

DRAFT IMPACT ASSESSMENT
on the modernisation of the EU copyright rules

Provisional

Provisional

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Executive Summary Sheet

Impact assessment on the modernisation of the EU copyright rules

A. Need for action

Why? What is the problem being addressed?

Digital technologies are changing the ways creative content is produced, distributed and accessed. This new environment represents an opportunity for all players in the value chain, but also new challenges.

Firstly, there are problems with the **cross-border provision and availability of content services** in the digital Single Market. This is linked to the territoriality of copyright on the one hand, which requires to clear rights for each country in which the content is communicated to the public, and to contractual restrictions imposed by rightholders and/or service providers, on the other.

The second set of issues arises from the **current legal framework of exceptions** to rights, which does not take full account of technology developments and is insufficiently harmonised across the EU.

Thirdly, there are issues relating to the **functioning of the copyright marketplace**. In this area, concerns have been raised as to the **insufficient clarity on the ownership of rights** and the **adequacy of remuneration for authors and performers** not only in the online environment. The development of digital technologies has also added another challenging dimension for the **enforcement of rights**.

What is this initiative expected to achieve?

This Impact Assessment (IA) report accompanies a White Paper which will address the need to reap the benefits of digital technology and of the single market. The IA defines general and specific objectives that any future policy intervention at EU level should aim at achieving.

The general objectives of further policy initiatives in this area would be to create a single market for digital content, enabling the full potential of digital technology to be exploited by all players in the value chain, while maintaining long-term incentives to create new content. More specifically, the initiative should result in facilitating the dissemination of content under licences across borders, ensuring that the legal framework for exceptions keeps up with technological developments, improving clarity on the ownership of rights, strengthening the position of creators in view of their fair remuneration and ensuring the effective and balanced enforcement of rights.

What is the value added of action at the EU level?

EU intervention would have the inherent advantage of being able to assure cross-border access to protected content. In the absence of EU intervention, different national approaches would continue and there would be insufficient harmonisation to enable the proper functioning of the internal market.

B. Solutions

What legislative and non-legislative policy options have been considered? Is there a preferred choice or not? Why?

The policy options presented in this IA have been considered in the context of the preparation of a White Paper indicating the Commission's views on key areas for review. To this end, policy options have been identified in three main areas for review: cross-border availability of content; balance between copyright protection and other public policy objectives; functioning of the copyright marketplace. At this stage of the policy process no preferred option has been identified.

For each problem area, four options were analysed, corresponding to a different level of ambition. A combination of the options could be considered in certain areas.

- The first option (**status quo**) would consist in relying on the market to improve the availability of content online, on Member States to take full advantage of the policy space available under the current legal framework, and on the courts to clarify provisions of the Directives relevant to the development of new uses and services.
- The second option comprises **Commission guidance** to Member States as well as to market players, in line with the current legal framework, coupled with **support for market initiatives** and/or market monitoring.
- The third option consists in **legislative intervention** aimed at achieving a much deeper level of harmonisation than is currently the case, clarifying the framework for some new uses and services, and

achieving a more systematic cross-border effect. On certain topics (territoriality and some of the exceptions), different sub-options or alternatives have been proposed.

- Under the fourth Option, a **single EU copyright title** would be developed to replace national copyright titles. Under a unitary title, the exclusive rights would be defined as being protected in the whole territory of the EU.

Who supports which option?

The positions of the different stakeholders, based on their replies to a recent public consultation, are presented in the relevant sections of the IA.

C. Impacts of the preferred option

What are the benefits of the preferred option (if any, otherwise main ones)?

The different policy options have been assessed in view of the preparation of the White Paper. The assessment is based on the information available at this stage of the policy development process.

The benefits of the four policy options are assessed for the different subjects covered in this IA. Several options would contribute to improve legal certainty for users, institutional users and distributors. Positive impacts in terms of reduction of transaction costs for institutional users and distributors are also expected under different policy options. In certain cases, the reduction of transaction costs could be reflected in lower prices for consumers. In addition, a number of options would contribute to enhance cross-border access to legal content for consumers. Several options include benefits for rightholders in terms of licensing opportunities and effective enforcement of copyright.

The options considered in this IA do not have any environmental impacts.

What are the costs of the preferred option (if any, otherwise main ones)?

The different policy options have been assessed in view of the preparation of the White Paper. The assessment is based on the information available at this stage of the policy development process.

The costs and risks of the four policy options are assessed for the different subjects covered in this IA. Several options entail compliance costs. Certain options may reduce licensing opportunities for rightholders and long-term incentives to create. A few options may have negative impacts on prices and on the availability of content for consumers.

How will businesses, SMEs and micro-enterprises be affected?

The options presented in this IA would impact SMEs, which constitute the fabric of many of the copyright intensive industries. A few options include specific administrative requirements which would result in higher regulatory burden for SMEs compared to larger companies. On the other hand facilitating the cross-border provision of services related to digital content and lowering transaction cost would have a favourable impact on SMEs.

Will there be significant impacts on national budgets and administrations?

Impact on national budgets would be the most significant where legislative options would be chosen, as it would require the implementation of the EU legal instrument.

Will there be other significant impacts?

Several options may have social impacts as well as impacts on fundamental rights, competitiveness, third countries and trade.

D. Follow up

When will the policy be reviewed?

Further analysis will be carried out by the Commission in order to collect the necessary data and assess in more detail the possible impacts on the relevant stakeholders. The follow-up will also include market monitoring and preparation of further policy proposals where relevant.

1. INTRODUCTION, POLICY CONTEXT, PROCEDURAL ISSUES AND CONSULTATION

1.1. Policy context

The digital economy has been a major driver of growth in the past two decades, and is expected to grow seven times faster than the overall EU GDP in coming years.¹ The online space enables new ways of creating and distributing content and new possibilities to generate value. The emergence of new business models capitalising on the potential of the internet to deliver content represents a challenge and an opportunity for the creative industries, authors and artists, the education and research communities and other actors in the digital economy. The question as to whether the EU copyright regulatory framework remains appropriate and is adapted to the digital environment is increasingly debated.²

In 2010, in its Digital Agenda for Europe,³ the Commission identified a number of actions in the field of copyright as part of its strategy to achieve a fully-functioning Digital Single Market. In 2011, in its Intellectual Property Strategy "A Single Market for Intellectual Property Rights",⁴ the Commission recognised the strategic importance of copyright for the development of the Digital Single Market. The strategy sought to develop targeted solutions designed to address specific obstacles with the most appropriate tools available, be they commercial or contractual solutions, technology-based solutions, or legislative intervention.

In addition, in its Communication of 18 December 2012,⁵ the Commission set out its strategy to ensure an effective Digital Single Market in the area of copyright, including the completion of its on-going effort to review the EU copyright legislative framework with a view to a decision in 2014 on whether to table legislative reform proposals, the objective being *“a modern copyright framework that remains fit for purpose and seeks to foster innovative market practices in order to guarantee effective recognition and remuneration of rights holders; to provide sustainable incentives for creativity, cultural diversity and innovation; to increase the choice of and open up access to legal offers by end users; to allow new business models to emerge; and to more effectively contribute to combating illegal offers and piracy”*.

At the European Council in October 2013 the Heads of State or Government concluded that: *“Providing digital services and content across the single market requires the establishment of a copyright regime for the digital age.”* It noted that *“the Commission will therefore complete its ongoing review of the EU copyright framework in spring 2014”*. The Council agreed that *“It is important to modernise Europe’s copyright regime and facilitate licensing, while ensuring a high level of protection of intellectual property rights and taking into account cultural diversity”*.

This Impact Assessment report (IA) accompanies a White Paper indicating the Commission’s views on key areas for review. The purpose of this IA is therefore to identify the most relevant issues and the areas where these issues need to be addressed at EU level. It covers three main areas: (i) the availability of and access to content in the Digital Single Market, (ii) the need to ensure in the legal framework a balance between copyright protection and other

¹ <https://ec.europa.eu/digital-agenda/sites/digital-agenda/files/FI3P%20Fact%20Sheet.pdf>

² This is explained in sections 2 and 3.

³ COM (2010) 245 final/2

⁴ COM (2011) 287 final

⁵ COM (2012) 789 final

public policy objectives (iii) the functioning of the copyright marketplace and the need to set the right incentives for investment in creative and intellectual work. Where, subsequently, specific policy initiatives will be proposed, those proposals will be based on more specific and detailed analysis of impacts.

1.2. Procedural issues and consultation of interested parties

A series of consultations have been held during recent years:

- The Green Paper on copyright in the knowledge economy (16/07/2008)⁶ included detailed questions on the relationship between exceptions to copyright and contractual licensing arrangements for the digitisation and making available of works in the EU by libraries and research institutions.
- The consultation on "Creative Content Online" (22/10/2009)⁷ again raised the question as to whether there was a need to harmonise at EU level a number of "public interest" exceptions.⁸ The consultation addressed the role of online markets and explored a variety of copyright management models that could help the development of such markets.
- The Green Paper on the online distribution of audiovisual works (13/07/2011)⁹ asked a series of detailed questions on various options for tackling the territoriality of copyright.¹⁰ It also asked specific questions about the relationship between copyright exceptions and contractual licensing arrangements for the digitisation and making available of works in the EU by libraries and archives with respect to the audiovisual (AV) sector, and in particular Europe's film heritage. Following this consultation the Commission issued a Communication on content in the Digital Single Market.¹¹
- From 30/11/2012 to 30/03/2013 the Commission carried out an interactive online consultation on the civil enforcement of intellectual property rights (IPR) (efficiency of proceedings and accessibility of measures).¹²
- From 5/12/2013 to 5/03/2014, the Commission launched a public consultation¹³, covering the key areas that are discussed in this IA. Over 10.000 replies were received from a broad range of stakeholders. Approximately 55% of the responses were submitted by end users, 7% by institutional users (e.g. libraries, cultural heritage institutions), 30% by authors and performers, 10% by publishers, producers and broadcasters, 1% by collective management organisations (CMOs), 1% by distributors, service providers and 0.25% by public authorities. 11 Member States replied to the questionnaire. The fact that specific online tools facilitating the reply to the public consultation by individual respondents were developed by certain

⁶ COM(2008) 466/3, at: http://ec.europa.eu/internal_market/copyright/copyright-info/index_en.htm and replies available at: <https://circabc.europa.eu/faces/jsp/extension/wai/navigation/container.jsp>

⁷ http://ec.europa.eu/internal_market/consultations/2009/content_online_en.htm

⁸ http://ec.europa.eu/avpolicy/other_actions/content_online/consultation_2009/index_en.htm

⁹ COM(2011) 427, at: http://ec.europa.eu/internal_market/copyright/initiatives/audiovisual/index_en.htm

¹⁰ Over 220 respondents provided detailed responses, not only with respect to the audiovisual but also the music sector.

¹¹ COM(2012) 789 final, at: http://ec.europa.eu/internal_market/copyright/licensing-europe/index_en.htm

¹² Referred to as "the consultation on the civil enforcement of IPR" below. For more details, including all public responses and a summary of responses, see: http://ec.europa.eu/internal_market/consultations/2012/intellectual-property-rights_en.htm

¹³ Referred to as "the public consultation" below. Consultation document available: http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm

stakeholder groups¹⁴ proved the high interest triggered by the consultation. An overview of stakeholders' views is incorporated in this IA.¹⁵

These broad-based public consultations have been complemented by a stakeholder dialogue "Licences for Europe", launched on 4 February 2013. This dialogue consisted of four Working Groups, each of which met around six times over a 10-month period, and which led to "Ten pledges to bring more content online" presented at a final plenary session on 13 November 2013. These pledges are summarised in Annex A, and, together with the discussions held in the Working Groups, are taken into account throughout the IA.

While no formalised evaluation of the copyright *acquis* has been carried out, many areas have been evaluated in the framework of the above Green Papers, consultations and the "Licences for Europe" forum. Moreover, in 2013-2014 a series of studies were conducted in order to explore the legal and economic consequences of the existing rules.¹⁶ Finally, this IA, as it accompanies a broad policy document, also evaluates the copyright *acquis*.

An Impact Assessment Steering Group held four meetings between September 2013 and January 2014 to assess the progress on the IA and to provide guidance on the drafting the final document. The Steering Group comprised representatives of DGs COMM, COMP, CNECT, EAC, ENTR, JRC, JUST, RTD, SANCO, SG, SJ and TRADE.

The Impact Assessment Board examined the IA and in its opinion of 6 May 2014 asked for the submission of a revised version of the report. Further to the Board's opinion, the following main changes have been made to this IA: The report makes it clear that it covers a selection of issues in copyright law and policy which is relevant for the functioning of the Digital Single Market. It better and separately explains the different problem areas and their relative importance. It describes the baseline scenario with particular attention to the effects of market initiatives and recent legislation and the need (or no need) for EU intervention. The link between the objectives and the problems is reinforced and the presentation of the options is clarified and developed in greater detail. A table (Annex R) was also added to improve clarity. The analysis of impacts and their comparison is strengthened, taking into account the impacts on different stakeholder groups and sectors. Finally, stakeholders' views are now presented extensively throughout the IA.

2. BACKGROUND

2.1. The role of copyright

Copyright rewards creativity (of composers, writers, journalists, film directors, musicians, actors, software developers, etc.) and investment in creativity (by book and newspaper publishers, film and record producers, broadcasters) by creating exclusive rights over the use of works and other protected subject-matter (e.g. records, broadcasts).¹⁷ International and national laws grant copyright protection since innovation and creation are considered public

¹⁴ Examples are: <http://copywrongs.eu/> <http://www.fixcopyright.eu/> <http://www.creatorsforeurope.eu/en/>

¹⁵ A detailed summary of the replies to the public consultation is available under: http://ec.europa.eu/internal_market/copyright/index_en.htm

¹⁶ http://ec.europa.eu/internal_market/copyright/studies/index_en.htm

¹⁷ "Copyright" is used in this document [with the exception of Section 2.3 and Annex C] to encompass copyright and related rights. "Works" is used [with the exception of Section 2.3 and Annex C] to encompass works and other protected subject matter.

good. Copyright is also a property right recognised in the European Charter of Fundamental Rights.¹⁸

Exclusive rights and their effective enforcement promote the formation of markets for creative content. They provide the framework within which rightholders can negotiate agreements with users authorising the exploitation of their work (e.g. a music service provider negotiating an agreement with record producers, music publishers and authors' CMOs for the provision of download sales or streaming services). This provides consumers with access to creative content and ensures that such content continues to be offered in the future. But copyright cannot correct for all market failures and may indeed introduce new ones. Accompanying transaction costs (e.g. time and other resources spent on locating rightholders), if substantial, may prevent mutually beneficial trade from happening. In addition, the value rightholders attach to works may sometimes not fully reflect their social value, e.g. when the use of a work generates external effects.¹⁹

Hence, a well-designed copyright system, in addition to ensuring adequate compensation for creators and producers in order to maintain incentives to create, may need additional balancing, e.g. by introducing copyright exceptions and limitations.²⁰ Copyright represents a carefully crafted balance between the short-term costs to society of an exclusive right granted to the rightholder and the long-term benefits of a steady stream of creative content that this monopoly generates. Such balance is ensured by an appropriate level of copyright protection; including the limitation of copyright in time²¹ and in scope (via exceptions).

2.2. Economic dimension

2.2.1. *The role of copyright-intensive industries in the EU economy*

According to a Report by the Office for Harmonization in the Internal Market and the European Patent Office²² 33 sectors of the EU economy are considered to be copyright-intensive. They account directly for 3.2% of employment in the EU with around 7.05 million jobs (on average in 2008-2010).²³ Overall, 4.2% of the EU's GDP is generated in copyright-intensive sectors (on average in 2008-2010).²⁴ Copyright-intensive industries account for 4.2% of EU's exports, with net exports of around €15 billion in 2010.

On top of being essential drivers for cultural diversity in Europe,²⁵ copyright-intensive industries are one of Europe's most dynamic economic sectors. More than 1 million companies are involved in motion picture, video and television programme production, sound

¹⁸ Article 17(2), Charter of Fundamental Rights of the European Union; Case C-277/10 *Martin Luksan v. Petrus van der Let* 9 February 2012;

¹⁹ External effects in this sense are benefits that affect a party who did not choose to incur that benefit.

²⁰ "Exceptions" is used in this document to encompass "exceptions and limitations" to copyright.

²¹ Property rights derived from copyright are granted for a limited period of time. After that period has elapsed, the work or other protected subject matter is available for use by anyone as it enters into the public domain.

²² "Intellectual property rights intensive industries: contribution to economic performance and employment in the European Union. Industry-Level Analysis Report". A joint project between the European Patent Office and the Office for Harmonization in the Internal Market, September 2013.

²³ Using an adapted version of the methodology developed by the World Intellectual Property Organization (WIPO)-in the WIPO guidelines, industries are grouped into four categories according to the degree to which their activity depends on copyright: core copyright industries, inter-dependent industries, partial copyright industries and non-dedicated support industries. The report, however, is based on a stricter approach to the definition of core copyright-intensive industries and does not cover inter-dependent, partial or non-dedicated support industries.

²⁴ Applying the original WIPO methodology, the report would arrive at 6,7% contribution to the employment and 7,8% contribution to GDP of copyright-intensive industries in the EU.

²⁵ Communication of the European Commission 'Promoting cultural and creative sectors for growth and jobs in the EU' 26 September 2012.

recording and music publishing activities, providing over 400,000 jobs, with net contribution to the EU economy of over €13 billion,²⁶ with the audiovisual sector worth nearly €132 billion in 2011, and online video on demand (VoD) €616 million (having grown by 45% compared to 2010).²⁷ The European game market is valued at €14,5 billion.²⁸ The creative industries in the EU are dominated by micro firms with 95% having fewer than 10 employees coexisting with very large corporations.²⁹ The overwhelming majority (90.8 %) of the value added generated within the EU-27's film and sound recording activities sector in 2010 was provided by SMEs,³⁰ which employ just over three quarters (75.4 %) of the total number of persons employed in the sector. In the recorded music industry, 99% of music business are SMEs while 80% of the music released today is produced by SMEs independent music companies,³¹ and one of the three major labels is European. Europe is particularly competitive in the publishing industry (books and newspapers). According to the Global Ranking of World Publishing released in July 2013, 7 of the top 10 book publishing companies are European,³² and large enterprises (employing 250 or more persons) generated almost half (49.3 %) of the EU-27's value added in 2010. Nevertheless, the average publishing industry employs 5.4 employees and less than 1% of the publishing companies have 250 employees.³³ Sport is also a significant sector in terms of growth and employment, contributing, directly and indirectly, to 2.98% of the EU Gross Value Added and 2.12% of total EU employment.³⁴ Although sports events are not covered by copyright,³⁵ major championships constitute premium content for broadcasters (and one of the most often pirated in the Internet).³⁶

Finally, European libraries, museums and other public cultural institutions have a fundamental role in support of creators and the creative industries and in the nurturing of future generations of users. Research and education are not only a cornerstone of contemporary societies and economic activities, but also provide key actors in innovation.

2.2.2. *New technologies, new ways of access to and distribution of creative content*

Digitisation has deeply impacted the ways works and services are consumed. With growing **access** to the internet, the use of online services is becoming a part of consumers' daily life: 76% of households in EU28 have internet access (72% broadband) and almost 80% of EU citizens use internet daily,³⁷ while 16% of individuals (29% of people between 16 and 24) use mobile internet (see also Table 1). Streaming, downloading and VoD services provide viewers with more flexibility when watching programmes, listening to music, reading books or newspapers. Tablets and smartphones further facilitate such uses. Consequently, consumers

²⁶ Source : Eurostat, 2013

²⁷ European Audiovisual Observatory 2012 Yearbook Volume 2 Television, cinema, video and on-demand audiovisual services – the pan-European picture

²⁸ PwC Global Entertainment and Media Outlook 2012-2016

²⁹ European Competitiveness Report 2010, p. 15

³⁰ Enterprises employing fewer than 250 persons.

³¹ Independent music companies Association (IMPALA) comments on the EC consultation on a future trade policy, July 2010.

³² See "the World's 60 Largest Book Publishers, 2013", <http://www.publishersweekly.com/pw/by-topic/industry-news/financial-reporting/article/58211-the-global-60-the-world-s-largest-book-publishers-2013.html>

³³ Source: Eurostat

³⁴ Study on the contribution of sport to economic growth and employment in the EU, <http://ec.europa.eu/sport/library/documents/f-studies/study-contribution-sports-economic-growth-final-rpt.pdf>

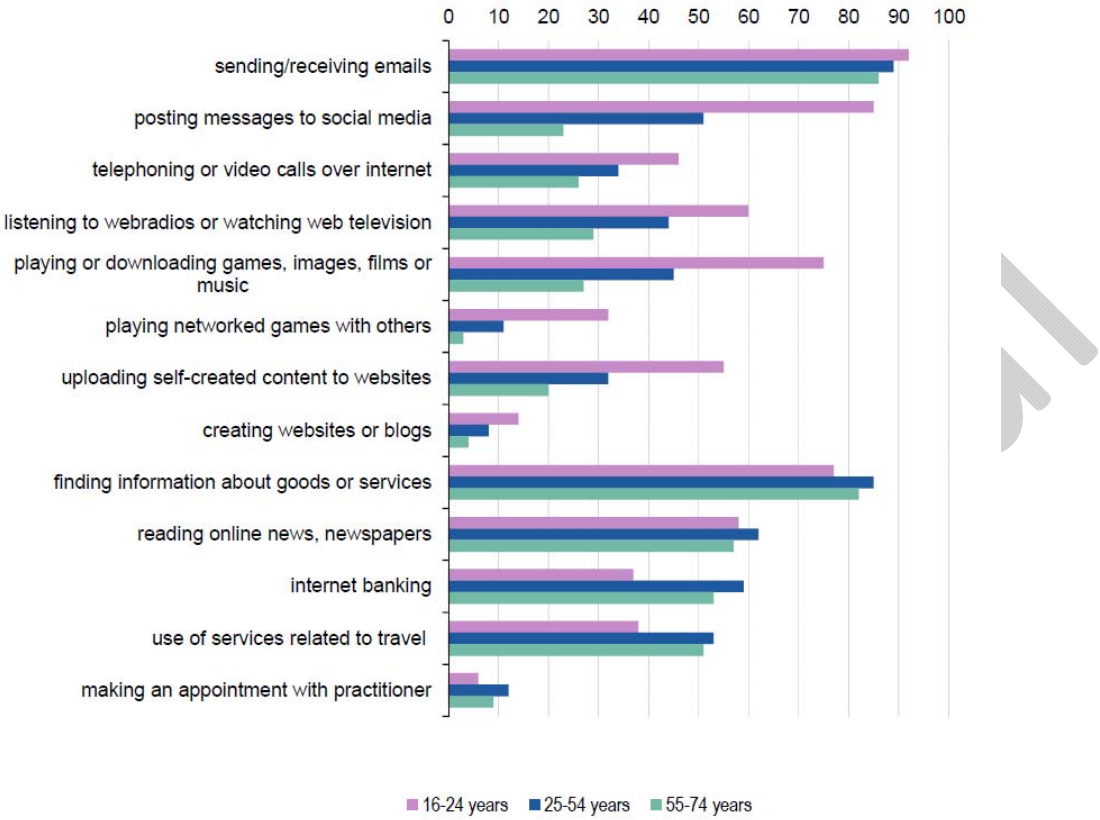
³⁵ C-403/08 and C-429/08, *Football Association Premier League and others*, §§ 96-99.

³⁶ Media rights are the most important source of revenue for professional sport; this revenue is redistributed to lower levels of the sporting pyramid through solidarity mechanisms that are part of the financing of grassroots sport in Europe.

³⁷ Source: Eurostat 2013 (% of individuals who accessed internet in the last 3 months preceding the Eurostat survey)

increasingly expect to access content at any time and from anywhere. During the next 5 years global digital spending on entertainment and media is expected to increase at a rate of 12.1%, whereas non-digital spending will only increase by 2.8%.³⁸

Table 1: Use of the internet for communication, entertainment and other selected activities, by age group, EU 27, 2012 (% of internet users)



Source: Eurostat³⁹

Digital technology also creates new forms of **production and distribution** of content, often making them more efficient and less costly. Some transaction costs decrease (e.g. by more efficient matching between owners and users; easier monitoring of consumption). Some new uses (e.g. digitisation of out-of-commerce works) however involve significant costs. There is also a vast scope for individuals to self-publish, reaching consumers directly online.

The last years have seen a plethora of **new services** coming into the market. The figures below illustrate their importance in the EU economy:

The number of licensed **digital music** services worldwide is steadily growing (about 400 at the end of 2010 and more than 500 at the end of 2012).⁴⁰ In the digital music sector, cloud computing and the shift from ownership to access-based models of consumption is changing the ways in which consumers access digital content, enabling e.g. subscription to extensive libraries on a streaming rather than download-to-own basis. Digital sales grew by 8.0% globally to US\$5.8 billion and accounted for more than 35% of global recorded music sales in 2012. Although download sales continue to account for a large part of global digital revenues (71%), the number of

³⁸ PWC, Global entertainment and media outlook: 2012-2016 (PWC 2012), <http://www.pwc.com/us/en/pressreleases/2012/digital-now-embedded.jhtml>. "In 2016, 67% of total global spending on entertainment and media growth will be generated by digital spending"
³⁹ [http://epp.eurostat.ec.europa.eu/cache/ITY OFFPUB/KS-SF-12-050/EN/KS-SF-12-050-EN.PDF](http://epp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-12-050/EN/KS-SF-12-050-EN.PDF)
⁴⁰ IFPI (Digital Music Report 2013, <http://www.ifpi.org/content/library/DMR2013.pdf>)

subscribers to music streaming service globally grew in 2012 by 44% to 20 million and in Europe such services already account for 23% of digital revenues (91% in Sweden but only 12% in UK).

The number of on-demand **audiovisual** services available in Europe (film VoD) grew from 142 in 2006 to more than 1300 in 2013. VoD film online accounted for 0.16% of the EU audiovisual market in 2011, growing by more than 60% compared to 2010. 52% of film VoD services are established in another market than the "reception market", and 32% are established in the US.⁴¹ With regard to the TV distribution platforms, the number of IPTV platforms in the EU27 has increased steadily (from 66 in 2008 to 130 in 2011).⁴² In 2011, consumers spent around €600 million on TV and film on demand in Europe.⁴³ Spending on physical video media (DVD/Blue-ray Disc) amounted to € 8.3 billion, down 7.7% compared to 2010. Digital delivery over the internet is still generating fairly small revenues but is growing fast. Nevertheless, broadcasters remain, for the time being, the major distributor of AV content, with 10,000 TV channels available in Europe. Broadcasters' net revenues totalled over €73 billion in 2011.⁴⁴

The **online games** market is one of the fastest growing markets in recent years and is expected to grow further. Spending on games online accounted for approximately €4 billion in UK, Germany, France, Italy, Spain, Netherlands, and Belgium in 2011.⁴⁵ In Europe the online games market grew from US\$ 3.5 billion in 2010 to almost US\$ 4 billion in 2011 and is expected to exceed US\$ 6.5 billion in 2016.⁴⁶

The **e-book** market in the EU was estimated in 2011 to account for not more than 1% - 3% of the book market. By 2013 it is estimated to have grown to 5% of the book market in Germany and almost 13% in the UK.⁴⁷ More and more e-books are available and book publishers increasingly offer digital content such as e-books and apps in addition to printed books, thus entering into direct competition with online retail platforms. European citizens have access to 2 million e-books; and researchers download almost 2.5 billion full text articles every year.⁴⁸ Some platforms still privilege distribution of content over proprietary networks (so called "walled gardens") on the internet.⁴⁹ Educational publishers⁵⁰ also increasingly offer resources (e.g. textbooks) in digital formats throughout the EU.

There are also new ways of creating and distributing **educational resources**. Communities of individuals and institutions are engaging in the production of so-called "Open Educational Resources" (OER). These are materials made available by their creators under open licences allowing (depending on the licence used) these materials to be reused, adapted and redistributed.⁵¹ Around the world different policy initiatives are being implemented to support the development of OER.⁵²

New technologies have also exponentially increased the number of citizens that access **heritage** online. For instance, the cinematographic archives of Cinecittà Luce on YouTube have reached more than 6 million views and more than 16.000 subscribers since July 2012.

⁴¹ Data from European Audiovisual Observatory

⁴² MAVISE/European Audiovisual Observatory, Yearbook 2011, <http://www.obs.coe.int>

⁴³ European Audiovisual Observatory

⁴⁴ European Audiovisual Observatory

⁴⁵ Newzoo, <http://www.newzoo.com>, Infographics/ Keynotes.

⁴⁶ PWC, Global entertainment and media outlook, 2012-2016 (PWC 2012)

⁴⁷ Rudiger Wischenbart, The Global eBook Report, 2013

⁴⁸ <http://www.cmba-alliance.eu/>

⁴⁹ The formats offered by certain major multinational retailing platforms (e.g. Amazon) are also inextricably linked to their proprietary devices and are not interoperable with other formats or capable of being used on devices of other vendors (e.g. e-books).

⁵⁰ Educational publishing represents between 15 and 20% of the publishing market at EU level.

⁵¹ The Open Courseware Consortium now has more than 30 thousand complete modules available; the number of Massive Open Online Courses MOOCs, a relevant new phenomenon in higher education has rapidly grown to 394 in Europe alone in January 2014, while it was 357 in October; the number of individuals (a vast majority of which are teachers) sharing resources and experiences through the OpenEducationEuropa.eu is around 40 thousand.

⁵² In its Paris Declaration of 2012, UNESCO made a clear pledge for authorities to actively promote OER. The recent Communication from the Commission on "Opening up Education" also encourages the use of OER. Communication from the Commission "Opening up Education: Innovative teaching and learning for all through new Technologies and Open Educational Resources", 25 September 2013, COM(2013) 654 final, see: http://ec.europa.eu/education/news/doc/openingcom_en.pdf

2.2.3. *The internet value chain and the role of copyright in the internet economy*

Digital technologies and new distribution channels brought about important changes in the market and in particular in the flow of revenues in the value chain (Figure 1).⁵³

- (a) New **intermediaries** between creators, creative industries and consumers appeared in the value chain, e.g. online services such as Amazon, Deezer, Xbox, news publishing platforms and horizontal internet platforms (e.g. YouTube, Facebook).
- (b) As regards **remuneration**, creative content is rewarded in a variety of ways, including directly by consumers (e.g. iTunes or Spotify premium services), or via a share of advertising revenues (e.g. most YouTube channels). New technologies allow intermediaries to track and analyse user behaviour (“big data” analysis), profile consumers and target advertising at them. Revenues generated through such advertising in turn finance or cross-subsidize the respective internet platforms.
- (c) Direct interaction between creators and consumers (e.g. through blogs) is also gaining importance, as is the use of open licences. As to **content creation**, some digital content can be produced and disseminated at low cost.

These evolutions, however, do not change the fact that **investment in creative content takes place at the beginning** of this internet-based value chain. Book, newspaper, scientific journal publishers and music, film and TV producers, including broadcasters, invest heavily in the creation of original content. Some examples:

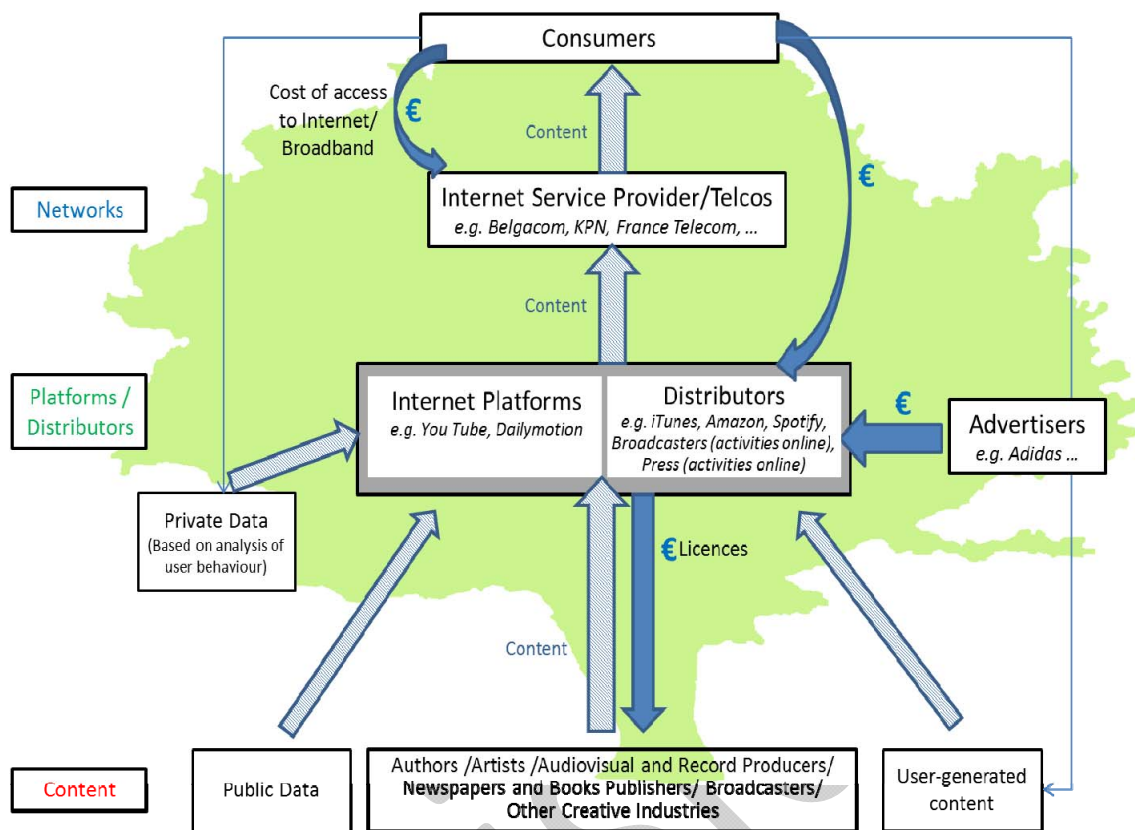
Record companies invest US\$4.5 billion annually – or 16% of the trade value of the industry – in artists and repertoire. 530,000 new titles were issued by **European book publishers** in 2011. It is estimated that **European broadcasters** (commercial and public) reinvest around 40% of annual turnover of €85bn in new content i.e. some €34bn annually in local European content. For comparison, in 2012 **Netflix** invested US\$100 million of its US\$1.5bn turnover (2011) in the production of creative content. It is important to note that **public funding** can also play a role in financing protected content, such as broadcasting, AV works or textbooks⁵⁴.

Figure 1: *Internet value chain*

⁵³ See Annex B for more detailed explanation.

⁵⁴ Public and philanthropic investment is also considerably being used for the production of OER.

The Internet Ecosystem



Despite the increased use of internet-based content distribution platforms, significant differences exist in the availability of online services within the Member States, and **consumers** continue to be frustrated by restrictions as to cross-border access to digital content and cross-border portability. Consumers replying to the public consultation argue that they are regularly confronted with access restrictions from certain service providers depending on the geographic location of their IP-address and those seeking to buy copyright-protected content are often only allowed access to online stores in their country of residence. Traditional media are going through a transition period. Monetising content in the digital environment presents a challenge, as does the development of viable business models in an environment where licensed services compete with illegal services free-riding on protected content. The transition to digital content presents also opportunities and challenges for the use of protected content by education and cultural heritage institutions, in an environment where their activities may, in certain cases, become close to those undertaken by commercial distribution channels.

According to a recent survey,⁵⁵ 96% of EU citizens agree that it is important that inventors, creators and performing artists can protect their rights and be paid for their work but at the same time 42% of EU citizens (and 57% of 15-24 year old) consider it is acceptable to download or access copyright-protected content illegally when it is for personal use.⁵⁶

⁵⁵ 2013 OHIM IP perception survey

⁵⁶ This is also related to some users' sentiment that IP mainly serves the interests of elites, mentioning large companies and successful artists as the primary beneficiaries of the IPR rules and their enforcement (2013 OHIM IP perception survey).

2.3. The legal framework for the dissemination of content online

Directive 2001/29/EC (the "InfoSoc Directive") was designed to update copyright to the Information Society and to implement the two 1996 WIPO Internet Treaties - the WIPO Copyright Treaty (WCT)⁵⁷ and the WIPO Performances and Phonograms Treaty (WPPT).⁵⁸ It harmonises several aspects of copyright that are essential to the making available online of works and other protected subject-matter. The Directive has to be read in conjunction with all other Copyright Directives,⁵⁹ including the recently adopted Directive 2014/26/EU on Collective Rights Management (the "CRM Directive"). In terms of the definition of rights and of exceptions, it has to be read together with Directive 96/9/EC (the "Database Directive"), Directive 2009/24/EC (the "Software Directive"), Directive 2006/115/EC (the "Rental and Lending Directive") and Directive 2012/28/EU (the "Orphan Works Directive"). As regards enforcement, procedures and remedies against infringements of copyright are foreseen in Directive 2004/48/EC⁶⁰ on the enforcement of Intellectual Property rights (IPRED). Finally, Directive 2000/31/EC (the "E-commerce Directive"), also contains provisions which are relevant to the enforcement of copyright.⁶¹

The Directives also reflect the obligations of Member States under the Berne Convention, and the Rome Convention, and of the EU and its Member States under the WTO TRIPS Agreement and the 1996 WIPO Internet Treaties. Since the conclusion of the InfoSoc Directive, the EU has also concluded another two WIPO Treaties: the Beijing Treaty on the Protection of Audiovisual Performances⁶² and the Marrakesh Treaty to improve access to published works for persons who are blind, visually impaired or otherwise print disabled.⁶³ Moreover, many provisions of EU law are reflected in agreements concluded by the EU with a large number of third countries.⁶⁴ These provisions, including the terms of protection, legally bind the EU and those third countries.

According to Article 167(4) of the Treaty on the Functioning of the European Union (TFEU), the Union shall take cultural diversity aspects into account in its actions under the other provisions of the Treaties. Moreover, the UNESCO Convention on the protection and the promotion of the diversity of cultural expressions to which the EU is a Party recognises the importance of intellectual property rights in sustaining those involved in cultural creativity.⁶⁵

The InfoSoc Directive harmonises several rights of authors and neighbouring rightholders⁶⁶ which are essential for the digital transmission of works and other protected subject-matter online. The Directive also seeks to harmonise "exceptions and limitations" to these rights,

⁵⁷ <http://www.wipo.int/treaties/en/ip/wct/>

⁵⁸ <http://www.wipo.int/treaties/en/ip/wppt/>

⁵⁹ http://ec.europa.eu/internal_market/copyright/acquis/index_en.htm

⁶⁰ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights;

[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0048R\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0048R(01):EN:HTML)

⁶¹ Further information on the legal framework is presented in Annex C.

⁶² <http://www.wipo.int/treaties/en/ip/beijing/>

⁶³ http://www.wipo.int/edocs/mdocs/copyright/en/vip_dc/vip_dc_8_rev.pdf

The UN Convention on the Rights of Persons with Disabilities that is now part of the EU legal order also contains obligations for the State Parties, concerning access to information and cultural material (Articles 21 and 30).

⁶⁴ <http://ec.europa.eu/trade/policy/countries-and-regions/agreements/>

⁶⁵ Preamble to the UNESCO Convention on the protection and the promotion of the diversity of cultural expressions.

⁶⁶ Producers, performers and broadcasters are holders of so-called "neighbouring rights" in performance and productions.

although most of those are optional for the Member States to implement. The implementation has to comply with the “three-step test”.⁶⁷

3. PROBLEM DEFINITION

This IA accompanies a broad policy paper and accordingly identifies a range of issues in the field of copyright that may constitute actual or potential problems for the completion of the Digital Single Market. It concentrates on selected provisions of the EU copyright *acquis* which are relevant in this respect, notably those contained in the InfoSoc Directive and – as regards certain limitations and exceptions- in the Software Directive, the Database Directive and the Rental and Lending Directive. This is obviously without prejudice to the fact that future discussions and possible legislative intervention might want to consider further issues (including review of legal texts other than those explicitly discussed in this IA).

The issues presented in this chapter are specifically linked to the copyright legal framework. It should be highlighted that these issues are not related to an incorrect implementation or enforcement of the existing Directives by Member States but are rather triggered by the development of digital technologies and the resulting uncertainties in the legal framework.

This chapter discusses the identified matters one by one. However, it needs to be underlined that the identified problems differ in a number of ways:

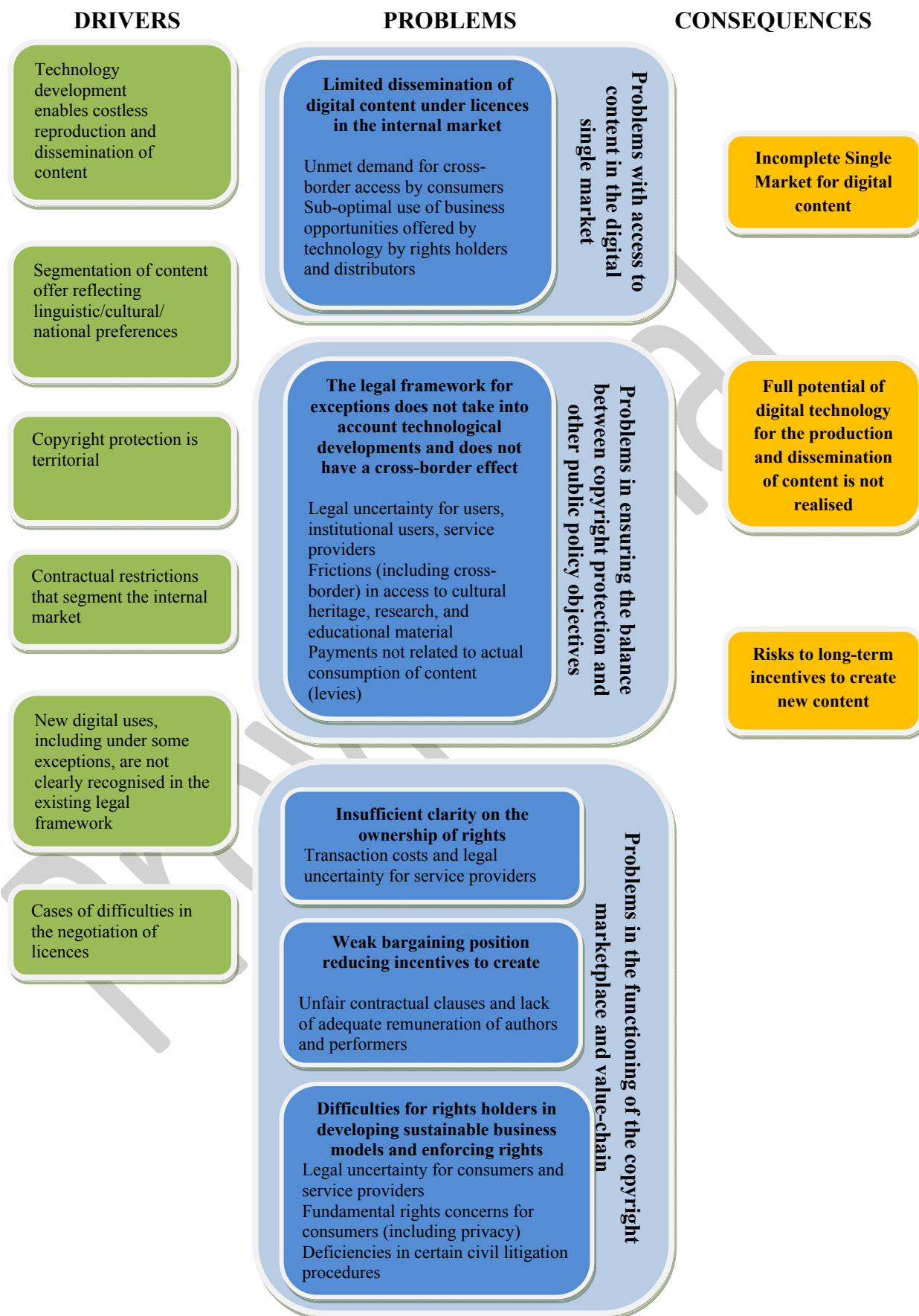
- Firstly, there is an important difference between the maturity of the different areas. In some cases (e.g. preservation, disabilities) the problems are clear and defined; in others (e.g. remuneration of creators) analyses are currently underway.
- Secondly, the importance of the identified problems from the perspective of the functioning of the internal market differ. For example, certain contractual restrictions can severely limit cross-border access to content and provision of services (e.g. territorial restrictions), while other issues may be relevant.
- Thirdly, the relative importance of intervention via copyright legislation also differs in the different problem areas. For example, the lack of cross-border effect of some of the exceptions can only be remedied via legislation, while copyright clearance is only a tiny fraction of the costs of mass digitisation.

The identified problems are summarised in Figure 2 below. The above considerations are taken into account in the relevant sections of this document.

⁶⁷

The exceptions may only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

Figure 2: Problem tree



3.1 Limited dissemination of digital content under licences in the internal market

In a 2011 Eurobarometer survey, 19% of the respondents indicated their interest in watching or listening to content from other EU countries and 27% in watching or listening to content from home when abroad. Interest from EU citizens living in another EU country is 40%. 31% of Europeans are prepared to pay for content from other EU countries.⁶⁸

Studies show that there are several population groups that could be interested in cross-border AV media services:⁶⁹ e.g. 12.9M intra-EU migrants (2008), approx. 1M short-term migrants, 3.7M travellers (intra-EU tourism - 2009). There are 108M people proficient in or learning foreign languages in Europe. A recent survey on the profile of European film viewers shows that nearly 60% of viewers get films free online (a significant proportion is pirated) and one of the main reasons given for European films is the lack of availability (44% of respondents).⁷⁰ Consumers replying to the public consultation repeatedly report problems as to the dissemination of creative content across borders, in particular in some sectors.

Despite these indications of significant demand, and the rapidly growing variety of online services available to citizens that was confirmed by the data submitted in the public consultation, accessibility varies. Some services are available in many or all Member States, e.g. via localised webstores. Other services may be available only through a single website which, however, may allow for cross-border access, regardless of where the customer is established or resides. Many services are on the other hand (a) available only in a single Member State or in a limited number of Member States; and/or (b) available only to customers residing in a specific Member State (i.e. not allowing cross-border access). In the public consultation, consumers call for a review of the copyright framework in this respect while Member States consider that there is no major problem or an immediate need to intervene.

Sub-sections 3.1.1 to 3.1.3 describe the copyright-relevant aspects of these territorial limitations. However, due to the private and hence confidential nature of licensing agreements, data is not publicly available either on their financial clauses or on related transaction costs.

3.1.1. Territoriality of copyright

Copyright is territorial, i.e. rights under copyright are granted by national law and not as unitary rights at EU level. The **geographical scope** of each of these 28 rights is limited to the territory of the relevant Member State.⁷¹ When distributing and communicating content on the Internet across borders, an online transmission may fall under the territorial scope of the exclusive right granted by the Member State in which the transmission is initiated and also in which the transmission is received. A service provider responsible for such a transmission must therefore acquire a licence in the Member State in which it initiates the transmission and also, in principle, in all Member States to which the content is transmitted.⁷²

⁶⁸ Special Eurobarometer 366, http://ec.europa.eu/public_opinion/archives/ebs/ebs_366_en.pdf

⁶⁹ http://ec.europa.eu/internal_market/media/docs/elecpay/plum_tns_final_en.pdf

⁷⁰ http://bookshop.europa.eu/is-bin/INTERSHOP.enfinity/WFS/EU-Bookshop-Site/en_GB/-/EUR/ViewPublication-Start?PublicationKey=NC0414085

⁷¹ As exclusive rights, exceptions to these rights are also territorial. This is discussed in Section 3.2.

⁷² The recent case law of the Court of Justice of the European Union (CJEU) suggests that a relevant criterion to localise where an infringing act of making content available to the public occurs is the “targeting” of persons in another Member State. See in particular Case C-173/11 (Football Dataco vs Sportradar) and Case C-5/11 (Donner) for copyright and related rights, and Case C-324/09 (L’Oréal vs

The requirement to clear rights country by country and the ability of rightsholders to take action against alleged infringers on a country-by-country basis have an impact on the freedom to provide and receive services across borders, and on the Digital Single Market in general. The territoriality of copyright increases transactions costs for online service providers, to the extent that the rights for the different territories cannot be cleared by a single transaction (e.g. with a producer or a CMO). Service providers responding to the public consultation argue that the main problem in the clearing of rights (including for cross-border services) is the lack of information on content (who represents particular rights in works, for which territories, etc.). Indeed, whereas the territoriality of copyright does not prevent the possibility to grant multi-territorial licences for a particular work, difficulties arise when the rights are in different hands (for a single or different territories). This problem has most frequently arisen in the licensing of authors' rights in musical works⁷³, hence the CRM Directive includes a title on the multi-territorial licensing of online rights in musical works. In the public consultation, many stakeholders, including rightsholders and CMOs, argue that before any other steps are taken, the effects of this Directive must be assessed.

Contrary to service providers, rightsholders argue that limited cross-border accessibility of content does not result from the territoriality of copyright or from problems in licensing but point to business decisions of service providers (see in Sub-section 3.1.2). Book and music publishers as well as record producers underline that they frequently grant multi-territorial licences.⁷⁴

Member States who responded to the public consultation⁷⁵ generally consider that there is no major problem of lack of cross-border access to content online. They consider that market-based solutions, together with the implementation of the CRM Directive and the case law of the CJEU should contribute to gradually improving the cross-border availability of content.

3.1.2. *Contractual restrictions that segment the internal market*

Even when rightsholders have all the rights to issue multi-territorial or pan-European licences, they may issue **exclusive licences with limited territorial scope**, e.g. for the territory of a Member State.

In practice, the licensing of rights functions very differently in different sectors. Licensing on the basis of territorial exclusivity (i.e. a single licensee is exclusively authorised to market a specific work in a specific Member State or territory) is more prevalent in the AV sector than in others. In the public consultation, film producers and broadcasters argue that there is a need for territorial restrictions in licences; otherwise they would not be able to pre-finance productions (on the basis of payments by distributors). These stakeholders, together with authors, claim that there is very limited demand for cross-border services due to cultural and

eBay) for trademarks. See also Ginsburg, Where Does the Act of 'Making Available' Occur? (<http://www.mediainstitute.org/IPI/2012/102912.php>). With regard to questions related to jurisdiction, the Court, has differentiated according to which provision of the Brussels I Regulation was applicable, see joined Cases C-585/08 and C-144/09 (Pammer and Hotel Alpenhof), Case C-170/12 (Pinckney vs KDG Mediatech), and pending Case C-441/13 (Pez Hejduk).

⁷³ A 2012 study, undertaken by KEA and IBBT-SMIT Institute of the Vrije Universiteit Brussel (VUB) estimated that online music services face significant transaction costs - costs which are additional to the costs of licences themselves: pan-European services which offer more than one million titles can face transaction costs of up to €260,000 and may require as much as six employees (full-time equivalent). The identification of rightsholders can take up to six months, and negotiations up to two years.

⁷⁴ Further details on territoriality are presented in Annex E.

⁷⁵ 11 Member States responded to the public consultation.

linguistic differences between Member States; therefore there is no business case for service providers. CMOs also explain that the demand for multi-territorial licenses from service providers is limited, especially in the AV sector. Requests for multi-territorial licences are more common in the music, fine arts and artistic photography sectors.

As regards premium AV content (e.g. new films, shows, series or live sports), high upfront investment is required, and rights are usually licensed with territorial exclusivity.⁷⁶ In such a situation, the economic exploitation rights for a specific Member State are licensed exclusively to a single national distributor, and the rightholder (usually the film producer) guarantees not to authorise any other distributor to market the concerned content in that Member State. In turn, the national distributor undertakes not to provide cross-border access to the content (in order not to disturb the territorial exclusivity granted to other national distributors).

As a consequence of this licensing practice, different persons hold the various national rights in the EU and acquiring a pan-European licence through a single entity is no longer possible.⁷⁷ Contractual clauses that guarantee absolute territorial exclusivity allow for effective price discrimination along national borders and are suitable to maximise the revenues of rightholders and national distributors. They are, in some cases, linked to the financing of a film production through the pre-sale of national exploitation rights (before production starts). These clauses also segment the internal market along national borders⁷⁸ and limit cross-border access to copyright-protected content. Limited availability creates frustration for consumers who expect to access and carry content across borders and are often not properly informed about territorial limitations.

The distinction between agreements based on territorial exclusivity and those based on absolute territorial exclusivity⁷⁹ is a general principle under EU competition law, applicable to all vertical agreements, including agreements for premium content, which is relevant in this context. Accordingly, rightholders and service providers may, under certain circumstances, agree on allocating exclusive territories to single distributors with regard to **active** sales. On the contrary, unless other circumstances justify the finding that such an agreement is not liable to impair competition, they are not allowed to exclude the possibility of **passive** sales.⁸⁰ The negative effects of contractual agreements based on absolute territorial exclusivity (that prohibit all cross-border sales including passive sales) can currently only be addressed

⁷⁶ This is facilitated by the fact that most of the relevant rights in premium AV content tend to be held by one rightholder (the film producer).

⁷⁷ To a lesser extent, differences in who holds the national rights required for the economic exploitation of creative content also derive from differences in the national rules on authorship and transfer of rights which are hardly harmonised at EU level. For example, the rules on which persons contributing to the creation of a film are to be regarded as authors may vary at national level (e.g. whether the cameraman or the cutter is a film author).

⁷⁸ In the Premier League Cases, the CJEU reiterated that the freedom to provide services is for the benefit of both providers and recipients of services. The Court also stated that absolute territorial exclusivity results in artificial price differences between the partitioned national markets. According to the Court, such partitioning and such artificial price differences are irreconcilable with the fundamental aim of the Treaty, which is the completion of the internal market. While intellectual property is, in principle, capable of justifying a restriction on the free movement of services, restrictions can be allowed only to the extent to which they are justified for the purpose of safeguarding the specific subject-matter of the intellectual property concerned. The specific subject-matter of copyright demands that rightholder are remunerated appropriately for the exploitation of their works. The specific subject-matter of copyright, however, does not guarantee the possibility to demand the highest possible remuneration. A premium paid to rightholders in exchange for absolute territorial exclusivity goes beyond their appropriate remuneration.

⁷⁹ Understood as eliminating all competition from third parties, including from parallel importers and exclusive licensees for other territories (passive sales).

⁸⁰ Or “spillover”, understood as sales resulting from a service provider’s response to unsolicited requests from individual customers residing outside the territory for which the service provider acquired the exclusive licence.

through the enforcement of competition law.⁸¹ Competition law decisions provide industry-wide guidance for companies as to their agreements' compliance with EU competition rules but assessments are necessarily fact-specific and it is enforced *ex post* on a case-by-case basis.

Independently from possible territorial exclusivity clauses in licence agreements between rightholders and distributors, restrictions on cross-border access may also result from **contractual limitations imposed on consumers by service providers**. Service providers acknowledge that even where they acquire a multi-territorial or pan-European licence, they may allocate customers to a specific national store for different reasons (release windows, costs of contextualisation and versioning, languages for customer service, consumer protection, different VAT rates, levies, etc).⁸²

3.1.3. *Exhaustion of rights*

There is uncertainty as to whether the principle of exhaustion of the distribution right applies in the digital environment, as it does to physical goods. Consumers who purchase a physical copy of a work are generally free to dispose of that copy e.g. via reselling or giving it as a gift.⁸³ Online “download-to-own” services allow the customer to use the acquired content (e.g. the digital copy of a film) for an unlimited period of time and therefore resemble, to some extent, sales contracts in the physical world (e.g. the purchase of a DVD). The question arises whether customers should equally be able to dispose of a copy acquired via the online service.⁸⁴ As regard computer programs, the CJEU rejected in Case C-128/11 (Oracle vs. UsedSoft), a distinction between the physical and online distribution of copies. The Court however stressed that its ruling was specific to the framework established by the Software Directive.

Exhaustion in the online environment raises issues that do not arise in the physical environment. Firstly, it remains to be seen how persons reselling a digital copy can be prevented from keeping and using a copy of the work afterwards. Effective technical protection measures such as “forward-and-delete” systems have hardly been deployed and, probably more importantly, may not be accepted by users. Secondly, the implications of the possible creation of a second-hand market for copies of perfect quality that never deteriorate are difficult to assess. Finally, the question of reselling digital content may become less relevant considering the shift from “download-to-own” services to “access-based-services” which are not based on transactional purchase. It is also important to note that many services offer the possibility for subscribers to share digital files (e.g. sending a newspaper article or sharing a playlist with friends) as they would do in the “physical world”.

In the public consultation, consumers generally argue that the current legal situation results in an unequal treatment of physical and digital works and consider that they should be able to resell digital content. On the contrary, rightholders and CMOs consider that allowing the resale of digital files would have very serious negative consequences for the market as it would result in a *de facto* second-hand market of the same quality of the first market

⁸¹ In this regard, and following the Premier League/Karen Murphy judgment, on 13 January 2014, the Commission initiated formal proceedings territorial licensing restrictions for pay-TV content.

⁸² Further details are presented in Annex E.

⁸³ This is possible because of the principle of exhaustion of the distribution right according to which rightholders cannot oppose the resale of a copy when the first sale in the EEA was made with their consent.

⁸⁴ To date, rightholders have usually been in a position to control the further dissemination of digital copies of their works after first sale.

(competing with it and therefore pulling down prices dramatically). They argue that it is impossible to ensure that the reseller destroys the original copy and that the principle of exhaustion applied to digital content would seriously hamper enforcement as it would practically legalise piracy. Service providers are divided on this issue, with some of them recognising the complexity of the issue and the need for further analysis. The need for further analysis and evidence is also highlighted in the responses from Member States, which point to the difficulties and risks associated with the application of exhaustion to digital copies.⁸⁵

3.2. The legal framework for exceptions does not take into account technological developments and does not have a cross-border effect

Possibilities for consumers to access and use digital content have multiplied in the last decade in line with developments in digital technologies. User expectations, including as to how digital technologies can be harnessed to achieve public policy objectives, have grown accordingly and calls for new exceptions to exclusive rights have been made. Indeed high transaction costs associated with new uses and media may in theory justify new exceptions e.g. where the market is slow to provide permissions efficiently. Yet, any analysis of whether exceptions are justified has to consider whether innovative market mechanisms are equally likely to appear and solve the problem in the near future.

Two main concerns arise with regard to the legal framework for exceptions⁸⁶: A) it does not take full account of technology developments and B) it does not allow users to benefit from the exception on a cross-border basis. The analysis presented in this IA focuses on the exceptions which are considered as the most relevant for the internal market.

A) A number of questions brought by **technology developments** relate to the scope of the exceptions. Firstly, some of the exceptions may be out of date in light of consumer patterns of technology use (e.g. regarding library collections). Secondly, as uses and services have changed and developed, there is in some cases a lack of clarity as to what is allowed (e.g. text and data mining, private copying and cloud computing-based services) under certain exceptions. Thirdly, questions arise as to whether new internet-enabled activities (that are already flourishing in some cases) need to be covered by new exceptions (e.g. user generated content, e-lending): these issues become all the more complex since in some cases the beneficiaries of the exceptions may be commercial providers of services (internet platforms), or could be developing functions which compete with the commercial provision of services (libraries for the distribution of their collections). The effect on rightholders, in terms of prejudice to their interest and effects on the normal exploitation of their works, needs to be carefully assessed.

B) The optional character and broad formulation of most existing exceptions constitute another area of concern. As a result, there is insufficient harmonisation and fragmentation of the scope and conditions of the exceptions as implemented by the Member States, as also confirmed by many stakeholders in the public consultation. This stands in the way of **cross-border effect** for Member States' national exceptions. To ensure the cross-border effect of exceptions to exclusive rights, mandatory exceptions with a high degree of details in their

⁸⁵ Further details are presented in Annex M.

⁸⁶ Exceptions foreseen by the EU legal framework are governed by the InfoSoc Directive (Article 5), the Directive on the Legal Protection of Computer Programmes (Directive 2009/24/EC, Articles 5 and 6), the Directive on the Legal Protection of Databases (Directive 96/9/EC, Articles 6 and 9), and the Directive on Rental Right and Lending Right (Directive 2006/115/EC, Articles 6 and 10).

functioning are normally needed⁸⁷. Unless this happens, content which is made available in one territory under an optional exception cannot be legally accessed in another Member State under the terms of that exception (where the Member State has not introduced the exception or has done it to a different extent). Institutional users mention problems for cross-border cooperation in the research area or inter-library loans. Some service providers also argue that the differences in the implementation of exceptions make it difficult to fully assess the applicable legal framework, in particular when negotiating multi-territorial licences and distributing products or providing services across borders. While most Member States who responded to the consultation consider that the optional nature of the exceptions should remain as their use and implementation has to be in line with national cultural and legal traditions, others see value in harmonising certain exceptions and ensuring their cross-border effect.

Independently, as a more general point, some stakeholders criticise the (alleged) **lack of flexibility** in the EU and national copyright laws due to the closed list of exceptions in the Copyright Directives. The generic formulation of most exceptions gives Member States broad leeway, however the closed list prevents them for introducing new exceptions. Users, institutional users and some service providers argue that the closed list of exceptions cannot keep up with technological changes and consequently hinders the emergence of new services and business models. They plead for the the introduction of a supplementary degree of flexibility through an open norm in addition to the existing list of exceptions in the national copyright systems, as well as at EU level. Rightholders and CMOs however consider that the current list, complemented by interpretation by national courts and the CJEU, respects Member States' legal traditions and provides the necessary flexibility and legal certainty for all stakeholders. Many of them argue that the introduction of an open norm will result in a high level of legal uncertainty in the market and increased litigation. A number of stakeholders indicate that the introduction of further flexibility would reduce the level of harmonisation of the exceptions in the EU. The majority of Member States responding to the public consultation consider that the existing system is sufficiently flexible and are opposed to further harmonisation of the exceptions. The divergent views illustrate the difficulties of the debate; in particular as to finding a balance between flexibility, legal certainty and the smooth functioning of the internal market.

3.2.1. Linking and browsing

Questions related to the legal status of linking and browsing concern primarily the definition of the relevant rights i.e. the right of communication to the public and the right of reproduction and the extent to which there is a need to establish new exceptions (notably for linking) or clarify the application of existing ones (notably for browsing).

There have been several cases before the CJEU⁸⁸ raising the question of whether the provision of a clickable link constitutes an act of communication to the public/making available to the public subject to the authorisation of rightholders. According to a recent ruling by the CJEU, the provision of a hyperlink to content that is freely available in the Internet constitutes an act of communication to the public (within the meaning of Article 3 of the Infosoc Directive) but it is not subject to the authorisation of the rightholder as the public does not constitute a "new

⁸⁷ This is for instance the case with the mandatory exception for technical copies in Article 5(1) of the Infosoc Directive.

⁸⁸ Cases C-466/12 (Svensson), C-348/13 (Bestwater International) and C-279/13 (C More entertainment).

public".⁸⁹ This case law helps clarifying some, but not necessarily all of the issues related to the provision of hyperlinks. For example, it is still necessary to clarify issues such as framing or the provision of links to a website that is only accessible to a certain public, e.g. on the basis of a subscription.

According to users and service providers responding to the public consultation, under no circumstances should linking (e.g. surface linking, deep linking, embedding) be subject to the authorisation of rightholders. They argue that links only facilitate access to works that are already publicly available. On the contrary, rightholders consider that authorisation should be required at least for embedded or framed links within websites as in such cases the owner of the website by displaying works may generate advertising revenue. CMOs argue that the authorisation of the rightholder is required whenever the linking results in a communication to the public of the copyright-protected work. A majority of Member States responding to the public consultation believe hyperlinking is fundamental to the internet and social media usage. They consider that linking to legally published material does not in itself infringe copyright.

Moreover, a user browsing on the Internet (e.g. viewing a web-page) regularly creates temporary copies of works and other subject-matter protected under copyright on the screen and in the 'cache' memory of his computer. A question has been referred to the CJEU⁹⁰ as to whether such copies are always covered by the mandatory exception for temporary acts of reproduction provided for in Article 5(1) of the InfoSoc Directive. Until the CJEU gives its judgment in this case, there remains legal uncertainty as to how copyright extends to browsing for users and rightholders alike.

Member States responding to the public consultation consider that the guidance from the CJEU should suffice to clarify these issues.⁹¹ Users, service providers and most institutional users consider that browsing should not require rightholders' authorisation, as it amounts to viewing, reading and listening. Service providers argue that acts of browsing do not have separate economic value. On the contrary, publishers, producers and broadcasters consider that browsing should be lawful under the condition that the work itself was made available with the rightholders' consent. Authors and performers hold that viewing websites should not require authorisation as long as it does not have its own economic value (e.g. commercial services offering viewing require authorisation).

3.2.2. *Library collections*

Libraries benefit from a broadly-worded exception to the reproduction right at EU level for specific acts of copying e.g. for **preservation** purposes. But, as also highlighted by institutional users (libraries, archives, museums, other cultural heritage institutions) in the public consultation, the corresponding national implementations vary greatly, and are not always clear on the relevant conditions: the purpose, whether format-shifting is allowed, the types of works covered, the type of beneficiary institutions, the number of copies that can be

⁸⁹ In that case (C-466/12 -Svensson) , which involved the provision of hyperlinks to articles on a web site that was freely accessible to the general public, the CJEU said that the provision of such links constituted an 'act of communication' within the meaning of Article 3 of Directive 2001/29/EC. However, since the users to which the links were communicated could have accessed the works on the website on which they had originally been made public, the criterion of communication to 'a new' public was not fulfilled. The CJEU concluded that there was therefore no communication to the public in accordance with the mentioned Article 3.

⁹⁰ Case C-360/13 (Public Relations Consultants Association Ltd). See also http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0202_PressSummary.pdf

⁹¹ Further details are presented in Annex N.

made.⁹² Five Member States⁹³ take a restrictive approach with respect to the number of copies that can be made and to format-shifting. National restrictions impair the ability of cultural institutions to take part in cross-border cultural projects, and may impair the ability of some institutions to outsource digitisation activities (when these occur outside the Member State in which the library is located).⁹⁴ Rightholders generally argue that the preservation exception is fit for purpose and sometimes point to budgetary constraints as a principal obstacle to digitisation for preservation. In some cases they lament that beneficiary institutions invoke preservation purposes as a way to evade rightholder remuneration, even when copies are made for other purposes. Print publishers and CMOs also sometimes stress that a distinction must be made between heritage/deposit libraries, with a clear preservation mission, and other libraries. While some Member States believe that there is no need to expand the scope of the current exception, others highlight the importance of a technologically neutral formulation of exceptions in this area.

The InfoSoc Directive also enables Member States to allow libraries to provide for the **consultation of their collections for purposes of research and private study** without the authorisation of rightholders, if the consultation occurs on the premises of the library. As is also generally claimed by institutional users and some end-users, in a digitally-connected society restriction of consultation to physical premises misses the opportunity offered by technology to provide efficient access for research and private study purposes.⁹⁵ Rightholders consider that licensing for remote access is already widespread and should be further encouraged. In the Scientific, Technical and Medical (STM) sector where publications have been available in digital format for long; rightholders and libraries have entered into agreements to enable remote consultation to collections, thus internalising in their arrangements the positive externalities associated with research and private study.⁹⁶ Nonetheless, terms may not have been agreed with publishers for all back catalogue collections of libraries e.g. pre-dating the digital age. For these works, institutions and individual users (students and researchers) are unable to exploit the efficiencies inherent in digital distribution, and the positive externalities generated by research and private study are not realised. Generally, institutional users are critical of the current licensing solutions for remote access, which they often describe as characterised by unbalanced power relations and sometimes negatively impacting collection development, duration of access, permitted uses. Some also highlight difficulties in negotiating licences as such. Among Member States, some believe that there is no reason to expand the scope of the current exceptions, while others are open to factoring in technological developments allowing for remote use, with the due safeguards for rightholders.

⁹² See Annex G(i) for further details.

⁹³ Germany, Italy, Ireland, Romania, Malta

⁹⁴ Study on the application of Directive 2001/29/EC on copyright and related rights in the information society, De Wolf & Partners, http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf

⁹⁵ At least one Member State, The Netherlands, interprets this exception as to cover distant consultation in a "closed network" (See chapter 3.12.1 of the 3rd report on the implementation of the 2005 EP and Council Recommendation on Film Heritage)

⁹⁶ By 2008, 96% of (STM) and 87% of arts, humanities and social sciences journals were accessible electronically (http://www.stm-assoc.org/2009_10_13_MWC_STM_Report.pdf) and by 2011, 60% of academic spending on content was in digital format (Outsell's Information Management Benchmark Survey, 2012). Accordingly university and research libraries (providing primarily access to scholarly content) benefit to a certain extent from institutional subscription licences which enable them to provide access to all licensed content across the range of their IP addresses i.e. typically across the whole of a university's network (campus) and – if the university has adopted appropriate protocols, products and software (Virtual Private Networks, EZProxy) then from any computer anywhere.

Unlike scholarly publications, digital markets for ‘trade’ publications (books for leisure or entertainment) are only just beginning to emerge in the EU, with e-books making up only 2% of the book market.⁹⁷ **E-lending** is not possible under an exception in the EU. Most rightholders are of the view that e-lending can have a substantially different economic impact as compared to public lending in the analogue world (approximating the position of the libraries to that of commercial book distributors) and should therefore rely upon licensing solutions. Publishers and libraries are in the early stages of experimenting with different business models for e-lending including the use of different contractual provisions to introduce “frictions” in e-lending. These are conditions designed to mimic some of the constraints associated with the lending of physical copies of books in order that e-lending does not undermine the normal channels of business since the effect of libraries providing essentially unrestricted online access to e-books (even as a “public” service) would be to supplant the normal sale of e-books. They include, variously, limiting the number of allowable simultaneous consultations, setting a maximum number of consultations before a new purchase is triggered,⁹⁸ requiring download on the premises during business hours, or holdback periods after publication.

Institutional users report significant barriers for public and research libraries in relation to licensing agreements for e-lending. In particular, they argue that libraries do not always succeed in negotiating licence agreements with publishers e.g. in the UK in July 2013, only two of the “Big Six” publishers offered their e-books to libraries;⁹⁹ or they complain that insufficient titles are offered to them or that the titles are out of date. Also, one experimental business model in Denmark, which enabled easy loans for extended periods of time and no waiting period,¹⁰⁰ was discontinued as it appeared to cannibalise the emerging e-book market.¹⁰¹ Member States generally acknowledge the need to find solutions so that citizens do not miss out from the possibilities offered by e-lending, while safeguarding the interests of rightholders.

New technologies are an opportunity for libraries and public memory institutions to exponentially increase visibility of their collections. “**Mass digitisation**” is normally used to refer to efforts by institutions such as libraries, archives, museum and other heritage institutions to digitise the entire content or part of their collections, having the objective of preserving cultural heritage with a view to making it available to the public.

⁹⁷ The e-book market is most developed in the UK (around 10%, probably because of language reasons and proximity to US market which is already very developed, more developed offer and limited presence of bookshops). In other large Member States the sale of e-books roughly represent only 2 to 3% of the market of the book publishers in trade publishing (Germany, France, Italy). In the US, by contrast, eBook sales represent 31% of the market.

⁹⁸ See the recent agreement concluded between Albin Michel and libraries in France providing that an e-book purchased by a library can be lent 100 times (can be simultaneously) a year. The e-books available for lending are selected by the publishers and should exclude bestsellers. In the UK, as of July 2012, 70% of UK public libraries were engaging in e-lending. In the US a number of pilot projects have been announced, including by Hachette and Macmillan, as well as a partnership between Penguin and 3M to make Penguin’s ebooks available through the New York Public Library and Brooklyn Public Library for a period of one year (announced in June 2012).

⁹⁹ CILIP briefing paper, version 3, July 2013

¹⁰⁰ eReolen.DK, see Annex G

¹⁰¹ The Danish pilot project Ereolen.dk (2011) involved the two largest Danish publishers and a number of local libraries and concerned the lending of Danish trade e-books. The publishers have withdrawn from the pilot project because, at a given moment, the number of loans of e-books reached about six times the number of sales of the same product (CILIP briefing paper, version 3, July 2013).

Current exceptions do not cover the mass digitisation and online dissemination of cultural heritage institutions' collections¹⁰². Thus, cultural heritage institutions need to conclude agreements with rightholders for the digitisation and making available of in copyright works. Considering the amount of works that need to be digitised¹⁰³, the clearance of rights constitutes a challenging task, generating transaction costs for cultural heritage institutions: identification costs to ascertain whether works are in the public domain or not; and search and negotiation costs to find rightholders and to negotiate agreements. The costs vary substantially from project to project and from field to field. However, according to a recent survey among heritage institutions, rights clearance represent less than 2% of the total digitisation costs and licences less than 4%, while the most important costs are linked to technical issues (e.g. digital conversion, metadata creation and archiving process)¹⁰⁴.

In some sectors and in some Member States solutions have been found to minimise transaction costs while protecting the legitimate interests of rightholders.¹⁰⁵ In all sectors the Orphan Works Directive and associated database will lower the costs associated with unlocatable rightholders. In the print sector, the roll-out of the ARROW (Accessible Registries of Rights Information and Orphan Works towards Europeana) system¹⁰⁶ is minimising identification costs for assessing the status of works: public domain, out-of-commerce, or in commerce¹⁰⁷. FORWARD (Framework for a EU-wide Audiovisual Orphan Works Registry) will achieve the same outcome for the cinematographic sector.¹⁰⁸ The implementation of the 2011 Memorandum of Understanding (MoU) on Out-of-Commerce Works¹⁰⁹ is reducing search and negotiation costs by providing a framework for voluntary collective management backed, where necessary, by extended collective management, presumptions of representation or equivalent mechanisms: public sector institutions no longer have to seek out or negotiate with all relevant contributors on an individual basis. In general Member States favour contractual mechanisms and discussions between CMOs and cultural heritage institutions to address the challenges of mass digitisation.

However, the initiatives mentioned above do not provide a systematic solution for the clearance of rights in mass digitisation projects. In the public consultation, libraries and cultural heritage institutions underlined that the requirement of due diligence searches makes the Orphan Works Directive not suitable for mass digitisation projects¹¹⁰. As regards out-of-

¹⁰² The exception under Articles 5(2)c of the InfoSoc Directive does not cover mass digitisation projects: it does not go beyond the notion of “specific acts of reproduction”

¹⁰³ Estimates as to the proportion of collections still to be digitised vary. One study suggests that while museums have digitised some 25% of their collections (with only 3% not to be digitised), libraries and archives, which have greater proportions of their collections which do not need to be digitised (69% and 36% respectively), have nevertheless digitised only 1% of their collections to date. Overall it may be the case that some 58% of the collections of cultural heritage institutions are awaiting digitisation. (see http://ec.europa.eu/information_society/activities/digital_libraries/doc/recommendation/staffworkingpaper1274final.pdf).

¹⁰⁴ ENUMERATE Core Survey 2, see <http://www.enumerate.eu/en/statistics/>

¹⁰⁵ See examples in Annex G(ii)

¹⁰⁶ <http://www.arrow-net.eu/>

¹⁰⁷ One study has shown the search time per book to have decreased from 4 hours to 5 minutes. See <http://www.arrow-net.eu/sites/default/files/Seeking%20New%20Landscapes.pdf>

¹⁰⁸ The European Association of Film Archives (ACE) estimates that 20% of their holdings are orphan.

¹⁰⁹ Memorandum of Understanding on Key Principles on the Digitization and Making Available of Out-of-Commerce Works

¹¹⁰ For example, the Dutch National Library calculated that for clearing 25.000 copyrighted Dutch books from the 1920s at least 50.000 rightholders should be tracked down. Also, in order to clear copyright in articles in digitized Dutch magazines from the period 1900-1940 (1,5 million pages), they would need to search for 14.000 authors. (reply to the public consultation).

commerce works, not all Member States have implemented a legislative framework for licensing based on collective management of rights, which can back up the implementation of the MoU. Secondly, the mechanisms put in place in certain Member States do not have a cross-border effect: e.g. the extended effect of a licence is applicable only in the country in which the agreement was concluded. For cultural heritage institutions in practice, collective licensing arrangements are not emerging in sectors other than print.¹¹¹¹¹²

3.2.3. Private copying

Member States are allowed to implement in their national law exceptions to the reproduction right for copies made for private use and photocopying.¹¹³ Most of them impose levies on goods typically used for such purposes (blank media, recording equipment, photocopying machines, mobile listening devices such as mp3/mp4 players, computers, etc.)¹¹⁴ in order to compensate rightholders for the harm they suffer when copies are made without their authorisation.¹¹⁵ In that context, levies are important for rightholders.

Typically, levies are claimed upon either the production or importation of a product, irrespective of whether they have been paid on the territory of another Member State or whether the product will subsequently be sold to another Member State. As the result of case-law of the CJEU¹¹⁶ levies may no longer be imposed on goods that are acquired for purposes clearly unrelated to private copying (i.e. by professional users). Nevertheless, most Member States continue to apply levies indiscriminately to all sales,¹¹⁷ but seek to mitigate double and undue payments resulting from cross-border transactions, as well as the indiscriminate application of private copying levies, by providing for *a priori* exemption or *ex post* reimbursement schemes. In case of the former, an upfront exemption is offered to those liable for payment. As far as *ex post* reimbursement schemes are concerned, those who paid levies unduly are entitled to seek reimbursement from the entity which collected a levy. However, not all Member States have such schemes in place¹¹⁸ and those that exist are not always

¹¹¹ For example, while an agreement was reached on principles and procedures for the digitisation and making available of European cinematographic heritage works in the context of Licences for Europe, this agreement sets out a voluntary approach for individual rights licensing on a film-by-film basis. Broadcasters have further expressed interest in pursuing collective licensing agreements for the digitisation and making available of the works in their archives. There has been so far no arrangements for the digitisation and making available of audio archives. The Europeana sounds project will run between 2014 and 2017 (see http://ec.europa.eu/information_society/apps/projects/factsheet/index.cfm?project_ref=620591).

¹¹² Further details are presented in Annex I.

¹¹³ Article 5(2)(a) and (b) of the InfoSoc Directive.

¹¹⁴ Member States' approaches diverge as regards the choice of products which are subject to levies. The levels of tariffs applicable across the EU also differ substantially e.g. in 2010 a blank DVD was subject to a levy of € 1.00 in France, € 0.48 in Denmark, € 0.0139 in Germany. In the same year, a mobile phone with an internal memory of 32 GB was subject to a levy of € 36.00 in Germany (provided it was equipped with a touch screen), € 18.00 in Hungary, € 10.00 in France, € 4.34 in Lithuania, and € 0.9 in Italy. (International Survey on Private Copying Law and Practice 201- de Thuiskopie/WIPO 2012)

¹¹⁵ Case C 467/08 Padawan [2010] ECR I 10055, paragraph 22, and Case C 462/09 Stichting de Thuiskopie [2011] ECR I 5331, paragraph 27

¹¹⁶ Case C-467/08 (Padawan vs SGAE); Case C-521/11 (Amazon.com International Sales and Others v Austro-Mechana Gesellschaft zur Wahrnehmung mechanisch-musikalischer Urheberrechte Gesellschaft mbH)

¹¹⁷ Some MS continue to apply levies indiscriminately and provide with a 'mutualisation' system whereby the level of tariff is decreased in order to take into account those entities which acquire products subject to a levy for purposes clearly unrelated to private copying (e.g. Czech Republic, Greece, Poland), International Survey on Private Copying Law and Practice - de Thuiskopie/WIPO 2012

¹¹⁸ For example Austria, Croatia and Estonia neither envisaged an *ex ante* exemption nor *ex post* reimbursement of transactions involving products sold to persons other than natural persons acquiring products in question for purposes clearly unrelated for private copying.

sufficiently efficient making it burdensome and complicated for individuals to claim back the unduly paid levies.¹¹⁹

Distributors and service providers confirm in the consultation that *ex post* reimbursement of unduly paid levies does not function well in practice and that many Member States do not have *ex ante* exemptions schemes, which, as a result, lead to undue payments and create obstacle to the functioning of the internal market. By contrast, CMOs, authors and performers consider that most national levy systems function well and highlight that no undue payments occur where appropriate *ex ante* exemption and *ex post* reimbursement schemes are in place. Most of the Member States who responded to the public consultation agree that incomplete systems create barriers to the functioning of the internal market and call for more harmonisation of criteria and procedures in which levies are set. However, a number of them also emphasises the wide margin of manoeuvre of which they dispose.

With the constant developments in digital technology, access-based business models including certain types of cloud-based services increasingly respond to consumers' expectations. Distributors and service providers almost unanimously consider in this context that levies constitute an anachronism in the digital environment and that the lower transaction costs offered in theory by more efficient digital technologies are not always realised. They argue that, when consumers copy files they have purchased online, to a number of devices (e.g. MP3 files to their computer, tablet and/or mobile phone), instances of 'double-dipping' occur whereby the consumer pays twice for one and the same copy: firstly by virtue of the contractually agreed licence fee (the access cost) and secondly through the 'rough justice' levy imposed on certain categories of devices. In the public consultation distributors, service providers and consumers point further to that in many cases, payments made by end-users are not related to the actual consumption of copyright protected content¹²⁰ even though technology increasingly enables the precise quantification of copies made by any given individual. They further argue that the levels of private copying levies consumers pay on media devices (which enable private copying) in some Member States are higher than they would have been otherwise, as they take into account all copies made by end-users, irrespective of whether those copies could have been already remunerated via licensing agreements or not. These views are not shared by CMOs, authors and performers which maintain that the claim of 'double-dipping' does not stand the test of scrutiny and that there is no evidence that contractual license fees are set at a level so as to cover instances of private copying. In general they consider that the current system strikes a right balance between various interests and that most national levy systems tend to function well. A number of publishers and producers foresee however that levies as a source of rightholders' revenue will decrease and it will be gradually replaced by direct payments. Member States' views on this issue are rather split: while some of them favour licensing agreements in the digital environment, others observe that levies have a complementary role to play.

¹¹⁹ For example, in Germany manufacturers and importers of products liable for the payments of levies who entered into contractual relations with the collecting society which perceives the levy are allowed to deduct the amounts payable for products sold to professional users; however, for entities with no contractual relations with the collecting society, the reimbursement is only possible upon the presentation of a proof of payment. In a sales-chain in which a number of intermediaries are involved, it is not unlikely that the product for which a levy was paid will ultimately be sold to a professional user who he will have no possibility of reimbursement as he will hardly know the identity of the entity who paid the levy.

¹²⁰ As a compensation mechanism, private copying levies are based on an assessment of the harm caused by private copying to rightholders but are not directly related to the actual amount of copies made by each individual end user.

All in all, it is clear that the *status quo* leads to legal uncertainty, and that different concerns exist about consumers facing higher prices for media and devices subject to levies¹²¹ and about distributors, service providers or individuals facing high transaction costs claiming back unduly paid levies, given diverging levy systems across the EU and situations of sub-optimal functioning of the system and reimbursement scheme. At the same time, the economic importance of levies for rightholders where it is applied is clear.

Against this background, in his recommendations of 31 January 2013¹²² which concluded stakeholders mediation process on private copying and reprography levies, Mr António Vitorino recommended, *inter alia*, to address potential obstacles to the functioning of the internal market either via shifting the liability of payment to retailers (in such a case a drastic simplification of the levy systems would also be required), or through the establishment of clear and predictable *ex ante* exemption schemes.¹²³ He further identified double payments among those issues which could have a negative impact on new, innovative business models in the context of the shift from ownership to more access-based business models (including certain type of cloud-based services), and suggested clarifying that copies that are made by end-users for private purposes in the context of an online service that has been licensed by rightholders do not cause any harm that would require additional remuneration in the form of private copying levies.

3.2.4. User-generated content (UGC)

Since users can copy, use and distribute content at little to no financial cost, new types of online activities are developing rapidly, including the making of so-called “user-generated content”, which includes situations where users take one or several pre-existing works, change or add something to the work(s) and upload the result (such as a “kitchen video”, or “mash-up”) on the Internet e.g. to platforms, including social networks, blogs, private websites, etc.¹²⁴ UGC is not new as such and, whilst no consensus on a definition seem to have emerged (including in the replies to the public consultation), it is generally understood to also cover completely original content created online by users.

The development of social networking and social media sites which enable users to share content widely, has vastly changed the scale of UGC. The main question in this area is the possible legal uncertainty experienced by users when uploading UGC based on pre-existing works on online platforms/websites and the potential economic impact these activities have for the rightholders of the pre-existing works. Disseminating UGC requires authorisation from the relevant rightholders, insofar as they are based on pre-existing work(s) protected by copyright.^{125 126} In this context the development of these activities can have an important impact on rightholders. Similarly the development of digital tools can increase the potential economic interest for the creators of UGC, who may themselves enjoy copyright protection. There nevertheless remain technological obstacles to the ability for UGC creators to identify themselves, and to reap economic reward for their efforts.

¹²² http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf

¹²³ Further details are presented in Annex H.

¹²⁴ User-generated content (UGC) can thus cover the modification of pre-existing works even if the newly-generated/"uploaded" work does not require a creative effort and results from merely adding, subtracting or associating some pre-existing content with other pre-existing content.

¹²⁵ Rights of reproduction, adaptation, and communication/making available to the public

¹²⁶ In the case those initial works were originally distributed through open licences, there is also the need to assess if such licences permitted the production of derivative works or if they imposed any further restrictions (requirement to also distribute the derivative under a similar open licence or prohibiting commercial exploitation).

In “Licences for Europe”, user groups pointed to the fact that legal uncertainty as to the possible application of certain exceptions, e.g. for quotation and parody, creates legal risks for end-users, and that a small portion of UGC may in fact be prevented. These views were reflected in the public consultation, where users groups generally referred to problems experienced by consumers in the re-use of pre-existing works. The need to clear rights for uses like 'remixes' or 'mash-ups' in the absence of applicable exceptions, or in case of legal uncertainty, was identified as an excessive burden put on users. Others highlighted problems linked to platforms taking down content under agreements with rightholders. On the contrary, most rightholders, CMOs and industry operators consider that no major problem has been identified and clearly evidenced in this area. The vast majority of UGC content is taking place on mainstream platforms on which UGC will be covered by umbrella licences. Concerned online platforms acknowledge that licensing and digital fingerprinting systems in place are useful and aim at minimising the burden for end-users. Some author representatives however report frequent unauthorised use of their works, particularly in journalism and photography, and point to the specific problem of metadata removal ('scrapping'), and, more generally, remuneration. In any case, the lack of case law on UGC also suggests that rightholders have so far refrained from preventing its emergence, with notable isolated cases relating to the assertion of moral rights. A number of Member States responding to the public consultation favour contractual solutions, including micro-licensing, and insist on the importance of preserving rightholders' remuneration as well as on the need to ensure transparency for users regarding existing licenses.

Since UGC is flourishing (as of 2013, 100 hours of video content are uploaded to YouTube every minute), the question of legal certainty needs to be carefully considered. The importance of UGC platforms, as main channels of content distribution and remuneration for rightholders (e.g. for music), also calls for careful assessment of the consequences of introducing exceptions in this area. Recently the market has developed in a way that the hosting of such content by large platforms is covered by authorisation from rightholders (notably in the music sector), with both intermediaries and rightholders (including, in some cases, UGC creators) sharing the generated advertising revenues. The point where uncertainty may remain is the ease with which smaller platforms can access licensing solutions, and individual blogs can benefit from micro-licences. Coverage is not comprehensive but it appears that such solutions are increasingly available in the market place for some users.¹²⁷ Transformative use of “print” (literary works, fine art, illustration, photography, design, architecture and other visual works) and AV content is not licensed in a systematic manner. However, some media companies are developing platforms themselves enabling active developers to re-use published content, including for publishing purposes.¹²⁸

3.2.5. *Text and data mining (TDM)*

Text and data mining, content mining, data analytics¹²⁹ are different terms used to describe increasingly important techniques for the exploration of vast amounts of text and data (e.g. online journals, web sites, databases etc.). The use of text mining in research has a big

¹²⁷ Small-scale licensing is being developed in the music industry and in the print sector (see the results of Licences for Europe (Working Group 2) in Annex A and the presentations available on: <https://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/WG2-UGC.pdf>)

¹²⁸ Further details are presented in Annex G.

¹²⁹ For the purpose of the present document, the term “text and data mining” will be used.

potential to foster innovation and bring about economic and societal benefits.¹³⁰ Some stakeholders, in particular representatives of researchers, institutional users and some service providers are concerned that the EU might already be losing ground to other regions of the world where TDM is increasingly becoming common practice in scientific research. Authors, publishers and the Member States who responded to the public consultation however consider that TDM is a new issue where licensing solutions are currently being developed.

Through the use of software or other automated processes, an analysis is made of relevant texts and data in order to obtain new knowledge and insights, patterns and trends. The texts and data used for mining are either freely accessible on the Internet or accessible through subscriptions to e.g. journals and periodicals that give access to the databases of publishers.

Two different issues arise with regards to TDM: on the one hand there is legal uncertainty, notably with regard to the application or not of rules on copyright and the sui generis protection of databases. On the other hand, there are questions related to access to the content to be mined (normally databases). These questions relate to whether or not the mining of content to which one has lawful access requires further authorisation and also to technical issues such as how to ensure the safety and stability of the publishers' infrastructures, what formats and platforms are better suited to facilitate mining, whether standardisation efforts are needed etc. All in all, besides addressing copyright aspects, resolving access related problems will require collaboration between all parties involved.

Usually when applying TDM technologies, a copy is made of the relevant texts and data (e.g. on browser cache memories or in computers' RAM memories or to the hard disk of a computer), prior to the actual analysis. Under copyright law, it is often considered necessary for the making of such copies (even in the case where there is already a lawful access to the relevant text and data), to obtain the authorisation from the rightholders¹³¹ in order to mine protected works, unless such authorisation can be implied (e.g. content accessible to general public without restrictions on the Internet, open access). Some types of TDM could however fall under the exceptions for non-commercial scientific research in Article 5(3)(a) of the InfoSoc Directive and Articles 6(2)(b) and 9(b) of the Database Directive, which are however optional and have not been implemented in all Member States. Some consider that the copies required for certain TDM techniques are covered by the exception for temporary copies in Article 5(1) of the InfoSoc Directive. However, it is unclear whether TDM would generally fulfil the conditions of this exception, since mining techniques usually seem to imply the making of copies which are not temporary and transient.

Some institutional users and service providers suggested that (certain techniques for) TDM do not at all involve copying and therefore are not covered by copyright. As many respondents to the public consultation highlighted, there is a high level of legal uncertainty on this matter, in particular since TDM does not consist only of a single technique, but can be undertaken in several different ways.¹³²

Questions arise as to whether, and to what extent, existing subscriptions (notably to scientific publications) or licence agreements allow for TDM. Researchers consider that if a researcher or research institution, or another user, have lawfully acquired access to digital content,

¹³⁰ Big data technologies such as text and data mining have, considered together, the potential to create 250 bn EUR of annual value to Europe's economy (2011 Study of the McKinsey Global institute: Big data –The next frontier for innovation, competition, and productivity)

¹³¹ It is common practice in Europe for researchers to contractually transfer their copyrights to publishers

¹³² However, the CJEU's recent judgment in *Innoweb* would seem to imply that a licence is required so far as the Database Directive is concerned in the context of comparison websites (see Case C-202/12 *Innoweb vs Wegener*).

including databases, the authorisation to read this content should include the authorisation to mine it. Institutional users, representatives of researchers in particular, have also argued that it is difficult, onerous and time-consuming to negotiate such agreements with the rightholders,¹³³ and that TDM is therefore often undertaken without an explicit permission to do so lawfully.

Publishers expressed concerns as to the importance of ensuring the establishment of safe and efficient infrastructure for TDM, including a secure access to databases used for mining and to control their usage. As an outcome of Licences for Europe, representatives of STM publishers have put forward practical initiatives to facilitate licencing of subscription based content.¹³⁴

3.2.6. *Persons with a disability*

Digital technology greatly facilitates accessible publishing and today in some Member States 80-90% of the top titles (books) are simultaneously published in an accessible format for persons with print disabilities.¹³⁵ However, it is estimated that at present only 7%¹³⁶ to 20%¹³⁷ of all titles are available in such formats.¹³⁸ Authors, CMOs and publishers consider that the existing market mechanisms are effectively addressing the problem. In some Member States there are agreements between rightholders and organisations serving the visually impaired for the production, distribution and making available of accessible formats (mainly books), *inter alia* for purposes of education.¹³⁹ Such agreements however are not in place in all Member States and only provide access to a fraction of all the works and other subject matter available to persons without disabilities.

The exception for persons with a disability as provided for by Article 5(3)(b) of the InfoSoc Directive¹⁴⁰ is generic and provides little guidance for its implementation. While a number of Member States use the full scope of the exception,¹⁴¹ others impose limitations as regards the beneficiaries, possible uses and formats, provide for strict administrative conditions, or restrict the application of the exception to cases where the works are not commercially available in the special format. Some Member States lay down a requirement for compensation to rightholders¹⁴² while others do not. The complexity of the application of the exception in some countries increases the transaction costs of libraries and other organisations which intend to make works accessible to visually and hearing impaired persons, and thus

¹³³ The JISC 2012 report "*Value and Benefits of Text Mining to UK Further and Higher Education*" highlights the significant time cost for an individual researcher wishing to mine numerous publications which relates to identifying the rightholders and seeking permissions to mine.

¹³⁴ Further details are presented in Annex K.

¹³⁵ In the UK 84% of the top 1000 titles in 2012 (source: RNIB), in France close to 90% (source: Exception "handicap" au droit d'auteur et développement de l'offre de publications accessibles à l'ère numérique. Catherine Meyer-Lereculeur, Mai 2013).

¹³⁶ http://www.rnib.org.uk/professionals/publishing/Pages/publishing_industry.aspx

¹³⁷ Source : Exception "handicap" au droit d'auteur et développement de l'offre de publications accessibles à l'ère numérique. Catherine Meyer-Lereculeur, Mai 2013

¹³⁸ These figures represent availability in some but not all accessible formats. Accessible formats include Braille, large print, e-books and audiobooks with special navigation, audio description and closed captioning for films, etc. It is important to distinguish between accessibility from the outset (when a book is created or a film edited in a format that makes it already accessible) from the "assistive solutions" which usually involved the retrofitting of some accessibility features in existing materials. The first one being significantly cheaper than the second one.

¹³⁹ E.g. the LIA project: <http://www.progettolia.it/en>

¹⁴⁰ The exception may be implemented for any use, for the benefit of people with a disability, that is directly related to the disability and of a non-commercial nature, to the extent required by the specific disability.

¹⁴¹ e.g. Spain, Hungary, Belgium, Poland.

¹⁴² e.g. Denmark, Germany (except for the production of individual copies), Finland and Sweden (if the beneficiary permanently keeps a copy).

reduces the number of potentially available accessible formats. The recently agreed treaty in WIPO on access to published works for persons with a print disability will address some of these issues including the mandatory nature of the exception. Users and institutional users see most problems as regards the scope of the “disabilities” exception; in particular that dyslexia is excluded from its scope in several Member States. Moreover, they are concerned that paragraph 4 of Article 6(4) of the InfoSoc Directive will create an obstacle for the beneficiaries of the exception. On the other hand rightholders argue that full accessibility will only be ensured by including accessibility features in mainstream publications.

Furthermore, the lack of cross-border effect of the exception makes it impossible for beneficiaries from other Member States to access books, educational material or journals in accessible format made under the copyright exception of another Member State.¹⁴³ The cost of producing a master version of a Braille file is close to €1,500 and €3,000 in the case of the master version of a DAISY file¹⁴⁴ recorded from scratch. The cost of an audio-description track for a film can be as high as € 2500.¹⁴⁵ If such files made under an exception cannot cross borders, these costs are duplicated for libraries or blind organisations in countries sharing the same language. In the case of educational material, the lack of cross-border effect is also likely to deprive visually impaired persons of cross-border educational opportunities.¹⁴⁶

Users and institutional users see most problems as regards the lack of possibility to export and import accessible formats made under a copyright exception. Authors, CMOs and publishers consider that international cooperation such as the ETIN (European Trusted Intermediaries Network) and TIGAR (Trusted Intermediary Global Accessible Resources)¹⁴⁷ projects should effectively address the problem of access to works by persons with disabilities. Those Member States who responded to the consultation underline the importance of the “disabilities” exception and most often consider that the ratification of the Marrakesh Treaty would provide a solution to possible problems related to cross-border access.¹⁴⁸

3.2.7. Education

The use of copyrighted works for the purpose of illustration for teaching is covered by an exception in the InfoSoc Directive and the Database Directive, allowing educational establishments and teachers to use extracts of e.g. novels, songs or films in the classroom or to complement teaching. Member States’ implementation of the generic exception at EU level varies considerably in terms of the materials that may be used, the type of educational uses allowed, or whether licensed solutions are preferred over the use of an exception.¹⁴⁹ In particular, the application to e-learning appears to be limited in certain Member States, where the exception covers only face-to-face teaching, or is submitted to strict conditions in the online environment. This becomes also a barrier when exploring blending ways of teaching

¹⁴³ In the EU, the existing licence-based cross-border exchange mechanism is carried out in accordance with a Memorandum of Understanding between publishers and blind organisations signed in 2010. The European Trusted Intermediaries Network (ETIN) provides a framework for the cooperation but it has had limited effect so far.

¹⁴⁴ <http://www.daisy.org/>

¹⁴⁵ Examples provided by European blind organisations.

¹⁴⁶ The pertinence of the problems related to lack of sufficient harmonisation and lack of cross-border effect is clearly indicated by the recent adoption of the Marrakesh Treaty to improve access to published works for persons who are blind, visually impaired or otherwise print disabled (June 2013); [http:// www.wipo.org](http://www.wipo.org)

¹⁴⁷ <http://www.visionip.org/tigar/en/>

¹⁴⁸ Further details are presented in Annex L.

¹⁴⁹ In some Member States the exception is accompanied by a remuneration system (e.g. BE, FR, DE) whereas in other Member States (e.g. DK, FI, SE, UK, ES for online use) different types of licensing systems are in place to cover the use of copyrighted works in the educational context. In certain Member States the legislation does not explicitly refer to remuneration or compensation mechanisms (e.g. LU, EL, IT except for anthologies, PT, LT, RO, SK).

and learning, complementing face-to-face with distance. Furthermore, even in face-to-face learning, if new technologies are exploited as teaching tools, these may imply access to educational materials online (even if the students are face-to-face with the teacher).

Reproduction rights organisations (i.e. CMOs managing the compensation for reprographic copies) underline that the notion of "illustration for teaching" generates uncertainties. Authors and publishers consider that licenses could reduce uncertainty and provide more flexible solutions to adapt to the needs of educational establishments.

The diversity of the conditions foreseen in national laws, combined with the lack of cross-border effect of the exception, creates legal uncertainty for educational establishments and practitioners willing to offer cross-border training or e-learning programmes (in particular in higher education). Institutional users responding to the public consultation, including universities and libraries, explained that the restrictive implementation of the exception in many Member States lead to a "grey zone" for teachers willing to use protected content in a digital learning environment. Teachers who use protected materials for the purpose of illustration under the terms of an exception in one Member State may run the risk of infringing copyright in another Member State when they make material available to cross-border students via online learning services and repositories or distance learning courses. Certain users also report problems with the making available on online platforms of educational resources containing protected content. Furthermore, the insufficient transparency on the rights and obligations associated with each resource might become a barrier for the promotion of sharing practices involving teachers and other individuals from different countries. In the public consultation, several Member States acknowledge the cross-border relevance of the exception in case of distance learning and argue that copyright rules should not hinder cross-border provision of courses in the EU.

This problem is likely to grow with increasing demand for cross-border education and online training solutions. Over the next 10 years, the e-learning market is projected by some to grow fifteen-fold, accounting for 30% of the whole education market.¹⁵⁰ Legal uncertainty on the status of educational materials, notably made available cross-border, is likely to undermine the ease with which online educational resources can be put together and disseminated.¹⁵¹

3.3. Problems in the functioning of the copyright marketplace

3.3.1. Insufficient clarity as to identification of rights ownership

Distributors and consumers claim that there is insufficient clarity with respect to the ownership of rights in the EU and that this undermines the ability of the market to deliver efficient licensing.

There are many private databases held by producers, CMOs and institutions such as libraries, which are based to some extent on the use of (more or less) interoperable, internationally agreed 'identifiers'. Identifiers can be compared to a reference number embedded in a work, are specific to the sector in which they have been developed,¹⁵² and identify, variously, the work itself, the owner or the contributor to a work or other subject matter. There are notable examples of where industry is undertaking actions to improve the integration and

¹⁵⁰ Industry research - IBIS Capital and Edxus Group, <http://edxusgroup.com/digitalisation-of-education-will-result-in-fifteen-fold-growth-for-e-learning-market-over-the-next-decade/>

¹⁵¹ Further details are presented in Annex J.

¹⁵² E.g. the International Standard Recording Code (ISRC) is used to identify recordings, the International Standard Book Number (ISBN) is used to identify books

interoperability of such identifiers and databases, as illustrated by Licences for Europe, and beyond. The Global Repertoire Database¹⁵³ should, once operational, provide a single source of information on the ownership and control of musical works worldwide. ARROW¹⁵⁴ aims to enable the identification of rightholders and rights and to clarify the rights status of a literary work including whether it is orphan or out of print. FORWARD¹⁵⁵ aims to achieve the same goal for cinematographic works. The print sector has further developed a “Toolkit” for improving micro-licensing in the context of Licences for Europe. In the AV sector, on the other hand, the attachment of interoperable identifiers to TV and film productions is not the norm, and accessible databases and registries are rare.

The UK Copyright Hub¹⁵⁶ is seeking to take identification systems a step further, and to create a linked platform, enabling the identification of rightholders and, eventually, automated licensing across different sectors.

Despite the above, it is still the case that commercial users cannot always identify who owns the rights to a given work etc. in a given Member State, and that individuals cannot always find out how they should seek a licence or to what extent they are authorised to re-use the work in the production of derivative works.

In the public consultation, rightholders and CMOs point out that several registration systems already exist in the Member States (e.g. RPCA or BALZAC in France) and underline the fact that voluntary systems already operate (ISBN, ISAN, EIDR). Member States generally favour the set-up of a voluntary registration system and consider the EU should encourage the development of standards for identifiers and other metadata.

In parallel, the question also arises as to the role of the public sector in supporting efforts of industry to establish interoperable norms for the identification and remuneration of content, see, e.g. the Linked Content Coalition,¹⁵⁷ which was established to develop building blocks for the expression and management of rights and licensing across all content and media types. It includes the development of a Rights Reference Model (RRM), a comprehensive data model for all types of rights in all types of content, whether published by major industry players, or by individual creators. The design and implementation of such tools should ensure a high standard of protection of fundamental rights, focusing in particular on the right of privacy of the users. Also, such tools should not be used to prevent different uses of copyright-protected materials under exceptions.¹⁵⁸

3.3.2. *Lack of mechanisms to ensure the adequate remuneration of authors and performers*

The Copyright Directives recognise for authors and performers a number of exclusive rights and, in the case of performers whose performances are fixed in phonograms, remuneration rights. As regards the rental rights, authors and performers have been explicitly granted an

¹⁵³ <http://www.globalrepertoiredatabase.com/>

¹⁵⁴ <http://www.arrow-net.eu/>

¹⁵⁵ http://ec.europa.eu/information_society/apps/projects/factsheet/index.cfm?project_ref=325135

¹⁵⁶ <http://www.copyrighthub.co.uk/>

¹⁵⁷ www.linkedcontentcoalition.org

¹⁵⁸ Further details are presented in Annex O.

unwaivable right to equitable remuneration. There are few provisions at EU level governing the transfer of rights from authors or performers to publishers or producers¹⁵⁹.

Concerns have been raised that authors and performers are forced to accept unfair contractual terms (e.g. global transfer of rights, no right to termination or renegotiation) and are not adequately remunerated in particular, but not solely, as regards online exploitation. This can have a negative impact on cultural production in Europe. Most authors, performers and CMOs are of the opinion that the current, mainly national, rules do not suffice and that therefore action at EU level would be necessary. In the public consultation, authors and performers especially report unfair contractual terms deriving from their weaker bargaining position. Nearly all authors and performers underlined the importance of collective bargaining in ensuring their fair remuneration (e.g. industrial agreements or model contracts). Those Member States who responded underline the importance of adequate or fair remuneration for authors and performers but consider that it is for the Member States to decide whether or not to intervene in this matter by legislative means.

National systems aiming to address the above problems have been built over decades on very different cultural and legal traditions. Mechanisms to try to ensure fairer terms, including adequate remuneration are often linked to the regulation of contracts.¹⁶⁰ Some Member States have introduced a legal requirement for the final distributor to remunerate authors/performers for the exploitation of their works. The role played by CMOs and by collective bargaining agreements also varies among the Member States. These different approaches are likely to become more evident as multi-territorial exploitation by on-line service providers becomes more frequent. The increasing diversity of emerging national legislation could create difficulties for the providers of multi-territorial services in the internal market. In the public consultation, publishers, broadcasters, producers and service providers recognise the need of fair remuneration but underline the importance of contractual freedom. It is necessary to carry out further analysis to examine the effects of the current situation on the functioning of the internal market.¹⁶¹¹⁶²

The issue of remuneration acquires a more general dimension if the broader flow of revenue among all actors in the Internet value chain, starting from those creating or investing in creation down to the individual person enjoying creative and intellectual works. There is a growing perception among right holders, as also reflected in replies to the public consultation, that the new ways of disseminating and accessing the result of intellectual and creative work online do not assure a fair return on investment and, more generally, of a lack of balance between Internet players and right holders themselves, putting cooperation under strain. This is an emerging debate not only in terms of problem definition but also as regards the determination of the right policy context for the discussion (which would seem broader than a copyright policy debate and affect other policy issues such as the regulation of media and online services).

¹⁵⁹ See e.g. Directive 2006/115/EC, Article 2(4)-(7) (the “Rental and Lending Directive”). Also Directive 2006/116/EC (the “Term Directive”) as amended by Directive 2011/77/EU makes provision to enable performers to terminate contracts on transfer and assignments in the event that the producer does not exploit the phonogram in question.

¹⁶⁰ And sometimes even to labour law.

¹⁶¹ Studies are underway and will be completed in 2015.

¹⁶² Further details are presented in Annex P.

3.3.3. *Problems related to enforcement*

The new market opportunities offered by a shift to digital technologies have at the same time been accompanied by new forms of infringements, in particular commercial-scale infringements aiming at generating profit. Concerns have been raised as to whether the current legal framework (IPRED and Article 8 of the Infosoc Directive) strike the correct balance for the enforcement of copyright in the digital age. On the one hand, the current measures seem to be insufficient to deal with the new challenges brought by the dissemination of digital content in an online cross-border context; on the other hand, there are concerns about the current balance between effective enforcement and the protection of fundamental rights. All of the above concerns have also been voiced by many respondents of all types to the copyright public consultation¹⁶³.

3.3.3.1. Rules on gathering of evidence and identification of infringers

Articles 6, 7 (gathering and preserving evidence) and 8 (right of information) of IPRED offer tools to rightholders to access information, evidence etc. in order to effectively protect their IPRs in civil court procedures. However, these tools are not always easy to apply to infringements of copyright occurring on the internet, in particular in the case of services which propose means to allow the profitable dissemination of infringing content. Rightholders responses to the public consultation have stressed this problem.. Rihgtsholders suggest that it is nearly impossible to trace copyright infringers based in other countries and acting anonymously via internet service providers (ISPs) who do not take due care in knowing their clients. At the same time, users consider that the identification of infringers on the internet through their IP addresses raises serious concerns in terms of protection of fundamental rights.

Problems stem, as confirmed by many rightholders in the public consultation, from the fact that these provisions have been implemented differently across Member States, which first leads to different levels of enforcement of copyright and second makes it difficult to apply cross-border measures, in particular to collect evidence across borders. Divergences relate, for example, to the condition imposed to use the right of information, in particular whether it is possible to use this tool as a preliminary measure or only in the context of an already existing proceeding, or the use of “commercial scale” criteria to be able to access this tool. The notion of “commercial scale” (which was not defined in IPRED) varies across Member States where it can be understood as a quantitative or as a qualitative (profit making aim) requirement. It follows that the application of the right of information that is conditional on commercial scale infringements varies significantly across Member States.¹⁶⁴ Because of the differences in the national transposition of Articles 6 and 7 of IPRED a court could be faced with a measure requested by a foreign court which is not known in its own state, and could then be reluctant to execute it. National courts have already refused to execute a measure aiming at preserving evidence requested by a court from another Member State¹⁶⁵. Cross-border preservation of evidence can also be problematic because of divergences of interpretation of the conditions set in IPRED, in particular that which requires the applicant of a provisional measure to institute proceedings leading to a decision on the merits within a reasonable period. The condition can be interpreted by some judges as not fulfilled when the proceedings on the merit

¹⁶³ For further detail see Annex Q.

¹⁶⁴ Examples were also provided in the public consultation. See Annex Q for further details.

¹⁶⁵ This was, for example, the case for a "description" in the case C-175/06, Tedesco, that was refused to be performed by the British authorities on the ground that such measures were not in keeping with national practices

are not introduced in the same country as the one where the Court ordering the provisional measure is located. This is problematic when evidence about an infringement is located in different countries and the applicant has grounds to seize one court on the merits in another one. The consultation on the civil enforcement of IPR demonstrated that very few respondents indicated that they had obtained a court order decision to request an intermediary established in another Member State to provide information on the identity of the infringer.

These difficulties arise in particular, when these tools are used in the online environment.¹⁶⁶ The main problem in this area relates to the articulation between the rules on the identification of infringers and the protection of personal data/ privacy (half of those who reported in that consultation that they were denied access to information reported that the refusal was based on personal data protection and privacy). Many respondents to the public consultation, be it rightholders, ISPs or internet users, consider that a clarification as to what measures can be taken to identify alleged infringers should be made. While IPRED stipulates that its provisions are without prejudice to the protection of personal data, neither IPRED, nor other EU legislation contain specific provisions on the retention and disclosure of personal data to copyright holders for the purposes of IPR civil enforcement.¹⁶⁷ It was reported that the articulation between the different rules was often not provided in Member States' legislations. This is likely to affect the effectiveness of measures implementing IPRED. Problems of effectiveness of the rules are linked to the period of retention of data, the possibility for ISPs (and their willingness) to legally disclose alleged infringers' identities or the accuracy of the data disclosed. The problem is particularly salient with respect to infringers operating anonymously, changing IP addresses rapidly and channelling the revenues they get from their activity through empty shell companies. At the same times, cases of overzealous enforcement of copyright allowed by the use of the tools provided for by IPRED were reported. A number of respondents to the public consultation, including internet users, indicated that the identification of alleged infringer raised huge concerns in terms of protection of fundamental rights (personal data, privacy). A number of contributions (in particular from internet users) consider that some existing practices involving the collection and treatment of IP addresses of internet users and the disclosure to third parties of the identities behind them are not in line with the European Charter of fundamental rights.

3.3.3.2. Rules on provisional measures and definitive injunctions

Enforcement of copyright should primarily be directed towards the actual perpetrator of the infringement himself, but this is often difficult given the ubiquitous nature of infringements on the internet and the possibility for infringers to operate in an anonymous way as described above. This is the reason why EU law provides rules on injunctions against intermediaries (Articles 9 and 11 of Directive 2004/48/EC and Article 8 of the Infosoc Directive). However, these rules appear to be ineffective to deal with infringements of copyright over the internet.¹⁶⁸

¹⁶⁶ Of 136 responses received to the consultation on the civil enforcement of IPR, on problems relating to the identification of infringers, only around 3% did not relate to infringements on the internet. See http://ec.europa.eu/internal_market/consultations/2012/intellectual-property-rights_en.htm

¹⁶⁷ This situation was reflected in the consultation on the civil enforcement of IPR: 68% of 146 respondents declared having faced problems in the identification of (alleged) infringers of their IPR. However, the consultation does not allow saying whether these problems were all related to data protection or had other reasons.

¹⁶⁸ The Consultation on the civil enforcement of IPR seems to reflect this: Very few stakeholders took a stand on the issue of injunctions imposed on intermediaries (28 respondents stated clearly that they obtained a preliminary injunction and 25 indicated that they obtained a permanent injunction). Other respondents indicated that preliminary injunctions were not granted due to an exemption of the intermediary from liability, difficulties in

There is no harmonised understanding of the types of intermediaries covered¹⁶⁹, of the types of injunctions that be ordered against them, in what circumstances they may be issued, under which conditions and within which delays. ISPs and internet users, emphasise the risk of creating disproportionate burdens on third parties. There is in particular a need to clarify how to articulate the possibility to impose injunctions on intermediaries given the prohibition for Member States to impose a general monitoring obligation on ISPs because of the EU acquis.¹⁷⁰ The lack of clarity concerning the extent to which intermediaries can be involved not only affects the effectiveness of IPR protection but also raises concerns in terms of protection of fundamental rights, for example the freedom to conduct a business or the freedom of expression.

There is therefore a need on the one hand to clarify the extent to which intermediaries can be involved in putting an end to copyright infringements on the internet, while on the other hand ensuring that other EU legal provisions including fundamental rights are duly taken into account.

3.3.3.3. Rules on damages in case of infringement of copyright

Rightholders generally claim that compensation for the prejudice suffered as a result of infringements of copyright is generally low (often insufficient to cover their losses and has little deterrent impact.¹⁷¹ More specifically, it is difficult on the Internet to prove the exact scope of the infringing use and therefore the actual damages that have occurred. This problem has also been acknowledged by some Member States, e.g. France, recognised the difficulty for judges to assess the level of damages and recommended increasing the use of experts to improve the level of indemnification (see Annex Q for further details).

Also, in spite of Article 14 of Directive 2004/48/EC, which requires Member States to ensure that reasonable and proportionate legal costs and other expenses should in principle be borne by the unsuccessful party, in practice, copyright holders are rarely reimbursed all legal costs and other expenses they incur to protect their copyright through litigation. This, together with the low levels of damages awarded, may inhibit copyright holders' possibilities and readiness to institute proceedings. As the consultation on the civil enforcement of IPR showed, rightholders might refrain from litigation if they felt that court proceedings are lengthy, costly and do not expect to get properly compensated.¹⁷²

proving the intermediary's knowledge or involvement in the infringing activity or lack of sufficient merit of the claim. Respondents to the public consultation reported that would be particularly relevant when the infringement did not concern the main market of the rightholder.

¹⁶⁹ The Court of Justice recently confirmed in a judgement that the concept of « intermediaries whose services are used by a third party to infringe a copyright or related right » provided for by Article 8-3 of Directive 2001/19 includes the internet service provider of a person accessing a website proposing content without the agreement of the rightholder, C-314/12.

¹⁷⁰ Article 15 of Directive 2000/31/EC.

¹⁷¹ For example, during the consultation on the civil enforcement of IPR, one respondent indicated that damage claims are rarely deterrent in cases of structurally infringing sites since the profits are very substantial and the abilities to hide assets due to the aforementioned problem of being able to do business anonymously. Respondents to the copyright consultation also expressed the view that damages were often not a deterrent and too low to make it worthwhile for rightholders to engage in legal procedures.

¹⁷² 51% of the respondents to the consultation on civil enforcement of IPR have indicated that they would refrain from litigation because of such reasons.

3.4. How would the problem evolve, without EU action?

A range of outcomes can be envisaged in the event that the EU does not act, depending on the specific issue. In some cases the likely developments, especially in the long term are very uncertain. Stakeholders' views on the status quo or the need for EU action vary¹⁷³.

With regard to the **cross-border availability of content**, trends vary by sector:

- Publishers may continue to grant multi-territorial licences for e-books, while some e-books retailers are likely to continue into the longer term to fragment the market for commercial reasons unrelated to copyright.
- In the music sector, the explosion of legal services means that consumers in all Member States have access to a wide range of services at national level. Restrictions by platforms and/or rightholders may limit cross-border access, but cross-border portability of services, which is already a reality on major platforms, is likely to become the norm in the short-term. In addition, the CRM Directive – which is to be transposed by April 2016 - should make it significantly easier for online service providers to get licences from CMOs for the use of authors' online rights in music. Consequently, the launch of multi-territorial/pan-European services will be easier and the entry barrier for new service providers will be lower.
- The availability of AV content is likely to vary depending on the originating producer and distributor. Broadcasters which control the rights in their programming are likely to continue to make their productions available cross-border, while ad-supported programming and premium content (sports, films) are likely to continue to be restricted on a territorial basis in the long term. Cinematographic works that are part-funded by national distributors are likely to continue to be distributed on the basis of exclusive territorial licensing and to that extent consumers demand for cross-border services would continue to be unmet.

If no changes were made to the EU legal framework, over the medium to long term, absolute territorial exclusivity clauses in licence agreements could only be addressed on a case-by-case basis through the enforcement of EU competition law, which may also set a precedent for the industry concerned.

With regard to rights in online transmission, questions relating to the localisation of the communication to the public act and exhaustion in the online environment would continue. The latter issue may be made less relevant by the further evolution of access-based licensing models. In the case of the localisation of the communication to the public act, consumers, distributors and rightholders alike would continue to face legal uncertainty, and national courts and the CJEU would continue to be called upon to clarify issues on an *ad hoc* basis. Given the fast-evolving technological environment and the divergences in national laws, the case law may however not provide sufficient uniformity and legal certainty in the internal market.

¹⁷³

In relation to cross-border access to content, exceptions, identification and registration, and definition of rights, rightholders generally prefer the status quo and rely on market solutions to address the problems raised in chapter 3. The views of other stakeholders vary on the different subjects and will be presented in chapter 5. As regards fair remuneration, authors and performers think that the status quo will maintain their weaker bargaining position while publishers, producers and service providers highlight the importance of contractual freedom. On most issues, the majority of the Member States also expressed preference for the status quo.

A similar situation will exist relating to the definition of the communication to the public right - in particular as regards linking- and to the definition of reproduction in digital networks - in particular as regards browsing. In these cases it would be for the national courts and the CJEU to clarify issues on *ad hoc* basis.

As regards the availability of content under the **exceptions**, the issues identified as to the legal uncertainty about the scope of certain exceptions, the lack of cross-border effect and the uneven implementation in Member States are likely to persist. This could favour the development of market-based solutions in certain areas, but might also undermine the public policy objectives pursued by the exceptions (e.g. education, research).

In the absence of EU intervention, the lack of clarity on what is allowed under certain exceptions (e.g. preservation, education, research, parody, etc.) would not be solved. Nevertheless, market players and consumers may continue to seek ways to exploit the potential of digital technologies irrespective of the uncertainties arising from the legal framework. E.g. UGC has so far flourished, and businesses have experimented with re-use business models. Services are likely to continue to develop including services offered by public service institutions, such as libraries and universities (e.g. e-lending, e-learning). As shown in Licences for Europe, rightholders are improving the availability, scope and ease-of-use of licences for such uses. The lack of clarity surrounding legal issues related to TDM would continue to result in legal uncertainty and transaction costs for researchers, unless the relevant stakeholders agree on solutions facilitating the use of TDM techniques. So far the debate has been polarised and no consensus has been reached.

In any event, without EU intervention content that is made available under exceptions will not be available across borders. This could for example hamper the cooperation in research projects and the development of distance learning in higher education as educational establishments making materials available under an exception on a cross-border basis would continue to run the risk of infringing copyright in Member States other than the Member State in which they are established. They would only be able to use digital materials across borders for teaching purposes when this use would have been negotiated with rightholders under a specific licence agreement. However, cross-border access to orphan works contained in the collections of cultural heritage institutions will be made possible by the Orphan Works Directive.

In the absence of EU intervention, the problems related to the lack of harmonisation on the exceptions could become more salient, as Member States are likely to continue to review national copyright legislation at different speeds and in different ways¹⁷⁴. This could lead to over-restrictive interpretations in some Member States, and insufficient protection for rightholders in other Member States. For example, as regards persons with disabilities, intermediaries (libraries, blind organisations) will continue to face high transaction deriving from the application of divergent national rules and from the lack of cross-border exchange and access to works by consumers (persons with disabilities) will continue to be limited. With regard to private copying, the discrepancies between the levy systems applicable in different

¹⁷⁴ Reforms have been recently undertaken in Germany (press clipping law) and are ongoing in the UK (draft legislation to modernise copyright exceptions), Spain (draft legislation covering notably private copying, orphan works, teaching exception), Poland (amendment of the Copyright Act necessary to implement the SatCab Directive), the Netherlands (temporary law on private copying levy, copyright contract law), Belgium (reform of the economic code, with provisions relating to copyright). Discussions on possible reforms of copyright legislation are also ongoing in Ireland (report from an independent Copyright Review Committee) and France (follow-up of rapport Lescure).

Member States will continue to lead to double payments by consumers, high transaction costs for all business involved, and disincentives to the development of innovative licensed services.

Nevertheless, recent initiatives and ongoing projects could positively affect the availability of content under certain exceptions. For instance, the Marrakesh Treaty, once ratified, will ensure cross-border exchange of accessible format copies of books for the benefit of visually impaired persons, also between the EU and third countries. The TIGAR and the ETIN projects, could, in the longer term, significantly contribute to the access to books for visually impaired persons but this would need to be preceded by a high number of cross-border licences granted by publishers to blind organisations/libraries for the making and distribution of accessible formats.

Given the high stakes involved, the market is likely to continue to develop systems to enable the **better identification of content online**, for licensing and remuneration purposes. The ARROW (print) and the FORWARD (films) projects provide for very efficient tools to identify rightholders, rights and information on the status of a work and could contribute to smoother licensing (including micro-licensing) and to a reduction of transaction costs. The Linked Content Coalition is aiming at forming a consortium of standards bodies and registries. The bodies that have invested heavily in the Global Repertoire Database to date are likely to pursue the initiative, one way or another, in order to recoup their investments. Standards organisations are likely to increase their cooperation with a view to improving interoperability (as has recently been the case with ISAN¹⁷⁵ and EIDR).¹⁷⁶ Nevertheless some obstacles are likely to remain. TV and film producers are proving slow to adopt interoperable identifiers, and in Licences for Europe gave little indication that they are ready to commit to do so as a general rule. This may have an impact on cross-border service provision and access to content. The UK Government and UK industry have put significant resources into the development of the Copyright Hub, but no other Member States have indicated that they are ready to match such efforts.

If problems with regard to **remuneration of authors and performers** are established, it is unlikely that the situation for authors and performers will change in any significant way without EU intervention. Member States are not likely to deviate from the regulatory approach they have taken to date, and producers, publishers, authors and performers are not likely to re-negotiate contracts generally. Even if there are changes in the Member States, the practices will continue to diverge. As a result, with the increased multi-territorial exploitation of works authors and performers will be remunerated differently for the exact same use of the exact same performances in the different Member States.

With regard to **enforcement**, should no action be taken there is a risk that the deficiencies in enforcement might discourage investment in new innovative on-line business services assisting with the diffusion of licit IP works. Certain specialist on-line music, video and e-book service providers have complained that the high level of IP infringing activity makes it difficult for them to establish their businesses viably within the EU. In the case of damages, if there is no policy intervention, the costs of investigating, taking legal action against, and rectifying an infringement will continue to not be compensated in full, placing the copyright holder at a disadvantage and neither serving as a deterrent nor compensating the rightholder's actual losses (and legal expenses). Respondents to the public consultation already stated that

¹⁷⁵ International Standard Audiovisual Number, an ISO unique identifier for audiovisual works and versions

¹⁷⁶ EIDR – Entertainment Identifier Registry - is a universal unique identifier system for film and television assets

they had to bear considerable costs to monitor and enforce their rights. What is more, inefficiencies and unclear relationships between copyright and fundamental rights (protection of consumers' personal data, right to information and right of expression of citizens) could, over time, undermine their trust in the legal system and, in particular, the respect of copyright. Some respondents to the public consultation were of the view that the legal concept of copyright would only serve a few, was outdated and should be removed or completely overhauled.

All in all, it seems that maintaining the status quo would encourage the development of market-based solutions, which could contribute to resolve, to a certain extent, some of the problems identified in this IA. However, market developments and voluntary initiatives may not be sufficient to address the issues related to the cross-border dissemination of content. In addition, the problems linked the definition of rights and scope of the exceptions could not be solved at national level.

3.5. Does the EU have the right to act?

3.5.1. Legal basis

The EU's right to take action follows from Article 114 of the TFEU, which confers on the EU the power to adopt measures for the establishment and functioning of the internal market and from Articles 53 and 62 of the TFEU which constitute the specific internal market legal basis for services. A wide range of EU instruments in the area of copyright have already been adopted pursuant to these legal bases. With regard to Option 4, the EU's right to action also follows from Article 118 of the TFEU, which confers on the EU the power to establish measures for the creation of European intellectual property rights that provide uniform protection throughout the Union.

This IA accompanies a White Paper which will address the question of how to adapt EU copyright rules to the digital environment and to the internal market. Any future actions in this area would be instrumental to achieving a better functioning of the internal market and facilitating the free movement of goods and services. Creating a uniform set of rules would create a level playing field and facilitate access to services across borders. Further, copyright and related rights are protected as property rights under the Charter of Fundamental Rights of the European Union, and are largely harmonised under secondary EU legislation. Addressing the fragmentation of rules would facilitate the free movement of all those services which exploit copyright protected content, including those which rely on exceptions.

Finally, Article 167(4) TFEU provides that the EU shall take cultural aspects into account in its action under other provisions of the Treaties, in particular in order to respect and to promote the diversity of its cultures. All proposed options take into account the implications of EU action for cultural diversity.

3.5.2. Subsidiarity and proportionality

The White Paper will identify the key areas for review as well as the challenges to be addressed and discuss whether and how further action is warranted at EU level. In order for any possible future EU action to be justified, it is necessary to respect the principles of subsidiarity and proportionality set out in Article 5(3) and (4) of the EU Treaty. The **subsidiarity principle** requires the assessment of two aspects, the necessity and the added value of the European action.

As regards the **necessity**, the rationale for European action stems from both from the harmonisation already in place (which for many issues of the issues covered by this IA - such as the exceptions - constrain the possibility for Member States to act unilaterally) and the cross-border nature of the dissemination of content through digital networks (on the various issues covered in this IA, action at national level, when possible, would be inefficient and could create new obstacles to the dissemination of content).

The problems related to the territoriality of copyright rules may only be addressed at EU level. With regard to restrictive clauses in licence agreements between service providers and rightholders, abusive conduct is dealt with on a case-by-case basis but Member States have not intervened or adopted relevant legislation, nor would national action guarantee a level playing field across Member States.

The problems related to the clarification or definition of rights as well as the clarification of the scope of the exceptions can only be addressed at EU level:

- Member States have vast leeway on the implementation of exceptions, and they have taken different approaches (scope, beneficiaries, acts, works covered etc.) in line with their cultural and legal traditions. In the absence of an EU initiative, different national approaches will continue and there will be insufficient harmonisation to enable the proper functioning of the internal market.
- Where there is a demonstrated need to update or extend the scope of certain exceptions or to create new exceptions, this would not be possible without EU intervention.¹⁷⁷
- National legislation currently does not allow for access to works and other subject matter made available under an exception beyond national borders.

In the area of identification of rights ownership, several national and industry initiatives could already provide practical tools to further facilitate licensing. EU action may however be necessary to cover all types of content across borders and further facilitate licensing.

The issues related to the bargaining position of authors and performers are often determined by branches of law that mainly fall in the competence of Member States. Nevertheless, EU intervention may be required if it is established that the current situation or the likely future developments are disruptive as to the functioning of the internal market,

As regards the enforcement of copyright, the legal framework has already been partially regulated at EU level in particular with Directive 2004/48 and Article 8 of the InfoSoc Directive. These rules have applied broadly subsidiarity in the pre internet context thus leaving large discretion for Member States, in particular on rules concerning the involvement of intermediaries to identify infringers or to put an end to infringements, as well as on the calculation of damages. However, the development of the internet and the globalisation of infringements of copyright has shown that more coordination is required at EU level to avoid diverging interpretation of these provisions in order to ensure a more efficient but also balanced enforcement of copyright including in case of cross-border infringements.

As regards the **added value**, EU intervention would have the inherent advantage of being able to assure cross-border access to protected content, under licences or under certain exceptions. EU action could also be of added value to ensure equal conditions for the adequate remuneration of authors and performers in cases of multi-territorial exploitation.

¹⁷⁷ See explanation in Section 3.2

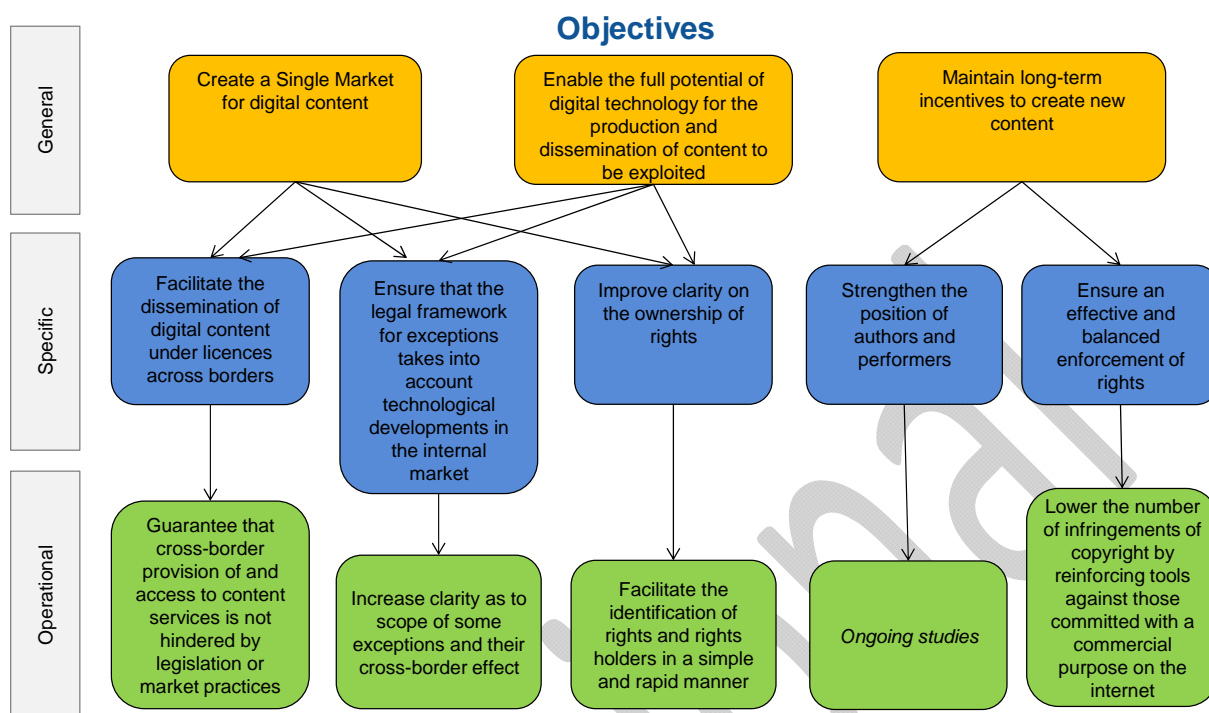
Under the **principle of proportionality**, the content and the form of EU action shall not exceed what is necessary to achieve the objectives of the Treaty. The proportionality of the different policy options considered has been assessed and the result of this assessment is described in the relevant part of this IA.

4. OBJECTIVES

This IA accompanies a White Paper which will define objectives and orientations for addressing the problems presented in Chapter 3. The **general objectives** of any future intervention are the creation of a Single Market for digital content, enabling the full potential of digital technology to be exploited by all players in the value chain and maintaining long-term incentives to create new content. In order to achieve these objectives, **specific intervention** should aim at facilitating the dissemination of content under licences across borders, ensuring that the legal framework for exceptions keeps up with technological developments, improving clarity on the ownership of rights, strengthening the position of creators in view of their fair remuneration and ensuring the effective and balanced enforcement of rights.

As this IA accompanies a broad policy document, the **operational objectives** are not very detailed. Nonetheless, it needs to be ensured that cross-border access is not hindered either by legislation or market practices, that there is legal clarity as regards exceptions, the identification of rights is facilitated and that the problems that have been identified as obstacles to copyright enforcement, in particular for infringements committed with a commercial purpose, are tackled. The situation of individual creators is an important element of the review but for the time being, studies exploring their position in the market are underway. The objectives are summarised in Figure 3 below.

Figure 3: Objectives



5. POLICY OPTIONS

The policy options presented in this chapter have been considered in the context of the preparation of a White Paper. The assessment of the policy options is based on the information available at this stage of the policy development process. Analysis is ongoing in many areas to further assess the impacts of the different policy options. Any future policy initiatives in the areas covered by this IA will be based on more specific and detailed analysis of impacts.

The different options set out below are not mutually exclusive. A combination of options can be envisaged in certain areas.

A summary table of the proposed policy options is presented in Annex R.

5.1. Facilitating the dissemination of digital content under licences in the internal market

5.1.1. Territoriality and absolute territorial restrictions

Option A1 - Status quo

Description: No policy intervention. This option would consist in relying on the market to improve the availability of content online, on Member States to take full advantage of the total policy space available under the Copyright Directives, and on the courts, and notably the CJEU, to clarify provisions of the Directives relevant to the development of new uses and services. This option would also rely on the implementation of the CRM Directive to support the development of multi-territorial/pan-European services.

Summary of impacts: The impacts are described and analysed in section 3.7 which presents the baseline scenario.

Option A2 - Guidance to Member States and stakeholders

Description: This option would entail issuing a Communication or Recommendation on the interplay between copyright, territorial exclusivity and the freedom to provide and receive services in the internal market, as developed by the CJEU. Such an instrument could also contain main principles with regard to the localisation of the copyright-relevant act in cross-border situations (see in Annex E).

Summary of impacts: Guidance on contracts between rightholders and distributors/service providers would contribute to legal certainty and could increase the cross-border availability of content. This option would be achievable in the short term. The extent to which rightholders would voluntarily follow a non-binding guidance is however difficult to assess, hence it could have limited effectiveness. Also, this option may not be sufficient to align industry practices in all sectors and complete the internal market for digital content. The impacts on consumers will also depend on the extent to which rightholders and distributors follow the guidance; it is not unlikely that consumers would continue to face restrictions of access to some content services. Rightholders and distributors would still be able to apply territorial exclusivity and price-discrimination along national borders. Cross-border competition would only increase to the extent the non-binding instrument would be followed. For those that consider that there is no need for policy intervention (rightholders, broadcasters and a number of distributors) this option is likely to be preferable to Options A3 and A4. Consumers having answered the consultation would not consider this option effective.

Option A3 - Legislative intervention

Description: Two mechanisms, which are not mutually exclusive, can be used to address the issue of territoriality and absolute territorial restrictions:

- Sub-option A

This sub-option would entail a new legal act¹⁷⁸ which sets out that **absolute territorial restrictions** in copyright licence contracts (or in contracts on the transfer or the assignment of rights) may be null and void because of their effect on the free movement of services. As in competition law and in line with the rationale of the CJEU's ruling in the Premier League Cases, a distinction between active and passive sales would be made, i.e. only absolute territorial restrictions (prohibiting not only active but also passive sales)¹⁷⁹ would be declared null and void. Accordingly, distributors could no longer be prevented contractually from responding to unsolicited requests of customers residing in other Member States than those for which they acquired a licence. Territorial restrictions prohibiting distributors from actively targeting customers who reside outside the territory for which they acquired a licence would, however, still be possible.

A safety clause would be introduced according to which absolute territorial restrictions may be justified when the rightholder is able to prove that they are the only way to achieve an appropriate remuneration. The remuneration of rightholders would normally be considered appropriate when it reflects the economic value of the exploitation of the work by the

¹⁷⁸ Internal market legal basis (Article 114 TFEU)

¹⁷⁹ See detailed explanation of the distinction in Annex D.

distributor, in particular the actual and potential number of customers purchasing or accessing it.¹⁸⁰

As to the contractual relationship between service providers and end-users, a provision would reinforce that service providers are not allowed to rely on copyright licences to discriminate against customers on grounds of nationality or place of residence, unless directly justified by objective criteria. When relying on such objective criteria, service providers would be required proactively to provide justification in a transparent and easily accessible way on their websites. AV services would explicitly be made subject to this provision. This provision would be needed to ensure that the intervention produces real results for consumers in terms of increased access.

Summary of impacts of Sub-option A: A legally binding instrument that prevents **absolute territorial restrictions** in copyright licence contracts could be an important step towards the completion of the Digital Single Market, in particular in sectors (e.g. in the AV sector) where such agreements are common. It should also help addressing questions related to the portability of services. In the public consultation, numerous service providers argue that licences should allow them to continue serving customers who have paid for the content and travel within the EU. Some service providers (e.g. VOD platforms' operators) indicate that IP blocking of foreign addresses is contractually required. While such a legal intervention would constitute a limitation to the freedom to conduct a business and to the property rights of the licensor, this would be justified provided the provision is carefully calibrated to ensure its adequacy and proportionality, in view of the Treaty fundamental freedom to provide and receive services across borders. This Sub-option would allow cross-border competition between distributors, who would be able to enter new markets through passive sales. Increased competition could lead distributors to review their offer and prices and, in the long term, may have a significant impact on the structure of the market.

The inability of rightholders to guarantee absolute territorial exclusivity to distributors may reduce licence fees. This could be (partially) compensated by the fact that some distributors will increase their customer base and therefore pay higher licence fees. Because of the possibility of passive sales, rightholders would no longer be able to price-discriminate effectively between national markets. This Sub-option may also have a significant effect on the existing business models for the financing and production of AV content and potentially on cultural diversity. This concern has been raised in the replies to the public consultation by broadcasters, film producers and some CMOs.

This Sub-option would increase cross-border access to digital content for consumers, in particular in the AV sector and would reply to the concerns expressed in the public consultation. It would also lead to a larger choice of services and limit the possibilities for service providers to deny access to services of consumers because of their place of residence. It would put pressure on service providers to make their services available across borders. Consumers in higher-value territories – should prices be subject to equalisation - may benefit from the more aligned prices coming from cross-border competition, whereas customers in lower-value territories may have to pay higher prices than currently. No empirical evidence is currently available to assess the extent of price equalisation and its possible consequences on services providers and consumers. These effects could be less pronounced in the case of

¹⁸⁰ Where the total number of customers purchasing or accessing the digital copy within the EU can be determined with a high degree of precision (i.e. in cases where customers make a payment in exchange), rightholders should be, in principle, deemed to be able to achieve appropriate remuneration.

services/content catering for local audiences and/or operating in languages not often used outside a specific Member State, as demand for actual cross-border access will likely be more limited. The effects will be greater in the case of service operating in widely spoken languages or providing less “language sensitive” content (e.g. music).

- Sub-option B

This sub-option would entail the introduction of a clear **definition of where the copyright relevant act is localised** in cross-border situations (i.e. for which Member States a service provider needs to obtain a licence). Two distinct solutions (mutually exclusive) could be considered: the “country-of-origin” and the “targeting” approach:

- (a) A “**country-of-origin**” principle for the right of communication to the public, including the right of making available, would be introduced, i.e. the copyright-relevant act (that needs to be licensed) would be deemed to occur in a single Member State (the “country-of-origin”). It would be defined as the Member State in which the service provider is established.¹⁸¹ Accordingly, a service provider would only need to obtain a licence for that Member State, regardless of where the customers accessing the service are established or reside¹⁸² (e.g. outside the service provider’s country).

A necessary measure to establish country of origin is to have a sufficient level of harmonisation to avoid the risk of “establishment shopping”. Clear criteria of establishment should be adopted in order to mitigate this risk. Moreover, the – so far largely national – rules on authorship, ownership and transfer of rights would have to be harmonised as well as the rules on remuneration of individual authors and performers. Enforcement-related rules would also have to be adapted to ensure that rightholders could, for example, still obtain an injunction against intermediaries established outside the country where the provider of an illegal, non-authorized service is established (even if there were a copyright infringement only in the service provider’s country of origin).

- (b) Alternatively, the “**targeting approach**” developed by the CJEU in some of its rulings for localising a place of infringement could be further developed to take account of licensing. A service provider would need to obtain a licence for all targeted Member States only, regardless of where the customers accessing the service are established or reside. Enforcement rules would also have to be addressed for infringements which occur in territories where the work can be accessed but where there is no targeting.

Under both alternatives, the level of the licence fee to be paid to the rightholder would still be in function of all customers that access the work in question, including those established or residing outside the country of origin or outside the targeted countries.

Summary of impacts of Sub-option B: This approach is more intrusive. The introduction of the “**country-of-origin**” principle, combined with the harmonisation of the rules on authorship, ownership, transfer of rights and enforcement, would increase the cross-border access to protected content and contribute to a better functioning of the internal market for digital content. A licence issued for the country of origin would - if not limited contractually - *de facto* become a pan-European licence. This would represent a complete change of

¹⁸¹ With regard to individuals, the point of attachment would be their Member State of residence. For transmissions originating in third countries, a catch-all element would need to be introduced.

¹⁸² Provided this takes place within the EEA.

paradigm and a serious limitation to the territoriality principle. The **"targeting approach"** would also have a positive impact on cross-border access to protected content, but at the same time it would not question the territoriality principle as such.

Under the **"country of origin" principle**, a service provider could use the licence granted in its country of origin (which will need to be obtained from the person holding the rights for that country) in order to actively market content outside its country of origin as well. Service providers would only need one licence which would, in principle, simplify the licensing process, reduce transaction costs and would in turn make it easier to launch pan-European services for the benefit of European consumers.

The country of origin principle would make it more difficult for rightholders to partition markets along territorial lines. For that purpose rightholders would no longer be able to rely on the rule that there is a separate copyright in each country of the EU. In the same way, it would be more difficult for service providers to partition the market and maintain territorial exclusivity. A service provider established in one Member States could undermine the economic position of rightholders and service providers in other Member States. This could have a negative impact on the revenue of both rightholders and service providers. This change would be particularly critical for the audio-visual industry in which it is a long-standing practice to license rights on a territorial basis in order to secure financing of audio-visual works. It is expected that rightholders, especially in the audio-visual sector, would try to avoid these implications of the country of origin principle by imposing territorial limitations contractually i.e. service provider would be under the *contractual* obligation not to provide the service outside its country of origin. Through contractual means, rightholders could thus recreate national borders that a country-of-origin principle is supposed to eliminate. Therefore, the possible introduction of a "country-of-origin" principle only has the desired impact with regard to the increased availability of protected content across borders for consumers if accompanied by Sub-option A, which would limit the freedom of rightholders to impose absolute territorial restrictions in licensing agreements and would reinforce the principle of non-discrimination in relations between service provider and end-users.

As it would also be difficult to define reliable criteria for determining the place of establishment, the introduction of a "country of origin" principle would pose the risk that service providers may establish themselves in countries that have a weaker legal framework for copyright protection. This could also prompt rightholders to withdraw their online rights from CMOs (to avoid "pan-European licences" being granted *de facto* by any CMO in Europe) , therefore creating a risk of repertoire disaggregation and higher transaction cost for service providers. This could negatively affect cultural diversity.

The **"targeting" approach** would reduce transaction costs for distributors operating on a multi-territorial basis when rights in different territories are in different hands (as they would only need to acquire a licence in the targeted country only) even if service providers would still need a licence for the territories targeted. On the other hand, service providers could respond to unsolicited requests to provide services from non-targeted territories. This would make it easier for customers to access services not available in their territories. Thus a service provider established in one Member States could undermine the economic position of rightholders and service providers in other Member States. Similarly to the case of the country of origin principle, it is expected that rightholders, especially in the audio-visual sector, would try to avoid these implications of the targeting approach by imposing territorial limitations contractually i.e. service provider would be under the *contractual* obligation not to provide

the service outside the targeted countries. In the same way as with the country of origin principle, the possible introduction of a targeting approach only has the desired impact with regard to the increased availability of protected content across borders for consumers if accompanied by Sub-option A.

In the public consultation, service providers call for the simplification of the licensing process and increased transparency. Some of them favour a one-stop-shop licensing based on the country of origin principle and on obligation to license to be imposed on collecting societies. Institutional users support the introduction of the country of origin principle, which they believe would facilitate their clearing of rights. Member States, authors, performers and CMOs see the country of origin as potentially harmful to cultural diversity. They consider that copyright in the EU is not sufficiently harmonised to avoid a race to the bottom. On the targeting approach they point to the fact that the notion of targeting is vague in many cases (e.g. content in popular languages) and its application could be based on subjective criteria linked to the intention of the service provider. The same position is taken by publishers and producers who also raise problems related to enforcement and the risk of serious disruption of the market. Broadcasters' views are split on this issue with some expressing the same views as publishers and producers and some supporting the country of origin principle.

The implications of the establishment of a "country of origin" principle or targeting approach as regards service providers established outside the EU would require careful analysis.

Option A4 – A unitary copyright title

Description: A Regulation would be proposed¹⁸³ setting out common EU rules. A single EU copyright title would be developed to replace national copyright titles. Under a unitary title, the exclusive rights would be defined as being protected in the whole territory of the EU. In order for a unitary title to be effective, there would need to be much higher harmonisation, and direct applicability, of the copyright framework at least as regards the definition of protected subject matter; the threshold of originality; authorship; ownership and transfers of rights. Other key issues such as moral rights (integrity and attribution), exceptions, mechanisms for remuneration as well as enforcement, may need to be examined in order to ensure that rightholders enjoy the same level of protection throughout the EU.

The unitary title would put an end to the territoriality of copyright in the EU. The title would have a EU-wide effect and a licence issued for a given right would – if not limited contractually – would be a pan-European licence.

Summary of impacts: By virtue of establishing a single title, copyright could no longer be invoked to justify the segmentation of the internal market for the provision of content services. The title would be valid on the same basis throughout the EU. This has as its corollary the need to harmonise many aspects of copyright law in Member States. It would also be important to take measures to ensure that territoriality (i.e. segmentation of the title) is not reintroduced by the practices of rightholders and distributors in the market. The establishment of a title would be a technically and politically challenging exercise, taking into account the significant divergences between Member States' legislation on many aspects of copyright law and practice. At the same time, once the common framework agreed, it will be of immediate application.

¹⁸³ Legal basis: Article 118 TFEU

The economic impacts for rightholders and distributors are likely to vary, depending on the sector in which they are active. It is likely to increase the price of licence fees, as authorisations (and services) would cover the entire EU. This is likely to favour larger companies with a cross-border network, over national network operators.¹⁸⁴ In the AV sector a competition between national networks with internet distributors is bound to have a severely disruptive impact on content production and distribution, advertising markets, and media plurality. These impacts however could be mitigated by the development of licensing practices based on the number of users targeted/actually served. In general transaction costs will be radically reduced (application of one single uniform set of rules through the EU). This will benefit all actors in the value chain and will lower entry barriers for new entrants. It will also improve legal certainty for all stakeholders. Finally, the impact of this option on cultural diversity would need to be carefully assessed.

Rightholders and CMOs do not support the idea of the Single Copyright Title, arguing that it would add complexity and would not take into account the cultural differences between Member States. On the contrary, many institutional users and users are in favour as this Option would improve transparency and legal certainty as well as reduce transaction costs. It would contribute to the completion of the Digital Single Market. However, they see it as a long term project rather than an idea that could be realised in the near future. Many stakeholders consider the Single Copyright Title unrealistic due to the existing differences between the Member States. Member States clearly oppose the idea.

Comparison of policy options on territoriality and absolute territorial restrictions

Criteria ► Policy option ▼	Effectiveness	Impact on the IM	Impact on consumers/users	Impact on rightholders	Impact on distributors/intermediaries	Compliance costs
Option A1 - Status quo	0	0	0	0	0	0
Option A2 – guidance	0/+	0/+	0/+	0/-	0/-	0/-
Option A3A – elimination of absolute territorial restrictions	++	++	++	-	-	--
Option A3B (a) – country of origin	+	+	+	--	+	--
Option A3B (b) – targeting approach	+	+	+	-	+	--
Option A4 – Unitary Copyright Title	++	++	++	-	+	--

"0" – no change "+" – positive impact "-" – negative impact

In terms of guaranteeing cross-border provision of and access to content services, Option A1 would be ineffective and option A2 would have a moderate impact. Options A3B(a) and (b) would reduce the obstacles linked to the definition of rights but may not be sufficient to address the problems identified as to the exercise of the rights in contractual arrangements. Similar consideration could apply to Option A4, although it would improve legal certainty compared to Option A3B(b) and avoid the potential risks identified under Option A3B(a). Options A3A seems more effective compared to Options A1, A2 and A3B as it would directly address the market-based obstacles related to the provision of content services. A combination of several options could provide the most effective solution.

All the proposed options (except A1) would have positive impacts on the internal market, with Option A4 being able to reach a higher level of uniformity compared to other options.

¹⁸⁴ In the AV sector, for example, 87% of current value is in national networks (broadcasting, cable, IPTV, cinema) and only 13% is international (satellite).

Option A1 would have no impact on any stakeholder group while guidance on contracts and clarifications on the targeting approach (Option A2) could increase legal certainty and have a slight positive impact on cross-border access. Consumers however would benefit significantly more from Option A3A, since the elimination of absolute territorial restrictions would radically ease cross-border access to content. Even Option A4 could be less effective, for as long as it does not address also contract law provisions. Options A3B(a) and (b) could both have some positive impact on consumers, if service providers pass on the lower transaction costs that accompany these options. Under Option A3A rightholders would not be able to continue with the contractual fragmentation of the internal market that is likely to have a negative impact on the existing business models and Options A3b(a)-(b) as well as Option 4 would equally entail the development of brand new contractual practices for licensing agreements. Distributors (in the AV sector) would also lose out on Option A3A as they would not benefit from territorial exclusivity anymore. Service providers would however have to deal with lower transaction costs than currently both under Options A3B(a) and (b) therefore both options would be beneficial for them. Option A4 would have the most favourable impact on this group as the uniform legislation would increase legal certainty.

In terms of efficiency, Options A3B(a), A3B(b) and A4 would require a high level of harmonisation (in particular for Options A3B(a) and A4) which would take time to achieve. These options would also entail high compliance costs, which could however be compensated by the reduction of transaction costs of licensing. Option A3A would also entail compliance costs linked to the renegotiation of contracts. The benefits of this option could nevertheless be observable in the short/medium run compared to the other options.

5.1.2. Application of the principle of exhaustion

Option B1 - Status quo

Description: No policy intervention, as in Sub-section 5.1.1.1.

Summary of impacts: The impacts are described the baseline scenario.

Option B2 - Guidance to Member States and stakeholders and support for market initiatives

Description: The Commission would monitor the market as regards the development of services allowing for the sharing of files and playlists and technologies allowing for a second-hand digital market. The Commission also would build on CJEU judgements and provide guidance on the current legal framework as regards the principle of exhaustion in digital transmissions.

Summary of impacts: The case law of the CJEU would provide clarity that the Commission could contribute to on the basis of guidelines. Some service providers who responded to the consultation however doubt that this option would be sufficient.

Option B3 – Legislative intervention

Description: Under Option B3 it could be established in a legally binding manner that, in the context of the InfoSoc Directive, the principle of exhaustion applies to copies acquired via download-to-own services in the online environment (to the extent required to achieve a functional equivalence to the “physical world”).

Summary of impacts: Should the market monitoring under Option 2 lead to the conclusion that legislative intervention was warranted, the application of the principle of exhaustion to all

download-to-own services in the online environment would result in a significant decrease in the revenues of rightholders due to the emergence of a second-hand market of perfect digital copies. In the absence of well-working technical protection measures, re-sellers could abuse the principle of exhaustion via illegally keeping a copy of the re-sold work. This would have an unpredictable effect among the rightholders affecting the cycle to investment in copyright content. These negative consequences on the market were highlighted by rightholders, CMOs and some service providers in the public consultation. In theory rightholders could increase the price for the first sale to some extent. This may not, however, be easily accepted by consumers. Distributors may have fewer incentives to innovate as regards their services; however, the opening of online second-hand stores would become possible. Consumers would most likely benefit from lower prices. First, because they could legally acquire second-hand copies and second, because the existence of a second-market would create pressure to reduce prices for the first sale as well. They would also be able to legally dispose of the digital content they have acquired online (e.g. to give it as a gift). For these reasons, consumers and some service providers replying to the public consultation support the application of the exhaustion principle to digital content. However, since this option will directly affect the rightholders' incentive to create and to invest in new works, the production of creative content available to consumers would decrease in the long term. Many stakeholders, including Member States, remain cautious on this issue.

Option B4 – A unitary copyright title

Description: when establishing a unitary copyright title there may be a need to establish whether the principle of exhaustion applies or not to copies acquired via download-to-own services in the online environment.

Summary of impacts: Depending on the decision taken for the application of the principle of exhaustion, impacts would be either identical to those described under Option B2 or under Option B3.

Comparison of policy options on exhaustion

Criteria ► Policy option ▼	Effectiveness	Impact on the IM	Impact on consumers/users	Impact on rightholders	Impact on distributors/intermediaries	Compliance costs
Option B1 - Status quo	0	0	0	0	0	0
Option B2 – guidance / support market initiatives	0/+	0/+	0	0	0	0/-
Option B3- application of exhaustion in digital environment	+	+	++/- -[*]	---	-/+ [**]	--
Option B4 – Unitary Copyright Title	<i>Same as in Option B2 or B3</i>					

"0" – no change "+" – positive impact "-" – negative impact [*: short term/long term] [**depending on the type of service providers: download services vs other services]

The effectiveness of Options B1 and B2 in terms of facilitating cross-border access to content in the internal market appears to be rather limited, although monitoring the evolution of technologies and services may be necessary in this area. Option B3 could be more effective as the application of exhaustion in the digital environment may contribute to enhancing cross-border access to and provision of content (notably through online second-hand stores). The efficiency of both options may however be undermined by significant compliance costs and the need to foresee mitigating measures for rightholders and distributors.

As regards the impact on stakeholders, Option B2 would be neutral and its impacts would be very similar to Option B1. Option B3 would have a more positive impact on consumers in the short term as the creation of a second-hand market would decrease prices. However in the long run this option would have a negative impact also on users as rightholders would not invest in creation of new content. Option B3 would be detrimental to rightholders in all sectors of the creative industries as a second-hand market of perfect digital copies would drive down prices to an extent that would make investment in new content uneconomical. The impact of this option on service providers would depend on their field of activity. Those exploiting the current download-to-own business models would be negatively affected while this option would open new possibilities for those engaging in second-hand trade and it would not affect streaming-based businesses. The impact of Option B4 on different stakeholder groups would depend on the content of the Copyright Code. If it took a position against digital exhaustion, the impacts would be as in Option B2; but if it contained this principle, the impacts would be as in Option B3.

5.2. Increasing clarity as regards the legal framework for exceptions

Four different policy options have been assessed for the different exceptions covered in this IA:

Option 1 - Status quo: No policy intervention. Member States could take advantage of the policy space available under the Copyright Directives, and on the courts, and notably the CJEU, to clarify provisions of the Directives relevant to the development of new uses and services

Option 2 - Guidance to Member States and stakeholders and support for market initiatives: This Option would comprise Commission guidance to Member States and to market players as well as market monitoring. In particular, the guidance would recall the principle developed by the CJEU in rulings related to exceptions, in particular the requirement that the principle of strict interpretation of the exceptions¹⁸⁵ should be balanced against the need to ensure that the interpretation of the conditions of exceptions enables the effectiveness of the exception, and its purpose to be observed.¹⁸⁶ Such guidance could clarify the scope of the exceptions at EU level and their concrete application in the digital environment.

Option 3 – Legislative intervention: This Option would consist in harmonising and making mandatory certain of the existing exceptions and clarifying the legal framework for some new uses. It would also include a mechanism to ensure that these exceptions have cross-border effect through mutual recognition or a similar mechanism. This Option would imply a much deeper harmonisation and require a level of convergence of copyright laws that has not been proposed by the Commission to date¹⁸⁷. The changes could be achieved mainly through the available legal instruments, most likely a Directive which would affect several existing Directives.¹⁸⁸ For several exceptions, two alternatives are envisaged (Alternative A and Alternative B).

Option 4 – A unitary copyright title and European Copyright Code: This Option would imply that the exclusive rights and all the exceptions thereto are harmonised at European level.

A description and assessment of the impacts of each of these policy options is presented per sector below.

¹⁸⁵ C-5/08, *Infopaq International*, C-145/10, *Painer*, C-403/08 and C-429/08, *Football Association Premier League and others*

¹⁸⁶ C-145/10, *Painer*

¹⁸⁷ Member States are in general quite reluctant to a further harmonisation of the exceptions, even if some of them acknowledge the need to ensure a cross-border effect.

¹⁸⁸ Including the InfoSoc Directive, the Database Directive and the Rental and Lending Directive.

5.2.1. Libraries and archives

Option C1 - Status quo

Description: see the general description under section 5.2

Summary of impacts: The impacts are described in the baseline scenario.

Option C2 - Guidance to Member States and stakeholders and support for market initiatives

Description: The Commission would provide guidance on the scope of the exception for **preservation** (applies to all works, including those born-digital, to all kind of public cultural heritage institutions including those with film and AV holdings and includes format-shifting); set up a stakeholder dialogue to promote best practice in the provision of **remote access** for purposes of research and private study, building on the approach in the STM sector; and promote contractual arrangements between rightholders and libraries at national level for **e-lending**. This could take the form of a structured dialogue aimed at a blueprint for license-based e-lending, accompanied by the monitoring of market developments. As to **mass digitisation**, the Commission would support the maximum implementation of the MoU on out of commerce works. This would imply encouraging, when needed, changes in the legislative framework in several Member States (for instance to facilitate the effects of the licences granted by CMOs). Under this option, the Commission would also facilitate the adoption of further MoUs, including for the making available of AV and audio works in the archives of public service broadcasters and libraries.

Summary of impacts: Guidance on the scope of the exception for **preservation** would clarify the legal situation for beneficiary institutions and thus reduce transactions costs. This can have the effect of reducing transactions costs for beneficiary institutions related to digitisation of items, mainly in the medium term (2-3 years) as lead time would be needed for adapting national legislation according to applicable procedures, which can vary from Member State to Member State. By potentially driving more legal certainty and a larger scope of national exceptions, this option could encourage a more intense digitisation activity, to the benefit of society as a whole. To the extent that the exception will still only apply to the reproductions for preservation purposes, the impact on right holders would be very limited, across sectors (print, music, audio-visual and other). The overall effectiveness of this option would however be dependent on its uptake at national level.

It is expected that targeted stakeholder dialogue on **remote access to library collections** and facilitating a blue print for contractual arrangements for e-lending will reap benefits over the short- medium- and longer term, by building on investments and know-how already existing, and developing cooperative, pragmatic solutions. This option could in particular expand the scope for remote access by students to the collections of university and research libraries to areas beyond those and the STM sector, benefiting wider categories of patrons. Both concerned beneficiary institutions could benefit from with faster and more structured licence negotiations. Benefits for the single market will depend on safeguards to be built into agreements, for example on cross-border accessibility. All sectors could in principle be affected, but the success of market initiatives to date indicates that practical benefits are likely to arise in the near term in particular in the “print” sector (e-books, online journals), where the market is developing rapidly, and publishers, book sellers and libraries are engaged – with greater or lesser – success in experimental business models to ensure sustainable models both for publishers and for libraries.

When it comes to **electronic lending**, the development of a blue print for at EU level for contractual arrangements could accommodate current market and public policy interests and concerns of different stakeholders, taking into account that stakeholders are already investing in and experimenting with different distribution platforms and models. It would help address the concerns raised by libraries with licensing models, for example concerning the breadth of offer for electronic lending and conditions attached to it, and those of right holders regarding the impact on commercial markets and fair remuneration. The impact on authors will also depend on the extent to which initiatives undertaken under this option will factor in their legitimate expectation of fair remuneration, which can be guaranteed by taking into account arrangements that are already in place for the lending of e-books. Consumers, and in particular library patrons would benefit to the extent that contractual agreements become more widespread, resulting in a larger e-lending offer. In this case too, benefits for the Single Market, and specific economic impacts, would depend from the construct of a possible blueprint and the ensuing agreements. This option could generate administrative costs for both right holders and libraries.

In the area of **mass digitisation**, the impacts of this option may vary by sector. In the print sector, the development of national solutions, under an EU “model” approach (MoU on out-of-commerce works) is expected to continue to be beneficial in terms of enabling institutional users and rightholders to achieve projects in practice, which provide citizens with access to their cultural heritage. Member States are in many instances best-placed to facilitate agreement between the stakeholders within a known and familiar environment, including determining national priorities in terms of funding and scope of collections, as well as the conditions for such projects. Agreements at national level based on the collective management of rights would reduce transaction costs and increase legal certainty for cultural heritage institutions. In Member States where such agreements have been set up, most rightholders consider that this mechanism constitutes a satisfactory solution. More generally, rightholders are not likely to be negatively affected, provided the necessary safeguards are foreseen in the solutions established at national level (e.g. possibility to opt out). However, it remains uncertain whether these agreements could be used in a cross-border context.

In the case of the audio and AV sectors, the evidence from Licences for Europe and from the public consultation suggests that there is willingness to seek collaborative solutions to the digitisation and making available of audio and AV collections. However, the effectiveness of such solutions may be limited by the widespread use of individual rights licensing in the AV sector. The impacts of such initiatives on the reduction of transaction costs linked to the clearance of rights may therefore be more limited. In addition, in order to reduce the costs of wide-scale digitisation efforts sufficiently (taking into account the constraints of public funding), flanking measures promoting the adoption of AV identifiers and the interoperability of databases will be needed.

In the public consultation, rightholders support the use of licences for remote access and e-lending and the implementation of the MoU on out-of-commerce works at national level. Many institutional users favour the introduction of principles on the acquisition and access to e-books by libraries and underline the need for a better implementation of the MoU in all Member States. They however consider that this approach may not be sufficient to address the challenges of mass digitisation.

Option C3 – Legislative intervention

Description: This option would harmonise and make mandatory the implementation in national legislation of exceptions for preservation and for remote access for the purpose of research and private study. As to the scope of the exception, two solutions can be envisaged:

- **Alternative A:** The **preservation** exception would apply to all works, including those born-digital, and include format-shifting. An exception for **remote (off-premise) online consultation** for purposes of research and private study would enable specific establishments (e.g. university libraries, archives) to provide remote access to works or other subject-matter held in their collections to their patrons over a closed network. Specific criteria would ensure that only those works and other subject matter which are not subject to purchase or licensing terms would be covered by the exception and that consultation of the library collection is solely permitted for the purposes of research or private study and accompanied by conditions to ensure compliance with the three step test (e.g. no permanent downloads). In addition, **mass digitisation** would be promoted through giving cross-border effect to Member States' legislation underpinning voluntary agreements for the making available of out-of-commerce works.
- **Alternative B:** The **preservation** exception would be extended to enable restoration and mass digitisation of all works in libraries' collections (including all legal deposit materials). **Remote access** would be extended to cover all works or other subject-matter held in the collections irrespective whether these are subject to purchase or licensing terms. The **e-lending** exception would apply in a manner which would be functionally equivalent to physical lending and include conditions to make it compatible with the three step test.

Summary of impacts of Option C3A: Regarding the **preservation** exception, beneficiaries of the exceptions such as libraries and archives usually support this option as they would gain legal certainty as to the application of the exception for specific acts of reproduction. This option could create a level-playing field in relation to the existence and scope of the national preservation exceptions. Applicable conditions would have to be carefully crafted, particularly when it comes to the availability of and conditions of access to replacement copies on the market, as they would be relevant for the impact on both beneficiary institutions and right holders and distributors. For the latter, the impact would be neutral if the exception were to be made applicable only when it proves not to be practical to purchase a replacement copy on the market. This option could lead to more preservation activities taking place, although such rate is influenced by a number of other factors beyond the applicable copyright regime.

Specific establishments and the researchers and students affiliated to them would also further benefit from this option as it relates to remote access. It would lower transaction costs for the making available of their collections for purposes of research and private study as a result of legal certainty under an exception for works which are not otherwise made available under licenced terms. As long as specific conditions to ensure compliance with the three step test are maintained, end-users would benefit from greater access to content for purposes of research and study, including in the long term. However, the impacts of an exception for remote access to library collections on other stakeholders needs to be further assessed. It will be crucial that the impact of the different conditions attached to this expanded exception are carefully examined and weighed, as equivalence between on-site consultation and remote consultation

cannot be assumed. The impact on the internal market will depend on the inclusion of mechanisms to ensure cross-border effect.

As to **mass digitisation**, Option C3A needs to be undertaken in combination with Option C2, which would support the development voluntary licensing agreements at national level. Providing a legal underpinning for voluntary licensing arrangements for the mass digitisation and making available of library collections would ensure that such collections were accessible cross border, thus bringing significant internal market benefits. The impact of this option on rightholders would depend on the conditions agreed for the making available of works across borders. Greater accessibility to, and preservation of, heritage materials, taken together with the preservation of incentives to create would contribute positively to cultural diversity.

Summary of impacts of Option C3B: Regarding the **preservation** exception, this option would create a level-playing field in relation to the existence and the scope of national preservation exceptions, providing a high degree of legal certainty to cultural heritage institutions. This would lower the transaction costs for cultural heritage institutions in those Member States which interpret the exception restrictively, in terms of not having to identify, find and negotiate with rights holders. However this option may generate some negative impacts on rights holders and distributors, since libraries would not need to purchase new copies to replace worn or fragile versions.

This option would also extend the exception that enables libraries and archives to make available protected content for **consultation** by their patrons and would therefore lower transaction costs for the use of educational content in the online environment. Specific establishments such as university libraries and archives may not be obliged to seek a licence when making copyright-protected content held in their collections available for remote consultation. This option would however be likely to be highly prejudicial to right holders' primary markets for the sale of e-journals and e-books that appear already to cater for the needs of these specific categories of users. Under this option, specific establishments may provide for access to all works that they manage to acquire and introduce in their collections. These establishments may no longer need to enter into licensing agreements with rights holders that tailor the licence to the number of potential users as well as the security of the network over which the journals and books will be made available. It appears unlikely that this option would be compatible with international obligations such as the three-step test.

The need for extending the **lending exception** (Public lending Right) to e-lending activities is difficult to assess as e-lending based on contractual agreements is still in the early stages and largely being tested. It is therefore too early to determine whether a market failure exists to such extent that an exception to copyright is required to partially or fully remedy to it. Library institutions would most likely benefit from an e-lending exception in that their ability to provide electronic lending could increase and the administrative burden related to licensing would be eliminated. Libraries' transaction costs, and the cost of acquiring e-books, would thus decrease. The extent of these benefits would depend however on the formulation of the conditions attached to that exception, for example in terms of 'frictions' (conditions mimicking the constraints related to physical lending), which can however also be negotiated and possibly better tailored through licensing agreements. The economic benefit would depend on the remuneration system attached to the exception as is the case under the physical lending exception. A central remuneration system could however generate substantial administrative costs.

A major potential problem raised in association to a new e-lending exception relates to the potential for it to 'cannibalise' the sales, thus affecting the commercial market of e-books, which is still nascent in a number of territories, and ultimately the very availability of e-book offer. This would negatively affect right holders, to different extents depending on the conditions attached to a possible exception. In addition, over the longer-term, it is likely that this approach would not enable libraries to develop the offer to subscribers – it would remain restricted to mirroring what is available in the physical world, and publishers would have few incentives to collaborate with libraries to improve the offer. Similarly, consumers would in the medium-term have access to a wider range of titles, but over the longer term be restricted in the modes of access to e-book collections.

Option C4 – A unitary copyright title and European Copyright Code

Description: see the general description under section 5.2

Summary of impacts: Under this Option, copyright protection would be valid on the same basis throughout the EU. The economic impacts for rightholders and distributors are likely to vary, depending on the sector in which they are active. The level of fair compensation for the use of works under an exception (when applicable) would be determined at EU level. This Option would be beneficial for users as they would enjoy EU-wide conditions for the use of and untrammelled cross-border access to protected content made available under an exception. Finally, the impact of this option on cultural diversity would need to be carefully assessed.

Comparison of policy options on libraries and archives

Preservation exception

Criteria ► Policy option ▼	Effectiveness	Impact on the IM	Impact on consumers/users	Impact on institutional users	Impact on rightholders	Compliance costs
Option C1 - Status quo	0	0	0	0	0	0
Option C2 – guidance	0/+	0/+	0/+	0/+	0	0
Option C3a – harmonised and mandatory exception for preservation (limited scope)	++	0/+	+	+	0/-	-
Option C3b – harmonised and mandatory exception for preservation (extended scope)	++	0/+	++	++	-	0
Option C4 – Unitary Copyright Title	<i>same as in Option 3a or 3b</i>					

"0" – no change "+" – positive impact "-" – negative impact

Remote access

Criteria ► Policy option ▼	Effectiveness	Impact on the IM	Impact on consumers/users	Impact on institutional users	Impact on rightholders	Impact on distributors/intermediaries	Compliance costs
Option C1 - Status quo	0	0	0	0	0	0	0
Option C2 – guidance / stakeholders dialogue	0/+	0/+	0/+	0/+	0/+	0/-	0/-
Option C3a – harmonised and mandatory exception for remote access (limited scope)	++	++	*	*	*	*	*
Option C3b – harmonised and mandatory exception for remote access (extended scope)	++	++	*	*	*	*	*
Option C4 – Unitary Copyright Title	<i>same as in Option 2, 3a or 3b</i>						

"0" – no change "+" – positive impact "-" – negative impact

[* The impacts on stakeholders and the compliance costs depend on the exact conditions to be set under the option.]

E-lending

Criteria ► Policy option ▼	Effectiveness	Impact on the IM	Impact on consumers/users	Impact on institutional users	Impact on rightholders	Impact on distributors /intermediaries	Compliance costs
Option C1 - Status quo	0	0	0	0	0	0	0
Option C2 – guidance / stakeholders dialogue	+	+	+	+	+	+	+
Option C3 – harmonised and mandatory exception for e-lending	+	+	*	*	*	*	*
Option C4 – Unitary Copyright Title	<i>same as in Option 2 or 3</i>						

"0" – no change "+" – positive impact "-" – negative impact

[* The impacts on stakeholders and the compliance costs depend on the exact conditions to be set under the option.]

Mass digitization

Criteria ► Policy option ▼	Effectiveness	Impact on the IM	Impact on consumers/users	Impact on institutional users	Impact on rightholders	Compliance costs
Option C1 - Status quo	0	0	0	0	0	0
Option C2 – guidance / stakeholders dialogue / support MoUs	+	+	+	+	+	+
Option C3 –cross-border effect to MoU for mass digitisation*	+	++	++	++	++	-
Option C4 – Unitary Copyright Title	<i>same as in Option 2 or 3</i>					

"0" – no change "+" – positive impact "-" – negative impact

[* The impacts of this option are considered together with the impact of Option 2.]

5.2.2. Education

Option D1 - Status quo

Description: see the general description under section 5.2

Summary of impacts: The impacts are described in the baseline scenario.

Option D2 - Guidance to Member States and stakeholders

Description: The Commission would clarify that the exception for illustration for teaching applies to e-learning activities undertaken by defined beneficiaries (recognized establishments as well as enrolled students), including blended forms of teaching and learning (mixing face-to-face and distance) and therefore enable acts of reproduction and communication to the public/making available over secured networks which are exclusively accessible to the beneficiaries of the exception; and issue guidance as to the extent to which works and other subject matter can be used, in line with the three-step test.

Summary of impacts: Clarifying the maximum scope of the teaching exception, in particular in relation to online uses, was suggested by several Member States and by certain institutional users in the public consultation. It would allow ensuring that Member States share a common understanding of the teaching exception and its application to e-learning activities (under certain conditions). It could contribute to resolve problems raised by certain publishers in the public consultation in relation to the interpretation of the exception and its extensive use by certain educational establishments. Such guidance could also encourage other Member States to modernise their legislation and adapt it to the development of new learning methods. It

would allow reducing, to a certain extent, the current legal uncertainty faced by educational establishments. However, such guidance would not grant any cross-border effect to the exception and educational establishments might still be hindered in the development of cross-border learning approaches. The impacts of this option on right holders are expected to be rather limited and would mainly depend on the possible changes introduced in Member States legislation.

Option D3 – Legislative intervention

Description: This option would harmonise and make mandatory the implementation in national law of a separate exception for illustration for teaching that would also be applicable to e-learning activities. It would specify the types of works (including films and other AV works and databases), use in whole or in part and other requirements to ensure compatibility with the three-step test conditions e.g. the exemption of textbooks and works dedicated to teaching, and the requirement that the use of the work be for illustration purposes only. It would be applicable to closed (secure) networks.

Summary of impacts: The introduction of a teaching exception mandatory across the EU would respond to the solution suggested by many institutional users in the public consultation. Certain Member States would also favour this option. Further defining the scope of the exception while making it compulsory and supported by a system of mutual recognition will allow to align national legislations and to facilitate the circulation of educational material across borders. Schools, universities, other education and training institutions, and students would benefit from legal certainty when engaging in distance and cross-border learning programmes and using protected content in this context for illustration purposes. This would be particularly important for higher education establishments (the development of cross-border exchanges in primary and secondary education may still be hampered by other obstacles, e.g. languages and nation curricula). This option would mainly affect rightholders in the print and AV sectors (e.g. authors, publishers and producers whose works may be used in the teaching context) as well as in the software industry (development of digital educational resources). In this regard, the application of the exception under specific conditions (e.g. over secure networks, use of fragments of works) would constitute important safeguards to limit the prejudice to rightholders. The educational publishing market is not expected to be negatively affected by this option provided the mandatory exception does not cover textbooks and material developed specifically for educational purpose. A wider scope for this exception may undermine investment in the production of quality educational material.

The specific conditions applying to this exception (including the possible need to foresee fair compensation and the possibility to override the exception by contracts) need to be further examined in order to better assess the impacts on existing licensing schemes (in place in a number of Member States), on the digital offer developed by educational publishers and on long term incentives to produce.

Option D4 – A unitary copyright title and European Copyright Code

Description: see the general description under section 5.2

Summary of impacts: The impacts of this Option would be as described in Option C4.

Comparison of policy options on education

Criteria ► Policy option ▼	Effectiveness	Impact on the IM	Impact on consumers/users	Impact on institutional users	Impact on rightholders	Impact on distributors/in intermediaries	Compliance costs
Option D1 - Status quo	0	0	0	0	0	0	0
Option D2 – guidance (elearning)	0/+	0/+	0/+	0/+	0	0	0
Option D3 – harmonised and mandatory teaching exception (under certain conditions)	++	++	+*	+*	-**	-**	-**
Option D4 – Unitary Copyright Title	<i>same as in Option 3</i>						

"0" – no change "+" – positive impact "-" – negative impact

[*Positive impact but its strength depends on the exact conditions to be set under the option. **Negative impact but its strength depends on the exact conditions to be set under the option.]

5.2.3. TDM

Option E1 - Status quo

Description: see the general description under section 5.2

Summary of impacts: The impacts are described in the baseline scenario.

Option E2 - Guidance to Member States and stakeholders and market monitoring

Description: The Commission would provide guidelines to Member States to clarify to what extent text and data mining activities/techniques are covered (or not) by copyright and to what extent they fall under the scope of the existing research exceptions (InfoSoc and Database Directives). The Commission would encourage a complete implementation by Member States of the existing exception for non-commercial scientific research while ensuring their compliance with the three-step test. Guidance will also be provided as regards the dividing line between commercial and non-commercial research. This option would also include market monitoring of the contractual agreements and technical infrastructure developed for text and data mining.

Summary of impacts: The proposed guidelines on the application of the research exception to text and data mining (and, national legislation that may be adopted as a result) would have the effect to remove, at least in part, the current legal uncertainty for the relevant stakeholders. Researchers that are currently not engaging into TDM could start doing so thanks to increased clarity brought about by the guidelines. Such guidelines could also go some way to improve the situation in the internal market. They could be an incentive for Member States that have decided not to implement the research exceptions in the 2001/29/EC and 96/9/EC Directives to do so in a consistent way taking TDM into account. Guidelines would therefore mitigate the risk of a further fragmentation of the internal market caused by the possibility that Member States decide to progressively introduce divergent TDM exceptions within the boundaries of the current EU rules without any coordination at EU level. At the same time, the possible adoption of national exceptions specifically covering TDM as a result of the guidelines would probably have a negative impact on rightholders' (in particular STM publishers') ability to licence TDM and to develop market initiatives in this area. It seems therefore important that if EU guidelines are adopted, they are accompanied by market monitoring mechanisms that would help to assess the functioning of licensing practices and

market initiatives aiming at facilitating technical access to content for mining purposes and their impacts in terms of transaction costs.

Option E3 – Legislative intervention

Description: Two alternatives can be envisaged:

- **Alternative A:** It would harmonise and make mandatory the implementation in national legislation of a specific exception for text and data mining for the purpose of non-commercial scientific research applicable not only in the case of works but also to the *sui generis* protection of databases. The exception would apply under the condition that the user has lawful access to the material that is to be mined. It should be clear that contractual arrangements providing the lawful access to the material (e.g. a subscription) should not override the exception.
- **Alternative B:** The scope of this alternative is broader. The mandatory exception would apply to TDM undertaken for both non-commercial and commercial scientific research in so far as the permitted uses do not enter into competition with the original content or service. As in alternative A, the exception would apply provided that the user has lawful access.

Summary of impacts of Option E3A: An exception for TDM carried out for the purpose of non-commercial scientific research, (applicable under the condition that the user has lawful access to the content to be mined) would provide legal certainty in the internal market. Researchers, universities and scientific institutions would be able to engage in TDM activities for non-commercial scientific research in full legal certainty and without the need to acquire a specific licence to TDM content they have subscribed to. By contrast, rightholders, in particular STM publishers, will be negatively affected since even a well-targeted exception would reduce their ability to licence TDM, which in turn may limit their incentives to invest in technical and market solutions in this area.

Summary of impacts of Option E3B: The introduction of a TDM exception covering both commercial and non-commercial scientific research is favoured by institutional users, who argue that a TDM exception limited to non-commercial scientific research would restrict the potential of TDM and stress the difficulty to draw the line between commercial and non-commercial. On the face of it, such broad exception would benefit not only institutional users (universities, research institutions, etc) but also commercial companies that will be able to stop paying to mine IP protected content. At the same time, commercial users have generally not signalled any market malfunctioning that would require the introduction of a TDM exception covering commercial research. A TDM exception covering commercial uses does not seem to be justified by any market failure. Such an exception (even if applicable on condition that permitted uses do not enter into competition with the original content or services) would probably disrupt what seems to be today a well-functioning TDM licencing market for both STM publishers and commercial users, eg. in the pharmaceutical sector. It is also clear that this option would affect rightholders, in particular STM publishers, much more negatively than an exception covering only non-commercial uses. If this option is retained, rightholders would lose all ability to licence access to content for TDM purposes, which would in turn probably result in reduced investments in TDM solutions and potentially in scientific publishing more generally.

Option E4 – A unitary copyright title and European Copyright Code

Description: see the general description under section 5.2

Summary of impacts: The impacts of this Option would be as described in Option C4.

Comparison of policy options on TDM

Criteria ► Policy option ▼	Effectiveness	Impact on the IM	Impact on consumers/users	Impact on institutional users	Impact on rightholders	Impact on distributors/in intermediaries	Compliance costs
Option E1 - Status quo	0	0	0	0	0	0	0
Option E2 – guidance	0/+	0/+	0/+	0/+	0	0	0
Option E3a – harmonised and mandatory TDM exception (non-commercial)	++	++	++	++	-	0	-
Option E3b – harmonised and mandatory TDM exception (non-commercial and commercial)	++	++	++	++	---	0	-
Option E4 – Unitary Copyright Title	<i>same as in Option 2, 3a or 3b</i>						

"0" – no change "+" – positive impact "-" – negative impact

5.2.4. Disabilities

Option F1 - Status quo

Description: see the general description under section 5.2

Summary of impacts: The impacts are described in the baseline scenario.

Option F2 - Guidance to Member States and stakeholders and support for market initiatives

Description: The Commission would provide guidance to Member States to encourage, for all disabilities, the cross-border exchange of accessible format copies by recommending models for mechanisms of cooperation and transparency measures to facilitate it. The guidance would also encourage Member States to reduce the restrictions in the implementation of the existing exception while ensuring compliance with the three-step test.

Summary of impacts: Common guidelines for the cross-border exchange of accessible format copies could have some positive impact on the internal market; however they alone are likely to be insufficient to achieve uniformity as regards the exception, hence licence-based mechanisms would continue to play a dominant role. Some Member States may however decide to abolish the restrictions in their national exception (i.e. extend the range of beneficiaries and uses). For persons with disabilities (users/consumers), this option would have limited but positive effect, especially in longer term when licensing agreements could allow for a more intensive cross-border exchange. Less improvement can be expected as regards cross-border access to special format copies made under an exception due to the legal uncertainty inherent in this option. For libraries and other organisations serving persons with disabilities the transaction costs may decrease slowly but they would continue to have difficulties with the legal uncertainty as regards the cross-border exchange. This option could have some negative impact on rights holders (in the print and, to some extent, in the AV sectors) if some or all Member States, on the basis of the guidance, decided to extend the scope of the exception and/or to allow for cross-border exchange that would be carried out without the rights holders' authorisation. The limited circle of affected users/consumers would however limit any possible negative impact.

Option F3 – Legislative intervention

Description: Harmonise and make mandatory the implementation in national law of an exception for disabilities and the cross-border exchange of accessible formats made under such an exception. The scope of the mandatory exception could differ:

- **Alternative A:** This alternative would harmonise and make mandatory an exception only for people with a print disability. Only the obligations laid down in the Marrakesh Treaty would be implemented.
- **Alternative B:** The scope of this alternative is broader. Firstly the mandatory exception would not only apply to people with a print disability (as in Alternative A) but also to hearing impaired people. Secondly the alternative goes beyond print material (also AV works would be covered).

Summary of impacts of Option F3A: This option would have a positive impact on the internal market, as it would ensure the cross-border exchange of accessible format copies made under an exception is carried out according to the same set of rules. However due to the limited number of affected users/consumers, the overall impact of the internal market (and on rights holders) would be limited. For persons with print disabilities (users/consumers), the impact of this option would be very positive. While equal access to works could significantly improve if accessible formats became the mainstream format for publishing, a harmonised mandatory exception together with cross-border access to copies in such formats will continue to have a great importance as regards books and print material published previously in analogue or non-accessible digital formats. The mandatory nature and the harmonisation of the scope of the exception would increase legal certainty, in particular for libraries and other organisations who aim to address the needs of persons with disabilities. It would also reduce transaction costs, including the existing cost of duplicating the investment necessary for the making of accessible format copies, even in countries sharing the same language. In the short term, this option would have some negative impact on rights holders as the number of works used without their authorisation to make accessible format copies could increase. The exact impact would depend on the possibility of requiring fair remuneration for the use of the exception. In the longer term however, if publishing in accessible formats became mainstream, the use of the exception is likely to decrease together with the potential negative impacts on rights holders.

Summary of impacts of Option F3B: The impacts of this option would be the same as of Option C3A, with the exception that this Option would ensure the benefit of the exception of the cross-border exchange to a broader circle of persons with a disability (consumers/users), and not only to print-disabled persons. The exception and its cross-border effect would extend to persons with a hearing impairment and AV works would also be covered. Accordingly, this Option would have some negative impacts on rights holders not only in the print sector but also in the AV sector.

Option F4 – A unitary copyright title and European Copyright Code

Description: see the general description under section 5.2

Summary of impacts: The impacts of this Option would be as described in Option C4.

Comparison of policy options on the disabilities exception

Criteria ► Policy option ▼	Effectiveness	Impact on the IM	Impact on consumers/users	Impact on institutional users	Impact on rightholders	Impact on distributors/intermediaries	Compliance costs
Option F1 - Status quo	0	0	0	0	0	0	0
Option F2 – guidance	0/+	0/+	0/+	0/+	0	0	0
Option F3a – harmonised and mandatory exception for people with a print disability (Marrakesh Treaty)	++	++	++	++	-	0/-	0/-
Option F3b - harmonised and mandatory exception (extended scope)	++	++	++	++	--	0/-	0/-
Option F4 – Unitary Copyright Title	<i>same as in Option 3a or 3b</i>						

"0" – no change "+" – positive impact "-" – negative impact

5.2.5. Private copy and reprography

Option G1 - Status quo

Description: see the general description under section 5.2

Summary of impacts: The impacts are described in the baseline scenario.

Option G2 - Guidance to Member States and stakeholders

Description: The Commission would provide guidance to Member States as to the application of the private copying exception to online services and to address the cross-border aspects of the levy schemes. The guidelines could also provide guidance on issues such as the methods of calculation of levies or the functioning of reimbursement schemes.

Summary of impacts: Guidance from the Commission on the methods of calculation of levies could yield some positive effects for the *distributors* and *intermediaries* which would benefit increased legal certainty and lower costs of compliance. Similarly, guidance concerning cross-border aspects of levy schemes, ensuring higher level of their interoperability and reducing the instances of undue payments would likely have short-term and long-term positive impacts on the *consumers*. Indeed, not only the instances of undue payments could decrease thanks to ex ante exemption of certain transactions, but also – in case such payments occur – the existence of reimbursement schemes fulfilling some minimum criteria, would greatly facilitate efficient recovery of unduly paid sums. Moreover, the increased legal certainty, including easy and predictable rules for exemption and/or reimbursement, could impact positively the distributors and intermediaries and would have an overall positive impact on free movement of goods and services in the Internal Market. The guidance on the functioning of levy schemes, if followed, could therefore result in the decrease in the distributors' compliance costs and reduce entry barriers. This could, in turn, encourage *smaller operators* (SMEs) to take greater advantage of the possibilities that the Internal Market offers.

If by contrast the Commission's guidance was not followed to a satisfactory extent, both in the short-term and the long term, the situation would be likely to remain similar to the effects of the *status quo* i.e. if there was no policy intervention at EU level at all. Moreover, the non-binding nature of the proposed instrument can result in Member States following the guidelines to a different extent. This, in turn, could contribute to further disparities of the levy schemes and varying conditions of setting-up and operating on-line business models across the EU.

In light of the results of the public consultation, it seems that this option would not reply to the concerns expressed by distributors and intermediaries, who call for phasing out of levies. By contrast, it would meet to higher extent the prevailing views of collecting societies and authors and performers who consider that the current system functions well and does not require any substantive changes.

Option G3 – Legislative intervention

Description: Two alternatives can be envisaged to streamline the operation of the relevant systems in the digital environment:

- **Alternative A:** Clarifying which categories of acts of reproduction could cause harm requiring compensation in the context of licensed digital transmissions and laying down the minimal requirements levy schemes need to fulfil in particular as regards exemption and/or reimbursement of undue payments as well as their transparency.
- **Alternative B:** Phasing out levies. Accompanying, transitional measures to mitigate possible negative impacts will be introduced.

Summary of impacts of Option G3A: Clarity as regards the methods of calculation of levies in the context of digital transmissions will yield immediate positive effects to the distributors and intermediaries. Distributors and intermediaries would therefore benefit legal certainty and lower costs of compliance. More clarity as regards the inter-operability of levy schemes and reduction of undue payments are likely to have both short-term and long-term positive impacts on the consumers. Indeed, by providing ex ante exemptions, the envisaged legislation could not only decrease the instances of undue payments, but also – in case such payments occur – greatly facilitate the reimbursement. Moreover, the increased legal certainty, including easy and predictable rules for exemption and/or reimbursement will impact positively the consumers, distributors and intermediaries and have an overall positive effect on free movement of goods and services on the Internal Market. Those rules will result in the decrease in the distributors' and intermediaries' compliance costs and reduce entry barriers. This will also encourage smaller operators (SMEs) to take greater advantage of the possibilities that the Internal Market offers. The overall impact on the free movement of goods and services would be therefore substantial. Marketing of products subject to levies on pan-European basis would become easier as the criteria for calculation of levies would be clearer and there will be appropriate arrangements in place allowing pan-European manufacturers and distributors to avoid undue payments.

As regards rightholders, given that the decrease of instances of undue payments will necessarily entail some adjustments in the overall amounts of levies collected, some decrease in their revenue should not be excluded.

Summary of impacts of Option G3B: The entire phasing out of levy schemes would be beneficial for consumers only in so far there is a sufficient degree of pass-on in the final prices of products subject to levies. In a similar vein, distributors and intermediaries would very likely face lower costs of compliance, lesser administrative burden of operating across the borders and higher margins (depending on the degree of pass-on in the prices of levied products). If prices of previously levied products were lower (i.e. there is a sufficient degree of pass-on) distributors and intermediaries revenue would rise as the result of the increased demand. Rightholders revenue would drop, potentially affecting their incentives to create as well as the cultural diversity. This negative effect could partly be outweighed by the increased

demand for products previously subject to levies which would spur the consumption of content. At the same time, this may allow for the development of new business models, allowing rightholders to identify new sources of revenues. The impacts would also differ from one category of rightholders to another, depending of their ability to negotiate appropriate licenced-based remuneration. In the light of the answers to the public consultation, this option would be welcomed by service providers but strongly opposed by authors, performers and collecting societies. Publishers and service providers are of the view that new business models offer an opportunity which in the long term will create a major source of revenue.

Option G4 – A unitary copyright title and European Copyright Code

Description: see the general description under section 5.2

Summary of impacts: The impacts of this Option would be as described in Option C4.

Comparison of policy options on the private copying exception

Criteria ► Policy option ▼	Effectiveness	Impact on the IM	Impact on consumers/users	Impact on rightholders	Impact on distributors/intermediaries	Compliance costs
Option G1 - Status quo	0	0	0	0	0	0
Option G2 – guidance	0/+	0/+	0/+	0	0/+	0/-
Option G3a- clarification in legislation	++	++	+	0/-	0/+	-
Option G3b- phasing out of levies	++	++	+/0	--	++	+
Option G4 – Unitary Copyright Title	<i>same as in Option 2, 3a or 3b</i>					

"0" – no change "+" – positive impact "-" – negative impact

5.2.6. UGC

Option H1 - Status quo

Description: see the general description under section 5.2

Summary of impacts: The impacts are described in the baseline scenario.

Option H2 - Guidance to Member States and stakeholders and support for market initiatives

Description: Licenses for Europe showed the difficulties to agree on a problem definition and the polarisation of views on this issue. In view of this, the Commission would clarify the type of acts that are covered under the current optional exceptions for quotation, parody and incidental inclusion (e.g. music playing in the background of a consumer video) and encourage the maximum implementation of these exceptions by Member States. This option would also include monitoring of and support to licensing schemes (including micro-licensing solutions) developed for UGC. In addition, the Commission would provide support to industry initiatives which aim to develop metadata and rights expressions models which enable creators of UGC to identify their works.

Summary of impacts: Guidance on the application of the exceptions for quotation, parody and incidental inclusion to UGC would contribute to clarify the scope of the above exceptions at EU level and its concrete application in the digital environment in the short-term. This

clarification could be useful in particular in Member States where the legislation is not clear as to its application to the phenomenon of UGC or where these exceptions have not been introduced. However, considering the non-binding nature of the guidance, existing differences between Member States as to the implementation and the treatment of the specific uses would be likely to persist despite this clarification. For rights holders and for distributors and intermediaries this option would bring change to the extent that Member States followed Commission guidance. For consumers, who already experience a low degree of risk in respect of UGC, this approach could in principle bring incremental change in the short-term in some Member States.

Monitoring licensing schemes (including when it comes to micro-licensing) would allow for a better understanding of their functioning, scope and availability in the market. While not necessarily having a direct impact on the market or on the different parties involved, this option would provide knowledge to both policy makers and market participants, possibly allowing for the further dissemination and uptake of best practices, and a larger awareness among consumers. This effect would be greater if monitoring is accompanied by support mechanisms.

The development of technological solutions to enable creators of content to identify their work across whatever platform or licensing approach would bring benefits to creators and distributors alike, by reducing transaction costs and the burden related to licencing, as well as increasing opportunities for remuneration. For creators, it would help them irrespective of the platform or the licensing approach they elected to use (proprietary systems, Creative Commons etc.) They would be able to track usage and seek remuneration, if they wished, across multiple platforms and whatever level of permission they chose to provide for.

Option H3 – Legislative intervention

Description: Users' creation of UGC for non-commercial purposes could be addressed by two distinct solutions:

- **Alternative A:** Further harmonising the scope of application and making mandatory the implementation in national law of the exceptions for quotation, parody and incidental inclusion, including by ensuring that national implementation enables an effective application of these exceptions.
- **Alternative B:** Introducing a new UGC-specific exception to be implemented by all Member States, enabling the use of pre-existing works to create derivative works. The exception would only apply for uses which have a non-commercial purpose, and should not become a substitute for the normal exploitation of the work.

Summary of impacts of Option H3A: Creators of remixed content would benefit from greater legal certainty as regards to the creation and the posting of UGC on different Internet platforms, as also explained by some users and service providers in the public consultation. The harmonisation of parody and quotation exceptions would improve the balance between the fundamental right to property on the one hand (Article 17 of the EU Charter of Fundamental Rights) and, on the other, fundamental rights such as the freedom of expression and information (Article 11 of the Charter). There would be some negative impact on rights holders' income due to the introduction in all Member States of these exceptions.

Summary of impacts of Option H3B: The introduction of a UGC-specific exception was one of the solutions suggested by many users having responded to the public consultation. For consumers posting transformative works and other subject matter on non-commercial blog sites and other platforms such an exception would increase certainty that their use of pre-existing works was non-infringing – to the extent that such use did not become a substitute for the original material. Rightholders however argued that the introduction of a UGC-specific exception would unjustifiably prevent them from the possibility to obtain remuneration through licences with UGC platforms or directly with users (in the case of micro-licensing for example), and to exercise their moral rights. This could lead to the emergence of alternative, non-licensed business models, which would compete with licensed approaches. Ultimately and in view of the fact that UGC platforms are increasingly one more channel of distribution of content on line such an exception would in the medium to long-term harm incentives to create and produce. Given the existence of platform licensing models, right holders argue that an exception in this area would mainly benefit commercial platforms, having little or no impact on consumers compared to the current situation.

The introduction of such an exception would also go hand in hand with a lengthy period of legal uncertainty as a number of conditions should be introduced to make the exception compliant with international obligations (i.e., the three step test). Exceptions do not provide absolute legal certainty. As with all exceptions, it would ultimately be a matter for national courts to assess in every individual case whether the conditions of the exception have been met.

Option H4 – A unitary copyright title and European Copyright Code

Description: see the general description under section 5.2

Summary of impacts: The impacts of this Option would be as described in Option C4.

Comparison of policy options on UGC

Criteria ► Policy option ▼	Effectiveness	Impact on the IM	Impact on consumers/users	Impact on rightholders	Impact on distributors/intermediaries	Compliance costs
Option H1 - Status quo	0	0	0	0	0	0
Option H2 – guidance / support to industry initiatives	+	0/+	0/+	0/+	0/+	0/-
Option H3a – harmonised and mandatory exceptions for quotation, parody and incidental inclusion	+	0/+	+	-	+	-
Option H3b - new UGC-specific exception (non-commercial)	+	0/+	+/-*	--	+	--
Option H4 – Unitary Copyright Title	<i>same as in Option 2, 3a or 3b</i>					

"0" – no change "+" – positive impact "-" – negative impact "*"short term/long term

5.2.7. *Linking and browsing*

Option I1 - Status quo

Description: see the general description under section 5.2

Summary of impacts: The impacts are described in the baseline scenario.

Option I2 - Guidance to Member States and stakeholders and support for market initiatives

Description: The Commission would build on CJEU judgements and provide guidance on the current legal framework as regards how copyright relates to linking and browsing. In parallel, there will be market monitoring of the existence (or not) of obstacles to hyperlinking and browsing.

Summary of impacts: Guidance on the application of copyright rules to linking and browsing would have the effect of contributing to more legal certainty for all the relevant stakeholders. Consumers who engage in linking and browsing at a daily basis would have more legal security as to their actions, service providers whose business models are based on the provision of links would receive guidance as to their situation vis-à-vis rightholders, etc. However, the level of security may not be satisfactory neither to consumers nor to service providers. The guidance could also be helpful for Member States reviewing their copyright legislation and wishing to make some indications as to the legal status of linking and browsing. Arguably Member States would not be able to provide for a new exception on linking. Market monitoring would help to assess the functioning of licensing practices and in particular could help in identifying various types of linking and differences between them.

Option I3 – Legislative intervention

Description: The concept of communication to the public especially in view of the multifactorial assessment of the act of communication to the public as established by the CJEU would be clarified. This would include clarification of the meaning and legal significance of different factors developed by the CJEU when defining what constitutes an act of communication to the public such as ‘new public’, or ‘technical means’. The legal status of linking in view of the right of communication to the public would be clarified i.e. whether linking is an act of the communication to the public and if so, a new mandatory exception to the right of communication to the public would be established. In the case of browsing, the scope of the existing exception in Article 5(1) of the InfoSoc Directive for temporary copies would be clarified to remove any outstanding uncertainty as to the legal status of browsing.

Summary of impacts: The clarification of the communication to the public right would bring legal certainty for all interested stakeholders as to what constitutes an act of communication to the public and therefore requires rightholders’ authorisation (this would be important for the case of linking but also for other instances of communication to the public which have caused doubts in the past such as cases of public performance, simulcasting etc.). Consumers could provide links in the context of e.g. blog discussions and browse the internet without thinking about possible copyright infringements. Clarity would help in licensing of business models relying on the provision of links. A mandatory exception for linking would increase legal certainty but it may prove to be unnecessary in light of the emerging case law.¹⁸⁹ With regard to copies made during browsing, all parties would benefit from increased legal certainty. Stakeholders seem to agree that browsing should not be subject to rightholders' authorisation. Service providers underline that the exception set out in Article 5(1) of the InfoSoc Directive should not be interpreted narrowly. The clarification of the exception would remove any outstanding doubt on this issue to the benefit of all interested rightholders and users in particular.

¹⁸⁹ See details in Sub-section 3.1.3.3

Option I4 – A unitary copyright title and European Copyright Code

Description: see the general description under section 5.2

Summary of impacts: The impacts of this Option would be as described in Option C4.

Comparison of policy options on linking / browsing

Criteria ► Policy option ▼	Effectiveness	Impact on the IM	Impact on consumers/users	Impact on rightholders	Impact on distributors/intermediaries	Compliance costs
Option I1 - Status quo	0	0	0	0	0	0
Option I2 – guidance / support market initiatives	0/+	0/+	0/+	0	0/+	0
Option I3 – clarification of relevant rights and exception for linking and browsing	++	+	*	*	*	0
Option I4 – Unitary Copyright Title	<i>same as in Option 3</i>					

"0" – no change "+" – positive impact "-" – negative impact

[* The impacts on stakeholders depend on the exact conditions to be set under the option.]

5.2.8. Comparison of the policy options on exceptions (overview)

Criteria ► Policy option ▼	Effectiveness	Impact on the IM	Impact on consumers/users	Impact on institutional users	Impact on rightholders	Impact on distributors/intermediaries	Compliance costs
Option 1 - Status quo	0	0	0	0	0	0	0
Option 2 – guidance / support market initiatives	0/+	0/+	+	+	0/+	0	0/-
Option 3A – further harmonisation	+	+	+	+	-	-	-
Option 3B- further harmonisation (extended scope)	+	+	++	++	--	-	-
Option 4 – Unitary Copyright Title	++	++	+ / ++	+ / ++	0/- [*]	-	--

"0" – no change "+" – positive impact "-" – negative impact *depending on the scope of the exceptions and on the level of fair compensation determined at EU level.

Option 2 may increase clarity compared to Option 1, in particular in those Member States where the legislation is not clear, where these exceptions have not been introduced at all, or where their maximum scope has not been used (e.g. for the education or research exceptions), but its effectiveness would depend on the take-up by the Member States. Over the medium term, differences between Member States in the treatment of exceptions in detail may persist and exceptions will not have a cross-border effect. Options 3A and 3B would be able to increase clarity as to the scope of some exceptions and their cross-border effect. Beyond providing legal certainty, the relative effectiveness of options 3A and 3B would need to be assessed in light of the impacts on the relevant stakeholders. Option 4 would be even more effective as it would provide a full harmonisation of the exceptions.

In terms of impacts on the internal market, Options 1 and 2 would not allow to reduce the cross-border obstacles identified for the use of protected works under several exceptions. The guidance foreseen in Option 2 for several exceptions could nevertheless limit the risk of a further fragmentation of the internal market caused by the adoption of diverging reforms in Member States. The mandatory nature of the exceptions foreseen under Options 3A and 3B, together with the cross-border effect, will reduce the differences observed between Member

States and positively affect the functioning of the internal market. The full harmonisation foreseen in Option 4 would have the most favourable impact, since exactly the same conditions would apply to the uses under exceptions in all Member States.

Option 2 may positively affect the beneficiaries of the exceptions (users and institutional users) as it would clarify which uses are allowed under the existing exceptions. Such clarification is not expected to create a prejudice for rightholders¹⁹⁰. On the other hand, support to market initiatives, in particular in the area of mass digitisation and e-lending, would be beneficial to rightholders while allowing for a greater availability of content. Option 3A would be more favourable to users and institutional users but would reduce licensing opportunities for rightholders¹⁹¹. The interests of rightholders are not expected to be unreasonably prejudiced by the making compulsory of the existing exceptions as long as specific conditions to ensure compliance with the three step test are maintained or clarified. Solutions would need to be found for the issue of fair compensation when necessary. The impacts of Option 3A on rightholders require further assessment, as they depend on the exact conditions associated with each exception. Option 3B offers fewer safeguards for rightholders (e.g. licensing terms not taken into account for remote consultation, commercial use allowed under the TDM exception) but wider possibilities to use content under exceptions for users and institutional users. It proposes in some cases a scope for exceptions that could lose balance, going in some cases as far as to enable non-commercial services to compete with licensed services on the basis of an exception (rather than on the basis of authorisations, as it the case with licensed, commercial services).

As regards efficiency, there are significant differences between options 2, 3A/B and 4. Option 2 appears to be achievable in the short term at limited costs but its efficiency may be limited in the long run. Options 3A and 3B could be achieved in the medium term but would entail certain compliance costs, for example related to the need to adapt licensing contracts to the new scope of the exceptions and to define compensation mechanisms applicable across borders. The positive effects of Option 4 would be observable only in the long term and would imply high transitional costs.

5.3. Improving the functioning of the copyright marketplace

5.3.1. Improve clarity on the ownership of rights

Option J1 - Status quo

Description: No policy intervention. Market initiatives would continue (or not) to develop.

¹⁹⁰ Rightholders and most Member States arguing that the existing system is adequate and flexible enough may favour Option 2 whereas institutional users which think that exceptions should be phrased in a much clearer manner will not.

¹⁹¹ In the public consultation, most Member States, rightholders, CMOs and some service providers generally consider that licensing solutions should always be favoured and that the existing list of exceptions in the InfoSoc Directive is a good solution. They think it is unclear if making those mandatory or further harmonising their content would bring any added value. Authors and publishers expressed a clear preference for flexible licensing solutions and warned about broad exceptions which could undermine the investments in creative content. The same approach was supported by most of the Member States that replied to the public consultation. They also highlight the need to maintain flexibility at national level and to harmonise only if there is strong evidence of the need for it (and of the pertinence of the solution). On the contrary, users and institutional users support mandatory exceptions with cross-border effect, in particular for research, teaching and disabilities. Most service providers are in favour of more harmonised exceptions.

Summary of impacts: The impacts are described in the baseline scenario.

Option J2 - Guidance to Member States and stakeholders and support for market initiatives

Description: The Commission would promote and support industry initiatives aimed at streamlining licensing and developing metadata and rights models to enable creators to identify their works, for example by issuing calls for tender to develop tools and technology to support implementation of Web Content Declarations (WCDs). In addition, the Commission could set up a dialogue with Member States and stakeholders to develop national copyright hubs which could simplify the identification and management of rights, and support projects to ensure interoperability between them; and design or support initiatives to integrate “orphan works” and public domain registry services and databases with WCDs and the evolving Hub network.

Summary of impacts: The proposed initiative could be of practical benefit to users, intermediaries and rightholders in the short- to medium-term. In all events, the distribution of creative content online will depend, in the medium-term, on accurate identification of such content in order to decrease transaction costs (identification, search and negotiation costs) and thus to facilitate the licensing and remuneration of online uses. It will be crucial for the long-term sustainability of online business models, whether of commercial distributors, other intermediaries, or rightholders, as well as in the interests of end-users. Therefore support in the short-term for industry initiatives to develop metadata and rights models to enable creators to identify their works, incentives for the attachment of interoperable identifiers to works and other subject matter, as well as dialogue with Member States and stakeholders to develop national copyright hubs would be important elements in building long-term benefits for the entire value chain. Stakeholders generally see important added value in promoting market-led initiatives on identifiers but do not support standardisation at EU level.

Option J3 – Legislative intervention

Description: This Option would aim to establish a system of rights registration in the EU, resulting in a central database for rights ownership, as well as recording of subsequent rights transfers. Potential users would be able to use the registration system as a tool to determine which works are still protected under copyright, and to determine which rightholders they need to contact in order to obtain a licence. Rightholders, on the other hand, could use registration entries as evidence in contractual negotiations or litigation. However, for the avoidance of doubt, registration would not be a prerequisite to enjoyment of copyright protection as this would be incompatible with the “no formalities” rule in the Berne Convention.

Subject to further assessment of its possible scope (domestic works or beyond) and feasibility notably in view of the EU’s and Member States’ compliance with its international obligations (including those arising from bilateral trade agreements), this option could make the extension of the term of protection beyond what is mandated in international agreements (50 years post mortem for authors, 50 years post publication/communication for performers and producers) dependent upon registration in a EU central database.

Summary of impacts: The practical functioning of any registration system would need significant research as to governance and financing, whether and how such a system could be made interoperable with other public or private rights databases, how to make the system

accessible for small as well as large rightholders, and how to make such a system cost-effective for users.¹⁹² There would also be a need to determine the right incentives for registration. In this regard, the link between registration and term of protection could provide such an incentive. Further analysis is however required to assess the feasibility of this option, including its compliance with international obligations.

In the public consultation, a majority of stakeholders underline that a compulsory system of registration of works at the EU level is contrary to Article 5.2 of the Berne Convention and therefore unacceptable. Rightholders consider almost unanimously that registration would be costly, complicated and an additional burden for them and point to the existing registration systems in Member States. On the contrary, service providers are generally in favour of a Berne-compliant, EU-wide registration system, which would facilitate licensing and improve legal certainty. Also institutional users and a number of individual users support the idea of an EU registration system, the main advantage of it being the easier identification of authors and orphan works.

Option J4 – A unitary copyright title and European Copyright Code

Description: This Option would require a decision on the same policy choices as in Option D3.

Summary of impacts: The same considerations apply as in Option J3.

Comparison of policy options on the identification of rights and rightholders

Criteria ► Policy option ▼	Effectiveness	Impact on the IM	Impact on consumers/users	Impact on rightholders	Impact on distributors/intermediaries	Compliance costs
Option J1 - Status quo	0	0	0	0	0	0
Option J2 – support industry initiatives/ stakeholders dialogue	+	+	+	++	++	0
Option J3 – EU system of rights registration	++	++	+	--	++	---
Option J4 – Unitary Copyright Title	<i>Same as in Option D2 or D3</i>					

"0" – no change "+" – positive impact "-" – negative impact

Options J3 and J4 would considerably facilitate the identification of rights and rightholders in the internal market thanks to the development of a central database for rights ownership. Option J2 may also be effective to support industry initiatives in this area, but its impact on the internal market may be more limited, i.e. depending on the success of the initiatives. As regards efficiency, Options J3 and J4 would require significant resources and could not be achieved in the short term. The time and resources required in Option J2 would be much lower.

Option J1 would have no impact on any stakeholder group. A more comprehensive identification system, whether based on market initiatives (Option J2) or law (Option J3) would not have direct impact on consumers but indirectly they could benefit from these options that could result in easier launch of online services. From this perspective, for service providers an EU system of rights registration could be the most favourable (Option J3) but

¹⁹² The US register has minimum search costs of \$330, putting a search beyond the means of most casual users of copyright

market initiatives, if successful, could deliver similar results (Option J2) and they would also not raise concerns as regards their compliance with international obligations. Finally, for rightholders, supporting industry initiatives would have a positive impact while a registration system, especially if it became a requirement (should it be in line with international obligations), would create major administrative burden for them. The impacts of Option J4 are the same as either in Option J2 or J3, depending on the policy choices made under this Option.

5.3.2. Ensuring adequate remuneration of authors and performers

Due to the early stages of the market analysis and discussion on strengthening the bargaining position of authors and performers, the impacts of the different options cannot be determined yet.

Option K1 - Status quo

Description: No policy intervention. Member States could take advantage of the policy space available under the Copyright Directives and market initiatives would continue (or not) to develop.

Option K2 - Guidance to Member States and stakeholders and support for market initiatives

Description: The Commission could establish a dialogue with stakeholders and Member States to review in practice the different national approaches to the transfer of rights and the remuneration of authors and performers, including collective bargaining agreements, contractual arrangements (including contractual clauses) and transfer of rights mechanisms as well as management by CMOs. Such a dialogue would serve as a platform to assess the relative merits and limitations of different approaches, and to enable the dissemination of best practice across EU Member States.

Option K3 – Legislative intervention

Description: This option would consist in determining and harmonising the mechanisms required to help achieving adequate remuneration of authors and performers throughout the EU. This could include, for example, harmonised rules as regards contractual clauses between authors and performers on the one hand and producers/publishers on the other (e.g. some types of clauses could be blacklisted) as well as modalities relating to the transfer of rights, possibly per sector (e.g. presumption of transfer of rights could be established).

Option K4 – A unitary copyright title and European Copyright Code

Description: This option would imply uniform rules applicable in all Member States as regards contractual clauses, collective bargaining and any provision of substantive copyright law that is deemed necessary to improve the bargaining position of authors and performers. This option would also require uniform rules as on authorship and ownership as well as on transfer of rights.

5.3.3. Ensuring an effective and balanced enforcement of rights

Option L1 – Status quo

Description: No policy intervention.

Summary of impacts: The impacts are described in the baseline scenario.

Option L2 - Guidance to Member States and stakeholders and support for market initiatives

Description: To address the lack of efficiency of measures allowing to identify infringers and to put an end to the infringements while at the same time ensuring that fundamental rights are taken into account, measures could be brought forward to involve intermediaries on a voluntary basis, with an emphasis on cases where the infringed content is used for a commercial purpose.¹⁹³ The aim of better tackling infringements committed with a commercial purpose and focusing the enforcement towards actors which take monetary advantage of infringing copyright is to reinforce the efficiency of the tools used to combat copyright infringements while avoiding potentially overzealous enforcement when this is not the case. This could, for example, be done via a Memorandum of Understanding and/or guidance to clarify the role of intermediaries in the IP infrastructure, in order to better identify infringers and stifle infringements when they are committed with a commercial purpose.

At the same time, clarification of the safeguards in terms of freedom of expression, respect of private life and data protection for private users could be provided. Such clarification would also recall the applicability of national legislation transposing Directive 95/46/EC to the processing of personal data by intermediaries in the IP infrastructure. Compliance with aforesaid national legislation will be monitored by the competent national supervisory authorities pursuant to Article 28 of Directive 95/46/EC.

To address the problem of low and 'erratic' damages, guidance could be provided to courts on how to calculate damages. Regarding the issue of cross-border corrective measures/damages, guidance addressed to Member States could deal specifically with the calculation of damages which takes into account additional costs that might have been triggered by the cross-border nature of the infringement.

Member States would be encouraged to set up dedicated copyright chambers in national courts. Judges from these courts should then be integrated into the network of IPR judges at the EU Observatory on infringements of IPRs ("the Observatory").

With regard to the enforcement of copyright across borders within the Union, Member States could be provided with guidance on divergences in provisional measures to preserve relevant evidence of an infringement of copyright that has taken place in another Member State and possibilities on how to reduce them.

Summary of impacts: The impacts of further involvement of intermediaries through voluntary measures in case of infringements committed for a commercial purpose depends very much on the nature of the instrument used and, in case of self-regulation, on the extent to which intermediaries, courts and Member States react to the guidance provided by the European Commission.

More effective scrutiny of infringers from intermediaries in case of infringements committed with a commercial purpose would reduce the harm to rightholders considerably but at the same time help to avoid too heavy a burden on private consumers who might infringe copyright without commercial purpose or scale. Such a distinction would also help to protect the fundamental rights of consumers as those could be better taken into account in the

¹⁹³

It was a major concern for some of the respondents to the public consultation that copyright enforcement against non-commercial infringements could be abolished. The intention of this option, however, is rather to put the emphasis on infringements of commercial scale without completely neglecting non-commercial infringements.

gathering of evidence, the enforcement of rightholders' right to information and in the execution of provisional and precautionary measures.

Rightholders who responded to the public consultation were massively in favour of further involvement of intermediaries to identify and put an end to infringements of copyright. On the other hand, a number of respondents (in particular internet users) were of the opinion that no further involvement of intermediaries was required since there would be a risk that this could lead to private censorship and would be too burdensome for ISPs.

Among those who were favourable to further involvement of intermediaries, views were pretty much split between legislative (solution proposed by rightholders) and non-legislative measures (notably ISPs).

In view of the positive experience with a recent MoU with stakeholders of a similar nature,¹⁹⁴ it is expected that such a MoU could exert peer pressure and thereby lead to an improvement with regard to the protection of copyright against infringements with a commercial purpose. To the extent that advertisers and payment service providers were to increase their efforts to avoid that advertisements are displayed on websites with copyright infringing content, it would have a strong impact discouraging copyright infringing businesses.

However, the efficiency of such an instrument will depend heavily on the extent to which intermediaries believe that such a MoU shields them from legal actions. Moreover, the use of a self-regulatory option will be of limited scope as any limitations to fundamental rights as provided for in the Charter of fundamental rights article 52.1, need to be provided by law and cannot be subject to self-regulation. It should also be pointed out that self-regulation cannot derogate from EU and national legislation already in force, as it is the case in particular for national legislations transposing Directive 95/46/EC and related case-law of the CJEU (for example the rights of the data subject to information (Section IV of Directive 95/46) and of access to data (Section V of Directive 95/46).

Guidance to courts on how to evaluate damages should help ensure that awards at the very least cover the costs and damage incurred by the rightholder and more uniform rulings in all Member States.

Dedicated copyright chambers in national courts would result in greater specialisation and expertise of judges. This would help addressing all three problems related to enforcement: Judges could better assess the quality of claims and of evidence provided. Judgements should become more predictable and damages more appropriate to the damage suffered. Furthermore, judges should be able to decide on preliminary measures faster and cases should be solved within a shorter period of time. Rightholders in the public consultation also mentioned this option, although not directly addressed by the questionnaire, and saw considerable benefits in it.

Option L3 – Legislative intervention

Description: Some of the measures proposed in Option L2 as "soft law", e.g. the involvement of intermediaries in the gathering of evidence in online cases or to end infringements of copyright, clarification on the calculation of damages, in particular in cross-border cases, the preservation of evidence in cross-border copyright infringements, or the delineation between

¹⁹⁴

Memorandum of Understanding on sale of counterfeit goods over the internet; see for context: http://ec.europa.eu/internal_market/iprenforcement/stakeholders/index_en.htm#maincontentSec2; and for the text of the MoU: http://ec.europa.eu/internal_market/iprenforcement/docs/memorandum_04052011_en.pdf

copyright enforcement and data protection and other fundamental rights, could be transformed into legal requirements. This could be done through a revision of IPRED in conjunction with Article 8 of the InfoSoc Directive. A key element of the reform would be to properly define the concept of “commercial scale or purpose”, in order to use it as a criteria to reinforce the involvement of intermediaries while ensuring that the focus of enforcement is not put on individual users acting without any commercial purpose. This should happen in compliance with fundamental rights, including freedom of expression, data protection and procedural safeguards, including requirements of clarity and foreseeability of the law limiting such fundamental rights.

Some elements might remain in the form of 'soft law' as the EU does not have the respective legislative competences. This would concern, e.g., the request to Member States to establish dedicated copyright chambers in courts.

Summary of impacts: In addition to the impacts of Option L2, a further involvement of intermediaries for infringements committed with a commercial purpose through legal harmonisation should render the enforcement of copyright more effective while also complying with the requirement of legal certainty. Moreover, further clarification of the interaction between copyright and fundamental rights would help safeguard the fundamental rights of customers and citizens in the enforcement of copyright and avoid unnecessary legal disputes and costs. This element has been regarded as very important by many respondents to the public consultation, be it rightholders, ISPs or internet users.

Legal certainty was a core concern of many respondents to the public consultation as uncertainty was seen as a major stumbling block to economic activity and of unease among users/citizens.

Clarification on the calculation of damages would benefit those rightholders who litigate against infringements and indirectly also all other rightholders by increasing the deterrent effect of enforcement through higher payments of damages and potentially a greater likelihood of prosecution.

More effective and balanced enforcement of copyright, in particular across borders is important for the increased cross-border business in creative content. Only if rightholders can be sure of the proper enforcement of their copyright across the EU will they be ready to make their works available across the entire internal market. At the same time, in order to be ready to engage in and benefit from cross-border shopping, private consumers need the reinsurance that they do not risk being prosecuted heavily for minor copyright infringements because of differences in national laws of which they were not aware.

Greater willingness to engage in the Digital Single Market from both sides, rightholders and consumers, would also open opportunities for entrepreneurs basing their business on copyrighted works to develop business cross-border. In this way cultural diversity could be enhanced across the whole EU.¹⁹⁵

Option L4 – A unitary copyright title and European Copyright Code

Description: If a Regulation was to establish a unitary copyright title and code in the EU, the enforcement problems regarding infringements occurring in several Member States would be solved (uniform interpretation of the conditions for the gathering of evidence and

¹⁹⁵ The importance of a well-functioning copyright regime for cultural diversity in Europe was also stressed by many respondents to the public consultation.

identification of infringers, possibility to have pan-European injunctions, consolidation of claims). Measures regarding the other issues would remain the same as described under Options L2 or L3 (level of damages, involvement of intermediaries). Instead of, or in addition to, Member States establishing dedicated copyright chambers in courts a unified Copyright Code would probably require a dedicated European chamber of the CJEU or a dedicated European Copyright Court.

Summary of impacts: The impacts of this option should, as far as enforcement is concerned, be very similar to those of Option L3. One could expect that they might be a bit stronger in the achievement of the objectives. However, as this option would require considerable changes in the entire set-up of copyright law in the EU, it would most likely take more time of the effects to materialise.

Comparison of policy options on enforcement

Criteria ► Policy option ▼	Effectiveness	Impact on the IM	Impact on consumers/users	Impact on rightholders	Impact on distributors/intermediaries	Compliance costs
Option L1 - Status quo	0	0	0	0	0	0
Option L2 – Guidance and support for market initiatives	+	+	+	+	+	0/+
Option L3 – Legislative intervention	++	++	++	++	++	+
Option L4 – Unitary Copyright Title	++	++	++	++	++	+

"0" – no change "+" – positive impact "-" – negative impact

As option L2 would to some extent rely on the good-will of stakeholders, its effectiveness could be very low. On the other hand, it could produce very effective and efficient results should stakeholders cooperate constructively. Using legislative tools in options L3 and L4 would ensure effectiveness and could be as efficient as option L2, if stakeholders were consulted properly in the preparation of the legislative measures. All options should have their strongest impact on the functioning of the Digital Single Market by making the framework more effective and harmonised across the Member States. The creation of a unitary copyright title should arguably support this impact. Therefore, option L4 would have a (slightly) stronger impact here than option L3.

Reduced (risk of) piracy would benefit rightholders in two ways. Firstly, more rightholders would be willing to engage in online activities as the risk that the profits from such activity would be made by others. Secondly, the benefits of rightholders would increase as the part of revenue which currently is being taken away by infringers would be reduced.

Greater legal certainty would increase users'/consumers' trust in the Digital Single Market . This and the increased offer would allow them to benefit in terms of choice, flexibility and speed, in particular when buying across borders. As a unitary title would reduce potential frictions between national regimes option L4 would again have the potential to provide the greatest benefit.

Because of this increased use of the internet by rightholders and users, there would also be a positive impact on intermediaries which already keep proper track of the relevant information about their clients (contact details etc.). On the other hand, those who have not done so so far, would face higher costs in stepping up their due diligence. In addition, they might lose some business with clients who took advantage of this insufficient due diligence, e.g. for infringements of copyrights. As they might manage to avoid this under option L2, they would

be better off under this option than under options L3 and L4; while the opposite holds for those operating proper due diligence systems already.

Finally, although it might sound counterintuitive, compliance costs might be reduced for both rightholders and intermediaries. A more harmonised approach to enforcement would allow rightholders to 'streamline' their monitoring and enforcement activities across Member States. Greater legal certainty, in particular with regard to the inherent conflict between copyright and fundamental rights, would make it easier for intermediaries to react to request.

6. OTHER IMPACTS

The policy options presented in chapter 5 may have impacts on fundamental rights, competitiveness, SMES, employment, third countries and trade. Since this IA accompanies a broad policy document, these impacts cannot be fully assessed at this stage. A first overview of the possible impacts is presented below.

6.1. Fundamental rights

A number of options presented in this IA may impact fundamental rights. **Copyright** is a property right recognised by the European Charter of Fundamental Rights¹⁹⁶; accordingly exceptions to copyright always represent a limitation to the exclusive rights of rightholders granted by law. Hence, any non-binding clarification on the maximum scope of the existing exceptions as in Option 2 may negatively affect the rights of rightholders while expanding the scope of the existing exceptions or creating new ones would have a clear negative impact. Option 1 would have no impact while the impacts of Option 4 would depend in the content of the Copyright Code as in Option 3.

The exception for **persons with a disability** affects fundamental rights enshrined in the United Nations Convention on the Rights of Persons with Disabilities, in particular the right of access to information¹⁹⁷ and the right of persons with disabilities to participate in cultural life on an equal basis with others.¹⁹⁸ Option F3A would positively affect the rights of persons with a visual impairment while Option F3B would benefit a broader circle of beneficiaries. For Option F4 the same considerations apply. Option F2 could have some positive effect if Member States broadened the scope of their national exceptions while Option F1 would have no impact on the rights of disabled persons.

As regards enforcement, Option L1 would maintain legal uncertainty as regards the articulation between different rights such as the **protection of personal data, the freedom of expression or to conduct a business** and the right for intellectual property to be protected, in particular in cases of injunctions to block infringing websites or injunctions to disclose the identity of infringers. Option L2 could clarify to a certain extent the existing legal framework but would be of rather limited effect since any limitations to fundamental rights need to be provided by law according to Article 52.1 of the Charter of Fundamental Rights. Options L3 and L4 would bring legal certainty and ensure that a proper balance is struck between the different fundamental rights, in particular the protection of personal data when injunctions are ordered to identify persons infringing copyright when enforcing copyright.

¹⁹⁶ Article 17(2)

¹⁹⁷ Article 21

¹⁹⁸ Article 30

6.2. Competitiveness

Several aspects of the options presented in this IA could affect the **competitiveness** of copyright-intensive industries. A few examples are presented below, however further analysis is required to assess the impacts of the options on the competitiveness of the different industries (e.g. book, music, AV).

Option A3A may reduce the cost competitiveness of rightholders as it would limit their ability to grant absolute territorial exclusivity and to price discriminate between national markets. Rightholders in the AV sector may be particularly affected, with a direct impact on their ability to produce and invest in new content. At the same time, this option would offer distributors the possibility to extend their customers' basis in new territories. This could encourage them to review their commercial processes and offer innovative services. However the competitive pressure may be detrimental to certain national distributors which may not be able to reduce their costs and maintain the same profitability without absolute territorial exclusivity agreements.

The harmonisation of the exceptions foreseen under Option C3A may not affect the competitiveness of creative industries. However the scope of the exceptions foreseen under Option 3B may reduce the rightholders' possibilities to offer licences and could therefore reduce their incentive to create new content or lead to lesser quality (and therefore less competitive) content.

The application of a uniform set of copyright rules through the EU foreseen under the unitary copyright title would be beneficial to creative industries, as it would reduce compliance costs and offer the possibility to generate economies of scale. However this option would strongly affect the structure of, notably, the AV sector, in terms of costs and competition between the different market players.

6.3. SMEs

The options presented in this IA would also impact SMEs, which constitute the fabric of many of the copyright intensive industries. In general, most of the options presented in the IA do not include specific administrative requirements which would result in higher regulatory burden for SMEs compared to larger companies. Exceptions include Option A3A (on territoriality) which may result in administrative burden for service providers (including SMEs) and may particularly affect SMEs in the short term as far as the renegotiation of contracts is concerned (the costs would in average be higher for SMEs than for large companies). Options J3 (on registration) and K3 (on remuneration of authors and performers) may also entail administrative burden for SMEs. Other options aiming at increasing legal certainty and reducing transactions costs would be particularly beneficial to SMEs.

6.4. Social impacts

The vast majority of the options presented in this IA that accompanies a broad policy document, do not have a direct impact on employment. However, as mentioned in the background section, copyright-intensive industries represent around 7.05 million jobs, accounting for 3.2% of employment in the EU. In addition, these industries generate employment in other industries which supply them with goods and services as inputs. If indirect employment is taken into account, copyright-intensive industries represent about 9,4 million jobs.

There are a number of options in the IA which may have an indirect positive impact on employment. In particular, facilitating the cross-border dissemination of content (Options A3 and A4) could increase employment by service providers (including by reducing the entry barriers to the market for SMEs) as well as the revenue of rightholders, including individual authors and performers. On the contrary, some other options such as Options 3A and 3B for the exceptions which foresee broadening the existing exceptions could reduce the remuneration of rightholders and lead, in the long term, to a reduction of employment in the creative industries.

The area in which the options could have a direct impact on employment is the fair remuneration of authors and performers. Depending on the mechanisms chosen, the options (in particular Option K3) could have an undeniable favourable effect on the labour market in the creative industries. However, as this area is not sufficiently mature to assess the impacts of the options (studies are underway), it is hard to estimate how many additional authors and performers could be able to effectively live from their copyright-related revenues.

6.5. Third countries and trade

Most options considered in this IA do not have direct impacts on third countries and trade beyond the considerations on the European industry's competitiveness explained above. Those third-country rightholders whose rights are protected in the EU under international agreements, would be affected by changes in the EU legislation similarly to European rightholders. For example, if the scope of the exceptions were broadened as in Option 3A and in particular Option 3B, this can be expected to have a negative impact also on their remuneration. If absolute territorial restrictions were to be prohibited, as presented in Option A3A, all licensing agreements covering the EU would have to be made subject to such legal obligation. Users from third countries would not be affected.

The areas where the chosen option could have a direct impact on the EU's international obligation are (i) the possible establishment of a system of rights registration (Option J3 and J4) and (ii) some of the options implying a broadening of the exceptions. These options would have to take into account the EU's and Member States' commitments under numerous international treaties¹⁹⁹ and bilateral trade agreements, also with respect to the term of protection in order not to trigger a breach of international obligations. They will also have to ensure compliance with the three-step test (as it is an obligation under TRIPS and the WIPO Treaties).

The options considered in this IA do not have any **environmental** impacts.

7. MONITORING AND EVALUATION

The methods and timetable for monitoring and evaluation are not very detailed at this stage of the policy development process since they would depend on the choice of legal instrument.

For several options presented in this IA, further analysis will be carried out by the Commission in order to collect the necessary data and assess in more detail the possible

¹⁹⁹ According to Article 5 of the Berne Convention, the country where copyright protection is claimed cannot attach mandatory formalities, such as registration to the protection during the term of protection guaranteed by the Convention. See also Annex C.

impacts on the relevant stakeholders. Exchange of information with Member States and with the relevant stakeholders could also be considered to ensure further data collection.

Certain policy options already include a market monitoring exercise, which could contribute to the preparation of further policy initiatives already in the short term.

Possible indicators that could be used to monitor progress towards meeting the objectives pursued in the modernisation of the EU copyright rules could include for example:

- Number of service providers offering cross-border access to content services, by sector;
- Number of services providers in each Member State proposing the portability of their services, by sector;
- Variation in the consumers demand for cross-border services;
- Availability of contractual agreements between publishers and libraries for the loan of e-books in each Member State;
- Number of e-books borrowed at public libraries;
- Number of micro-licensing schemes available for UGC;
- Variation in the content uploaded on UGC platforms;
- Availability of ex-ante / ex-post reimbursement schemes and variation in the tariffs applicable to products subject to levies;
- Variation in the number of accessible format copies of books for visually impaired persons;
- Variation in the use of interoperable identifiers;
- Number of copyright hubs developed at national level;
- Number of infringements of committed with a commercial purpose on the Internet.

If a legislative option is chosen, specific indicators will be selected to monitor progress towards meeting the operational objectives defined in this IA and an evaluation will be carried out five years after the transposition of the relevant legislation.

Given that this IA accompanies a White Paper, transposition and compliance are not relevant at this stage. They would have to be examined if a legislative option is chosen.

8. ANNEXES TO THE IMPACT ASSESSMENT

Provisional

8.1. ANNEX A – OUTCOME OF LICENCES FOR EUROPE

1. Cross-border portability of subscription services: joint statement by the audio-visual industry.

Today, subscribers to audio-visual services online, e.g. consumers watching movies via an Internet service provider or web-store, are often denied access to services legally bought in their own EU country when they cross national borders.

This will change:

Representatives of the audio-visual sector have issued a statement affirming their willingness to continue to work towards the further development of cross-border portability. Consumers will increasingly be able to watch films, TV programmes and other audio-visual content for which they have subscribed to at home, when travelling in the EU on business or holidays. This is already largely the case with music, e-books, magazines and newspapers.

[Signatories: Association of Commercial Television (ACT), European Coordination of Independent producers (CEPI), Europa Distribution, EUROVOD, Federation of European Film Directors (FERA), International Federation of Film Distributors Associations (FIAD), International Federation of Film Producers Associations (FIAPF), Independent Film & Television Alliance (IFTA), International Video Federation (IVF), Motion Picture Association (MPA), Sports Rights Owners Coalition (SROC), Society of Audiovisual Authors (SAA)]

2. Improved availability of e-books across borders and across devices: a Roadmap by the e-book sector.

Despite progress consumers are often still not able to transfer their e-book content from one device to another due to different e-book formats and other restrictions. Nor can they easily find online offers in particular from smaller market players.

This will change:

Publishers, booksellers and authors will continue promoting cross-border access, interoperability and discoverability of e-books through several initiatives, such as ePub, an open standard format that will make it possible to read e-books across different devices. As a result, you will increasingly be able to access your e-books online anywhere and from any device, provided your retailer works with interoperable formats.

[Signatories: European Writers Council (EWC), European Booksellers Federation (EBF), International Association of Scientific, Technical & Medical Publishers (STM), Federation of European Publishers (FEP), European Publishers Council (EPC)]

3. Easier licensing for music: commitments by the music sector.

Use (and re-use) of music on major platforms is largely covered by blanket licence agreements between producers, publishers, authors' collecting societies and those platforms. Small businesses or individuals who want a licence for e.g. the use of background music on their website may have difficulties to acquire the necessary licences.

This will change:

Record producers offer a new pan-European licence enabling background music on websites. For authors and publishers, their collective rights management societies have committed to spreading best practice on existing licensing schemes. This will make small-scale licences available in all EU countries, e.g. for background music on websites and small-scale web/podcasting.

[Initiatives by International Federation of the Phonographic Industry (IFPI) and the European Grouping of Societies of Authors and Composers (GESAC)]

4. Easier access to print and images: a toolkit by the print industry.

Today, users do not always know what they can or cannot do with a text or picture, and if and how they can get a licence.

This will change:

A range of new licensing solutions will allow all users (from businesses to individuals) to know what they are able to do with text and images and seek permission through streamlined licensing solutions if needed. This includes the identification of rights holders, information to users about licensing and licensing conditions, and easy pay-per-use payment systems.

[Signatories: European Publishers Council (EPC), European Visual Artists (EVA), European Writers' Council (EWC), Federation of European Photographers (FEP), International Federation of Reproduction Rights Organisations (IFRRO), International Federation of Journalists (IFJ), International Association of Scientific, Technical & Medical Publishers (STM)]

5. Enabling the identification of your work and rights online: an industry roadmap.

Web self-publishers, such as creators posting their new songs or videos online, are protected by copyright. Yet, often they cannot (easily) obtain identifiers for their works, or licences for re-using existing content, preventing them from monetising their works or stopping infringements of their rights, if they wish.

This will change:

Creators – "self-publishers" – will be able to attach a machine-readable identification to their content, in order to facilitate claims and acknowledgement of authorship and associated rights. This will make it easier to use (and re-use) content. Through more national and regional "hub" websites, like the new industry-led Copyright Hub in the UK, industry will accelerate the development of an efficient market helping users to get the licences they need.

[The Web Content Declaration (WCD) has developed out of the Linked Content Coalition (LCC) - an industry alliance aiming to facilitate licensing through the enhanced exchange of rights information (information about the right owner and the licence conditions)]

6. More active reader involvement in the online press: a declaration on improving the user experience.

In the digital environment, an increasing number of newspapers and magazines are encouraging dynamic interaction between users and press publishers.

This will change:

Press publishers will engage with readers to improve user experience, including via the uptake of User Generated Content (UGC) in their online publications and services. This will include improving information about what users can do with press publishers' content and what press publishers can do with users' content, including on how to better identify and protect content, as well as education, awareness-raising and sharing best practices across the sector.

[Signatories: European Magazine Media Association (EMMA), European Newspaper Publishers' Association (ENPA), European Publishers Council (EPC)]

7. More heritage films online: an agreement on principles and procedures.

Film heritage institutions struggle to fund the digitisation of European heritage films, and to clear authorisations with rightholders. European cinematographic heritage that would otherwise be accessible to citizens is left on the shelf.

This will change:

Film heritage institutions and film producers now have a clear agreement on how to go about digitising, restoring and making available European film heritage. This includes approaches for sharing the costs of digitisation and remuneration. It will enable film heritage institutions to free up valuable European films stored in their archives while guaranteeing the rightholders an appropriate share of the rewards.

[Signatories: Association des Cinémathèques Européennes (ACE), Federation of European Film Directors (FERA), International Federation of Film Producers Associations (FIAPF), Society of Audiovisual Authors (SAA)]

8. Freeing up TV footage archives through digitisation: discussions between public broadcasters and rightholders.

Public service broadcasters have archives comprising millions of hours of TV footage. Clearing the rights with the myriad of rightholders today makes the use of such material expensive and time-consuming.

This will change:

Broadcasters and rightholders have for the first time agreed to find solutions for the digitisation and making available of broadcasters' TV footage archives.

[Signatories: European Broadcasting Union (EBU), Society of Audiovisual Authors (SAA) not excluding dialogue with other relevant parties.]

9. Improving identification and discoverability of audio-visual content online: a declaration by the audio-visual industry.

Some European audio-visual producers have been slow to adopt interoperable identifiers for their productions. This, and a lack of interoperability between the standards available in the marketplace (ISAN and EIDR), has made rights management, including licensing and remuneration, difficult. This puts a brake on the availability of content online.

This will change:

The declaration represents, for the first time, broad support for international, standard audio-visual work identifiers from across a wide spectrum of actors in the European sector. Making current standards interoperable and using them widely will help to take audio-visual works out of the digital 'black hole' and streamline their distribution and discoverability.

[Signatories: Société civile pour l'Administration des Droits des Artistes et Musiciens Interprètes (Adami), British Film Institute (BFI), European Coordination of Independent producers (CEPI), European Association of Regional Film Funds (CineRegio), Entertainment Identifier Registry (EIDR), Eurocinema, European Organisation of Movie and Television Producers' Collecting Societies (EuroCopya), European Film Promotion (EFP), Federation of European Film Directors (FERA), International Federation of Film Producers Associations (FIAPF), Institut National de l'Audiovisuel (INA), ISAN International Agency (ISAN-IA), Society of Audiovisual Authors (SAA)]

10. Easier text and data mining of subscription-based material for non-commercial researchers: a commitment by scientific publishers.

Researchers are increasingly keen to engage in text and data mining, i.e. the automated 'scanning' of text or datasets in search of e.g. new significant correlations or recurrences. Even when researchers have a subscription to scientific and other publications, it is not clear that they will be able to mine them in the absence of a specific authorisation from publishers. In addition, researchers sometimes face technical problems to mine text or data.

This will change:

Scientific publishers have proposed a licensing clause for subscription-based material as a solution, further supported by the necessary technological solutions to enable mining. This is expected to allow researchers to mine, for non-commercial scientific research purposes and at no additional cost, journals subscribed by their university or research institution. Researchers will be able to connect to a web-based "mining portal" through which they can access the existing infrastructure of the participating publishers and mine publications subscribed by their university or research institution. A "click-through licence" for individual researchers has been developed.

[Signatories: By 11/11/2013, the following publishers had signed up to this commitment: American Chemical Society, British Medical Journal Publishing Group Ltd, Brill Publishers, Elsevier BV, Georg Thieme Verlag KG, Hogrefe Verlag GmbH & Co. KG, Institute of Physics / IOP Publishing Ltd, John Wiley & Sons Ltd, New England Journal of Medicine (Massachusetts Medical Society), Oxford University Press, Springer Science + Business Media Deutschland GmbH, Taylor and Francis Ltd, Wolters Kluwer Health (Medical Research) Ltd]

8.2. ANNEX B – THE INTERNET VALUE CHAIN

To understand the role and impact of copyright in the internet economy, it is necessary to understand the flow of services and revenues along the **internet value chain** (Figure 1).

The changing market conditions for the distribution and consumption of content, the new technologies and new distribution channels (streaming services, e-book sellers, VoD services, etc) have allowed for the emergence of (a) new actors and distribution patterns, (b) new remuneration and reward models, and (c) new content creation patterns.

- (d) New types of intermediaries between creators and the creative industries on the one hand and consumers on the other have emerged in the value chain. In some cases intermediaries operate on a very different basis from competing “classical” (off-line) distributors, notably they are not subject to certain national regulatory requirements. Online services such as Amazon, iTunes, Spotify, Deezer, Xbox, as well as news publishing platforms, have developed new distribution systems and compete with the existing players in sectors as different as book and newspaper publishing, music, film and television. Horizontal internet platforms such as YouTube and Facebook have become new channels to distribute content and also monetise the availability of creative content with advertising revenue and/or revenue from consumer data.
- (e) The flow of revenues between market participants involved in the production and dissemination of creative content has been undergoing significant changes. Creative content is remunerated on-line in a variety of ways, including: directly by consumers (services like iTunes or subscription services like Spotify), or via a share of advertising revenues (e.g. YouTube). Some business models are based exclusively on advertising; the consumption of creative content is "free" for the consumer, but the distributing platform pays for the content (through licensing agreements) and collects and analyses vast amounts of consumer data, and/or targets advertising. New technologies allow internet-based intermediaries to track and analyse user behaviour, including the consumption of creative content produced by third parties, when accessing their services. Using "big data" analysis, this information provides them with the possibility to profile consumers and target advertising at them. Revenues generated through such advertising in turn finance or cross-subsidize the respective internet platforms. New business models are also being explored in the education sector, with new flows or revenues emerging from complimentary services (e.g. student support, assessment and certification, advertising).
- (f) Finally, the trend of direct interaction in the online space between creators and consumers (e.g. through blogs) is also gaining importance, as is the use of open licences. While in a pre-internet economy, it was almost impossible for a creator to disseminate his or her work to a large audience of consumers without the intermediation of a producer or publisher who would assume the risk and the cost of (re-)production, some digital content can be produced and disseminated at low cost. For example, individual creators of user-generated content (UGC) obtain revenues from advertising posted along the original content they are distributing at no cost. Moreover, creation of professional content is increasingly taking into consideration precise information on the prevailing tastes and habits of users (e.g. this is the basis of investment in original series by Netflix). Also, UGC is often integrated by professional content producers (e.g. broadcasters) in their programming.

These evolutions, however, do not change the fundamental fact that investment in creative content remains at the beginning of this internet-based value chain. Publishers (books,

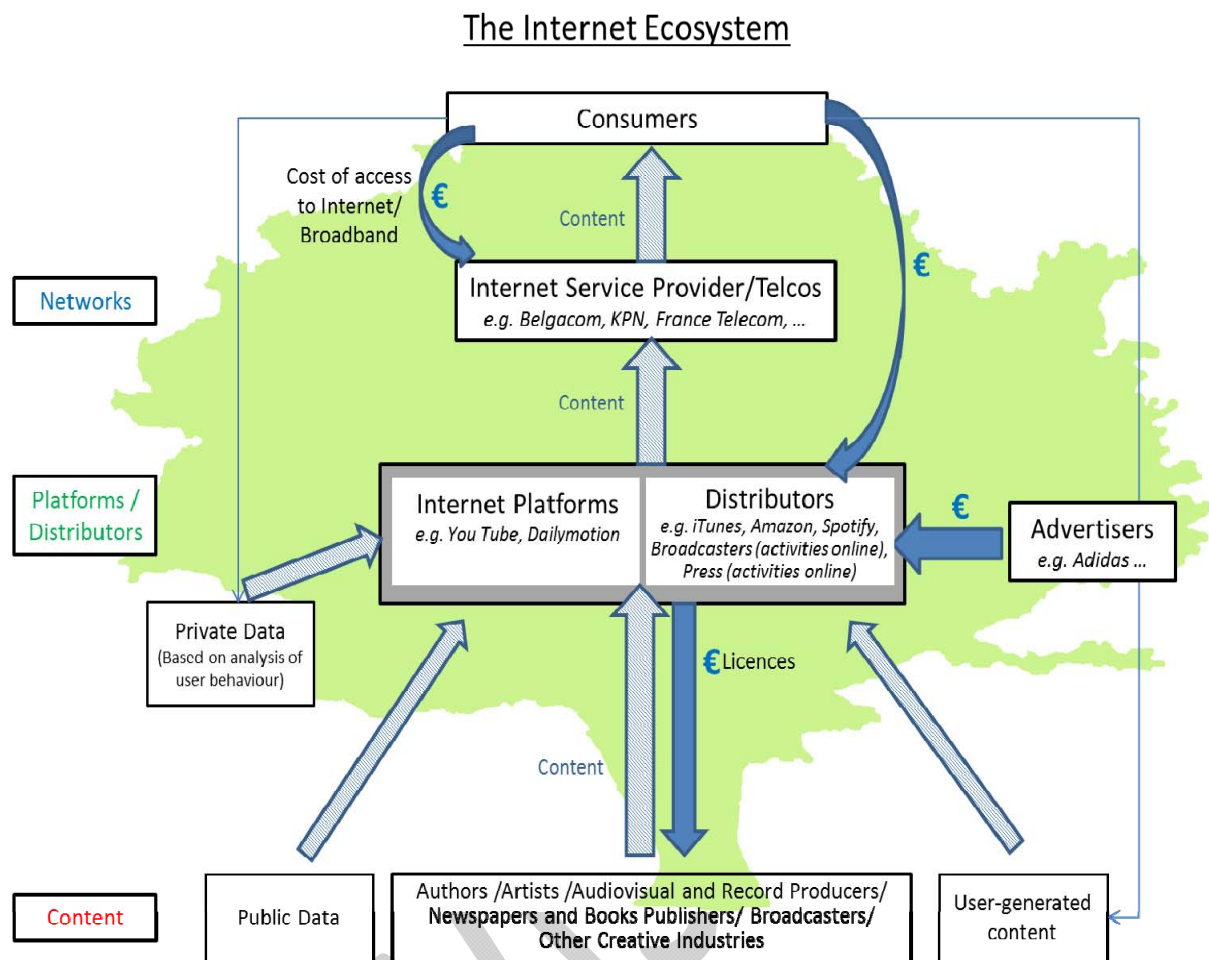
newspapers, scientific journals) and producers (music, film and TV producers, including broadcasters) invest heavily in the creation of original content. Record companies invest US\$4.5 billion annually – or 16% of the trade value of the industry – in artists and repertoire. 530,000 new titles were issued by European book publishers in 2011. It is estimated that European broadcasters (commercial and public) reinvest around 40% of annual turnover of €85bn in new content i.e. some €34bn annually in local European content. For comparison, in 2012 Netflix invested US\$100 million of its US\$1.5bn turnover (2011) in the production of creative content. In addition, public funding can also play a role in financing protected content, such as broadcasting, audiovisual works or textbooks²⁰⁰.

As an increasing number of consumers²⁰¹ want to have access to “professionally produced content” (e.g. television series) and the use of internet-based content distribution platforms becomes increasingly easy, consumption of such content through these platforms is growing. Economies of scale mean that platforms become important distributors in the internet value chain, mounting a challenge to “traditional” distributors.

²⁰⁰ Public and philanthropic investment is also considerably being used for the production of Open Educational Resources.

²⁰¹ Study on Digital Content Products in the EU, IBF International Consulting (2013)
http://ec.europa.eu/consumers/enforcement/sweep/digital_content/docs/dcs_complementary_study_en.pdf

Figure 1: Internet value chain



Notwithstanding technological developments and reduced transaction costs in the digital environment, significant differences in the availability of online services within the Member States exist, and users continue to be frustrated by limited cross-border access to digital content and, despite progress, limited cross-border portability. Consumers replying to the public consultation argue that they are regularly confronted with access restrictions from certain service providers depending on the geographic location of their IP- address and those seeking to buy copyright protected content online are often only allowed access to online stores directed to their country of residence.

Traditional media are going through a transition period. Monetising content in the digital environment presents a challenge, as does the development of viable business models in an environment where licensed services compete with illegal services free-riding on protected content.

According to a recent survey,²⁰² 96% of EU citizens agree that it is important that inventors, creators and performing artists can protect their rights and be paid for their work but at the same time 42% of EU citizens (and 57% of 15-24 year old) consider it is acceptable to

²⁰² 2013 OHIM IP perception survey

download or access copyright-protected content illegally when it is for personal use.²⁰³ This reflects, more broadly, a gulf between consumers - who expect to be able to use and re-use content easily and in a variety of ways – and rightholders or producers who need to make sufficient revenue in order to continue creating and investing and who have a legitimate expectation that their property rights be protected.²⁰⁴ At the same time, the transition to digital content presents both opportunities and challenges for the use of protected content by public service institutions, such as libraries, archives, schools and universities, in an environment where their activities may, in certain cases, become close to those undertaken by commercial distribution channels.

Against this background, European rules must continue to evolve to provide an appropriate "enabling framework" that incentivises investment by rewarding creation, that stimulates innovation and the exploitation of the full potential of digital technologies in an environment of undistorted competition, that facilitates access to creative content and the distribution of knowledge, and that protects and promotes the rich cultural diversity that is the hallmark of European society.

²⁰³ This is also related to some users' sentiment that IP mainly serves the interests of elites, mentioning large companies and successful artists as the primary beneficiaries of the IPR rules and their enforcement (2013 OHIM IP perception survey).

²⁰⁴ One study commissioned by Creative Commons explains that "70% [of content users] have downloaded content just for themselves, while 46% have shared what they downloaded with others. 49% have posted or uploaded content created by others to a blog or website. Others say they have made new works using others' content by incorporating it (13%), or changing or altering it (8%). 8% say they have remixed or mashed up content." Creative Commons Corporation, *Defining "Noncommercial". A Study of How the Online Population Understands "Noncommercial Use"*, September 2009, available online at http://wiki.creativecommons.org/Defining_Noncommercial.

8.3. ANNEX C – INTERNATIONAL AND EUROPEAN LEGAL FRAMEWORK

International treaties

Berne Convention for the Protection of Literary and Artistic Works

WIPO Copyright Treaty (WCT)

Rome Convention for the Protection of Performers, Producers of Phonograms and Broadcasting Organizations

Convention for the Protection of Producers of Phonograms Against Unauthorized Duplication of Their Phonograms

WIPO Performances and Phonograms Treaty (WPPT)

Agreement on Trade Related Aspects of Intellectual Property Rights (TRIPS)

Beijing Treaty on Audiovisual Performances (not in force)

Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled (not in force)

EU legislation

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society, OJ L 167, 22.6.2001, p.10. ("InfoSoc Directive")

Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property, OJ L 376, 27.12.2006, p. 28. ("Rental and Lending Directive")

Directive 2001/84/EC of the European Parliament and of the Council of 27 September 2001 on the resale right for the benefit of the author of an original work of art, OJ L 272, 13.10.2001, p. 32. ("Resale Right Directive")

Council Directive 93/83/EEC of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission, OJ L 248, 6.10.1993, p. 15. ("Satellite and Cable Directive")

Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs (Codified version), OJ L 111, 5.5.2009, p. 16–22. ("Software Directive")

Directive 2004/48/EC of the European Parliament and of the Council on the enforcement of intellectual property right, OJ L 157, 30.4.2004, p. 45–86. ("IPRED")

Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, OJ L 77, 27.3.1996, p. 20–28. ("Database Directive")

Directive 2006/116/EC of the European Parliament and of the Council of 12 December 2006 on the term of protection of copyright and certain related rights (codified version), OJ L 372, 27.12.2006, p. 12–18. ("Term Directive")

Directive 2011/77/EU of the European Parliament and of the Council of 27 September 2011 amending Directive 2006/116/EC on the term of protection of copyright and certain related rights, OJ L 265, 11.10.2011, p. 1-5. (“amended Term Directive”)

Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299, 27.10.2012, p. 5-12. (“Orphan Works Directive”)

Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.3.2014. p. 72-98. (“CRM Directive”)

Legal framework for the dissemination of content online

Directive 2001/29/EC (the "InfoSoc Directive" or "the Directive") was designed to update copyright to the Information Society and to implement the two 1996 WIPO Internet Treaties - the WIPO Copyright Treaty (WCT)²⁰⁵ and the WIPO Performances and Phonograms Treaty (WPPT),²⁰⁶ and, as such, it harmonises several aspects of copyright that are essential to the making available online of works and other subject matter. This Directive has to be read in conjunction with all other EU Copyright Directives,²⁰⁷ including the recently adopted Directive 2014/26/EU on Collective Rights Management . Most notably, in terms of the definition of rights and of limitations and exceptions to rights, it has to be read together with Directive 96/9/EC (the “Database Directive”), Directive 2009/24/EC (the "Software Directive"), Directive 2006/115/EC (the "Rental and Lending Directive") and Directive 2012/28/EU (the “Orphan Works Directive”).

The EU directives also reflect the obligations of the Member States under the Berne Convention, and the Rome Convention, and of the EU and its Member States under the WTO TRIPS Agreement and the 1996 WIPO Internet Treaties mentioned above. Since the conclusion of the InfoSoc Directive, the EU and its Member States have also negotiated and concluded a further two WIPO Treaties: the Beijing Treaty on the Protection of Audiovisual Performances²⁰⁸ and the Marrakesh Treaty to improve access to published works for persons who are blind, visually impaired or otherwise print disabled.²⁰⁹ Moreover, the EU has reflected the provisions of EU legislation as it stands in the texts of agreements concluded with a large number of third countries. The details of these provisions therefore legally bind the EU and the respective third countries.

The InfoSoc Directive harmonises several rights of authors and neighbouring rightholders²¹⁰ which are essential for the digital transmission of works and other protected subject matter online: (a) authors, performers, producers and broadcasters have an exclusive right to

²⁰⁵ <http://www.wipo.int/treaties/en/ip/wct/>

²⁰⁶ <http://www.wipo.int/treaties/en/ip/wppt/>

²⁰⁷ http://ec.europa.eu/internal_market/copyright/acquis/index_en.htm

²⁰⁸ <http://www.wipo.int/treaties/en/ip/beijing/>

²⁰⁹ http://www.wipo.int/edocs/mdocs/copyright/en/vip_dc/vip_dc_8_rev.pdf

The UN Convention on the Rights of Persons with Disabilities that is now part of the UN legal order contains obligations for the State Parties, concerning access to information and cultural material (articles 21 and 30).

²¹⁰ Producers, performers and broadcasters are holders of so-called “neighbouring rights” in performance and productions. Authors’ content protected by copyright is referred to as a “work” or “works”, while content protected by neighbouring rights is referred to as “other subject matter”.

authorise the reproduction of their works or other protected subject matter; (b) authors have the exclusive right to authorise the communication to the public of their works, including the making available of such works in such a way that members of the public may access them from a place and at a time individually chosen by them; and (c) performers, producers and broadcasters have an exclusive right to authorise the making available of their works and other protected subject matter in such a way that members of the public may access them from a place and at a time individually chosen by them. The rights granted under copyright are provided for in national law, and not in the form of unitary rights at EU level. The geographical scope of these national rights is limited to the territories of the Member States granting them.

The Directive also seeks to harmonise those “exceptions and limitations” (mostly, those that existed in Member States’ legislation before the negotiation of the InfoSoc Directive), and in so doing sets out a catalogue of exceptions and limitations to the exercise of the exclusive rights. An “exception” or limitation to an exclusive right means, effectively, that a rightholder is no longer in a position to authorise or prohibit the use of the work or other subject matter: the beneficiary of the exception is already authorised by law to use that material e.g. by copying it or making it available. Exceptions and limitations may only be applied “*in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder*” (three-step test).²¹¹

Exceptions and limitations have been provided for in order to facilitate the use of protected content in specific circumstances, for example where the transaction costs involved in acquiring authorisation outweigh the economic benefits of doing so (e.g. quotation, private copying); or to facilitate the achievement of specific public policy objectives such as press reporting, criticism or review. The exceptions and limitations provide a “legal authorisation” to beneficiaries such as individuals, researchers, teachers, public institutions, and those reporting on news and public events to use protected material without needing to seek authorisation from the rightholders. The list of exceptions is reproduced at Annex C.

In the same manner that the definition of the rights is territorial (i.e. has an effect only within the territory of the Member State), the definition of the limitations and exceptions to the rights is territorial too (so an act that is covered by an exception in a Member State "A" may require the authorisation of the rightholder in a Member State "B").^{212 213}

In some instances, Member States are obliged by EU Directives to compensate rightholders for the harm that a limitation or exception to their rights inflicts upon them. In other instances Member States are not obliged, but may decide, to provide for such compensation. So while exceptions are a rather blunt and irreversible tool, the scope for compensation can mitigate the potential economic harm to rightholders for the use of their material. Indeed, exceptions may improve or reduce welfare, depending on their necessity, scope and design. Exceptions are

²¹¹ WTO TRIPS Agreement, Art. 13, WCT Art. 10, WPPT Art. 16, and Berne Convention Art.9(2), the Beijing and Marrakesh Treaties

²¹² Only the exception established in the recent Orphan Works Directive (a mandatory exception to copyright and related rights in the case where the rightholders are not known or cannot be located) has been given a cross-border effect, which means that, for instance, once a literary work – for instance a novel – is considered an orphan work in a Member State, that same novel shall be considered an orphan work in all Member States and can be used and accessed in all Member States.

²¹³ See also Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, VIP/DC/8 REV.

likely to be justified when transaction costs prevent mutually beneficial trade, leading, in the extreme case to “missing markets” – the failure of services to emerge at all.²¹⁴

Exceptions to copyright are not the only tool to facilitate certain uses of works online and, increasingly, different stakeholders have seen the need to work together with a view to facilitate uses, for example where technical and/or financial collaboration is decisive to achieving the relevant goals in a sustainable manner. Indeed, rightholders and users are successfully working together on projects in various sectors and Member States.²¹⁵ Initiatives to back such efforts are being undertaken at EU level, notably to facilitate mass digitisation efforts. These include the 2011 Memorandum of Understanding on Key Principles on the Digitization and Making Available of Out-of-Commerce Works which aims to facilitate the digitization and making available by European libraries and similar institutions of books and learned journals in their collections which are out-of-commerce.^{216 217} In the structured stakeholder dialogue “Licences for Europe”, participants make 10 pledges to overcome problems European citizens may face in accessing cultural content in four areas: cross-border portability of content, user generated content, data- and text-mining and access to audiovisual works and audiovisual visual heritage. As part of the 10 pledges, film heritage institutions and film producers concluded an agreement on principles and procedures for the digitization and making available online of audiovisual content held by film heritage institutions. In addition, broadcasters and rightholders agreed to find solutions for the digitisation and making available of broadcasters’ TV footage archives²¹⁸.

The ARROW project is another example for a joint user – right owner initiative with the aim of facilitating the licensing of copyright protected works.²¹⁹

The InfoSoc Directive also implements international obligations concerning Technological Protection Measures (TPMs)²²⁰ and Rights Management Information.²²¹ In order for online business models to develop and to facilitate rights management in online networks, rightholders need to be able to identify works and other subject matter, and authorship, and to provide information on the terms and conditions of use the work. TPMs have been deployed to implement different online business models tailored to the needs of the consumer (e.g. allowing streaming of content, or downloading under specific conditions such as the number of copies that can be stored on different devices). Articles 6 and 7 of the Infosoc Directive oblige Member States to provide for adequate legal protection against the circumvention of such technological measures and against the removal or alteration of rights management information. Indeed, TPMs effectively underpin the development of online business models.

Finally, as regards the enforcement of copyright, Article 8 of the Infosoc Directive makes provision for sanctions and remedies and requires Member States to ensure that rightholders are in a position to apply for an injunction against intermediaries whose services are used by a third party to infringe copyright or related rights. Procedures and remedies against

²¹⁴ 2013 Study Assessing Copyright Exceptions (Charles River Associates), paragraph 43 [not yet published]

²¹⁵ Examples, include the Dutch project « Beelden van de Toekomst » and Europeana « Sounds »

²¹⁶ A work is out of commerce when the whole work, in all its versions and manifestations is no longer commercially available in customary channels of commerce, regardless of the existence of tangible copies of the work in libraries and among the public (including through second hand bookshops or antiquarian bookshops).

²¹⁷ http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm

²¹⁸ <http://ec.europa.eu/licences-for-europe-dialogue/en/content/final-plenary-meeting>

²¹⁹ <http://www.arrow-net.eu/>

²²⁰ pursuant to Articles 11 WCT and 18 WPPT

²²¹ pursuant to Articles 12 WCT and 19 WPPT

infringements of copyright are also foreseen in Directive 2004/48/EC²²² on the enforcement of Intellectual Property rights (IPRED). This Directive is the specific EU measure that seeks to provide for effective, proportionate and dissuasive measures, procedures and remedies necessary to ensure the enforcement of the IPR across the Union when it comes to the application of civil law procedures in case intellectual property rights provided for by EU law and/or by the national law of the Member State concerned are infringed.

Article 3 of IPRED sets out its general objectives and specifies that the measures that are transposed by the Member States must (i) be fair and equitable, (ii) not be unnecessarily complicated or costly and (iii) not entail unreasonable time-limits or unwarranted delays. Moreover, according to paragraph 2 of that article, they must also be (i) effective, (ii) balanced and proportionate, (iii) dissuasive, (iv) applied in such a manner as to avoid the creation of barriers to legitimate trade and (v) providing safeguards against their abuse. Other provisions cover, in particular, evidence-gathering powers for judicial authorities (Articles 6 and 7), powers to force offenders and other parties commercially involved in an infringement to provide information on the origin of the infringing goods and of their distribution network (Article 8), provisional and precautionary measures such as interlocutory injunctions or seizures of goods suspected of infringing (Article 9), as well as definitive injunctions (Article 11) or provisions on the payment of damages (Article 13).

Directive 2000/31/EC²²³ on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (the "E-commerce Directive"), also contains provisions which are relevant to the enforcement of copyright. Article 5 provides that Member States should ensure that service providers shall render easily, directly and permanently accessible to the recipients of the service and competent authorities certain information, such as the name of the service provider, his or her geographic address and other business details.

Articles 12 and 13 of the same Directive limit the liability of internet service providers for the mere transmission of information and the access to a communication network or for the temporary storage of information. Article 14 also limits the liability of internet service providers for the storage of information, provided that they are not aware of illegal content and that, on gaining knowledge of illegal content, they take action to remove or disable access to such content.

Article 15 prevents Member States from imposing a general obligation on information society service providers to monitor the information which they transmit or store, and from imposing a general obligation actively to seek facts or circumstances which may indicate illegal activity. At the same time, Member States may establish obligations for information society service providers to communicate to the competent authorities, at their request, information enabling the identification of recipients of their service with whom they have storage agreements.

Finally, it is noted that the review discussed in this Impact Assessment should be seen against the background of efforts by Member States to review copyright legislation in the light of the

²²² Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights;

[http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0048R\(01\):EN:HTML](http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32004L0048R(01):EN:HTML)

²²³ Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market; <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32000L0031:En:HTML>

opportunities and challenges of digital technology, including those in France, Germany, Ireland, the Netherlands, Poland, Spain, and the UK, as well as by third countries such as the US and Australia.

Provisional

8.4. ANNEX D - LIMITATIONS AND EXCEPTIONS TO COPYRIGHT

Article 5 of Directive 2001/29/EC

Article 5

Exceptions and limitations

1. Temporary acts of reproduction referred to in Article 2, which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable:

- (a) a transmission in a network between third parties by an intermediary, or
- (b) a lawful use

of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.

2. Member States may provide for exceptions or limitations to the reproduction right provided for in Article 2 in the following cases:

- (a) in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects, with the exception of sheet music, provided that the rightholders receive fair compensation;
- (b) in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation which takes account of the application or non-application of technological measures referred to in Article 6 to the work or subject-matter concerned;
- (c) in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage;
- (d) in respect of ephemeral recordings of works made by broadcasting organisations by means of their own facilities and for their own broadcasts; the preservation of these recordings in official archives may, on the grounds of their exceptional documentary character, be permitted;
- (e) in respect of reproductions of broadcasts made by social institutions pursuing non-commercial purposes, such as hospitals or prisons, on condition that the rightholders receive fair compensation.

3. Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases:

- (a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved;
- (b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;
- (c) reproduction by the press, communication to the public or making available of published articles on current economic, political or religious topics or of broadcast

works or other subject-matter of the same character, in cases where such use is not expressly reserved, and as long as the source, including the author's name, is indicated, or use of works or other subject-matter in connection with the reporting of current events, to the extent justified by the informatory purpose and as long as the source, including the author's name, is indicated, unless this turns out to be impossible;

(d) quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose;

(e) use for the purposes of public security or to ensure the proper performance or reporting of administrative, parliamentary or judicial proceedings;

(f) use of political speeches as well as extracts of public lectures or similar works or subject-matter to the extent justified by the informatory purpose and provided that the source, including the author's name, is indicated, except where this turns out to be impossible;

(g) use during religious celebrations or official celebrations organised by a public authority;

(h) use of works, such as works of architecture or sculpture, made to be located permanently in public places;

(i) incidental inclusion of a work or other subject-matter in other material;

(j) use for the purpose of advertising the public exhibition or sale of artistic works, to the extent necessary to promote the event, excluding any other commercial use;

(k) use for the purpose of caricature, parody or pastiche;

(l) use in connection with the demonstration or repair of equipment;

(m) use of an artistic work in the form of a building or a drawing or plan of a building for the purposes of reconstructing the building;

(n) use by communication or making available, for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises of establishments referred to in paragraph 2(c) of works and other subject-matter not subject to purchase or licensing terms which are contained in their collections;

(o) use in certain other cases of minor importance where exceptions or limitations already exist under national law, provided that they only concern analogue uses and do not affect the free circulation of goods and services within the Community, without prejudice to the other exceptions and limitations contained in this Article.

4. Where the Member States may provide for an exception or limitation to the right of reproduction pursuant to paragraphs 2 and 3, they may provide similarly for an exception or limitation to the right of distribution as referred to in Article 4 to the extent justified by the purpose of the authorised act of reproduction.

5. The exceptions and limitations provided for in paragraphs 1, 2, 3 and 4 shall only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

Protection of computer programmes: Articles 5 and 6 of Directive 2009/24/EC

Article 5

Exceptions to the restricted acts

1. In the absence of specific contractual provisions, the acts referred to in points (a) and (b) of Article 4(1) shall not require authorization by the right holder where they are necessary for the use of the computer program by the lawful acquirer in accordance with its intended purpose, including for error correction.
2. The making of a back-up copy by a person having a right to use the computer program may not be prevented by contract in so far as it is necessary for that use.
3. The person having a right to use a copy of a computer program shall be entitled, without the authorization of the right holder, to observe, study or test the functioning of the program in order to determine the ideas and principles which underlie any element of the program if he does so while performing any of the acts of loading, displaying, running, transmitting or storing the program which he is entitled to do.

Article 6

Decompilation

1. The authorization of the right holder shall not be required where reproduction of the code and translation of its form within the meaning of points (a) and (b) of Article 4(1) are indispensable to obtain the information necessary to achieve the interoperability of an independently created computer program with other programs, provided that the following conditions are met:
 - (a) those acts are performed by the licensee or by another person having a right to use a copy of a program, or on their behalf by a person authorized to do so;
 - (b) the information necessary to achieve interoperability has not previously been readily available to the persons referred to in point (a); and
 - (c) those acts are confined to the parts of the original program which are necessary in order to achieve interoperability.
2. The provisions of paragraph 1 shall not permit the information obtained through its application:
 - (a) to be used for goals other than to achieve the interoperability of the independently created computer program;
 - (b) to be given to others, except when necessary for the interoperability of the independently created computer program; or
 - (c) to be used for the development, production or marketing of a computer program substantially similar in its expression, or for any other act which infringes copyright.
3. In accordance with the provisions of the Berne Convention for the protection of Literary and Artistic Works, the provisions of this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the right holder's legitimate interests or conflicts with a normal exploitation of the computer program.

Protection of databases: Articles 6 and 9 of Directive 96/9/EC

Article 6

Exceptions to restricted acts

1. The performance by the lawful user of a database or of a copy thereof of any of the acts listed in Article 5 which is necessary for the purposes of access to the contents of the databases and normal use of the contents by the lawful user shall not require the authorization of the author of the database. Where the lawful user is authorized to use only part of the database, this provision shall apply only to that part.

2. Member States shall have the option of providing for limitations on the rights set out in Article 5 in the following cases:

(a) in the case of reproduction for private purposes of a non-electronic database;

(b) where there is use for the sole purpose of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;

(c) where there is use for the purposes of public security or for the purposes of an administrative or judicial procedure;

(d) where other exceptions to copyright which are traditionally authorized under national law are involved, without prejudice to points (a), (b) and (c).

3. In accordance with the Berne Convention for the protection of Literary and Artistic Works, this Article may not be interpreted in such a way as to allow its application to be used in a manner which unreasonably prejudices the right holder's legitimate interests or conflicts with normal exploitation of the database.

Article 9

Exceptions to the sui generis right

Member States may stipulate that lawful users of a database which is made available to the public in whatever manner may, without the authorization of its maker, extract or re-utilize a substantial part of its contents:

(a) in the case of extraction for private purposes of the contents of a non-electronic database;

(b) in the case of extraction for the purposes of illustration for teaching or scientific research, as long as the source is indicated and to the extent justified by the non-commercial purpose to be achieved;

(c) in the case of extraction and/or re-utilization for the purposes of public security or an administrative or judicial procedure.

Rental and Lending Rights: Articles 6 and 10 of Directive 2006/115/EC

Article 6

Derogation from the exclusive public lending right

1. Member States may derogate from the exclusive right provided for in Article 1 in respect of public lending, provided that at least authors obtain remuneration for such lending. Member States shall be free to determine this remuneration taking account of their cultural promotion objectives.

2. Where Member States do not apply the exclusive lending right provided for in Article 1 as regards phonograms, films and computer programs, they shall introduce, at least for authors, a remuneration.

Article 10

Limitations to rights

1. Member States may provide for limitations to the rights referred to in this Chapter in respect of:

(a) private use;

(b) use of short excerpts in connection with the reporting of current events;

(c) ephemeral fixation by a broadcasting organization by means of its own facilities and for its own broadcasts;

(d) use solely for the purposes of teaching or scientific research.

2. Irrespective of paragraph 1, any Member State may provide for the same kinds of limitations with regard to the protection of performers, producers of phonograms, broadcasting organizations and of producers of the first fixations of films, as it provides for in connection with the protection of copyright in literary and artistic works.

However, compulsory licenses may be provided for only to the extent to which they are compatible with the Rome Convention.

3. The limitations referred to in paragraphs 1 and 2 shall be applied only in certain special cases which do not conflict with a normal exploitation of the subject matter and do not unreasonably prejudice the legitimate interests of the right holder

3. Member States may exempt certain categories of establishments from the payment of the remuneration referred to in paragraphs 1 and 2.

8.5. ANNEX E – TERRITORIALITY OF COPYRIGHT

Protection under copyright comes into existence automatically with the creation of a work and does not, contrary to industrial property rights like e.g. trade marks or patents, depend on registration with a public body.

Copyright is also territorial (referring to national territories) in the sense that the rights granted under copyright (e.g. the right of reproduction, i.e. the right to prevent the unauthorised copying of protected content; or the right of making available, i.e. the right to prevent unauthorised dissemination of protected content online) are provided for in national law, and not in the form of unitary rights at EU level. For example, the author of a book has not a single EU-wide right of reproduction but 28 different national rights of reproduction. The geographical scope of these 28 rights is limited to the territory of the Member State that grants the right in question.

The Internet offers more than ever before the possibility to distribute/communicate content across borders. As a result, a single online cross-border transmission may fall under the territorial scope of the exclusive national right granted by the Member State in which the communication is initiated (e.g. the French right of making available to the public) and, at the same time, under the territorial scope of the exclusive national right granted by the Member State in which the transmitted content is received by the end-user (e.g. the Belgian right of making available). A service provider responsible for such a transmission must therefore acquire a licence not only in the Member State in which it initiates the transmission but possibly also in all Member States to which the content is transmitted (possibly 27 more Member States).

Despite the territoriality of copyright, rightholders are free to issue a multi-territorial or pan-European licence in a single contract. This is particularly the case where rightholders (e.g. a book publisher or a record producer) have the rights for all territories in their hands.²²⁴ Nevertheless, even when rightholders possess all rights to issue a multi-territorial or pan-European licence, they may prefer to issue exclusive licences with a limited territorial scope (e.g. matching the territory of a Member State or based on linguistic criteria).²²⁵

On the basis of the current legal framework for cross border infringements including transmissions over the internet, the most recent case law of the Court of Justice of the European Union (CJEU)²²⁶ suggests that a relevant criterion to localise where an infringing act of making content available to the public occurs is the “targeting” of persons in another Member State. According to this approach, the copyright-relevant act (which must be licensed) occurs at least in those countries which are “targeted” by the alleged infringer. If this approach is applied to licencing, a service provider would not need to acquire a licence

²²⁴ In the responses to the public consultation, record producers, music publishers, book publishers and collective management organisations in the music and fine arts sector argued that these so-called multi-territorial licences are granted when there is a demand for them (which, according to the responses, is however not always the case from the side of service providers, who may choose to serve only some territories and therefore only acquire licenses for those territories). In the music sector by way of example, some collective management organisations are mentioned as currently granting EU (and beyond) wide licences to up to 30 online service providers.

²²⁵ if the responses to the public consultation this has been in particular described for the audiovisual sector.

²²⁶ See in particular Case C-173/11 (Football Dataco vs Sportradar) and Case C-5/11 (Donner) for copyright and related rights, and Case C-324/09 (L'Oréal vs eBay) for trademarks. See also *Ginsburg*, Where Does the Act of 'Making Available' Occur? (<http://www.mediainstitute.org/IPI/2012/102912.php>). With regard to questions related to jurisdiction, the Court, has differentiated according to which provision of the Brussels I Regulation was applicable, see joined Cases C-585/08 and C-144/09 (Pammer and Hotel Alpenhof), Case C-170/12 (Pinckney vs KDG Mediatech), and pending Case C-441/13 (Pez Hejduk).

for all Member States in which the service is receivable but only for those that are actively targeted.²²⁷ A service provider “targets” a group of customers residing in a specific country when it directs its activity to that group, e.g. via advertisements, promotions, a language or a currency specifically targeted at that group.

A targeting approach as a legislative option, would require an online service provider to acquire the rights for e.g. a specific song for all Member States actively targeted.. Actively marketing that song throughout the whole EU without acquiring an authorisation for all Member States would infringe copyright in all those Member States in which the rights have not been cleared. For example, if an online platform acquires a licence to sell a digital copy of a specific song for Member State A, it would only be allowed to actively market it to customers located in Member State A.

The targeting approach has been criticised in responses to the public consultation for example by some authors and institutional users, who point out that such approach is vague, giving rise to uncertainties as to the countries targeted. The targeting approach has been supported by many consumers and organisations representing consumers (although the views among consumers have been divided on this issue). The licensing of rights functions very differently in the different sectors. In music, for example, phonogram producers usually hold their own rights (in the phonograms), as well as the rights of performers (in the performances fixated on the phonograms) that have been contractually transferred to them for the whole of the EU. Difficulties with multi-territorial licensing have mainly arisen where the online rights of authors (composers, lyricists) are in the hands of collecting societies. Collecting societies operate on a national basis and usually hold the (online) rights only for a single Member State (other than in the case of their own repertoire where they have the rights for all territories).²²⁸ This is the reason why the Commission proposed in 2012 a Directive on Collective Rights Management Organisations to facilitate the delivery of multi-territorial licences in musical works for the benefit of all online services that require multi-territory licences of music.

From the perspective of a customer that is denied access to a service abroad, this disadvantage is mitigated strongly when s/he is able to purchase the work in question from other distributors that are active in his or her own Member State of residence. This is often the case with regard to protected content other than premium audio-visual content (i.e. other content than e.g. films, series and shows, or live sports), where distribution is not organised on the basis of territorial exclusivity.

²²⁷ If, to the contrary, each act of accessing a service were already sufficient for a copyright relevant to occur in the Member State of access (regardless of whether that Member State was targeted by the service provider), passive sales would be possible to customers residing in Member States for which a licence has not been acquired.

²²⁸ In their answers to the public consultation, service providers argue that their main problem in starting a business is the lack of information on who holds which rights. They quote fragmentation of repertoire in music, need to contract with multiple licensors and inefficiencies of collective management organisations as obstacles to launching services. Other stakeholders such as authors rather take the view that multi-territorial licences are available but that service providers often do not opt for them. According to these stakeholders, problems in the music sector would be alleviated by the Global Repertoire Database and the Directive on Collective Rights Management Organisations.

Table A1 - Territorial coverage of large online music service providers:²²⁹

	Deezer	iTunes	Emusic	7Digital	Rara.com	Spotify	Napster	Youtube	Google Pl	Xbox	Nokia	LastFM	Jamba/Jar	Amazon	MySpace	Wimp	Total
HR																	1
RO																	4
CY																	5
MT																	5
SL																	4
BG																	5
SK																	6
HU																	6
CZ																	8
EL																	8
EE																	6
LV																	6
LT																	6
LU																	8
DK																	9
FI																	11
BE																	11
PL																	11
SE																	12
PT																	12
FR																	13
NL																	13
ES																	13
IE																	13
IT																	14
DE																	14
UK																	15
AT																	15
Total	28	27	25	25	20	25	15	18	14	13	12	9	7	6	6	4	

Source (May 2014): *pro-music.org*. Pro-music provides information about legitimate online music services. The information is compiled by organisations active in the music sector, including GERA (Global Entertainment Retail Association-Europe), IFPI and IMPALA (record producers), GIART and FIM (performers), ICMP and IMPA (music publishers), and IMMF (music managers).

In the audio-visual sector, the rights are usually licensed on the basis of territorial exclusivity, especially as far as premium audio-visual content is concerned (e.g. new films, shows, series or live sports).²³⁰ In such a situation, the economic exploitation rights for a specific Member State are licensed exclusively to a single national distributor, and the rightholder (usually the film producer) guarantees not to authorise any other distributor to market the concerned content in that Member State. The national distributor, on the other hand, undertakes not to provide any cross-border access to the exclusively licensed audio-visual content (in order not to disturb the territorial exclusivity of other national distributors that conclude a similar licence agreement with the rightholder).

This contractual transfer of rights to national distributors (all of which enjoy a national monopoly with regard to the distribution of the concerned audio-visual content) leads to a situation where different persons hold the various national rights in the EU. Acquiring a Pan-European license through a single entity that holds all the rights is therefore not possible anymore.²³¹ With regard to a film, for example, a French film distributor may hold the French right of reproduction and the French right of making the film available online, whereas a Belgian film distributor may hold the equivalent rights for the territory of Belgium. An online

²²⁹ The table expresses the availability of webstores in Member States. In particular as far as local, non-English/US repertoire is concerned, there can be differences between the various local webstores of an online music service provider with regard to the availability of individual songs or albums.

²³⁰ With regard to broadcasting, the type of audio-visual content that is not licensed on a territorial basis - and that is therefore most widely available cross-border - tends to be nationally produced programming that has limited mass-market appeal beyond national borders. Rights for US films and television works and international sporting events, on the other hand, tend to be licensed exclusively to different national or regional broadcasters.

²³¹ To a lesser extent, differences in who holds the national rights required for the economic exploitation of creative content also derive from differences in the national rules on authorship and transfer of rights which are hardly harmonised at EU level. For example, the rules on which persons contributing to the creation of a film are to be regarded as authors may vary at national level (e.g. whether the cameraman or the cutter are film authors).

service provider that intends to market a film via the internet to e.g. French and Belgian customers will therefore have to acquire a separate licence from the French and the Belgian distributor. Acquiring a licence only for the Belgian territory and actively marketing the film nevertheless also to customers residing in France would not only infringe copyright in France (the rightholder being the French distributor) but also the Belgian distributor's contract with the film producer (which protects the French film distributor's territorial exclusivity via obliging the Belgian distributor not to provide cross-border access to its services). In order to avoid legal sanctions, the Belgian online service provider will therefore geoblock its service and restrict its accessibility to customers residing in Belgium (respectively to customers using a Belgian IP address).

Absolute territoriality and geo-blocking can incite consumers to turn to copyright infringing products as a substitute²³².

The territorial exploitation of audio-visual content through several national (or regional) distributions enjoying territorial exclusivity may have multiple reasons.

First, the industry structure in the audio-visual sector is traditionally national, both with regard to the production and distribution (cinema operators, broadcasters, etc) of audio-visual content. As far as the online distribution of audio-visual works is concerned, however, global internet-based companies also play an important role.

Second, audio-visual productions are expensive and are often financed via pre-selling national rights (before production) to different national distributors on the basis of territorial exclusivity. Producers and broadcasters state in their response to the public consultation that territorial exclusivity is indispensable to ensure required pre-financing of the production by distributors.

Third, the territorial exploitation of audio-visual content through a single, exclusive distributor in each Member State allows for price-discrimination between national markets and maximises producers' revenues.

Fourth, audio-visual producers and distributors also stagger the media platforms through which a film is marketed ("release windows"). The standard sequence for a feature film, for example, is cinema release, video/DVD/Blu-Ray, VoD²³³, pay-TV and finally free-to-air TV. This means, for example, that it will not be possible to purchase a feature film through an online platform in a given Member State for as long as this film is shown in the cinemas there. The length and the exact chronology of the release windows are usually negotiated between rightholders and distributors, often within the framework of public funding conditions or, sometimes, generally applicable Member State regulations.. Release windows for the same audio-visual work often differ between Member States. Licencing contracts based on absolute territorial exclusivity support the system of release windows. Via shielding national distributors from external competition, absolute territorial exclusivity clauses also ensure that, for example, the release chronology that was agreed for a specific film in one Member State is completely segregated from a potentially different release chronology in another Member State. Accordingly, a distributor that is, for example, still showing a film in the cinemas in

²³² Brett Danaher & Samita Dhanasobhon & Michael D. Smith & Rahul Telang, 2010. "Converting Pirates Without Cannibalizing Purchasers: The Impact of Digital Distribution on Physical Sales and Internet Piracy," *Marketing Science*, INFORMS, vol. 29(6), pages 1138-1151, 11-12.

²³³ VOD platform operators indicate in their responses to the public consultation that online rights are often managed at national level with territorial exclusivity and IP blocking of foreign addresses being contractually required.

one Member State will not face any competition from another Member State in the form of an online VOD offer.

Customers that are – because of their place of residence - denied access to the buying (or watching) of e.g. a particular film cross-border from a particular online service provider, often cannot access that film from another, local online distributor. For example, the local distributor that enjoys territorial exclusivity in the Member State in which the concerned customer resides, may choose to follow a different media chronology and may, for example, offer that film online only several weeks later. It may also choose not to exploit that film in that Member State through an online platform at all. It is also possible that the producer cannot find any local distributor interested in purchasing the online rights for that Member State (while distributors in other Member States are at the same time still prohibited to provide their services in that Member State). Whatever the reason, customer residing in the “wrong” Member State can be completely prevented from purchasing a particular film online, although that film would be readily available in other Member States.

Table A2 - Territorial coverage of large Over the Top (OTT)²³⁴ audiovisual service providers²³⁵

	iTunes Store	UPC	Dailymotion	Sky	Xbox Movies/	Google Play M	Netflix	MUBI	Canal +	Youtube N	LoveFilm	BBCiPlaye	Canal Play	Maxdome	Total
HR															0
BG															1
CY															1
EE															1
LV															1
LU															1
MT															1
PT															1
RO															1
SI															1
AT															2
EL															2
DK															2
HU															2
LT															2
NL															2
SK															2
SE															3
PL															3
BE															3
CZ															3
ES															4
FI															4
IE															4
IT															4
FR															7
DE															9
UK															9
Total	26	8	7	6	6	5	4	4	3	3	2	2	1	1	

Source: MAVISE Database, European Audio-Visual Yearbook 2012 Vol.2

Independent from possible territorial exclusivity clauses in licence agreements between rightholders and distributors, restrictions on cross-border access seem to often be also the result of contractual limitations imposed by service providers themselves on consumers. Even if e.g. an online service provider has acquired a multi-territorial or pan-European licence, it may allocate a specific national store to customers residing in a specific Member State.

²³⁴ Over the Top (OTT) refers to audiovisual services provided over the internet rather than via a service provider's own dedicated managed network. It is usually delivered directly from provider to viewer using an open internet/broadband connection; accordingly, there is only little infrastructure investment required on the part of the provider (in particular as compared to IPTV services that are based on closed, proprietary networks).

²³⁵ The table expresses the availability of webstores in Member States. In particular as far as local, non-English/US productions are concerned, there can be differences between the various local webstores of an online service provider with regard to the availability of individual audio-visual works.

Service providers may choose to do so because of the resulting possibility to price-discriminate between national markets, or because they want to offer customers an experience tailored to local languages and preferences.

Absolute territorial exclusivity arrangements segment the Internal Market along national borders.

The CJEU has developed a distinction between agreements based on territorial exclusivity and those based on absolute territorial exclusivity.²³⁶ In the context of broadcasting of football matches²³⁷, under competition law, rightholders (as interpreted by the Premier League judgment to mean those that hold rights in football matches) and service providers may, under certain circumstances, agree on allocating exclusive territories to single distributors with regard to active sales, but they are - unless other circumstances justify the finding that such an agreement is not liable to impair competition - not allowed to exclude the possibility of passive sales (following the express request of a consumer residing outside the territory covered by the agreement) .

It is important to note, however, that the mere prohibition of territorial restrictions (with regard to passive sales) in agreements between rightholders and service providers does not automatically guarantee that end-users will be able to access a particular service cross-border. The decision of whether to serve customers residing in a specific Member State still lies with the service provider. Even in the absence of contractual clauses prohibiting the service provider to provide a service cross-border (at least with regard to passive sales), it may choose

²³⁶ With regard to copyright, see in particular the Premier League Cases (Joined Cases C-403/08 and C-429/08). The Football Association Premier League (FAPL) licenses the rights to broadcast the matches of the English premier football league. In order to maximise the value of these rights, the FAPL licences only one broadcaster per territory. In the Premier League Cases, the absolute territorial exclusivity of these licences was ensured via contractual terms that obliged the broadcasters to encrypt their satellite broadcasts and to limit the circulation of the decoders to the territory for which they obtained a licence. The cases were prompted by the attempts of the FAPL to stop the marketing and the use of decoding devices that were imported by a publican from Greece into the UK. The Greek satellite broadcaster NOVA had bought the rights for Greece from the FAPL at a cheaper price than the British broadcaster BSkyB paid for the UK. Accordingly, the decoding devices imported from Greece were much cheaper than the ones available in the UK from BSkyB (in addition, the Greek decoder imported by the publican was not licenced for commercial use). The two main parts of the CJEU's ruling in the Premier League Cases concern the freedom to provide services and competition law. The part of the judgment on the freedom to provide services rendered the provisions of national civil and criminal law sanctioning the unauthorised importation and use of the decoder card unenforceable. The part of the judgement on competition law eliminated the Greek broadcaster's contractual obligation not to sell decoder cards to customers established in another Member State (the UK).

²³⁷ With regard to the broadcasting of copyright, football matches which are – save for incorporated anthems, logos, etc - not protected by any EU rule of copyright , but which may be protected by national rules, see in particular the Premier League Cases (Joined Cases C-403/08 and C-429/08). The Football Association Premier League (FAPL) licenses the rights to broadcast the matches of the English premier football league. In order to maximise the value of these rights, the FAPL licences only one broadcaster per territory. In the Premier League Cases, the absolute territorial exclusivity of these licences was ensured via contractual terms that obliged the broadcasters to encrypt their satellite broadcasts and to limit the circulation of the decoders to the territory for which they obtained a licence. The cases were prompted by the attempts of the FAPL to stop the marketing and the use of decoding devices that were imported by a publican from Greece into the UK. The Greek satellite broadcaster NOVA had bought the rights for Greece from the FAPL at a cheaper price than the British broadcaster BSkyB paid for the UK. Accordingly, the decoding devices imported from Greece were much cheaper than the ones available in the UK from BSkyB (in addition, the Greek decoder imported by the publican was not licenced for commercial use). The two main parts of the CJEU's ruling in the Premier League Cases concern the freedom to provide services and competition law. The part of the judgment on the freedom to provide services rendered the provisions of national civil and criminal law sanctioning the unauthorised importation and use of the decoder card unenforceable. The part of the judgement on competition law eliminated the Greek broadcaster's contractual obligation not to sell decoder cards to customers established in another Member State (the UK). The part of the judgment on copyright precluded the broadcast in the UK (as a matter of EU law) where it contains works of authors and those that benefit from Article 3 of the Infosoc Directive.

to restrict the accessibility of its service to a limited number of Member States for other reasons.

Smaller distributors, for example, sometimes lack the financial resources or the technical infrastructure required for a pan-European service. Therefore, they may choose a more focused business model, based on making their service only available in a limited number of Member States.²³⁸

Distributors offering advertised-based services may also have limited interest in extending their service to customers residing in other Member States than the ones for which they concluded advertising agreements with local companies. If, for example, a service provider only gets paid by advertisers for viewings/clicks made by users residing in a particular Member State (which might be the only Member States in which the advertisers market the products in question), the service provider has nothing to gain from generating additional clicks via providing access to users residing in other Member States. Quite to the contrary, providing access to users in such other Member States may only invoke additional costs, as rightholders legitimately expect to be paid for those users.

With regard to paid-for services, where users make payments for e.g. each download of a digital copy of a song, the concept of passive sales is more likely to be a feasible approach. In such a situation, distributors can charge each customer initiating a passive sale a certain fee that directly contributes to their revenues, regardless of where the customer is residing; and rightholders can directly claim a certain percentage of these revenues that are resulting from cross-border passive sales.

The territoriality of copyright is inherent in the current copyright system and can, as such, only be eliminated via introducing a European Copyright Code providing for unitary exclusive rights (as opposed to national copyright codes providing for national exclusive rights). Naturally, this cannot be done at national level.

The negative effects of contractual agreements based on absolute territorial exclusivity (that prohibit all cross-border sales including passive sales)²³⁹ can currently only be addressed

²³⁸ In their responses to the public consultation, service providers also refer to a number of other factors than copyright such as the cost of compliance with divergent consumer protection laws, national rating systems, child protection obligations, fiscal regulations, release windows, the cost of contextualisation (i.e. market-specific marketing) and versioning (subtitling and dubbing), the cost of providing customer care and customer complaint services in several languages, no common standards for content delivery, the risk of fraud and non-payments and the diverse economic realities which make a single price impossible, lack of digital infrastructure/access to high speed broadband, difficulties in payment processing, divergent advertiser preferences, etc. They also refer to private-copying regulations. Providers of audio-visual services also refer to insufficient demand for cross-border services.

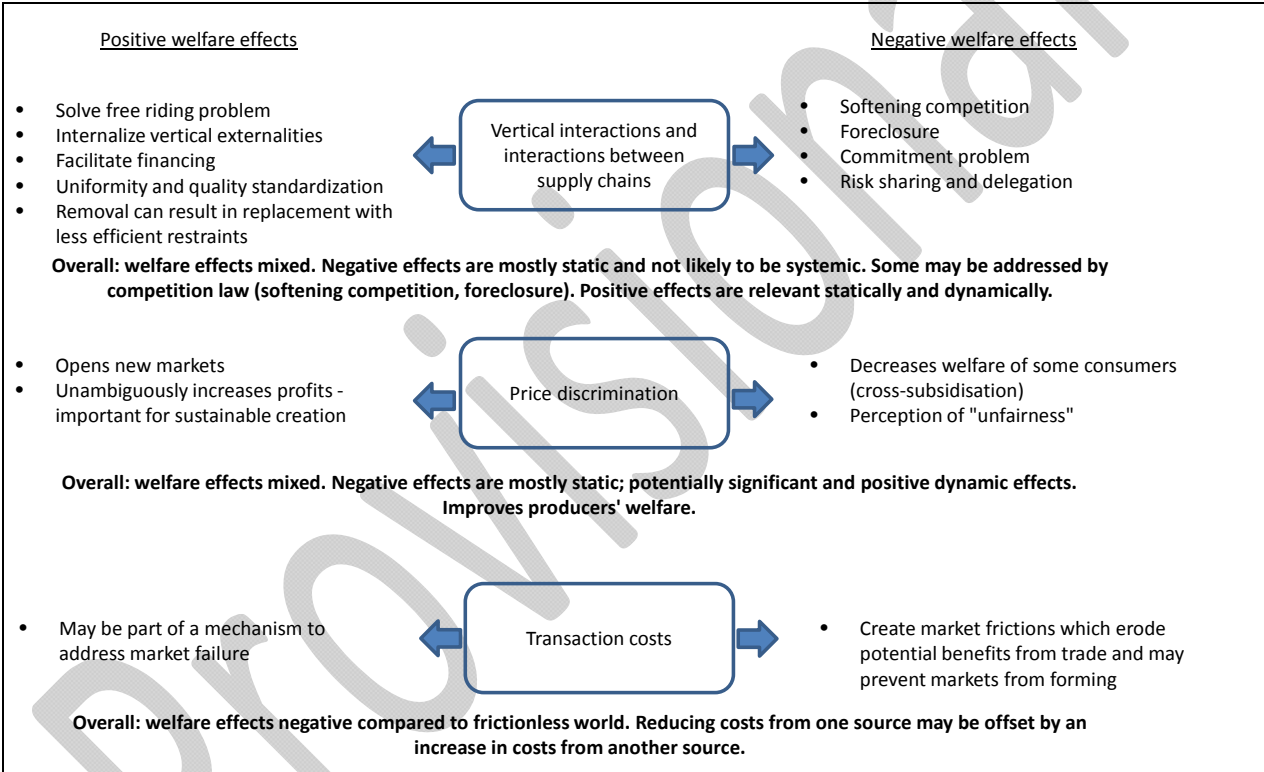
²³⁹ According to Point 51 of the Commission's Guidelines on Vertical Restraints (SEC(2010) 411) the Commission interprets "active" and "passive" sales as follows:

- "Active" sales mean actively approaching individual customers by for instance direct mail, including the sending of unsolicited e-mails, or visits; or actively approaching a specific customer group or customers in a specific territory through advertisement in media, on the internet or other promotions specifically targeted at that customer group or targeted at customers in that territory. Advertisement or promotion that is only attractive for the buyer if it (also) reaches a specific group of customers or customers in a specific territory, is considered active selling to that customer group or customers in that territory.
- "Passive" sales mean responding to unsolicited requests from individual customers including delivery of goods or services to such customers. General advertising or promotion that reaches customers in other distributors' (exclusive) territories or customer groups but which is a reasonable way to reach customers outside those territories or customer groups, for instance to reach customers in one's own territory, are considered passive selling. General advertising or promotion is considered a reasonable way to reach such customers if it would be attractive for the buyer to undertake these investments also if they would not reach customers in other distributors' (exclusive) territories or customer groups."

through the enforcement of competition law.²⁴⁰ Competition law decisions provide industry-wide guidance for companies as to their agreements' compliance with EU competition rules. Nevertheless, competition law is enforced ex post on a case by case basis, and assessments are necessarily fact-specific. Moreover, the freedom to provide and receive services in the Single Market falls under rules of the EU Treaty separate from its competition law provisions. Another difficulty lies in the current legal uncertainty as to the precise scope of permissible provisions in licence agreements based on territorial exclusivity. Finally, views among stakeholders also differ as to how to define passive sales in the context of online services related to copyright.²⁴¹

The figure below presents an economic framework for the analysis of territorial restrictions in copyright licensing agreements and in contracts with consumers.

Figure 2: An economic framework for the analysis: copyright territoriality and territorial restrictions in licensing agreements²⁴²



²⁴⁰ In this regard, and following the Premier League/Karen Murphy judgment, on 13 January 2014, the Commission initiated formal proceedings territorial licensing restrictions for pay-TV content.

²⁴¹ Some stakeholders argue that e.g. services provided on an English language online platform do not allow for a proper delineation between active and passive sales.

²⁴² Based on "Territoriality of the making available right" by Charles River Associates

Economic framework for analysis: Copyright territoriality and territorial restrictions in licensing agreements

The key economic mechanisms, through which territorial restrictions in licensing agreements may affect social welfare, can be broadly categorized into three groups: (1) the use of vertical restraints for interactions between parties within the vertical supply chain and between supply chains (2) price discrimination and (3) transaction costs. The effects of these mechanisms are, naturally, strongest when absolute territorial restrictions are applied. The magnitude of these effects would diminish according to the degree to which territorial restrictions are reduced.

(1) Vertical interactions and interactions between supply chains

Exclusive territorial agreements can generally contribute to a segmentation of markets, thus impeding an important objective of the Internal Market. It should be noted, however, that not all effects of exclusive territorial agreements should be considered to be *per se* negative. In this sense, the economic literature has shown that such agreements may solve externalities (such as double marginalization, investment incentive provision problems, free-riding).

It should be noted that the models in which vertical restraints lead to harm appear somewhat sensitive to small changes in assumptions and often exhibit ambiguous effects. This being said, economic theory provides some arguments on how vertical restraints (and in particular territorial restrictions) may enhance social welfare.

As summarized in the diagram in section 3.1, efficiency motives for vertical agreements may include:

- *Solving a free-rider problem.* Advertising and placement, in particular for movies, is often specific to a linguistic and cultural context in which the content is sold and to media that will expose the content. Local distributors, exhibitors and platforms are more likely to invest in such activities if they can capture the value that these activities create. Exclusive territories may contribute to avoiding that rival distributors, who have not made the investment in the placement, benefit from the investment (free-riding).

- *Solving vertical externalities.* Actors along the value chain are often confronted with agency problems which result from vertical externalities. For example, producers or distributors have to rely on cinemas to screen their movies in prime-times and incur investments in high quality equipment (e.g. seating, large screens, high quality sound and cleanliness). The cinemas might not be willing to make these investments if the movie is simultaneously offered by an online provider in the same territory. This particular problem might be diminished if the release windows are aligned across all the territories.

- *Alleviating the problem of capital market imperfections.* Financial markets do not always efficiently provide capital, in particular when the lenders have imperfect information on the quality of the borrower. Pre-selling of exploitation rights, whereby a downstream player finances a part of the production in exchange for territorial exclusivity, can therefore be important for creative industries because of the inherent revenue uncertainty. This mechanism allows for sharing the risk between the producer and commercial users.

- *Allowing for uniformity and quality standardization.* Vertical restraints may help create a brand image by imposing uniformity and quality standardization on the distributors. In this way, the attractiveness of the product to final consumers and sales can be increased. For example, by imposing territorial restrictions on distributors, the audio-visual producer can assure that a film will be mediated in a standardised way across a territory which shares common cultural and linguistic

elements to avoid confusion and loss of value.

Economic theory, on the other hand, identifies circumstances, in which vertical restraints may be harmful to welfare, and in particular consumer welfare, for example:

- *Dealer or supplier collusion.* The concern here relates to the fact that vertical restraints often reduce downstream competition. While this is not necessarily harmful to welfare by itself, in certain circumstances it might be - for example, resale price maintenance may remove price competition between retailers

- *Softening competition.* Also called “strategic delegation”, this effect relates to a strategic use of vertical restraints in order to change the nature of downstream competition so as to relax competition in the upstream markets.

- *Raising rival’s costs – foreclosure.* Entry of competitors at some level of the supply chain might be made more difficult by the use of certain vertical restraints. Alternatively, the concern is that the ability of existing rivals to exert competitive constraint could be weakened.

- *Commitment problem.* This problem can be a result of the incentive for opportunistic behaviour of the supplier who wants to offer a rival retailer a lower price (or better terms more generally) after the first retailer has invested in inventory holdings. The rival retailer will undercut, making it practically impossible for the first retailer to sell its inventory.

In creative industries, the scope for potential harmful effects of vertical restraints to arise needs to be assessed on a case-by-case basis as economic theory does not provide robust arguments for them to be systemic. This is because the assumptions, under which they are predicted to arise, are not always satisfied in these industries. It also needs to be kept in mind that the harmful mechanisms, as identified in the economic literature, typically ignore the dynamic aspects of social efficiency that may also be present. Indeed, while vertical restraints may in some cases be inefficient from the static (today’s consumer) point of view, they may also be important in preserving incentives for creation, to the effect that they would thus be dynamically efficient (tomorrow’s consumers point of view).

(2) Price discrimination

Price discrimination is a situation in which similar products are priced differently insofar as the price differentials are not justified by the differentials in costs of production or distribution. In order for price discrimination to be effective, three conditions must be satisfied. First, the firm must be able to distinguish between different consumers or groups of consumers who share some demand characteristics. Second, arbitrage, that is resale of goods in the secondary market which is not under the control of the firm, must be absent (or preventable). Third, the firm must possess some degree of market power. By ensuring that the above conditions are satisfied, territorial licensing facilitates price discrimination.

Clearly, price discrimination increases profits of a firm. But it is also well established in the economic theory that it may have positive effects on the surplus of the consumers, and thus total welfare. Indeed, economic theory predicts that in the static sense, price discrimination unambiguously reduces welfare only when it does not result in an increase in total output, whereas in other circumstances the effect on welfare is ambiguous.

Consider, for example, two territories in which consumers differ in their average valuation of the product. With price discrimination, the high valuation territory will be charged a higher price, whereas the low valuation territory will be charged a lower price. Thus, there will be cross-subsidisation of low-valuation consumers through high-valuation consumers and, correspondingly, an undersupply to high-valuation consumers and oversupply to low-valuation consumers. Such a cross-subsidisation results in a loss of social welfare. To compensate for this loss, price discrimination has to increase

overall output. In other words, price discrimination is statically beneficial when it allows for serving an additional market that would not be served under a uniform pricing scheme (because consumers' willingness to pay in this particular market is lower than the uniform price).

Additionally, price discrimination can entail important dynamic effects that should be considered as well. By way of example, ensuring certain level of profits, price discrimination can enhance the incentives to invest into production and quality of content. The extent of potential benefits from price discrimination in terms of investment into new products is, among others, influenced by three factors: (i) dispersion of the consumer valuation of the product (more generally heterogeneity of demand); (ii) magnitude of the sunk and fixed costs; (iii) longevity of the product.

These dynamic effects would appear to be particularly relevant for the creative industries. Therefore, while overall welfare effects that come about through the channel of price discrimination are ambiguous, changes abolishing the ability of the rightholders to price discriminate, must be carefully assessed.

(3) Transaction costs

Transaction costs are “frictions” which erode potential benefits from trade. In that sense transaction costs, to the extent they are avoidable, are always detrimental to welfare. Moreover, because transaction costs associated with online licensing reduce potential revenues, they may also decrease entry (or incentives for expansion) in the provision of music and audiovisual services, prevent formation of new markets and thus also affect welfare negatively in a dynamic sense.

On the premise that it reduces transaction costs, and all else given, a limitation on the practice of territorial licensing, is likely to promote cross-border trade of content. Besides the obvious benefits of trade to consumers in the form of greater availability of products, the benefits may also accrue to exporting producers in the form of higher profits, as the potential market size expands with trade. Moreover, the larger market size, in an industry characterized by large sunk costs, can bring about larger investments and improve the quality of the products – thus again improving social welfare.

It is clear that if transaction costs can be reduced by changing the legal framework without affecting the incentives of the producers, such changes should be considered. However, in such an assessment, there is a straightforward, but important consideration that has to be kept in mind: some transaction costs are an unavoidable consequence of licensing content, and therefore intrinsically linked to copyright as such and the role it plays in providing incentives for production of content.

Moreover, importantly to the assessment, it should be noted that while removing some sources of transaction costs, an intervention which limits the practice of territorial licensing may introduce other sources of transaction costs. For example, by removing territorial principle of licensing, the scope actual and potential audience would be more difficult to determine, which would increase transaction costs due to business uncertainty (resulting in a need for more complex and comprehensive contracts). Because there are different sources of transaction costs, the likely impacts need to be assessed in a comprehensive framework and all such sources need to be identified and considered with respect to their relevance.²⁴³

²⁴³

Ideally, the conclusion on the relative magnitude of the above effects and the overall impacts of policy changes would be made on the basis of comprehensive empirical analysis. However, the body of relevant empirical literature on the subject is still relatively small and in part is plagued by methodological problems and lack of data. It would indeed appear that, overall, the available evidence is not yet stable. Moreover, comprehensive empirical analysis would in principle have to encompass a large number of differentiated products, dissemination channels, different national markets and account for the fast, but uncertain, pace of adoption of online content dissemination. In order for the results of such an analysis to be directly useful for policy recommendations, it would not only have to account for the main mechanisms through which social welfare might be affected, but at the same time consider the ways in which industry structure could respond to policy changes.

8.6. ANNEX F: A CONCEPTUAL FRAMEWORK FOR AN ECONOMIC ASSESSMENT OF EXCEPTIONS TO COPYRIGHT

From an economic perspective, assuming the optimal scope of copyright, exceptions to copyright are not likely to be warranted absent clearly identified and persistent market failures. Such market failures may in particular arise from the existence of **transaction costs**. Exceptions to copyright are therefore more likely to be justified when transaction costs prevent mutually beneficial transactions. In the extreme case of missing markets, transaction costs erode the gains of trade between rightholders and potential users of copyrighted works so much that no trade occurs. To the extent that the formation of such markets in the future is unlikely, there may be an economic case for introducing an exception to copyright, as such an exception can then enable at least some uses of the creative work without adversely affecting incentives to create new work. However, where feasible, a market-based solution is generally more efficient socially as it allows both the authors and users to “negotiate” payments thus supporting efficient allocation of creative works to valuable uses and efficient levels of creative effort.

To the extent markets have formed for a specific use of copyrighted works, **externalities** can potentially introduce a case for exceptions. In order to identify the circumstances in which exceptions are socially desirable it is however important to ask whether external effects arise from the ideas or information associated with a creative work rather than the form in which these ideas are expressed. It might well be that often the external effects are in fact associated with the ideas and information (which are not protected by copyright) and hence do not require a new exception to be realized. On the other hand, exceptions may be well placed in circumstances in which copyright can be employed to effectively prevent access to and the reuse of the (formally unprotected) information or idea (thus giving the rightholders market power over access to these unprotected elements of their creative works) - in such circumstances exceptions may be the best way to release the potential positive externalities associated with information embodied in creative works. Significant transaction costs which hinder ex-ante negotiations for access further strengthen the case for exceptions in the presence of positive externalities from new uses. However, the implementation of certain exceptions meant to solve problems due to transaction costs or externalities may run into difficulty when the dissemination and efficient access to the work requires some effort on the part of the right's owner. It is then worth asking whether some market mechanism, or an alternative intervention cannot overcome the problems associated with externalities while preserving enough incentives for efficient levels of creative efforts.

Assuming further that markets for creative works exist, **market power** on the part of rightholders may result in a deadweight loss which could potentially be curbed by broader exceptions. However, it cannot be established on the basis of the economic theory alone whether exceptions should be narrowed or broadened in response to a reduction in the cost of making copies of creative works (brought about by technological advances). Indeed, in this case more creative works are produced, leading to more deadweight loss arising (favouring broader exceptions), which is to be considered against the increased net welfare gain to be potentially generated from each new work (favouring narrower exceptions). Furthermore, it cannot be established on the basis of theory alone whether exceptions should be broadened or narrowed down as a consequence of the expansion of the consumption possibilities of creative material (again brought about by technological advances). Nevertheless, there may be a case for exceptions in particular when they allow for the development of product qualities that a copyright owner could not produce herself due to transaction costs and technological constraints. Exceptions are also more likely justified in circumstances where, resulting from a potential users irreversible investment in a new use (service) that relies on access to existing copyrighted work, an increase in rightholders' bargaining power gives rise to opportunistic behaviour (also called "hold-up problem") as this risks introducing dynamic inefficiencies (in terms of suppressing incentives to invest in creative effort)

8.7. ANNEX G – USER-GENERATED CONTENT

User Generated Content (UGC) is intended for the purposes of this this Impact Assessment as referring to cases where a pre-existing work is taken by a user as a starting point for his/her own expression, modified or transformed in one way or another, and then made available online. A typical example is where an individual takes a music track, adds his/her video, and uploads the result onto a platform. It may also include the merging of two pre-existing works (“mash-ups”). The threshold may be lower than “a certain amount of creative effort”.²⁴⁴ It excludes the case of “mere upload”, where a user merely distributes on the internet (by uploading and sharing it) pre-existing works without having intervened in any way on the work. It also excludes “creation from scratch”, i.e. the case where a user creates a new work “from scratch”, without relying on a pre-existing work.

UGC involves (1) the reproduction right and (2) the communication to the public right (except where the UGC work is only made available to a limited group of friends or relations), including the right to make available.

(1) The reproduction right: there will be at least a “reproduction in part” in any User Generated Content since the user will start from a pre-existing work to generate a new/modified version of that work.

In addition, UGC involves the adaptation right every time the pre-existing work is a copyright protected work, since the user will, in some way, arrange the work or modify it.²⁴⁵ Article 12 of the Berne Convention provides for an exclusive right for authors to authorize adaptations of their works: “Authors of literary or artistic works shall enjoy the exclusive right of authorizing adaptations, arrangements and other alterations of their works.” The Berne Convention does not explicitly authorize Member States to provide for exceptions to the adaptation right but it is generally recognized that they may provide for an exception for parodies and caricatures, which are then to be considered as “excused adaptations”.²⁴⁶ Contrary to the reproduction right and the communication to the public/making available right, there is no express rule with respect to adaptations in the Infosoc Directive (unlike the Software Directive and in the Database Directive). However, the broad manner in which the reproduction right in Article 2 of that Directive is formulated and the CJEU’s jurisprudence on the scope of the reproduction right notably in the Infopaq²⁴⁷ and Eva-Maria Painer²⁴⁸ cases seem to cover adaptations that give rise to a further reproduction within the meaning of Article 2. The pending case of Allposters²⁴⁹ will shed further light on the scope of Article 2.

²⁴⁴ Proposed definition by the OECD

²⁴⁵ In the same sense, M. Ficsor, “Comments on the UGC provisions in the Canadian Bill C-32: potential dangers for unintended consequences in the light of the international norms on copyright and related rights” (23 October 2010), available at http://www.copyrightseesaw.net/archive/?sw_10_item=31, p. 3.

²⁴⁶ S. Ricketson & J. Ginsburg, *International copyright and Neighboring Rights*, Oxford University Press, 2005, p. 483-484, as quoted by M. Ficsor, “Comments on the UGC provisions in the Canadian Bill C-32: potential dangers for unintended consequences in the light of the international norms on copyright and related rights” (23 October 2010), available at http://www.copyrightseesaw.net/archive/?sw_10_item=31, p. 5.

²⁴⁷ Judgment of the Court of 16 July 2009, Case C 5/08, *Infopaq - Infopaq International A/S v Danske Dagblades Forening*

²⁴⁸ Case C-145/10 – *Eva-Maria Painer v Standard VerlagsGmbH*

²⁴⁹ Case C-419/13 – *Allposters v Stichting Pictoright*

(2) The right to make available: uploading UGC on a web platform or site, whether for commercial purposes or not, amounts to communication to the public and/or making available²⁵⁰.

Consequently, when UGC involves copying and adapting parts of pre-existing works and is communicated to the public, a licence from the rightholder covering the user's activities will be necessary, unless exceptions to the reproduction, communication to the public (making available) and adaptation right apply.²⁵¹ In several cases open licences already provide this authorisation to anyone willing to produce UGC.

In addition to the mandatory exception for technical acts of reproduction provided in article 5(1) of the InfoSoc Directive, three exceptions in the Directive are relevant, at least in part, in the event that UGC is created and distributed without the authorisation of the rightholder(s):

(a) Quotation for criticism or review: article 5.3(d) of the InfoSoc Directive allows Member States to provide for an exception or a limitation to the rights provided for in Articles 2 and 3 (i.e. the reproduction right and the public communication right): “*quotations for purposes such as criticism or review, provided that they relate to a work or other subject-matter which has already been lawfully made available to the public, that, unless this turns out to be impossible, the source, including the author's name, is indicated, and that their use is in accordance with fair practice, and to the extent required by the specific purpose*”.

All Member States either already had or have introduced such exception when implementing the InfoSoc Directive.²⁵² Variations persist:

- “Quotation” is often considered as meaning that only parts (or “small parts” of a work may be reproduced but this is not always the case and some Member States (the Netherlands) are more liberal than others (France, Luxembourg), while in Ireland, it is debatable whether the size of the quotation matters or not;
- It is sometimes recalled that the intellectual legacy of the pre-existing work must be respected and reflected in a recognizable way (Estonia, Belgium²⁵³), but not all Member States require that condition;
- Some Member States (Belgium, Italy) prohibit quotations for commercial purposes; in some Member States, the quotation may not prejudice the commercial exploitation of the work or otherwise cause a prejudice to the author. In some other Member States, such condition is not mentioned or not existing.

(b) Parody, caricature or pastiche: Article 5.3(k) of the InfoSoc Directive allows Member States to provide for an exception for “*for the purpose of caricature, parody or pastiche*”.

²⁵⁰ in the sense of Article 3 of the InfoSoc Directive “the exclusive right to authorise or prohibit any communication to the public of their works, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them”

²⁵¹ See in this sense, IDATE, TNO & IVIR, User-Created-Content: Supporting a participative Information Society, SMART, 2007/2008, p.188.

²⁵² Study on the application of Directive 2001/29/EC on copyright and related rights in the information society, De Wolf & Partners, http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf

²⁵³ M.C. Janssens, in La loi belge sur le droit d’auteur, Commentaire par article, Hommage à Jan Corbet, Larcier, ed. F. Brison & H. Vanhees, 3rd ed., p. 139.

There is currently a case pending before the CJEU which should shed light on the scope of this exception.²⁵⁴

- Ten Member States have introduced an explicit exception: Belgium, Germany, Estonia, Spain, France, Lithuania, Latvia, Luxembourg, Malta, and the Netherlands;
- In a further seven member States, it is considered that even though there is no explicit exception, such use may be otherwise authorised by virtue of the copyright framework: Austria, Denmark, Finland, Hungary, Italy, Portugal, Sweden;
- In the remaining 11 Member States there appears to be no provision authorising the use of protected content for the purpose of caricature, parody and pastiche (see table X below).

(c) Incidental inclusion Article 5.3(i) of the Info Soc Directive allows Member States to provide for the “*incidental inclusion of a work or other subject-matter in other material*”. The incidental inclusion exception may apply to certain cases of UGC, such as the examples often referred to of private video of weddings or other private or family events where some music may be heard in the background. There is as yet no CJEU judgment on the scope of this exception, so its scope is unclear. From a policy point of view, it can be argued that “incidental” does not equal “in the background” but rather refers to “accidental” or “unintentional” takings, and thus to situations in which the purpose of the user was not to capture the sounds or the images at stake but where such capture happened at the occasion of the recording of another element which was the real subject matter of the recording/creation by the user.²⁵⁵

The situation in Member States is as follows:

- Austria, Bulgaria, the Czech Republic, Greece, Italy, Latvia, Poland, Romania, the Slovak Republic, Slovenia, did not implement the exception;
- Finland, Germany, Ireland, Malta, the Netherlands, Portugal, Sweden and the United Kingdom implemented it;
- France accepts it in court decisions but the law does not mention the exception; the same seems to more or less apply in Hungary;
- Its inclusion via article 5.3(h) limits in many countries its scope of application to architectural works and sculptures (fine arts mainly) but can hardly be said to apply to music and “remix” for instance (Belgium, Estonia, Lithuania, Luxembourg).
- Sometimes, the purpose of the inclusion must be for reporting on current events (Denmark, Spain).

The overall picture of the legal framework for UGC at EU level is one lacking in harmonisation.

The possible “chilling effect” of the current situation is hard to assess because one would need, by definition, to gather information about projects which were not carried out on account of fears by users or caricaturists of the risks involved. In the meantime, the growing

²⁵⁴ Case C-201/13 – Deckmyn & Vrijheidsfonds v. family Vandersteen and others

²⁵⁵ Study on the application of Directive 2001/29/EC on copyright and related rights in the information society, De Wolf & Partners, http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf

production of UGC suggests that users seem at the moment not to be deterred by an uncertain legal framework.

As of 2013, 100 hours of video content are uploaded to YouTube every minute, and more than 1 million creators from over 30 countries, globally, earn money from their YouTube videos. More than 4,000 “partners” use Content ID to monetise the use (and re-use) of their material on YouTube, including major US network broadcasters, film studios, and record labels. For the time being rightholders have refrained from preventing the emergence of UGC, and have been rather inclined to embrace the commercial opportunities.²⁵⁶ It is predominantly the big platforms that have concluded licensing agreements with right-holders. In parallel, right-holders are working on creating solutions for micro-licensing.

Feed-back from stakeholders in the public consultation as to problem and solutions varies, but many highlight the lack of agreed or clear definitions of UGC and the importance of a clear understanding of its different categories. There is also widespread recognition that UGC as such can be an opportunity for all players involved, as long as the value generated by UGC is fairly distributed. Rightholder representatives and collective management organisation see no evidence of major problems in this area, and often highlight the current platform licensing solutions and developments in micro-licensing as the way to be supported. Issues put forward by this category of stakeholders however are related to the identification of pre-existing works, and the related problem of metadata removal, adequate remuneration and the respect of moral rights. Concerned online service providers and technology industry organisations generally recognise that the systems they have put in place allowing for the recognition of protected content in the UGC they carry are useful, but point to some inherent limits. Some technology industry respondents call for considering UGC as part of a broader discussion on the suitability of the current copyright rules to new realities of creation and use. End-user organisations tend to point to that consumers experience problems when trying to use pre-existing works and point to uncertainties as to the scope of existing exceptions will be taken down by hosting providers.

²⁵⁶

For example, in Europe, the licensing of ad-supported services (such as YouTube) accounts for 8% of the digital revenues of the members of IFPI or 2.3% of total revenues of IFPI members (IFPI « Recorded Industry in Numbers 2012 », p.29)

Table A3 - Implementation of Art 5.3.k InfoSoc Directive - Exception for Parody, caricature, pastiche

AT	No explicit exception. Some commentators consider that “the freedom to make caricatures is safeguarded under general principles of copyright law and will seldom amount to a reproduction or adaptation” ²⁵⁷ .
BE	Yes, existed since 1886. Case law has interpreted narrowly and requires the following cumulative conditions: the parody must itself be original, have a purpose of criticism, be somewhat humorous and may not cause confusion with the pre-existing work. It is sometimes further required that the parody not have a commercial purpose and not have as its main or sole purpose to cause prejudice to the pre-existing work. The parody may not overrule the moral right of integrity (the honour or reputation of the author may not be damaged) and article 10 of the EDHR may not be invoked to allow infringements to the moral right of integrity. The weighing of these different principles is described as a difficult exercise ²⁵⁸ .
BG	Not introduced
CZ	Not introduced
CY	Not introduced
DK	No explicit exception. However, caricatures will often be deemed new and independent works of art under Section 4 (2) of the Copyright Act and thus fall outside of the copyright protection of the pre-existing work ²⁵⁹ .
DE	Yes. The caricature exception existed prior to the Copyright Directive ²⁶⁰ . It is sometimes considered that this is not even a limitation to copyright but presupposes that caricatures do not constitute reproductions or adaptations ²⁶¹ .
EE	Yes, introduced. A parody may be made of a lawfully published work, to the extent justified by such purpose , which must be scientific, educational or informational ²⁶² .
EL	Not introduced
ES	Pre-existing exception retained.
FI	The caricature exception was not introduced explicitly when implementing the Copyright Directive (contrary to most exceptions of the catalogue), but it is admitted that parodies may be made, on the basis that ideas may not be protected, and with this limit that the parody may not be an adaptation of the pre-existing work (in which case it requires a licence) ²⁶³ . Some commentators add that parody is recognised

²⁵⁷ Institute for Information Law (IVIR), Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, Part II, Country reports, G. Westkamp, Final report, February 2007, p. 113.

²⁵⁸ M.C. Janssens, in La loi belge sur le droit d’auteur, Commentaire par article, Hommage à Jan Corbet, Larcier, ed. F. Brison & H. Vanhees, 3rd ed., p. 168.

²⁵⁹ Institute for Information Law (IVIR), Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, Part II, Country reports, G. Westkamp, Final report, February 2007, p. 163.

²⁶⁰ Copyright in the information society – A Guide to National Implementation of the European Directive, edited by B. Lindner & T. Shapiro, Edward Elgar Publishing Ltd, 2011 (Chapter on Germany by M. Schaefer), 223.

²⁶¹ Institute for Information Law (IVIR), Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, Part II, Country reports, G. Westkamp, Final report, February 2007, p. 230.

²⁶² Copyright in the information society – A Guide to National Implementation of the European Directive, edited by B. Lindner & T. Shapiro, Edward Elgar Publishing Ltd, 2011 (Chapter on Estonia by V. Naslund), p. 180.

²⁶³ Copyright in the information society – A Guide to National Implementation of the European Directive, edited by B. Lindner & T. Shapiro, Edward Elgar Publishing Ltd, 2011 (Chapter on Finland by K. Harenko), p. 191.

²⁶⁴ Institute for Information Law (IVIR), Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, Part II, Country reports, G. Westkamp, Final report, February 2007, p. 197.

	as a general principle of Finnish copyright law ²⁶⁴
FR	Yes. The caricature exception already existed before the Copyright Directive and the text was not changed upon implementation of said Directive; caricatures must however comply “with the laws of the genre” (which gave rise to numerous court decisions) ²⁶⁵ .
HR	
HU	No explicit provision exists under the Copyright Act. However, legal literature and practice accept the exception provided that the use must correspond to the conditions of the quotation exception or (yet this view is not shared by all, all the more so if one considers that exceptions must be interpreted narrowly) ²⁶⁶ consist in a humoristic-critical imitation of a given author’s style ²⁶⁷ .
IE	Not introduced
IT	Not introduced. However, there is consistent case-law stating that caricature and parody are allowed on the basis of Article 21 of the Constitution that enshrines the fundamental right of freedom of expression ²⁶⁸ .
LT	Yes, introduced.
LV	Yes, introduced, similar to Art 5.3.k.
LU	Yes. The Copyright Act allows caricatures aimed at mocking the parodied work provided that they are in accordance with fair practice and that they only use elements strictly necessary for the parody and do not disparage the work.
MT	Yes, the pre-existing exception was kept.
NL	Yes, introduced. The caricature must be made in accordance with what is reasonably permitted according to the rules of social intercourse.
PL	Not introduced.
PT	Not introduced. Some commentators consider that it is allowed as a free use in general, being a use merely inspired by an existing work ²⁶⁹ .
RO	Not introduced
SE	No parody exception in the law but it is accepted that general principles of law, confirmed on this by case-law, lead to the conclusion that parodies are not infringing the rights of the authors.
SK	Not introduced
SI	Not introduced
UK	Not introduced.

²⁶⁵ Copyright in the information society – A Guide to National Implementation of the European Directive, edited by B. Lindner & T. Shapiro, Edward Elgar Publishing Ltd, 2011 (Chapter on France by P. Kamina), p. 214.

²⁶⁶ Institute for Information Law (IVIR), Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, Part II, Country reports, G. Westkamp, Final report, February 2007, p. 262, where no reference is made to such possibility.

²⁶⁷ Copyright in the information society – A Guide to National Implementation of the European Directive, edited by B. Lindner & T. Shapiro, Edward Elgar Publishing Ltd, 2011 (Chapter on Hungary by M. Ficsor), p. 265.

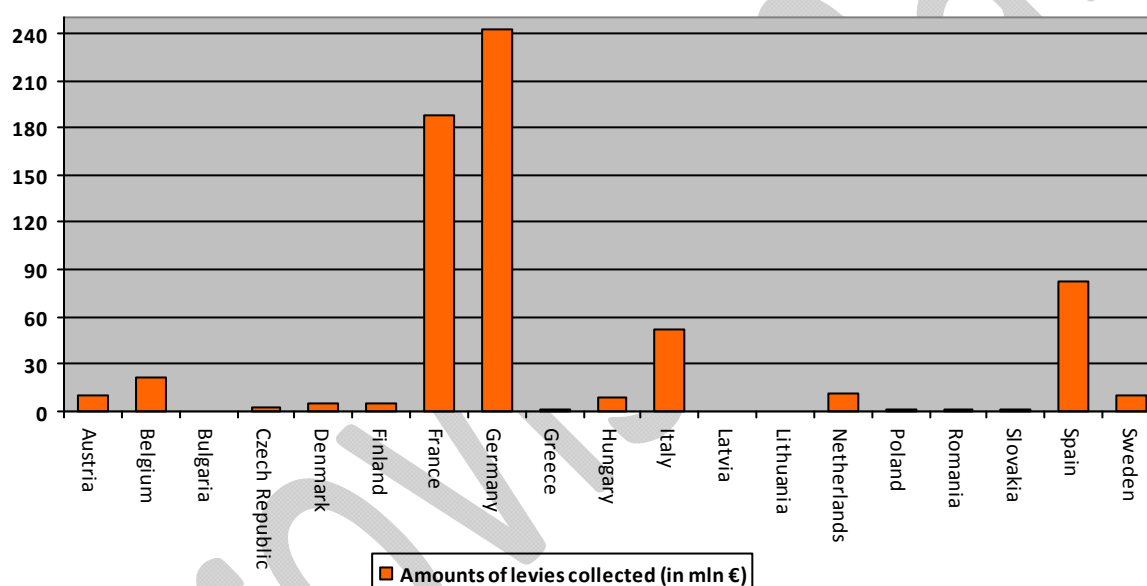
²⁶⁸ Copyright in the information society – A Guide to National Implementation of the European Directive, edited by B. Lindner & T. Shapiro, Edward Elgar Publishing Ltd, 2011 (Chapter on Italy by S. Ercolani), p. 316.

²⁶⁹ Institute for Information Law (IVIR), Study on the implementation and effect in Member States’ laws of Directive 2001/29/EC on the harmonization of certain aspects of copyright and related rights in the information society, Part II, Country reports, G. Westkamp, Final report, February 2007, p. 396 (referring to article 2 (1) n of the Copyright Act.

8.8. ANNEX H – PRIVATE COPYING AND REPROGRAPHY

Member States are allowed to implement in their national legislation exceptions or limitations to the reproduction right for copies made for private use and with the use of photographic technique or a similar process (i.e. photocopying).²⁷⁰ For those Member States that have introduced these exceptions, most impose levies on goods typically used for such purposes (blank media, recording equipment, photocopying machines, mobile listening devices such as mp3/mp4 players, computers, etc.) in order to compensate rightholders for the harm they suffer when copies are made without their authorisation. National levy systems are linked to the different traditions and values underpinning the cultural policies of Member States, as well as to economic factors such as income *per capita*²⁷¹. Currently 21 Member States have levy systems in place²⁷² and the overall amount of over €600 mln was collected in private copying levies for 2010.²⁷³

Graph A1 - revenue from levies across the EU in 2010



Member States approaches to these exceptions vary *inter alia* as regards categories of copies which are taken into account in the calculation of fair compensation, the choice of products to which levies apply and the level of tariffs applicable to those products.

The issue of private copying and reprography levies has been discussed on numerous occasions since 1998. The Commission led stakeholders dialogues and consultations in 2004/2005, 2006 and 2008. More recently, Mr António Vitorino, former Commissioner for Justice and Home Affairs, led a stakeholder focused process of mediation throughout 2012²⁷⁴. This mediation concluded on 31 January 2013 with the presentation by Mr António Vitorino of his recommendations.²⁷⁵ Subsequently, a

²⁷⁰ Articles 5(2)(a) and 5(2)(b) of Directive 2001/29

²⁷¹ http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf

²⁷² Spain abolished its system of levies on 31 December 2011. The government decided to compensate for the harm caused by private copying after 1 January 2012 via a payment from the general state budget.

²⁷³ International Survey on Private Copying Law and Practice - de Thuiskopie/WIPO 2012; this amounts includes Spain, but does not include Estonia.

²⁷⁴ http://ec.europa.eu/commission_2010-2014/barnier/docs/speeches/20120402/statement_en.pdf

²⁷⁵ http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf

debate between Member States took place at the Competitiveness Council of 28 May 2013 to take the stock of the situation and assess the possible ways forward.

a) Private copying and digital transmissions

Member States approaches diverge as regards the categories of acts of reproduction considered as private copying causing harm to rightholders and therefore taken into account in the calculation of fair compensation. In the context of digital transmissions in the on-line environment, these differences are evident in particular as regards the taking into account of permanent copies made by end-users in the context of on-demand delivery of copyright protected content (i.e. when the end-user downloads a copyright protected content and stores it on various devices according to the terms of use of the service in question) in the calculation of private copying and reprography levies.

Indeed, the legislative frameworks in a number of Member States (see Table 1) stipulate that such copies should not be treated as triggering levies. In the public consultation, many representatives of service providers as well as publishers, audio-visual and music producers indicated that under the current legal framework it is already possible to ensure that no levies are claimed in the context of on-line services where copyright protected content is made available on-demand on agreed contractual terms.

In the recent discussions on the reform of copyright in **the United Kingdom**, the introduction of a narrow private copying exception is being proposed by the government. It would allow individuals to format-shift content they own, and which they acquired lawfully e.g. it would be possible to store lawfully an acquired music file on various devices used by the consumer for his own personal use. The government considers that the proposed exception would allow for appropriate compensation to be paid at the point of sale, and the exception will cause minimal harm to rightholders.²⁷⁶

By contrast, the legislative frameworks of other Member States remain either silent or ambiguous, paving the way for the claiming of private copying and reprography levies for this type of end-users' copies.

As a result, instances of 'double-dipping' occur whereby one and the same copy is paid twice by the consumer: by virtue of the price paid for the download and through the 'levy' imposed on certain categories of products.

²⁷⁶ <http://www.ipa.gov.uk/techreview-private-copying.pdf>

Table A4 – Status of copies made in the context of on-demand delivery of content governed by contract under national law [(x) – national legislation allows not to take into account copies already paid in the price of the first download in the calculation of levies for subsequent copies made by end-users.]²⁷⁷

AT	n/a
BE	x
BG	n/a
HR	n/a
CZ	n/a
DK	n/a
EE	n/a
FIN	x
FR	x
DE	x
GR	n/a
HU	x
IT	x
LV	n/a
LT	n/a
NL	n/a
PL	n/a
PT	n/a
RO	n/a
SK	n/a
SLO	n/a
SV	x

The *status quo* leads to legal uncertainty as the approaches Member States take differ substantially and stakeholders face varying regulatory requirements, depending on the way the private copying and reprography exception are implemented. Payments made by end-users are often disconnected from the actual consumption of copyright protected content even

²⁷⁷

(x) signifies that the legislation of a given Member State makes it possible not to take into account copies already paid in the price of the first download in the calculation of levies for subsequent copies made by end-users. Such interpretation is based on the assumption that in Member States which correctly implemented Article 6(4)(4) of the Directive 2001/29 it should not be possible to claim private copying levies for copies made in the context of an on-line service whereby copyright protected content is offered on-demand on contractually agreed terms. Consequently, it is understood that in those Member States it is not possible to take into account such subsequent end-users copies in the calculation of the amounts of levies i.e. to claim levies on top of contractually agreed licence-fee. In all other Member States (n/a) this issue has not been explicitly addressed in the legislation, paving the way for claiming private copying levies also for those type of end-users copies.

though in the digital environment, the existing technology allows to quantify the copies made. Moreover, because the legislations of some Member States make it possible to ask levies for end-users copies made in the context of on-line services, the resulting amounts imposed on devices can be potentially higher than in those countries where such copies are not included in the calculation of levies.

Given the increasing penetration of internet access and the growth in the number of on-line services in which copyright protected content is offered to consumers on demand,²⁷⁸ which was stressed in a number of submissions in the public consultation by almost all stakeholders and provided that consumers will continue to prefer to own content, the overall number of cases in which the potential overlap between payments received by the rightholders by virtue of the agreements concluded with service providers and the payments from levies could also increase. However, the extent and the pace of that increase will largely depend on the business models which will eventually prevail on the market. Indeed, if the penetration of access-based services continues at its current pace, there will be fewer copies occurring at consumer's end (for instance those would be likely to be reduced to cases where the consumer wants to access offline the content for which he has paid e.g. by creating offline playlists) and less instances where the application of levies would be triggered.

b) Disparate national levy schemes and the free movement of goods and services

Member States approaches also differ substantially as regards the choice of products to which levies apply as well as the level of tariffs applicable to those products.

As regards the type of products which should be subject to levies, the CJEU clarified that "*the fact that that equipment or devices are able to make copies is sufficient in itself to justify the application of the private copying levy*".²⁷⁹ As a result, in principle all media, equipment, and devices capable of making copies of copyright protected content can be subject to a levy. Given lack of criteria at EU level, Member States continue to take very different approaches. While some of them opt for a rather limited catalogue of products subject to levies (e.g. applying levies only to recordable media),²⁸⁰ others extend the levy schemes to new categories of products.²⁸¹

²⁷⁸ In 2012 Digital sales grew by 8.0% globally; the number of subscribers globally grew in 2012 by 44% to 20 million and in Europe subscription streams already account for 23% of digital revenues.

²⁷⁹ Case C-467/08 (Padawan vs SGAE).

²⁸⁰ For instance Denmark and Portugal decided not to impose levies on any other categories of devices (their national schemes are limited to recordable media such as CD, DVD, memory cards etc.)

²⁸¹ With no levies on devices until 2012, the Netherlands decided to extend, as of 2013, private copying levies to devices such as audio/video players, smartphones, telephones with mp-3 players, tablets, HDD recorders and set-top boxes.

Table A5 - overview of products subject to private copying levies in MS with levy systems in place (2012)²⁸²

Country	Blank CD/DVDs	Blue ray discs	MP3 players	Mobile phones	PCs
Austria	√	√	√	x	x
Belgium	√	X	√	√	x
Bulgaria	√	√	√	x	x
Croatia	√	x	√	√	√
Czech Republic	√	X	√	x	x
Denmark	√	√	x	x	x
Estonia ²⁸³	√	x	X	n/a	x
Finland	√	√	√	x	x
France	√	X	√	√	x
Germany	√	√	√	√	√ ²⁸⁴
Greece	√	X	√	√	x
Hungary	√	√	√	√	x
Italy	√	√	√	√	√
Latvia	√	X	√	x	x
Lithuania	√	√	√	√	√
Netherlands ²⁸⁵	√	x	x	x	x
Poland	√	√	√	n/a	x
Portugal	√	x	x	x	X
Romania	√	√	√	√	x
Slovakia	√	√	√	n/a	√
Slovenia	√	√	√	x	X
Sweden	√	x	√	x	x

In a similar vein, while the CJEU did rule that "fair compensation must necessarily be calculated on the basis of the criterion of the harm caused to rightholders by the introduction

²⁸² International Survey on Private Copying Law and Practice - de Thuiskopie/WIPO 2012

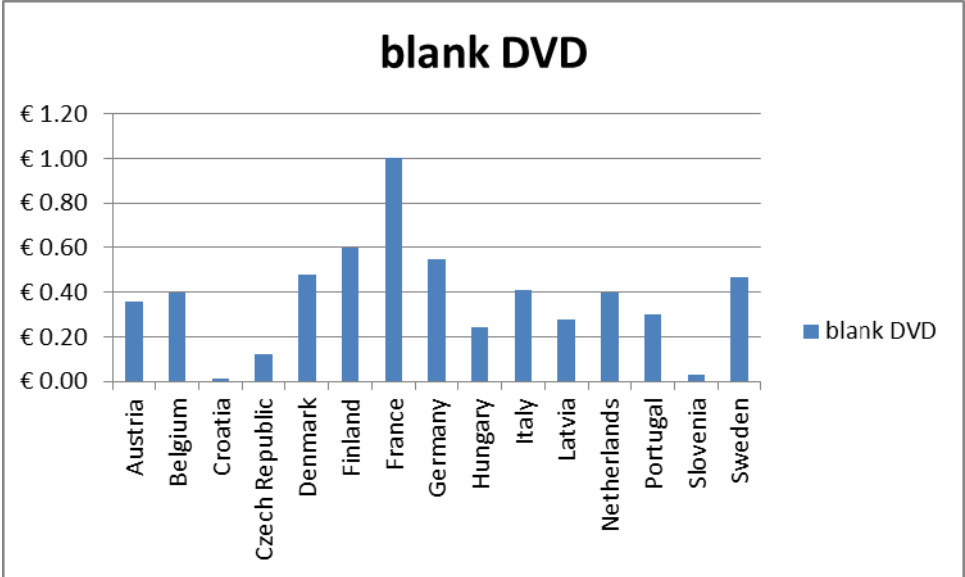
²⁸³ International Survey on Private Copying Law and Practice, de Thuiscope (21st revision 2010)

²⁸⁴ Subject of negotiations since 2011

²⁸⁵ As of 2013 private copying levies were extended to devices such as Audio/video players, smartphones, telephones with mp-3 players, tablets, HDD recorders and set-top boxes.

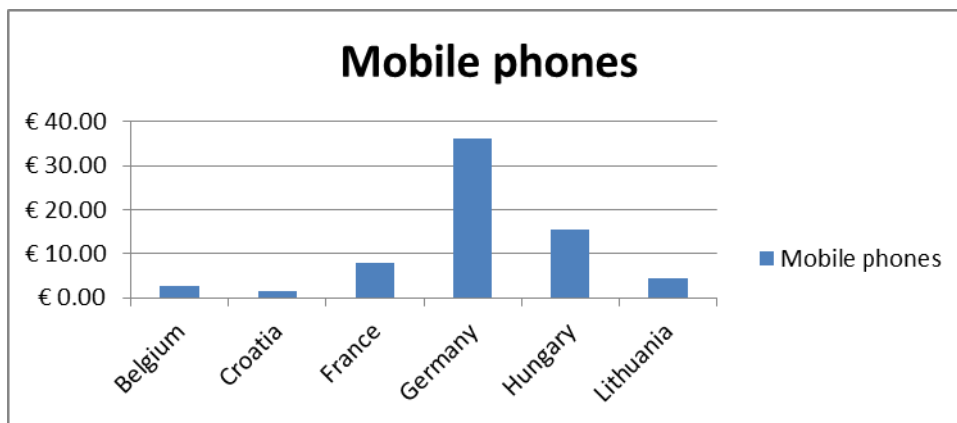
of the private copying exception"²⁸⁶ it also recognized that Member States enjoy broad discretion when determining the form, detailed arrangements and possible level of such compensation²⁸⁷. As a result, Member States continue to use various criteria in estimating the degree of harm and the resulting amounts of fair compensation. This raises the costs of operation of pan-European entities manufacturing and distributing products subject to levies on multiple territories. Indeed, such entities, although marketing on EU-wide basis, need to comply with varying approaches taken by Member States both as regards the choice of products which are levied and the amounts of applicable tariffs. In the context of the public consultation, service providers complained about the current legal framework which – in their view – makes the offering of goods and services on the internal market on pan-European basis, very difficult. Some of them invoke levies as reason for their withdrawal from markets of some of MS.

Graph A2 – example of varying tariffs applicable to blank DVDs²⁸⁸



Graph A3 – example of varying tariffs applicable to mobile phones in selected Member States²⁸⁹

²⁸⁶ In Case C-467/08 (Padawan vs SGAE), Case C-462/09 (Stichting de Thuiskopie vs Opus), Cases C-457/11 – C-460/11 (VG Wort vs Kyocera Mita et al), Case C-521/11, Austro Mechana vs Amazon;
²⁸⁷ in Case C-521/11 (Austro Mechana vs Amazon)
²⁸⁸ International Survey on Private Copying Law and Practice - de Thuiskopie/WIPO 2012
²⁸⁹ Tariffs applicable to mobile phones with 16 GB internal memory International Survey on Private Copying Law and Practice - de Thuiskopie/WIPO 2012.



Given that the principle of territoriality applies to the collection of levies, the disparities in national levy schemes become problematic whenever a product subject to levy is traded across the EU. Indeed, the CJEU confirmed that the 'harm' suffered by the rightholders arises on the territory where the final user resides and therefore needs to be compensated on the territory of that state²⁹⁰. Levies are therefore imposed whenever a product enters a national territory (i.e. upon its production or importation) and Member States do not take into account the payments of levies already made by virtue of the legislation of other countries. This means that one product can be subjected to a levy in several Member States simply because it was traded across the borders.²⁹¹

To mitigate these undue payments, many (but not all: see table below) Member States provide for *ex ante* exemption or *ex post* reimbursement of cross-border transactions. The former allows those liable for payment (i.e. manufacturers or distributors in the majority of cases) to obtain upfront exemption of the transactions involving those products subject to levies which will never be 'consumed' in the country in which they were produced or distributed and where the liability for payment arose.

Given that **the Netherlands** constitute an important 'hub' through which a significant number of electronic equipment and recordable media enter the EU and from which it is further distributed, the local collecting society (Stichting de Thuiskopie) has concluded a number of bilateral agreements with major manufacturers and distributors of products subject to levies. By virtue of those agreements, products not intended for the domestic market are excluded from the obligation to pay levies. Given that those products are stored in warehouses prior to their export, the system appears to be efficient and yields positive effects for large entities operating on pan-European basis.²⁹²

By contrast, in cases when *ex post* reimbursement schemes are in place, those who actually paid a levy for products subsequently exported to another Member State can, upon certain conditions, obtain a refund of the amount initially paid in the country from which the product in question was exported.

In a similar vein, pursuant to the case-law of the CJEU²⁹³, private copying levies must not be imposed on goods that are acquired by persons other than natural persons for purposes clearly

²⁹⁰ In Case C-462/09 (Stichting de Thuiskopie vs Opus)

²⁹¹ In Case C – 521/11 (Amazon vs. Austromechna), the CJEU viewed that although the fact that a levy has already been paid in another Member State does not prevent other Member State for imposing a levy on its territory upon placing the levied product on the market, the person who has previously paid that levy in a Member State which does not have territorial competence for the collection of levy may request its repayment in accordance with its national law.

²⁹² <http://www.cedar.nl/uploads/15/files/English%20information%20Private%20Copying%20in%20the%20Netherlands.pdf>

²⁹³ In Case C-467/08 (Padawan vs SGAE)

unrelated to private copying, (i.e. by 'professional users' such as public administration, businesses, SMEs etc.). Indeed, some MS already provide for ex ante exemption of such transactions.

Under the legislation in place in **France**, entities which acquire products subject to levies for professional purposes are allowed to conclude agreements with the entity in charge of the perception of levies (Copie France) allowing them not to pay levies for such products. In 2012 over 1500 entities were exempted from payment of private copying levies by virtue of such agreements.²⁹⁴

However, given the practical difficulties which often exist as regards the distinction between professional and non-professional users, most Member States preferred to apply levies indiscriminately to all sales and to reduce the number of undue payments via *ex post* reimbursement schemes. Some of them apply so-called 'mutualisation' schemes i.e. they continue to apply levies indiscriminately to all sales but provide for a reduction in the overall amount of tariff applicable, so as to take into account those transactions which involve 'professional' users not liable for payment.²⁹⁵

Unfortunately, the aforementioned means to mitigate the undue payments resulting from both cross-border transactions and transactions involving 'professional users', that is the *ex-ante* exemption or for *ex-post* reimbursement schemes, are not in place in all MS (see Table below). Moreover, those schemes that exist are not always equally and sufficiently efficient, often making it burdensome and complicated for individuals to claim back the unduly paid levies.²⁹⁶

For instance, in the majority of cases, only large manufacturers and importers who concluded agreements with collecting societies are *ex ante* exempted from levies when they trade across EU borders. Individuals or SMEs acquiring products which include levies from intermediaries (e.g. wholesalers) or retailers and selling them subsequently to another Member State (for example in the context of parallel-trade) will need to seek *ex post* reimbursement. The latter becomes impossible in practice since the entities collecting levies often require proof that the levy was actually paid and only those who actually made the payment first (i.e. manufacturer or distributor upon the introduction of the product to the market), would be able to furnish such proof.

A similar problem could arise in cases where 'professional users' (i.e. persons other than natural persons acquiring products bearing levies for purposes clearly unrelated for private copying) acquire levied products from intermediaries (e.g. wholesalers) or retailers. As they would not – in the majority of cases – be able to conclude agreements allowing them to be *ex-ante* exempted, they would need to request *ex-post* reimbursement. Given that the levy is normally paid upon the introduction of the product to the market and – in the majority of cases - only the person primarily liable (i.e. manufacturer or distributor) would have a proof of the payment, the reimbursement of the 'professional' end-user, can turn impossible in practice. The likelihood of unwarranted payments is therefore high.

²⁹⁴ The list of exempted entities goes beyond 'professional' users such as public bodies and business and includes organisations representing visually and hearing impaired people. More at: <http://www.copiefrance.fr/cms/site/cf-fr/homecf-fr/professionnels/liste-societes-exonerees-pro>

²⁹⁵ Such system exists in Czech Republic, Greece and Poland. Until 2011 France applied a similar system which was now replaced with an *ex ante/ex post* schemes for professional users.

²⁹⁶ In numerous MS, even if the exemption exists, it requires contractual arrangements between the manufacturer/distributor and the collecting society/entity in charge of the perception of levies (e.g. France, Germany). The *ex post* reimbursement, even if possible under national legislation, is usually complex and constrained by a number of factors e.g. by the language version of the website of the collecting society in question or the requirements of proof that the levy was paid.

Table A6 – overview of *ex ante* exemption and *ex post* reimbursement models for cross-border and professional sales (2012) [(+) existing scheme, (-) scheme does not exist, (+/-) limited scheme]

	Ex ante for professional	Ex post for professional	Ex ante for cross-border	Ex post for cross border
Austria	-	-	+ / -	+
Belgium	-	+/-	-	+
Bulgaria	-	+/-	-	+
Croatia	-	-	+/-	+
Czech Republic	+/-	+/-	+/-	+/-
Denmark	+	+	-	+/-
Estonia	-	-	-	+
Finland	+	+	-	+
France	+	+/-	+/-	+
Germany	+/-	+/-	+/-	+/-
Greece	+/-	+/-	+/-	+/-
Hungary	+/-	+	+/-	+/-
Italy	-	+/-	-	+/-
Latvia	-	+/-	-	+
Lithuania	-	+/-	-	+
Netherlands	+	+/-	+	+/-
Poland	+ / -	+/-	-	+/-
Portugal	-	+/-	-	+/-
Romania	-	+/-	-	+/-
Slovakia	-	-	+/-	+/-
Slovenia	-	+/-	+/-	+/-
Sweden	+	+	-	-

Given the lack of common criteria at EU level, it is to be expected that Member States will continue taking varying approaches. At the same time, without a coordinated attitude it is not very likely that national levy schemes will become more inter-operable and that all MS will provide for equally efficient *ex ante* exemption or *ex post* reimbursement schemes. Indeed, Member States seek to ensure the effective recovery of levies only in their respective national territories.

In the short-term, given the relatively high share of products potentially attracting levies in the entire intra-EU trade,²⁹⁷ the instances of undue payments are also expected to remain at significant level. In a similar vein, in the short term, with the share of products subject to levies in the entire intra-EU trade at a relatively high level, the indiscriminate application of levies to all transactions (where no or insufficiently efficient *ex ante* exemption or *ex post* reimbursement schemes are in place), the resulting number of undue payments will – at the very best – also remain at relatively high level.²⁹⁸

²⁹⁷ Calculations on the basis of EUROSTAT data show that between 2010-2012, share of intra-EU trade in product categories CN8 8471, 8519-8528 [...] in total intra-EU imports and exports was on average at 3.4%. data on the number of products subject to levies in cross-border trade comparing 2008, 2009 to 2011

²⁹⁸ Calculations on the basis of WIOD database (http://www.wiod.org/new_site/database/wiots.htm) for 2011 show that only around 17% of products potentially attracting levies (an assumption was made that they are produced in the sector “Electrical and optical equipment”) marketed in the EU were ultimately consumed by private individuals. This remains in stark contrast with the amounts of reimbursements of levies unduly paid by non-private users. For

Provisional

example in 2012 in France, for the overall amount of approx. €200mln perceived, €67.000 were reimbursed to persons other than natural persons who acquired products in questions for purposes clearly unrelated to private copying. At the same time it should be noted, however, that over 1500 entities entered into contractual arrangements with the competent collecting society, by virtue of which all transactions involving professional users were ex-ante exempt. In a similar vein, a recent study commissioned by the Lithuania government demonstrated that only 0,84% of all amounts collected as private copying levies were reimbursed to persons other than natural persons who acquired products subject to levies for purposes clearly unrelated to private copying (see: "Final Report of the Ministry of Culture of Republic of Lithuania – The Implementation of the European Parliament and Council Directive 2001/29/EC in Lithuania: the provisions of fair remuneration for private copying of audiovisual works and phonograms. The economic and legal analysis" Available at: <http://www.lrkmlt.lt/index.php?971888529>)

8.9. ANNEX I (i) - PUBLICLY ACCESSIBLE LIBRARIES, MUSEUMS AND ARCHIVES: SPECIFIC ACTS OF REPRODUCTION

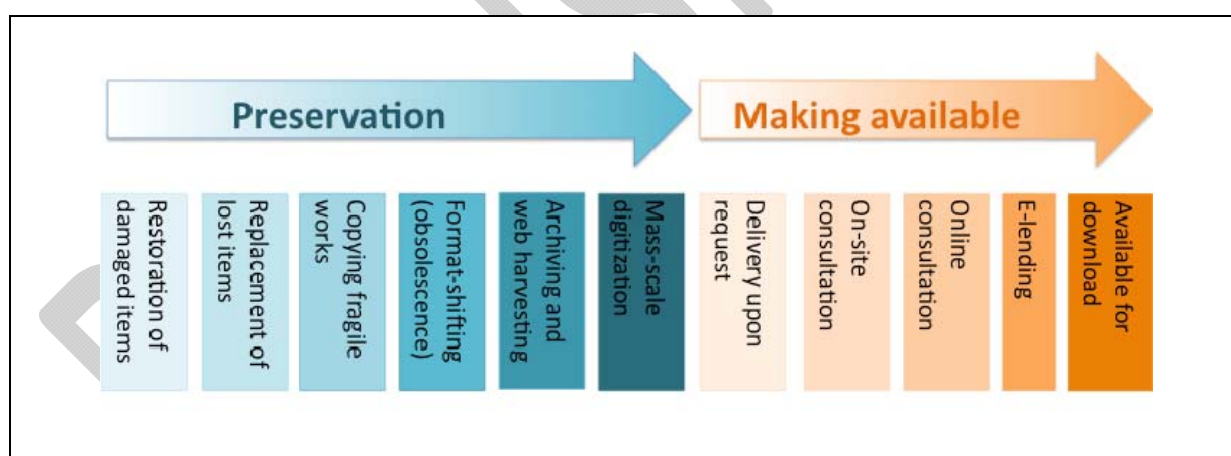
Libraries and other institutions, such as museums or archives, whose purpose is to maintain a collection of cultural artefacts and heritage, and to provide access thereto for research, education or private study, benefit from several exceptions in the *acquis communautaire*.

Those exceptions aim to facilitate:

- (a) Acts of preservation of the collections (art. 5(2) c) of the InfoSoc Directive);
- (b) Consultation of some works on the premises of the establishment (art. 5 (3) n)) for the purpose of research and private study; and
- (c) Authorizing public lending by libraries (art. 6 of the Rental and Lending Directive (2006/115)).

To a different extent and in different ways, such exceptions accommodate the key public-interest missions of the libraries, i.e. preservation and access to knowledge and culture. The digital evolution of libraries has significantly changed the possible impact of such exceptions, both on libraries' needs and expectations and on the legitimate protection of rights and interests of copyright and related rightholders. Libraries would like to benefit from the activities allowed under these exceptions by those directives to a similar or even broader extent in the digital environment, whereas copyright owners fear that the digital extent of such uses would disrupt the balance established by the exceptions when they were adopted, excessively prejudice their rights and hamper the development of new services and business models in the online world.

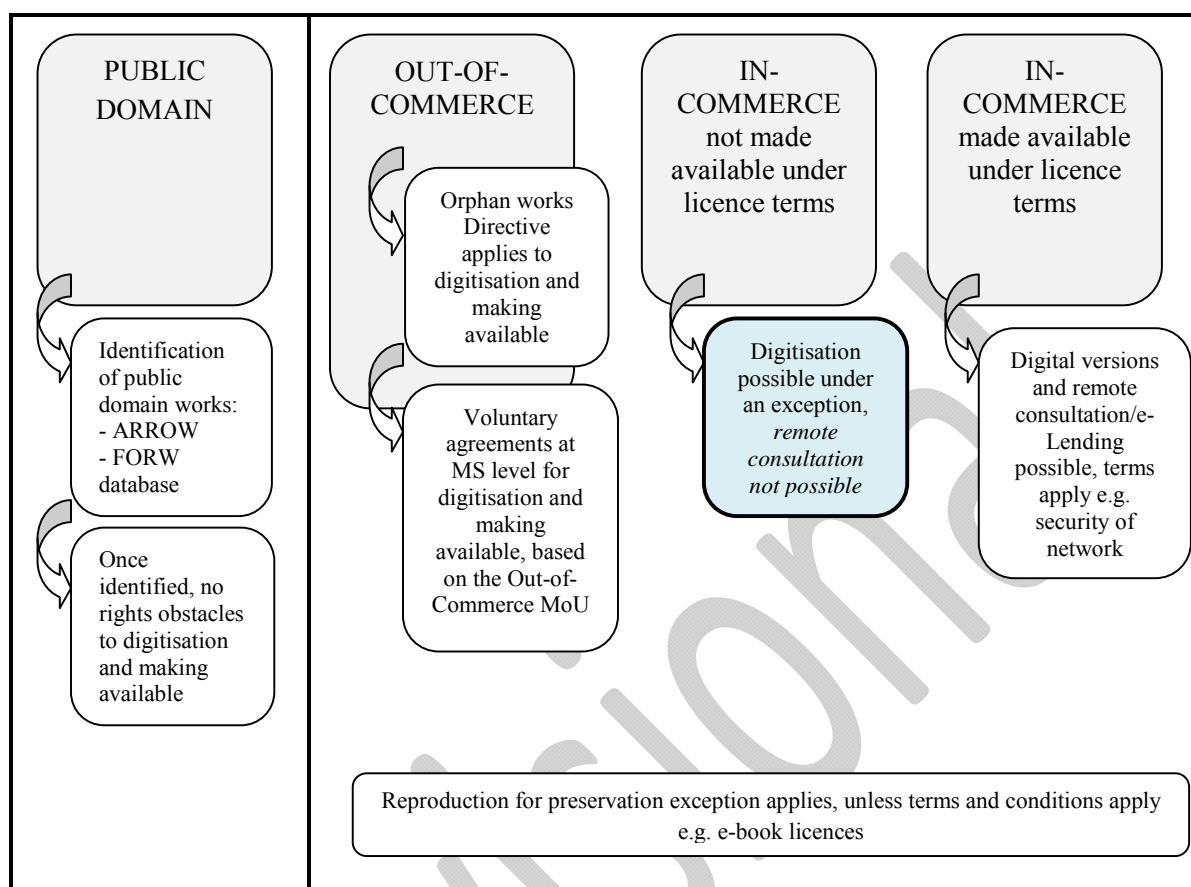
The activities of libraries and archives can be summarised as follows:²⁹⁹



The frameworks for the reproduction and making available of different parts of libraries' collections can be summarised as follows:

²⁹⁹ Study on the application of Directive 2001/29/EC on copyright and related rights in the information society, De Wolf & Partners, http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf

Print sector



The InfoSoc Directive foresees an exception under which MS may provide for exceptions or limitations to the reproduction right “in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage.”

The exception provided for in the article 5(2) c) of the InfoSoc Directive is rather open-ended, and likely to cover a number of acts of reproduction undertaken by libraries, to the extent they are specific (precisely described by law), and carried out with no direct or indirect commercial or economic advantage. Acts of preservation and archiving are allowed but not defined – covering restoration or replacement of damaged or fragile items of a collection, as well as copying for format shifting to migrate the format of a work that has become obsolete or for which the means to access to its content are not easy to find.

National transposition of the exception has sometimes been more restrictive than the directive itself:

- In some Member States the purpose of preservation has been interpreted strictly which prohibits libraries and other eligible institutions from performing some acts of preservation, notably format shifting (Germany, Italy, Ireland, Romania, Malta).
- Not all categories of works are covered by the national laws, e.g. in the UK and Lithuania the exception does not apply to sound recordings or films, while in Italy it does not apply to text-based works.

- The number of copies authorised for preservation of works constitutes another issue e.g. the UK, Croatia only allow the making of a single copy, while digital preservation will involve multiple and serial copying and reformatting”.

Problems regarding relying on the current copyright exceptions to carry out format shifting and create multiple copies for preservation purposes were reported in the context of the 2011 FP7 "Keep" (Keeping Emulation Environments Portable) project. In the public consultation, institutional users also highlighted issues deriving from the scope of the exception and from the very diverse way it has been implemented across the EU. They point to very narrow or unclear terms (limitations to the number of copies that can be made or to the categories of beneficiary institutions, the prohibition of format shifting are often cited). Some of them highlight that this lack of harmonisation and the territorial effect of the current exception have a negative impact on collaborative digitisation projects across countries. Institutions increasingly digitize works in their collections also beyond pure preservation and would like to provide access to these digitized copies in their collection. Other problems are quoted, for example the inability to produce back-up copies of subscribed online content or to rely on private companies for activities related to their public interest mission. Representatives of rightholders and collective management organisations (CMOs) however generally argue that no major problems have manifested with the use of the preservation exception and that it allows institutions to fulfil their public interest missions. Some of them also highlight that the digitisation for preservation is an important public policy objective but is often held back by budgetary restrictions. Some indicate that this can impact on the adequate remuneration of rightholders in the content held by these institutions. Some CMOs report that cultural heritage institutions in certain Member States digitise not only for preservation purposes but also to make digitised content easily accessible (online) to a larger public, and that they might not be willing to ask authorisation and to remunerate the rightholders for their operations. In some cases, rightholders themselves are obliged to preserve cultural heritage.

Table A7 - Examples of implementation in Member States of Article 5(2)(c) of the InfoSoc Directive – Exception for certain acts of reproduction made by libraries

MS	Objective	Beneficiaries	Works Concerned	Authorized acts	Other details
BE	Preservation (safeguarding the cultural and scientific heritage)	Libraries of educational establishments, publicly accessible libraries and archives	All type of works	Reproduction for preservation purposes	Number of copies limited to what is necessary for preservation purposes
BG	Reproduction provided that it will not serve commercial purposes	Public libraries, schools or other educational establishments, museums and archives with educational or	Published works	Reproduction	Reproduction in necessary quantities

		conservation purposes			
CZ	Own archival and conservation purposes	Library, archive, museum, gallery, school, university and other non-profit school-related and educational establishment	All types of works	Reproduction for archiving, conservation and restoration purposes. These reproductions can be used for consultation on the spot of the premises of the establishments	
DK	Preservation Possibility to make copies of missing parts of a work.	Libraries and publicly accessible archives, state run museums	All type of works, excludes computer programmes but not computer games. The libraries can copy articles only from newspapers, magazines and composite works, brief excerpts of books and other published literary works, as well as illustrations and music reproduced in connection with the text. Extended authorized use for out-of -print works.	Limited to restoration or replacement of a damaged or lost items Making of digital copies is allowed for library users subject to an extended collective license and the right of the owner to demand remuneration	Delivery of copies: subject to an extended collective license system
DE	The directive hasn't been transposed with regards to preservation purposes. There is an existing exception authorizing copying for "inclusion in a personal archive" and "for other personal use" which is considered to cover acts of reproduction made by libraries.	Museums, libraries and archives	All type of works, Extended authorized use for out-of -print works.	Archiving of a work on a paper and for analogue uses Sending a copy of a work in the collection of library upon individual request Digital copies can be sent to users requesting a copy of a work	Delivery of copies: an equitable remuneration to an author is required
ES	Conservation	Libraries,	All type of works in the	Reproduction for	

		museums, record and film libraries, newspaper libraries and archives	collections of libraries of educational establishments in public ownership or forming part of institution of cultural or scientific character, libraries and archives	investigation and preservation purposes (no gainful interest)	
FR	Preservation The legislation allows the reproduction and performance of works, to the extent it aims at preserving the conditions of on-site consultation for purposes of research or private study.	Publicly accessible libraries and archives	All type of works Extended authorized use for out-of -print works.	Reproduction of a work to enable on-site consultation	Several copies may be authorized when useful or needed to achieve preservation purposes
HU	Archiving Beyond preservation purposes: copying for the purpose of scientific research and public library supply, as well as for the internal purposes of the entity (but only for extracts of work)	Educational establishments, publicly accessible libraries and museums, publicly accessible archives	All type of works, portion of work is restricted: minor parts or a published work or newspapers or periodicals articles	Sending a copy of a work in the collection of library upon individual request Reproduction of a work to enable on-site consultation	
IT	Preservation The legislation covers less restrictive acts of copying, going beyond strict preservation purposes. It formulates the exception 'for the services of the institution'.	Libraries of educational establishments, publicly accessible libraries (in ownership of the State) and museums, publicly accessible archives	All type of works The legislation targets reprography of literary and printed works in public libraries and other establishments, and reproduction of sound and video recording in one single copy		A single copy allowed, one reproduction is allowed with regard to phonograms and videograms
LV	Reproduction of works for the needs of libraries and archives: preservation, restoration, replacement	Libraries, archives and museums	All types of works and subject-matter		Restricted to one copy of a work in their collections
LU	Preservation (to the safeguard 'heritage')	Educational establishments, publicly accessible	All types of works	Reproduction of a work to enable on-site consultation	

		libraries and archives			
NL	Restoration and retention of a work	Publicly accessible libraries and museums, publicly accessible archives	Literary, scientific or artistic works	Limited to restoration or replacement of a damaged or lost items Format-shifting allowed (the legislation allows 'keeping the work in a condition in which it can be consulted if there is no technology available to render it accessible')	Any number of copies limited to what is reasonably necessary for preservation purposes
PL	Maintaining and protecting collections	Educational establishments, museums, libraries and archives	All type of works	Limited to restoration or replacement of a damaged or lost items	
RO	Specific acts of reproduction	Publicly accessible libraries, educational establishments museums, or archives			
SI	Reproduction for internal use provided that it has no commercial purpose	Publicly accessible archives, museums and educational institutions as well as libraries and educational or scientific establishments	All types of works of their own collection	reproductions for (1) internal uses and (2) from existing ("own") copies held in such establishment Reproduction of whole books, graphic editions, electronic databases and computer programs are not, save for specific provisions, permitted	
UK	Preservation and	Museums	Literary, dramatic and	Limited to	Delivery of copies

	<p>replacement (stricter provisions: acts carried by libraries limited for the purpose of replacement)</p>	<p>(with plans to include also galleries), libraries and archives</p>	<p>musical work excluding sound recordings, films and broadcasts</p>	<p>restoration or replacement of a damaged or lost items Sending a copy of a work in the collection of library upon individual request (for research and private study)</p>	<p>(amount is limited to one copy of the same article or no copies of more than one article contained in the same issue of a periodical) : legislation requires payment of a sum at least equivalent to the cost attributable to the production of the copy</p>
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Provisional

8.10. ANNEX I (ii) - PUBLICLY ACCESSIBLE LIBRARIES, MUSEUMS AND ARCHIVES: MASS DIGITISATION

The term “mass digitisation” is normally used to refer to efforts by institutions such as libraries and archives to digitise (e.g. scan) the entire content or part of their collections, going beyond the objective simply of preserving these collections and, normally, with the objective of making them available to the public e.g. efforts by libraries to digitise novels from the early part of the 20th century or whole collections of pictures of historical value. The exception under Art 5(2) c) of the InfoSoc Directive does not cover projects of mass-scale digitization: it does not go beyond the notion of “specific acts of reproduction”. Recital 40 of the Directive rather encourages recourse to specific contracts or licences for activities that go beyond the “specific acts of reproduction” enabled by the article 5(2) c).

One Study has estimated that in total some €100bn will be necessary over time to bring the EU’s complete heritage online.³⁰⁰ One survey has found that of the collections held in the EU’s libraries and archives which responded to the survey, some 20% have been digitised. Art museums are the most digitised with 42%; while national libraries have only 4% digitised of a target of 62% of their collections. In the specific cases of film heritage, it is estimated that 1 million hours of film could be digitised in the holdings of all European Film Heritage Institutions³⁰¹. The European Association of Film Archives (ACE) estimates that only 1.5% of holdings are digitised. The EU Staff Working Document of 27/10/2011 (SEC(2011) 1274 final)³⁰² accompanying the Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation (C(2011) 7579 final)³⁰³ summarises progress in digitisation by type of cultural institution as follows:

Table A8 - Progress in digitisation by type of cultural institution

Institution	No need to digitise	Digitisation completed	Awaiting digitisation
Archives	36%	1%	63%
Broadcasters	28%	6%	66%
Museums	3%	25%	72%
Libraries	69%	1%	30%
Other	0%	15%	85%
TOTAL	31%	11%	58%

Source: Collection Trust (2010)

Many different types of cost are involved in digitisation projects³⁰⁴.

³⁰⁰ « Comité des Sages » Report « The New Renaissance »
http://ec.europa.eu/information_society/activities/digital_libraries/doc/refgroup/final_report_cds.pdf

³⁰¹ See "Challenges of the Digital Era for Film Heritage Institutions" study:
http://ec.europa.eu/avpolicy/docs/library/studies/heritage/exec_summary_en.pdf

³⁰² http://ec.europa.eu/information_society/activities/digital_libraries/doc/recommendation/staffworkingpaper1274final.pdf

³⁰³ <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:283:0039:0045:EN:PDF>

³⁰⁴ -These costs include the following (many of which not related to copyright) :
Creation/conversion costs: Overhead (staffing, space, depreciation on equipment, quality control), Fixed capital expenditure (equipment, training, software licensing); Variable production costs (per-item output costs - variable depending on type and quality - rights clearance).

In light of the high costs of digitisation, public private partnerships (PPPs) are increasingly used to help share the significant costs of digitisation projects (sponsoring/donation, indirect commercial exploitation,³⁰⁵ direct commercial exploitation,³⁰⁶ collaborative digitisation.³⁰⁷

The transaction costs associated with rights clearance specifically include (i) identification and search costs – identifying rightholders and locating them, and (ii) bargaining costs – obtaining permission to use the work, negotiation of a mutually beneficial trade, drafting the contracts as well as monitoring and enforcement costs (workflow of metadata, updating and keeping databases, keeping the contact with rightholders).

An example of the magnitude of the transaction costs involved in right clearance by Film Heritage Institutions is provided by the Belgian Royal Cinémathèque that estimates that these costs lie between 15% and 30% of the cost of the process of digitisation³⁰⁸. Another estimate is provided by the EYE Film Institute in terms of working hours³⁰⁹. During 2 years, two employees dedicated their work on a full-time basis to clear the rights of around 800 films that were made available through the former VoD service Ximon.nl.

The role of Libraries, archives and similar institutions has changed in the digital environment. The same has happened to public expectations in relation to access to heritage online. The Dutch Project "Images for the future"³¹⁰ is often quoted as a good practice in terms of digitisation of film and audiovisual heritage. However it has not managed to deliver online access to the digitised content. Images for the Future has led to digitisation of 96.700 hours of film and video from the Dutch Sound and Vision Institute, of which only 18% are available via education platforms and only 0,9% are available online. Of the 6008 films digitised by the EYE Film Institute, only 35% can be used outside EYE building and 7% were available on the VoD service Ximon.nl³¹¹.

A number of instruments have been developed at both EU and national level to lower transaction costs to clear copyright and thus to facilitate the digitisation and display of library collections which fall outside the normal channels of commerce.

Firstly, the Orphan Works Directive (2012/28/EU) sets out common rules on the digitization and online display of so-called orphan works that are part of the collections held by European

Long-term Management costs: Overhead (staffing, space, depreciation on equipment); Capital expenditure (equipment, storage infrastructure, training, software); Variable retro-conversion costs (format-shifting, management);

305 PPPs between companies like Google and cultural institutions, as part of the Google Book project – Library Programme (and more recently Google Art) use digitisation as a component of their wider business model, where the digital copy of public domain works is normally accessible for free to the end user. Although Google has not been explicit about its detailed business model, enhancing the quality of its services as a search engine seems to be a core business objective.

306 The investment by the private partner in digitisation is ‘paid back’ by the direct exploitation of the digitised content: access to content, including public domain works, is sold to the end user. Examples: ProQuest PPPs for early European books: Danish Royal Library, Biblioteca Nazionale Centrale di Firenze, Dutch Royal Library; Cengage Gale — British Library; Bloomsbury — The National Archives.

307 E.g. crowd-sourcing where the private partner is not a business organisation, but a multitude of people providing either manpower or ‘micro-funding’ to digitise collections.

308 Digitisation cost varies accordingly to the quality of the original material and the final definition. The European Film Gateway project estimated a cost of 1050€ per hour. The EYE Film Institute estimates this cost to lie between €1600 and 2200€ per hour.

309 http://ec.europa.eu/avpolicy/docs/reg/cinema/sept_11/eye.pdf

310 <http://www.eyefilm.nl/en/collection/images-for-the-future>

311 The VoD service Ximon.nl is closing down on 29 January 2014. Among the reasons quoted by Ximon itself is the expiry of public funding, but also the fact that the Dutch market is not big enough to generate a sufficient demand for this niche service, while the cost of clearing rights for the VoD distribution of films in other Member States' markets was too high (due to complexity, in particular for catalogue works).

libraries. Orphan works are works like books, newspaper and magazine articles and films that are still protected by copyright but whose authors or other rightholders are not known or cannot be located or contacted to obtain copyright permissions. The directive provides for common rules, in particular an EU-wide orphan works exception or limitation predicated upon the “diligent search” requirement, to make digitization and online display of orphan works legally possible.³¹²

The Commission’s Impact Assessment for the Orphan Works Directive showed that in the print sector, the most common and conservative estimate that European studies have put forward is that 5-10% of works included in library collections of print media are orphan. In some archives and libraries the figure rises to 50%. It also showed that some estimates suggest that as many as 90% of photographs contained in collections might be orphan works; and that in the audio-visual field, a survey by the Association des Cinémathèques Européennes had estimated that 12% of the films contained in the 24 film archives that responded to the survey were orphan works.

In connection with orphan works, the ARROW, (Accessible Registries of Rights Information and Orphan Works towards Europeana), is a project of a consortium of European national libraries, European and national publishers and collective management organisations, representing publishers and writers which aims to find ways to identify rightholders, rights and clarify the rights status of a work including whether it is orphan or out of print. ARROW is an automated tool to facilitate rights information management in any digitisation project involving text and image based works.³¹³ Once the Orphan Works directive is implemented, the ARROW search tool is expected to facilitate libraries when carrying out the diligent search for absent rightholders as required by the directive. ARROW is currently operational in 9 Member States and at an advanced state of implementation will be operational in 7 more Member States. At this stage it is only operational for literary works, not for visual art or audiovisual works. In the audiovisual sector, the FORWARD project (Framework for a EU-wide Audiovisual Orphan Works Registry) aims to design and implement a EU-wide system to assess the rights status (including Orphans) for all types of audiovisual works by federating the information resources of multiple national clearing centres. The project will deliver its first results most likely mid-2016.

The Orphan Works directive also foresees the creation of a single online EU database of Orphan Works, the aim of which is to enhance transparency, both for rightholders and users, as regards works digitised and made available by libraries and other cultural institutions under the directive. The database, that will be managed by OHIM (Office for the Harmonisation of the internal market) is currently under development and expected to be up and running by the October 2014 implementation deadline of the Directive.

One study³¹⁴ has examined the diligent search and rights clearance processes required to enable the British Library to digitise a selection of holdings as part of a mass digitisation project. The sample consisted of 140 works, 10 from each decade between 1870 and 2010. The study found that of the total number of potentially in-copyright works, 43% were orphan works, equating to 31% of the total sample. It further found that whilst it could take 1,000

³¹² http://ec.europa.eu/internal_market/copyright/orphan_works/index_en.htm

³¹³ ARROW is currently fully operational in 9 Member States and at an advanced state of implementation in 7 more Member States: <http://www.arrow-net.eu/news/arrow-plus-final-conference.html>

³¹⁴ <http://www.arrow-net.eu/sites/default/files/Seeking%20New%20Landscapes.pdf>

years for one person to clear the rights of just 500,000 books manually – equating to 4 hours per book - the use of the ARROW system would reduce this dramatically to less than 5 minutes per title to upload the catalogue records and check the results.

Libraries and cultural heritage institutions responding to the public consultation however underline that the requirement of due diligence searches foreseen in the Orphan Works Directive is not sufficient to address the copyright issues arising from mass digitisation projects. For example, the Dutch National Library calculated that for clearing 25.000 copyrighted Dutch books from the 1920s at least 50.000 rightholders should be tracked down. Also, in order to clear copyright in articles in digitized Dutch magazines from the period 1900-1940 (1,5 million pages), they would need to search for 14.000 authors.

The second instrument to have been developed at EU level is the Memorandum of Understanding (MoU) on Key Principles on the Digitization and Making Available of Out-of-Commerce Works (20/09/2011). This aims to facilitate the digitization and making available by European libraries and similar institutions of books and learned journals in their collections which are out-of-commerce³¹⁵. Under the MoU, a work is out of commerce when the whole work, in all its versions and manifestations is no longer commercially available in customary channels of commerce, regardless of the existence of tangible copies of the work in libraries and among the public (including through second hand bookshops or antiquarian bookshops). The MoU encourages voluntary contractual agreements between rightholders and digital libraries based on collective agreements negotiated in the country of first publication of the work,³¹⁶ which should set out the permitted uses of works. When a rightholder has not transferred its economic rights to a collecting society, the society which manages the rights of the same category of works in the State of first publication, is presumed to manage these rights, provided that it has made efforts to alert the rightholder. The MoU serves as a blueprint for collective licensing agreements negotiated amongst rightholders, libraries and collecting societies at national level.

The MoU recognises that some Member States may need to enact legislation to ensure the largest possible effect of the licences granted by the collecting societies (e.g. by establishing in legislation a presumption of representation of a collecting society or the recognition of an “extended effect” to the licences granted).

France and Germany have already adopted legislation to back the effects of the MoU. The French act (LOI n° 2012-287 du 1er mars 2012³¹⁷ relative à l'exploitation numérique des livres indisponibles du xx^e siècle) establishes a principle of mandatory collective management for the digital exploitation of out-of-commerce books (an “unavailable” book is one published in France before 1 January 2001 which is no longer the subject of a commercial release by a publisher and which is not currently the subject of a publication in printed or digital form), unless the author or publisher in question opposes such management. The German act (Entwurf eines Gesetzes zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes) contains a legal presumption of representation by a collection society in relation to works whose rightholder are not members of the collecting society. A registry of out-of-commerce works will be set up and authors not opting out of this

³¹⁵ In the public consultation, organisations representing visual artists and in particular photographers note that the MoU does not consider properly the use of images embedded within other works.

³¹⁶ See *infra*.

³¹⁷ French Law n° 2012-287 of 1st March 2012 on the Exploitation of Digital Books Unavailable in the Twentieth Century, *J.O.*, n° 0053, 2 March 2012, p. 3986.

registry will be presumed to be represented by the collective management organisation (CMO) of their respective field (text or image). Libraries holding such works in their collection will be authorized to reproduce and make those works available for non-commercial purposes. Other Member States already had frameworks in place e.g. Danish copyright law, which enables the making available of documents held in a library's collection under the frame of an extended collective licence.

The signatories of the MoU recognise that EU-level legislation may need to be enacted to ensure that publicly accessible cultural institutions and collective management organisations which enter into a licence are legally protected in a cross-border context. In the public consultation, some authors, publishers and collecting societies in the print sector consider however that there is no need for further legislation at EU level if the MoU on out-of-commerce works was correctly implemented in all Member States. Instead, voluntary agreements should be promoted to ensure access to digitised works (e.g. bilateral agreements between collective management organisations). On the other hand, institutional users (libraries, archives, other cultural heritage institutions) consider that legislation allowing cross-border use of the digitised works is necessary but many of them consider that this objective would be better achieved by an exception allowing for mass digitisation of out-of-print works (introduction of a new exception or an expanded version of the existing exceptions in Articles 5(2)c and 5(3)n of the InfoSoc Directive to cover the reproduction and making available of out-of-commerce works).

Taken together, the aim of these instruments is to respond to the fact that the transaction costs relating to the costs represented by rights clearance are likely to be affected by the following factors:

- Age of the work or other subject matter - the older a work is the more difficult it may become to locate the rightholder.
- The availability of collective licensing - the process is much cheaper and quicker in those instances where collective licensing agreements are in place providing a clear and known framework for the negotiation of rates and permissions.

In most sectors there is a long-standing tradition of collective rights management, certainly on behalf of authors (e.g. in the field of music and print). This has the potential to facilitate the clearance of rights in light of the massive number of rightholders that may be involved, whether as a result of the digitisation of a wide number of pieces of content (books in a library) or as a result of there being a large number of relevant rightholders in a given piece of content.

Against the background of established collective management organisations, National Projects inspired by the MoU have started to emerge in Europe. In 2012, the Dutch Royal Library cleared with national CMOs the right to digitize and make content from magazines from 1850 to 1940 available to the public through a dedicated website.³¹⁸ A pilot project launched by the Norwegian CMO Kopinor and the National Library of Norway ("Bookshelf") has as its aim the making available online to users of a Norwegian IP address of all Norwegian literature of the 20th century. This project reached 259.000 users in 2012 (5.2% of the Norway's population). As outlined by many institutional users in the public consultation,

³¹⁸ <http://tijdschriften.kb.nl/>. See the press release (in Dutch) at www.pictoright.nl/nieuws/images/KB-en-rechtenorganisaties-werken-samen-bij-toegang-cultureel-erfgoed.pdf.

this success illustrates that there is an important demand from citizens, teachers, students and researchers for the digitisation of 20th century works.

In the audiovisual sector rights clearance can be more complex for two reasons: firstly individual rights licensing by film and TV producers is the norm; and secondly an individual audiovisual work may have many different contributors. Although exploitation rights are generally concentrated in the hands of film producers, the making available right may not have been transferred to producers in the case of pre-digital films. This means that in principle all individual contracts must be re-assessed, and individual contributors re-contacted for authorisation if they have not transferred their rights.

Nevertheless, notable and successful agreements leading to digitization of extensive archives of audiovisual works have been reached. In the Netherlands the "Images for the Future" project of digitization and making available. Of the archives of the Netherlands Institute for Sound and Vision (Sound and Vision) in Hilversum, of EYE film Institute in Amsterdam, and of the National Archive in The Hague. the FES (Fund for the reinforcement of Economic Structure) is providing a budget of 154 million Euros over 7 years (2007-2014) to restore, preserve and digitize a total of 91.183 hours of video, 22.086 hours of film, 98.734 hours of audio, and 2.5 million photos from these archive, as well as to distribute them through various services. Audiovisual works have been cleared on the basis of voluntary extended collective licensing arrangements with representatives of all relevant stakeholders, leading to a revenue share for the commercialization of the collections (e.g. where viewers pay per download). Agreements are based on the principle of "revenue sharing" rather than up-front payment to right-holders.

In the context of Licences for Europe, an agreement on principles and procedures was reached between representatives of film heritage institution, film producers, and audiovisual authors (directors, screenwriters)³¹⁹ for facilitating the digitisation of, access to and increased interest of European citizens in European cinematographic heritage works. This sets out the principles upon which voluntary agreements at national level between institutions and rightholders for negotiated cinematographic works (on a film-by-film basis) within the collections of film heritage institutions could be reached, and sets out a 'roadmap' for negotiations between the parties. This document was inspired by the "Images for the Future" principle of "revenue-sharing". Due to this agreement, costs will be reduced substantially, as right-holders will be remunerated if and when profits are made. This agreement will be applied on a film-by-film basis. The extent to which it could contribute to the facilitation of mass digitisation is currently unclear.

National libraries also contain extensive collections of non-cinematographic (audiovisual) works as well as audio archives. Public service broadcasters (PSBs) have 28 million hours of television and radio content programming in their archives. The rights-clearing process would entail finding each and every rights-holder and their respective contracts, interpreting and checking the scope of their rights, renegotiating on an individual basis for new uses of their materials. A single refusal or impediment could block the entire process. For example, the BBC has calculated that clearing rights for the whole BBC archive would cost GBP 72

³¹⁹ Association des Cinémathèques Européennes, Federation of European Film Directors, International Federation of Film Producers Associations, and Society of Audiovisual Authors

million in staff alone and take three years. ZDF has estimated the number of contracts to be 70,000 per year.³²⁰

Public broadcasters explain in their replies to the public consultation that rights clearance on an individual basis for making available the content of their archives is practically impossible. Therefore they favour the introduction of an EU framework which would encourage the adoption of collective licensing solutions in Member States to facilitate the digitisation of their archives. Commercial broadcasters express a different view and do not report any problems with the clearing of archives for new uses. They consider that there is no need of collective management to ensure the digitisation of audiovisual collections or broadcasters' archives.

Film producers and audiovisual authors support further discussions on the digitisation and making available of public broadcasters' archives. They consider that the use of extended collective licensing or presumption of representation in this context should be consistent with the three-step text and offer sufficient guarantees to rightholders.

³²⁰ http://www3.ebu.ch/files/live/sites/ebu/files/Knowledge/Publication%20Library/EBU-Viewpoint-Copyright_EN.pdf

8.11. ANNEX I(iii) - PUBLICLY ACCESSIBLE LIBRARIES, MUSEUMS AND ARCHIVES: CONSULTATION OF COLLECTIONS FOR PURPOSES OF RESEARCH AND PRIVATE STUDY

Article 5(3)(n) of the InfoSoc Directive establishes an exception to allow for the consultation, for the purpose of research or private study, of all types of works (e.g. books) and other subject matter (e.g. a broadcast) held in the collection of libraries, museums, etc., via dedicated terminals on the premises of these establishments. The exception applies to works and other subject matter to which no purchase or licensing rules apply at the time of incorporation of the copies of the works (or other subject matter) in the collection of the establishment. There is currently a case pending before the CJEU which should clarify the scope of Article 5(3) (n)³²¹

Academic and research libraries

Since the conclusion of the InfoSoc Directive, digital networks have become ubiquitous, and both scholarly³²² and trade publications have become readily available in digital format. By 2008, 96% of STM and 87% of arts, humanities and social sciences journals were accessible electronically,³²³ and by 2011, 60% of academic spending on content was in digital format.³²⁴ As of 2012, all STM journals were available online, with just a few exceptions (e.g. very small journals; some journals in the humanities).³²⁵

Commonly, the institutional licences offered by publishers of STM works in digital format enable research organisations, universities etc to provide remote access to the ‘born-digital’ publications under licence to members of that institution.³²⁶ According to the “Generation Y” study on the information-seeking behaviours of doctoral students born between 1982 and 1994 (JISC & British Library, 2012), e-journals dominated as the main research resource across all subject disciplines. A significant minority (22%) of respondents to a 2005 survey preferred to conduct their e-browsing from the comfort of home, with medical researchers had the highest response at 29% (Mabe & Mulligan, 2011).

Journal articles are more important to scholarly exchange in STM areas than in the arts & humanities, where books and monographs play a more significant role. Ebooks made up only about 17% of STM book revenues in 2011. STM predict high growth rates, particularly in reference works and monographs in the sciences, while it is expected that textbooks may take longer to move largely to digital.³²⁷

Academic and research libraries therefore hold collections of material in a range of formats, acquired under a range of conditions – some allowing for remote access, others not, some in digital format others not.

Library stock can only be made available for remote consultation if a licence (or the terms and conditions applicable at the time of purchase) allow for it, or if the work in question falls under the scope of a relevant voluntary agreement concluded as a result of the MoU on Out-

³²¹ Case C-117/13 – Eugen Ulmer KG v Technische Universität Darmstadt

³²² Commonly referred to as Scientific, Technical and Medical (STM) publications

³²³ http://www.stm-assoc.org/2009_10_13_MWC_STM_Report.pdf

³²⁴ Outsell’s Information Management Benchmark Survey, 2012

³²⁵ http://www.stm-assoc.org/2012_12_11_STM_Report_2012.pdf

³²⁶ Either access within the university network or remote access via secure authentication protocols, depending on the IT infrastructure of the university.

³²⁷ http://www.stm-assoc.org/2012_12_11_STM_Report_2012.pdf

of-Commerce books³²⁸. It has been estimated that the peak age of needed articles in the STM sector varies substantially by discipline, with one study putting the peak age in humanities at about 20 years ago, in chemistry, engineering and medicine 10 years ago, and computer science, life sciences and information science 5 years ago.³²⁹ An illustrative example put forward in the context of the public consultation is the Dutch project “Delpher”, which contains 900,000 books, 1.5 million pages of articles from 80 magazines titles and almost 100 million newspaper articles. The material originates from the collections of university libraries, and the National Library of the Netherlands. The model is based on licensing agreements with the relevant rightholders.

The 3rd implementation report on the Film Heritage Recommendation highlights that 12 Member States mention in their reports that exception 5(3)(n) has been implemented in their national legislation in relation to cinematographic works.

In the public consultation, rightholders' representatives are generally of the view that online remote access is to be dealt with by way of licensing, and authors in particular highlight remuneration as an issue that should not be neglected. Some publishers and CMOs put forward their experience with extended collective management agreements. Scientific, technical and medical publishers stress that remote access is a standard component of many licenses with academic and research libraries and is often allowed on a cross-border basis. Music producers stress that access to music online is already very widely available in the EU, strongly limiting the relevance of this issue for music. Institutional users, on the other hand, often consider the current exception limited and not in line with the technological possibilities and the expectations of citizens. Libraries often consider that current licensing practices for remote access are not satisfactory for a number of reasons. For example, in contrast to what is the case for academic and research libraries, remote access to born-digital content is hardly developed for public libraries. Reluctance to conclude contractual agreements is also sometimes reported. Another criticism is that the application of TPM prevents or hinders technical accessibility and interoperability, format shifting, access and reuse of metadata for integration within library catalogues.

Table A9 - Implementation in Member States of Article 5(3)(n) of Directive – Exception for on-site consultation in libraries

MS	Objective	Beneficiaries	Authorised acts / Other details
AT	Not implemented ³³⁰		
BE	Research and private study	Libraries, educational establishments (teaching and scientific establishments), museums and archives. Beneficiaries must not search direct or indirect commercial or economic advantage.	Authorized acts: communication and making available
BG	Research for scientific	Public libraries, schools or other	Authorized acts: communication and

³²⁸ http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm

³²⁹ http://www.stm-assoc.org/2012_12_11_STM_Report_2012.pdf

³³⁰ Source, Guido Westkamp, Queen Mary Intellectual Property Research Institute, “The Implementation of Directive 2001/29/EC in the Member States” (February 2007), p.46

	purposes	educational establishments, museums and archives with educational or conservation purposes	making available
CZ	Not implemented		
CY	Not implemented		
DK	Personal viewing or study	Libraries, educational establishments, museums and archives. Beneficiaries are financed in whole or in part by public authorities	Authorized acts: communication and making available
DE	Research and private study	Libraries, museums and archives	Authorized acts: communication and making available Payment of equitable remuneration is required, the number of copies made simultaneously available cannot exceed the number of copies of the works owned by the institution
EE	Not implemented		
EL	Not implemented		
ES	Research	Educational establishments	Authorized acts: communication and making available Payment of equitable remuneration is required
FI	Research and private study	Archives, libraries or museums open to the public	Authorized acts: communication and making available Requirement that further copying or communication is made impossible.
FR	Research and private study	Libraries, museums and archives	Authorized acts: communication and making available
HR	Not implemented		
HU	Research and private study	Libraries, educational establishments, museums and archives	Displaying and communication should not be intended for earning or increasing income even in an indirect way
IE	Not implemented		
IT	Research and private study	Libraries, educational establishments, museums and archives.	Communication or making available to individual members of the public
LT	Research and private study	Libraries, educational establishments, museums and archives.	Authorized acts: communication and making available

LV	Not implemented		
LU	Research and private study	Libraries, educational establishments, museums and archives	Public communication
MT	Research or private study	Publicly accessible libraries, archives, educational establishments or museums	Authorized acts: communication and making available
NL	Research and private study	Libraries, museums and archives	Authorized acts: communication and making available
PL	Research or learning	Libraries, archives and schools Beneficiaries are financed in whole or in part by public authorities	Authorized acts: communication and making available
PT	Research and private study	libraries, museums, archives or educational establishments	Authorized acts: communication and making available
RO	Not implemented		
SE	Not implemented		
SK	Not implemented as such		
SI	Not implemented		
UK	Not available		

Table A10 - Academic libraries (including national and university) in the EU, 2011

MS	No. of Libraries	No. of registered users	Media stock	Loans	Visits	Number of staff	Average of e-resources	e-visits (No. of hits to the website)
AT	77		33,933,800	3,931,600	11,019,600	1,750		
DE	105	484,872	19,745,070	4,834,971	5,465,786	1,347	45,012	1,818,780
DK	91		20,000,000	3,200,000	4,000,000	2,919		9,300,000
FI	811	2,840,000	239,000,000	92,000,000		11,503	14,460,000	
HR	826	751,079	55,078,762	5,247,901	8,658,260	2,725		51,395,840
HU	28	202,187						
IT	31	207,260	13,580,645	6,290,615	5,923,462	693		3,708,618
LT	49	234,516	23,163,016	8,049,108	5,637,929	1,494	68,340	7,732,533
LU*	85		2,460,000			170		
MT	14	294,135	293,739,000	1,666,439		1,631	367,693	
NL	1,121	3,521,649	87,229,053	31,554,400		8,031		
RO	40	185,057	60,357	3,163,695		604	507	3,653,096
SI*	52	1,995,012	1,326,611	16,011,610	88,570,743	6,494	13,054,565	308,948,214
SK	199		52,425,824	9,031,458	17,150,068	2,423	61,700	20,867,597
UK	976		116,439,194	104,087,799	127,628,000	10,559		
=	4,505	10,715,767	958,181,332	289,069,596	274,053,848	52,343	28,057,817	407,424,678

Source: EBLIDA, Knowledge Information Centre (KIC)

*Year of data collection 2010

8.12. ANNEX I (iv) - PUBLICLY ACCESSIBLE LIBRARIES, MUSEUMS AND ARCHIVES: E-LENDING

The current legal framework for the lending of library collections dates from 1992³³¹ and 2001 and is calibrated to the lending of physical copies of such works. In the EU, public libraries primarily lend trade books and audio or audio-visual materials.³³² University and research libraries and archives predominantly lend STM publications. Both public and university/research libraries increasingly expect to be able to provide their patrons with the opportunity to borrow library materials electronically.³³³

In contrast to scholarly publications (see Annex G (iii) on remote consultation for purposes of research and private study) digital markets for trade publications, on the other hand, are just beginning to emerge in the EU, with ebooks making up only 2% of the book market³³⁴. The situation of the e-book market in the EU is in stark contrast to the USA, where eBook sales represent 31% of sales,³³⁵ and where we see the beginning of some commercial ‘lending’.³³⁶ E-book availability is growing steadily in many Member States, and ways to market are evolving rapidly, including not only traditional book retailers, but also horizontal internet retailers, as well as new digital platforms which provide both sales and temporary access facilities (e.g. Central Bookhouse in the Netherlands, new innovative services such as Izneo, French and Belgian rental service of comic e-books, Mobifo in Denmark and Paper C and Skoobe in Germany, streaming services for e-books, MLOL and Rete Indaco in Italy).

Publishers and libraries are likewise experimenting with different business models for the making available of works online, at national level, including direct supply of ebooks to libraries by publishers (particularly in the STM sector) or bundling by aggregators³³⁷, the sale of individual ebooks or grouping in packages, and outright purchase of an ebook by a library with an annual platform fee to cover hosting on the supplier’s website. Accordingly, some agreements authorize temporary download to the subscriber’s device (PC, tablets, etc.) while others authorize temporary access (streaming) to the platform hosted by the library’s supplier (publisher or aggregator).

Publishers/library business models are also experimenting with contractual provisions to introduce “frictions” (i.e. conditions of use) in e-lending, to mimic some of the constraints associated with the lending of physical copies of books in order that elending does not undermine the normal channels of business, including the emerging market for ebooks, by making it “as easy to borrow an e-book for nothing as it is to buy one”.³³⁸ Such frictions include the number of allowable simultaneous consultations, the number of consultations

³³¹ Rental & Lending Directive

³³² Audio/audiovisual make up 18% of loans from small libraries to 38% from larger libraries in France

³³³ No study available yet regarding the exact extend of the demand

³³⁴ The e-book market in the EU is a nascent market. It is most developed in the UK (25%, probably because of language reasons and proximity to US market which is already very developed, more developed offer and limited presence of bookshops). In other large Member States the sale of e-books roughly represent only 2 to 3% of the market of the book publishers in trade publishing (Germany, France, Italy).

³³⁵ Whereas eBook sales represent 15% in UK, 2% in Germany, 3% in France or 0,5% in Spain (Enders Analysis). Some European estimations are slightly more optimistic, e.g. 5% for Germany [http://www.lemonde.fr/economie/article/2013/10/09/livre-numerique-la-fracture-europeenne_3492453_3234.html]

³³⁶ Amazon Kindle Owners’ Lending Library

³³⁷ E.g. ‘OverDrive’

³³⁸ See FEP briefing paper in annex 2

before a new purchase is triggered,³³⁹ requiring download on the premises during business hours, or holdback periods after publication. In Sweden the Stockholm City library, a mid-sized, independent publishing house and a technology company specializing in e-book publishing and distribution have joined forces to trial a dual licensing model for e-books a pilot project. In their replies to the public consultation, publishers have made several examples of these new schemes and pilots.

Some national pilot projects have been reviewed or have been abandoned by the parties. The **Danish** pilot project Ereolen.dk (©2011)³⁴⁰ for example involved the two largest Danish publishers and a number of local libraries and concerned the lending of Danish trade e-books. The publishers have withdrawn from the pilot project because, at a given moment, the number of loans of e-books reached about six times the number of sales of the same product. Publishers argue that this model was “cannibalising” their sales of e-books in Denmark.³⁴¹

In the **UK** in July 2013, only two of the “Big Six” publishers offered their ebooks to libraries.³⁴² In the **Netherlands**, on the other hand, all big publishing houses have reached individual licence deals with the Bibliotheek.nl (BNL).

Research libraries benefit from wider access to journals as a result of subscription bundles, but complain that the lack of control inherent in having access to services (rather than buying physical books) is not consistent with their mission to collect and archive material. In the public consultation, they have also voiced concerns about restrictions in the availability of best sellers and about the price of e-books compared to the price of purchasing hard copies³⁴³.

What emerges from the wide range of different models under development is that the model used in any specific case represents a trade-off between price and accessibility i.e. the closer the lending restrictions mimic the constraints on physical lending then the greater the supply. The closer the model is to competition with ordinary sales channels the more restrictions there are on availability.

With respect to hard copies of books, authors are entitled to fair compensation for the lending of their works under an exception, harmonized in the EU by the Rental and Lending Directive. [Total levels of remuneration are listed in annex]. One Member State has

³³⁹ See the recent agreement concluded between Albin Michel and libraries in France providing that an e-book purchased by a library can be lent 100 times (can be simultaneously) a year. The e-books available for lending are selected by the publishers and should exclude bestsellers. In the UK, as of July 2012, 70% of UK public libraries were engaging in e-lending. In the US a number of pilot projects have been announced, including by Hachette and Macmillan, as well as a partnership between Penguin and 3M to make Penguin’s ebooks available through the New York Public Library and Brooklyn Public Library for a period of one year (announced in June 2012).

³⁴⁰ e-books could be read on several devices incl. IPAD. It is planned that in the future there should be apps available; DRM protection is used; the libraries paid for every book that is lent out (approx. 16-18 DKR). The price started at 18.50 DKR pr. click and fell to 16.50 DKR pr. click when the libraries had lent out more than 145.000 e-books. Books that were older than one year range between 15 DKR and 13 DKR
-the libraries can limit the loans of each loaner
-the book can be borrowed for a month and can be renewed for one more month within 90 days.
-there will be a “buy” button on the webpage. However, this has been tested by some booksellers so the plan is on hold

³⁴¹ See figure in annex 2

³⁴² CILIP briefing paper, version 3, July 2013

³⁴³ EBLIDA has quoted as an example that in August 2013 only six of the Bookseller official top 50 ranking for eBooks were available for libraries to purchase and has referred to a recent research (February 2013) by Shelf Free, which found that 85% of e-books aren’t available to public libraries in the UK. They have also complained about the price, quoting as an example Khaled Hosseini’s “And The Mountains Echoed” – available for individual readers from some vendors at 99p, but costing libraries £42.50 to buy.

announced plans to extend the public lending right (PLR) to ebooks and audio books borrowed onsite at public libraries i.e. by downloading books onto e-readers.³⁴⁴ Authors have indicated that publishers' contracts do not provide for the remuneration of authors for the lending out of e-books under licence. It is noted that libraries also lend content other than printed matter e.g. according to available statistics the share of non-book lending in Germany is 17.91 % of total loans (audio and audiovisual works and other subject matter).

Views vary among the most concerned stakeholders in the public consultation. Rightholders generally put forward licensing schemes that are being tested and/or rolled-out in various Member States and, while in some cases recognising that a certain degree of competition between (licensed) library lending and sales of e-books is there to stay, they believe e-lending conditions should be carefully calibrated to avoid inhibiting the launch of new services and technical and business innovation (since in direct competition). As one stakeholder put it, the risk is that "in a world in which it is as simple to borrow as to buy, people will borrow, not buy". Institutional users however generally report significant barriers for public libraries and research libraries in relation to licensing agreements for e-lending. In their view, the current licensing practices gives publishers excessive power and influence on the acquisition policy of libraries, which undermines the library's missions and autonomy. Some user organisations mention that at the moment access conditions for users are unclear.

³⁴⁴ UK Government response to the Sieghart Review.

Table A11 - Public libraries in the EU, 2011

MS	Number of Public Libraries	Number of registered users	Media stock	Loans	Visits	Number of staff	Average of e-resources	e-visits (No. of hits to the website)
AT	1473	996540	10624472	21010783	9753414	914		
CZ	5407	1430991	57214068	66500906	46543222	4878	84000	18177696
DE	9550	7900000	124000000	380000000	125000000	11620	18300000	
DK	544		22000000	44600000	36300000	4319	12	23900000
ES*	5075	13570814	8867886	60657759	111469607	12821	695147	14519091
HR	319	530261	375116	11939357	8150810	1650	43453	6541229
HU	3530	1548528	44065386	26228147	17308437	4141		18603831
IE	348	881320	12002316	35091006	17123490	1546		2840800
LT	65	690564	18619307	20214908	11121177	3803	60603	3506959
LU**	21		290000			30		
LV	819	446050	9276163	14195776	9876559	2152		2151935
NL	1177	4009000	30667000	100025000	59683825	8340		33009641
PL	8290	8915894	132534240	124058298	79597263	23457		
PT	194	1163480	644990	906566	6207919	2422		1502467
SE	1212	2753208	39572088	69532068	67398013	5553	4347	19000000
SK	1916	485822	16745247	17475143	5945505	1462	44	2198285
UK	4698	11412000	102305000	309472000	306591000	21779	7963	97721130
TOTAL	44638	56734472	629803279	1301907717	918070241	110887	19195569	243673064

Source: EBLIDA, Knowledge Information Centre (KIC)

*Year of data collection 2010

**Year of data collection 2012

Table A12 - Public lending right – remuneration in EU Member States

MIS	type of agreement	amount €	authors	translators	illustrators	publishers	public libraries	scientific libraries	year of data collection
AT	annual lump sum	581,000	70%			30%	80%	20%	
BE	Per loan = €0.0219 (reference year 2014)								
CZ	per book loan = €0.02	566,322							
DE	lump sum	16,000,000							
DK	political agreement on a lump sum	21,874,512	100%			0%			2011
EE	Loans based	120,420	60%	30%	10%	0%			2011
EL		200,000							
ES		115,778							2010
FI	lump sum (per book loan = €0.4)	3,825,000					100%	N/A	2013
FR	Govt. lump sum contribution of €1.50 per registered member of a public library and €1.00 per registered member of a university library, around €10,000,000(1)	15,405,181(2)	50%			50%			2012
HR									
HU		330,000							2012
IE	Loans-based €0,05 per loan	320,000							2010
IT	Fixed by decree	1,401,370	50%(3)			50%(3)			2011
LT		166720	70%		30%	0%	100%	N/A	2007
LU	2€ per loan								2011
LV	5% of expenditure on collections	77,470	100% % applies			0%			2011
NL		17,400,000							
SE	€0.08 per loan	12,790,000							2011
SK	€0.008879 per loan								2012
UK		2,833,365(4)							2012

Source: <http://www.plrinternational.com/established/established.htm>

(1)Part of this remuneration is generated by a royalty collected from bookstores, totaling 6% of the retail price for works purchased by lending libraries (France is under a fixed book price system). In exchange, libraries cannot demand a discount of more than 9% from bookstores (before 2003, the discount was set freely and could be as high as 20%).

(2)distribution for 2008

(3)in the print sector

(4)calculation on basis of figures supplied by PLR International

Table A13 - Implementation of the (derogation to the exclusive) public lending right in Member States

MS	Beneficiaries	Type of works	Remuneration / Other details
AT	publicly accessible institutions	All types of works?	Yes
BE	Institutions that are approved or officially established by the public authorities for the educational and cultural purpose	Literary works, databases, photographic works, scores of musical works, sound and audio-visual works	Yes (remuneration granted also to publishers) Healthcare institutions, institutions created for the blind, visually-impaired, deaf and hearing impaired, teaching and research establishments benefit from an exemption from the payment of the remuneration "Release window" for sound or audio-visual works
BG	Copyright Act 2000 granted authors the exclusive lending right. However unclear whether law provides for derogation to the exclusive lending rights		
CZ	Libraries, archives, museums, galleries, schools, universities and other non-profit schools-related and educational establishments	Originals or reproductions of published works (literary works: scholarly, professional and textbook works, popular science, poetry and cartographic works, other literature)	Yes
CY	Public libraries, non-commercial collection and documentation centres, scientific institutions Library, archive, museum, gallery, school, university and other non-profit school-related and educational establishment(Art. 37(2)) Directive implemented in Cyprus copyright law but public libraries excluded	Originals or reproductions of published works	Government plans to set up PLR system in 2014 using authors' organisations to distribute payments.
DK	Public libraries, the elementary school libraries and the Danish National Library for the Blind	Printed books, audio-visual material, music, art, posters, photos	Yes
DE	Publicly accessible institutions	Original or copies of the work (Article 27 (2) and 17 (2))	Yes
EE	Public libraries	Literary works, audiovisual and musical works	Yes
EL	No PLR system in operation yet. Authors and publishers have exclusive lending right in Greek	Original or copies of artistic, scientific, musical compositions, audio-visual	

	copyright law but government to date has not engaged in licensing discussions with authors' organisations	works	
ES	Libraries, archives, museums in public ownership or belonging to institutions of general cultural, scientific or educational interest without gainful intent	Books, records, DVDs	Libraries of teaching institutions benefit from an exemption from the payment of the remuneration
FI	Public libraries	Literary works, audiovisual and musical works	Yes
FR	Public libraries	Public lending restricted to a work subject to a publishing contract for its publications and distribution in a book format	Yes (remuneration granted also to publishers)
HR	Public Libraries	Original or copies of all categories of works excluding buildings and works of applied art, works that are mutually lent by institutions	Yes
HU	Public libraries	Exception only applies to literary works and printed music sheets	Yes
IE	Public libraries	Printed books	Yes
IT	Libraries and record libraries belonging to the State or to public authorities and making loans exclusively for purposes of cultural promotion and personal study	Literary and print works (with the exception of music scores and sheets), phonograms and video recordings embodying cinematographic or audio-visual works	"Release window" for sound or audio-visual works
LT	Libraries or other establishments accessible to the public, such as educational and scientific institutions,	Literary works, audiovisual and musical works	Yes
LV	Libraries	Literary works, audiovisual works and musical works	Yes
LU	Public libraries	Literary works, audiovisual works and musical works	Yes Institutions and establishments carrying out specialized lending, thematic lending or a lending to a targeted public, teaching and research establishments benefit from an exemption from the payment of the remuneration
MT	Establishments which are accessible to the public		Government plans to provide

	Maltese Civil Copyright Act 2000 implements the Lending Right Directive but excludes public libraries. No PLR system at present.		funding to National Library to set up PLR system in 2014.
NL	Libraries or other establishments accessible to the public, such as educational and scientific institutions,	Literary works, audiovisual and musical works	Yes Libraries acting for visually-impaired people and the National Library of the Netherlands, teaching and research establishments benefit from an exemption from the payment of the remuneration
PL	Libraries, archives and schools	Literary works, audiovisual and musical works	No, will probably be introduced in course of 2014
PT	Public lending establishments (public libraries, school and university libraries, museums, public archives, public foundations and non-profit private institutions)	Literary works, audiovisual and musical works	Yes, however exclusion of public libraries
RO	Agencies of an institution allowing access of the public	Excluding originals or copies of works, realized with a communication to the public purpose or to which use exist a contract, reference works designated for immediate consultation or for lending between institutions. So, no PLR system operating in Romania.	Yes but not if the work is lent through the libraries of educational establishments as well as through libraries with free access Release window for sound and audio-visual recordings
SE	Libraries or other establishments accessible to the public, such as educational and scientific institutions	Literary works and musical works	Yes
SK	Public libraries	Literary works, audiovisual works and musical works	Yes
SI	Public libraries	Literary works, audiovisual works and musical works	Yes
UK	Local library authorities	Exception specifically reserved to books. Government planning to extend exception to audio books and some categories of e-books on 1 July 2014.	Yes

8.13. ANNEX J: EXCEPTION FOR THE PURPOSE OF ILLUSTRATION FOR TEACHING

The InfoSoc Directive foresees an exception to the use of copyrighted works for the purpose of illustration for teaching (non-commercial purpose). This includes for example extracts of novels, songs or films used as illustration of the topic of a course in the classroom or on a dedicated website to complement the teaching.

This exception is drafted in a broad way, allowing Member States to provide an exception to the reproduction right and the communication to the public right (including the right of making available to the public) as well as the distribution right for the purposes of illustration for teaching on the condition that the source is indicated and to the extent justified by the non-commercial purpose to be achieved. The notion of "illustration for teaching" is not defined but can be understood as allowing a teacher to use a work to give example, to explain or support his/her course. The condition of illustration may be interpreted differently depending on the types of works used (e.g. part of a novel but entire work if it is a poem or a photograph). The directive does not limit the categories of works that could be covered by the exception and does not determine the beneficiaries. The wide formulation of scope of the exception allows for its application in the context of e-learning.

Member States' implementation of this broad exception varies considerably: they have introduced this exception in their national laws with very different measures as to the beneficiaries of this exception (public or private education bodies, teachers and students), the type and extent of works covered (extracts, format and quantity allowed), the type of educational uses (anthologies, copies for exams, public performances, etc). The condition of illustration is sometimes missing in national copyright laws (e.g. PL, IT, DK). Most Member States tend to limit the use of the exception to extracts of works. Certain types of works are out of the scope of the exception (e.g. music scores in FR) or allowed under specific conditions (e.g. audiovisual works can be used after two years upon release in DE). Some Member States (e.g. FR, DE, ES, AT) do not admit the exception for textbooks or other works made explicitly for educational purposes. A report drafted in October 2010 in the framework of the EFG project³⁴⁵ analysed this exception in 11 Member States. It also came to the conclusion that there were big discrepancies about its implementation among Member States.

The national laws do not always deal with e-learning, even if Recital 42 of the InfoSoc Directive explicitly includes distance learning in the scope of the exception. The application of the exception to e-learning appears to be problematic in certain countries which limit the exception to face-to-face teaching (e.g. HU, ES) or allow the publication online only under strict conditions (e.g. in Italy the publication on the internet is allowed for images or music of low resolution or bad quality). Other countries (e.g. FR, BE, UK) require that the communication takes place through closed and secure networks of the education bodies.

In the public consultation, authors and publishers explain that the wording of the exception in the InfoSoc Directive is sufficiently broad to cover different types of uses and that licensing solutions are in place to complement the exception where necessary. However, certain publishers (in particular from Germany and Spain) point to problems in the interpretation of the current exception, notably its application in the digital environment. They consider that schools and universities make an extensive use of the exception³⁴⁶. Reproduction rights

³⁴⁵ http://www.efgproject.eu/downloads/D_5_3_Final_Guidelines_Copyright_Clearance_online.pdf

³⁴⁶ Surveys by VG Wort have shown that over 400 million copies of textbooks fragments are made each year in schools in Germany

organisations also underline that the notion of "illustration for teaching" generates uncertainties and needs to be clarified at EU and national level. They defend a narrow understanding of "illustration for teaching" which should not comprise the reproduction, making available and distribution of educational resources (compilations, course packs, textbooks, e-reserves, etc).

Recital 36 of the Directive leaves the fair compensation for rightholders at the discretion of Member States. In some Member States the exception is accompanied by a fair compensation system (e.g. BE, FR, DE, NL, PL) which can be put into practice through collective agreements (e.g. FR³⁴⁷). In other Member States (e.g. EL, HU, LT, RO), the use of works under the teaching exception does not give rise to the payment of compensation.

Different types of individual and collective licensing systems are in place in certain Member States (e.g. DK, FI, SE³⁴⁸, UK) to cover the use of copyrighted works in the educational context. The licenses granted would allow teaching institutions a more intensive use than it would normally be possible to do under an exception. In the public consultation, some institutional users however indicate that licensing solutions are expensive and create administrative burden for schools and universities. On the contrary, authors, publishers and collecting societies consider that licensing solutions offer flexible and appropriate solutions for educational establishments. For example, representatives of authors and collecting societies in the UK illustrate in their replies the advantages of the licensing system. Economic analysis within Higher Education in the UK³⁴⁹ has found that the annual cost of clearing secondary use rights for individual published works would be between £145m - £720m, whereas the overall annual cost of a collective licence for this sector is around £6.7m. For schools, the cost of a licence enabling them to copy and reuse extracts from all the books and serials in their collections represents 0.03% of their annual spend; the annual cost to a high school of accessing and copying UK broadcast material is less than 60p per pupil. French publishers also observe that the expenditures dedicated to document acquisition in higher education are very limited: 45€ per student in France and 140€ in the UK³⁵⁰.

In several Member States, small-scale licensing solutions for so-called print content (text, image and visual arts) are being developed in the educational environment for uses by students and for the development of course material. Teachers and educational establishments can acquire micro-licences for the use of protected works. For instance, the collecting society CEDRO has launched a new online platform "Conlicencia"³⁵¹ offering "pay per use" licences and institution wide annual licenses for the use of copyrighted material (books, magazines, newspapers and music sheets). In Germany, similar initiatives ("MVB-RightsLink and RightSphere"³⁵²) provide copyright clearance in the form of a one-stop shop for different possible commercial and non-commercial uses of educational content where the potential user can receive the price of, and purchase, a licence online.

³⁴⁷ In France, two agreements, one for written publications and visual arts and the other for musical and audiovisual works, define the conditions of application of the exception.

³⁴⁸ Extended collective licensing in DK, FI, and SE.

³⁴⁹ An economic analysis of educational exceptions in copyright, PricewaterhouseCoopers LLP, March 2012, p.52 – referred to in the replies to the public consultation submitted by the Authors' Licensing and Collecting Society and the Society of Authors.

³⁵⁰ 2008 data

³⁵¹ See <http://conlicencia.com/>

³⁵² See <http://www.mvb-rightslink.com/>

The diversity of the situation in Member States is illustrated in *Table A14* below:

Limitations and exceptions in MS legislation based on Article 5(3)(a) of Directive – illustration for teaching		
MS	<u>Examples</u> of limitations / exceptions in MS legislation	Compensation foreseen for use under the exception
AT		yes
BE	Communication of works for teaching purpose allowed through closed networks.	yes
BG		no
CZ		not specified
CY		not specified
DK	Specific rules for anthologies (reproduction of extracts of works allowed 5 years after the publication of works; textbooks excluded).	yes (extended collective license)
DE	Making works available to the public for illustration in teaching allowed "exclusively for the specifically limited circle of those taking part to the instruction".	yes
EE		no
EL		no
ES	The exception covers acts of reproduction, distribution, communication to the public (textbooks excluded) if used for illustration purpose in the classroom.	not specified
FI	Specific rules for anthologies (reproduction of extracts of works allowed 5 years after the publication of works; textbooks excluded).	yes (extended collective licence)
FR	Reproduction of works allowed through digital workspace to pupils, students, teachers, researchers directly concerned.	yes
HR		yes
HU		no
IE	The exception does not apply if there is a licensing scheme.	yes (if licensing scheme in place)
IT	Publication on the internet allowed for images and music of low resolution or degraded.	Partially: remuneration foreseen only for reproduction of works in anthologies.
LT		no
LV		no
LU		not specified
MT		not specified
NL		yes
PL		yes
PT		not specified (not possible to licence over the exception)
RO		no
SE	Specific rules for anthologies (reproduction of extracts of works allowed 5 years after the publication of works; textbooks excluded).	yes (extended collective licence)
SK		no

SI		Partially: remuneration foreseen only for reproduction of works in textbooks
UK	The exception does not apply if there is a licensing scheme.	yes (if licensing scheme in place)

A few Member States are conducting a domestic copyright review in order to update their current exceptions still in compliance with Directive 2001/29/EC³⁵³.

The diversity of the conditions foreseen in national legislations for implementing the exception creates a complex legal framework. These differences do not seem to raise significant problems as long as the education is delivered in the premises of the education establishments and within national borders. However, the development of cross-border education and e-learning solutions implies that increasingly educational content becomes available across borders. This applies mainly in higher education (languages and curricula still represent natural obstacles to the development of cross-border exchanges in primary and secondary education).

Differences in national laws can create legal uncertainties for education establishments, teachers and students, particularly those involved in cross-border programmes or e-learning. For example, the use of a copyrighted work for the purpose of illustration under an exception in one Member State may be found to infringe copyright in a second Member State when content is made available cross-border to students following distance learning courses or enrolled in multi-institutional courses.

In the public consultation, institutional users (libraries, universities, etc) highlight the restrictive implementation of the exception in Member States and explain the problems they face in practice, in particular for distance learning and cross-border uses (e.g. problems faced by universities with campus abroad or virtual learning environments or by universities located close to a national boarder and attracting students from several Member States, problems for the development of resources in the context of Lifelong Learning and Erasmus+ programmes involving with a cross-border audience). Certain users also report problems with the making available on online platforms of educational resources containing protected content.

Developments teaching and learning through new technologies, including cross-border

Cross-border education takes place in higher education through students' mobility (students enrolled in a full study programme abroad or in study or training period abroad³⁵⁴) but also through training programmes offered by institutions of different Member States, via multi-institutional courses, branch campuses or franchising agreements³⁵⁵. In some cases, these cross-border programmes also imply the mobility of teachers delivering a training course in several Member States.

Evolutions in Information and Communication Technologies (ICT) are leading to new modes of teaching and learning. E-learning is increasingly used as a support tool to the traditional face-to-face courses (e.g. additional webpages hosting supplementary materials, assignments,

³⁵³ E.g. the copyright review led by the UK Government also focuses on the exception for education. <http://www.ipa.gov.uk/techreview-education.pdf>

³⁵⁴ The 2013 "Education and Training Monitor" shows that degree mobility is the most dominant form of learning mobility (covering 7% of all students enrolled in higher education in the EU), with EU credit mobility programmes also contributing significantly (1,1% of students).

³⁵⁵ A recent study identified 253 cross-border higher education programmes (covering only branch campuses or franchising agreements) operating in the EU: http://ec.europa.eu/education/higher-education/doc/studies/borders_en.pdf

copies of presentations by the teachers), in which case it is referred to as “blended learning”. In principle, if the access is restricted to the students enrolled in a specific course, the use of such webpages will have a limited cross-border dimension. However, e-learning can also be offered as a standalone training module, with no required presence in a classroom. In such a case, the cross-border dimension may be stronger. Many universities have developed distance-learning courses or programmes which allow students to access educational content anywhere. Finally, e-learning programmes can also be offered jointly by educational bodies established in different Member States.

The development of OERs (open educational resources) and MOOCs (Massive Open Online Courses) is currently changing learning methods and may lead education establishments to adapt their business models. In the recent Communication "Opening up Education"³⁵⁶, the Commission encourages the development of innovative learning practices combining face-to-face and online learning. It has also launched the "Open Education Europa"³⁵⁷ platform aimed at sharing educational resources available online in different languages. The European MOOCs Scoreboard³⁵⁸ illustrates the fast-growing use of MOOCs in the EU (81 courses in March 2013 and 394 in December 2013). Over the next 10 years, the e-Learning market is projected by some to grow fifteen-fold, accounting for 30% of the whole education market³⁵⁹.

This fast growth of open education practices raises new questions, such as to the use of OERs in the context of teaching. OERs are normally distributed under open licences, but authors may add specific limitations on the authorised uses under such licences (e.g. not authorising derivative works or commercial exploitation by third parties). Open licences encourage the community of practice and sharing of teaching resources in the education sector.³⁶⁰ In this context, there is a need for more transparency on the rights associated with each resource and the potential limitations to such rights.³⁶¹

Furthermore, it is worth noting that educational publishers³⁶² are also adapting their offers to the increasing use of digital technologies in education. All major educational publishing houses in the EU (including small and medium sized publishers) nowadays provide content in digital formats and the capital and management skills to develop special software or applications for teachers and educational establishments.³⁶³ In the public consultation, many publishers refer in their responses to the innovative and flexible solutions proposed to respond to the needs of educational establishments in the digital environment (e.g. digital formats of works, use of interactive white boards, resources for distance learning). Educational

³⁵⁶ Communication on "Opening up Education: Innovative teaching and learning for all through new Technologies and Open Educational Resources", see: http://ec.europa.eu/education/news/doc/openingcom_en.pdf

³⁵⁷ <http://openeducationeuropa.eu/>

³⁵⁸ http://openeducationeuropa.eu/en/european_scoreboard_moocs

³⁵⁹ Industry research - IBIS Capital and Edxus Group, <http://edxusgroup.com/digitalisation-of-education-will-result-in-fifteen-fold-growth-for-e-learning-market-over-the-next-decade/>

³⁶⁰ Open licences are in particular relevant for European education systems as the European Commission has introduced an open access requirement in its Erasmus+ programme. This implies that in any project funded through that programme beneficiaries will have to release its educational materials under open licences.

³⁶¹ The actual ownership of the copyrights of derivative works produced using initial works that were released under open licences (with or without limitations) is not always clear.

³⁶² Educational publishing is a very important component of the publishing sector, the largest cultural industry in Europe with a retail market value of about 40 billion €, representing between 18 and 20% of the market at EU level, and up to one third of the total in some Member States. It reaches higher figures in some countries: 25 to 30% in Spain, close to 30% in Flanders, more than 60% in Ireland, 22 to 25% in Italy, 25 to 30% in Poland. If scholarly and professional publishing were added, the share of the market at European level would be close to 35-40% if educational publishing were jeopardised (source: FEP).

³⁶³ Half of the revenues of Pearson, the largest educational publisher in the world, are now digital.

publishers expressed concerns on the fact that a further harmonisation of the teaching exception could undermine the role of licences and the investment in the production of quality educational material.

In the specific area of film literacy, the Commission is currently carrying out a study on the showing of films in European schools³⁶⁴. This study will provide information on the current practices by film schools in order to achieve their institutional objective of teaching about film and with films. Film heritage institutions responding to the public consultation explain that the possibilities to use audiovisual material for teaching purposes are very limited.

³⁶⁴ See presentation on <https://ec.europa.eu/digital-agenda/en/news/cinema-expert-group-subgroup-film-heritage-meeting-2728-november-2013-read-presentations>

8.14. ANNEX K - TEXT AND DATA MINING

Text and data mining consists of various tools, techniques or technologies for the automated processing of large volumes of texts and data that is often unstructured or not uniformly structured³⁶⁵. Mining is undertaken for purposes of e.g., identification and selection of relevant information, retrieval, extraction, interpretation, analysis etc. of such information, and the identification of relationships within/between/across documents and dataset. This allows the miner to obtain new knowledge and insights, patterns and trends. These techniques are increasingly been used across a wide range of sectors and are particularly, although not exclusively, relevant in the field of scientific research.

The large scale use of text and data mining is a relatively new phenomenon. Different techniques and software are used for mining. With the evolution of technology, these techniques and software are most probably going to evolve as well. From a legal point of view, the novelty and evolving character of text and data mining techniques raise a number of uncertainties across different fields of law (data protection, fundamental rights, contract law, copyright and database rights, technical standards etc.). As far as copyright (including for databases) is concerned, there is still considerable uncertainty as to the extent to which different text and data mining techniques imply copyright relevant activities or not, and, as the case may be, the extent to which they are covered by one or more of the exceptions and limitations set out in the EU copyright legal framework.

Besides the legal aspects, practical and technical issues also arise as regards how to ease access to the proprietary infrastructures hosting the content to be mined while safeguarding their stability and security.

Different scenarios may arise. A wide proportion of the content (copyright protected or not) that is currently used as a source for mining is freely accessible on the internet³⁶⁶ (e.g., blogs, web sites, free sections of online newspapers or magazines, databases, open access scientific journals, etc.). We understand that mining of this content is commonly taking place without any contractual relation between its owner/rightholder and the miners. At the same time, some platform operators have been blocking access to automated analysing of the data on their platforms, including to data provided by third parties (e.g. social networks), for reasons other than copyright.

A different issue may arise where content is not freely available online but hosted in proprietary databases/infrastructures (businesses or public authorities databases, subscription based published content such as magazine, newspapers and scientific journals other than open access³⁶⁷ etc). If the content owner decides to grant access, it does so by defining conditions and purposes in a contract. Today, scientific articles and research data are considered to be the main source of mining for scientific research purposes. Research institutions or universities typically have access to scientific publications through subscription licences concluded with the publishers. However, such licences usually only authorise the reading/consultation of

³⁶⁵ For a description of what text and data mining is, please see chapter 3.2.1.

³⁶⁶ It has been argued in legal literature that content made available on the internet, has been made available with the rightholders' implied consent. This interpretation has been upheld by the German Federal Court of Justice, in the case *Abbildung von Kunstwerken als Thumbnails in Suchmaschine* [Display of Works of Art as Thumbnails in Search Engine], GRUR, 628 (2010), See "Google and the thumbnail dilemma – "Fair use" in German copyright": <http://moritzlaw.osu.edu/students/groups/is/files/2013/08/8-Potzlberger.pdf>

³⁶⁷ The growth of open access publications is challenging the traditional subscription model by making scientific publications freely available on-line

these publications but either do not regulate/authorise or explicitly exclude text and data mining.

When it comes to copyright protected content, the possible need to obtain a specific authorisation to carry out mining (on top of the authorisation to access the content for reading/consultation purposes) depends on a) whether such mining involves a copyright relevant act (in particular an act of reproduction or extraction of data from a database) and b) whether this act may be covered or not by an exception or limitation in the territory where it is carried out.

It is our understanding that current text and data mining techniques usually involve the making of a copy of the relevant texts and data or of parts of them (e.g. on browser cache memories or in computers' RAM memories or to the hard disk of a computer).³⁶⁸ Copying of copyright protected content constitutes an act of reproduction protected under the rightholders' exclusive rights granted by Article 3 of Directive 2001/29/EC and Article 5 of Directive 96/9/EC. The copying of such texts/data/databases for the purpose of mining may also constitute an act of extraction which is protected by the exclusive *sui generis* right of the maker of a database under Article 8 of Directive 96/9/EC.³⁶⁹

Certain acts of reproduction or extractions carried out in the context of text and data could however fall under the exceptions for non-commercial scientific research in Article 5.3 a) of Directive 2001/29/EC and Article 6.2 b) and 9 b) of Directive 96/9/EC. Those articles leave a broad margin of manoeuvre for Member States to adopt, under some conditions, national exceptions allowing the reproduction and extraction of content for the purpose of non-commercial scientific research. If an exception applies, miners do not need to obtain rightholders' authorisation to engage in those acts. However, the research exceptions are optional and not all Member States have implemented them into national law.

Examples of Member States that have not implemented the exception in Article 5.3 a) of Directive 2001/29/EC are **Denmark, Finland and Italy**. Other Member States have implemented that exception in a more restrictive way, than provided for in the Directive. Article L. 122-5 of the **French** Copyright Act, limits the use of works for "illustration of research" to "reproduction and presentation of extracts of works".³⁷⁰

The **German** copyright act limits the research exception to certain copyright relevant acts, such as the making available of limited parts of a work to e.g., specifically limited circle of persons for their personal scientific research. As regards reproduction, the German act provides that it shall be "permissible to make single copies of a work or to have these made [...] for one's own scientific use if and to the extent that such reproduction is necessary for the purpose and it does not serve a commercial purpose".³⁷¹

The French and German laws do however not contain any obligations to indicate the source.

Article 34 of the **Spanish** Copyright Act also contains an exception for research which is undertaken for non-commercial purposes. It is mandatory to indicate the source of the work.³⁷²

³⁶⁸ An analysis is thereafter made of relevant texts and data through the use of programmed algorithms, software or other automated processes, in order to obtain new knowledge and insights, patterns and trends. The result from the analytical part of the mining would generally be combined, related or integrated with other existing or new information and knowledge

³⁶⁹ See the recent judgment of the CJEU in Case C-202/12 (Innoweb vs Wegener)

³⁷⁰ <http://www.culture.gouv.fr/culture/infos-pratiques/droits/exceptions.htm>

³⁷¹ http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html

³⁷² <https://www.boe.es/buscar/pdf/1996/BOE-A-1996-8930-consolidado.pdf>

Moreover, to date no Member State has adopted specific copyright legislation covering text and data mining on the basis of a research exception. We are also not aware of any judicial decisions in the Member States touching upon text and data mining, to what extent such activities may be copyright-relevant and whether they could be captured under the research (or other) exceptions laid down by the EU *acquis*.

In June 2013, the UK put forward a draft proposal to include a specific exception for text and data mining in its national copyright legislation³⁷³. The proposal refers to the existing exception in Article 5.3 a) of Directive 2001/29/EC for non-commercial scientific research. In addition to the UK, other Member States (for example France and Ireland) are also discussing the possibility to introduce an exception for text and data mining in their national legislation.

It has also been argued that the mandatory exception to the reproduction right laid down in Article 5.1 b) of Directive 2001/29/EC could apply to at least certain mining techniques. This exception covers temporary acts of reproduction that enable lawful use of a work or other subject-matter, provided that the copies made are transient or incidental. However, it is unclear whether text and data mining would generally fulfil the conditions set out in Article 5.1, since mining techniques usually seem to imply the making of copies which are not temporary and transient.

Market situation

Text and data mining was initially used mostly in the areas of life sciences and drug discovery³⁷⁴ but is today becoming a common tool also in social sciences, humanities, social media, security, business and marketing and even the legal field. Text and data mining techniques are used on a daily basis not only by researchers but also in business, in particular in the fields of pharmaceuticals, chemistry, abstracting and indexing services, libraries, suppliers of mining tools and services, publishers etc.³⁷⁵

Some studies indicate that text and data mining can save reading time, information handling time and costs.³⁷⁶

Vast amounts of new information and data are produced and put online every day through economic, academic and societal activities.³⁷⁷ The volumes of such “big data” are predicted to increase at a rate of around 40% per year, and have significant potential economic and societal value.³⁷⁸

³⁷³ <http://www.ipo.gov.uk/techreview-data-analysis.pdf>

³⁷⁴ Text and data mining constitutes an important tool for the discovery of patterns and relationships in biological and medical research, which is beneficial to the health care sector and to consumers. In this context, the use of text and data mining techniques has already enabled new medical discoveries, e.g., by the linking of existing drugs to new medical applications and by improving human curation. See the response from the British Library to the Independent Review of Intellectual Property and Growth, p. 31, Case D: <http://pressandpolicy.bl.uk/imagelibrary/downloadMedia.ashx?MediaDetailsID=886> and <http://www.biomedcentral.com/1471-2105/10/326>

³⁷⁵ “Journal Article Mining: A research study into Practices, Policies, Plans and Promises”, by Eefke Smit and Maurits van der Graaf, 2011, p. 6.

³⁷⁶ “The Value and Benefits of Text Mining”, JISC, 2012.

³⁷⁷ “The Value and Benefits of Text Mining”, JISC, 2012, p. 3.

³⁷⁸ It was reported in 2011 that if US health care could use big data creatively and effectively to drive efficiency and quality, the potential value from that data could be more than \$300 billion in value every year. In Europe, it is argued that government expenditure alone could be reduced by EUR 100 billion a year in operational efficiency improvements alone by using big data. “Big data: The next frontier for innovation, competition, and productivity”, McKinsey global Institute, 2011, p.2: http://www.mckinsey.com/insights/business_technology/big_data_the_next_frontier_for_innovation

The global research community generates over 1.8-1.9 million new scholarly articles per year.³⁷⁹ The number of articles published each year and the number of journals have both grown steadily for over two centuries, by about 3% and 3.5% per year respectively. The reason is the equally persistent growth in the number of researchers, which has also grown at about 3% per year and now stands at between 6 and 9 million, depending on definition.³⁸⁰

In the field of scientific research, text and data mining facilitates the research process and makes it more efficient, in particular by dramatically speeding up text and data analysis. This increases research efficiency and, as a consequence, the potential to achieve new discoveries. Text and data mining is also an important tool for ensuring, through peer review, the quality and accuracy of research.³⁸¹

A number of respondents to the public consultation have highlighted that text and data mining is a relatively new issue and that it is still unclear what techniques are actually covered by this concept as well as what rules apply. Legal uncertainty as regards copyright and text and data mining have come to the fore in particular as regards mining of subscription based content such as scientific journals published under the “traditional” model under which researchers transfer their copyright to STM publishers. Here, the practical question arises as to whether mining should be subject to a specific contractual agreement between publishers and research institutions in addition to the authorisation to have access granted through a subscription licence. Currently, it appears that most subscription licences do not include a specific authorisation to text and data mine. Some may explicitly forbid it³⁸².

In this context, **researchers and research institutions** (such as university libraries) consider that if they have lawfully acquired access to digital content, including databases, the authorisation to read this content should include the authorisation to mine it. In their replies to the public consultation, these stakeholders, as well as some service providers, have considered that the best way forward would be to clarify in legislation, for example by introducing a specific text and data mining exception, that text and data mining of content to which the user has lawful access can be undertaken without the need to seek authorisation from the rightholders. Research institutions have pointed out that a new exception on text and data mining should not be limited to non-commercial research.³⁸³

In addition, representatives of researchers and institutional users report high transaction costs mostly due to the necessity for institutions having subscribed to scientific journals to contact a large number of publishers to negotiate and obtain the authorisation to mine their collections³⁸⁴. The need to negotiate with each and every publisher³⁸⁵ also makes the process

³⁷⁹ “The STM report - An overview of scientific and scholarly journal publishing”, 2012, p 5. http://www.stm-assoc.org/2012_12_11_STM_Report_2012.pdf

³⁸⁰ Around 20% of these are however repeat authors. See, “The STM report - An overview of scientific and scholarly journal publishing”, 2012, p 5. http://www.stm-assoc.org/2012_12_11_STM_Report_2012.pdf

³⁸¹ Researchers have explained that the peer-review of mining based research involves a repetition of the same mining process as the one undertaken for the research that is being reviewed. In this context, the reviewer needs access to the material on the basis of which the mining was undertaken.

³⁸² See Article “Open Content Mining” by Peter Murray Rust, Diane Cabell and Jennifer C Molloy and slide nr 9 of the following presentation held by a researcher in the Working group on Text and Data Mining in Licences for Europe: <http://www.slideshare.net/rossmounce/content-mining>

³⁸³ Wellcome Trust, Submission to the UK IPO consultation on copyright, 2012, p. 8 http://www.wellcome.ac.uk/stellent/groups/corporatesite/@policy_communications/documents/web_document/wtv_m054838.pdf; Open Knowledge Foundation, submission to the UK IPO consultation on copyright, 2012 <http://science.okfn.org/2012/03/21/response-to-ipo-consultation-on-text-mining-copyright-exception/>

³⁸⁴ The main costs are related to the negotiation of a large amount of licence agreements and also to the setting up of text mining: “The Value and Benefits of Text Mining”, JISC 2012, p. 3.

time-consuming. For example, the British Library explained³⁸⁶ to have only been able to acquire, through years of negotiations, the rights to mine the content of sixteen publishers in total. Researchers have reported cases where they have had to keep ongoing research on hold for weeks or months while waiting for the signing of a licence agreement³⁸⁷. Moreover, it has been held that access is often provided only to abstracts of articles³⁸⁸ and not to the full texts, thus limiting the effectiveness of mining.

Researchers and libraries argue that they are in a position of weakness in negotiations with publishers and that it is difficult to convince the latter to include text and data mining in existing licence agreements³⁸⁹. Moreover, in some cases, the benefits of text and data mining can be significantly reduced if not all the relevant literature is captured, i.e., if one of all relevant publishers whose consent is sought for the project refuse access to his content.

Rightholders, in particular representatives of **STM (scientific, technical & medical) publishers** have held that licensing of text and data mining for scientific purposes is taking place, although they rarely receive requests for an authorisation to use their content for the purpose of text and data mining.³⁹⁰ The reasons for this could be the potentially high transaction costs described above³⁹¹, but also the legal uncertainty surrounding the matter, which could be stimulating the emergence of a “grey market”: mining of scientific journals may be actually taking place in a number of cases without it having been specifically licenced with the original subscription.

Even when mining is licensed and takes place, publishers have expressed concerns as to the security and stability of their technical infrastructures hosting the content, due to the intrusive nature of automated processes and mining software (mining techniques usually involve the copying of large quantities of content stored in proprietary databases).. In this respect, contractual agreements may be used as a tool to control technical access to proprietary data, even independently from profit considerations. Publishers are also concerned that mining may

³⁸⁵ An example concerning the PubMed database that contains biomedical literature: in that database there are 587 publishers with more than 1000 papers published each since 2000, see “The STM report - An overview of scientific and scholarly journal publishing”, 2012, p. 54. Another example provided by a researcher at the University of Bath is that the 500 most relevant journals for his research are published by 120 different publishers and that the 3 biggest of those publishers combined can provide him with less than 50% of the material to which he needed access: <http://www.slideshare.net/rossmounce/content-mining>

³⁸⁶ In relation to mining of websites, the British Library also indicated to have sought the permissions from 17,777 web-sites holders over eight years and to have had it from 4453 of them.

³⁸⁷ See slide nr 10 of the following presentation held by a researcher in the Working group on Text and Data Mining in Licences for Europe: <http://www.slideshare.net/rossmounce/content-mining>

³⁸⁸ See “Beyond genes, proteins, and abstracts: Identifying scientific claims from full-text biomedical articles”, Blake C, <http://www.ncbi.nlm.nih.gov/pubmed/19900574?dopt=Abstract>, where the author concludes that the abstracts of articles do in general contain only 8% of the scientific claims and that it therefore is necessary to have access to the full text articles. See also the presentation by Jean-Fred Fontaine “Text and Data Mining for biomedical Research”, <http://www.slideshare.net/libereurope/the-researcher-perspective-jeanfred-fontaine-mdc-berlin>

³⁸⁹ In a study undertaken by publishers, 60% of the seven interviewed publishers replied that they grant researched-focused mining requests in most or all cases. 32% of the seven interviewed publishers replied that they allow text and data mining for all and any purposes *without authorisation needed*, including the 28% that have an open access policy for that. 35% of the seven interviewed publishers replied that they do generally, *upon a request for authorisation*, allow mining in all or the majority of cases, and another 53% said that they allow it in some cases. Again, 53% held that they will decline mining requests if the results can replace or compete with their own products and services. See “Journal Article Mining: A research study into Practices, Policies, Plans and Promises”, by Eefke Smit and Maurits van der Graaf, 2011, p. 5.

³⁹⁰ “Journal Article Mining: A research study into Practices, Policies, Plans and Promises”, by Eefke Smit and Maurits van der Graaf, 2011, pp 5 and 31 where only 21% of the seven interviewed publishers responded that they receive more than 10 requests for mining per year, and these are larger publishers.

³⁹¹ CRA report “Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU – analysis of specific policy options”, p. 41.

result in the making, and subsequent dissemination, of derivative and/or substitutive products such as summaries or news-clipping based on their publications and are keen to regulate this contractually.

In their replies to the public consultation, representatives of authors, collecting societies and publishers have highlighted that licencing solutions are being developed and should be the preferred way forward. Legislative changes would in their view be premature.

In order to improve the current market situation, representatives of publishers have developed a series of **initiatives aimed at facilitating licensing agreements** for the purpose of text and data mining. In particular, in November 2013, **as an outcome of the “Licences for Europe” stakeholders’ dialogue**, a group of STM publishers presented a declaration of commitment covering both contractual and technical initiatives to streamline licences for non-commercial mining of subscription based scientific publications³⁹².

As reported in this declaration, the signatories have established (and committed to apply) a sample licence clause, to be included in existing subscription agreements (on request or as part of subscription renewal) at no additional cost for the final user authorising text and data mining for non-commercial research purposes. A web based click-through licence allowing individual researchers to request this authorisation has also been developed. Technological solutions which could complement the model clause and practically facilitate access to the scientific publications for mining purposes are also being developed. One of the main projects in this respect is the “Prospect” mining hub developed by CrossRef³⁹³. “Prospect” will allow researchers to access content subscribed by their institution directly in the publisher’s infrastructure and facilitate its mining for example through content formatting.

Other initiatives are being carried out at national level. These include work between publishers and rights clearance agents and collecting societies to implement licensing systems to facilitate easy, “one-to-many” rights clearance, such as PLS Clear in the UK³⁹⁴.

³⁹² http://www.stm-assoc.org/2013_11_11_Text_and_Data_Mining_Declaration.pdf. See also the Commission document “Licences for Europe: ten pledges to bring more content online” http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf

³⁹³ <http://www.crossref.org/>

³⁹⁴ <http://www.plsclear.com/>

8.15. ANNEX L - EXCEPTION FOR PERSONS WITH A DISABILITY

Article 5(3)(b) of the InfoSoc Directive enables Member States to provide for an exception to the rights of reproduction, distribution and communication to the public/making available for “uses provided for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability”.

This exception is implemented in the laws of all Member States but its implementation varies considerably. There are significant differences as regards the scope of the exception both as to the beneficiaries and the works covered. Some countries (e.g. LT, MT or SE) limit the accessible formats that can be made under the exception; others (e.g. AT, DK or NL) prescribe remuneration for the rightholders³⁹⁵ or only allow for the application of the exception where a work is not commercially available (e.g. UK, DE).

For example, in **France** the exception is applicable to persons with motorial, mental, sensorial, psychological, cognitive or physical disabilities above a certain limit set by administrative provisions. In the **UK** the provisions is applicable to only visually impaired and people who are unable, through physical disability, to hold or manipulate a book or to focus or move their eyes to the extent that would normally be acceptable for reading – recordings of performances are excluded – provided that the work used is not available in the desired form. In **Lithuania** the reproduction of lawfully published works is restricted to non-commercial educational, teaching and scientific research purposes. And in **Sweden** only libraries or organisations with special permission from the government are allowed to produce talking books freely, to communicate copies through a network directly to disabled people, and to make copies of radio or TV broadcasts and films for people who are deaf or hearing-impaired.³⁹⁶ Users and institutional users responding to the public consultation repeatedly raise the problem that “dyslexia” is excluded from the scope of the exception in a number of Member States (e.g. UK, DE).

The diversity of the conditions prescribed by national laws when implementing the exception creates a complex legal framework within the EU. While there are indications that the legislation implementing the exception in some countries is complex to apply even domestically,³⁹⁷ the differences usually raise major concerns in the cross-border context. The lack of the cross-border effect of the exception makes it impossible to access special format copies made under an exception in another Member State.

In order to address this problem on a global scale, the Marrakesh Treaty was adopted in the World Intellectual Property Organisation (WIPO) in June 2013.³⁹⁸ This Treaty facilitates the access to published works for persons who are blind, visually impaired, or otherwise print disabled. The Treaty creates a mandatory exception to copyright that allows organisations for the blind to produce, distribute and make available accessible format copies to visually impaired persons without the authorisation of the rightholder, not only domestically but also across borders.³⁹⁹ On the one hand, the scope of the Treaty is more limited than the scope of the “disabilities” exception in the InfoSoc Directive, on the other hand, unlike the Directive, it ensures the cross-border effect of the national exception. The Treaty enters into force once 20 Contracting Parties have ratified it. Users and institutional users responding to the public

³⁹⁵ This possibility is explicitly recognised by recital 36 of Directive 2001/29/EC.

³⁹⁶ See more examples in the problem definition and in Table A15.

³⁹⁷ See for example : Exception “handicap” au droit d’auteur et développement de l’offre de publications accessibles à l’ère numérique. Catherine Meyer-Lereculeur, Mai 2013.

³⁹⁸ http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=245323

³⁹⁹ It is to note that the Marrakesh Treaty does not only aim at facilitating the making and digital transmission of accessible format copies but also the distribution of physical copies, including across borders.

consultation urge the EU to rapidly ratify the Marrakesh Treaty, also recalling the EU's and the Member States' obligations under the UN Convention on the Rights of Persons with Disabilities.

Finally, Article 7 of the Audiovisual Media Services Directive⁴⁰⁰ obliges Member States to encourage media service providers gradually to make their services to people with a visual or hearing disability (e.g. by sign language, subtitling, audio-description or easily understandable menu navigation). In most Member States the public service broadcaster has the legal obligation to provide subtitles with their television programmes.⁴⁰¹ The actual implementation of this provision however seems rather varied in the EU.⁴⁰²

Market developments

In practice, people with visual impairment and other print disabilities (e.g. dyslexia) are the most concerned by the exception in Directive 2001/29/EC. Therefore this section mainly focuses on the developments of the accessibility of books and other print material as well as of audio-visual content for visually impaired and otherwise print-disabled persons. The European Blind Union estimates that there are 30 million blind and partially sighted persons in geographical Europe and an average of one in 30 Europeans experience sight loss.⁴⁰³ Accessible formats include Braille, large print, e-books, audiobooks with special navigation, etc.

Books and other print material in accessible formats are either produced by the publishers themselves or they are made, under licences or an exception, by specialised entities (libraries, blind organisations, etc.). For example, the EPUB format (currently EPUB3) is commonly used for e-book publishing. EPUB3 includes a wealth of features that can be used to enhance accessibility for visually impaired persons.⁴⁰⁴ These features can be incorporated at the time of production or later, for example by the specialised entities. Authors, collecting societies and publishers responding to the public consultation argue that the existing market mechanisms sufficiently address the question of access. All stakeholders seem to share the view that ultimately accessibility can only be ensured via mainstream publishing and not by exceptions to copyright but, unlike publishers, institutional users consider that this objective can only be reached in the long run.

As an illustration, in 2012 in the **UK** 84 % of the top 1000 titles were published in accessible format. This is a sharp increase compared to the figures in the previous years (73 % in 2011, 45 % in 2010 and 0 % in 2009)⁴⁰⁵. Still, when examining the overall market, only 7 % of books are also available in accessible format.⁴⁰⁶ In **France** it is estimated that 8 to 20% of books are available in at least one accessible format.⁴⁰⁷

⁴⁰⁰ Directive 2010/13/EU of the European Parliament and the Council of 10 March 2010 on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services.

⁴⁰¹ See details per Member State in Table A16.

⁴⁰² State of subtitling access in EU (EFHOH) – 2011 report
http://media.wix.com/ugd//c2e099_098aaba4b05ee8f7fed8b0add0b8c332.pdf

⁴⁰³ <http://www.euroblind.org/resources/information/nr/215>

⁴⁰⁴ EPUB is one of the most widely supported open, free e-book format. It was developed by the International Digital Publishing Forum. It is a reflowable, platform-independent electronic book. In EPUB3 the features of the DAISY format were incorporated into the EPUB format (2011). <http://www.daisy.org>

⁴⁰⁵ http://www.rnib.org.uk/aboutus/Research/reports/reading/Pages/accessible_titles_2012.aspx

⁴⁰⁶ http://www.rnib.org.uk/professionals/publishing/Pages/publishing_industry.aspx

⁴⁰⁷ Source: study “exception « handicap »” (2013)

When books are not published in an accessible format (Braille, for instance), such formats are produced by libraries or blind organisations. There are agreements between the publishing industry and blind organisations in a number of Member States.

For example, In **Italy** there is an agreement between the Italian Publishers Association (AIE) and the Italian Union of the Blind and Visually Impaired (UIPI) *inter alia* with a view to providing all visually impaired students with the necessary school books in an accessible format.⁴⁰⁸

In the **Netherlands**, a collective agreement between the Dutch Publishers Association and Dedicon which ensures accessibility of works for people with a disability via a library or ‘Loket aangepast-lezen’.⁴⁰⁹

No matter whether the accessible formats are produced under a licence or under an exception, the actual production costs of an accessible format are significant (and they are dependent on the actual format).

The cost of producing a Braille page is between EUR 1.40 and EUR 8.29, depending on the level of complexity and the genre. For instance, making a 1000-page long novel accessible in Braille would require 17 Braille volumes that cost around EUR 8,400. The production costs of the Braille version of a 400-page science text book is close to EUR 8,000 and the 150-long language text-book costs close to EUR 2,400. The production costs of a fully accessible DAISY format (audio-book with navigation tools)⁴¹⁰ are around EUR 3.400 for a 1000-page long novel and EUR 390 for a 150-page long language text-book. The cost of an audio-description track of a 90-120-minute long film is around EUR 2,500.⁴¹¹

Because of the prohibitive costs of production, in the last few years the market has started to develop licence-based models of cross-border exchange of accessible files, in particular to avoid the duplication of production costs between countries sharing the same language. Today the cross-border exchange of accessible formats is limited to a couple of hundreds of copies per year.

For example, in the **Netherlands**, 200-300 titles are imported and 50-100 titles are exported annually. As to educational titles, 50-100 are imported and 5-10 are exported in a year. As to the **UK**, in 2012/2013, 476 titles in Braille and 9 titles in DAISY format were sold abroad.

Currently two multi-lateral projects are run by publishers and blind organisations/libraries which aim at facilitating the making and cross-border exchange of accessible format copies: the TIGAR project (Trusted Intermediary Global Accessible Resources)⁴¹² in WIPO and the ETIN project (The European Trusted Intermediaries Network)⁴¹³ in the EU.⁴¹⁴ Both projects aim to improve the accessibility and amount of copyright-protected accessible materials available for people with print disabilities across borders through trusted intermediaries (TIs – blind organisations) and to establish long-term sustainable solution(s) for the cross-border exchange of accessible works.

ETIN was established in 2010 and aims to have pan-European coverage with initial focus on member countries from the EU, the EEA and Switzerland. TIGAR aims to have global

⁴⁰⁸ LIA project: <http://www.progettolia.it/en>

⁴⁰⁹ <http://www.nuv.nl/downloadcentrum/regelingen-modellen-en-checklists/regelingen-bibliotheken/regeling-toegankelijke-lectuur-leesgehandicapten.158422.lynkx>

⁴¹⁰ <http://www.daisy.org>

⁴¹¹ Examples provided by some European blind organisations.

⁴¹² <http://www.visionip.org/tigar/en/>

⁴¹³ http://ec.europa.eu/internal_market/copyright/initiatives/access/index_en.htm

⁴¹⁴ There are also some examples of bilateral cooperation between some Member States, e.g. between the Netherlands and Belgium.

coverage including developing countries. They also have different mechanisms for their operation: ETIN proposes de-centralised facilities managed by participating TIs for the exchange of files. TIs can exchange accessible versions of books among themselves, and can also supply accessible versions directly to visually impaired persons in other ETIN Member States.

TIGAR aims to have a specific ICT infrastructure managed by WIPO. It includes a centralised transitory file transfer facility (for transparency and for the ease of reporting), mechanisms to facilitate the provision of files from publishers, 'search and discovery' tools for accessible books available via TIs or commercially or in development, and other supporting services. At present, only a few Member States take part in the ETIN project⁴¹⁵ and no cross-border exchange is taking place yet due to the lack of licences and other agreements on national level. The TIGAR project seems to have developing countries as its main focus. Publishers report that the TIGAR database already contains data for over 200.000 titles.⁴¹⁶

As regards audiovisual content, the situation is very uneven in the Member States both as regards the availability of audio-descriptions for visually-impaired persons and as regards subtitles for hearing-impaired persons. In the EU, the UK and Germany take the lead in the number of hours that are available with audio-description on TV, in cinemas and also on DVDs. In some other countries (e.g. in France) there is a steady increase in the number of cinema screenings with audio-description but in the vast majority of Member States there are only a few releases with audio-description each year.⁴¹⁷ Some AV producers responding to the public consultation encourage stakeholder dialogue in order to improve the accessibility of audiovisual content for persons with a disability.

For example, in the UK more than 1,000 films have been released with these 'access' features since 2002. In most UK cinemas - including all digitally equipped sites - now have facilities for subtitles, and more than 300 have audio description facilities. In 2012 more than a hundred English language films were available with subtitles & audio- description. The top 20 UK releases, 41 of the top 50, and 71 out of the top 100 were available. The 100 most popular films of 2010 took around 90% of the box office revenue. The remaining 400+ films, most of which were not subtitled & described, accounted for just 10% of revenue. The majority of films that were not subtitled & described had a very limited release and were not screened in many multiplex cinemas (approx. three quarters of UK cinemas).⁴¹⁸

⁴¹⁵ TIs from the Netherlands, the Flemish part of Belgium, France, Denmark and Germany.

⁴¹⁶ The accessible formats originate from Canada, the US, Sweden, Denmark, Norway, Australia, Switzerland and Brazil. Other countries (e.g. New Zealand, South Africa, France) are expected to join soon.

⁴¹⁷ Information provided by some European blind organisations.

⁴¹⁸ <http://www.yourlocalcinema.com/available.html>

Table A15 - Implementation of Article 5(3)(b) of the InfoSoc Directive – Exception for persons with a disability

MS	Scope	Remuneration	Application to works, other subject matter/Other details
AT	Person with disabilities	yes	published work by reproduction non-commercial
BE	Person with disabilities	no	reproduction and communication to the public non-commercial
BG	Person with disabilities	no	reproduction of works non-commercial
CZ	Person with disabilities	no	people with disability makes a reproduction or has a reproduction made of a published work to the extent required by the specific disability; a reproduction so made may also be distributed and communicated by the same person people with vision disability provides the verbal expression of the visual component and adds it to the audio component of an audiovisual recording of an audiovisual work; the audio component of the audiovisual recording of an audiovisual work may also be reproduced, distributed and communicated by the same person non-commercial
CY	Person with disabilities	no	limitation concerns ‘uses’ in general and consequently both acts of reproduction and communication to the public non-commercial
DK	Visually- and hearing-impaired person	yes	published works, non-commercial use only no sound recordings of literary works or use that consists solely of sound recordings of musical works
DE	Person with disabilities (access to the work, because of a disability, is not possible or is made considerably more difficult by the already available means of sensual perception)	yes	reproduction and distribution of a work, non-commercial , if necessary to facilitate access
EE	Person with disabilities	no	reproduction, distribution and communication to the public of a lawfully published work. works created especially for disabled persons may not be reproduced, distributed and made available without the authorisation of the author non-commercial
EL	Person with visual or hearing impairment	no	reproduction of the work Minister for Culture may lay down the conditions of application of the regulation and its application to other categories of persons with disabilities
ES	Person with		reproduction, distribution and communication to the public

	disabilities		
FI	Person with disabilities	yes	copies of a published literary work, a published musical work or a published work of fine art may be made by means other than recording sound or moving images
FR	Motorial, mental, sensorial, psychological, cognitive or physical persons (recognised by a specialised commission or recognised by a medical certificate)	no	the reproduction or representation has to be carried out by a legal entity or publicly open establishments such as libraries, archives, documentation centres or multimedia cultural centres
HR	Person with disability	yes	use of copyright works non-commercial
HU	Persons with disabilities	no	non-commercial
IE	Person with a physical or mental disability	no	copy of a work and a recording
IT	Persons with disability	no	reproduction and communication to the public, for personal use, non-commercial
LT	People with visual or hearing impairment	no	reproduction for non-commercial educational, teaching and scientific research purposes of lawfully published works non-commercial
LV	People with visual or hearing impairment	no	organisations for the visually impaired and hearing impaired, as well as libraries which provide services to visually impaired and hearing impaired, shall be permitted to reproduce and distribute works non-commercial
LU	Persons with visual or hearing impairment	no	reproduction of a work
MT	Person with disabilities	no	the reproduction, translation, distribution or communication to the public of a work non-commercial
NL	Person with disabilities	yes	reproduction and communication to public of works non-commercial
PL	Person with disabilities	no	published works non-commercial and to the extent resulting from the nature of disability
PT	Person with disabilities	yes	the reproduction, public communication and making available to the public of a work
RO	Person with disabilities	no	the reproduction, distribution, broadcasting or communication to the public

SE	Person disabilities	with	yes	Anyone is entitled to make copies of literary and musical works, other than recording of sounds but only libraries or organizations with special permission from the government are allowed to produce talking books freely, to communicate copies through a network directly to disabled people, and to make copies of radio or TV broadcasts and films for people who are deaf or hearing-impaired.
SK	Person disabilities	with	no	reproduction of a released work public distribution by lending or to communication to the public
SI	Person disabilities	with	yes	reproduce or distribute works, provided that the work used is not available in the desired form no economic advantage
UK	Visually person	impaired	no	literary, dramatic, musical or artistic work or a published edition

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Table A16 - Accessibility requirements (transposition of Article 7 of AV Media Services Directive (2010/13/EU))

MS	General provision	Practical implementation
AT		<p>PSB: accessibility requirement for current affairs programmes on PSB, including online services (subtitles with all spoken-language TV broadcasts and audio description).</p> <p>Commercial AVMS providers – all av media services gradually made accessible to people with visual or hearing disabilities.</p> <p>Financial incentives for film productions</p>
<p>BE</p> <p>Fr</p> <p>Com</p> <p>FI</p> <p>Com</p>	<p>Advisory Committee drafts and amends the regulations regarding inter alia accessibility of programmes for people with impaired hearing.</p>	<p>PSB: Special obligation to provide access to programmes for people with impaired hearing (subtitles, sign language).</p> <p>PSB: 80% of programmes subtitled.</p> <p>PSB and commercial broadcasters: full subtitling of news programmes</p> <p>State aid for subtitling evening news: regional television broadcasters and commercial</p>
BG		<p>PSB: programme with sign language once a day and special programmes for people with impaired hearing.</p> <p>Commercial broadcasters: accessibility requirement in licensing obligations. News programmes with sign language.</p>
CZ		<p>PSB :at least 70% of programming have close or open captioning and incorporate sign language or simultaneous interpretation into it at least 2% of broadcast programmes.</p> <p>At least 10% of programmes should be made accessible to people with visual disability.</p> <p>Commercial broadcasters: At least 15 % of broadcast programmes accessible to people with impaired hearing (closed or open captioning) and at least 2% to people with impaired vision for national channels.</p> <p>On-demand providers :required where practicable to ensure that programmes have open or closed captioning or interpretation into sign language and a sound track intended for people with visual disability (</p>
CY		<p>Av providers: gradual accessibility to people with visual or hearing disabilities.</p> <p>Linear services : news bulletin of at least 5 minutes appropriate for deaf people between 18h-22h</p> <p>AV providers: increase the percentage of programmes accessible to people with hearing/visual disability by at least 5% in addition to news bulletins.</p>
DK		<p>PSB : public service obligation concerning service provision for people with disabilities</p>
DE	<p>Financially sound people with disabilities expected to pay a reduced contribution to make it easier to finance barrier-free television.</p> <p>German broadcasters should as far as possible</p>	<p>PSB and commercial broadcasters: Statutory subtitling and insertion of sign language</p> <p>Internet contributions: in large part barrier-free due to insertion sign language and subtitling.</p>

	provide for more barrier-free services.	
EE		Audiovisual media service providers : have to make their services available to people with hearing or visual disability gradually (by using subtitles, sign language, separate audio channels, teletext and other ancillary services).Reporting obligation in every two years. PSB: daily news are available with sign language interpretation
EL		PSB: subtitling and accessibility obligations depending on the nature of the programmes (informational, non-informational).
ES		Linear services : Free to air state and regional programmes : subtitling obligation for 75% of programmes and interpretation in sign language and audio-description for at least two hours per week PSB: 50%, 70% and 90% of subtitling in years 2011 -2013 Commercial broadcasters: subtitling reaching respectively 45%, 65% and 75 % in years 2011 -2013
FI	S. 19 a of the Act on Television and radio Operations (744/1998), supplemented by the government decree.	Linear services: PSB and programmes in the public interest, broadcast under national programme licence: Dubbing or subtitles-to-speech-service required for foreign language programmes and subtitling required for the programmes in Finnish and Swedish language. Gradually increasing quotas, that are higher for PSB (reaching 100% in 2016).All broadcasters: general requirement in broadcasting licences concerning subtitling of foreign language programmes
FR	Articles 28, 33-1 et 53 of the Law of 30 September 1986.	Linear services: PSB and main commercial channels: subtitling of all their programmes and proportion of programmes accessible for visually impaired people. Other channels : less stringent rules. Non linear services: recommendation for accessibility of programmes for people with hearing and vision disability.
HR		
HU	The Media Act obliges media service providers to gradually make their programmes accessible to those with hearing disability.	Linear services : PSB and important commercial channels: gradual accessibility of public service announcements, news and political information programmes as well as cinematographic works (subtitles or sign language). For cinematographic works and programmes produced for people with hearing disability a daily quota of at least 4 h of subtitling or providing sign language is set in a progressive way, to reach full subtitling in 2015.
IE	Section 43(1)(c) of the 2009 Act provides for the development of rules requiring Irish television broadcasters to provide access to people with sensory disabilities. This requirement is also reflected in Section 53 of the Disability Act, 2005.	Linear services: About 70% of broadcasting services required to provide some degree of accessibility. On-demand services: the voluntary Code of Conduct for On-demand av Providers – commitment to gradually make such services accessible.
IT	Art. 5(6) of the Audiovisual media services code adopted by	All av providers have to adopt appropriate measures to facilitate the reception of programmes by people with disabilities. At least one edition of the news broadcast on the three terrestrial PSB channels (Tg1 on Rai1,

	legislative decree n. 44/2010 Art. 4(1)f of Agcom deliberation no. 353/11/CONS on authorisations for dtb broadcasting PSB contract of service (2010-2012) signed 6 April 2011	Tg2 on Rai2, Tg3 on Rai3) has to be subtitled and one additional edition of the news has to be translated into sign language..
LT	General obligation to ensure that public information is also accessible to people with disabilities	Linear Services PSB: Programmes for people with visual and hearing disabilities in a proportion to be set by the Board. State aid funding: for cultural and educational projects aimed at adapting information of cultural and educational nature to people with visual and hearing disability.
LV	The Electronic Mass Media Law (Art.24.5) requires electronic media service providers to draw up codes of conduct indicating the measures which promote the accessibility of services to persons with visual and hearing disability.	Audiovisual media services: must be accessible to people with impaired vision and hearing. PSB: daily news with sign language interpretation.
LU	Convention on public service requires all the parties to introduce all the possible measures to provide for the accessibility of their services to people with disabilities.	Broadcasting services : TV news in the national language must be subtitled.
MT	Broadcasting Act encourages media service providers to make their services accessible to people with a visual and hearing disability.	Linear services : PSB: increase of the accessibility in particular for news broadcasts and current affairs programmes
NL		Linear Services: PSB: subtitling of 95% of programme parts which are in Dutch and measures for visually impaired people. National commercial broadcasters: subtitling of 50% of the programmes and measures for visually impaired people
PL		Linear services : accessibility requirement for people with hearing and visual disability through, audio description, subtitles and sign language (at least 10 % of quarterly transmission time)
PT		Linear and non linear services : .According to article 44, paragraph 3, the multiannual plan drawn up by the Media Regulator (ERC) contains the set of obligations relating to accessibility requirements to be followed by linear and on-demand av services.
RO	Media Law encourages audiovisual media service providers to ensure accessibility of their	Linear services: Subtitling with additional tools for news programmes. Subtitling of 17,3 % of PSB programmes .

	services to people with visual and hearing disability.	
SE		<p>PSB channels, linear: target : end of the licence period (1 January 2010 – 31 December 2013) subtitling of all programs. Hearing ability shall be prioritized by taken into account that background sound may deteriorate the ability to for people with hearing disabilities to take part of the content.</p> <p>Commercial channels, linear (TV4 largest broadcaster targeting the whole nation): All broadcasts, except live broadcasts, shall further make the sound and picture accessible in accordance with the following:</p> <ol style="list-style-type: none"> 1. 1 July 2011 – 30 June 2012: Sound (25 % of the broadcasting time), Picture (experimental works) 2. 1 July 2012–30 June 2013: Sound (50 %t), Picture(experimental works) 3. 1 July 2013 – 30 June 2014: Sound (70 %), Picture (1 %) 4. 1 July 2014 – 30 June 2014: Sound (80 %), Picture (2 %) 5. 1 July 2015 – 30 June 2016 : Sound (90 %), Picture (3 %) <p>65 Commercial channels (others than TV4): general obligation to promote accessibility</p>
SK		<p>Linear services:</p> <ul style="list-style-type: none"> - PSB broadcasting a television programme not digitally: 25% of all broadcast programmes accompanied by closed or open captions and 1% translated into sign language - PSB broadcasting digitally a television programme: 50% of all broadcast programmes accompanied by closed or open captions and 3% translated into sign language and 20% of all broadcasts programme with voice comment for people with visual disability. - Commercial broadcasters broadcasting digitally a television programme: 10% of all broadcast programmes accompanied by closed or open captions and/or translated into sign language and 3% of all broadcast programmes accompanied by voice commentaries for the blind. <p>AVMS providers must indicate clearly all programmes accessible to people with hearing and visual disability.</p>
SI	Public broadcasting should ensure broadcasts intended for visually impaired and deaf people.	State aid financing: in the field of production and broadcasting and audiovisual media intended for deaf and hard of hearing.
UK	Section 303-305 of the ommunications Act 2003 – commitment to extend access to broadcasting services for people with hearing and visual disability and to ensure consistently high standard of these services	<p>Linear services : Ofcom currently requires 72 channels with an audience share of 0, 05% or more to:</p> <ul style="list-style-type: none"> - subtitle 80% of their programmes within 10 years - audio describe 10% of their programmes (10y) - sign 5% of their programmes (10y) <p>Broadcasters with an audience below 1%: 30 minutes of sign-presented programming a month, or make alternative arrangements acceptable to Ofcom. Most have chosen to contribute funding to the British Sign Language Television Trust, which funds sign interpreted programmes on the Community Channel. BBC additionally provides for signing and audio description On –demand services:</p> <p>ATVOD: advice to on-demand service providers of best practice and encourage those that serve a significant audience to provide facilities for</p>

		people with hearing and vision disability. BBC and Channel 4 already provide for subtitling for many of its on-demand programmes
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8.16. ANNEX M – ONLINE TRANSMISSIONS AND THE EXHAUSTION OF RIGHTS

In order to reconcile the free movement of goods within the Union with the territoriality of national IPRs, the CJEU developed the doctrine of exhaustion. Subsequently, this doctrine was incorporated into several legal acts, such as into Article 4 (2) of Directive 2001/29 (the InfoSoc Directive). According to that provision, the right of distribution is exhausted "where the first sale or other transfer of ownership in the Community... is made by the rightholder or with his consent." Similarly, Article 4(2) of Directive 2009/24 on the legal protection of computer programs states that "the first sale in the Community of a copy of a program by the rightholder or with his consent shall exhaust the distribution right within the Community of that copy".

Because of the principle of exhaustion, consumers and other users who purchase a physical copy of a work or other subject-matter are generally free to dispose of that copy e.g. via reselling or giving it as a gift. The principle of exhaustion also makes parallel imports (cross-border) possible in the Internal Market.

So-called "download-to-own" services allow the customer to use the acquired content (e.g. the digital copy of a film) for an unlimited period of time, and therefore resemble, to a certain extent, sales contracts in the physical world e.g. the purchase of a film on a DVD. The question arises whether customers should be able to dispose of a digital copy acquired via an online service as they would be with regard to a physical copy. In the responses to the public consultation consumers argue that there is an unequal treatment of physical and digital works – in their view it should be permitted to resell both types of works.

Traditionally, both the right of distribution and the principle of exhaustion were considered to be limited to physical copies. The transmission of digital copies via digital networks was considered not to concern the right of distribution (which is subject to the principle of exhaustion) but rather the right of communication to the public/making available to the public. According to Article 3(3) of Directive 2001/29, the right of communication to the public/making available to the public "shall not be exhausted by any act of communication to the public or making available to the public".

In Case C-128/11 (*UsedSoft*)⁴¹⁹, however, the CJEU rejected, with regard to computer programs as protected under Directive 2009/24/EC, a distinction between the physical

⁴¹⁹ The applicant, Oracle, is a leading provider of database software. Oracle markets its software, in 85% of cases, by allowing its customers to download the software from its website. The licence agreement gives the customer a non-transferable user right for an unlimited period, exclusively for his internal business purposes. The defendant, *UsedSoft*, markets "used" or "second hand" licences acquired from customers of Oracle. Customers of *UsedSoft* who are not yet in possession of the software download it directly from Oracle's website after acquiring such a "used" licence. The principle of exhaustion of the distribution right applies both to copies of a computer program marketed by the rightholder on material media (CD-ROM or DVD) and to copies distributed by means of downloads from a website. The CJEU stated that where the rightholder makes available to his customer a (tangible or intangible) copy and concludes a licence agreement allowing the use of that copy for an unlimited period, the rightholder sells the copy to the customer. Thus, his exclusive right of distribution is exhausted. Even if the licence agreement prohibits a further transfer, the rightholder cannot oppose the resale of that copy. The first acquirer of a tangible or intangible copy of a computer program for which the copyright holder's right of distribution is exhausted must make the copy downloaded onto his own computer unusable at the time of resale. If he continued to use it, he would infringe the copyright holder's exclusive right of reproduction of his computer program. In contrast to the exclusive right of distribution, the exclusive right of reproduction is not exhausted by the first sale. The copy made by the second acquirer benefits from the exception to the right of reproduction provided for in Article 5(1) of the Computer Program Directive.

distribution of copies and the online distribution of copies. The Court pointed to the absence of a specific right similar to Article 3 of the Infosoc Directive for computer programs in Directive 2009/24; and recalled the objective of the principle of the exhaustion of the right of distribution of works protected by copyright which is, "in order to avoid partitioning of markets, to limit restrictions of the distribution of those works to what is necessary to safeguard the specific subject-matter of the intellectual property concerned" (para. 62). Allowing the rightholder for computer programs "to control the resale of copies downloaded from the internet and to demand further remuneration on the occasion of each new sale, even though the first sale of the copy had already enabled the rightholder to obtain an appropriate remuneration," [...] would go beyond what is necessary to safeguard the specific subject-matter of the intellectual property concerned (para. 63).⁴²⁰

In both Directive 2009/24 (the Computer Program Directive) and Directive 2001/29 (the InfoSoc Directive), the principle of exhaustion is limited to the right of distribution and requires a "sale". The central question is therefore whether offering a copy of a work for download (against a payment) can be regarded as an act of distribution and, hence, also as a "sale". The CJEU answered this question in the positive as regards computer programs and held that where a contract satisfies the conditions for a transfer of ownership that in the case of a download ownership in an immaterial copy is transferred. This approach allowed the Court to state that the principle of exhaustion is not limited to the distribution of physical copies (of a computer program). Otherwise, the Court argued, suppliers could easily circumvent the rule of exhaustion by not marketing their products on physical carriers and calling a contract that allows the use of a copy for an unlimited period of time simply a "licence" rather than a "sale".

A United States District Court, on the other hand, denied the possibility of a first-sale doctrine defense in a case concerning the re-sale of digital music files, stating that "the Court cannot of its own accord condone the wholesale application of the first sale defense to the digital sphere" and stressing that "Congress has the constitutional authority and the institutional ability to accommodate fully the varied permutations of competing interests that are inevitably implicated by such new technology".⁴²¹

As regards the right of reproduction (which is not subject to the principle of exhaustion), the CJEU held that an original acquirer of "a copy of a computer program for which the copyright holder's right of distribution is exhausted [...] must, in order to avoid infringing the exclusive right of reproduction in a computer program [...] make his own copy unusable at the time of its resale". Although the Court acknowledged that ascertaining whether the reseller's copy has been made unusable may prove difficult, it did not see a difference in relation to copies resold on e.g. a DVD, as a copy might also be kept by the reseller in that situation. In both cases, the rightholder is free to apply technical protection measures such as product keys.

It remains to be seen whether the CJEU will apply the principle of exhaustion also to digitally distributed copies of works other than computer programs. In Case C-128/11 the Court also

⁴²⁰ See also joined Cases C-403/08 and C-429/08 (Premier League) where the Court distinguished between the "appropriate remuneration" of rightholders and a "premium" resulting from absolute territorial restrictions. The Court held that "the payment of such a premium goes beyond what is necessary to ensure appropriate remuneration for those rightholders" (para. 116).

⁴²¹ Capitol Records, LLC vs. ReDigi Inc (Case No. 12-0095, 2012 U.S. Dist.). ReDigi is an online marketplace that allows its users to buy or sell pre-owned music files - that are verified to be legally obtained (e.g. via the iTunes Store) - to other users. ReDigi claims that its transaction system allows the transfer of music files between users without any duplication of the concerned files (there are never two copies that exist in parallel).

stressed the *lex specialis* character of the Computer Program Directive in relation to the InfoSoc Directive. However, unlike the Computer Programs Directive, Article 3 of the Infosoc Directive provides for a communication to the public right which is not subject to an exhaustion principle. Recital 29 of Directive 2001/29/EC (the InfoSoc Directive) states that “the question of exhaustion does not arise in the case of services and on-line services in particular”. The scope of Article 3 was addressed in the *ITV v TV Catchup* case for internet transmissions for the first time.⁴²²

Nevertheless, the Court made the following obiter dictum with regard to the InfoSoc Directive:

"It follows from Article 6(1) of the Copyright Treaty, in the light of which Articles 3 and 4 of Directive 2001/29 must, so far as possible, be interpreted [...] that the existence of a transfer of ownership changes an ‘act of communication to the public’ provided for in Article 3 of that directive into an act of distribution referred to in Article 4 of the directive which, if the conditions in Article 4(2) of the directive are satisfied, can, like a ‘first sale ... of a copy of a program’ referred to in Article 4(2) of Directive 2009/24, give rise to exhaustion of the distribution right" (para 52).

In any case, there remains an important difference between the Computer Program Directive and the InfoSoc Directive with regard to the right of reproduction. Only the Computer Program Directive provides for an exception if reproductions "are necessary for the use of the computer program" (Article 5 (1) of the Computer Program Directive). In the *UsedSoft* Case, the existence of this exception was the only reason why the second acquirer did not infringe the rightholder’s right of reproduction (which is not subject to exhaustion). As this exception is only provided for in the Computer Programs Directive, reproducing a work other than a computer program is not covered. Therefore, even if the principle of exhaustion also applies to the online distribution of digital copies of works other than computer programs (i.e. if it also applies in the context of the InfoSoc Directive), the second acquirer of a digital copy would still infringe the right of reproduction. In the absence of a comparable exception in the InfoSoc Directive that achieves the same result as Article 5(1) of Directive 2009/24 for computer programs, rightholders could therefore still prevent the resale of copies of their works on the basis of the right of reproduction (regardless of whether the right of distribution is exhausted or not).

The results of the public consultation show that generally rightholders and CMOs consider that a legal framework which would enable unlicensed resale of digital content would have very serious negative consequences for the market as it would undermine the investment in copyright content. There are fundamental differences in the impact on rightholders of the resale of digital works versus physical, they argue. While a physical copy will depreciate in value and quality over time, digital content will remain in the original state. Also, rightholders and CMOs argue that it is impossible to ensure that the reseller destroys the original copy or copies. In such situation there is no ‘transfer’ of the copy but its multiplication. It is also emphasised that the traditional concept of ownership which applies to physical goods should not be applied to digital content as the two are incomparable. Users of digital content may access such content on various devices and may use various functionalities that are not available in the case of physical copies. The needs of users are addressed by the marketplace rightholders and CMOs argue (e.g. users of online music services may share their playlists for

⁴²² Case C-607/11 (*ITV Broadcasting vs TV Catch Up*)

free) and the principle of exhaustion applied to digital content would seriously hamper enforcement as it would practically legalise piracy.

Service providers are divided on the issue of exhaustion vis-à-vis digital content with some calling for the extension of exhaustion to digital content, some opposing such extension for the reasons listed above and some stressing the complexity of the issue and the need for further analysis.

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8.17. ANNEX N - LEGAL UNCERTAINTY ON LINKING AND BROWSING

In the Svensson case (C-466/12 -Svensson), which involved the provision of hyperlinks to articles on a web site that was freely accessible to the general public, the CJEU said that the provision of such links constituted an ‘act of communication’ within the meaning of Article 3 of Directive 2001/29/EC. However, since the users to which the links were communicated could have accessed the works on the website on which they had originally been made public, the criterion of communication to ‘a new’ public was not fulfilled. The CJEU concluded that there was therefore no communication to the public in accordance with the mentioned Article 3 of Directive 2001/29/EC. Other cases are pending before the CJEU⁴²³ in which the question has been raised whether the provision of a clickable link constitutes an act of communication to the public/making available to the public subject to the authorisation of the rightholder.

The Svensson case prompted debate among academics and stakeholders on the issue of linking. It is argued by some that (i) establishing a hyperlink does not amount to “transmission” of a work, and that such transmission is a pre-requisite for “communication”; (ii) that the rights of the copyright owner apply only to the communication of a work, and whatever a hyperlink provides, it is not a work; and (iii) that even if a hyperlink is regarded as a communication of a work, it is not to a “new public.”⁴²⁴ According to a different view, the right of communication to the public/making available to the public also covers the mere offering of a work to the public (as opposed to being limited to the actual transmission of a work); accordingly, the making available right could also cover links that enable members of the public to access specific protected material.⁴²⁵ Among the different stakeholders that replied to the public consultation, several rightholders, CMOs and publishers consider that links providing a direct connection to a specific work, or which are embedded or framed, should be subject to the rightholder’s authorisation. They also consider the legislation should protect rightholder and licences service provides against those providing hyperlinks to unlawful content or which circumvent paywalls or other protection measures.

Service providers, most institutional users and some publishers do not believe that linking should require the rightholders’ authorisation, and that a link only facilitates access to already publicly available works.

When browsing the internet, a user (e.g. viewing a web-page) regularly creates temporary copies of works and other subject-matter protected under copyright on the screen and in the ‘cache’ memory of his computer. A question has been referred to the CJEU⁴²⁶ as to whether such copies are always covered by the mandatory exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC. Most stakeholders believe that browsing should not be subject to the rightholder’s authorisation and that temporary and incidental copies made in that context fall under the exception in Article 5(1). Rightholders, CMOs and publishers believe that the exception should not cover temporary and incidental reproductions on illegal websites. Service providers, however, are of the view that Article 5(1) should not be interpreted narrowly and that also browsing of illegal websites should be exempted since the user cannot know whether the site is illegal or not before visiting it.

⁴²³ Cases C-348/13 (Bestwater International) and C-279/13 (C More entertainment).

⁴²⁴ See, in particular, the European Copyright Society’s Opinion (retrieved on 11 December 2013): http://www.ivir.nl/news/European_Copyright_Society_Opinion_on_Svensson.pdf

⁴²⁵ See, in particular, ALAI’s opinion (retrieved on 11 December 2013): <http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf>

⁴²⁶ Case C-360/13 (Public Relations Consultants Association Ltd). See also http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0202_PressSummary.pdf

Given the importance of linking and browsing to the proper functioning of the internet, legal uncertainty as to how copyright extends to these activities is problematic for internet users and rightholders alike.

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8.18. ANNEX O - IDENTIFICATION AND LICENSING

There are many private databases of works and other subject matter held by producers, collective management organisations, and institutions such as libraries, which are based to a greater or lesser extent on the use of (more or less) interoperable, internationally agreed ‘identifiers’. Identifiers can be compared to a reference number embedded in a work, are specific to the sector in which they have been developed⁴²⁷, and identify, variously, the work itself, the owner or the contributor to a work or other subject matter. There are notable examples of where industry is undertaking actions to improve the adoption of identifiers, the development of rights ownership databases, and the interoperability of such identifiers and databases. Taking a step further, there are a number of examples of market initiatives to streamline licensing across a range of sectors and use cases.

Under the International Organization for Standardization (ISO), the ISO Technical Committee 46, Steering Committee 9, is responsible for international standards for telephony, technology, metadata, identifiers, etc. Under its aegis the following identifiers have been developed:

- ISBN (International Standard Book Number)
- ISSN (International Standard Serial Number)
- ISWC (International Standard Musical Work Code)
- ISRC (International Standard Recording Code)
- ISAN (International Standard Audiovisual Number)
- ISNI (International Standard Name Identifier)

In the audiovisual sector, the ISAN International Agency and the Entertainment ID Registry (EIDR) are pursuing efforts to support seamless registration of content IDs in either system.⁴²⁸

These identifiers provide a greater or lesser degree of meta information about a given work e.g. the ISWC does not incorporate author data but rather relates to a global database containing author, publisher and other rights management information. The ISBN on the other hand does comprise a region code, a publisher prefix, and numbers specific to the publication (sequentially attributed).

In addition to identifiers, there are a wide range of databases and registries of works and other subject matter, which may be specific to a sector or even an institution.

In the music sector, for example, the Global Repertoire Database⁴²⁹ should, once operational, provide a single source of information on the ownership and control of musical works worldwide.

In connection with orphan works in Europe, the ARROW, (Accessible Registries of Rights Information and Orphan Works towards Europeana), is a project of a consortium of European national libraries, European and national publishers and collective management organisations, representing publishers and writers which aims to find ways to identify rightholders, rights

⁴²⁷ E.g. the International Standard Recording Code (ISRC) is used to identify recordings, the International Standard Book Number (ISBN) is used to identify books

⁴²⁸ <http://eidr.org/eidr-and-isan-to-provide-seamless-registration-of-content-ids/>

⁴²⁹ <http://www.globalrepertoiredatabase.com/>

and clarify the rights status of a work including whether it is orphan or out of print. ARROW is an automated tool to facilitate rights information management in any digitisation project involving text and image based works.⁴³⁰ Once the Orphan Works directive is implemented, the ARROW search tool is expected to facilitate libraries when carrying out the diligent search for absent rightholders as required by the directive. In the audiovisual sector, the “FORWARD” project (Framework for a EU-wide Audiovisual Orphan Works Registry) aims to design and implement a EU-wide system to assess the rights status (including Orphans) for all types of audiovisual works by federating the information resources of multiple national clearing centres.

The Orphan Works directive also foresees the creation of a single online EU database of Orphan Works, the aim of which is to enhance transparency, both for rightholders and users, as regards works digitised and made available by libraries and other cultural institutions under the directive. The database, that will be managed by OHIM (Office for the Harmonisation of the internal market) is currently under development and expected to be up and running by the October 2014 implementation deadline of the Directive.

The Linked Content Coalition⁴³¹ was established to develop building blocks for the expression and management of rights and licensing across all content and media types. It includes the development of a Rights Reference Model (RRM) – a comprehensive data model for all types of rights in all types of content, whether published by major industry players, or by individual creators.⁴³²

The UK Copyright Hub⁴³³ is seeking to take sector-specific identification and database systems a step further, and to create a linked platform, enabling automated licensing across different sectors.

Most stakeholders encourage the EU to further promote and projects such as those mentioned in their responses to the public consultation. Some stakeholders such as institutional users highlight that identifiers and databases⁴³⁴ should be based on open standards and should be interoperable.

Despite the above, it is still the case that commercial users cannot always identify who owns the distribution rights to a given work etc. in a given Member State, and that individuals cannot always find out how they should seek a licence.

Formal registration of copyright is not often discussed as the existing international treaties in the area prohibit formalities as a condition for the protection and exercise of rights.⁴³⁵

⁴³⁰ ARROW is currently fully operational in 9 Member States and at an advanced state of implementation in 7 more Member States (ARROW Plus): <http://www.arrow-net.eu/news/arrow-plus-final-conference.html>

⁴³¹ www.linkedcontentcoalition.org.

⁴³² See also the Rights Data Integration Project (<http://www.rdi-project.org/>), partially funded under the Competitiveness and Innovation programme; consortium members include Linked Content Coalition members.

⁴³³ <http://www.copyrighthub.co.uk/>

⁴³⁴ Regarding in particular permissions databases, service providers and users state in their contributions to the public consultation that they should be monitored carefully.

⁴³⁵ Certain formalities as to the enforcement of rights are, however, compatible with international agreements, both with regard to domestic and non-domestic works. According to Title 17 § 412 US Copyright Code, for example, registration is a general prerequisite to certain remedies for copyright infringement (the award of statutory damages and attorney’s fees).

However, this prohibition is not absolute (it does not affect “domestic” works – i.e. works originating in the country imposing the formalities as opposed to works originating in another country). Moreover a system of registration does not need to be made compulsory or constitute a precondition for the protection and exercise of rights. With a longer term of protection and with the increased opportunities that digital technology provides for the use of content (older works and works that otherwise would have never been disseminated included) the advantages and disadvantages of a system of registration are increasingly being discussed e.g. the possibility to condition a Berne plus duration (e.g. the last 20 years of 70 years pma) on compliance with formalities.

Authors are almost unanimously against the idea of registration which they consider it costly, complicated and an additional burden. They also point out that several registration systems already exist in the Member States (e.g. RPCA or BALZAC in France) and that adding an EU system would not be beneficial. Instead they propose that the Commission supports and promotes those systems. Other concerns expressed by authors relate to the uncertainty about data collected, costs for users and in general costs and risks associated with formalities. Publishers/producers/broadcasters and CMOs have the same view as authors and they also underline the fact that voluntary systems already operate in the MS (ISBN, ISAN, EIDR).

Intermediaries/service providers are generally in favour of a Berne-compliant, voluntary, EU-wide registration. In their opinion registries would have the advantage of facilitating licensing and improving legal certainty, but the full advantages of registries go beyond licensing. An example of Creative Commons as a simple registration system is given. Also institutional users support the idea of an EU registration system, the main advantage of it being the easier identification of authors and orphan works. However, they point out that such a system to be effective would need to be mandatory, which is not permitted by international treaties. Consumer organisations see the advantage of the registration system in the enriching of the public domain, i.e. unregistered works would not be locked up and they could be used as building blocks of the new creations. It would also be easier and cheaper to obtain licenses if the owner were easily identified.

8.19. ANNEX P - ADEQUATE REMUNERATION OF AUTHORS AND PERFORMERS

The EU *acquis* recognises a number of exclusive rights of authors and performers and in the case of performers whose performances are fixed in phonograms, a remuneration right⁴³⁶. There are only a few provisions in EU law governing the transfer of rights from authors or performers to producers⁴³⁷, as this area traditionally has been for the Member States to regulate. Consequently, there are significant differences in this respect (especially but not exclusively in the audiovisual sector) built over decades on diverse cultural and legal traditions. The different approaches are likely to become more manifest with the increased frequency of multi-territorial exploitation by on-line service providers.

In EU law, Article 3(2a) of the Term Directive⁴³⁸ provides that performers can terminate contracts on transfer or assignment in the event that the producer does not exploit the phonogram in question. In the Rental and Lending Directive, in order to ensure remuneration when assigning or transferring exclusive rights, authors and performers have been granted an unwaivable right to equitable remuneration with respect to the rental right.⁴³⁹ As EU legislation in this area provides for “minimum harmonisation”, Member States remain free to adopt mechanisms to ensure adequate remuneration in their national legislation beyond the cases foreseen in the Directives. Finally, in certain limited cases the *acquis* imposes the collective management of exclusive rights (cable retransmission⁴⁴⁰) or allows Member States to impose it (resale right⁴⁴¹). Article 5(3) of the Rental and Lending Directive provides Member States with an option to impose the collective management of the remuneration right.

Developments in the different sectors

As regards the transfer of rights and equitable remuneration, different solutions seem to have developed in the different sectors.

In the **audiovisual sector**, *authors* usually transfer their exclusive economic rights to the producer. Remuneration may be restricted to a lump sum payment for their contribution to an audiovisual work (writing and/or directing etc.). The majority of the Member States does not provide a framework for audiovisual authors to receive a "per-use" payment for the primary, including online, exploitation of their works. In some Member States (France, Belgium and Bulgaria) a contractual practice has emerged whereby audiovisual authors reserve the right for collective management organisations to collect on their behalf from broadcasters for the broadcast of their works. In some Member States, notably in the UK, collective bargaining agreements governing the TV sector also include specific provisions for the remuneration to audiovisual authors. Where this practice exists, authors are said to achieve the best results in the negotiation of the terms of their contracts. However, in some Member States (Ireland and the Netherlands) collective bargaining has been found to be contrary to competition law on the basis that authors are predominantly free-lancers and as such they cannot be represented by the unions in negotiations. Finally, in some other countries (Spain, Italy and Poland) there is a legal requirement for the final distributor, usually a broadcaster, to remunerate authors for the exploitation of their works (the producer is nevertheless vested with the economic rights that need to be cleared for exploitation.)

⁴³⁶ Article 8(2) of Directive 2006/115/EC (“Rental and Lending Directive”).

⁴³⁷ See e.g. Article 3(3)-(6) of Directive 2006/115/EC.

⁴³⁸ Directive 2006/116/EC as amended by Directive 2011/77/EU.

⁴³⁹ Article 5 of the Rental and Lending Directive.

⁴⁴⁰ Article 9(1) of Directive 93/83/EEC on satellite broadcasting and cable retransmission

⁴⁴¹ Article 6(2) of Directive 2001/84/EC on the resale right

As with audiovisual authors, in most EU countries the exclusive economic rights of audiovisual *performers*, including the right of making available for interactive online use and the cable retransmission right, are usually transferred to the producer by law or by contract upfront, in exchange for a lump sum. A few Member States, such as Spain, provide for a separate equitable remuneration for audiovisual performers in addition to the exclusive right of making available.

In the **music sector** *authors* transfer the rights to producers for the making and the distribution of phonograms whereas they typically mandate their collective management organisation to manage the family of “communication rights” (broadcasting, public performance) and “digital rights” (reproduction and making available). In some specific cases (e.g. Anglo-American repertoire), some rights are transferred to the music publishers.

Performers normally transfer upfront all of their exclusive rights to producers. The situation is different for the remuneration rights for the public performance and broadcasting where Article 8(2) of the Rental and Lending Directive provides for a single equitable remuneration to be paid by the user if a phonogram published for commercial purposes is used for broadcasting by wireless means or for any communication to the public, and ensure that this remuneration is shared between the relevant performers and phonogram producers. In most Member States (with the exception of Ireland), this remuneration right is understood to cover some internet transmission, notably simulcasting (i.e. the simultaneous retransmission of a broadcast over the internet). In those cases performing artists in the music sector receive a single equitable remuneration in case a phonogram published for commercial purposes is simulcast.

In the **book sector**, the publishing contracts between *authors* and publishers have become more and more complex as the forms of exploitation of books and texts have multiplied over the last years. In exercise of contractual freedom, a great diversity of frameworks and practices have developed in the EU, for example, in the UK, an exclusive license with an intermediary between the author and the publisher (agent), assignment of rights in France or Spain (*dualist* regime; no possible waiver of moral rights in addition to the assignment of exclusive economic rights), “concession of rights for simple use or exclusivity” in Germany (*monist* regime; moral and economic rights are linked).

Differences in the contractual regimes are most often related to the scope and the object of the contract; exclusivity, limitation in time or geographical restrictions, scope of the rights, etc. It is compulsory in all Member States for all contracts to be in a written form. Some assignments extend to the full period of copyright protection (e.g. in France for domestic works), while others are limited (e.g. 15 years in Spain). The publishing contracts are traditionally concluded on a worldwide basis by language except for the UK where British publishers have exclusive rights only for the Commonwealth and Ireland and US publishers have exclusive rights for the US, Canada and Mexico. The rest of Europe was traditionally non-exclusive, which allowed for competition between UK and US editions. Each right assigned (e.g. hardcovers only, audiovisual adaptation or not, translation or not, digital rights included or not) might entail different levels of royalties.

A flat-rate payment for the author of a book is not frequent. It takes place only for collaborative works such as textbooks or dictionary or for on command works. The remuneration of the authors of trade books is traditionally proportionated to the sales. In most cases, publishers pay advances against royalties to authors (that they do not recover if the book is less successful than expected). Most national laws have a “best-seller clause” which

has to be included in the publishing contracts. Finally, authors argue that the application of fixed book prices in some Member States (e.g. Germany, Spain and France) has a positive impact on the level of the remuneration of authors.

In the **journalism and photography sector**, the very different bargaining power of the parties also seems to be the problem, in particular when the *author* is a free-lancer. Model contracts, if they exist in a sector, are not widely used, and collective bargaining does not seem to play a role. In this sector again, practices differ between Member States. In some Member States, notably the UK, Ireland and Malta, authors may sometimes have to waive their moral rights.

Discussions with stakeholders show that there are a number of contentious issues arising from the different bargaining powers and contractual practices of the relevant market players.

On the one hand, authors and performers, supported by representatives of users, argue that their weak negotiating position often results in unfair contractual terms (e.g. buy-out clauses and one-off lump sum payments). In particular, they argue that they do not benefit equally from the technological (digital) change in the production and distribution of audiovisual works and music. They point out that many contracts for the exploitation of works were concluded before the emergence of digital content distribution, and many contracts do not explicitly cover digital royalties. The way in which new online streaming services are licensed may circumvent the payment of digital royalties to artists and hence contravene the aim to create a favourable environment in the digital world for creators and rightholders, by ensuring appropriate remuneration for their creative works.

Authors and performer, supported by the users, IP organisations, cultural organisations, postulate collective bargaining and the right to re-negotiate and terminate contracts as a minimum safeguard of their rights, the introduction into the legislation the “use it or lose it” or “best-seller” clauses, or the obligation to conclude separate contracts for digital use, with terms adjusted to this type of exploitation.

AV authors and collecting societies argue that fairer contractual terms would not provide a solution in itself, as they could only affect the transfer of rights, buy-out, etc. in the first contract between the author or performer and the publisher/producer. They consider that this alone would not create a relation between the success of the work and author’s or performer’s remuneration. Therefore, they argue in favour of an unwaivable remuneration right that is collectively managed. Other authors/performers, in particular in countries with strong tradition of collective bargaining, however express concerns that the introduction of an unwaivable remuneration right would reduce the value of the author’s or performer’s exclusive right and weaken their bargaining position that traditionally relies on these exclusive rights.

As far as contracts are concerned, many would support the introduction on some or all of the following provisions: prohibition of a global transfer of rights or transfer for yet unknown forms of exploitation, transfer or licensing of rights for future works, in the case of lack of exploitation by the producer, publisher, broadcaster, the transferred rights should revert to the author, prohibition of non-disclosure agreement, a termination right, a prohibition of contracts ending only at the end of the copyright term, etc.. These measure however do not suit all authors and performers equally, the situation often differs in different sectors. Many underline the importance of the transparency of accounts and regular reporting by the publisher/producer to the author/performer. Institutional users stress the importance of prohibiting certain contractual clauses, as well as the confidentiality clause in contracts as this

widespread practice leads to the loss of information and bargaining power by the wide community that enter into agreements with publishers and other service providers.

Nearly all respondents underlined the importance of collective bargaining in ensuring fair remuneration to authors and performers. Industrial agreements and model contracts can both improve the situation of authors and performers and counterbalance the weaker bargaining position of individuals. In this respect, the US system and the German legislation are often cited as good examples. Some encourage the Commission to foster a dialogue between stakeholders towards more flexible contracts. Some collecting societies underline the role of collective right management in protecting the interests of authors and performers vis-à-vis producers, etc.

Some respondents (journalists and translators, in particular) express concerns about the transfer or the lack of recognition of their moral rights.

On the other hand, producers underpin their position by the argument that investment in audiovisual content and in music usually entails high financial risk. They say that predicting the popularity of a particular title is a highly complex exercise and it is difficult, if at all possible, to guarantee the success of a film in terms of box-office revenue. A similar reasoning applies to the popularity of music. Because of the information gap that exists between the producer and the consumer with respect to the level of demand and the significant sunk cost associated with the production of such works, producers argue that they face a significant hazard when deciding to invest money and resources into a project. In these sectors companies usually have to invest large upfront amounts of money in order to produce, develop and market the works created by the artists⁴⁴². Similar arguments are advanced by book publishers⁴⁴³. In general, publishers, producers but also broadcasters are of the opinion that authors and performers are appropriately remunerated thanks to the existing law and practice. They consider that this area must be regulated by the market and the most important thing is to ensure contractual freedom and negotiations. Some suggest that an obligation imposed on online platforms to co-finance AV productions, as is the case of traditional broadcasters, would further improve the situation of creators. Most of those stakeholders do not think that there is any reason for the EU to act in this area, because contract law is a national competence, and because there are differences between sectors which are best addressed at as low a level as possible. They object to an introduction of an unwaivable right to remuneration managed by the collecting societies, arguing that it would lead to increasing dispersion/ fragmentation of rights; prevent their centralisation in the producer and therefore make licensing slower and more difficult; and ultimately hamper the accessibility of content to consumers.

Intermediaries, distributors and service providers underline the importance of fair remuneration but argue in favour of maintaining contractual freedom. They do not see the introduction of a remuneration right as a suitable solution and consider that the payment of the author/performer should be arranged in the contract with the producer/publisher.

The information currently available to the Commission on this matter is not yet sufficient to allow for a conclusion as to nature of the problems in the market and whether they need to be

⁴⁴² CRA Study on Territoriality (2013) prepared for the Commission [not yet published]

⁴⁴³ The costs linked to physical books (printing, transport and storage) are not a major part of the investment. Instead, the editorial work (commissioning and acquisition, copy-editing, copyright fees), the production (type-setting, layout and design), the sales and marketing, the distribution (also for online works) and the finances require major investment from any publisher. Book publishers argue that on average, out of ten books published, one is profitable, two cover the costs and seven do not recover the investment.

addressed at EU level. In particular, there is a need to obtain information on, among other things, the contractual practices, negotiation mechanisms, the effects of the presumptions of transfer of rights mechanisms, the role of collective bargaining and of collective management organisations. The Commission has recently commissioned a study to provide an assessment of different national approaches and mechanisms that may affect the level of remuneration of authors and performers.

PROVISIONAL

8.20. ANNEX Q: ENFORCEMENT

With the internet, behaviours concerning the consumption of copyrighted content (in particular music but increasingly films and books as well) has changed dramatically. Until the spread of the internet, music consumption took place either through broadcast/TV or the purchase of phonograms. The number of producers of broadcasts and phonograms was fairly limited and the production of high quality counterfeits relatively expensive. Therefore, infringement levels were comparatively low and the enforcement of copyright was reasonably straightforward.

The internet has changed the situation in many respects:

- New possibilities of music consumption have opened up: internet radio, file (e.g. mp3) download on various devices, web streaming.
- All these new modes of consumption are, physically, not limited by distance or borders.
- Marginal costs of producing copyright infringing digital copies of the identical quality as the original are almost zero.
- The same holds for transaction costs (publicising websites/P2P download possibilities etc., dissemination of copies), arguably only financial transactions still represent a certain cost factor.

Internet facilitates to a certain extent anonymity of its users.

Pirated material can literally be sent by everybody from everywhere to anybody anywhere. Moreover, infringements of copyrighted content online have become so frequent that they are no longer considered by consumers as illegal or even if illegal, as causing economic harm. At the same time, given that technology allows for almost perfect copies at low cost, piracy has become an even more profitable business.

1. Current EU and national legal frameworks

The current EU regulatory framework already provides for tools which can in principle be used to tackle online copyright infringement. The Directive on the enforcement of IPR (Directive 2004/48/EC, “IPRED”) and Article 8 of the Infosoc Directive make provision for civil remedies in case of infringement of copyright. These provisions encompass in particular evidence-gathering powers for judicial authorities, powers to force offenders and any other party commercially involved in an infringement to provide information on the origin and distribution network of the infringing goods, provisional and precautionary measures (including against intermediaries whose services are used to infringe a copyright), permanent injunctions, powers to force offenders to pay damages. Directive 2000/31/EC on the electronic commerce is also relevant in the context of the enforcement of copyright. Article 14 of this Directive, as interpreted by the European Court of Justice, provides that, for a hosting service provider to avoid being held liable for illegal content (including content infringing copyright), it should expeditiously act on adequately substantiated and sufficiently detailed notices⁴⁴⁴. At the same time its Article 15 prohibits Member States from imposing on intermediaries a general obligation to monitor content that they transmit or host.

⁴⁴⁴ “Acting” takes the form of removing or disabling access to the illegal content by a “hosting provider”.

Beside these harmonisation instruments, the EU has also launched in 2009 a European Observatory on infringements of IPR. This has, included in its tasks, the need to identify trends in on-line copyright infringement in order to provide evidence on the need for adjustments to enforcement policy in this field. It has recently undertaken a first survey⁴⁴⁵ for this purpose that will be repeated on a bi-annual basis.

This EU framework has created high European legal standards to enforce copyright. All Member States have implemented IPRED as well as Article 8 of the Infosoc Directive and provided for civil remedies in case of infringement of copyright. Some Member States have also implemented other measures than those foreseen in IPRED to encourage better compliance with copyright law (for example administrative procedures in France with the HADOPI law⁴⁴⁶, in Spain with the Ley Sinde⁴⁴⁷, or in Italy with the regulation on online copyright enforcement⁴⁴⁸). At Member States level, the legal framework regarding the liability of hosting service providers (Article 14 of the e-commerce Directive referred to above) has created an incentive for the development of “notice-and action” procedures that are used to enforce copyright on the internet.

2. Problems identified in the current legal framework

The results of the public consultation on copyright show that many rightholders consider that the civil enforcement system could be improved and is for now time-consuming, expensive and inefficient. Many publishers see it as difficult and expensive to enforce rights case by case, the more so as rulings are difficult to enforce effectively. Generally, it is noted that there is limited capacity in the national courts (and limited rightholders’ time and money) to bring the number of actions against infringers necessary to curb infringement. A number of cross-border problems are reported, in particular for injunctions and damages.

Moreover, it is reported that the lack of efficiency of civil enforcement proceedings is aggravated by the lack of involvement of intermediaries in inhibiting online copyright infringements. Notice and take-down procedures are regarded as currently lacking effectiveness. Publishers claim that the e-commerce Directive is regarded as crucial in this context, given that it introduced an exemption from liability because the ISPs did not have many possibilities to influence the internet and to regulate their services. However, they claim that there are today many technologies to regulate the internet and that the safe harbour as foreseen by the e-commerce directive is no longer justified. Other contributions on the other hand raise the danger of using intermediaries as an extended arm for law enforcement given the destructive effects of censorship.

While institutional users on the other side consider that the best way to fight commercial piracy is to legalise the not-for-profit sharing of works between individuals, many intermediaries agree that improvement could be brought to civil enforcement systems. They are however of the opinion that instead of disproportionate actions against users, the civil enforcement system in the EU should focus on measures against professional infringers which

⁴⁴⁵ The European Citizens and Intellectual Property: Perception, Awareness and Behaviour, <https://oami.europa.eu/ohimportal/en/web/observatory/observatory-publications>

⁴⁴⁶ Loi n° 2009-669 du 12 juin 2009 favorisant la diffusion et la protection de la création sur internet http://www.legifrance.gouv.fr/affichTexte.do?jsessionid=C06CF191ECA64835E58B417557BF3F08.tpdjo01v_2?cidTexte=JORFTEXT000020735432&dateTexte=

⁴⁴⁷ Ley 2/2011, de 4 de marzo, de Economía Sostenible, <http://www.boe.es/buscar/act.php?id=BOE-A-2011-4117&p=20131023&tn=0>

⁴⁴⁸ Regolamento in materia di tutela del diritto d’autore sulle reti di comunicazione elettronica e procedure attuative ai sensi del decreto legislative 9 aprile 2003, N° 70 <http://www.agcom.it/Default.aspx?DocID=12229>

services are a necessary condition for any copyright infringement. *Member States are divided as to the need to further improve the system of enforcement.*

The Commission had also concluded in 2010 in the application report of IPRED⁴⁴⁹ that, despite an overall improvement of enforcement procedures, the volume of infringements has not decreased because of the unprecedented increase in opportunities to infringe IPR offered by the internet⁴⁵⁰. The report concluded that the Directive on its own was not necessarily fit for purpose anymore because it was not designed with this challenge in mind. As a consequence, some measures will remain ineffective while others could give rise to growing concerns, in particular from users and intermediaries, regarding the respect of fundamental rights.

2.1. Rules on gathering of evidence and identification of infringers are divergent and not adapted to the digital environment

Articles 6, 7 (gathering and preserving evidence) and 8 (right of information) of IPRED offer tools to rightholders to access information, evidence etc. in order to effectively protect their IPRs in civil court procedures. However, these tools are not always adapted to deal with infringements of copyright occurring on the internet, in particular to identify or keep evidence of infringements in case of services which propose tools allowing the dissemination of infringing content and which make profit out of these activities. Two particular sets of problems have been identified in relation to these tools.

First, the provisions foreseen in IPRED have been *implemented differently* across Member States, which first leads to different levels of enforcement of copyright and second makes it difficult to apply cross-border measures, in particular the cross-border collection of evidence.

Some Member States provide for provisional measures to obtain and preserve evidence, while others consider the preservation of evidence as a distinct procedure. Other divergences relate to the condition to use the right of information, in particular whether it is possible to use this tool as a preliminary measure or only in the context of an already existing proceeding. The possibility to use the tool as a *preliminary measure* is particularly important in the context of infringements of copyright on the internet where the identification of the infringer is often extremely difficult and necessary to start a proceeding. Other divergences across Member States relate to the *condition of “commercial scale”* in order to use the right of information or other tools relating to the gathering of evidence. The notion of “commercial scale” (which was not defined in IPRED but explained in a recital) varies across Member States where it can be understood as a quantitative or as a qualitative (profit making aim) requirement. The

⁴⁴⁹ Report from the Commission on the application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights, COM(2010)779 final (<http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:52010DC0779:EN:NOT>)

⁴⁵⁰ It is extremely difficult to estimate the exact scale of the problem, the quantity of illegal downloads and the economic impact on rightholders. Nevertheless, a study carried out by RAND in 2012 gives an overview of studies evaluating the impact of piracy on different industries, based on surveys or figures provided for by the industry itself. For example, in the software industry, a 2010 Business Software Alliance study reported an estimated global software piracy rate of 43% for 2009, expressed in terms of units of pirated software installed relative to total units of software installed. In the movie industry, a LEK Consulting study (Motion Picture Association of America, 2006) found that Motion Picture Association member companies lost \$6.1 billion in revenues due to piracy in 2005. \$1.4 billion to illegal copying, and \$2.3 billion came from online UUPC. Finally, in the music industry, the International Federation of Phonographic Industry reported a global average piracy rate of 38% in 2006 as a share of total sales (Siwek, 2007, p. 20). At the EU-27 level, a 2010 Tera Consultants study estimated Euro 5.3 billion lost revenues in the audiovisual sectors and Euro 4.5 billion in the software industry. Report “Measuring IPR infringements in the internal market Development of a new approach to estimating the impact of infringements on sales”, RAND, 2012. (http://ec.europa.eu/internal_market/iprenforcement/docs/ipr_infringement-report_en.pdf).

condition of commercial scale to be able to use identification tools (right of information) is not imposed in an uniform way across Member States. Some Member States do not impose this condition at all, other impose this condition only for the activity of the third party who is required to divulge the identity of the infringer, others impose this condition for the activity of the infringer itself.

These divergences not only create disparities in the level of protection of copyright, they also lead to problems for the cross-border enforcement. Because of the differences in the transposition of Articles 6 and 7 of IPRED into national law by Member States, a court could be faced with a measure requested by a foreign court which is not known in its own state, and could then be reluctant to execute it. In the IP field, some national courts have already refused to execute a measure aiming at preserving evidence requested by a court from another Member State⁴⁵¹. The finding of the Consultation on the civil enforcement of IPR is that only very few repondants indicated that they had obtained a court order decision to request an intermediary established in another Member State to provide information on the identity of the infringer.

Second, *further difficulties* arise when these tools are used in the *online environment*. The fact that almost all responses to the Consultation on the civil enforcement of IPR concerning problems of identification of infringers related to infringements occurring on the internet highlights this⁴⁵². The main problem in this area relates to the articulation between the rules on the identification of infringers and the protection of personal data/ privacy (half of those who reported in that Consultation that they were denied access to information reported that the refusal was based on personal data protection and privacy).

IPRED stipulates, in recitals (2) and (15) as well as in Article 8(3)(e), that its provisions are without prejudice to the protection of personal data. At the same time, neither IPRED, nor other pieces of EU legislation contain specific provisions on the retention and disclosure of personal data to copyright holders for the purposes of IPR civil enforcement.⁴⁵³ The European Court of Justice has clarified that the Union's *acquis* does not preclude Member States from imposing an obligation to disclose to private entities or persons personal data of citizens in order to enable them to bring civil proceedings for copyright infringements against these citizens, but nor does it require those Member States to lay down such an obligation⁴⁵⁴. The CJEU has also clarified that rules concerning the retention of data for civil enforcement of IPR purposes do not fall within the scope of Directive 2006/24 on the retention of data. The articulation between rules on gathering of evidence and identification of infringers and rules on protection of personal data is therefore left to the Member States (provided that they strike a fair balance between the various fundamental rights protected by the European Union's legal order). However, it was reported, in particular in the Consultation on the civil enforcement of IPR, that the articulation between the different rules is often not provided in the Member States legislations which is likely to affect the effectiveness of measures implementing Articles 6, 7 and 8 while at the same time raising concerns in terms of protection of personal

⁴⁵¹ This was for example the case for a “description” in the case C-175/06, Tedesco, that was refused to be performed by the British authorities on the ground that such measure were not in keeping with national practices.

⁴⁵² Of 136 responses to the Consultation on the civil enforcement of IPR received on problems relating to the identification of infringers, only around 3% did not relate to infringements on the internet. See http://ec.europa.eu/internal_market/consultations/2012/intellectual-property-rights_en.htm

⁴⁵³ This situation was reflected in the consultation on the civil enforcement of IPR: 68% of 146 respondents declared having faced problems in the identification of (alleged) infringers of their IPR. However, the consultation does not allow saying whether these problems were all related to data protection or had other reasons.

⁴⁵⁴ C-275/06, Promusicae (2008) and C-557/07, LSG v/ Tele 2 (2009).

data. This conflict has, for example, been acknowledged by the Austrian Supreme Court in the decision 'LSG vs Tele 2': "*As no explicit provision exists which requires the storing of traffic data to disclose identities and information to prosecute copyright infringers, the current right to information is worthless as the data which would be required are not entitled to be stored in the first place*"⁴⁵⁵.

The problems are as follows:

- (a) Rightholders complain that the retention of data, which is necessary to have access to the identity of infringers on the internet, can either be impossible for copyright civil enforcement purposes or too short to be useful in the framework of civil proceedings.
- (b) In cases of copyright infringements committed via the internet, internet service providers may often not be in a position to disclose alleged infringers' identities and contact details to rightholders, even in the context of judicial proceedings, because of the lack of legal basis at EU and national level to disclose personal data;
- (c) Moreover, even if intermediaries are willing to provide contact details of their clients following a Court order, the accuracy of these data is sometimes questionable. Many websites tend to operate anonymously, i.e. they register fake 'WHOIS' data and operate their business through empty shell companies. The problem is often compounded by the fact that some intermediaries offer services facilitating anonymous registration of domain names or allowing the actual IP addresses of the infringing websites to be hidden and generally provide services such as hosting without ensuring that contact details are accurate and/or up to date. Rightholders therefore complain that they do not have access to more data in case of infringements. The problems are particularly salient for infringers operating anonymously, changing Ip addresses rapidly and channelling the revenues they get from their activity through empty shell companies.
- (d) The lack of clarity concerning the articulation between enforcement of IPR and protection of personal data is not only likely to affect the effectiveness of provisions on the identification of infringers, but it can also raise concerns in terms of protection of fundamental rights of individuals to privacy and data protection (as enshrined under Article 7 of the Charter of Fundamental rights of the European Union and Article 8 ECHR, under Article 8 of the Charter of Fundamental rights of the European Union, and under Article 16 TFUE). It was reported that in some instances rightholders collect and process data, e.g. by monitoring of IP addresses involved into file sharing or even streaming practices, using technical means that might not respect quality standards that guarantee the correctness of the data. They sometimes use the data collected through the execution of a Court order to "offer" out-of-court settlements to individuals without having the intention to launch a procedure. As a consequence, individuals might be exposed to possibly overzealous enforcement of IPR by the respective rightholders.

The public consultation raised the issue of the balance between the right to have one's copyright respected and other rights such as the protection of private life and protection of personal data. Institutional users and intermediaries consider that the Court of Justice has already stated on the subject, has provided clear guidelines for national jurisprudence ensuring that any competing basic rights were sufficiently taken into account, and that the balance

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Decision of the Austrian Supreme Court of 13 November 2007.

between protection of copyright and protection of privacy and personal data should not be affected. Some even claim that there should be a stronger protection of privacy to avoid massive surveillance and collection of IP addresses. Users who replied this question consider that there is not a correct balance between the user's right and the rightholder, but that rightholders were privileged while users' rights were restricted (however, many replies did not refer to enforcement and the balance between fundamental rights and copyright but to contractual clauses in contracts with rightholders and intermediaries or technological barriers, e.g. DRM). If some rightholders agree that the Court of Justice has given all required guidance for national courts, many on the other hand consider that it would be appropriate to harmonise at EU level the criteria for the disclosure of personal data, in particular whether the right of information provided for by IPRED is limited by other rights such as "banking confidentiality". Many consider that data protection is granted a higher weight at the moment. In particular, a right to remain anonymous when committing an offence should not be accepted.

2.2. Rules on provisional measures and definitive injunctions tend to be ineffective against copyright infringements in the on-line environment

The main problem relates to the extent to which it is possible to involve intermediaries not only to help identify infringers as examined above but also in putting an end to infringements of copyright on the internet. Enforcement of copyright can in the first place be directed towards the actual perpetrator of the infringement himself, but this is often difficult given the ubiquitous nature of infringements on the internet and the possibility for infringers to operate in an anonymous way as described above. For cases where direct action against the perpetrator of the infringement is not possible or very difficult, involving intermediaries can be a solution to put an end to the infringement. This is the reason why EU law provides rules on injunctions against intermediaries (Articles 9 and 11 of Directive 2004/48/EC and Article 8 of the Infosoc Directive). However, these rules appear to be ineffective to deal with infringements of copyright over the internet, which is particularly problematic in cases of commercial scale infringements giving rise to revenues.⁴⁵⁶

The problem seems to stem from the fact that there is no harmonised understanding of the types of intermediaries covered, of the types of injunctions that be ordered against intermediaries, in what circumstances they may be issued, under which conditions and within which delays. For example, often courts appear to focus exclusively on internet service providers (ISPs) as intermediaries on the internet. Some Member States' courts have linked the question of granting an injunction against an ISP to the establishment of some kind of responsibility of the intermediary which makes the granting of preliminary injunctions against intermediaries very difficult⁴⁵⁷. There is a need to clarify how to articulate the possibility to impose injunctions on intermediaries given the prohibition for Member States to

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The Consultation on the civil enforcement of IPR seems to reflect this: Very few stakeholders took a stand on the issue of injunctions imposed on intermediaries (28 respondents stated clearly that they obtained a preliminary injunction and 25 indicated that they obtained a permanent injunction). Other respondents indicated that preliminary injunctions were not granted due to an exemption of the intermediary from liability, difficulties in proving the intermediary's knowledge or involvement in the infringing activity or lack of sufficient merit of the claim.

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In the Consultation on the civil enforcement of IPR, France, whose legislation includes within the notion of intermediaries those whose services are used by an infringer in the framework of its IPR infringing activity, called for a clarification in IPRED that injunctions are available independent of any liability of the intermediary.

impose a general monitoring obligation on internet service providers which is also part of the EU acquis.⁴⁵⁸ It was also reported in the framework of the Consultation on the civil enforcement of IPR, that there are other burdensome requirements in some Member States that can constitute a disincentive for rightholders to bring an action; for example, in Finland, a case against the primary infringer/operator of a site as well as high guarantee sums in court were required before an injunction would be enforced. Furthermore, rightholders complained that injunctions against intermediaries in some Member States have an ineffective scope, insofar as they only enjoin the intermediary from allowing exactly the same infringement to happen (i.e. a continuation of the specific infringement by the same infringer), whereas in practice it is quite possible that the same infringer may engage in future infringements of the right owner's title/product and this is particularly challenging for the protection of copyrighted works on-line. There are also doubts about the possibility to deliver injunctions on a catalogue-wide or only on a title-specific basis, which is very relevant when dealing with websites infringing copyright for a commercial purpose. It is not clear either whether ex parte injunctions which are foreseen in IPRED are possible when the recipient of the injunction is an intermediary. Finally, the possibility to request injunctions against intermediaries established in different Member States or to consolidate several actions in one jurisdiction is also very limited. According to the Consultation on the civil enforcement of IPR, many rightholders indicated that they had obtained neither a preliminary nor a permanent injunction imposed on an intermediary providing services necessary to access the infringing services/goods when the intermediary or the person infringing/allegedly infringing his IPRs were incorporated in a Member State other than the one in which the rightholder operated. Some of the respondents stressed that such legal actions – if possible according to the national legislation – are usually pursued in the country, where the intermediary is located. Moreover, the Consultation on the civil enforcement of IPR, despite acknowledging the general increase in the number of cross-border IPR infringements, revealed that the majority of stakeholders did not launch proceedings concerning such infringements that occurred in another Member State or in several Member States⁴⁵⁹.

The lack of clarity concerning the extent to which intermediaries can be involved does not only affect the effectiveness of the protection of IPR but is also likely to raise concerns in terms of protection of fundamental rights. It can for example not be excluded that an injunction against an intermediary would constitute a restriction to the freedom to conduct a business of the intermediary, in which case any such limitation would have to be provided by law in accordance with Article 52 of the Charter of Fundamental Rights⁴⁶⁰. Such an injunction could also result in a restriction of access to content and as such, may be considered as a

⁴⁵⁸ Article 15 of Directive 2000/31/EC.

⁴⁵⁹ For this reason, some of the respondents to Consultations on the civil enforcement of IPR called for an initiative at EU level, which would facilitate cross-border measures (i. e. against intermediaries), consolidation of claims and automatic enforcement of specific injunctions/judicial decisions issued in one Member State throughout the European Union (either directly or in expedited court procedure).

⁴⁶⁰ Following the ECtHR case law in this respect, this requirement implies not only that a domestic law exists as such but also imposes a certain requirement as to the quality of the law at stake, which would have to "be accessible to the persons concerned and formulated with sufficient precision to enable them – if need be, with appropriate advice – to foresee, to a degree that is reasonable in the circumstances, the consequences which a given action may entail [...] Domestic law must also afford a measure of legal protection against arbitrary interferences by public authorities with the rights guaranteed by the Convention. In matters affecting fundamental rights it would be contrary to the rule of law [...] for a legal discretion granted to the executive to be expressed in terms of an unfettered power. Consequently, the law must indicate with sufficient clarity the scope of any such discretion and the manner of its exercise" (ECtHR, *Glas Nadezhda Eood & Elenkov v. Bulgaria*, application no. 14134/02, 11 October 2007, para 45-46).

restriction on the freedom of expression and such a limitation would have to be provided by law in accordance with Article 52 of the Charter of Fundamental rights as well. It follows that an injunction with a broad scope or that lacks clarity as concerns its exact scope and specificity in terms of measures that would have to be implemented would raise serious concerns as to the requirement that any limitation of a Charter right would have to be provided by law. Moreover, the burden and cost of the implementation of the injunction imposed on an intermediary can also be problematic. In the *Scarlet case*⁴⁶¹, the CJEU has considered, concerning a system for filtering in order to prevent file-sharing which infringes copyright, that an injunction requiring an ISP to install a filtering system applying to all electronic communications passing via its services, which applies indiscriminately to all its customers as a preventive measure, exclusively at its expense and for an unlimited period would result in a infringement of the freedom of the ISP concerned to conduct its business and would be contrary to the conditions laid down in Article 3(1) of IPRED. On the other hand, the Court of Justice has clarified that the freedom of expression and the freedom to conduct a business do not preclude an injunction against an internet access provider ordering him to prevent its customers from accessing a website which places protected content online without the agreement of the rightholder, provided that certain conditions are met. This case concerns however a situation where the blocking of a website was requested, and does not solve the question of other types of injunctions that could be ordered by a judicial authority.

There is therefore a need on the one hand to clarify the extent to which intermediaries can be involved to help putting an end to copyright infringements on the internet, while on the other hand ensuring that the fundamental rights are duly taken into account.

2.3. *Insufficient relief to copyright holders for infringements to their rights*

Compensation to the rightholder for the prejudice suffered as a result of infringements of copyright is generally low and has little deterrent impact. More particularly on the internet, it is difficult to prove the exact scope of the infringing use and therefore the actual damages that have occurred. Rightholders claim that in many instances damages are set at levels that are neither dissuasive nor even compensate the rightholder's actual losses (and legal expenses).⁴⁶² This problem has also been acknowledged by some Member States, e. g. France recognised the difficulty for judges to assess the level of damages and recommended increasing the use of experts to improve the level of indemnification.

The reasons for the low levels of damages awarded are not only the difficulties in determining the pecuniary value of intellectual property, but also the lack of clarity of the rules contained in Directive 2004/48/EC, the freedom of the courts to apply the Directive's criteria and the considerable differences in the national transposition results. As it turned out from the responses to the Consultation on the civil enforcement of IPR, in some of the Member States courts do not award the profit generated by the infringer (unjust enrichment).⁴⁶³ This is possibly one of the reasons why rightholders claim that damages awarded are low in many instances. Responses also indicated that damage claims and recovery of profit claims are

⁴⁶¹ Case C-70/10 *Scarlet* extended (2011)

⁴⁶² For example, during the IPRED Consultation, one contribution indicated that damage claims are rarely deterrent in cases of structurally infringing sites since the profits are very substantial and the abilities to hide assets due to the aforementioned problem of being able to do business anonymously.

⁴⁶³ Only 46 out of 62 respondents have indicated that unjust enrichment is taken into account by national courts. (s. 4.7 of Synthesis of responses "Civil enforcement of intellectual property rights: public consultation on the efficiency of proceedings and accessibility of measures" dated July 2013)

rarely effective due to the lack of adequate disclosure obligations in most Member States as well as a lack of “know your customer” regulations applicable to service providers.

Also, in spite of Article 14 of Directive 2004/48/EC, in practice, copyright holders are rarely reimbursed all legal costs and other expenses they incur to protect their copyright through litigation. This, together with the low levels of damages awarded, may inhibit copyright holders’ possibilities and readiness to institute proceedings, even in cases of infringements with a commercial purpose involving significant levels of profits for the infringer. As the Consultation on the civil enforcement of IPR showed, rightholders might refrain from litigation if they held the court proceeding lengthy, costly and do not expect to get properly compensated.⁴⁶⁴

The challenges to be addressed are therefore a lack of efficiency of existing civil enforcement systems in the online environment, difficulties in setting a proper balance between protection of IPR and protection of other fundamental rights and a sub-optimal functioning of the single market for copyrighted content.

2.4. Results of the public consultation concerning the measures that could be undertaken to address the identified issues

Many respondents were in favour of rendering the civil enforcement system in the EU more efficient for infringements of copyright committed with a commercial purpose. Many publishers in particular agree that action should target illegal websites not individuals. However, a number of concerns were raised. In particular, they consider that the term “commercial purpose” lacked a definition and that a focus on “commercial purpose” alone would not help rightholders as long as effective enforcement was hindered in many ways, e.g. safe harbours for intermediaries. They insisted that it should be kept clear that all infringements should be punished, the only difference being that sanctions should be greater for commercial purpose infringements.

Regarding the measures that would be useful to foster cooperation of intermediaries, contributions from rightholders ask for clearer liability for infringers and intermediaries (ISPs, search engines, social networks, cloud services etc., including cases where they have several functions, e.g. hosting and editing) as well as clearer obligations for ISPs and other intermediaries to cooperate. In particular, ISPs should have an obligation to keep accurate and up to date public databases. Subjecting intermediaries to ‘know-your-consumer’ rules might be a useful first step. Other measures are proposed. Intermediaries could, for example, de-index links in search results when the site in question has been the subject of numerous notice and take down actions. Furthermore, ISPs could send educational messages to infringers and warn them that refusal to cease infringing will result in meaningful consequences such as access-blocking. Suggestions were also made such that search engines reduce online copyright infringement through preventive measures (e.g. preventing automated searches returning unlawful links and prioritising legal services) and by responding efficiently to ‘notice and take down’ notifications. Generally, it is suggested that “Notice and Take-Down”, “automated Take Down without Notice”, and “Notice and Stay-Down” actions be simplified and made more efficient. Advertisers should not advertise on infringing sites to restrict their revenue. Similarly, payment providers should not provide services to pirate sites and app stores should remove apps which are designed to facilitate piracy.

⁴⁶⁴ 51% of the respondents have indicated that they would refrain from litigation because of such reasons.

While publishers are still open to develop cooperation with intermediaries to address these issues, (one contribution suggests the elaboration of an MoU of the same type as the one adopted in May 2011 on the sale of counterfeits on the internet), quite a few called for legislation forcing intermediaries to cooperate as voluntary and industry-driven initiatives were not considered to have been fruitful. Numerous contributions consider that the provisions of the E-Commerce Directive lack clarity and it should be reopened to clarify/redefine the scope of the Safe harbour. Liability could be avoided by the hosting service provider only if he reveals the identity of the uploader or only if he proactively avoids illegal content. For example, the definition of ‘expeditious removal’ could be clarified to urge all sites to proactively remove infringing content if it has already been reported to them once.

On the contrary, some respondents claim that using the intermediaries as an extended arm of law enforcement is not a solution but a big problem in itself given the destructive effects of censorship and current tendencies towards total surveillance. Many contributions from intermediaries consider it necessary to revisit and broaden the scope of the safe harbours as applied in the E-commerce Directive, since it is currently unclear how the E-commerce Directive interacts with the Enforcement Directive. In order to be able to offer intermediary services it was of the utmost importance that intermediaries were exempted from liability for acts performed by their users. In addition, it should be made clear what kind of remedies rightholders could seek against intermediaries. Various intermediaries consider that both directives together achieved the necessary balance and that there should be no modification. If no legislative approach was warranted at this point, clear guidance to EU Member States to ensure the correct implementation of the existing legal framework would be welcome. There was also a major concern regarding the higher cost of implementation that ISPs were required to carry with regard to internet blocking. The cost of the blocking measures should be transferred to the owner of the right. They also suggest other measures such as registration and open licensing as the most efficient way to tackle the problem and the promotion of mediation and alternative dispute resolution mechanisms.

8.21. ANNEX R: SUMMARY OF THE PROPOSED OPTIONS

NB: the options presented below are not mutually exclusive. A combination of solutions presented under Options 2, 3 and 4 can be envisaged.

Option	Territoriality
1 – <i>No change</i>	The granting of multi-territorial licences for online uses is possible (the implementation of the Collective Rights Management Directive will further facilitate it) but contractual clauses guaranteeing absolute territorial exclusivity in licence agreements between rightholders and distributors remain and can only be addressed case by case through the enforcement of EU competition law where relevant. Cross-border availability, in particular for premium audio-visual content would remain at the same level, or only increase slowly. Customers interested in this type of content would continue to have only limited access with regard to online services originating in other Member States.
2 - <i>Guidance and support for market initiatives</i>	Guidance to MS on the interplay between copyright, territorial exclusivity and the freedom to provide and receive services in the Internal Market, as developed in the case law of the CJEU.
3 - <i>Legislative intervention</i>	<p>Two sub-options (not mutually exclusive) can be envisaged:</p> <p><i>Sub-option a:</i></p> <p>Introduce a new legal provision which prohibits the inclusion of “absolute territorial restrictions” in copyright licence contracts meaning that rights holders and distributors may not agree to contractual terms which prohibit the distributor from responding to unsolicited requests for access from cross border customers (prohibition on the prevention of passive sales).</p> <p>In addition, provision would be made for exceptional cases where it would otherwise not be possible for rights holders to achieve an appropriate remuneration (safety clause).</p> <p>A new provision linked to copyright licences would be introduced to re-enforce the principle that service providers are not allowed to discriminate on grounds related to nationality or place of residence, unless directly justified by objective criteria (service providers would be required to provide their justifications in a transparent and easily accessible way on their websites).</p> <p><i>Sub-option b :</i></p> <p>Introduction of a clear definition of where the copyright relevant act is localised in cross-border situations. Two alternatives can be considered:</p> <ul style="list-style-type: none"> - <i>Alternative b1:</i> introduction of the “country of origin” principle for the communication to the public right (including the making available right). Harmonisation of the rules on authorship, ownership and transfer of rights as well as enforcement-related mechanisms required in parallel. Transitional provisions for existing contracts required too. - <i>Alternative b2:</i> codification of the "targeting approach" in a legal act. A service provider would need to obtain a licence for all targeted Member States only, regardless of where the customers accessing the service are established or reside.
4 - <i>A single Copyright Title in Europe</i>	Single title – rights and exceptions would by default cover the entire EU. Territorial fragmentation (re)created contractually would have to be addressed separately (e.g. via Sub-option 3a or, as under the status quo, via competition law).

Option	Exhaustion	Registration, identification of rights ownership, and licensing	Fair remuneration for authors and performers
1 – <i>No change</i>	No application of the “exhaustion” principle to copies distributed by online transmission (other than possibly software).	Market initiatives. The Orphan Works Database.	Current acquis, MS rules and contractual relations.
2 - <i>Guidance and support for market initiatives</i>	<p>Market monitoring as regards developments of services allowing e.g. possibilities to forward copies and play lists to friends and of technology allowing for a second hand digital market.</p> <p>Guidance, building on CJEU judgements, on the scope of the current framework as regards the principle of exhaustion in digital transmissions.</p>	<p>Support for industry initiatives to streamline licensing and to develop metadata and rights models to enable creators to identify their works.</p> <p>Establish dialogue with MS and stakeholders to develop national copyright hubs.</p>	Establish a dialogue with stakeholders and MS to assess the relative merits of different national approaches
3 - <i>Legislative intervention</i>	Establish in legislation that the principle of exhaustion applies to copies acquired via a download-to-own service to the extent required to achieve a functional equivalence to the “physical world”	<p>Require MS to develop copyright hubs which could be federated at EU level.</p> <p><i>Sub-option a:</i> Establish a system for copyright registration and recordation of subsequent rights transfers in the EU (EU central database).</p> <p><i>Sub-option b</i> (to be envisaged in addition to Alternative <i>a</i>): In a manner compatible with the EU and Member States international obligations, establish a link between registration and the term of protection that goes beyond what is mandated in international agreements.</p>	Regulate at EU level aspects such as clauses in contracts between creators and producers/publishers; unwaivable rights, and transfer of rights.
4 - <i>A single Copyright Title in Europe</i>	Single regulation governing rights and exceptions to copyright, as well as contractual relations, directly applicable, on the basis of the conditions identified in 3a or 3b above.		

Exceptions and limitations

Libraries and archives				
Option	Preservation	Remote access	eLending	Heritage (digitization)
1 – <i>No change</i>	MS may provide for exceptions to the reproduction right in respect of specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage	Current exception limited to dedicated terminals on the premises of the establishments Contractual arrangements allowing for remote consultation are in place, in particular for scientific, technical and medical publications.	Current exception limited to physical lending. Contractual arrangements are being developed between libraries and publishers in some MS.	Application of MS' legislation regarding use of orphan works. Development of orphan works database and ARROW. National agreements (where available) which, on the basis of the principles of the MoU on out of commerce works (print works) allow for mass digitisation projects
2 - <i>Guidance and support for market initiatives</i>	Guidance on the maximum scope of the current exception for preservation purposes. The exception should be implemented as applying to all works and other subject matter in library collections (including legal deposit material)	Stakeholder dialogue to promote best practice in the provision of remote access for purposes of research and private study, building on the approach in the scientific, technical and medical sector.	Facilitate a blue print at EU level for contractual arrangements between authors, publishers, libraries and booksellers to achieve a level playing field of terms and conditions (including cross border) applicable in contractual arrangements across the EU (e.g. by a MoU)	Support efforts by stakeholders and MS to provide maximum implementation to the MoU on out of commerce works. Facilitate work on and adoption of further MoUs, including for the making available of audiovisual and audio works in the archives of public service broadcasters and libraries
3- <i>Legislative intervention</i>	Fully harmonise and make mandatory an exception (to the reproduction right) for preservation purposes. As to the scope of this exception, two alternatives can be envisaged: <i>Alternative a:</i> applicable to all works and other subject matter in	New, fully harmonised and mandatory exception (to the reproduction and making available rights) permitting specific establishments (e.g. university libraries, archives) to provide, under specific conditions, distant consultation by enrolled students and researchers by means of a secure network and access protocol for purposes of research and private study.	New, fully harmonised and mandatory exception (to the reproduction and making available rights) for e-lending under specific conditions, including those required to make it functionally equivalent to physical lending.	Introduce a mechanism at EU level to ensure the cross-border effect of licences granted under the existing national voluntary agreements

	library collections (including legal deposit material) for which it is not practical to purchase a replacement <i>Alternative b:</i> applicable to all works and other subject matter held in the collections	As to the scope of this exception, two alternatives can be envisaged: <i>Alternative a:</i> applicable to all works, including legal deposit and those born digital, but restricted to those to which no terms and conditions apply at time of purchase. <i>Alternative b:</i> applicable to all works in collections including legal deposit and those born digital, whether or not terms apply		
<i>Flanking measure for Option 3</i>	Where appropriate, ensure cross-border effect of the exceptions			
<i>4 - A single EU Copyright Title</i>	Single regulation governing all exceptions to copyright, directly applicable, on the basis of the conditions identified in 3a or 3b above.			

Exceptions Cont.

	Education and research		Disabilities
Option	Education	TDM	
<i>1 –No change</i>	MS may provide for exceptions for the sole purpose of illustration for teaching and for scientific research, as long as the source, including the author’s name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved		MS may provide for exceptions for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability
<i>2 - Guidance and support for market initiatives</i>	Guidance on the maximum scope of the current exception for illustration for teaching (separate from research) in line with the three-step test: in particular, it should apply to e-learning activities undertaken by defined beneficiaries enabling reproduction and making available over secured networks.	Clarify through guidelines to MS to what extent text and data mining activities/techniques are covered by copyright and, also, to what extent they fall under the scope of the existing research exceptions in the Info Soc and Database Directives.	Guidance to MS to encourage for all disabilities, the cross-border exchange of accessible format copies (under licences or exceptions) by recommending models for mechanisms of cooperation and transparency measures to facilitate it as well as reducing restrictions as to the scope of the existing exception.
<i>3 - Legislative intervention</i>	Fully harmonise and make mandatory a separate exception for illustration for teaching under certain conditions. Include both acts of reproduction and making available. Limit to the direct	<i>Alternative a:</i> Harmonise and make mandatory a separate exception for TDM (in the Info Soc and Database Directives) for non-commercial scientific research that would apply under the	<i>Alternative a:</i> Harmonise and make mandatory an exception for disabilities and the cross-border exchange of accessible formats made under such an exception,

	beneficiaries of the exception: recognized establishments and enrolled students (secured networks). Other conditions to be defined to ensure compliance with the three-step-test.	condition that the user has lawful access to the material that is to be mined. <i>Alternative b:</i> Introduce a mandatory exception as in alternative a) encompassing both commercial and non-commercial scientific research and subject to the condition that permitted uses do not enter into competition with the original content or services.	for the benefit of visually impaired persons (Marrakech Treaty). <i>Alternative b:</i> Harmonise and make mandatory an exception for disabilities and the cross-border exchange of accessible formats made under such an exception, for the benefit of visually impaired persons and other disabled persons.
<i>Flanking measure for Option 3</i>	Where appropriate, ensure cross-border effect of the exceptions.		
<i>4 - A single Copyright Title in Europe</i>	Single regulation governing all exceptions to copyright, directly applicable, on the basis of the conditions identified in 3a or 3b above.		

Option	UGC	Private copy	Hyperlinks and browsing
1 - <i>No change</i>	Market developments will continue (e.g. licences concluded with platform, development of micro licences). MS may provide for exceptions in respect of quotation, parody, and incidental inclusion.	The implementation of the private copying and reprography exceptions continues to diverge. As regards levies, only some MS provide for ex-ante exemptions and ex-post reimbursement schemes. Undue payments can be recovered on a case-by-case basis.	The scope of the relevant rights (mainly communication to the public) and exceptions (temporary copies exception) and consequently the status of linking and browsing to be determined by CJEU.
2 - <i>Guidance and support for market initiatives</i>	Guidance on the maximum scope of the current exceptions for quotation, parody and incidental inclusion. Support industry initiatives to develop metadata and rights models to enable creators of UGC to identify their works as well as to further develop micro-licensing initiatives.	Guidelines to MS clarifying the applicability and methods of calculation of levies in particular in the digital environment as well as cross-border aspects of levy schemes.	Market monitoring as regards the existence (or not) of obstacles to hyperlinking and as regards various business models relying on linking and browsing. Guidance & building on CJEU judgements on the scope of the relevant rights and exceptions and their application to linking and browsing.
3 - <i>Legislative intervention</i>	<i>Alternative a</i> Expand the scope for consumers' possibilities to use content for transformative purposes by fully harmonising and making mandatory the exceptions for quotation, parody and incidental inclusion, applicable to all works	<i>Alternative a:</i> Streamline the operation of the private copy and reprography regimes via legislation to: - clarify which categories of acts of reproduction could cause harm requiring compensation in the digital environment	Clarify the application of the relevant rights and exceptions to linking and browsing.

	<p>and other subject matter.</p> <p><i>Alternative b:</i> Implement a UGC-specific exception for transformative purposes in the creation of derivative works. The exception would only apply for uses which have a non-commercial purpose, and should not become a substitute for the normal exploitation of the pre-existing works.</p>	<p>- lay down minimal requirements that levy schemes need to fulfil as regards exemption and/or reimbursement of undue payments as well as their transparency.</p> <p><i>Alternative b:</i> Phase out levy schemes as the harm for private copying in the digital networks diminishes.</p>	
<i>Flanking measure for Option 3</i>	Where appropriate, ensure cross-border effect of the exceptions.		
<i>4 - A single Copyright Title in Europe</i>	Single regulation governing all exceptions to copyright, directly applicable, on the basis of the conditions identified in 3a or 3b above.		

Option	Enforcement
<i>1 - No change</i>	Status quo
<i>2 - Guidance and support for market initiatives</i>	<p>Propose voluntary measures to intermediaries to strengthen the respect for copyright when the infringed content is used for a commercial purpose e.g. through the signature of Memorandum of Understanding and guidance on the role of intermediaries in the IP infrastructure.</p> <p>Provide clarification of the safeguards in terms of fundamental rights in particular with respect to private life and data protection for private users.</p> <p>Provide guidance to courts on how to evaluate damages.</p> <p>Provide guidance to Member States on divergences in provisional measures and on the calculation of damages in case of cross-border infringements.</p> <p>Promote the creation of specialised Copyright chambers in national courts.</p>
<i>3 - Legislative intervention</i>	<p>Revision of Directive 2004/48/EC in conjunction with Article 8 of Directive 2001/29/EC to clarify the role of intermediaries in the IP infrastructure as well as the fundamental rights safeguards in particular with respect to the private life and data protection for private users.</p> <p>An amendment of IPRED to clarify certain definitions in order to harmonise its interpretation across Member States.</p> <p>Promote the creation of specialised Copyright chambers in national courts to enhance IP specialisation ensure a better understanding of cases and fairer compensation to copyright holders who have suffered infringements.</p>
<i>4 - A single Copyright Title in Europe</i>	

8.22. ANNEX S: GLOSSARY

Definitions

"Creative industries": they include services such as publishing activities (books, periodicals and software), motion pictures, video and television programme production, sound recording and music publishing activities, programming and broadcasting activities, computer programming, architectural and engineering services, advertising, design activities, photographic activities, translation and interpretation activities, creative, arts and entertainment activities.

"Copyright and related rights": copyright is vested in authors whereas related rights are vested in performers, phonogram (i.e. record) and film producers as well as broadcasting organisations. Copyright and related rights include so-called "economic rights" which enable rightholders to control (license) the use of their works and other protected subject matter (i.e. performances, phonograms, audiovisual productions and broadcasts) and to be remunerated for their use. These rights normally take the form of exclusive rights and include (among others): the right to copy or otherwise reproduce any kind of work and other protected subject matter; the right to distribute copies to the public and the right to communicate to the public performances of such works and other protected subject matter. These rights are, to a large extent, harmonised at the EU level. They can be managed directly by the original rightholder (e.g. the author of a book) or by those to whom the rights have been transferred (e.g. a book publisher). They can also be managed collectively by a collecting society. Authors are also granted so called "moral rights" (these are normally not granted to rightholders protected by related rights though some legislations provide for moral rights for performers). Moral rights may include the right to decide on disclosure of the work; the right to claim authorship of the work and the right to object to any derogatory action in relation to the work. Moral rights are not harmonised at the EU level.

"Work": creative output of authors protected by copyright. It includes: literary (books, lyrics, etc.), dramatic (plays, opera librettos, etc.), musical and artistic (photography, painting, etc.) works.

"Other protected subject-matter": output of holders of related rights i.e. performers, phonogram and film producers and broadcasting organisations.

"Commercial users" or "service providers": any person or entity involved in the provision of goods or services who for its activities needs a licence from rightholders of copyrights and/or related rights.

"Collective management organisations (CMOs) ": organisations traditionally set up by rightholders at national level and whose sole or main purpose is to manage copyright or related rights on their behalf.

"Three-step test": Copyright exceptions may only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject-matter and do not unreasonably prejudice the legitimate interests of the rightholder.

"Collective rights management": means the provision of the following services: the grant of licences to commercial users, the auditing and monitoring of rights, the enforcement of copyright and related rights, the collection of royalties and the distribution of royalties to rightholders.

"Repertoire": the sum of the rights of all rightholders that a collecting society directly represents.

"Reproduction right": the right to authorise or prohibit direct or indirect, temporary or permanent reproductions of a work or other protected subject matter by any means and in any form, in whole or in part (Article 2 of the InfoSoc Directive).

"Distribution right": the right to authorise or prohibit any form of distribution to the public of the original or copies of a work or other protected subject matter by sale or otherwise (Article 4 of the InfoSoc Directive and Article 9 of the Rental and Lending Directive).

"Right of communication to the public": the right to authorise or prohibit any communication to the public of a work or other protected subject matter by wire or wireless means (includes acts such as broadcasting). Recognised as a broad exclusive right encompassing the making available right (see below) to authors (Article 3(1) of the InfoSoc Directive); of a more limited scope for other rightholders (Article 8 of the Rental and Lending Directive).

"Right of making available": the right to authorise or prohibit the making available to the public of a work or other protected subject matter in such a way that members of the public may access them from a place and at a time individually chosen by them (Article 3 of the InfoSoc Directive).

"Rental and lending right": the right to authorise or prohibit the rental or lending of the original or copies of a work or other protected subject matter (Article 3 of the Rental and Lending Directive).

"Reprography copying": a possible exception or limitation of the reproduction right in respect of reproductions on paper or any similar medium, effected by the use of any kind of photographic technique or by some other process having similar effects (Article 5(2)(a) of the InfoSoc Directive)

"Private copying": a possible exception or limitation of the reproduction right in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial (Article 5(2)(b) of the InfoSoc Directive).

"Anglo-American repertoire": industry jargon for musical works registered by their authors with the collecting societies in the U.S. and the United Kingdom or originating from the U.S. and the United Kingdom.

"Music publisher": music publishers market musical works and provide authors with a number of other services. Publishers usually track various royalty payments, monitor uses and license certain uses on behalf of authors. They often pay the author an advance on royalties and promote the work, e.g. by creating "demo" recordings or finding performers and record producers which might be interested in the work. In return, publishers obtain a share of royalties from rights and/or a transfer of certain rights e.g. mechanical rights.

"Record producer" (also referred to as "phonogram producer"): record producers take the initiative and arrange the recording of music performances as well as the marketing and distribution of those recordings.