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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 Articles 3 and 6 and relevant recitals

Delegations will find in the Annex a revised Presidency compromise proposal on Articles 3 and 6 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**.

Recitals

- (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. The exceptions and limitations existing in Union law should continue to apply, including to text and data mining, education and preservation activities, as long as they do not limit the scope of the mandatory exceptions laid down in this Directive and on condition that their application does not adversely affect nor circumvent the mandatory rules set out in this Directive. Directives 96/9/EC and 2001/29/EC should be adapted.

- (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.
- (11b) 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 based on open access policy or through contractual arrangements between rightholders and research organisations or cultural heritage institutions, such as subscriptions, or through other lawful means. For instance, in cases of subscriptions taken by research organisations or cultural heritage institutions, the persons attached thereto 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, including the possibility to appoint trusted bodies for the purpose of storing such 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. Uses for the purpose of scientific research other than text and data mining, such as scientific peer review and joint research, should remain covered, where applicable, by the exception or limitation provided for in Article 5(3)(a) of Directive 2001/29/EC.

- (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 persons having lawful access to their data can access it, including through IP address validation or user authentication. 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.
- (13) In view of the nature and scope of the exception, which is limited to entities carrying out scientific research 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.

(13a) In addition to their significance in the context of scientific research, text and data mining techniques are widely used both by private and public entities to analyse large amounts of data in different areas of life and for various purposes, including for government services, complex business decisions or the development of new applications or technologies. Rightholders should remain able to license the uses of their works and other subject-matter falling outside the scope of the mandatory exception provided for in this Directive and the existing exceptions and limitations provided for in Directive 2001/29/EC. At the same time, consideration should be given to the fact that users of text and data mining techniques may be faced with legal uncertainty as to whether temporary reproductions and extractions which are an integral part of the process of text and data mining may be carried out on publicly available and lawfully accessed works and other subject-matter, in particular when the reproductions or extractions made for the purposes of the technical process may not fulfil all the conditions of the existing exception for temporary acts of reproduction in Article 5(1) of Directive 2001/29/EC. In order to allow for more legal certainty in such cases, this Directive should enable the Member States to provide under certain conditions for an exception or limitation for temporary reproductions and extractions of works and other subject-matter, insofar as these form an integral part of the text and data mining process and the copies made are not kept beyond that process. This optional exception or limitation should only apply when the work or other subject-matter is accessed lawfully by the beneficiary, including when it has been made available to the public online, and insofar as the rightholders have not reserved the right to make reproductions and extractions for text and data mining, for example by agreement, unilateral declaration, including through the use of machine readable metadata or by the use of technical means. Rightholders should be able to apply measures to ensure that their reservations in this regard are respected. The optional exception or limitation should leave intact the mandatory exception for text and data mining for research purposes laid down in this Directive.

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 not be retained for longer than necessary for achieving the purposes of scientific research.
2. *Moved to Art. 6(1).*
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, 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 1~~a~~ and 3.
- 5. Member States may provide for an exception or a limitation 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 temporary reproductions and extractions of works and other subject-matter that form an integral part of the process of text and data mining, provided that the works and other subject-matter are accessed lawfully and that the use of the works or other subject-matter for text and data mining is not expressly reserved by the rightholder. Rightholders shall be allowed to apply measures to ensure that any reservation of use referred to in subparagraph 1 is respected.**

Article 6
Common provisions

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