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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 8 – 12

Consultation Paper No. 3

6th November 2019

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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 intends to publish a series of public consultations regarding the transposition into Irish law of the Copyright Directive. Each consultation will be open for 4 weeks for submissions from interested parties. This consultation paper, the third in the series, is seeking input on the transposition of **Articles 8 to 12** of the Directive.

The Department has published two consultation papers on the transposition of the Directive, the first paper which sought views on the Value Gap provision (Articles 13-17) closed on 23rd October 2019. The second paper which focussed on exceptions (Articles 2–7) was published on 17th October 2019 and is scheduled to close on 14th November 2019.

The Department will publish a final consultation paper in the coming weeks seeking input to the transposition of the fair remuneration provisions in the Directive (articles 18-23).

The Department intends that all consultations will have concluded by the end of 2019.

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 rightsholders 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 and allow for wider access to 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 rightsholders are receiving less remuneration despite the increased usage of their works in recent years. The relevant articles aim at ensuring that authors and rightsholders 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 rightsholders 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 Out-of-Commerce works

Out-of-commerce works are works that are still protected by copyright but no longer commercially available through the customary channels of commerce. In the past works such as books were often referred to as being either “in-print” or “out-of-print” but with the advent of electronic channels of commerce, the term “out-of-commerce” is used. A work can be deemed to be out-of-commerce when a reasonable effort has been made to assess their availability to the public through customary channels of commerce.

Cultural heritage institutions, like archives and museums, have in their permanent collections/archives, a large number of works and other subject matter owned by different rightsholders, that they want to digitise and make available online as part of their digital library. However, cultural heritage institutions do not own the copyright in such works and getting the consent of individual rightsholders for use of their works can be difficult for various reasons.

The definition of a “cultural heritage institution” is contained in article 2(3) of the Directive and is defined as *“a publicly accessible library or museum, an archive or a film or audio heritage institution”*. Recital 37 clarifies that a “cultural heritage institution” is also considered to include, national libraries and national archives, the archives of publicly accessible libraries in educational establishments, research organisations and public sector broadcasting organisations.

Recital 37 also outlines the variety of works in the collection of cultural heritage institutions and the importance that the licensing mechanism and the exception provided for in the Directive can be used for different types of works, including:

- literary works, photographs, software, phonograms, audiovisual works and unique works of art, including where they have never been commercially available;
- never-in-commerce works including posters, leaflets, trench journals or amateur audiovisual works,
- unpublished works or other subject matter.

Works or other subject matter that are available in a different version, such as subsequent editions of literary works or alternate cuts of cinematographic works, or works available in different manifestation, such as digital and printed formats, are not considered out-of-commerce and therefore not covered by the scope of the Directive. However, the commercial availability of adaptations, including other language versions or audiovisual adaptations of a literary work, should not prevent a work from being deemed to be out-of-commerce in a given language.

Currently, no legislative framework exists for the use or digitisation of out-of-commerce works under Irish copyright law. The Directive provides for the creation of a legal mechanism to make it possible for cultural heritage institutions to obtain licences from collective management organisations representing the relevant rightsholder, allowing them to digitise out-of-commerce works and make them available online and across borders, without infringing copyright, provided the use is for non-commercial purposes.

The Directive also provides for a mandatory exception to copyright for the use of out-of-commerce works, where there is no collective management organisation representing the rightsholders in a certain type of work or when it is not possible to get the consent of the rightsholder.

The aim of this provision is to facilitate large scale digitisation projects of out-of-commerce works. This will mean that museums, libraries, film archives and other cultural heritage institutions across Europe will be able to digitise more cultural works for future generations so that citizens will have access to books, film or music records that are no longer commercially available.

4. Articles 8 to 11 (Recitals 31 to 42)

Article 8 provides for a regulatory framework that allows collective management organisations to conclude licences with cultural heritage institutions for the digitisation of out-of-commerce works that are in the permanent collections of the institutions, provided the use is for non-commercial purposes. The licences will apply irrespective of whether all rightsholders of the out-of-commerce work in question are covered by the licence granted by the collective management organisation, provided that the collective management organisation is sufficiently representative of rightsholders in that type of work. Licences issued under this mechanism should be applicable in all Member States.

Article 8 also provides for an exception to copyright law that will allow cultural heritage institutions to digitise and make available out-of-commerce works that are permanently in their collections in situations where no adequate licence is available from a collective management organisation or when the cultural heritage institution encounters difficulties in obtaining the necessary authorisation from the rightsholder.

The licensing mechanism and the exception provided for in article 8 are subject to a number of safeguards intended to protect rightsholders such as the possibility for rightsholders to opt-out or exclude their works from the out-of-commerce licensing mechanism or exception.

Recital 33 clarifies that Member States have flexibility in determining what the requirements are for collective management organisation to be deemed to be sufficiently representative of rightsholders, as long as that determination is based on a significant number of rightsholders in the relevant type of works having given a mandate allowing the licensing of the relevant type of use.

Article 9 provides that licences granted for the use of out-of-commerce works may apply to cultural heritage institutions in any EU Member State (cultural heritage institutions and collective management organisations are free to agree on the territorial scope of the licence). However, the use of out-of-commerce works made under the exception can only take place in the Member State where the cultural heritage organisation undertaking the work is established.

Recital 40 clarifies that collective management organisations and cultural heritage institutions should remain free to agree on the territorial scope of licences, including the option of covering all Member States, the licence fee and the uses allowed. Uses covered by such licences should not be for profit-making purposes. Recital 40 also points out that the digitisation of works by cultural heritage institutions can involve significant investments and that any licences granted under the mechanism should not prevent cultural heritage institutions from covering the costs of the licence and the costs of digitising and disseminating the works covered by the licence.

Article 10 provides that the arrangements put in place to allow rightsholders to exclude their works from the licensing mechanism or the exception, are adequately publicised, particularly where uses take place across borders in the EU. To achieve this a single publicly accessible online portal for the EU will be created to make such information available to the public for at least six months before the use of the out-of-commerce work takes place. The portal will be established and managed by the European Union Intellectual Property Office (EUIPO) and will make it easy for a rightsholder to exclude their work from a licence or the exception.

The EUIPO intends to seek input from relevant stakeholders in Member States regarding their functional and technical requirements for the out-of-commerce works Portal. A software requirements specification document will issue from the EUIPO in the coming weeks and the Department will circulate this document, on behalf of the EUIPO, to relevant stakeholders in Ireland. The information received will be used as a basis for the IT development of the Portal.

Recital 35 provides the rightsholders may opt-out in relation to the use of all of their works or specific works, or in relation to particular licences or uses under the exception, at any time before or during the term of the licence or use under the exception.

In addition to making information available through the online portal, article 10 provides for additional publicity measures to inform rightsholders about the licensing of out-of-commerce works or the use of such works under the exception. The publicity measures taken should be effective without the need to inform each individual rightsholder.

Article 11 obliges Member States to engage with stakeholders such as rightsholders, collective management organisations and cultural heritage institutions in each sector, before establishing the specific requirements to ensure that a work is out-of-commerce, such as checking that the work is not available to the public through customary channels of commerce.

In addition, regular sector specific stakeholder dialogue between representative users' and rightholders' organisations, collective management organisations and other relevant stakeholder organisations, is encouraged to ensure that the licensing mechanism for out-of-commerce works is functioning properly and that rightsholders are adequately protected.

5. Article 12 (Recitals 43 – 50)

Collective licensing with an extended effect

A functioning copyright framework that works for all parties, users, rightsholders and collective management organisation, requires the availability of effective licensing mechanisms for copyright protected works in the digital age. Collective licensing with extended effect allows a collective management organisation to conclude licences on behalf of rightsholders, irrespective of whether the rightsholder has authorised the organisation to do so.

Extended collective licensing by collective management organisations and similar mechanisms can make it possible to conclude agreements in those areas where collective licensing based on an authorisation by rightsholders does not provide an exhaustive solution for covering all works or other subject matter to be used.

Article 12 contains an option for Member States to provide for extended collective licensing. This is where a collective management organisation enters into a licensing agreement for the use of works, such an agreement can be extended to apply to the rights of rightsholders, who have not authorised that collective management organisation to represent them, or the organisation has a legal mandate or is presumed to represent rightsholders who have not authorised the organisation accordingly. The collective management organisation must be subject to the national rules implementing the EU Directive on Collective Rights Management (2014/26/EU). Under that Directive a collective management organisation must be authorised by law to manage copyright on behalf of more than one rightsholder, i.e. by way of assignment, licence or other contractual agreement. Article 12 is subject to a number of safeguards to protect the interests of rightsholders.

Recital 47 clarifies that mechanisms of collective licensing with an extended effect can only apply in well-defined areas of use, where obtaining authorisation from rightsholders on an individual basis is typically onerous and impractical. The mechanisms should be transparent and non-discriminatory as regards the treatment of rightsholders, including rightsholders who are not members of the collective management organisation.

Recital 48 provides that Member States should determine the requirements to be satisfied for collective management organisations to be considered sufficiently representative, taking into account the category of rights managed by the organisation, the ability of the organisation to manage the rights effectively, the creative sector in which it operates, and whether the organisation covers a significant number of rightsholders in the relevant type of works or other subject matter who have given a

mandate allowing the licensing of the relevant type of use, in accordance with Directive 2014/26/EU.

Recital 48 also clarified that rightsholders should be given the opportunity to exclude the use of their works from any licensing mechanisms, including before the conclusion of a licence and during the term of the licence.

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 1-17 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 8 - 12** 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 3
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 4th 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;
 - an organisation representing the rights of rightsholders (including authors and publishers);
 - a Cultural Heritage Institution (library, museums, archives, etc)
 - a Research Organisation
 - an Educational Establishment
 - a Public Sector Broadcasting Organisation
 - a Collective Management Organisation
 - other – please describe?
3. If you are providing a submission on behalf of an organisation, who does your organisation represent?
4. Do articles 8-12 of the Directive on Copyright in the Digital Single Market impact or place obligations on you/your organisation directly?

Article 8

5. In relation to the licensing of out-of-commerce works, do you have any views on what the requirements should be for a collective management organisation to be deemed to be sufficiently representative of rightsholders in a particular type of work?
6. Where there is more than one collective management organisation representative of the relevant works, what rules should apply with regards to joint licences or agreements between the relevant organisations?

Under recital 36, there is the possibility for Member States to decide who is to have legal responsibility regarding the compliance of the licensing of out-of-commerce works and their use under the conditions set out in the Directive.

7. Is it necessary to specify in Irish legislation who should have responsibility for monitoring compliance with the licensing of out-of-commerce works as set out in Article 8? If so, what information is necessary to ensure that there is compliance with the Directive in this regard?

In order to reflect the specificities of different types of works and other subject matter in the collections of cultural heritage institutions, Member States can establish specific requirements and procedures for determining whether a work or a set of works is out-of-commerce (Recital 37).

8. What are your views on whether Irish legislation should specify the requirements for determining whether a work or set of works is out of commerce? What should those requirements be, e.g., a certain period of time to have elapsed since the work was first made commercially available or a cut-off date?

When determining whether a work or set of works are out-of-commerce, a reasonable effort should be made to determine their availability through customary channels of commerce (Recital 38).

9. Who should be responsible, and why, for determining if a work is out-of-commerce, the Collective Management Organisation or the Cultural Heritage Institutions?
10. What do you consider to be “reasonable effort” when determining if a work is out-of-commerce?
11. In general, do you have any other views on the operation of the proposed licensing mechanism?

Article 9

12. Cultural Heritage Institutions can incur significant cost in the digitisation and dissemination of works in their collections. Should Irish legislation clarify that those costs must be taken into consideration in determining the licence fee charged under this mechanism?

Article 10

In addition to providing information about the proposed use of out-of-commerce works through the EUIPO online portal, Member States have the option to provide for additional appropriate publicity measures for the general awareness of rightsholders about the use of works under the licensing mechanism or the exception.

13. What are your views on whether additional publicity measures are necessary to increase awareness for rightsholders about the use of their works under this mechanism? If so, what should those additional publicity measures be?

Article 11

14. Is there currently a structure in place for sector specific stakeholder dialogue and if so, how does this operate? If no such structure exists, how could sector specific stakeholder dialogue be best achieved?

Article 12

Irish copyright legislation does not currently provide for extended collective licensing (ECL allows a collective management organisation to offer licences on behalf of rightsholders irrespective of whether they have authorised the collective management organisation to do so).

15. Do you think that collective licensing with extended effect should be provided for in Irish legislation, and if so, why?
16. Should it be decided to provide for collective licensing with extended effect, what requirements should be satisfied for a collective management organisation to be considered sufficiently representative of rightsholders in a specific type of work?

Other

17. Do you have any other issues you wish to raise in relation to the transposition of articles 8 – 12 of the Directive?