

The New Copyright Directive: A tour d’horizon – Part I

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João Pedro Quintais (Institute for Information Law (IVIR))

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This is the first post of a series on the new Directive (EU) 2019/790 on copyright and related rights in the Digital Single Market.



On 17 May 2019 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 (**CDSM Directive**). This marks the end of a controversial legislative process at EU level. It also marks the beginning of what will surely be a contentious process of national implementation. Indeed, the Polish government has already filed an action for annulment under Art. 263 TFEU, apparently focusing on the most problematic aspects of Article 17. Part I of this post briefly discusses the legislative process and surveys Titles I through III of the Directive. Part II will tackle the remainder of the Directive. Over the coming months other contributions on this blog will dig deeper into the specific rules.

How We Got Here

Readers will remember that the original proposal for a directive was submitted in September 2016 by the Commission. The process followed the ordinary legislative procedure, which places the European Parliament and the Council of the European Union on equal footing, meaning that a separate process for assessing the proposal took place within each institution.

At the Council, there was an agreement on 25 May 2018 on an amended version of the proposal, which set forth the Council’s position and provided the basis for its negotiating mandate. At the EU Parliament, five Committees were involved in the discussions, ending with the JURI (Legal Affairs) Committee, which voted on a compromise version on 20 June 2018. After some resistance, the text eventually made it to the stage of trilogue negotiations, concluded on 13 February 2019. The surviving compromise text was approved by the EU Parliament on 26 March. It was then approved by the Council on 15/17 April by a qualified majority. Six countries voted against and Germany added a protocol on the topic of “upload filters” (see [here](#)). (For an excellent timeline, check the [CREATe website](#).)

The legislative process was mired in controversy and heavily lobbied from all sides. The brunt of the criticism of the Directive focused on the new press publishers’ right (then Art. 11, now 15) and the so-called value gap or “upload filters” provision (then Art. 13, now 17). This criticism included [civil society protests](#) reminiscent of the ACTA debate, opposition by [digital rights NGOs](#) and [Internet luminaries](#), and [multiple expert statements](#) by research institutes and academics. (Disclosure: I have signed and coordinated a number of these statements). On balance, however, the lobbying by rights holders’ representatives – especially publishers, the recording industry and (*music*) collecting societies – appears to have been the most [intensive and effective](#), often outweighing empirical research in support of opposite views. (On this topic, I recommend this insightful talk by Professor Martin Kretschmer.)

A [good argument](#) can be made that the final version of the Directive is an improvement over the Commission’s original proposal. Unfortunately, that is a low bar to clear, especially regarding the most problematic provisions. The remainder of this post provides a (not so short) bird’s eye view of Titles I through III of the CDSM Directive.

CDSM Directive: Structure

The CDSM Directive is one of the longest in the copyright *acquis*, with 86 recitals and 32 articles. It is divided into five titles: general provisions (I), measures to adapt exceptions and limitations to the digital and cross-border environment (II), measures to improve licensing practices and ensure wider access to content (III), measures to achieve a well-functioning marketplace for copyright (IV), and final provisions (V). The table below roughly summarises the Directive’s structure.

TITLE	CHAPTER	ARTICLES	RECITALS <i>indicative</i>
I. GENERAL PROVISIONS	-	1, 2	1–4
II. MEASURES TO ADAPT (E&Ls) TO THE DIGITAL AND CROSS-BORDER ENVIRONMENT	-	3 to 7	5–29
III. MEASURES TO IMPROVE LICENSING PRACTICES AND ENSURE WIDER ACCESS TO CONTENT	1. <i>Out-of-commerce works and other subject matter</i>	8 to 11	30–43
	2. <i>Measures to facilitate collective licensing</i>	12	44–50
	3. <i>Access to and availability of audiovisual works on video-on-demand platforms</i>	13	51–52
	4. <i>Works of visual art in the public domain</i>	14	53
IV. MEASURES TO ACHIEVE A WELL-FUNCTIONING MARKETPLACE FOR COPYRIGHT	1. <i>Rights in publications</i>	15, 16	54–60
	2. <i>Certain uses of protected content by online services</i>	17	61–71
	3. <i>Fair remuneration in exploitation contracts of authors and performers</i>	18 to 23	72–81
V. FINAL PROVISIONS	-	24 to 32	82–86

General Provisions

Title I clarifies the subject matter and scope (**Article 1**). The Directive seeks to further harmonise EU copyright law with a particular focus on “digital and cross-border uses of protected content”. It keeps intact existing rules in the copyright *acquis*, with some exceptions. These are set forth in Article 24, which introduces amendments to the [Database Directive](#) and the [InfoSoc Directive](#).

Title I also contains the definitions (**Article 2**). These include research organisation, text and data mining (**TDM**), cultural heritage institution, press publication, information society service, and online content-sharing service provider.

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

Title II of the Directive sets forth a number of exceptions and limitations that Member States must provide. In a welcome departure from the legacy *acquis*, these are defined as *mandatory* exceptions, which for the most part cannot be overridden by contract. Their basic regime is as follows.

Articles 3 and 4 contain TDM-related exceptions. TDM is defined as “any automated analytical technique aimed at analysing text and data in digital form in order to generate information which includes but is not limited to patterns, trends and correlations.” **Article 3** 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 to which they have lawful access, and subject to a number of additional conditions. This will have to be articulated with the optional exception covering uses for scientific research purposes in Article 5(3)(a) [InfoSoc Directive](#), which applies to certain TDM activities.

Article 4 sets forth an exception for reproductions and extractions of lawfully accessed works/subject matter for the purposes of *TDM*. This is meant to add legal certainty for those acts that may not meet the conditions of the temporary and transient copy exception in Article 5(1) [InfoSoc Directive](#). The new exception is subject to reservation by rights holders, including through “machine-readable means in the case of content made publicly available online” (e.g. metadata and terms and conditions of a website or a service). Such reservation shall not affect the application of the TDM exception for scientific purposes in Article 3. Unfortunately, as noted previously on [this blog](#) and by [multiple researchers](#) during the legislative process, both TDM exceptions are narrow in scope and suffer from limitations that may exclude many important applications in this domain.

Article 5 contains an exception for the use of works/subject matter in digital and cross-border teaching activities. The provision is meant to add legal certainty for digital teaching activities as compared to existing exceptions in the [InfoSoc](#) and [Database Directives](#). However, its scope is quite limited. For example, it covers only use for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved, subject to further conditions. Additionally, it allows Member States to *exclude its application* altogether as regards specific uses or types of works/subject matter if there are suitable licences on the market, i.e. covering at least the same uses as those allowed under the exception. This possibility of exclusion is criticisable *inter alia* because it assumes such a provision is justified solely by a market failure rationale. This neglects the obvious public interest dimension and fundamental rights underpinning of the exception, which argue against such “licensing override” (see [also here](#)). Finally, this exception may be subject to fair compensation.

Article 6 sets forth an exception for acts of reproduction of certain works made by cultural heritage institutions for purposes of – and to the extent necessary for – *preservation*. This includes acts by third parties acting on the behalf and under the responsibility of the beneficiary institution. It does not include any copies or other copyright-relevant activities for different purposes, which require authorisation of the rights holder, unless the act is permitted by different exceptions. Some activities of digitisation or dissemination of out-of-commerce works by these institutions are facilitated by the new regime in Articles 8 to 11, discussed below.

Apart from Article 4, these mandatory E&Ls cannot be overridden by contract (**Article 7(1)**). They are however subject to two provisions in the [InfoSoc Directive](#) that will narrow their scope (**Article 7(2)**). First, the three-step test in Article 5(5), which the CJEU has the unfortunate habit of interpreting strictly (although that need not be the case – see e.g. [here](#), [here](#) and [here](#)). Second, part of the complex provisions in Article 6(4) [InfoSoc Directive](#), which allow for setting aside these exceptions through the application of technical protection measures.

In sum, despite the positive aspects, the above regime has significant shortcomings: the narrow scope of the new exceptions, the possibilities for contractual derogation, and the grandfathering of the technical protection measures regime. This regime will probably not lead to simplification and harmonisation of the system of exceptions in EU copyright law, as it continues to allow significant [cherry-picking](#) by Member States. Rather, the combination of its fragmented rules with the optional (and partially overlapping) catalogue of Article 5 [InfoSoc Directive](#) adds significant complexity to the *acquis*. In that sense, Title II feels like a missed opportunity.

Measures to Improve Licensing Practices and Ensure Wider Access to Content

Title III of the CDSM Directive consists of four chapters.

The first chapter sets out rules for the collective management of out-of-commerce (**OOO**) works/subject matter in the permanent collections of cultural heritage institutions on the basis of non-exclusive licences for non-commercial purposes. It further provides for a fall-back exception for these institutions to make available

such works/subject matter, for non-commercial purposes, subject to certain conditions and exclusions. The exception is a fall-back since it only applies 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 in question 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, by providing “professional, impartial and external advice”. 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 mostly aimed at enabling the circulation of “faithful reproductions” of these types of work. However, this only applies insofar as the materials resulting from the reproductions at issue are not per se original in the sense that they are “the author’s own intellectual creation”. In other words, a verbatim copy of public domain material does not meet the originality standard. Also important, as noted [elsewhere](#), is the fact that the provision advances the legislative codification (and alignment with CJEU case law) of the originality standard, which is now recognised 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 rule in the copyright *acquis* mentions the public domain.