

*Draft to be finalised in light of responses to the public consultation*

**DRAFT IMPACT ASSESSMENT**

**on the modernisation of the EU copyright acquis [provisional title]**

**PROVISIONAL VERSION**

*[to be finalised in light of responses to the public consultation]*

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<b>Executive Summary Sheet</b>
Impact assessment on <i>the modernisation of the copyright acquis</i> [provisional title]
<b>A. Need for action</b>
<b>Why? What is the problem being addressed?</b>
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 issues relating to the exact definition of the scope of rights involved in online transmissions. Secondly, 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 right holders and/or service providers, on the other. The third set of issues arises from the current legal framework of exceptions and limitations to rights, which does not take full account of technology developments and is insufficiently harmonised across the EU. Concerns have also been raised as to the adequacy of remuneration for authors and performers not only in the online environment. Finally, the development of digital technologies has added another challenging dimension for the enforcement of rights.
<b>What is this initiative expected to achieve?</b>
The general objectives of intervention would be to enable 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 enhancing the free movement of services, consumers' choice and access to knowledge, ensuring fair share across the value chain, encourage innovation and sustainable business models, promoting cultural diversity and ensuring the effective and balanced enforcement of rights.
<b>What is the value added of action at the EU level?</b>
EU intervention has 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. The globalisation of infringements of copyright also shows that more coordination is required at EU level to ensure a more efficient and balanced enforcement of copyright including in case of cross-border infringements.
<b>B. Solutions</b>
<b>What legislative and non-legislative policy options have been considered? Is there a preferred choice or not? Why?</b>
Four options were analysed, including the status quo. <b>A combination of the options could address the different problems.</b>  Option 1 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.  Option 2 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.  Option 3 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, rights in the online environment and some of the exceptions and limitations), different sub-options or alternatives have been proposed (Options 3a and 3b). The approaches outlined under Option 3b would in general be more "intrusive" than Option 3a.  Under Option 4, a European Copyright Code would be developed. The Code would establish a unitary title (covering the whole territory of the EU) replacing national ones. In order for a unitary title to be effective, there would need to be exhaustive harmonisation, and direct applicability, of the entire copyright framework.

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The IA compares the effectiveness and efficiency of the options but does not identify any preferred options. On several issues, further analysis is required to complete the assessment of the options.

**Who supports which option?**

A public consultation, covering the key areas that are discussed in this IA, is open until 5 February. The outcome of this consultation will help to better identify the position of the different stakeholders.

**C. Impacts of the preferred option**

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

The following considerations apply to the main options:

Option 2 may prove a useful tool on matters where Member States have not used to its maximum extent the possibilities of the current directives, notably as regards limitations and exceptions. In addition, the market-based solutions foreseen in Option 2 could be of practical benefit to users, intermediaries and right holders in the short- to medium-term.

Option 3 and Option 4 would contribute to enhance the cross-border access to legal content for consumers. Under Options 3, distributors would benefit from lower transaction costs, which could be reflected in lower prices for consumers. Option 3 would also improve legal certainty and reduce transactions costs for the beneficiaries of the exceptions (e.g. libraries, archives, universities, researchers). Option 3 should be beneficial to right holders by rendering the enforcement of copyright more effective.

Option 4 would be able to reach a higher level of uniformity than Option 3, which would be favourable to consumers and beneficiaries of the exceptions. The economic impacts for rights holders and distributors are likely to vary, depending on the sector in which they are active but generally all stakeholders should benefit from significantly lower transaction costs. The impact on right holders would also depend upon the agreed EU level of compensation for the uses allowed under the exceptions.

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 following considerations apply to the main options:

Option 2 may have a neutral impact on consumers while the impacts of Option 3 would depend on the territory in which consumers are located (by leading to more aligned prices in the internal market, Option 3a could negatively affect customers in lower-value territories). Right holders may be negatively affected by certain solutions presented under Option 3, e.g. if an exception also covered commercial activities or if the principle of exhaustion extended to acts of transmission of digital files (that are equivalent to acts of distribution). Further analysis is required to assess the impacts of Option 3, in particular as to the presented options for the bundling and registration of rights and the remuneration of authors and performers.

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

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

On the one hand, some of the options presented under this IA, in particular where legislative options are chosen, may negatively affect SMEs in the copyright-intensive industries (90% of the value added generated within the EU-27's film and sound recording activities sector in 2010 was provided by SMEs, which employ just over three quarters of the total number of persons employed in the sector). On the other hand facilitating the cross-border provision of services related to digital content and lowering transaction cost would also have a favourable impact on SMEs active in this area.

**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 and, in one instance, the development of registration and

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licensing tools (options 3 and 4). In the case of Option 2, the impact on Member States would be limited to their participation in dialogues organised by the Commission, where relevant.
<b>Will there be other significant impacts?</b>
The impacts on fundamental rights are outlined in section 6.2 of the IA.
<b>D. Follow up</b>
<b>When will the policy be reviewed?</b>
In the case of Option 2, the monitoring of the market developments would form part of the option itself and would lead to a review in the short term. In the case of legislative options (Options 3 and 4), their effect would be evaluated five years after the date of transposition or entry into force.

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## **1. INTRODUCTION, POLICY CONTEXT, PROCEDURAL ISSUES AND CONSULTATION [TO BE FINALISED IN LIGHT OF RESPONSES TO THE PUBLIC 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.<sup>1</sup> 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.<sup>2</sup>

In 2010, in its Digital Agenda for Europe,<sup>3</sup> 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",<sup>4</sup> 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,<sup>5</sup> 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*".

### **1.2. Procedural issues and consultation of interested parties**

A series of consultations have been held during recent years:

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

<sup>2</sup> This is explained in sections 2 and 3.

<sup>3</sup> COM (2010) 245 final/2

<sup>4</sup> COM (2011) 287 final

<sup>5</sup> COM (2012) 789 final

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- The Green Paper on copyright in the knowledge economy (16/07/2008)<sup>6</sup> 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. More than 350 contributions were received and showed a keen interest from the stakeholders (mainly professional associations and NGOs) for the adaptation of copyright to the digital environment. Respondents identified future challenges, e.g. scientific and educational publishing, the role of public libraries in digital environment or the treatment of certain beneficiaries of exceptions such as researchers or persons with a disability.
- The consultation on "Creative Content Online" (22/10/2009)<sup>7</sup> again raised the question as to whether there was a need to harmonise at EU level a number of "public interest" exceptions. More than 200 replies were received.<sup>8</sup> The consultation addressed the role of online markets and explored a variety of copyright management models that could help the development of such markets. Respondents were mainly associations and NGOs, with also a few contributions from companies and citizens. The need for more exceptions, larger in scope and benefiting more users, was expressed by certain stakeholders (IT companies, libraries and some citizens) while others (right holders, publishers, etc) pleaded for a better enforcement of existing legislation and stronger protection.
- The Green Paper on the online distribution of audiovisual works (13/07/2011)<sup>9</sup> asked a series of detailed questions on various options for tackling the territoriality of copyright.<sup>10</sup> 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 sector, and in particular Europe's film heritage. Following this consultation the Commission issued a Communication on content in the Digital Single Market.<sup>11</sup>
- 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).<sup>12</sup> The consultation gathered the views of 282 respondents, including companies, citizens, professionals, business organisations, etc.
- From 5/12/2013 to 5/02/2014, the Commission launched a public consultation<sup>13</sup>, covering the key areas that are discussed in this Impact Assessment (IA).

<sup>6</sup> COM(2008) 466/3, at: [http://ec.europa.eu/internal\\_market/copyright/copyright-info/index\\_en.htm](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>

<sup>7</sup> [http://ec.europa.eu/internal\\_market/consultations/2009/content\\_online\\_en.htm](http://ec.europa.eu/internal_market/consultations/2009/content_online_en.htm)

<sup>8</sup>

[http://ec.europa.eu/avpolicy/other\\_actions/content\\_online/consultation\\_2009/index\\_en.htm](http://ec.europa.eu/avpolicy/other_actions/content_online/consultation_2009/index_en.htm)

<sup>9</sup> COM(2011) 427, at: [http://ec.europa.eu/internal\\_market/copyright/initiatives/audiovisual/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/initiatives/audiovisual/index_en.htm)

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

<sup>11</sup> COM(2012) 789 final, at: [http://ec.europa.eu/internal\\_market/copyright/licensing-europe/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/licensing-europe/index_en.htm)

<sup>12</sup> Referred to as the consultation on the civil enforcement of IPR" below..For more details, including all public responses and a summary of responses a see: [http://ec.europa.eu/internal\\_market/consultations/2012/intellectual-property-rights\\_en.htm](http://ec.europa.eu/internal_market/consultations/2012/intellectual-property-rights_en.htm)

<sup>13</sup> [http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/index\\_en.htm](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm)

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[Stakeholders' responses will be summarised in Annex A and be incorporated into this IA].

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 B, and, together with the discussions held in the Working Groups, are taken into account throughout the IA.

An Impact Assessment Steering Group held four meetings between September 2013 and January 2014 to assess the progress on the impact assessment 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.

## **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). International and national laws grant copyright protection because innovation and creation are considered a public good. The core function of copyright is therefore to stimulate the availability of creative content by rewarding investment and effort (time and money) in its creation.

In economic terms, copyright overcomes a fundamental problem of markets for creative content: non-excludability, meaning that, in the absence of exclusive rights and their effective enforcement, rights holders would likely be unable to prevent consumption of their products and services without appropriate remuneration. By securing a clear allocation of rights, copyright promotes the formation of markets for creative content. It provides the framework within which rights holders and users are able to negotiate agreements which authorise the exploitation of their work or other subject matter (e.g. a music service provider negotiating an agreement with record producers, music publishers and authors' collecting societies for the provision of download sales or streaming services; a library negotiating an agreement with a publisher for the lending of e-books; an online service provider negotiating an agreement with film producers and broadcasters for the uploading of audiovisual material to a video sharing platform). In turn, 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. For example, transaction costs (such as time and other resources spent locating the rights holder and negotiating the licensing agreement), if substantial, may prevent mutually beneficial trade from happening. Or, when rights holders cannot effectively target different user groups, some users who are willing to pay more than it costs to produce a copy of e.g. a work, will not be served (and again, some markets will not be formed). In addition, the value attached by rights holders to works and other protected subject matter may sometimes not fully reflect their social value, e.g. when the use of a work generates external effects<sup>14</sup> that the owner of the

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<sup>14</sup> External effects in this sense are benefits that affect a party who did not choose to incur that benefit.



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copyright is unaware of or has no incentive to consider. In this sense, a well-designed copyright system, in addition to ensuring adequate compensation for creators and producers (in order to maintain incentives to create in the long run) may need additional balancing, for example, by introducing copyright exceptions and limitations. Similarly, market power on the part of right holders may result in a deadweight loss which could potentially be curbed by broader exceptions. This is to be considered against the increased net welfare gain to be potentially generated from each new work (favouring narrower exceptions).

Copyright is a property right recognised in the European Charter of Fundamental Rights.<sup>15</sup> As with any other property rights, the law grants the owner of the copyright (or related rights) exclusive rights of use of the work or performance, the film, the recording or the broadcast. Copyright thus represents a carefully crafted balance between the short-term costs to society of an exclusive right granted to the right holder and the long-term benefits of a steady stream of creative content that this monopoly generates. That balance is ensured by means of an appropriate level of copyright protection. For this reason, copyright is limited in time<sup>16</sup> and in scope (via limitations and exceptions).

### **2.2. Economic dimension**

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

The copyright framework has become particularly important in light of the significant role played by creativity in the economy and in the society in general. According to a Report by the Office for Harmonization in the Internal Market and the European Patent Office<sup>17</sup> 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).<sup>18</sup> Overall, 4.2% of the EU's GDP is generated in copyright-intensive sectors (on average in 2008-2010).<sup>19</sup> According to the same report, 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,<sup>20</sup> 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 recording and music publishing activities, providing over 400,000 jobs, with net contribution to the EU economy of over €13 billion,<sup>21</sup> with the audiovisual sector worth nearly €132 billion in 2011, and online video on demand (VoD) €616 million (having grown by 45%

<sup>15</sup> 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;

<sup>16</sup> 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.

<sup>17</sup> "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.

<sup>18</sup> 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.

<sup>19</sup> 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.

<sup>20</sup> Communication of the European Commission 'Promoting cultural and creative sectors for growth and jobs in the EU' 26 September 2012.

<sup>21</sup> Source : Eurostat, 2013



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compared to 2010).<sup>22</sup> The European game market is valued at €14,5 billion.<sup>23</sup> The creative industries in the EU are dominated by micro firms with 95% having fewer than 10 employees coexisting with very large corporations.<sup>24</sup> 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,<sup>25</sup> 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,<sup>26</sup> 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,<sup>27</sup> 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.<sup>28</sup>

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.<sup>29</sup> Although sports events are not covered by copyright,<sup>30</sup> major championships constitute premium content for broadcasters (and one of the most often pirated in the Internet).<sup>31</sup> In addition to industries, 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. [Data to be added if provided in the public consultation]. The role of copyright-reliant industries and public institutions is equally important. For instance, 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 and distribution of creative content*

Digital technology and the internet are rapidly changing the complex value chain for the production, distribution and consumption of creative content. With growing access to the internet, the use of online services is becoming more and more a part of EU consumers' daily life: 76% of households in EU-28 have internet access (72% broadband) and almost 80% of EU citizens use internet daily<sup>32</sup> while 16% of all individuals (29% of young people between 16 and 24 years old) use mobile internet. Table 1 below shows the main uses and users of the internet, notably for communication and entertainment activities. According to expert sources,

<sup>22</sup> European Audiovisual Observatory 2012 Yearbook Volume 2 Television, cinema, video and on-demand audiovisual services – the pan-European picture

<sup>23</sup> Global Entertainment and Media Outlook 2012-2016

<sup>24</sup> European Competitiveness Report 2010, p. 15

<sup>25</sup> Enterprises employing fewer than 250 persons.

<sup>26</sup> Independent music companies Association (IMPALA) comments on the EC consultation on a future trade policy, July 2010.

<sup>27</sup> 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>

<sup>28</sup> Source: Eurostat

<sup>29</sup> 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>

<sup>30</sup> C-403/08 and C-429/08, *Football Association Premier League and others*, §§ 96-99.

<sup>31</sup> 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.

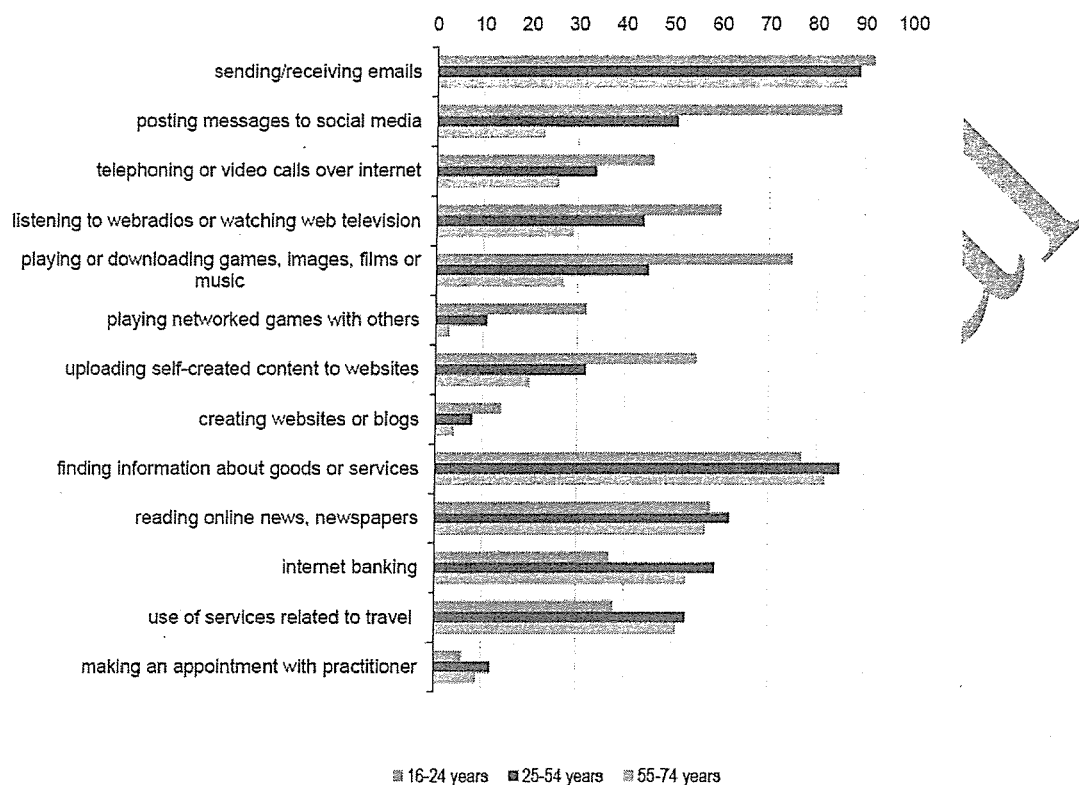
<sup>32</sup> Source: Eurostat 2013 (% of individuals who accessed internet in the last 3 months preceding the Eurostat survey)



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during the next 5 years global digital spending on entertainment and media will increase at a rate of 12.1%, whereas non-digital spending will only increase by 2.8%.<sup>33</sup>

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



Source: Eurostat<sup>34</sup>

Digitisation has deeply impacted the ways works and services are consumed by largely increasing the range of choices available to the audience and possibilities to personalise access in a way that fits best the users' lifestyles and fosters access to culture. For example, streaming, downloading and video-on-demand services provide viewers with more flexibility when watching programmes, listening to music, reading books or newspapers. The development of technological devices, such as tablets and smartphones, facilitates such use even more. Consequently, consumers now increasingly expect to access content at any time and from anywhere.

Digital technology also brings new opportunities to distribute content as a substitute or as a complement to established forms of distribution such as physical sales (e.g. CDs, DVDs and books), linear TV broadcasting, and cinema release. It has also made the production and distribution of content more efficient and less costly, resulting in a reduction in certain types

<sup>33</sup> 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"

<sup>34</sup> [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)

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of transaction costs - for instance, the internet allows for a much more efficient matching between owners and users and for easier monitoring of consumption. On the other hand, some new uses (e.g. digitisation of out of commerce works) involve significant costs due in part to the large amount of transactions involved often relatives to contracts concluded prior to Internet. The ease of digital production and the marginal costs of online distribution have also vastly expanded the scope for individuals to self-publish, reaching consumers directly online.

All in all, more content is available to EU citizens than ever before, and the last years have seen a plethora of new services coming into the market. 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).<sup>35</sup> 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 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 where downloading is still the dominant form of digital music consumption).

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.<sup>36</sup> 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).<sup>37</sup> In 2011, consumers spent around €600 million on TV and film on demand in Europe.<sup>38</sup> 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 audiovisual content, with 10,000 TV channels available in Europe. Broadcasters' net revenues totalled over €73 billion in 2011.<sup>39</sup>

The **online games** market is one of the fastest growing markets in recent years and it 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.<sup>40</sup> 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.<sup>41</sup>

The **e-book** market within the EU countries 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.<sup>42</sup> More and more e-books are available and book publishers increasingly offer digital content such as e-books and apps in addition to

<sup>35</sup> IFPI (Digital Music Report 2013, <http://www.ifpi.org/content/library/DMR2013.pdf>)

<sup>36</sup> Data from European Audiovisual Observatory

<sup>37</sup> MAVISE/European Audiovisual Observatory, Yearbook 2011, <http://www.obs.coe.int>

<sup>38</sup> European Audiovisual Observatory

<sup>39</sup> European Audiovisual Observatory

<sup>40</sup> Newzoo, <http://www.newzoo.com>, Infographics/ Keynotes.

<sup>41</sup> PWC, Global entertainment and media outlook, 2012-2016 (PWC 2012)

<sup>42</sup> Rudiger Wischenbart, The Global eBook Report, 2013

traditional 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.<sup>43</sup> Certain of these platforms still privilege distribution of content over proprietary networks (so called “walled gardens”) via distribution on the internet.<sup>44</sup> Educational publishers<sup>45</sup> 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 specific licence used) these materials to be reused, adapted and redistributed.<sup>46</sup> Around the world different policy initiatives are being implemented to support the development of OER. In its Paris Declaration of 2012, UNESCO has made a clear pledge for authorities to actively promote OER. The recent Communication from the Commission on "Opening up Education"<sup>47</sup> also encourages the use of OER.

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.

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

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.

- (a) 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.

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<sup>43</sup> <http://www.cmba-alliance.eu/>

<sup>44</sup> 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).

<sup>45</sup> Educational publishing represents between 15 and 20% of the publishing market at EU level.

<sup>46</sup> 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.

<sup>47</sup> 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](http://ec.europa.eu/education/news/doc/openingcom_en.pdf)

- (b) 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).
- (c) Finally, the trend of direct interaction in the online space between creators and consumers (e.g. through blogs) is also gaining importance, as it 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 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, user-generated content (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, textbooks<sup>48</sup>.

As an increasing number of consumers<sup>49</sup> 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.

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<sup>48</sup> Public and philanthropic investment is also considerably being used for the production of Open Educational Resources.

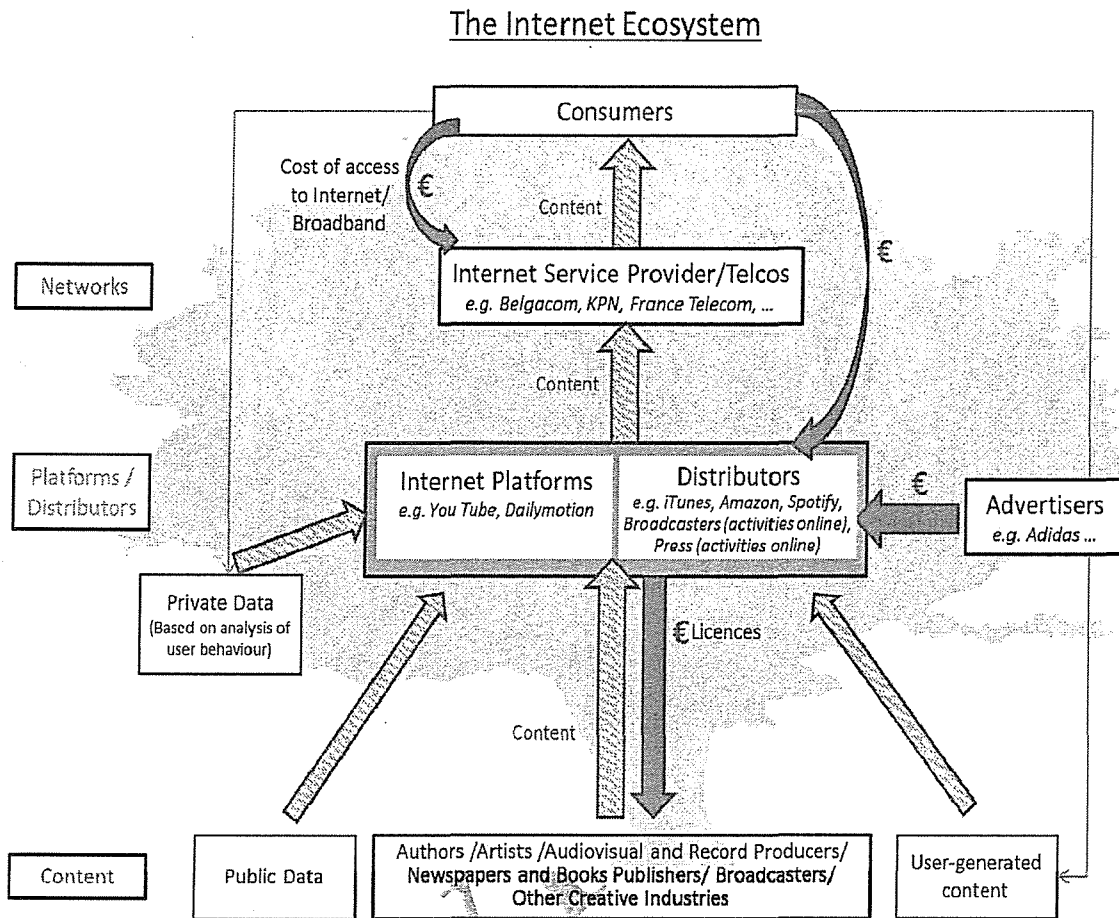
<sup>49</sup> Study on Digital Content Products in the EU, IBF International Consulting (2013)  
[http://ec.europa.eu/consumers/enforcement/sweep/digital\\_content/docs/dcs\\_complementary\\_study\\_en.pdf](http://ec.europa.eu/consumers/enforcement/sweep/digital_content/docs/dcs_complementary_study_en.pdf)

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Economies of scale mean that platforms become important distributors in the internet value chain, mounting a challenge to “traditional” distributors.

Provisional

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. [Add feedback from public consultation]

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. Another challenge is the possibility for certain institutions (e.g. libraries and educational establishments) to develop, on the basis of exceptions to copyright protection, distribution models that compete with normal channels of sale.

According to a recent survey,<sup>50</sup> 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 Europeans (and 57% of 15-24 year old) consider it is acceptable to download or access copyright-protected content illegally<sup>51</sup> when it is for personal use.<sup>51</sup> This

<sup>50</sup> 2013 OHIM IP perception survey

<sup>51</sup> 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).



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 rights holders 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.<sup>52</sup> 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.

### **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)<sup>53</sup> and the WIPO Performances and Phonograms Treaty (WPPT).<sup>54</sup> It harmonises several aspects of copyright that are essential to the making available online of works and other protected subject matter. This Directive has to be read in conjunction with all other EU Copyright Directives,<sup>55</sup> including the Directive on Collective Rights Management on which political agreement was reached in 2013. 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 Performances<sup>56</sup> and the Marrakesh Treaty to improve access to published works for persons who are blind, visually impaired or otherwise print disabled.<sup>57</sup> Moreover, the EU has reflected the provisions of EU legislation as it stands in the texts of agreements concluded with a large

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<sup>52</sup> 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](http://wiki.creativecommons.org/Defining_Noncommercial).

<sup>53</sup> <http://www.wipo.int/treaties/en/ip/wct/>

<sup>54</sup> <http://www.wipo.int/treaties/en/ip/wppt/>

<sup>55</sup> [http://ec.europa.eu/internal\\_market/copyright/acquis/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/acquis/index_en.htm)

<sup>56</sup> <http://www.wipo.int/treaties/en/ip/beijing/>

<sup>57</sup> [http://www.wipo.int/edocs/mdocs/copyright/en/vip\\_dc/vip\\_dc\\_8\\_rev.pdf](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).

*Draft to be finalised in light of responses to the public consultation*

number of third countries.<sup>58</sup> The details of these provisions including the terms of protection therefore legally bind the EU and the respective third countries, including the terms of protection.

According to Article 167 (4) of the Treaty on the Functioning of the European Union, 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 European Union is a Party recognises the importance of intellectual property rights in sustaining those involved in cultural creativity.<sup>59</sup>

The InfoSoc Directive harmonises several rights of authors and neighbouring rights holders<sup>60</sup> 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, but most of them are optional (Member States have a choice whether to implement them in national law).

Exceptions to copyright are not the only tool to facilitate certain uses of content online and, increasingly, different stakeholders have seen the need to work together with a view to facilitate uses. In the structured stakeholder dialogue “Licences for Europe”, participants made ten pledges to overcome problems European citizens may face in accessing content in four areas: cross-border portability of content, user generated content, data and text mining and access to audiovisual works and audiovisual heritage.

The InfoSoc Directive also implements international obligations concerning Technological Protection Measures<sup>61</sup> and Rights Management Information.<sup>62</sup>

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 rights holders 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 infringements of copyright are also foreseen in Directive 2004/48/EC<sup>63</sup> on the enforcement of Intellectual Property rights (IPRED).

Finally, Directive 2000/31/EC<sup>64</sup> (the “E-commerce Directive”), also contains provisions which are relevant to the enforcement of copyright.

Further information on the legal framework is presented in Annex C (i).

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<sup>58</sup> <http://ec.europa.eu/trade/policy/countries-and-regions/agreements/>

<sup>59</sup> Preamble to the UNESCO Convention on the protection and the promotion of the diversity of cultural expressions.

<sup>60</sup> 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 protected subject matter”.

<sup>61</sup> Pursuant to Articles 11 WCT and 18 WPPT

<sup>62</sup> Pursuant to Articles 12 WCT and 19 WPPT

<sup>63</sup> 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)

<sup>64</sup> 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>



**3. PROBLEM DEFINITION [TO BE FINALISED IN LIGHT OF RESPONSES TO THE PUBLIC CONSULTATION]**

The developments described in Section 2.2 represent an opportunity for all players in the value chain – creators, producers, distributors and end-users - to seek out new uses, users and services by capitalising on the potential offered by technology. In this environment, the fundamental principle of copyright protection remains sound: to the extent that copyright is enforceable, it overcomes the problem of “free-riding”, eliminating unauthorised access to creative works and thus continuing to provide incentives for creation. Furthermore, a well-functioning system of copyright protection ensures the property rights of rights holders as guaranteed under the Charter of Fundamental Rights.

However, a number of challenges have arisen as uses, services, and user patterns evolve with changing technology.

Firstly, there are issues relating to the exact **definition of the scope of rights** in online transmissions. Current law and practice could be seen as having led in some cases to an “over-reaching” of copyright and in others to excessively complex licensing.

Secondly, while internet enables the delivery of content seamlessly across borders, this potential is not always served by either market practice or the legislative framework. On the one hand, consumers increasingly expect to be able to access content anywhere. Copyright-protected content, on the other hand, is often bound to national contexts and cultural preferences, with national exploitation models being still the norm. Although the **territorial scope** of exclusive rights does not impede the grant of multi-territorial licences, it can be used to limit the cross-border availability of content. Linked to this are the **contractual restrictions** imposed by rights holders and service providers which may restrict cross border access and/or portability and result in the fragmentation of the internal market. Market players seem to limit cross border availability not only to maximise revenues, but also for a variety of other reasons, including issues related to consumer demand, cost of providing services, taxation issues, compliance with consumer protection etc.

The third set of issues arises from the **insufficiency of harmonisation** of the copyright framework across the EU. This relates in particular to the framework for **exceptions and limitations to rights** where the level of harmonisation achieved by the EU *acquis* is limited. Most limitations are optional and many are drafted in a manner that allows for wide differences in implementation at national level (e.g. exceptions for private copying, for education or for persons with disabilities).

Fourthly, there is also a need to ensure that the legislative framework sufficiently and clearly **takes account of technology development**, as well as of new uses and user expectations in the networked economy, while continuing to deliver a high level of protection for copyright holders.<sup>65</sup> The lack of clarity is illustrated *inter alia* by the number and range of cases referred to the Court of Justice of the European Union (CJEU) touching on questions as diverse as browsing and hyperlinking, consultation in library premises, or the exception for private copying. This leads to the perception by some that the digital needs of copyright users are not addressed adequately in a range of areas, or that artificial barriers to innovative uses of content are imposed.

<sup>65</sup> Recital 9, InfoSoc Directive



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Fifthly, concerns have been raised about the adequacy of **remuneration** for authors and performers not only in the online environment. There are substantial differences in regulatory approaches across the EU and substantial differences in terms of the relevant rights, mechanisms and methodology for remuneration across different sectors of the creative industry. There are also concerns as to the remuneration of creators of user generated content and the need to have mechanisms to clearly identify the authors and right-holders of UGC.

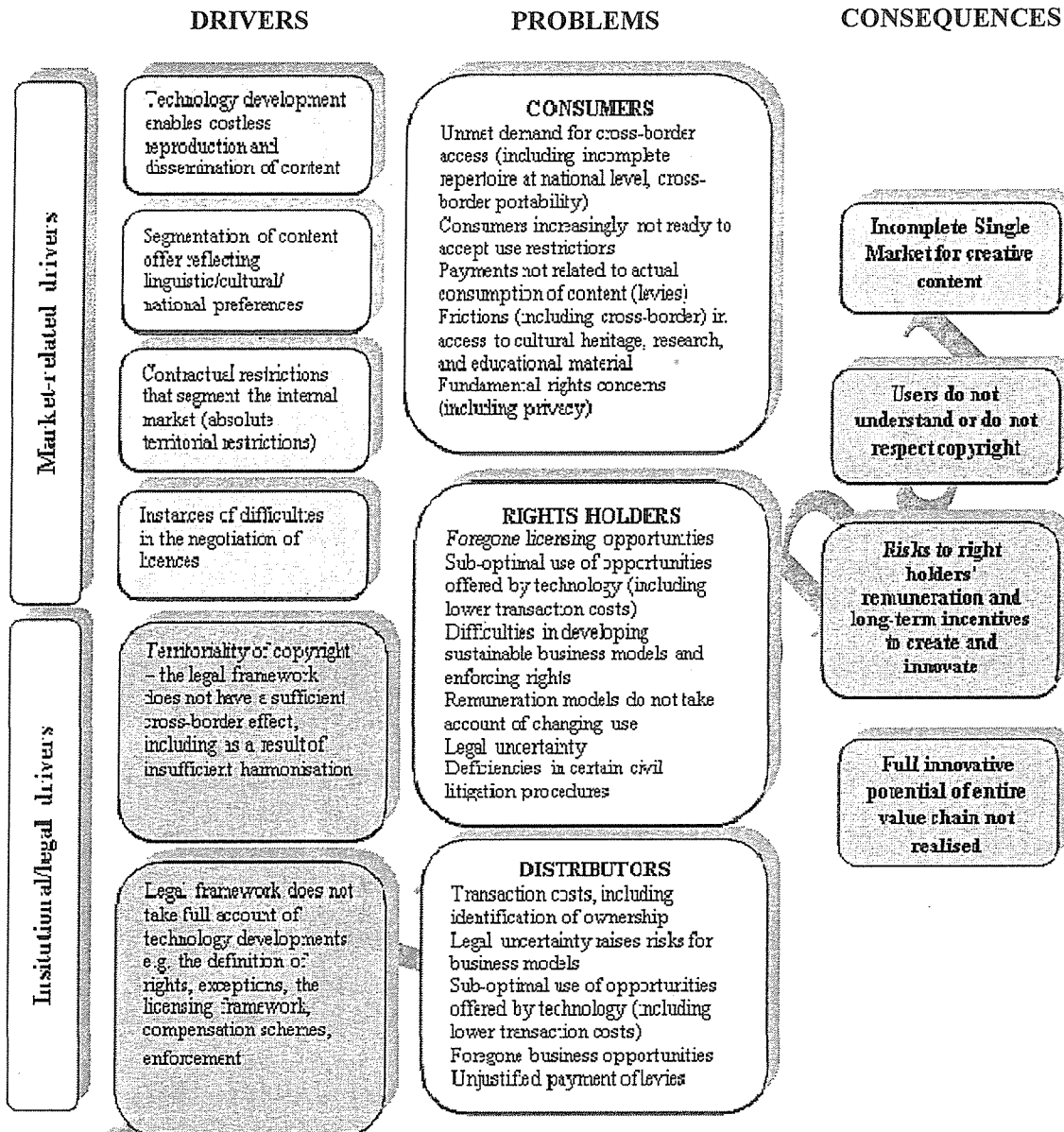
Finally, the development of internet and digital technologies have added another challenging dimension for the **enforcement** of copyright, opening the door for new forms of large-scale infringements which are difficult to tackle in particular in a cross-border context as is more and more often the case.<sup>66</sup> At the same time, citizens and consumers of online content are often concerned about the respect of their fundamental rights, such as the right for privacy, freedom of expression or the protection of their personal data.

These problems are summarised in Figure 2 below.

*Figure 2: Problem tree*

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<sup>66</sup> Enforcement of copyright is also challenging when open licences are used. There is a frequent confusion between open licences and public domain. Through an open licence a rights holder grants a user permission to anyone, under certain restrictions, but keeps the copyrights. Infringement may occur for example if the open licence does not include commercial exploitation by third parties and an infringer does such exploitation.



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### **3.1. The definition of rights and the functioning of the digital Single Market**

The changing patterns of distribution and use in digital networks raise important questions about the definition of rights in the online environment, as well as the territorial application of the rights framework. Linked to the territorial application of copyright are the contractual restrictions on the territorial availability of services that are used by some market players for a variety of reasons, irrespective of their actual ability to provide for multi-territorial services.

#### *3.1.1. Territoriality of copyright*

Copyright is territorial (referring to national territories) in the sense that the rights granted under copyright are provided for in national law, and not in the form of unitary rights at EU level. For example, the author of a book does not have a single EU-wide right of reproduction but 28 different national rights of reproduction. The geographical scope of each 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 and 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 transmission is initiated (e.g. the French right of making available to the public) and under the territorial scope of the exclusive national right granted by the Member State in which the transmission is received (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 also, in principle, in all Member States to which the content is transmitted.<sup>67</sup>

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)<sup>68</sup> 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. 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.

The territoriality of copyright is understood as 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. It therefore has an impact on the freedom to provide and receive services across borders, and on the Digital Single Market in general. It also 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 with a collective management organisation). Indeed, whereas the territoriality of copyright does not prevent the possibility to grant multiterritorial licences for a particular work, difficulties arise when the rights for

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<sup>67</sup> If EU copyright were based on a unitary title instead of on national, territorial rights, any licence would by default (insofar as not limited contractually) be a pan-European licence.

<sup>68</sup> 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/IP1/2012/102912.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*).

different territories are in different hands. Sometimes, even the rights in a work with regard to a single territory are in different hands. The sector where these types of problem has most frequently arisen in the past is the licensing of rights in musical works<sup>69</sup> which is normally done by collective rights management organisations. This is the reason why the proposal for a Directive on collective management of rights on which the European Parliament and the Council reached a political agreement on November 2013<sup>70</sup> includes a whole title on the multi-territorial licensing of online rights in musical works.

Finally, just as exclusive rights, exceptions and limitations to these rights are territorial. There are few express mechanisms for the cross-border effect of exceptions to exclusive rights save where the legislator has introduced mandatory exceptions. This is the case with the mandatory exception for technical copies in Article 5(1) of the Infosoc Directive and to a lesser extent the mandatory exceptions in the Software and the Database Directive.<sup>71</sup> This implies that content which is made available in one territory under an optional exception in one Member State cannot be legally accessed in another Member State under the terms of that exception where that exception has not been introduced into the law of that Member State. This is discussed further in section 3.2.2 below.

Further details are presented in Annex D.

### *3.1.2. Contractual restrictions that segment the internal market*

As explained above, despite the territorial nature of copyright, rights holders are free to issue a multi-territorial or pan-European licence in a single contract. This is particularly the case where right holders (e.g. a book publisher or a film producer) have the rights for all territories in their hands. Nevertheless, even when right holders possess all the rights to issue multi-territorial or pan-European licences, they may issue exclusive licences with a limited territorial scope e.g. matching the territory of a Member State. This is particularly the case in the audiovisual sector. Territorial financing is also the norm in this sector.

As a result, while a rapidly growing variety of online services is available, and citizens can choose between an ever wider range, their 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).

The licensing of rights functions very differently in different sectors. Licensing on the basis of territorial exclusivity - in the sense that a single licensee is exclusively authorised to market a specific work or other subject-matter in a specific Member State or territory is more prevalent in the audio-visual sector than in other sectors such as music or software. With regard to

<sup>69</sup> 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 right holders can take up to six months, and negotiations up to two years.

<sup>70</sup> Formal adoption is expected in spring this year. Deadline for implementation by Member States is 24 months after the date of entry into force of the Directive.

<sup>71</sup> See the judgment in Premier League referred to above and the UsedSoft judgment. There is also the system established by the Orphan Works Directive.

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premium audiovisual content (e.g. new films, shows, series or live sports), however, the business model is as follows.. High upfront investments are required, and rights are usually licensed on the basis of territorial exclusivity. This is facilitated by the fact that most of the relevant rights in premium audiovisual content tend to be held by one rightholder (the film producer). In such a situation, the economic exploitation rights for a specific Member State are licensed exclusively to a single national distributor, and the right holder (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 audiovisual content (in order not to disturb the territorial exclusivity of other national distributors that conclude a similar licence agreement with the right holder, and to ensure its own territorial exclusivity).

This contractual transfer of rights to several national distributors (enjoying distribution exclusivity for a specific territory) leads to a situation where different persons hold the various national rights in the EU. Acquiring a Pan-European licence through a single entity that holds all the rights is therefore no longer possible.<sup>72</sup>

Clauses in licence agreements that guarantee absolute territorial exclusivity allow for effective price discrimination along national borders and are normally designed to maximise the revenues of rights holders 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). Absolute territoriality clauses, however, also segment the Internal Market along national borders<sup>73</sup> and limit cross-border access to copyright-protected content. Limited availability creates frustration for consumers who expect to be able 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 exclusivity<sup>74</sup> is a general principle under EU competition law, applicable to all vertical agreements, including agreements for premium content, which is relevant in this context. According to this approach, rights holders and service providers may, under certain circumstances, agree on allocating exclusive territories to single distributors with regard to **active sales**. On the other hand, 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**.<sup>75</sup> The negative effects of contractual agreements based on absolute territorial

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<sup>72</sup> 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).

<sup>73</sup> 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 right holder 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 right holders in exchange for absolute territorial exclusivity goes beyond their appropriate remuneration.

<sup>74</sup> Understood as eliminating all competition from third parties, including from parallel importers and exclusive licensees for other territories (passive sales).

<sup>75</sup> 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.



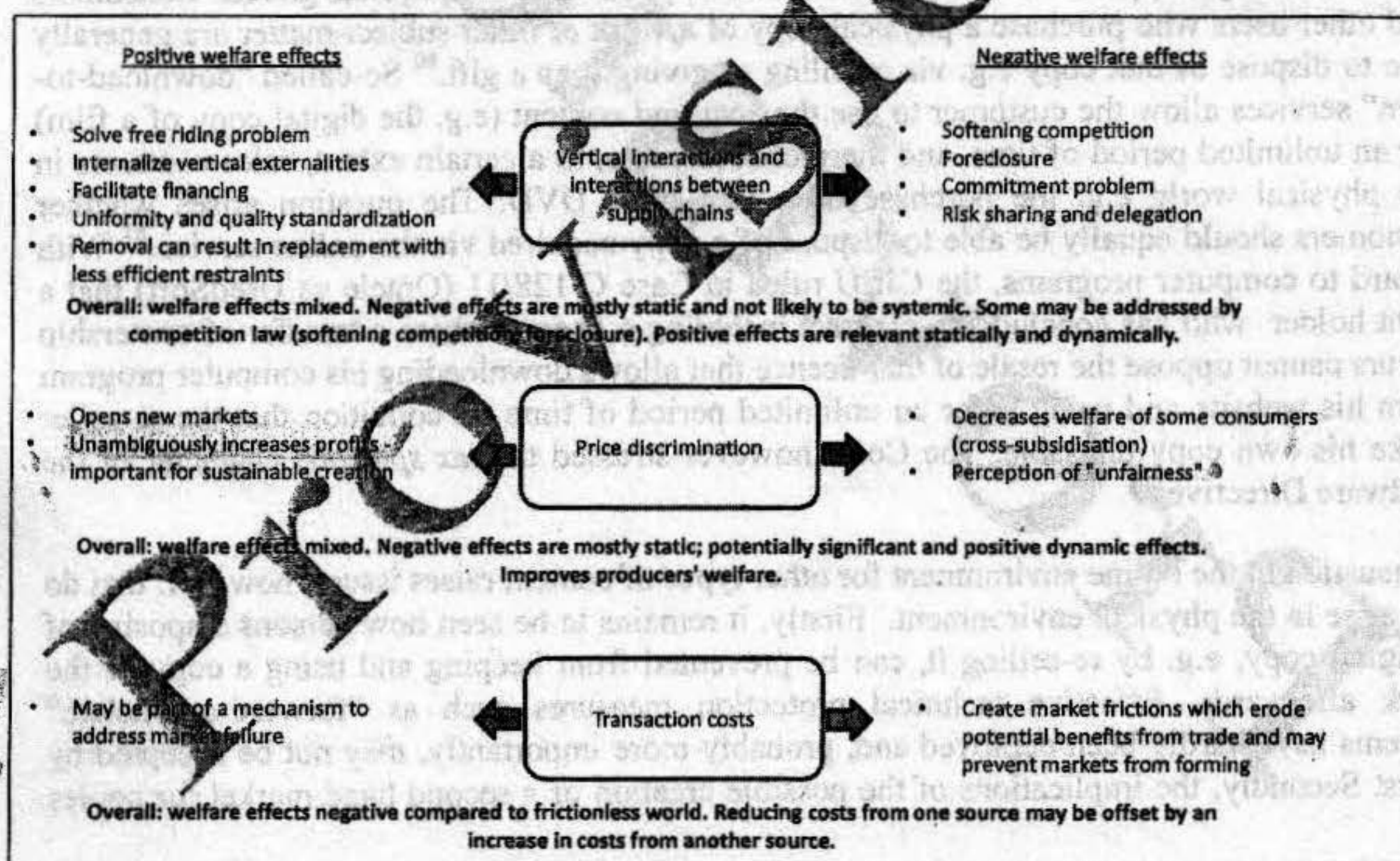
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exclusivity (that prohibit all cross-border sales including passive sales) can currently only be addressed through the enforcement of competition law.<sup>76</sup> Competition law decisions provide industry-wide guidance for companies as to their agreements' 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 provisions in the TFEU on competition law are separate from those on the freedom to provide and receive services in the Single Market.

Independent from possible territorial exclusivity clauses in licence agreements between rightholders and distributors, restrictions on cross-border access may also be the result of contractual limitations imposed on consumers by service providers themselves. Even if e.g. an online service provider has acquired a multi-territorial or pan-European licence, it may allocate customers residing in a specific Member State to a specific national store for different reasons (profit maximization, different VAT rates, languages for customer service, consumer protection, levies, etc).

The figure below presents an economic framework for the analysis of territorial restrictions in copyright licensing agreements and in contracts with consumers. Further details are presented in Annex D.

Figure 3: An economic framework for the analysis: copyright territoriality and territorial restrictions in licensing agreements<sup>77</sup>



<sup>76</sup> 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.

<sup>77</sup> Based on "Territoriality of the making available right" by Charles River Associates



### 3.1.3. *The definition of rights in the online environment*

There are a number of open questions with respect to the definition of rights in the online environment.

#### 3.1.3.1. Two rights for a single transmission

Online services imply for the purposes of the Infosoc Directive, in a single economic transaction, both the right of communication to the public (including the right of making available) and the reproduction right. Indeed, each digital transmission of copyright protected content entails, in the current state of technology and law, several reproductions including at the start of a transmission (e.g. the uploading of the work to a server prior to its making available)<sup>78</sup> and at its end (notably when content is downloaded by the final user).<sup>79</sup> The cumulative application of the two rights may increase transaction costs for the licensing of works for online use, since the reproduction right is autonomous and independent, and may be held by a person other than the holder of the communication to the public right (see above at 3.1.1).. Problems are less likely to arise when both the rights are in the hands of a single right holder.

#### 3.1.3.2. Online transmission and the exhaustion of rights

An area of uncertainty relates to the question of whether the principle of exhaustion of the distribution right applies in the digital environment, as it does for physical goods. 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.<sup>80</sup> 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 equally be able to dispose of a copy acquired via the online service.<sup>81</sup> With regard to computer programs, the CJEU ruled in Case C-128/11 (Oracle vs UsedSoft) that a right holder who has concluded a contract including a licence where a transfer of ownership occurs cannot oppose the resale of that licence that allows downloading his computer program from his website and using it for an unlimited period of time on condition that the re-seller make his own copy unusable. The Court however stressed the *lex specialis* character of the Software Directive.

Exhaustion in the online environment for other types of content raises issues, however, that do not arise in the physical environment. Firstly, it remains to be seen how persons disposing of a digital copy, e.g. by re-selling it, 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

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<sup>78</sup> This reproduction at the start of the transmission needs to be differentiated from the permanent reproductions a service provider may undertake to build a database for the provision of its services.

<sup>79</sup> Some of these reproductions are, however, covered by the mandatory exception provided for in Article 5(1) of the InfoSoc Directive, and thus do not need to be licensed. See also case C360/13 *Meltwater*, pending reference before the CJEU.

<sup>80</sup> This is possible because of the principle of exhaustion of the distribution right according to which right holders cannot oppose the resale of a copy when the first sale in the EEA was made with their consent.

<sup>81</sup> To date, rights holders have usually been in a position to control the further dissemination of digital copies of their works after first sale.



of perfect quality that never deteriorate are difficult to assess. Finally, the digital market is in a state of flux, and there are indications that there may be a shift from "download-to-own" services to "access-based-services" (financed by e.g. a periodically paid subscription fee). Such access-based services do not resemble sales contracts at all and, in the absence of any transactional purchase, the question of reselling digital content, for example, simply does not arise. It is also important to note that many services offer the possibility for subscribers to share digital files (e.g. the sending of a newspaper article or the sharing of a play list with friends) as they would do in the "physical world" with physical copies.

### 3.1.3.3. Legal uncertainty on linking and browsing

Several cases are pending before the CJEU<sup>82</sup> 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 right holder. Moreover, a user browsing 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 CJEU<sup>83</sup> 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 judgments in these cases, there remains legal uncertainty as to how copyright extends to these activities for internet users and right holders alike.

Further details are presented in Annex K.

## 3.2. Exceptions and limitations and the functioning of the internal market

There has never before been so much digital content available to consumers. Possibilities for access and use of digital content have multiplied in the last decade in line with developments in digital technologies, and user expectations, including expectations of how digital technologies can be harnessed to achieve public policy objectives, have grown accordingly. In view of such technological advances allowing for new modes of exploitation, 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. Besides enabling new modes of exploitation and use of creative work, technological advances may also result in a reduction in transaction costs e.g. it may be the case that transactions which would otherwise not have taken place become feasible, including for example, enabling a more efficient matching (semi or fully automated) of supply and demand between owners and users.

### **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,

<sup>82</sup> Cases C-466/12 (Svensson), C-348/13 (Bestwater International) and C-279/13 (C More entertainment).

<sup>83</sup> Case C-360/13 (Public Relations Consultants Association Ltd). See also [http://www.supremecourt.gov.uk/decided-cases/docs/UKSC\\_2011\\_0202\\_PressSummary.pdf](http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0202_PressSummary.pdf)



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transaction costs erode the gains of trade between right holders 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 right holders 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 right holders 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 right holders' 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).

#### *3.2.1 The legal framework does not take full account of technology developments*

A series of issues arises with regard to the legal framework for exceptions and limitations. Firstly, some of the exceptions may be outofdate 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 a framework based on exceptions will, apart from individual users, 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 right holders, in terms of prejudice to their interest and effects on the normal exploitation

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of their works, needs to be carefully assessed, as well as the effects on other types of stakeholders and the macro effects on society (eg. the reduced or increased availability of existing and future educational resources for education).

For most existing exceptions a common theme emerges: they are optional and lacking in detail. As result there is insufficient harmonisation of the scope and conditions of the exceptions as implemented by the Member States. This leads to over-restrictive interpretation in some cases and also stands in the way of cross-border effect for Member States' national exceptions. More generally, with regards to the EU system of optional exceptions, some stakeholders criticize the (alleged) lack of flexibility in the EU and national copyright laws due to the system of a close list of exceptions and plead for the the introduction of a supplementary degree of flexibility in the national copyright systems, as well as at EU level. Others however consider that this system, which corresponds the closest to the Member States' legal systems, provides the necessary flexibility and ensures a minimum of legal certainty for all stakeholders (including those benefiting from exceptions).

#### 3.2.1.1. 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 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,<sup>84</sup> the type of beneficiary institutions,<sup>85</sup> the number of copies that can be made.<sup>86</sup> Five Member States<sup>87</sup> take a restrictive approach with respect to the number of copies that can 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 instutions to outsource digitisation activities (when these occur outside the Member State in which the library is located).<sup>88</sup>

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 rights holders, if the consultation occurs on the premises of the library.<sup>89</sup> 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

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<sup>84</sup> For instance, Lithuania reports that cinematographic works are not covered by the transposition of the exception. See chapter 3.12.1 of the 3rd report on the implementation of the 2005 EP and Council Recommendation on Film Heritage.

<sup>85</sup> In some Member States, the national library is a beneficiary of this exception, but not the corresponding film heritage institution.

<sup>86</sup> The sole purpose of 'preserving and archiving' may comprise the making of a copy to replace a work where the original is damaged, lost, destroyed (e.g. UK, EE) or unusable (LT, EE) in full or in part (e.g. FI refers to technical reconstruction); must be restored (e.g. FI, NL); or requires conversion from an obsolete format (format-shifting) or to avoid further deterioration of the work's medium (anticipation). Most Member States expressly mention the use of digital copying technology and copying onto digital carriers, but several Member States have limited this exception to written texts. Some Member States also limit the exception for preservation purposes to those cases where a new copy is not available either from the right holders or on the market (e.g. UK, EL, FI).

<sup>87</sup> Germany, Italy, Ireland, Romania, Malta

<sup>88</sup> De Wolf Study for the European Commission

<sup>89</sup> Although photocopies, digital scans or downloads can however be made available between libraries; and copies can be shared by some institutions, for a fee, under the Inter-Library Loan system. See e.g. British Library Document Supply Service. See Case C-117/13 – Technische Universität Darmstadt v Eugen Ulmer KG.

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purposes.<sup>90</sup> In the Scientific, Technical and Medical (STM) sector where publications have for long been available in digital format, rights holders 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.<sup>91</sup> On the other hand, 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 (university and national libraries, research institutions, archives) and 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.

New technologies also offer the possibility for heritage institutions to provide general online access to their collections as part of their public interest missions. This new development allows an exponential explosion of visits. Current exceptions do not envisage use online by public heritage institutions, therefore potentially limiting the possibility of online exhibition of 20th century works (which are often still protected by copyright).

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.<sup>92</sup> E-lending is not possible under an exception in the EU. 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,<sup>93</sup> requiring download on the premises during business hours, or holdback periods after publication.

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,<sup>94</sup> or they complain that insufficient titles are offered to them or that the titles are out of date. On

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<sup>90</sup> 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)

<sup>91</sup> 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](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.

<sup>92</sup> 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.

<sup>93</sup> 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).

<sup>94</sup> CILIP briefing paper, version 3, July 2013

the other hand, one experimental business model in Denmark, which enabled easy loans for extended periods of time and no waiting period,<sup>95</sup> was discontinued as it appeared to cannibalise the emerging e-book market.<sup>96</sup>

Further details are presented in Annex G.

### 3.2.1.2. Private copying

Member States are allowed to implement in their national legislation exceptions or limitations to the reproduction right for copies made for private use and photocopying.<sup>97</sup> Most Member States 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 right holders for the harm they suffer when copies are made without their authorisation. Private copying levies systems are therefore a mechanism to compensate right holders for acts of private copying.<sup>98</sup> In that context, levies are important for right holders.

With the constant developments in digital technology, new types of services increasingly respond to consumers' expectations e.g. access-based business models including certain types of cloud-based services. However, the lower transaction costs offered in theory by more efficient digital technologies are not always realised. Indeed, when end-users/consumers copy files they have purchased online onto a number of devices (e.g. MP3 files onto their computer, tablet and/or mobile phone), instances of 'double-dipping' can 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. The *status quo* leads to a high level of legal uncertainty. In some cases, payments made by end-users are not related to the actual consumption of copyright protected content even though technology enables the precise quantification of copies made by any given individual. The levels of private copying levies paid by consumers 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.

Consequently, consumers face higher prices for media and devices subject to levies,<sup>99</sup> platform operators face high costs of developing new business models and right holders face foregone licensing opportunities.<sup>100</sup>

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<sup>95</sup> eReolen.DK, see Annex G

<sup>96</sup> 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).

<sup>97</sup> Article 5(2)(a) and (b) of the InfoSoc Directive.

<sup>98</sup> 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

<sup>99</sup> In many Member States with levy systems in place, rates applicable to devices enabling use of on-line services consisting of on-demand delivery of copyright protected content are relatively high. For example, according to International Survey on Private Copying Law and Practice 2011- de ThuisKopie/WIPO 2012, a mobile phone is subject to a levy of €2,50 in Belgium, €16 in Germany and a tablet is subject to a levy of € 0.09 to €50 in France. Those amounts could be adjusted (lower) in order to take into account the possibilities offered by licensing in the digital environment.

<sup>100</sup> The impact of the status quo on right holders could be negative as the increasing reliance on levies would prevent them from fully exploiting the licensing mechanisms which are optimal in the digital environment as they allow calculating the payment on the basis of each consumer's willingness to pay. Moreover, with no changes to the status quo right holders

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Against this background, in his recommendations of 31 January 2013<sup>101</sup> which concluded stakeholdersmediation process on private copying and reprography levies, Mr António Vitorino while recognizing the shift from ownership to more access-based business models (including certain type of cloud-based services), identified double payments occurring in the digital environment among those issues which could have a negative impact on new, innovative business models. He therefore suggested that in order to favor their development and growth in the EU it should be clarified that copies that are made by end-users for private purposes in the context of an on-line service that has been licensed by rightholders do not cause any harm that would require additional remuneration in the form of private copying levies.

Further details are presented in Annex F.

### 3.2.1.3. User generated content

Since citizens 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”, when users take one or several pre-existing works, change 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.<sup>102</sup> UGC is not “new” as such. However, the development of social networking and social media sites which enable users to share content widely, has vastly changed the scale of such activities and increased the potential economic impact these activities have for the rights holders of the pre-existing works. Under the current legal framework, such uses are subject to acquiring authorisation from the relevant rights holders if the initial work(s) is protected by copyright.<sup>103 104</sup> The development of digital tools has also increased 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.

In practice, the market has recently developed in such a way that the hosting by large platforms of such content is covered by authorisations from rights holders (notably in the music sector), with both intermediaries and rights holders (including, in some cases, UGC creators) sharing in the advertising revenues so generated. However, coverage is not comprehensive, and smaller platforms/individual blogs cannot benefit from the legal certainty provided by such “blanket” arrangements though micro-licences may increasingly be available in the market place for some users.<sup>105</sup> Transformative use of “print” (literary works, fine art, illustration, photography, design, architecture and other visual works) and audiovisual content is not licensed in a systematic manner. However, some media companies are

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would be worse-off as otherwise their revenue derived from levies could be out weighted by positive results of levy adjustment and the resulting increased demand. See Case C 463/12 Copydan Båndkopi

<sup>101</sup> [http://ec.europa.eu/internal\\_market/copyright/docs/levy\\_reform/130131\\_levies-vitorino-recommendations\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf)

<sup>102</sup> 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.

<sup>103</sup> Rights of reproduction, adaptation, and communication/making available to the public

<sup>104</sup> 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).

<sup>105</sup> 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 B and the presentations available on: <https://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/WG2-UGC.pdf>)



developing platforms themselves enabling active developers to re-use published content, including for publishing purposes.

The evidence across all sectors is that currently UGC is flourishing (as of 2013, 100 hours of video content are uploaded to YouTube every minute). The lack of case law on the issue also suggests that rights holders have so far refrained from preventing its emergence, with notable isolated cases relating to the assertion of moral rights. User groups (in the context of Licences for Europe) have noted however, that, a small portion of UGC may in fact be prevented, and that legal uncertainty as to the possible application of certain exceptions e.g. for quotation, and parody places legal risks on end-users. In Licences for Europe, the positions of stakeholders were too divergent to agree on a common line.

Further details are presented in Annex E.

#### 3.2.1.4. Text and data mining (TDM)

Text and data mining, content mining, data analytics<sup>106</sup> are different terms used to describe increasingly important techniques for the exploration of vast amounts of texts and data (e.g., online journals, web sites, databases etc.). The use of text mining in the field of research has a big potential to foster innovation and bring about economic and societal benefits.<sup>107</sup> Some stakeholders 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.

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.

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 right holders<sup>108</sup> in order to mine protected works or other subject matter, unless such authorisation can be implied (e.g. content accessible to general public without restrictions on the internet, open access). Some types of text and data mining 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,<sup>109</sup> which are however optional and have not been implemented in the national laws of all Member States. Some consider that the copies required for text and data mining are covered by the exception for temporary copies in Article 5(1) of the InfoSoc Directive.

It has also been suggested that (certain techniques for) text and data mining do not at all involve copying and therefore are not covered by copyright. None of this is clear, in particular

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<sup>106</sup> For the purpose of the present document, the term "text and data mining" will be used.

<sup>107</sup> 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)

<sup>108</sup> It is common practice in Europe for researchers to contractually transfer their copyrights to publishers

<sup>109</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

since text and data mining does not consist only of a single technique, but can be undertaken in several different ways.<sup>110</sup>

Questions arise as to whether, and to what extent, existing subscriptions (notably to scientific publications) or licence agreements allow for text and data mining. Researchers consider that if a researcher or research institution, or another user, have lawfully acquired access to digital content, including databases, the authorisation to read this content should include the authorisation to mine it.

It has also been argued that it is difficult, onerous and time-consuming to negotiate such agreements with the right holders,<sup>111</sup> and that text and data mining is therefore often undertaken without an explicit permission to do so lawfully. Concerns have also been raised as to the importance of ensuring the establishment of safe and efficient infrastructure for text and data mining, 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.

Further details are presented in Annex I.

### 3.2.1.5. 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.<sup>112</sup> However, it is estimated that at present only 7%<sup>113</sup> to 20%<sup>114</sup> of all titles are available in such formats.<sup>115</sup> In some Member States there are agreements between rights holders and organisations serving the visually impaired for the production, distribution and making available of accessible formats (mainly books), *inter alia* for purposes of education.<sup>116</sup> 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 Directive<sup>117</sup> is generic and provides little guidance for its implementation. While a number of Member States use the full scope of the exception,<sup>118</sup> others impose limitations as regards the

<sup>110</sup> 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*).

<sup>111</sup> 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 right holders and seeking permissions to mine.

<sup>112</sup> 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).

<sup>113</sup> [http://www.mib.org.uk/professionals/publishing/Pages/publishing\\_industry.aspx](http://www.mib.org.uk/professionals/publishing/Pages/publishing_industry.aspx)

<sup>114</sup> Source : Exception "handicap" au droit d'auteur et développement de l'offre de publications accessibles à l'ère numérique. Catherine Meyer-Lereculeur, Mai 2013

<sup>115</sup> 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.

<sup>116</sup> E.g. the LIA project: <http://www.progettolia.it/en>

<sup>117</sup> 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.

<sup>118</sup> e.g. Spain, Hungary, Belgium, Poland.

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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 rights holders<sup>119</sup> 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 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.

Further details are presented in Annex J.

### *3.2.2. Lack of cross-border effect of exceptions*

As mentioned in 3.1 above, there are few mechanisms to enable the cross-border effect of optional exceptions to exclusive rights. This means that 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. For example, differences in national laws as to the exception for private copying may create confusion for consumers in the internal market as regards what is legal and what is not when accessing content across-border. In a similar vein, compensation paid to right holders for some categories of exploitation of their protected content (such as private copying) in the territory of one Member State often has no impact on the payment obligations in another Member State.

#### *3.2.2.1. Persons with a disability*

With respect to persons with a disability, 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.<sup>120</sup> 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 file<sup>121</sup> recorded from scratch. The cost of an audio-description track for a film can be as high as € 2500.<sup>122</sup> 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.<sup>123</sup>

#### *3.2.2.2. 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

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<sup>119</sup> e.g. Denmark, Germany (except for the production of individual copies), Finland and Sweden (if the beneficiary permanently keeps a copy).

<sup>120</sup> 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.

<sup>121</sup> <http://www.daisy.org/>

<sup>122</sup> Examples provided by European blind organisations.

<sup>123</sup> 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>

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.<sup>124</sup> 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 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).

The diversity of the conditions foreseen in national legislations, 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. 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. 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.

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.<sup>125</sup> 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.

Further details are presented in Annex H.

### 3.2.2.3. Private copying

The difficulties associated with the exceptions and limitations in the cross-border environment are also apparent in relation to the purely national nature of private copying and reprography levy schemes which are used to provide fair compensation to rights holders. 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.<sup>126</sup>

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. Consequently double payments occur in the majority of such cases. In a similar vein, as the result of case-law of the

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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).

<sup>125</sup>

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/>

<sup>126</sup>

International Survey on Private Copying Law and Practice 201- de Thuiskopie/WIPO 2012

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CJEU<sup>127</sup> 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.<sup>128</sup> This can also result in undue payments.

To mitigate double and undue payments resulting from cross-border transactions, as well as the indiscriminate application of private copying levies, most Member States provide 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 place<sup>129</sup> and those that exist are not always sufficiently efficient, often making it burdensome and complicated for individuals to claim back the unduly paid levies.<sup>130</sup> The application of diverging levy systems in conjunction with the sub-optimally functioning of the exemption and reimbursement scheme lead to high transaction costs for individuals in claiming back unduly paid levies.

The recommendations resulting from the mediation on private copying and reprography levies led by Mr António Vitorino<sup>131</sup> also acknowledged the numerous, significant obstacles to free movement of goods and services in the internal market that current, disparate national levy schemes create. Mr António Vitorino recommended, inter alia, addressing this issue 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.

### **3.3. Identification of rights ownership and licensing**

Distributors and consumers have claimed 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 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

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<sup>127</sup> 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)

<sup>128</sup> 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

<sup>129</sup> 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.

<sup>130</sup> 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.

<sup>131</sup> [http://ec.europa.eu/internal\\_market/copyright/docs/levy\\_reform/130131\\_levies-vitorino-recommendations\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf)

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specific to the sector in which they have been developed,<sup>132</sup> 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 interoperability of such identifiers and databases, as illustrated by Licences for Europe, and beyond. The Global Repertoire Database<sup>133</sup> should, once operational, provide a single source of information on the ownership and control of musical works worldwide. ARROW<sup>134</sup> aims to enable the identification of rights holders and rights and to clarify the rights status of a literary work including whether it is orphan or out of print. FORWARD<sup>135</sup> 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 audiovisual 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 Hub<sup>136</sup> is seeking to take identification systems a step further, and to create a linked platform, enabling the identification of rights holders 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. Questions arise as to whether industry initiatives such as those outlined above should not be supplemented by a central EU registry, resulting in a central rights database for rights ownership and for the recordation of subsequent rights transfers. The level of demand for such an approach, the practical issues relating to the establishment of such a comprehensive database, and legal issues relevant to the Berne Convention, have yet to be examined in detail.

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, for example, the Linked Content Coalition,<sup>137</sup> 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 allowed by copyright exceptions and limitations.

Further details are presented in Annex L.

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<sup>132</sup> E.g. the International Standard Recording Code (ISRC) is used to identify recordings, the International Standard Book Number (ISBN) is used to identify books

<sup>133</sup> <http://www.globalrepertoiredatabase.com/>

<sup>134</sup> <http://www.arrow-net.eu/>

<sup>135</sup> [http://ec.europa.eu/information\\_society/apps/projects/factsheet/index.cfm?project\\_ref=325135](http://ec.europa.eu/information_society/apps/projects/factsheet/index.cfm?project_ref=325135)

<sup>136</sup> <http://www.copyrighthub.co.uk/>

<sup>137</sup> [www.linkedcontentcoalition.org](http://www.linkedcontentcoalition.org)

### 3.4. Mass digitisation of cultural heritage materials

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 (e.g. scan) the entire content or part of their collections, going beyond the objective simply of preserving specific items, having rather the objective of preserving cultural heritage with a view to making it available to the public.<sup>138</sup> 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.<sup>139</sup> The scale of the task is enormous, with one study estimating that in total some €100bn will be necessary over time.<sup>140</sup> 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 Institutions.<sup>141</sup> The European Association of Film Archives (ACE) estimates that only 1.5% of holdings are digitised.

Libraries', archives', museum' and other heritage institutions' collections comprise a wide range of works – from works in the public domain and works out of commerce to the latest “in commerce” works, including by virtue of legal deposit requirements. Thus, agreements need to be found with rights holders for the digitisation and making available of in copyright works. This entails 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 rights holders and to negotiate agreements. The costs vary substantially from project to project and from field to field. In the case of film and audiovisual works, the transactional costs are particularly high, due to the complexity created by the existence of multiple right holders and the territoriality of rights.

In some sectors and in some Member States solutions have been found to minimise transaction costs while protecting the legitimate interests of rights holders.<sup>142</sup> In all sectors the Orphan Works Directive and associated database will lower the costs associated with unlocatable rights holders, and eliminate the potential “hold up” problem whereby the inability to clear certain rights prevents the digitisation and making available of an entire work. In the print sector, the roll-out of the ARROW system is minimising identification costs for assessing the status of works: public domain, out-of-commerce, or in commerce. One study has shown the search time per book to have decreased from 4 hours to 5 minutes.<sup>143</sup> FORWARD will achieve the same outcome for the cinematographic sector.<sup>144</sup> The

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<sup>138</sup> E.g. efforts by libraries to digitise novels from the early part of the 20th century or whole collections of pictures of historical value.

<sup>139</sup>

[http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/recommendation/staffworkingpaper1274final.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/recommendation/staffworkingpaper1274final.pdf)

<sup>140</sup>

« Comité des Sages » Report « The New Renaissance »

[http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/refgroup/final\\_report\\_cds.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/refgroup/final_report_cds.pdf)

<sup>141</sup>

DAEFH study: [http://ec.europa.eu/avpolicy/docs/library/studies/heritage/exec\\_summary\\_en.pdf](http://ec.europa.eu/avpolicy/docs/library/studies/heritage/exec_summary_en.pdf)

<sup>142</sup>

See examples in Annex G(ii)

<sup>143</sup>

<http://www.arrow-net.eu/sites/default/files/Seeking%20New%20Landscapes.pdf>

<sup>144</sup>

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

*Draft to be finalised in light of responses to the public consultation*

implementation of the 2011 Memorandum of Understanding on Out-of-Commerce Works<sup>145</sup> 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 have no longer to seek out or negotiate with all relevant contributors on an individual basis. Neither can a single contributor “hold up” the conclusion of negotiations.

However, problems remain with regard to the clearing of rights in cultural heritage content. In terms of the legal framework, not all Member States have implemented a legislative framework for licensing based on extended collective management, presumptions of transfer of rights or similar mechanisms which can back up the implementation of the Memorandum of Understanding in Out-of-Commerce work. Secondly, these mechanisms 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. 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 by film producers on a film-by-film basis as well as for agreements with collective rights management organisations representing authors’ rights. It does not apply to works which rights holders have opted “for whatever reasons, to withdraw from circulation”. 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.<sup>146</sup>

Further details are presented in Annex G.

### **3.5. Mechanisms to ensure the adequate remuneration of authors and performers**

The EU 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 unwaivable right to equitable remuneration. There are few provisions at EU level governing the transfer of rights from authors or performers to publishers or producers<sup>147</sup>.

Concerns have been raised, notably in the replies to the Green Paper on the online distribution of audiovisual works, that authors and performers are not adequately remunerated in particular, but not solely, as regards on line exploitation. Some stakeholders are of the opinion that the current, mainly national, rules do not suffice and that therefore action at the EU level would be necessary. National systems aiming to ensure fair remuneration of authors and performers for the use of their works and performances have been built over decades on very different cultural and legal traditions. Mechanisms to try to ensure such adequate remuneration are often linked to regulation of contracts or even to labour law regulation. 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

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<sup>145</sup> Memorandum of Understanding on Key Principles on the Digitization and Making Available of Out-of-Commerce Works

<sup>146</sup> [http://ec.europa.eu/information\\_society/apps/projects/factsheet/index.cfm?project\\_ref=620591](http://ec.europa.eu/information_society/apps/projects/factsheet/index.cfm?project_ref=620591)

<sup>147</sup> 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.



collective management societies and by collective bargaining agreements also varies among the Member States. All in all, there are substantial differences in regulatory approaches across the EU and substantial differences across sectors of creative industry. These different approaches are likely to become more evident as multi-territorial exploitation by on-line service providers becomes more frequent.

Further details are presented in Annex M.

### **3.6. Enforcement**

The shift to digital technologies has allowed creators and other economic actors in the value chain to find new ways to market their products but has at the same time opened the door to new forms of infringements, in particular commercial-scale infringements aiming at generating profit. Concerns have been raised as to whether some of the provisions of 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 on the internet in particular in an online cross-border context; on the other hand, there are concerns about the current balance between enforcement of copyright and the protection of fundamental rights. More generally, effectiveness and efficiency of IPR enforcement may be improved while underpinning its legitimacy in the wider context of the copyright reform.<sup>148</sup>

#### *3.6.1. 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 right holders 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.

First, problems stem 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 the cross-border collection of evidence. 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 a “commercial scale” criteria to be able to access this tool (see Annex N for further details). 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 State. The finding of the Consultation on the civil enforcement of IPR is that only 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.

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<sup>148</sup>

Communication from the Commission on content in the Digital Single Market, COM (2012) 789.

*Draft to be finalised in light of responses to the public consultation*

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 this.<sup>149</sup> 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). IfIPRED 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, 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.<sup>150</sup> (see Annex N for further details). 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 data. Problems of effectiveness of the rules are linked to the period of retention of data, the possibility for internet service providers (and their willingness) to legally disclose alleged infringer's identities or the accuracy of the data disclosed. The problem is particularly salient for 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 (see Annex N for further details).

*3.6.2. 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.<sup>151</sup>

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

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<sup>149</sup> Of 136 responses 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](http://ec.europa.eu/internal_market/consultations/2012/intellectual-property-rights_en.htm)

<sup>150</sup> 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.

<sup>151</sup> 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.

### *Draft to be finalised in light of responses to the public consultation*

which delays. 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 internet service providers which is also part of the EU acquis.<sup>152</sup> 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, for example the freedom to conduct a business or the freedom of expression (see Annex N for further details).

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 other EU legal provisions including fundamental rights are duly taken into account.

#### *3.6.3. Insufficient relief to copyright holders for infringements to their rights*

Compensation to the right holder 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. Right holders claim that in many instances damages are set at levels that are neither dissuasive nor even compensate the right holder's actual losses (and legal expenses).<sup>153</sup> 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 N for further details).

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, right holders might refrain from litigation if they held the court proceeding lengthy, costly and do not expect to get properly compensated.<sup>154</sup>

#### **3.7. How would the problem evolve, without EU action? [to be finalised in light of responses to the public consultation]**

A range of outcomes can be envisaged in the event that the EU does not act, depending on the specific issue. In some cases, likely developments, especially long term, are extremely uncertain.

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 EU Member States have access to a wide range of services at national level. Restrictions by platforms and/or rights holders may limit cross-border access, but cross-border portability of

<sup>152</sup> Article 15 of Directive 2000/31/EC.

<sup>153</sup> For example, during the IPRED Consultation, Austrian association 'Film and Music' 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.

<sup>154</sup> 51% of the respondents have indicated that they would refrain from litigation because of such reasons.

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services – already a reality on major platforms - is likely to become the norm in the short-term. The availability of audiovisual 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 can 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.

The rapid growth of online services in all sectors in recent years strongly suggests that in many cases rights holders and distributors/intermediaries would continue to seek to negotiate terms for the making available of content. It is also likely that market players and consumers will 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. Some current issues of uncertainty, for example questions relating to exhaustion in the online environment, may quite feasibly be made less relevant by the further evolution of access-based licencing models. Nevertheless, in the absence of EU intervention consumers, distributors and right holders alike would run risks in respect of some uses and services, and national courts and the CJEU would continue to be called upon to clarify aspects of the framework on an *ad hoc* basis.

Some services are likely to continue to develop which, if not *a priori* commercial in character, nevertheless have the potential to compete with normal commercial channels. This includes services offered by public service institutions, such as libraries and universities (e.g. e-lending, e-learning) or developed by individual users (e.g. UGC). As shown in Licences for Europe rights holders are improving the availability, scope and ease-of-use of licences for such uses. Agreements between rights holders and users will continue to have the advantage of enabling cross-border use e.g. in several Member States educational use is agreed upon by virtue of collective licensing schemes, enabling educational establishments to provide cross-border access. At the same time, many users argued during Licences for Europe that such arrangements are not sufficient to address current problems. Without EU intervention content that is made available under exceptions will not be available cross-border. For instance, 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 right holders under a specific licence agreement.

In the absence of EU intervention, the lack of harmonisation could be exacerbated, as Member States are likely to continue to review national copyright legislation at different speeds and in different ways. This could lead to over-restrictive interpretations in some Member States, and insufficient protection for rights holders 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



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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 Member States will continue to lead to double payments by consumers (payment on devices etc. as well as payment for licensed services), high transaction costs for all business involved, and disincentives to the development of innovative licensed services. The lack of clarity surrounding legal issues related to text and data mining would continue to result in legal uncertainty and transaction costs for researchers, unless the relevant stakeholders agree on solutions facilitating the use of text and data mining techniques. So far the debate has been polarised and no consensus has been reached.

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 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 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 ISAN<sup>155</sup> and EIDR).<sup>156</sup> 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. 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.

With regard to the definition of rights, the need to clear two rights in order to provide online content services (the right of communication to the public and the reproduction right) will continue to affect transaction costs in the instances when these rights are in different hands.

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 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 creative artists and authors from producing content while infringers would be encouraged to develop commercially in many cases because of the low risk of them facing effective enforcement. 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 right holder's actual losses (and legal expenses). What is more, inefficiencies and unclear relationships between copyright and fundamental rights (protection of consumers' personal data, right to information

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<sup>155</sup> International Standard Audiovisual Number, an ISO unique identifier for audiovisual works and versions

<sup>156</sup> EIDR – Entertainment Identifier Registry - is a universal unique identifier system for film and television assets

and right of expression of citizens) could, over time, undermine their trust in the legal system and, in particular, the respect of copyright.

### **3.8. Does the EU have the right to act?**

#### *3.8.1. 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.

The proposed actions 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.<sup>157</sup> Addressing the fragmentation of rules would facilitate the free movement of all those services which exploit copyright protected content, including those services which rely upon the existence of 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.

#### *3.8.2. Subsidiarity and proportionality*

In order for a possible EU action to be justified, it is also 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 the trans-national nature of the problems. Some problems can only be addressed at EU level, notably the clarification or definition of rights as well as the clarification of the scope of the exceptions:

- 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 e.g. the lack of harmonisation of the exception for education hampers the dissemination of materials cross-border in transnational educational projects.
- Where there is a demonstrated need to update or extend the scope of certain exceptions, this would not be possible without intervention of the European Union.

<sup>157</sup>

See e.g. Directives referred to above.

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- National legislation currently does not allow for access to works and other subject matter made available under an exception or limitation beyond national borders.

With regard to restrictive clauses in licence agreements between service providers and rights holders, 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.

As regards the **added value** of European intervention, the objectives of the proposed action are better achieved by action on the part of the Union. EU intervention has the inherent advantage of being able to assure cross-border access to protected content, for example ensuring equal conditions for the adequate remuneration of authors and performers in cases of multi-territorial exploitation.

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 have 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.

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 impact assessment.

#### 4. OBJECTIVES

The general objectives of intervention would be, 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.

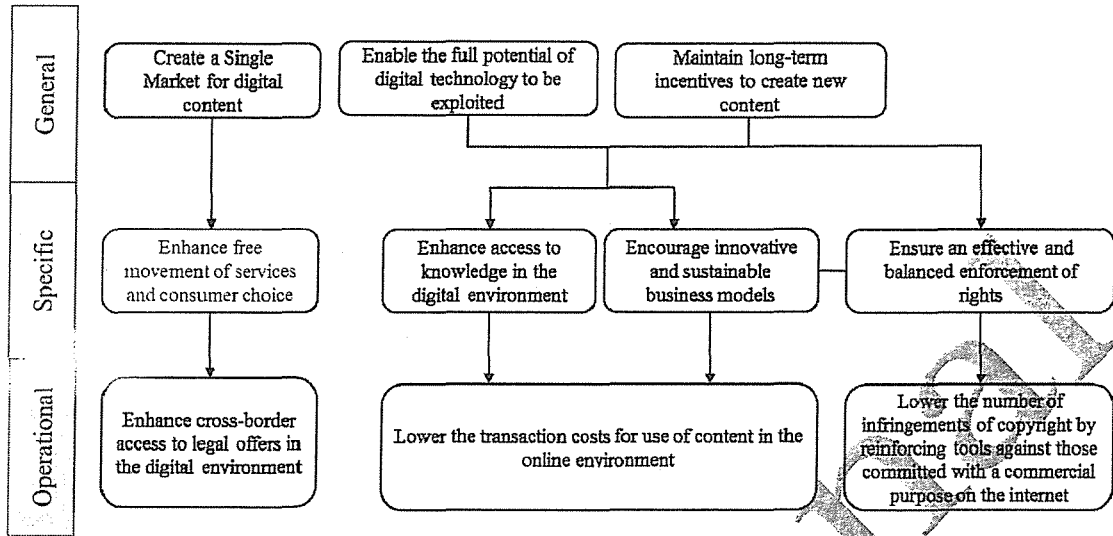
More specifically, intervention should aim at enhancing legal certainty, ensuring fair share across the value chain, promoting cultural diversity, enhancing consumer choice, competition and the free movement of goods and services in the Single Market, including improving access to knowledge in the digital environment while encouraging innovative and sustainable business models in particular through an effective and balanced enforcement of copyright, on the part of both right holders and distributors/intermediaries.

Operationally, the intervention should aim at increasing cross-border access to legal offers in the digital environment and lowering the transaction costs for the use of content in the online environment. It should tackle the problems that have been identified as obstacles to copyright enforcement, in particular for infringements committed with a commercial purpose. The rights that are recognised, with the appropriate boundaries, should be meaningful in the online environment, and the tools to enforce those rights should be available. At the same time the framework should guarantee the protection of fundamental rights, namely the right to property, the protection of personal data, the right to privacy and to information as well as the freedom of expression of all citizens.

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The objectives are summarised in Figure 4 below.

Figure 4: Objectives





Provisional

***The following sections reflect current discussions and need to be updated in light of the responses to the public consultation***

**5. POLICY OPTIONS [TO BE FINALISED IN LIGHT OF RESPONSES TO THE PUBLIC CONSULTATION]**

***It should be stressed that the options presented in this section are not mutually exclusive. Depending on the subject, a combination of solutions presented under Options 2, 3a and 3b can be envisaged.***

*Should there be no noteworthy improvement over the mid-term, Option 2 could also be replaced or complemented with measures described under Options 3 and/or 4.*

**5.1. Option 1 - Status quo**

*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 InfoSoc and other Directives, and on the courts, and notably the CJEU, to clarify provisions of the Directives relevant to the development of new uses and services.*

**5.2. Summary of impacts of Option 1**

*The impacts of Option 1 are described in section 3.7 which presents the baseline scenario ("How would the problem evolve, without EU action?").*

**5.3. Option 2 - Guidance to Member States and stakeholders and support for market initiatives [to be finalised in light of responses to the public consultation]**

*Option 2 would comprise Commission guidance to Member States as well as to market players, in line with the current legal framework, coupled with support for market initiatives. Guidance to Member States could be achieved through a Communication or Recommendation.*

*By doing so, this option would exploit to its maximum extent the current legal framework and support the market in the development of solutions for the use of content online, with a backstop of regulatory clarity. It would recall the principle developed by the CJEU in rulings related to limitations and exceptions, in particular the requirement that the principle of strict interpretation of the exceptions<sup>158</sup> 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.<sup>159</sup>*

*Moreover this option would provide active support to Member States and stakeholders, building upon initiatives and investments to date in order to deliver short-term and practical*

<sup>158</sup> C-5/08, *Infopaq International*, C-145/10, *Painer*, C-403/08 and C-429/08, *Football Association Premier League and others*

<sup>159</sup> C-145/10, *Painer*

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*benefits. It would also foresee market monitoring where market developments need in the first instance further observation and analysis before determining the most appropriate next steps.*

### *5.3.1. Territoriality and absolute territorial restrictions in licensing agreements*

*With regard to territoriality, 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 in the case law of the CJEU. Such an instrument could also contain main principles with regard to the localisation of the copyright relevant act in cross-border situations (elaborating e.g. on the "targeting" approach).*

### *5.3.2. Rights in online transmissions*

*In addition to monitoring the effect that the implementation of the Collective Rights Management (CRM) Directive has on the aggregation of rights, the Commission would monitor market developments via a dialogue with stakeholders and Member States<sup>160</sup> as regards the aggregation (or not) of the reproduction right and the right of communication to the public/ making available. It would also undertake market monitoring as regards the development of services allowing for the sharing of files and playlists and technologies allowing for a second hand digital market. It would also monitor the existence (or not) of obstacles to hyperlinking and browsing. Finally, the Commission would build on CJEU judgements and provide guidance on the current legal framework as regards the principle of exhaustion in digital transmissions and how copyright relates to linking and browsing.*

### *5.3.3. Registration, rights ownership and licensing*

*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.*

### *5.3.4. Adequate remuneration of authors and performers*

*Under this option, the Commission would 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 collecting societies. 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.*

### *5.3.5. Exceptions and other mechanisms to facilitate use*

- ***Libraries and archives:*** *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 audiovisual holdings and includes format-shifting); set up a stakeholder dialogue to promote best*

<sup>160</sup>

For example, by using the information exchange mechanism established by the CRM Directive.

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*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 rights holders and libraries at national level for e-lending. In addition, the Commission would support the maximum implementation of the MoU on out of commerce works and would facilitate the adoption of further MoUs, including for the making available of audiovisual and audio works in the archives of public service broadcasters and libraries.*

- **Education:** *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.*
- **TDM:** *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 the maximum implementation by Member States of the existing limitation for non-commercial scientific research while ensuring their compliance with the three-step test. The difficulty to draw a dividing line between commercial and non-commercial research would have to be taken into account in this context.*
- **Disabilities:** *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.*
- **Private copy and reprography:** *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 clarify the applicability and methods of calculation of levies by laying down criteria necessary to establish in particular which categories of copies made in the context of on-line services (including cloud-based services) should be taken into account in the calculation of fair compensation.*
- **UGC:** *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. 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.*

## *Draft to be finalised in light of responses to the public consultation*

### *5.3.6. Enforcement*

*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 for cases where the infringed content is used for a commercial purpose. 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.*

### *5.4. Summary of impacts of Option 2 [to be finalised in light of the replies to the public consultation]*

*The actions under Option 2 would be achievable in the much shorter term than the actions discussed in Options 3a, 3b and 4. They would contribute in the short-term to maximising the effect of the current legal framework, notably as to the application of CJEU judgments in the matters of territoriality, rights in the online environment and on the maximum scope of the exceptions and limitations to copyright. They would also contribute to the development of market solutions for the use of content online which could be achieved in a shorter term. However, they may sometimes not be sufficient to address certain issues discussed in this IA.*

*The specific impacts of Option 2 for each subject matter are described below:*

#### *5.4.1. Territoriality and absolute territorial restrictions in licensing agreements*

*Guidance on the extent to which the cross-border provision of copyright-protected content can – or cannot - be prohibited in contracts between rights holders and distributors/service providers would contribute to legal certainty and could increase the cross-border availability*



## *Draft to be finalised in light of responses to the public consultation*

*of protected content to some extent. On the other hand the likelihood and extent to which right holders would voluntarily follow the Commission's guidance in a non-binding instrument is difficult to assess, and the non-binding nature of the instrument could limit its effectiveness.*

*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 depend on the extent to which right holders and distributors follow the non-binding instrument voluntarily. If the Commission's guidelines were to be applied only partially, consumers would continue to face restrictions on access to some content services.*

*Under this option, rights holders 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 that right holders and incumbent distributors voluntarily follow the non-binding instrument.*

### *5.4.2. Rights in online transmissions*

*Under this option the Commission would take a prudent approach, observing first how the market will develop, and how the CJEU will rule on a number of issues before taking action. Neither positive nor negative impacts will accrue in the short term.*

### *5.4.3. Registration, rights ownership and licensing*

*The proposed initiative could be of practical benefit to users, intermediaries and rights holders 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 rights holders, as well as in the interests of end-user. 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.*

### *5.4.4. Adequate remuneration of authors and performers*

*Dialogue with stakeholders and Member States would allow the exchange of views and comparison of existing rules and solutions, with the aim of encouraging, where needed, legislative action at national level. It could be useful to assess the relative merits of different mechanisms such as unwaivable rights, collective bargaining or collective management. It could also help the collection and discussion of economic data and information relating to contracts in different creative sectors. However, it is not clear, if there were a general need to act, whether it would be sufficient to provide a solution. Given the existing differences between Member States' legal traditions in the area of contract law (and copyright law) it is doubtful that the approaches would converge to ensure a level playing field throughout the EU.*

### *5.4.5. Exceptions and other mechanisms to facilitate use*

*Guidance to stakeholders and to Member States on the maximum scope allowable under the current exceptions would clarify in the short-term the scope of the above exceptions at EU level (uses covered, beneficiaries) and their concrete application in the digital environment.*

### *Draft to be finalised in light of responses to the public consultation*

*This guidance would be useful for all stakeholders, 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. In the following cases such guidance should serve to ease, in the short-term, disputes as to the applicable framework for stakeholders seeking to make available works and other subject-matter, thus decreasing transaction costs: (i) the preservation of library collections in digital format; (ii) the application of the education exception for e-learning activities; (iii) application of the exceptions for quotation, parody and incidental inclusion; and (iv) the application of the research exception to text and data mining. It also is likely to be particularly helpful for Member States who are already engaged in a review of their national legislation. On the other hand, over the medium term, differences between Member States in the treatment of exceptions in detail are likely to persist and exceptions will not have a cross-border effect. To the extent that Commission guidance is not actually reflected in national laws, Option 2 would be insufficient to eliminate legal uncertainty. For instance, even if common guidelines for the cross-border exchange of accessible format copies could have some positive impact on the internal market they alone are likely to be insufficient to achieve uniformity across national frameworks.*

*Guidance from the Commission laying down minimum criteria that ex ante exemption and ex post reimbursement schemes could also yield some positive effects in the field of private copying and reprography. If followed by all Member States with levy schemes in place, it could lead to a reduction of instances of double payments whereby copies made by consumers on their devices in the context of on-demand services are considered to be remunerated via licence and they are not taken into account in the calculation of levies. In a similar vein, the common principles that the guidance on the functioning of levy schemes would contain, could alleviate the cross-border challenges that currently disparate, national levy schemes create. By recommending making levies visible on invoices, the guidelines could also increase consumers' awareness, contributing to the transparency and legitimacy of the levy schemes. If, by contrast, the Commission's guidance was not followed or was followed by only some Member States, this could provoke further disparities of national laws, adding to the complexity of the situation.*

*It is expected that targeted stakeholder dialogue and support for market initiatives will reap benefits over the short-, medium- and longer term, by building on investments and know-how already existing, and developing cooperative, pragmatic solutions. 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. This includes facilitating a blue print for contractual arrangements for e-lending and remote access to library collections, as well as supporting the implementation of the MoU on Out-of-Commerce Works.*

*The development of national solutions, under an EU "model" approach and exchange of best practice, is expected to continue to be the most beneficial in the short-, medium- and longer term in terms of enabling distributors and right holders 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.*

### *Draft to be finalised in light of responses to the public consultation*

*In the case of the audio and audiovisual sectors, the evidence from Licences for Europe suggests that there is a great deal of willingness to seek collaborative solutions to the digitisation and making available of audio and audiovisual collections. However, 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 audiovisual identifiers and the interoperability of databases will be needed*

#### *5.4.6. Enforcement*

*The impacts of this option depend very much on the extent to which intermediaries, courts and Member States react to the guidance provided by the European Commission.*

*In view of the positive experience with a recent MoU with stakeholders of a similar nature,<sup>161</sup> 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.*

*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.*

*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 right holder 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.*

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<sup>161</sup> 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](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](http://ec.europa.eu/internal_market/iprenforcement/docs/memorandum_04052011_en.pdf)

*Draft to be finalised in light of responses to the public consultation*

**5.5. Option 3 - Legislative intervention** [to be finalised in light of responses to the public consultation]

Option 3 would imply achieving in the medium-term (5-10 years) a much deeper level of harmonisation than is currently the case, clarify the framework for some new uses and services, and achieve a more systematic cross-border effect. It would be ambitious, requiring the co-legislators to agree on a greater level of detail on e.g. exceptions and limitations, and on a level of convergence of copyright laws that has not been proposed by the Commission to date. The changes envisaged under this option could be achieved mainly through the available legal instruments, most likely a Directive which would affect several existing Directives (including the InfoSoc Directive, Directive on the legal protection of Databases, Directive on Rental and lending rights).

**5.5.1. Territoriality and absolute territorial restrictions in licensing agreements**

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

- **Sub-option a**

This option would entail the creation of a new legal act (internal market legal basis) which sets out which 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 its 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<sup>162</sup> would be made in that instrument, in the sense that only absolute territorial restrictions (prohibiting not only active but also passive sales) would be declared null and void. Accordingly, distributors could in principle 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, in exceptional cases, be justified when the right holder is able to prove that they are the only way to achieve an appropriate remuneration. The remuneration of right holders would normally be considered appropriate when it reflects the economic value of the exploitation of the work or other subject-matter by the distributor, in particular the actual and potential number of customers purchasing or accessing the work or other subject-matter. Where the

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<sup>162</sup> 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."

*Draft to be finalised in light of responses to the public consultation*

*total number of customers purchasing or accessing the digital copy of a work or other subject-matter within the EU can be determined with a high degree of precision (i.e. in cases where customers make a payment in exchange for acquiring, or obtaining access to, a digital copy of a work or other protected subject matter), right holders should be, in principle, deemed to be able to achieve appropriate remuneration.*

*With regard to the contractual relationship between service providers and end-users, a provision would be introduced reinforcing the principle that service providers are not allowed to discriminate against customers on grounds related to nationality or place of residence, unless directly justified by objective criteria. When relying on such objective criteria (which should be further elaborated), service providers would be required proactively to provide their justification in a transparent and easily accessible way on their websites. Audio-visual 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.*

- *Sub-option b*

*This 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:*

- (1) *A "country-of-origin" principle for the right of communication to the public, including the right of making available, would be introduced, in the sense that the copyright relevant act (that needs to be licensed) is deemed to occur in a single Member State (the "country-of-origin"). The "country-of-origin" would be defined as the Member State in which the service provider is established.<sup>163</sup> 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 reside<sup>164</sup> (e.g. outside the service provider's country of origin). 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 at EU level as well as the rules on remuneration of individual creators and performers.*

*Enforcement related rules would also have to be adapted to ensure that right holders 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 would only be a copyright infringement in the service provider's country of origin).*

- (2) *Alternatively to the introduction of a "country-of-origin" principle, the "targeting approach" developed by the CJEU 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*

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<sup>163</sup> 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.

<sup>164</sup> Provided this takes place within the EEA.



### *Draft to be finalised in light of responses to the public consultation*

customers accessing the service are established or reside.<sup>165</sup> 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 options, the level of the licence fee to be paid to the right holder would still be a function of all customers that access the work or other subject-matter in question, including those established or residing outside the country of origin” or, respectively, outside the targeted countries.

#### *5.5.2. Rights in online transmissions*

Under this option, it could be clarified 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”). In addition, a mandatory copyright exception that explicitly covers linking and browsing could be introduced. As to the reproduction and making available rights, two alternatives can be envisaged:

- *Alternative a*

This would oblige right holders always to authorise, or transfer the right to authorise, both the reproduction and making available rights together (“bundling of rights”) for the purpose of online transmissions. Transitional provisions would have to be introduced to allow for the adaptation of existing contracts and mandates to collecting societies and the compatibility with the EU and the Member States international obligations further accessed.

- *Alternative b*

This would entail the redefinition of the reproduction and making available right so that one becomes incidental to the other, leaving only one right applicable to digital transmissions. As a consequence, for example a download-to-own online service would, only require the clearance of the reproduction right. Transitional provisions would have to be introduced to allow for the adaptation of existing contracts and mandates to collective management organisations.

#### *5.5.3. Registration, rights ownership and licensing*

- *Sub-option a*

This 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 right holders they need to contact in order to obtain a licence. Right holders, 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.

- *Sub-option b*

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A “targeting approach” would achieve for exclusive rights under copyright what Alternative 3a would achieve with regard to contracts: passive sales into non-targeted Member States would be possible without acquiring a separate licence for those Member States.

## *Draft to be finalised in light of responses to the public consultation*

*In addition to sub-option a, and 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 would 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.*

### *5.5.4. Adequate remuneration of authors and performers*

*This option would consist in determining and harmonising the mechanisms required to help achieve 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).*

### *5.5.5. Exceptions and other mechanisms to facilitate use*

- ***Libraries and archives:*** *This option would harmonise and make mandatory the implementation in national legislation of exceptions for preservation, for remote access for the purpose of research and private study, and for e-lending. 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 apply to those works to which no terms and conditions apply at the time of purchase, as long as a secure network could be assured. 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. 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), whether or not in-commerce. Remote access would be extended to cover the same works.*
- ***Education:*** *This option would harmonise and make mandatory the implementation in national legislation 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 audiovisual works), subject-matter and databases covered, use in whole or in part and other requirement to ensure compatibility with the three-step test conditions e.g. the exemption of text books 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.*
- ***TDM:*** *Two alternatives can be envisaged:*
  - *Alternative a: This alternative would harmonised and make mandatory the implementation in national legislation of a specific exception for text and*

***Draft to be finalised in light of responses to the public consultation***

*data mining for the purpose of non-commercial scientific research applicable not only in the case of works and other subject matter 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. In order to have full impact, 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 under alternative a, the exception would apply under the condition that the user has lawful access.*
- ***Disabilities:*** *Harmonise and make mandatory the implementation in national legislation of an exception for disabilities and the cross-border exchange of accessible formats made under such an exception. The scope of the mandatory exception would differ according to the alternative chosen.*
  - *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 (so also audiovisual works).*
- ***Private copying and reprography:*** *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 together as the development of digital services will minimise the harm private copying inflicts on right holders. Accompanying, transitional measures to mitigate possible negative impacts will be introduced.*
- ***UGC:*** *Users' creation of UGC for non-commercial purposes could be addressed by two distinct solutions:*
  - *Alternative a: Further harmonising and making mandatory the scope of application and making mandatory the implementation in national legislation 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 for transformative purposes to create derivative works. The exception would only apply for uses*

## ***Draft to be finalised in light of responses to the public consultation***

*which have a non-commercial purpose, and should not become a substitute for the normal exploitation of the work.*

### ***5.5.6. Enforcement***

*Some of the measures proposed in Option 2 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 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.*

### ***5.6. Summary of impacts of Option 3a [to be finalised in light of the responses to the public consultation]***

#### ***5.6.1. Territoriality and absolute territorial restrictions in licensing agreements***

*A legally binding instrument that prevents the use of absolute territorial restrictions in copyright licence contracts could be an important step, achievable in the medium-term, towards the completion of the Digital Single Market, in particular in sectors where territorial exclusivity agreements are common (i.e. in the audiovisual sector). While such an instrument would constitute a limitation to the freedom to conduct a business and the property rights of the licence provider, 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 option would allow cross-border competition between distributors, who would be able to enter new markets through passive sales. Allowing for increased cross-border access could favour larger companies with a cross-border network, over national network operators. 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 right holders 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, right holders will no longer be able to price-discriminate effectively between national markets. This option may also have a significant effect on the financing and production of audiovisual content. It may also have an effect on cultural diversity.*

*This option would increase cross-border access to digital content for consumers, in particular in the audiovisual sector. The elimination of contractual obstacles, combined with increased*

## *Draft to be finalised in light of responses to the public consultation*

*cross-border competition, would lead to a larger choice of services. In addition, this option would limit the possibilities for service providers to deny access to services to consumers because of their place of residence. This additional element would create pressure on service providers to make their services available across the internal market.*

*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 under the status quo.*

*These effects could be less pronounced in the case of 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).*

### *5.6.2. Rights in online transmissions*

*Should the market monitoring proposed in 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 could have the following impacts. The revenues of right holders could decrease significantly due to the emergence of a second-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 right holders affecting the cycle to investment. In theory right holders could increase the price for the first sale to a certain extent. This may not, however, be easily accepted by consumers. Distributors may have fewer incentives to innovate as regards certain aspects of 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 on line (e.g. to give it to heirs or as a gift).*

*The impacts of a mandatory copyright exception covering linking and browsing primarily depend on how the CJEU will rule on the pending cases. If linking and browsing are not subject to right holders' authorisation under the status quo, this option would not change anything, but may increase legal certainty. If, on the other hand, either browsing or linking is deemed to require the right holders' authorisation, the introduction of a mandatory exception for these activities would ensure that neither links to protected content nor the browsing of the internet would infringe copyright.*

*The bundling of rights could result in a shift of value among rights holders. Authors of musical works that form part of the Anglo-American repertoire, for example, usually transfer their right of reproduction to music publishers, and grant a mandate to a collective management organisation for the exploitation of the communication to the public and making available right. Such a splitting of rights would no longer be possible. Either the publisher or the collecting society would have to be granted both rights by the authors. At this stage, it is unclear whether a bundling of rights would rather favour, for example, collecting societies or publishers, therefore it is difficult to assess its effects on the distribution of wealth in the value chain. Its impact on competition should also be carefully assessed. In any event, further*



### *Draft to be finalised in light of responses to the public consultation*

*assessment of the compatibility of such measure with the EU and Member States and international obligation will be refused.*

*Distributors would benefit from lower transaction costs if they would only have to approach a single entity in order to acquire a licence for both rights. This may, on the other hand, no longer be needed if the Directive on Collective Rights Management produces the desired effects in terms of aggregation of rights. It is not possible at this stage to assess whether this measure will produce benefits for the end user.*

#### *5.6.3. Registration system*

*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 rights holders, and how to make such a system cost-effective for users.<sup>166</sup>*

*There will 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.*

#### *5.6.4. Harmonisation of remuneration of authors and performers*

*The impacts of harmonisation of the framework for remuneration across the EU could appear only in a long-term perspective given the significant divergences between Member States' approaches. Any proposals will need to be carefully calibrated to ensure that they lead to overall welfare gains.*

*In this context, further information needs to be collected on the actual levels of remuneration of authors and performers in different sectors as well as on the contractual practices, negotiation mechanisms, presumptions of transfer of rights and the role of collective bargaining. On this basis, the impacts of this option on authors and performers on the one hand and broadcasters, film and record producers, book or newspaper publishers, games publishers etc. on the other hand will have to be assessed, in particular in terms of costs and distribution of revenue in the value chain.*

#### *5.6.5. Exceptions and other mechanisms to facilitate use*

*Harmonising and making mandatory certain of the existing exceptions would improve the functioning of the internal market within the medium-term (between 5 and 10 years), taking into account the length of the negotiation and transposition processes. Providing a detailed scope for the provisions would need to be combined with a mechanism to ensure that these exceptions have cross-border effect through mutual recognition or a similar mechanism (solutions would need to be found for the issue of fair compensation) if so as to ensure legal certainty for the market and for the beneficiaries of the exceptions. Expanding the scope of existing exceptions or establishing new ones when required should be done on the same basis.*

*Beneficiaries of the exceptions such as libraries, and archives would have legal certainty as to the application of the exception for specific acts of reproduction. They would further benefit from lower transaction costs for the making available of their collections for purposes*

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<sup>166</sup> The US register has minimum search costs of \$330, putting a search beyond the means of most casual users of copyright

## *Draft to be finalised in light of responses to the public consultation*

*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. 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. Schools, universities, other education and training institutions, and students would benefit from legal certainty for the use of content for illustration purposes, and lower transaction costs. Libraries and organisations serving the visually impaired would also benefit from the cross-border circulation of content in accessible format and the consequential reduction of transaction costs. Distributors of products and services subject to the levy systems would benefit from legal certainty and lower transaction costs. Research and innovation would benefit from legal certainty as regards an exception for text and data mining.*

*Costs for consumers would be reduced, and they would have wider access to content via intermediaries such as libraries and archives. New types of UGC could develop as creators of remixed content would benefit from greater legal certainty as regards to the creation of UGC. Double payments for the private copy levy would be eliminated. Consumers, including persons benefitting from the 'disabilities' exception, would benefit from greater access to content for purposes of research, study, cultural materials, and entertainment including cross border.*

*The interests of rights holders are not expected to be prejudiced by the making compulsory of the existing exceptions (provided a good solution is found for the issue of fair compensation when relevant) as long as specific conditions to ensure compliance with the three step test are maintained or clarified. The same respect of the three-step test should be assured for new exceptions.*

*Greater accessibility to, and preservation of, heritage materials, taken together with the preservation of incentives to create would contribute positively to cultural diversity. The harmonisation of exceptions for persons with a disability and for UGC would improve the balance between the fundamental right to property on the one hand and, on the other, fundamental rights such as the rights of disabled persons or the freedom of expression.*

### *5.6.6. Enforcement*

*In addition to the impacts of Option 2, legal harmonisation of the term 'commercial scale' in IPRED should render the enforcement of copyright more effective while also complying with the requirement of legal certainty. More effective scrutiny of infringers would reduce the harm to right holders 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 gathering of evidence, the enforcement of right holders' right to information and in the execution of provisional and precautionary measures. Furthermore, a harmonised definition of 'commercial scale' would facilitate the cross-border enforcement of copyright in such cases. Clarification on the calculation of damages would benefit those right holders who litigate against infringements and indirectly also all other right holders 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 right holders can be sure of the proper enforcement of their copyright across the EU will they be ready to*

## **Draft to be finalised in light of responses to the public consultation**

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 reassurance 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, rights holders 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.

### **5.7. Summary of Impacts of Option 3b [to be finalised in light of the responses to the public consultation]**

The approaches outlined under Sub-option b (for territoriality, rights in the online environment and some of the exceptions and limitations) would in general be more "intrusive" than Sub-option a, and could in some cases be going beyond the minimum necessary in terms of curtailing exclusive rights.

#### **5.7.1. Territoriality and absolute territorial restrictions in licensing agreements**

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, however, represent a complete change of paradigm and a serious limitation to the territoriality principle. The introduction of a "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.

Both a "country of origin" and a "targeting" approach would reduce transaction costs for distributors operating on a multi-territorial basis in those instances where rights in different territories are in different hands (as they would only need to acquire a licence in the country of origin/targeted country only). However the "Country of origin" is likely to lead to problem in the functioning of collective management as it is likely to trigger a withdrawal of rights from collective management organisation.

Under the "country of origin" principle, a service provider can use the licence in its country of origin (possibly obtained from a person holding the rights in that country only) in order to actively market content outside its country of origin as well. When rights are territorially fragmented, i.e. when different persons or entities hold the rights for different Member States, a service provider established in one Member States may therefore undermine the economic position of right holders in other Member States. According to the "targeting" approach, this would only be the case with regard to passive sales (active sales into Member States for which no licence was obtained would still infringe copyright).

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 in terms of copyright protection. This could also prompt rights holders to withdraw their online rights from a large number of collecting societies, therefore creating a risk of repertoire disaggregation. This could affect cultural diversity. The "targeting" approach would not pose such risks.

### *Draft to be finalised in light of responses to the public consultation*

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*Costs for consumers would be reduced, and they would have wider access to content via intermediaries such as libraries and archives. New types of UGC could develop as creators of remixed content would benefit from greater legal certainty as regards to the creation of UGC. Double payments for the private copy levy would be eliminated. Consumers, including persons benefitting from the 'disabilities' exception, would benefit from greater access to content for purposes of research, study, cultural materials, and entertainment including cross border.*

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#### *5.6.6. Enforcement*

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*More effective and balanced enforcement of copyright, in particular across borders is important for the increased cross-border business in creative content. Only if right holders can be sure of the proper enforcement of their copyright across the EU will they be ready to*

*Draft to be finalised in light of responses to the public consultation*

*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, rights holders 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.*

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*Under the "country of origin" principle, a service provider can use the licence in its country of origin (possibly obtained from a person holding the rights in that country only) in order to actively market content outside its country of origin as well. When rights are territorially fragmented, i.e. when different persons or entities hold the rights for different Member States, a service provider established in one Member States may therefore undermine the economic position of right holders in other Member States. According to the "targeting" approach, this would only be the case with regard to passive sales (active sales into Member States for which no licence was obtained would still infringe copyright).*

*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 in terms of copyright protection. This could also prompt rights holders to withdraw their online rights from a large number of collecting societies, therefore creating a risk of repertoire disaggregation. This could affect cultural diversity. The "targeting" approach would not pose such risks.*



## *Draft to be finalised in light of responses to the public consultation*

Finally, Option 3b would also represent a longer term exercise than Option 3a, as the harmonisation of the rules on authorship, ownership, transfer of rights and enforcement would present political and technical challenges.

### *5.7.2. Rights in the online environment*

Should the market monitoring proposed under Option 2 lead to a conclusion that legislative intervention is needed, the redefinition of rights would significantly affect distribution of revenues between different right holders in those cases where different entities hold the right of reproduction and the right of communication to the public (including the right of making available) for the same work. One of these two entities would simply not have to be asked for a licence anymore. Transitional provisions would have to be in place, allowing for the renegotiation of contracts and mandates (and the allocation of remuneration among rights holders) in order to safeguard the position of an entire group of right holders that would otherwise be expropriated and hence to mitigate the negative impact on cultural diversity. Distributors would benefit from lower transaction costs if they had only to acquire a licence for a single right instead of a licence for two separate rights, when these rights are in the hands of different entities. Insofar as the lower transaction costs were passed on to consumers, consumers would benefit from lower prices.

### *5.7.3. Exceptions and other mechanisms to facilitate use*

Option 3b would have more pronounced effects on stakeholders than Option 3a in a number of ways. With respect to disabled persons, Option 3b would provide the benefit of the exception to a broader circle of persons with a disability (consumers), and not only to the visually impaired. The exception and its cross-border effect would extend to persons with a hearing impairment as well as to audiovisual works.

On the other hand, Option 3b proposes in some cases a scope for exceptions that could go beyond the minimum necessary to facilitate access and to reduce transaction costs, 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 in the case with licensed, commercial services). For example, the expansion of the exception to enable libraries and archives to make available protected content that is otherwise distributed online by rights holders would expand significantly the opportunities for cultural heritage institutions to make their collections available to the public. However, the option risks undermining competition by enabling them to compete on an uneven footing with commercial services, undermining normal commercial channels, and therefore risking incentives to create and produce.<sup>167</sup> Similarly, the introduction of a UGC-specific exception, without safeguards, would deprive rights holders of the possibilities to licence the use of their works or other subject-matter for the purpose of creation of derivative works. This is likely to damage existing and emerging licencing solution. It also risks the emergence of alternative, non-licensed business models, competing with licensed approaches, and thus risks long-term incentives to create and produce. While in some cases drawing a distinction between commercial and not commercial uses may pose interpretative problems, the introduction of an exception encompassing both non-commercial and commercial TDM (even if applicable on condition that permitted uses do not enter into competition with the original content or services) does not seem justified by any market failure, considering the existence of a well-

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This has to be assessed according to the commercial value of the content that would be made available by cultural institutions. For example, for the vast majority of European cinematographic works, the revenue is obtained in the first two years after release.

### *Draft to be finalised in light of responses to the public consultation*

*functioning market of TDM licencing between publishers and commercial users, eg. in the pharmaceutical sector. The entire phasing out of levy schemes as a result of the diminishing harm caused to right holders in the on-line environment would be harmful in the short- to medium-term for rights holders and on cultural diversity. At the same time, this may allow for the development of new business models, allowing right holders to identify new sources of revenues.*

*Finally, Option 3b would have a similar effect on the internal market as Option 3a, as it would be based on the principle of deeper harmonisation and mandatory implementation.*

#### **5.8. Option 4 – A unitary copyright title and European Copyright Code [to be finalised in light of responses to the public consultation]**

*Option 4 would be achieved through a Regulation setting out common EU rules and replacing national legislation with a legal base of Article 118 TFEU. 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 exhaustive harmonisation, and direct applicability, of the entire copyright framework. To that end, a European Copyright Code would be created. So far, harmonisation has focused principally on rights and exceptions (and even in that respect there are divergences). This would mean that in order to ensure the effectiveness of a unitary title, all other elements in a “Copyright Code” would need to be harmonised fully this includes: all exclusive rights that are not fully harmonised, including the adaptation right, the definition of protected subject matter; the threshold of originality; authorship; ownership; moral rights; term of protection; exceptions and limitations; copyright contract law; enforcement law and practice. A European Copyright Code would thus replace all national legislation on copyright, and all national copyright titles. It is likely to imply the need to establish either special copyright courts at the national level or an EU-level copyright court.*

#### **5.9. Summary of impacts of Option 4 [to be finalised in light of responses to the public consultation]**

*By virtue of establishing a single title and a European Copyright Code, copyright could no longer be invoked to justify the segmentation of the internal market for the provision of content services. Copyright protection would be valid on the same basis throughout the EU. This has as its corollary the need to harmonise all aspects of copyright law in all Member States. The establishment of a code and title would be a technically and politically challenging exercise, taking into account the significant divergences between Member States’ legislation on many relevant aspects of copyright law, and practice. Thus it is expected that it would only be over the long term (10-12 years), that the creation of a single European code and title would result in benefits for the internal market. At the same time, once the common framework agreed, it will be of immediate application as no separate implementation in Member States will be refused.*

*For rights holders, distributors, consumers, and the interests of cultural diversity, the actual impacts are likely to depend in part upon the intermediate steps that are taken towards establishing a uniform regulation of copyright in the EU (harmonisation of different areas at different times). The following sections assume that no intermediate steps are taken.*

*In order to ensure as a minimum that right holders enjoyed the same level of protection throughout the EU, there would need to be a harmonisation of the application of rights (e.g. in the audiovisual sector, different contributors enjoy different sets of rights in different*

## *Draft to be finalised in light of responses to the public consultation*

Member States) as well as of the notions of authorship and ownership, of contractual transfers of rights, and of moral rights. This implies the need to arbitrate a compromise between the *droit d'auteur* tradition and the Anglo-Saxon 'copyright' approaches. Firstly, there would need to be common agreement on what is being protected. In parallel with this, there would need to be the definition of protected subject matter, and the threshold of originality would need to be harmonised. The level of fair compensation for the use of works under an exception (when applicable) would be determined at EU level. The impact on right holders would depend upon the agreed EU level of compensation.

The economic impacts for rights holders and distributors are likely to vary, depending on the sector in which they are active. The removal of all territorial restrictions 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. In the audiovisual sector, for example, where 87% of current value is in national networks (broadcasting, cable, IPTV, cinema) and only 13% is international (satellite), the requirement for national networks to compete with internet distributors (with an international reach) is bound to have a severely disruptive impact on content production and distribution, advertising markets, and media plurality. On the other hand, these impacts could be mitigated by the development of licensing practices based on the number of users targeted/actually served. Secondly, in order to ensure a uniform set of benefits for consumers the exceptions and limitations to exclusive rights would need to be harmonised entirely, and made mandatory. This would be beneficial for users: they would enjoy EU-wide conditions for the use of protected content, and untrammelled cross-border access to content made available under an exception, as well as to content made available under licences.

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.

## **6. COMPARISON OF THE OPTIONS [TO BE FINALISED IN LIGHT OF RESPONSES TO THE PUBLIC CONSULTATION]**

### **6.1. Effectiveness and efficiency [to be finalised in light of responses to the public consultation]**

The comparison in this section is only meant to address the effectiveness and efficiency of the methods of intervention chosen in the different options and does not exclude a combination of the options. This is particularly important to keep in mind in view of the wide scope and different nature of the issues covered in this Impact Assessment.

As regards the **effectiveness** of the options, Option 3 (legislative intervention) and Option 4 (European Copyright Code) would be able to provide legally certain solutions that are necessary for enhancing the cross-border access to legal content and to improve the cross-border provision of services. In the long run, Option 4 would be able to reach a higher level of uniformity than Option 3, since it would provide a full harmonisation of the copyright framework. In the case of Option 3, the scale of favourable impact on cross-border access would depend on the exact content of the legislative intervention on the different subjects and on the implementation by Member States in light of their different copyright laws and legal traditions. On the contrary, both Options 1 and 2 would leave it to the market and to

## **Draft to be finalised in light of responses to the public consultation**

individual Member States to address the identified problems. Option 1 would be ineffective in cases where there are legal obstacles to cross-border access and Option 2 would have moderate impact. Non-binding guidance may prove useful tools on matters where Member States have not used to its maximum extend the possibilities of the current directives, notably as regards limitations, but this would depend on the take-up by the Member States. Obstacles to cross border access would however remain to quite some extent.

As regards lowering transaction costs, once again, Options 3 and 4 would create a harmonised legal framework. As a consequence of common rules in the Member States, the level of legal certainty would increase also for users and intermediaries, in particular if the cross-border application of provisions were clarified. Option 4 would imply a higher level of harmonisation hence its effect would be the most positive in the long run. Options 1 and 2 would leave transaction costs unchanged although Option 2 could help lowering transaction costs in those matters where stakeholders' cooperation is required. Both options however entail the risk of increasingly divergent national laws over time that could result in an increase of transaction costs for the use of content online. This risk is higher in Option 1 hence it has the least favourable impact.

As regards lowering the number of copyright infringement cases, the legislative options (Options 3 and 4) would provide the most effective solution. Further harmonisation could increase legal certainty, also in the cross-border context. Guidance on some matters that lack clarity today (Option 2) would increase clarity but it would not be effective in creating uniformity similar to Options 3 and 4. Option 1 would not change the current situation and would be ineffective.

As regards the efficiency of the options, the most important difference concerns Option 4. The single copyright title would take a significant amount of time to achieve; hence this option would be very inefficient in the short term. In the long term, it is likely to deliver the most results, in particular in view of the fact that Member States' procedures of implementation in national legislation of future copyright directive(s) are likely to be long and complex. Options 1 and 2 may both deliver some positive result, also most likely in the longer term. The existing and future market initiatives take time to develop and in that respect it may take a long time till they become efficient. On the contrary, if legislative intervention were chosen (Option 3), a new legal framework would already deliver results in the mid-term.

### **6.2. Other impacts [to be finalised in light of responses to the public consultation]**

As regards the fundamental rights, Option 1 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 2 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 on fundamental rights. Option 3 and 4 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.

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

7. **MONITORING AND EVALUATION**

*The methods and timetable for monitoring and evaluation would depend on the choice of legal instrument.*

*For several options presented in this Impact Assessment, further analysis will be carried out in order to collect the necessary data and assess in more detail the possible impacts on the relevant stakeholders.*

*Certain policy options presented in this Impact Assessment (Option 2) already include a market monitoring exercise, which could contribute to the preparation of further policy initiatives already in the short term.*

*If a legislative option is chosen (Options 3 or 4), appropriate indicators will be selected to monitor progress towards meeting the specific objectives defined in this Impact Assessment and an evaluation will be carried out five years after the transposition of the relevant legislation.*

PROVISIONAL



*Draft to be finalised in light of responses to the public consultation*

**8. ANNEXES TO THE IMPACT ASSESSMENT [TO BE SUBSTANTIATED FOLLOWING PUBLIC CONSULTATION]**

**8.1. ANNEX A – RESULTS OF THE PUBLIC CONSULTATION LAUNCHED ON 5 DECEMBER**

[TBC]

PROVISIONAL

## **8.2. ANNEX B – 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.**

*Draft to be finalised in light of responses to the public consultation*

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.**

*Draft to be finalised in light of responses to the public consultation*

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]



### 8.3. ANNEX C (i) – THE 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)<sup>168</sup> and the WIPO Performances and Phonograms Treaty (WPPT),<sup>169</sup> 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,<sup>170</sup> including the Directive on Collective Rights Management on which political agreement has been reached. 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 Performances<sup>171</sup> and the Marrakesh Treaty to improve access to published works for persons who are blind, visually impaired or otherwise print disabled.<sup>172</sup> 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 rightholders<sup>173</sup> 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 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.

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<sup>168</sup> <http://www.wipo.int/treaties/en/ip/wct/>

<sup>169</sup> <http://www.wipo.int/treaties/en/ip/wppt/>

<sup>170</sup> [http://ec.europa.eu/internal\\_market/copyright/acquis/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/acquis/index_en.htm)

<sup>171</sup> <http://www.wipo.int/treaties/en/ip/beijing/>

<sup>172</sup> [http://www.wipo.int/edocs/mdocs/copyright/en/vip\\_dc/vip\\_dc\\_8\\_rev.pdf](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).

<sup>173</sup> 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".

*Draft to be finalised in light of responses to the public consultation*

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 right holder 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).<sup>174</sup>

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 rights holders. 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").<sup>175 176</sup>

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 rights holders for the use of their material. Indeed, exceptions may improve or reduce welfare, depending on their necessity, scope and design. Exceptions are 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.<sup>177</sup>

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.<sup>178</sup> Initiatives

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<sup>174</sup> WTO/TRIPS Agreement, Art. 13, WCT Art. 10, WPPT Art. 16, and Berne Convention Art.9(2), the Beijing and Marrakesh Treaties

<sup>175</sup> 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.

<sup>176</sup> 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.

<sup>177</sup> 2013 Study Assessing Copyright Exceptions (Charles River Associates), paragraph 43 [not yet published]

<sup>178</sup> Examples, include the Dutch project « Beelden van de Toekomst » and Europeana « Sounds »

*Draft to be finalised in light of responses to the public consultation*

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.<sup>179 180</sup> 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 archives<sup>181</sup>.

The ARROW project is another example for a joint user – right owner initiative with the aim of facilitating the licensing of copyright protected works.<sup>182</sup>

The InfoSoc Directive also implements international obligations concerning Technological Protection Measures (TPMs)<sup>183</sup> and Rights Management Information.<sup>184</sup> In order for online business models to develop and to facilitate rights management in online networks, rights holders need to be able to identify works and other subject matter, and authorship, and to provide information on the terms and conditions of use of 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 right holders 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 infringements of copyright are also foreseen in Directive 2004/48/EC<sup>185</sup> 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

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<sup>179</sup> 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).

<sup>180</sup> [http://ec.europa.eu/internal\\_market/copyright/out-of-commerce/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm)

<sup>181</sup> <http://ec.europa.eu/licences-for-europe-dialogue/en/content/final-plenary-meeting>

<sup>182</sup> <http://www.arrow-net.eu/>

<sup>183</sup> pursuant to Articles 11 WCT and 18 WPPT

<sup>184</sup> pursuant to Articles 12 WCT and 19 WPPT

<sup>185</sup> 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)

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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/EC<sup>186</sup> 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 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.

<sup>186</sup>

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>

#### **8.4. ANNEX C (ii) - 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



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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**

*Draft to be finalised in light of responses to the public consultation*

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

*Draft to be finalised in light of responses to the public consultation*

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

*Draft to be finalised in light of responses to the public consultation*

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.

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## 8.5. ANNEX D – 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. 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).

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)<sup>187</sup> 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 for all Member States in which the service is receivable but only for those that are actively targeted.<sup>188</sup> A service provider “targets” a group of customers residing in a specific country

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<sup>187</sup> 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/IP/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).

<sup>188</sup> 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.

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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 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). 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.



Table A1 - Territorial coverage of large online music service providers:<sup>189</sup>

	Deezer	iTunes	Emusic	7Digital	Rara.com	Spotify	Napster	Youtube	GooglePlay	Xbox	Nokia	LastFM	Jamba/Jar	Amazon N	My Space	Wimp	Total
HR																	1
RO																	3
CY																	4
MT																	4
SI																	4
BG																	4
SK																	5
HU																	5
CZ																	6
EL																	6
EE																	6
LV																	6
LT																	6
LU																	8
DK																	8
FI																	10
BE																	11
PL																	11
SE																	11
PT																	12
FR																	13
NL																	13
ES																	13
IE																	13
IT																	14
DE																	14
UK																	15
AT																	15
Total	28	27	25	25	20	19	14	14	13	13	12	9	7	6	5	4	

Source (November 2013): *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).<sup>190</sup> 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.<sup>191</sup> 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

<sup>189</sup> 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.

<sup>190</sup> 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.

<sup>191</sup> 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).

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Belgian film distributor may hold the equivalent rights for the territory of Belgium. An online 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 rights holder 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 substitute<sup>192</sup>.

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.

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

<sup>192</sup>

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.

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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)<sup>193</sup> audiovisual service providers<sup>194</sup>**

	iTunes Store	UPC	Dailymotion	Sky	Xbox Movies/	Google Play M	Netflix	MUBI	Canal +	Youtube	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. Service providers may choose to do so because of the resulting possibility to price-discriminate

<sup>193</sup> 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).

<sup>194</sup> 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.

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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.<sup>195</sup> In the context of broadcasting of football matches<sup>196</sup>, 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

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<sup>195</sup> 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).

<sup>196</sup> 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.

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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 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.

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) can currently only be addressed through the enforcement of competition law.<sup>197</sup> 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.<sup>198</sup>

**Economic framework for analysis: Copyright territoriality and territorial restrictions in**

<sup>197</sup> 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.

<sup>198</sup> 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.

### 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. *(1) Vertical interactions and interactions between supply chains*

2. 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).

3. 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.

4. As summarized in the diagram in section 3.1, efficiency motives for vertical agreements may include:

5. - *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).

6. - *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.

7. - *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

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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.



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.

8. - *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.

9. 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.

10. 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).

11. **(2) Price discrimination**

12. 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.

13. 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.

14. 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).

15. 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.

16. 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.

17. **(3) Transaction costs**

18. 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.

19. 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.

20. 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.<sup>199</sup>

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## 8.6. ANNEX E – USER-GENERATED CONTENT

User Generated Content (UGC) is understood in 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”.<sup>200</sup> 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.<sup>201</sup> 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”.<sup>202</sup> 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 *Infopaq*<sup>203</sup> and *Eva-Maria Painer*<sup>204</sup> seem to cover adaptations which give rise to a further reproduction within the meaning of Article 2. The pending case of *Allposters*<sup>205</sup> will shed further light on the scope of Article 2.

<sup>200</sup> Proposed definition by the OECD

<sup>201</sup> 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](http://www.copyrightseesaw.net/archive/?sw_10_item=31), p. 3.

<sup>202</sup> 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](http://www.copyrightseesaw.net/archive/?sw_10_item=31), p. 5.

<sup>203</sup> Judgment of the Court of 16 July 2009, Case C 5/08, *Infopaq - Infopaq International A/S v Danske Dagblades Forening*

<sup>204</sup> Case C-145/10 – *Eva-Maria Painer v Standard VerlagsGmbH*

<sup>205</sup> Case C-419/13 – *Allposters v Stichting Pictoright*

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(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 available<sup>206</sup>

Consequently, when UGC involves copying and adapting parts of pre-existing works and is communicated to the public, a licence from the right holder covering the user's activities will be necessary, unless exceptions to the reproduction, communication to the public (making available) and adaptation right apply.<sup>207</sup> 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 Info Soc 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 right holder(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.<sup>208</sup> 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 countries (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, Belgium<sup>209</sup>), 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 Info Soc Directive allows Member States to provide for an exception for *"for the purpose of caricature, parody or pastiche"*.

<sup>206</sup> 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"

<sup>207</sup> See in this sense, IDATE, TNO & IVIR, User-Created-Content: Supporting a participative Information Society, SMART, 2007/2008, p.188.

<sup>208</sup> See the De Wolf Study for the European Commission

<sup>209</sup> 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.

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There is currently a case pending before the CJEU which should shed light on the scope of this exception.<sup>210</sup>

- 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.<sup>211</sup>

- It is not implemented at all in some Member States :
  - 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 did;
  - 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.

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<sup>210</sup> Case C-201/13 – Deckmyn & Vrijheidsfonds v. family Vandersteen and others

<sup>211</sup> De Wolf Study for the European Commission



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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 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 rights holders have refrained from preventing the emergence of UGC, and have been rather inclined to embrace the commercial opportunities.<sup>212</sup> 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.

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<sup>212</sup>

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)

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**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” <sup>213</sup>
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 <sup>214</sup> .
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 <sup>215</sup> .
DE	Yes. The caricature exception existed prior to the Copyright Directive <sup>216</sup> . It is sometimes considered that this is not even a limitation to copyright but presupposes that caricatures do not constitute reproductions or adaptations <sup>217</sup>
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 <sup>218</sup> .
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) <sup>219</sup> . Some commentators add that parody is recognised

<sup>213</sup> 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.

<sup>214</sup> 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.

<sup>215</sup> 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.

<sup>216</sup> 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.

<sup>217</sup> 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.

<sup>218</sup> 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.

<sup>219</sup> 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.

<sup>220</sup> 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.

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	as a general principle of Finnish copyright law <sup>220</sup>
FR	Yes. The caricature exception <b>already existed before the Copyright Directive</b> 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) <sup>221</sup> .
HR	
HU	No explicit provision exists under the Copyright Act. However, legal literature and practice <b>accept the exception</b> 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) <sup>222</sup> consist in a humoristic-critical imitation of a given author’s style <sup>223</sup> .
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 <sup>224</sup> .
LT	Yes, introduced.
LV	Yes, introduced, similar to Art 5.3.k.
LU	Yes. The Copyright Act <b>allows caricatures</b> 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 <sup>225</sup> .
RO	Not introduced
SE	<b>No parody exception in the law</b> 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.

<sup>221</sup> 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.

<sup>222</sup> 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.

<sup>223</sup> 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.

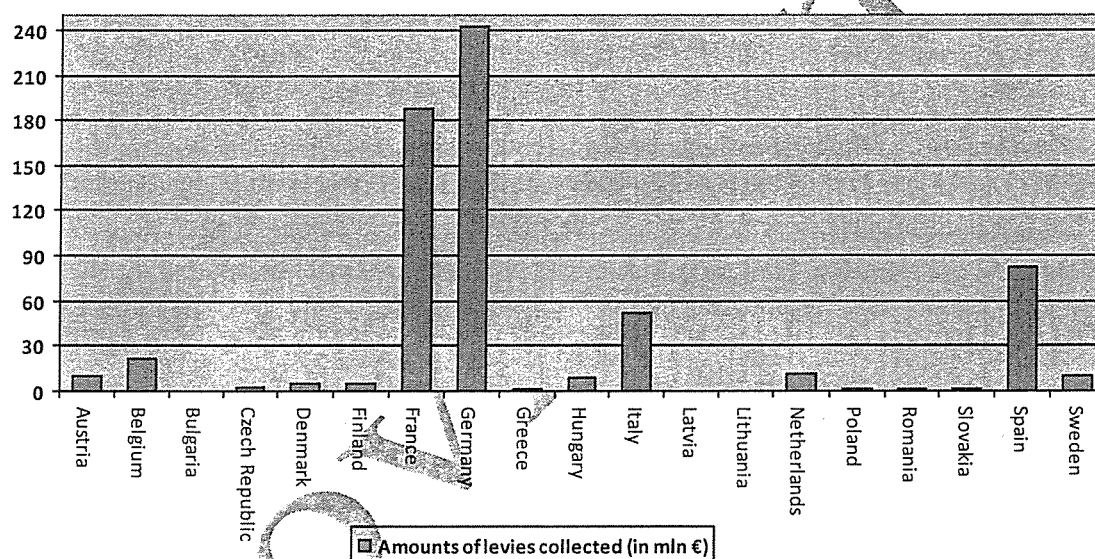
<sup>224</sup> Copyright in the information society – A Guide to National Implementation of the European Directive, edited by B. Lindner & T. Shapiro, Edward Elgar Publishing Ltd, 2011 (Chapter on Italy by S. Ercolani), p. 316.

<sup>225</sup> 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.

## 8.7. ANNEX F – 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).<sup>226</sup> 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*<sup>227</sup>. Currently 21 Member States have levy systems in place<sup>228</sup> and the overall amount of over €600 mln was collected in private copying levies for 2010.<sup>229</sup>

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 2012<sup>230</sup>. This mediation concluded on 31 January 2013 with the

<sup>226</sup> Articles 5(2)(a) and 5(2)(b) of Directive 2001/29

<sup>227</sup> [http://ec.europa.eu/internal\\_market/copyright/docs/levy\\_reform/130131\\_levies-vitorino-recommendations\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf)

<sup>228</sup> 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.

<sup>229</sup> International Survey on Private Copying Law and Practice - de Thuiskopie/WIPO 2012; this amounts includes Spain, but does not include Estonia.

<sup>230</sup> [http://ec.europa.eu/commission\\_2010-2014/barnier/docs/speeches/20120402/statement\\_en.pdf](http://ec.europa.eu/commission_2010-2014/barnier/docs/speeches/20120402/statement_en.pdf)

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presentation by Mr António Vitorino of his recommendations.<sup>231</sup> Subsequently, a 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 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.<sup>232</sup>

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.

<sup>231</sup>[http://ec.europa.eu/internal\\_market/copyright/docs/levy\\_reform/130131\\_levies-vitorino-recommendations\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf)

<sup>232</sup><http://www.ipo.gov.uk/techreview-private-copying.pdf>

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**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.]<sup>233</sup>**

AT	n/a
BE	<b>X</b>
BG	n/a
HR	n/a
CZ	n/a
DK	n/a
EE	n/a
FIN	<b>X</b>
FR	<b>X</b>
DE	<b>X</b>
GR	n/a
HU	<b>X</b>
IT	<b>X</b>
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	<b>X</b>

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-

<sup>233</sup> (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.



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users are often disconnected from the actual consumption of copyright protected content even 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,<sup>234</sup> 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*".<sup>235</sup> 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),<sup>236</sup> others extend the levy schemes to new categories of products.<sup>237</sup>

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<sup>234</sup> 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.

<sup>235</sup> Case C-467/08 (Padawan vs SGAE).

<sup>236</sup> 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.)

<sup>237</sup> 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.

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*Table A5 - overview of products subject to private copying levies in MS with levy systems in place (2012)<sup>238</sup>*

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 <sup>239</sup>	√	x	X	n/a	x
Finland	√	√	√	x	x
France	√	X	√	√	x
Germany	√	√	√	√	√ <sup>240</sup>
Greece	√	X	√	√	x
Hungary	√	√	√	√	x
Italy	√	√	√	√	√
Latvia	√	X	√	x	x
Lithuania	√	√	√	√	√
Netherlands <sup>241</sup>	√	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

<sup>238</sup>

International Survey on Private Copying Law and Practice - de Thuiskopie/WIPO 2012

<sup>239</sup>

International Survey on Private Copying Law and Practice, de Thuiskope (21<sup>st</sup> revision 2010)

<sup>240</sup>

Subject of negotiations since 2011

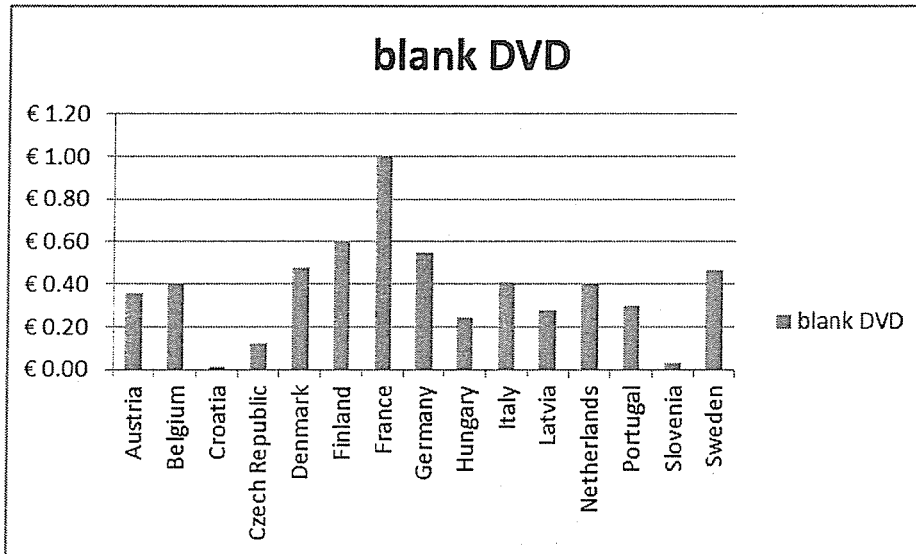
<sup>241</sup>

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.

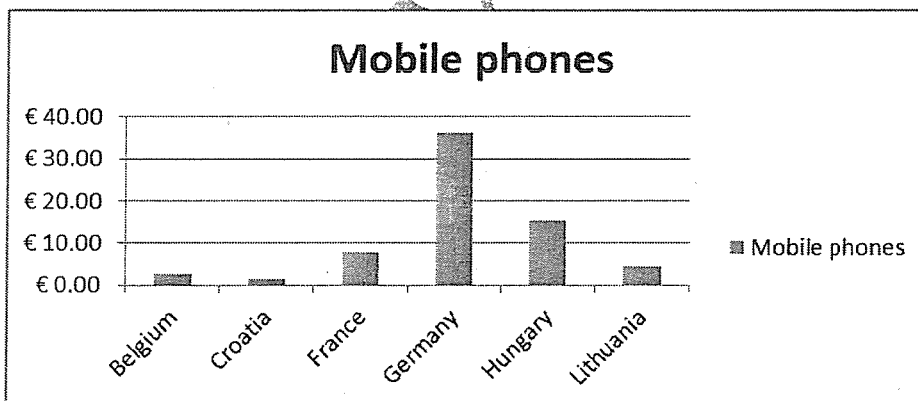
*Draft to be finalised in light of responses to the public consultation*

of the private copying exception<sup>242</sup> it also recognized that Member States enjoy broad discretion when determining the form, detailed arrangements and possible level of such compensation<sup>243</sup>. 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.

*Graph A2 – example of varying tariffs applicable to blank DVDs<sup>244</sup>*



*Graph A3 – example of varying tariffs applicable to mobile phones in selected Member States<sup>245</sup>*



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

<sup>242</sup> 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;

<sup>243</sup> in Case C-521/11 (Austro Mechana vs Amazon)

<sup>244</sup> International Survey on Private Copying Law and Practice - de Thuiskopie/WIPO 2012

<sup>245</sup> Tariffs applicable to mobile phones with 16 GB internal memory International Survey on Private Copying Law and Practice - de Thuiskopie/WIPO 2012.

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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 state<sup>246</sup>. 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.<sup>247</sup>

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.<sup>248</sup>

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 CJEU<sup>249</sup>, private copying levies must not be imposed on goods that are acquired by persons other than natural persons for purposes clearly 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.<sup>250</sup>

<sup>246</sup> In Case C-462/09 (Stichting de Thuiskopie vs Opus)

<sup>247</sup> In Case C – 521/11 (Amazon vs. Austromechana), 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.

<sup>248</sup>

<http://www.cedar.nl/uploads/15/files/English%20information%20Private%20Copying%20in%20the%20Netherlands.pdf>

<sup>249</sup> In Case C-467/08 (Padawan vs SGAE)

<sup>250</sup> 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>

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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.<sup>251</sup>

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.<sup>252</sup>

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.

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<sup>251</sup> 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.

<sup>252</sup> 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.

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**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,<sup>253</sup> 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.<sup>254</sup>

<sup>253</sup> 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

<sup>254</sup> Calculations on the basis of WIOD database ([http://www.wiod.org/new\\_site/database/wiots.htm](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



PROVISIONAL

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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 example in 2012 in France, for the overall amount of approx. €200mln perceived, €67.000 were reimbursed to persons other 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.

## 8.8. ANNEX G (i) - PUBLICLY ACCESSIBLE LIBRARIES, MUSEUMS AND ARCHIVES: SPECIFIC ACTS OF REPRODUCTION

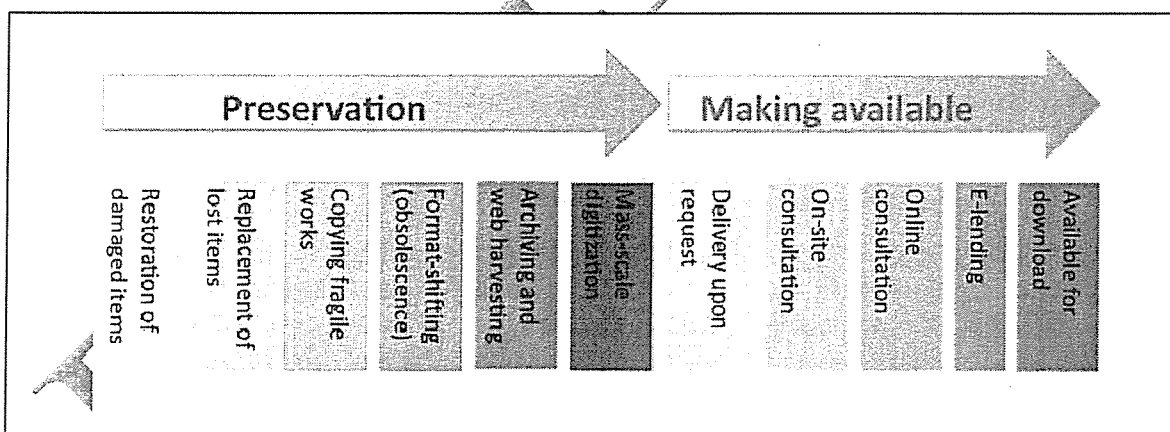
Libraries and other institutions, such as museums or archives, whose purpose is to maintain a collection of cultural artefacts and heritage, and to provide access thereto for research, education or private study, benefit from several exceptions in the *acquis communautaire*.

Those exceptions aim to facilitate:

- (1) Acts of preservation of the collections (art. 5(2) c) of the InfoSoc Directive);
- (2) Consultation of some works on the premises of the establishment (art. 5 (3) n)) for the purpose of research and private study; and
- (3) Authorizing public lending by libraries (art. 6 of the Rental and Lending Directive (2006/115)).

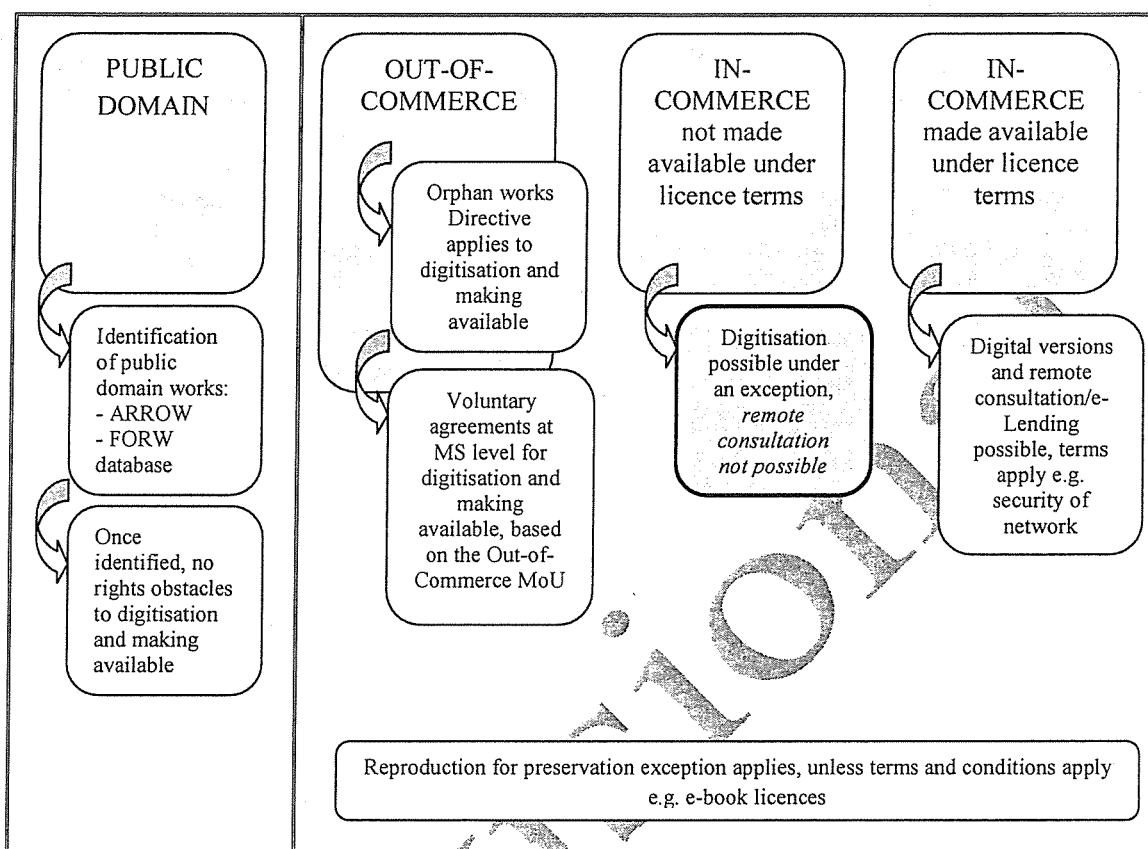
To a different extent and in different ways, such exceptions accommodate the key public-interest missions of the libraries, i.e. preservation and access to knowledge and culture. The digital evolution of libraries has significantly changed the possible impact of such exceptions, both on libraries' needs and expectations and on the legitimate protection of rights and interests of copyright and related rights holders. 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:<sup>255</sup>



The frameworks for the reproduction and making available of different parts of libraries' collections can be summarised as follows:

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.

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- 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.

**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 conservation purposes	Published works	Reproduction	Reproduction in necessary quantities
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,	Limited to restoration or replacement of a damaged or lost items  Making of digital copies is allowed for library users	Delivery of copies: subject to an extended collective license system

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			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.	subject to an extended collective license and the right of the owner to demand remuneration	
<b>DE</b>	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
<b>ES</b>	Conservation	Libraries, museums, record and film libraries, newspaper libraries and archives	All type of works in the collections of libraries of educational establishments in public ownership or forming part of institution of cultural or scientific character, libraries and archives	Reproduction for investigation and preservation purposes (no gainful interest)	
<b>FR</b>	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
<b>HU</b>	Archiving  Beyond preservation purposes: copying for	Educational establishments, publicly accessible libraries and	All type of works, portion of work is restricted: minor parts or a published work or newspapers or	Sending a copy of a work in the collection of library upon individual request	

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	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)	museums, publicly accessible archives	periodicals articles	Reproduction of a work to enable on-site consultation	
<b>IT</b>	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
<b>LV</b>	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
<b>LU</b>	Preservation (to the safeguard 'heritage')	Educational establishments, publicly accessible libraries and archives	All types of works	Reproduction of a work to enable on-site consultation	
<b>NL</b>	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
<b>PL</b>	Maintaining and protecting collections	Educational establishments, museums, libraries and	All type of works	Limited to restoration or replacement of a damaged or lost	



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		archives		items	
<b>RO</b>	Specific acts of reproduction	Publicly accessible libraries, educational establishments museums, or archives			
<b>SI</b>	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	<p>reproductions for (1) internal uses and (2) from existing ("own") copies held in such establishment</p> <p>Reproduction of whole books, graphic editions, electronic databases and computer programs are not, save for specific provisions, permitted</p>	
<b>UK</b>	<p>Preservation and replacement</p> <p>(stricter provisions: acts carried by libraries limited for the purpose of replacement)</p>	Museums (with plans to include also galleries), libraries and archives	Literary, dramatic and musical work excluding sound recordings, films and broadcasts	<p>Limited to restoration or replacement of a damaged or lost items</p> <p>Sending a copy of a work in the collection of library upon individual request (for research and private study)</p>	<p>Delivery of copies (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>

**8.9. ANNEX G (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 Info Soc 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.<sup>256</sup> 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. The EU Staff Working Document of 27/10/2011 (SEC(2011) 1274 final)<sup>257</sup> accompanying the Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation (C(2011) 7579 final)<sup>258</sup> 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 projects<sup>259</sup>.

<sup>256</sup> « Comité des Sages » Report « The New Renaissance »  
[http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/refgroup/final\\_report\\_cds.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/refgroup/final_report_cds.pdf)

<sup>257</sup> [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/recommendation/staffworkingpaper1274final.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/recommendation/staffworkingpaper1274final.pdf)

<sup>258</sup> <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:283:0039:0045:EN:PDF>

<sup>259</sup> -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).  
Long-term Management costs: Overhead (staffing, space, depreciation on equipment); Capital expenditure (equipment, storage infrastructure, training, software); Variable retro-conversion costs (format-shifting, management);

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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,<sup>260</sup> direct commercial exploitation,<sup>261</sup> collaborative digitisation.<sup>262</sup>

The transaction costs associated with rights clearance specifically include (i) identification and search costs – identifying rights holders 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 rights holders).

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 digitisation<sup>263</sup>. Another estimate is provided by the EYE Film Institute in terms of working hours<sup>264</sup>. 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"<sup>265</sup> 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.nl<sup>266</sup>.

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

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<sup>260</sup> 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.

<sup>261</sup> 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.

<sup>262</sup> 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.

<sup>263</sup> 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.

<sup>264</sup> [http://ec.europa.eu/avpolicy/docs/reg/cinema/sept\\_11/eye.pdf](http://ec.europa.eu/avpolicy/docs/reg/cinema/sept_11/eye.pdf)

<sup>265</sup> <http://www.eyefilm.nl/en/collection/images-for-the-future>

<sup>266</sup> 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).

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libraries. Orphan works are works like books, newspaper and magazine articles and films that are still protected by copyright but whose authors or other rights holders 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.<sup>267</sup>

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 rightsholders, 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.<sup>268</sup> 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 study<sup>269</sup> 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

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<sup>267</sup> [http://ec.europa.eu/internal\\_market/copyright/orphan\\_works/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/orphan_works/index_en.htm)

<sup>268</sup> 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>

<sup>269</sup> <http://www.arrow-net.eu/sites/default/files/Seeking%20New%20Landscapes.pdf>

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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.

The second instrument to have been developed at EU level is the Memorandum of Understanding 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-commerce. 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 right holders and digital libraries based on collective agreements negotiated in the country of first publication of the work,<sup>270</sup> which should set out the permitted uses of works. When a right holder 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 rights holder. The MoU serves as a blueprint for collective licensing agreements negotiated amongst rights holders, 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 1<sup>er</sup> mars 2012<sup>271</sup> relative à l'exploitation numérique des livres indisponibles du xxe 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 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.

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<sup>270</sup>

See *infra*.

<sup>271</sup>

French Law n° 2012-287 of 1<sup>st</sup> March 2012 on the Exploitation of Digital Books Unavailable in the Twentieth Century, *J.O.*, n° 0053, 2 March 2012, p. 3986.

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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.

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 right holder.
- 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 right holders 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 right holders 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.<sup>272</sup> 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 20<sup>th</sup> century.

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

<sup>272</sup> <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](http://www.pictoright.nl/nieuws/images/KB-en-rechtenorganisaties-werken-samen-bij-toegang-cultureel-erfgoed.pdf).



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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)<sup>273</sup> 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 rights holders 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 million in staff alone and take three years. ZDF has estimated the number of contracts to be 70,000 per year.<sup>274</sup>

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<sup>273</sup> Association des Cinémathèques Européennes, Federation of European Film Directors, International Federation of Film Producers Associations, and Society of Audiovisual Authors

<sup>274</sup> [http://www3.ebu.ch/files/live/sites/ebu/files/Knowledge/Publication%20Library/EBU-Viewpoint-Copyright\\_EN.pdf](http://www3.ebu.ch/files/live/sites/ebu/files/Knowledge/Publication%20Library/EBU-Viewpoint-Copyright_EN.pdf)

**8.10. ANNEX G(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)<sup>275</sup>

**Academic and research libraries**

Since the conclusion of the Info Soc Directive, digital networks have become ubiquitous, and both scholarly<sup>276</sup> 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,<sup>277</sup> and by 2011, 60% of academic spending on content was in digital format.<sup>278</sup> As of 2012, all STM journals were available online, with just a few exceptions (e.g. very small journals; some journals in the humanities).<sup>279</sup>

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.<sup>280</sup> 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.<sup>281</sup>

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-

<sup>275</sup> Case C-117/13 – Eugen Ulmer KG v Technische Universität Darmstadt

<sup>276</sup> Commonly referred to as Scientific, Technical and Medical (STM) publications

<sup>277</sup> [http://www.stm-assoc.org/2009\\_10\\_13\\_MWC\\_STM\\_Report.pdf](http://www.stm-assoc.org/2009_10_13_MWC_STM_Report.pdf)

<sup>278</sup> Outsell’s Information Management Benchmark Survey, 2012

<sup>279</sup> [http://www.stm-assoc.org/2012\\_12\\_11\\_STM\\_Report\\_2012.pdf](http://www.stm-assoc.org/2012_12_11_STM_Report_2012.pdf)

<sup>280</sup> Either access within the university network or remote access via secure authentication protocols, depending on the IT infrastructure of the university.

<sup>281</sup> [http://www.stm-assoc.org/2012\\_12\\_11\\_STM\\_Report\\_2012.pdf](http://www.stm-assoc.org/2012_12_11_STM_Report_2012.pdf)

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of-Commerce books<sup>282</sup>. 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.<sup>283</sup>

The 3<sup>rd</sup> 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.

**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 <sup>284</sup>		
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 purposes	Public libraries, schools or other educational establishments, museums and archives with educational or conservation purposes	Authorized acts: communication and 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

<sup>282</sup> [http://ec.europa.eu/internal\\_market/copyright/out-of-commerce/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm)

<sup>283</sup> [http://www.stm-assoc.org/2012\\_12\\_11\\_STM\\_Report\\_2012.pdf](http://www.stm-assoc.org/2012_12_11_STM_Report_2012.pdf)

<sup>284</sup> Source, Guido Westkamp, Queen Mary Intellectual Property Research Institute, "The Implementation of Directive 2001/29/EC in the Member States" (February 2007), p.46

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			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		

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**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

## 8.11. ANNEX G (iv) - PUBLICLY ACCESSIBLE LIBRARIES, MUSEUMS AND ARCHIVES: E-LENDING

The current legal framework for the lending of library collections dates from 1992<sup>285</sup> 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.<sup>286</sup> 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.<sup>287</sup>

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 market<sup>288</sup>. The situation of the e-book market in the EU is in stark contrast to the USA, where eBook sales represent 31% of sales,<sup>289</sup> and where we see the beginning of some commercial 'lending'.<sup>290</sup> 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).

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 aggregators<sup>291</sup>, 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".<sup>292</sup> Such frictions include the number of allowable simultaneous consultations, the number of consultations before a new purchase is triggered,<sup>293</sup> requiring download on the premises during business

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285 Rental & Lending Directive

286 Audio/audiovisual make up 18% of loans from small libraries to 38% from larger libraries in France

287 No study available yet regarding the exact extend of the demand

288 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).

289 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](http://www.lemonde.fr/economie/article/2013/10/09/livre-numerique-la-fracture-europeenne_3492453_3234.html)]

290 Amazon Kindle Owners' Lending Library

291 E.g. 'OverDrive'

292 See FEP briefing paper in annex 2

293 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-



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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.

Some national pilot projects have been reviewed or have been abandoned by the parties. The **Danish** pilot project Ereolen.dk (©2011)<sup>294</sup> 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.<sup>295</sup>

In the **UK** in July 2013, only two of the “Big Six” publishers offered their ebooks to libraries.<sup>296</sup> 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. 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 copies.<sup>297</sup>

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, ranging from x – y]. One Member State has 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.<sup>298</sup> 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

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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).

<sup>294</sup> 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

-he 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

<sup>295</sup> See figure in annex 2

<sup>296</sup> CILIP briefing paper, version 3, July 2013

<sup>297</sup> 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.

<sup>298</sup> UK Government response to the Sieghart Review.

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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).

PROVISIONAL

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**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

MS	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

*Draft to be finalised in light of responses to the public consultation*

**Table A13 - Implementation of the (derogation to the exclusive) public lending right in Member States**

<b>MS</b>	<b>Beneficiaries</b>	<b>Type of works</b>	<b>Remuneration / Other details</b>
<b>AT</b>	publicly accessible institutions	All types of works?	Yes
<b>BE</b>	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
<b>BG</b>	Copyright Act 2000 granted authors the exclusive lending right. However unclear whether law provides for derogation to the exclusive lending rights		
<b>CZ</b>	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
<b>CY</b>	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.
<b>DK</b>	Public libraries, the elementary school libraries and the Danish National Library for the Blind	Printed books, audio-visual material, music, art, posters, photos	Yes
<b>DE</b>	Publicly accessible institutions	Original or copies of the work (Article 27 (2) and 17 (2))	Yes
<b>EE</b>	Public libraries	Literary works, audiovisual and musical works	Yes
<b>EL</b>	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	

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	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

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	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



## **8.12. ANNEX H: 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) 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 project<sup>299</sup> 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.

Recital 36 of the Directive leaves the fair compensation for right holders 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. FR<sup>300</sup>). 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.

<sup>299</sup>

[http://www.efgproject.eu/downloads/D\\_5\\_3\\_Final\\_Guidelines\\_Copyright\\_Clearance\\_online.pdf](http://www.efgproject.eu/downloads/D_5_3_Final_Guidelines_Copyright_Clearance_online.pdf)

<sup>300</sup>

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.

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Different types of licensing systems are in place in certain Member States (e.g. DK, FI, SE<sup>301</sup>, UK) to cover the use of copyrighted works in the educational context. The licenses granted would allow teaching institutions intensive use than it would normally be possible to do under and exception. 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"<sup>302</sup> 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"<sup>303</sup>) 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.

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	Examples 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 licence)
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

<sup>301</sup> Extended collective licensing in DK, FI, and SE.

<sup>302</sup> See <http://conlicencia.com/>

<sup>303</sup> See <http://www.mvb-rightslink.com/>

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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/EC<sup>304</sup>.

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.

*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 abroad<sup>305</sup>) but also through training programmes offered by institutions of different Member States, via multi-

<sup>304</sup> 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>

<sup>305</sup> 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).

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institutional courses, branch campuses or franchising agreements<sup>306</sup>. 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, 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"<sup>307</sup>, the Commission encourages the development of innovative learning practices combining face-to-face and online learning. It has also launched the "Open Education Europa"<sup>308</sup> platform aimed at sharing educational resources available online in different languages. The European MOOCs Scoreboard<sup>309</sup> 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 market<sup>310</sup>.

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.<sup>311</sup> In this context, there is a need for more transparency on the rights associated with each resource and the potential limitations to such rights.<sup>312</sup>

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<sup>306</sup> 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](http://ec.europa.eu/education/higher-education/doc/studies/borders_en.pdf)

<sup>307</sup> 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](http://ec.europa.eu/education/news/doc/openingcom_en.pdf)

<sup>308</sup> <http://openeducationeuropa.eu/>

<sup>309</sup> [http://openeducationeuropa.eu/en/european\\_scoreboard\\_moocs](http://openeducationeuropa.eu/en/european_scoreboard_moocs)

<sup>310</sup> Industry research - IBIS Capital and Edxus Group, <http://edxugroup.com/digitalisation-of-education-will-result-in-fifteen-fold-growth-for-e-learning-market-over-the-next-decade/>

<sup>311</sup> 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.

<sup>312</sup> 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.

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Furthermore, it is worth noting that educational publishers<sup>313</sup> 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.<sup>314</sup>

In the specific area of film literacy, the Commission is currently carrying out a study on the showing of films in European schools<sup>315</sup>. 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.

PROVISIONAL

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<sup>313</sup> 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 15 and 20% of the market at EU level, and up to one third of the total in some Member States.

<sup>314</sup> Half of the revenues of Pearson, the largest educational publisher in the world, are now digital.

<sup>315</sup> See presentation on <https://ec.europa.eu/digital-agenda/en/news/cinema-expert-group-subgroup-film-heritage-meeting-2728-november-2013-read-presentations>

### 8.13. ANNEX I - 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 structured<sup>316</sup>. 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 development. 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, 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 content (copyright protected or not) currently used as a source for mining is freely accessible on the internet<sup>317</sup> (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 arises 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 access<sup>318</sup> 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

<sup>316</sup> For a description of what text and data mining is, please see chapter 3.2.1.

<sup>317</sup> It has been argued in legal literature that content made available on the internet, has been made available with the right holders '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-Potzberger.pdf>

<sup>318</sup> The growth of open access publications is challenging the traditional subscription model by making scientific publications freely available on-line

*Draft to be finalised in light of responses to the public consultation*

reading/consultation of 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).<sup>319</sup> 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.<sup>320</sup>

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".<sup>321</sup>

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".<sup>322</sup>

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.<sup>323</sup>

<sup>319</sup> 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

<sup>320</sup> See the recent judgment of the CJEU in Case C-202/12 (Innoweb vs Wegener)

<sup>321</sup> <http://www.culture.gouv.fr/culture/infos-pratiques/droits/exceptions.htm>.

<sup>322</sup> [http://www.gesetze-im-internet.de/englisch\\_urhg/englisch\\_urhg.html](http://www.gesetze-im-internet.de/englisch_urhg/englisch_urhg.html).

<sup>323</sup> <https://www.boe.es/buscar/pdf/1996/BOE-A-1996-8930-consolidado.pdf>



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Moreover, to date no Member States has adopted specific copyright legislation covering text and data mining on the basis of the research exceptions. 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 legislation<sup>324</sup>. 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 discovery<sup>325</sup> 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.<sup>326</sup>

Text and data mining was thus initially mostly used in life sciences, with the potential to transform the way scientists use the literature. Some studies indicate that text and data mining can save reading time, information handling time and costs.<sup>327</sup>

Vast amounts of new information and data are produced and put online every day through economic, academic and societal activities.<sup>328</sup> The volumes of such “big data”<sup>1</sup> are predicted to increase at a rate of around 40% per year, and have significant potential economic and societal value.<sup>329</sup>

<sup>324</sup> <http://www.ipo.gov.uk/techreview-data-analysis.pdf>

<sup>325</sup> 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>

<sup>326</sup> “Journal Article Mining: A research study into Practices, Policies, Plans and Promises”, by Eefke Smit and Maurits van der Graaf, 2011, p. 6.

<sup>327</sup> “The Value and Benefits of Text Mining”, JISC, 2012.

<sup>328</sup> “The Value and Benefits of Text Mining”, JISC, 2012, p. 3.

<sup>329</sup> 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

The global research community generates over 1.8-1.9 million new scholarly articles per year.<sup>330</sup> 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.<sup>331</sup>

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.<sup>332</sup>

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 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 it<sup>333</sup>.

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 addition, they 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 collections<sup>334</sup>. The need to negotiate with each and every publisher<sup>335</sup> also makes the process time-consuming. Researchers have reported cases where they have had to keep ongoing research on hold for weeks or months while waiting for the

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innovation, competition, and productivity”, McKinsey global Institute, 2011, p.2: [http://www.mckinsey.com/insights/business\\_technology/big\\_data\\_the\\_next\\_frontier\\_for\\_innovation](http://www.mckinsey.com/insights/business_technology/big_data_the_next_frontier_for_innovation)  
330 “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](http://www.stm-assoc.org/2012_12_11_STM_Report_2012.pdf)

331 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](http://www.stm-assoc.org/2012_12_11_STM_Report_2012.pdf)

332 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.

333 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>

334 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.

335 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>

signing of a licence agreement<sup>336</sup>. Moreover, it has been held that access is often provided only to abstracts of articles<sup>337</sup> 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 agreements<sup>338</sup>. 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. Finally, research institutions have pointed out that text and data mining should not be limited to non-commercial research<sup>339</sup>

**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.<sup>340</sup> The reasons for this could be the potentially high transaction costs described above<sup>341</sup>, 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, concerns have been reported as to the security and stability of publisher’s 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,

<sup>336</sup> 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>

<sup>337</sup> 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>

<sup>338</sup> 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.

<sup>339</sup> 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/wtvm054838.pdf](http://www.wellcome.ac.uk/stellent/groups/corporatesite/@policy_communications/documents/web_document/wtvm054838.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/>

<sup>340</sup> “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.

<sup>341</sup> 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.

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even independently from profit considerations. Publishers are also concerned that mining may 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 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 publications<sup>342</sup>.

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 CrossRef<sup>343</sup>. “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 UK<sup>344</sup>.

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<sup>342</sup> [http://www.stm-assoc.org/2013\\_11\\_11\\_Text\\_and\\_Data\\_Mining\\_Declaration.pdf](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](http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf)

<sup>343</sup> <http://www.crossref.org/>

<sup>344</sup> <http://www.plsclear.com/>

#### 8.14. ANNEX J - 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 rights holders<sup>345</sup> 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.<sup>346</sup>

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,<sup>347</sup> 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.<sup>348</sup> 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 right holder, not only domestically but also across borders.<sup>349</sup> 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.

<sup>345</sup> This possibility is explicitly recognised by recital 36 of Directive 2001/29/EC.

<sup>346</sup> See more examples in the problem definition and in Table A15.

<sup>347</sup> 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.

<sup>348</sup> [http://www.wipo.int/meetings/en/doc\\_details.jsp?doc\\_id=245323](http://www.wipo.int/meetings/en/doc_details.jsp?doc_id=245323)

<sup>349</sup> 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.

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Finally, Article 7 of the Audiovisual Media Services Directive<sup>350</sup> 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.<sup>351</sup> The actual implementation of this provision however seems rather varied in the EU.<sup>352</sup>

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.<sup>353</sup> 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.<sup>354</sup> These features can be incorporated at the time of production or later, for example by the specialised entities.

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)<sup>355</sup>. Still, when examining the overall market, only 7 % of books are also available in accessible format.<sup>356</sup> In France it is estimated that 8 to 20% of books are available in at least one accessible format.<sup>357</sup>

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.<sup>358</sup>

<sup>350</sup> 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.

<sup>351</sup> See details per Member State in Table A16.

<sup>352</sup> State of subtitling access in EU (EFHOH) – 2011 report  
[http://media.wix.com/ugd/c2e099\\_098aaba4b05ee8f7fed8b0add0b8c332.pdf](http://media.wix.com/ugd/c2e099_098aaba4b05ee8f7fed8b0add0b8c332.pdf)

<sup>353</sup> <http://www.euroblind.org/resources/information/nr/215>

<sup>354</sup> 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>

<sup>355</sup> [http://www.rnib.org.uk/aboutus/Research/reports/reading/Pages/accessible\\_titles\\_2012.aspx](http://www.rnib.org.uk/aboutus/Research/reports/reading/Pages/accessible_titles_2012.aspx)

<sup>356</sup> [http://www.rnib.org.uk/professionals/publishing/Pages/publishing\\_industry.aspx](http://www.rnib.org.uk/professionals/publishing/Pages/publishing_industry.aspx)

<sup>357</sup> Source: study “exception « handicap »” (2013)

<sup>358</sup> LIA project: <http://www.progettolia.it/en>

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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'.<sup>359</sup>

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)<sup>360</sup> 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.<sup>361</sup>

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)<sup>362</sup> in WIPO and the ETIN project (The European Trusted Intermediaries Network)<sup>363</sup> in the EU.<sup>364</sup> 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 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.

<sup>359</sup> <http://www.nuv.nl/downloadcentrum/regelingen-modellen-en-checklists/regelingen-bibliotheken/regeling-toegankelijke-lectuur-leesgehandicaptent.158422.lynkx>

<sup>360</sup> <http://www.daisy.org>

<sup>361</sup> Examples provided by some European blind organisations.

<sup>362</sup> <http://www.visionip.org/tigar/en/>

<sup>363</sup> [http://ec.europa.eu/internal\\_market/copyright/initiatives/access/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/initiatives/access/index_en.htm)

<sup>364</sup> There are also some examples of bilateral cooperation between some Member States, e.g. between the Netherlands and Belgium.



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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 project<sup>365</sup> 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.

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.<sup>366</sup>

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).<sup>367</sup>

<sup>365</sup> TIs from the Netherlands, the Flemish part of Belgium, France, Denmark and Germany.

<sup>366</sup> Information provided by some European blind organisations.

<sup>367</sup> <http://www.yourlocalcinema.com/available.html>

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**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

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	disabilities		
<b>FI</b>	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
<b>FR</b>	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
<b>HR</b>	Person with disability	yes	use of copyright works non-commercial
<b>HU</b>	Persons with disabilities	no	non-commercial
<b>IE</b>	Person with a physical or mental disability	no	copy of a work and a recording
<b>IT</b>	Persons with disability	no	reproduction and communication to the public, for personal use, non-commercial
<b>LT</b>	People with visual or hearing impairment	no	reproduction for non-commercial educational, teaching and scientific research purposes of lawfully published works non-commercial
<b>LV</b>	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
<b>LU</b>	Persons with visual or hearing impairment	no	reproduction of a work
<b>MT</b>	Person with disabilities	no	the reproduction, translation, distribution or communication to the public of a work non-commercial
<b>NL</b>	Person with disabilities	yes	reproduction and communication to public of works non-commercial
<b>PL</b>	Person with disabilities	no	published works non-commercial and to the extent resulting from the nature of disability
<b>PT</b>	Person with disabilities	yes	the reproduction, public communication and making available to the public of a work
<b>RO</b>	Person with disabilities	no	the reproduction, distribution, broadcasting or communication to the public

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<b>SE</b>	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.
<b>SK</b>	Person disabilities	with	no	reproduction of a released work public distribution by lending or to communication to the public
<b>SI</b>	Person disabilities	with	yes	reproduce or distribute works, provided that the work used is not available in the desired form no economic advantage
<b>UK</b>	Visually impaired person		no	literary, dramatic, musical or artistic work or a published edition

PROVISIONAL

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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>
BE Fr Com  FI Com	<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>

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	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 licences: 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 Rai,

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	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..
<b>LT</b>	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.
<b>LV</b>	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.
<b>LU</b>	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.
<b>MT</b>	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
<b>NL</b>		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
<b>PL</b>		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)
<b>PT</b>		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.
<b>RO</b>	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 .



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	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"> <li>1. 1 July 2011 – 30 June 2012: Sound (25 % of the broadcasting time), Picture (experimental works)</li> <li>2. 1 July 2012–30 June 2013: Sound (50 %), Picture(experimental works)</li> <li>3. 1 July 2013 – 30 June 2014: Sound (70 %), Picture ( 1 %)</li> <li>4. 1 July 2014 – 30 June 2014: Sound (80 %), Picture (2%)</li> <li>5. 1 July 2015 – 30 June 2016 : Sound (90 %), Picture (3%)</li> </ol> <p>65 Commercial channels (others than TV4): general obligation to promote accessibility</p>
SK		<p>Linear services:</p> <ul style="list-style-type: none"> <li>- PSB broadcasting a television programme not digitally: 25% of all broadcast programmes accompanied by closed or open captions and 1% translated into sign language</li> <li>- 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.</li> <li>- 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.</li> </ul> <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 communications 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"> <li>- subtitle 80% of their programmes within 10 years</li> <li>- audio describe 10% of their programmes (10y)</li> <li>- sign 5% of their programmes (10y)</li> </ul> <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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## 8.15. ANNEX K – DEFINITION OF RIGHTS IN THE ONLINE ENVIRONMENT

### Two rights for a single transmission

Directive 2001/29/EC harmonises the rights of authors and neighbouring rightholders<sup>368</sup> which are essential for the transmission of digital copies of works (e.g. an e-book) and other protected subject matter (e.g. a record in a MP3 format) over the internet or similar digital networks.

The most relevant rights for digital transmissions are the right of communication to the public, including the right of making available to the public<sup>369</sup>, and the right of reproduction<sup>370</sup>. The dissemination of a digital copy of work or other subject matter in digital networks is usually subject to both of these rights at the same time. Online transmissions therefore imply - in a single economic transaction - both the right of communication to the public (including the right of making available) and the reproduction right.

These two rights are applied in parallel because transmissions of a digital copy of a work are not limited to the act of transmission itself, but always involve the making of several copies as well<sup>371</sup>. Such copies are usually made both at the start of the transmission (e.g. the uploading of a digital copy of a work to a server by a service provider) and at the end of the transmission (e.g. the downloading of a digital copy of a work by an end-user).<sup>372</sup>

As a consequence, a service provider that intends to disseminate a work over the internet via e.g. a paid-for on-demand download service must, in principle, acquire a licence for (i) the right of communication to the public/making available to the public and (ii) the right of reproduction. The cumulative application of rights may increase transaction costs for the licensing of works for online use, since the reproduction right is autonomous and independent, and may be held by a person other than the holder of the communication to the public right. At the same time there are instances in which problems do not arise (when both the rights are in the hands of a single right holder or collective management organisation).

National courts have questioned the application of two separate rights to a single act of economic exploitation. In Germany, for example, the Higher Regional Court of Munich held that splitting online rights into the reproduction right and the right to make available to the public, with the aim to subsequently claim licence fees for both rights is inconsistent with German law. In particular, the German Court stated that, in the online environment, a work

<sup>368</sup> Film and record producers, performers and broadcasters are holders of so-called “neighbouring rights” in, respectively, their films, records, performances and broadcast. 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”.

<sup>369</sup> The right to authorise or prohibit any communication to the public by wire or wireless means and to authorise or prohibit the making available to the public “on demand” (see Art. 3 of Directive 2001/29/EC).

<sup>370</sup> The right to “authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part” (see Art. 2 of Directive 2001/29/EC) although temporary acts of reproduction of a transient or incidental nature are, under certain conditions, excluded (see art. 5(1) of Directive 2001/29/EC).

<sup>371</sup> Copies involved in an act of transmission need to be differentiated from the permanent copies that a service provider does, for instance to build a database with all the e.g. e-books it has a licence to exploit, in order to provide its service. These copies (and the reproduction right that needs to be cleared to make them) are separate from the copies made in the course of transmission not only from a “technical” point of view (they happen independently from any transmission happening) and also from an economic point of view (they have an independent value).

<sup>372</sup> Some of these reproductions are, however, covered by the mandatory exception provided for in Article 5(1) of Directive 2001/29/EC, and thus do not need to be licensed. See also case C360/13 *Meltwater*, pending reference before the CJEU.

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cannot be exploited on the basis of the reproduction right only (i.e. independent from the right of making available). Therefore, the splitting of one uniform economical-technical process into two separate exploitation rights would not be possible.<sup>373</sup>

In a case concerning download-to-own services related to videogames, the Supreme Court of Canada also stated that double payments for a single act of exploitation should be avoided. The Court observed that there is no practical difference between buying a durable copy of a work in a store and downloading a copy using the Internet. Contrary to the Higher Regional Court of Munich (which favoured the right of communication to the public), however, the Supreme Court of Canada ruled that only the reproduction right had to be licenced, and that no separate royalty for an act of communication to the public must be paid.<sup>374</sup>

Both courts expressed their clear view that only a single right should apply to a single act of economic exploitation. The different outcomes of the cases, however, also show that it is not self-evident which right should be given preference. In that regard, it should be stressed that the German case concerned a streaming service that did not involve the making of permanent copies by the end-users, whereas the Canadian Case was concerned with a download-to-own service for which the opposite was the case. Arguably, the importance of the communication to the public/making available to the public right is higher when end-users cannot make or use any permanent copies, whereas the right of reproduction could be seen as the characteristic right when it comes to download-to-own services. It should also be noted that many online services combine both streaming and downloading features (for instance to allow a subscriber to make paly list to listen when being off-line).

National rules on the interpretation of copyright contracts may also have an impact on the scope of a licence or a transfer of rights for the online exploitation of works.<sup>375</sup>

Finally, recent jurisprudence of the CJEU suggests that at least download-to-own transmissions in the case of software could (in addition to the right of reproduction) be subject to the right of distribution (traditionally associated with the distribution of physical copies only), instead of to the right of communication to the public/making available to the public.<sup>376</sup> However, in all other respects, the CJEU has not yet had the opportunity to consider the application of two separate rights in a single act of economic exploitation.

### **Online transmissions and the exhaustion of rights**

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<sup>373</sup> Decision of 29 April 2010, 29 U 3698/09 (MyVideo Broadband vs CELAS GmbH). MyVideo had concluded an agreement with the German collecting society GEMA for the streaming platform myvideo.de. With regard to EMI's Anglo-American repertoire, the agreement included the right of making available but not the right of reproduction, which was removed by EMI from GEMA to CELAS for European-wide licensing. When negotiations between CELAS and MyVideo failed, CELAS threatened to seek injunctive relief which made MyVideo file an action for a declaratory judgment, stating that CELAS had no right to prevent the offering of music on myvideo.de.

<sup>374</sup> Entertainment Software Association v. Society of Composers, Authors and Music Publishers of Canada, 2012 SCC 34. The case primarily concerned the question whether the transmission of musical works contained in video games that are sold online via downloads amounts to a communication to the public.

<sup>375</sup> In Greece, Article 15(4) of Law 2121/1993 provides that "if the extent and the means of exploitation which the transfer concerns or for which the exploitation or the exploitation license is agreed are unspecified, it shall be deemed that the said acts refer to the extent and the means that are necessary for the fulfilment of the purpose of the contract or license". In practice, this provision is applied in conjunction with the principle that in case of doubt a contract is always interpreted in favour of the author, meaning that when the rights transferred by the author are not specified in detail, the transfer only encompasses those rights that are absolutely necessary for the fulfilment of the purpose of the contract.

<sup>376</sup> Case C-128/11 (Oracle vs UsedSoft); see footnote 9 for further detail.

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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.

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 copies 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)<sup>377</sup>, however, the CJEU rejected, with regard to computer programs as protected under Directive 2009/24/EC, a distinction between the physical 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

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<sup>377</sup> 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.

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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).<sup>378</sup>

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".<sup>379</sup>

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 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

<sup>378</sup> 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 right holders" (para. 116).

<sup>379</sup> 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).

particular". The scope of Article 3 was addressed in the *ITV v TV Catchup* case for internet transmissions for the first time.<sup>380</sup>

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).

### **Legal uncertainty on linking and browsing**

Several Cases are pending before the CJEU<sup>381</sup> 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. Some argue 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."<sup>382</sup> Others argue that 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.<sup>383</sup>

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

<sup>380</sup> Case C-607/11 (*ITV Broadcasting vs TV Catch Up*)

<sup>381</sup> Cases C-466/12 (*Svensson*), C-348/13 (*Bestwater International*) and C-279/13 (*C More entertainment*).

<sup>382</sup> 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](http://www.ivir.nl/news/European_Copyright_Society_Opinion_on_Svensson.pdf)

<sup>383</sup> 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>



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'cache' memory of his computer. A question has been referred to the CJEU<sup>384</sup> 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.

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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Case C-360/13 (Public Relations Consultants Association Ltd). See also [http://www.supremecourt.gov.uk/decided-cases/docs/UKSC\\_2011\\_0202\\_PressSummary.pdf](http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0202_PressSummary.pdf)

## 8.16. ANNEX L - 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 developed<sup>385</sup>, 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.<sup>386</sup>

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 Database<sup>387</sup> 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 rightsholders, rights

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<sup>385</sup> E.g. the International Standard Recording Code (ISRC) is used to identify recordings, the International Standard Book Number (ISBN) is used to identify books

<sup>386</sup> <http://eidr.org/eidr-and-isan-to-provide-seamless-registration-of-content-ids/>

<sup>387</sup> <http://www.globalrepertoiredatabase.com/>

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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.<sup>388</sup> 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 rights holders 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 Coalition<sup>389</sup> 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.<sup>390</sup>

The UK Copyright Hub<sup>391</sup> 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.

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.<sup>392</sup>

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

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<sup>388</sup> 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>

<sup>389</sup> [www.linkedcontentcoalition.org](http://www.linkedcontentcoalition.org).

<sup>390</sup> 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.

<sup>391</sup> <http://www.copyrighthub.co.uk/>

<sup>392</sup> 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).

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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.

PROVISIONAL

## 8.17. ANNEX M - 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 right<sup>393</sup>. There are only a few provisions in EU law governing the transfer of rights from authors or performers to producers<sup>394</sup>, 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 Directive<sup>395</sup> 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.<sup>396</sup> 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 retransmission<sup>397</sup>) or allows Member States to impose it (resale right<sup>398</sup>). 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

<sup>393</sup> Article 8(2) of Directive 2006/115/EC (“Rental and Lending Directive”).

<sup>394</sup> See e.g. Article 3(3)-(6) of Directive 2006/115/EC.

<sup>395</sup> Directive 2006/116/EC as amended by Directive 2011/77/EU.

<sup>396</sup> Article 5 of the Rental and Lending Directive.

<sup>397</sup> Article 9(1) of Directive 93/83/EEC on satellite broadcasting and cable retransmission

<sup>398</sup> Article 6(2) of Directive 2001/84/EC on the resale right

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the exploitation of their works (the producer is nevertheless vested with the economic rights that need to be cleared for exploitation.)

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 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 postulate collective bargaining and the right to re-negotiate and terminate contracts as a minimum safeguard of their 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 artists<sup>399</sup>. Similar arguments are advanced by book publishers<sup>400</sup>.

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 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.

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<sup>399</sup> CRA Study on Territoriality (2013) prepared for the Commission [not yet published]

<sup>400</sup> 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.



## **8.18. ANNEX N: 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 notices<sup>401</sup>. 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.

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<sup>401</sup> "Acting" takes the form of removing or disabling access to the illegal content by a "hosting provider".

*Draft to be finalised in light of responses to the public consultation*

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 survey<sup>402</sup> 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 law<sup>403</sup>, in Spain with the Ley Sinde<sup>404</sup>, or in Italy with the regulation on online copyright enforcement<sup>405</sup>). 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. However, as concluded by the Commission in IPRED’s application report<sup>406</sup>, 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 internet<sup>407</sup>. The report concludes that the Directive on its own is 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 regarding the respect of fundamental rights.

<sup>402</sup> The European Citizens and Intellectual Property: Perception, Awareness and Behaviour, <https://oami.europa.eu/ohimportal/en/web/observatory/observatory-publications>

<sup>403</sup> 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?sessionId=C06CF191ECA64835E58B417557BF3F08.tp&djo01v\\_2?cidTexte=JORFTEXT000020735432&dateTexte=](http://www.legifrance.gouv.fr/affichTexte.do?sessionId=C06CF191ECA64835E58B417557BF3F08.tp&djo01v_2?cidTexte=JORFTEXT000020735432&dateTexte=)

<sup>404</sup> 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>

<sup>405</sup> Regolamento in materia di tutela del diritto d’autore sulle reti di comunicazione elettronica e procedure attuative ai sensi del decreto legislativo 9 aprile 2003, N° 70 <http://www.agcom.it/Default.aspx?DocID=12229>

<sup>406</sup> 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>)

<sup>407</sup> 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](http://ec.europa.eu/internal_market/iprenforcement/docs/ipr_infringement-report_en.pdf)

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.

## **2. Problems identified in the current legal framework**

### *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 right holders 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 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 State. The finding of the Consultation on the civil enforcement of IPR is that only 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.

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 this<sup>408</sup>. The main problem in this area relates to the articulation between the rules

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<sup>408</sup> Of 136 responses 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](http://ec.europa.eu/internal_market/consultations/2012/intellectual-property-rights_en.htm)

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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.<sup>409</sup> 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 obligation<sup>410</sup>. 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 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*"<sup>411</sup>.

The problems are as follows:

- (a) Right holders 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 right holders, 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

<sup>409</sup> 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.

<sup>410</sup> C-275/06, *Promusicae* (2008) and C-557/07, *LSG v/ Tele 2* (2009).

<sup>411</sup> Decision of the Austrian Supreme Court of 13 November 2007.

*Draft to be finalised in light of responses to the public consultation*

without ensuring that contact details are accurate and/or up to date. Right holders 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 right holders 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 right holders.

*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.<sup>412</sup>

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

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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.

*Draft to be finalised in light of responses to the public consultation*

against intermediaries very difficult<sup>413</sup>. There is 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 internet service providers which is also part of the EU acquis.<sup>414</sup> 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 right holders 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, right holders 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 right holders 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 right holder 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 States<sup>415</sup>.

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 Rights<sup>416</sup>. Such an injunction

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<sup>413</sup> 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.

<sup>414</sup> Article 15 of Directive 2000/31/EC.

<sup>415</sup> 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).

<sup>416</sup> 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

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could also result in a restriction of access to content and as such, may be considered as a 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*<sup>417</sup>, the CJEU considered 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 an 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.

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 right holder 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. Right holders claim that in many instances damages are set at levels that are neither dissuasive nor even compensate the right holder's actual losses (and legal expenses).<sup>418</sup> 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).<sup>419</sup> This is possibly one of the reasons why right holders claim that damages awarded are low in many instances. Responses also indicated that damage claims and recovery of profit claims are 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.

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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).

<sup>417</sup> Case C-70/10 Scarlet extended (2011)

<sup>418</sup> 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.

<sup>419</sup> 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)



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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, right holders might refrain from litigation if they held the court proceeding lengthy, costly and do not expect to get properly compensated.<sup>420</sup>

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.

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51% of the respondents have indicated that they would refrain from litigation because of such reasons.

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## 8.19. ANNEX O: GLOSSARY

### Legislative references

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")

### 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

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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.

**"Collecting societies"**: 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.

**"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).

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**"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.