SA&S

samenwerkingsverband

auteursrecht & samenleving

Comments on the European Commission's Directive Proposal of 14 September 2016 on copyright in the digital single market

SA&S - Partnership for Copyright & Society

A. Introduction

Within the framework of its 'digital single market' strategy, the European Commission made a number of regulation proposals on 14 September 2016: a directive and a regulation on digital and cross-border use, as well as a directive and a regulation on the use by the visually impaired.

Below, SA&S evaluates the Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - COM(2016)593 (hereinafter: the Directive proposal) and expresses its concerns. These remarks are made from the point of view of heritage institutions (libraries, museums and archives).

Apart from specific concerns about the Directive proposal itself, SA&S regrets that the European Commission failed to critically question the actual fundaments of copyright, such as the extremely long protection period (70 years after the author's death) or the extensive rights of exploitation granted to authors. To users of copyrighted materials it is clear that the balance between copyright and public interest is out of proportion. Heritage institutions are particularly disappointed that the European Commission did not have the courage to implement an open norm exception (by analogy with the American 'fair use' concept).

SA&S therefore makes an appeal to the European Commission to effectively establish a major reform of copyright laws. SA&S refers to its memorandum 'for a balanced copyright' from 2013.

B. (No) harmonisation of copyright exceptions

Copyright was harmonised in several areas by a number of European directives during the past decades. The most important one was directive 2001/29/EC 'on the harmonisation of certain aspects of copyright and related rights in the information society'. This directive lists a number of exceptions to copyright law. These exceptions, however, are optional. Member states may freely choose which exceptions they wish to implement in their national laws. In addition, member states have implemented certain exceptions in completely different ways. As a result, there is a total lack of harmonisation, which leads to uncertainty, mainly in the case of cross-border use of works.

Users of copyrighted material have therefore expressed the wish that this list of exceptions would be made mandatory and that member states would be required to implement the exceptions list in an identical way. Unfortunately, the Directive proposal does not meet these wishes.

Indeed, the Directive proposal starts with a general statement emphasising that its main objective is to further harmonise the 'digital and cross-border uses of protected content' (article 1). The existing directives concerning copyright remain fully in effect. This means that Directive 2001/29/EC listing optional exceptions also remains in force.

The only change in the Directive proposal is that three exceptions are made mandatory: those for research, education and heritage institutions (see below).

SA&S therefore continues to plead that all exceptions of Directive 2001/29/EC be made mandatory and that the member states be required to transpose them uniformly into their national legislation. This is the only way that legal uncertainty in various forms of cross-border use of works can be eliminated.

C. Text and data mining

There was a very strong demand by scientific institutions to make an exception for text and data mining. Researchers increasingly aim to find patterns and connections in texts or databases that are possibly protected by copyright or database producer rights. There was uncertainty whether data mining was covered by the existing exception in Directive 2001/29 for scientific research.

In the Directive proposal, the European Commission proposes a new mandatory exception for text and data mining (TDM) (although SA&S prefers the term 'content mining' as the implementation must not be limited to texts and data).

Research institutions are henceforth allowed to perform TDM. The proposal does require that access to the text and data is obtained legally by the institution. However, no contractual limitations to TDM can be enforced, which means that publishers or database producers cannot impair or limit this right through contractual provisions.

This new exception only applies to 'research organisations'. This includes non-profit research institutions as well as research organisations that have been entrusted by the government with a recognised task of public interest, and that do not keep the research results exclusively to themselves or a contractor. Commercial private research institutions that keep their results

exclusively to themselves are not covered by this exception, but it does apply to public-private partnerships that share their results (recitals 10 and 11 of the Directive proposal).

Publishers are allowed to apply necessary proportional measures to ensure the security and the integrity of their networks and databases, for example to prevent overload and slowness of their systems to the detriment of other users (art. 3 paragraph 3 and recital 12).

SA&S fails to understand why this exception is limited to 'research organisations'. Everyone who has legal access to texts, databases or other content should be able to perform 'content mining'. Indeed, the European Commission has an active policy to stimulate 'open science' and 'open innovation'. Furthermore, SA&S is concerned about the option given to publishers to take measures that potentially could hamper TDM.

D. Education

Article 5.3.a of Directive 2001/29 already made an extensive exception for educational use of works. This, however, was an optional exception, transposed in very different ways by the member states, which particularly poses a problem in cross-border education.

The new mandatory exception allows the classical use of works in classrooms, as well as the use in secure electronic networks to which only students and teachers have access. The use of works in such closed networks is deemed to take place solely in the member state in which the educational institution is established (art. 4 paragraph 3). This means that students can have access to their study materials from abroad through a closed network.

Although this exception is obviously a positive development, the second paragraph of article 4 poses problems. Indeed, member states may provide that this exception for educational purposes only applies when there are no "adequate licences easily available in the market". If there are, such an exception is not necessary, according to the European Commission. This causes inequality: in some member states the exception will be applied broadly, whereas other member states will either not apply it or only in a limited way. Moreover, it is unclear who will have to decide whether a licence is 'adequate' and 'easily available in the market'.

Paragraph 4 also leads to inequality. Member states may implement a fair compensation for this exception, but this is not mandatory. Since, based on paragraph 3, the principle of 'country of origin' applies, educational institutions in member states with a broad educational exception without a compensation arrangement are able to offer cheaper online education than institutions in member states that either do not have an educational exception or apply a compensation arrangement.

SA&S finds it regrettable that member states may opt out of implementing this exception if 'adequate' licences are easily available in the market. It perpetuates legal insecurity when implementing this exception. Providing education is a task of public interest, which makes it absolutely necessary that this exception can be applied undiminished. SA&S hereby appeals to the Belgian Government not to limit this exception by invoking a similar condition or by implementing a compensation for the exception.

E. The preservation copy

The preservation copy exception was already part of the optional list of exceptions in Directive 2001/29. This exception is made mandatory by the Directive proposal.

The preservation copy exception only applies to works that permanently belong to the collection.

Moreover, this exception only pertains to reproductions and not to the act of disseminating the works. This means that heritage institutions may digitise their collections, but they can only make them available internally and not online.

SA&S takes a moderately positive view on this exception, which already exists under Belgian law. However, SA&S is opposed to the limitation of this exception to works that permanently belong to the collection of a heritage institution. Works that are made available temporarily (e.g. works on loan) should also be included. In addition, the institutions do not only wish to have the possibility of making preservation copies, but also want to make their collections available under certain circumstances in a non-commercial context. A broader exception would be welcome.

F. Out-of-commerce works

Cultural heritage institutions (i.e. libraries, museums and archives) have the right to digitise works from their collections that are no longer in commerce and make them available, based on agreements with management companies deemed also to represent non-members at that moment. All rights holders do have the possibility of an opt-out (art. 7 paragraph 1 sub c). This system is also known as Extended Collective Licensing (ECL).

A work is out of commerce '*when the whole work or other subject-matter, in all its translations, versions and manifestations, is not available to the public through customary channels of commerce and cannot be reasonably expected to become so'*. According to SA&S, this definition is too broad and not in line with the customary interpretation. The proposal does stipulate that practical requirements need to be developed to ensure that collections as a whole can be presumed to be out of commerce. (art. 7 paragraph 2).

In addition, appropriate publicity measures need to be taken before they can be made available online (art. 7 paragraph 3). This must be announced in advance.

In principle, based on article 7 paragraph 4, licences must be sought from a collective management organisation from the member state where the work was first made public or where the producer is established. Only if after 'reasonable efforts' it is not possible to determine the member state, collective management organisations in the homeland of the cultural heritage institution may be contacted.

SA&S wonders how the concept of 'reasonable efforts' will be interpreted. The requirement of a 'diligent search' that according to the Directive on orphan works needs to be performed before an orphan work can be used, is often prohibitive. It is simply too expensive for institutions to perform such a search for each work. The regulation for orphan works is therefore rarely applied. SA&S thus proposes that institutions may always enter into an agreement with the collective management organisations of the homeland. It would then be those collective

management organisations' task to verify where the work was first made public and, where appropriate, to reach a mutual agreement with foreign collective management organisations.

According to article 7 paragraph 5, out-of-commerce works by subjects of non-EU countries that have not been made public for the first time in the EU, may not be put online by heritage institutions. Under this regulation, the unpublished work of, for instance, a Canadian artist who has lived in Belgium for most of his life cannot be made available online. **SA&S finds this highly impractical and proposes to give the collective management organisations of the homeland an active role in this matter, allowing them to reach a mutual agreement with foreign collective management organisations.**

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Article 8 states that heritage institutions may make out-of-commerce works that they are allowed to put online based on a licence with a collective management organisation, available in all member states. As in the case of orphan works, a portal site should be established at the European Union Intellectual Property Office (EUIPO). On this site, the intent to put certain works online should be announced at least six months in advance. This announcement should contain information that makes the identification of the works under the licence possible.

SA&S wonders how this will be implemented. Will the announcements be something like: "*The University of Ghent announces that 6 months from now it will put online all photographs from old editions of the newspaper Het Volk and other photographs from its archives, based on an agreement with Sofam in Brussels. It concerns five thousand photos by photographers A to Z and fifteen thousand photos by unknown photographers. Interested parties may view the photographs at 9 Rozier in Ghent*". Indeed, putting these photographs online is not allowed until six months after this announcement. Or is even this notification insufficient? Is it necessary to place the following announcement on the EUIPO website: "*Photograph of an unknown person, Korenmarkt in Ghent. Photographer unknown. Date unknown. Probably around 1950*". SA&S fears that all of this will cost a lot of time and money. It is therefore not feasible. SA&S proposes that institutions be allowed to start publishing immediately, albeit always with the metadata, and that rights holders may come forward until 6 months after the date of publication.

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Article 9 imposes a mandatory 'stakeholder dialogue'.

SA&S hopes that the final result of this dialogue will be that archives, museums and libraries will be allowed to digitise their complete collections and put them online, for instance when the work is at least 10 years old (or after a longer period of time, depending on the kind of work), that they will have to pay a fair compensation to the relevant collective management organisation, and that a work obviously will need to be removed forthwith upon the rights holders' request.

G. Publishing rights

The Directive proposal gives publishers of 'press publications' a new inherent related right. This right covers rights of reproduction and making the work available to the public, as far as digital use is concerned. All exceptions pertaining to copyright apply. This related right cannot be invoked against copyright holders. It remains valid for 20 years after publication.

'Press publications' only encompass "journalistic publications, published by a service provider, periodically or regularly updated in any media, for the purpose of informing or entertaining. Such publications would include, for instance, daily newspapers, weekly or monthly magazines of general or special interest and news websites. Periodical publications which are published for scientific or academic purposes, such as scientific journals, should not be covered by the protection granted to press publications under this directive." (recital 33).

SA&S is opposed to the implementation of a new related right. Publishers already have the copyright and the database rights on their press publications (in the sense that they can enter into agreements with authors to obtain all necessary rights). In two member states (Germany and Spain) where such a right has already been implemented, it has become apparent that this offers no benefit to the publishers.

H. No open access provision

In current practice, researchers often enter into an agreement with a publishing company whereby they relinquish their copyright to the company. As a result, the researcher/author can no longer decide to share his or her publication through an open access repository. If such a contract between the publishing company and the researcher exists, the university for which the researcher performs or has performed his/her research can no longer request to disseminate it through its repository via open access. Not even when it concerns a pre-publication version, since the publishing company can forbid the publication of the (research) text.

This is in conflict with the regulations of the Belgian FWO (Fund for Scientific Research) and the European Horizon2020 projects, which require that scientific publications resulting from the research be made available to the public. It is also in conflict with the EU's goal to make all publicly financed research available to the public via open access by 2020. In addition, it is in conflict with the Flemish Government's aim to meet the goal of the EU and make all publicly financed researches publicly available. For universities this is currently a catch-22 situation.

Universities have therefore expressed the wish to make provisions for a regulation in which the author – regardless of a possible transfer of rights to a publisher – should retain the right, possibly after a certain embargo period, to place his work in open access. Such a regulation has already been implemented in a few member states, such as the Netherlands and France.

SA&S therefore wishes that in a final Directive text a provision with regard to open access be added, in the sense of *"making scientific articles for which the research was fully or partially funded with public funds available free of charge by scientific or educational institutions, on expiry of a reasonable period after the first announcement of the work, on the condition that the source of the first announcement is clearly mentioned."*

The members of SA&S:

- VLUHR. De Vlaamse universiteiten en hogescholen raad
- CultuurConnect
- FARO. Vlaams steunpunt voor cultureel erfgoed
- VVBAD. De Vlaamse Vereniging voor Bibliotheek, Archief en Documentatie
- VIAA. Het Vlaams Instituut voor Archivering
- Lukas. Arts in Flanders
- De Luisterpuntbibliotheek
- OKO. Het Overleg Kunstenorganisaties

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*SA&S – **Partnership for Copyright & Society** – is a partnership of Flemish (Belgium) organisations in the domain of culture, heritage, education and science. We collaborate on issues of copyright to strengthen our expertise and position, to the benefit of our users and in the interest of the public domain.*

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