EUROPEAN COMMISSION

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Ms Malu DREYER
President of the Bundesrat
Leipziger Straße 3 - 4
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Dear President,

The Commission would like to thank the Bundesrat 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}.

Through this proposal, the Commission is making progress on the Digital Single Market Strategy[1] objective "to reduce differences between national copyright regimes and allow for wider online access to works by users across the EU" 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.

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 Commission is pleased that the Bundesrat shares the view that action at the European Union level as envisaged in the proposal is required to reduce the differences between national copyright regimes, in particular in relation to exceptions and limitations, and to facilitate cross-border access to copyright-protected content. The proposal presented by the Commission is currently with the co-legislators i.e the European Parliament and the Council. The Bundesrat's Opinion has been made available to the Commission's representatives in the ongoing negotiations with the co-legislators and will inform these discussions.

In response to the comments and questions put forward by the Bundesrat the Commission would like to refer to the attached annex.

[1] COM(2015) 192 final.
[2] COM(2015) 626 final.

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

Yours faithfully,

Frans Timmermans
First Vice-President

Andrus Ansip
Vice-President

ANNEX

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

- *On the exception for text and data mining (Article 3) – paragraphs 21 and 22 of the Opinion*

Article 3(1) and (2) of the proposal for a Directive introduces a new mandatory exception for text and data mining carried out by research organisations for the purpose of scientific research.

Article 3(4) of the proposal for a Directive, on the other hand, needs to be read in conjunction with Article 3(3), as a mechanism which would allow best practices to be agreed between rightholders and research organisations. It is not a prerequisite for the application of the text and data mining exception. It is also important to highlight that the measures provided for in Article 3(3) cannot go beyond what is necessary to ensure the security and integrity of the system or databases. Recital 12 underlines that such measures "should not undermine the effective application of the exception".

With regard to the impact of the text and data mining exception on users other than the beneficiaries, such as data analytics companies, this is not dealt with by the proposal. Therefore, the proposal does not change the current situation for other users of text and data mining or data analytics companies which can continue exercising their activities under the same conditions as today, including through the existing copyright or database exception on temporary acts of reproductions, extraction or re-utilisation, where relevant.

In order to take into account the realities of the current research environment and support innovation, Recital 10 of the proposal explicitly specifies that "research organisations should also benefit from the exception when they engage into public-private partnerships".

The proposed text and data mining exception is limited to the reproduction right and does not regulate the dissemination of the research results.

- *On the exception for use of works and other subject-matter in digital and cross-border teaching activities (Article 4) - paragraphs 11, 15, 19, 24 to 26 of the Opinion*

The introduction of a new mandatory exception for the use of protected content in digital teaching activities has been assessed in the Impact Assessment accompanying the proposal, on the basis of the data provided by stakeholders and in various studies, notably in relation to the impact on the licensing market.

The Commission considers that the proposed new exception for digital teaching activities set out in Article 4 of the proposal for a Directive would provide benefits to educational establishments, teachers and students.

The new exception only covers digital uses, including the making available of parts or extracts of works used for the purpose of illustration for teaching on the educational

establishment's intranet or virtual learning environment. For non-digital uses, Member States can continue to rely on the exceptions provided in Article 5(2)(a) and 5(3)(a) of Directive 2001/29/EC in conformity with Union law.

Under Article 4(2), Member States may provide that the exception does not apply where adequate licences are easily available. The proposed rules require Member States using this provision 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. Member States remain free to decide to implement the new exception without relying on this licence-based mechanism.

Article 4(4) of the proposal introduces the possibility for Member States to provide for fair compensation for the uses carried out under the new teaching exception. It would be up to the Member States deciding to use such a possibility to organise the fair compensation within limits imposed by European Union law.

- *On the exception for preservation of cultural heritage (Article 5) and the measures to improve licensing practices and ensure wider access to out-of-commerce works (Articles 7, 8 and 9)- paragraphs 13, 16, 27, 28 and 29 of the Opinion*

Article 5 of the proposal introduces a new mandatory exception for the preservation of works and other subject-matter that are part of the permanent collections of the concerned cultural heritage institutions. Article 5 aims at providing for preservation of cultural heritage and therefore lays down an exception to the reproduction right.

The Commission addressed the need to improve the legal framework for the dissemination and making available of cultural heritage in Articles 7 to 9 of the proposed Directive, which provides for legal mechanisms supporting easier collective licensing for the dissemination of out-of-commerce works in the collections of cultural heritage institutions. The inclusion of translations in the definition of out-of-commerce works applicable to those mechanisms is important for the balance that those rules seek to achieve in providing a solution that is workable for cultural heritage institutions while providing adequate safeguards for rightholders. As regards the reference of the Bundesrat's Opinion to second-hand bookshops, the Commission did not see the need to define "customary channel of commerce".

Both Article 5 and Articles 7 to 9 of the proposed Directive refer to a definition of 'cultural heritage institution' (Article 2) which focuses on the types of institutions that the Commission considers to be at the core of the efforts for the preservation and dissemination of cultural heritage.

- *On the interaction between technological protection measures and the exceptions and the limitation provided for in the proposal for a Directive (Article 6) – paragraph 17 of the Opinion*

The Commission considers that the interaction between technological protection measures and enjoyment of exceptions is an important issue. This issue is already dealt with by Article 6(4) of Directive 2001/29/EC. The principle, set out in Article 6(4)(1) is the following: first of

all, Article 6(4)(1) promotes voluntary agreements between rightholders and beneficiaries of exceptions. In the absence of voluntary measures, Member States are obliged to intervene and put in place mechanisms to ensure that rightholders make available to the beneficiary of an exception the means of benefiting from such an exception. Article 6(4)(4) carves out on-demand services from the application of this mechanism.

The proposal maintains the system established by Article 6(4) of Directive 2001/29/EC. In addition, the proposal extends the system laid down in Article 6(4)(1), as regards the exceptions contained in the proposal, to on-demand services.

- *On the protection of press publications concerning digital uses (Article 11) – paragraphs 20, 30 and 31 of the Opinion*

Article 11 of the proposal provides for a new related right for publishers of press publications. This new right aims at ensuring that economic contribution of press publishers (such as newspaper and magazine publishers) is recognised in Union law. As the subject-matter of protection is a press publication, the rights therein are granted exclusively to the publisher of press publications as defined in Article 2(4).

The rights granted to the publishers of press publications are the exclusive rights of reproduction and making available to the public, concerning digital uses. The introduction of a new related right for press publishers would create a new category of rightholders but will 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 under Article 11 is independent from and should 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). As the proposed rights are exclusive in their nature, they provide the publishers with the right to authorise or prohibit the reproduction and making available to the public of their press publications and to set the conditions to do so, including for free or against the payment of licence fees. Articles 14 to 16 of the proposal lay down measures on transparency in contracts of authors and performers and remuneration adjustment mechanisms which would help authors obtain a fair share of the proceeds stemming from the exploitation of press publications.

A 20-year term of protection is considered appropriate, as it would place press publishers in a situation comparable to other related rightholders without causing a significant impact on other stakeholders, including authors, consumers and online service providers.

- *On the sharing of claims to fair compensation for the uses of works under exceptions and limitations to copyright between authors and publishers (Article 12)- paragraph 32 of the Opinion*

Article 12 and Recital 36 of the proposed Directive lay down the possibility for Member States to provide that publishers may under certain circumstances claim a share of the compensation due for the uses of works made under an exception or limitation. As outlined in the Impact Assessment and in Recital 36 of the proposal, on the one hand publishers invest in

the exploitation of the works contained in publications and, on the other hand, the use of such published works under exceptions or limitations may in some instances deprive them of revenues. The Commission's proposal aims at providing a legal basis to Member States, which will remain free to decide if – and in which cases – the sharing of compensation between authors and publishers is appropriate in the respective national context in conformity with Union law.

- *On the use of protected content by information society service providers storing and giving access to large amounts of works and other subject-matter uploaded by their users (Article 13) – paragraphs 33 and 34 of the Opinion*

With regard to Article 13 and its possible impact on innovation and start-ups, it should be recalled that the proposal only focuses on those services which in terms of both content and audience have reached a certain scale. A service which may fulfil the criteria of a small or medium-sized enterprise (SME) may well have large amounts of protected content and be an important player on the content market whilst a start-up may take some time to or may never reach the level of content provision and audience figures for Article 13 to apply at all. For that reason, the Commission has chosen to use criteria which relate to the amount of protected content that is made available rather than the size of a given business.

Moreover, it should be pointed out that the measures that the services need to take must be 'proportionate', i.e. they should not be unnecessarily complicated and costly for the service providers. In other words, the service can choose measures that would be appropriate and proportionate in its specific case.

- *On fair remuneration in contracts of authors and performers (Articles 14 to 16) – paragraphs 35 to 37 of the Opinion*

Article 14 of the proposed Directive provides that authors and performers shall receive adequate information and that the transparency obligations which are imposed on the authors' and performers' contractual counterparts shall be proportionate. The proposal should allow authors and performers to benefit from the transparency obligation in a meaningful way.

However, these provisions are meant to ensure that the transparency obligations do not represent an unnecessary burden and that the authors' and performers' contractual counterparts are not obliged to provide information they do not possess themselves. As stated in Recital (41), Member States are encouraged to facilitate the transparency obligation through sector-specific stakeholder dialogue. In addition, Articles 14(2) and 14(3) provide adjustments in order to mitigate the administrative burden on creators' counterparts in specific cases. In particular, Article 14(3) provides that Member States may decide that the transparency obligations do not apply when the contribution of the author is not significant having regard to the overall work or performance.

Finally, the alternative dispute resolution mechanism provided for in Article 16 should be considered as an additional mechanism designed to help authors and performers to make use of their rights efficiently through a faster and simpler procedure.

- *On other issues – paragraphs 6, 9 and 18 of the Opinion*

As mentioned in the Communication accompanying the second copyright modernisation package, the Commission will continue to assess other issues related to exceptions identified in the Communication 'Towards a modern, more European copyright framework' of 9 December 2015. This includes questions related to private copying.

Regarding the establishment and application of databases with information essential of the administration of justice, several exceptions allowing use of copyright-protected content for the purposes of public security and proper performance of administrative or judicial proceedings exist in the copyright European Union acquis[3]*. Under these exceptions, Member States may authorise uses of copyright-protected content for the purposes of public security, administration and justice*[4]*. The proposal does not affect these exceptions, which remain fully applicable.*

Regarding the application of the principle of exhaustion to legally-acquired digital goods, the Commission consulted on this issue as part of the 2013/2014 public consultation on the review of the European Union copyright rules. Action in this regard at European Union level would be premature due, notably, to the difficulties in assessing the concrete impact on the market.

[3] See Article 5(3)(e) of Directive 2001/29/EC and Articles 6(2)(c) and 9(2)(c) of Directive 96/9/EC.
[4] However, other legal concerns, such as data protection concerns, may arise.