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Department of Business,
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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 2-7

Consultation Paper No. 2

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A. Overview

1. Background

On 14 September 2016, the European 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 is publishing 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 second in the series, is seeking input on the transposition of **Articles 2 to 7** of the Directive.

The Department published the first consultation paper seeking views on the Value Gap provisions (Articles 13-17) on Wednesday 25th September and that consultation will close on Wednesday 23rd October next.

The Department will also publish two further consultation papers in the coming weeks seeking input to the transposition of other areas covered in the Directive, namely:

- 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 licence 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 licence related to their works should they not be exploited in a reasonable timeframe.

3. Overview of Articles 2-7

Article 2 provides a list of important definitions, with some additional information and clarification on these contained in various recitals some of which are highlighted in brackets below:

- 'research organisation' (recital 12);
- 'text and data mining' (recital 8);
- 'cultural heritage institution' (recital 13);
- 'press publication' (recital 56);
- 'information society service' (recital 62); and
- 'online content-sharing service provider' (recital 62).

Text and Data Mining – Articles 3 and 4, Recitals 8 to 18

Text and data mining involves using computerised analytical techniques to analyse data. Article 2 defines this as “*any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations*”.

As research is increasingly carried out with the assistance of digital technology, there is a risk that the EU's competitive position as a research area will suffer. Therefore, articles 3 and 4 are aimed at addressing the legal uncertainty concerning text and data mining by providing mandatory exceptions, which will allow research institutions support innovation through text and data mining activities.

Article 3 introduces a mandatory exception which will allow research organisations and cultural heritage institutions use text and data mining techniques, on works to which they have lawful access, solely for the purposes of scientific research. Recital 14 provides guidance that such lawful access can include open access policies or contractual arrangements etc.

Recital 11 provides this exception extends to private partners conducting text and data mining for the purposes of scientific research in the framework of a public-private partnership with a research organisation or cultural heritage institution.

Recital 12 clarifies that the term 'scientific research' includes both natural and human sciences. Generally, research organisations must act either on a not-for-profit basis or in the context of a public-interest mission recognised by the state; this definition does not include organisations upon which commercial undertakings have a decisive control or might have preferential access to the results of the research.

Article 3(2) allows for copies of the works to be retained by the researchers for the purposes of the scientific research and also for verification purposes. Copies of such works must be stored with an appropriate level of security and Member States shall encourage relevant parties to define commonly agreed best practices to facilitate this exception. Recital 15 clarifies that while such measures are necessary, they must remain proportionate.

Separately, article 3(3) allows for rightsholders to be allowed to apply reasonable security measures to the networks and databases where works are hosted to secure the original work, when there is a risk that the security and integrity of their systems or databases could be jeopardised. Recital 16 indicates that these measures should also be proportionate to the risks involved, not going beyond what is necessary to achieve the objective and not undermine the effective application of the exception.

Article 4 creates an obligation to allow for reproduction of lawfully accessible works for the purposes of text and data mining, with recital 18 giving an indication of the other purposes for which text and data mining techniques can be applied beyond scientific research.

Such reproductions may be retained for as long as necessary for the purposes of text and data mining, under article 4(2). There are no specific conditions regarding security measures on the storage of the copies for this purpose.

This exception will apply provided the right has not been expressly reserved by the rightsholder and shall not affect the application of Article 3. Article 4(3) makes provision for rightsholders to explicitly reserve their rights, with recital 18 giving examples of how rightsholders can do so “in an appropriate manner”.

Recital 17 outlines that the nature and scope of the two exceptions for text and data mining purposes are limited and therefore any potential harm created to rightsholders through this exception would be minimal. As a result, there is no mechanism for Member States to provide for compensation to rightsholders under either of the text and data mining exceptions. Ireland does not currently have any system for compensation of rightsholders in relation to text and data mining activities.

Education: Digital and cross-border teaching activities – Article 5 and Recitals 19 to 24

Article 5 introduces a mandatory exception to allow digital use of works for the sole purpose of illustration and education, provided such use:

- a) takes place under the responsibility of an educational establishment, and
- b) is accompanied by indication of the source unless indication is impossible.

This exception covers the digital use of works for education at all levels of education, including primary, secondary, vocational and higher education. It applies to digital works for the purposes of illustration for teaching, and Recital 20 outlines the issues regarding the “non commercial purpose” of such teaching, including that the organisational structure and means of funding of the educational establishment are not decisive criteria.

Recital 21 gives some guidance on what constitutes “illustration for teaching” in enriching and complementing teaching activities and how, in most cases, this would involve the use of parts or extracts of works only rather than entire works. Ireland already has a limit in the Copyright and Related Rights Act 2000 (as amended) that not more than 5% of a work may be used in a calendar year for the purposes of illustration for teaching. It also clarifies that this exception

should also be understood to cover the specific accessibility needs of persons with a disability in relation to illustration for teaching purposes. Recital 22 gives some additional information on what is understood by “digital uses” both within the classroom or other venues through digital means and for teaching at a distance through a secure electronic network.

Article 5(2) and recital 23 outlines that, where suitable licences for the digital use of such works for the purposes of education are easily available in the market, Member States may provide that the exception excludes specific types of works, such as material that is primarily intended for the educational market. Any use of material in accordance with law deriving from this provision shall be deemed to occur solely in the Member State where the educational establishment is established. There are licences for the use of various types of works for educational purposes available in Ireland from licensing bodies representing those rightsholders and educational establishments are obligated to make use of these licences. These licences already include provision for digital use in education.

Article 5(4) allows Member States to provide for fair compensations to rightsholders for use of material under this exception. Recital 24 indicates that, in setting the level of fair compensation, due account should be taken of factors including the educational objectives within the Member State and of the harm to stakeholders. The creation of a compensation scheme should not create an administration burden on educational establishments. There are currently no fair compensation schemes (levies) in operation in Ireland in relation to copyright exceptions, however there are licensing schemes in operation for the use of different types of works in relation to education. In any consideration of whether a compensation scheme should be introduced, significant information on the costs involved and the levels of harm to stakeholders would be necessary to inform that process.

Preservation of Cultural Heritage – Article 6 and Recitals 25 to 31

Article 6 introduces a mandatory exception to allow cultural heritage institutions to make copies, in any format, of material permanently in their collections for the purposes of preservation of that material.

Recital 27 outlines that the scope of application of this exception is technologically neutral, so that the preservation can be made by the appropriate tool, means or technology, in any format or medium. Recital 28 outlines the awareness of legislators that cultural heritage institutions may not have the necessary technical means or expertise to preserve their collections themselves and that this preservation may need to be undertaken by third parties on their behalf. Recital 29 provides further detail on what works can be considered to be part of a permanent collection.

Common Provisions

Article 7 provides that any contractual provision contrary to the allowances provided for in Articles 3, 5 and 6 shall be unenforceable. Article 5(5) of the EU Directive 2001/29/EC¹ (“InfoSoc”) shall apply to the exceptions and limitations provided for under this Title. The first, third and fifth subparagraphs of Article 6(4) of the EU Directive 2001/29/EC (“InfoSoc”) shall apply to Articles 3 to 6 of this Directive.

¹ DIRECTIVE 2001/29/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

B. Information on Consultation Process

1. Submissions

The Department invites submissions on the transposition of the Copyright Directive into Irish law in general, and on the issues raised in questions 1-14 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 welcome information based on practical experience, case law, or similar legislation in other jurisdictions. Should you have any information relevant to **Articles 2-7** 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

Submissions to this consultation may be posted to:

Copyright Directive Consultation
Consultation Number 2
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 Thursday 14th November 2019**.

Any questions regarding the consultation can be emailed to 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
 - a Research Organisation
 - an Educational Establishment
 - other – please describe?
3. If you are providing a submission on behalf of an organisation, who does your organisation represent?
4. Do articles 2-7 of the Directive on Copyright in the Digital Single Market impact or place obligations on you/your organisation directly?

Article 3

5. Do you consider that the-text and data mining provision, contained in section 14 of the Copyright and Other Intellectual Property Law Provisions Act 2019, makes sufficient provision for this article? If not, what further provision do you think is necessary in relation to scientific research?
6. What do you consider to be “an appropriate level of security” for copies made under this exception, to fulfil article 3(2)? Are there specific details necessary to consider in this regard, and why? Are there “trusted bodies for the purposes of storing such copies”, as outlined in recital 15, that could be used in Ireland?
7. Will it be necessary to outline in greater detail what is necessary to ensure the security and integrity of the networks and data bases containing the original work to transpose article 3(3)? Is there an industry standard to refer to, or what specific matters need to be included? How will these measures remain proportionate, as outlined in Recital 16? What measures may rightsholders take to protect their work while ensuring access for researchers?
8. What would you consider to be the best practices to facilitate the provision in article 3(4)? Please include suggestions for rightsholders, research organisations and cultural heritage institutions to reach agreement on best practises, including any existing stakeholder dialogue mechanisms. Please also indicate whether your answer is from the perspective of a rightholder, a research organisation, a cultural heritage institution or another stakeholder.

Article 4

9. How do you expect this exception will operate with existing law? Is it necessary to implement any further measures beyond the text and data mining provision created in section 14 of the Copyright and other Intellectual Property Law Provisions Act 2019? If so, please give details of those additional measures necessary.
10. How should the necessary duration of retention of reproductions and extractions for the purposes of text and data mining be determined as allowed in article 4(2)? Please explain your reasons for that duration, including any specific experience you have or industry norms in this regard.

Article 5

11. In your opinion, does the new exception for digital and distance education in sections 15 and 31 of the Copyright and other Intellectual Property Law Provisions Act 2019 fulfil the requirements of this article? If not, what further provision needs to be made?
12. In your opinion should Ireland introduce compensation for rightsholders for the use of their works or other subject matter as provided for under article 5(4)? Please provide evidence or statistical data to support your view.

Article 6

13. Do you consider that the new exception for preservation of cultural heritage in section 18 of the Copyright and other Intellectual Property Law Provisions Act 2019 fulfils the requirements of this article? If not, what further provision needs to be made?

Other

14. Do you have any other issues you wish to raise related to the transposition of articles 2-7 specifically?