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Subject: Proposal for a Directive of the European Parliament and of the Council on
copyright in the Digital Single Market
- Revised Presidency compromise proposal regarding Articles 2 to 9

Delegations will find in the Annex a revised Presidency compromise proposal as the basis for discussion at the meeting of the Working Party on Intellectual Property (Copyright) on 3/4 October.

Changes in relation to the previous version (8929/17) are in ~~strike through~~ and **bold underlined**.

Proposal for a
DIRECTIVE OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL
on copyright in the Digital Single Market

- (5) In the fields of research, education and preservation of cultural heritage, digital technologies permit new types of uses that are not clearly covered by the current Union rules on exceptions and limitations. In addition, the optional nature of exceptions and limitations provided for in Directives 2001/29/EC, 96/9/EC and 2009/24/EC in these fields may negatively impact the functioning of the internal market. This is particularly relevant as regards cross-border uses, which are becoming increasingly important in the digital environment. Therefore, the existing exceptions and limitations in Union law that are relevant for scientific research, teaching and preservation of cultural heritage should be reassessed in the light of those new uses. Mandatory exceptions or limitations for uses of text and data mining technologies in the field of scientific research, illustration for teaching in the digital environment and for preservation of cultural heritage should be introduced. For uses not covered by the exceptions or the limitation provided for in this Directive, the exceptions and limitations existing in Union law should continue to apply. Directives 96/9/EC and 2001/29/EC should be adapted.
- (6) The exceptions and the limitation provided for in this Directive seek to achieve a fair balance between the rights and interests of authors and other rightholders on the one hand, and of users on the other. They can be applied only in certain special cases which do not conflict with the normal exploitation of the works or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholders.

- (7) The protection of technological measures established in Directive 2001/29/EC remains essential to ensure the protection and the effective exercise of the rights granted to authors and to other rightholders under Union law. This protection should be maintained while ensuring that the use of technological measures does not prevent the enjoyment of the exceptions and the limitation established in this Directive. Rightholders should have the opportunity to ensure this through voluntary measures. They should remain free to choose the appropriate means of enabling the beneficiaries of the exceptions and the limitation established in this Directive to benefit from them. In the absence of voluntary measures, Member States should take appropriate measures in accordance with the first subparagraph of Article 6(4) of Directive 2001/29/EC, including where works and other subject-matter are made available through on-demand services.
- (8) New technologies enable the automated computational analysis of information in digital form, such as text, sounds, images or data, generally known as text and data mining. Those technologies allow researchers to process large amounts of information with a view to gaining new knowledge and discovering new trends. Whilst text and data mining technologies are prevalent across the digital economy, there is widespread acknowledgment that text and data mining can in particular benefit the research community and in so doing support innovation. These technologies benefit research organisations as well as cultural heritage institutions, which may also carry out research in the context of their main activities. However, in the Union, such organisations and institutions are confronted with legal uncertainty as to the extent to which they can perform text and data mining of content. In certain instances, text and data mining may involve acts protected by copyright and/or by the *sui generis* database right, notably the reproduction of works or other subject-matter and/or the extraction of contents from a database. Where there is no exception or limitation which applies, an authorisation to undertake such acts would be required from rightholders.

- (8a) Text and data mining may also be carried out in relation to mere facts or data which are not protected by copyright and in such instances no authorisation is required under copyright law. There may also be instances of text and data mining which do not involve acts of reproduction or where the reproductions made fall under the mandatory exception for temporary acts of reproduction laid down in Article 5(1) of Directive 2001/29/EC, which should continue to apply to text and data mining techniques which do not involve the making of copies beyond the scope of that exception.
- (9) Union law provides for certain exceptions and limitations covering uses for scientific research purposes which may apply to acts of text and data mining. However, those exceptions and limitations are optional and not fully adapted to the use of technologies in scientific research. Moreover, where researchers have lawful access to content, for example through subscriptions to publications or open access licences, the terms of the licences may exclude text and data mining. As research is increasingly carried out with the assistance of digital technology, there is a risk that the Union's competitive position as a research area will suffer unless steps are taken to address the legal uncertainty for text and data mining.
- (10) This legal uncertainty should be addressed by providing for a mandatory exception to the exclusive right of reproduction and also to the right to prevent extraction from a database. In line with the existing European research policy, which encourages universities and research institutes to develop collaborations with the private sector, research organisations should also benefit from the exception when their research activities are carried out in the framework of public-private partnerships. While research organisations **and cultural heritage institutions** should remain the beneficiaries of the exception, they should be able to rely on their private partners for carrying out text and data mining, including by using their technological tools.

(11) Research organisations across the Union encompass a wide variety of entities the primary goal of which is to conduct scientific research or to do so together with the provision of educational services. The term "scientific research" within the meaning of this Directive covers both the natural sciences and the human sciences. Due to the diversity of such entities, it is important to have a common understanding of research organisations. They should for example cover entities such as research institutes, universities, including university libraries, or other higher education institutions. Despite different legal forms and structures, research organisations across the Member States generally have in common that they act either on a not for profit basis or in the context of a public-interest mission recognised by the State. Such a public-interest mission may, for example, be reflected through public funding or through provisions in national laws or public contracts. Conversely, organisations upon which commercial undertakings have a decisive influence allowing them to exercise control because of structural situations such as their quality of shareholders or members, which may result in preferential access to the results of the research, should not be considered research organisations for the purposes of this Directive.

~~(11a) Research organisations and cultural heritage institutions, including the persons attached thereto, should be covered by the text and data mining exception regarding content to which they have lawful access. Lawful access should be understood as covering access to content through contractual arrangements, such as subscriptions, or through other legal means, for example based on open access policy.~~

(11a) Cultural heritage institutions should be understood as including, among others, publicly accessible libraries belonging to educational establishments and archives belonging to public sector broadcasting organisations. They should also include national libraries and national archives.

(11a**b**) Research organisations and cultural heritage institutions, ~~including the persons attached thereto~~, should be covered by the text and data mining exception regarding content to which they have lawful access. Lawful access should be understood as covering access to content through contractual arrangements **between rightholders and research organisations or cultural heritage institutions**, such as subscriptions, or through other ~~legal~~**lawful** means, for example based on open access policy. **For instance, in cases of subscriptions taken by research organisations or cultural heritage institutions, individuals covered by these subscriptions would be deemed to have lawful access. Lawful access also covers access to content that is freely available online.**

(11c) Research organisations and cultural heritage institutions may in certain cases, for example for subsequent verification of scientific research results, need to retain the copies made under the exception for the purposes of carrying out text and data mining. In such cases, the copies made should not be retained for longer than is necessary for the scientific research activities. Member States may determine, at national level and after discussions with relevant stakeholders, the concrete modalities for retaining the copies. In order not to unduly restrict the application of the exception, these modalities should be proportionate and limited to what is needed for retaining the copies in a safe manner and preventing unauthorised uses.

(12) In view of a potentially high number of access requests to and downloads of their works or other subject-matter, rightholders should be allowed to apply measures when there is a risk that the security and integrity of their systems or databases could be jeopardised. Such measures could for example be used to ensure that only ~~authorised persons can~~**having lawful** access **to** their data **can access it**, including through IP address validation or user authentication, ~~or to prevent piracy~~. These measures should however remain proportionate to the risks involved and should not prevent or make excessively difficult text and data mining carried out by researchers ~~in a legitimate manner~~.

- (13) In view of the nature and scope of the exception, which is limited to entities carrying out scientific research on a non-for-profit basis or pursuant to a public interest mission, any potential harm to rightholders created through this exception should be minimal. Therefore, Member States should not provide for compensation for rightholders as regards uses under the text and data mining exception introduced by this Directive.
- (14) Article 5(3)(a) of Directive 2001/29/EC allows Member States to introduce an exception or limitation to the rights of reproduction, communication to the public and making available to the public for the sole purpose of, among others, illustration for teaching. In addition, Articles 6(2)(b) and 9(b) of Directive 96/9/EC permit the use of a database and the extraction of a substantial part of its contents for the purpose of illustration for teaching. The scope of those exceptions or limitations as they apply to digital uses is unclear. In addition, there is a lack of clarity as to whether those exceptions or limitations would apply where teaching is provided online and at a distance. Moreover, the existing legal framework does not provide for a cross-border effect. This situation may hamper the development of digitally-supported teaching activities and distance learning. Therefore, the introduction of a new mandatory exception or limitation is necessary to ensure that educational establishments benefit from full legal certainty when using works or other subject-matter in digital teaching activities, including online and across borders.
- (15) While distance learning and cross-border education programmes are mostly developed at higher education level, digital tools and resources are increasingly used at all education levels, in particular to improve and enrich the learning experience. The exception or limitation provided for in this Directive should therefore benefit all educational establishments recognised by a Member State, including primary, secondary, vocational and higher education. It should apply only to the extent that the uses are justified by the non-commercial purpose of the particular teaching activity. The organisational structure and the means of funding of an educational establishment should not be the decisive factors to determine the non-commercial nature of the activity.

(16) The exception or limitation should cover digital uses of works and other subject-matter such as the use of parts or extracts of works to support, enrich or complement the teaching, including learning activities. Uses allowed under the exception or limitation should be understood to cover the specific accessibility needs of persons with a disability in the context of illustration for teaching. When implementing the exception or limitation, Member States should remain free to specify, for the different categories of works or other subject-matter and in a balanced manner, the proportion of a work or other subject-matter that may be used for the sole purpose of illustration for teaching. The use of the works or other subject-matter under the exception or limitation should be only in the context of teaching and learning activities carried out under the responsibility of educational establishments, including during examinations or teaching activities taking place outside the premises of educational establishments, and be limited to what is necessary for the purpose of such activities. The exception or limitation should cover both uses through digital means in the classroom and online uses through the educational establishment's secure electronic network, the access to which should be protected, notably by authentication procedures.

(17) Different arrangements, based on the implementation of the exception provided for in Directive 2001/29/EC or on licensing agreements covering further uses, are in place in a number of Member States in order to facilitate educational uses of works and other subject-matter. Such arrangements have usually been developed taking account of the needs of educational establishments and different levels of education. Whereas it is essential to harmonise the scope of the new mandatory exception or limitation in relation to digital uses and cross-border teaching activities, the modalities of implementation may differ from a Member State to another, to the extent they do not hamper the effective application of the exception or limitation or cross-border uses. This should allow Member States to build on the existing arrangements concluded at national level. In particular, Member States could decide to subject the application of the exception or limitation, fully or partially, to the availability of adequate licences, covering at least the same uses as those allowed under the exception. **Member States could notably use** ~~†this mechanism would, for example, allow to~~ **giving** precedence to licences for materials which are primarily intended for the educational market **or for sheet music**. In order to avoid that such mechanism results in legal uncertainty or administrative burden for educational establishments, Member States adopting this approach should **take measures to** ensure that rightholders make the licensing schemes allowing digital uses of works or other subject-matter for the purpose of illustration for teaching easily available and that educational establishments are aware of the existence of such licensing schemes. Such measures may include the development of licensing schemes tailored to the needs of educational establishments and the development of information tools aimed at ensuring the visibility of the existing licensing schemes.

(17a) Member States should remain free to provide that rightholders receive fair compensation for the digital uses of their works or other subject-matter under the exception or limitation for illustration for teaching provided for in this Directive. For the purposes of determining the possible level of fair compensation, due account should be taken, inter alia, of Member States' educational objectives and of the harm to rightholders.

- (18) An act of preservation of a work or other subject-matter in the collection of a cultural heritage institution, ~~educational establishment or public service broadcasting organisation~~ may require a reproduction and consequently the authorisation of the relevant rightholders. **Cultural heritage institutions** Such entities are engaged in the preservation of their collections for future generations. Digital technologies offer new ways to preserve the heritage contained in those collections but they also create new challenges. In view of these new challenges, it is necessary to adapt the current legal framework by providing a mandatory exception to the right of reproduction in order to allow those acts of preservation.
- (19) Different approaches in the Member States for acts of preservation by cultural heritage institutions, ~~educational establishments or public service broadcasting organisations~~ hamper cross-border cooperation and the sharing of means of preservation by such ~~entities~~ **institutions** in the internal market, leading to an inefficient use of resources.
- (20) Member States should therefore be required to provide for an exception to permit cultural heritage institutions, ~~educational establishments or public service broadcasting organisations~~ to reproduce works and other subject-matter permanently in their collections for preservation purposes, for example to address technological obsolescence or the degradation of original supports. Such an exception should allow for the making of copies by the appropriate preservation tool, means or technology, in the required number and at any point in the life of a work or other subject-matter to the extent required ~~in order to produce a copy~~ for preservation purposes only. **Acts of reproduction undertaken by cultural heritage institutions for purposes other than the preservation of works and other subject-matter in their permanent collections should remain subject to the authorisation of rightholders, unless permitted by other exceptions or limitations provided for by Union law.**
- (20a) ~~The making of copies under this exception should be understood as including the making of copies by third parties acting on behalf of and under the responsibility of the beneficiaries.~~

(20a) Cultural heritage institutions do not necessarily have the technical means or expertise to undertake the acts required to preserve their collections themselves, particularly in the digital environment, and may therefore have recourse to the assistance of other cultural institutions and other third parties for that purpose. Under this exception, cultural heritage institutions should therefore be allowed to rely on third parties acting on their behalf and under their responsibility, including those that are based in other Member States, for the making of copies.

- (21) For the purposes of this Directive, works and other subject-matter should be considered to be permanently in the collection of a cultural heritage institution, ~~educational establishment or public service broadcasting organisation~~ when copies are owned or permanently held by such ~~an entity~~ **institutions**, for example as a result of a transfer of ownership or licence agreements.
- (22) Cultural heritage institutions should benefit from a clear framework for the digitisation and dissemination, including across borders, of out-of-commerce works or other subject-matter. However, the particular characteristics of the collections of out-of-commerce works, **together with the amount of works involved in mass digitisation projects**, mean that obtaining the prior consent of the individual rightholders may be very difficult. This can be due, for example, to the age of the works or other subject-matter, their limited commercial value or the fact that they were never intended for commercial use. It is therefore necessary to provide for measures to facilitate the **collective** licensing of rights in out-of-commerce works that are **permanently** in the collections of cultural heritage institutions and thereby to allow the conclusion of agreements with cross-border effect in the internal market.

- (23) Member States should, within the framework provided for in this Directive, have flexibility in choosing the specific type of mechanism, such as extended collective licensing or presumption of representation, allowing for licences for out-of-commerce works to extend to the rights of rightholders that ~~are~~**have** not ~~represented by~~**mandated a representative** collective management organisation, in accordance with their legal traditions, practices or circumstances. Member States should also have flexibility in determining ~~the required representativeness of~~ **whether the** collective management organisations **are sufficiently representative**, as long as this is based on a significant number of rightholders in the relevant type of works or other subject-matter.
- (24) For the purpose of those licensing mechanisms, a rigorous and well-functioning collective management system is important. That system includes in particular rules of good governance, transparency and reporting, as well as the regular, diligent and accurate distribution and payment of amounts due to individual rightholders, as provided for by Directive 2014/26/EU. Additional appropriate safeguards should be available for all rightholders, who should be given the opportunity to exclude the application of such mechanisms to their works or other subject-matter **in general or in relation to particular works or other subject-matter or to particular licences**. Conditions attached to those mechanisms should not affect their practical relevance for cultural heritage institutions. **It is important that when a rightholder excludes the application of such mechanisms to one or more of their works or other subject-matter, the informed collective management organisation does not continue to issue licences covering the relevant uses and any ongoing uses are terminated within a reasonably short period. Such exclusion by the rightholder should not affect their claim to remuneration for the actual use of the work or other subject-matter.**

(25) Considering the variety of works and other subject-matter in the collections of cultural heritage institutions, it is important that the licensing mechanisms introduced by this Directive are available and can be used in practice for different types of works and other subject-matter, including photographs, software, ~~sound recordings~~ **phonograms**, and audio-visual works **and unique works of art**, irrespective of whether they have ever been commercially available. **Never-in-commerce works may include posters, leaflets, trench journals or amateur audiovisual works, but also unpublished works or other subject-matter.** When **a work is available in any of its** different versions, **such as subsequent editions of literary works and alternate cuts of cinematographic works,** or **in any of its different** manifestations, **such as digital and printed formats of the same work,** ~~of a given work are available, such as subsequent editions of literary works, alternate cuts of cinematographic works or digital and printed formats of the same work,~~ this work **or other subject-matter** should not be considered out-of-commerce. Conversely, the commercial availability of **adaptations, including** other language versions **or audiovisual adaptations** of a literary work, should not preclude the determination of the out-of-commerce status of a work ~~in a given language~~. In order to reflect the specificities of different ~~categories~~ **types** of works and other subject-matter as regards modes of publication and distribution and to facilitate the usability of those mechanisms, specific requirements and procedures may have to be established by Member States for the practical application of those licensing mechanisms. It is appropriate that Member States consult rightholders, users and collective management organisations when doing so.

(25a) When determining whether works and other subject-matter are out-of-commerce, a reasonable effort should be required to assess their availability to the public in the customary channels of commerce, **taking into account the characteristics of the particular set of works. The reasonable effort should not have to be repeated over time but it should also take account of any easily accessible evidence of upcoming availability of works in the customary channels of commerce.** ~~Account should be taken not only of the immediate availability in the customary channels of commerce, but also of whether the work or other subject-matter can be reasonably expected to become available in the near future. A work-by-work assessment or a verification of availability across borders should only be required when this is considered reasonable.~~ **In many cases the out-of-commerce status of a set of works could be determined through a proportionate mechanism, such as sampling. The limited availability of a work, such as its availability in second-hand shops, or the theoretical possibility to obtain a licence to a work should not be considered as availability to the public in the customary channels of commerce.**

(26) For reasons of international comity, the licensing mechanisms for the digitisation and dissemination of out-of-commerce works provided for in this Directive should not apply to **sets of out-of-commerce works which predominantly consist of** works or other subject-matter that are first published or, in the absence of publication, first broadcast in a third country or, in the case of cinematographic or audiovisual works, to works the producer of which has his headquarters or habitual residence in a third country. Those mechanisms should also not apply to **sets of out-of-commerce works which predominantly consist of** works or other subject-matter of third country nationals except when they are first published or, in the absence of publication, first broadcast in the territory of a Member State or, in the case of cinematographic or audiovisual works, to works of which the producer's headquarters or habitual residence is in a Member State.

- (27) As the digitisation of the collections of cultural heritage institutions can entail significant investments, any licences granted under the mechanisms provided for in this Directive should not prevent cultural heritage institutions from generating reasonable revenues in order to cover the costs of the licence and the costs of digitising and disseminating the works and other subject-matter covered by the licence.
- (28) Information regarding the future and ongoing use of out-of-commerce works and other subject-matter by cultural heritage institutions on the basis of the licensing mechanisms provided for in this Directive and the arrangements in place for all rightholders to exclude the application of licences to their works or other subject-matter should be adequately publicised **both before a licence is granted and during the operation of the licence as appropriate.** This is particularly important when uses take place across borders in the internal market. It is therefore appropriate to make provision for the creation of a single publicly accessible online portal for the Union to make such information available to the public for a reasonable period of time before the ~~cross-border~~ use takes place. **This portal should provide rightholders with a possibility to exclude the application of licences to their works or other subject-matter.** Under Regulation (EU) No 386/2012 of the European Parliament and of the Council¹, the European Union Intellectual Property Office is entrusted with certain tasks and activities, financed by making use of its own budgetary means, aiming at facilitating and supporting the activities of national authorities, the private sector and Union institutions in the fight against, including the prevention of, infringement of intellectual property rights. It is therefore appropriate to rely on that Office to establish and manage the European portal making such information available. **In addition to making the information available through the portal, further appropriate publicity measures may need to be taken on a case-by-case basis in order to increase the awareness of affected rightholders, for example through the use of additional channels of communication to reach a wider public. The necessity, the nature and the geographic scope of the additional publicity measures should depend on the characteristics of the relevant out-of-commerce works or other subject-matter, the terms of the licences and the existing practices in Member States.**

¹ Regulation (EU) No 386/2012 of the European Parliament and of the Council of 19 April 2012 on entrusting the Office for Harmonization in the Internal Market (Trade Marks and Designs) with tasks related to the enforcement of intellectual property rights, including the assembling of public and private-sector representatives as a European Observatory on Infringements of Intellectual Property Rights (OJ L 129, 16.5.2012, p. 1–6).

TITLE I
GENERAL PROVISIONS

Article 2
Definitions

For the purposes of this Directive, the following definitions shall apply:

- (1) ‘research organisation’ means an entity, the primary goal of which is to conduct scientific research or to provide educational services involving also the conduct of scientific research
 - (a) on a non-for-profit basis or by reinvesting all the profits in its scientific research, or
 - (b) pursuant to a public interest mission recognised by a Member State,in such a way that the access to the results generated by the scientific research cannot be enjoyed on a preferential basis by an undertaking exercising a decisive influence upon such organisation;
- (2) ‘text and data mining’ means any automated analytical technique aiming to analyse text and data in digital form in order to generate information such as patterns, trends and correlations;
- (3) ‘cultural heritage institution’ means a publicly accessible library or museum, an archive or a film or audio heritage institution;
- (4) ...

TITLE II
**MEASURES TO ADAPT EXCEPTIONS AND LIMITATIONS TO THE DIGITAL AND
CROSS-BORDER ENVIRONMENT**

Article 3

Text and data mining

1. Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, Articles 5(a) and 7(1) of Directive 96/9/EC and Article 11(1) of this Directive for reproductions and extractions made by research organisations and cultural heritage institutions in order to carry out text and data mining of works or other subject-matter to which they have lawful access, for the purposes of scientific research.

1a. Copies of works or other subject-matter made in compliance with paragraph 1 shall be retained for no longer than is necessary for achieving the purposes of scientific research.
- ~~2. Any contractual provision contrary to the exception provided for in paragraph 1 shall be unenforceable.~~
3. Rightholders shall be allowed to apply measures to ensure the security and integrity of the networks and databases where the works or other subject-matter are hosted. Such measures shall not go beyond what is necessary to achieve that objective.
4. Member States shall encourage rightholders, ~~and~~ research organisations **and cultural heritage institutions** to define commonly-agreed best practices concerning the application of the **obligation and** measures referred to **respectively** in paragraphs **1a and** 3.

Article 4

Use of works and other subject-matter in digital and cross-border teaching activities

1. Member States shall provide for an exception or limitation to the rights provided for in Articles 2 and 3 of Directive 2001/29/EC, Article 5 and Article 7(1) of Directive 96/9/EC, Article 4(1) of Directive 2009/24/EC and Article 11(1) of this Directive in order to allow for the digital use of works and other subject-matter for the sole purpose of illustration for teaching, to the extent justified by the non-commercial purpose to be achieved, provided that the use:
 - (a) takes place under the responsibility of an educational establishment ~~and, for online uses,~~ **on its premises or other venues, or** through a secure electronic network accessible only by the educational establishment's pupils or students and teaching staff; **and**
 - (b) is accompanied by the indication of the source, including the author's name, unless this turns out to be impossible.

2. Member States may provide that the exception adopted pursuant to paragraph 1 does not apply generally or as regards specific types of works or other subject-matter, to the extent that adequate licences **covering the needs of educational establishments and** authorising the acts described in paragraph 1 are easily available in the market.

Member States availing themselves of the provision of the first subparagraph shall take the necessary measures to ensure that rightholders make the licences authorising the acts described in paragraph 1 available and visible for educational establishments.

3. The use of works and other subject-matter for the sole purpose of illustration for teaching through secure electronic networks undertaken in compliance with the provisions of national law adopted pursuant to this Article shall be deemed to occur solely in the Member State where the educational establishment is established.

4. Member States may provide for fair compensation for the harm incurred by the rightholders due to the use of their works or other subject-matter pursuant to paragraph 1.

Article 5

Preservation of cultural heritage

1. Member States shall provide for an exception to the rights provided for in Article 2 of Directive 2001/29/EC, **point (a) of Article 5** and **Article 7(1)** of Directive 96/9/EC, **point (a) of Article 4(1)** of Directive 2009/24/EC and Article 11(1) of this Directive, permitting cultural heritage institutions, ~~educational establishments or public service broadcasting organisations~~ to make copies of any works or other subject-matter that are permanently in their collections, in any format or medium, for the purpose of the preservation of such works or other subject-matter and to the extent necessary for such preservation
- ~~2. Any contractual provision contrary to the exception provided for in paragraph 1 shall be unenforceable.~~

Article 6

Common provisions

- 1. Any contractual provision contrary to the exceptions provided for in Articles 3, 4(1) and 5 shall be unenforceable.**
- ~~2.~~ Article 5(5) and the first, third and fifth subparagraphs of Article 6(4) of Directive 2001/29/EC shall apply to the exceptions and the limitation provided for under this Title.

TITLE III
MEASURES TO IMPROVE LICENSING PRACTICES AND ENSURE WIDER ACCESS
TO CONTENT

CHAPTER 1
Out-of-commerce works

Article 7

Use of out-of-commerce works by cultural heritage institutions

1. Member States shall provide that a collective management organisation, **in accordance with its mandates**, may conclude a non-exclusive licence for non-commercial purposes with a cultural heritage institution for the reproduction, distribution, communication to the public or making available **of a set** of out-of-commerce works or other subject-matter permanently in the collection of the institution, irrespective of whether ~~the~~**all** rightholders are represented by the collective management organisation, provided that:
 - (a) the collective management organisation is, on the basis of mandates from rightholders, **sufficiently** representative of rightholders in the relevant type of works or other subject-matter and of the rights which are the subject of the licence;
(aa) the collective management organisation assumes the legal responsibility for the use authorised by the licence agreement in relation to all rightholders of that category;
 - (b) equal treatment is guaranteed to all rightholders in relation to the terms of the licence;
 - (c) all rightholders may at any time ~~object~~**exclude the possibility for collective management organisations to license** their works or other subject-matter ~~being deemed to be out of commerce~~**in accordance with this Article, either in general or in specific cases**, or exclude the application of any licence **granted in accordance with this Article** to their works or other subject-matter.

2. A work or other subject-matter shall be deemed to be out-of-commerce when, **after a reasonable effort is made to determine its availability, it can be presumed in good faith that** the whole work or other subject-matter ~~in all its versions and manifestations,~~ is not available to the public through customary channels of commerce ~~after a reasonable effort is made to determine its availability.~~

Member States shall, in consultation with rightholders, collective management organisations and cultural heritage institutions, ensure that the specific requirements used to determine whether works and other subject-matter can be licensed in accordance with paragraph 1 do not extend beyond what is necessary and reasonable. Such requirements shall not preclude the possibility to determine the out-of-commerce status of a set of works or other subject-matter as a whole, when it is reasonable to presume that all works or other subject-matter are out-of-commerce.

3. ~~(...)~~ moved to Art. 8a(2)

4. Member States shall ensure that the licences referred to in paragraph 1 are sought from a collective management organisation that is representative for the Member State where the cultural heritage institution is established.
5. This Article shall not apply to **sets of out-of-commerce works if there is evidence to presume that they predominantly consist of:**
- (a) works or other subject-matter first published or, in the absence of publication, first broadcast in a third country, except for cinematographic or audiovisual works;
 - (b) cinematographic or audiovisual works, the producers of which have their headquarters or habitual residence in a third country;
 - (c) works or other subject-matter of third country nationals when a Member State or a third country could not be determined, after a reasonable effort, according to points (a) and (b).

Article 8
Cross-border uses

1.—Works or other subject-matter covered by a licence granted in accordance with Article 7 may be used by the cultural heritage institution in accordance with the terms of the licence in ~~all~~any Member States **covered by the licence**.

2.—(...)moved to Art. 8a(1)

3.—(...)moved to Art. 8a(1)

Article 8a
Publicity measures

1. Member States shall ensure that information for the purposes of the identification of the **out-of-commerce** works or other subject-matter ~~covered by a licence granted in accordance with Article 7, information on the parties to the licence and the allowed uses, and~~ **as well as** information about the possibilities of rightholders referred to in Article 7(1)(c), **and, as soon as it is available, information on the parties to the licence, the covered territories and the allowed uses is** ~~are~~ made publicly accessible in a single online portal for at least six months before the works or other subject-matter are reproduced, distributed, communicated to the public or made available ~~in Member States other than the one where the licence is granted, and for the whole duration of~~ **in accordance with** the licence.

The portal ~~referred to in paragraph 2~~ shall be established and managed by the European Union Intellectual Property Office in accordance with Regulation (EU) No 386/2012.

2. Member States shall provide that, **if necessary for the awareness of rightholders, further appropriate publicity measures are taken regarding the possibility for collective management organisations to license works or other subject-matter in accordance with Article 7, the licences granted and the possibilities of rightholders referred to in Article 7(1)(c).**

The **additional** appropriate publicity measures shall be taken in the Member State where the licence is sought. If there is evidence, **such as the origin of the works or other subject-matter,** to suggest that the awareness of rightholders could be more efficiently raised in other Member States **or third countries,** such publicity measures shall also cover those Member States **and third countries.**

Article 9

Stakeholder dialogue

Member States shall ensure a regular dialogue between representative users' and rightholders' organisations, and any other relevant stakeholder organisations, on a sector-specific basis, **to** foster the relevance and usability of the licensing mechanisms referred to in Article 7(1); **and to** ensure the effectiveness of the safeguards for rightholders referred to in this Chapter; ~~notably as regards publicity measures, and, where applicable, assist in the establishment of the requirements referred to in the second subparagraph of Article 7(2).~~