

Transposing the Directive on Copyright in the Digital Single Market

A Guide for Libraries and Library Associations

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**International
Federation of
Library
Associations and Institutions**



The European Union's Directive on Copyright in the Digital Single Market¹ (Directive (EU) 790/2019, also known as the 'DSM Directive') contains a number of important steps forward for the library and cultural heritage field.

To make the most of these – as well as to avoid the harm that other provisions risk causing – the way in which national governments 'transpose' the new rules (i.e. incorporate into national law) will be crucial.

This guide is intended to support advocacy by library associations, libraries and individual library and information workers interested in helping engage in this process, and so do the best for libraries and their users.

While this guide is primarily about transposition of the Digital Single Market Directive, its transposition may also provide an excellent opportunity to pass further copyright reforms for the benefit of the library, archive and museum community.

We therefore recommend that, in addition to the provisions included in this Guide, that libraries advocate to governments to update their copyright laws for the digital age and bring about full harmonisation across the EU by introducing any optional exceptions² from Article 5 of the Information Society Directive 2001/29/EC that have not already been transposed into their national laws.

This is an advocacy guide, **not** formal legal advice, and so should be read as such. National circumstances will vary, and so we encourage you to ask questions and engage with library organisations active at the European level.

It is produced purely for the benefit of those advocating in favour of broad and flexible copyright provisions for libraries, and is not openly available online. We ask you to be careful in distributing it.

In terms of its organisation, the guide goes through the Directive, Article by Article, looking at those which are most relevant for libraries. Other guides are available – notably those created by Communia and Copyright4Creativity, which will take a different angle and cover different elements, but which seek to ensure the same overall goals.

In each section, there is a:

- Summary, including a best- and worst-case scenario
- An introduction to what the Article says
- An exploration of how the decisions made at the national level may or may not improve matters

This guide is only one part of the support that European library associations plan to offer to their members. Through shorter briefing notes, webinars regular calls and other background materials, we will be looking to provide additional help at key moments in the process. You can help by ensuring the following:

- That you know who is responsible for implementing the Directive nationally
- That you know where to find information about how to implement the Directive

¹ Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC, <https://eur-lex.europa.eu/eli/dir/2019/790/oj>

² See 'Limitations and exceptions in EU copyright law for libraries, educational and research establishments: a basic guide.' LIBER [2016] <https://libereurope.eu/blog/2016/10/14/basic-guide-eu-copyright-limitations-exceptions-libraries-educational-research-establishments/>

- That you have contacted the relevant ministry or agency, and that they recognise libraries as key stakeholders
- That you are invited to attend relevant meetings, or to respond to consultations, and that you do this on time
- That you are aware of other stakeholders working on the implementation of the Directive
- That you follow stakeholder dialogues at the national level of key elements of the Directive.

To receive further updates, as well as invitations to calls, you can join our mailing list:
<https://infoserv.inist.fr/wws/info/eu-dsm>.

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Text and Data Mining (Articles 3 and 4)

Articles 3 and 4 of the Directive introduce two new mandatory exceptions to copyright to allow for text and data mining – the automated analysis of texts, databases and other materials. These look to respond to the uncertainty around whether and how copyright laws across the European Union currently permit or forbid mining activities. These Articles respond to calls made by European library groups (in particular LIBER), national libraries and research libraries over many years that the right to read should be the right to mine.

The two exceptions cover, respectively, text and data mining of legally accessed works by libraries³ and research institutions for commercial and non-commercial research purposes (Article 3), and all other text and data mining of legally accessed materials (Article 4). The relevant Recitals are 8-18.

Best case scenario:

Article 3. The new rules offer clear permission for libraries and their users to carry out text and data mining on all legally accessed materials, either on-site or remotely, including through public-private partnerships. There are no further restrictions intended to ensure security of databases, or particular rules around the safe storage of datasets.

Article 4. All other users also benefit from a broad exception, with the possibility for rightholders to opt out, strictly defined and easy for users and machines to understand and respect.

Member States take the opportunity of revisiting copyright law during the transposition of the Digital Single Market Directive to confirm broader research exceptions.

Worst case scenario:

The new rules allow only limited text and data mining activities, and exclude research carried out in partnership with private actors, limiting the possibilities for universities and others to form partnerships.

Researchers are forced to carry out mining activities within library buildings, and obliged to reveal their personal identities. Disproportionate security provisions mean that researchers downloading more than just a few papers are regularly blocked with no quick resolution when data scientists are blocked.

There are strict rules around secure storage of data which create additional costs and lead to many datasets simply being deleted, cutting across existing Research Funder mandates.

The wider exception allows for broad and non-automated means of exclusion of works from mining activities, meaning that innovative companies simply do data mining outside the EU.

A1. What Article 3 Says

Article 3 creates a new mandatory exception to copyright, the right to control extraction of information from works subject to copyright and the *sui generis* database right as well as the right to create digitised copies of legally accessed analogue works, in order to carry out text and data mining for the purposes of research.

³ Article 3 allows all publicly accessible cultural heritage institutions to data mine but the interests of brevity this guideline will use the word library to also mean archives, museums, galleries, film institutes etc.

The **beneficiaries** of the new exception in Article 3 are research organisations and cultural heritage institutions.

Research organisations are defined as being universities (including university libraries), research institutions or other bodies whose primary goal is to carry out scientific research.

The exception also covers institutions providing education involving scientific research (implying that institutions focusing mainly on teaching may also be able to benefit), research institutes and hospitals. Recital 12 clarifies that within the meaning of this Directive ‘scientific research’ covers both natural sciences and human sciences.

The Directive does place some limits on this, suggesting that research organisations need to:

- Be not-for-profit (i.e. either to be non-commercial, or to reinvest any returns in further research), **or**;
- Have a recognised public interest mission (i.e. through public funding, recognition in law, or recognition in public contracts);

The research organisation does need to ensure that a commercial for-profit company or other actor which has a decisive influence on the organisation (as a member or shareholder) does not enjoy preferential access to the results of the mining activity. In such instances it could not rely on Article 3, just Article 4 (see below).

A cultural heritage institution is defined as being a ‘*publicly accessible library or museum, an archive or a film or audio heritage institution*’. Recital 13 adds that the type of works or subject matter in the collections of an institution should not matter, and that national libraries and archives, and also educational establishments, research organisations and public sector broadcasting institutions as far as their archives and publicly accessible libraries should also be included in the definition.

The Directive clarifies in its recitals that the exception applies not only to the research organisations or cultural heritage institutions, but also to ‘the persons attached thereto’. This is not defined, but clearly implies that any member of staff, registered student or accredited user should be able to enjoy the new right also.

As concerns the **territorial scope** of the new right, as the exception is mandatory across the European Union, it makes it easier for libraries to support cross-border collaboration involving text and data mining.

First of all, the definition of a person who is ‘attached to’ a beneficiary institution will need to include researchers and other people from other institutions involved in collaborations. Secondly, the rules applying to the storage of datasets created as part of the research are defined nationally, which risks creating differences. (Please see below for more on this.)

On the subject of the **type of works** covered, the Directive is broad, referring only to ‘works or other subject matter’. The Recitals state that this includes databases, press publications, sounds and images, as well as text.

Moreover, the Directive is clear that all works to which there is legal access are covered, meaning that as well as works in a library’s permanent collection, it is also possible to mine works accessed through a subscription, and anything openly available on the open internet (including of course open access publications).

Importantly, the Recitals do note that when pure facts or data are mined, or where mining does not involve any form of reproduction, there is no need for the exception as there is no copyright issue in the first place.

As concerns **how the exception is used**, the Directive leaves this question open. There were efforts by rightholders during the negotiation of the Directive to promote their own platforms (such as CrossRef) as the solution to the problems identified.

However, these proposals were rejected on the basis that researchers wanted to choose their own tools to carry out TDM, that they didn't want to risk information about their activities being gathered by rightholders, and that nothing was preventing rightholders promoting their own products on merit.

The Recitals make it clear that in a situation where someone wants to carry out TDM under the exception but does not have the tools or skills to do so, they can turn to a private provider to do this. It will be important to protect this flexibility in national transpositions of the Directive.

As concerns the **security and integrity of networks and databases**, the Directive underlines that any measures taken should not go beyond what is necessary. As suggested in the Recitals, this could be as simple as user authentication to verify that the user does indeed have legitimate access.

The Directive also includes provisions concerning means of ensuring the security of databases, and for the secure storage of works used for text and data mining. On the **safe storage of data**, despite efforts by rightholders to oblige the deletion of datasets created in the course of text and data mining, the final version of the Directive only talks about the need to save such datasets securely. It does not prescribe how this should happen, but suggests that there should be discussions at national level about how safe storage can be carried out.

The Recitals do suggest that one possibility could be to name 'trusted bodies', although this is not obligatory, and it is made clear that any rules should not be disproportionate. We believe that any suggestion that copyright law should regulate where data is stored is strongly opposed, as it cuts across research funder best practice, which leaves this important decision to researchers who are aware of the many variables that may affect where to store data. The Recitals also suggest that it may only be in 'certain cases' that the datasets are kept, which is a potential concern.

Importantly, the beneficiaries of the Article are protected against **contract terms** which would prevent them from making use of the provisions of this Article. As highlighted in Article 7(1) of the Directive, such terms are non-enforceable. In other words, they can simply be ignored.

As concerns **technological protection measures**, while these no longer enjoy absolute protection under law, there remains some uncertainty as to how a beneficiary should go about challenging a technological protection measure which prevents them from making use of an exception.

The Article itself does not offer any detail, but the Recitals suggest reflecting Article 6 of the Information Society Directive⁴ – i.e. that rightholders should have the option to take voluntary measures before a beneficiary asks the public authorities to act, as well as having the key say in how access is provided.

However, depending on how these provisions are interpreted, this could cause unreasonable delays to researchers and others. We believe that any issues where researchers are prevented from access must be resolved by rightholders and governments within 72 hours, or financial penalties for delays where appropriate should be imposed. e.g. The users, or their institution, have paid for access.

⁴ 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, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0029>

The Directive is clear that there should be **no remuneration** paid for the use of the exception under Article 3, arguing that the scope of the Article is sufficiently narrow as to mean that any harm to rightholders would be minimal.

A2. What Article 4 Says

Article 4 of the Directive extends the text and data mining exception under Article 3 to all other users. It is a late addition to the Directive, following lobbying by research libraries and others.

The **beneficiaries** of the Article are anyone who has legal access to a work, either through payment (or subscription), or where it is freely available. Activities that would not be allowed under Article 3 (i.e. because they are not carried out by a research organisation covered by that Article) are therefore able to fall back on Article 4. For example, Article 4 applied to text and data mining carried out by a for-profit organisation not deemed to be fulfilling a public interest mission.

While the **activity covered** is still text and data mining, Article 4 suggests that this implies exceptions to a wider range of rights than under Article 3, including not only extraction and reproduction of databases, reproduction in general of works and press publications, but also the mining of software (a point that curiously isn't mentioned under Article 3).

The Recitals do also suggest that there may be situations where the temporary reproduction exception (which allows for the caching of webpages) may be an option also in some cases although when such reproductions are temporary and have no onward commercial value.

As mentioned above, one key condition for the application of the exception is whether the work is lawfully accessed, either through payment of any relevant fees, or because it is freely available online.

However (and unlike in Article 3, where it is not possible for a rightholder to use contract terms to prevent use of a work), this is not the case under Article 4. The Article notes that if the rightholder has 'expressly reserved' the right to carry out text and data mining 'in an appropriate manner', then the exception cannot be used.

There are some clues as to what 'in an appropriate manner' means. In the Article itself, it notes that one example could be to make this reservation clear in a machine-readable format for works that are available on the open internet. The Recitals are in fact clearer, underlining that such reservations must be machine-readable when the material is accessed across the open web, and can be placed in relevant metadata, or the terms and conditions associated with the content accessed.

We believe that the only option for rightholders to prevent access to materials on the open web should be the use of robot.txt protocol at this point in time. Further protocols may be developed in the future, but at this time robot.txt protocol is flexible enough to allow a website, or constituent parts of a website to be indexed but not mined. It is also sophisticated enough to specify who can mine, and who cannot.

For other content (i.e. that accessed under contract), it is possible to include contract terms that prohibit text and data mining, but as the recitals make clear this should only be enforceable when the material is not available across the open web, which is usually when there is more of a one to one relationship between licensor and licensee .

It is also possible to follow the relevant process to remove or circumvent **technological protection measures**, although it seems likely that a rightholder, when challenged, would then use the possibility to reserve the right to mine their works.

Concerning **geographical application**, given the risk of differentiated application from one country, a decisive factor for Article 4 is less where the researchers are physically based, but more to do with which institution governed by which Member State law is the data scientist affiliated to. The directive however is silent on jurisdictional clashes where researchers are based in one or more countries, but the library to which they have access is in another EU jurisdiction.

The Article also contains a provision underlining that it should be possible for anyone carrying out text and data mining to **retain a copy of the dataset** for as long as necessary. There is no definition of what this may mean, making it possible to argue that retention could be long-term, if properly justified. Nonetheless, the difference between this and Article 3 implies that there may also be situations where a rightholder can demand that the datasets be deleted. Clearly, it will be important to avoid this eventuality.

Again unlike in Article 3, there is no suggestion that there should be any **remuneration** for the use of this right. Any attempt to impose a remuneration obligation on openly accessible content on the internet is likely to be complicated, if not impossible (for example through the offering of specific licences for this purpose by collective management organisations (CMOs)).

We believe that for this reason, as well as for reasons of international competition with countries like the US, Israel and Japan, and for the confusion that will arise when not for profit organisations work under Article 3 work with for profit organisations under Article 4, this exception also should not be subject to remuneration.

Finally, reserving the right to carry out text and data mining **should not affect other rights**, in particular the temporary reproduction right (caching exception), or Article 3.

B. Improvements at the National Level

There are a number of areas where the room for manoeuvre left to Member States means that libraries and cultural heritage institutions will need to be active in promoting a transposition that meets their needs. Crucial areas are as follows:

Article 3

In applying Article 3, a first key step will be to ensure that **the definition of beneficiaries is as broad as possible**. It is important to be clear that when libraries and other research organisations or cultural heritage institutions are working with others in the context of public private partnerships, these should not face unnecessary restrictions.

The recitals state that the definition of where a research organisation or cultural heritage institution has a public mission should be wide (i.e. receiving public or charitable funding), and that it is only where a single commercial partner has a dominant stake that the exception does not reply.

A second key issue will be to ensure that **provisions around security** are kept proportionate. Therefore, libraries should advocate against the application of any security measures beyond standard user authentication and verification, and even then insist that this should not then come at the expense of the privacy of users.

Similarly, it is important to ensure that **stakeholder dialogues around what constitutes safe storage** of datasets do not interfere with existing Research Funder data management practices which leave this up to researchers. Moreover, libraries should strongly resist any move to suggest that not all datasets need to be saved. Both these are decision for researchers, not for legislators.

It should be made clear in the implementation that **contract terms** which look to prevent research organisations and cultural heritage institutions and their users from carrying out text and data mining are non-enforceable, and that libraries can simply ignore them.

As concerns the provisions on **technological protection measures**, national transposition should ensure that libraries and library users should not have to wait for more than 72 hours to gain access to materials they wish to mine. At best, the legislation itself should stipulate that rightholders remove relevant technological protection measures, meaning that libraries can themselves immediately remove any that remain. At worst, a 72 hour period should be set for action by rightholders and public authorities to resolve the issue if the rightholder does not do so voluntarily.

Article 3 also currently does not create an exception for remote researchers to access digitised analogue materials. Whereas data scientists can mine most subscription content and all websites where their workflow and data mining infrastructure is located, without an exception introduced under Article 5(3)(a) of the Information Society Directive allowing remote access for the purposes of scientific research, digitised analogue items cannot be mined by researchers without physically visiting the premises. This frustrates the entire purpose of the exception and we believe should be rectified by Member State governments.

Libraries and researchers should also push for clearer laws on how to share the results of text and data mining. Where the results do not contain any *sui generis* database rights or copyright from the original, sharing the results are not controlled by the law. However, where they do, we don't believe the quotation exception is flexible or clear enough as it stands and excludes unpublished works. To rectify this, as is the case in Japan, we believe that an exception under Article 5(3)(a) of the Information Society Directive should be created to allow the sharing of results, as long as they are not substitutable for the original copyright works.

Article 4

To as large an extent as possible, the transposition of Article 4 should mirror that of Article 3. This will allow for maximum simplicity in implementation and user understanding, for example for university spin-outs and the knowledge transfer agenda. This applies both to the definition of the right, to provisions around the **safe storage** of data, and to the prohibition of remuneration.

Whereas the Digital Single Market Directive allows rightholders to **opt out** of having their works mined under Article 4 such opt-outs should be kept as exceptional and automated as possible.

Member States should make it clear that broad text-based (i.e. human-readable) provisions such as 'all rights reserved' do not apply in this case, and oblige use of the (machine-readable) robots.txt protocol in order to ensure compliance with the directive. Away from the open web, where text and data mining may be prohibited by contract terms, these need to be made explicit in order to help those engaged in text and data mining understand what is possible and what is not.

General

In transposing Articles 3 and 4, there is an opportunity to address broader issues in research exceptions. For example, if there currently is no research exception, or where this is not adapted to the digital age (i.e. through limitations on numbers of copies, or to works held on library premises), libraries can call for improvements to be made.

In addition to a broad research copying exception, it is possible to introduce exceptions allowing for document supply (including in digital form) and on-site consultation of digitised works in the library's collections. Where not already achieved within a Member State, libraries should take the



opportunity of this legislation window to push for the full implementation of as many research and library related exceptions as allowed for under the Information Society Directive.

Libraries and research groups should also follow the lead of Belgium, Portugal, UK and Ireland and strongly request that all existing and future education, research and cultural heritage organisation exceptions in Member State law that are not already subject to protection from override by contract terms (e.g. 'dedicated terminals' exception in these cases) are protected from contract override as a matter of priority.

Article 5: Use of Works in Teaching Activities

Article 5, entitled *Use of works and other subject matter in digital and cross-border teaching activities*, mandates that Member States have to adopt a provision to allow the use of works or other subject-matter⁵ in digital and cross-border teaching activities. Member States have to adopt an exception; however they can decide that for certain uses, or for certain types of works, a licence applies instead. See also Recitals 19-24.

Best case scenario: a non-remunerated exception is adopted, applying both to digital and non-digital uses with licences not given priority, facilitating the use of works for illustrating for teaching purposes. Libraries are included within the definition of educational establishments.

Worst case scenario: the country chooses to apply a licence to most uses, licensing conditions are inadequate making it impossible (or expensive) to use works for teaching, the exception for the remaining uses is remunerated and there are differing rules for digital and non-digital uses.

A. What Article 5 Says

1. The exception

The exception relates to digital and cross-border teaching activities. The exception covers uses made “*through digital means, for example electronic whiteboards or digital devices which might be connected to the internet, as well as uses made at a distance through secure electronic environments, such as in the context of online courses or access to teaching material complementing a given course*”⁶. The Article does therefore not apply to non-digital activities but does allow the digitisation of analogue materials in order to undertake the activities outlined in Article 5. Uses can be digital and/or cross-border.

There is no limitation in terms of the **type of work**, and both works, and “other subject-matter” (meaning things protected by related rights, like databases, sound recordings, film/video and broadcasts) are included. It can be a work in a physical or digital format, although the scope of the Article is limited to online learning and therefore in practice it will most likely primarily apply to digital formats or the broadcast of analogue materials.

The **use** of the work that can be made is the following:

- reproduction (e.g. copies), and communication to the public (i.e. display it in a secure electronic online environment)⁷,
- in the case of databases, reproduction, translation, adaptation, arrangement and any other alteration, communication to the public and extraction and/or re-utilisation of the whole or of a substantial part⁸,
- and regarding software, the Recitals also clarify that its distribution should be limited to its digital transmission.
- while there is a possibility to set a limitation on what quantity of a work can be used, even if such a limitation is not made, the three-step-test in EU legislation (which provides that

⁵ e.g. works protected by related rights.

⁶ Recital 22

⁷ The rights indicated in Articles 2 and 3 of the Information Society Directive (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), available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0029>

⁸ The rights indicated in Articles 5(a)-(b), (d)-(e) and Article 7(1) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (Database Directive), available at <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A31996L0009>.

exceptions should not negatively affect the legitimate interests of rightholders) would not allow, in practice, the use of the whole work if that were to have a negative impact⁹.

The Article sets a few **conditions** that need to be respected: that the source of the author's name is indicated, unless it turns out to be impossible, and that the purpose of the teaching activity is non-commercial.

Regarding the non-commercial condition, there is the clarification that *“the organisational structure and the means of funding of an educational establishment should not be the decisive factors in determining whether the activity is for non-commercial nature”*¹⁰. Therefore, a private school or university could still benefit from this provision.

A third and very important condition refers to **who** can benefit from the provision:

- The Article reads “under the responsibility of an educational establishment, on its premises or at other venues”. The teaching activity could therefore take place somewhere other than the educational establishment, like a library, museum or archive, but it needs to be under the direction of the educational establishment. A university library, school library or other library within the educational institution can be considered as a beneficiary to the provision. However, it would not be the case for teaching activities organised by other types of library.
- It applies to educational establishments at all levels, including institutions involved at the primary, secondary, vocational and higher education levels.
- Libraries could argue that they should be considered educational establishments in the transposition text and that they should also be classed as educational establishments.

For distance online-learning mostly, a **“secure electronic environment”** will have to be set up in a way that it is only accessible by the educational establishment's pupils or students and teaching staff.

According to the Recitals¹¹, *“secure electronic environments should be understood as teaching and learning environments access to which is limited to an educational establishment's teaching staff and to pupils or students enrolled in a study programme, in particular through appropriate authentication procedures including password-based authentication”*.

A secure electronic environment could be, for instance, an online space that requires a login to access to the materials, but could also be a cloud service, or e-mail.

The exception cannot be **overridden by contract**¹². Any contractual provision contrary to it, for instance in a licence that gives access to digital material, shall not be enforceable. As set out below, there are, however, situations where licences can take priority over the exception (see sub-section B below)¹³.

The exception can, on an optional basis, be subject to **compensation** for the use of the works. The Directive does not provide any guidance on what this compensation should consist of, it only says it should be “fair” and that *“in setting the level of fair compensation, due account should be taken, inter alia, of Member States' educational objectives and of the harm to rightholders”*¹⁴. It should be done in a way that does not create additional administrative burden to the educational institution.

⁹ Recital 6

¹⁰ See recital 20.

¹¹ Recital 22

¹² Article 7(1)

¹³ Article 5(2)

¹⁴ Recital 24

As for **geographical scope**, the activities covered by this Article benefit from a ‘legal fiction’ meaning that when an act of teaching takes place in one Member State, students are treated (legally) as if they are also in this State, regardless of where in the EU they actually are.

This is an interesting principle that could be applied to other parts of EU law in order to remove legal risk around cross-border (including online) activities. The Directive is, however, silent about activities that take place under the responsibility of multiple educational establishments, in different States. Where each State has different laws, this will raise questions.

2. The licence

Member States may choose to give preference to a licence-based solution for certain uses or certain types of work (or other subject-matter). The licence solution can apply to any type of work, and the Directive lists, as examples, “*material that is primarily intended for the educational market or sheet music*”¹⁵.

The licence should cover at least the same uses covered by the exception. However, if Member States chose to apply licences that only cover partially the uses allowed under the exception, “*all the other uses remain subject to the exception*”¹⁶.

Member States can only opt for a licence-based solution if suitable licences authorising the acts that the exception authorises (see above) and covering the needs and specificities of educational establishment are easily available on the market. Such licences should, for example, not cover uses which are unnecessary for schools but which lead to them being more expensive. Furthermore, Member States choosing that option for certain types of work and certain uses will need to adopt the necessary measures to ensure that the licences are “available and visible in an appropriate manner for educational establishments”¹⁷.

Member States should first decide whether they are going to give preference to licences at all (there is no obligation to do so). If they do decide to allow licensing to have priority, they should provide clear guidance regarding under which conditions an educational establishment can use the works under the exception and when it should be done under the licence, for example when a use goes beyond a certain percentage of a work or would not be in line with a definition of fair practice¹⁸.

B. Improvements at the National Level

An **exception** is a simpler, most likely cheaper and more straightforward option than a e-based solution. The more Member States adopt the exception, the more harmonisation we will have within the European Union, thus fulfilling one of the main objectives of the Directive. Licence-based solutions will inevitably fragment the legal regimes across the union. The exception allows for public interest activities to take place in a way that does not harm the interests of rightholders, and in any case the exception could not be interpreted in a way that does so. If an exception was applied, there would still be many additional services that publishers could provide, not covered by the basic public-interest activities that the exception addresses.

Member States can choose to not apply any licensing solution, and for all the reasons above, we recommend advocating for the adoption of an exception without conditions at the national level.

¹⁵ Article 5(2)

¹⁶ Recital 23

¹⁷ Article 5(2)

¹⁸ Recital 23

Moreover, Article 25 in the Directive establishes that Member States can choose to **maintain** and **adopt broader exceptions** from the Information Society Directive¹⁹ and from the Database Directive²⁰. The Information Society Directive gave Member States the possibility to adopt an exception to the rights of reproduction and communication to the public for the purpose of illustration for teaching²¹. There are now several possibilities:

- a) A good exception has already been adopted at Member State level when the Information Society Directive was transposed. In that case, we recommend that this exception is kept, and that the new one is aligned to it so that all teaching activities fall under the same legal regime. It would simplify situations where it is difficult to identify if an activity is using digital or non-digital material (sometimes it is both).
- b) No exception was adopted when the Information Society Directive was transposed. In that case, you can now push for it, and argue that the new exception needs to cover teaching activities using both digital and non-digital material, and that it should apply across borders in all cases.
- c) A restrictive exception was adopted when the Information Society Directive was transposed. In that case, there is an opportunity now for it to be expanded.

If the Member State decides to apply a **licence-based solution**, which might be the case since these already exist in many EU countries, there are several conditions mentioned in the Article that really need to be underlined:

- Suitable licences which are easily available on the market are required. There is no guidance in how “suitable” should be interpreted, and this vagueness is to some extent an opportunity to define at the national level what suitable licences would be. This is a key part of the Article, where availability, price, conditions and other aspects of licences for educational material can be addressed. As suggested above, one condition could be that licences do not cover activities which are not necessary for schools, or that they are not applicable for uses that can be defined as fair.
- Regarding the requirement of licences being “*available and visible in an appropriate manner for educational establishments*”, the Recitals of the directive give Member States an active role. It is their responsibility, if they opt for a licence-based solution, to ensure the availability and visibility of licences, with the objective of minimizing the administrative burden put on educational establishments. It is also worth bearing in mind that it will likely be the larger publishers which are able to establish and make the most of licencing platforms, risking harming smaller operations.

Member States do not have the obligation to **provide guidance** on when to apply the exception and when to apply the licence, although it is recommended in the Directive, and would be very useful to educational institutions. If such guidance is adopted, it is worth following its creation to ensure that they provide the best interpretation possible.

Member States can choose to make the exception subject to **compensation**. Since this is a possibility, and not a mandatory condition, we would recommend insisting on not subjecting the exception to compensation, given that we will be talking about school and university budgets most of the time.

¹⁹ 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, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0029>

²⁰ Directive 96/9/EC (see above)

²¹ Article 5(3) “Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: (a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author’s name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved”.

It is also worth noting that this compensation is for digital uses, not for uses under a broader exception that may exist in the Member States for non-digital educational uses. Clearly in those countries where there is no remuneration currently, it would be a major step backwards for educators to need to start to pay.

Article 6: Preservation of Cultural Heritage

Article 6 of the Directive creates a mandatory exception allowing libraries and cultural heritage institutions to make copies of works in their permanent collections for preservation purposes, in any format. The accompanying Recitals²² make clear that it is possible to carry out preservation through preservation networks, including cross-border preservation networks, and that neither contracts nor technological protection measures can remove the right of cultural heritage institutions to undertake preservation. See also Recitals 24-29.

Best case scenario: National implementation allows libraries to take preservation copies of all works they hold for more than a short period of time, including materials acquired through licensing agreements. Preservation networks allow for the storing of works in different places, including other countries to maximise safety. Other internal library uses and, ideally, web harvesting, is also permitted under the exception.

Worst case scenario: National implementation places strict limits on which works can be preserved, excluding those works acquired via licence and held on third-party servers. Preservation networks are only possible for digitisation, with copies made in the digitising institution destroyed once other copies are returned to the home institution. Copies are only permitted in limited circumstances (i.e. at imminent risk of destruction, or where not commercially available).

A. What Article 6 Says

Article 6 introduces a new mandatory exception to copyright for the making of copies of works for preservation purposes. In the Recitals, the Directive suggests some potential reasons for this - to address the risk that older technologies no longer work, or for insurance purposes²³. This list is not exhaustive.

The beneficiaries of the Article are cultural heritage institutions, defined as '*publicly accessible librar[ies] or museum[s], an archive or a film or audio heritage institution*'²⁴.

The Article also notes that libraries and cultural heritage organisations should be able to make copies in any format or medium and using any technology. There is no limit on the number of copies made, although this should only be to the extent necessary for preservation in general. According to the Recitals, copies can be made at any time in the life of a work²⁵.

The Recitals make it clear that it is possible to carry out such preservation related copying through third parties, including across borders, offering welcome clarification to libraries²⁶.

The exception covers all types of work and subject matter permanently in the collections of cultural heritage organisations. This is defined, in the Recitals, as being when such works are '*owned or permanently held by that institution, for example as a result of a transfer of ownership or a licence agreement, legal deposit obligations or permanent custody arrangements*'²⁷.

Under this provision, libraries are allowed to disregard contract terms which say that they are not allowed to take preservation copies, and can also follow national processes to remove or circumvent technological protection measures.

²² Recitals 25-29, with Recital 28 in particular highlighting the value of networks and collaboration

²³ Recital 27

²⁴ Article 2(3)

²⁵ Recital 27

²⁶ Recital 28

²⁷ Recital 29

B. Improvements at the National Level

In the implementation of the Directive, library associations and others should look to ensure the following points are incorporated into the law:

- Ensure that as wide a range of copying involved in preservation is covered (including for insurance purposes).
- Ensure that provisions on sending of copies to preservation entities, including through cross-border preservation networks are included in national law, alongside the possibility to store copies made.
- Ensure that there are no limitations on when copying can be done (i.e. Undesirable restrictions could include only allowing preservation when works are at imminent risk of disappearing, or when there is no commercial copy available).
- Ensure that there is no unnecessary limitation on what libraries do with their preservation copies.
- Ensure that the provision is protected from contract override and technological protection measures.

Libraries may also wish to include the following:

- Expand the exception to cover other internal copying by libraries as allowed for under the Information Society Directive²⁸, e.g. Insurance, for loans, for rights clearance etc.
- Clarify that works covered include those to which libraries have perpetual or long-term access, even if they are held on third-party servers.
- Ensure that distribution of the preservation copies and, if applicable, making available or electronic document delivery is allowed
- In a very positive scenario, expansion of the provision to include web harvesting.

²⁸ 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, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0029>

Article 7: Contract Override and Technological Protection Measures

Article 7 of the Directive introduces vital technical provisions that in look to guarantee the effectiveness of the exceptions provided in Articles 3-6 in Title 2 of the Directive. In Paragraph 1 it introduces the requirement that where the terms of contracts signed in order to access works (for example, a licensing agreement) claim to prevent the use of the exceptions in Articles 3, 5 and 6, then they are not enforceable.

Similarly, Paragraph 2 provides that where technological protection measures (digital locks) prevent the enjoyment of the exceptions in Articles 3-6, the process in national law that should have been introduced under the Information Society Directive Article 6(4) for removing or circumventing these, now applies also to these Articles. See also Recital 7, and the examples in annex.

Best case scenario: the principle of the non-enforceability of contract terms which prevent use of exceptions is applied to all education, library and research exceptions (as is already the case in some Member States). Similarly, in all or most cases where technological protection measures stand in the way of exceptions, libraries can either remove or circumvent these directly, or benefit from a simple and rapid means of obliging rightholders to do so.

Worst case scenario: Member States fail to apply these provisions properly. If they do, they are limited to as few exceptions as possible, and the process for asking for the removal of technological protection measures is so long and complicated as to be unusable.

A. What Article 7 Says

Article 7 comes at the end of the ‘Title’ or chapter of the Directive that creates mandatory exceptions to copyright for text and data mining (Articles 3 and 4), illustration for teaching (Article 5), and preservation (Article 6). It has two important paragraphs, the first dealing with contract override, and the second with technological protection measures.

The first Paragraph (7(1)) underlines that ‘*Any contractual provision contrary to the exceptions provided for in Articles 3, 5 and 6 shall be unenforceable*’. This therefore applies to the exception for text and data mining by research institutions (including libraries), teaching and preservation.

However, it leaves out the exception for text and data mining mainly aimed at people or institutions other than research institutions. This tallies with the fact that Article 4 (on Text and Data Mining by actors other than research institutions) allows rightholders to opt-out of having their works mined without authorisation.

The second Paragraph (7(2)) makes a slightly complicated reference to the Information Society Directive’s²⁹ provisions on technological protection measures (TPMs). TPMs (digital locks) enjoy legal protection under European law (Article 6, Information Society Directive) – i.e. it is illegal to remove or circumvent these when they are effectively preventing illegal uses of works.

The Information Society Directive³⁰ (sometimes confusingly just called the “Copyright Directive”) does allow that when TPMs go beyond preventing illegal uses, and start preventing legal uses (such as those permitted under exceptions and limitations), they should not enjoy legal

²⁹ 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, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0029>

³⁰ Idem

protection (Article 6(4), paragraphs 1 and 2). However, the Information Society Directive also stipulates that when a work is accessed through a licence (on ‘mutually agreed terms’) and the material is made available across the web, then this does not apply (Article 6(4), paragraph 4).

In other words, there was no possibility to remove TPMs which prevent the enjoyment of exceptions using most digitally licensed works other than off-line digital media like CDs/DVDs etc.

This is clearly a problem, given the growing share of digital works in library collections which are licensed online across the web, as opposed to offline like CD and DVDs. The Digital Single Market Directive therefore makes clear by choosing not to apply this fourth paragraph from the Information Society Directive to Articles 3-6, meaning that governments can now intervene to force access to content protected by a technical protection measure.

This provision applies to all of the exceptions in Articles 3-6 (all text and data mining, teaching and preservation), although it is hard to see what difference it will make under Article 4, given that the Article itself allows rightholders to opt out, preventing their works being used under the exception.

A key point on the implementation of the TPMs provision is the process to be followed to achieve this. Recital 7 suggests that rightholders should have the opportunity to take voluntary steps to ensure that TPMs do not prevent the enjoyment of exceptions and limitations. Only in their absence should Member States act themselves.

This provision can be interpreted in different ways, but in many Member States, libraries and others are first required to ask rightholders to remove TPMs themselves, with little guidance on deadlines. This often means that users simply give up, which is clearly not a good situation.

B. Improvements at the National Level

A first important step will of course be to ensure that the provisions of Article 7 are applied in national law with no added complexity. In the case of contract override, the text of the Directive itself is sufficient, and could be copied into national law.

In the case of TPMs, it will be useful to set out stronger rules around the process for removing or circumventing these.

Less ambitiously, a short deadline could be set for rightholders to provide the means of circumventing TPMs, for example 72 hours (3 working days) after receipt of a request. If they fail to do this, governments should allow libraries and other beneficiaries to remove or circumvent themselves.

Looking beyond the Articles covered by Article 7, both provisions could apply to exceptions more broadly. A number of EU Member States – Belgium, Germany, Ireland, Portugal, and the UK – already apply contract override to a wider range of exceptions and limitations. Please see the [Appendix](#) for concrete examples.

This simplifies the work of libraries and other users who can simply rely on the law, rather than having to check contracts each time, when working out what they can do with a work to which they have access.

Articles 8-11: Out-of-Commerce Works

In order to deal with the ‘20th Century Black Hole’³¹ the Digital Single Market Directive includes provisions on out-of-commerce works - a term which encompasses both commercially published unavailable materials as well as in-copyright works that were never made commercially available (i.e. unpublished works).

Articles 8-11 introduce an exception to copyright allowing libraries and other cultural heritage institutions such as archives and museums, to digitise and place these works online, following a check as to their commercial availability (or, potentially, by applying a cut-off date before which all works are deemed out-of-commerce by default). However, this only applies:

- i) where there is no collecting society (CMO) which is sufficiently representative of creators in the sector; or
- ii) when they exist and are representative of creators in the sector, but they do not have the rights to allow cultural heritage organisations to make out-of-commerce works available across the open web.

Where they do have the rights to allow libraries etc to put their out-of-commerce works online, the collecting society can offer a licence that covers members and non-members alike (either through an ‘extended’ collective licence, or a presumption of representation). This provision, if implemented well, could unlock large quantities of Europe’s cultural heritage for the benefit of the many. See also Recitals 30-43.

Best case scenario: libraries, archives and museums enjoy a broad exception allowing them to digitise and give access to much more of their collections. Licences only have priority where there are representative, well-governed collecting societies which are ready to offer licences. The test for seeing if a work is out-of-commerce is simple and easy (for example through using a relatively recent cut-off date), and where the nationality of a creator is unclear, the default is to allow for digitisation and making available.

Worst case scenario: licences prevail over the exception in most cases, but collecting societies choose not to offer them or only do so on terms which libraries, archives or museums cannot meet, meaning that there are few possibilities to give online access. The test for whether a work is out-of-commerce is made too difficult (or a cut-off date set far in the past), and cultural heritage institutions or collecting societies choose not to apply it given its complexity. Large numbers of works are excluded because it cannot be determined if their creators are from EU countries or otherwise.

A. What Articles 8-11 Say

Articles 8-11 introduce a new exception to copyright to allow for the copying, distribution, communication to the public and making available (i.e. putting online) of works when these are out-of-commerce³², on a non-commercial website. The Directive is silent about whether

³¹ The large volume of books and other materials which can no longer be bought through standard commercial channels, and are not available online because for rightholders it is not economically viable, and for cultural heritage institutions rights clearance at scale is not feasible.

³² In more detail, the exception applies to the rights of temporary reproduction, translation, arrangement, alteration, adaptation, communication to the public, display, and performance of databases, including the reproduction, distribution display, communication or performance of a database that has been arranged, translated, adapted or altered, plus the extraction and re-use of parts (Articles 5(a)-(b) and (d)-(e) and Article 7(1) of Directive 96/9/EC), the reproduction of works, performances, recordings, broadcasts, and films,

digitisation under the exception should be remunerated. This is likely in order to respect existing Member State traditions, but could also be read as implying that there should be no remuneration, not least given the difficulty of making payments. The Recitals suggest that cultural heritage institutions may be able to charge for access to works in order to recoup the costs of digitisation³³.

Where there are collective management organisations (CMOs) which have the rights the exception provides and are sufficiently representative of rightholders, the Directive allows them to offer licences for non-commercial purposes³⁴. These licences can cover works both by creators who are members of the CMO, and by those who are not. They should be non-exclusive (i.e. should not mean that other libraries and other cultural heritage institutions cannot also acquire a licence) and should ensure that rightholders are treated equally (i.e. not favour members over non-members).

There is not necessarily an obligation on CMOs to offer a licence, and so, for example, if there is no agreement between a library and a representative CMO on terms, this does not mean that the exception applies. The library can however rely on the exception, if a CMO is representative of a certain category of rightholder but does not have the making available right which would allow cultural heritage institutions to make out-of-commerce works available across the open web.³⁵

While the provision also creates an exception for reproduction (i.e. digitisation in this case) we would strongly recommend that you do not license this activity but instead assert your right to do this as part of a library's preservation function.)

The **territorial scope** of the rights under the licence is left to discussions between the cultural heritage institution and the CMO – i.e. they can decide to make works available online across the European Union, or in just a selection of countries. This does effectively leave decision-making about whether everyone in the European Union can access digitised and uploaded works up to the CMO. Where there is agreement on rights working across borders, a legal fiction applies – i.e. if a work is uploaded to the internet in country A, and accessed in country B, the user in country B is considered as being in country A.

The Directive is not explicit on territorial scope under the exception, however Article 8(2) makes it clear that under the limitation and exception it is the jurisdiction of upload that governs the making available of the out-of-commerce works. If cross-border access across the whole of Europe was not permissible under the exception, Article 8(2) would not be required and one would expect Recitals that dealt with geo-blocking and territorial scope under the exception. This is not the case, so it follows that under the exception, works can be made available across the EU/EEA.

As concerns the **type of works** covered, there are four main conditions. The work or other subject matter:

- should be in the permanent collection of the library or other cultural heritage institution,
- should be out-of-commerce,
- should not be subject to a request from the rightholder to be taken down,

plus the communication to the public of works and making available of other subject matter (Articles 2 and 3 of Directive 2001/29/EC), the temporary reproduction, adaptation, alteration, arrangement, translation, distribution and rental to the public of computer programmes (Article 4(1) of Directive 2009/24/EC), and the use of short snippets of press publications (Article 15(1) of this Directive).

³³ Recital 40

³⁴ In this case, for reproduction (i.e. digitisation), distribution, making available and communication to the public.

³⁵ Article 8(3)

- should not be first published or broadcast in a non-EU country, be by a producer based in a non-EU country, or be by a non-EU citizen unless their nationality is unknown or incidental (see below for more on this issue).

There is no definition of ‘permanent collection’ (an issue that also arises under Article 6 on preservation).

In order to work out whether a work is out-of-commerce, the cultural heritage institution (or if under licence a CMO) should make a ‘reasonable effort’ to be sure that the whole work is not available through customary means (i.e. direct sales, rather than second-hand).

This is an important point that it is the **whole** “physical” work and not the embedded works that need to be commercially unavailable for it to be classified as out-of-commerce. For example a radio broadcast can be defined as out-of-commerce as the whole broadcast is commercially unavailable, even if certain tracks within the broadcast are still commercially available.

The Directive does look to underline that the requirements for checking commercial availability should be no more than what is reasonable or necessary. Recital 38 suggests that it may be enough to look only at easily-accessible sources of information (primarily national, but international if the work in question justifies it), and that the ‘theoretical possibility’ of acquiring a licence, for example, should not be enough to class a work as out-of-commerce. There is no explicit obligation to carry out an item-by-item assessment unless this is reasonable – in many cases, it is acceptable only to assess a sample.

Moreover, the fact that it is possible to buy a work in one language does not mean that versions in other languages cannot be determined to be out-of-commerce. However, if a work is commercially available in a different edition or in a different format (i.e. print vs digital), then it is unlikely to be counted as out-of-commerce.

The Directive leaves open the possibility – as exists in Germany and Norway for example, to set a ‘cut-off date’ – i.e. a date after which this law should not apply. If this date is too long ago this will undermine the purpose of this new law.

The Directive is clear that rightholders have the possibility to request that a work is not treated as being out-of-commerce, and so not placed online, or if online for the work to be removed. For example this may be because they would like to make money from it again, or purely by personal preference.

This process should be helped by a dedicated portal being set up by the EU Intellectual Property Office (EUIPO), which will allow rightholders to see if their works have been provisionally declared out-of-commerce. The Directive underlines that it is necessary for relevant information to have been shared, via the portal (and potentially other measures – see below) for at least six months before it is put online for the public.

The Directive also allows that in some situations, it may be appropriate to carry out publicity measures beyond simply placing reference to a work on the EUIPO platform – especially if there are clear connections between the work and another country.

Finally, the Directive looks to avoid non-EU citizens’ work being caught up in the Directive, excluding works which have first been published or broadcast outside the EU, films and other audio and audio-visual works whose producers are based outside of the EU, or works by non-EU citizens when it cannot be decided if the first publication, broadcast or production took place inside the EU or not. In the case of collections of work, these rules apply when a ‘predominant’ share of works fall into one of these categories – i.e. it is not necessary to be certain that all works are by EU nationals.

Beneficiaries: As highlighted in the introduction to this section, there is an exception which benefits cultural heritage organisations, except where there is a ‘sufficiently representative’ collective management organisation in the country where the cultural heritage institution is based which can license the making available right which would allow cultural heritage institutions to make out-of-commerce works available across the open web .

There is a significant question about the definition of ‘sufficiently representative’. This is not defined in the Directive. A further complication comes from the fact that representativeness should be calculated with reference to the ‘type’ of works covered (without specifying the types in question), and the rights in question.

The Directive does not make it clear how ‘types’ should be defined (film, broadcast, newspapers, books etc) or at a more granular level than that.

Determining when the exception applies: the question of the cases in which the exception and applies, or when there is a requirement to get a licence is left to the realities of licensing at Member State level. The Recitals do suggest that care needs to be taken in this choice, and that the fact that cultural heritage institutions and CMOs cannot agree the terms of a licence is not enough to let the exception apply³⁶.

Article 8(3), cross-referencing to Article 8(1)(a) however, does make it clear that the exception applies when the CMO is firstly not representative *and* does not have the rights to offer cultural heritage institutions a licence to put commercially available materials on the open web. Please note that the wording of the Article underlines that both conditions must be met in order for a licence to take precedence over the exception.³⁷

There is also an emphasis on the need to set up stakeholder dialogues, including cultural heritage institutions, rightholders, and CMOs in order to discuss the relevance and usability of licences, protect rightholders, and determine the rules around which works should be classed as out-of-commerce.

If effectively established and managed, these dialogues present a key way of ensuring a favourable implementation of the Directive for libraries, other cultural heritage institutions and their users, given that they will determine how a number of key provisions will apply, whether set out in law as regulations or by agreement between stakeholders .

It will be important to ensure that libraries, archives and museums are well-represented in these efforts, and that they place an emphasis on promoting access, rather than creating rules which make it all but impossible to make use of the new provisions.

B. Improvements at the National Level

There are a number of areas where the room for manoeuvre left to Member States means that libraries and other cultural heritage institutions will need to be active in promoting a transposition that meets their needs. Crucial areas are as follows - some of which will be determined through national law, and some through the planned stakeholder dialogues.

Definition of where the exception applies or not: this will be crucial in determining how effective the Directive is. A clear line will help ensure that as few works as possible end up in limbo, with no possibility to use the exception, but also no CMO willing to offer a licence on terms with which

³⁶ Recital 32

³⁷ The provision also creates an exception for reproduction (i.e. digitisation in this case) however we would strongly recommend that you do not license this activity but instead assert your right to do this as part of a library’s preservation function.

libraries or other cultural heritage institutions could agree. On the basis of survey work, it seems that in reality, even if in many countries there are a full set of CMOs for different types of work, they relatively rarely offer licences to libraries and other cultural heritage institutions for the types of rights covered by the Directive.

It will be important that cultural heritage institutions repeatedly underline Article 8(3), cross-referencing to Article 8(1)(a) which makes it clear that the exception only applies when the CMO firstly is representative and in addition does have the rights to offer cultural heritage institutions a licence to put commercially available materials on the open web. The majority of collecting societies are currently unlikely to have both such rights.

Another key factor in this will be to ensure that definitions of ‘types’ of work are clear. For example, mixing up leaflets or letters with books may lead to a lot of works that were never intended to be commercially exploited falling under the same licensing regime as that for commercial books. Similarly, placing posters in the same ‘type’ as visual arts could have a similar effect. Clear definitions will help here, both through law/regulation and through subsequent stakeholder dialogues.

Such clear categories will also make it easier to define whether CMOs are representative. It will be important for some countries to avoid a situation where a CMO which represents only a small share of creators is able to collect money on behalf of all. For example, creators of most unpublished works, such as letter-writers and diarists, are predominantly not members of CMOs, but members of the general public.

At the same time, well-governed, representative CMOs often offer a cost-effective means for libraries and other cultural heritage institutions to clear rights when this is necessary, and have confidence that the money they pay will go to the original creators.

Timely licences: CMOs are likely to make the case that they are close to be able to offer a licence for out-of-commerce works. In such instances it would be advisable for the legislature to set a specific period of time within which a licence must become available. We believe that such an intention should be formalised in writing and a period of 12 months from such a written statement should be sufficient for a licence to be put in place. If no licence is in place by the end of this period, then the exception should apply.

Licence availability after the exception is utilised: If an exception is used, and a licence is then forthcoming, the legislature should make it clear that retrospectively no remuneration is payable, and that a period of 12 months gratis is allowable going forward from when the licence is available for the institution to decide whether to use the licence, or to remove the works, or to clear some licences direct with rightholders so some but not all of the digitised works can remain online.

Whole work: Whereas in some languages it is very clear that the out-of-commerce status applies to the whole “physical” work, as opposed to the copyright works within the whole item, that is not the case for all languages. It is important that if there is any misunderstanding it is made clear that embedded works within the whole digitised item can still be in commerce, what matters for this designation is the entire item is out-of-commerce.

Definition of out-of-commerce works: while the Articles of the Directive do not give much detail on the process to be followed to determine the out-of-commerce status of a work, the Recitals³⁸ do. These indicate that it is only necessary to consult easily accessible sources of information, and primarily only those within the same country as the cultural heritage institution itself, unless the nature of the work justifies it.

³⁸ Recital 37

Crucially, it is important to avoid the complexity in the rules around defining orphan works that have seen the provisions of the Orphan Works Directive³⁹ used so little. It would therefore be welcome for national transpositions of the Directive to make it clear that only easily accessible sources need to be consulted to determine the out-of-commerce nature of a work.

National legislation should also make it clear that a work should be declared out-of-commerce as long as no substitutable version is also available, given that the specifics of a given edition or version may be of interest to researchers and readers. Once again, it will likely be the stakeholder dialogues that will finally define the rules here, but it is important, if possible, to set out some key principles.

The Directive does not say whether the cultural heritage institution or the CMO should carry out the assessment about the commercial availability of a work. If a cultural heritage institution is to pay a CMO for licences, it would be preferable for the CMO to take on this task, and to take the responsibility for any mistakes. We believe it would be fair that the legislature also limits liabilities for CMOs and cultural heritage organisations in the case of any inadvertent use of in commerce materials. An indemnity should cover all liabilities, and not only to the limit of the cost of the licence. We are aware of this practice in the case of some CMOs, in for example the Netherlands.

Definition of Permanent Collection: as in Article 6, it will be important to ensure that any effort to define the ‘permanent collection’ of a cultural heritage institution casts the net broadly in order to cover works available on long-term loan, those works available under a licence, and web-harvested content.

³⁹ Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works

Article 14: Works of Visual Art in the Public Domain

Article 14 of the Directive introduces the rule that a copy of a work of visual art in the public domain (i.e. where copyright has expired) should not itself benefit from copyright protection from related/neighbouring rights⁴⁰, unless the copy has been modified and now represents the new author's own creative work. In effect, it aims to prevent efforts to assert control over faithful reproductions of public domain works, and so facilitate access to culture. See also Recital 53.

Best case scenario: National implementation clarifies that faithful reproductions of public domain visual art should not enjoy copyright protection. Additionally, if not already so in national laws, the test for originality for all kinds of copyright works is set to the standard of 'the author's own intellectual creation', to ensure that copyright genuinely only protects works which include meaningful creative input. National laws, where necessary, also introduce a clear definition of the public domain.

Worst case scenario: Failure to properly clarify what reproductions of visual art shall and shall not be protected by copyright or related rights. In some EU Member States, rather than 'the author's own intellectual creation', there is for many types of copyright work only a low standard of originality or no definition at all in their national laws, so a failure to insert this Article's originality test of 'the author's own intellectual creation' into national law, at least in relation to copyright and related rights protected reproductions of visual art, would mean that many faithful reproduction images of visual art could still be copyrighted.

A. What Article 14 Says

Article 14, one of the shortest in the Directive, says that where copyright has expired in a work of visual art (i.e. the author has been dead for 70 years), then it should not be possible to claim copyright in an unoriginal copy of this.

Article 14 - Works of visual art in the public domain

Member States shall provide that, when the term of protection of a work of visual art has expired, any material resulting from an act of reproduction of that work is not subject to copyright or related rights, unless the material resulting from that act of reproduction is original in the sense that it is the author's own intellectual creation.

In practice, this aims to make it easier to use faithful reproductions (photos for example) of such works for any purpose. It responds to challenges faced in Germany, for example, where in a significant legal case⁴¹ finally ruled on by the German Federal Court regarding a German museums group and the use of photographs from their collections. The museums successfully claimed copyright and related rights under the then existing German law over photos of public domain paintings held in their collections that were published without the museum group's permission on Wikimedia Commons, resulting in the photos being removed. Everyone can **benefit** from the Article, given that public domain status means that the restrictions usually associated with economic rights under copyright no longer apply. The article however does not deal with practical issues of access to public domain images, that in the main are likely

⁴⁰ Related or neighbouring rights are rights adjacent to copyright, usually in materials or manifestations derived from original copyright works (for example performances, phonograms, broadcasts, film, databases and so forth) and generally attract a lower term of protection than copyright works.

⁴¹ Digitized images of works in the public domain: what rights vest in them? Analysis of the recent BGH Reiss-Engelhorn judgment, IPKat 19/02/19 . Part 1: <https://ipkitten.blogspot.com/2019/02/digitized-images-of-works-in-public.html> Part 2: https://ipkitten.blogspot.com/2019/02/digitized-images-of-works-in-public_19.html

now to be controlled more by contracts as regulated by the Public Sector Information Directive 2019 (known also as the 'Open Data' Directive).⁴²

Linked to this are the **permitted uses**. Once again, this is broad, given that once a work is in the public domain, the copyright rules which set out which types of uses are allowed or not no longer apply. The Directive itself talks about enabling the 'dissemination', of such works, but this is only one possibility. The relevant Recital⁴³ does underline that a museum, for example, will still be able to sell postcards, which may be an attempt to acknowledge that irrespective of copyright law, cultural heritage institutions still have physical control over access to their collections.

This includes questions around if and how they are digitised, and use of the digital surrogates, under what terms access is granted, and the duration of any period of exclusivity established in line with the Open Data Directive if digitised as part of a public private partnership. However, in the spirit of this Article, cultural heritage institutions will also need to fairly balance control of their images of public domain visual art, that will themselves be in the public domain under this Article, with their public interest missions to improve access to and use of their holdings.

In **terms of the types** of source work covered, Article 14, the Directive explicitly focuses on visual art. This is not defined in the Directive or anywhere else in the EU suite of copyright Directives, but implicitly covers those visual art works which do not fall under the sub-categories of other types of artistic work as defined by the Berne Convention⁴⁴. Thus unoriginal reproductions of visual art that is in the public domain, embedded within published or unpublished works, also come within the scope of Article 14.

As for the reproductions themselves, there is no definition of how the reproduction is made – whether through photography, digitisation, 3D scanning or otherwise. It is important that the legislation itself sticks to generic terminology and does not specify particular methods or formats of reproduction as these will change over time. However, the Article does state that where a **reproduction** represents '*the author's own intellectual creation*', then this Article shall not apply, and such a reproduction would itself benefit from copyright. This means that in order to claim copyright or related rights, then whoever is making the reproduction will need to do so in a way that adds something in order to qualify for any new right.

This represents an area of uncertainty, given inconsistency between countries in how originality is defined in national laws or jurisprudence. However, in regard to photographs, Recital 16 of the Term Directive⁴⁵ defines "author's own intellectual creation" as '*reflecting his personality, no other criteria such as merit or purpose being taken into account.*'

⁴² Public Sector Information Directive (EU) 2019/1024, <https://eur-lex.europa.eu/eli/dir/2019/1024/oj>. This notably sets out rules for the circumstances under which digitised copies of works may be subject to exclusive works (including time-frames), even when these are in the public domain.

⁴³ Recital 53, Directive (EU) 790/2019, <https://eur-lex.europa.eu/eli/dir/2019/790/oj>

⁴⁴ Berne Convention for the Protection of Literary and Artistic Works (as amended on September 28, 1979) <https://wipolex.wipo.int/en/text/283698> - The definition of 'artistic works' given in Article 2(1) includes: '*works of drawing, painting, architecture, sculpture, engraving and lithography; photographic works to which are assimilated works expressed by a process analogous to photography; works of applied art; illustrations, maps, plans, sketches and three-dimensional works relative to geography, topography, architecture or science*'. However, the wording of member state law or EU Directives take precedence over the Convention's wording. Furthermore, in the absence of a definition of the term 'visual art' used in this Directive's Article 14, the term might remain undefined or could be variably and more narrowly defined in national laws or subsequent case law. An example of a statutory definition in copyright law of 'visual art' from a major copyright legislative jurisdiction can be found in the United States Copyright Code s.101. United States Code Title 17: Copyright Law of the United States, Chapter 1 s.101 Definitions <https://www.copyright.gov/title17/92chap1.html#101>

⁴⁵ Term Directive 2006/116/EC (Article 6 & Recital 16) <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX:32006L0116>

B. Improvements at the National Level

In the implementation of the Directive, library associations and others should look to ensure the following points are incorporated into the law:

- As a starting point, the text of the Directive itself should be enacted using text as close as possible to the original language, making it clear that faithful reproductions of visual art in the public domain should themselves not be protected by copyright. It should be clear that any form of reproduction should be covered, including for example 3D scanning. This is very important to ensure that, as intended by this Article, faithful “straight” reproductions by scan or photograph or other future means of image reproduction of visual art that is out of copyright (i.e. in the public domain) are not themselves subject to copyright or related (neighbouring) rights. If they were to be, Article 14 would be rendered unusable.
- In some countries the general statutory definition of originality may be non-existent or set at a low threshold so it could make sense to try to take advantage of this legislative window to persuade such Member States to include the EU harmonised definition of originality as the ‘author’s own intellectual creation’ in their national copyright laws in relation to all copyright works protected under the Information Society Directive 2001 in line with the CJEU’s important precedent-setting 2009 *Infopaq* judgement⁴⁶.
- In some countries, there is no definition of the public domain in law. If this is the case, there is an opportunity, with the implementation of the Directive, to seek legislation that makes it clear that the public domain is recognised and protected.

⁴⁶ In its first *Infopaq* judgement of 16 July 2009 (Case C-5/08) <http://curia.europa.eu/juris/liste.jsf?num=C-5/08> the CJEU ruled that the harmonisation required by the Information Society Directive 2001/29/EC (available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0029>) means that the EU definition of originality as ‘the author’s own intellectual creation’ set by the three earlier Directives listed below, applies to **all** copyright works protected under the Information Society Directive (see *Infopaq* Summary para 1 and Judgement paras 34-39). *Infopaq* paras 6, 7, 11 & 35 also list the Articles of the three earlier Directives that used this definition:

Computer Programs Directive 2009/24/EC (codified Directive 91/250/EEC) Article 1(3) (Available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32009L0024>);

Database Directive 96/9/EC Article 3(1) (see *also* Recitals 15-16) (available at <https://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:31996L0009:EN:HTML>);

Term Directive 2006/116/EC Article 6 (see *also* Recital 16) (available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=CELEX%3A32006L0116>).

Article 15: Press Publishers Right⁴⁷

Article 15⁴⁸, entitled *Protection of press publications concerning online uses*, mandates Member States to grant rights to press publishers regarding the online use of their press publications by information society service providers. Academic and scientific publications are not subject to the new right. See Recitals 54-59.

Best case scenario: Countries interpret “press publication” narrowly (as defined in Article 2(4) and referred to in Recital 55) and make it explicitly clear that scientific journals and other publications are not covered by the new right. Conversely but with the same objective, countries interpret “very short extracts” broadly to give rise to a wide-ranging exception to ensure the widest sharing of information online. Countries make the right waivable, thereby encouraging press publishers not to exercise and enforce their right, and clearly exclude library, educational and research uses.

Worst case scenario: Countries interpret “very short extracts” narrowly, thereby extending the scope of application of the new provisions to all “snippets” of text that do not fall into the definition of “very short extracts.” Countries prohibit rightholders from waiving their rights. Countries develop and impose a very strict regime in favour of press publishers, resulting as we have seen in Spain with search engines, news aggregation service providers opting not to operate in the European Union and to withdraw their news services from the European market, or only the larger ones (Google) being able to pay for licences, depriving libraries and others of key media literacy tools.

A. What Article 15 Says

Article 15 is an extension to press publishers of certain **exclusive rights** granted by the Information Society Directive 2001/29/EC. Commercial information society service providers, such as news aggregators and media monitoring services, must obtain a licence from press publishers prior to online uses (reproduction, making available, or communication to the public) of their press publications, or parts thereof. Under previous law, publishers had to rely on authors assigning their rights to them and to prove rights ownership for each individual work in order to licence all the contents of the newspaper.

The **concept of press publishers** includes mainly commercial news publishers or news agencies based in the European Union⁴⁹. This includes blogs or other materials published under their authority, but not blogs or other websites⁵⁰.

Examples of **press publications** include: daily newspapers⁵¹, weekly or monthly magazines of general or special interest, including subscription-based magazines, and news websites. Press publications can contain literary works (texts) as well as photographs, drawings and videos, among others.

Significantly, Article 2(4) states that periodicals that are published for scientific or academic purposes, such as scientific journals (“scientific” meaning natural and human sciences), are not press publications for the purposes of this Directive. Therefore, such periodicals should be

⁴⁷ We are grateful to the European University Association, Electronic Information for Libraries, and the Confederation of Open Access Repositories for their help in preparing this chapter

⁴⁸ Article 15 was formerly Article 11. The numbering was changed in the final draft from the trilogue negotiations issued 26 March 2019 and approved by the Parliament and Council.

⁴⁹ Recital 55

⁵⁰ Recital 56

⁵¹ Recital 56

exempt from the application of Article 15. Hence, online uses of those publications should take place according to the same rules as before the introduction of Article 15. This is an important point to defend, given its potential impact on libraries.

Further **exceptions** in the Directive include offline uses and uses by individual users, for private or non-commercial purposes⁵². Other exceptions also apply, such as those for education, research and the activities of cultural heritage institutions, as provided for in the *Information Society Directive*. This also includes exceptions for quotation for purposes such as criticism or review⁵³. Nonetheless, implementation of Information Society Directive exceptions – most of which are optional – is uneven across Europe⁵⁴. Libraries should ensure maximum application of exceptions to this new right.

Significantly, the Article makes it clear that the right also applies not only to press publications as a whole, but also to parts thereof, as defined in Article 2(4)⁵⁵. There has been extensive debate⁵⁶ about how long these parts need to be in order to qualify for protection, with the suggestion that only “very short extracts”⁵⁷ and mere facts⁵⁸ would be out of scope.

The rights expire **two years** after publication, counting from January 1st following the publication date⁵⁹. The right does not apply to works published before 6 June 2019. Nothing in the Directive prevents the rights from being waived, which opens up the possibility to prevent a situation where a blanket licence can be demanded by collecting societies.

Authors of works incorporated in a press publication are entitled to receive an appropriate share of the revenues from this right⁶⁰.

The Directive underlines that **hyperlinking** is not covered by the scope of Article 15. It is nonetheless unclear whether what Article 15 excludes are only hyperlinks or other types of “clickable links” or “Internet links” as well (e.g., framing, embedding). In the interests of the widest sharing of knowledge, the exemption for linking should be as broad as possible. Hyperlinking to legal sources will remain possible, as per the Svensson CJEU case⁶¹.

B. Improvements at the National Level

At first glance, the Directive seems to leave little flexibility in implementation at the national level. Yet in light of the unsuccessful, ineffective and highly criticised experiences in Germany⁶² and

⁵² Article 15(1)

⁵³ Recital 57

⁵⁴ 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, in particular Articles 5(2) and 5(3), available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0029>

⁵⁵ See also Recital 58

⁵⁶ See in particular the judgement of the Court of Justice of the European Union in the *Infopaq* case (C-5/08), where the decision suggests that snippets as short as 11 words can fall under copyright, if they represent the intellectual creation of their author

⁵⁷ Article 15(1)

⁵⁸ Recital 57

⁵⁹ Article 15(4)

⁶⁰ Article 15(5)

⁶¹ C-466/12, Nils Svensson and Others v Retriever Sverige AB, <http://curia.europa.eu/juris/liste.jsf?num=C-466/12>

⁶² Sections 87f, 87g and 87h of the German Copyright Act, online https://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html. The German initiative is under scrutiny of the Court of Justice of the European Union, due to lack of notification to the EU Commission, see VG Media, C-299/17, online

Spain⁶³, many lessons may be drawn to ensure a favourable transposition of Article 15 in Member States.

Firstly, it would be worth trying to ensure that education and library uses are explicitly excluded from the effect of these provisions. This would provide the simplest and clearest protection.

Secondly, it will be important to ensure that national legislation also excludes scientific (natural and human science) journals and other publications. This should be easy, as it is explicit in the Directive. It will be useful to ensure a broad definition of excluded websites (such as blogs), in order to limit the damage to the research, education and cultural heritage communities. Independent blogs, social media and anything that does not take the shape of a traditional newspaper, news site or press agency should be explicitly excluded.

Thirdly, Member States have the possibility to clarify the meaning of “very short extracts” so as to ensure legal certainty and predictability. Libraries should push for a definition that allows for sufficient text to be provided to allow users to understand the relevance of clicking on a given link.

Next, libraries should ensure that all existing exceptions and limitations apply to the new right. This is particularly important in the case of exceptions for news reporting and quotation. Libraries may also wish to ensure that the right is waivable (and indeed include encouragement to publishers to do this).

More broadly, it is important to recall the underlying rationale for these provisions – the desire to ensure that sustainability of the press as a key pillar for healthy public debate. While we may disagree on the merits of Article 15 as a means of doing this, it would be good to support other (more effective) means of sustaining journalism.

<http://curia.europa.eu/juris/document/document.jsf?text=&docid=194481&pageIndex=0&doclang=en&mode=req&dir=&occ=first&part=1&cid=2143890>.

⁶³ Article 32 of the Spanish Intellectual Property Law (the quotation exception), online <https://www.boe.es/buscar/act.php?id=BOE-A-1996-8930>.

Article 17: Use of protected content by online content-sharing service providers⁶⁴

Article 17⁶⁵, entitled *Use of protected content by online content-sharing service providers*, mandates Member States to provide that an online content-sharing service provider needs to obtain authorisation from rightholders when it gives the public access to copyright-protected subject matter uploaded by its users. Some mitigation measures are in place to avoid copyright infringement liability if service providers can satisfy a set of conditions.

Not-for-profit scientific and educational repositories are exempt from the scope of Article 17. Therefore, they are not subject to the new rules that place the onus on service providers to monitor uploaded content proactively for copyright infringement. As such, they may continue to operate under the existing notice-and-take-down regime. See Recitals 61-71.

Best case scenario: national implementation expressly excludes all types of scientific (natural and human sciences) and educational repositories from its scope, and extends this to other platforms run by cultural heritage and research institutions. There are strong safeguards for freedom of expression and other exceptions and limitations.

Worst case scenario: the distinction between a for profit and not for profit scientific and educational repository is unclear, and the rights of users are marginalised.

A. What Article 17 Says

Article 17, often referred to as the "upload filter" or "value gap" provision, modifies the **liability regime of online content-sharing service providers** when their users upload copyright-protected material shared onto their platforms.

The aim of the article is allegedly to reinforce the position of copyright holders to negotiate a license and (potentially) obtain remuneration for the use of their copyright-protected content. As such, its supporters have argued, it will help bring more revenue to creators, and tackle the legal uncertainty regarding the liability of service providers for the acts of their users.

From another perspective, though, Article 17 is a highly controversial provision as it places primary responsibility on service providers for copyright infringement committed by their users, and obliges them to take disproportionate steps in response. This creates a costly and burdensome liability regime and risks hindering digital innovation and user participation.

The overall chilling effect on the sharing and reuse of content and on freedom of expression is concerning. Despite the language of the Recitals⁶⁶ to the effect that the directive is not aimed at restricting freedom of expression, it is likely to do so in practice. It may also lead to even more massive collection of data about users by platforms, which poses its own privacy concerns unless there are safeguards in place.

⁶⁴ We are grateful to the European University Association, Electronic Information for Libraries, and the Confederation of Open Access Repositories for their help in preparing this chapter

⁶⁵ Article 17 was formerly Article 13. The numbering was changed in the final draft from the trilogue negotiations issued 26 March 2019 and approved by the Parliament and Council. Article 17 should be read alongside Directive 2018/1808/EU on Audiovisual Media Services (available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex:32010L0013>). Article 28a of that Directive contains specific obligations against video-sharing platform services.

⁶⁶ Recital 70

Moreover, while the rhetoric on this focused primarily on YouTube, the general wording of the Article means that it also risks affecting other types of platforms, such as research platforms and even institutional repositories that are publicly available.

Currently, and until national transpositions of Article 17 become effective, service providers are able to rely on the **mere conduit** defence⁶⁷ to manage their responsibility (provided for under Article 14(1) of the e-Commerce Directive)⁶⁸. Under the present regime, service providers are not liable for the content they store if they (a) have no knowledge of the illegal nature of the content they store, and (b) act expeditiously to remove the flagged content upon notification.

With the introduction of Article 17, affected content-sharing service providers can no longer rely on the safe harbour regime when giving the public access to copyright protected works uploaded by their users⁶⁹.

Article 17 targets **online content-sharing service providers**. These are defined as an online service “whose main or one of the main purposes is to store and give the public access to a large amount of copyright protected works [...] uploaded by its users which it organises and promotes for profit-making purposes”⁷⁰.

There is a proposed **mitigation regime**⁷¹ for those service providers that have not obtained authorisation (no license) yet can satisfy four conditions and hence avoid liability for content unlawfully uploaded by their users (yet must still take it down on request). This also allows for simpler rules for new platforms which remain small, for example if they have employed ‘best efforts’ to deal with infringing content. However, these also do not offer particular clarity.

Fortunately – and importantly – the Directive underlines that **not-for-profit educational and scientific repositories are not covered**. (alongside sites like Wikipedia, GitHub, or electronic communications providers). This is a welcome result of advocacy by library and research organisations. However, there is no definition of these in the Directive, leaving the responsibility up to Member States.

Nonetheless, there may be other services – such as other platforms run or used by universities, as well as commercial platforms such as ResearchGate – which, as mentioned, risk being covered by the same rules as giants such as Facebook and YouTube. Given the lack of precision about the amount of content that needs to be uploaded for a site to be covered⁷², and about where the line lies between ‘for-profit’ and ‘not-for-profit’, it would be better to have these excluded from the new rules.

In short, the Directive introduces the idea that the act by an online content-sharing service provider of giving the public access to copyright-protected material uploaded by its users constitutes an act of **communication to the public** or an act of **making available to the public**.⁷³ Hence, under the new rule set out in Article 17, service providers have the obligation to **obtain the authorisation** from rightholders to give access to the copyright material that is being used.⁷⁴

⁶⁷ ‘Mere conduit’ refers to a situation where a service provider simply serves to provide access to content, without doing anything to it (organizing it, promoting it, attaching it to advertising)

⁶⁸ The limitation of liability or “safe harbour” is established in Article 14(1) of Directive 2000/31/EC [the e-Commerce Directive], online <https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:32000L0031>.

⁶⁹ Article 17(3).

⁷⁰ Article 2(6).

⁷¹ Article 17(4).

⁷² Recital 63.

⁷³ As defined in Article 3 of Directive 2001/29/EC (the *Infosoc* Directive, available at <https://eur-lex.europa.eu/legal-content/EN/ALL/?uri=celex%3A32001L0029>). See Article 17(1) and Recital 64.

⁷⁴ Article 17(1)§2.

They can achieve this by entering into **licensing agreements**⁷⁵ with copyright holders (musicians, authors, creators of audio-visual works, news publishers, etc.). Such licences should also allow users to make non-commercial uses of the works they find online.

However, since service providers cannot (always) know in advance which works users will upload to their platforms, they would theoretically need to have licenses for all copyrighted works that could possibly be uploaded to their platforms.

In addition, they are required to take **appropriate and proportionate measures** to ensure the effectiveness of the agreements with rightholders.⁷⁶ This leaves service providers with little choice but to **implement filtering of content** uploaded by users in order to avoid sanctions.⁷⁷ It is likely that only larger and more established (US) companies are likely to be able afford such technologies.

Article 17(10)⁷⁸ provides that, as soon as possible after the Directive comes into force, the Commission, in cooperation with Member States, shall organise **dialogues with stakeholders** to discuss best practices for cooperation between service providers and rightholders with regard to the **mitigation measures** foreseen in paragraph 4. The library, research and cultural heritage communities will engage in these to protect our sectors' interests.

The most problematic issue with upload filters is their inability to tell infringing uses of a work from **non-infringing uses**. Consequently, filters might block substantial numbers of uploads of content that would be covered under **exceptions and limitations** to copyright, such as fair dealing or uses for **quotation, parody or criticism**. This is an unacceptable cost to bear in light of the principle of freedom of expression.

Article 17(7) attempts to address the problem by introducing safeguards that specify that the measures “shall not result in the prevention of the availability of works uploaded by users which do not infringe copyright and related rights, including where such works or subject matter are covered by an exception or limitation.” Similarly, Article 17(9)(3) stipulates that the “Directive shall in no way affect legitimate uses, such as uses under exceptions or limitations provided for in Union law.”

As such, Member States are to ensure the possibility for users to upload content generated for the purposes of news reporting, criticism, caricature, parody, quotation, review and pastiche, where they make incidental use of other works, or are enjoying other exceptions and limitations.⁷⁹ Nonetheless, national legislation on exceptions and limitations in general remains far from harmonised.

In reality, service providers will be stuck between a rock and a hard place trying to meet their obligations under the mitigation measures and to safeguard users' rights and interests. While they are supposed to introduce complaints and redress mechanisms, these tend to favour out-of-court solutions and represent a weaker penalty than that for (inadvertently) giving access to copyrighted content.

⁷⁵ Article 17(1).

⁷⁶ Recital 66.

⁷⁷ Despite the fact that the Directive does not contain an *ad hoc* web-filtering/monitoring obligation. Article 17(8) states that “the application of this article shall not lead to any general monitoring obligation.”

⁷⁸ See also Recital 71.

⁷⁹ For example, the parody exception is optional, see Article 5(3)(k) of the Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society (the InfoSoc Directive), online <https://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32001L0029>.

B. Improvements at the National Level

Article 17 faces harsh criticism over the restrictions it places on the freedom of online expression, as it risks forcing platforms to prevent users from uploading copyrighted content without authorisation – even when they have a right to do so – at the risk of being held liable for infringements.

The complexity of the different mechanisms and the vagueness of the assessment criteria have raised concerns on all sides. Member States now have an opportunity to limit the damage when transposing the Directive into national law.

The below suggestions focus specifically on who is covered by the new rules, and the protection of exceptions and limitations. Other partner organisations offer more detailed advice on other elements of Article 17.

Member States should explicitly exclude educational and scientific repositories from coverage by the new rules. Furthermore, they should provide a restrictive **definition of “online content-sharing service provider”** so as to ensure that as many platforms that support the work of cultural heritage and research institutions are excluded as possible.

This could include for-profit repositories and other platforms and tools used by our institutions. Examples of this include Github, as well as Bepress (owned by Elsevier) both of which are widely used within academia.

Member States should underline clearly that any tools employed by service providers should not filter out content that legitimately makes use of exceptions and limitations to copyright. Vexatious and repeated incorrect claims by rightholders should be subject to penalty.

As an example of national implementation, the Dutch government has already prepared a bill on Article 17 (status July 2019). In this, it underlines that the new provisions should be focused on major commercial platforms, and clearly states that scientific and open educational resource repositories are not covered.

APPENDIX - Legislative examples: Protection of copyright exceptions from override by contract terms

Language used in legislation by five EU Member States that have adopted such provisions.

Belgium

[Code de Droit Economique Livre XI 'Propriété intellectuelle' \(Loi du 19 avril 2014\)](#)

Section 6. - **Exceptions aux droits patrimoniaux de l'auteur** Art. XI.193:

Les dispositions des articles XI.189, XI.190, XI.191 et XI.192, §§ 1er et 3, sont impératives

Titre 6 - **Programmes d'ordinateur** Art. XI.301:

Les dispositions des articles XI.299, §§ 2 et 3, et XI.300 sont impératives.

Titre 7 - **Bases de données** Chapitre 4 - **Droits et obligations des utilisateurs légitimes** Art. XI.311:

Le producteur d'une base de données qui est mise à la disposition du public de quelque manière que ce soit ne peut empêcher l'utilisateur légitime de cette base d'extraire et/ou de réutiliser des parties, qualitativement ou quantitativement non substantielles, de son contenu à quelque fin que ce soit. Dans la mesure où l'utilisateur légitime est autorisé à extraire et/ou à réutiliser une partie seulement de la base de données, l'alinéa 1er s'applique à cette partie.

[Code of Commercial Law, Book XI 'Intellectual Property' \(Law of 19 April 2014\)](#)

Section 6. - **Exceptions to the author's rights** Art. XI.193:

The provisions of Articles XI.189, XI.190, XI.191 and XI.192, §§ 1 and 3 are mandatory.

[Machine translation]

Title 6 - **Computer programs** Art. XI.301:

The provisions of Articles XI.299, §§ 2 and 3, and XI.300 are mandatory. [Machine translation]

Title 7 - **Databases** Chapter 4 - **Rights and obligations of legitimate users** Art. XI.311:

The producer of a database that is made available to the public in any way cannot prevent the legitimate user of this database from extracting and / or reusing parts, qualitatively or quantitatively non-substantial, of its content for any purpose whatsoever. Insofar as the legitimate user is allowed to extract and/or reuse only a part of the database, paragraph 1 applies to this part. [Machine translation]

Germany

[Gesetz über Urheberrecht und verwandte Schutzrechte \(Urheberrechtsgesetz, geändert durch das Gesetz vom 01. September 2017\)](#)

Abschnitt 5 **Rechtsverkehr im Urheberrecht**, Unterabschnitt 4 **Gesetzlich erlaubte Nutzungen für Unterricht, Wissenschaft und Institutionen** § 60g **Gesetzlich erlaubte Nutzung und vertragliche Nutzungsbefugnis:**

iii) *Auf Vereinbarungen, die erlaubte Nutzungen nach den §§ 60a bis 60f zum Nachteil der Nutzungsberechtigten beschränken oder untersagen, kann sich der Rechtsinhaber nicht berufen.*

(2) *Vereinbarungen, die ausschließlich die Zugänglichmachung an Terminals nach § 60e Absatz 4 und § 60f Absatz 1 oder den Versand von Vervielfältigungen auf Einzelbestellung nach § 60e Absatz 5 zum Gegenstand haben, gehen abweichend von Absatz 1 der gesetzlichen Erlaubnis vor.*

Teil 1 Urheberrecht

Abschnitt 6 Schranken des Urheberrechts durch gesetzlich erlaubte Nutzungen

Unterabschnitt 4 Gesetzlich erlaubte Nutzungen für Unterricht, Wissenschaft und Institutionen §

60g Gesetzlich erlaubte Nutzung und vertragliche Nutzungsbefugnis

(1) *Auf Vereinbarungen, die erlaubte Nutzungen nach den §§ 60a bis 60f zum Nachteil der Nutzungsberechtigten beschränken oder untersagen, kann sich der Rechtsinhaber nicht berufen.*

(2) *Vereinbarungen, die ausschließlich die Zugänglichmachung an Terminals nach § 60e Absatz 4 und § 60f Absatz 1 oder den Versand von Vervielfältigungen auf Einzelbestellung nach § 60e Absatz 5 zum Gegenstand haben, gehen abweichend von Absatz 1 der gesetzlichen Erlaubnis vor.*

Abschnitt 8 Besondere Bestimmungen für Computerprogramme § 69g Anwendung sonstiger Rechtsvorschriften, Vertragsrecht

(1) *Die Bestimmungen dieses Abschnitts lassen die Anwendung sonstiger Rechtsvorschriften auf Computerprogramme, insbesondere über den Schutz von Erfindungen, Topographien von Halbleitererzeugnissen, Marken und den Schutz gegen unlauteren Wettbewerb einschließlich des Schutzes von Geschäfts- und Betriebsgeheimnissen, sowie schuldrechtliche Vereinbarungen unberührt.*

(2) *Vertragliche Bestimmungen, die in Widerspruch zu § 69d Abs. 2 und 3 und § 69e stehen, sind nichtig.*

Teil 2 Verwandte Schutzrechte

Abschnitt 6 Schutz des Datenbankherstellers § 87e Verträge über die Benutzung einer Datenbank

Eine vertragliche Vereinbarung, durch die sich der Eigentümer eines mit Zustimmung des Datenbankherstellers durch Veräußerung in Verkehr gebrachten Vervielfältigungsstücks der Datenbank, der in sonstiger Weise zu dessen Gebrauch Berechtigte oder derjenige, dem eine Datenbank aufgrund eines mit dem Datenbankhersteller oder eines mit dessen Zustimmung mit einem Dritten geschlossenen Vertrags zugänglich gemacht wird, gegenüber dem Datenbankhersteller verpflichtet, die Vervielfältigung, Verbreitung oder öffentliche Wiedergabe von nach Art und Umfang unwesentlichen Teilen der Datenbank zu unterlassen, ist insoweit unwirksam, als diese Handlungen weder einer normalen Auswertung der Datenbank zuwiderlaufen noch die berechtigten Interessen des Datenbankherstellers unzumutbar beeinträchtigen.

Act on Copyright and Related Rights (Copyright Act, as amended up to Act of September 1, 2017)

Part 1 Copyright

Chapter 6 Limitations on copyright through lawfully permitted uses

Subchapter 4 Lawfully permitted uses for teaching, science and institutions Section 60g: Lawfully permitted use and contractually authorised use:

(1) *The rightholder may not invoke agreements which restrict or prohibit uses permitted in accordance with sections 60a to 60f and such restriction or prohibition is to the detriment of the persons entitled to such use.*

(2) *In derogation from subsection (1), agreements which deal exclusively with the making available of content at terminals in accordance with section 60e (4) and section 60f (1) or with the transmission of reproductions in response to individual orders in accordance with section 60e (5) shall have priority over lawful permission. [Official translation]*

Chapter 8 Special provisions on computer programs Section 69g Application of other legal provisions; law of contract:

(1) *The provisions of this Chapter shall be without prejudice to the application of other legal provisions concerning computer programs, particularly those concerning the protection of inventions, topographies of semi-conductor products, trademarks and protection against unfair*

competition, including the protection of business and trade secrets, as well as agreements based on the law of obligations

(2) Contractual provisions which are contrary to section 69d (2) and (3) and section 69e shall be null and void. [Official translation]

Part 2 Related rights

Chapter 6 Protection of makers of a database, Section 87e Contracts dealing with the use of a database:

A contractual agreement by which the owner of a copy of the database, which was brought to the market by sale with the consent of the producer of the database, that person who is otherwise authorised to use the copy of the database or that person who is given access to a database on the basis of a contract concluded with the producer of the database or of a contract concluded with a third party with the consent of the producer of the database, undertakes vis-à-vis the producer of the database to refrain from reproducing, distributing or communicating to the public quantitatively or qualitatively insubstantial parts of the database shall be ineffective insofar as these acts neither run counter to any normal utilisation of the database nor unreasonably impair the legitimate interests of the producer of the database. [Official translation]

Ireland

Copyright and Related rights Act 2000

Part I Preliminary and General s. 2 Interpretation

(10) Where an act which would otherwise infringe any of the rights conferred by this Act is permitted under this Act it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict that act.

Part 2 Copyright Chapter 6 s. 57 Education - Reprographic copying by educational establishments of certain works

(4) The terms of a licence granted to an educational establishment authorising the reprographic copying for the educational purposes of that establishment of passages from literary, dramatic or musical works or the typographical arrangements of published editions or original databases, which have been lawfully made available to the public, shall be void in so far as they purport to restrict the proportion of a work which may be copied (whether on payment or free of charge) to less than that which would be permitted under this section.

Part V Databases Chapter 7 Databases s.327 Rights and Obligations of Lawful Users

(2) Where, under an agreement, a person has a right to use a database, any term or condition in the agreement shall be void in so far as it purports to prevent that person from extracting or re-utilising insubstantial parts of the contents of the database for any purpose.

Copyright and Other Intellectual Property Law Provisions Act, 2019 (amending the Copyright and Related Rights Act 2000)

s.57C(2): Licensing schemes for educational establishments

The terms of a licence granted to an educational establishment on foot of a licensing scheme certified under section 173 shall be void in so far as they purport to restrict the proportion of a work which may be copied or communicated (whether on payment or free of charge) to less than that which would be permitted under section 57, 61 or 62, as the case may be.

Portugal

Código do Direito de Autor e dos Direitos Conexos (conforme alterado de acordo com DL n.º 100/2017, de 23/08)

Da utilização livre - Âmbito Artigo 75(5): *É nula toda e qualquer cláusula contratual que vise eliminar ou impedir o exercício normal pelos beneficiários das utilizações enunciadas nos n.os 1, 2 e 3 deste artigo, sem prejuízo da possibilidade de as partes acordarem livremente nas respectivas formas de exercício, designadamente no respeitante aos montantes das remunerações equitativas.*

Copyright and Related Rights Code (amended by DL 100/2017)

Of free use - Scope Article 75(5) 5 - Any contractual clause aimed at eliminating or impeding the normal exercise by the beneficiaries of the uses set forth in paragraphs 1, 2 and 3 of this article is without prejudice, without prejudice to the possibility of the parties freely agreeing on the respective forms of exercise, namely as regards the amounts of equitable remuneration.

[Machine translation]

United Kingdom

Copyright Designs and Patents Act 1988 (CDPA)

As the original wording is very extensive, the full list of the protected UK exceptions is summarised below together with the language for the relevant provisions in the CDPA. Note that the wording used protects each exception from override by contract *terms*, not the contract as a whole, otherwise general contract law could be undermined.

- **Fair Dealing for Research or Private Study** - copying of works, performances or recordings for research or private study for a non-commercial purpose
s.29(4B): To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.
Sch.2 para 1C(4): To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this paragraph, would not infringe any right conferred by this Chapter, that term is unenforceable.
- **Text and Data Mining (TDM)** - copying of works or recordings for TDM for a non-commercial purpose
s.29A(5): To the extent that a term of a contract purports to prevent or restrict the making of a copy which, by virtue of this section, would not infringe copyright, that term is unenforceable.
Sch.2 para 1D(4): To the extent that a term of a contract purports to prevent or restrict the making of a copy which, by virtue of this paragraph, would not infringe any right conferred by this Chapter, that term is unenforceable.
- **Fair Dealing for Quotation** for criticism, review or otherwise - copying of a proportion of a work, performance or recording *made available to the public*
s.30(4): To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of subsection (1ZA), would not infringe copyright, that term is unenforceable.
Sch.2 para 2(1B): To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of sub-paragraph (1ZA), would not infringe any right conferred by this Chapter, that term is unenforceable.
- **Fair Dealing for Caricature, Parody or Pastiche** - copying of works, performances or recordings
s.30A(2): To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.

Sch.2 para 2A(2): *To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this paragraph, would not infringe any right conferred by this Chapter, that term is unenforceable.*

- **Fair Dealing for Reporting Current Events (News)** - copying of works (other than photographs), performances or recordings
s.30(4): *To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of subsection (1ZA), would not infringe copyright, that term is unenforceable.*
Sch.2 para 2A(2): *To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this paragraph, would not infringe any right conferred by this Chapter, that term is unenforceable.*
- **Disabled Persons** (all disabilities) - copying of works or recordings for personal use, the making and supply of accessible copies/intermediary copies of works or recordings for a disabled person by authorised bodies
(s.31F(8)): *To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of section 31A, 31B or 31BA, would not infringe copyright, that term is unenforceable.*
Sch.2 para 3E(6): *To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of paragraph 3A, 3B or 3C, would not infringe any right conferred by this Chapter, that term is unenforceable.*
- **Fair Dealing for Illustration for Instruction** - copying of works, performances or recordings by someone giving or receiving instruction for a non-commercial purpose
s.32(3): *To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.*
Sch.2 para 4(2): *To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this paragraph, would not infringe any right conferred by this Chapter, that term is unenforceable.*
- **Educational Establishments Copying and Use of Extracts** - of a work (not broadcasts or standalone artistic works) or of a recording for instruction for a non-commercial purpose
s.36(7): *The terms of a licence granted to an educational establishment authorising acts permitted by this section are of no effect so far as they purport to restrict the proportion of a work which may be copied (whether on payment or free of charge) to less than that which would be permitted by this section.*
Sch.2 para 6ZA(6): *The terms of a licence granted to an educational establishment authorising acts permitted by this paragraph are of no effect so far as they purport to restrict the proportion of a recording which may be copied (whether on payment or free of charge) to less than that which would be permitted by this paragraph.*
- **Non-profit Libraries Copying for Supply to other Libraries** - of single copies of the whole or a part of published works or published recordings
s.41(5): *To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.*
Sch.2 para 6D(4): *To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this paragraph, would not infringe any right conferred by this Chapter, that term is unenforceable.*
- **Non-profit Libraries, Archives or Museums Copying for Preservation or Replacement** - of items or recordings in their collections

[s.42\(7\)](#): *To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.*

[Sch.2](#) para 6E(6): *To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this paragraph, would not infringe any right conferred by this Chapter, that term is unenforceable.*

- **Non-profit Libraries Copying for Users** - of periodical articles, a reasonable proportion of other published works or published recordings for a user's non-commercial research or private study

[s.42A\(6\)](#): *To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.*

[Sch.2](#) para 6F(6): *To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this paragraph, would not infringe any right conferred by this Chapter, that term is unenforceable.*

- **Computer Programs** - back up copies, decompilation, observing, studying and testing, decompilation

ss. [50A\(3\)](#); [50B\(4\)](#); [50BA\(2\)](#): *Where an act is permitted under this section, it is irrelevant whether or not there exists any term or condition in an agreement which purports to prohibit or restrict the act (such terms being, by virtue of section 296A, void).*

See also [s.296A\(1\)](#) avoidance of certain terms

- **Databases** - certain acts

[s.50D\(2\)](#): *Where an act which would otherwise infringe copyright in a database is permitted under this section, it is irrelevant whether or not there exists any term or condition in any agreement which purports to prohibit or restrict the act (such terms being, by virtue of section 296B, void).*

[s.296B](#) avoidance of certain terms: *Where under an agreement a person has a right to use a database or part of a database, any term or condition in the agreement shall be void in so far as it purports to prohibit or restrict the performance of any act which would but for section 50D infringe the copyright in the database.*

- **Broadcasts** - recording by non-profit organisations for archival purposes

[s.75\(2\)](#): *To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this section, would not infringe copyright, that term is unenforceable.*

[Sch.2](#) para 21(2): *To the extent that a term of a contract purports to prevent or restrict the doing of any act which, by virtue of this paragraph, would not infringe any right conferred by this Chapter, that term is unenforceable.*