

Explanatory Statement

Copyright in the digital single market

Scope and purpose

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

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

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

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

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

Text and Data Mining

Text and data mining allows for the reading and analysis of large amounts of digitally stored information to gain new knowledge and discover new trends. For text and data mining to occur one first needs to access information and then to reproduce that information. It is generally only after that information is normalised that its processing through text and data mining can occur. Once there is lawful access to information, it is when that information is being normalised that a copyright protected use takes place since this leads to a reproduction by changing the format of the information itself or an extraction from a database into one that can be subjected to text and data mining. The copyright relevant processes in the use of text and data mining technology is consequently not the text and data mining process itself which consists of a reading and analysis of digitally stored normalised information, but the process of access and the process by which information is normalised to enable its automated computational analysis.

The process of access to information be it works or other subject matter protected by copyright is already regulated in the copyright related acquis. In this respect therefore the exception that is required is to address the reproduction or extraction done in the normalisation process of the data. Where those with lawful access to data undertake the process of normalisation of that data for the purpose of subjecting that emerging reproduction or extraction, the prejudice to publishers is minimal on the basis of lawful access. Where however the already normalised data sets are provided from the publishers, compensation may be levied by the publishers to cover the cost of that process.

At the same time, research organisations often face challenges in obtaining access to the multitude of scientific publications that are required for research to be undertaken through the text and data mining process. In these cases, the research organisations would not have access to such publications and consequently are unable to normalise the data. To facilitate innovation and research for such organisations, publishers are obliged to provide research organisations with the normalised datasets but may seek compensation relative to the costs of undertaking the normalisation process.

The possible abuse of datasets being used for other purposes is to be addressed while taking into consideration that for research it is often important that the underlying datasets upon which conclusions are reached remain subject to verification. For this purpose, Member States should set up storage facilities of these datasets access to which is limited to verification of the research.

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

Education is a lifelong learning process. This places the responsibility of education on establishments which are not necessarily the traditional schooling premises. Educational programmes are offered by schools, universities, private tuition organisations, NGOs, and other structures. What is important is not who is offering the education but that the use of copyrighted material for illustration in teaching is limited to truly education

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

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

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

Out of commerce works

i. Legal certainty

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

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

that is permanently held in their collections. Albeit this is only for preservation, once cultural heritage institutions already have this possibility, they do not then need a licence to digitise out of commerce works for non-commercial purposes.

ii. Fulfilling the cultural purpose of cultural heritage institutions

Having recognised the importance of preserving works and other subject matter permanently held in the collections of cultural heritage institutions, and having recognised the need to facilitate non-exclusive licencing through collective management organisations to enable the distribution through closed and secure portals for cultural non-commercial purposes, it becomes important to establish a solution for those works and sectors for which the availability of licencing is lacking. In doing so, however safeguards still need to be put in place including for example the restriction of the use to closed and secure portals for cultural non-commercial purposes.

iii. Authors remain at the heart of the proposals

In facilitating the attainment of the cultural purpose that cultural heritage institutions fulfil, authors and rightholders need to be retained at the heart of the proposals. This can be done by involving them in the determination of whether the licenses referred to in Article 7 are available or not, including them in the stakeholders dialogue that Member States are to ensure and provide authors with a right to seek the exclusion of their works from the license mentioned in Article 7(1) as well as from the use regulated in Article 7(2).

Publicity of licenses and actions being taken in terms of Article 7 will also ensure better protection to authors.

Rights in publications

Copyright solutions to challenges need to be focused and clearly assessed as to their necessity, adequacy and proportionality. Such solutions affect not only the rightholders in question but also all other stakeholders who may in way or other come in touch with the rights held in copyright by rightholders. Press publishers do face challenges in the digitalisation process of business and consumer habits. Digitalisation makes it easier for content found in press publications to be copied or taken. Digitalisation also facilitates access to news and press by providing digital users a referencing or indexing system that leads them to a wide range of news and press. Both processes need to be recognised as separate processes.

Using digital technology to copy and make one's own news and press content that is created by others, is clearly disproportionately harmful to the financial interests of press publishers. Using digital technology to facilitate the finding of news and press published

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

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

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

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

Certain Uses of protected content on online services

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

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

ii. Clarity and Legal Certainty in Article 13

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

classifications of service providers already established under Directive 2000/13/EC to be used.

Implementation of agreements concluded between service providers and rightholders may be carried out through technological measures which however must be respectful of the copyright acquis in its entirety thereby not only respectful of the rights in copyright but also of the exceptions and limitations to copyright. The implementation of such measures requires the correct identification of works by rightholders as being their own or under a licence to them. Consequently, while service providers are in a position to be responsible for the functioning of measures operated, rightholders remain liable in the assertion of their rights over works.

The implementation of the measures adopted by service providers is connected to the management by rightholders of their rights in copyright. Transparency through the communication of information on the measures used and their accuracy is needed to ensure that rightholders can effectively manage their rights.

The process cannot underestimate the effects of the identification of user uploaded content which falls within an exception or limitation to copyright. To ensure the continued use of such exceptions and limitations, which are based on public interest concerns, communication between users and rightholders also needs to be efficient.

The application of such obligations to only those platforms who have large amounts of information creates more uncertainty, since there is no verifiable way of defining what amounts to large amounts especially when even start ups require large amounts of data to be able to start participating and contributing to the digital economy.

Fair remuneration in contracts of authors and performers

Several stakeholders participate on any one value chain but each investment or use done is almost invariably founded in the creativity originating from authors and performers. Each stakeholder seeks more empowerment to be better able to enter contractual relations, but authors and performers have particularly faced challenges in retrieving a fair remuneration from the exploitation of their works and performances from those to whom they have licenced or transferred their rights.

Four criteria that can facilitate a more sound foundation for authors and performers to continue their work are that of (i) a declaration that authors and performers have a right to fair remuneration, (ii) increasing transparency, (iii) triggering contract adjustment mechanisms and (iv) making measures of redress more accessible.

Each of these criteria need to be implemented in a balanced manner so as to ensure that other rightholders are not disproportionately prejudiced. It is for this purpose that while the right to fair remuneration of authors and performers has been entrenched, other amendments have been proposed to ensure clarity and legal certainty. Representation in seeking the recognition or enforcement of one's rights in copyright is also provided to

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