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*cc. Mr Gérard LARCHER
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Dear Chair,

The Commission would like to thank the Sénat for its Opinion on the proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market {COM (2016) 593 final}, the 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 final}, the 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 related rights for the benefit of persons who are blind, visually impaired or otherwise print disabled {COM (2016) 595 final} and the 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 benefits 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 final}.

Through these proposals, the Commission is making good on the Digital Single Market Strategy¹ objective "to reduce differences between national copyright regimes and allow for wider online access to works by users across the European Union" and on the action plan for the modernisation of European Union copyright rules outlined in the Communication 'Towards a modern, more European copyright framework'² of December 2015.

¹ COM(2015) 192 final.

² COM(2015) 626 final.

The proposal for a Directive on copyright in the Digital Single Market aims at adapting certain key exceptions to copyright to the digital and cross-border environment; improving licensing practices and ensuring wider access to content; and achieving a well-functioning marketplace for copyright.

The objective of the proposed Regulation on online transmissions of broadcasting organisations and retransmissions of television and radio programmes is to facilitate the clearance of rights for cross-border online transmissions of television and radio programmes and retransmissions over closed networks, therefore fostering the cross-border distribution of television and radio programmes.

With the proposal for a Directive 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, the Commission is implementing the Marrakesh Treaty into European Union law through a new exception. The proposal for a Regulation in the same area will make sure that the Member States may apply the provisions of the Marrakesh Treaty with third countries.

The Commission welcomes the Sénat's support, notably on the introduction of new copyright exceptions, on the new rules aimed at ensuring increased transparency for authors and performers on the exploitation of their works and on the measures proposed to address the difficulties faced by rightholders when seeking to be remunerated for and control the distribution of their content online. The Commission also shares the Sénat's wishes that the provisions of the Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled can be implemented rapidly in the Union. In response to the specific comments presented in the Opinion, the Commission would like to refer the Sénat to the attached annex.

The proposals presented by the Commission are currently in the legislative process involving both the European Parliament and the Council in which your government is represented.

The Commission hopes that the clarifications provided in this reply address the issues raised by the Sénat and looks forward to continuing our political dialogue in the future.

Yours faithfully,

*Frans Timmermans
First Vice-President*

*Andrus Ansip
Vice-President*

ANNEX

The Commission has carefully considered the issues raised by the Sénat in its Opinion and is pleased to provide the following clarifications.

- *On exceptions to copyright (Articles 3 to 6 of the proposal for a Directive on copyright in the Digital Single Market) – paragraphs 18 to 20 of the Opinion*

The objective of the exception provided for in Article 3 is to provide full legal certainty to researchers carrying out text and data mining activities and to support the European Union's research policy. In the current research environment, it is very difficult to draw a clear line between commercial and non-commercial activities. The more so that universities and research centres engage regularly in public-private partnerships. Against this background, the Commission considered that limiting the text and data mining exception to non-commercial purposes would not bring the necessary legal certainty for researchers and therefore would jeopardise its objective. Finally, the conditions of the text and data mining exception, in particular the lawful access condition and the closed list of beneficiaries, offer sufficient guarantees to rightholders and maintain a balance between the relevant interests.

The new exception allowing digital uses of protected content in the context of illustration for teaching (Article 4 of the proposal for a Directive) covers all types of works. Considering that Article 4 contains a certain level of flexibility for Member States in the implementation of the exception, the Commission believes that there is no need for an explicit exclusion of textbooks and sheet music. Under Article 4(2), Member States may provide that the exception does not apply where adequate licences are easily available. As explained in recital 17 and in the Impact Assessment accompanying the legislative proposal³, this provision could notably be used by Member States in relation to content which is primarily intended for the educational market (for example textbooks), in order to avoid possible negative impacts on the licensing market. For textbooks and sheet music, Member States could therefore decide to subject the application of the exception to the availability of licences. In this case, they would need to ensure the appropriate availability and visibility of licences, in order to make sure that educational establishments benefit from full legal certainty and do not incur disproportionate administrative costs.

- *On the measures to facilitate the digitisation and making available of out-of-commerce works (Articles 7 to 9 of the proposal for a Directive on copyright in the Digital Single Market) – paragraph 21 of the Opinion*

The proposed licensing mechanism provided for in Articles 7 to 9 of the proposal for a Directive responds to the specific problem faced by cultural heritage institutions in clearing copyright and related rights for the digitisation and dissemination of out-of-commerce works

³ Impact Assessment on the modernisation of European Union copyright rules: <https://ec.europa.eu/digital-single-market/en/news/impact-assessment-modernisation-eu-copyright-rules>.

as part of their cultural missions; it has therefore not been conceived with commercial uses in mind. Furthermore, those licensing mechanisms provided for in the proposal by no means preclude the possibility of renewed commercial exploitation by the rightholders of the concerned works or other subject-matter.

- *On the measures to achieve a well-functioning marketplace for copyright (Articles 11 to 16 of the proposal for a Directive on copyright in the Digital Single Market) – paragraphs 14 to 16 of the Opinion*

The rights granted to the publishers of press publications under the Commission's proposal are the exclusive rights of reproduction and making available to the public, concerning digital uses. These rights are already granted in European Union law, under Articles 2 and 3 of Directive 2001/29/EC⁴ to authors, performers, film producers, phonogram producers and performers. The introduction of a new related right for press publishers would create a new category of rightholders but would not change the scope of what is protected by copyright. This is clarified in particular in recital 34 of the Commission's proposal.

The protection granted to publishers of press publications under Article 11 is independent from and shall in no way affect any rights provided for in Union law to the authors of the works incorporated in a press publication, as laid down in Article 11(2). The exploitation of the rights of journalists who are authors of works incorporated in a press publication would therefore not be affected by the new related right.

Article 13 of the Commission's proposal for a Directive provides for measures that would allow rightholders to be in a better position to determine whether and under which conditions their content is used by services that store user uploaded content. The Commission considers that due to their nature and role, these services can be expected to have certain responsibilities and cooperate more with rightholders whose content is uploaded without their involvement.

The wider context for the measures imposed on the above-mentioned services has been set out in the relevant recitals in the Commission's proposal which, among others, recall the application of the existing copyright and e-commerce rules to these market players, without changing the underlying directives, namely Directive 2001/29/EC and Directive 2000/31/EC⁵.

Finally, the contract adjustment mechanism in Article 15 would guarantee a right to claim an additional, appropriate remuneration to those individual authors and performers whose agreed remuneration turns out not to be 'equitable' compared to the revenues generated. The assessment of the disproportion and the appropriate additional remuneration would be conducted on a case-by-case basis, taking into account all the circumstances of the case, including the usual practices of the sector. This provision would contribute to the strengthening of the bargaining position of creators.

⁴ OJ L 167, 22.6.2001, p. 10-19.

⁵ OJ L 178, 17.7.2000, p. 1-16.

– On measures to fight against piracy and counterfeiting – paragraph 13 of the Opinion

Strengthening the fight against piracy and massive copyright infringements remains a priority for the Commission. Actions related to the enforcement of intellectual property rights form a complementary workflow to copyright proposals and include among other things a 'follow-the-money' approach to deprive those engaging in commercial infringements from the revenue streams. An assessment of the need to amend the current legal framework, in particular Directive 2004/48/EC on the enforcement of intellectual property rights⁶, is underway.

– On the measures provided in the proposal for a Regulation 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 – paragraphs 16 and 17 of the Opinion

The measures provided in the proposal for a Regulation aim at facilitating the clearance of rights for online transmissions and retransmissions of television and radio programmes, without disrupting the existing licensing and distribution models. They are based on mechanisms used in the Satellite and Cable Directive (Council Directive 93/83/EEC⁷) for satellite broadcasting (country of origin) and cable retransmissions (mandatory collective management of rights).

In the proposed Regulation, the country of origin principle would only apply to the licensing of rights for broadcasters' online services consisting in the provision of radio or television programmes simultaneously with or for a defined period of time after their broadcast (online live television, catch-up services along with ancillary materials). Considering its narrow scope of application and the fact that the proposal does not restrict the contractual freedom of the parties, the Commission considers that the application of the country of origin principle does not risk jeopardising the territoriality of copyright. The proposal does not oblige broadcasters to provide their services across borders or rightholders to grant pan-European licences (see recital 11 of the proposal for a Regulation). This means that, despite the application of the country of origin to the licensing of rights, broadcasters and rightholders would remain free to contractually limit the distribution of content to certain territories.

For retransmissions of television and radio programmes, the proposed Regulation extends the mandatory collective management of rights to retransmission services operating by means other than cable, but on equivalent closed networks such as Internet protocol television networks. This measure, in the same way as equivalent rules applying to cable retransmissions under the Satellite and Cable directive, would not affect the territorial licensing of rights, only the manner in which these rights are exercised, i.e. via collective management organisations or broadcasters.

⁶ OJ L 157, 30.4.2004, p. 45-86.

⁷ OJ L 248, 6.10.1993, p. 15-21.

- *On the implementation of the Marrakesh Treaty in European Union law – paragraphs 22 and 23 of the Opinion*

In drafting the proposals for a Directive and a Regulation to implement the Marrakesh Treaty, the Commission has paid utmost consideration to the letter and the spirit of the Treaty, and in particular to the importance of facilitating the cross-border exchange of accessible format copies, in a legal environment that would provide legal certainty for beneficiaries and that would keep the administrative burden to the minimum. For this reason, and given the specific nature and the targeted scope of the exception introduced by the Marrakesh Treaty, the Commission considers that Member States should not be allowed to introduce compensation schemes or the condition of verification of commercial availability of accessible format copies with reference to this specific exception. The Commission deems this a key element for the effectiveness of the Marrakesh Treaty on the ground, particularly in the single market.