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Promoting a fair, efficient and competitive European copyright-based
economy in the Digital Single Market

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**COMMUNICATION FROM THE COMMISSION TO THE EUROPEAN
PARLIAMENT, THE COUNCIL, THE EUROPEAN ECONOMIC AND SOCIAL
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**Promoting a fair, efficient and competitive European copyright-based economy in the
Digital Single Market**

1. INTRODUCTION

The Commission's Digital Single Market (DSM) Strategy¹ adopted in May 2015 identified digital content as one of the main drivers of growth in the digital economy. It highlighted the need for action leading to wider online access to content for users, including audiovisual, music, books and other sectors, and to a market and regulatory environment that continues to be conducive to creativity, its sustainable financing, and cultural diversity.

A targeted modernisation of EU copyright rules, as a key element in pursuing those DSM objectives, was set out in the Commission's Communication "Towards a modern, more European copyright framework"² of December 2015. The Communication outlined targeted actions and a long-term vision, reflecting the need to advance the single market in this area, to update rules in accordance with digital realities, to ensure that European creative industries remain competitive and to maintain a good balance between copyright and other public policy objectives such as education, research, innovation and the needs of persons with disabilities.

Further to the proposed Regulation on cross-border portability of online content services³ of December 2015, whose purpose is to allow EU residents to travel with the digital content they have purchased or subscribed to at home, the Commission is now proposing a set of legislative measures with three objectives: (i) ensuring wider online access to content in the EU and reaching new audiences, (ii) adapting certain exceptions to the digital and cross-border environment, and (iii) fostering a well-functioning and fair copyright marketplace. Furthermore, the Commission is also working on measures for an effective and balanced enforcement system. This is particularly important in the fight against commercial-scale infringements of copyright.

As highlighted in the December Communication, the EU's copyright rules cannot be considered in isolation from the broader set of policies, including notably the Creative Europe programme,⁴ that contribute to the rich cultural output of Europe and affect the environment for the cultural and creative industries, for innovation and for cultural diversity.

The EU is home to, among others, some of the largest publishing houses, a dynamic music industry, and a film sector that receives praise worldwide. In consequence it is a global industrial and cultural leader. Some of its cultural and creative industries, however, face particular competitiveness, entrepreneurial and financing challenges. European film productions, for example, would benefit from new audiences within the EU and beyond. This should have a beneficial impact on the development of new business models and new sources of revenue, if the main issues related to the scale, availability and visibility of productions are addressed.

In addition to promoting cultural and linguistic diversity, helping the professionalisation of the cultural and creative sectors, and providing wider access to culture and creative content, the Creative Europe programme aims to address some of

¹ Commission Communication "A Digital Single Market Strategy for Europe", 6 May 2015. COM(2015) 192 final.

² COM(2015) 626 final.

³ COM(2015) 627 final.

⁴ The 2014-2020 budget of the programme amounts to EUR 1.46 billion. The Creative Europe programme includes a sub-programme for Culture and another for MEDIA, in addition to a cross-sectoral strand.

these competitiveness issues, including as regards access to finance through a new Guarantee Facility that is already in place with a budget of EUR 121 million.⁵

Through a combination of legislative and non-legislative measures, the Commission is proposing an ambitious agenda to help European copyright industries to flourish in the single market and European authors reach new audiences, while making European works widely accessible to European citizens, also across borders. This Communication presents the latest developments and state of play following the December Communication.

2. MEASURES TO ENSURE WIDER ACCESS TO CONTENT ACROSS THE EU

In its December Communication, the Commission announced a gradual approach to removing the obstacles to cross-border access to content and to the broader circulation of works across the EU, notably in light of increasingly widespread Internet connections and digital technologies. The objective is to increase the availability of works for citizens across Europe, provide new distribution channels for creators, promote the cultures of the Member States, and bring the EU's common cultural heritage to the fore.

The December Communication set out targeted actions to facilitate the online cross-border distribution of television and radio programmes, the licensing of European audiovisual works on video-on-demand (VoD) platforms, and the digitisation and wider dissemination of out-of-commerce works. As also announced in the December Communication, a number of measures undertaken in the context of the Creative Europe MEDIA programme,⁶ which has been supporting the development, promotion and distribution of European works for 25 years, are also geared towards the objective of a broader access to European films across the EU, in commercial channels and in non-commercial settings. Those measures are presented below, along with the newly proposed copyright legislation.

First, a proposal for a Regulation⁷ aims at creating favourable conditions for new online ways of cross-border distribution of television and radio programmes comparable to those applicable to the more traditional transmissions via satellite and retransmissions via cable. The new rules, inspired by those existing in the Satellite and Cable Directive,⁸ will make it simpler and faster to clear the rights that are needed for certain online services provided by broadcasters (programmes transmitted online by the broadcasters at the same time as their broadcast and their catch-up services), and for re-transmission services via means such as IPTV (TV or radio over closed circuit Internet Protocol-based networks). These rules aim to facilitate the evolution of the market and a wider dissemination of European radio and TV productions, which are an important source of information and entertainment for Europeans. This shall, in turn, generate more consumer choice and cultural diversity.

In parallel, the proposal for a Directive on Copyright in the Digital Single Market⁹ introduces a new negotiation mechanism that will make it easier to conclude licensing

⁵ The Commission is also looking into other sources of finance for the sector, including equity financing and crowdfunding.

⁶ A sub-programme of the Creative Europe programme.

⁷ Proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes, COM(2016) 594.

⁸ Directive 93/83/EEC.

⁹ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016) 593.

agreements to make audiovisual works available on VoD platforms. It is part of a broader policy effort to address the multiplicity of factors that lie behind the limited availability of European audiovisual works, notably films, across the EU.¹⁰ Typically produced by small production companies, European films are significantly less widely distributed online across the EU than US films.¹¹ In territories where no agreements have been signed with local distributors, European citizens do not have any possibility to access such films legally. Licensing issues and related legal and contractual difficulties for the exploitation of European audiovisual works on VoD services will also be addressed in a structured stakeholder dialogue. This will be promoted by the Commission and will regularly gather industry actors along the value chain (producers, authors, sales agents, distributors, broadcasters, aggregators, VoD platforms). The dialogue will aim at streamlining licensing practices and facilitating industry agreements leading to a more sustained exploitation and wider availability of European works. The Commission will report on the results of the dialogue by end of 2018.

The Commission is also encouraging the development of practical tools that will make licensing for exploitation of audiovisual works in multiple territories across the EU easier and more efficient. These include the development of licensing hubs, i.e. online tools that allow the digital distribution of European works also in countries where they have not been released in cinemas or where there is no national distributor, and the creation of curated catalogues of audiovisual works from different producers, ready to be offered to VoD service providers. Further challenges arise from the fact that no universal system of identification is used in the audiovisual sector. Instead, two standard identifiers¹² coexist on the market and the sector remains hesitant to use them as they are not interoperable. This means that licensing activities are burdensome and cannot be easily automated. The organisations responsible for the two separate identifiers are presently working with the Commission towards full interoperability of their databases and identifiers.¹³ Finally, the Commission will also explore ways to incentivise rights holders to make available works receiving support for distribution through the Creative Europe MEDIA programme in territories where no distribution agreement has been signed.

Measures are also being introduced to address the lack of visibility and linguistic barriers that stand in the way of users having access to European works. Subtitling and dubbing are key for cross-border distribution of audiovisual works,¹⁴ and are financed by both the Creative Europe MEDIA programme and other public funds. Through ongoing projects under the Creative Europe MEDIA programme and an online repository tool to allow easy access to and reuse of existing subtitling and dubbing by operators in the EU, to be launched by the end of 2016, the Commission aims to increase efficiency in public funding and use of subtitling and dubbing. Online search tools also are efficient gateways for consumers to find online legal offerings of films. The European Union Intellectual

¹⁰ On average, European films only reach 2.8 EU Member States compared to 6.8 EU Member States for US films. In cinemas, the gap between European films (2.6) and US films (9.7) is even wider (European Audiovisual Observatory, "How do films circulate on VOD services and in cinemas in the European Union?", May 2016).

¹¹ 47% of EU films released in EU cinemas between 2005 and 2014 are available on at least one VoD service (5,046 films out of 10,828), while 87% of US films released in the same period in EU cinemas are available on at least one VoD service (2,404 films out of 2,748) (European Audiovisual Observatory, "How do films circulate on VOD services and in cinemas in the European Union?", May 2016).

¹² The ISAN (International Standard Audiovisual Number) and EIDR (Entertainment Identifier Registry).

¹³ By the end of 2016, the Commission will also propose the use of a common standard identifier as a requirement for the support through the MEDIA programme.

¹⁴ For some audiovisual works, global platforms require a minimum number of language versions.

Property Office is developing a search tool that can work at European level and a toolkit for the creation of national search tools, which will be fully operational by 2017 and available to Member States free of charge. The Commission will also promote the use of data and automated tools for content recommendation, catering for broader interest and taste, in view of developing and enlarging audiences for European works. More widely, promoting the discoverability of European films is an important challenge on which the Commission has ongoing discussions with the European Film Agency Directors Association (EFADs) and the film industry. Given the potential of films produced as co-productions to travel across Europe and beyond,¹⁵ the Commission, together with EFADs, will explore, in 2017, the development of joint promotion strategies for European co-productions. All these measures complement the recently adopted proposal to amend the Audiovisual Media Services Directive,¹⁶ which introduces a reinforced requirement to promote European works in VoD services, by ensuring their presence and visibility.

Furthermore, the Commission is working on ways to explore alternative models of financing, production and distribution that have the single market and global markets as their horizon from the outset. In this respect, the Commission will place a particular focus on the European animation sector. Story-telling is of particular importance in this sector and works travel across borders more easily. Producers of animation tend to work on different projects at the same time for television and film and may also co-operate with other studios on separate projects. In parallel with the current support of the Creative Europe MEDIA Programme, the Commission will launch before the end of this year a dialogue with the major European animation studios to discuss how the sector can scale up. It should also identify the specific needs of the sector across a range of issues from reducing brain drain to helping animation films and television animation to travel even better. The aim of this dialogue would be to agree a joint action plan for the sector by mid-2017.

Finally, the proposal for a Directive on Copyright in the Digital Single Market¹⁷ introduces solutions for easier licensing of rights by cultural heritage institutions as required for the digitisation and dissemination of works that are out-of-commerce but hold great cultural value. Access to works in non-commercial settings e.g. educational organisations, public libraries, non-theatrical venues is also very important for nurturing cultural diversity, educational purposes, and participation in society. Such channels, along with improved media literacy, can play a key role in promoting and creating a sustainable audience for European works. Furthermore, the Commission is exploring together with EFADs and the audiovisual industry creating and funding in 2017 a catalogue of European films for educational purposes. This would be a useful pilot project to present the diversity and quality of European films to young audiences.

¹⁵ According to a recent report by European Audiovisual Observatory ("How do films circulate on VOD services and in cinemas in the European Union?", May 2016), co-productions circulate better than average European films. European films are in average available in 2.8 countries while European co-productions are available in 3.6 countries.

¹⁶ Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in member States concerning the provision of audiovisual media services in view of changing market realities, COM(2016) 287 final.

¹⁷ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016) 593.

3. MEASURES TO ADAPT EXCEPTIONS TO DIGITAL AND CROSS-BORDER ENVIRONMENTS

Copyright exceptions allow, for specific purposes and under specific conditions, the use of protected works without the authorisation of right holders. They respond to public policy objectives at EU level and play an important role in the broader copyright framework. However, at present, most exceptions in EU law are optional and do not have cross-border effect. Furthermore, some of them need to be re-assessed in light of today's technological realities, increasing the level of harmonisation where needed while not affecting well-functioning systems at national level.

The legislative measures proposed today bring the EU framework on exceptions up to speed with digital uses, in certain key areas like education, research and access to knowledge and are particularly focused on cross-border uses, thus contributing to further deepening the single market. The proposal for a Directive on Copyright in the Digital Single Market¹⁸ introduces new mandatory exceptions in the areas of education, research, and preservation of cultural heritage.

A new exception on illustration for teaching will provide full legal certainty for the use of protected content in digitally-supported and online teaching activities, including across borders. This will benefit new modes of providing education, notably distance learning, and student and teacher mobility across the EU.

The proposal also introduces a new mandatory exception for text and data mining carried out for the purposes of scientific research. The exception will allow research organisations to use text and data mining technologies in full legal certainty. A mandatory exception in this area will prevent different approaches being followed in different Member States in an area, like research, where cross-border cooperation on a large scale and cross-discipline collaboration is more and more frequent. This will support scientific advancement and innovation in the EU.

The proposed Directive also includes a new mandatory exception for digital preservation by cultural heritage institutions, which takes into account the needs of content in digital forms and the use of digital technology in preservation. It reflects the use of digitisation as a preservation technique but also the increased number of 'born-digital' works in the collection of cultural heritage institutions. Increased preservation rates will be beneficial for the survival of cultural heritage and allow citizens to engage with it for longer.

In parallel, two legislative proposals¹⁹ are adopted today for the implementation in EU law of the Marrakesh Treaty,²⁰ which requires parties to introduce exceptions supporting

¹⁸ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016) 593.

¹⁹ Proposal for a Directive of the European Parliament and of the Council on certain permitted uses of works and other subject-matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society, COM(2016) 596, and Proposal for a Regulation of the European Parliament and of the Council on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject-matter protected by copyright and

people with print disabilities to access books and other print material in formats that are accessible to them. The proposal for a Directive will establish a mandatory exception and ensure its functioning for the making and exchange of such accessible format copies within the single market. The proposal for a Regulation will permit the cross-border exchange of such copies between the EU and third countries that are parties to the Treaty.

The Commission will continue to assess a number of other issues related to exceptions identified in the December Communication. Some of these issues may need to be reconsidered, at a later stage, in light of the outcome of cases currently pending before the Court of Justice of the EU. This includes the exception authorising libraries and other institutions to allow on-screen consultation of works for research and private study on their premises.²¹

Following up on the analysis of the results of the public consultation on the ‘panorama exception’,²² which allows people to take and upload pictures of works like buildings or sculptures located in public spaces, the Commission confirms the relevance of this exception. Under EU legislation, Member States enjoy a large margin of manoeuvre to lay down such exceptions. Nearly all Member States have a panorama exception in their national legislation. Recently, Member States that had not previously done so have introduced this exception in their laws or are discussing draft measures to this end. The Commission will continue monitoring these developments and strongly recommends that all Member States implement this exception.

4. MEASURES TO ACHIEVE A WELL-FUNCTIONING MARKETPLACE FOR COPYRIGHT

In recent years, the internet has become the main marketplace for accessing and distributing copyright-protected content. Online services now represent a major source of revenue for works and other protected content and are expected to continue to grow in importance. There is however a growing concern about the equitable sharing of the value generated by some of the new forms of online content distribution along the value chain. Right holders report difficulties faced when seeking to authorise and be fairly remunerated for the use of their content online. This situation could also put service providers engaging in equivalent forms of distribution at a disadvantage. Linked to this, but also affecting offline forms of exploitation, there is the question of the fair remuneration of authors and performers and of the difference in bargaining power when they license or transfer their rights.

These difficulties undermine the objective that the Digital Single Market delivers a fair return on investment for all. These issues are vital across the cultural and creative sectors, including publishing, images, music and audiovisual. Further to the December

related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled, COM(2016) 595.

²⁰ The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled, signed on behalf of the EU on 30 April 2014.

²¹ Case C-174/15. Vereniging Openbare Bibliotheken vs Stichting Leenrecht.

²² See <https://ec.europa.eu/digital-single-market/en/news/public-consultation-role-publishers-copyright-value-chain-and-panorama-exception>.

Communication, the need to address them was confirmed in the Communication on online platforms of May 2016.²³

The proposal for a Directive on Copyright in the Digital Single Market²⁴ will give press publishers legal certainty and put them in a better negotiating position in their contractual relations with online services using and enabling access to their content. It will do so by providing a new related right that recognises the key role press publishers play in terms of investments in and overall contribution to the creation of quality journalistic content, and will grant them the protection they need for the effective exploitation of their publications in the digital environment. The proposal will also establish the possibility for Member States to have systems where publishers (including book and scientific publishers) may have a share in compensation mechanisms such as those foreseen for private copying or reprography.

The proposal will also reinforce the position of right holders to negotiate and be remunerated for the online exploitation of their content by online services storing and giving access to content uploaded by their users. Given the role played by these services in the communication of protected content, the proposal will request service providers that store and provide access to large amounts of works to take, in cooperation with right holders, appropriate and proportionate measures, including based on content recognition technology, to ensure the functioning of agreements with right holders. In this area, active cooperation between stakeholders will also be important. Consumers will continue to be able to both upload their content and enjoy a large content offer in a fairer and more legally secure environment.

Finally, authors and performers will benefit from increased transparency on the exploitation of their works and performances and from improved capability to receive appropriate remuneration. This should lead to a better functioning framework for all players through legal clarity for those acquiring the rights and higher trust for authors and performers, including in the online environment. The effective deployment of these measures will require from Member States the organisation of sector specific discussions to define in practice the appropriate transparency obligations per type of content and industry. The Commission will closely follow this work at Member State level to ensure the efficiency and coherence of the results. The Commission will also continue to engage with all interested parties from the cultural and creative sectors, through general or sector specific dialogues, to discuss developments around this issue and the need for further action.

Overall, these measures will contribute to a copyright marketplace that works efficiently for all parties, gives the right incentives for investment in, and dissemination of, creative content in the online environment, and upholds the importance of a free and diverse press in the EU.

5. MEASURES TO PROVIDE AN EFFECTIVE AND BALANCED ENFORCEMENT SYSTEM

²³ Communication on Online Platforms and the Digital Single Market Opportunities and Challenges for Europe, COM(2016) 288 final.

²⁴ Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market, COM(2016) 593.

Copyright infringements on a commercial scale, with infringers free-riding on the work and investment of others, are today a serious threat for European creators, preventing them from deriving a legitimate profit from their creation and thus ultimately discouraging creativity and innovation. Without an effective and balanced enforcement system copyright and other intellectual property rights (IPR) are ill-protected and investment in creativity and innovation is throttled. Following the announcement in the December Communication, the Commission is carrying out an evaluation of the overall functioning of the current legal framework for enforcement of IPR, as part of a wider initiative aiming to enhance the protection of all IPR and focusing on commercial-scale infringements.

The contributions to a public consultation on the evaluation and modernisation of the legal framework for the enforcement of IPR,²⁵ launched in support of the evaluation, confirmed that the infringement of IPR, including copyright, is a major problem. More than three quarters of the responding right holders and public authorities observed that IPR infringements have increased over the last 10 years. While the majority of respondents felt that the existing rules have helped effectively in protecting IP and preventing IP infringements, many right holders and intermediaries in particular consider that the measures and remedies provided for by the IPR enforcement directive²⁶ are not applied in a homogeneous manner across the Member States. This could result in different level of protection in the Member States and suggests that the IPR enforcement directive did not fully eliminate the disparities at national level as regards the means of enforcing IPR. A significant number of respondents also identified a need to adjust some of these measures, in order to ensure legal certainty and enhance their effectiveness, such as the issuing of provisional and precautionary measures and injunctions against intermediary service providers or the calculation of appropriate damages. The cumbersome procedure for obtaining provisional and precautionary measures or injunctions for the same infringements against similar addressees in more than one jurisdiction in the EU is another issue particularly raised by copyright holders.

Following the evaluation the Commission will propose any amendments necessary to the legislative framework which help improving the legal enforcement framework for all IPR infringements, including copyright infringements, a clarification of the scope and application of provisional and precautionary measures and injunctions, as well as of the rules for the calculation and allocation of damages. The Commission will also explore possibilities to facilitate the issuing of provisional and precautionary measures or injunctions for the same infringements against similar addressees in more than one jurisdiction in the EU.

The fast developing digital environment and technology, however, also require that the measures, procedures and remedies provided for by the IPR enforcement directive can be applied and issued by the competent national courts without undue delay. This is particularly relevant to protect works and other protected subject matter. Member States need to ensure that their judicial systems have the necessary capacity to respond to the need for fast and effective protection of IPR, in particular on the internet. The Commission will furthermore assess incentives to promote the specialisation of national judges in matters of infringement and validity of IPR, considering the positive experience reported from those Member States which already have such specialised judges.

²⁵ See <http://ec.europa.eu/growth/industry/intellectual-property/enforcement/>.

²⁶ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

The December Communication also stated that "the Commission will take immediate action to engage, with all parties concerned, in setting up and applying 'follow-the-money' mechanisms in a self-regulatory approach".²⁷ Based on the positive experience with the existing and recently upgraded Memorandum of Understanding on the online sale of counterfeit goods²⁸ the Commission has endorsed the conclusion of voluntary cooperation agreements involving other types of intermediary service providers in the protection of IPR,²⁹ including online advertising, payments and shipping services providers. Online advertising is a major source of income for copyright infringing internet sites. The purpose of the initiative related to advertising is to dissuade the placement of advertising on commercial scale IP infringing websites, thereby preventing the funding of IPR infringement through advertising revenue. To the extent that copyright infringing websites offer so-called premium or subscription models, giving faster access to content against payment, payment service providers can play a key role in implementing the 'follow the money' principle, intercepting financial transactions and eventually withdrawing their services and in so doing rendering these businesses unprofitable. The Commission is fully committed to achieving concrete results in these processes, crucial to combat piracy, and expects that the widest possible range of stakeholders will join them, building on similar agreements in place at national level. Depending on the progress of these initiatives the Commission will also explore other options to strengthen the involvement of intermediary service providers in the protection of IPR, such as liability of intermediaries in cases where the intermediary is aware that its services are used by a third party to infringe an IPR but fails to act.

6. CONCLUSION

The cultural and creative industries are important for Europe in many different ways. They constitute a significant economic sector but are also a primary source of learning and entertainment and are crucial to maintaining and nurturing Europe's cultural diversity. The ability of the European copyright industries to innovate in the digital environment is a prerequisite for their success and their ability to compete globally.

A well-designed copyright framework and supporting measures are therefore essential for authors, performers and the cultural and creative sectors so they can reach out to larger audiences and ultimately provide more choices to citizens. The Commission is implementing an ambitious agenda that both modernises the EU copyright framework for the benefit of all stakeholders and supports the availability and visibility of European cultural and creative content, including across borders. The legislative initiatives and financial support measures are mutually supportive and reinforcing. The Commission will monitor the impact of these measures and follow-up on the efforts made by industry to integrate the objectives set out above in their business models.

²⁷ A commercial scale IPR infringing scheme will consist of paying for services to produce, distribute or promote IP infringing goods and services as well as generating revenues from the promotion and sale of such goods and services. The "follow the money" approach involves different types of intermediary service providers in the protection of IPR by designing policy measures that identify and seek to disrupt the revenue stream for the infringing activity.

²⁸ <http://ec.europa.eu/DocsRoom/documents/18023/>

²⁹ Commission Declaration on the facilitation and monitoring of memoranda of understanding seeking to dissuade commercial scale intellectual property infringing activities in the internal market: <http://ec.europa.eu/DocsRoom/documents/18023/>