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DRAFT REPORT

on the implementation of Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society

Committee on Legal Affairs
Rapporteur: Julia Reda

The European Parliament,

Original report, including Reda's AM	OFE's suggested changes
having regard to Articles 4, 26, 34, 114 and 118 of the Treaty on the Functioning of the European Union (TFEU),	
having regard to Articles 11, 13, 14, 16, 17 and 52 of the Charter of Fundamental Rights of the European Union,	
having regard to Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society,	
having regard to the Berne Convention for the Protection of Literary and Artistic Works,	
having regard to the World Intellectual Property Organisation (WIPO) Copyright Treaty of 20 December 1996,	
having regard to the WIPO Performances and Phonograms Treaty of 20 December 1996,	
having regard to the WIPO Treaty on Audiovisual Performances, adopted by the WIPO Diplomatic Conference on the Protection of Audiovisual Performances in Beijing, on June 24, 2012,	

having regard to Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multiterritorial licensing of rights in musical works for online use in the internal market,	
having regard to Directive 2013/37/EU of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information,	having regard to Directive 2013/37/EU of 26 June 2013 amending Directive 2003/98/EC on the re-use of public sector information, ***and the Commission Notice 'Guidelines on recommended standard licences, datasets and charging for the reuse of documents',***
	(new recital) ***having regard to Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.***
having regard to Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works,	
having regard to Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights,	
having regard to Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission,	
having regard to Directive 92/100/EEC of 19 November 1992 on rental right and lending right and on certain rights related to copyright in the field of intellectual property,	
having regard to its resolution of 27 February 2014 on private copying levies (P7_TA(2014)0179,	
having regard to its resolution of 12	

September 2013 on promoting the European cultural and creative sectors as sources of economic growth and jobs (P7_TA(2013)0368,	
having regard to the public consultation on the review of the EU copyright rules carried out by the Commission between 5 December 2013 and 5 March 2014,	
having regard to the Commission Green Paper, Copyright in the Knowledge Economy, COM(2008)0466, – having regard to the Commission communication entitled A Single Market for Intellectual Property Rights: Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe (COM(2011)0287),	
A. whereas the European legal framework on copyright and related rights is central to the promotion of creativity and innovation, and to access to knowledge and information;	
B. whereas the Directive on the harmonisation of certain aspects of copyright and related rights in the information society (2001/29/EC) aimed to adapt legislation on copyright and related rights to reflect technological developments;	
C. whereas the Charter of Fundamental Rights protects the freedom of expression, of the arts and scientific research, the right to education and the freedom to conduct a business;	
Ca: Whereas Article 11 of the Charter of Fundamental Rights defines the right of freedom of expression as including the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and regardless of frontiers;	
D. whereas Article 17 of the Charter of Fundamental Rights enshrines the right to	

property, with a distinction between the protection of possessions on the one hand (first paragraph), and the protection of intellectual property on the other hand (second paragraph);	
Da: Whereas Article 52 of the Charter of Fundamental Rights establishes a principle of proportionality, according to which any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms, only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others;	
E. whereas decisions on technical standards can have a significant impact on human rights — including the right to freedom of expression, protection of personal data and user security — as well as on access to content;	
1. Welcomes the Commission's initiative of conducting a consultation on copyright, which attracted great interest from civil society with more than 9 500 replies, 58.7 % of which came from end users;	1. Welcomes the Commission's initiative of conducting a consultation on copyright, which attracted great interest from ***all stakeholders, including*** civil society, with more than 9 500 replies, 58.7 % of which came from end users; Justification: While the consultation was exceptional in terms of participation from end users, input from all stakeholders should be welcome and considered on its own merits.
2. Notes with concern that the vast majority of end-user respondents report facing problems when trying to access online services across the Member States, particularly where technological protection measures are used to enforce territorial restrictions;	
	AM 2 bis (new) ***Notes that technological development means everyone is becoming a creator and can***

	easily reach a European audience on the internet, and that the copyright framework must take them into account. Justification: internet users, users of mobile devices, citizens and everyday consumers create content on an unprecedented scale, and also contribute to socially valuable projects such as Wikipedia or creative commons libraries. They may also include the European creators of tomorrow.
	AM - para 2 ter (new) ***Notes that facts, ideas and the non-expressive elements of news are not protected by copyright under international law and that extending protection in such a way would be detrimental to society as a whole, whether to freedom of expression, to research and science or to innovation.*** Justification: These limits to the scope of copyright are in the public interest and preserve freedom of information, research, innovation, amongst other societal interests. It is necessary to protect these limits and ensure the public domain is not shrunk in a way that would be hugely detrimental to society as a whole. Adding "the non-expressive elements" is needed as there is otherwise a possible ambiguity in light of the Infopaq CJEU judgment. That is, "news", as such, is not protected, but the way in which, for example, a headline writer might express the essence of a news story is so protected, and arguably should be.
3. Acknowledges the necessity for authors and performers to be provided with legal protection for their creative and artistic work; recognises the role of producers and publishers in bringing works to the market, and the need for appropriate remuneration for	

all categories of rightholders; calls for improvements to the contractual position of authors and performers in relation to other rightholders and intermediaries;	
3a: Calls for the introduction of Community provisions in the area of contract law applicable to copyright, particularly safeguarding authors' rights to bring their works to the market in case a rightholder has refrained from making use of an exclusive right to the work in question for an extended period of time;	3.a Calls for **a *legal instrument safeguarding*** ~~the introduction of Community provisions in the area of contract law applicable to copyright, particularly safeguarding~~ authors' rights to bring their works to the market in case a rightholder has refrained from ~~making use of~~ ***exercising*** an ***overriding*** exclusive right to the work in question for an extended period of time; Justification: Contractual agreements cannot cover a right/legal concept that does not yet exist. Under the Berne convention, an author's right to a work subsists from the moment of the realisation of the work. It does not have to "be used" to become effective and it cannot be abandoned by inactivity. "Making use" is not a legal term applicable to European/Berne copyright. Moreover, one cannot relinquish copyright terms, so "exclusive right" refers to other rights than copyright that conflict with copyright protection.
3b: Notes that the existing definitions and scope of the exclusive rights for reproduction, for the communication to the public and for the making available to the public, and for distribution, need clarification to better fit the technological and cross-border nature of digital exploitation acts, and to facilitate the clearance of rights;	
3c: Suggests to further investigate the effects and benefits from a country of origin approach in rights clearance to facilitate pan-European commercial services; recommends building upon existing best-practice solutions to cross-border access in the area of satellite broadcasting and cable retransmission;	
	AM 3c bis (new)

	Notes that, according to the Commission's impact assessment on collecting societies, collecting societies in Europe collect more than three times what they collect in the US, and 62% of the worldwide market; and urges that these resources flow better and faster to European creators. Justification: an evidence-based debate on copyright should take into account the fact that significant revenue is flowing to collecting societies, and focus on whether there is a need to improve the fast, transparent and effective flow of payments to creators themselves.
4. Considers the introduction of a single European Copyright Title on the basis of Article 118 TFEU that would apply directly and uniformly across the EU, in accordance with the Commission's objective of better regulation, as a legal means to remedy the lack of harmonisation resulting from Directive 2001/29/EC;	
4a: Notes the adoption by the Commission of legal instruments aiming at removing obstacles to bringing out the full economic potential from the exploitation of public sector information, and allowing the re-use of such information even in the presence of intellectual property rights;	
5. Recommends that the EU legislator further lower the barriers to the re-use of public sector information by exempting works produced by the public sector – as part of the political, legal and administrative process – from copyright protection;	5. Recommends that the EU legislator further lowers the barriers to the re-use of public sector information by exempting works produced by the public sector – as part of the political, legal and administrative process – from copyright protection, ***or releasing such works under open licenses, as defined in the European Commission Guidelines on recommended standard licences, datasets and charging for the reuse of documents****;*

	Justification: The absence of any copyright is not always the best way to promote the re-use of public sector information. Under certain circumstances, open licences might be more appropriate.
	AM - para 5 bis (new) ***Notes that the CJEU (Case C-466/12, Svensson) has made clear that exclusive rights are fully harmonised and that new rights on link protection cannot be created at national level, and calls on the Commission to monitor and enforce this rule with respect to national developments.*** Justification: It is important to consider the proper enforcement of the existing acquis, in parallel to a potential review of the existing EU copyright framework. In addition, the creation of new national barriers to online services can deprive consumers of access to services and create new obstacles for start ups and other companies to work on copyright.
6. Calls on the Commission to safeguard public domain works, which are by definition not subject to copyright protection and should therefore be able to be used and re-used without technical or contractual barriers; also calls on the Commission to recognise the freedom of rightholders to voluntarily relinquish their rights and dedicate their works to the public domain;	6. Calls on the Commission to ***harmonise the law allowing the existence of public domain works and*** safeguard ~~public domain~~ ***these*** works, which are by definition not subject to copyright protection and should therefore be able to be used and re-used without technical or contractual barriers; also calls on the Commission to ***establish*** the freedom of rightholders to voluntarily relinquish their rights and dedicate their works to the public domain; Justification: The public domain should be defined and applied in a positive manner, not simply as the absence of copyright. The term "establish" makes clear that the legal base for this right of authors would have to be created.
	AM - para 6 bis (new) ***Calls on the Commission to encourage,***

	including through regulatory incentives, full transparency on ownership of rights, to ensure transparent and fast licensing and accurate and fast payment to creators. Justification: proper licensing and the fast roll out of new services cannot function without proper and transparent information about who owns what rights. Transparent information on rights ownership also allows creators to be paid faster, more accurately and more effectively.
6a: Considers that the registration of works should be encouraged, in order to clearly identify and locate right holders, as well as to distinguish between copyrighted and noncopyrighted works, thus improving legal certainty, facilitating the licensing of rights and limiting the spread of orphan works; more broadly, is of the opinion that mechanisms allowing to identify the initial rightholder, the transfer of rights and the publication date of the work, should serve as a presumption of authorship;	
7. Calls on the Commission to harmonise the term of protection of copyright to a duration that does not exceed the current international standards set out in the Berne Convention;	7. Calls on the Commission to harmonise the ***terms*** of protection ***not exceeding*** the current international ***duration*** set out in the Berne Convention ***and preserving the social contract on access to the public domain*****;** Justification: We need plannable law and rights. Retrofitting terms is not good legislation. Reminding of a social contract is helpful to this end.
7a: Notes that the current legal Acquis recognises the full harmonisation of exclusive rights, whereas exceptions and limitations to exclusive rights remain optional and not harmonised;	7a: Notes that ~~the current legal Acquis recognises the full harmonisation of exclusive rights, whereas exceptions and limitations to exclusive rights remain optional and not harmonised~~ ***whereas rights are fully harmonised, exceptions are optional, and further notes that the three-step-test can be***

	applied to reduce the scope of an optional exception. Considers that as a consequence, the current framework creates flexibility in the protection of exclusive rights, but not in favour of exceptions. Justification: the current state of EU copyright rules allow for optional exceptions, which are applied in different ways depending on the Member State. This creates legal uncertainty and also impedes further developments in areas like research.
7b: Notes the significant number of suggestions that have been put forward in the replies to the consultation of the Commission on the review of the EU copyright rules, to introduce new exceptions and limitations to exclusive rights, as well as broadening the scope of existing exceptions;	
8. Calls on the EU legislator to remain faithful to the objective stated in Directive 2001/29/EC of safeguarding a fair balance between the different categories of rightholders and users of protected subject-matter, as well as between the different categories of rightholders;	
9. Notes that exceptions and limitations in the digital environment should be enjoyed without any unequal treatment as compared with those granted in the analogue world;	9. Notes that ***the spirit of the law when applying*** exceptions and limitations in the digital environment should be ~~enjoyed without any unequal treatment as compared with those granted in~~ ***aligned with that of*** the analogue world, ***and any divergence duly justified****;* Justification: It can be challenging to apply exceptions and limitations in both digital and analogue worlds in exactly the same way (e.g. CJEU ruling on the Allposters case compared to the arguments developed in the UsedSoft case). The intention to extend analogue world exceptions to the digital world is welcome, and when this is not practically possible, it should be duly justified.

10. Views with concern the increasing impact of differences among Member States in the implementation of exceptions, which creates legal uncertainty and has direct negative effects on the functioning of the digital single market, in view of the development of cross-border activities;	
11. Calls on the Commission to make mandatory all the exceptions and limitations referred to in Directive 2001/29/EC, to allow equal access to cultural diversity across borders within the internal market and to improve legal certainty;	
12. Notes with interest the development of new forms of use of works on digital networks, in particular transformative uses;	
13. Calls for the adoption of an open norm introducing flexibility in the interpretation of exceptions and limitations in certain special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author or rightholder;	13. Calls for the adoption of an open norm introducing greater flexibility in the ***three-step test*** interpretation of exceptions and limitations in special cases that do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the author or rightholder; Justification: This should not be confused with the introduction of a U.S.-style fair use doctrine, which would in its current form be incompatible with the European system of exceptions and limitations. Referring explicitly to the three-step-test, it clarifies that the open norm would be used to provide additional flexibility to the existing system, rather than create a separate, parallel one.
	AM - para 13 bis (new) ***Calls for the European legislator to take into account the open norm proposal drafted by European academics under the Wittem code, in particular Article 5.5, and the existence of the three steps test as an existing legal tool which could allow flexibility.***

	Justification: The European Copyright Code was drafted as a result of the Wittem Project (2002), when copyright scholars across the EU aimed to create a model or reference tool for future harmonisation or unification of copyright at the European level. Relevant past work should be taken into account throughout ongoing policy developments.
	AM - para 13 ter (new) ***Calls for the European legislator to consider allowing Member States to adopt national new exceptions, provided they comply with the three-steps-test and do not have a significant and detrimental impact on the single market.*** Justification: technological developments lead to new innovations and new consumer practices which evolve fast and allow new opportunities for growth. Member States are in a better position to adopt exception to match these developments, where there is no harm to rightholders and to the single market, and provide a useful insight into whether such exceptions benefit consumers and innovation.
14. Urges the European legislator to ensure the technological neutrality and future-compatibility of exceptions and limitations by taking due account of the effects of media convergence; considers, in particular, that the exception for quotation should expressly include audio-visual quotations in its scope;	
15. Stresses that the ability to freely link from one resource to another is one of the fundamental building blocks of the internet; calls on the EU legislator to make it clear that reference to works by means of a hyperlink is not subject to exclusive rights, as it does not	

consist in a communication to a new public	
	AM - para 15 bis (new) ***Stresses that the right to browse the internet is also fundamental and should not require additional permissions; calls on the EU legislator to expressly protect the right to browse.*** Justification: Browsing also usually involves making temporary copies of content which might occasionally be copyrighted, strictly for technical purposes. This is a common use and as such should not be subject to additional permissions from rightholders.
16. Calls on the EU legislator to ensure that the use of photographs, video footage or other images of works which are permanently located in public places are permitted;	
17. Emphasises that the exception for caricature, parody and pastiche should apply regardless of the purpose of the parodic use;	
18. Stresses the need to enable automated analytical techniques for text and data (e.g. 'text and data mining') for all purposes, provided that permission to read the work has been acquired;	18. Stresses the need to enable automated analytical techniques for text and data (e.g. '~~text and data~~ ***content*** mining') for all purposes, provided that ~~permission to read the work has been acquired~~ ***the work is lawfully accessed;*** Justification: "content mining" is broader, in order to stress that images, audio and video can also be mined.The ability to mine content that has been openly made available should not be subject to new permissions. This would otherwise amount to unprecedented restrictions on innovation and research activities, as well as an increase in the scope of protection of copyright to cover facts, data, ideas incorporated in copyright materials. We are concerned that the term "read" could be a hostage to interpretation and therefore suggest to replace it with a less ambiguous wording.

19. Calls for a broad exception for research and education purposes, which should cover not only educational establishments but any kind of educational or research activity, including non-formal education;	
20. Calls for the adoption of a mandatory exception allowing libraries to lend books to the public in digital formats, irrespective of the place of access;	20. Calls for the adoption of a mandatory exception allowing libraries to lend ~~books~~ ***works*** to the public in digital formats, irrespective of the place of access; Justification: this should be the norm for any types of works, when applicable.
21. Calls on the EU legislator to preclude Member States from introducing statutory licences for the compensation of rightholders for the harm caused by acts made permissible by an exception;	
	AM - para 21 bis (new) ***Calls on the Commission to properly enforce EU law against existing compensation claims that do not rely on demonstrated harm, or that rely on acts that cause only minimal harm;*** Justification: Any compensation mechanism should be based on significant, demonstrated harm and balanced against the market distortion effects that it causes.
21a: Deplores the lack of harmonisation between Member States as regards the interpretation of Article 5.2 b of Directive 2001/29/EC on exceptions for reproductions on any medium made by a natural person for private use, and as regards the remuneration schemes to compensate for the prejudice to rightholders put in place in some Member States to allow for the fair compensation of the rightholders in relation to these acts of copying, which affects the functioning of the internal market;	21a: Deplores the lack of harmonisation between Member States as regards the interpretation of Article 5.2 b of Directive 2001/29/EC on exceptions for reproductions on any medium made by a natural person for private use. ***Also draws attention to the negative impact on the functioning of the internal market of the lack of harmonisation of private copying exception across Member States, particularly*** ~~and~~ as regards the remuneration schemes to compensate for the prejudice to rightholders put in place in some Member States to allow for the fair compensation of the rightholders in relation to

	these acts of copying~~, which affects the functioning of the internal market~~; Justification: Some Member States chose to put in place government funds for compensation, other Member States do not foresee any compensation for private copying and a third category of Member States apply varying levels of levies. This affects the functioning of the internal market and creates market distortions.
22. Calls for the adoption of harmonised criteria for defining the harm caused to rightholders in respect of reproductions made by a natural person for private use, and for harmonised transparency measures as regards the private copying levies put in place in some Member States;	
-	***AM - para 22 (new)*** ***Recommends that unless clear and demonstrable harm to rightholders can be established from the reproduction for private use of copyrighted works, compensation mechanisms should not be extended to new technological supports, such as cloud storage;*** Justification: Any compensation mechanism should be based on significant, demonstrated harm and balanced against the market distortion effects that it causes.
22a: Proposes to strengthen authors' rights by making remuneration rights tied to exceptions and limitations non-transferable to other rightholders;	22a: ~~Proposes to strengthen authors' rights by making remuneration rights tied to exceptions and limitations non-transferable to other rightholders~~; Justification: This seems extreme - the rendering non-transferable of economic rights does not seem to me to sit well with the framework of European law, in which there is a clear distinction between the alienable economic rights and the inalienable moral rights of authors. In all other respects,

	property rights in Europe are held to be at the will of the right-holder, subject to any public good, and it seems rather extreme to except such a freedom here. Attempts such as this frequently have unintended consequences--see, for example, the effect of the "Google law" in Spain, which at least arguably prevents authors from providing works to the public under Creative Commons licences.
23. Stresses that the effective exercise of exceptions or limitations, and access to content that is not subject to copyright or related rights protection, should not be hindered by technological measures;	23. Stresses that the effective exercise of exceptions or limitations, and access to content that is not subject to copyright or related rights protection, should not be hindered by technological measures ***and where it is, circumvention should be expressly permitted.*** Justification: Technological measures should never impede on the effective exercise of exceptions or limitations. If and when they do, circumvention techniques should be allowed to restore these rights.
24. Recommends making legal protection against the circumvention of any effective technological measures conditional upon the publication of the source code or the interface specification, in order to secure the integrity of devices on which technological protections are employed and to ease interoperability; considers, in particular, that where the circumvention of technological measures is allowed, technological means to achieve such authorised circumvention must be available;	24. ~~Recommends making legal protection against the circumvention of any effective technological measures conditional upon the publication of the source code or the interface specification, in order to secure the integrity of devices on which technological protections are employed and to ease interoperability;~~ **C**onsiders~~, in particular,~~ that where the circumvention of technological measures is allowed, technological means to achieve such authorised circumvention must be available; Justification: Making the source code of technical protection measures public defeats their entire purpose and renders them completely ineffective. We suggest as an alternative to ensure that if and when such measures impede on the effective exercise of exceptions or limitations (and only in such cases), the technical means to circumvent them be made available.