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Subject:	Proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market - Discussion paper on Article 11 and Article 13

Further to the orientation debate that took place at the meeting of the Permanent Representatives Committee on 31 January 2018, delegations will find in Annex a discussion paper drawn up by the Presidency, to be discussed at the Working Party on Intellectual Property (Copyright) on 12 February 2018.

Discussion paper for Article 11 and Article 13***1. Article 11***

The political guidance provided by the Coreper of 31 January mandated the Working Party to finalise the work on a possible solution to the problems faced by press publishers in the digital environment. The Presidency took note of the comments expressed by delegations during the discussion with a view to finding a solution. While Option B (of Annex II of document 15651/17) remains on the table, the Coreper mandated the Working Party to explore some amendments to Option A. These amendments take into consideration the three main elements that a number of delegations found relevant for that purpose, notably with respect to:

- (i) the application of the criterion of size/length to grant protection to extracts of press publications;
- (ii) whether uses performed by individual users should be covered or not by the protection granted to press publishers; and
- (iii) the term of protection of the rights provided to press publishers.

On the basis of these elements, the Presidency suggests some amendments to Option A as set out below. Changes as to Option A of Annex II of document 15651/17 are shown in strikethrough and underlined. The main features of these amendments are as follows:

- a) With regard to the uses of extracts of press publications by service providers, it is proposed to acknowledge the increasingly important economic value of such uses. It is proposed to provide that the uses of extracts of press publications should be subject to the authorisation of the press publisher, recalling that some services provided today are based directly or indirectly on the use of extracts of press publications and may even become a substitute for the press publications they have been extracted from. Like the rest of the article, this provision should be without prejudice to the copyright protection granted by copyright law to the works contained in the press publications (see second sub-paragraph of Article 11(1) and new recital 34a).
- b) It is proposed to reduce the scope of the protection granted to press publishers by covering the exclusive right to authorise or prohibit acts of reproduction and making available to the public of press publications performed by service providers, regarding digital uses. This amendment would align the text with the overall objective of the legislative intervention to reinforce the position of press publishers vis-à-vis other service providers reusing their content, while making sure that individual users are not affected by the new rights (see first sub-paragraph of Article 11(1) and recitals 31, 32 and 34).
- c) Most delegations have expressed support for a reduction of the term of protection of 20 years laid down in Article 11(4) of the Commission's proposal. However, due to the divergent views on how long the term of protection should be, it has been put between brackets to signal that the decision on the term should be left to a later stage, if a broader agreement on the other elements of Option A is reached.
- d) Other technical amendments to Option A include: (i) the reference to the acts of hyperlinking, contained in recital 33 of the Commission's proposal, has been moved to recital 34, which describes the scope of the right; and (ii) some technical amendments have been included in Article 11(2) as suggested by some delegations in previous meetings of the Council Working Party.

OPTION A (new neighbouring right)

- (31) A free and pluralist press is essential to ensure quality journalism and citizens' access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society. In the transition from print to digital, publishers of press publications are facing problems in licensing the online use of their publications **to service providers** and recouping their investments. In the absence of recognition of publishers of press publications as rightholders, licensing and enforcement in the digital environment are often complex and inefficient.
- (32) The organisational and financial contribution of publishers in producing press publications needs to be recognised and further encouraged to ensure the sustainability of the publishing industry. It is therefore necessary to provide at Union level a harmonised legal protection for press publications in respect of digital uses- **by service providers**. Such protection should be effectively guaranteed through the introduction, in Union law, of rights related to copyright for the reproduction and making available to the public of press publications in respect of digital uses **by service providers**.
- (33) For the purposes of this Directive, it is necessary to define the concept of press publication in a way that embraces only journalistic publications, published in any media, including on paper, in the context of an economic activity which constitutes a provision of services under EU law. The press publications to be covered are those whose purpose is to inform the general public and which are periodically or regularly updated. Such publications would include, for instance, daily newspapers, weekly or monthly magazines of general or special interest and news websites. Press publications contain mostly literary works but increasingly include other types of works and subject-matter, notably photographs and videos. Periodical publications published for scientific or academic purposes, such as scientific journals, should not be covered by the protection granted to press publications under this Directive. This protection does not extend to acts of hyperlinking when they do not constitute communication to the public.

- (34) The rights granted to the publishers of press publications under this Directive should have the same scope as the rights of reproduction and making available to the public provided for in Directive 2001/29/EC, insofar as digital uses ~~are concerned~~ **by service providers are concerned. They should not extend to acts of hyperlinking when they do not constitute communication to the public.** They should also be subject to the same provisions on exceptions and limitations as those applicable to the rights provided for in Directive 2001/29/EC, including the exception on quotation for purposes such as criticism or review laid down in Article 5(3)(d) of that Directive.

(34a) Uses of press publications by service providers consist of the use of entire publications or articles but also of extracts of press publications. Such uses of extracts have also gained economic relevance. New services directly or indirectly based on extracts of press publications are provided to users or to other service providers. Some of these services may become alternative services, as users may lose the incentives to access the press publication or the article from which the extracts originate. Therefore, publishers of press publications should have the right to authorise or prohibit such uses of extracts. Uses of individual words or very short excerpts of text contained in a press publication should remain out of the scope of the rights provided for in this Directive, without prejudice to the rights provided for in Union law to authors and other rightholders of the works and other subject-matter contained in the press publication.

- (35) The protection granted to publishers of press publications under this Directive should not affect the rights of the authors and other rightholders in the works and other subject-matter incorporated therein, including as regards the extent to which authors and other rightholders can exploit their works or other subject-matter independently from the press publication in which they are incorporated. Therefore, publishers of press publications should not be able to invoke the protection granted to them against authors and other rightholders or against other authorised users of the same works and other subject-matter. This is without prejudice to contractual arrangements concluded between the publishers of press publications, on the one side, and authors and other rightholders, on the other side.

Article 11

Protection of press publications concerning digital uses

1. Member States shall provide publishers of press publications with the rights provided for in Article 2 and Article 3(2) of Directive 2001/29/EC for the digital use of their press publications **by service providers**.

~~The~~**Without prejudice to the rights provided for in Union law to authors and other rightholders of the works and other subject-matter contained in a press publication, the** rights referred to in the first subparagraph shall ~~also~~**not** apply in respect of **uses of** extracts of a press publication ~~provided that the extracts are the expression of the intellectual creation of their authors~~**limited to individual words or very short excerpts of text**.

2. The rights referred to in paragraph 1 shall leave intact and shall in no way affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject-matter incorporated in a press publication. The rights referred to in paragraph 1 may not be invoked against those authors and other rightholders and, in particular, may not deprive them of their right to exploit their works and other subject-matter independently from the press publication in which they are incorporated.

~~When an author or a rightholder has concluded licences with different persons in respect of a~~**a** work or other subject-matter **is** incorporated in a press publication **on the basis of a non-exclusive licence**, the rights referred to in paragraph 1 may not be invoked to prohibit the use by other authorised users ~~of such a work or other subject-matter.~~ The rights referred to in paragraph 1 may not be invoked to prohibit the use of works or other subject-matter ~~that are in the public domain~~**whose protection has expired**.

3. Articles 5 to 8 of Directive 2001/29/EC and Directive 2012/28/EU shall apply *mutatis mutandis* in respect of the rights referred to in paragraph 1.

4. The rights referred to in paragraph 1 shall expire [20] years after the publication of the press publication. This term shall be calculated from the first day of January of the year following the date of publication.

As a reminder, Option B, as in the last compromise proposal in Annex II of document 15651/17 is as follows:

OPTION B (*Presumption for publishers of press publications*)

- (31) A free and pluralist press is essential to ensure quality journalism and citizens' access to information. It provides a fundamental contribution to public debate and the proper functioning of a democratic society. The sustainability of the press publishing industry should therefore be ensured.
- (31a) In the transition from print to digital, publishers of press publications are increasingly facing problems in licensing the online use of their publications and recouping their investments. Press publications contain mostly literary works but increasingly include other types of works and subject-matter, notably photographs and videos. Due to the large number of authors and rightholders involved in the creation of a press publication, licensing and enforcement of the rights in press publications are often complex and inefficient in the digital environment. Publishers may notably face difficulties when proving that they have been transferred or licensed the rights in such works and other subject-matter for the purposes of concluding licences or enforcing the rights in respect of their press publications.

(31b) Publishers of press publications need to acquire all the relevant economic rights from the authors and rightholders to incorporate their works or other subject-matter in a press publication. This principle should continue to apply. However, without prejudice to contractual arrangements concluded between the publishers of press publications, on the one side, and the authors and other rightholders, on the other side, the licensing and enforcement of the rights acquired vis-à-vis third parties should be facilitated. It is therefore necessary to provide at Union level a rebuttable presumption to allow the publisher to be regarded as the person entitled to conclude licences on and enforce the rights of reproduction and making available to the public concerning the digital use of works and other subject-matter contained in the press publication provided that the name of the publisher appears on the publication.

(32) *Deleted.*

(33) For the purposes of this Directive, it is necessary to define the concept of press publication in a way that embraces only journalistic publications, published in any media, including on paper, in the context of an economic activity which constitutes a provision of services under EU law. The press publications to be covered are those whose purpose is to inform the general public and which are periodically or regularly updated. Such publications would include, for instance, daily newspapers, weekly or monthly magazines of general or special interest and news websites. Periodical publications published for scientific or academic purposes, such as scientific journals, should not be covered by the presumption of rights granted to publishers for press publications laid down in this Directive.

(34) *Deleted.*

- (35) The presumption for publishers of press publications laid down in this Directive should not affect the rights of the authors and other rightholders in the works and other subject-matter incorporated therein, including as regards the extent to which authors and other rightholders can exploit their works or other subject-matter independently from the press publication in which they are incorporated. Therefore, publishers of press publications should not be able to invoke the presumption laid down in this Directive against authors and other rightholders or against other authorised users of the same works and other subject-matter.

Article 11

Licensing and enforcement of rights in press publications concerning digital uses

1. Member States shall provide that, in the absence of proof to the contrary, the publisher of a press publication shall be regarded as the person entitled to conclude licences and to seek application of the measures, procedures and remedies referred to in Directive 2004/48/EC and Article 8 of Directive 2001/29/EC in respect of the rights provided for in Article 2 and 3(2) of Directive 2001/29/EC concerning the digital use of the works and other subject-matter incorporated in such a press publication, provided that the name of the publisher appears on the publication.
2. The presumption provided for in paragraph 1 shall not affect any rights provided for in Union law to authors and other rightholders, in respect of the works and other subject-matter incorporated in a press publication. The presumption may not be invoked against the authors and other rightholders and, in particular, may not deprive them of their right to exploit their works and other subject-matter independently from the press publication in which they are incorporated.]

2. Article 13

The political guidance given by the Coreper of 31 January mandated the Working Party to find an appropriate solution on Article 13 as a matter of priority. Based on the discussions held, the Presidency proposes to look into the main elements of a possible compromise together with the corresponding relevant drafting proposals, and to leave some flexibility as to which of these elements the final possible compromise would include, as a result of the discussions. It should be noted that the option of going back towards the approach taken in the Commission proposal remains on the table also as a possible compromise.

As regards some of the relevant recitals, no drafting is proposed at this stage, as they will need to be adapted depending on what the text of Article 13 will contain in the end.

1. Clarification on the communication to the public and definition of content sharing services

The clarification of the conditions under which an online service storing and giving access to the public to user uploaded content is communicating the protected works or other subject matter to the public could be done through the combination of a definition in Article 2 of ‘online content sharing service provider’ and the use of certain criteria for communication to the public based on the case law of the CJEU in Article 13. Using the definition of ‘online content sharing service’ would allow targeting in a clearer way the online services covered, while not affecting the notion of communication to the public.

The notion of knowledge, which remains in Article 13, could be further specified in a recital if necessary.

The clarifications as to which services are not targeted by the proposal could be left in a recital (current recital 37, as drafted in the last compromise text - doc. 15651/17, might need to be adjusted depending on the final definition in Article 2).

Delegations are invited to indicate whether they consider this approach appropriate together with proposals for further improvements of the relevant drafting based on the proposals below.

Article 2

- (5) *‘online content sharing service provider’ within the meaning of this Directive is a provider of an information society service whose main or one of the main purposes is to store and give the public access to a significant amount of copyright protected works or other protected subject-matter uploaded by its users which the service organises with the aim of obtaining profit from their use;*
- (5a) *‘information society service’ is a service within the meaning of Article 1(1)(b) of Directive (EU) 2015/1535 of the European Parliament and of the Council¹.*

Recital explaining which services are not targeted (recital 37 of document ST 15651/17)

- 37) *[....]It is therefore necessary to clarify the copyright relevant obligations applicable to online content sharing services without affecting other services, such as internet access, providers of cloud services, which allow users to upload content for their individual use, such as cyber lockers or online marketplaces whose main activity is not giving access to copyright protected content but online retail. Nor should the clarification apply to providers of online services which store and provide access to content that is mainly uploaded by the rightholders themselves or is authorised by them, including scientific or educational repositories where the content uploaded is authorised. Nor should the clarification affect the use or works and other subject matter under an exception or limitation to copyright and related rights. The clarification should be targeting the specific situation of online content sharing services, defined for the purposes of this Directive as information society service providers whose main or one of the main purposes is to provide access to copyright protected content uploaded by their users², without affecting the application of Article 3(1) and (2) of Directive 2001/29/EC and Article 8 (2) of Directive 2006 /115/EC in other situations.*

¹ Directive (EU) 2015/1535 of the European Parliament and of the Council of 9 September 2015 laying down a procedure for the provision of information in the field of technical regulations and of rules on Information Society services (OJ L 241, 17.9.2015, p. 1–15).

² This definition will be adjusted depending on the outcome of the discussion regarding Article 2.

Article 13

Use of protected content by online content sharing service providers

1. *Member States shall provide that an online content sharing service provider is performing an act of communication to the public or an act of making available to the public within the meaning of Article 3(1) and (2) of Directive 2001/29/EC when it plays an indispensable role and intervenes in full knowledge of the consequences of its action to give the public access to copyright protected works or other protected subject matter uploaded by their users.*
2. **Liability for service providers that communicate to the public and possible link to measures (possible limitation of liability under certain conditions)**

Delegations' views still diverge as to the need to explicitly exclude the services that communicate to the public from Article 14 of the E-commerce Directive. Additionally, some of those delegations who want to exclude online content sharing services from the limited liability regime in Article 14 ECD consider that some targeted limitation of liability for unauthorised acts of communication to the public and acts of making available may be needed. In light of these diverging views the delegations are invited to indicate whether in cases of services which perform an act of communication to the public and are excluded from Article 14 ECD, a targeted limitation of liability should be provided for and whether the drafting proposal below goes in the right direction or should a different approach be taken and if yes, which one.

Possible drafting:

Article 13

1a. Member States shall provide that when an online content sharing service provider is performing an act of communication to the public or an act of making available to the public in accordance with paragraph 1, it is not eligible for the limited liability provided for in Article 14 of Directive 2000/31/EC and shall be liable for unauthorised acts of communication to the public and acts of making available:

- (a) when upon provision by rightholders of information on specific unauthorised works or subject matter the service provider does not take effective measures to prevent the availability on its services of these unauthorised works or other subject-matter identified by the rightholders;*
- (b) when upon notification by rightholders of a specific unauthorised work or other subject matter, does not act expeditiously to remove or disable access to the specific unauthorised work or other subject matter and does not take steps to prevent its future availability through the measures referred to in point (a).*

The rest of the subsequent provisions concerning the measures mentioned in Article 13(1a)(a), regarding the proportionality, the reporting obligation and the redress mechanism, would be the same as in the drafting text on measures proposed below in Section 3, from paragraph 1a to paragraph 5, with the necessary relevant adaptations (as explained in Section 3).

3. Measures

In case the obligation of taking measures is maintained, the text based on the previous discussions and consolidated versions of the text would remain as presented below, with possible adaptations depending on which services should be covered or other adaptations as needed, subject to the final compromise.

Possible drafting:

Article 13

1. Member States shall ensure that an information society service provider which stores and provides access to the public to a significant amount of copyright protected works or other subject-matter uploaded by their users takes effective measures:

- (a) to ensure the functioning of agreements concluded with rightholders for the use of their works or other subject-matter; and*
- (b) in the absence of an agreement, to prevent the availability on their services of works or other subject-matter identified by rightholders.*

The measures shall be applied by the information society service provider at the request of rightholders to specific works and other subject-matter as identified by them.

1a. The measures referred to in paragraph 1 shall be appropriate and proportionate, taking into account, among others, the nature of the services, the type of works or other protected subject-matter uploaded by the users of the services, the availability and costs of relevant technologies and their effectiveness in light of technological developments.

2. The information society service providers referred to in paragraph 1 shall provide rightholders, at their request, with adequate information on the functioning and deployment of the measures, as well as, when relevant, adequate reporting on the use of the works and other protected subject-matter.

3. *Member States shall ensure that for the purpose of the application of the measures referred to in paragraph 1 to specific works or other subject-matter of rightholders, the rightholders shall provide the information society service providers referred to in paragraph 1 with the necessary data³.*
4. *Member States shall ensure that the measures referred to in paragraph 1 shall be implemented by the information society service provider without prejudice to the freedom of expression and information of their users and the possibility for the users to benefit from an exception or limitation to copyright. For that purpose the service provider shall put in place a complaint and redress mechanism that is available to users of the service in case of disputes over the implementation of the measures. Complaints submitted under this mechanism shall be processed by the relevant rightholders within a reasonable period of time. The rightholder shall duly justify its decision.*
5. *Member States shall facilitate, where appropriate, the cooperation between the information society service providers referred to in paragraph 1 and rightholders through stakeholder dialogues to define best practices, such as the use of appropriate and proportionate technologies.*

4. Users of the services

The delegations seem to agree that in case licences are concluded between rightholders and services, these should cover the users. The text proposed in the latest consolidated version would be maintained.

Member States shall provide that licensing agreements concluded between online content sharing service providers and relevant rightholders shall cover the acts of the users of the services falling within Article 3(1) and (2) of Directive 2001/29/EC and Article 8 (2) of Directive 2006/115/EC, when the users are not acting in a professional capacity.

³This paragraph would not apply in case the measures will be linked to liability as presented in section 2.