

Statement on the Proposed Directive on Copyright in the Digital Single Market

Leuven, 4th November 2016

The European universities of science and technology broadly supported the European Commission's (EC) [Communication 'Towards a modern, more European copyright framework'](#) and shared our insights to improve its impact. However, the [proposal for the Directive on Copyright in the Digital Single Market](#) released by the EC on 14th September does not entirely meet our expectations. We call upon the European Parliament and Council of the European Union to improve the legislation significantly and to update the EU framework on copyright:

- Although we welcome the three mandatory exceptions for research, education and preservation, legal uncertainty remains in various aspects of the proposal and as such prevents the Digital Single Market to reach its full potential. In particular, the exception for Text and Data Mining (TDM) needs to be improved considerably ensuring that it is fit for both open science and open innovation. TDM should thus be extended towards `data analytics` also encompassing e.g. codes in software. Moreover, requiring (or rewarding) interoperability, in combination with a reciprocity principle, could ensure achieving a fair deal while fuelling combinatorial innovation. It would also be a way of overcoming harmful tendencies towards monopolies, as they are caused by network effects today.
- We expected a stronger recognition of open access in the proposal. The current following formulation in (36) is an example: "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." An exception to make publicly funded research available to the broader public through open access - as widely recognised by the Competitiveness Council and as is required under Horizon 2020 - must be included. In order to enable a full open access environment, the Directive should provide for an exception that allows research organisations to distribute publications of affiliated researchers through their own channels, such as publication repositories. Such visibility will improve the quality of research and stimulate further cooperation and valorisation. In addition we also plea for a right of secondary publication for authors.
- Restricting the TDM exception to research organisations inhibits our collaborations with researchers in business, industries, public services and citizens. Moreover, it will obstruct collaborative infrastructures such as the European Open Science Cloud (EOSC) and violates the principle of openness and transparency and the link between science and innovation. First, a mandatory exception must be included to enable all parties who have legal access to the content to mine it with the tools of their choice: "the right to read is the right to mine" (cf. Murray-Rust, 2012). Second, allowing data providers to introduce random measures to protect the security and integrity of their network allows them to arbitrarily block access for researchers with legal access to their content, trying to conduct content mining. Safeguards should be put in place. Restrictions to data analytics will only extend the (legal) uncertainty faced by researchers.

- We consider the following provisions under (27) too vague and are concerned that they might result in unfair limitations of access to the digitised works: "As mass digitisation projects can entail significant investments by cultural heritage institutions, any licences granted under the mechanisms provided for in this Directive should not prevent them from generating reasonable revenues in order to cover the costs of the licence and the costs of digitising and disseminating the works and other subject-matter covered by the licence."
- (31) to (35) introduce a publisher's copyright which might result in a `link tax` or a prohibition of quoting of or linking to press articles. While there are exceptions in the proposal (the additional rights should be limited to press publications), this neglects the interactions between this sector and academia, e.g. in the field of data analytics. For the development of the digital market, these attempts might be very harmful.
- (36) proposes that publishers should be able to claim parts of the authors' financial compensation. We reject the idea that publishers should have a neighbouring right. They are service providers and not creators of works, and if their license agreement with an author does not cover the author's sharing of their compensation, authors should not be forced to grant publishers more than what was agreed upon.
- The proposal for the obligation to monitor user-uploaded content includes the obligation to give right holders access to data and works so that they can check for possible copyright infringements. In our view, this will hinder these platforms and might be harmful to innovation and starting new platforms. As data providers in the current proposal may block access, we plea for an external, transparent & independent network monitoring mechanism.
- We welcome that the directive explicitly facilitates cross-border off-site education, but we are concerned about the possibility to allow member states to ignore and by-pass this exception if licensing schemes are available for these materials. When a Higher Education Institution (HEI) has the ambition to share protected content in a cross border educational course environment conflicts of interests occur. While the proposal for the Directive claims that the exception is subordinated by the license terms agreed on between HEI and the publisher the agreement should therefore be renegotiated. In the proposal is stated: "In order to avoid that such mechanism results in legal uncertainty or administrative burden for educational establishments, Member States adopting this approach should take concrete measures to ensure that licensing schemes allowing digital uses of works or other subject-matter for the purpose of illustration for teaching are easily available and that educational establishments are aware of the existence of such licensing schemes. (Directive, 16, p.16)". In reality this means that all license terms should have addenda and adaptations to the current terms in order to execute the exceptions in practice.

- We underline the importance of the following definitions for staff and students:
 - o `Staff` should encompass all staff, including teaching, administrative and technical staff and experts contributing to or supporting teaching and research. This also includes staff on other campuses of the institution (wherever that may be) and persons hosted by an institution for a limited period of time.
 - o `Students` should encompass all learners, with which the institution has established a formal relationship, apart from degree students, also lifelong learners on short-cycle, certificate courses etc., which for internal administrative reasons, due to national law and funding regulations etc. may not be called students, including participants of Massive Open Online Courses (MOOCs) and similar open courses. Their attendance should be compared with a physical or virtual library use, rather than a formal learning provision.
- We regret that the update of the exception on preservation of cultural heritage is limited to objects permanently in collections only. This creates interpretation issues with regard to online material and does not recognise the collaboration efforts between cultural heritage institutions to digitalise and share works ensuring widest access to the broader public.

For more information and enquiries, please contact our Secretary General David Bohmert at david.bohmert@cesaer.org.

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