international obligations of the Union. 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, provided that this is in compliance with Union law, including the rules on collective rights management provided in Directive 2014/26/EU. In particular, such schemes should also ensure that Article 7 of Directive 2014/26/EU applies to rightholders that are not members of the organisation that concludes the agreement. 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.

(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. Such mechanisms should be based on objective, transparent and non-discriminatory criteria as regards the treatment of rightholders including non-members. In particular the mere fact that the affected rightholders are not nationals or residents of or established in the Member State of the user who is seeking a licence, should not be on its own merits a reason to consider the clearance of rights so onerous and impractical to justify the use of such mechanisms. 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 that apply in a non-discriminatory manner.

(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. Member States should determine the requirements for those organisations to be sufficiently representative taking into account the category of rights managed by the collective rights management organisation, the ability of the organisation to manage the rights effectively and the creative sector in which it operates and also whether the organisation covers 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, and in accordance with Directive 2014/26/EU. 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 including in particular as regards access to information on the licensing and the distribution of remuneration. Publicity measures should be effective throughout the duration of the licence without imposing disproportionate administrative burdens on users, collective management organisations and rightholders and without the need to inform each rightholder individually. In order to ensure that rightholders can easily regain 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, including before the conclusion of a licence and during the term of the licence. In such cases, any ongoing uses should be terminated within a reasonable period. Such exclusion by the rightholders should not affect their claims to receive remuneration for the actual use of the work or other subject-matter under the licence. Member States may also decide that additional measures are appropriate to protect rightholders. This could include, for example, encouraging the exchange of information among collective management organisations and other interested parties across the Union to raise awareness about these mechanisms and the rightholders' possibility to exclude their works or other subject-matter from them.

- (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 uses, should always be carefully and clearly defined in 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 collective rights management organisations which are subject to 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, the effect on rightholders who are not members and/or who are nationals of, or resident in, another Member State, the impact on the cross border provision of services, including the potential need to lay down rules to give such schemes cross-border effect within the internal market. To ensure transparency, information about the use of such mechanisms under this Directive should be regularly published by the Commission. Member States that have introduced such mechanisms should therefore inform the Commission about relevant national legislation and its application in practice, including scopes and types of licensing introduced on the basis of general legislation, the scale of licensing and the collective management organisations involved. Such information should be discussed with Member States in the contact committee referred to in Article 12(3) of Directive 2001/29/EC. The Commission should publish a report by 10 April 2021 on the use of such mechanisms in the Union and their impact on licensing and rightholders, on the dissemination of cultural content and on the cross-border provision of services in the area of collective management of copyright and related rights, and competition.

- (29) Video-on-demand services have the potential to play a decisive role in the dissemination of audiovisual works across the European Union. However, the availability of those works, in particular European works, on video-on-demand services remains limited. Agreements on the online exploitation of such works may be difficult to conclude due to issues related to the licensing of rights. Such issues may, for instance, appear when the holder of the rights for a given territory has low economic incentive to exploit a work online and does not license or holds back the online rights, which can lead to the unavailability of audiovisual works on video-on-demand services. Other issues may be linked to the windows of exploitation.
- (30) To facilitate the licensing of rights in audiovisual works to video-on-demand services, this Directive requires Member States to provide for a negotiation mechanism allowing parties willing to conclude an agreement to rely on the assistance of an impartial body or of one or more mediators. For that purpose, Member States may either create a new body or rely on an existing one that fulfils the conditions established by this Directive. Member States may designate one or more competent bodies or mediators. The body or the mediators should meet with the parties and help with the negotiations by providing professional, impartial and external advice. Where a negotiation involves parties from different Member States, those parties should agree beforehand on the competent Member State, should they decide to rely on the negotiation mechanism. The body or the mediators could meet with the parties to facilitate the start of negotiations or in the course of the negotiations to facilitate the conclusion of an agreement. The participation in this negotiation mechanism and the subsequent conclusion of agreements should be voluntary and should not affect the parties' contractual freedom. Against that background, Member States should be free to decide on the concrete functioning of the negotiation mechanism, including the timing and duration of the assistance to negotiations and the bearing of the costs. Member States should ensure that administrative and financial burdens remain proportionate to guarantee the efficiency of the negotiation mechanism. Member States should encourage dialogue between representative organisations, without it being an obligation for Member States.

- (30a) The expiry of the term of protection of a work entails the entry of that work in the public domain and the expiry of the rights that Union copyright law provides to that work. In the field of visual arts, the circulation of faithful reproductions of works in the public domain contributes to the access to and promotion of culture (or access to cultural heritage). In the digital environment, the protection of these reproductions through copyright or related rights is inconsistent with the expiry of the copyright protection of works. In addition, differences between the national copyright laws governing the protection of these reproductions give rise to legal uncertainty and affect the cross-border dissemination of works of visual arts in the public domain. Therefore, it should be clarified that certain reproductions of works of visual arts in the public domain should not be protected by copyright or related rights. This should not prevent cultural heritage institutions from selling reproductions, such as postcards.
- (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. 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 problems in licensing the online use of their publications 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 are often complex and inefficient.

(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 foster the availability of reliable information. It is therefore necessary to provide at Union level a harmonised legal protection for press publications in respect of online uses by information society service providers, leaving unaffected current copyright rules in Union law applicable to private or non-commercial uses of press publications by individual users, including when they share press publications online. 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 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 ¹². The legal protection for press publications provided for by this Directive should benefit publishers established in a Member State and having their registered office, central administration or principal place of business within the Union.

The concept of publisher of press publications should be understood as covering service providers, such as news publishers or news agencies, when they publish press publications within the meaning of this Directive.

¹² Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1–15).

- (33) For the purposes of this Directive, it is necessary to define the concept of press publications so that it only covers journalistic publications, published 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 would include, for instance, daily newspapers, weekly or monthly magazines of general or special interest, including subscription based magazines, 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 published for scientific or academic purposes, such as scientific journals, should not be covered by the protection granted to press publications under this Directive. Neither should this protection apply to websites, such as blogs, that provide information as part of an activity which is not carried out under the initiative, editorial responsibility and control of service provider, such as a news publisher.
- (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 online uses by information society service providers are concerned. The rights granted to the publishers of press publications should not extend to acts of hyperlinking. They should also not extend to the mere facts reported in the press publications. They should also be subject to the same provisions on exceptions and limitations as those applicable to the rights provided for in Directive 2001/29/EC, including the exception on quotation for purposes such as criticism or review laid down in Article 5(3)(d) of that Directive.

- (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, the use of individual words or very short extracts of press publications by information society service providers may not undermine the investments made by publishers of press publications in the production of content. Therefore, it is appropriate to provide that the use of individual words or very short extracts of press publications should not fall within the scope of the rights provided for in this Directive. Taking into account the massive aggregation and use of press publications by information society service providers, it is important that the exclusion of very short extracts should be interpreted in such a way as not to affect the effectiveness of the rights provided for in this Directive.
- (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 or against other authorised users of the same works and other subject-matter. 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.

Authors whose works are incorporated in a press publication should be entitled to an appropriate share of the revenues press publishers receive for the uses of their press publications by information society service providers.

This is without prejudice to Member States' laws on ownership or exercise of rights in the context of employment contracts, provided that they are compliant with Union law.

- (36) Publishers, including those of press publications, books or scientific publications and music publications, often operate on the basis of the transfer of authors' rights by means of contractual agreements or statutory provisions. In this context, publishers make an investment with a view to the exploitation of the works contained in their publications and may in some instances be deprived of revenues where such works are used under exceptions or limitations, such as the ones for private copying and reprography, including the corresponding existing national schemes for reprography in the Member States, or under public lending schemes.

In several 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, this Directive allows Member States that have in place existing schemes for the sharing of compensation between authors and publishers to maintain them.

This is particularly important to those Member States that had such compensation-sharing mechanisms before 12 November 2015 although in other Member States, compensation is not shared and solely due to authors in accordance with national cultural policies. While this Directive should apply in a non-discriminatory way to all Member States, it should respect the traditions in this area and not oblige those Member States that do not currently have such compensation-sharing schemes to introduce them. It should not affect existing and future arrangements in Member States regarding remuneration in the context of public lending. It should also leave untouched national arrangements related to the management of rights and to remuneration rights, provided that they comply with Union law.

All Member States should be allowed but not obliged 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 to them by an exception or limitation, including through collective management organisations that jointly represent authors and publishers, publishers are entitled to a share of such compensation.

Member States should remain free to determine the burden on the publisher to substantiate his claim for the compensation or remuneration and to lay down the conditions as to the sharing of this compensation or remuneration between authors and publishers in accordance with their national systems.

- (37) Over the last years, the functioning of the online content market has gained in complexity. Online content sharing services providing access to a large amount of copyright protected content uploaded by their users have become main sources of access to 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.

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 uncertainty affects rightholders' possibilities to determine whether, and under which conditions, their works 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 balance for both parties. Rightholders should receive an appropriate reward for the use of their works or other subject matter.

However, as contractual freedom is not affected by these provisions, the right holders should not be obliged to give an authorisation or to conclude licensing agreements.

(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 user. The definition of an online content sharing service under this Directive should target 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 Directive are those services, the main or one of the main purposes of which is to store and enable users to upload and share a large amount of copyright protected content with the purpose of obtaining profit therefrom, either directly or indirectly, by organising it and promoting it in order to attract a larger audience, including by categorising it and using targeted promotion within it. The definition does not include services which have another main purpose than enabling users to upload and share a large amount of copyright protected content with the purpose of obtaining profit from this activity. These include, for instance, electronic communication services within the meaning of Directive 2018/1972 establishing the European Electronic Communications Code, as well as providers of business to-business cloud services and 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. Providers of services such as open source software development and sharing platforms, not for profit scientific or educational repositories as well as not-for-profit online encyclopedias are also excluded from this definition.

Finally, in order to ensure a high level of copyright protection, the liability exemption mechanism provided for in Article 13 should not apply to service providers 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 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 that online content sharing service providers engage in an act of communication to the public or making available to the public when they give the public access to copyright protected works or other protected subject matter uploaded by their users. Consequently, the online content sharing service providers should obtain an authorisation, including via a licencing agreement, from the relevant rightholders. This does not affect the concept of communication to the public or of making available to the public elsewhere under Union law nor does it affect the possible application of Article 3(1) and (2) of Directive 2001/29/EC to other service providers using copyright-protected content¹³.
- (38a) When online content sharing service providers are liable for acts of communication to the public or making available to the public under the conditions established under this Directive, Article 14(1) of Directive 2000/31/EC should not apply to the liability arising from Article 13 of this Directive. This should not affect the application of Article 14(1) of Directive 2000/31/EC to these service providers for purposes falling outside the scope of this Directive.
- (38b) 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 for a specific liability mechanism for the purposes of this Directive for cases where no authorisation has been granted. This should be 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 compliance with Union law. In particular, the specific regime applicable to new online content sharing service providers with an annual turnover below 10 million euros, whose average number of monthly unique visitors in the Union does not exceed 5 million should not affect the availability of remedies under national law and EU law.

¹³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (OJ L 178, 17.7.2000, p. 1–16).

Where no authorisation has been granted to the services providers, they should make their best efforts in accordance with high industry standards of professional diligence to avoid the availability on their services of unauthorised works and other subject matter, as identified by the relevant rightholders. For that purpose rightholders should provide the service providers with necessary and relevant information taking into account, among other factors, the size of rightholders and the type of their works and other subject matter. The steps taken by the online content sharing service providers in cooperation with rightholders should not lead to the prevention of the availability of non-infringing content, including the use of works or other protected subject matter covered by a licencing agreement, exception or limitation to copyright. Thereby it should not affect users who are using the online content sharing providers' services in order to lawfully upload and access information on these services.

The obligations established in Article 13 should also not lead to Member States imposing a general monitoring obligation.

When assessing whether an online content sharing service provider has made its best efforts according to the high industry standards of professional diligence, account should be taken of whether the service provider has taken all the steps that would be taken by a diligent operator to achieve the result of preventing the availability of unauthorised works or other subject matter on its website, taking into account best industry practices and the effectiveness of the steps taken in light of all relevant factors and developments, as well as the principle of proportionality. For the purposes of this assessment, a number of elements should be considered, such as the size of the service, the evolving state of the art of existing means, including future developments, for avoiding the availability of different types of content and their cost for the services. Different means to avoid the availability of unauthorised copyright protected content may be appropriate and proportionate per type of content and it is therefore not excluded that in some cases unauthorised content may only be avoided upon notification of rightholders.

Any steps taken by the service providers should be effective with regard to the objectives sought but should not go beyond what is necessary to achieve the objective of avoiding and discontinuing the availability of unauthorised works and other subject matter.

If unauthorised works and other subject matter become available despite the best efforts made in cooperation with rightholders as required by this Directive, the online content sharing service providers should be liable in relation to the specific works and other subject matter for which they have received the relevant and necessary information from rightholders, unless they demonstrate that they have made their best efforts pursuant to high industry standards of professional diligence.

In addition, where specific unauthorised works or other subject matter have become available on the services, including irrespective of whether the best efforts were made and regardless of whether right holders have made available the necessary information in advance, the online content sharing service providers should be liable for unauthorised acts of communication to the public of works and other subject matter, when upon receiving a sufficiently substantiated notice, they fail to act expeditiously to remove from their websites or disable access to the notified works and subject matter. Additionally, these services should also be liable if they fail to demonstrate that they have made their best efforts to prevent the future uploads of specific unauthorised works, based on relevant and necessary information provided by rightholders for that purpose.

When rightholders do not provide the service providers, with the necessary and relevant information on their specific works and other subject matter or when no notification concerning the 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 make their best efforts to avoid on their services the availability of unauthorised content in accordance with the high standard of professional diligence, the service providers should not be liable for unauthorised acts of communication to the public or of making available to the public of these unidentified works and other subject matter.

(38ba) Article 13(4aa) applies to new online services. A similar provision is foreseen in Article 16(2) of Directive 2014/26/EU of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market. The rules set in this Directive are intended to take into account the specific case of start-up companies working with user uploads to develop new business models.

The modified regime applicable to new service providers with a small turnover and audience should benefit genuine new enterprises and should therefore cease to apply three years after they became first available online in the Union. It should not be abused by arrangements aiming at extending the benefit of this modified regime beyond the first three years. In particular, it should not apply to services newly created or to services provided under a new name but which are pursuing the activity of an already existing online content sharing service provider which could not or does not longer benefit from this regime.

(38c) The online content sharing service providers should be transparent towards rightholders with regard to the steps taken in the context of the cooperation. As different actions may be undertaken by the online content sharing service providers, they should provide rightholders, at their request, with adequate information on the type of actions undertaken and the way they are implemented. Such information should be sufficiently specific to provide enough transparency to rightholders, without prejudice to the business secrets of online content sharing 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 agreements are concluded between service providers and rightholders.

(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 service, these should also cover the copyright relevant acts in respect of uploads by the users within the scope of the authorisation granted to the service providers, but only in cases where the users act for non-commercial purposes, such as sharing their content without any profit making purpose, or when the revenue generated by their uploads are not significant in relation to the copyright relevant act of the users for which they are covered.

When rightholders have explicitly authorised users to upload and make available works or other subject-matter on an online content sharing service, the act of communication to the public of the service is authorised within the scope of the authorisation granted by the rightholder. However, there should be no presumption in favour of the online content sharing service providers that their users have cleared all the relevant rights.

(39a) The steps taken by the online content sharing 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.

Users should be allowed to upload and make available content generated by users for specific purposes of quotation, criticism, review, caricature, parody or pastiche. This is particularly important to strike a balance between fundamental rights in the Charter of Fundamental Rights of the European Union, in particular the freedom of expression and the freedom of the arts, and the right to property, including intellectual property. For these reasons, these exceptions should be made mandatory in order to ensure that users receive uniform protection across the Union. It is important to ensure that online content sharing services operate an effective complaint and redress mechanism to support these uses.

The online content sharing service providers should also put in place effective and expeditious complaint and redress mechanisms allowing users to complain on the steps taken with regard to their uploads, in particular when they could benefit from an exception or limitation to copyright in relation to an upload that is removed or to which access is disabled. Any complaint filed under such mechanisms should be processed without undue delay and be subject to a decision by a human. When rightholders request the services to take action against the uploads by users, such as disabling access to or removing content uploaded, the rightholders should duly justify their requests. Moreover, in accordance with Directive 2002/58/EC¹⁴ and Regulation (EU)2016/679¹⁵, the cooperation should not lead to any identification of individual users nor the processing of their personal data.

Member States should also ensure that users have access to out-of-court redress mechanisms for the settlement of disputes. Such mechanisms should allow disputes to be settled impartially. Users should also have access to a court or another relevant judicial authority to assert the use of an exception or limitation to copyright rules.

- (39b) As soon as possible after the entry into force of this Directive, the Commission, in collaboration with Member States, should organise dialogues between stakeholders to arrive to a uniform application of the obligation of cooperation and to define best practices with regard to the appropriate industry standards of professional diligence. For this purpose the Commission should consult relevant stakeholders, including user organisations and technology providers, and take into account the developments on the market. User organisations should also have access to information on actions carried out by online content sharing service providers to manage content online.

¹⁴ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications), *OJ L 201, 31.7.2002, p. 37–47*.

¹⁵ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regard to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation), *OJ L 119, 4.5.2016, p. 1–88*.

(39x)* Authors and performers tend to be in a weaker contractual position when they grant a licence or transfer their rights, including through their own companies, for the purposes of exploitation in return for remuneration, and these natural persons need the protection provided for by this Directive to be able to fully benefit from their rights which are harmonised under Union law. This need does not arise when the contractual counterpart acts as end user and does not exploit the work or performance itself, which could among others be the case in some employment contracts.

**[Note to lawyer linguists; recital (39x) is a new, introductory recital to the whole chapter 3 on fair remuneration to clarify that the provisions apply to "exploitation contracts". The proposed text is based on recitals 40 and 40a – the repetitions can be deleted from recitals 40 and 40a.]*

(39y) The remuneration of authors and performers should be appropriate and proportionate to the actual or potential economic value of the licensed or transferred rights, taking into account the author's or performer's contribution to the overall work or other subject-matter and all other circumstances of the case, such as market practices or the actual exploitation of the work.

A lump sum payment can also constitute proportionate remuneration but it should not be the rule. Member States should have the possibility, taking into account the specificities of each sector, to define specific cases for the application of lump sums.

Members States should be free to implement the principle of appropriate and proportionate remuneration through different existing or newly-introduced mechanisms, which may include collective bargaining and other mechanisms, provided that such mechanisms are in conformity with applicable Union law.

- (40) Authors and performers need information to assess the economic value of their rights which are harmonised under Union law. This is especially the case where natural persons grant a licence or transfer rights for the purposes of exploitation in return for remuneration. This need does not arise when the contractual counterpart acts as end and does not exploit the work or performance itself, which could among others be the case in some employment contracts. Additionally, this need does not arise when the exploitation has ceased, or when the author or performer has granted licence to the general public without remuneration.
- (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 and accurate 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: up-to-date to allow access to recent data; relevant to the exploitation of the work or performance; and comprehensive to cover all sources of revenues relevant to the case, including, where applicable, merchandising revenues. 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 worldwide with a regularity which is appropriate in the relevant sector, but at least annually. The information should be provided in a manner that is comprehensible to the author or performer and it should allow the effective assessment of the economic value of the rights in question. The transparency obligation should nevertheless apply only where copyright relevant rights are concerned. 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 to other parties who exploit the rights, this Directive entitles authors and performers, in cases where the first contractual counterpart has provided the information available to them but the received information is not sufficient to assess the economic value of their rights, to request additional relevant information on the exploitation of the rights. This can be ensured either directly from sublicensees or through the contractual counterparts of authors and performers. Authors and performers and their contractual counterparts may agree to keep the shared information confidential, but authors and performers should always have the possibility to use the shared information for exercising their rights under in this Directive. Member States should have the option, in compliance with Union law, to provide for further measures through national provisions to ensure transparency for authors and performers.
- (41) When implementing transparency obligations, Member States should take into account the specificities of different content sectors, such as those of the music sector, the audiovisual sector and the publishing sector and all relevant stakeholders should be involved when determining such sector-specific requirements. Where relevant, the significance of 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 in respect of agreements concluded between rightholders and collective management organisations, independent management entities or other entities subject to the national rules implementing Directive 2014/26/EU as those organisations or entities are already subject to transparency obligations under Article 18 of Directive 2014/26/EU. Article 18 of Directive 2014/26/EU applies to organisations which manage copyright or related rights on behalf of more than one rightholder for the collective benefit of those rightholders. However, individually negotiated agreements concluded between rightholders and their contractual partners who act in their own interest and should be subject to the transparency obligation provided for in this Directive.

(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 when the economic value of the rights turns out to be significantly higher than initially estimated. Therefore, without prejudice to the law applicable to contracts in Member States, a remuneration adjustment mechanism should be provided for cases where the remuneration originally agreed under a licence or a transfer of rights clearly becomes disproportionately low compared to the relevant revenues derived from the subsequent exploitation of the work or fixation of the performance by the contractual counterpart of the author or performer. The revenues which should be taken into account for the assessment of the disproportion are all revenues relevant to the case, including, where applicable, merchandising revenues. The assessment of the situation should take account of the specific circumstances of each case, including the contribution of the author or performer, as well as of the specificities and remuneration practices of the different content sectors, and whether the contract is based on a collective bargaining agreement. Representatives of authors and performers duly mandated in accordance with national law, in compliance with Unions law, should have the possibility to provide assistance to one or more authors or performers in requesting the adjustment of the contracts, also taking into account the interests of other authors or performers when relevant. Those representatives should protect the identity of the represented authors and performers for as long as this is possible. Where the parties do not agree on the adjustment of the remuneration, the author or performer should be entitled to bring a claim before a court or other competent authority. This mechanism should not apply to contracts concluded by entities defined in Article 3(a) and (b) of Directive 2014/26/EU or by other entities subject to the national rules implementing Directive 2014/26/UE.

- (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 by authors and performers or their representatives on their behalf related to obligations of transparency and the contract adjustment mechanism. 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.
- (43a1) When authors and performers license or transfer 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 elapsed, authors and performers should be able to benefit from a mechanism for the revocation of rights allowing them to transfer or license their rights to another person. 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 audio-visual sector, or of the works, notably providing for time frames for the right of revocation. In order to protect the legitimate interests of licensees and transferees of rights and to prevent abuses, and taking 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 in accordance with certain procedural requirements and 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.

- (43a2) The obligations laid down in Articles 14, 15 and 16 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 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 Council¹⁴ 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, 15 and 16, as implemented in the Member State of the forum.
- (43b) Nothing in this Directive should be interpreted as preventing holders of exclusive rights under Union copyright law from authorising the use of their works or other subject-matter for free, including through non-exclusive free licences for the benefit of any users.
- (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 in order to achieve those objectives.
- (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.

- (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 Regulation (EU) 2016/679 of the European Parliament and of the Council and Directive 2002/58/EC of the European Parliament and of the Council¹⁶.
- (47) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents¹⁷, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified,

HAVE ADOPTED THIS DIRECTIVE

¹⁶ Directive 2002/58/EC of the European Parliament and of the Council of 12 July 2002 concerning the processing of personal data and the protection of privacy in the electronic communications sector (Directive on privacy and electronic communications) (OJ L 201, 31.7.2002, p. 37–47), called, as amended by Directives 2006/24/EC and 2009/136/EC, the “e-Privacy Directive”.

¹⁷ OJ C 369, 17.12.2011, p. 14.