

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 sales¹⁶² 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

¹⁶² 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.¹⁶³ 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 reside¹⁶⁴ (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*

¹⁶³ 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.

¹⁶⁴ 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.¹⁶⁵ 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*

¹⁶⁵

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.¹⁶⁶

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

¹⁶⁶ 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

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 it 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.¹⁶⁷ 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-

¹⁶⁷ 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