United Nations Committee of Experts
on International Cooperation in Tax Matters

DISCUSSION DRAFT:
Possible Changes to the United Nations Model Double Taxation Convention
Between Developed and Developing Countries Concerning
Inclusion of software payments in the definition of royalties

Period for comments: 16 February to 16 March 2021

The Subcommittee on the Update of the UN Model invites public comments on the attached discussion draft which includes a proposed revision to the definition of "royalties" and a draft Commentary on the proposed definition. An earlier discussion draft on the same topic was released on 1 September 2020. That draft, and comments received thereon, were discussed at the 21st session of the Committee of Experts on International Cooperation in Tax Matters. The Committee directed the Subcommittee to continue its work, including by drafting a proposed Commentary and, if necessary, making technical changes to the proposal itself.

The Subcommittee has decided that it would be useful to receive additional technical input before making a recommendation to the full Committee at its 22nd session, currently scheduled for April 2021. It therefore is issuing this discussion draft in order to receive such input. While stakeholders may comment on any aspect of the proposal, the Subcommittee is particularly interested in receiving input on the following questions:

- Is the description of "software" in paragraph 12.1 of the Commentary on Article 12 of the OECD Model (extracted in paragraph 12 of the proposed UN Commentary) (a) consistent with current business practice and (b) appropriate for use as a definition in this context, perhaps by adding the definition to Article 3?
- Do paragraphs 16 and 17 of the proposed UN Commentary adequately distinguish between goods that constitute "computers" and those that are not "computers" notwithstanding that they incorporate software to execute their functions or provide some degree of connectivity? What additional language or examples would help to clarify the distinction?
- The proposed Commentary continues to adopt paragraph 14.4 of the Commentary on Article 12 of the 2017 OECD Model on distribution intermediaries. Some participants in the Subcommittee do not agree with the analysis in that paragraph for the reasons set out in the Annex to this Discussion Draft. Do you agree with the position set out in paragraph 19 of the proposed Commentary or with the analysis in the annex? If the latter, do you agree that the appropriate approach is to delete the words 'for the purposes of using it' at the end of subparagraph (c)?

This proposal has not been considered by the full Committee and the release of the proposal therefore does not indicate agreement by the Committee nor does it bind the Committee in any way.

Comments should be sent by 16 March 2021 at the latest by email to taxcommittee@un.org in Word format

(in order to facilitate their inclusion in a revised version of the note that will be distributed to members of the Committee). These emails should include the reference line "Comments on the discussion draft on the inclusion of software payments in the definition of royalties" and the comments should be addressed to the "Subcommittee on the United Nations Model Tax Convention between Developed and Developing Countries".

Please note that, with the exception of comments from United Nations member States, all comments received regarding this discussion draft will be made publicly available.

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1. Background

1. At the 21st session of the Committee of Experts on International Cooperation in Tax Matters, the Committee discussed note E/C.18/2020/CRP.38 (Inclusion of Software Payments in the Definition of Royalties). The draft report of the 21st session notes:

> 40. Ms. Peters introduced note E/C.18/2020/CRP.38 on the application of Article 12 of the UN Model to software payments. The Secretariat recalled the discussion of the topic at the twentieth session, when it was decided that work should focus on a proposal for changing the definition of royalties in order to include a reference to payments for the use of, or the right to use, software payments. A note including the proposed change and the arguments for and against it was subsequently drafted by the Subcommittee and released as a discussion draft on 1 September 2020. The comments received by 4 October were presented at the virtual meeting of the Subcommittee held on 7 October, when it was decided to ask for a Committee decision at this session on whether and how to pursue the work on this topic.
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> 41. A number of Members and observers intervened on this issue. While a large majority of Members supported continuing the work on the proposal, there were differing views on the proposal.
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> 42. While some Members considered that it was time to reach a decision on the proposal, a number of Members indicated that they needed more time to consider the issues raised by the comments in particular and the impact of the proposal on the Commentary to the Model.
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> 43. One observer who supported the proposal argued that the Commentary should specify that the proposed change was merely a clarification, which would ameliorate issues arising from the wording of existing treaties. He also suggested adopting a broad interpretation of the phrase "in consideration of" so that Article 12 could apply to situations where software is provided free of charge.
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> 44. The Secretariat noted that the great majority of interventions supported continuing the work on the proposal, with a view to reaching a decision on the proposed change to the definition of royalties and the consequential Commentary changes at the twenty-second session. It also proposed that such work be carried on by the Subcommittee on the basis of a paper to be prepared by the Secretariat.
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> 45. That paper would include proposed Commentary and could also include changes to the proposal intended to address technical issues, such as the treatment of software that forms part of tangible goods and the fact that the domestic law of some States differed on the question of whether the transfer of software to an end-user should be considered as the acquisition of property or as a license.

2. This discussion draft has been produced in accordance with that decision. Section 2 includes the proposal for changes to the definition of royalties found in Art. 12(3) of the UN

Model. Section 3 includes the proposed paragraphs of the UN Commentary on Article 12 relating to software and to digital content, marked to show changes (in ***bold italics*** or ~~strikethrough~~). Section 4 contains an unmarked version of the Commentary.

3. The next steps regarding the proposal are:

16 March 2021 – Deadline for submitting comments on this discussion draft;

22-24 March 2021 – Meeting of the Subcommittee to review the comments received and finalize the paper to be submitted to the Committee for decision;

31 March 2021 – Submission of the paper to the Committee***;***

19-30 April 2021: Online meeting of the Committee at which a decision on the paper will be made.

2. Proposal for Change to the Definition of Royalties

4. The discussion draft of 1 September 2020 suggested simply adding the words "computer software" to the existing definition of the term "royalties" in paragraph 3 of Article 12 of the UN Model, so that paragraph 3 would have read as follows:

> The term "royalties" as used in this Article means payments of any kind received as a consideration for the use of, or the right to use, any copyright of literary, artistic or scientific work including cinematograph films, or films or tapes used for radio or television broadcasting, any patent, trade mark, design or model, plan, secret formula or process, ***computer software*** or for the use of, or the right to use, industrial, commercial or scientific equipment or for information concerning industrial, commercial or scientific experience.

5. Some comments suggested that the paragraph as a whole had become difficult to parse and that it would benefit from breaking out the separate types of property referred to in the definition of "royalties" for purposes of the UN Model. Separating out payments with respect to different types of property would also facilitate the common practice of providing different withholding rates for different categories of royalties. The Subcommittee therefore is considering a revised proposal, which reads as follows:

> The term "royalties" as used in this Article means payments of any kind received as a consideration for***:***
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> ***(a)*** the use of, or the right to use,
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> ***i)*** any copyright of literary, artistic or scientific work including cinematograph films, or films or tapes used for radio or television broadcasting***;***
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> ***ii)*** any patent, trademark, design or model, plan, or secret formula or process***;***
>
> ***iii)*** ~~or for the use of, or the right to use,~~ industrial, commercial or scientific equipment; or

iv) computer software;

(b) information concerning industrial, commercial or scientific experience, ***or***
(c) the acquisition of any copy of computer software for the purposes of using it.

This revised proposal excludes from the definition of royalties the acquisition of computer software for the purpose of distribution, an issue addressed in paragraph 19 of the draft UN Commentary on Article 12, a result similar to the result in paragraph 14.4 of the Commentary on Article 12 of the 2017 OECD Model Convention.

3. Proposed Changes to the Commentary on Article 12 (Marked Version)

6. The portions of the Commentary on Article 12 that are relevant to the treatment of computer software would be modified as follows:

Paragraph 3

12. This paragraph ~~reproduces~~ ***corresponds to*** Article 12, paragraph 2, of the OECD Model Convention~~,~~ but***, as explained below, includes specific references to computer software,[1] which are not referred to in the OECD definition, and*** does not incorporate the 1992 amendment thereto which eliminates equipment rental from this Article. Also, paragraph 3 of Article 12 includes payments for tapes and royalties which are not included in the corresponding provision of the OECD Model Convention. ~~The following portions of the OECD Commentary are relevant (the bracketed paragraphs being portions of the Commentary that highlight differences between the United Nations Model Convention and the OECD Model Convention~~ ***Paragraph 3 of the UN Model also breaks out separate types of property referred to in the definition of "royalties" for purposes of this Model. This structure was viewed as making the definition easier to parse as well as accommodating the common practice of providing different withholding rates for different categories of royalties. The Committee considers that the following part of the Commentary on Article 12 of the 2017 OECD Model Convention is applicable to Article 12 of this Model (the modifications that appear in square brackets, which are not part of the Commentary on the OECD Model Convention, have been inserted in order to provide additional explanations or to reflect the differences between the provisions of the OECD Model Convention and those of this Model***):

> 8. Paragraph 2 contains a definition of the term "royalties". These relate, in general, to rights or property constituting the different forms of literary and artistic property, the elements of intellectual property specified in the text***[, industrial, commercial or scientific equipment]*** and information concerning industrial, commercial or scientific experience. The definition applies ***[for instance]*** to payments for the use of, or the entitlement to use, rights ***[and property]*** of the kind mentioned, whether or not they have been, or are required to be, registered in a public register. ***[Subparagraph (a) of***

[1] The Committee has not reached an agreement on the proposal to amend the definition of "royalties" in this manner. In order to provide a draft Commentary, however, it is necessary to assume that such a decision has been made.

the] definition covers both payments made under a licence and compensation which a person would be obliged to pay for fraudulently copying or infringing the right.

…

8.4 As a guide, certain explanations are given below in order to define the scope of Article 12 in relation to that of other Articles of the Convention, as regards, in particular, [equipment renting and] the provision of information.

…

10. Rents in respect of cinematograph films are also treated as royalties, whether such films are exhibited in cinemas or on the television. It may, however, be agreed through bilateral negotiations that rents in respect of cinematograph films shall be treated as business profits and, in consequence, subjected to the provisions of Articles 7 and 9***[or 12A]***.

…

11.5 In the particular case of a contract involving the provision, by the supplier, of information concerning computer programming, as a general rule the payment will only be considered to be made in consideration for the provision of such information so as to constitute know how where it is made to acquire information constituting ideas and principles underlying the program, such as logic, algorithms or programming languages or techniques, where this information is provided under the condition that the customer not disclose it without authorisation and where it is subject to any available trade secret protection.

11.6 In business practice, contracts are encountered which cover both know-how and the provision of technical assistance. One example, amongst others, of contracts of this kind is that of franchising, where the franchisor imparts his knowledge and experience to the franchisee and, in addition, provides him with varied technical assistance, which, in certain cases, is backed up with financial assistance and the supply of goods. The appropriate course to take with a mixed contract is, in principle, to break down, on the basis of the information contained in the contract or by means of a reasonable apportionment, the whole amount of the stipulated consideration according to the various parts of what is being provided under the contract, and then to apply to each part of it so determined the taxation treatment proper thereto. If, however, one part of what is being provided constitutes by far the principal purpose of the contract and the other parts stipulated therein are only of an ancillary and largely unimportant character, then the treatment applicable to the principal part should generally be applied to the whole amount of the consideration.

12. Whether payments received as consideration for computer software may be classified as royalties poses difficult problems but is a matter of considerable importance in view of the rapid development of computer technology in recent years and the extent of transfers of such technology across national borders… ~~In 1992, the Commentary was amended to describe the principles by which such classification should~~

~~be made. Paragraphs 12 to 17 were further amended in 2000 to refine the analysis by which business profits are distinguished from royalties in computer software transactions. In most cases, the revised analysis will not result in a different outcome.~~

12.1 Software may be described as a program, or series of programs, containing instructions for a computer required either for the operational processes of the computer itself (operational software) or for the accomplishment of other tasks (application software). It can be transferred through a variety of media, for example in writing or electronically, on a magnetic tape or disk, or on a laser disk or CD-Rom. It may be standardised with a wide range of applications or be tailor-made for single users. It can be transferred as an integral part of computer hardware or in an independent form available for use on a variety of hardware.

13. In 2021, the Committee of Experts[2] agreed to amend paragraph 3 to include specific references to computer software in new subdivision (a)(iv) and subparagraph (c). However, payments in consideration for the use, or the right to use, a copyright of computer software may also be covered by subdivision (a)(i). Accordingly, the Committee considers that the following part of the Commentary on Article 12 of the 2017 OECD Model is applicable for purposes of interpreting subdivision (a)(i) of paragraph 3 of Article 12 of this Model with respect to computer software (the modifications that appear in square brackets, which are not part of the Commentary on the OECD Model Convention, have been inserted in order to provide additional explanations or to reflect the differences between the provisions of the OECD Model Convention and those of this Model):

12.2 The character of payments received in transactions involving the transfer of computer software depends on the nature of the rights that the transferee acquires under the particular arrangement regarding the use and exploitation of the program. The rights in computer programs are a form of intellectual property. Research into the practices of OECD member countries has established that all but one protects rights in computer programs either explicitly or implicitly under copyright law. Although the term "computer software" is commonly used to describe both the program—in which the intellectual property rights (copyright) subsist—and the medium on which it is embodied, the copyright law of most OECD member countries recognises a distinction between the copyright in the program and software which incorporates a copy of the copyrighted program. Transfers of rights in relation to software occur in many different ways ranging from the alienation of the entire rights in the copyright in a program to the sale of a product which is subject to restrictions on the use to which it is put. The consideration paid can also take numerous forms. These factors may make it difficult to determine where the boundary lies between software payments that are properly to be regarded as royalties and other types of payment. The difficulty of determination is compounded by the ease of reproduction of computer software, and by the fact that acquisition of software frequently entails the making of a copy by the acquirer in order to make possible the operation of the software.

[2] The references to "the Committee of Experts", "majority" and "minority" in paragraphs 13, 14, 15 and 19 will be adjusted after the 22nd Session of the Committee in April 2021.

13. The transferee's rights will in most cases consist of partial rights or complete rights in the underlying copyright (see paragraphs 13.1 and 15 below), or they may be (or be equivalent to) partial or complete rights in a copy of the program (the "program copy"), whether or not such copy is embodied in a material medium or provided electronically (see paragraphs 14 to 14.2 below). In unusual cases, the transaction may represent a transfer of "know-how" or secret formula (paragraph 14.3).

13.1 Payments made for the acquisition of partial rights in the copyright (without the transferor fully alienating the copyright rights) will represent a royalty ***[in accordance with subdivision (a)(i) of paragraph 3 of Article 12 of this Model]*** where the consideration is for granting of rights to use the program in a manner that would, without such license, constitute an infringement of copyright. Examples of such arrangements include licenses to reproduce and distribute to the public software incorporating the copyrighted program, or to modify and publicly display the program. In these circumstances, the payments are for the right to use the copyright in the program (i.e. to exploit the rights that would otherwise be the sole prerogative of the copyright holder). It should be noted that where a software payment is properly to be regarded as a royalty there may be difficulties in applying the copyright provisions of the Article to software payments since paragraph 2 requires that software be classified as a literary, artistic or scientific work. None of these categories seems entirely apt. The copyright laws of many countries deal with this problem by specifically classifying software as a literary or scientific work. For other countries treatment as a scientific work might be the most realistic approach. Countries for which it is not possible to attach software to any of those categories might be justified in adopting in their bilateral treaties an amended version of paragraph 2 which either omits all references to the nature of the copyrights or refers specifically to software.

14. In other types of transactions, the rights acquired in relation to the copyright are limited to those necessary to enable the user to operate the program, for example, where the transferee is granted limited rights to reproduce the program. This would be the common situation in transactions for the acquisition of a program copy. The rights transferred in these cases are specific to the nature of computer programs. They allow the user to copy the program, for example onto the user's computer hard drive or for archival purposes. In this context, it is important to note that the protection afforded in relation to computer programs under copyright law may differ from country to country. In some countries the act of copying the program onto the hard drive or random access memory of a computer would, without a license, constitute a breach of copyright. However, the copyright laws of many countries automatically grant this right to the owner of software which incorporates a computer program. Regardless of whether this right is granted under law or under a license agreement with the copyright holder, copying the program onto the computer's hard drive or random access memory or making an archival copy is an essential step in utilising the program. Therefore, rights in relation to these acts of copying, where they do no more than enable the effective operation of the program by the user, should be disregarded in analysing the character of the transaction for tax purposes ***[in accordance with subdivision (a)(i) of paragraph 3***

of Article 12 of this Model]… ~~Payments in these types of transactions would be dealt with as commercial income in accordance with Article 7.~~

14.1 The method of transferring the computer program to the transferee is not relevant. For example, it does not matter whether the transferee acquires a computer disk containing a copy of the program or directly receives a copy on the hard disk of her computer via a modem connection. It is also of no relevance that there may be restrictions on the use to which the transferee can put the software.

14.2 The ease of reproducing computer programs has resulted in distribution arrangements in which the transferee obtains rights to make multiple copies of the program for operation only within its own business. Such arrangements are commonly referred to as "site licences", "enterprise licenses", or "network licences". Although these arrangements permit the making of multiple copies of the program, such rights are generally limited to those necessary for the purpose of enabling the operation of the program on the licensee's computers or network, and reproduction for any other purpose is not permitted under the license. Payments under such arrangements will in most cases be ~~dealt with as business profits in accordance with Article 7~~ ***[outside the scope of subdivision (a)(i) but could be covered by subdivision (a)(iv) or subparagraph (c) of the definition of royalties.]***

14.3 Another type of transaction involving the transfer of computer software is the more unusual case where a software house or computer programmer agrees to supply information about the ideas and principles underlying the program, such as logic, algorithms or programming languages or techniques. In these cases, the payments may be characterised as royalties to the extent that they represent consideration for the use of, or the right to use, secret formulas or for information concerning industrial, commercial or scientific experience which cannot be separately copyrighted. This contrasts with the ordinary case in which a program copy is acquired for operation by the end user.

14.4 Arrangements between a software copyright holder and a distribution intermediary frequently will grant to the distribution intermediary the right to distribute copies of the program without the right to reproduce that program. In these transactions, the rights acquired in relation to the copyright are limited to those necessary for the commercial intermediary to distribute copies of the software program. In such transactions, distributors are paying only for the acquisition of the software copies and not to exploit any right in the software copyrights. Thus, in a transaction where a distributor makes payments to acquire and distribute software copies (without the right to reproduce the software), the rights in relation to these acts of distribution should be disregarded in analysing the character of the transaction for tax purposes. Payments in these types of transactions would be dealt with as business profits in accordance with Article 7. This would be the case regardless of whether the copies being distributed are delivered on tangible media or are distributed electronically (without the distributor having the right to reproduce the software), or whether the software is subject to minor customisation for the purposes of its installation.

14. In the view of a [majority] of the Members of the Committee, the addition of subdivision (a)(iv) is justified because Article 12 is intended to cover payments with respect to the "letting" of property. In their view, a person that is making payments for the use of, or the right to use, computer software described in subdivision (a)(iv) is making a payment in consideration for the "letting" of that intangible property just as a person that is making payments covered by subdivision (a)(iii) is making a payment in consideration for the "letting" of tangible property.

15. A [minority] of the Committee opposed including an explicit reference to software in paragraph 3. In general, they agreed with the distinction made by Paragraphs 13.1 and 14 of the OECD Commentary between the use of a copyright right and the use of a copyrighted article, comparing the acquisition of standardized computer software to the purchase of a product such as a book and arguing that both should give rise to business profits, not royalties. They believe that treatment as business profits is appropriate as it will result in net basis taxation under Article 7, rather than the gross basis taxation that usually applies under Article 12 and point to the arguments against the imposition of a gross basis withholding tax on payments for computer software that are described in paragraphs 6 to 9 of the UN Commentary on Article 12 with respect to royalties generally. The guidance therein is relevant to the issue of the source taxation of payments in consideration for computer software. Some were also concerned about the effect on individuals who, while theoretically required to withhold on payments under Article 12, in practice were seldom required to do so before the addition of subdivision (a)(iv) and subparagraph (c) of paragraph 3 because only enterprises are likely to engage in activities that constitute the "use" of a copyright (such as reproduction and distribution). They are concerned that individuals are ill-equipped to comply with withholding obligations that may apply with respect to a quite wide variety of transactions. Also, in their view, the proposed definition may not provide adequate clarity, making it challenging to administer and resulting in more, rather than fewer, disputes.

16. Subdivision (a)(iv) is intended to apply to direct payments for computer software, whether installed on a mainframe computer, desktop or laptop or accessed over the internet or an intranet through such computers. As noted in paragraph 14.1 of the Commentary on Article 12 of the 2017 OECD Model set out above, the method by which the computer software is transferred to the transferee is not relevant to the categorization for purposes of Article 12. Therefore, it should not matter whether a user downloads a copy of computer software pursuant to what is legally a "license" under domestic law, or "purchases" a copy of computer software. In the latter case, any CD-ROM or other medium containing the computer software that is purchased is the means by which the user can access the computer software, which is the object of the transaction. Because the domestic law can vary in how it treats these economically equivalent transactions, and to provide a consistent treatment of these transactions, subparagraph (c) was added to paragraph 3.

17. Many consumer goods contain software that improves the performance of the good or provides additional functionality (such as advanced electronics in an automobile or an automatic timer on a coffeemaker), but such goods generally would not be viewed as "computers" (although they may contain computers, such as the computer that controls an airplane). The reference to "computer software" in paragraph 3 is not intended to encompass such software when the fundamental purpose of the transaction is the purchase of the good and such software cannot be purchased independently of the good. (See paragraph 17 of the OECD Commentary on Article 12, extracted in paragraph 23 below, for guidance with respect to software bundled with the sale of

computer hardware.) However, the separate purchase of a copy of computer software, for example a navigation program that can be downloaded to an automobile's on-board computer in the normal use of that computer, would be covered by the definition in paragraph 3.

18. Under subdivision (a)(iv) of paragraph 3 of Article 12, payments made for the use of, or the right to use, computer software will always represent a royalty, without regard to whether the consideration is for the granting of rights to use the software in a manner that would, without such license, constitute an infringement of copyright. Thus, as under the OECD Model, the term "royalties" will include payments under arrangements that include licenses to reproduce and distribute to the public software incorporating a copyrighted program, or to modify and publicly display the program. In these circumstances, the payments are for the right to use the copyright in the program (i.e. to exploit the rights that would otherwise be the sole prerogative of the copyright holder). However, as a result of the addition of subdivision (a)(iv), the definition of "royalties" in paragraph 3 includes payments with respect to software that is transferred through a "program copy", a result different from that in paragraph 14 of the OECD Commentary on Article 12. Similarly, the definition would encompass payments for "site licenses", "enterprise licenses", or "network licenses", which, according to paragraph 14.2 of the OECD Commentary, are not treated as royalties for purposes of paragraph 2 of Article 12 of the OECD Model.

19. The words "for the purposes of using it" at the end of subparagraph (c) are intended to produce the same result as in paragraph 14.4 of the Commentary on Article 12 of the 2017 OECD Model with respect to distribution rights in the absence of reproduction rights. A [minority] of the members of the Committee disagree with the analysis in paragraph 14.4 of the Commentary on Article 12 of the 2017 OECD Model Convention. In their view, distribution is an integral part of copyright rights in many countries and payments with respect to such rights should be covered by Article 12 even in the absence of reproduction rights. Those taking this position therefore would delete the words "for the purposes of using it."

20. The addition of subdivision (a)(iv) creates the possibility of overlap between different portions of the definition, which could be important if, as is often the case, different withholding rates apply to different categories of royalties. For example, if the copyright laws of a Contracting State classify software as a literary or scientific work, then payments with respect to use of the copyright would be covered by both subdivisions (a)(i) and (a)(iv). Similarly, the supply of logic, algorithms or programming languages or techniques described in paragraph 14.3 of the OECD Commentary could be covered by both subdivision (a)(iv) and subparagraphs (b).

21. There also are possible overlaps between the provisions of Articles 12, 12A and 12B. Paragraph 5 of Article 12B provides that payments covered by Articles 12 and 12A are excluded from the scope of Article 12B. For example, a payment in consideration for the online acquisition of a copy of standardized accounting software for use in a business would be within the scope of Article 12 and therefore would be excluded from Article 12B. Because the purpose of the transaction was the acquisition of a copy of the software for the use of the payor, Article 12 would apply to the payment, which would therefore be excluded from the scope of Article 12B, by reason of Article 12B(5). However, Article 12 does not apply to the free downloading of software to facilitate what is fundamentally a different type of transaction, such as the acquisition of goods or the receipt of services. Thus, if a merchant provides free application software to facilitate the on-line purchase of

goods, sales of such goods will give rise to business profits which are subject to Article 7 (see paragraph 42(iv) of the Commentary on Article 12B). Similarly, free downloads of application software to access online intermediation platform services or online gaming, which are intended to facilitate automated digital services would not implicate Article 12, so that the entire profit would fall within the scope of Article 12B. However, if the user makes a separate payment in order to download the application software, that payment would be subject to Article 12.

22. There is less risk of overlap between Article 12 and Article 12A or Article 14 as regards payments for computer software, because Articles 12A and 14 apply to the provision of services, such as software consulting, that involve human input, while Article 12 relates to the use of property. Thus, if a resident of a source State hires a resident of another State to develop or modify computer software owned by that source State resident, payments made under that contract for services will be covered by Article 12A (or Article 14, if the requirements of that article are met), not Article 12, as "one of the parties undertakes to use the customary skills of his calling to execute work" for the other party (see paragraph 11.2 of the OECD Commentary on Article 12). However, if the resident of the other Contracting State owns computer software which it has already developed, and licenses that computer software to the source State resident for its own use, without further modification, payments made under that arrangement will be subject to Article 12. Finally, if, in the second case, the resident of the source State requests modifications to the computer software in order to meet the needs of its business, then any payments made with respect to those modifications would fall within Article 12A or Article 14.

23. The Committee considers that the following part of the Commentary on Article 12 of the 2017 OECD Model Convention is applicable to Article 12 of this Model, including with respect to computer software (the modifications that appear in square brackets, which are not part of the Commentary on the OECD Model Convention, have been inserted in order to provide additional explanations or to reflect the differences between the provisions of the OECD Model Convention and those of this Model):

> 15. Where consideration is paid for the transfer of the full ownership of the rights in the copyright, the payment cannot represent a royalty and the provisions of the Article are not applicable. Difficulties can arise where there is a transfer of rights involving:
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> -- exclusive right of use of the copyright during a specific period or in a limited geographical area;
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> -- additional consideration related to usage;
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> -- consideration in the form of a substantial lump sum payment.
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> 16. Each case will depend on its particular facts but in general if the payment is in consideration for the transfer of rights that constitute a distinct and specific property (which is more likely in the case of geographically-limited than time-limited rights), such payments are likely to be business profits within Article 7 (or 14 in the case of the United Nations Model Convention) or a capital gain within Article 13 rather than royalties within Article 12. That follows from the fact that where the ownership of rights has been alienated, the consideration cannot be for the use of the rights. The essential character of the transaction as an alienation cannot be altered by the form of the

consideration, the payment of the consideration in instalments or, in the view of most countries, by the fact that the payments are related to a contingency.

17. Software payments may be made under mixed contracts. Examples of such contracts include sales of computer hardware with built-in software and concessions of the right to use software combined with the provision of services. The methods set out in paragraph 11***.6*** above for dealing with similar problems in relation to patent royalties and know-how are equally applicable to computer software. Where necessary the total amount of the consideration payable under a contract should be broken down on the basis of the information contained in the contract or by means of a reasonable apportionment with the appropriate tax treatment being applied to each apportioned part.

24. In 2021, the Committee of Experts agreed to introduce Article 12B, addressing automated digital services. As a result, the downloading of some digital content is covered in Article 12B. However, because Article 12B(5) provides that "income from automated digital services" does not include payments qualifying as "royalties", it is still necessary to determine the extent to which the download of digital material constitutes the use of a copyright, in which case a payment for such download would be covered by subdivision (a)(i) of paragraph 3 of Article 12. Payments for digital downloads of computer software may also constitute royalties under subdivision (a)(iv) or subparagraph (c) of paragraph 3 of Article 12. (See paragraphs 16 to 19 above.) In other cases, payments in consideration for the download of digital content would constitute "income from automated digital services" or "business profits", taxable under Article 12B or Article 7, respectively. To aid in making those distinctions, the Committee considers that the following part of the Commentary on Article 12 of the 2017 OECD Model Convention is applicable to Article 12 of this Model (the modifications that appear in square brackets, which are not part of the Commentary on the OECD Model Convention, have been inserted in order to provide additional explanations or to reflect the differences between the provisions of the OECD Model Convention and those of this Model):

17.1 The principles expressed above as regards software payments are ***[***also***]*** applicable as regards transactions concerning other types of digital products such as images, sounds or text. The development of electronic commerce has multiplied the number of such transactions. In deciding whether or not payments arising in these transactions constitute royalties, the main question to be addressed is the identification of that for which the payment is essentially made.

17.2 Under the relevant legislation of some countries, transactions which permit the customer to electronically download digital products may give rise to use of copyright by the customer, e.g. because a right to make one or more copies of the digital content is granted under the contract. Where the consideration is essentially for something other than for the use of, or right to use, rights in the copyright (such as to acquire other types of contractual rights, data or services), and the use of copyright is limited to such rights as are required to enable downloading, storage and operation on the customer's computer, network or other storage, performance or display device, such use of copyright should not affect the analysis of the character of the payment for purposes of applying ***[subdivision (a)(i) of]*** the definition of "royalties".

17.3 This is the case for transactions that permit the customer (which may be an enterprise) to electronically download digital products (such as software, images, sounds or text) for that customer's own use or enjoyment. In these transactions, the payment is essentially for the acquisition of data transmitted in the form of a digital signal and therefore does not constitute royalties ***[under subdivision (a)(i) of paragraph 3 of Article 12 of this Model]*** but falls within ***[subdivision (a)(iv) or subparagraph (c) of that paragraph or, if that is not the case, within]*** Article 7***[, 12B]*** or Article 13, as the case may be. To the extent that the act of copying the digital signal onto the customer's hard disk or other non-temporary media involves the use of a copyright by the customer under the relevant law and contractual arrangements, such copying is merely the means by which the digital signal is captured and stored. This use of copyright is not important for classification purposes because it does not correspond to what the payment is essentially in consideration for (i.e. to acquire data transmitted in the form of a digital signal), which is the determining factor for the purposes of the definition of royalties. There also would be no basis to classify such transactions as "royalties"***[under subdivision (a)(i)]*** if, under the relevant law and contractual arrangements, the creation of a copy is regarded as a use of copyright by the provider rather than by the customer.

17.4 By contrast, transactions where the essential consideration for the payment is the granting of the right to use a copyright in a digital product that is electronically downloaded for that purpose will give rise to royalties. This would be the case, for example, of a book publisher who would pay to acquire the right to reproduce a copyrighted picture that it would electronically download for the purposes of including it on the cover of a book that it is producing. In this transaction, the essential consideration for the payment is the acquisition of rights to use the copyright in the digital product, i.e. the right to reproduce and distribute the picture, and not merely for the acquisition of the digital content.

Because Article 12B(5) provides that payments described in Article 12 are excluded from Article 12B, payments described in paragraph 17.4 continue to be subject to Article 12, notwithstanding that they may also be described in paragraphs 5 and 6 of Article 12B. ~~Some members of the Committee of Experts are of the view that the payments referred to in paragraphs 14, 14.1, 14.2, 14.4, 15, 16, 17.2 and 17.3 of the OECD Commentary extracted above may constitute royalties.~~

4. Proposed Changes to the Commentary on Article 12 (Unmarked Version)

7. The following shows the portions of the Commentary on Article 12 that are relevant to the treatment of computer software as they would read after the changes set out in Part 3:

12. This paragraph corresponds to Article 12, paragraph 2, of the OECD Model Convention but, as explained below, includes specific references to payments for computer software[3], which are not referred to in the OECD definition, and does not incorporate the 1992 amendment thereto which eliminates equipment rental from this Article. Also, paragraph 3 of Article 12 includes payments for

[3] The Committee has not reached an agreement on the proposal to amend the definition of "royalties" in this manner. In order to provide a draft Commentary, however, it is necessary to assume that such a decision has been made.

tapes and royalties which are not included in the corresponding provision of the OECD Model Convention. Paragraph 3 of the UN Model also breaks out separate types of property referred to in the definition of "royalties" for purposes of this Model. This structure was viewed as making the definition easier to parse as well as accommodating the common practice of providing different withholding rates for different categories of royalties. The Committee considers that the following part of the Commentary on Article 12 of the 2017 OECD Model Convention is applicable to Article 12 of this Model (the modifications that appear in square brackets, which are not part of the Commentary on the OECD Model Convention, have been inserted in order to provide additional explanations or to reflect the differences between the provisions of the OECD Model Convention and those of this Model):

> 8. Paragraph 2 contains a definition of the term "royalties". These relate, in general, to rights or property constituting the different forms of literary and artistic property, the elements of intellectual property specified in the text[, industrial, commercial or scientific equipment] and information concerning industrial, commercial or scientific experience. The definition applies [for instance] to payments for the use of, or the entitlement to use, rights [and property] of the kind mentioned, whether or not they have been, or are required to be, registered in a public register. [Subparagraph (a) of the] definition covers both payments made under a licence and compensation which a person would be obliged to pay for fraudulently copying or infringing the right.
>
> …
>
> 8.4 As a guide, certain explanations are given below in order to define the scope of Article 12 in relation to that of other Articles of the Convention, as regards, in particular, [equipment renting and] the provision of information.
>
> …
>
> 10. Rents in respect of cinematograph films are also treated as royalties, whether such films are exhibited in cinemas or on the television. It may, however, be agreed through bilateral negotiations that rents in respect of cinematograph films shall be treated as business profits and, in consequence, subjected to the provisions of Articles 7 and 9[or 12A].
>
> …
>
> 11.5 In the particular case of a contract involving the provision, by the supplier, of information concerning computer programming, as a general rule the payment will only be considered to be made in consideration for the provision of such information so as to constitute know how where it is made to acquire information constituting ideas and principles underlying the program, such as logic, algorithms or programming languages or techniques, where this information is provided under the condition that the customer not disclose it without authorization and where it is subject to any available trade protection.
>
> 11.6 In business practice, contracts are encountered which cover both know-how and the provision of technical assistance. One example, amongst others, of contracts of this kind is that of franchising, where the franchisor imparts his knowledge and

experience to the franchisee and, in addition, provides him with varied technical assistance, which, in certain cases, is backed up with financial assistance and the supply of goods. The appropriate course to take with a mixed contract is, in principle, to break down, on the basis of the information contained in the contract or by means of a reasonable apportionment, the whole amount of the stipulated consideration according to the various parts of what is being provided under the contract, and then to apply to each part of it so determined the taxation treatment proper thereto. If, however, one part of what is being provided constitutes by far the principal purpose of the contract and the other parts stipulated therein are only of an ancillary and largely unimportant character, then the treatment applicable to the principal part should generally be applied to the whole amount of the consideration.

12. Whether payments received as consideration for computer software may be classified as royalties poses difficult problems but is a matter of considerable importance in view of the rapid development of computer technology in recent years and the extent of transfers of such technology across national borders…

12.1 Software may be described as a program, or series of programs, containing instructions for a computer required either for the operational processes of the computer itself (operational software) or for the accomplishment of other tasks (application software). It can be transferred through a variety of media, for example in writing or electronically, on a magnetic tape or disk, or on a laser disk or CD-Rom. It may be standardised with a wide range of applications or be tailor-made for single users. It can be transferred as an integral part of computer hardware or in an independent form available for use on a variety of hardware.

13. In 2021, the Committee of Experts[4] agreed to amend paragraph 3 to include specific references to computer software in new subdivision (a)(iv) and subparagraph (c). However, payments in consideration for the use of, or the right to use, a copyright of computer software may also be covered by subdivision (a)(i). Accordingly, the Committee considers that the following part of the Commentary on Article 12 of the 2017 OECD Model Convention is applicable for purposes of interpreting subdivision (a)(i) of paragraph 3 of Article 12 of this Model with respect to computer software (the modifications that appear in square brackets, which are not part of the Commentary on the OECD Model Convention, have been inserted in order to provide additional explanations or to reflect the differences between the provisions of the OECD Model Convention and those of this Model):

12.2 The character of payments received in transactions involving the transfer of computer software depends on the nature of the rights that the transferee acquires under the particular arrangement regarding the use and exploitation of the program. The rights in computer programs are a form of intellectual property. Research into the practices of OECD member countries has established that all but one protects rights in computer programs either explicitly or implicitly under copyright law. Although the term "computer software" is commonly used to describe both the program—in which the intellectual property rights (copyright) subsist—and the medium on which it is

[4] The references to "the Committee of Experts", "majority" and "minority" in paragraphs 13, 14, 15 and 19 will be adjusted after the 22nd Session of the Committee in April 2021.

embodied, the copyright law of most OECD member countries recognises a distinction between the copyright in the program and software which incorporates a copy of the copyrighted program. Transfers of rights in relation to software occur in many different ways ranging from the alienation of the entire rights in the copyright in a program to the sale of a product which is subject to restrictions on the use to which it is put. The consideration paid can also take numerous forms. These factors may make it difficult to determine where the boundary lies between software payments that are properly to be regarded as royalties and other types of payment. The difficulty of determination is compounded by the ease of reproduction of computer software, and by the fact that acquisition of software frequently entails the making of a copy by the acquirer in order to make possible the operation of the software.

13. The transferee's rights will in most cases consist of partial rights or complete rights in the underlying copyright (see paragraphs 13.1 and 15 below), or they may be (or be equivalent to) partial or complete rights in a copy of the program (the "program copy"), whether or not such copy is embodied in a material medium or provided electronically (see paragraphs 14 to 14.2 below). In unusual cases, the transaction may represent a transfer of "know-how" or secret formula (paragraph 14.3).

13.1 Payments made for the acquisition of partial rights in the copyright (without the transferor fully alienating the copyright rights) will represent a royalty [in accordance with subdivision (a)(i) of paragraph 3 of Article 12 of this Model] where the consideration is for granting of rights to use the program in a manner that would, without such license, constitute an infringement of copyright. Examples of such arrangements include licenses to reproduce and distribute to the public software incorporating the copyrighted program, or to modify and publicly display the program. In these circumstances, the payments are for the right to use the copyright in the program (i.e. to exploit the rights that would otherwise be the sole prerogative of the copyright holder). It should be noted that where a software payment is properly to be regarded as a royalty there may be difficulties in applying the copyright provisions of the Article to software payments since paragraph 2 requires that software be classified as a literary, artistic or scientific work. None of these categories seems entirely apt. The copyright laws of many countries deal with this problem by specifically classifying software as a literary or scientific work. For other countries treatment as a scientific work might be the most realistic approach. Countries for which it is not possible to attach software to any of those categories might be justified in adopting in their bilateral treaties an amended version of paragraph 2 which either omits all references to the nature of the copyrights or refers specifically to software.

14. In other types of transactions, the rights acquired in relation to the copyright are limited to those necessary to enable the user to operate the program, for example, where the transferee is granted limited rights to reproduce the program. This would be the common situation in transactions for the acquisition of a program copy. The rights transferred in these cases are specific to the nature of computer programs. They allow the user to copy the program, for example onto the user's computer hard drive or for archival purposes. In this context, it is important to note that the protection afforded in

relation to computer programs under copyright law may differ from country to country. In some countries the act of copying the program onto the hard drive or random access memory of a computer would, without a license, constitute a breach of copyright. However, the copyright laws of many countries automatically grant this right to the owner of software which incorporates a computer program. Regardless of whether this right is granted under law or under a license agreement with the copyright holder, copying the program onto the computer's hard drive or random access memory or making an archival copy is an essential step in utilising the program. Therefore, rights in relation to these acts of copying, where they do no more than enable the effective operation of the program by the user, should be disregarded in analysing the character of the transaction for tax purposes [in accordance with subdivision (a)(i) of paragraph 3 of Article 12 of this Model]…

14.1 The method of transferring the computer program to the transferee is not relevant. For example, it does not matter whether the transferee acquires a computer disk containing a copy of the program or directly receives a copy on the hard disk of her computer via a modem connection. It is also of no relevance that there may be restrictions on the use to which the transferee can put the software.

14.2 The ease of reproducing computer programs has resulted in distribution arrangements in which the transferee obtains rights to make multiple copies of the program for operation only within its own business. Such arrangements are commonly referred to as "site licences", "enterprise licenses", or "network licences". Although these arrangements permit the making of multiple copies of the program, such rights are generally limited to those necessary for the purpose of enabling the operation of the program on the licensee's computers or network, and reproduction for any other purpose is not permitted under the license. Payments under such arrangements will in most cases be [outside the scope of subdivision (a)(i) but could be covered by subdivision (a)(iv) or subparagraph (c) of the definition of royalties.]

14.3 Another type of transaction involving the transfer of computer software is the more unusual case where a software house or computer programmer agrees to supply information about the ideas and principles underlying the program, such as logic, algorithms or programming languages or techniques. In these cases, the payments may be characterised as royalties to the extent that they represent consideration for the use of, or the right to use, secret formulas or for information concerning industrial, commercial or scientific experience which cannot be separately copyrighted. This contrasts with the ordinary case in which a program copy is acquired for operation by the end user.

14.4 Arrangements between a software copyright holder and a distribution intermediary frequently will grant to the distribution intermediary the right to distribute copies of the program without the right to reproduce that program. In these transactions, the rights acquired in relation to the copyright are limited to those necessary for the commercial intermediary to distribute copies of the software program. In such transactions, distributors are paying only for the acquisition of the software copies and not to exploit any right in the software copyrights.

Thus, in a transaction where a distributor makes payments to acquire and distribute software copies (without the right to reproduce the software), the rights in relation to these acts of distribution should be disregarded in analysing the character of the transaction for tax purposes. Payments in these types of transactions would be dealt with as business profits in accordance with Article 7. This would be the case regardless of whether the copies being distributed are delivered on tangible media or are distributed electronically (without the distributor having the right to reproduce the software), or whether the software is subject to minor customisation for the purposes of its installation.

14. In the view of a [majority] of the Members of the Committee, the addition of subdivision (a)(iv) is justified because Article 12 is intended to cover payments with respect to the "letting" of property. In their view, a person that is making payments for the use of, or the right to use, computer software described in subdivision (a)(iv) is making a payment in consideration for the "letting" of that intangible property just as a person that is making payments covered by subdivision (a)(iii) is making a payment in consideration for the "letting" of tangible property.

15. A [minority] of the Committee opposed including an explicit reference to software in paragraph 3. In general, they agreed with the distinction made by Paragraphs 13.1 and 14 of the OECD Commentary between the use of a copyright right and the use of a copyrighted article, comparing the acquisition of standardized computer software to the purchase of a product such as a book and arguing that both should give rise to business profits, not royalties. They believe that treatment as business profits is appropriate as it will result in net basis taxation under Article 7, rather than the gross basis taxation that usually applies under Article 12 and point to the arguments against the imposition of a gross basis withholding tax on payments for computer software that are described in paragraphs 6 to 9 of the UN Commentary on Article 12 with respect to royalties generally. The guidance therein is relevant to the issue of the source taxation of payments in consideration for computer software. Some were also concerned about the effect on individuals who, while theoretically required to withhold on payments under Article 12, in practice were seldom required to do so before the addition of subdivision (a)(iv) and subparagraph (c) of paragraph 3 because only enterprises are likely to engage in activities that constitute the "use" of a copyright (such as reproduction and distribution). They are concerned that individuals are ill-equipped to comply with withholding obligations that may apply with respect to a quite wide variety of transactions. Also, in their view, the proposed definition may not provide adequate clarity, making it challenging to administer and resulting in more, rather than fewer, disputes.

16. Subdivision (a)(iv) is intended to apply to direct payments for computer software installed on a mainframe computer, desktop or laptop or accessed over the internet or an intranet through such computers. As noted in paragraph 14.1 of the Commentary on Article 12 of the 2017 OECD Model set out above, the method by which the computer software is transferred to the transferee is not relevant to the categorization for purposes of Article 12. Therefore, it should not matter whether a user downloads a copy of computer software pursuant to what is legally a "license" under domestic law, or "purchases" a copy of computer software. In the latter case, any CD-ROM or other medium containing the computer software that is purchased is the means by which the user can access the computer software, which is the object of the transaction. Because the domestic law can vary in how it treats these economically equivalent transactions, and to provide a consistent treatment of these transactions, subparagraph (c) was added to paragraph 3.

17. Many consumer goods contain software that improves the performance of the good or provides additional functionality (such as advanced electronics in an automobile or an automatic timer on a coffeemaker), but such goods generally would not be viewed as "computers" (although they may contain computers, such as the computer that controls an airplane). The reference to "computer software" in paragraph 3 is not intended to encompass such software when the fundamental purpose of the transaction is the purchase of the good and such software cannot be purchased independently of the good. (See paragraph 17 of the OECD Commentary on Article 12, extracted in paragraph 23 below, for guidance with respect to software bundled with the sale of computer hardware.) However, the separate purchase of a copy of computer software, for example a navigation program that can be downloaded to an automobile's on-board computer in the normal use of that computer, would be covered by the definition in paragraph 3.

18. Under subdivision (a)(iv) of paragraph 3 of Article 12, payments made for the use of, or the right to use, computer software will always represent a royalty, without regard to whether the consideration is for the granting of rights to use the software in a manner that would, without such license, constitute an infringement of copyright. Thus, as under the OECD Model, the term "royalties" will include payments under arrangements that include licenses to reproduce and distribute to the public software incorporating a copyrighted program, or to modify and publicly display the program. In these circumstances, the payments are for the right to use the copyright in the program (i.e. to exploit the rights that would otherwise be the sole prerogative of the copyright holder). However, as a result of the addition of subdivision (a)(iv), the definition of "royalties" in paragraph 3 includes payments with respect to software that is transferred through a "program copy", a result different from that in paragraph 14 of the OECD Commentary on Article 12. Similarly, the definition would encompass payments for "site licences", "enterprise licenses", or "network licences", which, according to paragraph 14.2 of the OECD Commentary, are not treated as royalties for purposes of paragraph 2 of Article 12 of the OECD Model.

19. The words "for the purposes of using it" at the end of subparagraph (c) are intended to produce the same result as in paragraph 14.4 of the Commentary on Article 12 of the 2017 OECD Model with respect to distribution rights in the absence of reproduction rights. A [minority] of the members of the Committee disagree with the analysis in paragraph 14.4 of the Commentary on Article 12 of the 2017 OECD Model Convention. In their view, distribution is an integral part of copyright rights in many countries and payments with respect to such rights should be covered by Article 12 even in the absence of reproduction rights. Those taking this position therefore would delete the words "for the purposes of using it."

20. The addition of subdivision (a)(iv) creates the possibility of overlap between different portions of the definition, which could be important if, as is often the case, different withholding rates apply to different categories of royalties. For example, if the copyright laws of a Contracting State classify software as a literary or scientific work, then payments with respect to use of the copyright would be covered by both subdivisions (a)(i) and (a)(iv). Similarly, the supply of logic, algorithms or programming languages or techniques described in paragraph 14.3 of the OECD Commentary could be covered by both subdivision (a)(i) and subparagraph (b).

21. There also are possible overlaps between the provisions of Articles 12, 12A and 12B. Paragraph 5 of Article 12B provides that payments covered by Articles 12 and 12A are excluded from the scope of

Article 12B. For example, a payment in consideration for the online acquisition of a copy of standardized accounting software for use in a business would be within the scope of Article 12 and therefore would be excluded from Article 12B. Because the purpose of the transaction was the acquisition of a copy of the software for the use of the payor, Article 12 would apply to the payment, which would therefore be excluded from the scope of Article 12B, by reason of Article 12B(5). However, Article 12 does not apply to the free downloading of software to facilitate what is fundamentally a different type of transaction, such as the acquisition of goods or the receipt of services. Thus, if a merchant provides free application software to facilitate the on-line purchase of goods, sales of such goods will give rise to business profits which are subject to Article 7 (see paragraph 42(iv) of the Commentary on Article 12B). Similarly, free downloads of application software to access online intermediation platform services or online gaming, which are intended to facilitate automated digital services would not implicate Article 12, so that the entire profit would fall within the scope of Article 12B. However, if the user makes a separate payment in order to download the application software, that payment would be subject to Article 12.

22. There is less risk of overlap between Article 12 and Article 12A or Article 14 as regards payments for computer software, because Articles 12A and 14 apply to the provision of services, such as software consulting, that involve human input, while Article 12 relates to the use of property. Thus, if a resident of a source State hires a resident of another State to develop or modify computer software owned by that source State resident, payments made under that contract for services will be covered by Article 12A (or Article 14, if the requirements of that article are met), not Article 12, as "one of the parties undertakes to use the customary skills of his calling to execute work" for the other party (see paragraph 11.2 of the OECD Commentary on Article 12). However, if the resident of the other Contracting State owns computer software which it has already developed, and licenses that computer software to the source State resident for its own use, without further modification, payments made under that arrangement will be subject to Article 12. Finally, if, in the second case, the resident of the source State requests modifications to the computer software in order to meet the needs of its business, then any payments made with respect to those modifications would fall within Article 12A or Article 14.

23. The Committee considers that the following part of the Commentary on Article 12 of the 2017 OECD Model Convention is applicable to Article 12 of this Model, including with respect to computer software (the modifications that appear in square brackets, which are not part of the Commentary on the OECD Model Convention, have been inserted in order to provide additional explanations or to reflect the differences between the provisions of the OECD Model Convention and those of this Model):

> 15. Where consideration is paid for the transfer of the full ownership of the rights in the copyright, the payment cannot represent a royalty and the provisions of the Article are not applicable. Difficulties can arise where there is a transfer of rights involving:
>
> -- exclusive right of use of the copyright during a specific period or in a limited geographical area;
>
> -- additional consideration related to usage;
>
> -- consideration in the form of a substantial lump sum payment.

16. Each case will depend on its particular facts but in general if the payment is in consideration for the transfer of rights that constitute a distinct and specific property (which is more likely in the case of geographically-limited than time-limited rights), such payments are likely to be business profits within Article 7 (or 14 in the case of the United Nations Model Convention) or a capital gain within Article 13 rather than royalties within Article 12. That follows from the fact that where the ownership of rights has been alienated, the consideration cannot be for the use of the rights. The essential character of the transaction as an alienation cannot be altered by the form of the consideration, the payment of the consideration in instalments or, in the view of most countries, by the fact that the payments are related to a contingency.

17. Software payments may be made under mixed contracts. Examples of such contracts include sales of computer hardware with built-in software and concessions of the right to use software combined with the provision of services. The methods set out in paragraph 11.6 above for dealing with similar problems in relation to patent royalties and know-how are equally applicable to computer software. Where necessary the total amount of the consideration payable under a contract should be broken down on the basis of the information contained in the contract or by means of a reasonable apportionment with the appropriate tax treatment being applied to each apportioned part.

24. In 2021, the Committee of Experts agreed to introduce Article 12B, addressing automated digital services. As a result, the downloading of some digital content is covered in Article 12B. However, because Article 12B(5) provides that "income from automated digital services" does not include payments qualifying as "royalties", it is still necessary to determine the extent to which the download of digital material constitutes the use of a copyright, in which case a payment for such download would be covered by subdivision (a)(i) of paragraph 3 of Article 12. Payments for digital downloads of computer software may also constitute royalties under subdivision (a)(iv) or subparagraph (c) of paragraph 3 of Article 12. (See paragraphs 16 to 19 above.) In other cases, payments in consideration for the download of digital content would constitute "income from automated digital services" or "business profits", taxable under Article 12B or Article 7, respectively. To aid in making those distinctions, the Committee considers that the following part of the Commentary on Article 12 of the 2017 OECD Model Convention is applicable to Article 12 of this Model (the modifications that appear in square brackets, which are not part of the Commentary on the OECD Model Convention, have been inserted in order to provide additional explanations or to reflect the differences between the provisions of the OECD Model Convention and those of this Model):

17.1 The principles expressed above as regards software payments are [also] applicable as regards transactions concerning other types of digital products such as images, sounds or text. The development of electronic commerce has multiplied the number of such transactions. In deciding whether or not payments arising in these transactions constitute royalties, the main question to be addressed is the identification of that for which the payment is essentially made.

17.2 Under the relevant legislation of some countries, transactions which permit the customer to electronically download digital products may give rise to use of copyright by

the customer, e.g. because a right to make one or more copies of the digital content is granted under the contract. Where the consideration is essentially for something other than for the use of, or right to use, rights in the copyright (such as to acquire other types of contractual rights, data or services), and the use of copyright is limited to such rights as are required to enable downloading, storage and operation on the customer's computer, network or other storage, performance or display device, such use of copyright should not affect the analysis of the character of the payment for purposes of applying [subdivision (a)(i) of] the definition of "royalties".

17.3 This is the case for transactions that permit the customer (which may be an enterprise) to electronically download digital products (such as software, images, sounds or text) for that customer's own use or enjoyment. In these transactions, the payment is essentially for the acquisition of data transmitted in the form of a digital signal and therefore does not constitute royalties [under subdivision (a)(i) of paragraph 3 of Article 12 of this Model] but falls within [subdivision (a)(iv) or subparagraph (c) of that paragraph or, if that is not the case, within] Article 7, [12B] or Article 13, as the case may be. To the extent that the act of copying the digital signal onto the customer's hard disk or other non-temporary media involves the use of a copyright by the customer under the relevant law and contractual arrangements, such copying is merely the means by which the digital signal is captured and stored. This use of copyright is not important for classification purposes because it does not correspond to what the payment is essentially in consideration for (i.e. to acquire data transmitted in the form of a digital signal), which is the determining factor for the purposes of the definition of royalties. There also would be no basis to classify such transactions as "royalties" [under subdivision (a)(i)] if, under the relevant law and contractual arrangements, the creation of a copy is regarded as a use of copyright by the provider rather than by the customer.

17.4 By contrast, transactions where the essential consideration for the payment is the granting of the right to use a copyright in a digital product that is electronically downloaded for that purpose will give rise to royalties. This would be the case, for example, of a book publisher who would pay to acquire the right to reproduce a copyrighted picture that it would electronically download for the purposes of including it on the cover of a book that it is producing. In this transaction, the essential consideration for the payment is the acquisition of rights to use the copyright in the digital product, i.e. the right to reproduce and distribute the picture, and not merely for the acquisition of the digital content.

Because Article 12B(5) provides that payments described in Article 12 are excluded from Article 12B, payments described in paragraph 17.4 continue to be subject to Article 12, notwithstanding that they may also be described in paragraphs 5 and 6 of Article 12B.

ANNEX ON COPYRIGHT ISSUES RELATED TO DISTRIBUTION INTERMEDIARIES

A. *Issues with para 14.4 of the OECD Model Commentary adopted at present in UN Model Commentary*

The reproduction right and the distribution rights (for literary works incl. computer software)

1. Copyright is a bundle of rights, and each right in the copyright can be dealt with independent of the others. The distribution right does not depend on the reproduction right and operates independently of the other rights as do the other copyright rights.[5] In the national legislations of 27 countries which were extracted as in Appendix, distribution right is found appearing as one of the exclusive rights of the copyright owner.

On First sale/exhaustion-

2. The distribution right is only in respect of copies not in circulation, since once a copy is sold, it is deemed a copy already in circulation. Thus, the distribution right belonging to the copyright owner in respect of a copy of a literary work does not survive once a copy is first sold. The copyright owner retains other rights, like reproduction, adaptation and translation rights, but not the right to control further trade in respect of those copies, which is exhausted on the first sale.

3. The first sale doctrine vests the *copy owner* with statutory privileges which operate as limits on the exclusive rights of the copyright owners.[6] Issuing copies to the public suggests a release of the copies onto the market such that it may be passed on to the other members of the public.[7]

Exhaustion - national or international

4. The first sale doctrine/principle of exhaustion exhausts the distribution right belonging to the copyright owner. However, there have been differing treatments worldwide regarding whether this principle of exhaustion of the distribution right is applicable nationally or internationally. If on the first sale of a copy anywhere in the world, the copyright owner's distribution right is exhausted, preventing him from influencing any subsequent sale of that copy in any jurisdiction, it is international exhaustion. If, on the other hand, the sale of a copy in that jurisdiction alone exhausts the distribution right, the exhaustion is national.

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[5] Paul Goldstein, *Goldstein on Copyright* (3rd edn, Aspen Publishers, 2006) 7:122.2, while describing Title 17 of the United States Code.

[6] *Softman Products Company LLC v Adobe Systems Inc* 171 F. Supp. 2d 1075 (2001)(C.D. Cal. 2001)

[7] *Copinger and Skone James on Copyright,* Kevin Garnett, Gillian Davies, Gwilym Harbottle (eds), 1st South Asian Edn, (London: Sweet & Maxwell 2012) para 7-91.

5. *Kirtsaeng*[8] is a leading case on the issue of first sale doctrine. Kirtsaeng was a Thai student studying in the U.S.A. He sourced low-priced editions of books from Thailand, imported them into the U.S.A. and sold them at a neat profit. The publishers contended that these books were being sold in the U.S.A. by Kirstaeng without their permission, and the same was an infringement of their right to distribute these books in the U.S.A. The Supreme Court disagreed, and held that the first sale doctrine applied with equal force in cases where the copies have been first sold abroad. Accordingly, in the U.S.A., the distribution right of the copies of works exhaust on their first sale anywhere in the world.

6. In a country whose national copyright law treats exhaustion of the distribution right as in the U.S.A., a reseller who purchases the copies anywhere in the world to resell in that country will not pay for the distribution right since that right is exhausted on the first sale of the copies. Accordingly, the payment made by the reseller is not towards the distribution right and not in respect of copyright or for the use of copyright and is not royalty for purposes of taxation.

7. On the other hand, in some countries such as in India, courts have overwhelmingly ruled against international exhaustion, that is, exhaustion of the copyright owner's distribution right in India on the first sale of a copy anywhere in the world. In other words, the copyright owner continues to exclusively enjoy the distribution right in respect of copies which are yet to be issued to the public in India even if these copies have been earlier sold by him or by others under his authority outside the country. Consequently, any consideration received by a non-resident copyright owner from a reseller, to exercise this right in India is in respect of, and for the use of copyright and thus has to be characterised as royalty under the domestic tax law and the relevant tax treaty. Therefore, the argument that the consideration received by the software supplier is for a copyrighted article, and not the copyright itself, and hence cannot be characterised as royalty under the domestic tax law or a tax treaty, is not available.

8. Thus, where a reseller purchases copies of copyrighted work for their distribution in a country where there is national exhaustion of such right (say, India or the EU), he introduces the copies for the first time in that country by issuing copies to the public. Since the reseller uses the distribution right belonging to the copyright owner, the consideration he pays to the copyright owner to obtain that right is to be characterised as royalty. If there is no separate consideration paid for such right, the purchase price for the copies paid to the copyright owner may need to be apportioned towards the distribution right and the copies themselves.

9. The point to note is this principle of exhaustion is applied differently by countries, and a conclusion that the distribution right is exhausted in all cases may not be correct.

10. Finally, suppose the copyright owner earns income by permitting others to use the distribution right (where its not exhausted). In that case, such income is for the use of copyright and royalty under a treaty.

[8] *Kirtsaeng v John Wiley* 133 S. Ct. 1351, 1358 (2013).

B. Issues with exclusion of distribution cases under new definition of Royalty under para 3 of Article 12 due to clause (c) –Possibility of abuse

By excluding resale cases from the new scope of software royalties, possibility of abuse of the provision is there. If a distributor D buys the software from a resident R in the other contracting state and then it sells it to a resident S of the same state where D is a resident, it can be a way of circumventing the provision as otherwise the acquisition of software would be subject to the provision if S buys directly from R.

Appendix

National Copyright Laws of some countries – extracts

[where distribution right (issue of a copy to the public) is provided in law of these countries to be copyright – emphasis provided with the text marked in red]

No	Country	Legislation	Provision
1	Argentina		***Law No. 11.723 – Legal Intellectual Property Regime***[9] Article 2 – The right of ownership of a scientific, literary or artistic work shall include, for its author, the entitlement to dispose of, publish, perform and publicly exhibit, alienate, translate, adapt or authorize the translation of, and reproduce the work in any form.
2	Australia		***Copyright Act, 1968 (No. 63, 1968)*** Section 31: Nature of copyright in original works (1) For the purposes of this Act, unless the contrary intention appears, copyright, in relation to a work, is the exclusive right: (a) in the case of a literary, dramatic or musical work, to do all or any of the following acts: (ii) to publish the work;
3	Austria		***Federal Act on Copyright in Works of Literature and Art and on Related Rights (Copyright Act)***[10] Distribution right. § 16. (1) The author has the exclusive right to distribute workpieces. By virtue of this right, workpieces may neither be offered for sale nor brought into circulation in a manner that makes the work accessible to the public without his consent.

[9] Source: https://wipolex.wipo.int/en/text/225488; translation provided by WIPO.
[10] Source: https://wipolex.wipo.int/en/text/503812 accessed on 18.8.2020; unofficial English translation.

4	Belgium		***Law inserting Book XI "Intellectual Property" in the Code of Economic Law, and inserting the provisions specific to Book XI in Books I, XV and XVII of the same Code***[11] Chapter 2. - Copyright Section 1. - Copyright in general Art. XI.165. § 1. ……. The author of a literary or artistic work alone has the right to authorize distribution to the public, by the sale or otherwise, of the original of his work or of copies thereof……
5	Brazil		***Law No. 9.609 of Feb 19, 1998 On the Protection of Intellectual Property of Software, its Commercialization in the Country, and Other Provisions***[12] 2. The protection system for intellectual property of software is the same granted to literary works by the copyright laws and connected provisions in Brazil, under the terms of this Law. ***Law No. 9.610 of Feb 19, 1998 (Law on Copyright and Neighboring Rights)***[13] Chapter III- Ownership Rights of the Author and its Duration Art. 28 The author has the exclusive right to use, enjoy and dispose of the literary, artistic or scientific work. Art. 29. It depends on the prior and express authorization of the author to use the work, by any modalities, such as: phonogram or audiovisual production; VI -distribution, when not intrinsic to the contract signed by the author with third parties for use or exploitation of the work; IV - distribution - the making available to the public of the original or copy of literary, artistic or scientific works, fixed interpretations or performances and phonograms, through the sale, lease or any other form of transfer of ownership or possession;
6	Canada		***Copyright Act (R.S.C. , 1985, c. C-42)***[14] *Copyright in works* 3 (1) For the purposes of this Act, ***copyright***, in relation to a work, means the sole right to produce or reproduce the work or any substantial part thereof in any material form whatever, to perform the work or any substantial part thereof in public or, if the work is unpublished, to publish the work or any substantial part thereof, and includes the sole right

[11] Source: https://wipolex.wipo.int/en/text/535051 accessed on 18.8.2020; unofficial English translation.
[12] Source: https://wipolex.wipo.int/en/text/125391
[13] Source: https://wipolex.wipo.int/en/text/505104
[14] Source: https://wipolex.wipo.int/en/text/541758 accessed on 19.8.2020.

			(a) to produce, reproduce, perform or publish any translation of the work, *Definition of publication* 2.2 (1) For the purposes of this Act, ***publication*** means (a) in relation to works,(i) making copies of a work available to the public,..
7.	People's Republic of China[15]	Copyright Law (Promulgated by the Standing Committee of the National Congress on February 26th, 2010 and entered into force on April 1st, 2010)	**Article 10** The term "copyright" shall include the following personality rights and property rights: (I) the right of publication, that is, the right to decide whether to make a work available to the public; (2) the right of authorship, that is, the right to claim authorship and to have the author's name mentioned in connection with the work; (3) the right of alteration, that is, the right to alter or authorize others to alter one's work; (4) the right of integrity, that is, the right to protect one's work against distortion and mutilation; (5) the right of reproduction, that is, the right to produce one or more copies of a work by printing, photocopying, lithographing, making a sound recording or video recording, duplicating a recording, or duplicating a photographic work or by any other means; (6) the right of distribution, that is, the right to make available to the public the original or reproductions of a work though sale or other transfer of ownership; (7) the right of rental, that is, the right to authorize, with payment, others to temporarily use cinematographic works, works created by virtue of an analogous method of film production, and computer software, except any computer software that is not the main subject matter of rental;
8.	Denmark		***Copyright 2014***[16] Scope of Protection 2.–(1) Within the limitations specified in this Act copyright implies the exclusive right to control the work by reproducing it and by making it available to the public, whether in the original or in an amended form, in translation, adaptation into another literary or artistic form or into another technique.

[15] Source: https://wipolex.wipo.int/en/text/186569 accessed on 23.9.2020.
[16] Source: https://wipolex.wipo.int/en/text/546839 accessed on 19.8.2020.

			(3) The work is made available to the public if (i) copies of the work are offered for sale, rental or lending or distribution to the public in some other manner; Publication and Publishing–(1) A work shall be considered to have been made public if it has lawfully been made available to the public. (2) A work shall be considered published if, with the consent of the author, copies of the work have been put on the market or otherwise distributed to the public.
9.	Finland[17]		***Copyright Act, 1961*** § 2 Financial rights Copyright confers, subject to the limitations set out below, the exclusive right to dispose of a work by making copies of it and making it available to the public, unaltered or altered, translated or altered, in another literary or artistic form, or by another method. § 8 Publication A work is considered to have been made public when it has been lawfully made available to the public. A work is considered to have been published when its copies have been put up for sale or otherwise distributed to the public with the consent of the author.
10	France[18]	Intellectual Property Code Part 1: Literary and artistic property Book I: Copyright	Article L122-6 Subject to the provisions of Article L. 122-6-1, the exploitation right belonging to the author of a software includes the right to perform and authorize: 3 ° The placing on the market for payment or free, including the rental, of the copy (s) of software by any process. However, the first sale of a copy of software in the territory of a State member of the European Community or of a State party to the Agreement on the European Economic Area by the author or with his consent exhaust the right of placing on the market of this copy in all the Member States except the right to authorize subsequent rental of a copy.
11	Germany [19]	Copyright Act of 9 September 1965 (Federal Law Gazette I, p. 1273)	Subchapter 3 Exploitation rights Section 15 General (1) The author has the exclusive right to exploit his work in material form; this right shall in particular include 2. the right of distribution (section 17),

[17] Source: https://wipolex.wipo.int/en/text/467065 accessed on 19.8.2020.
[18] Source: https://wipolex.wipo.int/en/text/537284 accessed on 19.8.2020 , unofficial English translation.
[19] Source: English translation provided by juris GmbH – www.juris.de

			Section 17 Right of distribution (1) The right of distribution is the right to offer the original or copies of the work to the public or to bring it to the market. (2) Where the original or copies of the work have been put into circulation by the sale with the consent of the person entitled to distribute them within the territory of the European Union or another Contracting Party of the Agreement on the European Economic Area, their dissemination shall be permissible, except by means of rental, … Division 8 Special provisions on computer programs Section 69c Restricted acts The rightholder shall have the exclusive right to perform or authorise the following acts: … 3. any form of distribution of the original of a computer program or of copies thereof, including rental. Where a copy of a computer program is put into circulation with the rightholder's consent in the area of the European Union or another Contracting Party of the Agreement on the European Economic Area by sale, the right of distribution shall be exhausted in respect of this copy, with the exception of the rental right;
12	Ghana[20]	Copyright Act, 2005	**Section 5 Economic rights of authors** The author of any protected copyright work has the exclusive economic right in respect of the work to do or authorise the doing of any of the following: (d) the distribution to the public of the originals or copies of the work by way of first sale or other first transfer of ownership, and
13	India	Copyright Act, 1957	**Section 14. Meaning of copyright.**-For the purposes of this Act, "copyright" means the exclusive right subject to the provisions of this Act, to do or authorise the doing of any of the following acts in respect of a work or any substantial part thereof, namely:- (a) in the case of a literary, dramatic or musical work, not being a computer programme,- (i) to reproduce the work in any material form including the storing of it in any medium by electronic means; (ii) to issue copies of the work to the public not being copies already in circulation; (iii) to perform the work in public, or communicate it to the public; (iv) to make any cinematograph film or sound recording in respect of the work; (v) to make any translation of the work;

[20] https://wipolex.wipo.int/en/text/148037 accessed on 23.9.2020.

			(vi) to make any adaptation of the work; (vii) to do, in relation to a translation or an adaptation of the work, any of the acts specified in relation to the work in sub-clauses (i) to (vi); (b) in the case of a computer programme,- (i) to do any of the acts specified in clause (a); (ii) to sell or give on commercial rental or offer for sale or for commercial rental any copy of the computer programme: Provided that such commercial rental does not apply in respect of computer programmes where the programme itself is not the essential object of the rental."
14	Ireland[21]	COPYRIGHT AND RELATED RIGHTS ACT, 2000	Rights of Copyright Owner 37.—(1) Subject to the exceptions specified in Chapter 6 and to any provisions relating to licensing in this Part, the owner of the copyright in a work has the exclusive right to undertake or authorise others to undertake all or any of the following acts, namely: (a) to copy the work; (b) to make available to the public the work; 40(1) References in this Part to the making available to the public of a work shall be construed as including all or any of the following, namely: (e) issuing copies of the work to the public; (8) There shall be a right of the owner of copyright to make available to the public copies of a work or to authorise others to do so which shall be known and in this Part referred to as the ''making available right''.
15	Italy[22]	LAW 22 APRIL 1941, N. 633. - PROTECTION OF COPYRIGHT AND OTHER RIGHTS RELATED TO ITS OPERATION.	Section I - *Protection of the economic use of the work.* 12. [1] The author has the exclusive right to publish the work. [2] He also has the exclusive right to economically use the work in any form and manner, original or derived, within the limits set by this law, and in particular with the exercise of the exclusive rights indicated in the following articles. 17. 1. The exclusive right of distribution has as its object the placing on the market or in circulation, or in any case available to the public, by any means and for any reason, of the original of the work or of the copies thereof and includes, moreover, the exclusive right to introduce in the territory of the European Community States, for distribution purposes, the reproductions made in non-Community States
16	Luxembourg[23]	Law of 18 April 2001 on copyright,	33. Subject to Articles 34, 35 and 36, the exclusive rights of the author of a computer program include the right to make and authorize:

[21] Source: https://wipolex.wipo.int/en/text/520188 accessed on 20.8.2020.
[22] Source: https://wipolex.wipo.int/en/text/477618 accessed on 21.8.2020 unofficial English translation.
[23] Source: https://wipolex.wipo.int/en/text/128652 accessed on 21.8.2020, unofficial English translation.

		neighboring rights and databases	*(c)* any form of distribution to the public of the original or copies of a computer program, including without limitation sale, leasing, licensing and rental. However, the first such transaction carried out in the European Economic Community by the owner of the exclusive rights or with his consent, exhausts the right of distribution in the Community of the copies of the computer program which is the subject of the transaction, at the end of the period. exception of the right to control the subsequent rentals of these copies.
17	Japan[24]	Copyright Act (Act No. 48 of May 6, 1970)	**Right of Transfer** **Article 26**-2 (1) The author of a work (except a cinematographic work; the same applies hereinafter in this Article) has the exclusive right to make that work available to the public through the transfer of the original work or a copy of the work (if the work is one that has been reproduced in a cinematographic work, this excludes making that work available to the public through the transfer of a copy of the cinematographic work; the same applies hereinafter in this Article).
18	Mexico[25]	Federal Copyright Law	**Article 27.-** The holders of economic rights may authorize or prohibit: **IV.** The distribution of the work, including the sale or other forms of transmission of ownership of the material supports that contain it, as well as any form of transmission of use or exploitation. When the distribution is carried out through sale, this right of opposition will be understood to have been exhausted after the first sale, except in the case expressly contemplated in article 104 of this Law; **Article 16.-** The work may be made public through the acts described below: **V.** Distribution to the public: Making the original or copy of the work available to the public through sale, lease and, in general, any other way, and …
19	Netherlands[26]	Copyright Act Law of 23 September 1912	**Article 1** Copyright is the exclusive right of the creator of a literary, scientific or artistic work, or of his successors in title, to publish and reproduce it, subject to the restrictions set by law. **§ 4. Making public** **Article 12**

[24] Source: https://wipolex.wipo.int/en/text/578251 accessed on 23.9.20.
[25] Source: https://wipolex.wipo.int/en/text/570484 accessed on 21.8.2020, unofficial English translation.
[26] Source: https://wipolex.wipo.int/en/text/468398 accessed on 21.8.2020, unofficial English translation.

			1. The publication of a work of literature, science or art also includes: 1 °. the publication of a reproduction of all or part of the work; 2 °. the distribution of all or part of the work or of a reproduction thereof, as long as it has not appeared in print;
20	New Zealand[27]	Copyright Act 1994 (Public Act 1994 No 143)	Section 16 : Acts restricted by copyright (1) The owner of the copyright in a work has the exclusive right to do, in accordance with sections 30 to 34, the following acts in New Zealand: (b) to issue copies of the work to the public, whether by sale or otherwise: Section 9 : Meaning of issue to the public (1) References in this Act to the issue of copies of a work to the public mean the act of putting into circulation copies not previously put into circulation; and do not include the acts of— (a) subsequent distribution or sale of those copies;
21	Norway[28]	**Copyright Act**	**§ 3. *Content of the copyright*** Copyright gives the exclusive right to dispose of the intellectual property by a) producing a permanent or temporary copy of the intellectual property, regardless of the manner and in what form this takes place b) make the work available to the public. The work is made available to the public when a) a copy of the work is offered for sale, rental or lending or otherwise distributed to the public b) copies of the work are shown publicly without the use of technical aids c) the work is performed in public….
22	Slovakia[29]		**Section Two Exclusive Property Rights** **§ 19** (1) The author has the right to use his work and the right to give consent to the use of his work. (2) The work may be used only with the consent of the author, unless this Act provides otherwise. (3) The author has the right to remuneration for the use of the work, unless this Act provides otherwise in the fourth chapter; this does not affect the provision of § 65 par. 1 second sentence. (4) The use of the work is in particular (e) the public distribution of the original work or a copy of the work

[27] Source: https://wipolex.wipo.int/en/text accessed on 21.8.2020.
[28] Source: https://wipolex.wipo.int/en/text/504083 accessed on 21.8.2020, unofficial English translation.
[29] Source: https://wipolex.wipo.int/en/text/542164 accessed on 22.8.2020, unofficial English translation.

23	Spain[30]	Legislative Royal Decree 1/1996	**Article 99.** *Content of the exploitation rights.* Without prejudice to the provisions of article 100 of this Law, the exclusive rights of the exploitation of a computer program by whoever is its owner in accordance with article 97, will include the right to carry out or authorize: c) Any form of public distribution including the rental of the original computer program or its copies. **Article 19.** *Distribution.* 1. Distribution is understood to be the making available to the public of the original or of the copies of the work, on a tangible medium, through its sale, rental, loan or in any other way.
24	Sweden[31]		***ACT ON COPYRIGHT IN LITERARY AND ARTISTIC WORKS (Swedish Statute Book, SFS, 1960:729, as last amended by SFS 2018:1099)[32]*** Article 2. Subject to the limitations prescribed hereinafter, copyright shall include the exclusive right to exploit the work by preparing copies of it and by making it available to the public, be it in the original or an altered manner, in translation or adaptation, in another literary or artistic form, or in another technical way. The work is made available to the public in the following cases: 4. When copies of the work are placed on sale, leased, lent, or otherwise distributed to the public.
25	Swiss Confederation	Federal Act on Copyright and Related Rights (Copyright Act, CopA) of 9 October 1992 (Status as of 1 January 2017)	Art. 10 Use of the work 1 The author has the exclusive right to decide whether, when and how his work is used. 2 The author has the right, in particular: b. to offer, transfer or otherwise distribute copies of the work;
26	United Kingdom [33]	Copyright, Designs and Patents Act, 1988	**Copyright, Designs and Patents Act, 1988** **Section 16 : The acts restricted by copyright in a work** (1) The owner of the copyright in a work has, in accordance with the following provisions of this Chapter, tehexclusive right to do the following acts in the United Kingdom- (a) To copy the work (see section 17); (b) To issue copies of the work to the public (see section 18);

[30] Source: https://wipolex.wipo.int/en/text/577658 accessed on 20.8.2020.
[31] Source: https://wipolex.wipo.int/en/text/532409 accessed on 21.8.2020.
[32] Source: https://wipolex.wipo.int/en/text/532409 accessed on 21.8.2020.
[33] Extracted from Copinger & Skones on Copyright.

			(ba) To rent or lend the work to the public [see section 18A); (c) …… (d) …… (e) …… And those acts are referred to in this Part as the "acts restricted by the copyright".
27	United States	Copyright Law of the United States and Related Laws - Title 17 of the United States Code	**§ 106 · Exclusive rights in copyrighted works** Subject to sections 107 through 122, the owner of copyright under this title has the exclusive rights to do and to authorize any of the following: (1) to reproduce the copyrighted work in copies or phonorecords; (2) to prepare derivative works based upon the copyrighted work; (3) to distribute copies or phonorecords of the copyrighted work to the public by sale or other transfer of ownership, or by rental, lease, or lending; (4) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and motion pictures and other audiovisual works, to perform the copyrighted work publicly; (5) in the case of literary, musical, dramatic, and choreographic works, pantomimes, and pictorial, graphic, or sculptural works, including the individual images of a motion picture or other audiovisual work, to display the copyrighted work publicly; and (6) in the case of sound recordings, to perform the copyrighted work publicly by means of a digital audio transmission.