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Department of Business,
Enterprise and Innovation

Consultation on the transposition of Directive (EU) 2019/790 of the European Parliament and of the Council on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

Articles 18 – 23

Consultation Paper No. 4

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A. Overview

1. Background

On 14 September 2016, the EU Commission published a package of copyright reform proposals as part of its Digital Single Market strategy. This included a Directive on copyright in the Digital Single Market (hereinafter referred to as the “Copyright Directive”). The Copyright Directive provides a framework for the formulation of modern copyright legislation suitable for all European citizens.

Following extensive technical negotiations over the course of two and a half years, agreement was reached between the three institutions of the European Union and the Directive was published in the Official Journal of the European Union on 17th May 2019. Ireland, along with all other EU Member States, now has until 7th June 2021 to transpose the Copyright Directive into national legislation.

The Department of Business, Enterprise and Innovation opted to conduct a series of public consultations, 4 in total, regarding the transposition into Irish law of the Copyright Directive. Each consultation was allotted 4 weeks to allow for submissions from interested parties.

To date the Department has published three consultation papers seeking views on the transposition of the Directive:

- the first paper, on the Value Gap provisions (Articles 13-17), closed on 23rd October 2019;
- the second paper, on exceptions (Articles 2–7), closed on 14th November 2019;
- the third paper, on out-of-commerce works and extended collective licensing, was published on 6th November 2019 and is scheduled to close on 4th December 2019.

This consultation paper, the final of the series, is seeking input on the transposition of **Articles 18 to 23** of the Directive.

This engagement with our stakeholders will assist the Department in preparing suitable legislation to transpose the Directive into Irish law, ensuring that such legislation meets the needs of our citizens in the modern digital age. We welcome all submissions on this important piece of modernising legislation and look forward to continuing the constructive and informative dialogue we have maintained with all our stakeholders throughout negotiations on the Directive.

2. Main Aim of the Directive on Copyright in the Digital Single Market

Rapid developments in digital technologies continue to transform the way creative works and other subject matter are produced, distributed and accessed in the digital environment. With the development of new technologies and business models, legal uncertainty exists for both rightholders and users, as regards certain uses, including cross-border uses, of copyright protected works and other subject matter in the digital environment.

The Copyright Directive contains a number of varied provisions that constitute a significant updating of European Union Copyright Law which will reduce the difference between national copyright regimes which will allow for wider access and use of copyright protected works benefitting the creative sectors, press publishers, researchers, educators, cultural heritage institutions, and citizens.

This includes removing digital barriers between Member States by introducing several mandatory copyright exceptions to widen the scope of use of materials in the fields of education, research and facilitating cultural heritage institutions to make copies of works in their collections to the extent necessary for their preservation. In addition, the Directive also makes provisions for licensing of “out of commerce” works.

One of the main objectives of the Copyright Directive is to address the ‘value gap’, whereby rightholders are receiving less remuneration despite the increased usage of their works in recent years. The relevant articles aim at ensuring that authors and rightholders receive a fair share of the value that is generated by the use of their works, particularly by online platforms that give access to user-uploaded content, while being minimally burdensome on platforms. The provisions will allow press publishers to receive remuneration for the online exploitation of their works by news aggregators, without preventing users from making lawful use of those works and will help ensure the sustainability of the publishing industry.

The Directive also imposes additional transparency obligations on online platforms in licensing negotiations with rightholders and provides for a contract adjustment mechanism where the remuneration originally agreed under a license or a transfer of rights is disproportionately low compared to the revenues generated, effectively allowing a renegotiation of contracts.

Finally, the Directive introduces a mechanism which will allow authors or performers the right to revoke the license related to their works should they not be exploited in a reasonable timeframe.

3. Overview of Chapter 3 – Articles 18 - 23

The Copyright Directive contains several different measures to strengthen the position of authors and performers. The objective of Articles 19-22 is to ensure that authors and performers are in a better position to receive fair and adequate remuneration for the use of their works. This will be achieved by providing rightsholders with greater access to information on the use of their works, as well as the ability to renegotiate their contracts based on an increase in use of their works. Ireland worked alongside our colleagues in other Member States to craft a balanced and appropriate compromise on these articles and believes that they are vitally important to allow authors and performers receive a fair share of the revenue generated by the exploitation of their works.

Article 18 (Recitals 72 & 73) outlines the principle of appropriate and proportionate remuneration for authors and performers in relation to the exploitation of their works, this is particularly useful as authors and performers tend to be in the weaker contractual position when they grant a licence or transfer their rights.

Article 19 (Recitals 74 – 77) provides for transparency obligations on the parties to whom works are licensed, requiring that they provide comprehensive information on the exploitation of the works, “at least once a year”, including the modes of exploitation and all revenues generated and remuneration due. This will ensure that authors and performers have access to an increased level of information about the exploitation of their works and performances which is necessary to allow rightsholders adequately and continuously assess their economic value.

This article also specifies that information is provided to authors and performers (or their representatives) in cases where the rights have subsequently been sub-licensed to other parties and where the first contractual counterpart doesn’t hold all relevant information. Article 19(2) and Recital 76 provides further information on this matter.

Recital 77 explains that it should not be necessary to apply these transparency obligations to collective management organisations, independent management entities or other entities as they are already subject to transparency obligations set out under Article 18 of the CRM Directive 2014/26/EU.¹ Those organisations are required to comply with the provisions set out in the European Union (Collective Rights

¹ 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 Text with EEA relevance

Management)(Directive 2014/26/EU) Regulations 2016, which transposed the CRM Directive.

Article 20 (Recital 78) is designed to operate in conjunction with Article 19, it offers authors and performers a contract adjustment mechanism when “the remuneration originally agreed turns out to be disproportionately low” compared to the success of their work or performance and the resulting revenues generated. Certain contracts for the exploitation of rights can be of a lengthy duration, this provision will allow rightsholders, without prejudice to the law applicable to contracts in Member States, to review and adjust existing contracts.

As per Recital 78, this mechanism should not apply to contracts concluded by collective management organisations, independent management entities or other entities that are subject to the European Union (Collective Rights Management) (Directive 2014/26/EU) Regulations 2016, which transposed the CRM Directive.

Article 21 (Recital 79) provides for a voluntary, alternative dispute resolution procedure for disputes related to obligations arising from Articles 19 and 20.

Article 22 (Recital 80) recognises the potential risk that rightsholders face when signing an exclusivity contract. The article addresses the “lack of exploitation” of works by providing a mechanism that will allow authors or performers, after a reasonable time and upon appropriate notices and deadlines, revoke in whole or part the license or transfer of rights when their works are not being exploited. When a rightsholder transfers their rights there is an expectation that their work or performance will be exploited, in the event that this does not occur this article will allow for the revocation of rights thus allowing rightsholders to transfer or license their rights to another person.

Article 23 (Recital 81 & 82) prevents parties from overriding Articles 19-21 in contract and is a key provision that ensures that the principles contained in Chapter 3 are met. It also clarifies that Articles 18-22 do not apply to authors of a computer program².

It is advisable that individuals refer to Recitals 72-82 which provide further detail and additional information on the intention and the objectives of Articles 18-23.

² As specified in Article 2 of Directive 2009/24/EC Of The European Parliament and of The Council of 23 April 2009 on the legal protection of computer programs

B. Information on Consultation Process

1. Submissions

The Department invites submissions on the transposition of this Directive into Irish law on the issues raised in **questions 1 - 18** outlined below.

While not every respondent may have views on every question, we would ask that every respondent include the information under questions 1-4 to assist us in our consideration of the responses and to help ensure our transposition is as practical and useful as possible to all stakeholders in Ireland.

We would appreciate any specific views on the articles covered within this document. We would particularly welcome information based on practical experience, case law, or similar legislation in other jurisdictions. Should you have any information relevant to **Articles 18 - 23** in addition to the questions asked, it may be included as annexes to submissions where this is more practical.

Respondents are requested to make their submissions in writing (clearly identifying the consultation paper number) and, where possible, by email. Submissions to this consultation should be sent to [**copyright@dbei.gov.ie**](mailto:copyright@dbei.gov.ie) or posted to:

Copyright Directive Consultation
Consultation Number 4
Copyright Section
Intellectual Property Unit
Department of Business, Enterprise and Innovation
23 Kildare Street
Dublin 2
D02 TD30

The closing date for submissions is **5pm on Monday 23rd December 2019**.

Any questions regarding the consultation can be emailed to [**copyright@dbei.gov.ie**](mailto:copyright@dbei.gov.ie)

2. Confidentiality of Submissions

Contributors are requested to note that it is the Department's policy to treat all submissions received as being in the public domain unless confidentiality is specifically requested. Respondents are, therefore, requested to clearly identify material they consider to be confidential and to place same in a separate annex to their response, labelled "confidential". Where responses are submitted by email, and those emails include automatically generated notices stating that the content of same should be treated as confidential, contributors should clarify in the body of their emails as to whether their comments are to be treated as confidential.

3. Relevant provisions of the Freedom of Information Act 2014

Respondents' attention is drawn to the fact that information provided to the Department may be disclosed in response to a request under the Freedom of Information Acts. Therefore, should you consider that any information you provide is commercially sensitive, please identify same, and specify the reason for its sensitivity. The Department will consult with any potentially affected respondent regarding information identified as sensitive before deciding on any Freedom of Information request.

4. General Data Protection Regulation (GDPR)

Respondents should note that the General Data Protection Regulation ('GDPR') entered into force in Ireland on 25th May 2018 and it is intended to give individuals more control over their personal data. The key principles under the Regulation are as follows:

- Lawfulness, fairness and transparency;
- Purpose Limitation;
- Data minimisation;
- Accuracy;
- Storage Limitation;
- Integrity and confidentiality, and
- Accountability.

The Department of Business, Enterprise and Innovation is subject to the provisions of the Regulation in relation to personal data collected by it from 25 May 2018. Any personal information which you volunteer to this Department, will be treated with the highest standards of security and confidentiality, strictly in accordance with the Data Protection Acts 1988 to 2018.

C. Questions

General

1. Name (and contact details if you wish)
2. Are you:
 - a rightsholder;
 - a content creator;
 - a platform (in particular an “online content-sharing service provider”, as defined by Article 2(6) of the Directive);
 - an organisation representing the rights of rightsholders (including authors and publishers);
 - a body/entity operating under the European Union (Collective Rights Management) (Directive 2014/26/EU) Regulations 2016; or
 - other – please describe?
3. If you are providing a submission on behalf of an organisation, who does your organisation represent?
4. Do articles 18-23 of the Directive on Copyright in the Digital Single Market impact or place obligations on you/your organisation directly?

Article 18

5. How do you consider that this article interacts with current Irish legislation?
6. In your view is there a need for any further mechanism in Ireland to ensure that authors and performers receive appropriate and fair remuneration? Please provide any data to support your answer.

Article 19

7. Is the return of information to authors and performers related to the exploitation of their works “at least once a year” sufficient, or should this occur more frequently? If the latter, how often?
8. Is it necessary to define the specificities of individual sectors? If so, what factors should be considered?

9. Should limits be placed on the obligation for the return of information where the administrative burden becomes disproportionate to the revenues generated by the exploitation of a work or performance? What do you consider to be an excessive burden?
10. If Ireland opts to transpose the voluntary provision of Article 19(4), what criteria should be used to determine that the “contribution of the author or performer is not significant”?

Article 20

11. Do you consider that current Irish legislation regarding copyright and contract law sufficiently provides for contract adjustment matters? If not, do you have any suggestions regarding the development of an appropriate mechanism?
12. What criteria should be established to determine if the remuneration originally agreed turns out to be “disproportionately low”?

Article 21

13. Do you believe that the Arbitration Act 2010 is sufficient in achieving the goals of this article?

Article 22

14. Do you consider it necessary for Ireland to transpose the voluntary provision of Article 22(2)? If so, why?
15. As contained in Article 22(3), what do you consider to be an appropriate/reasonable timeframe before an author or performer can exercise the right to revoke access to their work?

Other

16. Do you have any other issues you wish to raise specifically in relation to the transposition of Articles 18-23?
17. Do you have any economic, financial or other data to assist in the transposition of Articles 18-23, or the Directive as a whole?
18. Do you have any other views that you wish to raise in relation to the transposition of the Directive that were not covered in this or the previous consultation papers?