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NOTE

From: Presidency
To: Delegations

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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 on Article 9a and relevant recitals

Delegations will find in the Annex a revised Presidency compromise proposal on Article 9a and relevant recitals, to be discussed at the meeting of the Working Party on Intellectual Property (Copyright) on 4 and 5 December.

Changes in relation to previous version are in ~~striketrough~~ and **bold/underlined**.

Article 9a

Collective licensing with an extended effect

1. When a collective management organisation, in accordance with its mandates, enters into a collective licensing agreement for the exploitation of works or other subject-matter Member States may provide, subject to safeguards provided for in this Article, that such an agreement, as far as the use within their national territory is concerned, may be extended to apply to the rights of rightholders who have not authorised the organisation to represent them by way of assignment, licence or any other contractual arrangement, or that the organisation is presumed to represent rightholders who have not authorised the organisation accordingly.

2. Member States shall ensure that the licensing mechanism referred to in paragraph 1 is only applied within ~~narrow and~~ well-defined areas of use ~~in cases~~ where obtaining authorisations on an individual basis is typically onerous and impractical to a degree that makes the **required** licensing transaction unlikely due to the nature of the use or of the types of works **or other subject-matter** concerned **and that such mechanism safeguards the legitimate interests of rightholders.**

3. The safeguards referred to in paragraph 1 must ensure that:
- (a) the 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 for the relevant Member State;
 - ~~(b) the organisation assumes the legal responsibility for the use authorised by the licence agreement in relation to all rightholders of that category;~~
 - (eb)** equal treatment is guaranteed to all rightholders in relation to the terms of the licence;
 - ~~(dc)~~ all rightholders who have not authorised the organisation operating the licence may at any time easily **and effectively** exclude the possibility for an organisation to license their works or other subject-matter **from the licensing mechanism established in accordance with this Article, either in general or in specific cases, or easily exclude the application of any licence granted in accordance with this Article to their works or other subject-matter;**
 - (ed)** appropriate publicity measures are taken **to raise the awareness of rightholders** regarding the possibility for organisations to license works or other subject-matter **and the licensing taking place** in accordance with this Article, ~~the licences granted~~ and the possibilities of rightholders referred to in point ~~(dc)~~ starting from a reasonable period before the works or other subject-matter are used under the licence.
4. The mechanism referred to in paragraph 1 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholders. **The rules provided for in this Article are without prejudice to the application of collective licensing mechanisms with an extended effect in conformity with other provisions of European Union law which allow for exceptions or limitations and mandatory collective management of rights.**

5. Where the law of a Member State provides for ~~the conclusion of a~~ liceneessing mechanism in accordance with this Article, the Member State concerned shall inform the Commission about the scope of that law, ~~and the licensing schemes~~ purposes and types of licenses introduced under that law as well as contact details for organisations issuing licences in accordance with the mechanism in paragraph 1. The Commission shall publish this information on the online portal referred to in Article 8a.

6. Based on the information received pursuant to paragraph 5 and on the discussions in the contact committee referred to in Article 12(3) of Directive 2001/29/EC, the Commission shall, by 31 December 2020, submit to the European Parliament and to the Council a report on the use of such mechanisms referred to in paragraph 1 in the EU and their impact on licensing and rightholders. The Commission's report shall be accompanied, if appropriate, by a legislative proposal, including as regards the cross-border effect of such national schemes.

Recitals

(28a) **The measures provided for in this Directive to facilitate the collective licensing of rights in out-of-commerce works or other subject-matter that are permanently in the collections of cultural heritage institutions should be without prejudice to the use of such works or other subject-matter under exceptions or limitations provided for in Union law or under other licences with an extended effect, where such licensing is not based on the out-of-commerce status of the covered works or other subject matter.**

(28aa) ~~A functioning copyright framework that works for all parties requires the availability of these proportionate, legal mechanisms for the licensing of works. Systems such as extended collective licensing or presumptions of representation are a well-established practice in several Member States and can provide such~~ **may be used in different areas. A functioning copyright framework that works for all parties requires the availability of these proportionate, legal mechanisms for the licensing of works. Member States should therefore be able to rely on** solutions, allowing relevant licensing organisations, which are owned or controlled by their rightholder members (or entities representing rightholders) or organised on a not for profit basis, to offer licences covering large volumes of works or other subject-matter for certain types of use, and distribute the revenue received to rightholders.

(28b) In the case of some uses, together with the large amount of works involved, the transaction cost of individual rights clearance is prohibitively high ~~compared to the commercial value of the use,~~ and without effective collective licensing mechanisms **all the required** transactions in these areas **to enable the use of these works or other subject matter** are unlikely to take place. Extended collective licensing and similar mechanisms have made it possible to conclude agreements in areas affected by this market failure where traditional collective licensing does not provide an exhaustive solution for covering all works and other subject-matter to be used. These mechanisms serve as a complement to collective management based on individual mandates, by providing full legal certainty to users. **At the same time, they provide a further opportunity to right holders to benefit from the legitimate use of their works.**

(28c) Given the increasing importance of the ability to offer flexible licensing solutions in the digital age, and the increasing use of such schemes in Member States, it is beneficial to further clarify in Union law the status of licensing mechanisms allowing collective management organisations to conclude licences, on a voluntary basis, irrespective of whether all rightholders have authorised the organisation to do so. Member States should have the ability to maintain and introduce such schemes in accordance with their legal traditions, practices or circumstances, subject to the safeguards provided for in this Directive and in full respect of Union law and their international obligations related to copyright. These schemes would only have effect in the territory of the Member State concerned, unless otherwise provided for in Union law. Member States should have flexibility in choosing the specific type of mechanism allowing for licences for works or other subject-matter to extend to the rights of rightholders that have not authorised the organisation that concludes the agreement, as long as it guarantees sufficient protection of the non-member rightholders. Such mechanisms may include extended collective licensing and presumptions of representation.

(28d) It is important that such mechanisms are only applied in **well-defined areas of use** ~~cases,~~ where **obtaining authorisations on an** ~~the licensing of works by other means, notably~~ individual **basis is typically onerous and** ~~licensing, would be impractical~~ **to a degree that makes the required licensing transaction, i.e. a licence that covers all the involved rightholders** ~~and thus unlikely to occur~~ **due to the nature of the use or of the types of works concerned.** It is equally important that the licensed use neither affects adversely the economic value of the relevant rights nor deprives rightholders of significant commercial benefits. Moreover, Member States should ensure that appropriate safeguards are in place to protect the **legitimate** interests of rightholders that are not represented by the organisation offering the licence ~~so that the licensed uses do not unreasonably prejudice their legitimate interests.~~

(28e) Specifically, to justify the extended effect of the mechanisms, the organisation should be, on the basis of authorisations from rightholders, sufficiently representative of the types of works or other subject-matter and of the rights which are the subject of the licence. ~~Moreover, to~~ **To** ensure legal certainty and confidence in the mechanisms, ~~the collective management organisation should assume~~ **Member States may determine the allocation of** legal responsibility for uses authorised by the licence agreement. Equal treatment should be guaranteed to all rightholders whose works are exploited under the licence as regards, notably, access to information on the licensing and the distribution of remuneration. Publicity measures should be effective **throughout the duration of the licence** without the need to inform each rightholder individually. ~~Rightholders must also be given the opportunity to exclude the application of such mechanisms to their works or other subject-matter; this is important~~ **In order** to ensure that ~~they~~ **rightholders** can easily retain control of their works, and prevent any uses of ~~said~~ **their** works that ~~they feel are~~ **would be** prejudicial to their interests. ~~Therefore, in,~~ **rightholders must be given an effective opportunity to exclude the application of such mechanisms to their works or other subject-matter for all uses and works or other subject-matter or for specific uses and works or other subject-matter In** such cases, any ongoing uses should be terminated within a ~~reasonably short period.~~ However, the requirement of this Directive to provide for such an opportunity to rightholders is without prejudice to cases when Union or international law allow mandatory collective management in relation to those rights which are the subject of the licence. **reasonable period.** Member States may also decide that additional measures are appropriate to protect rightholders

(28f) **Member States should ensure that** ~~the~~ purpose and scope of any licence granted as a result of these mechanisms, as well as the possible users, should always be carefully, ~~narrowly~~ and clearly defined in national legislation or ~~in the licences authorised by a competent national authority,~~ **if the underlying legislation is a general provision, in the licensing practices applied as a result of such general provisions, or in the licences granted.** The ability to operate a licence under these mechanisms should also be limited to organisations **which are either owned or controlled by their right holder members or which operate on a not for profit basis,** regulated by national law implementing Directive 2014/26/EU.

(28g) Given the different traditions and experiences with extended collective licensing across Member States and their applicability to rightholders irrespective of their nationality or their Member State of residence, it is important to ensure transparency and dialogue at Union level about the practical functioning of these mechanisms, including as regards the effectiveness of safeguards for rightholders, their usability and the potential need to lay down rules to give such schemes cross-border effect within the internal market. To ensure transparency, information about the use of such mechanisms under this Directive should be regularly published by the Commission. Member States that have introduced such mechanisms should therefore inform the Commission about relevant national legislation and its application in practice, **including scopes and types of licensing introduced on the basis of general legislation, the scale of licensing and the collective management organisations involved.** Such information should be discussed with Member States in the contact committee referred to in Article 12(3) of Directive 2001/29/EC. The Commission should publish a report by 31 December 2020 on the use of such mechanisms in the Union and their impact on licensing and rightholders.
