On 17 May 2020 the official version of the new Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market was published in the Official Journal of the EU (OJ L 131). This marks the end of a controversial legislative process, which has taken five years of heated debate, involving a separate process for assessing the proposal alone as well as the public consultation. At the Council, there was an agreement on 25 May 2020 on an amended version of the proposal, which sets forth the Council’s position and provides the basis for its negotiability at the EU Parliament, but Committees were invited to discuss, ending with the JIM (legal Affairs) Committee, which voted on a compromise version (Table II.1). The final version made it to the stage of trilogue negotiations, which concluded on 13 February 2019. The surviving compromise text was approved by the full European Parliament on 26 June 2019. It was then approved by the Council on 29 July by a qualified majority. It will now be for the Member States to adapt the new regime to their legal systems. The new Directive (EU) 2019/790 is relatively rather general and leaves a wide berth to the Member States with regard to how it should be implemented in their national legislation.

Measures to adapt Exceptions and Limitations to the digital and cross-border environment

Title II of the Directive consists of four chapters. It sets out new exceptions, the possibilities for contractual derogation, and the grandfathering of the technical protection measures. The following table roughly summarises the Directive’s structure.

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<td>I. Limits to copyright protection</td>
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<td>Provisionally, there is a separate adaptation procedure for Member States (EU and EEA) to implement the Directive’s requirements.</td>
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<td>II. Exceptions relevant for the digital and cross-border environment</td>
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General Provisions

Title I clarifies the subject matter and scope (Article 1). The Directive seeks to further harmonise EU copyright law, in a particular focus on “digital and cross-border uses of protected content”. It aims at striking exciting rules in the copyright acquis, with some exceptions. These are set out in Article 2, which outlines exemptions to the acquis.

Title I also contains the definitions (Article 3). These include research organisations, text and data mining (TDM), cultural heritage institutions, users, information society service, and online content sharing service providers.

Measures to adapt Exceptions and Limitations to the digital and cross-border environment

Title II of the Directive consists of a number of exceptions and other legislative Member States may choose to apply. A welcome departure from the legacy acquis, these are defined as mandatory exceptions, which the Member States must adhere to.

Articles 5 and 6 contain TDM-relevant exceptions. Article 5 is defined as “any substantial analytical technique aimed at expert users and data in digital form or to generate information which includes but is not limited to pattern, trends, and correlations”. Article 6 provides an exception for acts of TDM for the purposes of scientific research (covering both natural and human sciences) by research organisations and cultural heritage institutions, regarding works/subject matter in which they have taken access, subject to a number of additional conditions. This will have to be adapted with the optional exceptions covering acts of TDM for scientific purposes in Article 3. The latter define highly narrowly the Directive’s exceptions.

Article 8 sets forth an exception for reproductions and adaptations of performative or audio-visual – works/broadcast matter for the purposes of TDM. This is meant as a legal certainty for those acts that may not reach the conditions of the temporary and transient copy exception in Article 5(1) InfoSoc Directive. The exception is subject to a number of limitations, but includes research organisations, text and data mining (TDM), cultural heritage institutions, users, and online content sharing service providers.

Article 10, dealing with the non-commercial use for scientific purposes in Article 5(3)(a) InfoSoc Directive, which applies to certain TDM activities.

Article 12 provides an exception for acts of reproduction and adaptation of performative or audio-visual – works/broadcast matter for the purposes of TDM. This is meant as a legal certainty for those acts that may not reach the conditions of the temporary and transient copy exception in Article 5(1) InfoSoc Directive. The exception is subject to a number of limitations, but includes research organisations, text and data mining (TDM), cultural heritage institutions, users, and online content sharing service providers.

Article 11 deals with an exception for acts of reproduction of certain works made by cultural heritage institutions for purposes of – and the need to ensure accessibility – of preservation. This includes acts by the parties acting on its behalf. However, it involves the mandatory character of the bibliographic information, but it can include acts of carrying out or other copyright-related activities different purposes, which require authorization of the right holders, unless the act is performed in different exceptions. Any acts of digitisation and dissemination of out-of-copyright works by these institutions are facilitated by the new regime in Articles 8 to 11, discussed above.

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Article 13, dealing with an exception for acts of reproduction of certain works made by cultural heritage institutions for purposes of – and the need to ensure accessibility – of preservation. This includes acts by the parties acting on its behalf. However, it involves the mandatory character of the bibliographic information, but it can include acts of carrying out or other copyright-related activities different purposes, which require authorization of the right holders, unless the act is performed in different exceptions. Any acts of digitisation and dissemination of out-of-copyright works by these institutions are facilitated by the new regime in Articles 8 to 11, discussed above.

The new Directive introduces two chapters.

The first chapter sets out for the collective management of authorised works (SMC) such works that need to be given notice to, to access the permission. The second chapter sets out for the act of TDM for the purposes of research and development activities, which may be subject to a number of conditions, one of them being a prohibition on the use of works/subject matter in the permanent collections of cultural heritage institutions on the basis of the exclusive licences for non-commercial purposes. It further provides for a fall-back exception for these institutions to make available
The clause is limited to the extent the conditions for collective management of OOC works are not met, e.g. because the relevant collective management organisation is not sufficiently representative. Curiously, rights holders are allowed to opt out – in general or in specific cases – not only from collective management but also from the exception (Article 8).

Where a licence is granted pursuant to this scheme, the OOC works may be used by cultural heritage institutions in any Member State. However, if the use is privileged by the exception, it is deemed to occur solely in the country of establishment of the beneficiary institution (Article 9).

Finally, this chapter contains provisions on publicity measures in connection with this scheme, including an online portal to be established and managed by the EUIPO (Article 10), and the promotion of a sector-specific stakeholder dialogue (Article 11).

The second chapter contains one provision on measures to facilitate collective licensing with an extended effect (Article 12). Although specific references on extended collective licensing (ECL) could be found in previous directives, this is the first general provision on the matter in the EU acquis. Among the “safeguards” for ECL are the requirements of sufficient representation, equal treatment, opt-out, and information obligations vis-à-vis rights holders. Importantly, Article 12 does not affect the application of pre-existing ECL mechanisms and clearly demarcates this mechanism from mandatory collective management of rights.

The third chapter contains one provision aimed at facilitating the conclusion of agreements for the purpose of making available audiovisual works, in particular European works, on video-on-demand platforms (Article 13). Difficulties in licensing arise for instance due to refusals to license and windows of exploitation. To overcome these challenges, Member States shall establish or designate an “impartial body” of mediators to assist parties facing difficulties in negotiating the necessary licences. Importantly, this is a voluntary negotiation mechanism for the parties, who retain contractual freedom.

The fourth chapter contains a single but important provision, not present in the Commission proposal but introduced during the legislative process. Article 14 states that any materials resulting from reproductions of works of visual art for which the term of protection has expired are not protected by copyright or related rights, i.e., they are in the public domain. As Recital 53 clarifies, this provision is largely aimed at enabling the circulation of “faithful reproductions” of these types of work. However, as Recital 53 clarifies, this provision is only aimed at enabling the circulation of “faithful reproductions” of these types of work. Nevertheless, this provision is not intended to derogate from the prohibition of the making public of reproductions of works of visual art for which the term of protection has not expired.

This provision codifies (and aligns with CJEU case law) the public domain which has been recognized in relation to materials resulting from acts of reproduction of works of visual art, whereas before that occurred only in connection to software, databases and photographs. But perhaps most importantly, this is the first instance where a work is in the copyright acquis mentions the public domain.