Directive (EU) 2019/790 of the European Parliament and of the Council of 17 April 2019 on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC (Text with EEA relevance)

DIRECTIVE (EU) 2019/790 OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL

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on copyright and related rights in the Digital Single Market and amending Directives 96/9/EC and 2001/29/EC

(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 53(1) and Articles 62 and 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 Committee[(1)],

Having regard to the opinion of the Committee of the Regions[(2)],

Acting in accordance with the ordinary legislative procedure[(3)],

Whereas:

(1) The Treaty on European Union (TEU) provides for the establishment of an internal market and the institution of a system ensuring that competition in the internal market is not distorted. Further harmonisation of the laws of the Member States on copyright and related rights should contribute to the achievement of those objectives.

(2) The directives that have been adopted in the area of copyright and related rights contribute to the functioning of the internal market, provide for a high level of protection for rightholders, facilitate the clearance of rights, and create a framework in which the exploitation of works and other protected subject matter can take place. That harmonised legal framework contributes to the proper functioning of the internal market, and stimulates innovation, creativity, investment and production of new content, also in the digital environment, in order to avoid the fragmentation of the internal market. The protection provided by that legal framework also contributes to the Union's objective of respecting and promoting cultural diversity, while at the same time bringing European common cultural heritage to the fore. Article 167(4) of the Treaty on the Functioning of the European Union requires the Union to take cultural aspects into account in its action.

(3) Rapid technological developments continue to transform the way works and other subject matter are created, produced, distributed and exploited. New business models

and new actors continue to emerge. Relevant legislation needs to be future-proof so as not to restrict technological development. The objectives and the principles laid down by the Union copyright framework remain sound. However, legal uncertainty remains, for both rightholders and users, as regards certain uses, including cross-border uses, of works and other subject matter in the digital environment. As stated in the Commission Communication of 9 December 2015 entitled 'Towards a modern, more European copyright framework', in some areas it is necessary to adapt and supplement the existing Union copyright framework, while keeping a high level of protection of copyright and related rights. This Directive provides for rules to adapt certain exceptions and limitations to copyright and related rights to digital and cross-border environments, as well as for measures to facilitate certain licensing practices, in particular, but not only, as regards the dissemination of out-of-commerce works and other subject matter and the online availability of audiovisual works on video-on-demand platforms, with a view to ensuring wider access to content. It also contains rules to facilitate the use of content in the public domain. In order to achieve a well-functioning and fair marketplace for copyright, there should also be rules on rights in publications, on the use of works or other subject matter by online service providers storing and giving access to user-uploaded content, on the transparency of authors' and performers' contracts, on authors' and performers' remuneration, as well as a mechanism for the revocation of rights that authors and performers have transferred on an exclusive basis.

(4) This Directive is based upon, and complements, the rules laid down in the directives currently in force in this area, in particular Directives 96/9/EC[(4)], 2000/31/EC[(5)], 2001/29/EC[(6)], 2006/115/EC[(7)], 2009/24/EC[(8)], 2012/28/EU[(9)] and 2014/26/EU[(10)] of the European Parliament and of the Council.

(5) In the fields of research, innovation, education and preservation of cultural heritage, digital technologies permit new types of uses that are not clearly covered by the existing Union rules on exceptions and limitations. In addition, the optional nature of exceptions and limitations provided for in Directives 96/9/EC, 2001/29/EC and 2009/24/EC in those fields could 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, innovation, 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, illustration for teaching in the digital environment and for preservation of cultural heritage should be introduced. The existing exceptions and limitations 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 or limitations provided for in this Directive, which need to be implemented by Member States in their national law. Directives 96/9/EC and 2001/29/EC should, therefore, be amended.

(6) The exceptions and limitations 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 that

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. Such protection should be maintained while ensuring that the use of technological measures does not prevent the enjoyment of the exceptions and limitations provided for in this Directive. Rightholders should have the opportunity to ensure that through voluntary measures. They should remain free to choose the appropriate means of enabling the beneficiaries of the exceptions and limitations provided for 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 to the public 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. Text and data mining makes the processing of large amounts of information with a view to gaining new knowledge and discovering new trends possible. Text and data mining technologies are prevalent across the digital economy; however, there is widespread acknowledgment that text and data mining can, in particular, benefit the research community and, in so doing, support innovation. Such technologies benefit universities and other research organisations, as well as cultural heritage institutions since they could 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 can involve acts protected by copyright, by the sui generis database right or by both, in particular, the reproduction of works or other subject matter, the extraction of contents from a database or both which occur for example when the data are normalised in the process of text and data mining. Where no exception or limitation applies, an authorisation to undertake such acts is required from rightholders.

(9) Text and data mining can also be carried out in relation to mere facts or data that are not protected by copyright, and in such instances no authorisation is required under copyright law. There can also be instances of text and data mining that do not involve acts of reproduction or where the reproductions made fall under the mandatory exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC, which should continue to apply to text and data mining techniques that do not involve the making of copies beyond the scope of that exception.

(10) 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 could 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 concerning text and data mining.

(11) The legal uncertainty concerning text and data mining should be addressed by providing for a mandatory exception for universities and other research organisations, as well as for cultural heritage institutions, to the exclusive right of reproduction and to the right to prevent extraction from a database. In line with the existing Union research policy, which encourages universities and research institutes to collaborate with the private sector, research organisations should also benefit from such an exception when their research activities are carried out in the framework of public-private partnerships. While research organisations and cultural heritage institutions should continue to be the beneficiaries of that exception, they should also be able to rely on their private partners for carrying out text and data mining, including by using their technological tools.

(12) 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 should be understood to cover 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, in addition to universities or other higher education institutions and their libraries, also entities such as research institutes and hospitals that carry out research. Despite different legal forms and structures, research organisations in 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 could, 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 such undertakings to exercise control because of structural situations, such as through their quality of shareholder or member, which could result in preferential access to the results of the research, should not be considered research organisations for the purposes of this Directive.

(13) Cultural heritage institutions should be understood as covering publicly accessible libraries and museums regardless of the type of works or other subject matter that they hold in their permanent collections, as well as archives, film or audio heritage institutions. They should also be understood to include, inter alia, national libraries and national archives, and, as far as their archives and publicly accessible libraries are concerned, educational establishments, research organisations and public sector broadcasting organisations.

(14) Research organisations and cultural heritage institutions, including the persons attached thereto, should be covered by the text and data mining exception with regard to content to which they have lawful access. Lawful access should be understood as covering access to content based on an 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 the

case of subscriptions taken by research organisations or cultural heritage institutions, the persons attached thereto and covered by those subscriptions should be deemed to have lawful access. Lawful access should also cover access to content that is freely available online.

(15) Research organisations and cultural heritage institutions could in certain cases, for example for subsequent verification of scientific research results, need to retain copies made under the exception for the purposes of carrying out text and data mining. In such cases, the copies should be stored in a secure environment. Member States should be free to decide, at national level and after discussions with relevant stakeholders, on further specific arrangements for retaining the copies, including the ability to appoint trusted bodies for the purpose of storing such copies. In order not to unduly restrict the application of the exception, such arrangements should be proportionate and limited to what is needed for retaining the copies in a safe manner and preventing unauthorised use. 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.

(16) 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 them, including through IP address validation or user authentication. Those measures should remain proportionate to the risks involved, and should not exceed what is necessary to pursue the objective of ensuring the security and integrity of the system and should not undermine the effective application of the exception.

(17) In view of the nature and scope of the exception, which is limited to entities carrying out scientific research, any potential harm created to rightholders through this exception would be minimal. Member States should, therefore, not provide for compensation for rightholders as regards uses under the text and data mining exceptions introduced by this Directive.

(18) 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 and the development of new applications or technologies. Rightholders should remain able to license the uses of their works or other subject matter falling outside the scope of the mandatory exception provided for in this Directive for text and data mining for the purposes of scientific research and of 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 could be faced with legal uncertainty as to whether reproductions and extractions made for the purposes of text and data mining can be carried out on lawfully accessed works or other subject matter, in particular when the reproductions or extractions made for the purposes of the technical process do not fulfil all the conditions of the existing exception