



**European Committee
of the Regions**

SEDEC-VI-019

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OPINION

Copyright in the Digital Single Market

THE EUROPEAN COMMITTEE OF THE REGIONS

- confirms local and regional authorities' pivotal role and potential in providing digital services for the general public and creating and managing digital infrastructure, often in the context of cross-border or interregional cooperation, with a view to removing barriers to online activity;
- is pleased that the Commission has granted the Member States room for manoeuvre with regard to applying the exceptions for the use of protected works for educational purposes. National, regional and local identity will thus be upheld, along with the specific types of licence resulting from different political and social circumstances;
- agrees that reinforcing the transparency clauses of contracts between creators and their counterparts is primarily intended to rebalance bargaining power in situations prejudicial to authors. Therefore notes that such action does not constitute a violation of contractual freedom, thus respecting the role played by the market in identifying offers suited to the parties' requirements;
- is pleased that the Commission intends to increase the presence of the European audiovisual catalogue on various digital platforms, particularly in light of the limited presence of works which, owing to their low economic value, have difficulty accessing traditional distribution channels.

Rapporteur

Mauro D'Attis (IT/EPP), Member of Brindisi Municipal Council

Reference documents

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions – Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market
COM(2016) 592 final

Proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market
COM(2016) 593 final

Opinion of the European Committee of the Regions - Copyright in the Digital Single Market

I. RECOMMENDATIONS FOR AMENDMENTS

Amendment 1

Proposal for a directive

Recital 13

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<i>There is no need to</i> provide for compensation for rightholders as regards uses under the text and data mining exception introduced by this Directive given that in view of the nature and scope of the exception <i>the harm should be minimal.</i>	<i>Member States may</i> provide for compensation for rightholders as regards uses under the text and data mining exception introduced by this Directive given that in view of the nature and scope of the exception <i>even minimal harm still implies a tangible advantage for the beneficiaries of the exception.</i>

Reason

Recital 10 of the Commission document includes research organisations engaged in "public-private partnerships" among beneficiaries. It follows that the private sector can derive an indirect advantage from the exception. Therefore, the Commission should not rule out a more open approach to compensation.

Amendment 2

Proposal for a directive

Recital 24

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
For the purpose of those licensing mechanisms, a rigorous and well-functioning collective management system is <i>important</i> . That system <i>includes</i> in particular rules of good governance, transparency and reporting, as well as the regular, diligent and accurate distribution and payment of amounts due to individual rightholders, as provided for by Directive 2014/26/EU. Additional appropriate safeguards should be available for all rightholders, who should be given the opportunity to exclude the application of such mechanisms to their works or other subject-matter. Conditions attached to those mechanisms should not affect their practical relevance for cultural heritage institutions.	For the purpose of those licensing mechanisms, <i>and for the benefit of the rightholders involved,</i> a rigorous and well-functioning collective management system is <i>imperative</i> . That system <i>should be based</i> in particular <i>on</i> rules of good governance, transparency and reporting, as well as the regular, diligent and accurate distribution and payment of amounts due to individual rightholders <i>and make use of available technological developments,</i> as provided for by Directive 2014/26/EU. Additional appropriate safeguards should be available for all rightholders, who should be given the opportunity to exclude the application of such mechanisms to their works or other subject-matter. Conditions attached to those mechanisms should not affect their practical relevance for cultural heritage

	institutions.
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<i>Reason</i>
The Commission flags up the key role played by collective management organisations, but should explicitly encourage more ambitious modernisation of these organisations. This point is made in light of technological developments which, if adopted and developed fully by management organisations, would improve current processes for obtaining licences and collecting and distributing rights, and thus boost members' income.

Amendment 3
Proposal for a directive
Recital 38

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p>Where information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements with rightholders, unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council[1].</p> <p>In respect of Article 14, it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor.</p> <p>In order to ensure the functioning of any licensing agreement, information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users should take appropriate and proportionate measures to ensure protection of works or other subject-matter, such as implementing effective technologies. This obligation should also apply when the information society service providers are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC.</p> <hr/> <p>[1] Directive 2000/31/EC of the European</p>	<p>Where information society service providers store and provide access to the public to copyright protected works or other subject-matter uploaded by their users, thereby going beyond the mere provision of physical facilities and performing an act of communication to the public, they are obliged to conclude licensing agreements with rightholders, unless they are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC of the European Parliament and of the Council[1].</p> <p>In respect of Article 14, it is necessary to verify whether the service provider plays an active role, including by optimising the presentation of the uploaded works or subject-matter or promoting them, irrespective of the nature of the means used therefor.</p> <p>In order to ensure the functioning of any licensing agreement, information society service providers storing and providing access to the public to large amounts of copyright protected works or other subject-matter uploaded by their users should take appropriate and proportionate measures to ensure protection of works or other subject-matter, such as implementing effective technologies <i>for the fair redistribution of value towards rightholders</i>. This obligation should also apply when the information society service providers are eligible for the liability exemption provided in Article 14 of Directive 2000/31/EC.</p> <hr/>

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).	[1] 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).
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<i>Reason</i>
<p>In Article 13(3), the Commission quite rightly highlights the importance of defining best practices for content recognition.</p> <p>One closely linked issue is redistributing the value generated by the works once recognised towards rightholders. For the sake of consistency between recital 38 and Article 13(3), the text should state this detail clearly, as recognition of the works is only the first link in the value chain.</p>

Amendment 4

Proposal for a directive

Article 3

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p>1. Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC and Article 11(1) of this Directive for reproductions and extractions made by research organisations in order to carry out text and data mining of works or other subject-matter to which they have lawful access for the purposes of scientific research.</p> <p>2. Any contractual provision contrary to the exception provided for in paragraph 1 shall be unenforceable.</p> <p>3. Rightholders shall be allowed to apply measures to ensure the security <i>and</i> integrity of the networks and databases where the works or other subject-matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective.</p> <p>4. Member States shall encourage rightholders and research organisations to define commonly-agreed best practices concerning the application of the measures referred to in paragraph 3.</p>	<p>1. Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC and Article 11(1) of this Directive for reproductions and extractions made by research organisations in order to carry out text and data mining of works or other subject-matter to which they have lawful access for the purposes of scientific research.</p> <p>2. Any contractual provision contrary to the exception provided for in paragraph 1 shall be unenforceable.</p> <p>3. Rightholders shall be allowed to apply measures to ensure the security <i>in terms of</i> integrity, <i>availability and confidentiality</i> of the networks and databases where the works or other subject-matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective.</p> <p>4. Member States shall encourage rightholders and research organisations to define commonly-agreed best practices concerning the application of the measures referred to in paragraph 3, <i>including measures for the fair redistribution of value towards rightholders.</i></p>

Reason

The traditional security model for data has three objectives: confidentiality, integrity and availability. Each objective deals with a different aspect of data protection. The Commission could stipulate a specific objective here: encouraging measures to close the gap in terms of value generated between service providers and the rightholders whose works are being exploited.

Amendment 5

Proposal for a directive

Article 10

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p>Negotiation mechanism</p> <p>Member States shall ensure that where parties wishing to conclude an agreement for the purpose of making available audiovisual works on video-on-demand platforms face difficulties relating to the licensing of rights, they may rely on the assistance of an impartial body with relevant experience. That body shall provide assistance with negotiation and help reach agreements.</p> <p>No later than [date mentioned in Article 21(1)] Member States shall notify to the Commission the body referred to in paragraph 1.</p>	<p>Negotiation mechanism</p> <p>Member States shall ensure that where parties wishing to conclude an agreement for the purpose of making available audiovisual works on video-on-demand platforms face difficulties relating to the licensing of <i>audiovisual</i> rights, they may rely on the assistance of an impartial body with relevant experience. That body shall provide assistance with negotiation and help reach agreements.</p> <p>No later than [date mentioned in Article 21(1)] Member States shall notify to the Commission the body referred to in paragraph 1.</p>

Reason

The original article may be interpreted ambiguously if it does not specify that it is referring to audiovisual rights, and not for example to the rights to musical works included in audiovisual productions. Our addition removes this ambiguity.

Amendment 6

Proposal for a directive

Article 13

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p>1. Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders</p>	<p>1. Information society service providers that store and provide to the public access to large amounts of works or other subject-matter uploaded by their users shall, in cooperation with rightholders, take measures to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter or to prevent the availability on their services of works or other subject-matter identified by rightholders through</p>

through the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate. The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.	the cooperation with the service providers. Those measures, such as the use of effective content recognition technologies, shall be appropriate and proportionate and shall ensure the fair redistribution of value towards rightholders . The service providers shall provide rightholders with adequate information on the functioning and the deployment of the measures, as well as, when relevant, adequate reporting on the recognition and use of the works and other subject-matter.
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Reason
<p>In Article 13(3), the Commission quite rightly highlights the importance of defining best practices for content recognition.</p> <p>One closely linked issue is redistributing the value generated by the works once recognised towards rightholders. For the sake of consistency between Article 13(1) and Article 13(3), the text should state this detail clearly, as recognition of the works is only the first link in the value chain.</p>

Amendment 7

Proposal for a directive

Article 14

Text proposed by the Commission	CoR amendment
<p>1. Member States shall ensure that authors and performers receive on a regular basis and taking into account the specificities of each sector, timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, notably as regards modes of exploitation, revenues generated and remuneration due.</p> <p>2. The obligation in paragraph 1 shall be proportionate and effective and shall ensure an appropriate level of transparency in every sector. However, in those cases where the administrative burden resulting from the obligation would be disproportionate in view of the revenues generated by the exploitation of the work or performance, Member States may adjust the obligation in paragraph 1, provided that the obligation remains effective and ensures an appropriate level of transparency.</p> <p>3. Member States may decide that the obligation in paragraph 1 does not apply when the</p>	<p>1. Member States shall ensure that authors and performers receive at least once a year basis and taking into account the specificities of each sector, timely, adequate and sufficient information on the exploitation of their works and performances from those to whom they have licensed or transferred their rights, notably as regards modes of exploitation, revenues generated and remuneration due.</p> <p>2. The obligation in paragraph 1 shall be proportionate and effective and shall ensure an appropriate level of transparency in every sector. However, in those cases where the administrative burden resulting from the obligation would be disproportionate in view of the revenues generated by the exploitation of the work or performance, Member States may adjust the obligation in paragraph 1, provided that the obligation remains effective and ensures an appropriate level of transparency.</p> <p>3. Member States may decide that the obligation in paragraph 1 does not apply when the</p>

contribution of the author or performer is not significant having regard to the overall work or performance.	contribution of the author or performer is not significant having regard to the overall work or performance.
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<i>Reason</i>
"On a regular basis", as stated in paragraph 1, could be ambiguous. Based on practices in use in the sector, a 12-month period seems appropriate although shorter timeframes would obviously be better and often achievable.

Amendment 8
Proposal for a directive
Article 15

<i>Text proposed by the Commission</i>	<i>CoR amendment</i>
<p>Contract adjustment mechanism</p> <p>Member States shall ensure that authors and performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances.</p>	<p>Contract adjustment mechanism</p> <p>Member States shall ensure that authors and performers are entitled to request additional, appropriate remuneration from the party with whom they entered into a contract for the exploitation of the rights when the remuneration originally agreed is disproportionately low compared to the subsequent relevant revenues and benefits derived from the exploitation of the works or performances. <i>This mechanism must guarantee fair compensation, taking into account the specific features of different sectors.</i></p>

<i>Reason</i>
This mechanism risks creating legal uncertainty if applied uniformly to all sectors of the creative industry, as the Commission itself notes in recital 42.

II. POLICY RECOMMENDATIONS

THE EUROPEAN COMMITTEE OF THE REGIONS

Preliminary comments

1. confirms local and regional authorities' pivotal role and potential in providing digital services for the general public and creating and managing digital infrastructure, often in the context of cross-border or interregional cooperation, with a view to removing barriers to online activity;
2. welcomes the proposed measures concerning the internal market for e-communications designed to speed up dynamic and sustainable growth in all economic sectors and to create jobs,

as well as to ensure that copyright rules are modernised in light of the digital revolution and changes in consumer behaviour;

3. welcomes the development of measures to improve the position of rightholders to negotiate on the exploitation of their content, particularly as regards uses by online services which give access to user-uploaded content and which sometimes do not provide fair remuneration for this exploitation; stresses, however, that regional and local actors, start-ups and small businesses are often in a weaker position than large rightholders and must not be unduly restricted;
4. notes that the Commission's arguments regarding the added value of a European-level legislative measure in this sector are completely convincing, and that such a measure therefore complies with the subsidiarity principle. This also applies to the arguments relating to proportionality;¹

Copyright in the digital market

5. is pleased that the Commission has granted the Member States room for manoeuvre with regard to applying the exceptions for the use of protected works for educational purposes. National, regional and local identity will thus be upheld, along with the specific types of licence resulting from different political and social circumstances;
6. hopes that further consideration will be given to the role played by collective management organisations in ensuring the fair, modern and effective implementation of copyright;
7. points out that it is important for online teaching resources to be available for use also for distance learning and periods of temporary residence abroad, for example, and not just in the country where the educational establishment is physically located;
8. proposes in particular that the Commission should point out that without targeted investment in modernisation tools, management organisations will be depriving the market and their own members of a service which will improve both licensing systems and systems for collecting and distributing revenue;
9. endorses the call for transparency in a market which for a long time has suffered from the effects of a lack of transparency, promoting special interests and often leading to contractual arrangements detrimental to creators;
10. also regrets that the Commission wishes to introduce an exemption to the transparency obligation when the contribution of an author or performer is not significant. Current technologies for recognising and documenting the body of work can establish the overall value of a work and of the various interested parties with sufficient accuracy, regardless of the level of the individual contribution;

¹ According to the CoR Subsidiarity Expert Group report, based on the consultation which took place from 4 to 14 October 2016.

11. agrees that reinforcing the transparency clauses of contracts between creators and their counterparts is primarily intended to rebalance bargaining power in situations prejudicial to authors. Therefore notes that such action does not constitute a violation of contractual freedom, thus respecting the role played by the market in identifying offers suited to the parties' requirements;
12. proposes that the Commission encourage service providers and organisations in the value chain to jointly develop standard formats for exchanging information on the use of works, with the aim of ensuring greater efficiency and interoperability;

Preservation of cultural heritage

13. is pleased that the European Commission has emphasised the preservation of works subject to technological obsolescence or the degradation of original supports. Is convinced that this exception will facilitate the procedure for preserving Member States' cultural and artistic wealth and hopes that it will encourage partnerships set up for preservation purposes in the public interest, involving cultural heritage institutions and research organisations²;

Growth of the European audiovisual catalogue

14. is pleased that the Commission intends to increase the presence of the European audiovisual catalogue on various digital platforms, particularly in light of the limited presence of works which, owing to their low economic value, have difficulty accessing traditional distribution channels;
15. supports the extension of collective licensing of out-of-commerce works for collective management organisations and cultural heritage institutions. Emphasises, in particular, the benefits of such measures in ensuring adequate remuneration for rights holders, as well as legal certainty for institutions;
16. regrets that the text makes no mention of the local and regional nature of these works. It should be pointed out that, without frequent collaboration between performers, business and local administrations providing cultural subsidies, many of these works would never be completed;

The role of publishers

17. supports the defence of the fundamental role played by publishers in ensuring the circulation of high-quality publications, which require substantial investment to maintain their independence and integrity;
18. endorses the Commission's support which aims to ensure that publishers are recognised as rightholders, enabling them to compete in the digital arena.

²

Back in 1996, Milan University's musical computer science laboratory (*Laboratorio di Informatica Musicale – LIM*) and Milan's Scala Theatre worked together to digitalise over 5 000 magnetic tapes from the sound archive, thereby making them permanently accessible to and ensuring better quality for future generations.

Brussels, 8 February 2017

The President
of the European Committee of the Regions

Markku Markkula

The Secretary-General
of the European Committee of the Regions

Jiří Buriánek

III. PROCEDURE

Title	Copyright in the Digital Single Market
References	Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions - Promoting a fair, efficient and competitive European copyright-based economy in the Digital Single Market COM(2016) 592 final Proposal for a directive of the European Parliament and of the Council on copyright in the Digital Single Market COM(2016) 593 final
Legal basis	Article 307 TFEU
Procedural basis	Rule 41b)i
Date of Commission letter	n. a.
Date of President's decision	n. a.
Commission responsible	SEDEC
Rapporteur	Mauro D'Attis (IT/EPP)
Analysis	September 2016
Discussed in commission	15 November 2016
Date adopted by commission	15 November 2016
Result of the vote in commission (majority, unanimity)	Majority
Date adopted in plenary	8 February 2017
Previous Committee opinions	Interoperability solutions for European public administrations (ISA) ³ Internet of things and re-use of public sector information ⁴ Digital agenda for Europe ⁵ The European eGovernment Action Plan 2011-2015 ⁶ Guidelines for Trans-European Telecommunications Networks ⁷ Digital Single Market ⁸ Modernisation of the EU copyright rules ⁹
Date of subsidiarity monitoring consultation	n. a.

³ CdR 10-2009_FIN_AC.

⁴ CdR 247-2009_FIN_AC.

⁵ CdR 104-2010_FIN_AC.

⁶ CdR 65-2011_FIN_AC.

⁷ CdR 5559-2013.

⁸ CdR 2646-2015.

⁹ CdR 39-2016.