

*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]*

**PROVISIONAL**

Provisional

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## Executive Summary Sheet

Impact assessment on the modernisation of copyright in the digital single market (provisional title)

### A. Need for action

#### Why? What is the problem being addressed?

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

#### What is this initiative expected to achieve?

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.

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

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. Solutions

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

Four options were analysed, including the status quo. A combination of the options could address the different problems.

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.

**Will there be other significant impacts?**

The impacts on fundamental rights are outlined in section 6.2 of the IA.

**D. Follow up**

**When will the policy be reviewed?**

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 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.

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%

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<sup>15</sup> Article 17(2), Charter of Fundamental Rights of the European Union; Case C-277/10 *Martin Luksan v. Petrus van der Lek* 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-27 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> C-403/08 and C-429/08, *Football Association Premier League and others*, §§ 96-99.

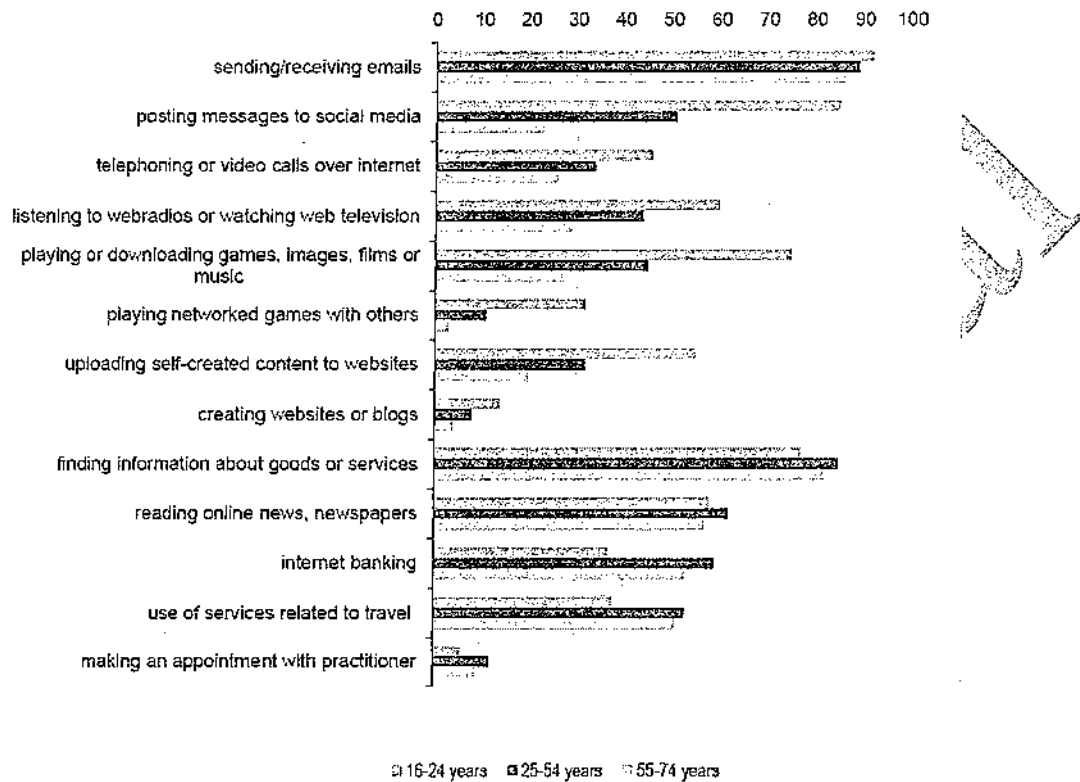
<sup>31</sup> Media rights are the most important source of revenue for professional sport; this revenue is redistributed to lower levels of the sporting pyramid through solidarity mechanisms that are part of the financing of grassroots sport in Europe.

<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://ecp.eurostat.ec.europa.eu/cache/ITY\\_OFFPUB/KS-SF-12-050/EN/KS-SF-12-050-EN.PDF](http://ecp.eurostat.ec.europa.eu/cache/ITY_OFFPUB/KS-SF-12-050/EN/KS-SF-12-050-EN.PDF)

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 relative 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.

<sup>43</sup> <http://www.emba-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 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.

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

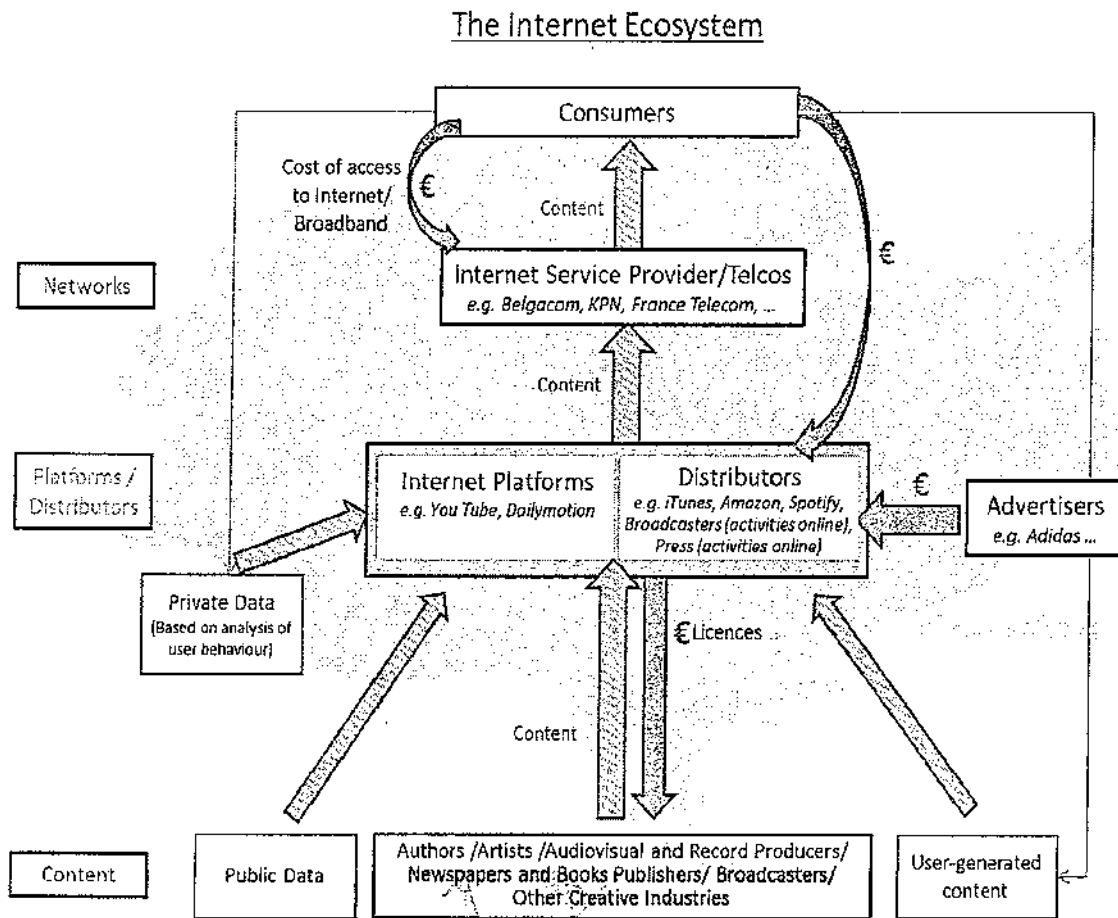
<sup>49</sup> Study on Digital Content Products in the EU, IBF International Consulting (2013)  
[http://ec.europa.eu/consumers/enforcement/sweep/digital\\_content/docs/dcs\\_complementary\\_study\\_en.pdf](http://ec.europa.eu/consumers/enforcement/sweep/digital_content/docs/dcs_complementary_study_en.pdf)

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

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 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

<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).