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NOTE

From:	General Secretariat of the Council
To:	Permanent Representatives Committee
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Subject:	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 - Preparation for the trilogue

I. INTRODUCTION

1. On 14 September 2016, the Commission submitted a draft proposal for a Directive and for a Regulation for the implementation of the Marrakesh Treaty in order to fulfil its international obligations. The Marrakesh Treaty was adopted in 2013 at the World Intellectual Property Organisation (WIPO) with the aim of facilitating the availability and cross-border exchanges of accessible formats of books and other print material to beneficiaries of the Marrakesh Treaty, i.e. people who are blind, visually impaired or otherwise print disabled. It was signed by the Union in April 2014.

2. The proposed Directive will bring Union law into line with the EU's international commitments under the Marrakesh Treaty by increasing the availability of works and other protected subject-matter in formats that are accessible to beneficiary persons. It will do so by ensuring that beneficiary persons and organisations serving their need on a non-profit basis can rely on a mandatory and harmonised exception to copyright and related rights within the Union.
3. The Economic and Social Committee delivered its opinion on 25 January 2017.
4. The European Parliament started the discussions and their vote is scheduled for 23 March 2017.

II. STATE OF PLAY

5. The Presidency started the discussions in October 2016 at the working party meeting level. The overall objective of the draft directive -to be seen together with the proposed regulation- met a large consensus between the Member States which emphasised the importance of moving swiftly on this file. Several meetings of the working group took place and discussions can be summarized as follows:

Member States agreed on the need to align the definition of "authorised entities" to the definition of the Marrakesh Treaty which gives more clarity on the authorisation or recognition which has to be given by the Member State (Article 2). A similar alignment is also reflected in the draft regulation.

Member States agreed that the three-step test which is a standard provision in copyright law has to be included (Article 3.2a).

Member States agreed also to include the obligations of authorised entities which are listed in the draft Regulation into the draft Directive (Article 4a).

Member States agreed that some degree of transparency is necessary. In doing so, a new article 4a has been included which provides for a database to collect the names and contact details sent by authorised entities on a voluntary basis to the Member States to be set up and to be centralised by the Commission. (Article 4b).

Member States discussed at length also the possibility for them to allow compensation and to check the commercial availability. A compromise has been found in recital 11 which would give the Member States enough flexibility.

6. The **main** changes in comparison to the **initial** proposal thus incorporated address the above-mentioned issues in point 5 and, in a nutshell, consist of :
- Alignment of the definition of authorised entities as in the Marrakesh Treaty in Article 2,
 - Inclusion of the three-step test provision in Article 3.2a,
 - Inclusion of obligations on authorises entities in Article 4b (as in Article 5 of the draft regulation),
 - Extension of the transposition period from 12 to 24 months (Article 9),
 - Following the Opinion of the European Court of Justice A-3/15, recitals 4a and 4b have been added for clarification,
 - Introduction of flexibility for Member States regarding compensation and commercial availability as reflected in recital 11.

III. CONCLUSION

7. The Permanent Representatives Committee is invited to:

- **grant the Presidency a mandate based on the text annexed in order to start negotiations with the European Parliament, with a view to reaching an agreement at first reading.**

Presidency compromise
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**

(Text with EEA relevance)

THE EUROPEAN PARLIAMENT AND THE COUNCIL OF THE EUROPEAN UNION,

Having regard to the Treaty on the Functioning of the European Union, and in particular Article 114 thereof,

Having regard to the proposal from the European Commission,

After transmission of the draft legislative act to the national parliaments,

Having regard to the opinion of the European Economic and Social Committee¹,

Acting in accordance with the ordinary legislative procedure,

Whereas:

- (1) Union legal acts in the area of copyright and related rights provide legal certainty and a high level of protection for rightholders. This harmonised legal framework contributes to the proper functioning of the internal market and stimulates innovation, creation, investment and the production of new content, including in the digital environment. It also aims to promote access to knowledge and culture by protecting works and other subject-matter and by permitting exceptions or limitations that are in the public interest. A fair balance of rights and interests between rightholders and users should be safeguarded.

¹ OJ C , , p . .

- (2) Directives 96/9/EC², 2001/29/EC³, 2006/115/EC⁴ and 2009/24/EC of the European Parliament and of the Council⁵ harmonise the rights of rightholders. Those Directives provide for list of exceptions and limitations to those rights, which allow for the use of content without the authorisation of the rightholders under certain conditions in order to achieve certain policy objectives.
- (3) Persons who are blind, visually impaired or otherwise print disabled continue to face many barriers in accessing books and other print material which are protected by copyright and related rights. Measures need to be taken to increase the availability of those works in accessible formats and to improve their circulation in the internal market.
- (4) The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled ('the Marrakesh Treaty') was signed on behalf of the Union on 30 April 2014⁶. Its aim is to improve the availability of works and other protected subject-matter in accessible formats for persons who are blind, visually impaired or otherwise print disabled. The Marrakesh Treaty requires contracting parties to provide exceptions or limitations to the exclusive rights of holders of copyright and related rights for the making and dissemination of copies in accessible formats of certain works and other subject-matter, and for the cross-border exchange of those copies. The conclusion of the Marrakesh Treaty by the Union requires the adaptation of Union law by establishing a mandatory exception for uses, works and beneficiary persons covered by the Treaty.

² Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 77, 27.3.1996, p. 20).

³ Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society (OJ L 167, 22.6.2001, p. 10).

⁴ Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (OJ L 376, 27.12.2006, p. 28).

⁵ Directive 2009/24/EC of the European Parliament and the Council of 23 April 2009 on the legal protection of computer programs (OJ L 111, 5.5.2009, p. 16).

⁶ Council Decision 2014/221/EU of 14 April 2014 on the signing, on behalf of the European Union, of the Marrakesh Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled. (OJ L115, 17.4.2014, p. 1).

- (4a) In accordance with the Opinion A-3/15 of the European Court of Justice, "(...) *the exception or limitation provided for by the Marrakesh Treaty will have to be implemented within the field harmonised by Directive 2001/29.*"⁷
- (4b) This Directive implements the obligations that the Union has to meet under the Marrakesh Treaty in a harmonised manner, with a view to ensuring that those measures are applied consistently throughout the internal market. This Directive should therefore provide for mandatory exceptions to the rights that are harmonised by Union law and are relevant for the uses and works covered by the Marrakesh Treaty. These include in particular the rights of reproduction, communication to the public, making available, distribution and lending, as provided for in Directives 2001/29/EC, 2006/115/EC and 2009/24/EC, as well as the corresponding rights in Directive 96/9/EC. As the scope of exceptions and limitations required by the Marrakesh Treaty also includes works in audio form, like audiobooks, it is necessary that these exceptions also apply to related rights.
- (5) This Directive concerns persons who are blind, who have a visual impairment which cannot be improved so as to give them visual function substantially equivalent to that of a person who has no such impairment, or who have a perceptual or reading disability, or who are unable, due to a physical disability, to hold or manipulate a book or to focus or move the eyes to the extent that would be normally acceptable for reading, in so far as a result of such impairments or disabilities, those persons cannot read printed works to substantially the same degree as persons without such impairments or disabilities. This Directive aims at improving the availability of books, journals, newspapers, magazines and other writings, notations including sheet music, and other print material, including in audio form, whether digital or analogue, in formats that make those works and other subject-matter accessible to those persons. Accessible formats include for example Braille, large print, adapted e-books, audiobooks and radio broadcasts.

⁷ point 112 of the Opinion A-3/15

- (7)(*ex 8*) A mandatory exception should limit the right of reproduction so as to allow for any act that is necessary in order to make changes to or convert or adapt a work or other subject-matter in such a way as to produce an accessible format copy that makes it possible for those persons to access this work or other subject-matter. This includes providing the necessary means to navigate information in an accessible format copy.
- (8)(*ex 7*) Uses laid down in this Directive include the making of accessible format copies by either the beneficiary persons or authorised entities serving their needs, whether public or private organisations, in particular libraries, educational establishments and other non-profit organisations that serve persons with a print disability as their main or one of their main activities or as part of their public interest missions. Those uses should also include making accessible format copies, for the exclusive use of the beneficiary persons, by a natural person who does so on behalf of a beneficiary person or who assists the beneficiary person in doing so. Accessible format copies should only be made of works or other subject-matter to which beneficiary persons or authorised entities have lawful access.
- (9) An exception under this Directive should allow authorised entities to make and disseminate online and offline within the Union accessible format copies of works or other subject-matter covered by this Directive. This Directive should not establish an obligation on authorised entities to make and disseminate copies.

(10) It should be possible for accessible format copies made in one Member State to be available in all Member States, in order to ensure their greater availability across the internal market. This would reduce the demand for duplication of work in producing accessible format copies of the same work or other subject-matter across the Union, thus generating savings and efficiency gains. This Directive should therefore ensure that accessible format copies made by authorised entities in any Member State may be circulated and accessed by beneficiary persons and authorised entities throughout the EU. In order to foster such cross-border exchange, and to facilitate the authorised entities' mutual identification and cooperation, the voluntary sharing of information regarding the names and contact details, including web-sites if available, of authorised entities established in the Union should be encouraged. Member States should provide the information received from authorised entities to the Commission without any obligation to check the completeness and accuracy of this information as well as its compliance with their national law implementing this Directive. Such information should be made available online by the Commission in a central point of information at Union level. This would also assist authorised entities as well as beneficiary persons and rightholders in contacting authorised entities to receive further information, (in line with the provisions set out in this Directive and Regulation (...)).

The afore-mentioned central point of information should be complementary to the information access point to be established by the International Bureau of the World Intellectual Property Organisation (WIPO) as provided for in the Marrakesh Treaty aiming to facilitate the identification of, and cooperation among, authorised entities at the international level.

(10a) In order to improve the availability of accessible format copies and to prevent the illegal dissemination of works and other subject-matter, this directive introduces certain obligations to which authorised entities should comply with when engaging in the uses permitted under this Directive.

(10b) Uses permitted under this Directive should be directly related to the disability or impairment and of a non-commercial nature and should be undertaken to the extent required by the specific needs as they relate to the disabilities and impairments covered by this Directive.

- (10c) Authorisation or recognition requirements that Member States may apply to authorised entities, such as those related to the provision of services of a general nature to beneficiary persons, should not have the effect of preventing entities that comply with the definition of authorised entity under this Directive from undertaking the uses allowed under this Directive.
- (11) In view of the specific nature of the exception, its targeted scope and the need for legal certainty for its beneficiaries, Member States should not be allowed to impose additional requirements for the application of the exception. However, Member States may determine whether exceptions or limitations under this Directive are subject to fair compensation. Furthermore, Member States may confine those exceptions or limitations under this Directive to works which, in the particular accessible format, cannot be obtained commercially under reasonable terms for beneficiary persons.
- (12) Any processing of personal data under this Directive should respect fundamental rights, including the right to respect for private and family life and the right to protection of personal data under Articles 7 and 8 of the Charter of Fundamental Rights of the European Union ('the Charter') and must be in compliance with Regulation 2016/679/EC of the European Parliament and of the Council⁸, which govern the processing of personal data, as may be carried out by authorised entities within the framework of this Directive and under the supervision of the Member States' competent authorities, in particular the public independent authorities designated by the Member States.

⁸ Regulation (EU) 2016/679 of the European Parliament and of the Council of 27 April 2016 on the protection of natural persons with regards to the processing of personal data and on the free movement of such data, and repealing Directive 95/46/EC (General Data Protection Regulation) (OJ L 119, 4.5.2016, p. 1).

- (13) The United Nations Convention on the Rights of Persons with Disabilities ('the UNCRPD'), to which the EU is a party, guarantees people with disabilities the right of access to information and the right to participate in cultural, economic and social life on an equal basis with others. The UNCRPD requires parties to the Convention to take all appropriate steps, in accordance with international law, to ensure that laws protecting intellectual property rights do not constitute an unreasonable or discriminatory barrier to access by persons with disabilities to cultural materials.
- (14) Under the Charter, the Union recognises and respects the right of people with disabilities to benefit from measures designed to ensure their independence, social and occupational integration and participation in the life of the community.
- (15) With the adoption of this Directive, the Union aims to ensure that beneficiary persons have access to books and other print material in accessible formats. Accordingly, this Directive is an essential first step in improving access to works for people with disabilities.
- (17) In cases which are not covered by this Directive, Member States should be allowed to continue to provide for an exception or limitation for the benefit of persons with a disability pursuant to point (b) of Article 5(3) of Directive 2001/29/EC. This Directive does not prevent Member States from providing for exceptions or limitations to rights that are not harmonised in the copyright framework of the Union.
- (18) This Directive respects the fundamental rights and observes the principles recognised in particular by the Charter. This Directive should be interpreted and applied in accordance with those rights and principles.
- (19) The Marrakesh Treaty imposes certain obligations regarding the exchange of accessible format copies between the Union and third countries that are parties to the Treaty. The measures taken by the Union to fulfil those obligations are contained in Regulation [...] ⁺ which should be read in conjunction with this Directive.

⁺ OJ note to insert reference to Regulation as of 2016/0279 (COD) file.

- (20) Since the objective of this Directive, namely to improve access to works and other subject-matter protected by copyright and related rights for persons who are blind, visually impaired or otherwise print disabled in the Union, cannot be sufficiently achieved by the Member States but can rather, by reason of its scale and effects, be better achieved at Union level, the Union may adopt measures in accordance with the principle of subsidiarity as set out in Article 5 of the Treaty on European Union. In accordance with the principle of proportionality as set out in that Article, this Directive does not go beyond what is necessary in order to achieve that objective.
- (20a) (ex-16) The Commission should assess whether this Directive is sufficient and effective in ensuring the achievement of its objective and whether its scope could be extended to ensure the availability in accessible formats of works and other subject-matter other than those covered by this Directive, as well as the availability of works and other subject-matter in accessible formats for persons with other disabilities. The Commission will review the situation closely.
- (21) In accordance with the Joint Political Declaration of 28 September 2011 of Member States and the Commission on explanatory documents⁹, Member States have undertaken to accompany, in justified cases, the notification of their transposition measures with one or more documents explaining the relationship between the components of a directive and the corresponding parts of national transposition instruments. With regard to this Directive, the legislator considers the transmission of such documents to be justified.

⁹ OJ C 369, 17.12.2011, p. 14.

HAVE ADOPTED THIS DIRECTIVE:

Article 1

Subject matter and scope

This Directive lays down rules which aim at further harmonising the Union law applicable to copyright and related rights in the framework of the internal market, by providing rules on certain works and other subject-matter without the authorisation of the rightholder, for the benefit of persons who are blind, visually impaired or otherwise print disabled.

Article 2

Definitions

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

- (1) ‘work or other subject-matter’ means a work in the form of a book, journal, newspaper, magazine or other writing, notation including sheet music, and related illustrations, in any medium, including in audio forms such as audiobooks, which is protected by copyright or related rights and which is published or otherwise lawfully made publicly available;
- (2) ‘beneficiary person’ means:
 - (a) a person who is blind;
 - (b) a person who has a visual impairment which cannot be improved so as to give the person visual function substantially equivalent to that of a person who has no such impairment, and is, as a result, unable to read printed works to substantially the same degree as a person without such impairment;
 - (c) a person who has a perceptual or reading disability, and is, as a result, unable to read printed works to substantially the same degree as a person without such disability; or
 - (d) a person who is otherwise unable, due to a physical disability, to hold or manipulate a book or to focus or move their eyes to the extent that would be normally acceptable for reading.
- (3) ‘accessible format copy’ means a copy of a work or other subject-matter in an alternative manner or form that gives a beneficiary person access to the work or other subject-matter, including allowing for the person to have access as feasibly and comfortably as a person without a visual impairment or any of the disabilities referred to in paragraph 2.

- (4) ‘authorised entity’ means an entity that is authorised or recognised by a Member State to provide education, instructional training, adaptive reading or information access to beneficiary persons on a non-profit basis. It also includes a public institution or non-profit organisation that provides the same services to beneficiary persons as one of its primary activities, or institutional obligations as part of their public-interest missions.

Article 3

Permitted uses

1. Member States shall provide for an exception or limitation to the effect that any act necessary for:
 - (a) a beneficiary person, or a person acting on their behalf, to make an accessible format copy of a work or other subject-matter, to which the beneficiary person has lawful access, for the exclusive use of the beneficiary person; and
 - (b) an authorised entity to make an accessible format copy of a work or other subject-matter, to which it has lawful access, and to communicate, make available, distribute or lend an accessible format copy on a non-profit basis to a beneficiary person or authorised entity for the purpose of exclusive use by a beneficiary person;does not require the authorisation of the rightholder of any copyright or related right in the work or other subject-matter pursuant to Articles 2, 3 and 4 of Directive 2001/29/EC, Articles 5 and 7 of Directive 96/9/EC, Article 1(1), Article 8(2) and (3) and Article 9 of Directive 2006/115/EC and Article 4 of Directive 2009/24/EC.
2. Member States shall ensure that the accessible format copy respects the integrity of the work or other subject-matter, having due consideration for the changes required to make the work accessible in the alternative format.
- 2a. The exception provided for 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 right-holder.
3. The first, third and fifth subparagraphs of Article 6(4) of Directive 2001/29/EC shall apply to the exception provided for in paragraph 1 of this Article.

Article 4

Accessible format copies in the internal market

Member States shall ensure that an authorised entity established in their territory may carry out the acts referred to in point (b) of Article 3(1) for a beneficiary person or an authorised entity established in any Member State. Member States shall also ensure that a beneficiary person or authorised entity established in their territory may obtain or may have access to an accessible format copy from an authorised entity established in any Member State.

Article 4a

Obligations of authorised entities

1. Member States shall ensure that an authorised entity established in their territory carrying out the acts referred to in Articles 3 and 4:
 - (a) distributes, communicates, makes available or lends accessible format copies only to beneficiary persons or other authorised entities;
 - (b) takes appropriate steps to discourage the unlawful reproduction, distribution, communication to the public, making available or lending of accessible format copies;
 - (c) demonstrates due care in, and maintains records of, its handling of works and other subject-matter and of their accessible format copies; and
 - (d) publishes and updates, on its website if appropriate, information on the manner in which it complies with the obligations laid down in points (a) to (c) of this paragraph.

2. Member States shall ensure that an authorised entity established on their territory carrying out the acts referred to in Article 4 shall provide the following information, on request, to any beneficiary person, authorised entity or right holder:
 - (a) the list of works and other subject-matter of which it has accessible format copies and the available formats; and
 - (b) the name and details of the authorised entities with which it has engaged in the exchange of accessible format copies pursuant to Article 4.

Article 4b

Transparency and exchange of information

1. Member States shall encourage authorised entities established in their territory carrying out the acts referred to in Article 4 of this Directive and Articles 3 and 4 of the Regulation [...], to communicate to them, (on a voluntary basis) their names and contact details;
2. Member States shall provide the information they have received pursuant to paragraph 1 to the Commission. The Commission shall make such information publicly available in a central point of information online and keep it up to date.

Article 5

Protection of personal data

The processing of personal data carried out within the framework of this Directive shall be carried out in compliance with Directive 95/46/EC.

Article 6

Amendment to Directive 2001/29/EC

In Article 5(3) of Directive 2001/29/EC, point (b) is replaced by the following:

‘(b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability, without prejudice to the obligations of Member States under Directive [...];’

Article 7

Report

By ... [four years after the date of entry into force of this Directive], the Commission shall present a report to the European Parliament, the Council and the European Economic and Social Committee on the availability, in accessible formats, of works and other subject-matter other than those defined in Article 2(1) for beneficiary persons, and of works and other subject-matter for persons with disabilities other than those referred to in Article 2(2), in the internal market. The report shall contain an assessment on whether an amendment of the scope of this Directive should be considered.

Article 8

Review

No sooner than ... [seven years after the date of entry into force of this Directive], the Commission shall carry out an evaluation of this Directive and present the main findings to the European Parliament, the Council and the European Economic and Social Committee, accompanied, where appropriate, by legislative proposals for the amendment of this Directive.

Member States shall provide the Commission with the necessary information for the preparation of the evaluation report and the preparation of the report referred to in Article 7.

Article 9

Transposition

1. Member States shall bring into force the laws, regulations and administrative provisions necessary to comply with this Directive by ... [24 months after the date of entry into force of this Directive]. They shall forthwith communicate to the Commission the text of those provisions.

When Member States adopt those provisions, they shall contain a reference to this Directive or be accompanied by such a reference on the occasion of their official publication. Member States shall determine how such reference is to be made.

2. Member States shall communicate to the Commission the text of the main provisions of national law which they adopt in the field covered by this Directive.

Article 10

Entry into force

This Directive shall enter into force on the twentieth day following that of its publication in the *Official Journal of the European Union*.

Article 11

Addressees

This Directive is addressed to the Member States.

Done at Brussels,

For the European Parliament

The President

For the Council

The President
