



An Roinn Gnó,  
Fiontar agus Nuálaíochta  
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 13-17

Consultation Paper No. 1

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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 17<sup>th</sup> May 2019. Ireland, along with all other EU Member States, now has until 7<sup>th</sup> 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 first consultation is seeking input on the transposition of Articles 13 to 17 of the Directive. The Department will publish further consultation papers in the coming weeks seeking input to the transposition of other areas covered in the Directive, namely:

- exceptions and limitations (articles 3-7),
- out-of-commerce works and extended collective licensing (articles 8-12), and
- fair remuneration (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 Articles 13-17 and recitals 51-74: Press Publishers and the Value Gap**

The evolving media landscape in the digital age has led to a massive increase in the means by which the public can access and upload content. The advent of social media and portable devices has allowed people to enjoy creative works in ways that were unimaginable at the turn of the millennium.

To ensure that copyright legislation in the European Union is appropriate for the modern, digital age, it is important to implement new measures to ensure a well-functioning marketplace for copyrighted works in the Digital Single Market. The intention of the Copyright Directive is to provide a framework for the formulation of modern copyright legislation suitable for all European citizens. Among the Directive's many proposals are provisions aimed at ensuring greater rights for press publishers seeking to protect their content online (Article 15), and measures to address the "value gap", whereby rightsholders are receiving less remuneration despite the increased usage of their works (Article 17).

An outline of each specific article, and some issues of relevance to the Irish transposition of these articles, is included in the following pages, to provide the background for the questions which are asked in section C of this paper.

## **Press Publishers; Article 15 (Recitals 56-59)**

Article 15 of the Directive establishes a neighbouring press publishers' right, which would allow press publishers to seek remuneration for the online exploitation of their works by news aggregators. The additional revenue generated by this new right will help to ensure a free and pluralist press, allowing the Irish public to consistently access reliable news sources.

The definition of "press publishers" is contained in article 2(4) with some guidance on this definition provided in recital 56. It clarifies that both digitised and born-digital publications are covered. It also clarifies that this is a collection of works of a journalistic nature, and specifically excludes scientific journals from its remit.

The scope of the protection is clarified to allow that, while article 15 can apply to either entire articles or parts of articles, it has a quantitative criterion as its basis for protection. This means that it does not apply to individual words or very short extracts. The new right also does not apply to private or non-commercial uses of press publications by individual users. Recital 57 notes that the rights granted to publishers of press publications do not extend to acts of hyperlinking. This recital also clarifies that the rights granted to press publishers do not extend to "mere facts" reported in press publications.

The new press publishers right have a two-year term of protection from the 1 January after the date of publication. It does not apply to publications published before 6 June 2019.

Remuneration generated by this new provision is to be shared between the authors of the works incorporated in the publication and the publishers themselves. This is without prejudice to existing law in Member States, which includes provisions in Irish law in the Copyright and Related Acts 2000 (as amended), specifically Section 23(1)(A) on the first ownership of copyright in the context of employment contracts.

## **The Value Gap; Article 17 (Recitals 64-74)**

Article 17 is intended to address the issue of the value gap in the digital market, where rightsholders, such as musicians, are receiving less remuneration relative to the increase in use of their works.

The definition of online content-sharing service providers (hereinafter referred to as “platforms”) is contained in article 2(6) with some guidance on that definition provided in recital 62. This article specifies that providers that fall under this definition are those where the main, or one of the main, purposes of the platform is to store and give access to large amounts of copyright-protected works or other protected subject matter uploaded by users, and where the platform organises and promotes for profit-making purposes. The second paragraph of recital 62 has an indicative list of the types of services which are intended to be excluded, such as not-for-profit online encyclopaedias and non-for-profit educational and scientific repositories.

A platform performs an act of communication to the public when it gives the public access to copyright-protected works or other protected subject matter uploaded by its users (as outlined in article 17(1)). Where a platform is performing an act of communication to the public, it does not benefit from the limitation of liability in article 14(1) of the eCommerce Directive 2000<sup>1</sup> for the purposes of article 17 of this Directive, as outlined in article 17(3) and clarified in recital 65.

The overall objective of article 17 is to foster the licensing of copyright-protected works by platforms to ensure that rightholders can obtain remuneration for the exploitation/use of their works. This could be accomplished by obliging online content sharing service providers, such as video-sharing platforms, to seek licensing agreements with rightsholders for the use of their works. These agreements need to cover the acts of users, including:

- when these users are not acting on a commercial basis or where their activity does not generate significant revenues; and
- within the limits of the licence granted to the service, not beyond those limits.

Where no licensing agreement is reached, article 17(4) outlines that the platform would be liable for any unauthorised acts of communication to the public, where infringing content is uploaded by its users, unless it can demonstrate that it:

1. Makes its best efforts to obtain authorisations for these uploads from the rightsholders;
2. Makes its best efforts, in accordance with high industry standards of professional diligence, to ensure the unavailability of specific protected content for which

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<sup>1</sup> Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce); OJ of 17.7.2000 L178/1-L178/16; <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031&from=EN>

rightholders have provided them with relevant and necessary information to identify those works; and

3. Acts expeditiously upon receiving notice from rightsholders to disable access to or remove content and makes best efforts to avoid future uploads of that content.

The EU Commission will undertake stakeholder dialogues, in conjunction with Member States, to discuss best practises for cooperation between platforms and rightholders. The EU Commission will use these dialogues and other consultations with stakeholders to issue guidance on the application of article 17, in particular regarding the cooperation referred to in article 17(4) outlined above. This guidance will be useful to Member States, including Ireland, in facilitating and regulating that cooperation between relevant stakeholders at national level.

Article 17(5) outlines the conditions applicable to allow for a proportional approach to be taken when determining whether a platform is following the obligations contained in article 17(4). Recitals 66-69 provide further detail on the intention of these articles. This includes considering such factors as the size of the audience that platform reaches and the availability of suitable and effective means to comply with these obligations. There is also a carve-out for micro and small enterprises based on two conditions:

1. Services to the public have been available for less than three years
2. Audience figures are less than 5 million per month on average (this is calculated based on the previous years' figures).

Micro and small enterprises meeting conditions 1 and 2 who have not concluded a licence agreement have an obligation, when notified by the rightsholder, to remove/disable access to the copyright protected work.

Micro and small enterprises which do not meet the second condition, i.e. that have audience figures higher than 5 million per month on average, and who have not concluded a licence agreement, have an obligation, when notified by the rightsholder, to remove/disable access to the copyright protected work and to prevent further uploads of the work.

Article 17(8) clearly indicates that the application of this article shall not lead to any general monitoring obligation. However, there is a transparency obligation on platforms to provide rightholders with adequate information, on the request of those rightholders, on the functioning of their practises in relation to their efforts to obtain authorisations, to ensure the unavailability of those works where they have been provided with the necessary information, and to act expeditiously on receipt of notices from rightholders to remove unauthorised content.

In addition, other safeguards within this article include that it shall not affect legitimate uses (such as caricature, parody or pastiche, or quotation for criticism or review); that it shall not lead to the identification of individual users except in accordance with GDPR and the E-Privacy Directives; and that the cooperation envisaged between rightholders and platforms shall not result in the prevention of the availability of content which does not infringe copyright.

Article 17 introduces a new mandatory exception for parody, pastiche and caricature. While Ireland has recently introduced a similar exception in its national legislation in the Copyright and Other Intellectual Property Law Provisions Act 2019, article 17 harmonises that exception for user generated content. This will ensure greater consistency of the application of this important “freedom-of-speech” exception throughout the entire European Union.

Platforms are obliged to put in place effective and expeditious complaints and redress mechanisms to address disputes over the removal of content that has been uploaded. This includes cases of unjustified disabling of access to or removal of user content. This mechanism is to be put in place by the platforms who must process complaints without undue delay. Rightsholders requesting the removal of content must justify their reasons for their requests. Decisions on the disabling of access to or removing of content should be subject to human review. There is also a requirement for an out-of-court redress mechanism to be available to users.

## **Claims to Fair Compensation; Article 16 (Recitals 60-63)**

Article 16 is an optional provision, which provides that where Member States have a system of compensation for the use of copyright-protected works under an exception or limitation to copyright, a transfer of license from an author to a publisher (e.g. press, books, scientific publications and music) would be a sufficient legal basis for the publisher to claim a share of any compensation arising from the use of the work under an exception or limitation. This provision is without prejudice to national arrangements regarding public lending rights.

This is a voluntary provision for Member States and is not intended to oblige Member States that do not currently have such compensation-sharing schemes to introduce them. Ireland does not currently have a compensation-sharing scheme relevant to this provision.

## **Other Provisions; Article 13 (negotiation mechanism) and article 14 (copying of visual works of art in the public domain) (Recitals 51-53)**

This consultation is also seeking input on articles 13 and 14.

Article 13 establishes a negotiation mechanism for parties seeking to conclude agreements on the making available of audio-visual works on video-on-demand platforms. Where the parties face difficulties relating to the licensing of rights, they may seek the assistance of an impartial body or mediators. This body can be newly established for the purposes of this Directive or can be an existing body that fulfils the conditions established by this Directive. Participation in this negotiation mechanism is voluntary and does not affect the contractual freedom of any of the parties involved. Article 13 will help facilitate the licensing of rights and encourage the availability of European content on video-on-demand platforms. Views of stakeholders on how such a negotiation mechanism could operate in Ireland, including the potential for using any existing bodies or mechanisms in the sector and the expected burden of activity and additional costs arising, would be welcomed from relevant stakeholders.

Article 14 clarifies that any material resulting from copying a work of visual art in the public domain will not be subject to copyright, unless that resulting material is the author's own intellectual creation. This would prevent people from claiming the copyright in works that have already entered the public domain. This harmonised provision will help address cross-border legal uncertainty in the EU and ensures that faithful reproductions of works in the public domain can be used to promote culture and cultural heritage.

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## B. Information on Consultation Process

### 1. Submissions

The Department invites submissions on the transposition of this Directive into Irish law in general, and on the issues raised in questions 1-16 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. In particular, we would welcome information based on practical experience, case law, or similar legislation in other jurisdictions. Should you have any information relevant to **articles 13-17** 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 to [copyright@dbei.gov.ie](mailto:copyright@dbei.gov.ie). Submissions to this consultation may be posted to:

Copyright Directive Consultation  
*Consultation Paper No. 1*  
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 the 23<sup>rd</sup> October 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.

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## C. Questions

### General

1. Name (and contact details if you wish)
2. Are you:
  - A rightsholder;
  - a user;
  - a content-creator;
  - a platform (in particular an “online content-sharing service provider”, as defined by Article 2(6) of the Directive);
  - a press publisher;
  - an organisation representing the rights of rightsholders (such as a collective management organisation); or
  - other – please describe?
3. If you are providing a submission on behalf of an organisation, who does your organisation represent?
4. Do articles 13-17 of the Directive on Copyright in the Digital Single Market impact or place obligations on you/your organisation directly?

### Article 13

5. Do you believe that there is any body or mechanism currently established in Ireland that can fulfil the duties obliged by this article?
6. Do you feel that the Arbitration Act 2010 or Mediation Act 2017 is sufficient in achieving the goals of this article?

### Article 14

7. Do you have any views regarding the transposition of Article 14?

### Article 15

8. What do you consider constitutes “very short extracts” for the purposes of this article?
9. How do you consider Article 15(5), which obliges the share of revenues between publishers and authors, interacts with existing Irish legislation, in particular Section 23(1)(a) of the Copyright and Related Rights Act 2000 which establishes that the copyright in a work made in the course of employment is first owned by the employer?
10. Do you envision any interaction or overlap between Article 15 and the existing protection for typographical arrangements under Irish copyright law?

## **Article 16**

11. Do you favour Ireland transposing this voluntary provision? If so, why? Please provide evidence or statistical data to support your view
12. Given that Ireland does not maintain a system of copyright levies, how do you consider that this provision could operate in conjunction with existing Irish law?

## **Article 17**

13. How do you interpret the term “best efforts” as used in Article 17 of the Directive? Please refer to any relevant case law in Ireland or CJEU that interprets this concept in your answer. What do you consider to constitute “best efforts” for the purposes of Article 17(4) in particular?
14. How do you consider the new exception for quotation, criticism, review, caricature, parody, and pastiche in Article 17(7) will interact with existing Irish law? For instance, do you believe that the new fair dealing exception for caricature, parody or pastiche recently introduced in Section 13 of the Copyright and Other Intellectual Property Law Provisions Act 2019 would be sufficient to cover the equivalent exception in Article 17?
15. Is the Arbitration Act 2010 sufficient to act as an “out-of-court redress mechanism” to settle disputes as obliged under Article 17(9)?

## **Other**

16. Do you have any other issues you wish to raise related to the transposition of Articles 13-17 specifically?