

Exceptions in the Proposed Directive for Copyright in the Digital Single Market

A joint position by:

Music sector



Audiovisual and Software Sector



Books/ press/ journals



A healthy and sustainable cultural and knowledge ecosystem is a vital driver for economic and social development in Europe. To this end, the undersigned creative sectors support a balanced approach to Articles 3 to 6 of the proposed Directive on Copyright in the Digital Single Market (the “Proposed Directive”). We call on the European Parliament and the Council, when examining the Proposed Directive, to carefully consider its impact on our sectors, alongside the benefits to users.

Contractual solutions to access copyright protected works should be encouraged in the first place, either via individual licenses or through agreements with collective management organisations. Contractual solutions are tailored-made solutions, able to move with the times and adapt to markets more easily – they address specific needs of individual user groups and include provisions on cross border uses when relevant. Contractual solutions stimulate right holders to respond in a targeted manner to user needs while preserving their ability to create, finance, produce, market and distribute culturally diverse and valuable content. When licensing is not possible, Member States must foresee a payment of fair compensation to the right holders for uses under exceptions.

The Commission’s proposed Directive introduces several exceptions. However, we believe that a number of fundamental principles need to be safeguarded in order to ensure the right basis for creativity, investment and cultural diversity going forward:

Common Provisions

1. It must be clarified that in general exceptions cannot be combined with each other¹.

While each exception in the Proposed Directive might be justified on its own merit and with a concise scope, beneficiaries of all these exceptions must have lawful access to the copyright protected content. This means for most repertoires an *acquired access with the consent of the right holders*. We call on the co-legislators to address this crucial issue and to provide reassurance that authors’ rights/copyright will remain an incentive for creation and for investment in production, marketing and distribution.

2. Application of exceptions to on-demand services where Technical Protection Measures (TPMs) are used to comply with agreed contractual terms.

The Proposed Directive, as well as all existing copyright exceptions, must be applied in a balanced manner consistent with EU and international copyright norms, such as the Three-Step-Test². Article 6(4)(4) of the 2001 Copyright Directive recognises that interactive on-demand distribution models increase consumer choice: it expands the variety of legal offers and ensures protection of the underlying content. It is a crucial provision underpinning the continued offering of content and services on an on-demand basis. Any legislative proposal that undermines the ability of right holders to control and deploy TPMs to manage the access to and use of their content in the on-demand space would severely limit their ability to protect

¹ This is particularly important in light of the CJEU ruling in Case C-117/13 Ulmer vs Darmstadt

² See Article 10 WCT, Article 5(5) of the 2001/29 Directive.

their investment. It would also likely deprive consumers of new services with innovative interactive functionalities that have been enabled by TPMs.

Therefore, it is necessary that Article 6(4)(4) of the 2001/29 Copyright Directive continues to apply in the on-demand space. A specific reference to Article 6(4)(4) should therefore be included in Article 6 of the Proposed Directive.

Article 3 - Text and Data Mining (TDM)

In order for the Text and Data Mining exception to be balanced, it is essential that it remains limited to non-commercial players, is used in relation to scientific research and limited to scientific publications. It should exclude content that is made freely available to individual readers at the point of access online. Such content is **also valuable and benefits from the same copyright protection**. If the exception were to cover also cultural heritage institutions, it should be clarified that these institutions may benefit from it only when they conduct non-commercial scientific research. Moreover, already existing licensing opportunities should be prioritised and mining should be permitted only in cases where the miner has acquired lawful access.

As the process of Text and Data Mining includes a substantial download of protected works, it must be clarified that any reproduction of copyright protected works shall be stored in a secure manner and deleted upon completion of the TDM process.

Article 4 - Illustration for teaching

Creative works, including pedagogical works, require an indispensable investment from their authors and publishers/producers. The foreseen exception must make sure that the incentives for all creators and business partners to continue to work and to invest in the creation, production, marketing and distribution of works is not prejudiced.

Concerning the use of copyright protected works for cross-border teaching, there is no evidence of a market failure, nor is there any assessment of how a harmonised compulsory exception might potentially damage the market. The existing exceptions of the 2001 Copyright Directive are broad and allow all necessary access and uses – which is complemented by licensing arrangements that permit additional access and uses, including cross border uses where appropriate. Member States should prioritise licensing arrangements and in that regard, keep adequate budgets to support the acquisition of educational resources, both physical and – where possible – digital.

Article 5 Preservation

We support the mission of heritage institutions (libraries, archives) to preserve copyright works for the long term.

The approach proposed by the Commission of an exception to the right of reproduction should be clarified, in application of the subsidiarity principle, by requiring Member States to designate which cultural heritage institutions are in charge of preservation, also in line with national systems of legal deposit. Digitisation may offer a long term archival solution to

preservation, but at high cost and is currently not the preferred approach for all types of copyright works. For many categories of items comprised in collections effective repositories should guarantee security, a robust backup, disaster recovery systems, remedies to format obsolescence, etc. It is a collective and societal duty to look to the future, and right holders fully participate by complying with legal deposit requirements and/or by making voluntary deposits; yet, we need to avoid duplication of efforts. Hence, Member States should decide which concrete institutions are entitled to preserve copyright works and/or under which circumstances.

Thank you for your support.