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**COMMISSION STAFF WORKING DOCUMENT**

**IMPACT ASSESSMENT**

**on the modernisation of EU copyright rules**

*Accompanying the document*

[...]

[...]

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# 1. INTRODUCTION

## 1.1. EU COPYRIGHT RULES

Copyright and related rights are rights granted to authors (copyright) and to performers, producers and broadcasters (related or neighbouring rights<sup>1</sup>). They include so-called "**economic rights**" which enable right holders to control (license) the use of their works (e.g. a novel) and other protected material (such as a record or a broadcast), and be remunerated for their use. These rights are limited in time (in Europe, between 50 and 70 years). Economic rights (and their term of protection) are, to a large extent, harmonised at EU level. Authors are also granted so-called "moral rights" (notably the right to claim authorship and the right to object to any derogatory action in relation to the work). Moral rights are not harmonised at EU level.

Copyright systems balance the recognition of rights with **exceptions** in order to facilitate the use of protected content in specific circumstances, notably to facilitate the achievement of specific public policy objectives such as education or access to information. Exceptions provide a "legal authorisation" to beneficiaries to use protected material without needing to seek authorisation from the right holders. The EU copyright rules set out an exhaustive list of exceptions to rights across various copyright directives. The harmonisation achieved is however limited: most of the exceptions are optional (Member States may decide to implement them or not), and broadly formulated, leaving Member States (MS) a relatively wide margin of manoeuvre when implementing them.

Copyright systems also provide for procedures and remedies against **infringements** of copyright (enforcement). These have been partly harmonised at EU level (e.g. evidence-gathering powers for judicial authorities, powers to force parties commercially involved in an infringement to provide information on the origin of the infringing goods, provisions on the payment of damages).

Directive 2001/29/EC (the "**InfoSoc Directive**") was designed to update copyright rules to the (then nascent) digital networks and to implement the two 1996 WIPO<sup>2</sup> Internet Treaties - the WIPO Copyright Treaty<sup>3</sup> and the WIPO Performances and Phonograms Treaty.<sup>4</sup> It harmonises several exclusive rights that are essential to the online dissemination of works and other protected subject-matter, notably the right of reproduction, i.e. the right to prevent the unauthorised copying of protected content and the right of making available, i.e. the right to prevent unauthorised dissemination of protected content online, as well as exceptions to exclusive rights.

**Licensing** is the main mechanism for the exercise of copyright and related rights. Depending on the relevant right, the type of use and the sector, licences are most often granted directly by the right holder (e.g. film producer, software producer) or via collective management organisations (CMOs), representing normally a category of right holders (e.g. authors) and of rights (e.g. rights in musical works). Collective management of exclusive rights (these are typically the most important rights for economic exploitation, e.g. distribution in the physical world and making available in the online world) is voluntary, except in certain specific cases

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<sup>1</sup> Related rights (also referred to as neighbouring rights) are rights similar to copyright but do not reward an author's original creation (a work). They reward either the performance of a work (e.g. by a musician, a singer, an actor) or an organisational or financial effort (e.g. by phonogram or film producers and broadcasters), which may also include a participation in the creative process.

<sup>2</sup> World Intellectual Property Organization, <http://www.wipo.int>

<sup>3</sup> <http://www.wipo.int/treaties/en/ip/wct/>

<sup>4</sup> <http://www.wipo.int/treaties/en/ip/wppt/>

allowed by law and copyright international treaties. For example, Directive 93/83/EC (the "Satellite and Cable Directive") imposes mandatory collective management of cable retransmission rights in order to facilitate the clearance of rights by cable operators.<sup>5</sup> The EU has recently adopted legislation to improve the functioning of CMOs, including in order to facilitate the provision of multi-territorial licences (Directive 2014/26/EU).

Copyright is **territorial** (referring to national territories) in the sense that the rights granted under copyright are provided for in national law, and not in the form of unitary rights at EU level. For example, the author of a book has not a single EU-wide right of reproduction but 28 different national rights of reproduction. The geographical scope of these 28 rights is limited to the territory of the MS that grants the right in question.

## 1.2. POLICY CONTEXT

Digital technologies are changing the ways creative content is produced, distributed and accessed. They create opportunities as well as new challenges for the creative industries<sup>6</sup>, authors and artists, the education and research communities, online service providers including search engines and content distributors, telecommunication operators, cultural heritage institutions, individual users and other players in the digital economy. These new uses and opportunities, together with the cross-border nature of digital networks, have brought to the fore questions related to the degree of harmonisation achieved by the EU copyright rules.

The **Digital Single Market (DSM) Strategy**<sup>7</sup> adopted in May 2015 called for addressing in the EU copyright framework a set of key obstacles to the functioning of the DSM and announced legislation *"to reduce the differences between national copyright regimes and allow for wider online access to works by users across the EU"*, notably as regards portability and cross border access to copyright-protected content services; exceptions, in particular in the area of education and research; and the role of intermediaries in the distribution of copyright protected content. It also indicated that the Commission would review the Satellite and Cable Directive to assess whether it has facilitated consumers' access to satellite broadcasting services across borders, as well as the possible extension of some of the Directive principles/mechanisms to the licensing of rights required for certain broadcasters' online service.

As a first step to implement the DSM strategy in the area of copyright, the Commission adopted a proposal for a **regulation on the cross-border portability of online content services**<sup>8</sup> in December 2015, in order to in order to allow EU residents to travel with the digital content they have purchased or subscribed to at home.

At the same time, it adopted a **Communication "Towards a modern, more European copyright framework"**<sup>9</sup> in which it presented a plan including targeted actions and a long-term vision to modernise EU copyright rules. The Communication highlighted the need to inject more single market into the current EU copyright rules and to adapt them to new technological realities. This IA on the modernisation of EU copyright rules supports the targeted initiatives presented in this Communication, as a second step in the implementation of the DSM strategy on copyright.

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<sup>5</sup> See section 3.2.3.

<sup>6</sup> See Annex 5 for background information on creative industries in the EU economy.

<sup>7</sup> Communication from the Commission "A digital single market strategy for Europe", 6 May 2015, [http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication\\_en.pdf](http://ec.europa.eu/priorities/digital-single-market/docs/dsm-communication_en.pdf)

<sup>8</sup> COM(2015) 627 final.

<sup>9</sup> COM(2015) 626 final.

EU action in the area of copyright complements other EU initiatives recently adopted in the context of the Digital Single Market Strategy, notably on the **revision of the Audiovisual Media Services Directive (AVMS)**,<sup>10</sup> on **measures addressing unjustified geo-blocking**<sup>11</sup> and on **online platforms**.<sup>12</sup>

The analysis presented in this IA strongly relies on the preliminary work conducted by the Commission on the **review of EU copyright rules** between 2013 and 2016.<sup>13</sup> The review process covered a broader set of matters than those presented in this IA. Such a broad exercise was necessary for the Commission to gain an understanding of the full range of questions being discussed in the context of copyright policy and digital networks. However, not all those questions relate to matters requiring legislative intervention or, most importantly, requiring legislative intervention at this stage. There are issues where the Court of Justice of the European Union (CJEU) may have provided sufficient clarity to the existing rules or where cases are pending. There are also issues where the necessity to intervene has not been established or where there is not the required degree of maturity in terms of evidence of a problem and/or of the effects of intervention.<sup>14</sup>

The IA also takes into account the conclusions of the **ex-post evaluation of the Satellite and Cable Directive**.<sup>15</sup>

## 2. OBJECTIVES AND SCOPE OF THE INITIATIVE

### 2.1. OBJECTIVES

The key policy objective of this initiative is to ensure a smooth functioning of EU copyright rules in the Digital Single Market. This IA covers a number of different areas within the EU copyright framework that are all relevant for the completion of the DSM.

Three general objectives have been identified: (i) allow for wider online access to protected content across the EU, focusing on TV and radio programmes, European audiovisual works and cultural heritage; (ii) facilitate digital uses of protected content for education, research and preservation in the single market and (iii) achieving a well-functioning market place for copyright where right holders can set licensing terms and negotiate on a fair basis with those distributing their content (notably as regards new forms of content distribution).

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<sup>10</sup> Proposal for an updated Audiovisual Media Services Directive: <https://ec.europa.eu/digital-single-market/en/news/proposal-updated-audiovisual-media-services-directive>.

The revised AVMS directive updates the rules applicable to all types of audiovisual media, notably in terms of promotion of European works, protection of minors, showing of advertisements; it however does not cover the rules applicable to the licensing of copyright-protected content.

<sup>11</sup> Proposal for a Regulation on addressing geo-blocking and other forms of discrimination based on customers' nationality, place of residence or place of establishment within the internal market: <http://ec.europa.eu/DocsRoom/documents/16742>. The proposal does not cover audiovisual services.

<sup>12</sup> Communication on Online Platforms and the Digital Single Market Opportunities and Challenges for Europe, <https://ec.europa.eu/digital-single-market/en/news/communication-online-platforms-and-digital-single-market-opportunities-and-challenges-europe>.

The Communication outlines the key issues identified in relation to online platforms and presents the Commission's position on both the innovation opportunities and the regulatory challenges presented by them.

<sup>13</sup> See Annex 4.

<sup>14</sup> This is for instance the case for the issue of remote consultation of works held in libraries and other relevant institutions, where there is a pending CJEU cases (on the closely inter-twined issue of electronic lending by libraries), and of the issue of "freedom of panorama", where there have been recent developments in Member States.

<sup>15</sup> See "Ex-post (REFIT) Evaluation of the Satellite and Cable Directive (93/83/EEC)".

The initiative aims at addressing copyright-related obstacles to meet those general objectives. The specific objectives of the initiative are described within each section of the IA.

## 2.2. SCOPE

This IA considers adjusting existing rules or introducing new rules in three distinct areas:

- (i) access to content online;
- (ii) the functioning of key exceptions in the digital and cross-border environment; and
- (iii) the functioning of the copyright marketplace.

These three areas have been identified in the Communication of December 2015, together with actions on the enforcement of IP rights, which are not part of the initiatives considered on this IA but for which specific initiatives are being considered separately. This IA focuses on the targeted actions identified in the Communication within these three areas:

- On **access to content**, the Commission proposed in the above mentioned Communication "*a gradual approach to removing obstacles to cross-border access to content and to the circulation of works*". The proposal for a regulation on portability constituted a first important step in this direction. This IA concentrates on further actions in relation to the cross-border distribution of TV and radio programmes online, the licensing of European audiovisual works and the digitisation and making available of out-of-commerce works. As indicated in the Communication of December 2015, accompanying measures aimed at ensuring a wider access to creative content online will be proposed in the context of the 'Creative Europe' programme and are therefore not covered by this IA.
- In relation to **exceptions**, this IA looks into the exceptions which are relevant for access to knowledge, education and research, which have been substantially affected by technological developments and have a cross-border dimension. It examines whether new exceptions are required in EU rules to cover digital and online uses in teaching activities, text and data mining and preservation activities by cultural heritage institutions. Legislative measures are also being considered to introduce a new exception allowing people with print disabilities to access books and other print material in formats that are accessible to them. They are not considered in this IA as they relate to the implementation of EU international obligations (Marrakesh Treaty<sup>16</sup>).
- On the **functioning copyright market place**, the IA concentrates on issues related to the distribution of value in the online copyright value chain, thus responding to the objective stated in section 4 "achieving a well-functioning market place for copyright" of the Communication of December 2015. The IA addresses problems faced "upstream" by rightholders when trying to license their content to online service providers (use of protected content by online service providers storing and giving access to user uploaded content and rights in publications) and those faced "downstream" by creators when negotiating contracts for the exploitation of their works (fair remuneration in contracts of authors and performers).

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<sup>16</sup> The Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or otherwise Print Disabled, signed on behalf of the EU on 30 April 2014.

### 3. ENSURING WIDER ACCESS TO CONTENT

#### 3.1. INTRODUCTION

##### 3.1.1. Background

Digital technologies have facilitated the distribution of and access to copyright-protected content, with 49% of EU citizens accessing music or audiovisual (AV) content online.<sup>17</sup> The Internet has favoured the entry of new market players and the development of new services (e.g. music streaming services, VoD platforms, etc.) providing access to a large quantity and variety of content online. It has also provided a growth opportunity for traditional players. Traditional television (TV) still remains the most important channel to access AV content,<sup>18</sup> but both broadcasters and retransmission<sup>19</sup> service providers (e.g. cable operators) are increasingly investing in the development of digital and online services in order to improve consumers' experience and offer more flexibility. Digital technologies also offer new opportunities to cultural heritage institutions (CHIs) willing to digitise and disseminate parts of their collections that would otherwise remain confined to their premises with limited access to the public.

Despite the rapidly growing variety of online services available to citizens, cross-border access to and availability of digital content (both in terms of content provided by online services in other Member States and of content produced in other Member States) vary. While broadcasters play an important role in informing, entertaining and educating the general public, their programmes often remain unavailable online to European citizens living in other Member States (MS). In addition, the variety of TV / radio channels from other MS provided by retransmission services differs across the EU.<sup>20</sup> Also, European films, documentaries and series are often under-represented in the catalogues of VoD platforms. Finally, only a limited part of the collections of CHIs are available online and across borders.

The existence of barriers to the portability and cross-border access to content was highlighted in the Digital Single Market Strategy.<sup>21</sup> The Commission presented a legislative proposal on portability in December 2015<sup>22</sup> and proposed a "gradual approach to removing obstacles to cross-border access to content and to the circulation of works" in the Communication "Towards a modern, more European copyright framework" adopted at the same time.<sup>23</sup> In this context, three fields of possible EU legislative intervention were identified: improving cross-border distribution of TV and radio programmes online; facilitation of licensing agreements for the online availability of European AV works and digitisation and making available of

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<sup>17</sup> Source: Flash Eurobarometer 411. 82% of respondents indicated using the Internet and 60% of Internet users indicated having accessed or downloaded music and 59% AV content at least once in the last twelve months.

<sup>18</sup> In terms of consumers' viewing time. Source: IHS Technology, "Current market and Technology Trends in the Broadcasting Sector", May 2015.

<sup>19</sup> "Retransmission" is used in the meaning of Directive 93/83/EEC to denote simultaneous, unaltered and unabridged retransmission for reception by the public of an initial transmission from another Member State, by wire or over the air, including that by satellite, of television or radio programmes intended for reception by the public.

<sup>20</sup> See Annex 6B.

<sup>21</sup> Communication "A Digital Single Market Strategy for Europe", May 2015. COM(2015) 192 final.

<sup>22</sup> Proposal for a regulation of the European Parliament and of the Council on ensuring the cross-border portability of online content services in the internal market - COM(2015) 627 final

<sup>23</sup> Communication "Towards a modern, more European copyright framework" COM(2015) 626/2 (Commission Communication of 9 December 2015).

out-of-commerce (OOC) works across the EU.<sup>24</sup> The present section of the IA refers to these fields.

The Commission has carried out an evaluation of the Satellite and Cable Directive<sup>25</sup> and in particular of the effectiveness and relevance of the principle of "country of origin" applicable to satellite transmissions and of the mandatory collective management applicable to cable retransmissions. Even though this evaluation, being limited to particular technologies of transmission (satellite and cable), is not directly relevant for the measures considered in this IA (online transmissions),<sup>26</sup> its main findings have been taken into account where meaningful parallels could be drawn.

In the online environment, players engaged in the distribution and dissemination of content (notably broadcasters, retransmission service providers, VoD platforms, but also CHIs as far as the access to the heritage is concerned) may face significant difficulties when trying to clear the rights for the online exploitation of protected works across the EU.<sup>27</sup> Also, VoD platforms willing to enrich their catalogue with European AV works often face problems to acquire online rights. Finally, OOC works held in the collections of CHIs often remain unavailable online, due, in part, to significant difficulties in the clearance of rights.

This section of the IA examines how the clearance of rights can be facilitated to improve the online availability of content across the EU.

### **3.1.2. Why should the EU act?**

#### **Legal basis**

The EU's right to act follows from Article 114 of the Treaty on the Functioning of the European Union (TFEU), which confers on the EU the power to adopt measures for the establishment and functioning of the internal market and has provided a legal basis for a wide range of EU instruments in the area of copyright.

The rights relevant for online dissemination of content (notably the reproduction and making available rights) have been harmonised in the InfoSoc Directive.<sup>28</sup>

The definition of harmonised rules simplifying, where appropriate, the licensing of rights for online transmissions and retransmissions of TV and radio programmes, and for the dissemination of OOC works by CHIs, would contribute to improving the functioning of the Digital Single Market, and in particular the distribution of and access to digital content. The same applies as regards the facilitation of negotiations to acquire online rights for AV content notably as regards rights for the exploitation in different territories.

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

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<sup>24</sup> The present section of the IA focuses on issues related to the making available of out-of-commerce works in the collections of CHIs. Specific issues linked to the preservation (including digital preservation) of cultural heritage are presented in section 4.4 of this IA.

<sup>25</sup> Directive 93/83/EEC, see "Ex-post (REFIT) Evaluation of the Satellite and Cable Directive (93/83/EEC)".

<sup>26</sup> The EU harmonised rules facilitating the acquisition of rights for satellite broadcasting and cable retransmissions of TV and radio programmes from other MS do not apply to online distribution activities of broadcasters and to retransmissions by means other than cable.

<sup>27</sup> "Works" is used in this IA to encompass works protected under EU copyright *acquis* and other protected subject matter.

<sup>28</sup> Directive 2001/29/EC.

## **Subsidiarity and added value**

The problems identified in this section of the IA have an important cross-border dimension: broadcasters face difficulties in particular when clearing rights for making their content available online across borders; similarly, the acquisition of rights can be complex for retransmission services other than cable operators when they offer channels from other MS. National solutions for these problems may generate further fragmentation in the Digital Single Market. In order to produce clear benefits in terms of online access to content, a common approach should be provided at EU level.

As regards the online availability of European AV works, MS' action may not be sufficient to improve the online availability of European (including non-national) AV works. The dialogue between the relevant stakeholders and negotiations for the licensing of online rights need to be encouraged at EU level in order to have an impact on the diversity of the content offered by online services, and in particular on the presence of European works in catalogues of these services.<sup>29</sup>

Regarding OOC works, EU action responds to the need to facilitate the making available to the public of the heritage held in CHIs, including across borders. Without EU intervention, such actions would be limited by national borders (and would happen only in some MS).

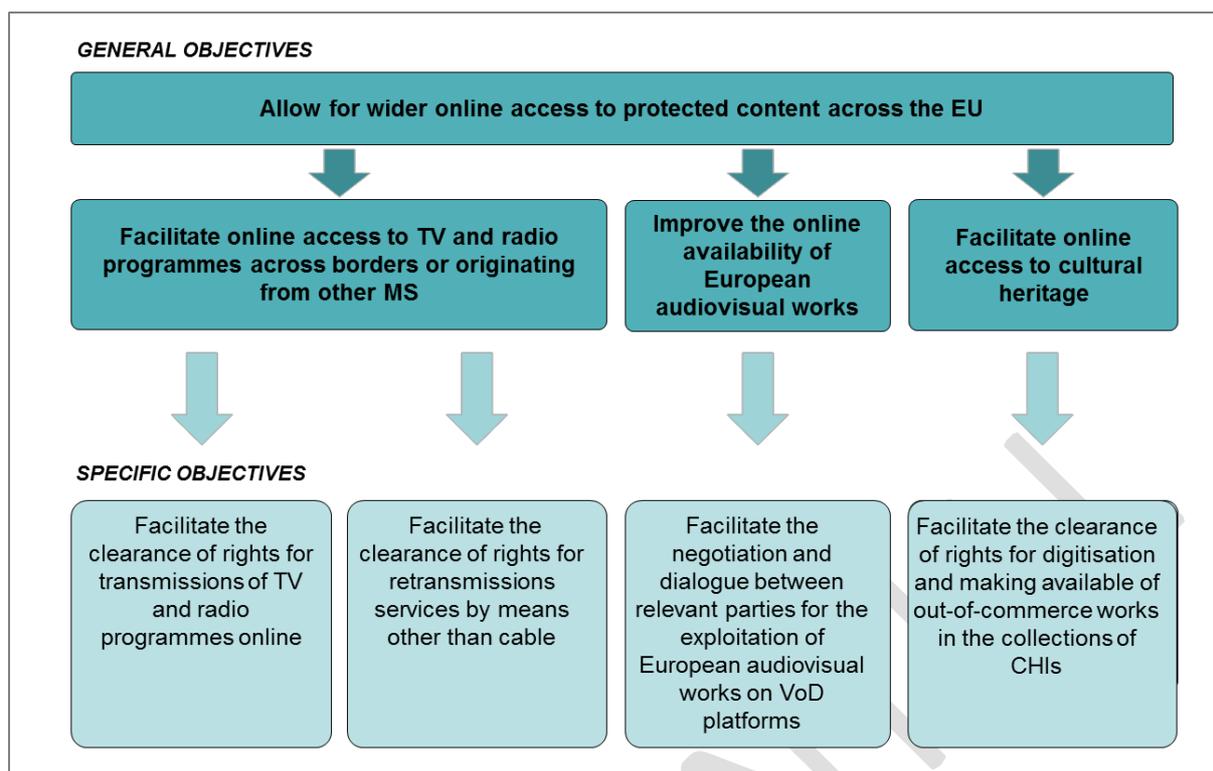
### **3.1.3. What should be achieved?**

The general objective of EU intervention is to allow for wider online access to protected content by users across the EU, in particular in the following areas: transmissions and retransmissions of TV and radio programmes; European AV works and cultural heritage.

EU action aims at removing the copyright-related obstacles and at creating the conditions allowing broadcasters, service providers and CHIs to offer wider online access to content across the EU. The specific objectives are therefore defined in terms of facilitating clearance of rights (and negotiation) between the relevant parties.

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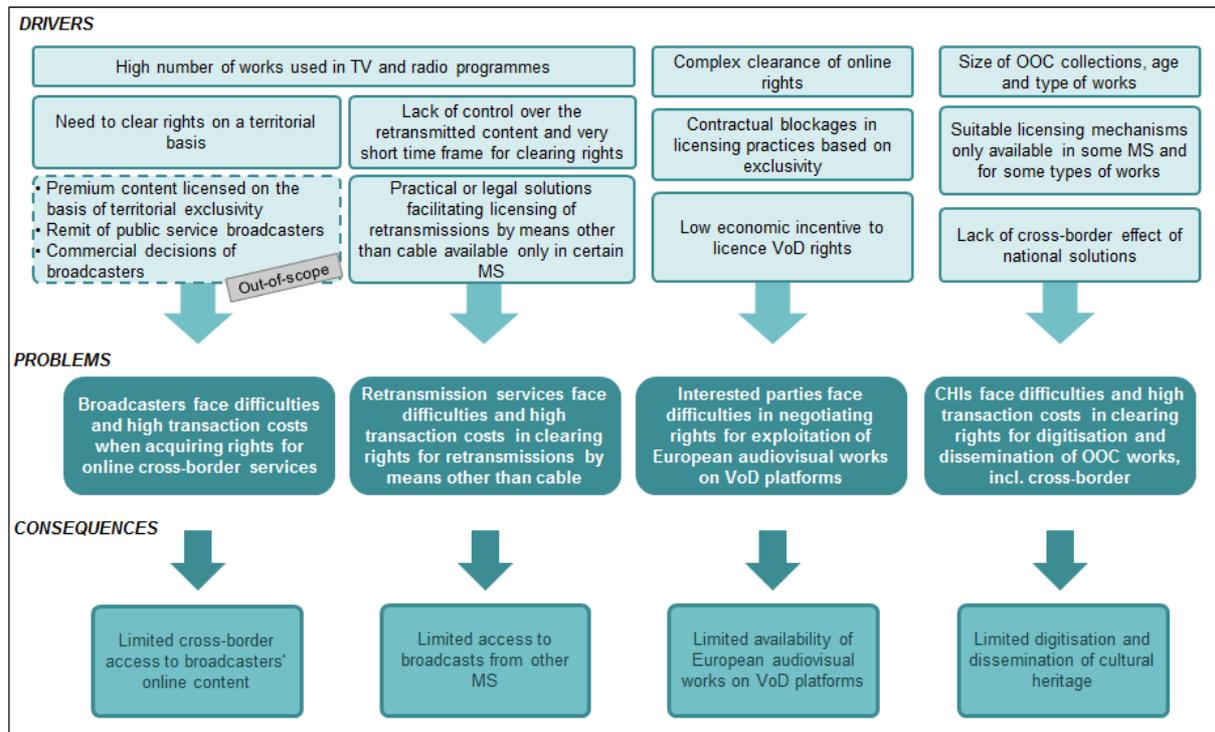
<sup>29</sup> In the framework of the current reform of the Audiovisual Media Services Directive (Directive 2010/13/EU), an obligation for on-demand audiovisual media services to include in their catalogue at least 20% of European works has been introduced (see Article 13.1 of the proposal). The present initiative aims at solving copyright-related contractual blockages preventing a larger availability of EU audiovisual works on VoD platforms. The present initiative could help on-demand players to achieve the 20% threshold provided for in the AVMS Directive reform, but remains independent from the AVMS Directive reform.



### 3.1.4. Methodology

#### Problem definition

As illustrated in the problem tree presented below, the problems reported in this section of the IA are all directly related to difficulties encountered with the clearance of rights: broadcasters when acquiring the rights for their online services available across borders; retransmissions services (different from but functioning like cable operators) for the clearance of rights for retransmissions of TV and radio programmes from other MS; VoD platforms in obtaining online rights of European AV works; CHIs clearing the rights for digitisation and dissemination of OOC works in their collections.



The specific drivers and consequences are explained in the following sub-sections. However certain overarching elements are presented here as they apply to different contexts.

The territoriality of copyright<sup>30</sup> and the specific licensing practices existing for certain types of works are one of the drivers contributing to the complexity of rights clearance in cross-border contexts. A service provider that is making the content available online in more than one MS must have the relevant rights to use such content for the relevant territories. Where the relevant rights for all the relevant territories are held by one single right holder/distributor, the service provider can obtain a multi-territorial licence covering all territories. As regards the online rights in musical works, some collective management organisations (CMOs) license rights on a territorial basis,<sup>31</sup> while a number of music publishers and CMOs grant multi-territorial licences.<sup>32</sup> The multi-territorial licensing of these rights is facilitated by Directive 2014/26/EU on Collective Rights Management (the "CRM Directive").<sup>33</sup> Multi-territorial licensing is widely used for the rights held by record producers. AV content is mainly licensed and distributed on a territorial basis. AV producers of premium content<sup>34</sup> often grant an exclusive licence to a single distributor/broadcaster/service provider in each MS. This form of licensing is considered important by the audiovisual industry for the

<sup>30</sup> Territoriality of copyright means that rights under copyright are granted by national laws and not as a unitary title at EU level. The geographical scope of each right is limited to the territory of the MS which has granted it.

<sup>31</sup> Right holders usually transfer their rights for all EU territories to a single CMO and/or a publisher, who in turn enters into agreements with other CMOs and sub-publishers for representation in separate MS. See [Charles Rivers Associates Study Economic Analysis of the Territoriality of the Making Available Right in the EU](#), March 2014 pages 41-42.

<sup>32</sup> In June 2015, the CMOs PRS (UK), GEMA (Germany) and STIM (Sweden) received the clearance of their deal by the Commission with a view to establishing a multi-territorial licensing hub in Europe. EC press release: [http://europa.eu/rapid/press-release\\_IP-15-5204\\_en.htm](http://europa.eu/rapid/press-release_IP-15-5204_en.htm)

<sup>33</sup> Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84, 20.3.2014, p. 72-98.

<sup>34</sup> AV content which is considered as a vital input because it attracts substantial audiences and thus generate substantial revenues for right holders.

financing of AV works, with rights being often pre-sold at the pre-production stage. In exchange for an upfront payment to the film producers, distributors and/or broadcasters often obtain exclusive exploitation rights in a specific territory for a defined period of time. As regards OOC works in heritage collections, existing solutions,<sup>35</sup> where available, are also territorially confined.

Beyond licensing issues, the limited availability of content online across borders is also the result of decisions taken by service providers (which may be related to commercial strategies, regulatory requirements, technological or financial constraints, etc.). As a result, there are instances where even if multi-territorial licences are granted by rightholders or even if agreements between right holders and service providers do not include limitations on territorial exploitation, cross-border access remains a problem. This is however not a problem that can be addressed by copyright specific legislation.<sup>36</sup> This section of the IA does not directly address these issues.

Difficulties in clearing rights for online exploitation, including across borders, often result in less varied content being available online and in consumers facing restrictions when trying to access content online. There is however consumer interest for content from other Member States:

- In the Eurobarometer survey carried out in 2011 on cross-border demand for content services,<sup>37</sup> 19% of Europeans indicated they were interested in receiving content from another EU country, with 15% interested in TV programmes, 3% in on-demand services and 2% in other types of content;
- In the Eurobarometer survey carried out in 2015 on "Cross-border access to online content",<sup>38</sup> almost one in ten Internet users (8%) indicated they have tried to access content from an online service meant for users in another MS, while 50% of respondents who have not tried indicated they would be interested to do so (the most popular type of content being audiovisual - 29% of respondents);
- In the 2014 public consultation on the review of the EU copyright rules and in the 2015 public consultation on the review of the Satellite and Cable Directive, the vast majority of consumers argued in favour of cross-border access to online content;<sup>39</sup>
- In the public consultation on the Audiovisual Media Services Directive, 82% of the respondents who expressed an opinion on the issue of "Promotion of European works" indicated being interested in watching more content produced in another MS.

## Identification of policy options

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<sup>35</sup> For example based on extended collective licensing or presumptions of representation by CMOs. See Annex 9E for more information on these mechanisms and national examples.

<sup>36</sup> Some of these issues are addressed by accompanying measures announced in the Commission Communication of 9 December 2015.

<sup>37</sup> Special Eurobarometer 366 : Building the Digital Single Market - Cross Border Demand for Content Services

<sup>38</sup> Flash Eurobarometer 411;  
<http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2059>

<sup>39</sup> "Report on the responses to the Public Consultation on the Review of the EU Copyright Rules":  
[http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/docs/contributions/consultation-report\\_en.pdf](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf). See relevant extracts in Annex 2B.

"Full report on the public consultation on the review of the EU Satellite and Cable Directive":  
<https://ec.europa.eu/digital-single-market/en/news/full-report-public-consultation-review-eu-satellite-and-cable-directive>. See Annex 2C.

The policy options have been developed in relation to the specific issues at stake in each area. Different licensing regimes, considered as enabling mechanisms to facilitate the clearance of rights, are examined in the legislative options.

## **Impacts of policy options**

### *Stakeholders affected*

The policy options related to online transmissions and retransmissions of TV and radio programmes would affect, on the one hand, broadcasters (TV and radio), retransmission service providers and other online service providers, and on the other hand, all right holders whose works are used in TV and radio programmes (mainly in the AV, music and visual art sectors).

Regarding the availability of works in VoD platforms, the policy options examined in the IA would affect all types of stakeholders in the AV sector (authors, producers, distributors, broadcasters, VoD platforms, etc.).

The policy options considered in relation to OOC works would have an impact on CHIs such as libraries, archives, museums and film heritage institutions, and on right holders in all sectors (the collections of CHIs contain OOC which can be books, phonograms, AV works, photographs, etc.).

Impacts on consumers/users are assessed for each policy options, mostly in terms of access to and availability of online content.

Obligations and costs for MS resulting from the preferred policy options are presented in Annex 3.

### *Type of impacts and availability of data*

Only the most significant and likely impacts are reported in this IA. The impacts are assessed by group of stakeholders (e.g. broadcasters, service providers, right holders), focusing mainly on economic impacts, notably transaction costs and licensing revenues. In addition, broad social impacts (e.g. impacts on cultural diversity) and impacts on fundamental rights are assessed separately. All policy options considered in this section of the IA may have an impact on copyright as a property right (Article 17(2) of the European Charter of Fundamental Rights) and on the freedom to conduct a business (Article 16). In addition, impacts on freedom of information (Article 11), freedom of the arts and sciences (Article 13), and right to education (Article 14) are examined where appropriate. Impacts on third countries or on the environment are not elaborated upon as the policy options presented in this section of the IA are considered not to have any substantial impact on them. No significant impacts on employment have been identified.

Whereas general market data is widely available on the different sectors and distribution channels examined in this section of the IA (TV market, VoD market<sup>40</sup>), specific data related to transaction costs and licensing revenues is not publicly available. Other than in a few cases, this data could not be obtained from stakeholders despite repeated attempts (through direct requests to stakeholders or dedicated studies<sup>41</sup>).

### *Impacts on SMEs*

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<sup>40</sup> See Annex 8.

<sup>41</sup> The SatCab Study specifically analysed differences in obtaining remuneration by CMOs and individual licensors for retransmission of TV and radio programmes over various platforms. However, the findings are rather limited due to limited information which was made available to the contractor.

The policy options considered in this IA do not target SMEs but may have an impact on them, as the large majority of companies that may be affected are SMEs. In the sector of programming and broadcasting activities, 98.9% of companies are SMEs (85% micro-companies) generating 17.9% of the value added.<sup>42</sup> In the sector of film and music production, 99.9% of companies are SMEs (96% micro-companies) generating 85% of the value added (32% by micro-companies).<sup>43</sup>

The policy options examined in this section of the IA are expected to reduce the administrative burden faced by TV and radio broadcasters as well as service providers willing to obtain rights for the online and/or cross-border exploitation of works and would therefore be positive for SMEs active in this area. Most right holders may also benefit from the licensing or negotiation mechanisms examined in the different policy options, in particular individual right holders or micro-companies that do not have the capacity to manage individual licensing deals with a high number of service providers and have a limited market power. Furthermore, the policy options examined in the different areas covered by this section of the IA could generate new licensing opportunities for right holders and possibly additional licensing revenues. Therefore, mitigating measures in favour of SMEs have not been deemed necessary.

### Comparison of policy options

The policy options are compared against the criteria of effectiveness (i.e. to what extent they fulfil the specific objective), efficiency (i.e. at what cost they do so), impact on the different groups of stakeholders and coherence with regard to cultural diversity, fundamental rights and/or other EU policies. Each option is rated between "--" (very negative), "-" (negative), 0 (neutral), "+" (positive) and "++" (very positive).

## 3.2. ONLINE TRANSMISSIONS AND RETRANSMISSIONS OF TV/RADIO PROGRAMMES

### 3.2.1. Background data on the TV and radio sector<sup>44</sup>

Despite the way TV has been transformed by the emergence of digital technologies and the internet,<sup>45</sup> traditional TV remains relevant both economically and as the source of information and entertainment for viewers. In 2014, the EU-28 TV market was worth around €86 billion.<sup>46</sup> In the same year, TV content (linear and time-shifted viewing) equated to 96% of all video consumption in six countries (FR, ES, DE, IT, UK and US).<sup>47</sup>

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<sup>42</sup> Source: Eurostat Structural Business Statistics, 2012 data for radio broadcasting, television programming and broadcasting activities.

<sup>43</sup> Source: Eurostat, Structural Business Statistics, 2013 data for motion picture, video and television programme production, sound recording and music publishing activities.

<sup>44</sup> See Annex 6 for further details.

<sup>45</sup> Annex 6A.

<sup>46</sup> This comprises direct revenues from three main sources: pay-television subscriptions (37%), followed by advertisement (34%) and public funding (29%). Source: European Audiovisual Observatory Yearbook, 2015. Television maintains the highest share of advertising revenue across all media: global total TV advertising revenue's share of global total advertising revenue was 31.5% in 2014, see PWC the Global entertainment and media outlook 2015 –2019, <http://www.pwc.com/gx/en/industries/entertainment-media/outlook/segment-insights/tv-advertising.html>.

<sup>47</sup> According to IHS which tracks the total viewing of France, Spain, Germany, Italy, the United Kingdom and the United States by combining viewing time data from linear televisions, PVR (personal video recorder), time-shifting, pay TV video-on-demand services and over-the-top (OTT) content- Source:

96% of Europeans watch television at least once a week, predominantly on a TV set but increasingly online (in 2014, 20% of Europeans – but 40% of those aged 15-24- watched TV online at least once a week, representing a 3% increase compared to 2012).<sup>48</sup> The average TV viewing time for the whole EU population in 2013 was 223 minutes per day.<sup>49</sup> While viewing patterns are changing, particularly among younger viewers, TV programming still represents an important part of their video viewing.<sup>50</sup>

TV and radio remain the main source of news for a large majority of Europeans, compared to other sources (notably print and online). For example, 72% of consumers in France, 69% in Germany, 63% in Denmark and 59% in the UK indicated TV or radio as their main source of news.<sup>51</sup> 80% of the EU population listens to radio for at least 2 to 3 hours a day – and mostly to local or regional programmes. On average, 6 to 8% of total listening of radio is done online in Europe.<sup>52</sup>

A broadcaster may make a TV or radio channel available directly through a traditional terrestrial transmission,<sup>53</sup> or via a satellite,<sup>54</sup> cable<sup>55</sup> or other telecommunications network.<sup>56</sup> TV and radio channels can also be offered online over the open internet. Many satellite, cable and IPTV operators offer such services to their subscribers. There are also some online services of this type provided by entities that do not offer satellite, cable or IPTV transmissions.<sup>57</sup> The following diagram illustrates the functioning of direct, including online, transmissions of TV and radio programmes (section 3.2.2) and of retransmissions of TV and

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IHS Technology, "Current market and Technology Trends in the Broadcasting Sector", May 2015, p. 27.

<sup>48</sup> Standard Eurobarometer 82, Media Use in the EU, Autumn 2014: <http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/yearFrom/1973/yearTo/2014/surveyKy/2041>

<sup>49</sup> The figure includes linear TV as well as short term catch-up. Source: "The development of the European market for on-demand audiovisual services", European Audiovisual Observatory, March 2015.

<sup>50</sup> In the UK, TV programming accounts for 65% of video viewing among individuals aged 16 to 24. <http://informity.com/2015/06/18/young-people-still-watch-television/>

Truth About Youth, Thinkbox, June 2015

<sup>51</sup> France: TV 61% radio 11% ; Germany: TV 56% radio 13%; Denmark TV 54% radio 9%; UK TV 51% radio 8%. See Hermes [study on the future of European audiovisual regulation 2015](#), based on Reuters Digital News Survey 2014 / Hans-Bredow-Institute.

<sup>52</sup> Source: AER reply to the public consultation on the SatCab review, 2015.

<sup>53</sup> Terrestrial radio and TV services are broadcast from transmission towers and received through an antenna. Terrestrial channels are generally free to view, although some are available as part of subscription services (normally as part of a package of channels linked to the basic level of subscription).

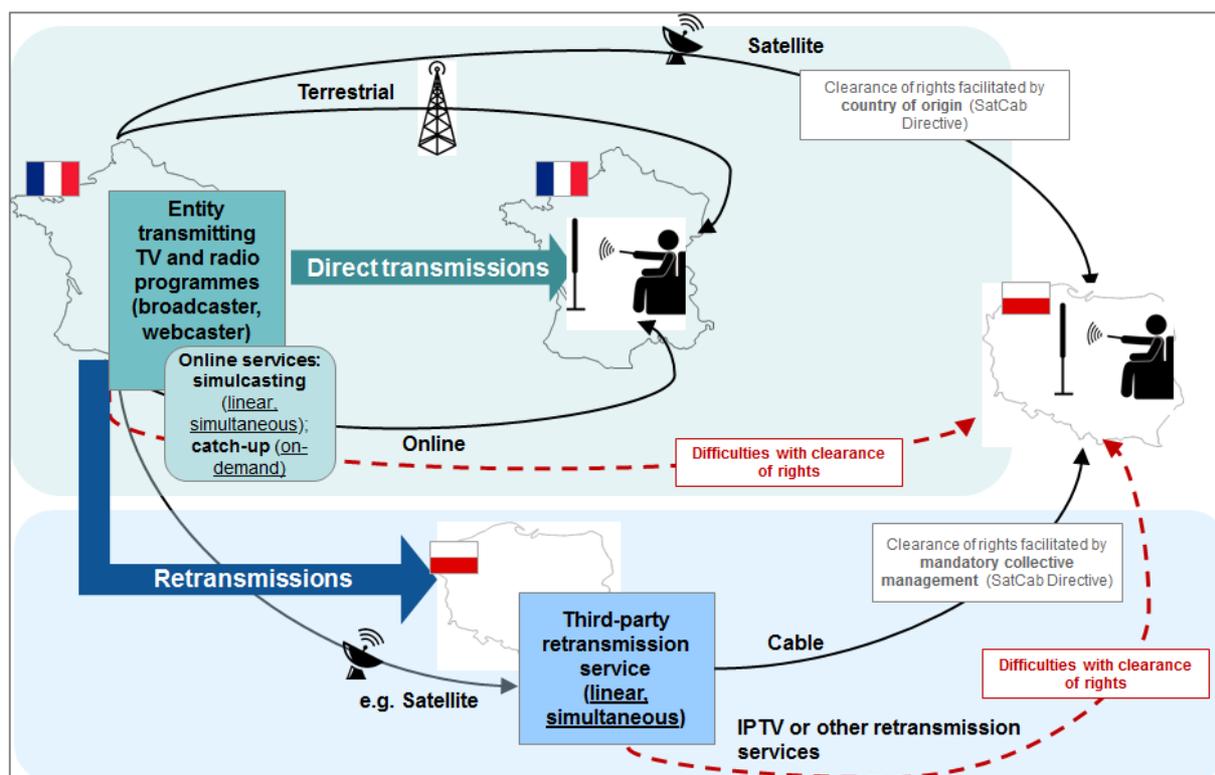
<sup>54</sup> Direct to home satellite television and radio channels are uplinked from an earth station or teleport either directly by a broadcaster, by a third-party facility or by a satellite operator. Some satellite services are free to air. However, many satellite services are encrypted and therefore users are also required to pay for a subscription in order to access the content. In most cases these encrypted pay channels are offered as part of package of channels offered by satellite package providers.

<sup>55</sup> Cable television and radio services are generally carried over a co-axial cable. Signals are received at a cable head end, either via terrestrial or satellite transmissions, and retransmitted via cable to customer homes. Some channels may be provided free of charge, or as part of a basic cable service tier. Other channels may be encrypted and are offered on a subscription basis, typically in various bundled packages.

<sup>56</sup> It is now possible for telecommunications companies (which may be either incumbent telephone companies or competing providers of communications services) to distribute radio and television channels and other AV services over fixed or wireless broadband data networks using internet protocols. Such services are sometimes referred to as internet protocol television, or IPTV.

<sup>57</sup> For example, YouTube live channels.

radio programmes (section 3.2.3). The problems addressed by this IA concern the transmissions and retransmissions marked by dotted lines below.



### 3.2.2. Online transmissions of broadcasting organisations

#### 3.2.2.1. What is the problem and why is it a problem?

**Problem:** Broadcasting organisations face practical difficulties with the acquisition of rights for their online services when they are offered across borders

Description of the problem: As viewing habits of consumers are changing and demand for access to TV and radio online grows, broadcasters have responded by expanding their services online and allowing consumers' access through screens such as tablets and smartphones. The online offerings of broadcasters include simulcasting services (TV/radio channels which are transmitted online alongside traditional broadcasting by satellite, cable, terrestrial), webcasting services (online only linear channels<sup>58</sup>), TV catch-up services<sup>59</sup> and podcasts, i.e. radio programmes that can be streamed or downloaded as well as other on-demand services (e.g. VOD). Simulcasting and catch-up services are often monetised through advertising (although some broadcasters charge for access to these services).

In order to make their online services available across borders, broadcasters need to have the required rights for the relevant territories. This may require engaging in a complex process for obtaining online rights, generating high transaction costs, and may reduce broadcaster's

<sup>58</sup> For example, YouTube live channels which cover live streams such as gaming, music, sports, news, technology, nature; iTunes "Beats" radio which offers linear music streaming. Traditional broadcasters have also started to offer online-only linear TV-like channels: as of February 2016, BBC 3 channel is available only online; on 31 May 2016, RTL II (Germany) launched its online channel RTL II You, which combines linear services with video-on-demand.

<sup>59</sup> The concept of 'catch-up' television, enabling consumers to view programmes at the own choice of timing, is generally based on clearance of the rights for programming within a limited window, typically 7 to 30 days after transmission.

incentives to provide cross-border services. Despite requests to the relevant stakeholders, no data could be obtained on transaction costs related to clearing online rights on a cross-border basis.<sup>60</sup> For satellite broadcasting the clearance of rights has been facilitated by the application of the country of origin principle enshrined in the Satellite and Cable Directive<sup>61</sup> according to which the act of communication to the public by satellite takes place solely in the MS where, under the control and responsibility of the broadcaster, the programme-carrying signal is introduced into an uninterrupted chain of communication leading to the satellite and down towards the earth. Therefore the rights for such satellite transmission must only be cleared for one MS. This same principle does not apply when a broadcaster clears rights for its online services.

The need to facilitate the clearance of rights for broadcast-related online services has been recognised by stakeholders in the music sector<sup>62</sup> and in the acquis. Article 32 of the CRM Directive introduces a derogation from the rules on the multi-territorial licensing of rights in musical works for the clearance of rights required by broadcasters for simulcasting and other online transmissions which are ancillary to the initial broadcast of radio or television programmes. The rationale behind this derogation, as explained in recital 48 of the CRM Directive, was to leave the required flexibility for the licensing of online rights in musical works for such transmissions to be licensed via local CMOs (rather than by other EU CMOs or "hubs" aggregating rights which may not necessarily be in the same MS as the broadcaster seeking the licence).

Drivers: [*High number of works and short timeframe*] In addition to content such as films, TV series or music produced by other parties (for which rights have to be cleared with the relevant right holders), broadcasters on a daily basis transmit a very high number of hours of

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<sup>60</sup> EBU members' experience with archives rights clearance for online transmissions shows that administrative costs can be 15000-20000 EUR in a standard case, while a difficult case could amount to 60000-80000 EUR (EBU reply to the SatCab public consultation). (*Note:* this example concerns transaction costs to clear online rights for archive content nationally, to which the broadcaster previously acquired a licence for broadcasting). EBU explained that these examples of the clearance costs figures come from the BBC in 2005, adapted to the inflation. In general, "standard" cases are typically documentaries, current affairs and non-fiction programmes, as they involve less different right holders, whereas "difficult" cases are typically dramas, comedy series and other fiction programmes. The standard/difficult borderline is also determined by the age of the programme (the older it is, the more difficult it is to clear the rights). See for further information <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipso.gov.uk/ipreview-c4e-sub-bbc.pdf>.

However, despite requests, neither EBU nor ACT provided data on cross-border transaction costs for clearing online rights, as compared to transaction costs in one jurisdiction.

<sup>61</sup> See section 6.1 of the ex-post (REFIT) Evaluation of the Satellite and Cable Directive (93/83/EEC).

<sup>62</sup> The EBU, the European Composers and Songwriters Alliance (ECSA), the International Confederation of Music Publishers (ICMP) and the European Grouping of Societies of Authors and Composers (GESAC) have signed on 4 April 2014 a Recommendation for the licensing of broadcast-related online activities

(<http://www.ebu.ch/files/live/sites/ebu/files/News/2014/04/Recommendation%20for%20the%20Licensing%20of%20Broadcast-related%20online%20activities.pdf>). This Recommendation sets the principles which encourage the aggregation of rights for the licensing on a cross-border basis of broadcast-related online services provided by and under the control and responsibility of a broadcaster which services have a clear relationship with the broadcaster's linear offline broadcast services, in particular material with a thematic relationship with the offline broadcast content. In 2002, the Commission cleared an agreement between CMOs of record producers concerning one-stop licensing of rights for simulcasting services of TV and radio broadcasters. Under this agreement, broadcasters can get a multi-territorial licence from a CMO of their choice for simulcasting services in the EEA rather than secure a licence from each national CMO (Case No COMP/C2/38.014 — IFPI 'Simulcasting'). Subsequently further agreements have been concluded to cover other online related services such as some forms of webcasting (2005) and catch-up services (2015).

original TV and radio programmes<sup>63</sup> such as news, cultural, political, documentary or entertainment programmes that they produce themselves, which use variety of content (audiovisual, music, text, images, etc.) protected by copyright<sup>64</sup> the rights to which have to be cleared. This results in a complex clearance of rights with a variety of right holders. Major public service broadcasters conclude more than 70,000 contracts with right holders per year.<sup>65</sup> For example, one episode of series produced by a broadcaster may include up to 100 underlying rights.<sup>66</sup> Often the rights need to be cleared in a short time-frame, in particular when preparing programmes such as news or current affairs which represent an important part of broadcasters' transmissions.<sup>67</sup> The relevant rights may be held by CMOs (e.g. rights in musical works) or by individual right holders such as producers (e.g. rights in AV works). With regard to some other works, e.g. pictures and photographs the situation is mixed as some rights are represented by CMOs and some by individual right holders. There can be also situations where one work is embedded in another e.g. music in an AV work or a picture in a text which further complicates the rights clearance. This means that in their daily operations TV broadcasters face significant transaction costs related to the clearance of underlying rights for their programmes. The transaction costs for radio broadcasters are less significant, since (i) radio broadcasts contain fewer types of works protected by copyright (notably, no images or audiovisual works) and (ii) there are well-established collective management structures for the main type of copyright-protected work used in radio broadcasts, i.e. music, which makes it easier for radio broadcasts to clear rights.<sup>68</sup>

These costs and the complexity of the task increase significantly if a broadcaster wants to clear the rights for cross-border offerings in several territories. As described in section 3.1.4, in some cases multi-territorial licences are available but often broadcasters must clear rights for certain works territory by territory. As regards radio broadcasting, according to the information provided in meetings with the stakeholders, agreements between radio broadcasters and local CMOs may allow cross-border transmissions up to certain % of audience (e.g. 5 or 7.5%) which could explain why there is a broad offer of online radio services.

Beyond the complexity of rights clearance other factors influence the cross-border accessibility of TV and radio programmes. They are presented below but this IA is not addressing these particular issues.

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<sup>63</sup> For example, EBU members in the EU aggregate up to 10 million broadcast hours per day (Source: EBU).

<sup>64</sup> Such programmes include news, current events, political debates; own documentary/entertainment productions; culture, science, arts programmes; lifestyle programmes, etc. See examples provided in Annex 6A.

<sup>65</sup> Source: EBU. In Germany, ARD and ZDF conclude at least 150 000 contracts each year.

<sup>66</sup> Source: EBU. An example of BBC TV series *Doctor Who* shows that more than 80 contributions per episode needed to be cleared, see <http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-c4e-sub-bbc.pdf>; for ZDF (Germany), a single 30 minutes episode of a TV series can generally involve up to 100 contributions and right holders (actors, musicians, composer, phonogram industry etc.); for the documentary “Künstlerportait”, ORF (Austria) needed to clear 32 rights (13 clips) and, in addition, music rights are cleared with CMOs. (Source: EBU). See for further details Annex 6A.

<sup>67</sup> On average, news and current affairs programmes represent 25.9 % of EBU members' programmes (source: EBU/MIS – on the basis of aggregated data from 2014 concerning 35 broadcasters in 27 EU countries). 58% of programming of German broadcaster ZDF is dedicated to information.

<sup>68</sup> Despite requests addressed to the relevant stakeholders we were not able to obtain more specific information on potential problems in licensing rights for cross-border online transmissions of radio broadcasters.

[*Territorial exclusivity*] Another factor influencing the access to TV and radio programmes across borders is the fact that the rights in premium content (e.g. films and TV series of particular interest for the audience), as explained in section 3.1.4, are generally licensed on the basis of territorial exclusivity. The important role this licensing plays for the audiovisual industry is also explained in section 3.1.4. Broadcasters willing to serve audiences across borders may not be able to acquire the relevant rights if the rights in other territories are granted, on an exclusive basis, to another service provider(s). At the same time, they may enter into contracts under which they agree to limit or block cross-border access to premium content to which they have acquired the rights for territories in which they operate. This is confirmed by initial findings of the Commission's e-commerce sector inquiry.<sup>69</sup>

[*Remit of public service broadcasters*] Some public service broadcasters may be limited in their possibility of offering certain content in their online services by their national public service remit. For example in Germany public service broadcasters are not allowed to place TV-feature films and series purchased from third parties online.<sup>70</sup>

[*Commercial decisions of broadcasters*] Finally, in some cases, broadcaster's themselves may take decision to focus on a specific territory and to tailor their offerings to the specific audience due to a variety of factors. For example, broadcasters may decide to geo-block access to their own programming where they see possibilities of licensing it in other territories. According to the feedback received from stakeholders, other considerations such as the demand for the services, language spoken by consumers, the complexity of the legal framework as well as the viability of revenues may result in broadcasters deciding not to enter certain markets at all.<sup>71</sup>

Consequences: In consequence of the combination of the drivers described above, TV broadcasters often make their online services available only in a territory of one MS and put in place measures which prevent cross-border access to these services such as geo-blocking of IP addresses from other territories.<sup>72</sup> According to the initial findings of the Commission's e-commerce sector inquiry published on 18 March 2016,<sup>73</sup> 82% of the public service TV broadcasters and 62% of commercial TV broadcasters who responded to the inquiry implemented at least one type of geo-blocking to their online services. Data provided by the European Broadcasting Union (EBU) as well as data collected in the SatCab study<sup>74</sup> on cross-border availability of online services of TV broadcasters indicates that international content such as sports, fiction, documentaries and entertainment, as well as content based on foreign formats is in principle geo-blocked. The situation with the original content produced by TV

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<sup>69</sup> Respondents have stated that some right holders make the licensing of their content conditional upon the fact that the service provider undertakes to apply geo-blocking, or that the cost of making some content available without geo-blocking would be higher/too high. Licensing agreements for TV drama and TV series, and films and sports events, appear to include requirements to geo-block more often than licensing agreements for other digital content categories. 59% of respondents state that they are contractually required by right holders to geo-block. 66% of all agreements with suppliers of film content that were referred to by respondents require digital content service providers to geo-block.

<sup>70</sup> Capello M. (ed.), "Online activities of public service media: remit and financing", IRIS Special 2105-1, European Audiovisual Observatory, Strasbourg, 2015, p. 61.

<sup>71</sup> See Synopsis Report in Annex 2C and also "Survey and data gathering to support the evaluation of the Satellite and Cable Directive 93/83/EEC and assessment of its possible extension" (the "SatCab Study") [**to be published (copy available on request)**], sections 3 and 4.

<sup>72</sup> See Annex 6B and SatCab Study, section 3.

<sup>73</sup> The initial findings from the Commission's e-commerce sector inquiry published on 18 March 2016.

<sup>74</sup> See Annex 6B. EBU data covers public broadcasters from 14 EEA countries; the SatCab Study covers data from 11 MS (three commercial/public broadcasters' channels from each covered MS).

broadcasters is mixed but often broadcasters also block access to their own content.<sup>75</sup> In the case of radio broadcasting both online live streaming and podcasts are usually not geo-blocked.

How the problem would evolve: Without intervention at EU level addressing the particular complexity of the clearance of rights this problem would persist as broadcasters would face the same practical difficulties in clearing rights for cross-border transmissions. EU consumers would remain limited in their cross-border access to TV programmes such as news, cultural or political programmes, documentaries or entertainment programmes which due to their national specificities often cannot be easily replaced by programmes offered in other MS.

### 3.2.2.2. What are the various options to achieve the objectives?

This IA assesses the baseline scenario, one non-legislative and two legislative options to facilitate licensing in order to enhance cross-border transmissions of TV and radio programmes online. The options considered in this IA are enabling options aiming to facilitate licensing of rights, in order to allow the market to respond gradually to legal and policy changes.

#### Baseline

No policy intervention. This option would consist in relying on market players to progressively offer cross-border access to TV and radio programmes distributed online as well as on the courts, and notably the CJEU, to clarify the application of the Treaty and of provisions of EU secondary law relevant to the free movement of services. It would also mean continuing to rely on the application of competition law to agreements including limitations on territorial exploitation of content.

#### *Stakeholders' views*<sup>76</sup>

All public service broadcasters, commercial radios and certain other service providers consider that the baseline option cannot solve the identified problems. They consider that a heavy administrative task and transaction costs linked to licensing rights across borders would remain. Right holders, CMOs and the majority of commercial broadcasters<sup>77</sup> support this option, arguing that the current framework already offers possibilities to license rights on a multi-territorial basis and that the limited cross-border supply is driven by a limited consumer demand and language barriers. Consumers' representatives consider that the current regulatory framework does not sufficiently ensure access to TV/radio programmes available online in other MS and that market-driven solutions would not be sufficient to solve this problem.

#### **Option 1 – Voluntary agreements to facilitate the clearing of rights for broadcasters' online services ancillary to their broadcasts**

- This option would promote maximising a voluntary aggregation of the rights necessary to provide multi-territorial licences for broadcasters' online services. It would build on the

<sup>75</sup> A few examples concerning public broadcasters: LTV (Lithuania) in principle does not geo-block own produced content while CT1 (Czech Republic), a general channel is fully geo-blocked and CT24, a news and current affairs channel, geo-blocks sports news; the livestream channel of ZDF (Germany), Mediathek, is geo-blocked and cross-border access is allowed only to selected programmes. A few examples concerning commercial broadcasters: TV4 Play (Sweden), geo-blocks all online TV simulcasting services except news, TV3 (Lithuania) makes available across borders news and own production while international entertainment programmes are geo-blocked; RTL TV Now (Germany) makes simulcasting services available only locally while live TV News are available internationally (paid services). See also Annex 6B.

<sup>76</sup> In this section, the summaries of stakeholders' views are based on the results of the public consultation on the review of the EU Satellite and Cable Directive, see Annex 2C.

<sup>77</sup> The difference in the opinion between commercial and public service broadcasters may stem from the fact that the former typically produce more content which is licensed to third parties.

voluntary agreements between right holders and broadcasters which already exist in the music sector<sup>78</sup> and would aim to introduce them in other content sectors important for broadcasting (such as AV and visual arts) and also with regard to commercial broadcasters who are not party to the arrangements with authors' CMOs. Based on such arrangements, broadcasters would be able to acquire from CMOs multi-territorial licences to aggregated repertoires.

- It would focus on online services of broadcasting organisations which are ancillary to the initial broadcast, i.e. simulcasting (linear simultaneous transmission of a broadcast by the broadcaster), catch-up TV/radio services (on-demand transmission of a broadcast available for a limited period of time after it has been broadcast in a linear manner) and material related to the broadcast (e.g. previews).<sup>79</sup>
- In order to facilitate the clearing of the rights for cross-border transmissions of broadcasters' online services ancillary to their broadcast, the Commission would assess the functioning of the existing voluntary agreements in the music sector and foster a dialogue between the parties (right holders, CMOs and broadcasters) if there is a need to improve their functioning. It would also promote similar agreements at EU level for the AV sector and other content sectors important for broadcasting services (such as visual arts).

#### *Stakeholders' views*

Public service broadcasters are likely to consider that this option is not sufficient to achieve the identified objective. Commercial broadcasters and some other service providers may favour this option as it would rely on industry-based solutions. Right holders and CMOs are likely to support such option. However, in the case of AV stakeholders, the usual practice for licensing is individual agreements thus it is less likely that they would support voluntary aggregation of repertoires by CMOs, especially for the premium AV content. Consumers' representatives consider that market-driven solutions would not be sufficient to solve the identified issues.

### **Option 2 - Application of country of origin to the clearing of rights for broadcasters' online services ancillary to their initial broadcast**

- Introduce a rule providing that as concerns the licensing of rights for certain online transmissions by broadcasting organisations, the copyright relevant act takes place solely in the MS where the broadcasting organisation is established. As a result, in order to provide certain services in the Union, rights would only need to be cleared for the "country of origin" (COO) of the broadcasting organisation (and not for the countries of reception).<sup>80</sup>
- This option would cover the same online services of broadcasting organisations as under Option 1.<sup>81</sup>

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<sup>78</sup> See section 3.2.2.1 above.

<sup>79</sup> Access to and availability of European audiovisual works on VoD platforms are addressed in section 3.3 of this IA.

<sup>80</sup> The COO rule discussed in this IA should be distinguished from the country of origin principle (COO) applicable under the Audiovisual Media Services Directive 2010/13/EU (AVMSD). The COO under the AVMSD establishes the jurisdiction in terms of the *regulatory framework* harmonised under the AVMSD: providers only need to abide by the rules of a Member State which is their 'country of origin' as defined in that Directive. Also, if any Member State adopts national rules that are stricter than the AVMSD, these can only be applied to providers falling under that jurisdiction. The COO rule discussed in this IA covers *licensing of copyright and related rights* and does not concern the matters harmonised under the AVMSD.

<sup>81</sup> This approach is aligned with Article 32 of the CRM Directive, see above. Access to and availability of European audiovisual works on VOD platforms are addressed in section 3.3 of this IA.

- The COO rule would enable broadcasters to provide services across borders but it would not oblige them to do so (Option 2 would not entail any rules limiting the contractual freedom of broadcasters and right holders). The application of the COO rule and the contractual freedom of broadcasters and right holders would be subject to the application of the Treaty as well as to the applicable secondary law (notably, as regards the freedom to provide services).
- The licence fee payable to right holders would have to take into account all aspects of the online transmission of the broadcast, including the audience, unless agreed otherwise with right holders.<sup>82</sup>
- The Commission would put in place a monitoring mechanism to assess the cross-border availability of broadcasters' online services covered under this option.

*Stakeholders' views*

All public service broadcasters and commercial radios support this option. Commercial TV broadcasters are generally against this option due to the fear that it may lead to the weakening of territorial licensing or even to mandatory pan-European licences. They argue that this, in turn, would limit possibilities for smaller broadcasters/broadcasters operating in smaller markets to obtain licences in premium AV content, as right holders, without exclusivity guarantees, would focus on the largest/most lucrative markets. Other service providers than broadcasters call for a cautious and well-measured approach, ensuring a level playing field. Right holders and CMOs are against such option for similar reasons as commercial TV broadcasters, underlining that this may undermine incentives to invest in AV production. They also raise a possible risk of establishment shopping and of disaggregation of repertoire. Consumers' representatives support the application of the COO rule to broadcasters' online transmissions.

**Option 3 – Application of country of origin to the clearing of rights for the services covered by Option 2 and for TV and radio-like linear online transmissions (and services ancillary to such transmissions)**

- This option would cover, in addition to the services covered under Option 2, TV and radio-like linear online transmissions which are not linked to a broadcast but are online only transmissions (webcasting) and services ancillary to the webcast (such as catch-up and previews of the webcasts). The "country of origin" (COO) rule would apply to such services.
- TV and radio-like linear online transmissions would be defined as (i) linear services; (ii) which are provided on the basis of a schedule; (iii) and under the editorial responsibility of the service provider.
- The other main elements of this option would be the same as under Option 2.

*Stakeholders' views*

Public service broadcasters support the COO rule for broadcasters' transmissions however do not ask for the application of the COO rule beyond that, underlying a special situation of broadcasters. Commercial TV broadcasters do not support this option for the same reasons as Option 2. Majority of service providers other than broadcasters underline the importance of a level playing field and some of them call for a technology-neutral approach. Right holders and CMOs would oppose this option for similar reasons as commercial TV broadcasters and underline that, as a result, this option may decrease incentives to invest into AV content. Also, they are concerned that extending the COO rule to webcasting services would entail an even higher risk of establishment shopping by online service providers and encourage "race to the bottom": search of the lowest copyright fees. This, in turn, may lead to disaggregation of repertoires licensed by CMOs. Consumer representatives support the application of the COO rule to all online transmissions.

<sup>82</sup> An equivalent principle is established in recital 17 of the Satellite and Cable Directive for communication to the public by satellite.

## Discarded options

*Overarching COO rule:* The identified objectives could be achieved also by applying the "country of origin" rule to all communication to the public and making available acts online in which case the rule would apply also to services such as VOD services,<sup>83</sup> on demand music streaming services, etc. However, such option is not considered in this IA as its scope is broader than the targeted objective raised in the *DSM Strategy*: "to tackle [...] measures to ensure enhanced cross-border access to broadcasters' services in Europe". The Copyright Communication acknowledges the necessity of a gradual approach, in order to allow the market to adapt to policy and legal changes. As a first step, the initiative will focus on TV and radio programmes which are a main way to access content in the EU, in particular as regards news and cultural programmes. Linear transmissions offer to consumers the ability to consume content as it happens which is extremely important for event driven programming.<sup>84</sup> The Commission will continue monitoring the situation in the market, following its long-term vision.<sup>85</sup>

*Restrictions to contractual freedom:* Options which, in addition to establishing the COO rule, would prohibit contractual arrangements concerning territorial exploitation of content were discarded. Such options could de facto result in pan-European licences. Many operators, including SMEs, may not have financial means to acquire pan-European licences. If the market does not have a possibility to adapt to changes gradually such options could push smaller operators out of this segment of the market. Also, such options may impact the way how the creative, especially AV, content is financed and distributed.<sup>86</sup>

### **3.2.2.3. What are the impacts of the different policy options and who will be affected?**

#### ***Approach***

The above options would affect broadcasters, webcasters and other online service providers as well as right holders whose works are used in TV and radio programmes. They would also affect consumers. The impacts affecting these groups of stakeholders are presented separately.

- For broadcasters, the following economic impacts have been considered: impacts on transaction costs linked to clearing rights, on possibilities to offer services across borders and, where relevant, impacts on licensing costs (licence fees paid by broadcasters to right holders directly or through CMOs).
- The same types of impacts have been examined for webcasters in Option 2.
- In addition, the impacts on the competitive situation with other service providers (not covered by the options) were considered.
- For right holders, the main economic impacts are on licensing models (in particular, a possibility to exploit rights on an exclusive territorial basis) and on licensing revenues. The impacts would vary depending on the sector: the AV works are more often distributed on the basis of territorial exclusivity as compared to other works used in TV and radio programmes (such as music, literary works, artistic works, e.g. photographs). Therefore, impacts are assessed separately for AV, music and visual arts sectors.
- For consumers, the impacts on access to online transmission services across borders have been considered, as well as impacts on prices (where relevant).

The majority of commercial broadcasters as well as right holders and CMOs are concerned that the intervention may oblige broadcasters to provide consumers with cross-border access to their online services.<sup>87</sup> As explained above, the options considered in this IA would not oblige broadcasters to provide services across borders and would not entail any rules limiting the contractual freedom of broadcasters and right holders. The same stakeholders also underline a risk that introducing the COO rule for online transmissions will weaken territorial

<sup>83</sup> VOD services have different characteristics than broadcasting services, described in Annex 8. Access to and availability of EU audiovisual works on VOD platforms is covered under section 3.3 of this IA.

<sup>84</sup> See p. 29 of the IHS Technology report Current Market and Technology Trends in the Broadcasting Sector, 2015.

<sup>85</sup> See the Commission Communication of 9 December 2015.

<sup>86</sup> See section 3.1.

<sup>87</sup> See for example "The Impact of cross-border access to audiovisual content on EU consumers" (May 2016), a report by Oxera and O&O, prepared for a group of international audiovisual industry members, analysing the effects of the full cross-border access.

licensing of rights (or even lead to mandatory pan-European licensing). They argue that the establishment of the COO rule in combination with the application of the free movement of services principle and competition law would have a detrimental effect on territorial licensing. As it is not possible to predict potential future effect that the application of the free movement of services principle and competition law may have on territorial licensing of rights, this IA does not assess impacts that the proposed intervention may have in combination with these rules.

The assessment below is mainly qualitative, as the publicly available data or data that could be obtained from stakeholders on licensing revenues and transaction costs is limited.

## **Baseline**

### **IMPACTS ON STAKEHOLDERS**

#### **Broadcasters**

Impacts on transaction costs: Under the baseline scenario, broadcasters would continue facing high transaction costs linked to licensing of rights for cross-border online transmissions, including for their own programmes. Existing voluntary initiatives aimed at promoting the aggregation of rights and the granting of multi-territorial licences, as mentioned in section 3.2.2.1, could nevertheless contribute to facilitating the clearance of rights for musical works and phonograms used in radio and TV broadcasts.

Impacts on possibilities to offer services across borders: Due to persisting difficulties in acquiring underlying rights for online cross-border transmissions, broadcasters are likely to continue geo-blocking access to their own programmes. AV premium content is likely to continue being licensed on a territorial basis, leading to either the entire programme being geo-blocked or certain parts of the programme being blacked-out. These agreements based on territorial exclusivity would be subject to the application of EU and national law. As concerns music, availability of multi-territorial licences is expected to increase due to the implementation of the CRM Directive. As for visual arts, no significant changes to the current licensing practices are expected.

#### **Other service providers**

The baseline option would not have any impacts on the competitive situation between broadcasters and service providers other than broadcasters.

#### **Right holders**

Impacts on licensing models and revenues: The baseline option would not have any impact on licensing models applied by right holders or on the licensing revenues received from broadcasters or webcasters. In particular, the AV sector would continue to be able to collect revenues based on the territorial licensing of rights (subject to EU rules). However, other right holders whose content is distributed in limited geographic areas by broadcasters may lose opportunities to have their content reaching audiences across borders. The potential of the Digital Single Market for some creative content may remain underexploited, especially for content which does not rely on exclusive territorial licensing.

#### **Consumers**

Impacts on access to online transmission services: Consumers are likely to continue facing restrictions to cross-border online access to TV and radio programmes. This is in contrast with consumers' demand for cultural, information and entertainment content from other MS.<sup>88</sup>

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<sup>88</sup> See indications of consumer interest for content from other MS in section 3.1.4 According to a study carried out in 2012 ([The economic potential of cross-border pay-to-view and listen audiovisual media services](#)), the number of hours of non-national EU fiction as a proportion of total fiction hours in the

## SOCIAL IMPACTS

The baseline scenario would not affect the production of new cultural content. However, access to cultural diversity may remain limited under this option, as consumers would continue facing restrictions to access TV and radio programmes online from other MS (including as regards access to content such as news, current events or other non-fiction TV, which represent a significant proportion of broadcaster's programming<sup>89</sup>). This situation would affect the role of broadcasters as key players for linear transmissions of current events and of cultural programmes.

## IMPACTS ON FUNDAMENTAL RIGHTS

The baseline scenario would not have any impact on copyright as property right or on the freedom to conduct a business, as recognised in the European Charter of Fundamental Rights (Articles 16 and 17). It may have an indirect impact on the freedom of information enshrined in the Charter (Article 11), to the extent that this option would not facilitate further development of access to information.

### **Option 1 – Voluntary agreements to facilitate the clearing of rights for broadcasters' online services ancillary to their broadcasts**

## IMPACTS ON STAKEHOLDERS

### **Broadcasters**

Impacts on transaction costs: Option 1 could facilitate the clearance of rights and reduce transaction costs for cross-border online transmissions only on the basis of voluntary agreements concluded between right holders, CMOs and broadcasters. The effectiveness of such agreements would depend on the sectors' willingness to license rights collectively.

As mentioned above, voluntary initiatives have already been developed in the music sector to facilitate licensing of broadcasters' online services. A recommendation, signed by music composers and songwriters, music publishers, authors' CMOs and public broadcasters, provides guidelines for the aggregation of rights in CMOs.<sup>90</sup> The CMOs representing major and independent record producers have set up a network of reciprocal representation agreements that allows for the granting of multi-territorial licences for broadcasters online related activities by a single CMO. The first of such agreements covered only simulcasting and was cleared by the Commission in 2002.<sup>91</sup> Subsequently further agreements have been concluded to cover other online related services such as some forms of webcasting and catch-up services.<sup>92</sup> Option 1 would allow to assess the functioning of these practical tools

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schedules of a sample of broadcasters varies from 2% to 35% in the countries for which data is available.

<sup>89</sup> News and current affairs represent 25.9% of public broadcasters' programming while programmes on arts, culture, education and science account for 14% of their programming. (Source: EBU – on the basis of aggregated data from 2014 concerning 35 broadcasters in 27 EU countries). According to [the initial findings from the Commission's e-commerce sector inquiry](#), 23% of agreements require providers to geo-block news (including current events) and 50% to geo-block other non-fiction TV. See also Annex 6B (Availability of broadcasters' online services across borders).

<sup>90</sup> Recommendation for the licensing of broadcast-related online activities of 4 April 2014. The Recommendation's objective is to ensure, by way of voluntary aggregation of rights and reciprocal representation agreements among CMOs, that CMOs can license the broadcaster not only the rights relevant for broadcasts but also all the rights it needs for its online broadcast-related activities including across borders.

<sup>91</sup> Case No COMP/C2/38.014 — IFPI 'Simulcasting'.

<sup>92</sup> The reciprocal agreements have currently 21 EU based signatory CMOs. 17 CMOs have reported they have licensed broadcasters' 'Catch-up' services either for multi-territory or for mono-territory reception.

developed by the industry, resolve possible blockages and identify ways in which they could be further used. An increased use of such voluntary agreements could reduce transaction costs for the clearance of underlying rights in radio and TV programmes (e.g. broadcasters could clear online music rights with one single CMO instead of negotiating with CMOs and right holders in each territory). This would be particularly relevant for broadcasters' original productions but in some cases could be also important for third-party content.

The dialogue foreseen under Option 1 could allow exploring the need for and feasibility of similar agreements for other types of works, notably AV content and visual art works (see impacts on right holders below) and, as regards authors' rights in musical works, also for commercial broadcasters. However, this would mainly depend on the willingness of right holders to enter such dialogue.

Impacts on possibilities to offer services across borders: the voluntary agreements fostered under Option 1 would allow broadcasters to make part of their own programmes available online and across borders. The type of content and the availability of different services (simulcasting, previews, catch-up) would depend on the feasibility and functioning of such voluntary agreements as well as the conditions foreseen in them. Option 1 is not expected to have any impact on the possibility to offer premium content across borders.

Impacts on licensing costs: Option 1 is not expected to have any direct impact on licensing costs for broadcasters. To the extent that voluntary agreements could lead to multi-territorial licences, licence fees would be adjusted taking account of the audience in different territories.

### **Other service providers**

Impacts on the competitive situation: Option 1 would encourage and facilitate discussions between broadcasters, right holders and CMOs for the licensing of certain online rights, but it would not grant a special licensing regime to broadcasters. Therefore, it would not have any impact on the competitive situation between broadcasters and other service providers (who would be in a position to negotiate similar licensing schemes with CMOs and right holders).

### **Right holders**

Impacts on licensing models and revenues: Option 1 would encourage right holders to aggregate their rights with CMOs for the purpose of licensing broadcasters' online ancillary services; however it would not impose any licensing regime (e.g. mandatory collective management) and would not affect their contractual freedom.

- Right holders in the music sector are expected to support a further development of voluntary agreements with CMOs and broadcasters. It is not excluded, however, that right holders may be reluctant to aggregate at CMOs certain rights (e.g. for catch-up services or music channels) in order to protect their revenues in the on-demand market.
- Producers of AV works which are not distributed on the basis of exclusivity may see an interest in such agreements, as it could increase the exposure of their works and generate additional revenues. They could for example decide to transfer their online rights, for the purpose of licensing broadcasters' online ancillary services, to CMOs which currently manage their cable retransmission rights. Such arrangements based on collective management of rights are more likely to be developed for simulcasting than for catch-up services (right holders may be more reluctant to license rights for catch-up through CMOs in order to optimise licensing of their on-demand rights).
- Right holders in the AV sector who rely on territorially based licensing models are likely to be very reluctant to engage in licensing practices based on aggregation of rights or multi-territorial licensing.

- This option could encourage visual arts industry to enter into agreements with broadcasters based on the aggregation of their rights with CMOs, in particular those who already rely on the collective management of rights.

## **Consumers**

Impacts on access to online transmission services: Depending on the feasibility and effective implementation of the voluntary agreements signed between right holders and broadcasters, Option 1 could result in consumers having access across borders to more content through broadcasters' online ancillary services (in particular broadcasters' own productions and AV content not distributed on the basis of exclusivity). Access to premium content through simulcasting or catch-up services would most likely remain geo-blocked.

## **SOCIAL IMPACTS**

Option 1 would not affect the production of new cultural content. It may have a limited positive impact on access to cultural diversity, if more TV and radio programmes from other MS are made available online.

## **IMPACTS ON FUNDAMENTAL RIGHTS**

Option 1 would not have any impact on copyright as property right or on the freedom to conduct a business. It may have a slight positive impact on the freedom of information, to the extent that it could facilitate cross-border access to information.

## **Option 2 – Application of country of origin to the clearing of rights for broadcasters' online services ancillary to their initial broadcast**

### **IMPACTS ON STAKEHOLDERS**

#### **Broadcasters**

Impacts on transaction costs: This option would simplify the clearance of rights needed for cross-border online transmissions: broadcasters would only need to clear the rights for the country of origin while they would be able to offer their services in the entire EU. It would lead to savings in transaction costs<sup>93</sup> and would also enable broadcasters to clear rights more swiftly, which is in particular important for time-sensitive programming. Such savings in transaction costs would be beneficial to both large broadcasters with large number of licensing contracts and to smaller broadcasters whose resources to carry out the administrative task associated with obtaining licences covering multiple territories are limited. However, Option 2 entails a limited risk of disaggregation of repertoire currently managed by CMOs (see below under 'impacts on right holders'), which would have a negative effect on transaction costs (broadcasters would have to negotiate with individual right holders instead of CMOs).

Impacts on possibilities to offer services across borders: While this option would facilitate clearance of rights, the ultimate outcome in terms of offering programmes across borders would depend on the business decisions by broadcasters and right holders. Nevertheless, it is expected that this option would open new opportunities for broadcasters to offer services across borders, in particular as concerns content which does not rely on territorial exclusivity. This in particular concerns original productions of broadcasters for which they clear

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<sup>93</sup> It is not possible, however, in this IA to quantify such savings in transaction costs. As explained above, despite requests, neither EBU nor ACT provided data on cross-border transaction costs for clearing online rights, as compared to transaction costs in one jurisdiction.

underlying rights.<sup>94</sup> Thanks to reduced transaction costs, broadcasters would be enabled to target new markets and enlarge their audiences. Such opportunities would in particular apply to broadcasters who transmit TV and radio programmes in languages which are widely understood in other MS. 37% of Europeans say that they regularly use foreign languages when watching films/television or listening to the radio.<sup>95</sup> Also other broadcasters could expand their audiences, for example, by serving linguistic minorities in other MS or offering services to Europeans who live in other EU MS than their MS of origin. About 4 million EU citizens are members of linguistic minorities.<sup>96</sup> 13.6 million EU citizens live in an EU Member State other than their country of citizenship.<sup>97</sup> These people may have an interest to keep up with the developments in their linguistic/home country as well as maintain cultural links with that country and therefore would constitute a potential audience for broadcasters. By enlarging their audience across borders broadcasters would be able to collect additional revenues.<sup>98</sup>

As concerns premium AV content, it is not expected that Option 2 would change its cross-border distribution by broadcasters in a short or medium term. Right holders and broadcasters are likely to continue relying on territorially based exploitation of this content (see below). Also, broadcasters may continue to geo-block premium AV content across borders. However, such agreements between right holders and broadcasters would be subject to the application of EU and national law.

Impacts on licensing costs: Licence fees are expected to be an important element in broadcasters' decisions to make their programmes available across borders and in right holders' decisions to grant licences.<sup>99</sup> If broadcaster's audience would grow due to cross-border transmission facilitated by the COO rule, licence fees are expected to be adjusted (to reflect the larger audience). In accordance with this option licence fees should be set taking into account all aspects of the broadcast, including the actual audience, the potential audience and the language version. The feedback collected during the public consultation shows that setting licence fees for satellite transmissions under the COO rule available across borders has not caused any substantial practical problems. Some respondents to the consultation pointed

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<sup>94</sup> Such programmes in particular include news, current events, political debates; own documentary/entertainment productions; culture, science, arts programmes; lifestyle programmes, etc. Out of 5720 EU TV channels listed in MAVISE database, 243 channels are listed as "general", 226 channels as "documentary", 188 as "lifestyle/specific leisure", 156 channels as "news", see SatCab study, [table 2.11].

<sup>95</sup> Most widely spoken foreign EU languages are English (38%), French (12%), German (11%), Spanish (7%). See [Special Eurobarometer 386 \(2012\)](http://ec.europa.eu/public_opinion/archives/ebs/ebs_386_en.pdf)

<sup>96</sup> For example, in Slovakia 8.8% of the population has Hungarian as the mother tongue; in Lithuania - 5.3% Polish; in Finland - 5.1% Swedish. Source: study on [The economic potential of cross-border pay-to-view and listen audiovisual media services](#) (2012).

<sup>97</sup> Eurostat data from April 2013, [http://ec.europa.eu/eurostat/statistics-explained/index.php/EU\\_citizenship\\_statistics\\_on\\_cross-border\\_activities](http://ec.europa.eu/eurostat/statistics-explained/index.php/EU_citizenship_statistics_on_cross-border_activities)

<sup>98</sup> In the study [The economic potential of cross-border pay-to-view and listen audiovisual media services](#), it was estimated that in 2009 potential willingness to pay for subscription based cross-border AVMS among intra-EU migrants was between €760 million and €1,610 million annually in the EU based on the proportion of online survey respondents who were "very likely" and "fairly likely" to pay respectively (the total EU pay-TV market size was 28.6 billion EUR). **NB:** this survey concerned all subscription-based cross-border AV media services.

<sup>99</sup> For example, according to [the initial findings from the Commission's e-commerce sector inquiry](#) published on 18 March 2016, 68.9% of digital content providers replied that costs of purchasing content for territories other than those in which the provider operates is the most important factor for not making the service available across borders. In addition, broadcasters may need to take into account other possible costs: with online distribution, there are variable costs for the service provider that increase with usage, see further the SatCab study.

to difficulties with measuring the audience, a task which is significantly easier for online services.

### **Other service providers**

Impacts on the competitive situation: Option 2 would not significantly affect the on-demand services market because it would not apply to broadcasters' on-demand services, which are not ancillary to the initial broadcast. For example, if a broadcaster creates a VoD library, it would need to acquire rights according to the same rules as VoD service providers. Therefore, on-demand service providers would continue competing on an equal footing with broadcasters offering such services.

Yet, there may be a partial overlap between on-demand services (such as VoD) and broadcasters' online catch-up services, which in fact are on-demand services for a limited duration.<sup>100</sup> However, catch-up services do not constitute a complete substitute to VoD services as they are limited in time and are linked to the initial broadcast transmitted according to a schedule. Moreover, right holders would be able to address this issue by negotiating with broadcasters limitations to catch-up services.

Other service providers than broadcasters, which transmit linear TV or radio-like channels only online (operators of webcasting services) would not benefit from Option 2. However neither would a broadcaster offering an online-only channel (webcast) and therefore such broadcasters would compete with such service providers on an equal basis.

### **Right holders**

Impacts on licensing models and revenues would depend on whether right holders rely on territorial exclusivity in licensing their content.

- Option 2 is not expected to impact the licensing of premium AV content (right holders would be able to continue licensing their rights on a territorial basis, subject to the requirements of EU and national law). However, it could be beneficial to those AV right holders whose productions attract smaller audiences and who do not rely on territorial exclusivity: the COO rule would allow broadcasters to make such content available across borders and could result in additional revenues for right holders.
- Option 2 is likely to have a concrete effect on how rights are licensed by right holders who do not rely on a geographic distribution of their content, such as music and visual arts. This option may have a positive impact on their revenues thanks to a larger audience facilitated by the COO rule. Right holders are likely to adapt the licensing mechanisms to ensure that the revenues match the exploitation of their content (if this leads to a measurable increase in audience/revenues of that broadcaster). However, where the tariffs are already calculated on the basis of usage or the volume of audience, for example a percentage of broadcaster's revenues, no change to the contractual arrangements may be necessary. Moreover, in contrast with the "traditional" broadcasting, online distribution can offer accurate measurement of actual usage.

As regards the rights managed by CMOs, there is a risk that right holders would like to exercise more control over the licensing of rights under the COO rule and would decide to withdraw rights from CMOs. This could cause disaggregation of repertoires currently managed by CMOs. However, this risk is limited under Option 2, as the online services covered only concern ancillary services to the initial broadcast. Furthermore, the feedback received during the public consultation have not identified any concrete substantial risk that

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<sup>100</sup> Currently, the standard duration of broadcaster's catch-up services varies between 7 and 30 days.

broadcasters would relocate their place of establishment due to the reasons linked to licensing of copyright and related rights. This is mainly due to the fact that broadcasters are generally established in the country where their main audience is located and rely on infrastructures which cannot be easily relocated. Therefore, this option would not create any substantial risks that the revenues of right holders would suffer due to "establishment shopping" by broadcasters.

## **Consumers**

Impacts on access to online transmission services: Option 2 would enable consumers to have access to more broadcasters' programmes across borders, especially to content which is distributed without territorial exclusivity. Wider choice for consumers would also make competitive pressure on local broadcasters, compelling them to better meet evolving consumer demand. As concerns premium AV content, restrictions to cross-border access may continue to apply, as explained above.

Impacts on consumer prices: The impact on prices would depend on broadcasters' business models and on their decision to make their online transmissions accessible on a cross-border basis for free (or on ad-financed basis) or for payment. The increased cross-border availability of broadcasters' online services could have an impact on consumers' decisions related to their consumption of TV programmes, e.g. on whether to take a package service (retransmission services) or not. As consumers would have more choice in terms of available programmes across borders, they may better structure their consumption depending on their needs.

## **SOCIAL IMPACTS**

Benefits may be expected in terms of enhanced access to information and cultural content, in particular news, current events and cultural programmes. As a result, consumers would be able to better satisfy their diversified interests for programmes originating from other MS, including cultural, educational (e.g. learning languages) and entertainment. This is in particular relevant for non-fiction content, which is less available to consumers through means other than broadcasters' programmes.

## **IMPACTS ON FUNDAMENTAL RIGHTS**

By establishing the licensing regime applicable to certain types of cross-border online transmissions, this option would have a limited negative impact on copyright as property right. It would have a positive impact on the freedom of information, to the extent that this option would facilitate access to information.

## **Option 3 – Application of country of origin to the clearing of rights for the services covered by Option 2 and for TV and radio-like linear online transmissions (and services ancillary to such transmissions)**

The core difference between Options 2 and 3 is that Option 3 also covers online linear TV and radio-like transmissions (webcasting services)<sup>101</sup> and online services ancillary to webcasting. The impacts discussed below are linked to these additional services. One general challenge in assessing impacts of this option is the fact that webcasting market (in the sense of online-only, linear TV or radio-like services) is at a development stage and not yet fully formed. As opposed to settled rules pertaining to broadcasting organisations, the acquis and national regulatory frameworks regarding webcasting services are only developing, including the very definition of these services.

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<sup>101</sup> For example, webcasting services include YouTube live channels or iTunes "Beats" radio-like linear services.

## **IMPACTS ON STAKEHOLDERS**

### **Broadcasters**

The impacts of Option 3 on broadcasters could in principle be comparable to the ones described under Option 2. In addition, broadcasters would be able to rely on the COO rule for their webcasts. However, the higher risk of content disaggregation identified under Option 3 (see 'impacts on right holders' below) is likely to have a negative impact on transaction costs (even if licensing would be required only for one territory, the number of individual transactions may increase) and undermine the effectiveness of Option 3 in terms of facilitation of licensing.

### **Webcasters**

Option 3 would align webcasters' licensing regime to that of broadcasters. Webcasters could in principle save transaction costs for their online transmissions and have better possibilities to offer their services across borders in the same way as in the case of broadcasters described under Option 2. However, they may also be negatively affected by the risk of disaggregation of repertoire brought about by this option (see 'impacts on right holders' below).

### **Other service providers**

Impacts on the competitive situation: Option 3 could substantially impact the competitive situation between service providers offering on-demand services (VOD, music on demand, which would not be covered under this option) and service providers offering webcasting services. Increasingly, webcasting services can directly compete with on-demand services. Especially over time, the boundary between on-demand services and online linear transmissions may be even more blurred. Services offered to consumers by new entrants have evolved: service providers such as Spotify and Deezer do not only offer on-demand services on the basis of catalogues but also online radio-like services, offering to consumers special programming (e.g. 'artist radio' or 'channels') which are often partly interactive (e.g. the subscriber may influence the transmission by indicating his or her preferences and dislikes). Similar services are being developed by platforms such as YouTube. With these new models emerging, it becomes more difficult to distinguish what constitutes an online linear transmission and an on-demand service. Therefore, Option 3 could create a grey area, where it would not be clear whether certain online services would be covered by the legal intervention or not. As a result, it would not provide to the market players the necessary legal certainty nor would it ensure an even competitive situation.

Furthermore, online service providers can relocate their services more easily than traditional broadcasters and therefore they can gain a competitive advantage over broadcasters by relocating their establishment to a jurisdiction with lower copyright fees.

### **Right holders**

Impacts on licensing models and revenues: Under Option 3, the application of the COO rule to webcasters could lead to new forms of content exploitation (e.g. similar to near on-demand services) which would be fundamentally different from broadcasters' online ancillary services. For example, it is possible to imagine linear streaming services providing access to a limited range of content (one or several films, one or several recordings) in a near on-demand manner over certain period of time - such services would be competing with on-demand services (where the latter would not be able to rely on the COO rule).

Option 3 would generate market uncertainty for right holders and significantly increase the risk of content disaggregation of rights currently held by CMOs. As mentioned above, it is easy for online operators to relocate their establishment in the EU, for instance in order to

lower fees paid to right holders or for reasons not related to copyright (e.g. taxes or the regulatory regime). The risk of "establishment shopping" would in particular apply when rights are managed by CMOs (especially music). As right holders cannot directly control the tariffs fixed by CMOs for the licensing of rights, there is a risk that service providers, who heavily rely on music content, would establish in territories with lower tariffs.<sup>102</sup> Thus it could encourage "race to the bottom" in terms of copyright fees. This would be detrimental to right holders and could trigger withdrawal of their rights from local CMOs in order to protect their revenues. Also, as the application of the COO principle to a market which is not yet fully formed and where boundaries with on-demand (such as VoD) services are not clearly delineated would be likely to drive right holders to withdraw rights from CMOs in order to exercise more control over the licensing.<sup>103</sup> As a result, this could lead to disaggregation of repertoires managed by CMOs, contrary to the objective of the CRM Directive.

## Consumers

Impacts on access to online transmission services: Impacts on consumers would depend on the effects that this option would have in the effective facilitation of licensing. In addition to the positive impacts mentioned under Option 2, consumers could benefit from cross-border access to webcasting services, notably with regard to content distributed without territorial exclusivity. However, due to a risk of negative impact on broadcasters' transaction costs explained above, there is a risk that the impact on consumers may be negative.

Impacts on consumer prices: would be similar to the impacts described under Option 2, as long as this option leads to more availability of cross-border services.

## SOCIAL IMPACTS

The risks associated with Option 3 may result in this option, as explained above, having a neutral or even negative impact on the distribution of and access to cultural content.

## IMPACTS ON FUNDAMENTAL RIGHTS

Option 3 would negatively affect copyright as property right, given that it may expose right holders to the potential risks of lower revenues. Its impact on the freedom of information would depend on the extent to which this option would facilitate access to information.

### 3.2.2.4. How do the options compare?

Option	Effectiveness	Efficiency	Impact on stakeholders	Social impacts and fundamental rights
<b>Baseline</b>	(0) Limited availability of TV and radio programmes across borders would persist	(0) No direct costs associated with the baseline option	(0) Impacts on stakeholders would depend on developments in the licensing market	(0) No direct impact on cultural diversity (0) No direct impact on fundamental rights
<b>Option 1 – Voluntary</b>	(0/+) Would enhance access to	(0/-) Possible one-off costs linked to	(0/+) Limited reduction of transaction costs for	(0/+) Limited positive impact on

<sup>102</sup> E.g., according to the available examples, for commercial radios copyright fees in various MS may vary between 9% of broadcaster's revenues in the Netherlands to 2.2% in Greece; for related rights: from 7% in Finland to 1% in Italy. Note: this information represents an average in each country and was updated last in 2012/2014 (*Source:* AER).

<sup>103</sup> Such risk was raised by certain CMOs in response to the SatCab public consultation. E.g. GESAC submitted that an extension of the COO rule to VoD services could discourage the re-aggregation of repertoires promoted by the CRM Directive and even cause further fragmentation of repertoires in the market.

<b>agreements to facilitate the clearing of rights for broadcasters' online services ancillary to their broadcasts</b>	broadcasters online transmissions across borders to a limited extent	negotiation of voluntary agreements but expected to be limited	broadcasters due to the possibilities of aggregation of rights; better opportunities to offer their online services across borders (0) Neutral impact on other service providers (0/+) Impacts on revenues of right holders expected to be neutral or adjusted according to the usage (0/+) Limited improvement to cross-border availability of content for consumers	cultural diversity (0) Neutral impact on the right of property (0/+) Limited positive impact on the right to information
<b>Option 2 – Application of country of origin to the clearing of rights for broadcasters' online services ancillary to their initial broadcast</b>	(+) Would enhance access to broadcasters online transmissions across borders	(0/-) Possible one-off costs linked to renegotiation of contracts	(+) Reduced transaction costs for broadcasters due to simplified clearance of rights; wider opportunities to offer their online services across borders (0/-) Neutral or marginal negative impact on other service providers (0/+) Impacts on revenues of right holders expected to be neutral or adjusted according to the usage (+) Improved cross-border availability of content for consumers	(+) Positive impact on access to information and cultural content (-/0) Limited negative impact on the right of property (+) Positive impact on the right to information
<b>Option 3 – Application of country of origin to the clearing of rights for the services covered by Option 2 and for TV and radio-like linear online transmissions (and services ancillary to such transmissions)</b>	(-) Market uncertainty and risk of disaggregation of repertoire may hamper the effectiveness of the Option	(-) Possible high compliance costs linked to the risk of disaggregation of repertoire	(+/-) Simplified clearance of rights applying to webcasts but risk of negative impact on transaction costs (-) Legal uncertainty on the application of the COO rule to certain online services (-) Impacts on protection of right holders interests expected to be negative due to the risks of "establishment shopping" (0/-) Risk of no effect (or negative effect) on cross-border availability of content for consumers	(0/-) Risk of negative impact on access to cultural content (-) Risk of negative impact on the right of property (0/-) Neutral or negative impact on the right to information

**Option 2** is the preferred option, as it facilitates cross-border transmission of broadcasters' TV and radio programmes online, while preserving a balanced landscape taking into account the interests of right holders, by establishing the licensing regime based on the COO, while granting consumers a clear benefit of enhanced access to broadcasters' TV and radio programmes in the internal market. The baseline option would not allow reaching the

objectives identified in this IA. Option 1 could enhance access to broadcasters' online transmissions across borders but its outcome would be more uncertain than the one of Option 2. Option 3 can create legal uncertainty as it would be very difficult to draw the boundary between services covered by the intervention and not, in particular in a future-proof manner. It may also lead to a fragmentation of rights (notably those managed by CMOs). Moreover, Option 3 entails more risks for right holders with potential negative impact on the right of property due to the risks of establishment shopping.

Option 2 is proportionate as it only affects copyright in a limited manner. The limited impacts of Option 2 on copyright as a property right would be justified in view of the Treaty fundamental freedom to provide and receive services across borders.

### 3.2.3. Digital retransmissions of TV and radio programmes

#### 3.2.3.1. What is the problem and why is it a problem?

***Problem:** Providers of retransmission services face practical difficulties with the acquisition of rights for retransmission of TV and radio channels from other Member States by means other than cable*

Description of the problem: Nowadays TV and radio channels reach viewers and listeners through several types of retransmission service providers: cable TV/radio providers, satellite TV/radio (package) providers, IPTV (TV/radio over closed circuit IP-based networks) providers, digital terrestrial TV (DTT) providers and also the emerging over-the-top (OTT) TV/radio service providers.<sup>104</sup> The core business activity of retransmission service providers is to aggregate TV and radio channels into packages (basic, premium, thematic, etc.) and to provide them to consumers simultaneously to their initial transmission, unaltered and unabridged, typically against payment.

Retransmission of TV and radio channels has proved to be a highly successful means to enable Europeans to access broadcasts from other MS: e.g. 177 "foreign" TV channels are available to cable subscribers in Germany, 150 in France, 158 in the Netherlands, 143 in Portugal, 163 in Denmark, 159 in Poland, 168 in Ireland and 232 in Hungary.<sup>105</sup>

IPTV and OTT have been developing at a fast pace recently, which is explained by several technological and business factors: (i) IPTV and OTT have superior retransmission capacity; (ii) they are more attractive to consumers due to built-in interactivity of services and can be enjoyed (in the case of OTT) without the need for a dedicated hardware (such as a set-top-box and/or a satellite antenna); (iii) they are well promoted by numerous operators and major Internet platforms.

When distributing TV and radio channels and programmes running on them, retransmission service providers routinely engage in a copyright-relevant act of communication to the public.

The Satellite and Cable Directive provides for a system of mandatory collective management for retransmissions by cable of TV and radio broadcasts from another MS. This means that the right of cable retransmission with regard to TV / radio broadcasts from other MS cannot be exercised by right holders individually but may only be exercised by a collective

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<sup>104</sup> Such OTT retransmission services are a relatively recent phenomenon. "Zattoo", based in the US and Switzerland, is the pioneer of this type of retransmission services – was launched in 2006 and is now available in six countries: Germany, Switzerland, Spain, Denmark, Luxembourg and the UK. Swedish provider "Magine" launched its service in 2013 and is currently available in Sweden, Germany and the UK. Telecom operators are exploring this market too: Dutch KPN launched an OTT service called "Play" in November 2015, and Telekom Austria launched an OTT service "A1 Now" in March 2016.

<sup>105</sup> Data from the European Audiovisual Observatory.

management organisation. The only exception is made for the rights exercised by broadcasting organisations in respect of their own transmissions.

The rationale behind this system is to ensure that cable operators are in a position to acquire all rights necessary for retransmission of TV and radio channels and that there are no black-outs in the retransmitted channels or programmes. At the time of adoption of the Directive it was considered that individual licensing was impractical in the case of retransmission, while voluntary collective management would not guarantee the absence of black-outs.<sup>106</sup> The system provided for in the Satellite and Cable Directive is limited to retransmissions by cable and therefore does not extend to retransmissions by other means such as IPTV or OTT. This means that, depending on the MS (see below), providers of retransmission services by means other than cable cannot benefit from the system facilitating the clearance of relevant rights.<sup>107</sup> Such providers therefore face a heavy rights clearing burden in order to be able to provide their services.

Drivers: [*Complex clearance of rights*] Taking into account that each channel delivers numerous programmes composed of a multitude of copyright-protected works, that a typical retransmission service provider offers multiple channels, that the retransmission service provider has no control over the use of works in particular channels and no time to obtain licences for those works, the potential copyright clearing burden for retransmission service providers is important.

Example:

Belgian IPTV provider Proximus offers around 100 TV channels in its basic package, among them a channel of ZDF, German broadcaster. ZDF handles approximately 70,000 contracts with right holders each year.<sup>108</sup> Since ZDF has 9 generalist and thematic channels in total,<sup>109</sup> each channel can be said to represent (approximately) the "copyright clearing burden" of 7,700 contracts. Extrapolating this "copyright clearing burden" to 100 TV channels offered by Proximus and considering that 15 of these channels are retransmitted in both standard and high-definition quality, the potential copyright clearing burden for Proximus can be estimated at approximately 650,000 contracts per year  $((100-15) \times 7,700)$ .

In other words, providers of retransmission services offered on satellite, IPTV, mobile, DTT or OTT platforms face the same problems the cable operators once faced, in particular when they retransmit TV and radio broadcasts from other MS.

The problems are mitigated (but not solved) by the practice of some broadcasters whereby they aggregate retransmission rights from other rights holders (e.g. audiovisual producers) and grant the "all-rights-included" licences<sup>110</sup> to retransmission service providers.

The licensing problems described above mainly concern TV. They affect radio retransmission to a much lesser extent, since (i) radio broadcasts contain fewer types of works protected by copyright (notably, no images or audiovisual works) and (ii) there are well established collective management structures for the main type of copyright-protected work used in radio

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<sup>106</sup> The system of mandatory collective management of rights to retransmission of broadcasts is compatible with Article 11bis(2) of the Berne Convention which allows compulsory licences for such retransmissions.

<sup>107</sup> As indicated in the Ex-post Evaluation of the Satellite and Cable Directive (93/83/EEC), the system provided by the Satellite and Cable Directive for cable retransmissions has proven to be generally effective. At the same time, it was observed that other technological means of retransmission have emerged for which the Satellite and Cable Directive is not relevant due to its technology-specific provisions.

<sup>108</sup> EBU contribution to the public consultation.

<sup>109</sup> Data from the European Audiovisual Observatory.

<sup>110</sup> Such licences protect retransmission service providers against potential claims by 3<sup>rd</sup> party right holders concerning the use of works included in the broadcast.

broadcasts, i.e. music, which makes it easier for the retransmission services other than cable to obtain the required retransmission licences.

[*Legal or practical solutions available only in certain MS*] Legislation in some MS have considered retransmissions over "closed"<sup>111</sup> electronic communications networks (e.g. Slovakia, Austria) or over a particular network (e.g. DTT in Ireland) as equivalent to cable (and hence under the mandatory collective management system).

In some MS, in addition to the mandatory collective management implemented for cable retransmission, voluntary collective licensing schemes are in place to license other retransmission services: e.g. IPTV in Ireland, Netherlands, France, Poland, Belgium, Germany and Spain or satellite in France and Poland. Certain MS have in place extended collective licensing systems for retransmissions by all technical means (cable, satellite, DTT, IPTV, mobile or OTT).

Finally, in some MS (e.g. Greece, Estonia, Croatia, Latvia, Luxembourg, Romania) there are neither legal nor practical solutions facilitating licensing of retransmission of TV and radio broadcasts by means other than cable. In these Member States the providers of such other retransmission services have to rely on multiple licensing tools: the "all-rights-included" licences from broadcasters, collective licensing (only in the content sectors where it is available, mainly music) and individual licensing (notably by right holders of audiovisual works).<sup>112</sup>

[*Commercial decisions*] Apart from the licensing difficulties, the choices of digital retransmission service providers when it comes to including or not TV / radio channels into the packages provided to consumers are driven by these two factors: (i) the perceived demand by a typical audience in a particular territory<sup>113</sup> (in practice IPTV services often follow the patterns established by cable TV<sup>114</sup>) and (ii) the fees charged by the respective broadcasters.<sup>115</sup>

Consequence: The lack of mechanisms facilitating the licensing of rights for retransmission services using means other than cable leads to a limited access to TV and radio channels from other MS (as the offer of such channels is limited). A comparison of the total number of TV channels (from other MS) available through cable retransmission with the total number of TV channels (from other MS) available through IPTV retransmission in 10 EU MS (Germany, Hungary, Ireland, Poland, Netherlands, Denmark, Sweden, UK, Spain and France)<sup>116</sup> has shown that there are more TV channels (from other MS) on cable TV than IPTV in all but 1 MS (France).

How the problem would evolve: The fragmentation of rules applying to the clearance of rights for retransmissions by means other than cable is likely to become more problematic with the uptake of IPTV retransmission services in the coming years, expected to account for 16% of EU 28 TV households in 2020 (up from 13% in 2015).<sup>117</sup> The extent of use of cable

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<sup>111</sup> Meaning that a retransmission service can only be accessed by a consumer through an electronic communications network, dedicated fully or partially to the retransmission service (as opposed to access through "open" Internet / any electronic communications network giving access to the Internet).

<sup>112</sup> See Annex 7A for the full overview.

<sup>113</sup> The SatCab study [p. 27, 45].

<sup>114</sup> The SatCab study [p. 46].

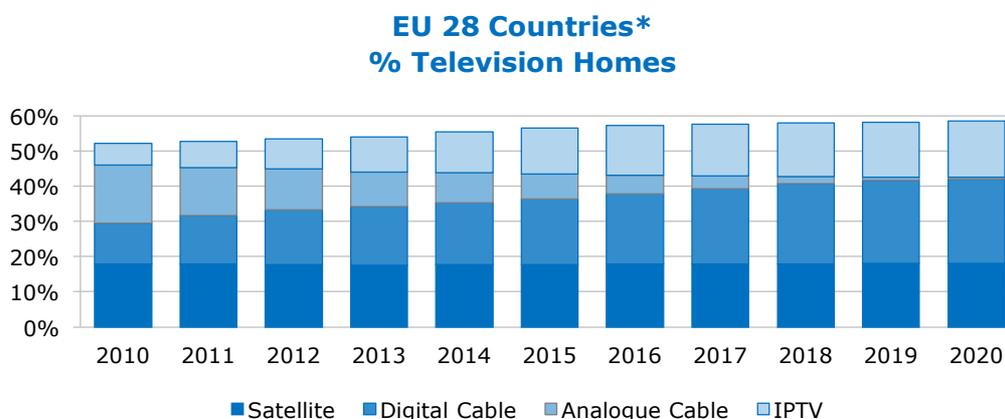
<sup>115</sup> The SatCab study [p. 52].

<sup>116</sup> See Annex 7B.

<sup>117</sup> The projections for the Western European markets show very similar trends (e.g. the growth of IPTV from 15% of TV households in 2015 to almost 19% in 2021): <http://www.broadbandtvnews.com/2016/04/12/iptv-overtakes-pay-satellite-tv-in-western-europe/>

retransmission services and satellite transmission / retransmission services is forecast to decline or remain stable.

### Pay TV subscriptions for EU28 to 2020



Source: Digital TV Research, Global Pay TV Operator Forecasts 2015, October 2015  
\*Data not available for Cyprus and Luxembourg

### 3.2.3.2. What are the various options to achieve the objectives?

Non-regulatory options are not considered because they would not be sufficient to achieve the objectives. Their effectiveness would be similar to the baseline scenario, and they would not provide the necessary degree of legal certainty.

#### **Baseline**

No policy intervention. This option would mean relying on the market players - right holders, including CMOs, and retransmission service providers - to work out and agree on the appropriate licensing arrangements and/or relying on the MS to establish the appropriate licensing facilitation mechanisms.

#### *Stakeholders' views*<sup>118</sup>

While most of individual right holders and commercial broadcasters support this option, consumer representatives, CMOs, public service broadcasters,<sup>119</sup> cable and telecoms operators consider that it cannot solve the identified problems as only legislative intervention can ensure that retransmission service providers are in a position to acquire all necessary rights.

#### **Option 1 - Mandatory collective management of rights to retransmission of TV / radio broadcasts by means of IPTV and other retransmission services provided over "closed" electronic communications networks**

- Option 1 would introduce mandatory collective management for simultaneous, unaltered and unabridged retransmission of TV / radio broadcasts by IPTV retransmission services and other retransmission services provided over "closed" electronic communications networks.<sup>120</sup>

<sup>118</sup> In this section, the summaries of stakeholders' views are based on the results of the public consultation on the review of the EU Satellite and Cable Directive published online attached hereto as Annex 2C.

<sup>119</sup> The difference in the opinion between commercial and public service broadcasters may stem from the fact that the former typically produce more content which is licensed to third parties.

<sup>120</sup> Directive 2002/21/EC (the Framework Directive): 'electronic communications network' means transmission systems and, where applicable, switching or routing equipment and other resources, including network elements which are not active, which permit the conveyance of signals by wire,

- As a result, Option 1 would concern IPTV<sup>121</sup> and other retransmission services (satellite, mobile, DTT) that can only be accessed by a consumer through an electronic communications network, dedicated fully or partially to the retransmission service (as opposed to access through "open" Internet / any electronic communications network giving access to the Internet).
- Option 1 would concern retransmission of TV / radio broadcasts originating in other MS.
- Just as in the case of the cable retransmission regime, broadcasters would be able to directly license to the retransmission service providers concerned the rights exercised by them in respect of their own broadcasts, irrespective of whether the rights concerned are broadcasters' own or have been transferred to them by other copyright owners and/or holders of related rights.
- As a result, the retransmission service providers concerned would have to obtain licences only from two categories of right holders - broadcasters and CMOs.

*Stakeholders' views*

Most right holders - phonogram producers, music publishers and many audiovisual producers – as well as commercial broadcasters are against this option due to the potential disruptive effect on the markets, which, according to them, function well. Cable and telecoms operators, consumer representatives, CMOs and public service broadcasters tend to be in favour of the possible application of the mandatory collective management regime to IPTV / other retransmission services provided over "closed" electronic communications networks and consider that it could improve the availability of TV / radio broadcasts across Europe.

**Option 2 – Mandatory collective management of rights to retransmission of TV / radio broadcasts by means of any retransmission services, irrespective of the retransmission technology or network used, as long as they are provided to a defined number of users (subscribers, registered users)**

- The main elements of Option 2 are the same as those of Option 1 except that Option 2 would introduce mandatory collective management for a wider range of retransmission services.
- In particular, Option 2 would also apply to OTT retransmission services, as long as they are provided to a defined number of users (subscribers, registered users). It would not cover the OTT retransmission services which do not require subscription or registration (and typically rely on business models, e.g. advertising-based, that are different from most other retransmission services).

*Stakeholders' views*

They are the same as on Option 1, though many supporters of the application of the mandatory collective management regime to the retransmission services other than cable (most of CMOs and public service broadcasters, some cable / telecoms operators) emphasise that such application should be limited to the retransmission services provided over closed networks / in closed environments and/or functioning in a territorially-limited way.

**3.2.3.3 What are the impacts of the different policy options and who will be affected?**

radio, optical or other electromagnetic means, including satellite networks, fixed (circuit- and packet-switched, including Internet) and mobile terrestrial networks, electricity cable systems, to the extent that they are used for the purpose of transmitting signals, networks used for radio and television broadcasting, and cable television networks, irrespective of the type of information conveyed.

<sup>121</sup> ITU's definition of IPTV refers to "multimedia services such as television/video/audio/text/graphics/data delivered over IP based networks managed to provide the required level of quality of service and experience, security, interactivity and reliability".

### ***Approach***

The options described above would affect retransmission service providers, consumers and right holders - individual right holders whose works are used in TV and radio broadcasts, CMOs and broadcasters. The impacts affecting these groups of stakeholders are presented separately.

- For retransmission service providers, the following economic impacts have been considered: impacts on the variety and quality of TV / radio retransmission services, on costs (transaction costs linked to clearing of rights and licensing costs linked to fees paid to right holders) and on competitiveness.
- For right holders, the main economic impacts considered are on licensing revenues (with a particular focus on the impacts in the audiovisual industry, given the specificity of this industry - its reliance on the business / distribution models based on territorial exclusivity).
- For consumers, the main impact areas considered are the choice of retransmission services and prices of services.

The assessment below is mainly qualitative, as the publicly available data or data that could be obtained from stakeholders on the licensing practices and transaction / licensing costs is limited.

## **Baseline**

### **IMPACTS ON STAKEHOLDERS**

#### **Retransmission service providers**

Impacts on the variety and quality of TV / radio retransmission services: The legal uncertainty as to whether all rights relevant for the retransmission service have been cleared faced by the retransmission service providers other than cable is expected to persist under the baseline option. As a result, those service providers can be expected to continue limiting their retransmission offers. Moreover, in view of the legal uncertainty, some market players might hesitate to launch innovative retransmission services or delay the launch in order to deal with licensing.

Impacts on costs of retransmission service providers: The baseline option would not have any direct impacts on costs. But neither would it alleviate the additional transaction cost burden for the retransmission service providers other than cable, resulting from the fact that they have to obtain licences not only from broadcasters and CMOs (like cable operators), but also from all the right holders who have chosen to exercise their rights individually rather than transferring them to a broadcaster or mandating a CMO.

The impacts described above could be eliminated or mitigated in some MS, notably those in which the collective management regime already applies, as a result of national law (mandatory / extended collective management) or practical arrangements by the market players (voluntary collective management), to retransmission services other than cable or might become applicable to them in the future.<sup>122</sup>

However, these solutions have led and are likely to continue leading to (i) lack of legal certainty in the market; (ii) fragmentation across the EU (different retransmission services falling within the scope of different licensing facilitation solutions in different MS) and (iii) significant time gaps between the emergence of an innovative retransmission service and the application of licensing facilitation mechanisms to it, if at all.

#### **Right holders**

Impacts on licensing revenues: Under the baseline option, the ability of right holders to generate revenues from the retransmission services other than cable would continue to vary depending on several factors: (i) whether a particular type of retransmission service falls within the scope of (mandatory or voluntary) collective management arrangements in a particular MS; (ii) the relative size of the right holder and his capacity to manage a network of

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<sup>122</sup> See Annex 7A for the overview of the current state of play.

licensing deals with numerous foreign retransmission service providers as well as the extent to which the right holder transfers his retransmission rights to broadcasters; (iii) the extent to which the providers of retransmission services other than cable actually enter into licensing deals with those right holders who choose to exercise their rights individually or, on the contrary, rely on the "all-rights-included" licences granted by broadcasters.

## **Consumers**

Impacts on the choice and prices of retransmission services: In the scenario of no policy intervention, consumers could continue facing a sub-optimal market offer of TV / radio retransmission services. In particular, as explained above, the choice of channels is expected to be more limited than it could be if a clear legal framework facilitating licensing was in place for the different retransmission services. Consumers could be paying a higher subscription price due to a lesser choice of retransmission services than the one resulting from the situation of effective competition between a variety of existing market players and new entrants. However, as there are more elements that affect prices (e.g. whether premium or non-premium content is included, whether the service is bundled with other services), the concrete impact on the prices is difficult to predict.

## **SOCIAL IMPACTS**

The access to a wide range of TV / radio channels is an important element to promote cultural diversity, media pluralism and to respond to social and cultural needs of EU citizens. The baseline option is not expected to contribute to these objectives.

## **IMPACTS ON FUNDAMENTAL RIGHTS**

This option would not have any impact on copyright as a property right (Article 17 of the Charter of Fundamental Rights) or the freedom to conduct a business (Article 16), as it would not expand the scope of the mandatory collective management.

## **Option 1 – Mandatory collective management of rights to retransmission of TV / radio broadcasts by means of IPTV and other retransmission services provided over "closed" electronic communications networks**

### **IMPACTS ON STAKEHOLDERS**

#### **Retransmission service providers**

Impacts on the variety and quality of TV / radio retransmission services: Option 1 would enhance the level of legal certainty for the benefit of a specific category of retransmission services - those provided over "closed" electronic communications networks - and can be expected to contribute to a better offer of such services, depending on market situations in particular MS. It could also be an incentive for the retransmission service providers concerned to expand the range of TV / radio channels offered to their subscribers. The actual impact of Option 1 in the different MS would depend on the regime currently applying to the licensing of rights for retransmission services other than cable.

#### Impacts on costs of retransmission service providers:

*Transaction costs:* this option is expected to reduce the transaction costs linked to the clearance of rights for the retransmission services provided over "closed" electronic communications networks. Providers of the services concerned would only need to deal with two licensing "sources" - broadcasters and CMOs.

The extent of reduction would depend on the market practices prevailing currently in the different MS, in particular: (i) whether different categories of individual right holders usually transfer retransmission rights to producers and/or broadcasters and whether broadcasters grant

the service providers concerned the "all-rights-included" licences; (ii) the set up and practices of collective management organisations (e.g. even without a mandatory collective management regime applying to them, IPTV providers are usually licensed by the music sector CMOs; it is not excluded that, upon the introduction of mandatory collective management, they might need to obtain licences from additional CMOs, e.g. those representing film producers, notably in the scenario where film producers' retransmission rights cannot be cleared with broadcasters as part of the "all-rights-included" licences).

*Licensing costs:* due to the confidentiality of information concerning specific licence fees it is not possible to draw conclusions regarding the impacts of Option 1 in this regard.

Impacts on competitiveness: It could be argued that Option 1 would benefit a specific category of retransmission services - those provided over "closed" electronic communications networks - and that other retransmission services (OTT) would be subject to a less favourable licensing regime, resulting potentially in a competitive disadvantage for them. However, due to the experimental / niche nature of OTT retransmission services, it is questionable whether they are equivalent to retransmissions over "closed" electronic communications networks.

### **Right holders**

Impacts on licensing revenues: Overall, since Option 1 is expected to help increase the number of the retransmission services provided over "closed" electronic communications networks as well as the number of TV / radio channels they offer, it is likely to generate additional licensing opportunities for the right holders and have a positive impact on their licensing revenues.

As regards individual right holders, Option 1 would have no direct impact on the licensing revenues of those individual right holders whose retransmission rights are already managed by CMOs as a result of national law or practical arrangements by the market players (voluntary collective licensing). In particular, when collective management is a standard practice in the music sector (for authors' rights and, often, producers' rights), Option 1 is not expected to lead to a change in licence fees and, consequently, licensing revenues.

Option 1 may have an impact on the licensing revenues of the individual right holders (e.g. audiovisual producers) whose retransmission rights are not currently managed by CMOs and this impact may differ depending on the relative size of the right holder and his capacity to manage a network of licensing deals with numerous foreign retransmission service providers. On the one hand, a relatively big right holder (e.g. a major US film studio, a large record label) with resources to manage numerous licensing deals might be able to earn more from direct licensing of retransmission rights to retransmission service providers compared to the revenues stemming from the mandatory collective management. Such right holders may prefer to retain control over licence fees and other licence terms. Due to the confidentiality of information concerning specific licence fees it is not possible to draw concrete conclusions regarding the extent of a change between individual licensing and collective management in licensing revenues. On the other hand, a relatively small right holder (e.g. audiovisual script writer) might not be getting revenue from the retransmission rights at all and, therefore, would benefit from the introduction of mandatory collective management. Despite these benefits, especially for smaller right holders, most of right holders who responded to the public consultation indicate that they are against this option due to the potential disruptive effect on the markets. This suggests that right holders perceive that risks outweigh benefits in the case of this option.

Option 1 is also expected to have a positive impact on the licensing revenues of broadcasters: even if their rights would be excluded from the mandatory collective management regime,

just as in the case of cable retransmission, it would be easier for broadcasters to have their programmes exploited abroad without having to clear themselves the underlying rights of other right holders for the countries concerned.

Option 1 is not expected to affect the territory-by-territory content financing and distribution models of audiovisual right holders, notably because most of the retransmission services provided over "closed" electronic communications networks rely on the infrastructures located in the territory of a particular MS.

As regards CMOs, Option 1 would have a positive impact on them (e.g. on CMOs representing audiovisual producers for the purpose of cable retransmission), as it would allow them to grant retransmission licences to and obtain licensing revenue from additional types of retransmission service providers – IPTV, mobile, satellite and DTT. The extent of the impact would depend on the number of licences granted to such providers and the licence fees paid by them, but a positive factor in this respect is that CMOs could extend their licensing activities at a low cost by applying the existing cable licensing arrangements.

### **Consumers**

Impacts on the choice and prices of retransmission services: Option 1 is expected to play an important role in facilitating the launch of new services, and thus enabling consumers to have a better choice of different retransmission services (these include IPTV which is predicted to grow, but also e.g. satellite retransmission services). Easier copyright clearing mechanism could also result in consumers being able to watch / listen to a greater variety of TV / radio channels from other MS, e.g. those tailored to specific preferences of particular groups of consumers. This, in turn, could lead to more intense competition between different retransmission services and, potentially, lower prices for consumers. However, as there are more elements that affect the decision by operators to launch new services and their prices (e.g. whether premium or non-premium content is included, whether the service is bundled with other services), the concrete impact on the prices is difficult to predict.

### **SOCIAL IMPACTS**

Option 1 is expected to contribute to promoting cultural diversity, media pluralism and to respond to social and cultural needs of EU citizens by putting in place a legal framework enabling access to a wider range of TV / radio channels.

### **IMPACTS ON FUNDAMENTAL RIGHTS**

Since Option 1 would expand the scope of the mandatory collective management and, therefore, limit the licensing choices of the right holders, it would have an impact (a limited one, due to its scope of application) on copyright as a property right (Article 17 of the Charter of Fundamental Rights) and on the freedom to conduct a business (Article 16). However, Option 1 would have a positive impact on the freedom of information (Article 11 of the Charter).

**Option 2 – Mandatory collective management of rights to retransmission of TV / radio broadcasts by means of any retransmission services, irrespective of the retransmission technology or network used, as long as they are provided to a defined number of users (subscribers, registered users)**

### **IMPACTS ON STAKEHOLDERS**

#### **Retransmission service providers**

Impacts on the variety and quality of TV / radio retransmission services: Option 2 would enhance the level of legal certainty for the benefit of a wide range of retransmission services -

IPTV, OTT, satellite, DTT, mobile - and can be expected to both (i) contribute to a greater variety of such services and (ii) provide an incentive to the retransmission service providers to expand the range of TV / radio channels offered to their subscribers.

Impacts on costs of retransmission service providers:

*Transaction costs:* this option is expected to reduce the transaction costs linked to the clearance of retransmission rights in the same way as Option 1.

*Licensing costs:* As in Option 1.

Impacts on competitiveness: Option 2 would benefit different types of retransmission services but could be seen as creating a competitive distortion between OTT services, depending on their business models (OTT retransmission services which do not have subscribers or registered users and rely on advertising would not benefit from the facilitation of rights clearance).

**Right holders**

Impacts on licensing revenues: The effects of the wider scope of Option 2 compared to Option 1 (OTT retransmission services covered) are difficult to assess due to the experimental / niche nature of those retransmission services. However, Option 2 may negatively affect right holders that rely on individual or voluntary collective management of their rights and for which it is important to control the online retransmission of their content (notably, but not only, the audiovisual industry). As explained in Option 1, big right holders may prefer to retain control over licence fees and other licence terms. Given the importance, the experimental/niche nature of the OTT market and its potential large scale, the preference for control over the licensing of rights to OTT retransmission is stronger than in the case of retransmissions over "closed" networks.

The OTT retransmission services are by their very nature not firmly linked to a particular territory, and their ability to ensure a controlled environment is limited if compared e.g. to cable or IPTV (which are normally limited to national or regional territories). Also, content delivered over the open internet can be more easily intercepted than content delivered over "closed" networks such as IPTV.<sup>123</sup> Finally, as such services are not linked to any particular infrastructure, their number can potentially be very high.

As Option 2 would extend to a wide variety of retransmission services (notably OTT) it could pose a risk that right holders would not always be able to choose the optimum business strategies in order to obtain the return on investment made. This risk is especially relevant for retransmissions via OTT services. In particular, the same content could be made available in a territory at the same time through different services, as a result of right holder's exclusive distribution deals as well as retransmission of foreign TV channels (for example, a premium TV series being available at the same time through a SVoD service and through an online service retransmitting foreign channels). This in principle is not different from Option 1 but the impact of such cases could be much greater given the cross-border nature of OTT services, their potential big scale (as they are not linked to any particular infrastructure), the fact that they have a more limited ability to ensure that consumers from other territories will not be able to access the service and the fact that OTT services are more prone to illegal interception. This could reduce the value of exclusive distribution deals based on different windows of exploitation and undermine the territory-by-territory distribution strategies. Due to the possible overlap between different windows (pay TV, VoD, SVoD and free TV) right

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<sup>123</sup> Source: IHS Technology, "Current market and Technology Trends in the Broadcasting Sector", May 2015, p.19.

holders may become reluctant to license their content for the free window, since such content could be retransmitted online in other MS through mandatory collective management.

As regards CMOs, Option 2 is likely to have a positive impact on them (e.g. on CMOs representing audiovisual producers for the purpose of cable retransmission), as it would allow them to grant retransmission licences to and obtain licensing revenue from a wider range and greater number of retransmission service providers (at a low cost - by applying the cable licensing arrangements).

### Consumers

Impacts on the choice and prices of retransmission services: Just as Option 1, this option is expected to contribute to more intense competition between different retransmission services and a greater choice of TV / radio channels from other MS and hence, potentially, to lower prices for consumers. However, the risk of overlap between different windows of exploitation mentioned above may result in less premium content being available through free-to-air TV.

### SOCIAL IMPACTS

Option 2 is expected to promote cultural diversity, media pluralism and to respond to social and cultural needs of EU citizens by putting in place a legal framework enabling access to a wider range of TV / radio channels. The possible impact in terms of licensing of premium content to free-to-air broadcasters may nevertheless negatively affect the access to cultural diversity and in turn have a negative effect regarding addressing social and cultural needs of EU citizens.

### IMPACTS ON FUNDAMENTAL RIGHTS

Since Option 2 would expand the scope of the mandatory collective management and, therefore, limit the licensing choices of the right holders, it would have a significant impact on copyright as a property right (Article 17 of the Charter of Fundamental Rights) and on the freedom to conduct a business (Article 16). However, Option 2 could have a positive impact on the freedom of information (Article 11 of the Charter) depending on the willingness of right holders to license their content for the free window.

#### 3.2.3.4. How do the options compare?

Option	Effectiveness	Efficiency	Impact on stakeholders	Social impacts and fundamental rights
<b>Baseline</b>	(0/-) Sub-optimal availability of TV and radio broadcasts from other MS on different retransmission services	(0) No direct costs	(0) Impacts on stakeholders would depend on market developments	(0/-) No direct impact on cultural diversity (0) No direct impact on fundamental rights
<b>Option 1 – Mandatory collective management of rights to retransmission of TV / radio broadcasts by means of IPTV and other retransmission</b>	(+) Would enhance the availability of different retransmission services and TV / radio broadcasts from other MS	(0/-) Possible one-off costs linked to concluding licensing agreements between retransmission service providers and CMOs, but expected to be limited	(+) Reduced transaction costs for retransmission service providers (0/+) More licensing revenue for those individual right holders that do not have the possibility to license rights individually (especially small) and CMOs	(+) Positive impact on cultural diversity (0/-) Limited negative impact on the property right (+) Positive impact on the freedom of information

services provided over "closed" electronic communications networks			(+) Better choice of different retransmission services and TV / radio broadcasts from other MS for consumers	
<b>Option 2 – Mandatory collective management of rights to retransmission of TV / radio broadcasts by means of any retransmission services, irrespective of the retransmission technology or network used, as long as they are provided to a defined number of users (subscribers, registered users</b>	(+) Would enhance the availability of different retransmission services and TV / radio broadcasts from other MS	(0/-) Possible one-off costs linked to concluding licensing agreements between retransmission service providers and CMOs, but expected to be limited	(+) Reduced transaction costs for retransmission service providers, including certain types of OTT (-) Risk of undermining right holders' exclusive online rights and distribution strategies, leading to a reduction of licensing revenue (+/-) Better choice of different retransmission services and TV / radio broadcasts from other MS for consumers, but risk of limited availability of premium content through free-to-air TV	(+/-) Positive impact in terms of access to a variety of channels may be undermined by the reduced availability of premium content on free-to-air TV (-) Negative impact on the property right (0/+) Moderately positive impact on the freedom of information

**Option 1** is the preferred option, as it would enhance the availability of different retransmission services and TV / radio broadcasts from other MS, while preserving a balanced regulatory landscape taking into account the interests of right holders. The baseline option would not allow reaching the objectives identified in this IA. Option 2 entails risks for right holders in terms of distribution strategies and licensing revenues, which may affect the availability of content for consumers.

Option 1 is proportionate as it only affect copyright in a limited manner (i.e. by establishing the licensing facilitation regime – based on mandatory collective management) while granting consumers a benefit of enhanced choice of retransmission services and TV / radio broadcasts from other MS. The compliance costs of Option 1 (and of Option 2) would be marginal as the same network of CMOs which is used to license rights to cable retransmissions could be used (and actually is some MS already is used) to license rights to retransmissions by means other than cable. One-off costs linked to concluding licensing agreements between retransmission service providers and CMOs could occur but these are expected to be limited. The impacts of Option 1 on copyright as a property right would be justified in view of the Treaty fundamental freedom to provide and receive services.<sup>124</sup> This option would also have positive impact on the freedom to information.

<sup>124</sup> Article 52(1) of the Charter allows for restrictions interfering with the exercise of the freedoms of the Charter: those restrictions (i) must be provided for by law and (ii) respect the essence of those rights and freedoms. In addition, the limitations are (iii) “subject to the principle of proportionality” and “may be made only if they are necessary and genuinely meet objectives of general interest recognized by the Union or the need to protect the rights and freedoms of others”.

### 3.3. ACCESS TO AND AVAILABILITY OF EU AUDIOVISUAL WORKS ON VoD PLATFORMS

#### 3.3.1. What is the problem and why is it a problem?

**Problem:** *Access to and availability of EU audiovisual works on VoD platforms is still limited.*

Description of the problem: The on-demand market of audiovisual works<sup>125</sup> is becoming increasingly important. Consumers' spending on digital video increased by 42.8% in 2013 and reached a total of EUR 1.97 billion.<sup>126</sup> The SVoD market evolves more rapidly than other VoD markets. The revenues of the SVoD market have grown from EUR 40.7 million to 844 million between 2011 and 2014.<sup>127</sup> The number of VoD services in Europe is also increasing, with around 2,000 services in Europe.<sup>128</sup> It is expected that the VoD market will continue to increase significantly in the 5-10 next years.<sup>129</sup> However, access and availability of EU audiovisual works on VoD platforms remain limited. At EU level, only 47% of EU films released in cinemas between 2005 and 2014 are available on at least one VoD service.<sup>130</sup> All works are not equally affected by the limited online availability: small productions are more affected than big productions that benefited a theatrical release and promotion efforts. Apart from classical works, old works are less available than new ones.<sup>131</sup> The type of VoD also has an influence on the availability of works: works are more often and quickly available on TVoD (in particular EST), than on SVoD. This is generally due to the release windows system, in which SVoD comes last.<sup>132</sup> Finally, the offer on VoD platforms greatly varies from one Member State to another and European audiovisual works are not often available on platforms outside their home country. For instance, a recent study shows that EU films are in average available on VoD in only 2.8 countries.<sup>133</sup>

VoD platforms are likely to become essential in terms of access to audiovisual works.<sup>134</sup> Therefore it is necessary that EU audiovisual works benefit from this new channel of distribution. Moreover, this also constitutes an opportunity to develop legal offer that could help fighting piracy.<sup>135</sup>

Several reasons explain the limited availability of European audiovisual works on VoD platforms.

Drivers: [*Complex clearance of rights*] Firstly, clearance of rights for VoD exploitation can be complex. It is not always easy to determine who owns the digital rights (e.g. lack of any

<sup>125</sup> The on-demand market of audiovisual works (or Video-on-Demand ('VoD') market) as understood here includes (i) Subscription VoD ('SVoD') and (ii) Transactional VoD ('TVoD') which itself includes buy services (EST- Electronic self-through) and rental services (DTR – Download to rent). It also includes AVoD (Advertising-supported Video-on-Demand) and FVoD (Free Video-on-Demand).

<sup>126</sup> European video: the industry overview – International video federation, 2014.

<sup>127</sup> EU Observatory- Study on-demand markets in the European Union – 2014 and 2015 developments.

<sup>128</sup> Data for February 2014. European Audiovisual Observatory, Study on on-demand audiovisual markets in the European Union, 2014.

<sup>129</sup> EU Observatory – On-demand markets in the European Union – 2014 and 2015 developments.

<sup>130</sup> In comparison, 87% of US films are available on VoD. See C. Grece, "How do films travel on VoD and in cinemas in the European Union – A comparative analysis", May 2016.

<sup>131</sup> As it has been highlighted in recent reports, see Annex 8A.

<sup>132</sup> Traditionally, first comes the theatrical release, then DVD and TVoD, then pay TV and free TV and coming last, SVoD. See Annex 8B for an overview of the main actors in the audiovisual industry.

<sup>133</sup> In comparison, US films are available in 6.8 countries. See C. Grece, "How do films travel on VoD and in cinemas in the European Union – A comparative analysis", May 2016.

<sup>134</sup> 59% of Internet users (respondents) have accessed or downloaded audio-visual content (films, series, video clips, TV content, excluding sports) in the last 12 months. Eurobarometer 411 (August 2015). 30% of respondents have paid for that access or downloading.

<sup>135</sup> See Annex 8A – VoD as a means to fight piracy.

licence from the initial author<sup>136</sup> or succession issues) or whether all the rights for the VoD exploitation have been cleared. For instance, it has been reported that the rights to music included in a movie had not been cleared for SVoD exploitation, leading to the impossibility for a VoD platform to include this work in its SVoD catalogue.

[*Contractual blockages*] Secondly, contractual blockages generally linked to licensing practices based on exclusivity of rights and on the release windows system, also limit the online availability of audiovisual works. As regards exclusivity, a typical situation is where all the rights (including VoD rights) to a specific work have been granted on an exclusive basis to an entity who is not interested in the online exploitation of the work (e.g. a broadcaster to whom exclusivity was granted as a counterpart for the financing of the work). Another situation is when a right holder decides to hold back online rights as long as the rights for a theatrical release have not been licensed, in order to keep open its chances to get the highest revenues. Some right holders want indeed to keep maximum flexibility as regards exploitation rights, even if this leads to no exploitation on VoD platforms. In those cases, the online exploitation of the work remains blocked for an indefinite time. When digital exploitation occurs, right holders often decide to enter the VoD exploitation only when revenues from other windows have been secured.<sup>137</sup> For instance, broadcasters often insist upon full or partial holdbacks against either TVoD or SVoD exploitation during the period covered by their licence.<sup>138</sup> In those cases, the online exploitation of a work occurs at the very end of the release windows.<sup>139</sup> This may negatively impact the attractiveness of VoD offers.

[*Low economic incentive*] A third obstacle is the low economic incentive for right holders and distributors to licence VoD rights, and for VoD platforms and aggregators to acquire exploitation rights for more works. This low incentive mainly derives from the poor return on investment linked to making the works available on VoD platforms.

As regards the right holders and distributors, the exploitation on VoD platforms is still an emerging market<sup>140</sup> and, at least for SVoD, it comes at the end of the release windows. Therefore the remuneration that is collected for this mode of exploitation remains limited. The revenues will depend on the sales models and the VoD type. For instance, SVoD is generally remunerated via a flat fee (around 3.000-10.000 for 18 months) when TVoD will be remunerated by a percentage of the sale price.<sup>141</sup> A study<sup>142</sup> shows that a right holder received approximately €1,5 from each VoD rental, but a sale of the same film on DVD or Blu-ray

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<sup>136</sup> In France, this situation has been addressed by the conclusion of an agreement ('protocole d'accord') between the SACD and organisations of producers. This agreement was extended to the whole sector in 2007 (see 'Arrêté du 15 février 2007'). This agreement provides for a standard clause to be included in the contracts to allow VoD exploitation. This agreement also includes a presumption of licence for previous contracts. This aims at lifting obstacles at the very beginning of the chain of exploitation (initial authors) and at providing remuneration to initial authors.

<sup>137</sup> Study "Multi-territory licensing of audiovisual works in the European Union", October 2010.

<sup>138</sup> Study on the fragmentation of the single market for on-line video-on-demand services: point of view of content providers, study commissioned by the European Commission (DG CONNECT) and prepared by iMinds (SMIT), p. 36: "(...) some sector stakeholders, in particular pay TV channels, use release windows as a means to hamper the VoD market's development. By imposing 'unreasonable' holdback periods, these pay TV players negatively impact the attractiveness of legal VoD offers".

<sup>139</sup> This is particularly true for SVoD (contrary to EST).

<sup>140</sup> See Annex 8A.

<sup>141</sup> See the study commissioned by uniFrance films, "New French and European film markeys – Digital: a new growth driver for intra-community circulation and export?", Ernst& Young, March 2015.

<sup>142</sup> Study carried out for the European Commission "Analysis of the legal rules for exploitation windows and commercial practices in EU Member States and of the importance of exploitation windows for business practices", p. 36 (2014).

came with at least three times higher revenues.<sup>143</sup> Currently, revenues from theatrical exploitation largely outweigh VoD revenues.<sup>144</sup> This *low remuneration* could by itself prevent right holders and distributors from exploiting VoD rights, in particular if there is a risk that the availability of works on VoD platforms undermines revenues from more profitable distribution channels (e.g. DVD, Blu-ray).

In view of the low revenues, *transaction and technical costs*<sup>145</sup> can be too heavy, in particular for small productions, old works or in the absence of traditional commercial distribution of a work in a given territory.<sup>146</sup> Right holders therefore need a highly efficient licensing model (i.e. easy contact, negotiations kept to a minimum and standard contracts) to limit the costs. In this respect, big studios (mainly American studios) are better equipped than small or even medium producers. This could explain why only 27% of films available on VoD and 30% on SVoD in the EU are European.<sup>147</sup>

As regards VoD platforms and aggregators, several costs affect their ability to include more works in their catalogue. Firstly, the *price of the works* can prevent them from including these works in their catalogue. With limited budgets, VoD platforms have to make choices and would only pay high licence fees for highly valuable works.<sup>148</sup> Secondly, *transaction costs* can be important, in particular when contracting with small or medium producers. Except for highly valuable works, VoD platforms generally prefer to conduct negotiations with big studios covering a whole catalogue than individual negotiations with small or medium producers covering only few titles. With multiple individual negotiations come diverse and multiple demands from right holders. Aggregators, acting as intermediaries, facilitate contacts and agreements between right holders, their representatives and VoD platforms.<sup>149</sup> However, aggregators face similar issues: a burdensome licensing process and title-by-title negotiation.<sup>150</sup> To some extent, *technical costs*<sup>151</sup> can also affect VoD platforms and aggregators negatively.

Consequences: As a result, some works will never find their way to VoD platforms. On the one hand, even when costs are not particularly high, they would still need to be recovered by means of a minimum amount of viewers. Some works would never achieve this threshold and VoD platforms would therefore not include them in their catalogue. On the other hand, VoD platforms are not willing to include all possible works in their catalogue. They have to carefully select the works that will be part of their catalogue and to find the right balance between costs and benefits. On top of that, platforms (in particular platforms investing in original content such as Netflix) generally wish to limit the size of their catalogue to avoid

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<sup>143</sup> Mission sur le développement des services de vidéo à la demande et leur impact sur la création: centre national du cinéma et de l'image animée, Hubac, S. (2010).

<sup>144</sup> See Annex 8A.

<sup>145</sup> Technical costs are briefly described in Annex 8A.

<sup>146</sup> Many European works are not released in all EU Member States. VoD exploitation could compensate this absence. However, in the absence of any previous distribution scheme in a given territory, transaction costs would be particularly high as they would only concern VoD exploitation.

<sup>147</sup> Compared to 59% of US films on VoD and 60% on SVoD (based on the number of cumulative film titles). Sample of 75 VoD and 16 SVoD catalogues. "Origin of films in VoD catalogues in the EU". European Audiovisual Observatory. November 2015.

<sup>148</sup> For which exclusivity plays a role, see Annex 8A.

<sup>149</sup> Since 2015, the MEDIA programme supports "ready-to-offer" catalogues of European films – see Annex 8E.

<sup>150</sup> Some of these issues will be addressed by accompanying measures announced in the Commission Communication of 9 December 2015.

<sup>151</sup> Which are to a large extent similar to the ones for right holders. See Annex 8A.

any 'cannibalisation risk'.<sup>152</sup>

How the problem would evolve: In conclusion, despite the growing number of online content services, many audiovisual works (and among them, many European works) would not find their way to online exploitation. Evolution of the market could improve the availability of these works on VoD platforms, however obstacles, including related to the licensing of rights, are likely to persist.

### 3.3.2. What are the various options to achieve the objectives?

The options below focus specifically on the licensing problems limiting the availability of European audiovisual works on VoD platforms, described above. The rest of the issues will be addressed in parallel by the accompanying measures as described in the Communication "Towards a modern, more European copyright framework"<sup>153</sup> and in the framework of the 'Creative Europe' programme.

#### Baseline

No policy intervention. This option would rely on the natural evolution of the VoD market. As VoD will become an increasingly important way to access audiovisual works in the coming years, it is likely to gain in financial attractiveness for right holders.

#### *Stakeholders' views*

Following discussions and meetings with stakeholders' representatives, it appears that producers and distributors (and to a certain extent, aggregators) would in general support this option since most of them consider that the VoD market is still emerging and can regulate itself. Nevertheless, as it appears from meetings with some stakeholders' representatives, authors, some producers and VoD platforms generally consider that this option would not be sufficient to solve the obstacles leading to the limited availability of audiovisual works on VoD platforms. This view is likely to be shared by consumers since they will continue to face limited availability of EU audiovisual works on VoD platforms.

#### **Option 1 – Stakeholders' dialogue focusing on licensing issues and aiming at improving the proportion of EU audiovisual works available on VoD platforms**

Under this option, a stakeholders' dialogue would be put in place with the following elements:

- A multi-party stakeholders dialogue aimed at exploring ways to improve the availability of EU audiovisual works on VoD platforms.
- The dialogue would take place at European level.
- This stakeholder dialogue would focus only on licensing issues and related legal and contractual difficulties (e.g. unblocking of VoD rights). The main participants will therefore be authors, producers, sales agents, distributors, broadcasters, aggregators, VoD platforms (including telecom operators offering VoD services), with the underlying idea to gather together parties that do not enter directly into commercial agreements with each other.

<sup>152</sup> For instance, as regards EST or TVoD, it is important to keep the number of 'cheap' movies limited, to avoid any cannibalisation of the 'expensive' movies (to avoid that viewers opt for the cheaper films on a regular basis). This is also applicable for SVoD services (e.g. Netflix considers that "instead of trying to have everything, we should strive to have the best in each category"- see Netflix long term view document, p. 5, available on [http://files.shareholder.com/downloads/NFLX/2441659654x0x656145/e4410bd8-e5d4-4d31-ad79-84c36c49f77c/IROverviewHomePageLetter\\_4.24.13.pdf.pdf](http://files.shareholder.com/downloads/NFLX/2441659654x0x656145/e4410bd8-e5d4-4d31-ad79-84c36c49f77c/IROverviewHomePageLetter_4.24.13.pdf.pdf)). SVoD services with original content also do not want to see their own productions cannibalized by cheaper works.

<sup>153</sup> Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions "Towards a modern, more European copyright framework" COM(2015) 626 final. See also Annex 8E.

- This dialogue would be part of the accompanying measures announced in the Communication "Towards a modern, more European copyright framework" to ensure a wider access to content across the EU and, more particularly, to intensify the dialogue with the audiovisual industry to find ways for a more sustained exploitation of existing European films. These measures will address consumers' expectations, including by encouraging Member States to promote legal offer and to develop search tools to make EU audiovisual works more findable and prominent.
- The result could be the adoption of self-regulatory measures for improving the availability (for a more sustained exploitation) of EU audiovisual works, including on VoD platforms.

*Stakeholders' views*

It is likely that stakeholders would support this option, as some individual initiatives from different stakeholders are already trying to address ways to improve availability of audiovisual works (specifically European). This option would bring all stakeholders, at European level, around the table with that same objective. If successful, the stakeholder dialogue would help streamlining licensing practices as regards digital exploitation. Following meetings with stakeholders' representatives, it appears that authors and VoD platforms in particular would support this measure but could consider it insufficient as it does not give a tool to solve individual disputes (including contractual blockages). Consumers would support an option aiming at enlarging the catalogue of EU audiovisual works on VoD platforms.

**Option 2 – Stakeholders' dialogue (Option 1) + Obligation for Member States to establish a negotiation mechanism to overcome obstacles to the availability of audiovisual works on VoD**

This option would maintain the European-level dialogue from Option 1 and will add the obligation for Member States to introduce in their legislation a mechanism/process to facilitate negotiations aimed at facilitating the exploitation of EU audiovisual works on VoD platforms, with the following elements:

- The negotiation mechanism put in place by Member States will help addressing individual cases. The stakeholders' dialogue will address problems of availability in a general framework and try to find solutions agreed by a multiplicity of parties.
- The negotiation mechanism will aim at helping solving specific disputes where licensing obstacles limit and/or block the availability and exploitation of an (or several) audiovisual work(s) on VoD platforms (e.g. a producer whose work is not exploited on VoD platforms; a VoD platform that wants to make available a particular AV work).
- The parties who can resort to negotiation will be those wishing to exploit VoD rights and those holding the rights.
- Member States will have to create a negotiation mechanism with the following essential elements: Member States will identify an impartial instance that will facilitate negotiations between parties (without prejudice of the possibility to go to Court). The negotiation mechanism (i) will be determined by each Member State after having consulted with the relevant stakeholders (practical issues such as the bearing of costs and timeline will therefore be left to Member States); (ii) will be on a voluntary basis; and (iii) will require the parties' commitment to negotiate in good faith. The selected impartial party will (i) actively work towards reaching an agreement and facilitate negotiations; (ii) bring professional experience that can contribute to the conclusion of more commercial agreements.

- The expected outcome would be commercial agreements leading to an increase of EU audiovisual works being available on VoD platforms. There is no obligation for the parties to reach an agreement.

*Stakeholders' views*

Authors, aggregators and platforms would support this mechanism, as they generally favour measures addressed to unblock contractual blockages and/or solve disputes leading to the unavailability of works. Following meetings and discussions with stakeholders' representatives, it appears that producers, distributors, sales agents would support this option as well because it respects their contractual freedom while providing a framework to help solving individual disputes. Consumers would support an option aiming at enlarging the catalogue of EU audiovisual works on VoD platforms.

**Discarded options**

*Restrictions to contractual freedom:* Options imposing obligations that would restrict the stakeholders' contractual freedom were discarded. Such options would be more constraining on the parties since parties would have no choice but to start negotiations or to allow the exploitation of the works. However, their practical implementation and real impact on the market remain unclear. It is for instance unclear whether forced negotiations (even in good faith) could reach more agreements than negotiations on a voluntary basis. As regards any obligation to exploit, it would have been very difficult to determine the conditions under which such obligation could take place without expropriating the concerned person's rights. These options would heavily hinder the contractual freedom of the parties, which now freely negotiate and agree on the different types of exploitation that right holders want to licence, e.g. theatres, pay and free broadcasting, DVD, VoD.

**3.3.3. What are the impacts of the different policy options and who will be affected?**

***Approach***

The options presented above would affect all stakeholders in the VoD exploitation chain of EU audiovisual works. These stakeholders include:

Right holders and distributors: This category includes right holders (director of a movie, screenwriter, producers -to whom the rights to a work are generally assigned- and other possible right holders), and broadcasters. This category also includes distributors and sales agents. For them, the following impacts have been considered: (i) impacts on the incentives for the exploitation of online rights (ii) impacts on costs.

VoD platforms and aggregators: The following impacts have been considered: (i) impacts on availability of works in their catalogue; (ii) impacts on costs.

Consumers: The impact on the availability of EU audiovisual works on VoD platforms has been considered.

Only the most significant and likely impacts are reported in this IA. The assessment is mainly qualitative, as the data available is very limited because of confidentiality issues.

**Baseline**

**IMPACTS ON STAKEHOLDERS**

The limited availability of EU audiovisual works on VoD platforms is expected to persist under the baseline option.<sup>154</sup> The maturity of the VoD market in terms of revenues has not been reached yet. In the absence of any intervention at EU level, contractual blockages are likely to persist. In many cases, the licensing process for EU audiovisual works would remain burdensome.

**Right holders and distributors**

Impacts on the incentives for the exploitation of online rights: Most successful/mainstream

<sup>154</sup> Only 32% of respondents are able to find the audiovisual content they are looking for. Eurobarometer 411, August 2015.

works would find their way to VoD platforms. For other audiovisual works (including numerous European works), low revenues and high costs would in many cases continue to prevent any online exploitation. The right holders' business model based on exclusivity deals and release windows would not be affected under this option. Right holders would only have limited incentive to intensify the online exploitation of their works. Apart from increased revenues, a possible incentive could be if the VoD market grows to the point that it becomes essential from the right holders' point of view (e.g. as a marketing tool or as the main distribution channel). However, this is not likely to happen in the short term.

Impacts on costs: The development of intermediaries (such as aggregators) in the VoD market could have a positive outcome on transactions costs for right holders. Aggregators could help right holders concluding agreements on the digital exploitation of their works. This would particularly be true for small producers and distributors who do not always have the resources to start direct negotiations with VoD platforms. However, this positive impact would be limited as intermediaries would continue to face high transaction costs, which could prevent their development.

### **VoD platforms and aggregators**

Impacts on the availability of works in their catalogues: VoD platforms and aggregators would have no leverage under this option to unblock contractual blockages except for the growing importance of the VoD market (and revenues linked to it). Upstream, VoD platforms and aggregators are likely to face less clearance of rights issues. To facilitate clearance of rights, initiatives as the ones already launched in some countries could be launched in other countries. However, this would rely on individual initiatives, at national level. Downstream, even if reduced, costs would continue to be important (see *infra*). It would therefore still be difficult and expensive for VoD platforms and aggregators to conclude agreements with small and medium producers (and by consequence include their works in their catalogue).

Impacts on costs: With the development of the VoD market, VoD platforms and aggregators could gain in bargaining power and bring forward in the negotiation standard contractual practices (such as "block-agreements"<sup>155</sup>). This could lead to some reduction of transaction costs. For some categories of works, VoD platforms and aggregators would also be able to better bargain the licence cost as VoD market gains in importance. Development of the VoD market could also lead to an increase of the licences prices but in proportion with an increase of the revenues. Under this option, VoD platforms would still face technical costs (when not borne by right holders).

### **Consumers**

Impact on the availability of EU audiovisual works on VoD platforms: As the VoD market evolves, consumers would be offered a larger choice of audiovisual works. However, this choice would be limited to some extent as access to some categories of works would remain limited: (i) works whose rights are blocked by rightholders; (ii) works (mainly small productions) for which transaction costs would be too high) and (iii) works that VoD platforms are not willing to include in their catalogue. Costs for consumers to access catalogues of VoD platforms would remain unchanged.

### **SOCIAL IMPACTS**

The baseline option will not sufficiently contribute to increase the availability of European audiovisual works on VoD platforms, which participate in the cultural diversity. As a

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<sup>155</sup> Meaning that VoD platforms and aggregators could engage in negotiations with several rightholders at a time for a catalogue of works.

consequence, the visibility and circulation of European audiovisual culture across the European Union would remain limited. This would constitute a lost opportunity for European audiovisual works to reach a larger public.

#### **IMPACTS ON FUNDAMENTAL RIGHTS**

The baseline scenario would not have any impact on copyright as property right (Article 17(2) of the European Charter of Fundamental Rights) or on the freedom to conduct a business (Article 16), as it would not alter the current licencing system.

#### **Option 1 – Stakeholders' dialogue focusing on licensing issues and aiming at improving the proportion of EU audiovisual works available on VoD platforms**

#### **IMPACTS ON STAKEHOLDERS**

Having a platform to meet and discuss licensing issues preventing availability of EU audiovisual works on VoD platforms (e.g. exclusivity issues; release windows), at European level, could contribute to reach agreements (self-regulatory measures) for a more sustained exploitation of EU works, which would benefit all stakeholders involved. However, chances of reaching concrete agreements would depend on the willingness of the stakeholders to engage in constructive discussions and to take commitments.

#### **Right holders and distributors**

Impacts on the incentives for the exploitation of online rights: The right holders' business model based e.g. on exclusivity deals and release windows would not be affected under this option. The stakeholders' dialogue could lead to some agreement as regards the streamlining of licensing practices (for instance, development of standard clauses that could easily be included in contracts). This could encourage right holders intensifying digital exploitation of their works. The stakeholder dialogue could also raise awareness as to the importance of clearing the rights for the producers. This could have a positive impact on distributors and other intermediaries down the contractual chain, and ultimately, on the availability of works on VoD platforms.

Impacts on costs: The stakeholder dialogue could contribute to reduce costs linked to VoD exploitation (e.g. if the stakeholder dialogue help defining contractual standards that would streamline the licensing process and reduce transaction costs).

#### **VoD platforms and aggregators**

Impacts on the availability of works in their catalogues: As mentioned above ('right holders and distributors'), the stakeholder dialogue could have a positive impact on the streamlining of the licensing process and the clearance of rights.<sup>156</sup> This could help increasing the number of works available in the VoD catalogues. However, by its nature, the stakeholder dialogue would only concern collective solutions and could not solve individual issues. Therefore, the impact of this option on works blocked in exclusivity deals are expected to be limited. It would indeed be necessary to start individual negotiations to obtain from a right holder that it renounces to its exclusivity. As regards release windows, this option could have a positive impact by bringing more flexibility. For instance, stakeholders could discuss under what conditions an earlier availability on SVoD platforms would be possible (for instance, stakeholders could discuss the possibility for right holders to stop – even temporarily – the exploitation on SVoD in case of another, more valuable, distribution opportunity). Finally, the

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<sup>156</sup> As regards clearance of rights, initiative as the one launched by the SACD in France (see *supra*) could be discussed in the framework of the stakeholders' dialogue. This would allow a discussion and possible similar solution at European level.

stakeholder dialogue could facilitate contacts between small and medium right holders (or their representatives) and aggregators/VoD platforms. They could work together on ways to improve the inclusion of their works in an aggregator's or VoD platform's catalogue.

Impacts on costs: The stakeholder dialogue could help reducing transaction costs. If successful, the stakeholder dialogue could lead to an agreement on new contractual standards. This could facilitate licences negotiation.

## **Consumers**

Impact on the availability of EU audiovisual works on VoD platforms: Under this option, if the stakeholder dialogue helps reducing transactions costs and facilitating contacts between on the one hand, VoD platforms and aggregators, and on the other hand, right holders (in particular producers), consumers would be able to enjoy a larger choice of works, including small productions. They could also benefit from earlier access to some works on VoD platforms. It is likely that costs for consumers to access VoD services would remain unchanged or would only slightly increase in cases where SVoD platforms offer a substantially larger catalogue.

## **SOCIAL IMPACTS**

Option 1 is expected to contribute to the objective by enabling a dialogue that could facilitate access to a wider range of European audiovisual works. This would in the medium/long term increase the number of works available on VoD platforms. This would positively affect the visibility and circulation of European audiovisual works across the European Union.

## **IMPACTS ON FUNDAMENTAL RIGHTS**

The Option 1 scenario would not have any impact on the property right or on the freedom to conduct a business.

## **Option 2 – Stakeholders' dialogue (Option 1) + Obligation for Member States to establish a negotiation mechanism to overcome obstacles to the availability of audiovisual works on VoD**

Impacts of the stakeholder dialogue, which is also part of Option 2, have been assessed under Option 1. The impacts assessed below concern only the negotiation mechanism.

## **IMPACTS ON STAKEHOLDERS**

The negotiation mechanism would address individual cases of lack of availability and complements the general approach pursued by the stakeholder dialogue. The intervention of an impartial instance is likely to facilitate the negotiations. The involvement of different stakeholders in the chain of rights (for instance a producer, a distributor and a VoD platform) would allow all necessary interests to be taken into account. The nature of the negotiation process could lead to flexible solutions. Any potential guidelines or standards decided following the stakeholder dialogue could also be helpful to reach solutions. However, by virtue of its voluntary basis, this solution will only apply when parties agree to start negotiations. There would not be an obligation to reach an agreement. Compliance costs deriving from the obligation for Member States to establish a negotiation mechanism are detailed in Annex 3.

## **Right holders and distributors**

Impacts on the incentives for the exploitation of online rights: Under Option 2, the right holders' business model based on exclusivity deals and release windows would not be affected. However, online exploitation of a work could be discussed in the framework of the negotiation forum. Since the negotiation mechanism would work on a voluntary basis, this

would prevent possible abusive demands from VoD platforms and aggregators. This negotiation forum could also benefit right holders. For instance, a producer having assigned rights to a broadcaster not willing to exploit the work on VoD could rely on the negotiation mechanism to try unblocking the situation. Right holders could also use the negotiation mechanism to try unblocking situations of systematic refusals from VoD platforms or aggregators to include their works in the VoD catalogues. The intervention of an impartial instance/moderator could facilitate discussions and help finding solutions. The moderator could help unblocking the situation by providing objective and professional input. He could also submit proposals. More generally, the moderator would help rationalise discussions. The obligation of negotiation in good faith would also play a role. In view of the voluntary basis and the necessity to negotiate in good faith, parties would refrain from entering into negotiations unless there is a strong will to reach an agreement.

Impacts on costs: Impacts on costs would be to a large extent similar as the ones assessed in Option 1. The participation in a negotiation forum to unblock a situation could help parties making economies by speeding up the negotiation process.

### **VoD platforms and aggregators**

Impacts on the availability of works in their catalogues: This option is likely to have a positive impact on the possibility for VoD platforms and aggregators to overcome obstacles linked to exclusivity rights and exploitation rights, release windows and clearance of rights. The flexibility of the negotiation mechanism, the participation of different parties and the intervention of a moderator could help parties finding suitable solutions (see *supra* 'right holders and distributors'). The obligation to negotiate in good faith would prevent any obstruction from right holders (or other stakeholders). The experience gained from the negotiation mechanism could be reused in other negotiations. VoD platforms would for instance be able to conclude other agreements with stakeholders, based on the previous agreements obtained via the negotiation mechanism. Since the negotiation mechanism would entail some costs (i.e. costs linked to the involvement of parties negotiating), it would mainly be used in cases where there is a common will to make the works available online but where negotiations are difficult. This negotiation mechanism is likely to be used to unblock the rights to a catalogue of works or to facilitate contractual collaboration between parties. In view of the voluntary basis of the mechanism, the positive impact on VoD platforms and aggregators would materialise where right holders are willing to negotiate.

Impacts on costs: Since the negotiation mechanism would be used to address individual blockages cases, it would not have a global impact on transactional or technical costs.

### **Consumers**

Impact on the availability of EU audiovisual works on VoD platforms: If the negotiation mechanism achieves unblocking some situations and facilitating collaboration between some parties, consumers could benefit from a larger catalogue of works on VoD platforms. Impact on the costs for consumers would be similar as the one under Option 1.

### **SOCIAL IMPACTS**

Option 2 would have a positive impact on cultural diversity, as resolution of individual cases would contribute to enriching the catalogues of European works available to consumers (including the ones for which the rights were blocked). This would in the medium/long term increase the visibility and circulation of European audiovisual works across the European Union.

### **IMPACTS ON FUNDAMENTAL RIGHTS**

Option 2 scenario would not have any impact on the property right or on the freedom to conduct a business since the participation in the negotiation mechanism would be on a voluntary basis.

### 3.3.4. How do the options compare?

Option	Effectiveness	Efficiency	Impact on stakeholders	Social impacts and fundamental rights
<b>Baseline</b>	(0) Contractual blockages, clearance issues, issues linked to strict release windows and burdensome licensing processes would persist.	(0) No direct costs associated with the baseline option.	(0) Impacts on stakeholders would depend on the evolution of the VoD market.	(0) No direct impact on fundamental rights. (0) No direct impact on cultural diversity and the visibility and circulation of EU audiovisual works.
<b>Option 1 – Stakeholders' dialogue</b>	(0/+) Could result in some improvements as regards the clearance of rights, and the streamlining of the licensing process. To some extent, it could provide some flexibility as regards release windows. Contractual blockages linked to exclusivity deals would persist.	(0/-) Limited costs linked to the organisation of the stakeholders' dialogue.	(0/+) Main impacts on stakeholders would depend on the possible changes introduced by the stakeholders' dialogue. If the stakeholders' dialogue leads to the adoption of some standards and practices (e.g. contractual clauses) and more flexibility, there would be a possible reduction of licensing and clearance costs.	(0) No direct impact on fundamental rights. (0/+) Positive impact on cultural diversity and the visibility and circulation of EU audiovisual works provided that the stakeholder dialogue leads to more works available on VoD platforms.
<b>Option 2 – Stakeholders' dialogue and negotiation mechanism</b>	(+) In addition to collective solutions that could be brought by the stakeholders' dialogue, individual cases could also be addressed. This would provide a framework for stakeholders to solve contractual blockages and other licensing individual issues. However, the voluntary basis of the mechanism would limit the number of cases where it would apply.	(0/-) Limited costs linked to the organisation of the stakeholders' dialogue and possible participation in the negotiation mechanism. (0/+) Possible reduction of costs by speeding up the negotiation process.	(0/+) Possible reduction of licensing and clearance costs (cf. <i>supra</i> ). (+) Possibility to use the negotiation mechanism to unblock individual cases (e.g. contractual blockages) and to facilitate contractual collaboration between stakeholders.	(0) No direct impact on fundamental rights. (+) Positive impact on cultural diversity and the visibility and circulation of EU audiovisual works thanks to the greater availability of EU AV works on VoD platforms (which would also include audiovisual works for which the rights were blocked).

**Option 2** is the preferred option, as it would allow reaching the objective of improving the availability of EU audiovisual works on VoD platforms. Under this option, solutions to both collective and individual cases are envisaged. The stakeholders' dialogue, if successful, could lead to the adoption of some contractual standards that could benefit all stakeholders in the audiovisual sector. This would have a positive impact on the licensing process. The stakeholders' dialogue could also increase flexibility in licensing VoD rights and facilitate to some extent contacts between small and medium right holders (or their representatives) and

aggregators/VoD platforms. As regards individual cases, the negotiation mechanism could help parties finding suitable solutions to allow the licensing of VoD rights. This would be achieved with the help of the impartial instance/moderator and thanks to the obligation to negotiate in good faith. In contrast, Option 1 would not address these individual situations. Consequently, Option 2 would entail higher benefits than Option 1 since it would deal with both collective and individual cases. Since the negotiation mechanism would be on a voluntary basis, this solution would heavily rely on the will of parties to reach agreement. All blockages could therefore not be solved under this solution. However, this solution leaves the contractual freedom of parties untouched. As regards costs, Options 1 and 2 would both entail limited costs related to the organisation and participation in a stakeholders' dialogue. Under Option 2, the participation in a negotiation forum to unblock a situation could help parties making economies by speeding up the negotiation process. The possible costs incurred by the participation in the negotiation mechanism would therefore be compensated. Consequently, costs for stakeholders under Option 2 are not expected to be higher than under Option 1. This is all the more the case since the participation in the negotiation mechanism would be on a voluntary basis, stakeholders would be protected against abusive demands from other stakeholders. Finally, Option 2 has no impact on the right holders' business model based on exclusivity deals and release windows. The impact on the right to property is therefore neutral.

Option 2 allows reaching the policy objective in a proportionate manner, focusing on facilitating contacts and negotiations between stakeholders without interfering with their contractual freedom.

### **3.4. OUT-OF-COMMERCE WORKS IN THE COLLECTIONS OF CULTURAL HERITAGE INSTITUTIONS**

#### **3.4.1. What is the problem and why is it a problem?**

**Problem:** *Digitisation and dissemination of out-of-commerce works held by cultural heritage institutions, including across borders, in 'mass digitisation' projects, is adversely affected by difficulties in clearing rights*

Description of the problem: As part of their dissemination missions, cultural heritage institutions (hereafter: 'CHIs') are willing to digitise works held in their collections and disseminate them to the public, notably online, including across borders.<sup>157</sup> This activity is particularly relevant when collections are out-of-commerce (hereafter: 'OOC'),<sup>158</sup> as OOC works are not available via any other channel but can still hold great cultural, scientific, educational, historical and entertainment value.<sup>159</sup>

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<sup>157</sup> The cultural importance of digital heritage collections is reflected in the well-established EU policy on the digitisation and online accessibility of cultural material, notably as outlined in the Recommendation of the European Parliament and of the Council of 16 November 2005 on film heritage and the competitiveness of related industrial activities (2005/865/CE), the Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation (2011/711/EU), the Council conclusions on the digitisation and online accessibility of cultural material and digital preservation (10-12 May 2012), the Commission Communication "Towards an integrated approach to cultural heritage for Europe" (COM(2014) 477 final), and the creation of the Europeana project.

<sup>158</sup> OOC works are works still under copyright protection, copies of which are not commercially available to the public through the customary channels of access and are not expected to become available in the future. See more specific definition of OOC works under Options 1 and 2 below.

<sup>159</sup> Numerous institutional respondents to the 2013-2014 public consultation pointed to a large demand from citizens, teachers, students and researchers for the digital availability of works in heritage

The digitisation and dissemination of in-copyright OOC works as part of 'mass digitisation'<sup>160</sup> efforts is however faced by distinct difficulties and high transaction costs for clearing the relevant rights.<sup>161</sup> This problem contrasts with the inherently low current commercial value of the works at stake.

It is very difficult to give an estimation of the number of works that remain locked within the walls of CHIs as a direct consequence of copyright-related issues, as the feasibility of mass digitisation projects depends on a variety of factors.<sup>162</sup> In a recent survey of cultural institutions, respondents estimated that only 55% of their digital collections<sup>163</sup> are available on their institutional website, 28% in a national online aggregator<sup>164</sup> and 22% on Europeana.<sup>165</sup> These data do not distinguish between in-copyright and public domain works and among the different possible causes. It is however reasonable to expect that if only copyright-protected works were considered, the level of works available online would be lower. Furthermore, practitioners in this field say that the relative underrepresentation of works from the 20<sup>th</sup> century (known as the '20<sup>th</sup> century black hole'), particularly its second half, and, generally speaking, of sound recordings and audiovisual works<sup>166</sup> in online collections is an illustration of the correlation between the copyright status of works in CHIs collections and their availability online. For example, only 10.93% of works in a recent sampling made by the Europeana Foundation of works showing up in the Europeana portal belong to the second half of the 20th century.<sup>167</sup>

Drivers: [*Size of OOC collections, age and type of works*] Difficulties in rights clearance and transaction costs affecting mass digitisation are mainly related to the nature of the works involved:

- The *size* of OOC collections that CHIs wish to digitise and further disseminate is often large,<sup>168</sup> multiplying the resources that are required for rights clearance.<sup>169</sup> For example,

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collections, particularly from the 20<sup>th</sup> century (which are likely to be still protected by copyright in most cases).

<sup>160</sup> 'Mass digitisation' refers here to large-scale projects for the digitisation and making available online of collections or parts of collections of a given CHI.

<sup>161</sup> These are the reproduction and making available rights for online dissemination, but might also include the broader communication to the public right and the distribution right.

<sup>162</sup> Copyright-related issues are only part of the factors influencing the feasibility of digitisation projects by CHIs. Among other aspects is a significant funding challenge. In 2010, it was estimated that digitising the collections of Europe's museums, archives and libraries would cost EUR 100 billion (N. Poole, "The Cost of Digitising Europe's Cultural Heritage. A Report for the Comité des Sages of the European Commission", November 2010). The cost of digitising the whole European film heritage would range between EUR 500 million and 2 billion (T. Baujard *et al.*, "Challenges of the Digital Era for Film Heritage Institutions", December 2011). Other organisational, legal (notably data protection) and skill-related questions also play a crucial role in determining the feasibility of digitisation projects. On copyright and digitisation, see also Annex 9B.

<sup>163</sup> Intended as comprising both digital reproductions of analogue works and born-digital works, and the related metadata.

<sup>164</sup> See Annex 9A for more information on aggregators.

<sup>165</sup> G.J. Nauta – W. van den Heuvel, DEN Foundation on behalf of Europeana/ENUMERATE, "Survey Report on Digitisation in European Cultural Heritage Institutions 2015", June 2015.

<sup>166</sup> The latter are considered the most expensive to digitise in the first place, but also likely to be in-copyright in larger numbers than other types of work given the much more recent development of these modes of production.

<sup>167</sup> The sample covered works from 1800 to today. See Annex 9C for more on this specific figure and illustrations of the '20th century black hole' and the presence of sound and audiovisual works in online digital collections.

<sup>168</sup> See Annex 9A for data and examples on the extent of cultural heritage collections in Europe (data do not distinguish between in-copyright and public domain works, or between OOC and non-OOC works, but give a clear indication of the scale of digitisation efforts).

in a project on the history of genetics carried out in the UK on a collection of books from the 20<sup>th</sup> century, 5,459 individual authors were identified for 1,620 works, with 5 % of the works having more than 10 authors.<sup>170</sup>

- Works are often *old*<sup>171</sup> and have been, by definition, out of circulation. This means right holders (or those who can clear the rights on their behalf) may be difficult to find and that the chain of title can be considerably long, complex and subject to uncertainty.<sup>172</sup>
- The *type* of many of the works that are important from a heritage perspective – for example newsreels, photos, unpublished materials, or works that have never been intended for commercial circulation, such as political leaflets or trench journals<sup>173</sup> – means that rights may have never been managed in any way.

Time-demanding rights clearance means high transaction costs for CHIs: attempts to quantify such costs in a general way are difficult as each collection and process is different. Quantifications can however be based on individual case studies; available ones suggest figures varying between approximately EUR 50 and 100 for a single book, between EUR 5.70 and EUR 50 for a single poster, between EUR 0.70 and EUR 1.70 for a single photograph, EUR 27 for a short amateur film.<sup>174</sup>

[*Suitable licensing mechanisms only available in some MS and for some types of works*] Collective licensing, whereby single contracts are concluded with a collective management organisation (hereafter: 'CMO') for entire collections of works, can be an evident answer to the transaction costs problem mentioned above. Yet, collective management of rights is not available for all types of works<sup>175</sup> and CMOs may only grant licences for the rights mandated to them by the right holders that they represent. Given the nature of the works at stake, however, it is quite common that part of their right holders are not represented in the relevant CMOs. This makes it impossible for the latter to issue a licence that also comprises the rights of such 'outsider' right holders. This situation undermines the usefulness of collective

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<sup>169</sup> The cost of clearing rights can be reduced by the effect of innovative tools and projects like ARROW and FORWARD, and the database foreseen by the Orphan Works Directive. Except for orphan works, these tools are however only of assistance in the identification of the copyright status, of the right holders and the available licensors of the rights, and of determining whether they are in or out of commerce), but not in obtaining authorisations to use works and in the negotiation of licences as such. Their scope extends to certain types of works only (see Annex 9I for more information).

<sup>170</sup> For more information on this project, see Annex 9D and R. Kiley, "Clearing rights to digitise books published in the 20<sup>th</sup> century: a case study prepared by the Wellcome Library, the Authors' Licensing and Collecting Society and the Publishers Licensing Society", June 2013.

<sup>171</sup> As regards for example, their date of publication.

<sup>172</sup> This can be a typical problem in Central and Eastern European MS that underwent transitions into and out of socialist economic systems.

<sup>173</sup> Trench journals are works authored by and distributed among military personnel engaged in conflict, notably during WWI. Other types of relevant works that the Commission services came across in preparation of this IA include maps, postcards, posters, calendars, advertisement material, menus, school yearbooks, letters, annual reports, broadcasts, documentaries, screenplays, correspondence, cartoons, plans, drawings, herbaria, experimental and amateur films, sound recordings (including old formats like shellac records and wax cylinders), pamphlets, leaflets, government publications, ancillary and publicity materials related to other works, in addition to films, phonograms, books, newspapers and magazines, sheet music, paintings, sculptures, and other artistic objects.

<sup>174</sup> Data in this area was only available in the form of case-studies. Further data is presented in Annex 9D.

<sup>175</sup> In the print sector, for instance, collective management plays an important role in licensing, as does for musical compositions. It is less widespread for visual works. In the audiovisual sector, on the other hand, licensing mostly takes place on an individual basis, which is the preferred licensing mechanism, including for the use in question, according to a large number of film producers who responded to the 2013-2014 public consultation. See Annex 9F for an overview of collective management practices per sector.

licensing in many of the cases at hand, leaving, again, individual rights clearance as the only solution for many works.

Some MS have addressed the latter problem by establishing in national law, for example through extended collective licensing (ECL) or presumptions of representation, that licences issued by a CMO can apply to works of outsiders, under certain conditions, including the possibility for individual right holders to 'opt out' their works from these licences.<sup>176</sup> Under such legislation, CMOs can issue licences that cover entire collections, including works of outsiders, in full legal certainty. This means, for example, that if a CHI wishes to digitise and make available a collection of OOC books and part of the right holders in the collection is not represented in the relevant CMO, that CMO will be allowed by the law, under certain conditions, to grant a licence to the CHI covering the full collection, except for right holders that express their opposition to their works to be used. These mechanisms are however not available in all MS for the uses in questions and for all kinds of works.<sup>177</sup>

[*Lack of cross-border effect of national solutions*] Where they are present, they only apply within the MS that has enacted them, in practice limiting access to works licensed under this type of mechanisms to one national territory.

Some of such national developments follow a 2011 Memorandum of Understanding<sup>178</sup> (hereafter: 'the 2011 MoU') agreed between right holder and library representatives under the auspices of the European Commission to facilitate the clearance of rights in OOC books and learned journals.<sup>179</sup> The 2011 MoU however only applies to some categories of works.<sup>180</sup> Successful national legislative and contractual solutions have also been preceded by stakeholder consultation processes, sometimes reflected in model contracts.<sup>181</sup> Such experiences point to the important role played by stakeholder cooperation and engagement with public authorities on the field in the achievement of practical solutions, but this has occurred in some specific areas and MS only.<sup>182</sup>

Consequences: CHIs regularly report that difficulties in clearing rights can be, and often are, a

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<sup>176</sup> See Annex 9E for more information on these mechanisms and actual examples.

<sup>177</sup> See also European Commission, "Report on the Implementation of Commission Recommendation 2011/711/EU – 2013-2015", 2016 [*to be published (copy available on request)*].

<sup>178</sup> Memorandum of Understanding on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works, signed on 20 September 2011 ([http://ec.europa.eu/internal\\_market/copyright/docs/copyright-info/20110920-mou\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/copyright-info/20110920-mou_en.pdf)).

<sup>179</sup> The MoU acknowledges the need that MS adopt legislative measures backing collective management schemes for rights clearance, foreseeing safeguards for non-represented right holders, and calls for the European Commission to intervene to ensure legal certainty in a cross-border context as follows: "Calling on the European Commission, to the extent required to ensure legal certainty in a cross-border context, to consider the type of legislation to be enacted to ensure that publicly accessible cultural institutions and collective management organisations which enter into a licence in good faith applying these key principles are legally protected with regard to licensed uses of works of rightholders who have been presumed to be within the scope of the licence".

<sup>180</sup> The potential of the 2011 MoU to act as a model for other types of works was recognised by the Commission Recommendation of 11 October 2011 on the digitisation and online accessibility of cultural material and digital preservation (2011/711/EU), which invited MS to create "the legal framework conditions to underpin licensing mechanisms identified and agreed by stakeholders for the large-scale digitisation and cross-border accessibility of works that are out-of-commerce".

<sup>181</sup> For example, model contract terms based on extended collective licensing (ECL) for the digitisation and making available of images contained in CHI collections were finalised in October 2015 in SE. This was the outcome of stakeholder working groups set up in 2013 with the involvement of the national secretariat for national coordination of digitisation, digital preservation and digital access to cultural heritage (Digisam) and visual CMO Bildupphovsrätt (BUS). The model contract terms are not specific to OOC works only.

<sup>182</sup> See also Annex 9G for more information on the role of stakeholder cooperation in this area.

defining barrier for proceeding with a project at all, or in selecting the works that will be included in one. This causes projects to be skewed toward public domain and pre-20<sup>th</sup> century works, or newer collections) or OOC collections remaining simply unavailable beyond CHI's premises, and not accessible across borders.<sup>183</sup> More broadly, this situation means that the societal and economic benefits of the digitisation and dissemination of digitised cultural heritage are missed,<sup>184</sup> including for certain right holders in terms of better discoverability of 'dormant' works that can lead to further exploitation and therefore revenue possibilities.

How the problem would evolve: The difficulties and costs of clearing rights in this area are influenced by various factors, but they are likely to persist for the foreseeable future. Although in the wake of the 2011 MoU and of EU recommendations<sup>185</sup> the number of MS has increased that have national provisions allowing for collective licences also covering the right of 'outsiders', these solutions are not expected to develop across the EU in a uniform way. The main observed trend is for them to cover literary works only. Furthermore, cross-border barriers will remain as those solutions only have national application.

### 3.4.2. What are the various options to achieve the objectives?

#### Baseline

No policy intervention. CHIs would continue to rely mainly on individual licensing, or collective licensing where possible. Collective licensing would be supported by national legal mechanisms to cover the rights of outsiders only in a limited number of MS.<sup>186</sup> Licences resulting from these mechanisms would be limited to one national territory. The 2011 MoU would continue to call on MS to adopt such mechanisms for books and learned journals, and to provide a basis for further collective licences for this category of works.

#### *Stakeholder views*

CHIs consider the status quo insufficient and would not support lack of policy action, as wouldn't individual end users/consumers. Within the cultural industries, views would be more mixed with some players, for example among film producers and commercial broadcasters, supporting no intervention at EU level, while others, such as authors and CMOs, favourable to EU intervention to varying degrees (at least to address uncertainty in cross-border contexts).<sup>187</sup>

#### **Option 1 – EU legislative intervention (i) requiring MS to put in place legal mechanisms to facilitate collective licensing agreements for OOC books and learned journals<sup>188</sup> and to foster national stakeholder frameworks, and (ii) giving cross-border effect to such legal mechanisms.**

- Type of mechanisms: MS would be required to provide for adequate mechanisms in their legal system ensuring that voluntary collective licensing agreements between CHIs

<sup>183</sup> See R.Peters – L.Kalshoven, "What rights clearance looks like for Cultural Heritage Organisations – 10 case studies", Europeana Factsheet, 31 March 2016, for concrete examples.

<sup>184</sup> See Annex 9J for more information on the social and economic impact of digitisation.

<sup>185</sup> Notably the Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation (2011/711/EU), which encouraged MS to create "the legal framework conditions to underpin licensing mechanisms identified and agreed by stakeholders for the large-scale digitisation and cross-border accessibility of works that are out-of-commerce", and a similar call in the Council Conclusions on the digitisation and online preservation of cultural material and digital preservation of 10-11 May 2012.

<sup>186</sup> For examples of MS where this is already possible, via ECL, presumptions of representations or similar mechanisms, see Annex 9E. See also European Commission, "Report on the Implementation of Commission Recommendation 2011/711/EU – 2013-2015", 2016.

<sup>187</sup> These stakeholder views are also evidenced by the 2013-2014 public consultation.

<sup>188</sup> In line with the scope of the 2011 MoU.

operating<sup>189</sup> and CMOs for the digitisation and dissemination of OOC books and learned journals (including embedded images) in their collections can also apply to the works of outsiders.

- Scope of the mechanisms: (i) OOC books and learned journals first published in the MS where the licence is sought, (ii) the rights of reproduction, communication to the public (including making available) and distribution, and (iii) non-commercial uses.<sup>190</sup> Books and learned journals would be considered OOC as defined in the 2011 MoU.<sup>191</sup> MS would have the possibility to establish further national-specific criteria for works to be eligible for the mechanisms in question,<sup>192</sup> which will have to be done in consultation with concerned right holders and users.
- Safeguards for right holders: these mechanisms would have to reflect a set of features established at EU level to provide for adequate safeguards for right holders, notably outsiders, as regards: (i) sufficient representativeness of the licensor CMO of right holders in the relevant category of works, rights and uses in the MS where the licence is sought, (ii) the possibility for outsiders to opt out of licences prior and during licence terms, (iii) equal treatment of CMO members and outsiders, and (iv) transparency/publicity obligations. MS would otherwise remain free to choose the suitable mechanism according to their legal traditions, practices or circumstances.<sup>193</sup>
- Cross-border effect: the legal possibility for the part of the licences that relates to outsiders to apply across borders in the EU would be established by EU law. Such cross-border effect would kick in after adequate information on the collections of works covered by the licence has appeared on a publicly accessible European transparency web portal for a sufficient period of time, except for works of authors that might have opted out during that period.
- Stakeholder frameworks: MS would also be required to foster national stakeholder frameworks and dialogue at national level with a view to facilitate the practical implementation of the licensing mechanisms deriving from the obligation defined above, beyond purely legal aspects, and to achieve similar outcomes as the 2011 MoU in other sectors.

#### *Stakeholder views*

Most CHIs would consider this option not satisfactory because it covers books and learned journals only (as would individual users/consumers),<sup>194</sup> even if they would welcome legal certainty as regards the cross-border effect.<sup>195</sup> Views within the right holder constituencies would vary. Some, like certain authors and CMOs, would welcome the option as it ensures cross-border effect to the licensing mechanisms foreseen by the 2011 MoU. Others, especially outside of the books and journals sector, would consider it irrelevant or oppose this approach.

<sup>189</sup> Such as publicly accessible libraries, educational establishments and museums, as well as archives and film or audio heritage institutions.

<sup>190</sup> With the possibility for CHIs to generate revenues but only to cover and recoup their costs.

<sup>191</sup> Under this definition, a work is considered out-of-commerce when the whole work, is, in all its versions and manifestations, no longer commercially available in customary channels of commerce, regardless of the existence of tangible copies of the work in libraries and among the public, including through second hand bookshops or antiquarian bookshops.

<sup>192</sup> For example a cut-off date, i.e. books published before a certain date (as it is the case in DE), or an original language criterion, like in PL legislation where the OOC rules are not applicable to works written in a foreign language and translated into Polish.

<sup>193</sup> See Annex 9E for a description and examples of possible mechanisms, which include for example presumptions of representation or ECLs.

<sup>194</sup> As resulting from those individual users/consumers and consumer organisation who responded on this specific matter in the 2013-2014 public consultation.

<sup>195</sup> This view was very frequent among CHI responses to the 2013-2014 public consultation.

Some right holder sectors might be willing to engage in stakeholder dialogues with a view to voluntary solutions.<sup>196</sup>

**Option 2 – EU legislative intervention (i) requiring MS to put in place legal mechanisms to facilitate collective licensing agreements for all types of OOC works and to foster national stakeholder frameworks, and (ii) giving cross-border effect to such legal mechanisms.**

Same as Option 1, but:

- Covering all types of OOC works, with a similar attachment to a single MS as in Option 1. Licences would have to be sought in the MS of first publication or, in the absence of publication, first broadcast, or – in the case of cinematographic or audiovisual works – the MS where the headquarters or habitual residence of the producer is located.<sup>197</sup> In cases where attachment to a MS cannot be established with certainty after reasonable efforts, the licence would have to be sought in the MS where the CHI is established.
- A work would be considered OOC when the whole work is, in all its translations, versions and manifestations, not being communicated, made available or distributed to the public through customary channels of access, and cannot be reasonably expected to become so. MS would have the same possibility as in Option 1 to establish further national-specific criteria.

*Stakeholder views*

A number of CHIs and CHI professionals, notably national librarians, would be positive about this option as the intervention covers all categories of works and is in line with certain national experiences that they consider successful. Others would still not find it satisfactory, given their preference for an exception.<sup>198</sup> Some right holders, for instance among authors and CMOs would also find the large scope of the option satisfactory, and engage in the stakeholder processes that the option foresees. Other segments of the industry, for example newspaper publishers, commercial broadcasters and film and record producers, would not support this option, also in view of its reliance on collective management.<sup>199</sup>

**3.4.3. What are the impacts of the different policy options and who will be affected?**

*Approach*

The options presented above would mainly affect institutional users (CHIs) (and by extension people with an interest in accessing digitised cultural heritage through them, i.e. end-users), as well as right holders in OOC works held by CHIs (and, by extension, CMOs). The impacts affecting these two groups are presented separately.

- For CHIs, the impact on lower transaction costs and the possibility to carry out-cross-border uses was assessed, with reference to the possibility for CHIs to obtain collective licences with that effect. These effects are both **economic** and **social** in nature, as they influence the availability of digitised cultural heritage in the EU.
- For right holders, the following impacts, **economic** in nature, were assessed: impacts (i) on revenues, (ii) on the exercise of rights (in other words, on their freedom not to have their works exploited or to exploit them directly and in ways other than by CHIs), and (iii) on possible administrative burdens.

The policy options are also assessed in relation to their **general social impacts** (cultural diversity, the possibility

<sup>196</sup> An overall strong preference for voluntary and licence-based solutions is clear from right holder submissions to the 2013-2014 public consultation.

<sup>197</sup> Similarly to the rules determining the MS where a diligent search must be undertaken before a work can be established as being an orphan work for the purposes of the Orphan Works Directive.

<sup>198</sup> CHIs in the 2013-2014 public consultation stressed the importance of solutions covering all types of works and many of them indicated their preference for an exception, as generally did individual end users/consumers and consumer organisations. CHI respondents also referred to collective management solutions, notably ECL, as an alternative.

<sup>199</sup> These various views are present in right holder responses to the 2013-2014 public consultation.

for end users to have access to digitised cultural heritage, and influence on the general societal impacts of digitisation)<sup>200</sup> and as to the impacts on **fundamental rights** (property right, freedom of the arts and sciences, and right to education).

The assessment below is mainly qualitative, as suitable data was not available to produce quantitative assessments. Quantitative examples of the transaction costs that the considered options aim to reduce are included in Annex 9D. Practical impacts are also illustrated in a dedicated case study under each of the three options, which can be found in Annex 9H.

## **Baseline**

### **IMPACTS ON STAKEHOLDERS**

#### **CHIs**

Transaction costs and cross-border uses: This option would not have any direct impact on rights clearance and transaction costs and would entirely depend on the solutions available at national level. CHIs in MS whose legal frameworks already allow for licences also covering the rights of outsiders for the digitisation and dissemination of OOC works<sup>201</sup> would already benefit from the possibility of substantially lower transaction costs. The issues described in the description of the problem above would persist in the majority of MS, as that possibility is present in only a few MS, and mainly for books and other literary works (there are legal frameworks which could also be used for other types of OOC works in an even smaller group of MS).<sup>202</sup> In the absence of EU intervention, licences concluded via these mechanisms covering outsiders, be them specific to certain types of works or not, would be valid for a single MS territory (at least as regards the rights of outsiders). Opportunities would be larger for literary works than in other sectors also because suitable licensing structures are widespread in this area and much less in others, like for film and audio-visual works.<sup>203</sup> Irrespective of the broader category of works, possibilities to obtain suitable collective licences could be limited for works that CMOs do not traditionally licence, for example because they have never been intended for commercial use,<sup>204</sup> due for example to lack of familiarity of CMOs with them and their right holders.

Other MS might decide in the future to adapt their legal frameworks. Such evolution is however entirely dependent on the will of individual MS, and would probably not take place in a systematic manner, particularly beyond books and learned journals (where the 2011 MoU has generated momentum). Resulting licences would still be limited territorially.

#### **Right holders**

Revenues: Possibilities for right holders, including outsiders, to receive new or extra revenue from collective licences for OOC works can take the form of payments generated by the initial licences with CHIs, and from subsequent licensing opportunities stemming from the exposure of works that are otherwise not easily visible. Under the baseline scenario, these opportunities would not increase and be subject to the same limitations as regards MS territories and categories of works as discussed under "CHIs".

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<sup>200</sup> Given the difficulty in identifying and quantifying precise impacts on the latter aspect, reference is made to Annex 9J, which elaborates on the general social and economic impacts of the digitisation of cultural heritage.

<sup>201</sup> See Annex 9E for a description and examples of possible mechanisms (ECLs, presumptions of representation or similar).

<sup>202</sup> Notably in MS that have general extended collective management systems, i.e. whose scope in terms of uses and types of works is not limited *a priori* by law.

<sup>203</sup> Both in terms of the existence of CMOs and of the mandates they have or can expect to have from right holders to proceed with licensing that go beyond the specific functions that are traditionally assigned to them (e.g. management of cable retransmission rights).

<sup>204</sup> For example political leaflets, sketches, non-commercial sound recording or amateur footage.

Impact on the exercise of rights: There would be no change for right holders. In those MS and for those categories of works for which mechanisms exist through which licences between CMOs and CHIs can also cover the rights of outsiders and suitable licensing structures are in place, right holders should still retain the freedom to decide on the exploitation of their works through the opt-out possibilities that such schemes normally foresee.<sup>205</sup>

Possible administrative burden: Right holders may incur costs for exercising their opt-out possibility. Licensor CMOs can also incur specific costs related to the use of the existing mechanisms, for example related to publicity/transparency, the handling of opt-outs and the distribution of remuneration to outsiders.<sup>206</sup> The baseline scenario would have no impact as such in this area either, as these costs are only relevant where the mechanisms referred to in the previous paragraph already exist today.

## **SOCIAL IMPACTS**

No impact on cultural diversity in terms of access by people to a larger and more diverse set of works held in CHIs and of incentives for creators to keep creating works.

Additional opportunities for end-users to access their cultural heritage would be limited, as regards MS and types of works, as outlined under "CHIs" above. The same limitations would more broadly apply to the social and economic impacts associated to digitisation.<sup>207</sup>

No specific contribution to the EU's policy on digitisation and online accessibility of cultural heritage.

## **IMPACTS ON FUNDAMENTAL RIGHTS**

No impact on copyright as a property right, as recognised by Article 17(2) of the European Charter of Fundamental Rights, nor any substantial impact on the arts and scientific research, relevant for the freedom of the arts and sciences (Article 13), and on education, protected under Article 14.

**Option 1 – EU legislative intervention (i) requiring MS to put in place legal mechanisms to facilitate collective licensing agreements for OOC books and learned journals<sup>208</sup> and to foster national stakeholder frameworks for these and other works, and (ii) giving cross-border effect to such legal mechanisms.**

## **IMPACTS ON STAKEHOLDERS**

### **CHIs**

Transaction costs and cross-border uses: Option 1 would deliver solutions in all MS for books and learned journals. These could take the form of ECLs, presumptions of representations or similar systems, depending on national circumstances. Combined with the large availability of collective licensing practices and CMOs in this sector, this would mean that the possibility for CHIs to benefit from lower transaction costs to obtain comprehensive licences for OOC books and learned journals would exist largely across Europe for this category of works. For example, the transaction costs emerged in the digitisation project on the history of genetics mentioned in section 3.4.1, estimated at approximately GBP 45,000 for 987 works made

<sup>205</sup> See Annex 9E for more on opt-outs as part of this type of licensing.

<sup>206</sup> These costs can vary depending on the design of each mechanism and the associated administrative procedures (notably to opt works out). Costs for CMOs only apply if the CMO decides to use those mechanisms, which remain voluntary. See Annex 9H for an illustrative case study and a table illustrating impacts on the different stakeholder categories.

<sup>207</sup> For more on the possible social and economic impacts of the digitisation of cultural heritage see Annex 9J.

<sup>208</sup> In line with the scope of the 2011 MoU.

available, could be reduced to the costs of negotiating one licence with the relevant CMO,<sup>209</sup> and this would be legally possible everywhere in the EU.

The possibility to actually use those legal frameworks would be accelerated by the stakeholder frameworks that MS would have to put in place, helping to address practical issues, like for example the absence of suitable licensing structures in certain MS, CMOs' lack of familiarity with types of works that they do not traditionally licence, the need for literary and visual works CMOs to work jointly (for embedded visual works), and other licensing aspects. Given the current estimations concerning individual rights clearance for books,<sup>210</sup> savings in transaction costs that this option would entail for CHIs across the EU are expected to be meaningful.

The above impacts would however only materialise in a substantial way for books and learned journals. For other works, the situation would be similar to the baseline scenario in the short term.<sup>211</sup> In the long term, the stakeholder frameworks that the MS would have to foster could improve the situation to some extent, through processes similar to the 2011 MoU. These developments, which are difficult to predict precisely, could in turn, but only in the even longer term, induce MS to adapt their legal frameworks at national level. The resulting licences would however still be limited territorially as this option would only give cross-border applicability to licences for books and learned journals.

### **Right holders**

Revenues: New revenue opportunities for right holders as described under the baseline scenario would potentially emerge in all MS for books and learned journals. Such opportunities would however not increase for right holders in other types of works, or only in the long term as a consequence of the stakeholder frameworks which MS would have to foster.

Impact on the exercise of rights: Right holders in books and learned journals would retain the possibility to prevent the dissemination of their works by a CHI. While members of licensor CMOs would do so by the normal management of their mandates to the CMO, outsiders would rely on the opt-out possibilities that licensing mechanisms foreseen by this option would have to ensure. These would be compounded by adequate transparency/publicity measures on relevant licences and opt-out possibilities, which MS would also be obliged to ensure. Foreign right holders, including from outside of the EU, would not be at a substantial disadvantage as only rights in books and learned journals first published in the country where the licence is sought could be licensed under such mechanisms. The obligation to publish adequate information on the collections of works to be used in a publicly accessible European transparency web portal for an appropriate period of time would mitigate the risk of licensing works against the will of individual right holders, including foreign ones, or of works that are OOC in a MS but still in commerce in another MS.

Possible administrative burden: The possible costs as described under the baseline would be potentially present for all right holders and CMOs in books and learned journals everywhere in the EU. The transparency/publicity obligations foreseen by this option would however help keeping those costs to a reasonable level for right holders. The number of opt-outs that is

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<sup>209</sup> No data could be found to assess such cost, however it is expected to be lower than GBP 45,000.

<sup>210</sup> See Annex 9D for available examples and estimations as regards books.

<sup>211</sup> CHIs will be in the position to ask for collective licences covering the rights of outsiders only in the limited number of MS and, within that group, with more opportunities for music and, to a lesser degree, for visual arts than for film audiovisual works, and scarce or inexistent opportunities for works that CMOs are not used to licence, like works in CHI collections that have never been intended for commercial use.

reported from current experiences with extended collective licences, presumptions of representations or similar mechanisms at national level suggests that such costs would overall be limited. For example, only about 2% of the total book titles digitised and made available by the National Library of Norway as a result of an ECL licence were opted out.<sup>212</sup>

The effects described above for books and learned journals would extend to other types of works at the same pace and to the same extent as described under "CHIs" and not be present as regards the cross-border effect of licences.<sup>213</sup>

The European transparency web portal of OOC works would be built on the existing Orphan Works Database infrastructure, which is run by the European Union Intellectual Property Office (hereafter: 'EUIPO'). Thanks to the use of existing infrastructure and resources, it is estimated that the building cost of the portal infrastructure could range between EUR 500,000 and 700,000, with its annual maintenance amounting to approximately 15% of the building cost (i.e. in the range of EUR 75,000-105,000).<sup>214</sup> This cost would be covered by the budget of EUIPO.<sup>215</sup>

## **SOCIAL IMPACTS**

Positive impact on cultural diversity, as a larger set of books and learned journals that would otherwise remain confined to the premises of CHIs is expected to become available to the public, while incentives for authors to create new works would not be substantially affected. Opportunities for end-users to have access to cultural heritage would increase, but mainly as regards OOC books and learned journals and not for other types of works. The same limitation would apply to the broader social and economic impacts of digitisation.<sup>216</sup>

Positive contribution of this option to the objectives of EU's policy on digitisation and online accessibility of cultural heritage, as it increases the possibilities for OOC works to become available for end-users. These benefits will mainly concern literary works in the short term, with a possible positive impact for other works but only in the longer term.

## **IMPACTS ON FUNDAMENTAL RIGHTS**

There would be a limited impact on copyright as a property right, as recognised by Article 17(2) of the European Charter of Fundamental Rights. Possible positive impact on the arts and scientific research, relevant for the freedom of the arts and sciences (Article 13) and on education (right to education protected by Article 14), as more creative and learned material will be accessible.

**Option 2 – EU legislative intervention (i) requiring MS to put in place legal mechanisms to facilitate collective licensing agreements for all types of OOC works and to foster national stakeholder frameworks, and (ii) giving cross-border effect to such legal mechanisms.**

## **IMPACTS ON STAKEHOLDERS**

### **CHIs**

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<sup>212</sup> Data as of May 2015, provided to European Commission services by Norwegian CMO Kopinor. The scheme also includes in-commerce books. See Annex 9E for more on opt-outs in this case and other figures.

<sup>213</sup> See Annex 9H for an illustrative case study and a table illustrating impacts on the different stakeholder categories.

<sup>214</sup> These costs correspond to a first estimation based on existing experience with the Orphan Works Database.

<sup>215</sup> The creation of and budget allocation to the possible portal would be subject to decisions taken on the basis of the governance rules of EUIPO.

<sup>216</sup> See Annex 9J on these aspects.

Transaction costs and cross-border uses: Under Option 2, the presence of legal frameworks everywhere in the EU that allow for licences issued by CMOs to also cover the rights of outsiders would give CHIs the possibility to see their related transaction costs diminish considerably everywhere in the EU for the digitisation and dissemination of works. This would apply to all types of works, like photographs, for which, for example, an available case study<sup>217</sup> calculated individual rights clearing costs to be incurred for a collection of about 27,800 items by a CHI at approximately EUR 15,000. Under this option, it would be possible for the CHI to reduce that cost to the one of negotiating a single licence with a CMO. Licences concluded on the basis of such legal frameworks could have cross-border effect for all works too.

The stakeholder processes that MS would have to put in place would have the same purpose as in Option 1, i.e. lay the ground for a conducive environment, in practical and organisational terms, for such legal mechanisms to be used in practice. These would be particularly relevant in those MS and for those sectors where licensing structures are not widely available and collective management not widespread. In some sectors (e.g. audio-visual), without proper stakeholder engagement convened by public authorities, the practical effects of this option would not easily materialise, at least in the short term. It is expected that the presence in all MS and for all types of works of adapted legal frameworks would provide momentum for such stakeholder frameworks to produce results, especially when combined with the consultation with right holders and uses that MS would have to organise if they decide to introduce national-specific criteria for works to be eligible for the envisaged schemes.

### **Right holders**

*Impacts on right holders would be the same in nature as in Option 1, but would extend to a higher number of right holders because all types of works would be covered in all MS.*

Revenues: Opportunities are expected to arise concretely at different paces for different categories of works depending on the availability of suitable licensing structures as explained under "CHIs".

Impact on the exercise of rights: The safeguards for right holders, including from other MS and from outside of the EU, foreseen in Option 1 would also, *mutatis mutandis*, be present under this option, for works other than books and learned journals. The ability to retain the freedom to decide on the type of exploitation of works that may be held by CHIs is for example important in the cinema sector, where old films considered part of cultural heritage can attract renewed commercial interest and new commercial exploitation.<sup>218</sup> The systems envisaged under this option would not affect those possibilities because of the opt-out and the fact that works re-entering commercial channels would not be eligible anymore (as not OOC anymore).

Possible administrative burden: The impact would be the same in nature as in Option 1, but apply to all types of works.

The costs described under Option 1 for the setting up and management of the European transparency web portal of OOC by the EUIPO would apply under this option too. The use of the portal for all types of works could also lead to efficiency gains in the long term.

### **SOCIAL IMPACTS**

Positive impact on cultural diversity as it would facilitate access to all types of OOC works,

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<sup>217</sup> See Annex 9D. In this case, the clearance process did not take place.

<sup>218</sup> A commercial distribution sector specialised in heritage films (*films de patrimoine*) has for example developed in FR in the last few years.

while not substantially affecting incentives for authors to create new works.

Opportunities for access to digitised cultural heritage by end-users would increase and extend to all types of works. This would, accordingly, have a broader influence on the social and economic benefits associated to the digitisation of cultural heritage.<sup>219</sup>

Very positive contribution to the objectives of the EU's policy on digitisation and online accessibility of cultural heritage.

#### IMPACTS ON FUNDAMENTAL RIGHTS

The limited impact on copyright as a property right mentioned in option 1 would affect more right holders. Impact on the arts and scientific research, as well as education could be even more positive as all types of OOC works could become available.

#### 3.4.4. How do the options compare?

Option	Effectiveness	Efficiency	Impact on stakeholders	Social impacts and fundamental rights
<b>Baseline</b>	(0) relevant licensing opportunities only present in some MS and for books and literary works principally, with no multi-territorial applicability.	(0) No direct costs.	(0) Impacts on stakeholders would depend on developments at national level but not address territoriality issues.	(0) No impact on cultural diversity. No substantial impact on the possibility to access cultural heritage by end-users. No contribution to EU policy objectives on digitisation and online accessibility of cultural heritage. No impact on fundamental rights.
<b>Option 1 – Mechanisms to facilitate collective licensing agreements for OOC books and learned journals; cross-border effect of such mechanisms; stakeholder frameworks.</b>	(+) Relevant licensing mechanisms, with multi-territorial application, in place everywhere in the EU for books and learned journals (not for other works).	(-) Costs related to the set-up and management of the European transparency web portal.	(+) Opportunities for reduced transaction costs for CHIs and more OOC books and learned journals becoming available to the public. (0/+) Potential revenue opportunities for right holders while retaining their freedom to exploit their works otherwise. (0/-) Some costs related to the management of opt-out costs, expected to be limited.	(+) Positive impact on cultural diversity and on the possibility for people to access cultural heritage as more OOC books and learned journals can become available. Positive contribution to EU policy objectives on digitisation and online accessibility of cultural heritage. (-) Limited negative impact on fundamental rights.

<sup>219</sup>

See Annex 9J on these aspects.

<b>Option 2 – Mechanisms to facilitate collective licensing agreements for all OOC works; cross-border effect of such mechanisms; stakeholder frameworks.</b>	(++) Relevant licensing mechanisms, with multi-territorial application, in place everywhere in the EU for all types of works.	(-) Costs related to the set-up and management of the European transparency web portal.	(++) Opportunities for reduced transaction costs for CHIs and more works becoming available to the public. (0/+) potential revenue opportunities for right holders while retaining their freedom to exploit their works otherwise. (0/-) Some costs related to the management of opt-out costs, expected to be limited.	(++) Positive impact on cultural diversity as more works are likely to be made accessible and therefore on the possibility for people to access cultural heritage. (++) Very positive contribution to the EU policy objectives on digitisation and online accessibility of cultural heritage. (-) Limited negative impact on fundamental rights.
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**Option 2** is the preferred option as it would, on the one hand, put in place legal frameworks conducive to a reduction of transaction costs and make possible the specific licences required for the uses at stake, for all works and in all MS, including across borders. On the other hand, it would not engender particular compliance costs (the mechanisms introduced would be an enabling element which remains subject to voluntary use), nor affect the interests of right holders to any tangible extent, or imply additional costs for them, for example in terms of missed revenues or licensing opportunities (it creates on the contrary potential opportunities for new revenue and exposure). The baseline option would not be effective and Option 1 would be effective only for certain types of works. As applying to all types of works, Option 2 is the most effective and efficient.

The option is also proportionate, including its impacts on fundamental rights, in that it addresses the underlying problem without generating particular costs or putting disproportionate obligations on stakeholders.

## 4. ADAPTING EXCEPTIONS TO DIGITAL AND CROSS-BORDER ENVIRONMENT

### 4.1. INTRODUCTION

**4.1.1. Background** The EU copyright legal framework harmonises rights of authors and neighbouring right holders and seeks to harmonise “exceptions and limitations”<sup>220</sup> to these rights, although most of them are optional for the Member States (MS) to implement. An “exception”<sup>221</sup> to an exclusive right means that a right holder is no longer in a position to authorise or prohibit the use of a work or other protected subject matter<sup>222</sup>: the beneficiary of the exception is already authorised by law to do so. Exceptions are provided for in order to facilitate the use of protected content in specific circumstances (for example where the transaction costs involved in acquiring authorisation outweigh the economic benefits of doing so) and/or to facilitate the achievement of specific public policy objectives such as education and research. Beneficiaries of the exceptions may be individuals or institutions.

This section of the Impact Assessment (IA) focuses on exceptions that play a central role to achieve important public policy objectives at EU level but that at the same time are not fully adapted to the current digital and cross-border environment. While no formal evaluation of the EU legal framework for copyright exceptions has been conducted, the review process carried out between 2013 and 2016 allowed to gather information and evidence on the implementation of exceptions in MS and their functioning in the digital environment.<sup>223</sup>

The need to facilitate use of copyright-protected material for specific purposes in this context has been acknowledged in the Digital Single Market Strategy.<sup>224</sup> Further to the review process and the Communication "Towards a modern, more European copyright framework" of December 2015<sup>225</sup>, three possible areas of intervention have been identified: education, research and preservation of cultural heritage. Specific copyright exceptions, optional for MS, exist in EU law for "specific acts of reproduction"<sup>226</sup> (often used for preservation) and "illustration for teaching or scientific research".<sup>227</sup> In these areas, digital technologies have allowed to explore new types of uses (e.g. digital preservation, digital and online educational activities, text and data mining (TDM)) which are not always clearly allowed under the current copyright rules. This legal uncertainty negatively affects the functioning of these exceptions in the digital environment and the way in which users can benefit from the potential of these technologies. Furthermore, while cross-border activities are increasingly important for the activities of libraries, education establishments and research institutions, the current EU legal framework does not allow users to benefit from the exceptions on a cross-border basis. In the Communication of December 2015, the Commission also highlighted the exception authorising libraries and other institutions to allow on-screen consultation of works for research and private study on their premises and the need to assess its functioning in the

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<sup>220</sup> Exceptions are set out in the InfoSoc Directive (Directive 2001/29/EC, Article 5), the Software Directive (Directive 2009/24/EC, Articles 5 and 6), the Directive on the Legal Protection of Databases (Directive 96/9/EC, Articles 6 and 9), the Directive on Rental Right and Lending Right (Directive 2006/115/EC, Articles 6 and 10) and the Orphan Works Directive (Directive 2012/28/EU, Article 6).

<sup>221</sup> "Exceptions" is used in this IA to encompass “exceptions and limitations” to copyright.

<sup>222</sup> "Works" is used in this IA to encompass works and other protected subject matter.

<sup>223</sup> The results of the review process are presented in Annex 4 (The copyright review process: summary of the main relevant findings).

<sup>224</sup> Communication "A Digital Single Market Strategy for Europe", May 2015. COM(2015) 192 final.

<sup>225</sup> COM(2015) 626 final.

<sup>226</sup> Article 5(2)c of the InfoSoc Directive.

<sup>227</sup> Article 5(3)a of the InfoSoc Directive and Article 6(2)b of the Directive on the Legal Protection of Databases.

digital environment. This assessment would need to take into account the outcome of a CJEU case on the closely inter-twined issue of electronic lending by libraries which is currently pending;<sup>228</sup> it is therefore not part of this IA.

#### **4.1.2. Why should the EU act?**

##### **Legal basis**

The EU's right to act follows from Article 114 of the Treaty on the Functioning of the European Union (TFEU), which confers on the EU the power to adopt measures for the establishment and functioning of the internal market and has provided legal basis for a wide range of EU instruments in the area of copyright.

In Directive 2001/29/EC (the "InfoSoc Directive"), the EU exercised its competence as regards the rights which are relevant for online dissemination (notably the reproduction and making available rights) and the exceptions applicable to such rights. Article 5 provided for an exhaustive list of exceptions, including the exception for preservation, teaching and research mentioned above. Any change in the harmonised framework concerning the scope of exceptions or the introduction of their cross-border effect would need to rely on the same legal bases.

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

##### **Subsidiarity and added value**

The existing level of harmonisation limits the possibility for MS to act in the area of copyright as they cannot unilaterally alter the scope of the harmonised rights and exceptions. Therefore, the need to update some of the existing exceptions or to introduce new exceptions, in particular to reflect new digital uses, makes the amendment of EU legislation inevitable.

Moreover, EU intervention is indispensable to achieve one key objective of the copyright modernisation, which is to guarantee legal certainty in cross border situations. This can only be achieved by making the relevant exceptions mandatory for MS to implement, increasing their level of harmonisation, and, when relevant, recognising their cross border effect. None of this can be achieved by MS legislation. Without intervention in EU law, beneficiaries of the exception would face legal uncertainty and may not be able to rely on the exception in cross-border situations (for example teachers in distance learning programmes making content available under the teaching exception in one MS would need to verify whether the same acts are allowed under the exceptions in MS where the students are located, and if not, may have to obtain authorisation from right holders). Therefore, MS acting alone could not sufficiently address these problems and the objectives can be only achieved by EU action.

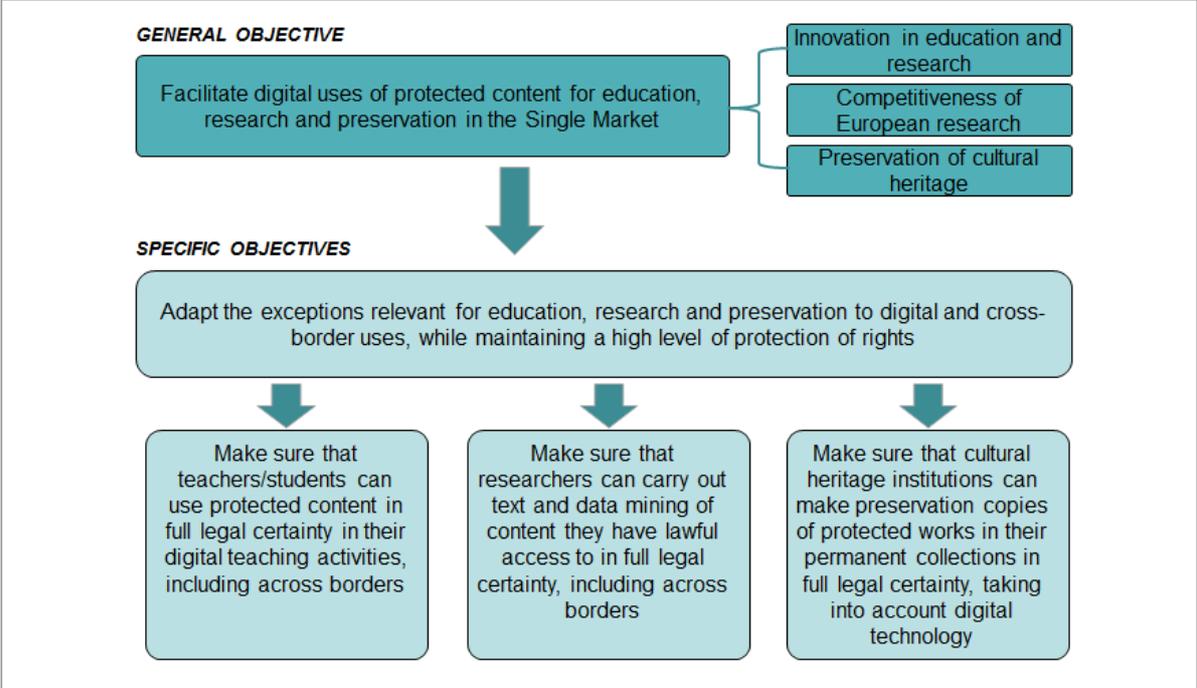
#### **4.1.3. What should be achieved?**

The general objective of EU intervention is to facilitate digital uses of protected content for education, research and preservation in the Single Market. Through this objective, EU intervention should contribute to promote digital innovation in education and research, foster the international competitiveness of European research and encourage the preservation of cultural heritage.

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<sup>228</sup> Case C-174/15, Vereniging Openbare Bibliotheken v Stichting Leenrecht.

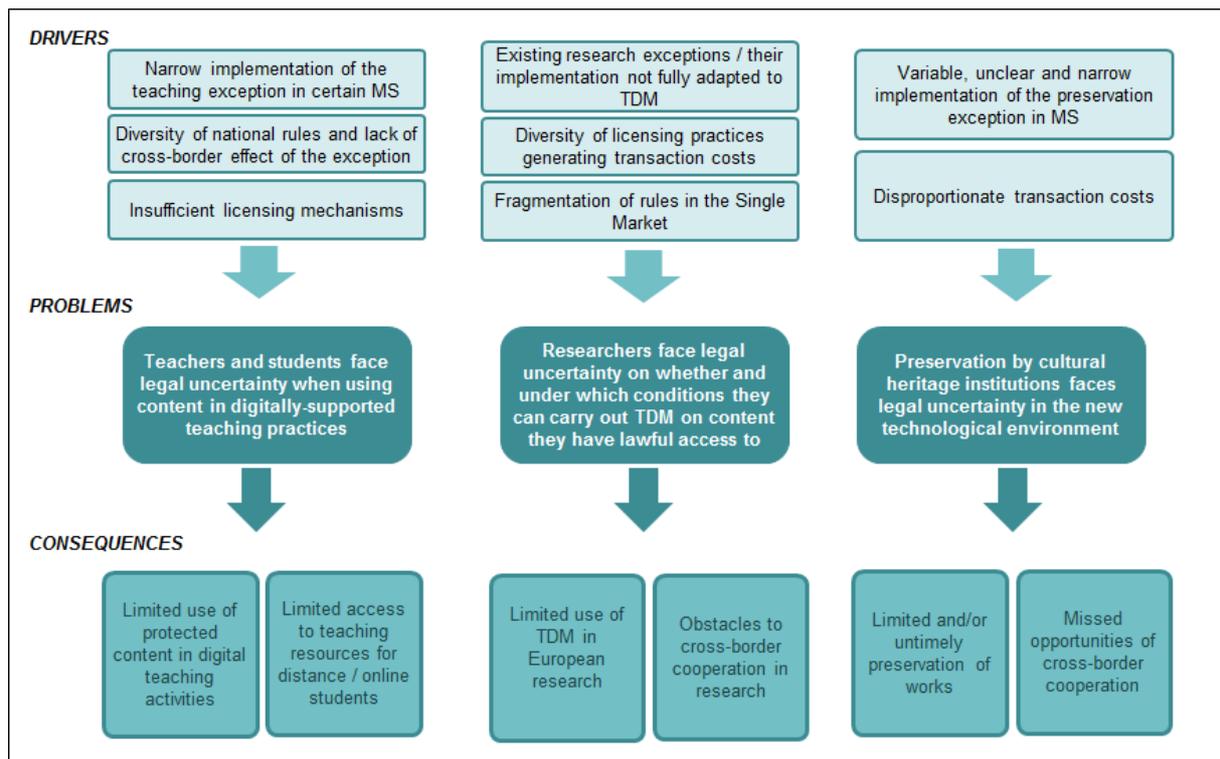
Achieving this general objective requires adapting the relevant copyright exceptions to enable digital and cross-border uses, while maintaining a high level of protection of rights. Changes to existing rules should aim at providing legal certainty for the use of protected content in digitally-supported teaching activities, for text and data mining in the context of scientific research and for digital preservation by cultural heritage institutions.



**4.1.4. Methodology**

**Problem definition**

The problems described in this section of the IA are closely linked to the specificities of the EU legal framework for exceptions described above. As illustrated in the problem tree below, legal uncertainty on the acts allowed under the existing copyright exceptions, in particular in relation to digital and cross-border uses, has been identified as a major issue in several areas. This legal uncertainty is often the result of a restrictive implementation of copyright exceptions for "specific acts of reproduction" and "illustration for teaching and research" in certain MS and/or of the fragmentation of copyright rules and licensing conditions. It can result in a suboptimal use of protected content in the digital environment.



### Identification of policy options

The policy options examined in each of the three areas include the baseline option, a non-legislative option (in the form of Commission's guidance, peer review mechanism and/or stakeholders' dialogue) and one or several legislative options. Non-legislative options have been developed taking into account the specificities of each exception (implementation in MS, relation with licences, stakeholders concerned). Legislative options are designed to complement the existing exceptions (in the case of preservation and teaching), or to introduce a new exception (in the case of TDM, supplementing the existing research exception).

### Impacts of policy options

The revision of existing exceptions or the introduction of new exceptions need to be assessed in relation to, on the one hand, how they facilitate the access to and use of protected works by certain specific categories of users (educational establishments, research institutions, cultural heritage institutions); on the other hand, how they affect right holders' revenues and incentives to create or to invest in the creation of new works. More generally, it is important to highlight that exceptions need to comply with the 'three-step test', enshrined in the main international treaties on copyright,<sup>229</sup> which provides that exceptions may only be applied (i) in certain special cases, (ii) which do not conflict with a normal exploitation of a work or other subject matter, and (iii) do not unreasonably prejudice the legitimate interests of the right holder. The three-step test is also established in Article 5(5) of the InfoSoc Directive.

Preferred options would be those bringing social gains without reducing incentives to create. A thorough understanding of the licensing market and a precise definition of the scope and conditions of application of the exceptions is necessary to achieve this balance.

### *Stakeholders affected*

<sup>229</sup> WTO TRIPS Agreement Article 13; WCT Article 10; WPPT Article 16; Beijing Treaty Article 13 and Marrakesh Treaty Article 11.

The main stakeholders affected by the different policy options are certain users and institutional users (teachers, researchers, educational establishments, research institutions, cultural heritage institutions) and right holders. The analysis presented in this IA focuses mainly on the impact on right holders in the print sector (authors and publishers), as text documents (books, newspapers, scientific journals) and images are the type of documents mostly used in education and research and are an essential part of the collections of cultural heritage institutions. Impacts on right holders in other sectors (music, AV) are mentioned where relevant.

Impacts on MS, notably in terms of obligations deriving from the preferred policy options and related costs, are presented in Annex 3.

#### *Type of impacts and availability of data*

Only the most significant and likely impacts are reported in this IA. The impacts are assessed by group of stakeholders (users and right holders). In addition, broad social impacts (impacts on education, research, preservation of cultural heritage and cultural diversity; no significant impacts on employment have been identified) and impacts on fundamental rights are assessed separately.

Economic impacts are examined for each group of stakeholders, including impacts on transaction costs, in particular costs related to the clearance of rights where a given use requires the authorisation of right holders; as well as impacts on licences' costs (for users) and on licensing revenues or licensing opportunities (for right holders). In this regard, it is important to note that the policy options developed in the area of exceptions should not have a direct impact on right holders' primary market (e.g. acquisition of books by educational establishments or libraries, subscriptions to scientific journals), but on the licensing of further uses of their content for specific purposes (e.g. digital copying for preservation, scanning, text and data mining). Therefore, the analysis focuses mainly on assessing the impacts on this type of licensing. Possible indirect impacts on right holders' primary market are mentioned where relevant.

The data available on transaction costs linked to right clearance is limited, since education, research and cultural heritage institutions generally do not engage in a systematic evaluation of these costs in relation to their uses of copyright protected content. In addition, these costs are highly variable depending on the type and number of works and the MS concerned.

Data on licences' costs and licensing revenues are provided where available. This type of data is generally not publicly available but has been provided by stakeholders (notably right holders) for the purpose of this IA, sometimes on a confidential basis. The available data does not always exactly correspond to the uses contemplated in this IA. For instance, digital uses for illustrating teaching or text and data mining are generally part of wider licences acquired by education or research institutions. It can therefore be very difficult to assess the costs related to these specific uses and the corresponding revenues for the right holders.

The social and economic impacts of the different policy options strongly depend on the scope and conditions of application of the exceptions. In this context, one important element is the relation between exceptions and licences. In certain cases, it may be necessary to prevent contractual override of the exception in order to achieve the desired social objectives. In other cases, making an exception subject to the availability of licences may be required to mitigate the economic impact of an exception or to avoid eroding well-functioning national systems.

All policy options considered in the area of exceptions may have an impact on fundamental rights, in particular on copyright as a property right (Article 17(2) of the European Charter of Fundamental Rights). In addition, impacts on scientific research and academic freedom

(Article 13) and on the right to education (Article 14) are considered where appropriate. Impacts on other fundamental rights are not mentioned as there is either no or insignificant impact on them.

Impacts on third countries or on the environment are not elaborated upon as the policy options presented in this section of the IA are considered not to have any substantial impact on them.

### *Impacts on SMEs*

SMEs are the backbone of Europe's economy. They represent 99% of all business in the EU. In the past five years they have created around 85% of new jobs and provided two-third of the total private sector employment in the EU. The exceptions analysed in this section of the IA are exceptions to the rights held by natural persons or legal entities, including SMEs and micro-enterprises. The policy options considered in this IA do not target these entities but may have an impact on them, notably as the large majority of right holders affected by the exceptions are SMEs.

99.4% of European companies active in the book publishing sector (books, newspapers, journals) are SMEs, of which 90% are micro-companies (0-9 employees). SMEs generate 49% of the value added of the sector (including 10% from micro-companies).<sup>230</sup> In the sector of film and music production, 99.9% of companies are SMEs (96% micro-companies) generating 85% of the value added of the sector (32% by micro-companies).<sup>231</sup>

Therefore, the impacts of the different policy options on right holders are assessed taking account of the high number of SMEs. The impacts on the licensing market and on licensing revenues are for example key criteria when comparing the options. Micro, small and medium-sized companies may be proportionately more strongly affected by a reduction of licensing revenue than large companies with a more varied range of products.

Excluding micro-companies would not be appropriate, considering the purpose of the initiative. By defining the scope of copyright exceptions, the legislative options in this initiative would contribute to define the scope of copyright as a property right, which cannot vary according to the size of the entity holding this right. None of the existing exceptions in the EU legal framework differentiates its scope of application according to this criterion. In addition, excluding micro-companies would make it impossible to achieve the objectives defined in section 4.1.3, since the exceptions considered in this IA would not apply to all relevant content but only to the fraction which is not held by micro-enterprises. This would create major legal uncertainty for users and would not allow ensuring a consistent implementation of rights and exceptions, regardless of the type of works and/or right holders.

Since none of the policy options would result in administrative obligations for SME, mitigating measures for SMEs have not been proposed. Certain options may generate one-off compliance costs related to the need to adapt existing licences, however these costs are expected to be marginal.

### **Comparison of policy options**

The policy options are compared against the criteria of effectiveness (i.e. to what extent they fulfil the specific objective), efficiency (i.e. at what cost they do so), impact on the different groups of stakeholders (users and right holders) and coherence with regard to cultural

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<sup>230</sup> Source: Eurostat, Structural Business Statistics, 2013 data for publishing of books, periodicals and other publishing activities.

<sup>231</sup> Source; Eurostat, Structural Business Statistics, 2013 data for motion picture, video and television programme production, sound recording and music publishing activities.

diversity, fundamental rights and/or other EU policies. Each option is rated between "--" (very negative), "-" (negative), 0 (neutral), "+" (positive) and "++" (very positive).

## 4.2. USE OF PROTECTED CONTENT IN DIGITAL AND CROSS-BORDER TEACHING ACTIVITIES

### 4.2.1. What is the problem and why is it a problem?

**Problem:** *Teachers and students face legal uncertainty when using content in digitally-supported teaching practices, in particular across borders*

Description of the problem: A huge variety of content (text, images, music, video), often protected by copyright, is used in teaching activities. While reference textbooks or academic books are usually bought by educational establishments or directly by students, other materials used to illustrate or complement teaching are generally shown in the classroom by teachers, copied or distributed to students. Digital technologies are offering new opportunities to use a wide range of media and content in order to enrich teaching activities. However, many users in the education field consider that the conditions for using protected content in digital or online teaching activities are unclear. According to a recent survey, only 34% of educators and 26% of learners declared that the conditions under which copyrighted works can be used for learning/teaching purposes are very clear to them. Furthermore, 24% of educators indicated they come across copyright-related restrictions in their digital teaching activities at least once a week.<sup>232</sup> Teachers and students facing legal uncertainty or specific restrictions frequently refrain from using protected content, in particular when this content has to be accessed by students through online means and from different MS.<sup>233</sup> In some cases legal uncertainty may result in unauthorised uses. Many respondents to the 2013-2014 public consultation brought forward difficulties in cross-border uses.<sup>234</sup>

Drivers: [*Restrictive implementation of the exception*] The use of protected works for the purpose of illustration for teaching is covered by exceptions in the InfoSoc Directive and the Database Directive.<sup>235</sup> The notion of "illustration for teaching" can be understood as allowing a teacher to use a work to give examples, to explain or support his/her course.<sup>236</sup> The illustration for teaching exception ("the teaching exception") has been implemented in all MS, with significant differences as to the type of works covered and the type of educational uses

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<sup>232</sup> Survey carried out in the context of the study on '*Assessment of the impact of the European copyright framework on digitally-supported education and training practices*' – Upcoming publication. Survey sample composed of about 2000 respondents in 9 MS.

<sup>233</sup> This is confirmed by the survey carried out in the context of the above-mentioned study: when faced with copyright restrictions on the use of certain works, 62% of educators and 60% of learners chose not to use protected works in order to avoid any possible problems. 41% of educators and 60% of learners looked for alternatives whereas uses without authorisation were reported by 21% of learners and 14% of educators. See Annex 10B for additional data on the perception of copyright-related obstacles in education.

<sup>234</sup> Respondents mentioned for instance problems faced by universities with campuses abroad, by universities located close to a national border and attracting students from several MS, or by education bodies involved in Erasmus+ programmes with a cross-border audience. See Annex 2B.

<sup>235</sup> Article 5(3)a of Directive 2001/29/EC and Article 6(2)b of Directive 96/9/EC.

<sup>236</sup> The condition of illustration has often been interpreted to define the extent of a work that can be used under the exception, which may vary depending on the types of works (e.g. part of a novel but an entire work if it is a poem or a photograph). For further explanations, see *Study on the application of Directive 2001/29/EC on copyright and related rights in the information society*, Jean-Paul Triaille *et al*, De Wolf & Partners, December 2013, p. 359-362.

allowed.<sup>237</sup> The legal uncertainty faced by teachers in the digital environment may arise from the restrictive implementation of the teaching exception in certain MS, where the exception does not clearly allow digital or online uses (e.g. by allowing only reproduction on paper or distribution of physical copies<sup>238</sup>) or where strict conditions apply to these uses (e.g. imposing a low resolution for the making available of images<sup>239</sup>).<sup>240</sup> Feedback from educational users also highlights the concrete obstacles faced in certain MS in digital education practices.<sup>241</sup>

[*Heterogeneous implementation and lack of cross-border effect*] The uncertainty is reinforced in a cross-border context by the diversity of the conditions established in national laws combined with the lack of cross-border effect of the exception. Teachers who use protected materials for the purpose of illustration under the terms of an exception in one MS may run the risk of infringing copyright in another MS when they make material available to students across borders. When asked about the type of copyright-related problems encountered in cross-border education, educators point out the lack of information on copyright rules in other MS, the differences in the application of the exception and the national scope of the licences.<sup>242</sup>

The practical implementation of the teaching exception differs from a country to another.<sup>243</sup> In certain MS (notably FR, DE, ES, NL), collective agreements are in place to organise the compensation of right holders that may be required in national laws for uses under the teaching exception. In other MS (UK, IE), licensing schemes for uses of protected content in teaching activities prevail over the exception. Finally, educational uses are allowed under extended collective licensing (ECL) in DK, FI and SE.<sup>244</sup>

[*Insufficient licensing mechanisms*] These different types of licensing schemes are very common in the print sector<sup>245</sup> and usually define authorised uses precisely; however, the type of digital uses covered may vary<sup>246</sup> and cross-border uses are not always allowed.<sup>247</sup>

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<sup>237</sup> Certain types of works are out of the scope of the exception (e.g. textbooks in FR, ES, DE, AT) or their use is allowed under specific conditions (e.g. audiovisual works can be used after two years upon release in DE). The types of uses allowed under the exception (e.g. anthologies, exams, public performances) also vary from a MS to another. See 'Study on the application of Directive 2001/29/EC on copyright and related rights in the information society', Jean-Paul Triaille *et al*, De Wolf & Partners, December 2013, p. 368 et s.

<sup>238</sup> HR and EL

<sup>239</sup> IT

<sup>240</sup> Further examples of restrictive implementation of the exception are presented in the study 'Assessment of the impact of the European copyright framework on digitally-supported education and training practices' – Upcoming publication.

<sup>241</sup> "5 outrageous things educators can't do because of copyright", by COMMUNIA: <https://medium.com/copyright-untangled/5-outrageous-things-educators-can-t-do-because-of-copyright-ac447dcc6e09#lbbqxa2ki>

<sup>242</sup> See Annex 10B for additional data on the perception of copyright-related obstacles in education.

<sup>243</sup> See Annex 4 for further details on the implementation of the teaching exception in MS.

<sup>244</sup> See Annex 10C for a description of compensation and licensing schemes for educational uses.

<sup>245</sup> Text documents and images are the type of material most widely used in education. The survey carried out in the context of the study 'Assessment of the impact of the European copyright framework on digitally-supported education and training practices' (p.58) showed that images and text documents are used at least once a week by about 70% of educators whereas other types of works including audio and video media are used by about 45% of educators.

<sup>246</sup> Digital uses include notably scanning (digitisation from an analogue copy), digital copying (copying from an original in electronic format or from Internet downloads), inclusions in presentations or in course packs, projections to electronic whiteboards, posting to internal networks and Virtual Learning Environments, storing in internal databases. The types of digital uses allowed depend on the scope of the licensing scheme. For instance, the collective licensing schemes based on a legal licence in CZ, HU, PT, SK, SI and PL include copies from Internet downloads and other digital copies as long as they are

Collective licensing schemes for educational uses are less widespread in other sectors (e.g. audiovisual) or for certain types of works (e.g. digital educational resources). In such cases, educational establishments need to negotiate and obtain a licence directly with the right holders, generating significant transaction costs.

Consequences: The legal uncertainty on digital uses of protected content in teaching activities may, on the one hand, negatively impact the further development of digitally-supported educational practices in primary and secondary education, where digital resources are mainly used to complement face-to-face teaching.<sup>248</sup> On the other hand, it is likely to affect higher education institutions more strongly, due to a more pervasive use of digital resources in this context<sup>249</sup> (e.g. use of digital course packs, access to resources through the university's intranet, etc.) and to the rapid development of cross-border and online education. An increasing number of universities are proposing distance learning modules online or delivering Joint Degrees, while many others collaborate on developing shared curricula using online content. The number of individuals taking online courses has doubled between 2007 and 2013, reaching more than 10% in certain MS.<sup>250</sup> The ability for teachers and students to use and access material online from any MS – through the university's intranet or virtual learning environment – is essential in this context.

How the problem would evolve: Without intervention at EU level, educational establishments and teachers in a number of MS would continue to face legal uncertainty when using protected content to support digital teaching and learning activities, unless these MS unilaterally decide to amend their legislation to allow such uses. The scope of existing collective licences may be widened in order to cover digital uses. However, obstacles to cross-border uses of content are likely to remain, and distance and online students would continue to be disadvantaged as regards the access to teaching materials.

#### **4.2.2. What are the various options to achieve the objectives?**

The general and specific objectives are described in section 4.1.3.

##### **Baseline**

No policy intervention. In MS where digital and online uses are not clearly allowed under the national teaching exception, this option would consist in relying on market developments (e.g.

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presented on print but other digital uses are subject to voluntary collective licensing agreement (source: IFRRO).

<sup>247</sup> Certain licensing schemes in the print sector allow cross-border uses under certain conditions for the purpose of distance learning, while others don't allow such uses. See Annex 10C for further details. Licenses granted for the use of audiovisual works in the context of education generally do not cover cross-border uses.

<sup>248</sup> The survey on the use of ICT in schools carried out in 2011/2012 shows that 1 in 4 primary schools students is in a school with a virtual learning environment (VLE), whereas this number rises to almost two-thirds in vocational schools. Also, 30% of secondary school students use digital textbooks and multimedia tools once a week or almost every day. Source '*Survey of Schools: ICT in Education: benchmarking access, use and attitudes to technology in Europe's schools, Final study report, February 2013*'. See Annex 10A for background data on the development of digital and online education.

<sup>249</sup> In a 2013 survey by the European Universities Association on e-learning, 80% of responding institutions indicated that they use digital courseware such as digital textbooks, curricula and reference materials. 82% of institutions also indicated that they offer online courses. In 40% of the institutions at least half of the students are engaged in e-learning; [http://www.eua.be/Libraries/Publication/e-learning\\_survey.sflb.ashx](http://www.eua.be/Libraries/Publication/e-learning_survey.sflb.ashx). See Annex 10A for background data on the development of digital and online education.

<sup>250</sup> Source: Eurostat (Internet use and activities). In 2015, 6% of individuals (and 9% of individuals aged 16 to 29) in EU 28 had used the Internet for an online course of any subject in the last 3 months before the survey (13% in FI, 11% in ES and UK, 10 % in LU). This covers all types of online courses.

further development of collective licensing schemes, publishers' digital offers) to offer solutions that allow teachers and students to use protected content in teaching activities supported by digital tools or taking place online. At the same time, certain MS could decide to amend their national exceptions – based on the optional teaching exception in Article 5(3)a of the InfoSoc Directive, which allows digital uses– to clarify the extent to which certain digital and online uses are covered in their MS.

*Stakeholders' views*

Right holders are likely to support the baseline option. Institutional users in the education area (educational establishments, teachers) would consider that this option cannot solve the identified problems.

**Option 1 – Guidance to MS and stakeholders' dialogue on raising awareness in the education community on the use of protected works for teaching purposes**

- Under this option, the Commission would issue guidance to MS as to the extent to which protected content can be used in the digital environment under the existing teaching exception, in line with the three-step test. Such guidance would encourage MS to make sure, when required, that their national exception applies to digital resources used for teaching purposes and to online activities undertaken by educational establishments or teachers.
- In addition, the Commission would encourage discussions between right holders and educational establishments to explore ways to raise awareness in the education community on the uses allowed under the exception or under specific licences.

*Stakeholders' views*

Right holders are expected to be rather supportive of this option, as it would not imply any further harmonisation of the existing teaching exception; would leave sufficient space for licensing mechanisms and could contribute to a better understanding of copyright rules among teachers and students.<sup>251</sup> While certain institutional users may support Option 1 as an intermediate solution,<sup>252</sup> most of them would consider that it does not sufficiently address the practical problems encountered when using protected works in distance or cross-border education.

**Option 2 – Mandatory exception with a cross-border effect covering digital and online uses in the context of illustration for teaching**

This option would make mandatory for MS the implementation of an exception to the rights of reproduction and making available to the public, with the following elements:

- Beneficiaries: educational establishments.
- Subject-matter covered: all types of works or other protected subject-matter, including resources produced specifically for education (e.g. textbooks, academic books, educational documentaries).
- Permitted uses: teachers and students affiliated to educational establishments would be allowed to use protected works for non-commercial purpose to illustrate teaching through digital means in the classroom (e.g. whiteboards) or online under the educational establishment's secure electronic network (e.g. virtual learning environment, intranet).

<sup>251</sup> In the public consultation on the review of EU copyright rules carried out in 2013/2014 (referred to as the "2013/2014 public consultation"), the large majority of respondents representing authors and publishers considered that there was no need to modify the teaching exception in the EU legal framework and that individual and collective licensing solutions should be encouraged. Several CMOs, and in particular reproduction rights organisations, asked for a clarification of the exception at EU and national level, notably as regards the notion of illustration for teaching. See Annex 2B.

<sup>252</sup> In the 2013/2014 public consultation, certain institutional users considered that in the short term the Commission should clarify the scope of the teaching exception to encourage MS to use the flexibility offered by the current rules.

Online uses which would result in making protected content available on the open internet (e.g. uses beyond quotation of protected content in Open Educational Resources - OERs<sup>253</sup> or in Massive Open Online Courses - MOOCs<sup>254</sup>) would not be covered under this option.<sup>255</sup>

- Relationship with the licensing market: the uses allowed under the exception would not be subject to the availability of licences.
- Compensation: MS would remain free to determine whether they require compensation for the uses under the exception. In MS opting for compensation, it would be applied to the uses undertaken by educational institutions (and their affiliated teachers and students) established in that MS, irrespective of where such uses actually would take place.
- Interaction with the current exception: outside the scope of this mandatory exception, the existing (optional) teaching and research exception under Article 5(3)a of the InfoSoc Directive would continue to apply. For teaching, this would be relevant mainly for analogue uses.
- Cross-border effect: The exception would have a cross-border effect, in the sense that the content made available under the exception by beneficiary institutions would be lawfully accessible to affiliated teachers and students located in other MS.

*Stakeholders' views*

This option is expected to be supported by institutional users in the education area, which are generally in favour of a broad mandatory teaching exception for digital and online uses.<sup>256</sup> It would be strongly opposed by right holders whose works are used in the teaching context (in particular educational publishers, considering the impact that this exception would have on their primary market) and by certain MS using licences-based systems, including ECL, for authorising educational uses.

**Option 3 – Mandatory exception with a cross-border effect covering digital and online uses in the context of illustration for teaching, with the option for MS to make it (partially or totally) subject to the availability of licences**

- This option would be similar to Option 2 but would leave MS the possibility to decide that the exception would come into play only if licences covering the same uses are not available in the market.
- In order to reduce the administrative burden for educational establishments related to the need to check the availability of licences, MS opting for this approach would have to take measures to ensure that licences covering relevant uses are available, sufficiently visible and easy to use for educational establishments.<sup>257</sup> They would be required to notify to the Commission the measures taken in this respect.

<sup>253</sup> Open Educational Resources are any type of educational materials that are in the public domain or released under an open license. The nature of these open materials means that anyone can legally and freely copy, use, adapt and re-share them. OERs range from textbooks to curricula, syllabi, lecture notes, assignments, tests, projects, audio, video and animation (UNESCO definition).

<sup>254</sup> MOOCs are online courses aimed at unlimited participation and open access via the internet. In many cases, participants need to register in order to have access to the online courses; however they don't need to be affiliated to any educational body or to comply with any admission requirements.

<sup>255</sup> The option of introducing a mandatory exception covering all types of digital and online educational uses carried out for non-commercial purpose (including in OERs and MOOCs) has been discarded, as it would make it difficult to control the dissemination of protected content online (users would be allowed to copy protected content and make it widely available online through education blogs or websites).

<sup>256</sup> This was reflected in the results of the 2013/2014 public consultation. See Annex 2B.

<sup>257</sup> Such measures could differ from MS to MS as long as the result is achieved in terms of availability, visibility and user friendliness. They could consist, for example, in promoting specific educational

- Cross-border uses would be covered through the cross-border effect of the exception (as in Option 2) or through licences which would have to provide for an equivalent scope in order to ensure full legal certainty (right holders would have to grant multi-territorial licences or to specifically allow the content to be accessed from other MS by affiliated teachers and students, through the educational establishment's secure electronic network).

*Stakeholders' views*

Right holders and CMOs are expected to favour this option, as it would allow MS to keep or to introduce the possibility of licences for educational uses. On the other hand, the education community may find it insufficient to create full legal certainty for teachers and students.<sup>258</sup>

#### 4.2.3. What are the impacts of the different policy options and who will be affected?

**Approach**

The options presented above would affect institutional users (educational establishments) and users in the education area (teachers, students) as well as right holders whose works are used as illustration in teaching activities. The impacts affecting these two groups are presented separately.

- For users, the following **social impacts** have been considered: impacts on legal certainty for digital and cross-border teaching activities. **Economic impacts** are examined in terms of transaction costs (related to the negotiation and management of licences) and licensing costs (licence fees paid to right holders or CMOs) for educational establishments.
- For right holders, the most relevant impacts are **economic impacts** related to licensing revenues. Since educational publishers play a particular role in the production of educational content (including content developed and distributed in a digital form), specific impacts on the educational publishing market are considered where relevant.<sup>259</sup>

The policy options are also assessed in relation to their **social impacts** on cultural diversity, digital education and digital skills, as well as to their impacts on **fundamental rights** (property right and right to education).

The assessment below is mainly qualitative, as the data publicly available or that could be obtained from stakeholders on compensation or licensing of educational uses is limited. Quantitative estimates are elaborated where possible, on the basis of available data.

### Baseline

#### IMPACTS ON STAKEHOLDERS

#### **Institutional users and other related users (educational establishments, teachers, students)**

Impacts on legal certainty for digital and cross-border education: The legal uncertainty faced by educational establishments and teachers in certain MS for digital and online uses is expected to persist under the baseline option. Only reforms at national level or developments in the licensing market could contribute to reduce it. A certain number of MS (e.g. Spain, UK) have recently amended their legislation to clarify that the teaching exception applies to content used in secure electronic environments. Other MS may follow, however it is unlikely that all MS would engage in similar reforms and in any event such reforms would not result in

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licensing schemes to which right holders could adhere on a voluntary basis and/or in developing online tools allowing educational establishments to easily check the availability of licences allowing to use different types of works to illustrate teaching activities.

<sup>258</sup> Certain stakeholders in the education community consider that licensing cannot be an adequate solution to provide access to protected content. See "COMMUNIA policy paper on exceptions and limitations for education": <http://www.communia-association.org/policy-papers/leveraging-copyright-in-support-of-education/>

<sup>259</sup> Educational publishing is a very important component of the publishing sector, the largest cultural industry in Europe with a retail market value of about 40 billion €, representing between 18 and 20% of the market at EU level. It reaches higher figures in some countries: 25 to 30% in Spain, close to 30% in Flanders, more than 60% in Ireland, 22 to 25% in Italy, 25 to 30% in Poland (source: Federation of European Publishers - FEP).

an exception applicable across borders. In MS where specific educational licensing schemes are in place, CMOs may propose to review the scope of the licences to better respond to the needs of educational establishments, for example as regards digital and online uses. However they may not always be able to licence cross-border uses (if they don't have the right holders' mandate for all EU territories). Furthermore, solutions based on collective licensing may not be fit for all types of works (e.g. audiovisual works). In the MS where the uncertainty would persist, teachers would be deterred from using protected content in digital teaching activities, beyond what is allowed for under existing licences. They may instead increasingly use OERs available under open licences, which however may not fully cover their needs, in terms of quality and variety of educational materials.<sup>260</sup>

Under this option, cross-border uses of protected content would remain subject to legal uncertainty. This aspect would constitute a significant obstacle for higher education institutions proposing distance learning programmes followed by students located in other MS.<sup>261</sup> Enrolled students may be disadvantaged by having a limited access to teaching materials.

Impacts on costs for educational establishments: The baseline option would not have any direct impacts on costs. Where digital and cross-border uses are not allowed under the teaching exception or under specific licensing schemes, educational establishments would continue facing transaction costs to obtain the necessary authorisations.

### **Right holders**

Impacts on licensing revenues: Under the baseline option, the ability of right holders to generate revenues from educational uses would continue to vary from a MS to another, depending on the scope of the teaching exception, the mechanisms foreseen for the compensation of right holders for uses under the exception, and the licences covering additional uses.

### **SOCIAL IMPACTS**

The legal uncertainty on the use of protected content could contribute to slow down the development of digital and cross-border education and indirectly the acquisition of digital skills, which are essential in the information society; however many other factors may more strongly influence such development (e.g. availability of broadband connections in schools, IT equipment, teachers' digital skills, etc).

The access to a wide range of cultural materials to illustrate or complement teaching is an important element to promote cultural diversity. The baseline option may, to a minor extent, negatively affect cultural diversity as it could limit the ability of teachers to use such illustrative content in digital teaching practices.

### **IMPACTS ON FUNDAMENTAL RIGHTS**

This option would not have any impact on copyright as a property right (Article 17 of the Charter of Fundamental Rights), as it would not expand the scope of the existing teaching exception. It may have an impact on the right to education, as enshrined in Article 14 of the

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<sup>260</sup> Only 27.4% of users or their representatives agree that open license materials can fully cover their educational needs. Stakeholders' survey carried out in the context of the '*Assessment of the impact of the European copyright framework on digitally-supported education and training practices*'. See Annex 10B on the perception of copyright-related obstacles in education.

<sup>261</sup> When developing such programmes, educational establishments would have to ascertain whether the use of copyrighted works is authorised or not in the different countries where the enrolled students are located, and if not, they would have to seek licences for such uses or could decide to limit cross-border access.

European Charter of Fundamental Rights, only to the extent that the legal uncertainty faced by educational establishments would constitute an obstacle to the further development of distance learning. Distance learning plays a role in facilitating access to education, for example for people with disabilities that cannot be present on the premises of educational establishments or people pursuing further education while working.<sup>262</sup>

### **Option 1 – Guidance to MS and stakeholders' dialogue on raising awareness in the education community on the use of protected works for teaching purposes**

#### **IMPACTS ON STAKEHOLDERS**

##### **Institutional users and other related users (educational establishments, teachers, students)**

Impacts on legal certainty for digital and cross-border education: Option 1 would allow reducing, to a certain extent, the current legal uncertainty faced by educational establishments and teachers in the digital environment. The actual impact would depend on actions taken by MS following the guidance provided by the Commission. In the best-case scenario, Option 1 could result in digital and online uses being allowed under the national implementations of the teaching exception; however this would not be sufficient to provide cross-border effect for the use of protected content under the exception.

Efforts to raise awareness among teachers and students on the scope of the exception and the uses allowed under licences could bring positive results and are likely to be well accepted. In fact, teachers are often not aware of the licences purchased by their educational establishment.<sup>263</sup> Measures aimed at raising awareness on copyright rules were the type of solutions that gathered strongest support both from users and copyright holders in a recent survey.<sup>264</sup>

Impacts on costs for educational establishments: the transaction costs described in the baseline option could only be reduced if MS clarify the application of the exception to digital and online uses on the basis of the Commission's guidance.

##### **Right holders**

Impacts on licensing revenues: The impacts of this option on right holders are expected to be rather limited and would mainly depend on the possible changes introduced in MS legislation. On the one hand, this option may limit the right holders' ability to license certain types of educational uses (e.g. digital copying, scanning, posting on the school's intranet - if digital uses become covered by national exceptions). On the other hand, the dialogue with users in the education community may bring positive results in the medium to long term by reducing the cases of unauthorised uses.

#### **SOCIAL IMPACTS**

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<sup>262</sup> For example, the Open University in the UK, has more than 250,000 students, 12,000 of whom have a disability, health condition, mental health difficulty or specific learning difficulty (such as dyslexia).

<sup>263</sup> Just more than a half (53.2 %) of educators report that they know their education institution is covered by licensing agreements allowing digital uses of protected content. Survey carried out in the context of the study on '*Assessment of the impact of the European copyright framework on digitally-supported education and training practices*' (p.120). Concerning licences allowing the use of films in school, only 21% of teachers of primary and secondary education report that their school have license agreements whereas the majority report that their school has no agreement or was unable to say. Source: "*Showing films and other audio-visual content in European Schools - Obstacles and best practices*" – May 2015.

<sup>264</sup> Survey carried out in the context of the study on '*Assessment of the impact of the European copyright framework on digitally-supported education and training practices*' (p.35).

Option 1 could have a positive impact on the further development of digitally-supported education practices and indirectly on the acquisition of digital skills. The obstacles to cross-border education would nevertheless persist. There may be some positive impacts in terms of wider access to cultural works as a result of teachers' extended ability to use protected content in digital teaching practices (depending on the extent to which MS follow the guidance and/or the success of stakeholders' discussions).

#### **IMPACTS ON FUNDAMENTAL RIGHTS**

Option 1 would have no direct impact on the right of property, as it would not expand the scope of the existing teaching exception but provide guidance on the conditions of use of protected content under the existing exception. The impact on the right to education would be similar to the baseline option.

#### **Option 2 – Mandatory exception for digital and online uses for the purpose of illustration for teaching, including across borders**

##### **IMPACTS ON STAKEHOLDERS**

##### **Institutional users and other related users (educational establishments, teachers, students)**

Impacts on legal certainty for digital and cross-border education: Option 2 would bring a high degree of legal certainty to educational establishments and teachers across all MS. This could lead in the short term to an increased use of illustrative resources and an enriched learning environment for students. The actual impacts on education institutions would vary between MS, depending on how the optional teaching exception has been implemented so far and on the licensing mechanisms in place. The impact of Option 2 would be stronger in MS where the scope of the existing teaching exception is currently limited or unclear (e.g. where the teaching exception does not clearly apply to digital and online uses or where it applies only to certain types of works and media). Importantly, Option 2 would allow in particular higher education institutions to gain legal certainty for cross-border uses. Distance and online students, including those located in other MS, would be able to access the materials used and made available by teachers under the same conditions as on-site students.

However, the legal certainty offered by Option 2 to educational establishments and teachers may be undermined in the long term by a reduced quality and variety of educational resources, which could result from the application of the exception to textbooks and other resources produced specifically for education (see 'impact on right holders' below). In a recent survey, a majority (54.6%) of educational users reported that they used licensed works more because they offer better quality and/or variety than open licence alternatives.<sup>265</sup>

##### Impacts on costs for educational establishments:

*Transaction costs:* Option 2 would significantly reduce the transaction costs supported by educational establishments when digital and cross-border uses are not allowed under the national teaching exception or under a collective licensing agreement. These transaction costs include staff costs for providing guidance to teachers on the use of specific resources, identifying right holders and obtaining the necessary authorisations; they may be particularly high when authorisation need to be obtained on a work-by-work basis (which may often be the case for using audiovisual works). No evidence could be found to quantify these costs.

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<sup>265</sup> Stakeholders' survey carried out in the context of the 'Assessment of the impact of the European copyright framework on digitally-supported education and training practices'. See Annex 10B on the perception of copyright-related obstacles in education.

*Licensing costs (licence fees paid by educational establishments)*: Option 2 could result in a reduction of licensing costs in MS where secondary uses<sup>266</sup> of protected content in education are currently allowed under collective licensing schemes (including ECL). Part of the uses (digital and online uses for illustrating teaching) would become covered by the new EU exception. Educational establishments would therefore be in a position to renegotiate their agreements with CMOs which may be constrained to review the scope of their licences and reduce licence fees.<sup>267</sup> Data collected for a few MS on the cost of licensing for educational establishments (where educational uses are allowed under a licence or an ECL) tend to show that these costs are relatively low: in the UK copyright licensing payments (covering analogue and digital uses) make up less than 0.1% of an educational establishment's expenditure;<sup>268</sup> in Denmark they amount to less than 1%.<sup>269</sup> The reduction of licensing costs under this Option would therefore be limited, in particular if MS introduce an obligation to compensate right holders for the uses under the new exception.

Option 2 would also significantly reduce *opportunity costs* associated to materials not being used due to legal uncertainty or budgetary constraints on educational establishments.

### **Right holders**

Impacts on licensing revenues: the impact of Option 2 would vary between MS, depending on how the optional teaching exception has been implemented so far and on MS decision to require compensation for the uses under the new EU exception or not.

In MS where the current teaching exception already encompasses digital and online uses for all types of works (e.g. BE and NL),<sup>270</sup> no impact is expected on right holders' revenues. The authorisation of cross-border uses, in the conditions foreseen under Option 2, is not expected to prejudice the right holders' interests, as it would not result in the uncontrolled dissemination of content online (cross-border uses under the exception would be limited to distance students enrolled with a specific educational establishment and accessing through a secure network). Therefore, it is not expected to affect the amount of the compensation required in certain MS.

In MS where the current teaching exception is limited to analogue uses or does not clearly allow digital uses (notably HR, IT, PL), right holders may be negatively affected only to the extent their current revenues rely on the licensing of digital educational uses. This may be the cases in certain countries, where digital uses are subject to voluntary collective licensing agreements.<sup>271</sup> However, it seems that in the past the restrictive implementation of the

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<sup>266</sup> "Secondary uses" designate uses to illustrate and complement teaching, such as copying and making available extracts of protected works to students.

<sup>267</sup> Licensing schemes could remain an attractive option for educational establishments if they allow more flexible uses compared to the exception.

<sup>268</sup> Source: Higher Education Statistics Agency (UK), Learning and Skills Council, Department for Education, CLA accounts, PwC analysis in 'An economic analysis of education exceptions', March 2012, PwC. Available at: <https://www.pwc.co.uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf>

<sup>269</sup> Source: FEP. Additional data provided by IFRRO illustrate the standard per page rate for copying in education: €0.0142 (LV), €0.011-€0.045(NL), €0.0256-€0.0512 (BE), €0.033-€0.036 (EL), to €0.04 (FR, DK). These costs do not include the transaction costs mentioned above (mainly staff costs, e.g. for negotiating and managing licences).

<sup>270</sup> In many other MS, digital uses are allowed under the national teaching exception but certain types of works are excluded from the scope of the exception e.g. resources specifically intended for education are excluded from the exception in AT, DE, ES, FR; sheet music in FR, IT, ES; recently released cinematographic works in DE.

<sup>271</sup> For example in CZ, HU, PT, SK, SI and PL. Source: IFRRO.

exception did not favour the development of licences.<sup>272</sup> Therefore, in this case the impact of Option 2 is expected to be limited. It could nevertheless reduce licensing opportunities in the medium term.

Significant impact is expected in MS where digital and online secondary uses of content for teaching activities currently require a licence., i.e. MS using ECL (DK, FI, SE) and MS where the exception is subject to the availability of licences (UK, IE). In these cases, right holders would not be able anymore to exercise their exclusive rights to authorise or prohibit digital uses of their works for illustrating teaching. They would be able to continue offering licences only for print copies and digital uses which would go beyond the scope of the new exception (e.g. in terms of extent of copying). This would imply a significant loss of secondary licensing income.<sup>273</sup> one can reasonably assume than Option 2 would affect at least half of the secondary licensing revenue currently stemming from digital uses.<sup>274</sup> Estimates established on this basis and considering the relative importance of digital uses in several MS<sup>275</sup> show that Option 2 would lead to a reduction of 14% to 25% of the total revenues currently collected by CMOs (in the print sector) from educational establishments.<sup>276</sup> This proportion is likely to increase over the next years, with the uptake of digital teaching practices at all education levels.

In those MS, right holders would be differently affected depending on how much their works are used in the teaching context. Considering that text documents and images are the types of content currently most widely used in education, right holders in the print sector (writers, visual artists, publishers) are likely to be more affected than others. The strongest impacts would be felt by educational and academic authors and publishers, whose works are intensively used by educational establishments. A large part of the volume of copies made in the context of teaching (analogue and digital copies) is based on copies from textbooks or other educational resources: 90% in Ireland, 80% in France, 67% in Germany.<sup>277</sup> Such impact would also be felt by educational publishers in MS where textbooks and other educational resources are excluded from the scope of the national teaching exception (notably FR, DE, AT, ES).<sup>278</sup> Data collected for FR, DE, UK and SE indicates that secondary uses of textbooks account for 1 to 4% of the educational publishers' turnover in those countries.<sup>279</sup> A reduction of 14 to 25% of this source of revenue would therefore have a non-negligible impact on the industry. Academic and STM publishers would also be strongly impacted by the reduction of

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<sup>272</sup> For example, the narrow implementation and interpretation of the exception in Italy did not lead to a large recourse to licensing mechanisms or contractual agreements but created a situation of uncertainty for educational establishments and right holders. See: "Copyright and educational uses: the unbearable case of Italian law from a European and comparative perspective", Giuseppe Mazziotti. Available at: [http://cadmus.eui.eu/bitstream/handle/1814/19697/LAW\\_2011\\_17\\_Mazziotti.pdf?sequence=1](http://cadmus.eui.eu/bitstream/handle/1814/19697/LAW_2011_17_Mazziotti.pdf?sequence=1)

<sup>273</sup> "Secondary licensing income" refers to the revenue generated by licences authorising the secondary uses of protected content in teaching activities.

<sup>274</sup> The exact share of the revenues that would be affected would depend on the current scope of the licensing schemes in terms of extent of digital and online uses allowed.

<sup>275</sup> See Annex 10D for data on the share of digital uses in the revenues collected by CMOs.

<sup>276</sup> This includes revenues from all types of education establishments. The revenues from licensing to higher education institutions are expected to be more strongly affected.

<sup>277</sup> Source: data collected by FEP from ICLA (Ireland – the figure mentioned above relate to post-primary education only), CFC (France - the figure mentioned above relate to secondary education only), VG Wort (Germany) on the basis of reporting/surveys of users. In Spain, 26% of the copies made are from textbooks and 39% from academic books. IFRRO also indicated that non-fiction works, including textbooks and academic books, are the works mostly used by educational establishments.

<sup>278</sup> The rationale for excluding this type of works from the teaching exception is linked to the fact that educational users constitute their primary market.

<sup>279</sup> See Annex 10D for data on the share of secondary uses in the revenues of educational publishers.

licensing income from higher education institutions.<sup>280</sup> Furthermore, the negative impact would extend to educational authors for whom this source of income constitutes a constant revenue stream compared to more variable revenues from primary sales. A study carried out in the UK in 2011 reported that for UK educational authors a 20% reduction of the secondary licensing income would result in a 29% decline in output (which would mean 2870 less new works being created annually).<sup>281</sup> The possible compensation that may be imposed at national level would not ensure the level of revenues that right holders can obtain when exercising their exclusive rights on the market.<sup>282</sup>

Impacts on competitiveness and innovation in the educational publishing industry: The reduction of secondary licensing revenue is expected to have a direct impact on educational publishers' incentive to invest in new content.<sup>283</sup> It is likely to hit first digital educational resources, whose market is not profitable yet, notably because of the high fixed costs associated to the development of digital products and educational resources platforms.<sup>284</sup> Evidence collected in the UK from a sample of educational publishers indicated that revenues from secondary licensing equate to 19% of their investment in content development.<sup>285</sup> In the long term, the lack of sufficient investment in digital products could affect the competitiveness of the European educational publishing industry, including at international level. International sales of textbooks and academic books are important notably for the UK and French educational publishing industries (sales in English/French-language markets).

## **SOCIAL IMPACTS**

The legal certainty provided by Option 2 would result in a positive impact on the further development of digital and cross-border education and indirectly on the acquisition of digital skills. Option 2 would allow a wider and more flexible use of protected content in education, which may contribute to promote cultural diversity among students. However, the impact of this option on right holders in certain MS could affect the incentive to invest in the production of new content, in particular resources produced specifically for the educational market. If investment in new content decreases, the quality and variety of educational resources used to illustrate and complement teaching may decline.

## **IMPACTS ON FUNDAMENTAL RIGHTS**

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<sup>280</sup> In 2015, STM and academic publishers in the UK received about 22% of CLA licensing revenue distributed to publishers. Source: CLA/ALCS/PLS.

<sup>281</sup> *'An economic analysis of education exceptions in copyright'*, PWC, March 2012, [http://www.pwc.co.uk/en\\_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf](http://www.pwc.co.uk/en_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf)

<sup>282</sup> Indications on the amount of compensation required in certain MS for uses under the existing teaching exception and on the remuneration stemming from educational licensing schemes existing in other MS are provided in Annex 10C. For example, the compensation required at national level on annual basis for uses of print works is €1.7 million in FR (covering only digital uses, by all types of educational institutions). By contrast, the remuneration collected for digital uses of print works in education institutions the UK amounted to about €9.3 million in 2014/15.

<sup>283</sup> Most are developing digital solutions alongside traditional textbooks, in order to accompany the transition towards digital education while meeting the continuing demand for print works.

<sup>284</sup> For example, in IT, digital textbooks represent the 34.4% of the offer but just the 0.8% of textbooks actually adopted by schools. In FR, educational publishers have invested 25 million euros in digital textbooks over the last 3 years, despite a very small market (less than 1% of the print market). Currently, producing digital textbooks costs 20 to 50% more than print books, considering the costs of additional digital rights and digital maintenance. Source: data collected by FEP.

<sup>285</sup> *'An economic analysis of education exceptions in copyright'*, PWC, March 2012, [http://www.pwc.co.uk/en\\_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf](http://www.pwc.co.uk/en_UK/uk/assets/pdf/an-economic-analysis-of-education-exceptions-in-copyright.pdf): "In 2011, a sample of seven major educational publishers received £3.6 million in PLS revenue (19% of their annual investment in new materials)."

Option 2 would affect the right of property, with some uses which currently require the authorisation of right holders in certain MS being covered by a mandatory exception. On the other hand, it would have some positive impacts on the right to education as it will support the further development of distance education.

**Option 3 – Mandatory exception with a cross-border effect covering digital and online uses in the context of illustration for teaching, with the option for MS to make it (partially or totally) subject to the availability of licences**

**IMPACTS ON STAKEHOLDERS**

**Institutional users and other related users (educational establishments, teachers, students)**

Impacts on digital and cross-border education: Option 3 would have the same positive effects as Option 2 in terms of possibility of use of protected content digitally and online for illustrating teaching, including across borders. Legal certainty for such uses would be ensured either via the mandatory exception, or via licences providing for at least equivalent conditions of use (in practice, licences would probably cover uses tailored to the needs of different types of educational establishments, including uses which would go beyond the exception). For most teachers it is irrelevant to know whether the uses are allowed under an exception or under a licence, as long as the conditions for use are equivalent.<sup>286</sup>

Impacts on costs for educational establishments:

*Licensing costs:* In MS deciding to use the possibility offered under this Option to make the application of the exception subject to the availability of licences,<sup>287</sup> educational establishments would have to pay licence fees for digital and online uses of protected content (where such licences are available). However, as illustrated under Option 2, data collected from certain MS where educational uses are allowed under a licence or an ECL show that these costs are rather limited if compared to establishments' overall costs. Furthermore, licences covering cross-border uses are not expected to be more costly, as they would not extend the number of users (licence fees are generally defined according to the number of students).

In MS opting for implementing the new exception with an obligation of compensation, educational establishments may incur some costs related to compensation. Considering the current level of compensation in certain MS, these costs are expected to be marginal. For example, the compensation required in France for digital uses of print works is €1.7 million by year, for 14.7 million pupils/students. The recently negotiated compensation in Spain amounts to €3.2 million for digital uses of print works in higher education (covering about 1.2 million students).<sup>288</sup>

*Transaction costs:* The possible transaction costs for educational establishments related to the need to check the availability of licences are expected to be reduced by the measures MS would have to take to ensure the availability, visibility and user-friendliness of licences covering secondary uses of protected content in education. The development of specific educational licensing schemes<sup>289</sup> could for example contribute to significantly reduce

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<sup>286</sup> This argument was developed in the study "Showing films and other audio-visual content in European Schools – Obstacles and best practices" – May 2015.

<sup>287</sup> This possibility is likely to be used by MS to maintain the mechanisms in place (e.g. ECL in DK, FI, SE and exception subject to licences in UK and IE) and could be used by other MS as well.

<sup>288</sup> [http://cultura.elpais.com/cultura/2016/03/15/actualidad/1458066248\\_393225.html](http://cultura.elpais.com/cultura/2016/03/15/actualidad/1458066248_393225.html)

<sup>289</sup> Such schemes would be based on voluntary collective management: interested right holders would give a mandate to a CMO to licence their works for uses in the context of illustration for teaching.

transaction costs, even if different schemes may coexist for different types of works. Since these schemes may not fully remove the need for educational establishments to take up individual licences,<sup>290</sup> it may also be necessary for MS to develop online tools allowing to check the licences available for a given work. Option 3 may also generate administration costs for educational establishments, linked to the negotiation and management of licenses. Such costs could be reduced if MS decide to centralise, at national or regional level, the acquisition of licences for educational establishments.<sup>291</sup>

## **Right holders**

Impacts on licensing revenues: Option 3 would have the same effects on right holders as Option 2 if all MS decide to implement the EU exception as such. However, the possibility to make the exception subject to the availability of licences is very likely to be used by MS to maintain the mechanisms in place (e.g. ECL in DK, FI, SE and exception subject to licences in UK and IE). It could also be introduced in other MS for certain types of works (e.g. textbooks and educational resources), notably in countries where they are currently excluded from the teaching exception (AT, DE, FR, ES). Such mechanism would allow to favour licensing for resources which are primarily intended for the educational market, but would nevertheless offer the necessary legal certainty where licences are not available. Under this scenario, the negative impacts described under Option 2 would not materialise under Option 3.

In MS using ECL or making the exception subject to the availability of licences, right holders would need to give sufficient visibility to their licensing offers<sup>292</sup> if they want to be remunerated for the uses of their works in the teaching context. This may generate some costs, in particular for SMEs, which are however expected to be compensated by licensing revenues. The need to make licensing solutions widely available and adapted to the needs of educational establishments could encourage right holders to sign up into specific educational licensing schemes that may be developed by MS. Other right holders may prefer developing their own licensing solutions online, in particular for digital resources.<sup>293</sup>

For cross-border uses, right holders would have to adapt the licences granted to educational establishments in order to authorise such uses under similar conditions as the exception (i.e. under secure electronic networks, for access by affiliated teachers and students). In most cases, right holders would have the rights for all territories and would therefore be able to allow such uses, without necessarily granting multi-territorial licences.<sup>294</sup>

Impacts on competitiveness and innovation in the educational publishing industry: this option is likely to have a limited impact on the competitiveness of the publishing industry, as it leaves to MS the possibility to favour the use of licences over the exception for digital and

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<sup>290</sup> Certain right holders may decide not to participate in educational licensing schemes based on collective management; or such schemes may not be developed for certain types of works, for which individual licensing would apply (e.g. AV works, digital textbooks). Licensing bodies increasingly tend to propose online tools allowing to check permitted uses. See Annex 10C.

<sup>291</sup> This has been done recently for state funded schools in England. See: <https://www.gov.uk/guidance/copyright-licences-information-for-schools>

<sup>292</sup> Right holders would have to propose specific licensing solutions for secondary uses of their content in teaching activities.

<sup>293</sup> Many educational publishers are licensing their digital products via online platforms, for example in France through a single entry portal called "Wizwiz", which offers a catalogue of all digital educational resources from over 60 French publishers, or in Germany, through the online platform "digitale-schulbuecher" which gathers a variety of digital textbooks from different publishers.

<sup>294</sup> CMOs in charge of educational licensing schemes would have to obtain from their members a mandate for all EU territories.

online uses in education. MS where the current exception does not apply to textbooks and other educational resources are expected to use the flexibility of Option 3 to make this type of works subject to the availability of licences. This would allow educational publishers to continue investing in the development of digital resources. Educational publishers would generally be in the position to allow cross-border uses.

## SOCIAL IMPACTS

Option 3 would have a positive impact on the further development of digital and cross-border education and indirectly on the acquisition of digital skills. It would allow to promote cultural diversity through wider and more flexible uses of protected content in education. In addition, to the extent MS use the flexibility foreseen under this Option to make the resources developed specifically for education subject to the availability of licences, the impact of this option on right holders is not expected to affect the production of new content.

## IMPACTS ON FUNDAMENTAL RIGHTS

The impact of Option 3 on the right of property would be mitigated by the possibility for MS to decide that licences prevail over the application of the exception. Option 3 will have positive impacts on the right to education as it will support the further development of distance education.

### 4.2.4. How do the options compare?

Option	Effectiveness	Efficiency	Impact on stakeholders	Social impacts and fundamental rights
<b>Baseline</b>	(0) Legal uncertainty for digital/online and cross-border uses would persist	(0) No direct costs associated with the baseline option	(0) Impacts on stakeholders would depend on reforms at national level or developments in the licensing market	(0/-) No direct impact on cultural diversity; indirect negative impact on the development of digital and cross-border education (0) No direct impact on fundamental rights
<b>Option 1 – Guidance and stakeholder s' dialogue</b>	(0/+) Could result in some improvements in certain MS but would not allow to ensure legal certainty across the EU	(0/-) Limited costs linked to the organisation of the stakeholders' dialogue	(0/+) Main impacts on stakeholders would depend on the possible changes introduced in MS legislation	(0/+) Possible positive impact on cultural diversity and the development of digital and cross-border education, depending on MS action (0) No direct impact on fundamental rights
<b>Option 2 – Mandatory exception for digital and online uses for the purpose of illustration for teaching, including across borders</b>	(++) Would ensure legal certainty for digital and online uses, including across borders	(-) High compliance costs in MS using licence-based mechanisms for educational uses (need to review the functioning and scope of these mechanisms in view of the introduction of a mandatory exception)	(+) Full legal certainty and possible reduction of licensing costs for educational establishments (-) Possible reduction of the quality and variety of educational resources in the medium/long term (--) Significant loss of licensing income for right holders in certain MS	(+/-) Positive impact on cultural diversity in the short term; in the medium/long term, could negatively affect the production of educational resources (+/-) Positive impact on digital and cross-border education may be undermined by lower quality and variety of educational resources in the medium/long term

				(-) Negative impact on the right of property (+) Positive impact on the right to education
<b>Option 3 – Mandatory exception with option for MS to make it subject to licences</b>	(++) Would ensure legal certainty for digital and online uses, including across borders	(0/-) Compliance costs for certain MS related to the need to take measures to ensure the availability and visibility of licences.	(+) Full legal certainty for educational establishments if MS take the appropriate measures to ensure the availability and visibility of licences (-/0) Depending on the choice made by MS, possible licensing and transaction costs for educational establishments, but expected to be limited (0) Impacts on right holders expected to be neutral	(+) Positive impact on cultural diversity (+) Positive impact on the development of digital and cross-border education (-/0) Limited negative impact on the right of property, depending on the choice made by MS (+) Positive impact on the right to education

**Option 3** is the preferred option, as it would allow to reach the objective of full legal certainty for digital and cross-border uses in education for the benefit of educational establishments, teachers and students, while limiting negative impacts on right holders. In contrast, Option 1 would not be sufficiently effective and Option 2 would entail significant foregone costs for right holders in several MS, with a possible negative impact on the quality and variety of educational resources in the long term. Option 3 could imply some compliance costs for MS deciding to make the exception subject to the availability of licences, because of the requirement to ensure availability and visibility of such licences. However, these costs are expected to be lower than the compliance costs associated with Option 2 (need for certain MS to thoroughly review the way in which educational establishments make use of protected content in order to implement the exception). Also, such compliance costs from MS would allow to significantly reduce administrative burdens and related transaction costs for educational establishments. Finally, the impacts on cultural diversity and fundamental rights are more balanced under Option 3 compared to Option 2.

Option 3 allows to reach the policy objective in a proportionate manner, focusing on uses which have a cross-border dimension and leaving sufficient flexibility for MS to choose the most suitable mechanism (exception or licensing).

### 4.3. TEXT AND DATA MINING

#### 4.3.1. What is the problem and why is it a problem?

**Problem:** Researchers are faced with legal uncertainty with regard to whether and under which conditions they can carry out TDM on content they have lawful access to.

**Description of the problem:** Text and Data Mining (TDM) is a term commonly used to describe the automated processing ("machine reading") of large volumes of text and data to uncover new knowledge or insights.<sup>295</sup> TDM can be a powerful scientific research tool to

<sup>295</sup>

See Annex 11B for a description of the technical processes of TDM.

analyse big corpuses of text and data such as scientific publications or research datasets.<sup>296</sup>

The current level of TDM in the EU is difficult to quantify.<sup>297</sup> Attempts have been made by some studies on the basis of proxies,<sup>298</sup> in particular the number of journals publications on TDM which suggest a slow but constant increase over the years (around 10% per annum worldwide in 2010-2014 and similar trends in EU MS)<sup>299</sup> with the EU MS covering 28,2% of worldwide publications on TDM, Asia 32,4% and Northern America 20,9%.<sup>300</sup> All stakeholders generally agree that TDM is still a nascent tool, in particular in the non-business sector, i.e. for research carried out by organisations such as universities or other entities performing research on a non-for profit basis or in the context of a public mission (generally referred in this IA as "public interest research organisations"). Researchers are generally convinced of the potential of TDM but they put forward legal uncertainty, caused by the current copyright rules, as one of the reasons for the slow development of TDM in the EU (in addition to issues unrelated to copyright, such as lack of awareness and skills, infrastructural challenges, etc.). A recent survey reported that less than 20% of researchers had used TDM techniques to analyse journal literature in a sample of EU MS (24% worldwide).<sup>301</sup> Right holders – notably scientific publishers - report from their side a relatively limited number of TDM requests from universities and other public interest research organisations (around 15% of publishers in the UK had received TDM requests in 2014 to mid-2015 according to one survey).<sup>302</sup> In newspapers publishing, a major national daily newspaper indicated to receive 20 TDM requests per year from academic institutions.

Drivers: [*Current research exceptions in EU law not fully adapted to TDM*] Copyright is relevant in this context as TDM may often involve copying (e.g. downloading) of the content to be analysed, which can be protected by the "right of reproduction" under copyright law.<sup>303</sup> The current EU copyright rules lay down exceptions permitting the use of content for the purposes of non-commercial scientific research.<sup>304</sup> However, a considerable level of legal

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<sup>296</sup> In addition to researchers in public interest organisations such as universities, TDM is increasingly used by companies, notably life-science and technology companies, in the context of their "in house" research. TDM or similar data analysis tools, such as web-scraping, are also used by businesses at a wider scale, as part of or basis for their commercial activities going beyond scientific research (marketing, mining of customers' data, etc).

<sup>297</sup> See the UK impact assessment no. BIS0312 (2012), "Exception for copying of works for use by text and data analytics", [https://www.gov.uk/government/uploads/system/uploads/attachment\\_data/file/308738/ia-exception-dataanalytics.pdf](https://www.gov.uk/government/uploads/system/uploads/attachment_data/file/308738/ia-exception-dataanalytics.pdf)

<sup>298</sup> See in particular two studies carried out by the Lisbon Council in 2014 and 2016: S. Filippov, "Mapping Text and Data Mining in Academic and Research Communities in Europe" 2014, and S. Filippov, P.Hofheinz "Text and Data Mining for Research and Innovation", 2016 that use as indicators the number of publications containing "data mining" in the title or anywhere in the text as well as patents granted in data mining. The publications indicator has also been used in the 2016 PRC survey, "Text Mining of Journal Literature" – May 2016, [www.publishingresearchconsortium.com](http://www.publishingresearchconsortium.com). See Annex 11E.

<sup>299</sup> PRC survey, 2016 based on Scopus journals data.

<sup>300</sup> Filippov, Hofheinz, 2014, page 10.

<sup>301</sup> PRC, "Text Mining of Journal Literature" – May 2016, [www.publishingresearchconsortium.com](http://www.publishingresearchconsortium.com). Two third of respondents to the survey indicated that they would be interested to learn more about TDM.

<sup>302</sup> The survey covered the period immediately before and after the adoption of the UK exception, it is therefore difficult to draw conclusions on this basis.

<sup>303</sup> See Annex 11C. The Commission commissioned a "Study on the legal framework of text and data mining" – J.P. Triaille, March 2014. See also "Standardisation in the area of innovation and technological development, notably in the field of text and data mining" – Report to Commission, 2014.

<sup>304</sup> Article 5(3)(a) of Directive 2001/29/EC and Articles 6(2)(b) and 9(b) of Directive 96/9. The "transient copies" exception in Article 5(1) of Directive 2001/29/EC may also be relevant for some TDM techniques which do not involve permanent copying.

uncertainty exists in practice. Research organisations do not always know whether TDM is copyright-relevant at all, whether it may be covered by an exception or whether a specific right holders' authorisation is required.

[*Diversity of licencing practices generating transaction costs*]: Researchers consider this situation to be particularly problematic as regards protected content to which they already have lawful access to on the basis of a subscription purchased by their library or institution. Subscriptions to scientific publications may currently include or not the authorisation to perform TDM, prohibit it altogether, or leave it unclear. Even if the largest STM publishers have gradually started to include TDM for non-commercial purposes in their subscription licenses for academic institutions,<sup>305</sup> different conditions may apply and this trend is not general practice yet.<sup>306</sup>

Research organisations may face additional costs to clarify what is allowed in terms of TDM and possibly renegotiate the subscription to make sure they can do TDM. In some cases, researchers may need to take up licences for TDM if their subscription does not cover it.<sup>307</sup> A large research university in the UK indicated that the costs for them to check the compliance of their TDM activities with the different applicable TDM licences could amount to up to GBP 500.000 per year.<sup>308</sup>

[*Fragmentation of rules in the single market*]: Besides legal uncertainty, fragmentation in the Single Market is an emerging problem as MS have started to adopt national TDM exceptions which need to remain within the boundaries of the research exceptions in the current EU rules. The UK adopted a specific TDM exception in 2014<sup>309</sup> and some other MS are currently discussing possible national solutions.<sup>310</sup>

Consequences: The above factors together have led to a situation where in practice, whether a prior authorisation for TDM in addition to the authorisation to access the content is required or not depends on the factual circumstances of each case and on the copyright legal framework in the MS where the research activity takes place.

How the problem would evolve: TDM is likely to become an even more important research tool over time, as technology improves and becomes more widespread, researchers acquire new skills and digital research sources increase. Almost all scientific journals are already available online, and a total of around 2.5 million scientific articles are published every

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<sup>305</sup> This is for example the case of Elsevier (<https://www.elsevier.com/about/company-information/policies/text-and-data-mining>) Springer (<https://www.springer.com/gp/rights-permissions/springer-s-text-and-data-mining-policy/29056?token=prtst0416p>) and Wiley (<http://olabout.wiley.com/WileyCDA/Section/id-826542.html>). Usually TDM is gradually included in subscription licences when they are renewed (for example one major publisher indicated that in 2014 around 25% of their non-commercial licences included TDM – the proportion is probably higher in 2016). [http://rue89.nouvelobs.com/sites/news/files/assets/document/2014/11/marche\\_elsevier.pdf](http://rue89.nouvelobs.com/sites/news/files/assets/document/2014/11/marche_elsevier.pdf).

<sup>306</sup> In the UK, before the 2014 TDM exception, of the 15 publishers in the NESLi2 scheme (scheme for central journal negotiations on behalf of the UK academic community), 11 had clauses permitting TDM, and the 4 other publishers were silent as to whether TDM was permitted or not under the subscription licence.

<sup>307</sup> The JISC 2012 report "Value and Benefits of Text Mining to UK Further and Higher Education" highlights the significant time cost for an individual researcher wishing to mine numerous publications which relates to identifying the right holders and seeking permissions to mine, see <https://www.jisc.ac.uk/reports/value-and-benefits-of-text-mining>

<sup>308</sup> Source: UCL (University College London). The UCL has 9000 researchers and produces more than 11,000 articles per year. For more examples, see section 4.3.3, Option 2.

<sup>309</sup> The Copyright and Rights in Performances (Research, Education, Libraries and Archives) Regulations 2014: <http://www.legislation.gov.uk/ukxi/2014/1372/contents/made>

<sup>310</sup> Eg. DE, EE, FR, IE.

year.<sup>311</sup> It has been calculated that the overall amount of scientific papers published worldwide may be increasing by 8 to 9% every year and doubling every 9 years.<sup>312</sup> In some instances, more than 90% of research libraries' collections in the EU are composed of digital content.<sup>313</sup> This trend is bound to continue; however, without intervention at EU level, the legal uncertainty and fragmentation surrounding the use of TDM, notably by research organisations, will persist. Market developments, in particular the fact that publishers may increasingly include TDM in subscription licences and develop model clauses and practical tools (such as the Cross-Ref text and data mining service), including as a result of the commitments taken in the 2013 Licences for Europe process<sup>314</sup> to facilitate it may partly mitigate the problem. However, fragmentation of the Single Market is likely to increase over time as a result of MS adopting TDM exceptions at national level which could be based on different conditions.

#### 4.3.2. What are the various options to achieve the objectives?

The general and specific objectives are described in section 4.1.3.

##### Baseline

- No policy intervention. This option would consist in relying on the development of market-based initiatives to facilitate TDM licencing, notably following the statement of commitment by a group of STM publishers in the 2013 "Licences for Europe" process, where they notably committed to include TDM in subscription licences at no additional cost and to develop technological solutions.<sup>315</sup> At the same time some MS could decide to adopt national TDM exceptions within the boundaries of the current research exceptions (Article 5(3)(a) of the InfoSoc Directive and Articles 6(2)(b) and 9(b) of Database Directive), as done by UK in 2014.

##### *Stakeholders' views*

Right holders would support the baseline option as they are generally opposed to an intervention in this area. Researchers consider that legislative intervention is needed and would therefore strongly criticise a lack of EU action.<sup>316</sup>

##### **Option 1 – Fostering industry self-regulation initiatives without changes to the EU legal framework**

- Non-legislative option. The Commission would encourage stakeholders, notably publishers and researchers, to identify collaborative solutions to facilitate TDM, in particular for content subscribed to by research organisations.

<sup>311</sup> STM report, March 2015.

<sup>312</sup> L. Bornmann, R. Mütz, "Growth rate of modern science" <http://arxiv.org/ftp/arxiv/papers/1402/1402.4578.pdf>

<sup>313</sup> For instance, 94% of journals and 24% of books held by the University College London are digital. 79% of the Stockholm University's budget goes into digital content (source: LIBER).

<sup>314</sup> See: [http://www.stm-assoc.org/2013\\_11\\_11\\_Text\\_and\\_Data\\_Mining\\_Declaration.pdf](http://www.stm-assoc.org/2013_11_11_Text_and_Data_Mining_Declaration.pdf). On that occasion a group of 13 STM publishers issued a declaration ("*A statement of commitment by STM publishers to a roadmap to enable text and data mining (TDM) for non-commercial scientific research in the European Union*") where they committed in particular to include TDM clauses in subscription contracts for no additional cost to users and to develop further technological solutions to facilitate TDM licences. See also the Commission document "Licences for Europe: ten pledges to bring more content online" [http://ec.europa.eu/internal\\_market/copyright/docs/licences-for-europe/131113\\_ten-pledges\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf). On Cross Ref, see <http://tdmsupport.crossref.org/>. See Annex 11D.

<sup>315</sup> See above.

<sup>316</sup> See the report on the responses to the public consultation on the review of EU copyright rules carried out in 2013/2014 (referred to as the "2013/2014 public consultation") in Annex 2B.

- Structured dialogues between researchers and publishers would be organised to allow both sides to express their views, notably with regard to researchers' needs and the technical safeguards publishers could use to ensure the protection of their content without creating unnecessary or disproportionate burden for researchers. Building on existing initiatives such as Cross Ref, this option would also support and promote further technical solutions, such as platforms facilitating TDM in practice to allow researchers to access publishers' data at one go, promoting common standards for data formats or the creation of trusted intermediaries ensuring a safe environment for the mining of content.
- The Commission would monitor the implementation of the commitments made by publishers to allow TDM for scientific purposes and to amend their licences respectively. If no substantial improvements are achieved in the mid-term, the Commission would consider proposing legislative changes as described in Options 2 to 4.

*Stakeholders' views*

Rightholders would support this non-legislative option. STM publishers in particular have asked the Commission to pursue a self or co-regulatory approach on TDM following up on the Licences for Europe dialogue. They consider that collaborative solutions identified together with non-commercial researchers would be a balanced way forward and could yield concrete results more quickly. On the other hand, researchers are not in favour of additional stakeholder dialogues if not accompanied by legislative changes (researchers' representatives left the dialogue considering that licences-based solutions were not an appropriate way to fully solve the problems and foster the development of TDM).<sup>317</sup>

**Option 2 – Mandatory exception covering text and data mining for non-commercial scientific research purposes.**

This option would make mandatory for MS the implementation of an exception to the rights of reproduction and of database extraction,<sup>318</sup> with the following elements:

- Beneficiaries: any user who has lawful access to content protected by copyright or by the *sui generis* database right (e.g. a subscription to a scientific journal). Lawful access would cover access to content through authorisation by content owners (e.g. subscriptions to scientific journals) as well as access to publicly available content (e.g. open access content).
- Permitted uses: lawful users would be permitted to carry out the reproductions which are necessary for the TDM process, as long as the TDM is carried out for non-commercial scientific research purposes.<sup>319</sup> The exception would not permit any communication to the public of the content being mined.
- Relationship with the licencing market: given that lawful access will often be granted through contracts,<sup>320</sup> legislative intervention would also make clear that contractual terms that prevent or restrict uses permitted under the exception are null and void. At the same time, right holders would be allowed to apply proportionate measures which are necessary to guarantee the security of the content as long as this does not unduly hamper uses covered by the exception. Additionally, the legislative instrument would encourage stakeholder dialogues aiming at setting up best practices and mutually agreed technical solutions with regard to security aspects.

<sup>317</sup> Idem.

<sup>318</sup> Article 2 of Directive 2001/29/EC and Articles 5(a) of Directive 96/9/EEC and 7(1) of Directive 96/9/EEC.

<sup>319</sup> Consistently with current EU rules (e.g. recital 36 of the 96/9/EC Database Directive), the term scientific research covers both the natural sciences and the human sciences.

<sup>320</sup> This is the case of lawful access through subscription contracts. The situation is different notably for open access content and publicly available websites.

- Compensation: the exception would not be subject to the payment of fair compensation to right holders as its specific features, notably the lawful access condition, allow right holders to keep generating revenues from the access to their content, notably through subscription licences.
- Interaction with the current exceptions: the current research exceptions in the Infosoc and Database directives would remain untouched and continue to apply outside the scope of the new TDM exception. The exception under this option would also be without prejudice to the transient copies exception under Article 5(1) of the Infosoc Directive.

*Stakeholders' views*

Right holders, publishers in particular, are strongly opposed to a legislative intervention introducing a TDM exception at EU level. Their main concern is an exception would facilitate the misuse and piracy of their content and make them lose business opportunities in future. This option would be the least opposed by right holders (notably publishers) among the legislative options as it is clearly limited to TDM carried out for non-commercial research purposes. While it would go some way in addressing the problem (and to pursue their the "right to mine is the right to read" objective) researchers are likely to consider it insufficient to provide full legal certainty for TDM because of the "non-commercial" condition, in particular when research projects are carried out by public interest research organisations in partnerships with commercial operators.<sup>321</sup>

**Option 3 – Mandatory exception applicable to public interest research organisations covering text and data mining for the purposes of both non-commercial and commercial scientific research**

As Option 2 for all the points except for the beneficiaries of the exception and the purpose of the scientific research which would be as follows:

- The exception would only apply to research organisations. This will cover for example universities and research institutes<sup>322</sup> but not commercial companies, which are not among the beneficiaries of the exception under this option.
- On the other hand, the exception would permit these beneficiaries to carry out TDM on content they have lawful access to irrespective from the non-commercial or commercial purpose of their scientific research. This would cover notably research projects carried out in the framework of Public-Private Partnerships (PPPs, which may have an ultimate commercial outcome.

*Stakeholders' views*

Researchers generally consider this option favourably as it would increase legal certainty for their organisations to perform TDM, including in the context of PPPs. At the same time part of the research community has expressed the concern that the concept of public interest organisation could be difficult to define and apply and, more generally that a TDM exception should be extended to anybody who has lawful access and covering both non-commercial and commercial research. Right holders are against any legal intervention, but they may accept this option as the intervention would clearly be limited to public interest research organisations

**Option 4 – Mandatory exception applicable to anybody who has lawful access (including both public interest research organisations and businesses) covering text and data mining for any scientific research purposes.**

*Main elements:*

- As Option 2 but under this option the exception would permit any user who has lawful access to carry out TDM for the purposes of both non-commercial and commercial

<sup>321</sup> To be noted that similar discussions arose in the context of the 2014 TDM exception adopted in the UK, which is very similar to the EU exception considered under Option 3.

<sup>322</sup> In order to distinguish them from commercial companies, these organisations, which generally carry out research for a non-for-profit basis or in the context of a public interest mission under MS law, are referred to broadly as "public interest" research organisations in this IA.

scientific research. Differently from the other legislative options, the exception would not be limited to non-commercial use (Option 2) nor to specific beneficiaries (Option 3). In practice this intervention would cover TDM for scientific research beyond public research area, notably when carried out by commercial operators such as life science companies.

*Stakeholders' views*

The research community supports this option as it would fully pursue their objective that "the right to read is the right to mine". This option would be strongly opposed by right holders. Publishers in particular take the view that such a large exception would significantly interfere with the TDM licencing market in the commercial sector, mainly in the area of life science. Commercial companies carrying out scientific research have generally not raised problems with commercial TDM licences, nor have generally requested the Commission to take action in this area.

#### 4.3.3. What are the impacts of the different policy options and who will be affected?

*Approach*

The assessment below is mainly qualitative. Quantitative market data have been provided by stakeholders with regard in particular to costs for researchers arising from legal uncertainty and current licensing practices of right holders (in particular scientific and press publishers). The options are assessed both as regards their economic and social impacts. They are expected to mainly affect two major groups of stakeholders - researchers seeking to carry out TDM and right holders whose content is analysed through TDM. The impacts affecting these two groups are presented separately and focusing on most significant and likely impacts for each category. The impacts on technology companies (data analytics service providers) are not specifically described below as these services are deemed not to be directly affected by the options proposed. Indirectly, intervention on TDM is expected to have a positive impact on technology service providers, including SMEs and start-ups, notably as the proposed intervention aims at creating a better legal framework for TDM in the EU which in turn should increase the market opportunities for these players as technology partners or service providers of research organisations performing TDM. SMEs performing research activities will also indirectly benefit from the intervention as private partners in PPPs with "public interest" research organisations.

For researchers, the impacts assessed relate to the legal uncertainty around the use of TDM for scientific research purposes and the related transaction costs, notably finding out what is permissible under existing licenses or under national law, including the laws of different MS for cross-border projects. The assessment mainly covers researchers in "public interest" research organisations which have been identified as those for whom there is the strongest evidence of a problem.<sup>323</sup> The impacts on the usage of TDM for in-house scientific research by commercial companies such as life science or technology ones are described only for the option that affects them indirectly (Option 3) or directly (Option 4).

For right holders, the impacts assessed are mainly on their licensing revenues and on the security and protection of their content. The impacts on the licensing revenues comprise TDM licenses, both for commercial and non-commercial use, as well as impact on revenues from the subscriptions market. Impacts are mainly assessed as regards right holders in the publishing sector, since this is currently by far the main area for TDM carried out for scientific research purposes. This includes in particular **scientific publishers**, who largely generate revenues from access to their content via subscriptions agreements which may allow or not TDM<sup>324</sup>. Other relevant right holders include **news publishers** who possess important databases, notably archives, which may be of importance for certain areas of research (notably languages and humanities). However, the commercial value of the press archives and other news content is expected to remain untouched due to the "lawful access" condition and the fact that none of the options considered in the IA allows the communication to the public of the mined content. TDM-based research may in some cases be carried out also on copyright protected content other than

<sup>323</sup> See problem definition.

<sup>324</sup> Scientific publishers, including those who traditionally published only under a subscription model, are increasingly publishing part of their content under open access licences. However, subscriptions remain at the moment an essential part of the business model and revenues sources of many scientific publishers. See Annex 11A.

text-based publications (i.e. audiovisual and music<sup>325</sup>) However, we have not yet found evidence of significant impact in these areas, which are therefore not specifically analysed in the impact assessment. Open access publications are an increasingly important channel of scholarly publications. Since open access licences generally do not limit TDM, the impact on "pure" **open access publishers** is not discussed in detail either (see below on the coherence of the options with EU open access policy). Finally, TDM could be used by researchers on copyright protected content publicly accessible on the internet. The impact on right holders in content freely available online is not discussed as it is considered to be marginal since all the options relate to content to which the user has lawful access.

Social impacts are examined in relation to the benefits of European research for society and to the EU attractiveness as a research area. The policy options presented are coherent with and support another important area of EU policy, i.e. open access policy that aims at greater sharing of public-funded research results and thereby improve scientific research, as well as the European Open Science Cloud and Innovation Union.<sup>326</sup> The options all concern scientific research and are not expected to affect cultural diversity. Impact on fundamental rights is explained for relevant options and with regard to fundamental freedoms which would be impacted.<sup>327</sup>

## **Baseline**

### **IMPACTS ON STAKEHOLDERS**

#### **Researchers**

Impact on legal certainty and transaction costs: problems faced by public interest research organisations are likely to remain largely unsolved under this option. Publishers' market driven initiatives aiming at facilitating mining for non-commercial purposes on the basis of licences will continue to be developed.<sup>328</sup> Over time more publishers are likely to include TDM clauses in their subscriptions or provide open access solutions.<sup>329</sup> This would improve legal certainty for researchers to some extent. However different licensing terms and conditions would stay at least in part.<sup>330</sup> Researchers' resistance to TDM offers based on licences is likely to continue: despite improvements, these offers depend on publishers' policies which are potentially bound to change over time (and are unlikely to ever cover all relevant publications). Fragmentation in the single market as a result of different TDM laws across MS would also remain unsolved and is likely to become worse with more MS adopting national TDM exceptions in the absence of EU intervention. Overall, the objective of ensuring full legal certainty for researchers seeking to mine the copyright-protected content they have lawful access to would not be achieved.

#### **Right holders**

Impact on TDM licensing market and the revenues thereof: TDM may increasingly be included in subscription licences that scientific publishers conclude with public interest organisations such as universities and licencing-based tools may be developed further (see above). However, these developments are not likely to result in substantial increase in revenues for publishers, given on the one hand the resistance of researchers to these offers and on the other hand the unlikely increase of licencing fees due to the inclusion of TDM in

<sup>325</sup> For example, the British National Library reported some projects using mining of music recordings; in the audio-visual sector, the French National Audiovisual Institute (INA) has developed mining tools for audio and video content (see e.g. <http://www.otmedia.fr>).

<sup>326</sup> See Annex 11A. The impact on open access is increasingly positive going from Option 1 to 4 and is therefore not specifically mentioned in the assessment of the various options below.

<sup>327</sup> Notably copyright as a property right, freedom of art and science. Privacy (Articles 7 and 8 of the EU Charter of fundamental rights) is not impacted as none of the options concern access to or further communication of content and privacy rules continue to apply.

<sup>328</sup> See Annex 11D. STM indicated that end 2015 around 50% of STM journal content was minable through Cross-Ref (by licensed users).

<sup>329</sup> See problem definition.

<sup>330</sup> Including different TDM policies as regards for example content that can be mined in a given amount of time, download speed, etc.

subscription licences.<sup>331</sup> The adoption of national TDM exceptions by an increasing number of MS could progressively erode publishers' ability to licence TDM across the EU. However national exceptions would be limited by the "non-commercial" condition set out in the current EU rules and, if drafted along the lines of the 2014 UK precedent ("lawful access" condition, exception limited to the reproduction right) they would not directly affect the publishers' subscription market. Under the baseline scenario, scientific publishers are likely to continue to expand the TDM licencing offers for the commercial market (e.g. pharmaceutical and life-science companies) – often in the context of added value packages including not only TDM as such but also providing additional facilities (e.g. pre-formatting of data, direct injections into existing databases etc.). Revenues from commercial licences are likely to increase substantially over time (see Option 4).

Impact on the protection of content: publishers would continue to be able to use licenses as a mean to impose technical and contractual means to protect their content (ensure that only authorised users can access and carry out TDM and protect their databases from massive downloads).

## **SOCIAL IMPACTS**

Negative social impacts as the persisting copyright related problem slowing down the development of TDM in European research would, at least in part, remain unsolved. This could contribute to Europe losing attractiveness as a research area on a worldwide scale, for example as regards EU universities' ability to attract and retain top quality scientists.

## **IMPACTS ON FUNDAMENTAL RIGHTS**

The baseline would have no impact resulting from EU action on copyright as a fundamental right and on research, protected under the fundamental right of freedom of art and science under Article 13 of the EU charter of fundamental rights.

## **Option 1 – Fostering industry self-regulation initiatives without changes to EU legal framework**

### **IMPACTS ON STAKEHOLDERS**

#### **Researchers**

Impact on legal certainty and transaction costs: Public interest research organisations could potentially benefit from more legal certainty as a result of a convergent industry approach to TDM fostered by the Commission through structured stakeholder dialogues. This could also limit to some extent the right-clearance costs. However, due to the voluntary nature of the potential commitments taken by the publishers, full legal certainty would not be achieved. Moreover, self-regulatory measures would only bring about a positive impact on researchers if mutually satisfactory solutions are found, which does not seem likely to happen in the absence of a legislative intervention, as the experience from the 2013 Licences for Europe process has shown).<sup>332</sup> As under the baseline, fragmentation in the single market arising from different national laws would not be solved.

#### **Right holders**

Impact on TDM licensing market and the revenues thereof: this option is likely to result in some increase in costs for right holders (notably publishers) because of the additional efforts

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<sup>331</sup> STM publishers committed in Licences for Europe to include TDM in their subscriptions licenses with universities "at no additional costs". We have not found evidence of a substantial increase of price of subscription licenses with non-commercial users that include TDM.

<sup>332</sup> See options description.

they would have to undertake under a structured self-regulatory approach to develop mining infrastructures (notably Cross Ref) and licencing offers. However, since public interest research organisations are not likely to react favourably to these efforts (see above), this option is not likely to bring about additional licensing opportunities for publishers. The commercial market would not be addressed by stakeholder dialogues and therefore the impact on publishers as regards commercial revenues would remain the same as for the baseline.

Impact on the protection of content: Cooperation with researchers in the context of structured stakeholder dialogues may improve to some extent the convergence and users' acceptance of technical safeguards applied by publishers in the context of licences. As above, publishers may incur additional costs arising from the technical safeguards acceptable to the researchers. The overall impact of this option on the protection of content is likely to be similar to the baseline.

## **SOCIAL IMPACTS**

Similar to the baseline as measures under this option have a voluntary character and are therefore not expected to fully solve the legal uncertainty faced by researchers as regards TDM.

## **IMPACTS ON FUNDAMENTAL RIGHTS**

Impact on copyright is the same as for the baseline. The impact on the right of freedom of art and science would be only slightly positive.

## **Option 2 – Mandatory exception covering text and data mining for non-commercial scientific research purposes**

### **IMPACTS ON STAKEHOLDERS**

#### **Researchers**

Impact on legal certainty and transaction costs: positive impact on researchers as legislative intervention introducing a harmonised exception would increase legal certainty and reduce rights clearance costs. Researchers would be able to mine scientific publications subscribed to by their institution in full legal certainty as long as this is done for non-commercial scientific research. In addition, transaction costs for public interest research organisations could be considerably reduced. Comprehensive quantitative data on the transaction costs incurred by research organisations seeking authorisation for TDM are not available. However, some quantitative estimation of the costs saving can be generated on the basis of case-studies provided by researchers' representatives.<sup>333</sup> These examples point to costs ranging between 3.399 and 18.630 GBP for a research project based on mining 3.000 articles published in 187 journals by 75 different publishers.<sup>334</sup> On a yearly basis, these transaction costs (and the related savings) have been estimated to go up to 500.000 GBP for a large research university.<sup>335</sup> There is also some first indication of a positive impact on scientific research projects based on TDM of the exception for non-commercial TDM introduced in the UK in

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<sup>333</sup> The case studies all refer to the UK before the adoption of the 2014 exception and also predate the developments following the Licences for Europe dialogue.

<sup>334</sup> Wellcome Trust, 2012, Box 2 p.10, cited in the study *Assessing the economic impacts of adapting certain limitations and exceptions to copy-right and related rights in the EU*, [http://ec.europa.eu/internal\\_market/copyright/docs/studies/140623-limitations-economic-impacts-study\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/140623-limitations-economic-impacts-study_en.pdf), pp. 68-69. In other cases researchers have given examples of mining projects requiring authorisation from 120 different publishers: Ross Mounce: presentation in Licences for Europe (2013): <http://www.slideshare.net/rossmounce/content-mining>

<sup>335</sup> Source: ECL. Data calculated on the basis of a team of 10 extra staff plus academic time needed to ensure that researchers are compliant.

2014,<sup>336</sup> which has comparable features to the exception considered under this option. Quantitative data on the impact of the UK law are not available yet.

In spite of the positive impact of this option for public interest research organisations, some legal uncertainty could remain because of the "non-commercial scientific research purposes" condition. Researchers have raised the concern that a significant grey area would remain as regards research projects which - even if carried out by public interest research organisations - may eventually have a commercial outcome (as a result of a transfer of technology agreement or other). This grey area may cast doubts in particular as regards research projects conducted in partnerships with private operators (PPPs) which represent a large part of publicly funded (at EU or national level) research projects.<sup>337</sup>

This option may in theory lead to an increase in subscription fees for public interest research organisations if publishers raise the subscription fees to compensate for possible losses caused by the exception (i.e. publishers may try to absorb the value of TDM in the subscription fee). However, there is no evidence of any significant rise in the fees of subscription licences which have included TDM over the last few years.<sup>338</sup>

### **Right holders**

Impact on TDM licensing market and the revenues thereof: Negative effects on right holders, notably on publishers as they will no longer be able to authorise or prohibit TDM of the content they give researchers access to, for non-commercial scientific purposes. However, the negative impact would largely be reduced by the "lawful access" condition,<sup>339</sup> i.e. by the fact that the exception would not affect publishers' ability to continue to authorise or prohibit and to generate revenues from selling subscriptions to universities and other research organisations.<sup>340</sup> Publishers would in principle lose the ability to licence TDM as a self-standing use; however there is currently no evidence of a specific TDM market separate from the subscription market in the academic/non-commercial context.<sup>341</sup> The trend over the last few years has been for STM publishers to gradually include TDM in the subscription licences without significant increase of licences fees (as mentioned above). This seems to confirm the absence of a significant extra value of TDM in the context of current subscription licences.

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<sup>336</sup> New projects have been reported by researchers representatives in the UK to the UK IPO after the UK TDM exception was introduced in 2014, notably in the field of medicine and biology. These include Mining academic literature for molecular pathways found in Alzheimer's and Parkinson's diseases to identify new targets for drug development; National Centre for Text Mining (NaCTeM) collaboration with US Defense Advanced Research Projects Agency (DARPA) to mine biomedical texts to look for new cancer pathways; and Biotechnology and Biological Sciences Research Council (BBSRC) funded project to mine images to extract phylogenetic relationships (relating to evolutionary history and biology) from journal figures/illustrations to draw new conclusions in the field. The positive impact on TDM activities of UK TDM exception has also been reported by LIBER at their intervention at the European Commission Roundtable on TDM, February 2015: <http://libereurope.eu/blog/2015/02/23/liber-argues-for-pan-european-tdm-exception/>

<sup>337</sup> In the context of the 7<sup>th</sup> Research Framework Programme, about 34% of all consortia included at least one private for profit entity together with non-commercial players (e.g. universities or research organisations). Roughly 67% of the EC contribution was spent for these mixed consortia. It is likely that these projects will be excluded from the scope of the exception.

<sup>338</sup> See also baseline. Data on the impact on the subscription fees of the legislative reform in the UK which has introduced a TDM exception are not yet available.

<sup>339</sup> CRA study "Assessing the economic impacts of adapting certain limitations and exceptions", May 2014, p.73.

<sup>340</sup> Subscription licences with public interest research organisations represent around 70% of STM publishers global revenues. The main revenues linked to journal publishing are generated by academic library subscriptions (68-75%), see STM 2015 report.

<sup>341</sup> CRA study, p. 77.

Similarly to STM publishers, the "lawful access" condition would substantially mitigate the impact on other right holders whose content could be relevant for mining purposes. Press publishers have brought forward some examples of licences with research organisations permitting TDM in addition to access to their content.<sup>342</sup> In some fields, such as linguistic research, newspapers may be an important source for analysis, and TDM may be the main feature of licences (i.e. users primarily want to mine the content rather than to read it). In these cases newspaper publishers (and other right holders that may be in a comparable situation) would in any case be able to factor in the value of TDM in the licence fee, given that they would remain in control of the decision whether to authorise or prohibit access to the content.

Impact on the protection of content: This option would have an impact on the possibility for right holders to impose technical conditions on users which they consider important to prevent unauthorised uses (and ultimately piracy) and to protect their databases, including their technical stability. Today these conditions (APIs for automated downloading, limiting access to a determined range of IP addresses, using user authentication measures, applying limits on the speed or number of downloads are imposed by right holders in the TDM licencing clauses) are imposed by right holders through TDM licences clauses.<sup>343</sup> In view of the current limited self-standing economic value of TDM in licenses with universities/public research organisations (see above), the possibility for STM publishers to impose such conditions is a key reason why they consider it essential to retain the ability to licence TDM.

These concerns would be mitigated by the introduction in legislation of a provision allowing content owners to apply proportionate measures necessary to guarantee the security of their systems without unduly hampering TDM (such as measures that may be necessary to ensure only authorised persons can access and carry out TDM). Additionally, stakeholder dialogues would encourage the identification of mutually agreed technical solutions and best practices (see the description of the option above).

## **SOCIAL IMPACTS**

Positive impact as the harmonisation of the EU legal framework for researchers carrying out TDM is expected to contribute to improving Europe's potential as a research area on the worldwide scale, including its ability to retain and attract top quality researchers, with the ensuing positive consequences in terms of scientific and societal progress. The research productivity gains which could be triggered by a clarification of the EU rules applicable to TDM have been estimated by some at 2% and the impact on GDP growth at 0.26%.<sup>344</sup>

## **IMPACTS ON FUNDAMENTAL RIGHTS**

Negative impact on copyright as a fundamental right. However, the current balance between rights and exceptions will not be substantially altered by this option, as EU law already contains exceptions allowing uses of IP protected content for the purposes of non-commercial scientific research. The impact on freedom of art and science would be positive.

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<sup>342</sup> Comprehensive data and information on the size and value of the TDM licensing market for press publisher is not available. However, the Commission has received information from specific press publishers indicating that at least in their cases TDM licenses constitute a relevant business opportunity. These revenues would remain unaffected under this option due to the lawful access condition.

<sup>343</sup> See also problem definition and Annex 11B for more details.

<sup>344</sup> See Chapter 3 in the Expert Group Report (2014) on "Standardisation in the field of Text and Data Mining, [http://ec.europa.eu/research/innovation-union/pdf/TDM-report\\_from\\_the\\_expert\\_group-042014.pdf](http://ec.europa.eu/research/innovation-union/pdf/TDM-report_from_the_expert_group-042014.pdf)

### **Option 3 – Mandatory exception applicable to public interest research organisations covering text and data mining for the purposes of both non-commercial and commercial scientific research**

#### **IMPACTS ON STAKEHOLDERS**

##### **Researchers**

Impact on legal certainty and transaction costs: Similar positive impact as under Option 2 as regards both legal certainty and costs reductions, as a result of the introduction of an exception harmonised at EU level. Additional positive impact as this option would remove the legal uncertainty and the grey area as regards the research projects carried out by public organisations with a possible commercial outcome, including in cooperation of these organisations with private partners (PPPs).

##### **Corporate research users**

Corporate research users are not among the beneficiaries of the exception under this option. They have generally not asked EU intervention in this area as a B2B licencing market exist (see Option 4). This option is not expected to have a significant indirect impact on these players as their needs in relation to TDM are generally different than those of universities and other public interest research organisations (see Option 4).

##### **Right holders**

Impact on TDM licensing market and the revenues thereof: The legal technique to define the scope of the exception is different, however this option is not expected to have a substantially different impact on right holders than Option 2. In particular, the fact that the exception would not be subject to the "non-commercial purposes" condition is compensated by the application of the exception only to specific categories of beneficiaries. i.e. to public interest research organisations. The mitigating effect of "lawful access" condition would apply also under this option (see above). Like Option 2, this option would leave untouched the purely commercial TDM market which constitutes an important source of licencing revenues for STM publishers (e.g. licences with life science companies- see Option 4).

Impact on the protection of their content: Similar to Option 2.

#### **SOCIAL IMPACTS**

Similar or larger positive impacts than under Option 2 because of increased legal certainty for researchers under this option.

#### **IMPACTS ON FUNDAMENTAL RIGHTS**

Increased negative impact on copyright since the present option is not limited to non-commercial purposes. However, the negative impact is mitigated by the "lawful access" condition and the fact that the beneficiaries would not include commercial operators. Positive impact on the freedom of art and science.

### **Option 4 – Mandatory exception covering applicable to anybody who has lawful access (including both public interest research organisations and businesses) covering text and data mining for non-commercial and commercial scientific research purposes.**

#### **IMPACTS ON STAKEHOLDERS**

##### **Researchers**

Impact on legal certainty and transaction costs: The impact of Option 4 on public research organisations is similar to Option 3.

## Corporate research users

Differently from the other options, because of the broader scope of application of the exception, Option 4 would specifically benefit researchers in commercial companies as they would no longer need a specific license to mine content to which they have lawful access to. However, corporate users, notably life-science companies, benefit today from a functioning licencing market for TDM of scientific publications and they have not requested any intervention at EU level. TDM is often licensed to these users as part of a wider licensing agreement with right holders including several uses and services that go well beyond what the exception would allow them to get for TDM purposes (notably in terms of formats, structured data, getting direct feeds into their own databases etc.). Therefore corporate users are likely to continue to buy value added services from content owners. This option also entails a risk that publishers may increase the subscription fees for commercial users to compensate for the loss of TDM related revenues (this is more likely to happen with corporate users than with universities – see above).<sup>345</sup>

## Right holders

Impact on TDM licensing market and the revenues thereof: This option would have a significant negative impact on right holders. As a consequence of the broad scope of the exception, STM publishers would no longer be able to licence TDM for scientific research purposes to commercial players, which represent an essential market for them, notably in areas such as life science and pharmaceutical.<sup>346</sup> Industry estimates the value of the commercial TDM market (in Europe) to be worth more than 56 million euros by 2019.<sup>347</sup> Two major STM publishers currently have 302 existing TDM licences with life science companies<sup>348</sup>. Publishers indicate that the use of TDM is also increasing outside the life science and pharmaceutical industry, including in sectors such as chemical manufacturing.<sup>349</sup> Similarly to the other legislative options, this option would in principle not remove right holders' ability to generate revenues from selling access to their content. However, deals between STM publishers and corporate users usually include TDM as part of comprehensive agreements covering a whole series of usage rights and added value services mentioned above. The introduction of an exception would lower the value of these agreements, since TDM rights as such can no longer be subject to licence. Right holders may try to compensate the value lost as a consequence of the legislative intervention by raising licences fees for access and other uses/value added services. However, it is not clear whether and to what extent they would manage to do so. The exception would bring about compliance costs and changes to right holders' business models. The impact is likely to be all the more significant given the TDM commercial market's growth potential.

Impact on the protection of their content: Similar as Option 2 but the level of the impact would be higher due to a wider range of researchers covered by this option which would increase security risks even if TDM can be carried out only by users who have obtained the lawful access to the content.

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<sup>345</sup> In that sense, it is noteworthy to mention (at least as an indication) that some open access publishers already charge more for a CC-BY licence (allowing commercial use) than for a CC-BY-NC licence (not allowing commercial use), in order to compensate the loss of revenue linked to commercial reuse (See STM report (2015), p. 21).

<sup>346</sup> According to the 2015 STM report "TDM is most common in life sciences research, in particular within pharmaceutical companies, but relatively little used elsewhere" (2015 STM report, p. 146). Increase though is reported in the chemical manufacturing sector (See Annex 11A).

<sup>347</sup> Source: STM.

<sup>348</sup> Publishing industry sources.

<sup>349</sup> For more information, see Annex 11A.

## SOCIAL IMPACTS

Similar to Option 3.

### IMPACTS ON FUNDAMENTAL RIGHTS

Negative impact on copyright as a fundamental right. The current balance between rights and exceptions set by the current EU legal framework would be substantially altered, since the exception would allow uses of a very broad range of protected content by anybody for commercial purposes. The impact on freedom of research would be positive.

#### 4.3.4. How do the options compare?

Option	Effectiveness	Efficiency	Impact on stakeholders	Social Impact/Impact on Fundamental Rights
<b>Baseline</b>	(0) Legal uncertainty for digital/online and cross-border uses would persist	(0) No direct costs associated with the baseline option	(0) Impacts on stakeholders would depend on reforms at national level or developments in the licensing market	(0/-) No direct social impact or or impacts on fundamental rights as a consequence of EU action. Indirect negative social impact.
<b>Option 1 – Fostering industry self-regulation initiatives without changes to the EU legal framework</b>	(0/+) Could gradually result in limited increase of legal certainty for researchers through clearer licensing terms used by publishers	(0/-) Limited costs for right holders who take commitments (need to change existing licensing to allow TDM for scientific research purposes).	(0/+) Main impacts on stakeholders would depend on commitments taken by industry.	(-) Negative social impact as problems which contribute to slow down Europe as a research area would remain unsolved. (0) No impact on copyright. (0/+) Slightly positive impact on the right of freedom of art and science.
<b>Option 2 – Mandatory exception covering text and data mining for non-commercial scientific research</b>	(+) Would ensure increased legal certainty for researchers carrying out TDM for non-commercial purposes	(-) Limited compliance costs for right holders because of the need to adapt licences with public interest research organisations following the introduction of the exception.	(+) Increase in legal certainty and reduction of transaction costs for researchers carrying out TDM for non-commercial purpose. Some legal uncertainty persists for PPP research projects. (-) Limited negative effect on publishers' TDM licensing market	(+) Positive social impact on Europe's attractiveness as a research area. (-) Limited negative impact on the right of property (+) Positive impact on the right of freedom of art and science.
<b>Option 3 – Mandatory</b>	(++) Would ensure legal certainty for	(-) Limited compliance costs for	(++) Increase in legal certainty and	(+) Positive social impact on

<b>exception applicable to <u>public interest research organisations</u> covering text and data mining for the purposes of both <u>non-commercial and commercial scientific research</u></b>	public interest research organisations carrying out TDM both for commercial and non-commercial purposes	right holders because of the need to adapt licences with public interest research organisations following the introduction of the exception	reduction of transaction costs for researchers, including for research carried out via PPPs (-) Limited negative effect on publishers' TDM licensing market.	Europe's attractiveness as a research area (-) Limited negative impact on the right of property (+) Positive impact on the right of freedom of art and science.
<b>Option 4 – Mandatory exception applicable to <u>anybody who has lawful access</u> (both public interest organisations and businesses) covering text and data mining for any scientific research purposes of both <u>non-commercial and commercial scientific research</u>.</b>	(++) Would ensure legal certainty for researchers, including researches in commercial entities, carrying out TDM both for commercial and non-commercial purposes	(--) High compliance costs for publishers who may need to renegotiate a significant number of business agreements with their commercial customers	(++) Increase in legal certainty and reduction of transaction costs for researchers carrying out TDM both for commercial and non-commercial purposes (--) As the exception would cover all researchers, including commercial customers, this option would have a strong negative effect on publisher's TDM licensing market	(+) Positive social impact on Europe's attractiveness as a research area (--) Negative impact on the right of property (+) Positive impact on the right of freedom of art and science.

**Option 3** is the preferred option. This option would create a high level of legal certainty and reduce transaction costs for researchers with a limited impact on right holders' licensing market and limited compliance costs. In comparison, Option 1 would be significantly less effective and Option 2 would not achieve sufficient legal certainty for researchers, in particular as regards PPPs. Option 3 allows reaching the policy objectives in a more proportionate manner than Option 4, which would entail significant foregone costs for rightholders, notably as regards licences with corporate researchers. In particular, Option 3 would intervene where there is a specific evidence of a problem (legal uncertainty for public interest organisations) without affecting the purely commercial market for TDM where intervention does not seem to be justified. In all, Option 3 has the best costs-benefits trade off as it would bring higher benefits (including in terms of reducing transaction costs) to researchers without additional foregone costs for rightholders as compared to Option 2 (Option 3 would have similar impacts on right holders but through a different legal technique i.e. scope of the exception defined through the identification of specific categories of beneficiaries rather than through the "non-commercial" purpose condition). The preferred option is also coherent with the EU open access policy and would achieve a good balance between copyright as a property right and the freedom of art and science.

## 4.4. PRESERVATION OF CULTURAL HERITAGE

### 4.4.1. What is the problem and why is it a problem?

**Problem:** *Preservation by cultural heritage institutions (CHIs) faces legal uncertainty in the new technological environment*

Description of the problem: An important function of libraries, archives, museums and other institutions is to preserve cultural heritage: 90% of cultural heritage institutions (CHIs) responding to a recent survey declared that they have collections that need to be preserved for future generations.<sup>350</sup> As in many cases preserving works requires copying them, the societal importance of preservation is reflected in national exceptions to the reproduction right for preservation purposes, which implement an optional EU exception for "specific acts of reproduction" by certain institutional users.<sup>351</sup> The space allowed for preservation activities under national exceptions is however sometimes narrow, unclear, not adapted or explicit enough to cover preservation in digital environments and of works in digital form. It varies from MS to MS. This creates legal uncertainty for CHIs and can lead to desirable preservation activities not taking place.

Preservation copying addresses for example the degradation of the original material and the disappearance of the technologies and devices underpinning its *readability*. The British Library, for instance, estimates that many of the 6,500 items that make up its sound collection, which come in 42 different physical formats, will become unreadable within 15 years in the absence of action.<sup>352</sup> Technology allows for 'digitisation', i.e. the creation of digital equivalents or so-called 'surrogates' of works originally on analogue supports (for example paper), which is also done for preservation purposes.<sup>353</sup> Furthermore, 'digital preservation', i.e. the preservation of works in digital form, both resulting from digitisation and 'born-digital' works,<sup>354</sup> raises specific issues. Those works can be subject to quicker degradation than content in analogue form, often with no notice to the human eye, and to quick technological obsolescence.<sup>355</sup> Digital content can then require media migration and 'format-shifting', i.e. copying content onto more adequate media or formats.<sup>356</sup> It can also warrant proactive

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<sup>350</sup> G.J. Nauta – W. van den Heuvel, DEN Foundation on behalf of Europeana/ENUMERATE, "Survey Report on Digitisation in European Cultural Heritage Institutions 2015", June 2015.

<sup>351</sup> The exception applies to publicly accessible libraries, educational establishments and museums, as well as archives (Article 5(2)c of the InfoSoc Directive). The importance of cultural heritage preservation is reflected in EU policy on digital cultural heritage, notably as outlined in the Recommendation of the European Parliament and of the Council of 16 November 2005 on film heritage and the competitiveness of related industrial activities (2005/865/CE), the Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation (2011/711/EU), the Council conclusions on the digitisation and online accessibility of cultural material and digital preservation (10-12 May 2012), and the Commission Communication "Towards an integrated approach to cultural heritage for Europe" (COM(2014) 477 final).

<sup>352</sup> British Library, "Living Knowledge: the British Library 2015-2023", September 2015.

<sup>353</sup> On the concept and purposes of 'digitisation', as applied to preservation and to the digitisation and dissemination of out-of-commerce works in the collections of CHIs (section 3.4), see Annex 9B.

<sup>354</sup> 'Born-digital works' are works that were created directly in digital form, as opposed to a conversion from an analogue source.

<sup>355</sup> The British Library's "Digital Preservation Strategy 2013-2016" (March 2013) describes these characteristics as the "inherent instability and transient nature" of digital content.

<sup>356</sup> These practices are for example acknowledged as "essential" for preservation purposes in the 2012 "Statement on the Implementation of (Statutory and Voluntary) Deposit Schemes for Non-Print Publications" by the Conference of European National Librarians (CENL) and the Federation of European Publishers (FEP). The choice of the best media or formats for preservation purposes depends on a variety of factors like for example the level of their adoption, any dependencies on other formats and systems, size and complexity aspects etc.

preservation from the day works are acquired into a collection. Digital preservation is also seen as a continual process, rather than a series of discrete and occasional interventions. More generally, digitisation and digital preservation confront CHIs with complex, open technical questions and can imply considerable costs.<sup>357</sup> CHIs indicate that a number of these challenges cannot be addressed by individual institutions, many of which will not have the resources to undertake digital preservation on their own. This is reflected in ongoing collaborative R&D and standardisation efforts, and an increasing interest in sharing infrastructure and work in networks, including across MS.<sup>358</sup>

The holdings of CHIs in the EU are vast.<sup>359</sup> Data on the copyright-protected portion of these is difficult to obtain, especially at aggregate level, but it is expected to be substantial, particularly for certain types of works: a study<sup>360</sup> estimated the amount of public domain works, (i.e. those that are *not* protected by copyright) in CHI collections at only 12% for books (in general in the EU), at 18% for the British Library Sound Archive and at 30% for musical compositions in the Cambridge University Library. It can therefore be expected that the problems described above potentially concern a large number of works in Europe.

Drivers: [*Variable, unclear and narrow implementation of the preservation exception in MS*] The implementation in national laws of the current, optional EU exception applicable to preservation varies and can be limited and/or unclear in scope.<sup>361</sup> This can be the case for the categories of beneficiary institutions: for example the exception only refers to archives in DE. Certain categories of works can also be excluded from the scope of the national exception, like in IT where record and film archives can only reproduce phonograms and videograms. The specific purposes and uses allowed and other applicable conditions also change: the possibility of making digital copies, like in EE, or format shifting, like in NL, is rarely explicitly covered in other MS. This can for example prevent a library from creating a digital equivalent of a sound recording from an analogue support. The number of copies that may be made can be limited to one, like in IT, contrasting with the need of multiple copies that is often inherent to digital preservation.

[*Disproportionate transaction costs*] Where an exception is not applicable, the potential transaction costs implied by the need for CHIs to obtain authorisation from right holders can be disproportionate: if on the one hand the time and resources required to establish the copyright status of works, find and contact right holders and obtain their authorisation can be

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<sup>357</sup> A recent study estimated in EUR 500 million the cost of preserving the DE film heritage alone ("DE 2015-2013 national report on the implementation of the Commission Recommendation on Digitisation and Online Accessibility of Cultural Material and Digital Preservation"). A cultural heritage expert described digital preservation to Commission services as "a new science".

<sup>358</sup> This aspect, along with issues related to the national implementation of the current exception for 'specific acts of reproduction' emerged frequently in institutional user responses to the 2013-2014 public consultation.

<sup>359</sup> See Annex 9A for estimations and data on the magnitude of CHIs collections at aggregate and institutional level.

<sup>360</sup> R. Pollock – P. Stepan, "The size of the EU public domain", 2009. The study only aimed at providing a gross estimation of the public domain in Europe and is based on a number of approximations. See also J. Boulanger *et al.*, "Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights. Analysis of specific policy options", Charles River Associates, May 2014.

<sup>361</sup> See J-P. Triaille *et al.*, "Study on the application of Directive 2001/29/EC on copyright and related rights in the information society", De Wolf & Partners, December 2013, European Commission, "Report on the Implementation of Commission Recommendation 2011/711/EU – 2013-2015", 2016 [*to be published (copy available on request)*], and European Commission, "Report on the Implementation of the European Parliament and Council Recommendation on Film Heritage 2012-2013", 2014.

considerable,<sup>362</sup> on the other hand the likelihood that right holders refuse authorisations or seek remuneration is low as suggested by relevant case studies;<sup>363</sup> the economic value of a hypothetical licence only covering this use is likely to be insignificant, considering the limited economic interest for right holders of copies that are made for no other purpose than preservation of works that CHIs already have. The authorisation of right holders for preservation copying is in some particular cases explicitly foreseen. However, this normally occurs as part of broader licences or agreements that are first and foremost concerned with *access* to works by CHIs (and its final users) and/or their *acquisition* of permanent copies (which they can then permanently host, e.g. on their servers, for subsequent preservation). These licences do not have as their primary focus the *conditions* of preservation (the problem addressed here), and exist in some specific contexts only, notably in instruments on voluntary deposit of works<sup>364</sup> concluded between certain categories of right holders and CHIs, and in scientific publishing licences. The latter can alternatively also refer preservation to well-established third-party specialised organisations.<sup>365</sup>

Consequences: The lack of timely preservation of works is first and foremost a cultural and social concern, and the extent of the problem is difficult to quantify. Variations in the scope of national preservation exceptions are also an obstacle to cooperation possibilities and efficiency gains that can be achieved in the single market. For example, a frequent practice in digital preservation is to store different digital copies of the same work in a minimum number of separate locations, each requiring dedicated infrastructure. Divergent legal frameworks can be a barrier to the possibility to share such infrastructure among CHIs located in different MS,

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<sup>362</sup> These transaction costs can be reduced by the effect of innovative tools and projects like ARROW and FORWARD (see more in Annex 9I), and the database foreseen by the Orphan Works Directive. Except for the Orphan Works database, these tools are however only relevant for a part of the relevant transaction costs and are only available for certain types of works.

<sup>363</sup> For example, in a project carried out by ANLux, the national archives of Luxembourg, related to photographs from the 1950-1970s, most authorisations sought from 22 photographers (or their heirs) were provided for free. In a separate example, only one out of the 17 right holders that gave authorisation to digitise their work asked for a fee (see: B. Stratton, "Seeking new landscapes. A rights clearance study in the context of mass digitisation of 140 books published between 1870 and 2010", 2011). As being about digitisation and making available of works (rather than preservation), these examples belong to the uses treated under section 3.4, and are used here by analogy on the reasonable assumption that the value for right holders of making available of a work online is higher than that of simple preservation copying.

<sup>364</sup> For example the 2012 "Statement on the Implementation of (Statutory and Voluntary) Deposit Schemes for Non-Print Publications" by the Conference of European National Librarians (CENL) and the Federation of European Publishers (FEP), and the 2010 Framework Agreement to Establish Procedures for Voluntary Deposits of Film with Preservation Archives concluded between the Association of European Film Libraries (ACE) and the International Federation of Film Producers Associations (FIAPF) and the associated template for bilateral agreements. The acquisition of copies by CHIs does not require agreements with right holders where deposit is a legal obligation. This type of agreements can however still be relevant in that context for other aspects, like for example cooperation between parties on delivery methods or formats, and conditions for access of works by end-users.

<sup>365</sup> In scientific publishing, subscription licences to electronic resources that are made available remotely to library users by a publisher can also foresee the delivery of a permanent archival copy to the contracting library and preservation copies as part of authorised uses. According to a survey by the International Association of Scientific, Technical and Medical Publishers (STM) among a part of its members, 87% of subscription licences allowed for preservation copies by the licensee or foresaw other preservation arrangements. The latter include systems, based on cooperation between publishers and research libraries, which usually entrust preservation to third-party entities, based on prior authorisation by publishers. Well-known examples are the e-Depot (managed by the Dutch National Library), LOCKSS, CLOCKSS, and Portico. These mechanisms are however also concerned with the subsequent making available of works under certain conditions (notably 'trigger events', for example the publisher being no longer in business). An overview of these 'keeper' initiatives is available from the Keepers' Registry (<http://thekeepers.org>).

and therefore have an impact on the broader problem of high technical costs associated to digital preservation.

How the problem would evolve: The future evolution of the problem is difficult to predict, but its general magnitude is likely to increase over time, given the gradual shift to digital in the production, dissemination and preservation of works, as shown by the fact that already today on average 60% of CHIs collect born-digital material.<sup>366</sup> This trend is clear in the individual institution examples like the British Library, which estimated the digital content stored in its long-term digital library system to amount to 280 terabytes and 11,500,000 ~~million~~ items in 2013, with an expected increase to approximately 5 petabytes by 2020.<sup>367</sup>

#### 4.4.2. What are the various options to achieve the objectives?

The general and specific objectives are described in section 4.1.3.

##### Baseline

No policy intervention. Reproduction of works for preservation purposes by CHIs would continue to take place only as permitted under the different conditions and the varying space provided by the national implementation of the existing EU exception for 'specific acts of reproduction', or after the reproduction right has been cleared with right holders if CHIs consider that the transaction costs involved is for them worth and possible to incur. In voluntary legal deposit contexts and for parts of scientific publications that libraries have access to remotely, preservation could continue to take place within broader agreement-based systems.<sup>368</sup>

##### *Stakeholders' views*

CHIs consider that the identified problems would not be solved in the absence of policy action. Right holders, on the contrary, overall maintain that the current legal framework for preservation by CHIs is adequate and would be in favour of no intervention.<sup>369</sup>

#### **Option 1 - Guidance to MS and peer review mechanism on the implementation of the EU exception on 'specific acts of reproduction' for preservation purposes**

- The Commission would provide guidance on the maximum scope of the current exception on 'specific acts of reproduction' as applicable to preservation purposes (categories of works, including those born-digital, beneficiaries and uses), while ensuring compliance with the three-step test.
- In addition, it would also initiate a 'peer review' among MS aimed to the comparison of national implementations of the EU exception and mutual learning as to the maximum space that it allows.

##### *Stakeholders' views*

Some CHIs would see some value in this option as possibly leading to a more shared understanding of the challenges of preservation in the digital age and to legislative change in individual MS. They would however consider it also insufficient, notably with regard to collaboration in cross-border contexts. Right holders would consider this option unnecessary for the same reasons as outlined under the baseline scenario.

#### **Option 2 - Mandatory harmonised exception for preservation purposes by cultural heritage institutions**

<sup>366</sup> G.J. Nauta – W. van den Heuvel, DEN Foundation on behalf of Europeana/ENUMERATE, "Survey Report on Digitisation in European Cultural Heritage Institutions 2015", June 2015.

<sup>367</sup> British Library, "Digital Preservation Strategy 2013-2016", March 2013.

<sup>368</sup> See section 4.4.1.

<sup>369</sup> This position was very broadly shared among right holder respondents in the 2013-2014 public consultation, which emphasised preference for licensing solutions and voluntary cooperation.

This option would require MS to implement a mandatory exception to the reproduction right with the following elements:

- Beneficiaries: CHIs engaged in preservation activities such as publicly accessible libraries, museums, as well as archives and film or audio heritage institutions. Beneficiaries would be allowed to outsource activities covered by the exception, for example to technical service suppliers.
- Subject-matter covered: all types of works and other protected subject matter in the permanent collection of the beneficiaries, intended as works on carriers (e.g. books, minidisc, tapes) that they own or are permanently deposited with them, or embodied in files that they already own or host on a permanent basis (for example as a result of a contractual agreement allowing for the downloading or transfer of archival copies for permanent hosting, or of legal deposit legislation).
- Permitted uses: beneficiary institutions would be able to perform all acts of reproduction and make as many copies as necessary for preservation purposes, into any format and media, irrespective of the technique used and of the state of a given work (for example, even before degradation has started). The exception would only cover the reproduction right (and the database extraction right in the case of the protection of non-original datasets). It would as such not permit further distribution or uses of the content, for example its making available.
- Relationship with the licensing market: as applicable to *permanent* collections as described above, the exception would per se have no bearing on the ability of right holders to authorise or prohibit the acquisition of permanent copies by CHIs, and more generally on the licensing market, and their ability to take measures to preserve the stability and security of their systems through which access to electronic resources is provided.
- Compensation: for the reasons explained in the previous point, MS may not subject the exception to fair compensation.
- Interaction with the current exception: outside of the scope of this mandatory exception, the existing (optional) exception for 'specific acts of reproduction' under Article 5(2)c of the InfoSoc Directive would continue to apply, as relevant in uses other than preservation.

*Stakeholders' views*

CHIs would favour this option as the one that best addresses the problems they raise with the current situation.<sup>370</sup> Right holders would, on the contrary, consider it unnecessary and/or excessive.

#### 4.4.3. What are the impacts of the different policy options and who will be affected?

*Approach*

The options presented above would mainly affect institutional users (CHIs) and right holders whose works are copied to be preserved. The impacts affecting these two groups are presented separately.

- For **CHIs**, the **social** impact in terms of **legal certainty** in the preservation of copyright-protected cultural heritage has been considered. **Economic** impacts in terms of potential **transaction costs** are also referred to in this context as relevant.
- For **right holders**, the main impacts are **economic** and related to revenues and to the licencing market for access to electronic resources. These impacts are relevant for all types of right holders, with the latter being of particular concern for those primarily engaged in licensing for access to electronic resources with CHIs

<sup>370</sup>

Institutional respondents in the 2013-2014 public consultation largely favoured legislative interventions.

(notably publishers and producers).

The policy options are also assessed in relation to their general **social impacts** (on cultural diversity and the preservation of cultural heritage more broadly) and impacts on **fundamental rights** (property right, freedom of the arts and sciences, and right to education).

The assessment below is mainly qualitative, as the relevant data that are publicly available or that could be obtained from stakeholders is limited.

## **Baseline**

### **IMPACTS ON STAKEHOLDERS**

#### **CHIs**

Impacts on legal certainty for preservation of cultural heritage: In the short term, the situation would not substantially change for CHIs. They would enjoy a narrow or larger space for preservation depending on the MS in which they carry out their preservation activities. Except in cases where MS may update their implementation of the current EU exception for 'specific acts of reproduction' to exploit its full space for preservation purposes, legal uncertainty and barriers to preservation will persist to varying degrees in the long term too. Furthermore, due to different national laws, legal uncertainty for CHIs wishing to perform preservation of works abroad, for example through shared infrastructure, will remain, therefore hampering the ability to take advantage of economies of scale.

Preservation of certain types of electronic content, mainly a number of scientific publications that CHIs access remotely from publisher or other platforms' servers, or those that they receive on the basis of voluntary deposit agreements, will continue to take place on the basis of authorisations that are included in agreements with a broader scope.<sup>371</sup>

#### **Right holders**

Impact on revenues: Right holders could in theory obtain extra revenues in those cases where CHIs, in order to make preservation copies that are not covered by a national exception or the agreements mentioned above, decide to ask for a specific authorisation. Given the negligible economic significance of preservation copying of works that have already been permanently acquired by a CHI, it is unlikely that right holders would ask, and that CHIs would be ready to pay, significant fees.

Impacts on licensing market for electronic resources: There would be no specific impact on the licensing market for access to electronic resources. Right holders would still be in the position to negotiate the transfer of permanent copies to CHIs as part of licences.<sup>372</sup>

### **SOCIAL IMPACTS**

Incentives for creators to produce more and diverse content would not change, but some of this content could go lost for lack of preservation in the long term, with a possible negative impact on cultural diversity.

Persisting legal uncertainty and national variations might limit or reduce the rates of works in CHIs that are preserved, with possible negative effects on the ability of society at large to see their heritage preserved as a public good in the long term, and therefore on the development of the arts, science, education and social development more broadly.

This option also has no specific contribution to the objectives of EU's policy on digital cultural heritage preservation.

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<sup>371</sup> Including through systems like the e-Depot of the Dutch National Library, LOCKSS, CLOCKSS, and Portico.

<sup>372</sup> Except if other areas of law limit this possibility, notably possible legal deposit obligations.

## IMPACTS ON FUNDAMENTAL RIGHTS

No impact on copyright as a property right, as recognised by Article 17(2) of the European Charter of Fundamental Rights. No tangible impact on the arts and scientific research, relevant for the freedom of the arts and sciences (Article 13), nor on education, protected under Article 14.

### **Option 1 – Guidance to MS and peer review mechanism on the implementation of the EU exception on 'specific acts of reproduction' for preservation purposes**

## IMPACTS ON STAKEHOLDERS

### CHIs

Impacts on legal certainty for the preservation of cultural heritage: Individual MS may decide to update their national legislation. This would result in a variably improved environment for CHIs to make preservation copies at national level. On the one hand, this effect could be felt earlier than a legislative option. Given the non-binding nature of this option, it is unlikely that the scope of national exceptions is brought up to speed with the needs of digital preservation in all MS and that discrepancies disappear. As a result, the option would not substantially facilitate preservation acts carried out in MS other than the one in which a given CHI is established. The impact on the environment for preservation, notably in terms of legal certainty would be limited, depending on the decisions of individual MS.

A Recommendation of the European Parliament and Council, a Commission Recommendation, and EU Council Conclusions already made a number of recommendations to MS for a more conducive legal environment regarding reproductions for preservation purposes.<sup>373</sup> Relevant implementation reporting<sup>374</sup> indicates however that, despite a slight increase in time in the number of MS reporting explicit provisions for multiple copying and format-shifting, national variations continue to exist in this area, as regards the scope of exceptions.

As in the baseline scenario, under this option the preservation of certain works, mainly in the area of scientific publishing or voluntary legal deposit practices, could continue to take place based on authorisations from right holders as part of broader agreements. A possible larger scope of national preservation exceptions is unlikely to affect such arrangements, as they are also required for the acquisition/delivery of permanent copies to the CHIs in the first place and can also cover access to works (not only their preservation).

### Right holders

Impacts on revenues: Missed revenue opportunities for right holders due to the possible expansion of the scope of national exceptions under this option are expected to be minimal, given that they would still regard reproductions for preservation purposes only. The possible

<sup>373</sup> Under "Preservation", the Recommendation of the European Parliament and of the Council of 16 November 2005 on film heritage and the competitiveness of related industrial activities (2005/865/CE) recommended MS to adopt measures to include "the reproduction of films on new storage media". The Commission Recommendation on the digitisation and online accessibility of cultural material and digital preservation (2011/711/EU) recommended MS to "make explicit and clear provision in their legislation so as to allow multiple copying and migration of digital cultural material by public institutions for preservation purposes, in full respect of European Union and international legislation on intellectual property rights". A similar objective for 2012-2015 was included in the Council Conclusions on the digitisation and online preservation of cultural material and digital preservation of 10-11 May 2012 which invited MS to "ensure long-term digital preservation".

<sup>374</sup> European Commission, "Report on the Implementation of Commission Recommendation 2011/711/EU – 2013-2015", 2016, and European Commission, "Report on the Implementation of the European Parliament and Council Recommendation on Film Heritage 2012-2013", 2014.

increase in preservation copies, as a result of a larger space under national exceptions, can have a slight downward impact on the number of copies that CHIs might have purchased on the market with preservation purposes in mind, in those cases where the national exception previously did not allow them to make copies.

Impacts on licensing market for electronic resources: The impact would be similar as in the baseline scenario.

#### **SOCIAL IMPACTS**

Similar impact to the baseline scenario on cultural diversity in the short term, with some possible positive impact in the long term deriving from higher preservation rates.

Positive impact also on society at large in the long term, in terms of heritage, as a public good, being preserved in the long term.

Such impact, as well as the contribution to the objectives of the EU's policy on digital cultural heritage preservation, would be subject to the same limitations described under "Impacts on legal certainty for the preservation of cultural heritage" above, as they are dependent on the will of the MS to expand the scope of their relevant exceptions.

#### **IMPACTS ON FUNDAMENTAL RIGHTS**

See baseline scenario.

### **Option 2 – Mandatory harmonised exception for preservation purposes by cultural heritage institutions**

#### **IMPACTS ON STAKEHOLDERS**

##### **CHIs**

Impacts on legal certainty for preservation of cultural heritage: This option would be effective for CHIs as all of them (including for example museums and film heritage institutions in all EU MS) would be in the position to carry out preservation reproductions of works in their permanent collections with legal certainty and with digital technologies. This option would in practice cover preservation in digital environments, extend the range of beneficiaries in those MS where the current national exception excludes certain types of CHIs, and the range of works in those national cases where some categories are not currently contemplated. This would reflect the current reality of a wide variety of different types of works present in the collections of most individual institutions: for example, estimates suggest that 80% of museums also have text-based materials in their collections, while 74% and 54% of libraries also hold visual and audio/video materials respectively.<sup>375</sup> The same scope of the national exception across the EU would also lift uncertainty regarding preservation reproductions done in MS other than the one where CHIs are established. This would benefit economies of scale and collaboration.

The option would also eliminate the potential transaction costs related to clearing rights for preservation copies, as clearly illustrated by an estimation by the UK government that put at GBP 25.9 million per year (of which 15.5 for institutional users and 10.4 million for right

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<sup>375</sup> G.J. Nauta – W. van den Heuvel, DEN Foundation on behalf of Europeana/ENUMERATE, "Survey Report on Digitisation in European Cultural Heritage Institutions 2015", June 2015. For further data on the diversity of works within individual CHI collections see Annex 9A.

holders) the savings in reduced administrative costs at national level deriving from extending the national preservation exception to extra categories of users and to all works.<sup>376</sup>

Whereas a solid estimation of the increase of the preservation rates of works held by CHIs is not possible, the effect of this option can be expected to be substantial as it removes the key copyright obstacle to preservation activities.

As in the previous options, preservation copying of certain works (part of scientific publishing, works covered by voluntary deposit arrangements) could still be contemplated as part of agreements with right holders. The same exception across the EU is not likely to affect these practices for the same reasons explained under Option 1.

### **Right holders**

Impacts on revenues: While this option implies the introduction of a new harmonised exception, the impact in terms of missed revenue is likely to be minimal for the same reasons as per Option 1, as this exception would only apply to works that CHIs already have in their permanent collections and have no bearing on the acquisition of permanent copies into a collection. Right holders could lose some revenue from replacement copies that could have been bought on the market in the absence of an exception, but that effect is expected to be negligible. Works enjoying a longer life thanks to preservation has a potential positive effect on the revenues of right holders in terms of possible future uses of the works and therefore licensing revenue.

Impacts on licensing market for electronic resources: As the exception only applies to works that are already in the permanent collection of a CHI, the option would have a similar impact as in the baseline scenario and Option 1, including as regards the ability of right holders to take measures to preserve the stability and security of the systems through which they deliver electronic content.

### **SOCIAL IMPACTS**

Positive effect on cultural diversity as this option is liable to increase preservation rates to a significant extent while not substantially affecting incentives to create for right holders.

This would have a positive effect on society at large in the long term, with positive spill-over effects on the arts, science, education and social development. This option would not only benefit citizens of MS where a preservation exception is currently missing, or restricted or unclear in scope, but also those of MS where it is already present. This is because European cultural heritage is often dispersed across different MS:<sup>377</sup> parts of the cultural heritage of a MS that currently has a broad preservation exception might be held by CHIs in MS where there is currently a narrower exception.

The contribution of this option to the objectives of the EU's policy on digital cultural heritage preservation would be substantial, as it would take away key obstacles (copyright clearance and uncertainty) that CHIs are faced with today when they want to make preservation copies in their collections.

### **IMPACTS ON FUNDAMENTAL RIGHTS**

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<sup>376</sup> UK Government, "Impact assessment on copyright exception for archiving and preservation", 2014 ([http://www.legislation.gov.uk/ukia/2014/157/pdfs/ukia\\_20140157\\_en.pdf](http://www.legislation.gov.uk/ukia/2014/157/pdfs/ukia_20140157_en.pdf)).

<sup>377</sup> There are various reasons for such dispersion, for example historical changes in territorial boundaries. Different versions of a work can exist in different MS. There are for example cases of cinematographic works that underwent cuts due to censorship in the country they originate from, which did not affect copies that were held abroad.

The introduction of an EU-level compulsory exception to the reproduction right for preservation purposes would have a marginal impact on copyright as property right, as recognised by Article 17(2) of the European Charter of Fundamental Rights, as it would only apply to authorisations for preservation copies by CHIs. By supporting more preservation of works and their longer term availability, it can also have a positive impact on the arts and scientific research, relevant for the freedom of the arts and sciences (Article 13), and on education, protected under Article 14.

#### 4.4.4. How do the options compare?

Option	Effectiveness	Efficiency	Impact on stakeholders	Social impacts and fundamental rights
<b>Baseline</b>	(0) Legal framework and space for preservation (esp. digital) will still be unclear or restrictive, and fragmented.	(0) No costs associated to the baseline option.	(0) No impact on stakeholders.	(0/-) Possible negative impact on cultural diversity and the preservation of cultural heritage as a public good. No contribution to EU policy objectives on cultural heritage preservation. No sensible impact on fundamental rights.
<b>Option 1 – Guidance and 'peer review'</b>	(0/+) Could result in some improvements in certain MS but would not bring about legal certainty and a better space for preservation across the EU and in cross-border settings.	(0/-) Limited costs linked to the organisation of the 'peer review'.	(0/+) Main impacts on stakeholders would depend on actions taken at national level.	(0/+) Some possible positive impact on cultural diversity and the preservation of cultural heritage as a public good, depending on action taken at national level. Contribution to EU policy objectives on cultural heritage preservation would also depend on actions taken at national level. No sensible impact on fundamental rights.
<b>Option 2 – Mandatory harmonised exception for preservation purposes by cultural heritage institutions</b>	(++) Would provide legal certainty and a clear and updated space for preservation across the EU, including in cross-border settings.	(0) No particular compliance costs.	(++) Legal certainty and increased space to preserve for CHIs. (-/+) possible minimal loss of revenue for right holders from replacement copies bought on the market but more works preserved. No impact on licensing of electronic resources and security and	(+) Positive impact on cultural diversity and the preservation of cultural heritage as a public good, as more works are likely to be preserved. (+) Positive contribution to the EU policy objectives on cultural heritage

			stability of systems.	preservation. (0) No tangible impact on fundamental rights.
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**Option 2** is the preferred option is as it would provide the best environment and the largest space for preservation, including in digital environments, for CHIs while not generating particular compliance costs, or affecting the interests of right holders to any meaningful extent. This option would reduce costs for CHIs related to legal uncertainty, and for both CHIs and right holders in terms of potential transaction costs related to requests for authorisations and their handling, to a larger extent than Option 1. At the same time, given the use at stake and the conditions attached to the exception foreseen by Option 2, it would not imply foregone costs for right holders (related to missed revenues or licensing opportunities) to any meaningful degree. Furthermore, Option 1 might imply some compliance costs for MS that are not present in Option 2. Positive impacts on cultural diversity and, ultimately, the ability of people to engage with cultural heritage would be higher in Option 2 than in Option 1, with similar impacts on fundamental rights. As such Option 2 is the most effective and efficient.

Option 2 is also proportionate in that it addresses the underlying problem without generating particular costs or putting special obligations on stakeholders.

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## 5. ACHIEVING A WELL-FUNCTIONING MARKET PLACE FOR COPYRIGHT

### 5.1. INTRODUCTION

#### 5.1.1. Background

In the recent years, the internet has become the main marketplace for the distribution of and access to copyright protected content, involving a high number of market players and a diversity of business models. While online content services have become essential for the generation of revenues, right holders face difficulties when seeking to monetize and control the distribution of their content online. There is a growing concern about the sharing of the value generated by some of the new forms of online content distribution.

This section of the IA examines issues related to the distribution of value in the online environment, taking into account the initial investments in creative content and the new business models and licensing practices. It concentrates on difficulties faced by right holders in negotiating with online services involved in the commercial reuse of copyright-protected content, in particular online services distributing content uploaded by end-users and news aggregators, social media and other online services providing access to publications. Problems related to the contractual relationships between authors and performers on the one hand and those to which they assign the rights for the exploitation of their works and performances, including online, on the other, are also considered in this section of the IA.

The need to address issues related to the sharing of value in the online environment and the remuneration of creators was highlighted in the Copyright Communication of December 2015, which reminded the "*digital single market's ambition to deliver opportunities for all and to recognise the value of content and of the investment that goes into it.*" The Commission's intention to take measures in this area was confirmed in the Communication on online platforms of May 2016.<sup>378</sup>

#### 5.1.2. Why should the EU act?

##### Legal basis

As indicated in the previous sections of the IA, the EU's right to act follows from Article 114 of the TFEU, which confers on the EU the power to adopt measures for the establishment and functioning of the internal market. It is also strongly linked to the harmonisation of the rights relevant for online dissemination achieved in the InfoSoc Directive.

The measures envisaged in this section of the IA would allow right holders to better exercise their rights in the online environment and would therefore contribute to improve the functioning of the Digital Single Market, as the main marketplace for the distribution of and access to copyright-protected content.

Article 167(4) TFEU related to cultural diversity has been taken into account in the design and analysis of policy options presented in this section of the IA.

##### Subsidiarity and added value

In the areas covered by this section of the IA, the rationale for EU action stems both from the harmonisation already in place (notably in terms of rights) and the cross-border nature of the

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<sup>378</sup> Communication on Online Platforms and the Digital Single Market Opportunities and Challenges for Europe, [http://europa.eu/rapid/press-release\\_IP-16-1873\\_en.htm](http://europa.eu/rapid/press-release_IP-16-1873_en.htm)

distribution of content online. Intervention at national level would not be sufficiently efficient to ensure a well-functioning digital single market for the distribution of copyright protected content and could create new obstacles.

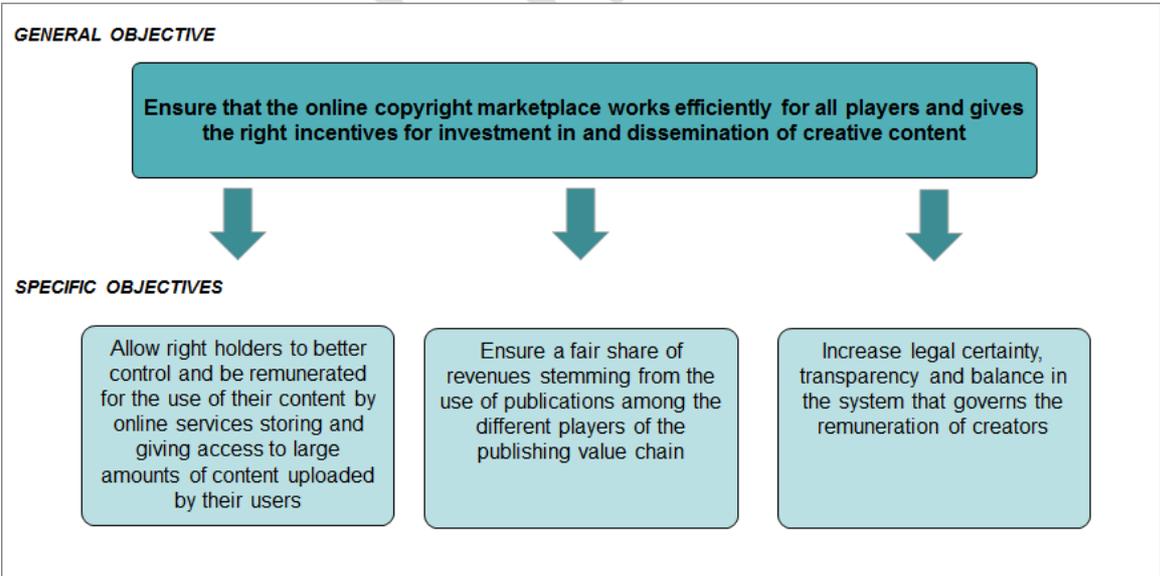
The issues faced by right holders when their content is uploaded by users on sharing websites or by press publishers when their publications are used by online services providing access to news content need to be addressed at EU level in order to guarantee a level playing field in the digital single market and avoid the fragmentation that could be generated by MS opting for different national solutions.

Although national rules may govern the contractual relationships between creators and those exploiting their works, the lack of transparency in this area constitutes an obstacle to the correct functioning of the single market for creators. EU action is therefore necessary to determine the required level of transparency. Specific elements may nevertheless be left at the discretion of MS, in order to take account of the existing national rules and the specificities of each sector.

**5.1.3. What should be achieved?**

The general objective is to achieve a copyright marketplace and value chain that works efficiently for all players and gives the right incentives for investment in and dissemination of creative content.

Specific objectives have been identified in each of the area covered: (i) ensure that right holders benefit from a legal framework allowing them to negotiate and be remunerated for the online exploitation of their content by online services storing and giving access to large amounts of content uploaded by their users; and that there is a fair environment for all types of online content services; (ii) ensure a fair share of revenues stemming from the use of publications among the different players of the publishing value chain and (iii) increase legal certainty, transparency and balance in the system that governs the remuneration of creators.

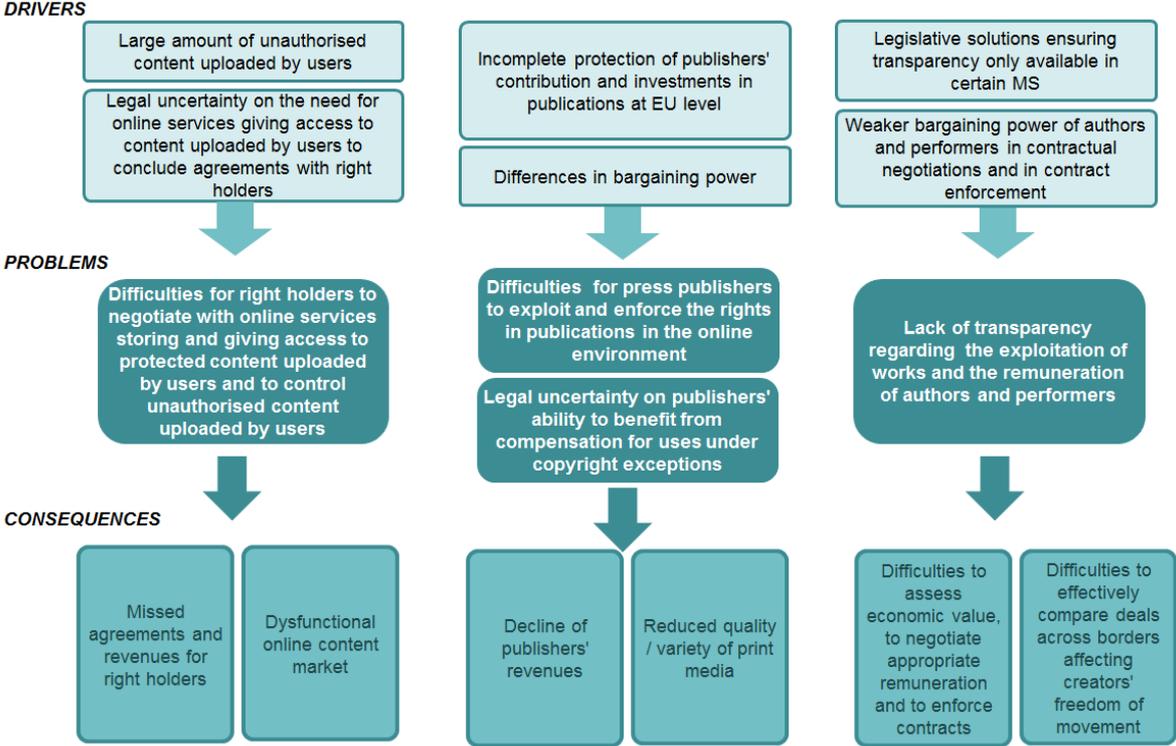


**5.1.4. Methodology**

**Problem definition**

Two types of problems are described in this section of the IA, reflecting two aspects of the value chain: those faced 'upstream' by right holders when trying to license their content to

certain online content services (difficulties to negotiate on a fair basis and to obtain remuneration) and those faced 'downstream' by creators when negotiating contracts for the exploitation of their works (lack of transparency on the exploitation of the works). The latter are not specific to the online environment but have been exacerbated by the multiple forms of exploitation existing online. The specific drivers and consequences are illustrated in the problem tree below and further explained in the following sub-sections.



**Identification of policy options**

The policy options examined in each of the three areas include the baseline option, a non-legislative option, and one or several legislative options. The legislative options have been designed taking account of the existing legal framework and the different forms of distribution of content online. In view of the differences between the upstream and downstream problems and the diverse situation of stakeholders, no common solution could be envisaged to address in a general manner the concern about the sharing of value in the online environment.

**Impacts of policy options**

*Stakeholders affected*

The policy options considered in this section of the IA would directly affect certain types of online content services (in particular, those storing and giving access to content uploaded by users and those giving access to news content) and would also have an impact of the competitive situation of other types of online content services.

The options envisaged to address the difficulties faced with online services distributing content uploaded by end-users would affect all types of right holders whose content is used by these services (in the music, audiovisual and print sectors).

For the use of publications online, the options envisaged would have an impact on publishers (press and book publishers), as well as on authors and other creators of the individual contributions which compose a publication.

The options envisaged in the area of remuneration would affect more strongly authors and performers and all types of parties they contract with (which could be producers, publishers, broadcasters but also online content services in some cases).

The impacts on consumers are examined in the three areas covered by this section, notably in terms of access to content.

#### *Type of impacts and availability of data*

Only the most significant and likely impacts are reported in this IA. The impacts are assessed by group of stakeholders (e.g. online services, right holders, consumers), focusing mainly on economic impacts, for example in terms of exploitation of content, revenues, business models, competitive situation, compliance costs. These economic impacts are mostly assessed from a qualitative point of view, considering how the different policy options would affect the negotiations between those creating or investing in the creation of content and those distributing such content online. The limited availability of data in this area (beyond market data or specific examples provided by stakeholders which are presented in the problem definition where available) did not allow to elaborate a quantitative analysis of the impacts of the different policy options.

In addition to the impacts on the different groups of stakeholders, broad social impacts (e.g. impacts on cultural diversity) and impacts on fundamental rights are assessed separately. All policy options considered in this section of the IA may have an impact on copyright as a property right (Article 17(2) of the European Charter of Fundamental Rights), on the freedom to conduct a business (Article 16) and on freedom of information (Article 11). Impacts on third countries or on the environment are not elaborated upon as the policy options presented in this section of the IA are considered not to have any substantial impact on them.

#### *Impacts on SMEs*

The large majority of companies that would be affected (as right holders, publishers, authors/performers or their contractual counterparties, but also certain types of online services) by the options considered in this section of the IA are SMEs, and more particularly micro-companies (90% of companies in the publishing of books, newspapers and journals and 96% of companies in the film and music production and 95% of companies involved in data processing, hosting and related activities or web portals)<sup>379</sup>.

The policy options examined in relation to the use of content uploaded by users or the use of publications through online services would contribute to support SMEs and micro-companies in their negotiation with online content services. Certain options would however generate obligations for SMEs active as online services. Also, some of the policy options considered in the area of remuneration of authors and performers would create compliance costs for SMEs and micro-companies (notably producers or publishers) contracting with authors and performers. These costs are analysed in section 5.3.3 and in Annex 14.

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<sup>379</sup> Source: Eurostat, Structural Business Statistics, 2013 data for publishing of books, periodicals and other publishing activities (J581); motion picture, video and television programme production, sound recording and music publishing activities (J59); data processing, hosting and related activities; web portals (J631).

Considering the high number of SMEs and micro-companies in the creative industries and in the distribution of content online, exemptions or mitigating measures have not been deemed appropriate as they may create possibilities for businesses to circumvent the obligations and would not allow to reach the objectives defined above.

## Comparison of policy options

The policy options are compared against the criteria of effectiveness (i.e. to what extent they fulfil the specific objective), efficiency (i.e. at what cost they do so), impact on the different groups of stakeholders and coherence with regard to cultural diversity, fundamental rights and/or other EU policies. Each option is rated between "--" (very negative), "-" (negative), 0 (neutral), "+" (positive) and "++" (very positive).

### 5.2. USE OF PROTECTED CONTENT BY ONLINE SERVICES STORING AND GIVING ACCESS TO USER UPLOADED CONTENT

#### 5.2.1. What is the problem and why is it a problem?

***Problem:** Right holders face great difficulties, or are unable, to negotiate with online service providers that store and give access to large amounts of protected content uploaded by their users. This results in right holders having limited control over the use and the remuneration for the use of their content.*

Description of the problem: The functioning of the online content market place is complex. There has been a progressive shift from ownership to access-based models. Today, copyright protected content is no longer only distributed directly by a digital service provider to end users. Instead, access to online content often takes place at the end of a process in which several parties participate. As a result, right holders do not always have control over the way their content is distributed online. With the rise of Web 2.0 technologies, interactive services including participatory networks have emerged and increasing amounts of content is accessed through content sharing platforms that make available protected content uploaded by their customers (as opposed to content provided to the service provider directly by right holders).

Such user uploaded content platforms often provide the public with large amounts of protected content. In addition to enabling the making available of content, these platforms provide functionalities such as categorization, recommendations, playlists, or the ability to share content, to make their services more attractive to end users. These services use copyright protected content in order to attract and retain users to their websites thereby increasing the value of their services. Access to such content is generally "free" for users and the service draws its revenues, directly or indirectly, from advertising and user data.

While some of the providers of these services have *de facto* become major actors of online content distribution<sup>380</sup> and have substantial number of users<sup>381</sup> and significant market

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<sup>380</sup> See, for example, results from a study commissioned by GESAC showing that cultural content could represent up to 66% of YouTube views and that music videos received 59% of total views: [http://www.rolandberger.com/gallery/pdf/Report\\_for\\_GESAC\\_Online\\_Intermediaries\\_2015\\_Nov\\_EUR.pdf](http://www.rolandberger.com/gallery/pdf/Report_for_GESAC_Online_Intermediaries_2015_Nov_EUR.pdf).

<sup>381</sup> As of October 2015, Youtube had 1.3 billion users, i.e. 33% of internet users. It is the world's largest online video platform with 400 hours of video content uploaded every minute, <https://www.youtube.com/yt/press/statistics.html> and <http://www.statisticbrain.com/youtube-statistics/>. Daily Motion advertises itself as one of the biggest video platforms and most popular European sites attracting 300 million users watching 3.5 billion video views every month,

valuations,<sup>382</sup> right holders are not necessarily able to enter into agreements with them for the use of their content. This affects right holders' possibility to determine whether, and under which conditions, their content is made available on the services and to get an appropriate remuneration for it.<sup>383</sup>

Some online service providers refuse to negotiate any agreement, which means that despite the availability of copyright protected content on these platforms no revenues are generated for right holders for the use of their content. Refusals of agreements have above all been reported by right holders in the music and images sectors.<sup>384</sup> At the same time, some online service providers have argued that right holders have requested terms that they considered unreasonable for the type of service they provide.<sup>385</sup>

In some cases, platforms have offered right holders agreements for a share of the revenue generated by advertising placed around their content.<sup>386</sup> However, these agreements have been reported by some right holders to be different from copyright licensing agreements as the platforms argue that they are not under a legal requirement to negotiate with right holders and

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*<http://www.dailymotion.com/be-fr/about>. Vimeo, another global online video platform, has a monthly audience of more than 170 million people and 35 million registered users, <http://iac.com/brand/vimeo>. SoundCloud currently has approximately 250 million registered users while it had about 150 million registered users in 2015 (and 11 million in 2011), <http://www.bloomberg.com/news/features/2015-07-10/can-soundcloud-be-the-facebook-of-music>. Pinterest states that it has more than 100 million monthly active users, <http://venturebeat.com/2015/09/16/pinterest-finally-shares-its-size-100m-monthly-active-users-and-counting/>.*

<sup>382</sup> Youtube is estimated to be worth more than \$70 billion, and its revenues are reported to have reached \$9 billion in 2015, <http://www.bloomberg.com/news/articles/2015-05-27/a-bank-of-america-analysis-says-youtube-is-worth-more-than-85-percent-of-companies-in-the-s-p-500>, <http://www.musicbusinessworldwide.com/youtube-will-earn-9bn-in-revenue-this-year-towering-over-spotify/>. Pinterest has been valued at \$12 billion in 2015, <http://expandedramblings.com/index.php/pinterest-stats/>. Soundcloud has been valued at \$700 million in 2014 <http://www.businessinsider.com/soundcloud-valuation-2014-1?IR=T>. Dailymotion was valued at \$295 million in 2015, see <http://techcrunch.com/2015/06/30/vivendi-buys-80-of-frances-dailymotion-valuing-the-youtube-rival-at-295m/>.

<sup>383</sup> See for example the letter sent by 186 artists to the US Congress in June 2016, <http://www.musicbusinessworldwide.com/revealed-the-186-artists-protesting-against-youtube-shielding-dmca-laws/>. See also the position of Impala, the independent music companies' association, regarding the situation on the market, <http://www.thedigitalpost.eu/2015/channel-digital-single-market/copyright-birds-eye-view-independent-music-sector>.

<sup>384</sup> Collective management organisations representing authors in the music sector have reported failures to obtain licenses with services like Dailymotion, Vimeo or Myspace. Besides refusals of licenses, renewals of contracts may also fail, as reported by GEMA, the German authors' collecting society, <http://www.dw.com/en/german-battle-over-youtube-royalties-wages-on/a-5951245>. For images, CEPIC has reported in their reply to the public consultation on online platforms that 80%-90% of their images used online are unlicensed, <https://ec.europa.eu/eusurvey/pdf/answer/6b37d157-1c33-44f8-893e-af86b3c96aa1>. Services mentioned include Pinterest, Flickr and Tumblr. In submissions to the Commission from July 2015, Getty Images indicates that "it has been frustratingly difficult to enter into licensing arrangements with online platforms in respect of images that have been uploaded by unlicensed third parties".

<sup>385</sup> See the reply by Soundcloud to the public consultation on online platforms, <https://ec.europa.eu/eusurvey/pdf/answer/6acf2b21-865a-402c-876a-e2b67c0cee9>. Despite initial failures to reach agreements in certain cases, Soundcloud has by now concluded agreements with right holders.

<sup>386</sup> The information provided by right holders, including in their replies to the public consultation on online platforms, shows the existence of some agreements on the market - see for example the reply by GESAC, <https://ec.europa.eu/eusurvey/pdf/answer/4ebd8857-927d-411f-9ff1-282e9f822ff3>.

that they enter into such "monetisation agreements" on a purely voluntary basis.<sup>387</sup> Right holders argue that this alleged absence of legal requirement impedes fair negotiations. An example provided by the music industry shows that, in 2015, pure advertising-supported online services storing and giving access to content uploaded by end users which have an estimated user base of more than 900 million generated revenues amounting to US\$634 million, which is (approximately) four per cent of global music revenues.<sup>388</sup> Given the significant user base, right holders argue that such revenues are insignificant compared to what other service providers<sup>389</sup> are generating for right holders. At the same time, there is publicly available information about the payments made by a major service provider to right holders for the use of their music.<sup>390</sup>

The negotiation position of right holders is further weakened by the fact that they are not in a position to keep their content away from these platforms, because the content is uploaded by users. Where the content is infringing, they can ask the platforms to take down the content, in each individual case, which leads to significant costs for them.<sup>391</sup> At the same time, some platforms have already voluntarily taken measures to help identifying and monetising the use of content on their services, in particular through content identification technologies. These technologies are applied at the time of upload of the content to verify through an automated

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<sup>387</sup> For the music sector, see for example a report published by the Music Managers Forum in 2015, "Dissecting the digital dollar", at p. 67, <http://themmf.net/digitaldollar/>. Youtube has argued that its service rather creates additional value - where no value at all could be obtained - for right holders through the possibility to generate revenues from user uploaded content. According to Youtube, fan-uploaded content accounts for roughly 50% of the music industry's revenue from YouTube. See article in the Guardian where Youtube's point of view on the value gap is described, <http://www.theguardian.com/music/musicblog/2016/apr/28/youtube-no-other-platform-gives-as-much-money-back-to-creators>. Youtube also argues that their average user spends just one hour watching music on Youtube a month (as opposed to the 55 hours a month the average Spotify subscriber consumes), <http://youtubecreator.blogspot.be/2016/04/setting-record-straight.html>.

<sup>388</sup> IFPI digital music report 2016, available at <http://www.ifpi.org/news/IFPI-GLOBAL-MUSIC-REPORT-2016>.

<sup>389</sup> The recording industry points to \$2 billion having been paid by subscription services that had an estimated user base of 68 million in 2015. See IFPI Digital Music Report 2016. Artists have also voiced concerns about the level of payments, see for example <https://www.theguardian.com/music/musicblog/2016/may/02/nelly-furtado-youtube-artist-royalties-fair-pay>.

<sup>390</sup> See the position of Youtube, indicating the amount it has paid to the music industry since its foundation available at <http://www.musicbusinessworldwide.com/youtube-and-google-play-have-paid-out-3bn-to-record-industry/> and <http://www.digitalmusicnews.com/2016/06/14/youtube-responds-artists-fair-pay/>.

<sup>391</sup> See sections 4.3 and 4.4 of the public consultation on online platforms, <https://ec.europa.eu/digital-single-market/en/news/full-report-results-public-consultation-regulatory-environment-platforms-online-intermediaries> as well as the replies of the music community to the US Copyright Office related to the section 512 study, <http://www.riaa.com/wp-content/uploads/2016/03/Music-Community-Submission-in-re-DMCA-512-FINAL-7559445.pdf>. Sony Music Entertainment has provided some evidence on this issue before the US Copyright Office: "... prior to reaching a licensing agreement with the popular music focused uploaded content service Soundcloud from April 1, 2015 to April 2016, Sony spent hundreds of thousands of dollars to manually review 1.5 million metadata matches and to send takedown notices to remove approximately 218.000 infringing copies of Sony recordings from the soundcloud platform. Despite the scale of this enormous effort, it was only sufficient to monitor approximately 15% of Sony's catalog on this single platform", see <https://www.regulations.gov/document?D=COLC-2015-0013-90111>. See also IFPI reply to the public consultation on online platforms stating that: "around 90% of infringements that IFPI locates and addresses with a takedown request could have been avoided if the relevant services had taken measures to avoid that infringing content reappears after the first notification. For example, in 2015, One Direction's "Drag Me Down" reappeared over 2,700 times on YouTube following the first notice", see <https://ec.europa.eu/eusurvey/pdf/answer/138c7b30-556b-4b7b-adf1-fe5ab8406f4c>.

procedure whether the content uploaded by users is authorized or not, based on data provided by right holders.<sup>392</sup> Some services claim high rates of successful content identification<sup>393</sup>. The identification of some types of content, such as bootleg remixes and DJ sets, or more generally of content that has been transformed or differs significantly from the original content, may be very challenging.<sup>394</sup> It has been argued that content identification technologies may lead to "false positives" (i.e. situations where content is wrongly identified and removed).<sup>395</sup> At this stage, it seems clear that better cooperation with right holders is required (notably to provide data such as fingerprints) for the efficient functioning of these technologies.<sup>396</sup>

The situation described is also said to result in a decrease of the value of copyright protected content.<sup>397</sup> Several broadcasters for example have started legal actions against different online platforms that disseminate their programs online claiming that these platforms are actively exploiting the content and benefitting financially from it.<sup>398</sup> They consider that these services limit their ability to monetize certain types of content on other services.<sup>399</sup>

Besides right holders, other online content service providers (those that acquire a license from right holders and distribute protected content directly to end users) are affected by this situation. They find themselves at a competitive disadvantage - they negotiate and conclude licenses with right holders in order to operate their services<sup>400</sup> while online platforms

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<sup>392</sup> See Annex 12A for more information on the functioning of different technologies depending on the type of content.

<sup>393</sup> Youtube for example indicates that only 0.5% of all music claims are issued manually and that they handle the remaining 99.5% with 99.7% accuracy (through Content ID), <https://www.theguardian.com/music/musicblog/2016/apr/28/youtube-no-other-platform-gives-as-much-money-back-to-creators>. This is contested by creators, see above. Audible Magic - the content identification technology and service provider - has indicated positive identification rates that exceed 99%, <http://www.audiblemagic.com/why-audible-magic/>.

<sup>394</sup> <http://www.ft.com/intl/cms/s/0/0e2abaa2-f58d-11e5-96db-fc683b5e52db.html#axzz4AEnEjaF4>. See for instance the statement made by the French start up Blue Efficiency regarding Google's Content ID technology (regarding the identification of films): "*The Content ID robot does not enable to identify content that has been skilfully modified with a view to slip through the tracks*", <http://www.pressreader.com/france/edition-multim%C3%A9di/20160215/28150075030257>.

<sup>395</sup> This risk is put forward in particular in respect to automated notifications. See the Chilling Effects Clearinghouse, a collaborative archive founded by several law school clinics in the US which collects and analyses legal complaints and requests for removal of online materials, <http://chillingeffects.org/>.

<sup>396</sup> See for example the mission launched by the French CNC (*Centre national de la cinématographie*) in 2016 with the objective, inter alia, to encourage rights holders to understand better and use more the functionalities offered by content recognition technologies (see letter of the CNC n°127 – 29 February 2016). Already in 2013 the Lescure report commissioned by the French government concluded: "*they [the content identification tools] remain insufficiently used by the rights holders who do not always master the modus operandi and the functioning (it is particularly the case of the small players)*", see Lescure report, page 404 [http://www.culturecommunication.gouv.fr/var/culture/storage/culture\\_mag/rapport\\_lescur/index.htm](http://www.culturecommunication.gouv.fr/var/culture/storage/culture_mag/rapport_lescur/index.htm).

<sup>397</sup> See the 2016 LEAR report prepared for Mediaset; *Developments of the audiovisual markets and creation of original contents* [ADD REF once published].

<sup>398</sup> See e.g. the recent case against Break.com in Italy (R.T.I vs TMFT Enterprises LLC/Break Media, N. 8437/2016), TF1 et autres / Dailymotion, Cour d'appel de Paris, Pôle 5 - Chambre 1, arrêt du 2 décembre 2014. See also the long lasting litigation between Youtube and TF1 that ended in 2014 by an agreement after several court decisions.

<sup>399</sup> According to Mediaset, an imbalance is created in the market with digital platforms gaining an increasing percentage of advertising revenues. See the 2016 LEAR report cited above.

<sup>400</sup> In the case of Spotify or Deezer, the payments to right holders for the rights in the content they distribute represent around 70% of the services' revenues. See Deezer's CEO statement on the impact of

distributing user uploaded content have no or very limited content acquisition costs.<sup>401</sup> This is particularly relevant as both online content distribution services and user uploaded platforms may be seen by consumers as equivalent sources for content consumption.<sup>402</sup> This is notably the case in the music sector where platforms are largely used by consumers to access music online. In this context, a Eurobarometer on users' preferences for accessing content online conducted in March 2016 shows that 31 % of respondents use most often video or music-sharing websites to access music online.<sup>403</sup>

Drivers: [*Legal uncertainty hampering the possible negotiation of agreements*] Under copyright law, right holders can exercise their right to authorize and exploit commercially the communication to the public of their works or other protected subject-matter, by the conclusion of licenses in return for payment of remuneration,<sup>404</sup> if they so choose.<sup>405</sup> When content is disseminated online, an act of communication to the public takes place which may, depending on the circumstances, involve more than one actor. The Court of Justice of the European Union (CJEU) has not addressed the specific case of online services giving access to content uploaded by their users.<sup>406</sup> With some exceptions,<sup>407</sup> national case law is not very clear either as to who engages into an act of communication to the public when content is

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Youtube at <http://www.cnn.com/2016/04/19/blame-taylor-swift-youtube-for-low-artist-pay-from-streaming-deezer-ceo.html>.

401 See the statement by indie labels at <http://www.digitalmusicnews.com/permalink/2014/05/22/19-indie-label-organizations-speak-youtube>, according to which: “the contracts currently on offer to independent labels from YouTube are on highly unfavourable, and non-negotiable terms, and undervalue existing rates in the marketplace from existing music streaming partners such as Spotify, Rdio, Deezer and others”.

402 See the 2015 JRC technical report "Let the music play? Free streaming, product discovery, and digital music consumption", page 8, footnote 11: "Youtube offers a different music consumption experience than interactive streaming services like Deezer or Spotify. However, it allows users to access music in an almost unrestricted way, making this service rather similar to the premium subscriptions offered by fully interactive streaming services". See also the report published by the Music Managers Forum (p. 66) cited above indicating that "...sites like Youtube and Soundcloud soon boast music libraries very similar (and often larger) to those of services like Spotify and therefore compete with those platforms".

403 Professional music streaming services come second with 22% of respondents indicating that they use such services most often. See the results from Flash Eurobarometer 437, *Internet users' preferences for accessing content online* (Annex 12B).

404 See for instance Court of Justice of the European Union, *Premier League vs Murphy*, para.107 (Joined Cases C-403/08 and C-429/08).

405 A copyright license can be given for free. Instances where right holders may decide to do so include the case of unknown authors or artists seeking exposure for their works or performances (services, such as Myspace, have launched the careers of unknown artists, see <http://www.forbes.com/sites/lorikozlowski/2012/05/15/how-myspace-spawned-a-startup-ecosystem/#56cce0f56364>). Soundcloud's objective at the beginning was to provide an open platform that directly connected, on a free basis, creators with their audience.

406 When dealing with broadcasting which involved two actors in the chain of communication (broadcasters and distributors), the CJEU has taken different positions. In one instance, it has indicated that there can be two parties involved in one single act of communication to the public, i.e. the broadcaster and the distributor (C-432/09, *Airfield*) while in another instance, it has ruled that only one party is communicating to the public, suggesting that it was likely to be the distributor (see C-325/14 *SBS/Sabam*).

407 In the context of the GEMA vs Youtube cases in Germany (Higher Regional Court Hamburg, July 2015; Higher Regional Court Munich, January 2016, file number 29 U 2798/15), the courts considered that while a service like Youtube increasingly takes over the function of an attractive and competitive music service and presents itself as a comprehensive alternative to Spotify and similar services, it does not carry out an act of communication to the public pursuant to Article 3 of Directive 2001/29 (which is carried out by the uploaders).

uploaded on a sharing website. As a result, a case by case assessment is needed for deciding who is communicating to the public.

Additional uncertainty arises from the question of whether specific service providers that store and give access to content uploaded by a third party can benefit from the hosting service provider status provided under the E-Commerce Directive ("ECD").<sup>408</sup> It is again up to the courts to assess on a case by case basis whether a given service qualifies as a mere technical, automatic and passive hosting service provider with the consequence that it can be exempted from liability under copyright law. While national courts have often deemed some providers of user uploaded content services to be hosting service providers covered by Article 14 of the ECD, they have in a number of cases recognized the importance of protected content for their business models and revenues.<sup>409</sup>

*[Presence of large amounts of content which is uploaded by users]* Given the fact that content is uploaded by users, it is in practice difficult for right holders to determine the availability of protected content on user uploaded platforms. In case of platforms which services (or one of their services) result in the provision of access to significant amounts of, e.g. videos or other AV works, music or pictures, right holders face particular difficulties when wanting to negotiate licenses or reach agreements.<sup>410</sup> Even if major user uploaded content services have, on a voluntary basis, put in place measures such as content identification technologies,<sup>411</sup> their deployment remains voluntary, is subject to the conditions set by the services and right holders claim that their functioning/efficiency remains generally opaque for them.

Consequences: The combination of the two drivers above has led to the situation where right holders are confronted with large use of their content on user uploaded content services and fail (or have difficulties) to negotiate agreements with these services.

How the problem would evolve: If no action is taken at EU level, the described legal uncertainty is likely to remain and affect right holders' possibilities to negotiate agreements. This in turn risks constraining the growth of right holders' revenues due to the scale of the use of their content on user uploaded platforms. The general trend in content consumption, which is moving away from physical media towards the digital services, may further exacerbate the current problem, as seems to be indicated by the fact that the increase in consumption has not been accompanied by a proportionate increase in payments to right holders.<sup>412</sup>

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<sup>408</sup> Article 14 ECD limits the liability of "hosting service providers" provided that they are not aware of illegal content and that, on gaining such knowledge, they take expeditious action to remove or disable access to it. The CJEU has clarified that the status of hosting provider can be claimed only by a provider whose activity is of a mere technical, automatic and passive nature (see for example case C-324/09, *L'Oréal and Others*).

<sup>409</sup> See for example the GEMA vs Youtube cases and the case against Break.com in Italy cited above.

<sup>410</sup> Right holders have described their negotiation relationship with certain online service providers as "take it or leave it": they must either accept the terms offered by the service or continue to send notifications for each individual content which can be infringed thousands of times. See the synopsis report to the online consultation on public consultation, section 3.6.1, <https://ec.europa.eu/digital-single-market/en/news/full-report-results-public-consultation-regulatory-environment-platforms-online-intermediaries>.

<sup>411</sup> See Annex 12A for examples of content identification technologies used by certain services.

<sup>412</sup> According to the 2015 Yearbook of the British Phonographic Industry (BPI), Vevo and YouTube were responsible for more than **50%** of all on-demand music streams in the UK. Despite an **88%** rise in YouTube and Vevo plays, money coming into labels from 'pure ad-supported' platforms rose by just **4%**, see <http://www.musicbusinessworldwide.com/youtube-is-paying-less-than-0-0009-per-stream-to->

At the same time the market has been undergoing certain changes with licensing and partnership agreements being struck between right holders and online services that had so far refused to conclude agreements.<sup>413</sup> This trend may continue but it may still follow the pattern whereby services operate without the right holders' agreement and build an audience before agreements are concluded.<sup>414</sup> Moreover, in the absence of a clear legal framework, this trend is unlikely to become the rule in the short or mid-term. It is also possible that the CJEU will bring clarity to the question of whether an uploaded content service is responsible for acts of communication to the public and/or can benefit from the hosting provider status under the ECD. This cannot, however, be predicted as it is entirely dependent on referrals by national courts. Under such circumstances the amount of content on user uploaded content services not covered by an agreement with right holders will continue to have a negative effect on negotiations.

### 5.2.2. What are the various options to achieve the objectives?

The general and specific objectives are described in section 5.1.3.

#### Baseline

No policy intervention. This option would rely on the existing legal framework and the case by case assessment by the courts of the concept of communication to the public and of the scope of the hosting service provider status under Article 14 ECD. The implementation by the service providers of content identification technologies will remain voluntary.

#### Stakeholders' views

*Right holders* will not support this option as they consider that the current legal framework requires amendment and that the market will not address the situation. *Online service providers* storing and giving access to user uploaded content will support this option as they consider that the legal framework is clear and that they are already taking voluntary measures.<sup>415</sup> *Other content service providers* are likely not to be in favour of this option as it maintains the imbalance on the market. *Consumers* will be in favour of this option as they do not see the

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[uk-record-labels/](#). In France, **Snep** has reported that income from ad-funded video services - including the likes of DailyMotion, Vevo and YouTube - dropped by **8.8%** year-on-year. In the US: according to the **Recording Industry Association of America** (RIAA) report, in 2014, [ad-supported, on-demand streaming grew 63 percent year on year](#), while revenue rose just 34 percent. See an article in the New York Post citing the report <http://nypost.com/2016/03/22/record-labels-slam-youtube-ad-supported-streaming-services/>.

<sup>413</sup> See article describing the agreement into which Soundcloud has entered with PRS, the UK authors' collecting society: <http://www.musicbusinessworldwide.com/soundcloud-signs-legal-settlement-with-prs-in-time-for-christmas/>. Besides SoundCloud, Youtube has launched a new paid service called Youtube Red (so far only in the US), <http://www.cnet.com/how-to/youtube-red-details/>. Pinterest has signed a partnership agreement with Getty images, see article <https://techcrunch.com/2013/10/25/pinterest-inks-deal-with-getty-images-will-pay-a-fee-for-the-photo-agencys-metadata/>.

<sup>414</sup> For example, the music service provider Soundcloud, founded in 2008, has entered into its first licensing deal with independent labels in 2015, six years after its foundation: <http://www.theguardian.com/technology/2015/jun/04/soundcloud-signs-licensing-deal-independent-labels>. See also the deal that Soundcloud recently concluded with SACEM, the French authors' collecting society, and UMPI (Universal Music Publishing International): <https://societe.sacem.fr/en/press-resources/per-publication/Press+releases/a-new-deal-license-sacem-universal-music-publishing-international-and-soundcloud-strike-new-european-deal>.

<sup>415</sup> See the synopsis report on the public consultation on the regulatory environment for platforms, online intermediaries and the collaborative economy, sections 3.6 and 4, <https://ec.europa.eu/digital-single-market/en/news/full-report-results-public-consultation-regulatory-environment-platforms-online-intermediaries>.

need for a change to the status quo and will fear that any intervention with regard to measures limiting unauthorized content may have a negative impact on the freedom of information/expression.<sup>416</sup>

### **Option 1 – Stakeholder dialogues between right holders and online services which store and give access to large amounts of content uploaded by their users**

#### *Main elements:*

- The Commission would launch stakeholder dialogues that would bring together right holders and user uploaded copyright protected content services to encourage them to define best practices, notably in view of reaching more agreements for the use of the protected content.
- The dialogues would focus on service providers which store and provide access to large amounts of copyright protected content. These services will be targeted due to the important role they play on the online content market in view of the significant amount of protected content they use. The determination of what constitutes "large amounts of content" needs to be made on the basis of a combination of factors including the number of users and visitors and the amount of content uploaded.<sup>417</sup> These factors are independent from the size of the service provider itself, which can also be an SME. The identified services would be expected to engage in the dialogue and negotiate agreements in view of sharing fairly the value created by the use of protected content with right holders. Given the different dynamics in each sector (music, audiovisual, images), the dialogues would be conducted on a sector by sector basis.
- The best practices could also define appropriate technologies that user uploaded content platforms would be encouraged to put in place to help the implementation of their agreements with right holders. When defining such technologies, content identification technology providers would also be involved in the debate. Account would be taken of existing technologies, their availability, efficiency and costs for each contracting party in order to find a balanced approach. The best practices could also focus on the ways to ensure that the services (i) obtain the necessary data from right holders to make the technologies work and (ii) are transparent towards right holders in terms of the operation, characteristics and efficiency of the technologies used.

#### *Stakeholders' views*

Due to the non-binding nature of this option, *rights holders* will oppose it, whereas *online service providers* giving access to user uploaded content may support it.<sup>418</sup> *Other content service providers* are likely to find this

<sup>416</sup> In their replies to the public consultation on online platforms, individual users expressed their views on the relations between right holders and platforms and on the possible duty of care on online platforms with regard to tackling (all) illegal content (not only copyright infringing content). See the synopsis report on the public consultation on the regulatory environment for platforms, online intermediaries and the collaborative economy, <https://ec.europa.eu/digital-single-market/en/news/full-report-results-public-consultation-regulatory-environment-platforms-online-intermediaries>.

<sup>417</sup> It can be difficult to quantify the exact amount of copyright protected content uploaded by users due to the diversity of content which in many cases may not be copyright relevant (such as family pictures) or be uploaded by right holders themselves. See for instance the Hadopi study regarding an estimated quantification of content and types of content on YouTube and Daily Motion <https://www.hadopi.fr/observation/publications/qualification-et-quantification-des-contenus-sur-youtube>; <https://www.hadopi.fr/actualites/actualites/qualification-et-quantification-des-contenus-sur-dailymotion>. It seems however clear that even if protected content available on user uploaded content services was to represent only a part of the overall content available on these services, the amount would still be very significant due to the scale many of these services have reached.

<sup>418</sup> See the above cited synopsis report on the public consultation on online platforms.

option insufficient. *Consumers* are likely to view the possible outcome of a stakeholders' dialogue (even if based on voluntary measures) as impacting negatively the freedom of expression.<sup>419</sup>

## **Option 2 – An obligation on user uploaded content services to seek, in good faith, to conclude agreements with right holders and to put in place appropriate and proportionate content identification technologies**

### *Main elements:*

- The obligation to seek, in good faith, to conclude agreements reflecting the economic value of the use made of the protected content with right holders would apply, as in option 1, to service providers which have large amounts of user uploaded content (independently of whether the services are liable for a copyright relevant act and of whether they could be considered as hosting providers under article 14 of the ECD). It is clear that online service providers may have very different services (a user uploaded content platform, their own channels, third party channels). This obligation would only apply to the user uploaded content services to the extent that the content is copyright protected.
- The type of agreement to be sought in good faith will not be defined as it would depend on the nature of the services. It could take the form of a copyright license in case the service engages into a copyright relevant act. It could also be another type of partnership agreement, such as a monetisation agreement (sharing of revenue) to avoid right holders requesting a takedown where the service is deemed to be a hosting service provider covered by Article 14 of the ECD.
- Given the availability of large amounts of user uploaded content in their services, service providers would also be obliged to put in place appropriate and proportionate measures, such as content identification technologies, to ensure the functioning of these agreements.
- In order to define what is appropriate and proportionate, cooperation with right holders will be required. As in option 1, services and right holders would need to agree on the ways to ensure the technologies are applied efficiently, notably through appropriate data provision (such as fingerprints) by right holders. Such cooperation should also aim at greater transparency for right holders on the functioning and efficiency of the technologies used by the services.
- The obligation on the services to put in place appropriate and proportionate measures in cooperation with right holders is consistent with the nature of the services covered (services providing access to large amounts of content uploaded by users) and what could reasonably be expected from them in order to effectively put in practice agreements with right holders without amounting to active monitoring of the content.
- The above obligations will be without prejudice to liability regimes applicable to copyright infringements and the application of Article 14 ECD. The applicability of relevant rules will need to be assessed on a case by case basis.
- The notice and takedown regime will continue to apply for hosting service providers covered by article 14 with respect to content not covered by agreements or in cases where the content cannot be identified.

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<sup>419</sup> See the reply by BEUC to the public consultation on online platforms, <https://ec.europa.eu/eusurvey/pdf/answer/452cd1fc-7e4f-4102-aae3-254d219876e8>.

- Member States would be required to facilitate cooperation between service providers and right holders where appropriate, notably in cases where no individual agreement is reached between the parties on appropriate measures to be put in place by the services.

*Stakeholders' views*

*Right holders* may support this option if it sets the clear basis for them to negotiate with the service providers and establishes a clear obligation on the latter to take appropriate and proportionate measures.<sup>420</sup> Some *online service providers* storing and giving access to large amounts of user uploaded content will oppose this option, others may argue that they already use these technologies on a voluntary basis. They are likely to argue that the intervention would counter the freedom of expression and freedom to conduct business.<sup>421</sup> *Other content service providers* are likely to support this option if it improves the level playing field on the online content market. *Consumers* are likely to argue that this option will have a negative impact on the freedom of expression/information.<sup>422</sup>

### **Discarded option**

The objective of ensuring a better functioning online marketplace for copyright protected content could also be achieved through a clarification specifying that services storing and giving access to copyright protected content are engaged in a communication to the public and therefore need to obtain a license from right holders for the use of this content.

However, such an option is not considered in the current IA for the following reasons.

First, an intervention that clarifies the 'communication to the public' right only in relation to user uploaded services carries certain risks as regards the general articulation of the concept of communication to the public and the consequences that such targeted clarification would have as regards other uses (criteria used to clarify the application in one particular case could have unintended consequences in other situations). Moreover, subject to further developments, including as regards the case law of the CJEU, the concept of communication to the public may need to undergo a deeper analysis.<sup>423</sup> Second, such an option could also prove to be insufficient to ensure a better functioning of the online content marketplace given the different interpretations of Article 14 of the E-Commerce Directive by national courts.

### **5.2.3. What are the impacts of the different policy options and who will be affected?**

***Approach***

The options presented above would have an impact on right holders across all sectors, on online services that store and give access to the public to large amounts of user uploaded content, as well as on online content services that distribute content provided directly by right holders and that can be perceived, from a user perspective, as equivalent sources for content consumption. The options also affect consumers. The likely impacts on each stakeholder group are presented separately.

<sup>420</sup> Related to the technologies, see the synopsis report on the public consultation on the regulatory environment for platforms, online intermediaries and the collaborative economy, sections 4.4 and 4.5, <https://ec.europa.eu/digital-single-market/en/news/full-report-results-public-consultation-regulatory-environment-platforms-online-intermediaries>.

<sup>421</sup> Idem. See also the open letter sent to the Commission in April 2016, co-signed by a number of associations representing internet companies (e.g. CCIA, EuroISPA, Digitaleurope) and other stakeholders: <http://libereurope.eu/wp-content/uploads/2016/04/Open-letter-Copyright-Reform.pdf>. Youtube has also expressed its opinion on the issue of the value gap in the press, arguing that the service creates additional value for right holders through monetization of fan videos as well as providing additional value through user data. See article in Financial Times: <http://www.ft.com/intl/cms/s/0/37dcc5fc-0ca3-11e6-ad80-67655613c2d6.html#axzz47ANNJ444>.

<sup>422</sup> BEUC has co-signed the open letter cited above. See also the reply by BEUC to the public consultation on online platforms referred to above.

<sup>423</sup> See pending cases C-160/15 - *GS Media*, C-527/15 - *Stichting Brein/Wullems* and C-610/15 *Stichting Brein/Ziggo*.

- For right holders: the impacts assessed are those on legal certainty and on the negotiations of agreements with the services for the use of their content and possible revenues generated.
- For online services that store and give access to large amounts of user uploaded content: the most important impacts described relate to the negotiation with right holders and the implementation of technology.
- For other online content service providers distributing content: the main impacts relate to the level playing field in the market and to their business model.
- For consumers/end users: the impact is assessed on the content consumption possibilities and the possibility for them to upload content.
- The policy options are also assessed in relation to their social impact, with focus on cultural diversity.
- For fundamental freedoms, the impact is assessed on copyright as a property right, freedom of expression and information, as well as the freedom to conduct a business as recognised respectively by Articles 17, 11 and 16 of the European Charter of Fundamental Rights.

The assessment below is mainly qualitative, based on the data publicly available, replies submitted via the public consultation on online platforms<sup>424</sup>, or provided by relevant stakeholders, as well as a Flash Eurobarometer survey on users' preferences in accessing content online conducted in March 2016.

## **Baseline**

### **IMPACTS ON STAKEHOLDERS**

#### **Creative industries/right holders**

Impact on legal certainty: The situation is unlikely to change in the short to mid-term due to inconsistent national case law<sup>425</sup> on the concept of communication to the public and on the scope of application of Article 14 ECD. At present, it cannot be predicted whether the CJEU will bring some clarity in the future.

Impact on the possibility to conclude agreements and obtain remuneration for the use of content: While agreements have already been concluded with certain user uploaded content services, right holders are likely to continue having difficulties to enter into negotiations and/or negotiate fair terms for the use of their content.<sup>426</sup> While some of the service providers may voluntarily or under pressure from artists<sup>427</sup> and from major right holders (including risks of litigation)<sup>428</sup> decide to seek agreements for the use of copyright protected content, this is unlikely to become a general trend in the short to mid-term. It can be expected that the ability to negotiate agreements will depend on the market position of right holders, with small right holders likely to continue to face more difficulties than major ones.<sup>429</sup>

As the implementation by the services of content identification technologies will remain voluntary, it is likely that right holders will continue to have limited control over the use of their content and thereby be in a weaker negotiation position.

<sup>424</sup> <https://ec.europa.eu/digital-single-market/en/news/full-report-results-public-consultation-regulatory-environment-platforms-online-intermediaries>.

<sup>425</sup> See problem description.

<sup>426</sup> See problem description.

<sup>427</sup> See problem description quoting a letter sent by artists to the US Congress in June 2016 asking for a reform 'that balances the interests of creators with the interests of the companies who exploit music'.

<sup>428</sup> See problem description regarding the litigation between PRS and Soundcloud that resulted into the conclusion of an agreement after five years. See also the announcement in October 2015 of a collaborative agreement by Google/YouTube and Mediaset España, putting an end to 8 years of legal disputes, [http://www.mediaset.es/inversores/en/GoogleYouTube-Mediaset-Espana-collaborative-agreement\\_MDSFIL20151021\\_0005.pdf](http://www.mediaset.es/inversores/en/GoogleYouTube-Mediaset-Espana-collaborative-agreement_MDSFIL20151021_0005.pdf), <http://www.panoramaaudiovisual.com/en/2015/10/21/Mediaset-sign-peace-with-google-and-will-circulate-its-content-on-youtube/>.

<sup>429</sup> For example, Impala, the association representing independent labels, has pointed to difficulties in negotiating with Youtube threatening that the content will be blocked if the contract proposed by it is not signed by the independents, see <http://www.impalamusic.org/content/youtube-issues-content-blocking-threats-independent-labels-win-and-impala-raise-concerns>.

## **Online services that store and give access to large amounts of user uploaded content**

Compliance costs/investments needed for the negotiation and the putting in place of appropriate measures: No impact. In the short to mid-term, these services are unlikely to have an incentive to change their practices with regard to the conclusion of agreements with right holders without any change in legislation. Yet, a certain evolution can be expected in the mid to long term given that developments in this direction are already taking place (not only in the music sector<sup>430</sup> but also in the audiovisual and in the images sector where a few partnerships are being concluded).<sup>431</sup> The services are also likely to continue to use content identification technologies on a voluntary basis.<sup>432</sup>

### **Other content service providers**

Impact on the level playing field: No impact. They will continue to face an uneven playing field. This uncertain environment and diverging legal and financial obligations will put new entrants under unfair competitive pressure from incumbent services that do not play by the same rules. This may constitute a deterrent for new services to enter the market.

Impact on their business model: The pressure to compete with user uploaded services which face lower operating costs will continue to make it more difficult for these other online content services to have or build a sustainable business model.<sup>433</sup>

### **Consumers**

No impact in the short to mid-term as the user uploaded content services will in the majority of cases continue to operate in the same manner. In the long term, there could be a risk of reducing consumer choice if the current situation affects fair competition in the market and the availability of content..

### **SOCIAL IMPACTS**

There could be an indirect negative impact on cultural diversity in the long term if the revenues generated for the commercial use of copyright protected content cannot sustain the production of new (and diverse) content.

### **IMPACTS ON FUNDAMENTAL RIGHTS**

This option has no direct impact on copyright as a property right, nor on the freedom of expression and information or the freedom to conduct a business. An indirect impact on copyright can be expected, especially in the long term, if the incentives for right holders to create cultural content are reduced.

## **Option 1 – Stakeholder dialogues between right holders and services which store and give access to large amounts of content uploaded by their users**

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<sup>430</sup> See the above reference to Soundcloud. Youtube has already signed a number of agreements and is said to be renegotiating agreements with music labels, see e.g. <http://www.ft.com/cms/s/0/2c310ae8-fbc2-11e5-8e04-8600cef2ca75.html#axzz4CK050197>.

<sup>431</sup> See problem description.

<sup>432</sup> See Annex 12A for the description of different technologies and their usage by major user uploaded content services.

<sup>433</sup> Having a sustainable business model on today's streaming market has proven to be very difficult, as demonstrated by the losses incurred, the failures by some streaming services (e.g. Deezer), to raise funds, or by cases of bankruptcy (e.g. the US streaming service Rdio). See <https://www.theguardian.com/technology/2015/oct/28/deezer-ipo-music-streaming>, <http://www.musicbusinessworldwide.com/another-streaming-service-fails-ipo-guvera-move-blocked/>, <http://www.hollywoodreporter.com/thr-esq/rdio-was-losing-2-million-840977>.

## IMPACTS ON STAKEHOLDERS

### **Creative industries/right holders**

Impact on legal certainty: The current lack of legal certainty cannot be improved via a process which is not binding as to the outcome. Therefore, in the short and medium term, negotiations will continue to take place in an unclear legal context that currently appears to be unfavorable to right holders.

Impact on the possibility to conclude agreements and obtain remuneration for the use of content: It seems unlikely that particular improvements will result from a stakeholder dialogue in comparison to the possible evolution of the market. The possibility of best practices being established and followed seems limited. It is also unlikely that the voluntary deployment of content identification technologies would improve the negotiation and functioning of possible agreements or the transparency as regards the functioning and deployment of the technologies.

### **Online services that store and give access to large amounts of user uploaded content**

Compliance costs/investments needed for the negotiation and the putting in place of appropriate measures: Limited impact due to the voluntary nature of the stakeholder dialogue and the limited likelihood of an agreement on best practices.

### **Other content service providers**

Impact on the level playing field: Unlikely to have any effect as, for the reasons explained above, different content service providers are likely to continue playing by different rules.

Impact on their business model: An impact similar to the one under the baseline scenario can be expected.

### **Consumers**

No direct impact on consumers. They could be impacted if online services giving access to user uploaded content concluded agreements which led to a change in their freely available services. This is however unlikely given that negotiations, if they take place, are likely to take into account the popularity of the current "freemium" models for consumers (and the important role they play for the overall business models of certain platforms).<sup>434</sup>

## SOCIAL IMPACTS

For the reasons explained above, this option is likely to have no impact or a very limited positive impact on **cultural diversity**.

## IMPACTS ON FUNDAMENTAL RIGHTS

This option would have no impact or a very limited positive impact on copyright as a property right. It would have a limited negative impact on the freedom of expression and information (if, following the stakeholder dialogue, services implemented content identification technologies that blocked or removed content for unjustified reasons, for example when an exception or a limitation to copyright applies). In such an unlikely case there would also be a limited negative impact on the freedom to conduct a business of service providers covered by this IA due to the costs they may need to incur.

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<sup>434</sup> See Annex 12B containing the results from the Flash Eurobarometer on Internet users' preferences for accessing content online showing the predominance of "free" for accessing content online.

**Option 2 – An obligation on services which store and give access to large amounts of user uploaded content to seek, in good faith, to conclude agreements with right holders and to put in place appropriate and proportionate content identification technologies**

**IMPACTS ON STAKEHOLDERS**

**Creative industries/right holders**

Impact on legal certainty: Even if this option does not deal with the interpretation of the concept of communication to the public or the limitations to liability for hosting service providers established in the ECD, this option should have a positive effect as it will establish a clear obligation on service providers to seek, in good faith, to reach agreements with right holders willing to negotiate with them for the use of their content.

Impact on the possibility to conclude agreements and obtain remuneration for the use of content: The combination of a good faith negotiation obligation and an obligation to deploy technical means is likely to have a positive impact on right holders in terms of possibilities to conclude agreements and increase revenues. This is notably the case for the music sector where, as explained above, some agreements are already in place and there is an overall readiness to conclude agreements with the services. In the case of audiovisual content, this option may increase the willingness of right holders to allow more of their content, to be available on user uploaded content services while continuing to take down premium content.

The quantification of the concrete impact or increase in revenues for right holders cannot be foreseen, due to different factors related to commercial negotiations, including the size of the service as well as possible developments in the business models. There have been indications from some right holders that the expected remuneration should be similar to the revenues generated by the free tiers of other content services (to the extent it is possible to differentiate free tier revenues from premium service ones).<sup>435</sup> The possibilities to obtain fair remuneration will also increase if right holders can exercise their rights and decide on the availability of their content.

The deployment of technologies that are necessary to make the possible agreements work, will imply some costs for right holders. These costs will arise where they provide data (e.g. contents or fingerprints depending on the technology used<sup>436</sup>) necessary for the content identification technologies to work. When right holders already provide such data to major online services, the impact is expected to be limited and outweighed by the positive impacts of this option.

**Online services that store and give access to large amounts of user uploaded content<sup>437</sup>**

Compliance costs/investments needed for the negotiation and the putting in place of appropriate measures:

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<sup>435</sup> See for example an article at <http://www.musicbusinessworldwide.com/youtube-are-under-paying-exploiting-creators-and-getting-away-with-it> where the independent community is asking for a minimum per-view guarantee at least as great as existing services that have a free tier. At the same time, it should be acknowledged that the payment resulting from the free tier is linked to the coexistence of freemium and premium pricing.

<sup>436</sup> See Annex 12A on content identification technologies.

<sup>437</sup> Based on the current market situation (and the examples of services cited by the respondents to the Flash Eurobarometer), it is estimated that the number of services affected would be those that have a high number of users (from several millions to over a billion) and daily uploads ranging from hundreds to millions of files. This category includes services which may differ significantly in terms of size: Youtube is clearly the biggest service but services such as Dailymotion, Vimeo, Pinterest are also likely to fall into this category.

- **Costs related to negotiating agreements:** the obligation to negotiate in good faith to reach agreements will create transaction costs for service providers that have so far refused to enter into negotiations or for those that may need to renegotiate their existing agreements at the request of right holders who may for example ask for more transparency on the use of the content. Currently the major user uploaded content services tend to be enterprises of a large size for which the transaction costs are expected to be reasonable. The transaction costs related to the negotiation of agreements will be higher for SMEs<sup>438</sup> but they should remain reasonable as the obligation is limited to undertaking a good faith negotiation and justified because only those service providers giving access to large amounts of content would be covered. New entrants which start their business with a small quantity of user uploaded content would not be impacted. Obviously, it would remain for the parties to decide if they conclude agreements or not. In the case of the conclusion of an agreement, its terms would depend on the commercial negotiations with right holders<sup>439</sup> (obviously, the terms are likely to include the payment of a license fee or sharing of revenues with right holders).

- **Costs related to appropriate and proportionate measures/content identification technologies to be put in place:** the need to put in place measures, such as content identification technologies will involve costs which will depend on the quantity and the type of content to be identified. These technologies would allow for the effective implementation of the agreements for the use of the content (and be the basis for the remuneration of right holders). Technology can be either developed by the service itself or bought from technology service providers. An online service can choose between the technology providers taking into account the specificities and needs of its service as well as its size. Technologies with basic functionalities, allowing one to one recognition of content (such as music recordings) would be the least costly, whereas more elaborate technologies that could be required to identify certain types of works (e.g. the underlying composition of a recording) would be more costly<sup>440</sup>. Many of the online intermediaries replying to the public consultation on platforms indicated that it is very difficult to provide an estimation of the financial costs of running such technologies<sup>441</sup>. The prices offered by technology providers vary with the scale and types of services provided. It is expected that small services can take the necessary measures by relying on the technology and related services available on the market.<sup>442</sup> For example, on the basis of the information available, it is estimated that a small scale online service provider can obtain such services for less than 900 euros a month.<sup>443</sup> For online services hosting large amounts of different works, the cost will be higher. At the same time, the major online user uploaded content services have already put in place content identification technologies<sup>444</sup> and

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<sup>438</sup> Soundcloud is a service provider that could qualify as an SME.

<sup>439</sup> In case of a copyright licence, GEMA has published a list of tariffs for free ad based streaming services, which depend on the level of interactivity of the service and range from EUR 0.00025 to EUR 0.00375 per stream, see GEMA website at <https://www.gema.de/musiknutzer/tarife-formulare/tarif-vr-od-9/>.

<sup>440</sup> For example, the additional functionalities allowing the detection of changes to the original recording and match cover versions or mixes.

<sup>441</sup> An estimation of costs related to all types of illegal content (and not only copyright) ranging from 5-10% of operation costs or several thousand to million euros per year has been put forward by certain intermediaries, see <https://ec.europa.eu/digital-single-market/en/news/full-report-results-public-consultation-regulatory-environment-platforms-online-intermediaries>.

<sup>442</sup> See Annex 12A for an overview of different content identification technologies per sector, their effectiveness and related costs, as well as examples of what the current services use.

<sup>443</sup> See the submission by Audible Magic to US Copyright Office in the context of the Section 512 study <https://www.regulations.gov/#!documentDetail;D=COLC-2015-0013-85992>.

<sup>444</sup> YouTube uses its own technology – Content ID, Soundcloud uses a combination of Audible Magic and its own technology; Dailymotion uses the services of third parties - Audible Magic and l'Institut National de l'Audiovisuel (INA). When services decide to invest in their own technology the costs are likely to be higher. YouTube has indicated that it has invested more than \$60 million to develop its

therefore the costs for them are likely to be limited to the need to provide greater transparency and cooperate with right holders on the functioning and efficiency of the technologies used by the services.

### **Other content service providers**

Impact on the level playing field: This option is very likely to have a positive impact on content service providers which would not have to incur any additional costs and can only benefit from a market where providers compete on equal grounds.

Impact on their business model: Given the expected improvement of the level playing field, it would help the services to sustain or strengthen their business model.

### **Consumers**

The impact on consumers will depend on the possible changes made by the services to the way they function as a result of possible agreements with right holders, which could reduce the content freely available on the service. However, as indicated in option 1, negotiations are likely to take into account the popularity of the current "freemium" models. On the other hand, consumers may in the long term have an increased choice of content due to more incentives for right holders to create new content. This would result from the increased possibility for right holders to negotiate agreements and to be remunerated for the use of their content.

### **SOCIAL IMPACTS**

Option 2 is expected to have a positive impact on **cultural diversity** if it leads to better conditions for the negotiation of the use and remuneration of copyright protected content. This should bring more certainty and incentives to right holders to create new content. As a result, the access to a culturally diverse content is expected to be positively impacted.

### **IMPACTS ON FUNDAMENTAL RIGHTS**

Option 2 would have a positive impact on *copyright* since right holders will benefit from an improved framework for the use of their content by user uploaded content services. The *freedom of expression and information* may be affected negatively in cases where the services remove user uploaded content in an unjustified manner (for example when an exception or a limitation to copyright applies or the content is in public domain) or when the technologies fail to identify the content correctly<sup>445</sup>. This negative impact is mitigated by the fact that this option targets specific services, which store large amounts of user uploaded content and which in the majority of cases already have in place procedural safeguards in the context of notice and take down requests to allow the users to contest unjustified removals of their content. These measures will continue to apply just as they apply today, for cases where unauthorized content is removed following an agreement with right holders. In all, as content recognition technologies are already applied by the major user uploaded content services, it is likely that this option would not lead to significant increases in unjustified take downs compared to the current situation. Furthermore, the cooperation with right holders and the evolution of technology are likely to lead to an increase in the accuracy of content

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Content ID system Google's submission to US Copyright Office, <https://www.regulations.gov/#!documentDetail;D=COLC-2015-0013-90806>. Soundcloud has estimated in its reply to the public consultation on online platforms that it has spent approximately EUR 5m public consultation, <https://ec.europa.eu/eusurvey/pdf/answer/6acf2b21-865a-402c-876a-e2b67c0ceef9>.

<sup>445</sup> See the issues raised with regard to fundamental rights in the *Study of fundamental rights limitations for online enforcement through self-regulation*, <http://www.ivir.nl/publicaties/download/1796>.

identification. At the same time there is likely to be a positive impact on users who in the long term should have access to an enhanced range of creative content and services as incentives to invest will improve. The impact on the *freedom to conduct a business* can be negative due to costs and investments that would be incurred. At the same time, the level of this impact is expected to be limited due to the fact that the obligation to seek to conclude agreements with right holders does not impose an obligation to conclude them. With regard to the technologies to be put in place, the obligation is specific and targeted: it relates to specific content, identified by right holders in advance and to information provided by them. This makes the implementation of the technology obligation easier for the services. The impact is further limited by the fact that the content identification technologies to be put in place need to be proportionate, which means that no unreasonable costs can be expected from the services with regard to the deployment of the technologies, taking into account the size and the nature of the individual services. Furthermore, these technologies are increasingly available in the market. Overall, this option is considered to strike the necessary balance between copyright and other fundamental freedoms.

**5.2.4. How do the options compare?**

Option	Effectiveness	Efficiency	Impact on stakeholders	Coherence
<b>Baseline</b>	(0) No impact on legal certainty, presence of content not covered by agreements will persist	(0) No direct costs associated with this option	(0) No direct impacts on stakeholders	(0/-) No direct impact on cultural diversity, indirect negative impact on incentives to create and invest in cultural content (0) No impact on other fundamental rights
<b>Option 1 – Stakeholder dialogues between right holders and services which store and give access to large amounts of content uploaded by their users</b>	(0/+) Limited impact on legal certainty and, presence of content not covered by agreements	(0/-) Limited compliance costs for user uploaded content services which implement the best practices (0/-) Limited compliance costs for right holders	(0/+) Limited positive impact on right holders' possibility to negotiate agreements and on the reduction of content not covered by agreements. (0/-) Limited negative impact on the business model of user uploaded content services which implement the best practices (0/+) Limited positive impact on other content services (0) No direct impact on consumers	(0/+) Limited positive impact on cultural diversity and on the property right. (0) Neutral impact on freedom of expression and information in cases where best practices are implemented (0/-) Limited negative impact on freedom to conduct business in cases where best practices are implemented

<b>Option 2 – An obligation on user uploaded content services to seek in good faith to conclude agreements with right holders and to put in place appropriate and proportionate content identification technologies</b>	(++) Positive effect on legal certainty and on presence of content not covered by agreements	(-) Compliance costs for user uploaded content services (0/-) Limited compliance costs for right holders	(++) Positive impact on right holders' possibility to negotiate agreements and on the reduction of content not covered by agreements (-) Negative impact on the current business model of user uploaded content services (+) Positive impact on other content services (0) No direct impact on consumers	(++) Positive impact on impact on cultural diversity and on property right. (0) Neutral impact on freedom of expression and information. (0/-) Limited negative impact on freedom to conduct business
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**Option 2** is the preferred option. This option would increase the level of legal certainty for *right holders* and allow them to negotiate agreements with online services storing and giving access to large amounts of user uploaded content. It would also improve the possibility for them to keep unauthorized content away from the services. This option is likely to have a negative impact on the current business model of service providers storing user uploaded content which will need to seek to conclude agreements where these do not exist yet or need to be renegotiated upon request by right holders and put in place the appropriate and proportionate measures to limit the availability of content that has been supplied by right holders. The compliance costs are however limited by the "good faith obligation" and the fact that the technologies to be put in place need to be proportionate. Additionally, a majority of the covered services already deploy some content identification technologies or can rely on third party services which can be particularly relevant for SMEs. In comparison to Option 1 which is voluntary, Option 2 will create a clear obligation on the user uploaded content service providers to seek in good faith to conclude agreements with right holders and to ensure that less unauthorized content is present on user uploaded content services. As a consequence, Option 2 is the best option to reach the policy objectives while maintaining a balance between the relevant fundamental rights.

### 5.3. RIGHTS IN PUBLICATIONS

#### 5.3.1. What is the problem and why is it a problem?

**Problem:** *The shift from print to digital has enlarged the audience of newspapers, magazines and other publications but made the exploitation and enforcement of the rights in publications increasingly difficult. In addition, publishers face difficulties as regards compensation for uses under exceptions.*

Description of the problem: The changes to the way copyright-protected content is distributed and consumed in the digital environment (see also the "value gap" section of this IA) have affected print publications, in particular newspapers and magazines, in a specific way. The publishing industry is in the middle of a shift from print to digital. Print circulation of daily newspapers has been constantly declining for years (by 17 % in the period 2010-2014 in 8 EU

MS),<sup>446</sup> a trend that is expected to continue. In all MS sampled by a recent survey, the proportion of consumers who indicated that the internet was their main source to access news largely outweighed those for whom the favourite source was printed newspapers (e.g. 29 % to 3 % in FR; 23 % to 7 % in DE, 34 % to 8 % in IT; 38 % to 10 % in the UK).<sup>447</sup> Digital audiences of newspapers and magazines have been growing exponentially: web traffic has doubled over the last five years (from 248.4 to 503.4 million of unique users between 2011 and 2015).<sup>448</sup> Today, newspapers and magazines' websites and apps are the main services used to access news for 42 % of users in the EU).<sup>449</sup>

Despite the growing success of publishers' content online, the increase of publishers' digital revenues has not made up for the decline of print. Between 2010 and 2014, news publishers' total print revenues decreased by €13.45 billion<sup>450</sup> and digital revenues rose by €3.98 billion: a net revenue loss of € 9.47 billion (-13 %).<sup>451</sup>

Several factors may explain this situation. On the one hand, news publishers have traditionally made available online large proportions of their content for free, since the early days of the internet. This business model was sustainable when print revenues ensured sufficient returns of investments and the internet was an additional source of brand exposure and advertising revenues. With the decline of print, publishers have become increasingly dependent on the need to monetise their digital content, but they manage to do so today only to a limited extent. Paywalls and B2C digital-subscription offers are being increasingly proposed, in particular by the main newspaper brands, but today they only count for around 10 % of news publishers' online revenues.<sup>452</sup> Freely-available content remains crucial as it attracts advertising revenues, which are today still the main contributor to news publishers' digital revenues. However, the large proportion of news publishers' content available online has also favoured, over time, the emergence of online service providers, such as social media and news aggregators, which base in full or in part their business models on reusing or providing access to such content.

In 2016, social media (22 %), news aggregators (14 %) and search engines (21 %) are, taken together, the main way to read news online for 57 % of users in the EU.<sup>453</sup> The relation between these online services and newspaper publishers is complex. On the one hand they increase the visibility of newspaper content and bring new traffic –and thus advertising

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<sup>446</sup> See Annex 13A. Data regarding BE, FR, DE, FI, PL, IT, ES, UK- decline of daily newspapers range from -8 % in BE to -52 % in IT. Of magazines from -6 % in BE to -39 % in IT. These data have been provided by the news publishing sector (EPC, EMMA, ENPA and NME after carrying out an internal survey among their members). Other sources show similar trends: according to Deloitte, the circulation of traditional print journalism decreased in DE by 41 % between 2001 and 2014; FR -10 % between 2001 and 2011. Source: “The impact of web traffic on revenues of traditional newspaper publishers. A study for France, Germany, Spain and the UK”, Deloitte, March 2016 <http://www2.deloitte.com/content/dam/Deloitte/uk/Documents/technology-media-telecommunications/deloitte-uk-impact-of-web-traffic-on-newspaper-revenues-2016.pdf>

<sup>447</sup> Source: Reuters Institute Digital News Report 2015, p.10. <http://www.digitalnewsreport.org>. In some MS online is the first source of news, in others this is TV. See Annex 13A for further details.

<sup>448</sup> See Annex 13A. Data provided by the news publishing sector based on a sample of 8 EU MS.

<sup>449</sup> Source: Eurobarometer on Internet users' preferences for accessing content online (n° 437/ March 2016) – *Types of services used to access the news online*. See Annex 13 A.

<sup>450</sup> See Annex 13A. The decrease of print revenues are caused by a decline of both sales and advertising revenues, the latter have declined by €7 billion between 2010 and 2014. Source: PwC Entertainment and Media Outlook 2015-2019.

<sup>451</sup> Source: PwC Entertainment and Media Outlook 2015-2019. For country specific figures data provided by the news publishing sector see Annex 13 A.

<sup>452</sup> Source: Deloitte, 2016, p.12-13. For example, according to this study, advertising revenues captured by newspapers publishers in the UK were estimated to reach €285 million or 11 % of the total local display advertising market in 2014.

<sup>453</sup> See Annex 13A. Source: Eurobarometer Flash 437- *Types of services used to access the news online*.

revenues— to newspaper websites.<sup>454</sup> According to a recent study covering FR, DE, UK and ES, 66 % of visits to newspapers' websites consist in referral traffic, i.e. traffic channelled by other online services, the total value of which has been estimated to be €746 million in the 4 MS considered.<sup>455</sup> On the other hand, 47 % of consumers browse and read news extracts on these websites without clicking on links to access the whole article in the newspaper page, which erodes advertising revenues from the newspaper webpages.<sup>456</sup>

News publishers have attempted to conclude licences with online service providers for uses of their content online, and sought to participate in the advertising revenues generated by their content on third parties' websites. However, they have generally not managed to do so, despite the fact that these services often engage in copyright-relevant acts.<sup>457</sup> More generally, the opportunity offered by the digital environment has not translated into the emergence of a solid B2B licensing market for online uses of news publications. News publishers generally point out that B2B-licence revenues are a very low proportion of their online revenues and that they face considerable difficulties in concluding licences with online service providers.<sup>458</sup> Services distributing digital news publishers' content to consumers based on licensing agreements are just beginning to be tested now.<sup>459</sup> Cooperation agreements between major online service providers and publishers, which aim at supporting technological solutions to improve readers' experience (in particular on smartphones) and generate higher advertising revenues, are beginning to emerge.<sup>460</sup> However, none of these agreements specifically targets the use of content by online service providers.

The problem described above does not affect publishers other than news publishers to the same extent, due to the different nature of their products and business models. Book publishers generally do not make their content freely accessible online in the same way newspaper publishers do. As a consequence, online services such as news aggregators and social media hardly play a role as distributors of book content at the moment. The online distribution of e-books generally follows a more traditional-linear model, based on copyright licences between publishers and online distributors (with or without the intervention of intermediaries), in many cases large multimedia online service providers. Scientific publishers

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<sup>454</sup> According to Google, their services alone send 10 billion clicks worth of traffic to news publisher websites each month, and each visit is for them an opportunity to earn revenue through advertising and subscription. They state that in 2015, their partners around the world earned more than \$10 billion using their AdSense products. Source: Google's answer to the 2016 public consultation.

<sup>455</sup> Deloitte, 2016.

<sup>456</sup> See Annex 13A. Source: Eurobarometer Flash 437 - *Use of news aggregators, online social media or search engines to access the news online*.

<sup>457</sup> According to the case-law of the CJEU, copying parts of newspaper articles is copyright relevant (covered by the exclusive right of reproduction) in all cases where these parts are original, in the sense that they are their author's intellectual creation (see Case 5/08, "Infopaq").

<sup>458</sup> At the moment, a B2B licensing market for digital publishing content appears to have only emerged in the area of media monitoring. Licences have brought revenues to publishers amounting to €6 million in FR and £26 million in the UK in 2015 according to media monitoring industry. Source: AMEC-FIBEP's answer to the 2016 public consultation.

<sup>459</sup> Notably the Dutch based company Blendle. See Annex 13C.

<sup>460</sup> See Annex 13C. In 2015 and 2016, Facebook (Instant Articles), Google (AMP) and Apple (Apple News) developed three platforms aimed at delivering news to mobile users in an optimised (easier/faster) way, so as to increase exposure of publishers' content while allowing them to achieve a better monetisation of their content, notably through advertising. Yahoo also established mechanisms to facilitate the monetisation of news content, based on a share of advertising revenues when portions of publishers' articles are included within their service and/or payment of a fee for inclusion of articles as a whole (source Yahoo's answer to the 2016 public consultation). On a wider scale, Google's Digital News Initiative (DNI) – of which AMP is part - is an ongoing collaboration/forum with publishers based on granting funds or technology support to innovative projects in online news.

generate revenues either through subscription licences with universities and similar establishments or, when they make available their content online under the open access model, by charging authors for the publication. Because of the specific nature of the scientific publications, advertising revenues as well as traffic generated by online service providers hardly play a role in this market.

At the same time, an additional specific problem which affects all publishers, in particular book publishers, is the legal uncertainty as regards publishers' ability to receive revenues stemming from compensation for uses of works under exceptions to copyright. Publishers currently receive such compensation in 18 MS, i.e. the majority of MS, under different national arrangements.<sup>461</sup> However, recently, legal uncertainty has arisen in the MS, in particular regarding the question to which extent they can provide that authors' claims to fair compensation can be transferred in order to allow publishers to receive fair compensation alongside authors. This problem has come to the fore notably following the recent jurisprudence of the CJEU in which the Court has held that statutory provisions according to which a part of such compensation is distributed to publishers are not in line with the *acquis* if it is not ensured that authors benefit, directly or indirectly, from this compensation.<sup>462</sup> This case-law concerns predominantly the private copying and reprography exceptions, but potentially extends to uses under other exceptions that are subject to compensation. Publishers are particularly exposed to this, because unlike other players in a similar role in the creative industries, e.g. film producers, they are not recognised as related rightholders but rely on authors' copyright that is transferred to them. The economic implications of this problem are illustrated by the fact that in the 12 MS which operate a levy-scheme and foresee an author-publisher split and for which there was data available, an aggregated total amount of €40 million was distributed to publishers over the course of the respective last financial year.<sup>463</sup>

Drivers: [*Incomplete protection of publishers' contribution and investments on publications at the EU level*] EU copyright law recognises and incentivises the economic and creative contribution of film producers, phonogram producers and broadcasting organisations by granting them related rights. Publishers across different sectors also play an important role in assembling, editing and investing in content. However, today, they are not identified as rightholders under EU copyright rules.<sup>464</sup> They generally exploit and enforce their content on the basis of the rights transferred to them by authors (writers, journalists, photographers, etc).<sup>465</sup> Some MS grant a specific additional protection to publishers as authors of collective works (e.g. PT). In addition, other MS (notably DE and ES) have recently adopted national measures (generally referred to as "ancillary rights") to grant publishers specific protection as

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<sup>461</sup> e.g. AT, BE, BG, CZ, EE, ES, FR, DE, EL, HU, LV, LT, NL, PL, PT, RO, SI, SK, see also Annex 13D.  
<sup>462</sup> See the judgments in *Luksan*, Case C-277/10 and *Hewlett-Packard Belgium v Reprobel*, C-572/13.

<sup>463</sup> 2014/2015 respectively. See International Survey on Text and Image Copyright Levies 2014, available [http://www.ifro.org/sites/default/files/levies\\_2014\\_online.pdf](http://www.ifro.org/sites/default/files/levies_2014_online.pdf) and also Annex 13 D. From an economic point of view, it is also important to note that for publishers these revenues are not associated with any marginal costs.

<sup>464</sup> EU copyright law provides exclusive rights of reproduction and making available to the public to film producers, phonogram producers and broadcasting organisations. In contrast, under EU law publishers do not hold such rights in respect of their publications.

<sup>465</sup> The transfer of journalists' rights to publishers is governed in MS by copyright law and contract law. A publisher is typically transferred the journalists' rights against the payment of remuneration (as part of his salary or as an addition; or independently in the case of freelancers). The scope of the transfer is set out in the contract (normally what is needed for the exploitation of the newspaper or magazine, but it may go beyond). It can also be established in a legal presumption in copyright law. For further details on the industry practices, see 2016 study on the "Remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works" Institute for Information Law (IViR) of the University of Amsterdam, together with Europe Economics, PLS.

regards uses of their content online. The DE law is an exclusive right covering specifically the making available of press products to the public, which has been implemented by the main news publishers under collective management schemes.<sup>466</sup> The ES law establishes an obligation for online service providers to pay compensation to publishers (which cannot be waived) for uses of their content online<sup>467</sup>. None of these two recent "ancillary rights" solutions have proven effective to address publishers' problems so far, in particular as they have not resulted in increased revenues for publishers from the major online service providers. This incomplete protection causes legal uncertainty as regards exploitation of publishing content through B2B licensing agreements and makes enforcement complex and sometimes inefficient (e.g. proving the chain of title of all rights related to a publication).<sup>468</sup> It also contributes in part to the legal uncertainty concerning publishers' ability to receive compensation under exceptions, when they rely on rights transferred to them.

[*Differences in bargaining power*] The gap in the current EU rules further weakens the bargaining power of publishers in relation to large online service providers. These online service providers have a strong bargaining position and receive the majority of advertising revenues generated online (for example 40 % of total advertising investments in BE).<sup>469</sup> This makes it difficult for publishers to negotiate with them, including regarding the share of revenues related to the use of their content, on an equal footing.

Consequences: The works and other protected subject-matter published by different publishing industries (e.g. newspapers, books and scientific journals) are essential in a democratic society, as they play an important role in citizens' access to knowledge and good quality information, including on issues related to democracy and democratic decision making. The problems described above contribute to a situation of general decline of publishers' revenue streams in the news sector and to a potential loss of revenues linked to compensation for uses under copyright exceptions across the entire publishing industry.

If the investments and contribution of publishers increase the value of publications but are not compensated by sufficient revenues, the sustainability of publishing industries in the EU may be at stake, with the risk of further negative consequences on media pluralism, democratic debate and quality of information. In addition, the legal uncertainty regarding the question whether publishers can be entitled to claim compensation for uses under exceptions affects publishers in many MS. It in particular puts at risk the sustainability of smaller book publishers and, as a consequence, of cultural diversity in the European society.<sup>470</sup>

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<sup>466</sup> See Annex 13B for an overview of provisions in MS copyright law granting specific protection to publishers.

<sup>467</sup> Legally, the ES law is an exception allowing certain uses of news content online, coupled with an unwaivable compensation, subject to compulsory collective management, to be paid to the publishers or authors of the original press article.

<sup>468</sup> Today, publications comprise a large variety of content including text, images and videos. In the news sector, these are created and updated constantly by hundreds of creators. Traditional news publishers like Trinity Mirror in the UK and Bild in Germany have gained audience and advertising revenue through creating a range of video output for their own websites and for distribution through social media. The video news consumption online is increasing in the EU (e.g. in 2015: 27 % of users accessing online news in ES; 25 % in IT; 18 % in DE and DK). Source: Reuters Institute Digital News Report 2015.

<sup>469</sup> Source: "Vers un modèle économique durable pour les éditeurs belges de journaux et de magazines: aperçu de l'importance des licences". JFB, Vlaamse Nieuwsmedia and The PPress, 2014. <https://www.mediaspecs.be/files/upload/file/etude-d-impact-licences-fr.pdf>, p.10-11

<sup>470</sup> At the moment, based on information gathered by IFRRO through its membership, publishers receive compensation for uses of their works, in particular under the private copying or reprography exceptions, in 18 MS. See Annex 13D.

How the problem would evolve: In the near future, the production and distribution of digital content, notably on online service providers (both websites and apps) will continue to require growing investments from news publishers.

Without intervention at EU level, news publishers will continue licensing the use of their publications mainly on the basis of the rights transferred to them by the content creators. In a constantly-evolving market, with more and more players and means of news distribution, this is likely to increase legal uncertainty, weaken the position of news publishers, accentuate their loss of revenues, complicate enforcement of rights and eventually affect the number and quality of print media. This would be prejudicial for the media pluralism, good quality information and the role they play in democratic societies. In the absence of EU intervention, the decreasing share of the compensation due for uses under exceptions would put at risk in particular the smaller players throughout the whole publishing industry (news, books and scientific publishers), who are currently relying on this compensation and are essential for the cultural diversity and media pluralism in this sector.

### 5.3.2. What are the various options to achieve the objectives?

The general and specific objectives are described in section 5.1.3.

#### Baseline

No policy intervention. Under this option, the use of publications would remain governed by the rules applicable to the rights transferred to them by authors and other rightholders. Issues related to the different bargaining position of news publishers and online service providers would not be addressed, without prejudice to the possible application of competition law. This option would rely on market developments and stakeholders reaching voluntary agreements to cooperate and find win-win solutions concerning the online dissemination of publishers' content, notably as regards newspaper and magazine online content<sup>471</sup>. At the same time, certain MS could decide to amend their national legislation to introduce rights for news publishers at national level, which would increase fragmentation of copyright rules in the single market.

Some MS may try to address the problem of legal uncertainty as regards publishers' (across different sectors) ability to receive compensation for uses under private copying, reprography and other exceptions through national law within the boundaries of the current EU rules, including the case law of the CJEU. Other MS may hesitate to do so in the absence of EU intervention because of the situation of legal uncertainty described above.

#### *Stakeholders' views*

Most online service providers, such as content aggregators and social networks, oppose legislative intervention and support the status quo, as they consider that the relationships between them and news publishers should be left to the market. Most publishers consider that the status quo cannot solve the identified problems.

#### **Option 1 – Encouraging stakeholders' dialogue and cooperation to find solutions concerning the dissemination of news publishers' contents**

Under this option, the Commission would encourage stakeholders, namely news publishers and online service providers, to identify collaborative solutions to facilitate the conclusion of agreements for the online use of news publishers' contents. Notably, the Commission would:

(i) launch a structured dialogue between news publishers and online services providers which would take stock of existing market initiatives<sup>472</sup> and foster discussions to identify common

<sup>471</sup> See Annex 13C for an overview of market-led solutions in the news sector.

<sup>472</sup> Annex 13C.

solutions which would facilitate the emergence of cooperation agreements between the two categories of stakeholders; and

(ii) monitor the implementation of any resulting initiative and assess its effectiveness to ensure a fair distribution of revenues generated by the reuse of news publishers' contents, in particular to assess whether specific EU legislative intervention at a later stage is warranted.

*Stakeholders' views*

Services providing access to publications could be supportive of this option, as it would not imply creation of any further rights at EU level. Most publishers consider that such a non-legislative approach would not be sufficient to tackle the challenges they currently face.

## **Option 2 – Introduction in EU law of a related right covering online uses of news publications**

This option would ensure that the creative and economic contribution of news publishers (such as newspapers and magazines) is recognised and incentivised in EU law, as it is today the case for other creative sectors (film and phonogram producers, broadcasters). The creation of a new category of rightholders (news publishers) would not affect the scope of the exclusive rights granted to them, notably the rights of "making available to the public" and of "reproduction", which are harmonised under current EU copyright rules. This means, in particular, that this intervention would not change the legal status of hyperlinks in EU law as it follows from the case-law of the CJEU according to which the "*provision on a website of clickable links to works freely available on another website*" does not constitute a copyright relevant act<sup>473</sup>. The legal intervention would be as follows:

- **Protected subject-matter:** The protection would benefit publishers of news publications, that is, publications containing predominantly text-based journalistic contributions, such as news items, articles and reports, issued on a periodical basis under the editorial, technical and economic responsibility of a natural or legal person.
- **Rights covered:** news publishers would be granted the exclusive rights of making available to the public, and reproduction to the extent needed for digital uses.
- **Exceptions:** exceptions and limitations laid down in EU copyright law, including new ones introduced by this legislative intervention, would apply.
- **Protection of TPMs and Rights-Management Information and enforcement:** Articles 6, 7 and 8 of the InfoSoc Directive, as well as Directive 2004/48 would apply.
- **Relationship with authors' rights:** Publishers' rights would apply without prejudice to authors and other creators' rights on their individual contributions (news articles, photographs, videos) which compose the protected subject-matter (the final news product).
- **Term of Protection:** The term of protection of other related rights such as those granted to film and record producers is usually 50 years. A shorter term of protection should be proposed in this case, taking into account the shorter economic cycle of the exploitation of news content (a relatively short period after publication). This is consistent with the situation in the MS where publishers are granted self-standing protection in copyright law (see Annex 13 B) and in which the term of protection is usually shorter than for other related rights. Three scenarios are considered in this IA:
  - A) Medium term of protection (between 10 and 50 years)
  - B) Short term of protection (between 5 and 10 years)
  - C) Very short term of protection (between 1 and 5 years)

*Stakeholders' views*

<sup>473</sup> Case C-466/12 "*Svensson*".

Most news publishers, in particular the main newspaper and magazine organisations which replied to the public consultation, support the introduction of a new related right at EU level and consider that this should have a term of protection of 50 years to put publishers on an equal footing with other related rightholders. Authors in the news sector (notably journalists) have expressed mixed reactions when replying to the public consultation. They generally consider that the bargaining power of the publishing industry in relation to online service providers should be strengthened but they express some concerns as to the possible negative impact that new rights granted to publishers could have on them. Service providers, such as news aggregators and media monitoring services, are generally opposed to granting a new related right to news publishers as they claim that this would disincentive investments in innovative online services and create barriers for small businesses. Consumer organisations have expressed reservations as regards the possible introduction of a neighbouring right and the concern that this could make it more difficult for consumers to access existing news content online. At the same time, some consumer organisations recognise that a neighbouring right could have a positive impact on the quality of news content.

### **Option 3 – As Option 2 plus introduction, in EU law, of the possibility for MS to provide that publishers may claim compensation for uses under an exception**

In addition to the introduction of the new related right for online uses of news publications described under Option 2, this option would introduce a specific provision in EU law clarifying that Member States may choose to establish in their legislation that where an author has transferred a right to a publisher, such a transfer constitutes a sufficient legal basis for the publisher to claim compensation for the uses made under an exception to the transferred right, provided that the publisher ensures that the author benefits adequately from this compensation.

#### *Stakeholders' views (In addition to position as regards Option 2).*

In the replies to the public consultation publishers other than news publishers (books and scientific publishers) have mainly pointed to problems different from those raised by news publishers, notably the legal uncertainty as regards compensation for uses under exceptions. Therefore, publishers across different sectors are expected to be supportive of this option, as it establishes a margin of manoeuvre for MS to introduce national laws that foresee the distribution of compensation to publishers as derived rightholders, thus in principle allowing the existing systems in many MS to endure, although there may be adaptations necessary. In the public consultation some authors have expressed support for such national arrangements, whereas other authors are sceptical regarding the extent to which they benefit from them. Consumers are expected to take a neutral view as regards the additional elements in Option 3, as this intervention in the area of compensation for exceptions is not expected to increase the overall level of compensation due and hence of levies charged to final consumers.

### **Discarded option**

*Introduction in EU law of a related right covering all publications including publications other than news:* The identified objectives could be achieved also by introducing in EU law a related right covering all publishers in all sectors (news, books, scientific publishers, etc.). However, such an option is not considered in this IA as it would not be a proportionate way to address the problems faced by the publishing industry and described in the problem definition. The problem related to news publishers' difficulties to reach agreements and monetise use of their content by online service providers can be addressed by a related right applicable to news publications only (Option 2). The situation as regards publishers' ability to receive compensation for uses under exceptions, which affect publishers across all sectors (news, books, scientific publications) can be addressed in a proportionate way by the introduction of the clarification concerning publishers' claim for compensation (Option 3).

### **5.3.3. What are the impacts of the different policy options and who will be affected?**

#### ***Approach***

The options presented above would primarily affect publishers and authors whose works are part of publications (in particular journalists, writers, photographers, etc) as well as online services providing access to or using publications, and consumers. The impacts affecting these four groups are presented separately:

- For publishers, the main impacts are related to legal certainty and their ability to obtain revenues (including from compensation) for the use of their publications and to enforce their rights. Intervention is expected to have an economic impact related to the increase of their revenues.
- For authors and other creators of the individual contributions which compose a publication, the impacts on their current revenues and their ability to exploit their individual rights independently from publishers' rights are considered.
- For service providers, the following impacts have been considered: impacts on legal certainty in their relations with publishers and economic impacts in their business models (licensing and transaction costs).
- For consumers, impacts related to the conditions to access content are considered.

The policy options are also assessed in relation to their general **social impacts** (on cultural diversity and the availability and findability of content) and impacts on fundamental rights (property right and freedom of information).

## **Baseline**

### **IMPACTS ON STAKEHOLDERS**

#### **Publishers**

Without intervention at EU level, legal uncertainty in this sector is expected to increase and publishers' bargaining position would further weaken. Print circulation of daily newspapers in Europe is expected to decline by 19 % between 2014 and 2019.<sup>474</sup> In terms of revenues, the number of people who pay for news is projected to grow in the future between 7 % and 23 % in the UK, ES, IT and other MS.<sup>475</sup> However, the loss of print revenues is not expected to be compensated by the increase of online revenues. Online revenue streams feature smaller margins, as the competition for digital advertisement revenues is tough and free-access news are widely available. Moreover, access to news through smartphones is increasing every year (e.g. in the UK, of those who use a device to access digital news, those who say it is now their main device have risen from 15 % to 27 % since 2013 – this figure has risen to 47 % of those aged 25-34).<sup>476</sup> As advertising revenues linked to access through smartphones are lower than through computers, this evolution of news consumption would make overall revenues decrease. PwC estimates that Europe's newspaper and magazine revenues will decrease, under this option, by 7.34 % in the period 2014-2019.<sup>477</sup>

In this scenario, service providers may be willing to agree on the use of publishers' content in a satisfactory way for both publishers and themselves, as some of them do today.<sup>478</sup> However, it is difficult to envisage whether these agreements will be kept or extended in the long term if there are no external incentives, particularly as this market is constantly evolving.

Publishers would still face difficulties to license their publications or prevent unauthorised uses thereof. In the long term, the quality of their content and the reputation of their brands may be affected. Legal uncertainty as regards publishers' ability to receive compensation for uses under exceptions would persist.

#### **Authors**

A decline in the publishing industry would have a negative impact on rightholders who depend on this sector. Journalists, photographers and other authors would continue to see their contributions to publications being reused by services other than the publishers they have

<sup>474</sup> Source: PwC Entertainment and Media Outlook 2015-2019.

<sup>475</sup> Source: Reuters Institute Digital News report 2014, p.58.

<sup>476</sup> Source: Reuters Institute Digital News report 2015.

<sup>477</sup> Source: PwC Entertainment and Media Outlook 2015-2019.

<sup>478</sup> Xavier Grangier, Head of Digital / CTO at Libération sets out the positive impacts of using Facebook's Instant Articles: <https://www.linkedin.com/pulse/lib%C3%A9ration-facebooks-instant-articles-xavier-grangier>

transferred their rights to, without getting any appropriate income in return. As a result, the quality of journalism may be negatively affected in the medium term.

### **Service providers**

Under this scenario, some online service providers would continue negotiating the use of publications with publishers on the basis of the transferred rights as it is the case, for instance, of some media monitoring and analysis organisations which already pay licence fees to publishers.<sup>479</sup> Others would continue to use the publications without licence or other commercial agreement. Finally, it should be noted that a decrease of the number or quality of news publications could be generally negative for service providers, as they would have less content to base their business models on.

### **Consumers**

This option would be neutral regarding economic impacts on consumers.

### **SOCIAL IMPACTS**

Under the baseline scenario, incentives to create and invest in publications would remain structurally the same, which may negatively affect the number of publications in the medium term. This would entail negative social impacts, including regarding cultural diversity, media pluralism and the availability and findability of a wide variety of publications for consumers.

### **IMPACTS ON FUNDAMENTAL RIGHTS**

This option would have no impact on copyright as property right (Article 17 of the Charter of Fundamental Rights), since there will be no changes to current copyright rules. The right to freedom of expression and information (Article 11 of the European Charter of Fundamental Rights), which includes the pluralism of the media, may be negatively affected in the long run if the sustainability of the news industry is at stake.

### **Option 1 – Encouraging stakeholders' dialogue and cooperation on finding solutions concerning the dissemination of news publishers' contents**

#### **IMPACTS ON STAKEHOLDERS**

##### **Publishers**

The non-binding nature of the stakeholders' dialogue would make the impacts of this option and its effectiveness to solve the problems raised by publishers mainly depend on the willingness of the stakeholders to participate in it and to take commitments. The complexity of the market and the variety of players and business models, as well as their unequal bargaining power and the opposed views of the relevant stakeholders as to how the reuse of news content benefits the other party, are all factors which may limit the effectiveness of this option. As a result, the impacts of this option are expected to be rather limited and only slightly better than the baseline scenario.

This option would not solve the specific problem concerning publishers' ability to receive compensation from uses of their publications under exceptions. In all, these limited impacts may not make up for the costs related to the participation in the dialogue, considering in particular that many publishers are SMEs.

##### **Services providers**

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<sup>479</sup> Source: AMEC-FIBEP's answer to the 2016 public consultation.

Neutral impacts are expected, or slightly positive if they manage to reach long-lasting favourable agreements with news publishers, when they see a business opportunity to do so.

### **Impacts on authors and consumers**

Like baseline.

### **SOCIAL IMPACTS**

Like baseline.

### **IMPACTS ON FUNDAMENTAL RIGHTS**

Like baseline.

## **Option 2 – Introduction in EU law of a related right covering online uses of news publications**

### **IMPACTS ON STAKEHOLDERS**

#### **Publishers**

Today, news publishers publish or license out their products on the basis of the rights of the authors (journalists, photographers, etc.) that contribute to the creation of their products (newspaper, magazine, etc.). Under this option, news publishers would be able to rely on a self-standing related right laid down at EU level when seeking to negotiate the use of their publications with online service providers. This right would be independent from the right of the authors but would not remove the need for news publishers to acquire these rights (by contractual transfer or by licence) to publish and license their products<sup>480</sup> (in the same way, for example, film producers have to acquire the rights of authors and performers in a film even if they are identified as related rightholders in EU copyright law).

At the same time, being identified as original rightholders of a related right would bring an added value to news publishers in terms of legal certainty and bargaining power in relation to online service providers. Uniform protection at EU level would further strengthen news publishers at EU scale, thus providing a more effective protection than under different national laws.<sup>481</sup> In particular intervention at EU level is expected, because of its scale, to strengthen publishers bargaining powers in a more effective way than it has happened under national measures such as the "ancillary rights" adopted in DE and ES, where major online service providers either closed down their news aggregation services (ES) or concluded free licences for the use of publishers' content (DE) which did not generate any remuneration for publishers so far. Moreover the related right granted to press publishers under this option would be different from the ES law insofar as it would be an exclusive right and not an unwaivable compensation: this would leave news publishers a greater margin for manoeuvre to negotiate different types of agreements with service providers and is therefore expected to be more effective for them in the long run (notably as it will allow press publishers to develop new business models in a flexible way).

Overall, as a result of this option, online service providers that today use news content online and engage in copyright relevant acts without the publishers' prior authorisation would be able to do so to a lesser extent. As a consequence, agreements covering online uses of newspaper content are likely to be concluded in more cases.

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<sup>480</sup> Subject to provisions in national law regarding presumption of transfer of rights, which would not be affected.

<sup>481</sup> See Annex 13B.

Publishers will remain free to agree on different licensing models and remuneration structures. The concrete impact on their licensing revenues would depend on the specific negotiations and market strategy of each individual publisher, but is expected to be generally positive. News publishers have estimated that the introduction of a new related right could lead to a 10 % increase in revenues or between 10-15 % in publishers' operating profit margin.<sup>482</sup> The emerging trend of monetisation agreements between news publishers and online service providers could also be reinforced. News publishers have estimated that a related right could have an indirect positive effect in boosting the incentives to conclude these agreements, with potential revenues that could reach €31 million in France<sup>483</sup>.

Overall, the effectiveness of this option in terms of facilitating the conclusion of agreements for the use of news publishers' content online is likely to depend on the respective bargaining power of the negotiating parties. However, in the long term all news publishers are likely to benefit from more legal certainty and a fairer online market place.

This option would improve only to a limited extent news publishers' ability to receive payments under compensation for exceptions, since the new right would only cover online uses and thus would not include compensation under the reprography exception (which only applies to reproductions on paper or similar media).<sup>484</sup>

Finally, increased legal certainty brought up by the introduction of the new right could have a positive effect on news publishers as regards enforcement measures against unauthorised uses of their content. With a new right, news publishers would not have to prove the whole chain of title before the court to get injunctive relief or to institute infringement proceedings,<sup>485</sup> as it has happened in some cases which were brought to the attention of the Commission.<sup>486</sup> This could have a positive impact in reducing piracy and related losses for news publishers (which have been estimated to be around €10.76 million per year in BE and to amount to 30 % loss of digital transaction volume and a potential 10-20 % of turnover in DE).<sup>487</sup>

This option would allow news publishers to exploit their publications online and adapt their businesses to current uses, but also with a view to other possible means of online exploitation in the future. The different positive impacts expected as a result of this option in terms of legal certainty, bargaining power and increased revenues would contribute not only to the sustainability of the news sector in the EU, but also to foster high-quality journalism, media pluralism and, ultimately, the European democratic debate.

The effects on news publishers described above would materialise in all the three scenarios considered as regards the term of protection. Scenario A (10 to 50 years) would place news publishers in a situation comparable to that of other related rightholders but may not seem to be justified taking into account the shorter life-cycle of exploitation of news by online service providers. Scenario B (5 to 10 years) would address the problem of publishers as regards the

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<sup>482</sup> Data provided by the news publishing sector as regards BE, FR, DE, FI, PL, IT, ES, UK.

<sup>483</sup> Source: Syndicat de la Presse Quotidienne Nationale: answer to the 2016 public consultation.

<sup>484</sup> Article 5(2)(a) of the Infosoc Directive. Reprography has usually been in the past (i.e. before the Repobel judgment of the CJEU) the main source of compensation levies for newspaper publishers (e.g. for Belgian newspapers, the level of compensation has usually amounted up to €2.1 million for reprography and €100,000 for private copying according to the newspaper industry).

<sup>485</sup> The presumption of ownership pursuant to Article 5(b) of Directive 2004/48/EC would apply to news publishers. Therefore, a publisher would be entitled to benefit from the measures, procedures and remedies provided for in the Directive when its name appears on a publication in the usual manner.

<sup>486</sup> For instance, the recognition of related rights would solve situations where news publishers have been required to present over 22,000 contracts with journalists in order to file a lawsuit for the infringement of their rights in DE.

<sup>487</sup> Data provided by the news publishing sector as regards BE, FR, DE, FI, PL, IT, ES, UK.

use of their content by online service providers such as news aggregators and social media, and would also provide publishers with a clearer legal framework when concluding licensing agreements with service providers having a different business model (e.g. distributors of multi-publishers content, services providing access to news archives). Scenario C (1 to 5 years) would address specifically the situation concerning online service providers such as news aggregators and social media but may not be fully future proof as regards exploitation of news content by other businesses.

Under this option, publishers other than news publishers would not be affected, as per the baseline scenario. Therefore, problems raised by these publishers as regards claims for compensation would not be addressed.

### **Authors**

With a new related right, news publishers would still need to acquire the authors' (and other rightholders) authorisation to use their content in the publications. Therefore, improvements to the news publishers' bargaining position under this option could indirectly have a positive impact on authors and other rightholders working in this sector in so far as publishers transfer part of these benefits to the authors in terms of job creation or better salaries/remuneration (which would vary on a case-by-case basis).

Authors, journalists in particular, have expressed concerns, in the context of the public consultation, that a publishers' right could make it more difficult for them to exploit their works separately from the publisher. The related right under this option would protect the value added by the publisher, which in a print product is not always easily separable from the author's work (in contrast with, for instance, a cinematographic work, where the subject-matter of protection of the producer, the film, is clearly different from the script, which is a text-based work). Today, when a journalist grants a publisher a non-exclusive authorisation to use an article,<sup>488</sup> he generally remains entitled (as the author of the work) to further use it (e.g. to authorise the use by a third party or to publish it himself in a collection or anthology). This is common industry practice even when the author's original manuscript has been subject to amendments during the editing process carried out by the publisher. Intervention in EU law under this option will clarify that the introduction of a related right for news publishers does not affect authors' ability to exploit their works independently. Provisions to this effect exist in MS laws granting self-standing protection to publishers).<sup>489</sup>

The three scenarios (A, B, C) as regards the term of protection should be generally neutral on authors considering that the related right granted to publishers will not affect their authors rights.

### **Service providers**

The impact of a new publishers' right on service providers would depend on the size, bargaining power and business model of the different players.

The clear identification of news publishers as rightholders is likely to prompt more online service providers to conclude agreements with publishers for the use of their content online. This option could therefore bring more service providers to conclude agreements with news publishers in more cases, thus accelerating the cooperation which is starting to emerge between big online service providers and the publishing sector (see problem definition and baseline). The introduction of a new right is not likely to substantially affect the ongoing

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<sup>488</sup> In the context of a contract (e.g. licence or employment relation).

<sup>489</sup> ES, IE, IT, RO and other MS provide for similar provisions in their current national laws. See Annex 13B.

initiatives and would probably foster the conclusion of more agreements between the major internet players and the publishing industry in the medium to long term.

Some service providers who already conclude licences covering specifically the use of digital news content, such as the media monitoring services, have expressed the concern that licence fees may increase as a result of the introduction of a new publisher right.<sup>490</sup> In practice, licence fees would depend on specific negotiations and business models and publishers may not have an interest in raising licence fees in licensing markets which already function today.

New entrants in the market of online services would need to factor in the need to conclude agreements with news publishers when deciding whether to start their activities. However, this will not be the direct consequence of the introduction of the new publishers' right as such. Already today copyright relevant uses of content online are subject to the need for users to acquire the prior authorisation of publishers (on the basis of the rights publishers acquire from authors. Moreover, the introduction of uniform rules at EU level under this option would have the positive effect for service providers to reduce fragmentation of the rules protecting publishers across MS, making it easier for them to conclude licences for multi-territorial uses of publishers' content. This aspect, together with better market conditions supporting the emergence of new B2B licence opportunities for news products, could foster innovation and facilitate the emergence of new and diverse business models of digital news distribution (such as streaming, access to broad multi-brand catalogues of different newspapers, etc).<sup>491</sup>

Service providers could in principle be affected by the three term of protection scenarios (A, B, C) to a varying extent, depending on their business models (i.e. whether they target the distribution of "news of the day" – like it is generally the case of online service providers such as news aggregators and social media or rather longer term uses, such as access to newspaper archives). However, in practice, the impact of a new publishers' right on these stakeholders may not substantially change under the three scenarios. This is due to the fact that service providers would have in any event to seek authorisation for the use of news content even after the expiry of the publishers' right because they would still need to clear – as it is already the case today- the rights of the authors in news publications (which have a longer term of protection: i.e. 70 years after death)

## **Consumers**

Consumers reap considerable benefits from news aggregators and social media news providers. At the same time they also benefit from high quality newspaper content feeding these channels of consumption. By fostering the production of high quality news content, this option is expected to have a positive impact on consumers. Better market conditions for the news publishing industry could give rise to the development of innovative offers for the digital distribution of news content, with larger catalogues and more choice. Digital subscription of newspapers and magazines are expected to be further developed, which will be particularly beneficial to consumers given the decline of print products.

Consumer organisations have raised concerns that granting additional protection to publishers could negatively affect consumers as a result of the consequences that they believe this intervention could have on online services providing access to news content online. The extents to which this may happen in practice depend at least in part on the impact of the

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<sup>490</sup> Source: AMEC-FIBEP's reply to the 2016 public consultation.

<sup>491</sup> As mentioned above, differently from music and films, where streaming services have now become mainstream of the last few years with brands such as Spotify, Deezer, Netflix, etc, in the news publishing sector these business models have not emerged as consolidated offers yet (one example of service trying this business model is Blendle - see Annex).

option on service providers (see above), including as regards the different scenarios for the term of protection (scenario A, B and C, above). However problems experienced by consumers in ES – which are often quoted as a source of concern in relation to a possible intervention on publishers at EU level (given that a major news aggregator decided to discontinue its service in ES) – are not expected to arise under this option since the related right proposed under this option is different from the unwaivable compensation measure under the ES "ancillary rights" law (see above: impact on publishers).

## **SOCIAL IMPACTS**

By improving the sustainability of the news publishing sector, this option would have a very positive impact in the number and quality of news publications. European society would benefit from media pluralism and enhanced participation in the democratic debate.

## **IMPACTS ON FUNDAMENTAL RIGHTS**

Positive impacts on copyright as property right and the right to freedom of information, resulting from the fact that this option is expected to increase the level of protection of news publications and to foster the quality of journalistic content.

## **Option 3 – As Option 2 plus introduction, in EU law, of the possibility for MS to provide that publishers may claim compensation for uses under an exception**

## **IMPACTS ON STAKEHOLDERS**

In addition to the impacts of Option 2, Option 3 would have the following impacts:

### **Publishers**

This option would have additional positive impacts as regards news publishers' ability to receive compensation for uses under exceptions (notably the reprography exception).<sup>492</sup> For example, in DE, the reprography compensation distributed to news publishers has numbered in recent years around €1.5 million per year and has been used exclusively for the education and training of journalists.<sup>493</sup>

For other publishers, in particular book and scientific publishers, Option 3 is highly significant, as their publications are often used under an exception such as private copying. For instance, in DE in 2013 over €20 million have been distributed to scientific publishers (books and journals) alone and an additional €3 million to other book publishers.<sup>494</sup> In 2012 the sum that scientific publishers received amounted even to over €30 million and to €2.3 million to other book publishers.<sup>495</sup>

Until now, publishers in 18 MS have received (part of the) compensation for uses of their publications under an exception.<sup>496</sup> The basis and the details of the respective arrangements in place differ, but in many MS there are joint authors/publishers collecting societies in place

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<sup>492</sup> As described under Option 2, news publishers would be able to rely on the new related right for compensation claims regarding online uses of their works under an exception. However, since the new related right covers only online uses, they would not be able to claim compensation under the reprography exception under Option 2 but they would be able to do so under Option 3.

<sup>493</sup> See e.g. Verwertungsgesellschaft Wort, Bericht des Vorstands über das Geschäftsjahr 2013, [http://www.vgwort.de/fileadmin/pdf/geschaeftsberichte/Geschaeftsbericht\\_2013.pdf](http://www.vgwort.de/fileadmin/pdf/geschaeftsberichte/Geschaeftsbericht_2013.pdf), p. 6 and Bericht des Vorstands über das Geschäftsjahr 2012, <http://www.vgwort.de/fileadmin/pdf/geschaeftsberichte/entwurf-final-ende-R.pdf>, p. 7.

<sup>494</sup> See Verwertungsgesellschaft Wort, Bericht des Vorstands über das Geschäftsjahr 2013, p. 7.

<sup>495</sup> Ibid.

<sup>496</sup> According to information provided by the book publishing industry: AT, BE, BG, CZ, EE, ES, FR, DE, EL, HU, LV, LT, NL, PL, PT, RO, SI, SK.

that are in charge of negotiating tariffs and collecting the compensation, e.g. in the form of a levy, and distributing it to authors and publishers. In their replies to the public consultation these collecting societies have expressed the concern that their very existence could be put in danger by the current situation of legal uncertainty. In the 12 MS for which detailed data was available, such compensation to publishers amounted to an aggregated sum of €40 million in the respective last financial year.<sup>497</sup> Figures differ greatly from MS to MS and range from €24 million in DE to €7,000 in LT for reprography. Option 3 leaves it to MS to decide if they want to put publishers in a position to receive compensation for uses of publications under an exception on condition that the original rightholders benefit in an adequate manner, directly or indirectly, from the compensation due. Thus, depending on the concrete legislative measures passed by the MS, the existing schemes providing for a split of the compensation between authors and publishers as well as the established practise of collecting societies could be maintained, so long as it is ensured that authors benefit adequately from the compensation due.

### **Authors**

Option 3 would have potential impacts on all authors in the publishing sector, including writers of books, as regards compensation for harm suffered due to uses under exceptions. This impact would vary across MS, depending on the starting situation in the respective MS, as not all of them provide for arrangements under which publishers receive compensation for uses under exceptions.

However, MS that want to make use of the possibility provided for by this option would have to ensure that authors benefit from compensation claimed by publishers. Accordingly, this option would benefit authors by enhancing transparency regarding the economic value of the compensation due for uses under an exception and the way in which they benefit from it, after transferring their rights to a publisher. When implementing this option, MS may provide that these benefits may also take non-monetary forms, such as the funding of social and cultural establishments set up for the benefit of authors through (parts of) the compensation due for uses under an exception to copyright.<sup>498</sup>

### **Service providers**

The additional elements under Option 3 should have no impact on online service providers.

### **Consumers**

The additional elements under Option 3 should have no additional impact on consumers, as the overall level of compensation would stay the same. This is the case because the optional mechanism proposed additionally under Option 3 would be neutral as to the overall level of harm caused by uses under the exception. Its effect would rather be to "pass on" part of the harm, and as a result of the compensation claim, from the author to the publisher as a consequence of the transfer.

## **SOCIAL IMPACTS**

Additional positive impacts on cultural diversity are expected under this option, because of the added value that it would bring to publishers across all sectors in particular smaller book publishers.

## **IMPACTS ON FUNDAMENTAL RIGHTS**

No additional impact on fundamental rights.

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<sup>497</sup> See Annex 13D.

<sup>498</sup> See e.g. the CJEU judgment in *Amazon v Austro-Mechana*, C-521/11, para. 50.

### 5.3.4. How do the options compare?

Option	Effectiveness	Efficiency	Impact on stakeholders	Social impacts and fundamental rights
<b>Baseline</b>	(0) Publishers would continue to face difficulties to license their publications or to get enough revenues (including compensation) for the reuse of their content.	(0) No direct costs associated with the baseline option.	(0) Impacts would depend on the evolution of the market. This uncertainty would prejudice publishers.	(0) No direct impact on fundamental rights. Cultural diversity may be negatively affected in the long term.
<b>Option 1 – Stakeholders' dialogue</b>	(0/+) It could foster new agreements but depending mainly on the willingness of the parties to participate. (0) Legal certainty (including on the claims to receive compensation) across the EU would not be achieved.	(-) Costs linked to the organisation of the stakeholders' dialogue.	(0) Main impacts on stakeholders would depend on the uneven willingness of the parties to participate in the dialogue and reach agreements.	(0) No direct impact on fundamental rights. Cultural diversity may be negatively affected in the long term.
<b>Option 2 – Introduction in EU law of a related right covering online uses of news publications</b>	(+) Legal certainty and stronger bargaining powers would foster the conclusion of B2B licences for online uses of news. The positive impact on publishers would remain but decrease under the three scenarios (A, B, C) concerning the term of protection. (-) It would not solve the unclear situation regarding publishers' possibility to claim compensation for uses made under an exception.	(-/0) Compliance costs for online service providers, which may need to review business models in terms of agreements with news publishers.	(++) Increased legal certainty would help news publishers to conclude digital licences and monetise the reuse of their content. (0/+) Authors to benefit indirectly from positive impact on news publishers. (-/+ ) Some negative impact on smaller online service providers. At the same time, new innovative business models for the distribution of news could emerge. (0/+) positive impact on consumers as regards the enhanced availability of quality content in the long term.	(+) Positive impact on copyright as property right. (+) It would help secure the quality and plurality of journalism.
<b>Option 3 – As Option 2 plus EU law possibility for claims for compensation</b>	Same impacts as Option 2, and additional impacts as follows			
	(+) It would effectively solve the unclear situation regarding publishers' possibility to claim compensation for uses made under an exception.		(+) If provided by national law, publishers would be entitled to get compensation from exceptions in most MS.	(+) Specific positive impacts on small book publishers would be positive for the cultural diversity.

**Option 3** is the preferred option. This impact assessment does not take a decision as to whether the term of protection of the related right for news publishers should be as under scenario A, B or C (at this stage this is left for political decisions). The non-legislative Option 1 would not solve the problems effectively as this option fully depends on the behaviour of the different market players and self-regulatory solutions alone are unlikely to fully address the unbalance in the bargaining power between publishers and online service providers. Both options 2 and 3 provide exclusive rights to news publishers, but not to other kinds of publishers. As set out in the problem definition, the way books and scientific journals are distributed online by their publishers makes the identified problem mainly relevant for the news publishing sector. Therefore, both options address the specific problems identified in the news publishing industry, related to the reuse of content by online service providers and the

need to obtain a fair return to sustain their activities. By introducing related rights for news publishers, both options would increase the legal certainty in that sector, strengthen publishers' bargaining position and ultimately have a positive impact in their ability to license their content and enforce the rights on their news publications. Although online service providers reusing news content may face transactional costs that they do not face today as a result of an increased pressure to conclude agreements with publishers, the final decision about the reuse of this content and the corresponding conditions (e.g. either free or against the payment of a fee or a monetisation agreement) would be left to the freedom of contract of the parties. Therefore, both options enable the achievement of the policy objective in a proportionate manner, without going beyond what is necessary to do so.

Whereas Option 2 does not address the problems that all kind of publishers are facing regarding their possibility to claim compensation under exceptions to copyright, Option 3 would allow MS to provide that publishers can under certain conditions claim (a part of) the compensation linked to exceptions of the rights they have been transferred by authors. This targeted solution ensures that Option 3 does not go beyond what is needed to achieve the objective.

#### 5.4. FAIR REMUNERATION IN CONTRACTS OF AUTHORS AND PERFORMERS

##### 5.4.1. What is the problem and why is it a problem?

**Problem:** *Authors and performers face a lack of transparency in their contractual relationships as to the exploitation of their works and their performances and as to what remuneration is owed for the exploitation.*

**Description of the problem:** A primary objective of copyright is to secure appropriate reward for authors and performers (hereafter: 'creators').<sup>499</sup> This is the reason why they are granted economic rights over the use of their works and performances (hereafter: 'works'). Frequently, creators do not exploit their works themselves. Commercial exploitation is often arranged through the grant of licences or the transfer of rights (e.g. to a publisher or a producer) "*in return for payment of appropriate remuneration*".<sup>500</sup> These contractual relationships constitute the exercise of the economic rights. The determination of what constitutes appropriate remuneration depends on factors such as the nature and scope of the use of the works. Thus, the assessment of the appropriateness of the remuneration requires information on such factors.

However, the information received from creators<sup>501</sup> and some recent studies<sup>502</sup> indicate the existence of problems of lack of transparency in the creators' contractual relationships with

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<sup>499</sup> Recital (10) of the InfoSoc Directive articulates this objective: "If authors or performers are to continue their creative and artistic work, they have to receive an appropriate reward for the use of their work."

<sup>500</sup> ECJ, Case C-403/08, 4 October 2011, *Football Association Premier League Ltd and Others v QC Leisure and Others*, pt. 107-108; ECJ, Case C-351/12, 27 February 2014, *OSA*, pt. 23; ECJ, Case C-92/92, 20 October 1993, *Collins et Patricia Im- und Export / Imtrat et EMI Electrola*, p. 12, 21; ECJ, Case C-62/79, 18 March 1980, *Coditel / Ciné Vog Films*, p. 14

<sup>501</sup> Including the [replies to the July 2014 public consultation on the review of the EU copyright rules](#) (hereafter the 'Public Consultation'), where the issues raised included poor quality and/or lack of accounts and reporting by publishers and producers with regards to the use of the rights transferred by the author or the performer.

<sup>502</sup> For example, the 2015 study on the "[Remuneration of authors and performers for the use of their works and the fixations of their performances](#)" concerning the audiovisual and music sectors (hereafter: 'AV/M Study'), [Institute for Information Law](#) of the University of Amsterdam, together with [Europe Economics](#), PLS, and the 2016 study on the "Remuneration of authors of books and scientific journals,

producers, publishers, broadcasters and other possible licensees or transferees (hereafter collectively: 'contractual counterparties') regarding:

- the *possible exploitation*, i.e. how the work may be used;
- the *actual exploitation*, i.e. how the work is used and with what commercial result; and
- the *remuneration* that is owed for the exploitation.

There may be uncertainty about *possible exploitation* because licence and transfer agreements do not always specify the obtained rights while modes of exploitation and supply chains have become very diverse and complex.<sup>503</sup> Concerning *actual exploitation*, on the basis of the information available there seems to be many instances when creators do not receive satisfactory or any information from their contractual counterparty on the modes and extent of use and on the revenues generated from the exploitation,<sup>504</sup> which may lead to uncertainty about owed *remuneration*. This situation can be described as an *information asymmetry* because the information that would be required to ensure transparency may, in fact, be available to the contractual counterparties but it is not shared with creators.<sup>505</sup>

The situation of creators varies to some extent depending on the Member States (MS) or the sector and seems to be better where collective bargaining is allowed and efficient<sup>506</sup> but problems related to lack of transparency and information asymmetry seem to arise in most creative sectors.<sup>507</sup> Transparency is also affected by the increasing complexity of the new modes of distribution of works online and by the measurement of the actual online exploitation of such works, notably due to the evolution of consumption patterns in some sectors, for instance from ownership to access/streaming modes of consumption.

In the absence of transparency, creators are unable to effectively compare deals and offers, including across borders, which undermines their ability to exercise their freedom of movement.<sup>508</sup> In addition, there is a fragmented situation between the different MS<sup>509</sup> as regards transparency which prejudices a level playing field for contractual counterparties in the Internal Market. Furthermore, differences between MS may create legal uncertainty and

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translators, journalists and visual artists for the use of their works" (hereafter: 'Print Study') from the same authors to be published (copy available on request). See also *infra* the study of the European Parliament.

<sup>503</sup> "There is a lack of transparency of the remuneration arrangements in the contracts of authors and performers in relation to the rights transferred" (AV/M Study, p. 8 and 135, Print Study, p. 237) and for creators it is "difficult, if not impossible, to break down their remuneration according to the different rights".

<sup>504</sup> Even when there is reporting, the provided information may be unclear or inconclusive according to creators' testimonies. See Annex 14B for examples of the contents of reporting statements. See "Contractual arrangements applicable to creators: law and practice of selected Member States" (2014), a study commissioned by the European Parliament, S. Dusollier, C. Ker, M. Iglesias and Y. Smits, p.76, 164.

<sup>505</sup> As reported by authors and performers in the 2014 Public Consultation, *ibid*.

<sup>506</sup> In France, the adaptation of the publishing contract to digital which provides increased transparency safeguards to the authors was negotiated by the main publishing stakeholders and constitutes a good example. Also see for the US: O'Rourke, M. (2003), "Bargaining in the Shadow of Copyright Law after Tasini", Case Western Reserve Law Review, Vol. 53, Issue 3

<sup>507</sup> The Council of the European Union in its conclusions on "[The transition towards an Open Science system](#)" (adopted on 27/05/2016) also stressed the importance of clarity in scientific publishing agreements.

<sup>508</sup> Differences between national legislations may seem unclear for creators and limit their ability to understand their remuneration in different MS.

<sup>509</sup> Different transparency obligations exist in various MS such as FR, BE, SE, HU or DE. See Annex 14A for an overview of national legislation and soft-law on transparency.

lead to greater transaction costs and "jurisdiction shopping" by transferees. The European context of the problem is ever more relevant due to the increasing cross-border creation and exploitation of works.<sup>510</sup>

Drivers: [*Weaker bargaining power of authors and performers in contractual negotiations*] The main underlying cause of this problem is related to a market failure: there is a natural imbalance in bargaining power in the contractual relationships,<sup>511</sup> favouring the counterparty of the creator, partly due to the existing information asymmetry.<sup>512</sup> The difference in bargaining power can also create a "take it or leave it" situation for creators and therefore full "buy-outs" using catch-all language that covers any mode of exploitation without any obligation to report to the creator.

[*Legislative solutions ensuring transparency in MS are not sufficient*] A regulatory aspect of the problem is that most MS impose either too generic transparency or reporting obligations or only transparency obligations applicable to certain sectors (without the necessary mechanisms to ensure enforcement). The fact that some MS, notably FR and DE, are currently planning to introduce or to strengthen such measures<sup>513</sup> also confirms the existence of the problem and contributes to an uneven playing field.

[*Weaker bargaining power of authors and performers in contract enforcement*] Another driver of the issue, also related to the difference in bargaining power, is that often creators depend on their contractual counterparties and are unwilling to challenge them or to request further information for fear of possible consequences.<sup>514</sup>

Consequences: As a consequence, creators are confronted with instances where they are unable to effectively monitor the use, measure the commercial success and assess the economic value of their works. Because of this, there are instances where creators are unable to negotiate an appropriate remuneration in exchange for their rights, to verify that they are receiving the agreed amounts or to enforce their claims for remuneration effectively.<sup>515</sup> This

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<sup>510</sup> In the music sector, a recent study shows that the share of non-local EU repertoires in radio airplay / digital download song sales is 34%/29% in DE, 39%/21% in PL, 33%/32% in NL, 22%/18% in FR, 22%/17% in ES and 20%/15% in SE. [[E. Legrand, Monitoring the cross-border circulation of European music repertoire within the European Union, Report commissioned by EMO & Eurosonic Noordslag, in partnership with Nielsen, January 2012.](#)] In the audiovisual sector, on the basis of data collected by the European Audiovisual Observatory between 2011 and 2015, 25% of European feature films (between 260-300 films/year) are co-productions. The Eurimages support scheme which is a cornerstone of European film financing (supporting 92 European co-productions in 2015) requires the financial, technical and artistic co-operation of the co-producing European countries which entails creators working in multiple MS.

<sup>511</sup> Laffont J.J., Tirole, J., 1988, "The dynamics of incentive contracts", *Econometrica*, Vol 56, No 5, p.1153

<sup>512</sup> In the UK, it is reported that on an individual standpoint "36% of writers thought their own bargaining position had got worse over the last five years whereas 22% thought it had got better" whereas "when considering the industry as a whole 5% of respondents thought that the position for writers had got better over the period whereas 64% thought it had got worse", J. Gibson, P. Johnson, and G. Dimita 2015, ["The Business of Being an Author – A Survey of Authors' Earnings and Contracts"](#), London, Queen Mary Intellectual Property Center

<sup>513</sup> See Annex 14A for a summary of recent and ongoing transparency initiatives of MS.

<sup>514</sup> According to information shared by creators with the Commission, such behaviour can also be experienced in MS and sectors where there are reporting obligations in place if such obligations are not supported by measures that help enforcement and verification of the reporting.

<sup>515</sup> The AV/M Study points out that (i) contract terms and conditions and (ii) sales are the factors that are directly linked to the determination of the remuneration of creators. Yet, these are the two areas where lack of transparency was identified as a major problem (p.114).

situation has been reflected in statements on lack of fair remuneration from stakeholders<sup>516</sup> and, in recent studies conducted in the UK and France, for example.<sup>517</sup>

How the problem would evolve: All things being equal, this situation is not likely to improve to a sufficient extent, notably as there are no indications that the current bargaining positions will become more balanced. It is not clear either whether the information asymmetry would improve. In fact, as exploitation is getting more complex and more intermediaries join the value chain there is a risk of less transparency. On the other hand, the constantly improving information technology should allow providing for more efficient, more accurate and more economic reporting mechanisms.<sup>518</sup> Without EU intervention, these technologies are not likely to be used to their full potential. Creators will not be able to force transparency on their contractual counterparties since they are in a weaker bargaining position and, in many instances, have few alternatives. Some MS may follow the example of recent initiatives to legislate to introduce transparency measures but such interventions are not likely to happen in all MS or sectors and could risk further fragmenting the Internal Market.

Some stakeholders and studies<sup>519</sup> argue that *ex-ante intervention* (i.e. at the stage when a contract is being defined) via options such as prohibition of certain contractual clauses, would be more effective. However, EU intervention on copyright contract law concerning fair and unfair clauses raises questions at this stage in terms not only of proportionality and contractual freedom but also of its articulation with the very different approaches in MS and differences between the creative sectors. Therefore, the scope of this impact assessment covers ex-post aspects linked with lack of transparency and unbalanced bargaining positions.

#### 5.4.2. What are the various options to achieve the objectives?

The general and specific objectives are described in section 5.1.3.

##### Baseline

No policy intervention. This option would rely on MS or self-regulation by industries at national level to impose transparency obligations on the contractual counterparties, or on industry specific agreements (resulting from collective bargaining for example) and other market developments to improve transparency.

##### *Stakeholders' views*

Creators would consider that this option cannot solve the identified problems as they believe that, for a large number of them, due to the natural imbalance between the parties, problems with lack of transparency can only be remedied by (EU) legislative intervention. Contractual counterparties would support the baseline option and consider that the existing competition between them and market developments/industry practices are the best way to address transparency problems if they exist. They will also argue that an intervention in this area would affect their contractual freedom. Consumers would deem that this option is not satisfactory since they consider that there is a need for EU intervention in this area in order to ensure adequate remuneration for creators.

<sup>516</sup> See [Public Consultation results](#) that mention lack of "adequate or fair remuneration" and underline that "online exploitation, especially in a cross-border context, makes it particularly difficult to ensure that there is a relationship between the use and success of the work or performance and the remuneration provided to the creator".

<sup>517</sup> See, for example: "What are words worth now", a survey conducted in the UK by ALCS (2014) <http://www.alcs.co.uk/Resources/Research>; "Économies des droits d'auteur Place et rôle de la propriété littéraire et artistique dans le fonctionnement économique des filières d'industrie culturelle", conducted in France by Françoise Benhamou et Dominique Sagot-Duvaurox for the French Ministry of Culture, <http://books.openedition.org/deps/440>

<sup>518</sup> An increasing number of music stakeholders such as record companies and online service providers develop online royalty portals which enable artists to have a complete overview of revenues generated by the exploitation of their works and received royalties.

<sup>519</sup> See p. 59 of the AV/M Study and policy options 1 and 3 on p.142.

## Option 1 – Recommendation to MS and stakeholders' dialogue on improving transparency in the contractual relationships of creators

- Under this option, the Commission would issue a recommendation to MS to adapt their national laws to impose transparency obligations on the contractual counterparties of creators.
- In addition, the Commission would recommend to MS to put in place stakeholder dialogues between representatives of authors and performers on the one hand, and producers, publishers, distributors on the other, to explore ways of improving transparency and develop collective or model agreements and best practices for reporting. These dialogues would have to be sector specific due to the different dynamics of different content sectors.<sup>520</sup>

### *Stakeholders' views*

Views are different among creators as to whether a recommendation can address the identified problems but most stakeholders are likely to consider that this option is still insufficient to solve them because the recommendation would be followed by MS to a different extent and may be disregarded. Equally, creators will consider that stakeholders' dialogues are not likely to produce concrete results (notably if not linked to legislation). Contractual counterparties would favour this option over a legislative intervention but would still oppose it, notably if it is seen as likely to lead to legislative intervention at national level. Consumers who underlined the need for EU intervention would consider this option to be insufficient. Intermediaries may deem this option adequate to ensure a fair remuneration to creators.

## Option 2 – Imposing transparency obligations on the contractual counterparties of creators

This option would oblige MS to impose a reporting obligation<sup>521</sup> on the contractual counterparty of a creator, with the following elements:

- The obligation would lie with the first licensee/transferee. In case the contractual counterparty is replaced entirely (by way of legal succession or right transfer, for example), the obligation shall lie with the new right holder.
- The reporting would be done on a regular basis without having to be requested by the creator.<sup>522</sup> The reporting should occur with reasonable periodicity.<sup>523</sup>
- The minimum content of reporting - including information about the modes of exploitation and corresponding revenues - would be set out by EU legislation while sector specific details should be defined for different sectors<sup>524</sup> at MS level in consultation with the relevant stakeholders. This is necessary in order to reflect the large variety of contracts and remuneration arrangements across sectors as well as the differences between the relevant information required for transparency.

<sup>520</sup> See Annex 14A for examples.

<sup>521</sup> A reporting obligation in EU legislation to ensure more transparency has been consistently advocated for by creators, including the *Authors' Group*, an umbrella organisation of ECSA, EFJ, EWC, FERA and FSE, in their recent "[Declaration towards a modern, more European copyright framework and the necessity of fair contracts for creators](#)" and their "[Information note for President Martin Schulz](#)".

<sup>522</sup> Creators point out that an "on demand" obligation would not be effective as they would seldom request reporting due to their weaker bargaining position.

<sup>523</sup> Frequency of reporting would depend on the sector, and if it is not agreed otherwise in stakeholder dialogue it should occur at least once a year as this is the general minimum standard across sectors.

<sup>524</sup> Sectors will have different methods of reporting as their value chain structures and models of exploitation vary. For example, final cost of the film production could be relevant as part of the reporting in the audiovisual sector, whereas in the print sector data on the number of copies printed, sold and on stock would have to be included. See Annex 14C for a selection of potential sector specific impacts.

- Proportionality test: In order to make the obligation proportionate, in cases where the contribution of the creator is not significant to the overall characteristics of the work, reporting obligation would not be mandatory. Subject to the proportionality test (i.e. provided that the contribution of the creator is significant), lump-sum remuneration arrangements would also be covered by the reporting obligation.<sup>525</sup> In the cases where the administrative burden of reporting would be disproportionate to the generated revenues, the obligations on contractual counterparties could be limited.<sup>526</sup> Agreements concluded with collective management organisations would be exempted as these are covered by the CRM Directive's reporting obligations.<sup>527</sup>
- The reporting obligation would only have an ex-post effect on contracts which means that parties would still be free to negotiate the commercial terms.

*Stakeholders' views*

Creators would strongly support such transparency obligations leading to appropriate solutions per sector. Some would however claim that transparency obligations on their own are not sufficient and would call for further intervention on unfair contracts or the introduction of an unwaivable remuneration right.<sup>528</sup> Contractual counterparties would object to this option. They would argue that compliance would be too burdensome and the intervention would limit their contractual freedom.<sup>529</sup> Consumers would be in favour of an intervention at EU level.

**Option 3 – Imposing transparency obligations on the contractual counterparty of creators supported by a contract adjustment right and a dispute resolution mechanism**

This option would oblige MS to introduce the reporting obligation as described under Option 2, with the following additional elements:

- A contract adjustment mechanism

The mechanism would ensure a right to request the adjustment of the contract, ultimately by a court or other competent authority, in case the agreed remuneration is disproportionate to the revenues and benefits derived from the exploitation of the work.<sup>530</sup> This option would help

<sup>525</sup> Reporting in these cases is practically non-existent. Nevertheless, lump-sum payments are based on the anticipated commercial success of a work and information on use and generated revenues is required to assess the commercial value, therefore, excluding lump-sum payments would be an unjustified discrimination among creators. Moreover, it would incentivise contractual counterparties to offer more lump-sum deals which are already considered by creators unfair and too commonly used in some sectors. In the UK, a study reported that 69% of writers have mentioned that at least 40% of the contracts they have signed were buy-out contracts ([The Business of Being an Author, A Survey of Author's Earnings and Contracts](#), Queen Mary University of London, April 2015). Also p.91 AV/M study

<sup>526</sup> For instance, in sectors like press publishing and broadcasting, reporting on all works to all creators may not be proportionate considering the large number of works used in their daily output. Nevertheless, specific proportionate transparency requirements should be determined even for these sectors through the stakeholder dialogue.

<sup>527</sup> Article 17 of the Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market (CRM Directive)

<sup>528</sup> Some stakeholders claim that intervention into contracts is needed to strengthen the creators' rights and that an unwaivable right for remuneration is necessary to ensure a minimum appropriate remuneration to creators. See the position of SAA ([SAA White Paper 2015](#)) and of AEPO-ARTIS, EuroFIA, FIM and IAO ([Fair internet for performers campaign](#)).

<sup>529</sup> See [Public Consultation results](#) where contractual counterparties expressed a need for a healthy competition to ensure fair remuneration for creators, also referring to the possibilities in reporting offered by technological developments.

<sup>530</sup> The contract adjustment mechanism for unforeseen revenues is usually called a “best-seller clause”. This widespread expression may be easily understood but it is somewhat misleading because it suggests

restoring the relation between the remuneration and the success of the work and would ensure appropriate remuneration when the agreement of the parties is unbalanced.

Even though such a mechanism exists in several MS, including DE, FR or HU, the related case-law<sup>531</sup> and information received from stakeholders is extremely limited suggesting that contract adjustment rights are mainly used as leverage in negotiations. Nevertheless, creators would be more likely to invoke such a right if they received more information on revenues because of the reporting obligation.

- A dispute resolution mechanism

The dispute resolution mechanism would help ensuring effective enforcement of the reporting obligation and the contract adjustment mechanism. This will be a voluntary dispute resolution mechanism<sup>532</sup> competent for (i) adjusting disproportionate remuneration arrangements deriving from unfair agreements or changed circumstances (e.g. unexpected success, new modes of exploitation), and (ii) settling contractual disputes about transparency.

It would address the problems identified since disputes that may arise in relation with new transparency obligations may be resolved faster and with adequate expertise. It should help creators, who are usually reluctant to go to court against their contractual counterparties, to enforce their rights to transparency or contract adjustment. This option would of course not deprive creators of the possible use of other existing means notably a court or other competent authority to seek to adjust the remuneration.<sup>533</sup>

*Stakeholders' views*

Creators would clearly support a contract adjustment mechanism.<sup>534</sup> They would also welcome an alternative dispute resolution mechanism because they are usually reluctant to bring their contractual counterparty to court. As with Option 2, some of these stakeholders would consider that these mechanisms would only partially address their concerns about remuneration. Contractual counterparties would oppose these supporting options on the basis of contractual freedom and the re-negotiation cost of contract adjustment. Consumers and some

that it only applies to actual best-sellers, which constitute the top 5-10% of sales lists, while in theory the clause should trigger when there is a significant disproportion between the agreed remuneration and the actual revenues (i.e. the commercial value) which can happen to any kind of work, even of low/medium success provided that such success (revenue) had been unforeseen and is not in proportion to the agreed remuneration. Therefore, “better-seller clause” would be a more appropriate name for a contract adjustment mechanism that applies when a work sells better than expected. Such clause exists, among others, in the legislation of DE, FR, HU, PL, ES and SL. See Annex 14D for more details.

<sup>531</sup> Perhaps the most well-known dispute is the Das Boot case: the creator (the director of photography of a film) first had to raise a claim to obtain information on the exploitation of the work (he faced a lack of transparency on the exploitation of the work and the yielded revenues) before initiating proceedings on the basis of Article 32a of German copyright law which provides for a fairness clause.

<sup>532</sup> A similar mechanism can be found in NL where the June 2015 amendment of the Author's Right Act introduced a new dispute resolution committee (see article 25g of the [Dutch Author's Right Act](#)). See also in the UK the mechanisms managed by [The Publishers Association](#).

<sup>533</sup> Under current national legislations (see Annex 14D), when proceedings are initiated on the basis of a better-seller clause, courts conduct, in most of the cases, a judicial revision of the contract. For lump-sums, it often results in damages granted to the creator corresponding to the difference between the agreed remuneration and the remuneration that s/he should have received (such remuneration is for instance often calculated in France taking into account the professional usages). In the less common case where a better-seller clause would be enforced for proportional remuneration (as opposed to lump-sum based), courts would be able to revise the royalty percentage taking into account the exploitation of the work.

<sup>534</sup> In the Public Consultation, they often mentioned that a buy-out contract “prevents their adequate or fair remuneration as the payment does not relate to use, and even less so to the success, of their work or performance”. The [Authors' Group's recent "Declaration towards a modern, more European copyright framework and the necessity of fair contracts for creators"](#) highlights that “authors’ contracts lack provisions allowing them to renegotiate their terms, particularly in case of use of the work in additional formats and commercial success beyond expectations”.

intermediaries would welcome transparency obligations supported by these mechanisms. Other intermediaries are likely to have concerns about this option.

#### 5.4.3. 4. What are the impacts of the different policy options and who will be affected?

##### ***Approach***

The options presented above would mainly affect the two parties of a licence or right transfer agreement: creators on the one hand, and their direct contractual counterparties<sup>535</sup> on the other. Following some general impacts under each option, the impacts affecting these two groups are presented separately. Only the most significant and likely impacts are reported in this IA.

- For creators, the following impacts have been considered: (i) impacts on transparency of contracts; and (ii) impacts on the capability to receive appropriate remuneration (even retroactively).
- For the contractual counterparties, the main impacts are economic and are related to (i) compliance costs and (ii) competition. As most of the European companies active in the creative sectors are SMEs, all impacts are examined in this context.

The assessment below is mainly qualitative, with some limited quantitative evidence, as the data publicly available or that could be obtained from stakeholders on the *lack* of transparency is limited.

## **Baseline**

### **IMPACTS ON STAKEHOLDERS**

#### **Creators**

Impacts on transparency of contracts: Considering recent and upcoming initiatives some development may be expected<sup>536</sup> but the problem of information asymmetry is not likely to be resolved by market developments, including self-regulation, or MS legislation. Problems for creators as regards lack of information on the exploitation and revenues generated by their works will continue. At the same time exploitation – particularly online exploitation – is expected to become more complex and varied, involving new intermediaries and forms of use.<sup>537</sup> This risks making it even more difficult for creators to understand and monitor the exploitation and the revenue flow, resulting in an increased information asymmetry.

Impacts on the capability to receive appropriate remuneration: Under the baseline scenario the weaker bargaining position of authors and performers is not likely to improve overall which entails a risk of non-appropriate remuneration.

#### **Contractual counterparties**

Impacts on compliance cost: This option would not have an impact on compliance costs for contractual counterparties, unless this cost arises from self-regulation or individual MS intervention. However, the costs linked to the differences between transparency requirements in MS relevant for those parties active in several MS will remain.

Impacts on competition: Without any EU intervention, the contractual counterparties of creators would benefit from the information asymmetry, especially in MS and sectors where

<sup>535</sup> While the majority of affected first licensees/transferees will be producers, publishers and broadcasters, it is to note that creators may enter into contractual relationships directly with platforms or other distributors in which case these will be the affected contractual counterparties.

<sup>536</sup> In the music sector, for example, Worldwide Independent Network (WIN), the international association representing independent labels established the principles of revenue sharing with artists and more transparency in contracts with digital platforms in their Fair Digital Deals Declaration. Also, in their "Recommendation for the licensing of broadcast-related online activities", several stakeholders, including public broadcasters (EBU) and music publishers (ICMP), have agreed on the necessity of transparency of licence agreements. The French publishers association (SNE) also provides detailed practical guidelines on reporting to its members in view of promoting transparency.

<sup>537</sup> For example, distribution of music via UGC platforms or of newspaper articles via social media.

there are no transparency obligations at all. The fragmentation of the internal market would continue.<sup>538</sup>

## **SOCIAL IMPACTS**

In a market where conditions for fair remuneration are not optimal, creators may dedicate less time to content creation and creative professions would become altogether less attractive which is detrimental to cultural diversity.<sup>539</sup>

## **IMPACTS ON FUNDAMENTAL RIGHTS**

This option will not have a direct impact on copyright as a property right (although problems for the effective exercise of this right by creators will continue and therefore there would be an indirect impact on the medium to long term). Weak bargaining position of creators may also prejudice their freedom of expression through artistic creation. This option would have no impact on the freedom to conduct a business of contractual counterparties.

## **Option 1 – Recommendation for MS and stakeholders' dialogue on improving transparency in the contractual relationships of creators**

### **IMPACTS ON STAKEHOLDERS**

A recommendation would act as guidance to those MS which plan to take steps towards ensuring more transparency. This option could result in positive developments, even though it would not ensure a similar level of transparency in all MS and in all sectors. Those MS that take action are not likely to do so consistently, but this option could provide more flexibility to MS to adapt their legislation.

### **Creators**

Impacts on transparency of contracts and on the capability to receive appropriate remuneration: The effects of a recommendation will depend on the extent to which it is followed by MS. It will also provide an opportunity for creators to push for changes at national level through the stakeholder dialogue. In fact, according to the available information, a sector specific dialogue seems to be an essential element in implementing transparency efficiently, as evidenced by examples in different MS and sectors (see Annex 14A). Thus, a recommendation may have positive impacts on transparency in certain MS.

### **Contractual counterparties**

Impacts on compliance costs: The effects on compliance costs will depend on the extent to which the recommendation is followed in MS. Contractual counterparties are likely to face different costs in different MS.

Impacts on competition: A recommendation may reduce the fragmentation between different national legislations to some extent but still would not create a level playing field for businesses in the EU.

## **SOCIAL IMPACTS**

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<sup>538</sup> For instance, a book publisher operating in France, Lithuania and Luxembourg would have to comply with very different transparency obligations: in France, a detailed mandatory reporting obligation based on co-regulation (Art. L.132-17-3 and the underlying industrial agreement); in Lithuania, a more generic obligation to provide information and only at the author's request; whereas in Luxembourg, the publisher would not have to comply with any transparency obligations.

<sup>539</sup> According to the findings of the survey "What are words worth now" *ibid*, the percentage of authors earning their income solely from writing dropped from 40% to just 11.5% between 2005 and 2013.

Depending on the MS, there might be positive social impacts (compared to the baseline option) but not across the whole EU.

## **IMPACTS ON FUNDAMENTAL RIGHTS**

In MS where the recommendation is followed, impacts on freedom of expression and freedom to conduct a business may be similar to those under Option 2, but the objectives of free movement and a level playing field would continue to face the same fragmentation problems as those under the baseline option. The impact of this option on the right to property of creators would depend on the take-up of the recommendation by the MS and would range from no direct impact (and problems with enforcement remaining) to improving the bargaining position of creators and contributing to the enforcement of their rights in those MS which follow the recommendation.

## **Option 2 – Imposing transparency obligations on the contractual counterparty of creators**

### **IMPACTS ON STAKEHOLDERS**

#### **Creators**

Impacts on transparency of contracts: The reporting obligation would greatly decrease the information asymmetry as creators would receive the relevant information on the uses of their works and the corresponding revenues. As a direct impact, the enforcement of contracts would become much easier and effective, particularly in the case of royalty-based remuneration arrangements because the correct payment of remuneration could be verified. Having information on the specific modes of use would ultimately bring transparency to the scope of the contracts and would highlight the difference between different rights and modes of exploitation which may be taken into account by creators for future negotiations.<sup>540</sup> This option would therefore have a significant indirect impact without a disproportionate intervention in the contractual freedom of the parties. It is important to note that the implementation of the reporting obligation may lead to disagreements between the parties as to the revenues and remuneration. In view of this the possibility to resort to a dispute settlement mechanism such as the one described under Option 3 could be important.

Impacts on the capability to receive appropriate remuneration: As a major impact, creators would be able to effectively assess the commercial value of their works which would greatly improve their bargaining position in future deals.<sup>541</sup> The importance of this measure is also proven by the fact that creators have been consistently calling for it.<sup>542</sup>

#### **Contractual counterparties**

Impacts on compliance cost: The main impact would be the administrative burden of compliance.<sup>543</sup> Costs would depend on a large number of factors, such as the number of

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<sup>540</sup> It has been shown that specifying the scope of licence/transfer has a direct and positive effect on the remuneration of creators, see Print Study and AV/M Study p.136 and policy recommendations p. 142 and "*Contractual arrangements applicable to creators...*", *ibid*, p.103-104.

<sup>541</sup> "Remuneration is an important part of the contractual bargain". Transparency obligations "will enable the author to have a broader understanding of the financial flows related to her work and her actual share in its economic exploitation", in: "*Contractual arrangements applicable to creators...*", *ibid*, p.105

<sup>542</sup> See, for example, in the [Authors' Group's "Declaration towards a modern, more European copyright framework and the necessity of fair contracts for creators"](#); the [Paying Artist Campaign](#) launched in the UK by visual artists or the [Fair terms for creators](#) campaign coordinated by the Creators Rights Alliance.

<sup>543</sup> See Annex 14C for an economic assessment of potential sector specific impacts.

creators and works, the complexity of exploitation, the quality of the data received from intermediaries, the frequency of reporting and, perhaps most importantly, the already existing reporting practices. Some contractual counterparties already report to creators on the basis of contractual clauses, royalty-deals or statutory provisions.<sup>544</sup> In such cases the intervention would have practically no impact or only a limited impact in adapting their reporting to the new requirements. For those who do not report to creators yet, the incurred expenses would include the one-off cost of developing reporting processes and the recurring cost of actual reporting. However, even in these cases contractual counterparties would have to report on information that is already available as it would have been previously gathered and processed for intellectual property management and accounting purposes.<sup>545</sup> Therefore, following the one-off investment, complying with the reporting obligation would mainly consist of taking the effort to extract the relevant information and to share it with the creator in a structured, comprehensible way. It is also to note that transparency requirements have also been imposed on other important players in the value chain such as CMOs.<sup>546</sup>

In addition, in order to produce reporting statements, contractual counterparties would use different types of electronic tools going from widely available spreadsheets to complex reporting software specifically designed for companies' reporting needs. Limited information allowing only anecdotal estimation of the potential costs related to these reporting tools is available. The extent of costs would depend on whether and what reporting tools are already used by affected companies and which type of use. The costs would further vary depending on the type of information required for each creative sector. However, costs linked to the utilisation of a reporting electronic tool are not expected to be significant for a large majority of SMEs since they would likely use commonly deployed spreadsheets. In most cases, costs could be absorbed in the routine software maintenance costs of those companies.

Furthermore, labour-related costs linked to reporting are very difficult to estimate as they would, among other things, depend on the type and the number of works, the complexity of the authorship and on the number of actors from which the information has to be gathered. As an example, book publishing stakeholders informed us that reporting can be dealt with on simpler cases within 2-3 minutes while the more difficult ones require 10 to 15 minutes. Audiovisual stakeholders stated that time allocated to reporting to all creators of a movie could range between one or two hours for simpler cases to ten hours for the most intricate ones. On the basis of the limited information on reporting mechanisms we received from contractual counterparties, the following examples of cost estimations could be made for different sectors as guidance to illustrate the potential impacts, assuming that there is currently no reporting in place at all by a given contractual counterparty (see more information on these examples and calculations in Annex 14C).

#### Examples

A) According to a medium-sized book publisher, reporting on 600 titles on the basis of spreadsheets takes 80 man-hours per year, and the average time required for compiling and sending a report on a title is 8 minutes (simpler cases can be dealt with in 2-3 minutes while the more difficult ones can take 10-15 minutes). To make reporting even more efficient, they are now investing in an accounting and reporting software, the one-off cost of which is approximately €10,000.

B) In the music sector, where regular reporting is well established, the information received from independent record labels shows how the cost of reporting differs according to, amongst others, the size of the catalogue, the

<sup>544</sup> For examples see Annex 14A, also for an example of contractual clauses: in Denmark, Sector agreement entered into between Danish producers' association and the Danish writers' association in 1996 or the sector agreement entered into between Danish producers association and Danish actors' association.

<sup>545</sup> AV/M Study, p.146.

<sup>546</sup> Article 17 of the CRM Directive.

number of titles released per year and the staff involved in the reporting activities (frequency of reporting being twice a year in all cases for which the information has been shared). In one medium-sized label (105 employees in the EU), which holds a total catalogue of over 3000 titles and releases 50 titles per year, 3 employees deal with reporting full time, which costs the label €198'000 per year. Together with the software maintenance it amounts to €103 per title. A small label employing 36 staff of which 2 full time equivalent work on reporting (total catalogue: 50'000 tracks) incur similar total cost of reporting annually €200'000, or €64 per title. According to the information received on nine micro labels, the cost per title of reporting done by three of them (holding 60, 62 and 250 title catalogues) is comparable to the one incurred by small and medium but in several other cases, where catalogues range from 150 to 400 titles, it is much lower per title (between €7 and €12). This may stem from the fact that, having smaller catalogues to deal with, micro labels can do without specialised accounting software and/ or employ free-lance staff or external bookkeepers to deal with the reporting twice per year when it is due.

C) On the basis of the collected information from the audiovisual sector, assuming that a producer wants to report on a film that has 8 creators entitled to reporting and reporting occurs annually; reporting would take 4-6 hours in the first year and 2-3 hours in subsequent years. As for external service providers, prices would be expected to be in the range of €1,000 per movie per year and would not surpass the cost of €4,000 + 0.5-1% of revenues in total.<sup>547</sup>

As shown in Annex 14C, the costs of reporting in the book publishing sector range from 0.02% of the turnover for large and medium-sized companies to 0.39% for micro companies. In the audiovisual sector, depending on a scenario assumed (reporting done internally or involving a collection agency or other external provider) the share of these costs in the turnover situates between 0.1% and 2.3% for micro companies, 0.01% and 0.2% for small and are around 0.1% for medium and large. Time spent on reporting annually accounts on average for around 1% of the total working time for micro book publishers and between 0.1% and 0.2% for the other size categories.

The administrative burden would decrease with time as it would become part of the "business as usual" process. In addition, evolving technologies will continue to reduce the costs of collecting and processing the relevant data and therefore reduce the administrative burden.

The reporting obligation could be more burdensome for smaller companies (e.g. a small publisher or record label) as they have fewer resources, however the higher relative burden of reporting would be mitigated by the proportionality principle established in option 2. It is also important to note that micro enterprises manage less works and they would need to provide a smaller number of reports to fewer creators. Transparency remains essential in these cases and the possible administrative costs are justified in view of the fact that the business of these companies is based on the exploitation of the copyright of the individual creators. The possibility of providing an exemption for micro enterprises was considered, however, taking into account the predominance of micro enterprises in the creative industries (above 90% in some sectors), establishing such an exemption would result in the transparency obligation applying to a very limited number of contractual counterparties. This would defeat the purpose of the intervention.<sup>548</sup> Specifications of obligations per sector and stakeholders' dialogues at MS level aimed at introducing consistent reporting obligations would also help to ensure that reporting obligations and their related compliance costs are proportionate. Finally, companies that do not have the appropriate tools may decide to acquire a software for this

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As it was reported by a French distributor and a Danish producer on a confidential basis 99.4% of European companies active in the book publishing sector (books, newspapers, journals) are SMEs, of which 90% are micro-companies (0-9 employees). SMEs generate 49% of the value added of the sector (including 10% from micro-companies). In the sector of film and music production, 99.9% of companies are SMEs (96% micro-companies) generating 85% of the value added of the sector (32% by micro-companies). Source: Eurostat, Structural Business Statistics, 2013 data for publishing of books, periodicals and other publishing activities.

purpose or engage an external service provider instead of developing an internal reporting process.<sup>549</sup>

**Impacts on competition:** A general, mandatory reporting obligation with a set of common minimum content requirements would reduce fragmentation of the single market and would create a level playing field for businesses across Europe by eliminating the commercial disadvantage of players in MS that already have transparency obligations. Greater transparency should promote more effective competition between contractual counterparties.<sup>550</sup> The use of effective reporting as a tool to compete for creators is already becoming clear in some sectors, particularly in the music industry.<sup>551</sup>

## **SOCIAL IMPACTS**

Better transparency and bargaining position for creators would help with reaching the goal of appropriate remuneration thereby making creative careers more attractive, which would result in a greater number of professional creators and more creative output altogether. Transparency would give a powerful message to consumers as they indicate to be more willing to pay for copyright protected works if they know that a fair remuneration would reach the original creators.<sup>552</sup> In view of the fact that the reporting obligation should be of a proportionate nature, no negative indirect impacts on consumers would be expected, for example due to compliance costs passed on to them.

## **IMPACTS ON FUNDAMENTAL RIGHTS**

This option would positively affect the right to property of creators by improving the bargaining position and contributing to the enforcement of their rights. This in turn would ensure their freedom of expression through artistic creation. Transparency would make any offers within and between MS comparable and creators would exercise their freedom of movement between MS more easily. On the other hand, Option 2 would introduce constraints on the right to conduct a business of contractual counterparties insofar as the production of reporting statements would constitute an additional administrative burden. The reporting obligation introduced by Option 2 would only have a limited and proportionate impact on contractual freedom as this ex-post instrument would not affect formulation of the terms of the contracts.

## **Option 3 – Imposing transparency obligations on the contractual counterparty of creators supported by a contract adjustment right and a dispute resolution mechanism**

In addition to the impacts of the reporting obligation as presented above, the mechanisms under this option would have the following impacts:

### **I. Contract adjustment mechanism**

#### **IMPACTS ON STAKEHOLDERS**

<sup>549</sup> For instance, one company offers business management software for small publishers from €790, and in the audiovisual sector, external service providers offer reporting for €1,000 / year for one film.

<sup>550</sup> See Print study, p.121 and p. 105 of the AV/M Study on "ex post accuracy".

<sup>551</sup> See, for example, statements from [Universal](#): "the flexibility and transparency (...) will be unprecedented for our industry, and set a new standard of service to our important clients", [Sony](#): "Transparency has been the key word when we developed this", or [Kobalt](#): "Our industry-defining Kobalt Portal provides full transparency with real-time updates, powerful reporting, and user-friendly analysis tools".

<sup>552</sup> 96% of Europeans believe that IP is important because it supports innovation and creativity by rewarding inventors, creators and artists, see: "[The European citizens and intellectual property: perception, awareness and behaviour](#)", 2013, study commissioned by the EUIPO. In the Public Consultation, users also suggest that "the way in which new online streaming services are licensed may circumvent the payment of digital royalties to artists".

## Creators

Impacts on transparency of contracts: This mechanism would improve the effectiveness of the reporting obligation under option 2 since it would provide creators with legal means to request adjustment of the remuneration on the basis of the information received in reporting statements.

Impacts on the capability to receive appropriate remuneration: This option would have a positive impact on the capability of creators to renegotiate contracts, particularly in extraordinary circumstances.<sup>553</sup> The contract adjustment mechanism could remedy those cases in which a lump-sum/buy-out deal turns out to be unfair, and it also addresses outright unbalanced deals as well as changed circumstances.<sup>554</sup> The mechanism would reinforce creators' bargaining position as it would serve as leverage in their negotiations before and after signing the contract.

### Contractual counterparties

Impacts on compliance cost: Option 3 would have a financial impact on the contractual counterparty who would incur a renegotiation cost when adjusting the contract. Such cost includes the renegotiation cost itself and the cost related to the increase of the remuneration owed to the creator. Costs associated to the renegotiation of contracts are very difficult to estimate as they would depend on various factors as the number of relevant works, the scope of the assigned rights, the extent of changes that parties want to introduce and the current practices of remuneration negotiation. The Commission has not been able to obtain any estimation of such costs. However, in light of the bargaining position of the majority of creators, the long-term duration of many contracts and the unpredictability of the commercial success of works in many sectors, the possible cost of compliance with a contract adjustment right seems justified on fairness grounds and proportionate. In case of unsuccessful negotiations, if the contractual counterparties and creators choose to use the dispute resolution mechanism, they would face alternative dispute resolution costs, as the ones described below. Costs related to the increase of the remuneration owed cannot be considered as an additional financial impact since they would constitute an eventual rebalancing of the share of value between creators and their contractual counterparties.

Even though such measures would be very important for the affected individual creator, the direct impact on contractual counterparties would be limited since it would affect a limited number of contracts. Such cases will arise only when a significant disproportion between the agreed remuneration and the revenues yielded from the exploitation of the work occurs. In addition, in countries where legislation already provides for an adjustment mechanism, it is recognized that this clause is rarely enforced before the courts.<sup>555</sup>

## II. Dispute resolution mechanism

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<sup>553</sup> As advocated by creators themselves, for example, in the abovementioned [Declaration of the Authors' Group: "In most instances, authors' contracts lack provisions allowing them to renegotiate their terms, particularly in case of use of the work in additional formats and commercial success beyond expectations"](#).

<sup>554</sup> The mechanism tackles the common problem of assigning all rights, including those to unknown future modes of exploitation, which is allowed in many MS and can also be applied to pre-digital contracts which have become disproportionate even if they were balanced at signing. AV/M Study, policy recommendation no. 3; "*Contractual arrangements applicable to creators...*", *ibid*

<sup>555</sup> It is reported that "litigation cases are rare" under French law, *Communication Commerce électronique* n° 9, September 2007, comm. 104, C. Caron; also, stakeholders provided very limited data on such cases.

The implementation of dispute resolution mechanisms will have impacts both on MS which will have to set up such mechanisms and on creators and their contractual counterparties which will initiate dispute settlement proceedings.

## IMPACTS ON STAKEHOLDERS

### Member States

Impacts on implementation costs: MS would incur some cost for setting up the dispute resolution mechanism. These costs would depend on the system of dispute resolution chosen by a MS. It should be noted that the majority of MS already have dispute resolution mechanisms for CMOs and commercial users in place and could therefore build on the existing structures. As a matter of comparison, when the implementation of dispute resolution mechanisms aimed at solving disputes arising between CMOs and their members was assessed, it was reported that the costs of establishing such mechanisms would be in the range of €35,000, and the operating costs in the range of €11,000 euros per year.<sup>556</sup> Given the similarities between the envisaged dispute mechanism and the one assessed for CMOs, MS will arguably bear similar costs to the ones reported above. Finally, as alternative dispute resolution mechanisms tend to be cheaper than judicial proceedings, in the long term the cost of setting-up such a mechanism could be offset by savings made due to a lower number of court cases.

### Creators and contractual counterparties

Impacts on transparency of contracts: The dispute mechanism will enable creators to enforce more efficiently transparency obligations and the possibilities offered by the adjustment mechanism. Since dispute settlement proceedings will be less costly and faster than court proceedings, creators will be more incentivized to seek enforcement of their rights.

Impacts on the capability to receive appropriate remuneration: Thanks to a more effective implementation of transparency obligations and a better enforcement of the contract adjustment mechanism, creators will be able to seek more appropriate remuneration without risking their professional relationships as much as they would by going directly to court.

Impacts on cost of proceedings: The operating costs would be borne by the creators and their contractual counterparties. Costs are expected to be relatively similar to the fees set for already existing alternative dispute resolution mechanisms. As an example, the British Publishers Association set up an Informal Dispute Settlements mechanism whose fees incurred by parties include the referee's fee (£400 for half-day hearing, £650 for full-day hearing), the referee's expenses (travel, telephone, copying), and the Association's fees (without charge for members of the Association, non-member publishers: £250, other parties: £100).<sup>557</sup> WIPO estimates fees for a mediation proceeding at \$250 (administration fee) + mediator's fees calculated on the basis on the amount in dispute (amount in dispute up to \$250,000: \$2,500. Amount in dispute over \$250,000: \$300-600 per hour / \$1,500-3,500 per day).<sup>558</sup> As this would be a completely voluntary procedure it would have no economic impact on stakeholders that do not participate, and those who agree to it would be doing so for their own benefit.

## SOCIAL IMPACTS

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<sup>556</sup> See the [impact assessment accompanying the document Proposal for a Directive of the European Parliament and of the Council on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market](#) (p 119, 176)

<sup>557</sup> Rules of Informal Dispute Settlements, the Publishers Association

<sup>558</sup> WIPO, Fees Calculator, <http://www.wipo.int/amc/en/calculator/adr.jsp>

The contract adjustment mechanism and the dispute resolution mechanism would encourage contractual relationships between creators and contractual counterparties to become fairer and more balanced. This would improve collaboration between creative stakeholders and incentivize a more conducive environment for creation. These mechanisms would also highlight the protection of creators to everyone in the value chain, including consumers.

#### IMPACTS ON FUNDAMENTAL RIGHTS

This option would further strengthen creators' right to property and their freedom of expression through art. Option 3 would also further affect the right to conduct business of contractual counterparties but this effect, particularly in the case of voluntary dispute resolution, would be limited.

#### 5.4.4. How do the options compare?

Option	Effectiveness	Efficiency	Impact on stakeholders	Social impacts and fundamental rights
<b>Baseline</b>	(0) Lack of transparency in the contractual relationships between creators and their contractual counterparties would remain	(0) No direct costs associated with the baseline option	(0) Impacts on stakeholders in particular the difference in bargaining powers would depend on reforms at national level and/or on commitments taken by the industry	(0) No direct impact on cultural diversity and fundamental rights
<b>Option 1 – Recommendation and stakeholders' dialogue</b>	(0/+) Could result in some improvements in certain MS but would not allow to ensure increased transparency across the EU	(0/-) Limited costs linked to the organisation of the stakeholders' dialogue (0/-) Compliance costs depending on the outcome at MS level	(0/+) Main impacts on stakeholders would depend on the possible changes introduced in MS legislation	(0/+) No direct impact on cultural diversity and fundamental rights but MS developments may have positive impacts
<b>Option 2 – Imposing transparency obligations on the contractual counterparty of authors and performers</b>	(++) Would increase transparency in the contractual relationships between creators and their contractual counterparties	(-) MS level costs linked to the organisation of the stakeholders' dialogue to determine reporting obligations	(+) For authors and performers it would decrease information asymmetry, improve enforcement and bargaining position, and bring transparency to the scope of contracts (-) Additional administrative burden and costs for the creators' contractual counterparties	(+) Positive impact on creation and cultural diversity (+) Positive impact on right to property, and freedom of movement and expression (-) Negative impact on the freedom to conduct a business
<b>Option 3 – Imposing transparency obligations to contractual counterparty of authors and performers</b>	(++) Would increase transparency in the contractual relationships between creators and their contractual counterparties, improve contract	(-) MS level costs linked to the organisation of the stakeholders' dialogue to determine reporting obligations (-) Costs of setting	(+) Increase of transparency and the certainty for creators to benefit from an appropriate remuneration (-) Additional administrative burden and costs for the creators'	(+) Positive impact on creation and cultural diversity (+) Positive impact on right to property, and freedom of

<b>supported by a contract adjustment right and a dispute resolution mechanism</b>	(+) improved enforcement and means for some creators to renegotiate agreements	up and administering dispute resolution mechanisms within MS	contractual counterparties (-) Renegotiation costs for creators and their contractual counterparties	movement and expression (--) Negative impact on the freedom to conduct a business
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**Option 3 or a combination of Option 2 and the dispute resolution mechanism in Option 3** are the preferred option. Transparency measures would rebalance contractual relationships between creators and their contractual counterparties by providing the creators with the information necessary to assess whether their remuneration is appropriate in relation to the economic value of their works and if the remuneration is deemed inappropriate, a legal mechanism in order to seek out a renegotiation of their contracts. In contrast, option 1 may not be sufficiently effective and Option 2 would only provide transparency measures without instruments to counter the effects of lack of transparency. In comparison to Option 2, Option 3 has a more positive impact on creators who would have tools to take action for requesting a fairer share value on the basis on the information provided on reporting statements but would have a higher impact on the contractual freedom of the parties. The additional costs entailed by the dispute resolution mechanism would be justified by the need to provide remedies to the lack of transparency in the contractual relationships between creators and their contractual counterparties. Both Option 3 or a combination of Option 2 and the dispute resolution mechanism in Option 3 would help achieving a level playing field for creators and their contractual counterparties by providing incentives for an increased transparency and enhanced collaboration.

## 6. OVERALL CONCLUSIONS

### 6.1. SUMMARY OF PREFERRED OPTIONS

The following table sets out the preferred options:

Area		Preferred policy option
<b>Ensuring wider access to content</b>	Online transmissions of broadcasting organisations	Option 2 - Application of country of origin to the clearing of rights for broadcasters' online services ancillary to their initial broadcast
	Digital retransmissions of TV and radio programmes	Option 1 - Mandatory collective management of rights to retransmission of TV / radio broadcasts by means of IPTV and other retransmission services provided over "closed" electronic communications networks
	Access to and availability of EU audiovisual works on VoD platforms	Option 2 – Stakeholders' dialogue + Obligation for Member States to establish a negotiation mechanism to overcome obstacles to the availability of audiovisual works on VoD
	Out-of-commerce works in the collections of Cultural Heritage Institutions	Option 2 - EU legislative intervention (i) requiring MS to put in place legal mechanisms to facilitate collective licensing agreements for all types of OOC works and to foster national stakeholder frameworks, and (ii) giving cross-border effect to such legal mechanisms.
<b>Adapting exceptions to digital and cross-border environment</b>	Use of protected content in digital and cross-border teaching activities	Option 3 - Mandatory exception with a cross-border effect covering digital and online uses in the context of illustration for teaching, with the option for MS to make it (partially or totally) subject to the availability of licences
	Text and data mining	Option 3 - Mandatory exception applicable to public interest research organisations covering text and data mining for the purposes of both non-commercial and commercial scientific research
	Preservation of cultural heritage	Option 2 - Mandatory harmonised exception for preservation purposes by cultural heritage institutions
<b>Achieving a well-functioning market place for copyright</b>	Use of protected content by online services storing and giving access to user uploaded content	Option 2 - Legal intervention imposing an obligation on online services which store and give access to the public to large amounts of content uploaded by their users to seek, in good faith, to conclude agreements with right holders for the use of their content and to put in place appropriate and proportionate measures, in cooperation with right holders, to avoid unauthorized content in their services
	Rights in publications	Option 3 - Introduction in EU law of a related right covering online uses of news publications + introduction, in EU law, of the possibility for MS to provide that publishers may claim compensation for uses under an exception
	Fair remuneration in contracts of authors and performers	Option 3 (transparency obligations supported by a contract adjustment right and a dispute resolution mechanism) or Option 2 (transparency obligation) plus dispute resolution mechanism

## 6.2. ANALYSIS OF THE COMBINED APPLICATION OF THE PREFERRED OPTIONS

### 6.2.1. Impact on stakeholders

The combined application of the preferred options would affect all types of stakeholders differently, but is not expected to result in any disproportionate impact on a specific category of stakeholders. All the options and their impacts have been analysed and compared in the preceding sections against a set of policy objectives originally outlined in the Communication from the Commission on "Towards a modern, more European copyright framework" from December 2015.<sup>559</sup> As a result of an in-depth analysis based on the existing evidence and stakeholder consultation, a package of options has been chosen. The impacts on stakeholders and possible synergies arising from the different options are presented below.

**Right holders** – As a result of the preferred options for "Ensuring wider access to content" (section 3), right holders would face new conditions for the licensing of rights to broadcasters for their ancillary online services (country of origin) and for the licensing of rights to certain retransmission services (mandatory collective management). The targeted nature of the measures proposed would mitigate potential negative impacts for right holders. Right holders would benefit from the licensing mechanisms to facilitate the clearing of rights in EU AV works for use on VoD platforms and for the digitisation and dissemination of out-of-commerce works in cultural heritage collections for the purpose of better dissemination of their works and revenue opportunities. Following the intervention for "Adapting exceptions to digital and cross-border environments" (section 4), right holders would need to take account of the scope of the new exceptions on teaching, TDM and preservation when licensing their content to institutional users. Potential negative impacts would be mitigated by several relevant factors (e.g. the TDM option being based on the lawful access condition and allowing rightholders to take proportionate technical measures to ensure the security of their content, the teaching option allowing flexibility for Member States to take account of the existing licensing arrangements, the preservation exception applying only to the works already in the collections of CHIs). The intervention for "Achieving a well-functioning market place for copyright" (section 5) would have as a consequence the possibility for right holders to rely on the new rules to enter into agreements with certain online services for the use of their content online. The solution envisaged for publishers would give news publishers legal certainty and additional bargaining power in relation to online services, and would enable Member States to allow all publishers to claim compensation for uses under exceptions of rights transferred by authors. Authors and performers would benefit from increased transparency on the exploitation of their works and performances and from improved capability to receive appropriate remuneration, while their contractual counterparts (notably producers and publishers) would have to comply with the new reporting obligations.

**Broadcasters and retransmission services** – Pursuant to the intervention on "Ensuring wider access to content" (section 3), broadcasters (as far as their online transmissions ancillary to the initial broadcasts are concerned) - and retransmission services operating by certain means other than cable – would benefit from simpler and faster clearance of rights. As right holders themselves, broadcasters would be subject to the same impacts as other right holders (see above).

**Online service providers** would be differently affected depending on their business models and on the type of content they distribute. VoD platforms would be able to submit contractual blockages for obtaining online rights to the negotiation forum proposed as part of the

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<sup>559</sup> COM(2015) 626 final, cit.

preferred options under "Ensuring wider access to content" (section 3). As a result of the intervention for "Achieving a well-functioning market place for copyright" (section 5), online services storing and giving access to content uploaded by users would have to seek in good faith agreements with right holders and introduce the necessary technological measures to make such agreements work in practice. This would help creating a level-playing field with other online content service providers. Online services such as news aggregators or social media services would need to secure the agreement of news publishers to use their content.

**Consumers** are expected to benefit from wider access to TV and radio programmes online, when broadcasters and retransmission services make use of the licensing arrangements as per the preferred options of the "Ensuring wider access to content" part of this IA (section 3). Consumers are also expected to benefit from a greater availability of EU AV works on VoD platforms across MS, when the negotiating mechanisms proposed under the same section help rights' negotiations. Also as part of "Ensuring wider access to content" (section 3), the measures to facilitate the dissemination of out-of-commerce works would provide consumers with access to content that would otherwise be unavailable to them, nationally and across borders. Consumers would also benefit, directly or indirectly, from the improved possibilities for use of content and increased legal certainty as regards notably education and preservation activities stemming from the preferred options under "Adapting exceptions to digital and cross-border environment" (section 4). The measures proposed to "Achieving a well-functioning market place for copyright" (section 5) are likely to have in the medium term a positive impact on the production and availability of culturally diverse content and on media pluralism, for the benefit of consumers.

**Institutional users** (cultural heritage institutions, research institutions and educational establishments) would benefit from higher legal certainty when using protected content for specific purposes (respectively, preservation, TDM and illustration for teaching), as a result of intervention under "Adapting exceptions to digital and cross-border environment" (section 4). Cultural heritage institutions would benefit from easier licensing solutions for the digitisation and dissemination of out-of-commerce works in their permanent collections, as outlined under "Ensuring wider access to content" (section 3). This would reduce their rights clearance transaction costs and support them in making out-of-commerce works available across borders.

### **6.2.2. Subsidiarity and proportionality**

The problems identified in this IA have an important cross-border dimension stemming from the harmonisation which is already in place as a result of existing EU copyright rules (notably in terms of rights) and the cross-border nature inherent in the distribution of content online. The solutions designed to address these problems and selected as preferred policy options on the basis of their effectiveness and efficiency have all been scrutinised from the subsidiarity and proportionality angle in each thematic section. The results of this analysis show that the options chosen are proportionate to the objectives in that they address the underlying problems without generating unjustified costs. On the basis of this IA it also appears that a common approach should be provided at EU level as relying on national solutions for the problems identified would generate further fragmentation in the functioning of the Single Market. Finally, EU intervention is indispensable to achieve one of the key objectives of the copyright modernisation, which is to guarantee legal certainty in cross border situations.

## **6.3. MONITORING AND EVALUATION**

### **6.3.1. Monitoring and evaluation plan**

The Commission will ensure that the actions selected in the course of this IA contribute to the achievement of the policy objectives defined in sections 3.1.3, 4.1.3 and 5.1.3. The monitoring process would partly depend on the type of legal instrument that will be chosen to implement the preferred policy options.

The preferred policy options identified in section 3.2 of this IA (online transmissions and retransmissions of TV and radio programmes) would be best implemented through a regulation. This instrument would be the best to facilitate online access to TV and radio programmes across borders or originating from other MS, as it would ensure that the new rules are applicable in all MS at the same time. Also, it would allow a uniform application of the rules in the EU, which is particularly important to guarantee legal certainty to service providers operating in different territories. The first data collection should take place when the regulation enters into force in order to establish the baseline for future evaluations. The monitoring process would then focus on progress made in relation to the cross-border availability of TV and radio programmes, with data collection taking place every 2-3 years. The main indicators are presented in the table in section 6.2.2.

For the other topics covered by this IA, a directive is a more suitable instrument as it would allow MS to determine the technical or practical aspects complementing the EU harmonised rules and to take into account the existing national legislative framework. The monitoring process could consist of two phases:

- The first phase would concentrate on the short-term, starting right after the adoption of the legislative proposal, and would focus on the correct transposition of the directive in MS. Before the transposition deadline, the Commission would organise transposition workshops and meetings with MS' representatives (e.g. group of experts) to assist them in the transposition process and to facilitate the mutual exchange of information. After the transposition deadline, the Commission would verify the timely adoption and correctness of the transposition measures.
- The second phase would be mid to long-term and would focus on direct effects of the rules contained in the directive. The table in section 6.2.2 below presents the main indicators that will be used to monitor progress towards meeting the objectives pursued in the modernisation of EU copyright rules, as well as the possible sources of information. Depending on the data needs, information would be gathered from MS, creative industries or institutional users. Where needed, the Commission would send questionnaires to MS or stakeholders or organise specific surveys. The first data collection should take place before the end of the transposition period in order to establish the baseline. The information-gathering should then take place every 2-3 years after the transposition deadline in order to monitor progress in the achievement of the objectives.

A comprehensive evaluation could take place at the latest 10 years after the adoption of the directive and 5 years after the adoption of the regulation, in order to measure their effectiveness, efficiency, relevance, coherence and added value, in accordance with the Commission's Better Regulation principles.

### 6.3.2. Operational objectives and monitoring indicators

Objectives	Indicators	Source of information
<b>ENSURING WIDER ACCESS TO CONTENT</b>		
<b>Facilitate the clearance of rights for transmissions of TV and radio programmes online</b>		
<i>Operational objective:</i> Increase the number of TV and radio programmes accessible online across borders	<ol style="list-style-type: none"> <li>1. Number of simulcasting services available across borders in the EU and percentage of geo-blocked content</li> <li>2. Number of catch-up services available across borders in the EU and percentage of geo-blocked content</li> <li>3. Online cross-border availability of radio and TV programmes, by type of content (news, shows, cultural programmes, films, series, etc)</li> <li>4. Audience of online radio and TV programmes</li> </ol>	This information would be obtained from publicly available data sources (European Audiovisual Observatory) or directly from broadcasters (through bilateral contacts or questionnaires).
<b>Facilitate the clearance of rights for retransmissions services by means other than cable</b>		
<i>Operational objective:</i> Increase the number of TV/radio channels offered by retransmission services provided over closed electronic communications networks	<ol style="list-style-type: none"> <li>1. Number of retransmission services provided over closed electronic communications networks</li> <li>2. Number of foreign TV / radio channels available in each MS through those retransmission services</li> <li>3. Share of IPTV retransmission or retransmission over closed electronic communications networks in the EU television market (in comparison to cable and satellite)</li> </ol>	This information would be obtained from publicly available data sources (European Audiovisual Observatory) or from business intelligence services (e.g. IHS, Digital TV research)
<b>Facilitate the negotiation and dialogue between relevant parties for the exploitation of European audiovisual works on VoD platforms</b>		
<i>Operational objective:</i> Increase the number of European audiovisual works available through VoD platforms	<ol style="list-style-type: none"> <li>1. Number and type of self-regulatory measures adopted following the stakeholders' dialogue</li> <li>2. Number of cases submitted to the negotiation mechanism in each MS and identification of the type of stakeholder resorting to this mechanism (VoD platforms, aggregators, right holders)</li> <li>3. Number of successful negotiations through the negotiation mechanism in each MS</li> <li>4. Costs related to the set-up and functioning of the negotiation mechanism in each MS</li> <li>5. Number of (or percentage of) European audiovisual works available on VoD / SVoD platforms</li> <li>6. Share of VoD / SVoD revenues in total revenues</li> </ol>	This information would be gathered directly from MS (in particular for indicators n°2 to 4), from the European Audiovisual Observatory (for indicators n°5 and 6) or from VoD platforms (through bilateral contacts or questionnaires).
<b>Facilitate the clearance of rights for digitisation and making available of out-of-commerce works in the collections of CHIs</b>		
<i>Operational objective:</i> Increase the number of OOC works in the collections of CHIs made available to the public, incl. across borders	<ol style="list-style-type: none"> <li>1. Number of institutions engaging in digitisation and dissemination projects of OOC works, by type of works</li> <li>2. Number of licences for OOC works issued to cultural heritage institutions based on ECL, PoR or similar systems;</li> <li>3. Number of in-copyright OOC works made available online by beneficiary institutions</li> </ol>	This information would be gathered from beneficiary institutions (for indicators n°1, 3, 4, 5) and collecting societies (for indicators n°2, 6), through bilateral contacts or questionnaires.

	(by type of work); 4. Number of in-copyright OOC works made available online by beneficiary institutions (by type of work) – across borders; 5. Number of users accessing digitised OOC works online, including across borders 6. Revenues for right holders stemming from collective licensing in this area.	The European transparency web portal would allow to monitor the number of OOC works made available by CHIs.
<b>ADAPTING EXCEPTIONS TO DIGITAL AND CROSS-BORDER ENVIRONMENT</b>		
<b>Make sure that teachers/students can use protected content in full legal certainty in their digital teaching activities, including across borders</b>		
<i>Operational objective:</i> Increase the use of protected content in digitally-supported teaching activities, including across border	1. Number of educational establishments offering online courses / cross-border or distance education programmes 2. Number of students involved in cross-border or distance education programmes 3. Frequency of use of different types of protected content (print, images, films, etc) in digital / online and cross-border education; 4. Number of MS making the exception subject to the availability of licences and in these countries, number of collective licensing schemes for educational uses 5. Types of initiatives implemented to promote the availability and visibility of licences 6. Number of MS requiring compensation of the exception and amount of the compensation; 7. Licensing costs for educational establishments; 8. Right holders' revenues deriving from educational uses (through compensation and/or secondary licensing) and part of the revenues stemming from digital uses	This information would be gathered through educational authorities in each MS and through surveys among teachers and students. In addition, data could be obtained from publishers and collecting societies.
<b>Make sure that researchers can carry out text and data mining of content they have lawful access to in full legal certainty, including across borders</b>		
<i>Operational objective:</i> Make sure that researchers can text and data mine content they have lawful access to in full legal certainty	1. Number of (cross-border) research and innovation projects using text and data mining; 2. Number of text and data mining services; 3. Number of text and data mining licensing platforms; 4. Publishers' revenue deriving from text and data mining licences; 5. Number of text and data mining related scientific publications.	This information would be gathered through the H2020 participants, the H2020 statistics Unit in the Commission, statistics from OpenAire Data Platform or data provided directly by stakeholders (publishers, institutional users, etc).
<b>Make sure that cultural heritage institutions can make preservation copies of protected works in their permanent collections in full legal certainty, taking into account digital technology</b>		
<i>Operational objective:</i> Increase the number of CHIs engaged in digital preservation and of works that are preserved by CHIs	1. Number of CHIs engaging in digital preservation 2. Number of CHIs sharing digital preservation infrastructure 3. Number of digital preservation projects 4. Number of works undergoing digital preservation	This information would be gathered from beneficiary institutions and MS, mainly through surveys, including building on existing frameworks (e.g. the Enumerate project, reporting on EU Recommendations).

<b>ACHIEVING A WELL-FUNCTIONING MARKET PLACE FOR COPYRIGHT</b>		
<b>Ensure that right holders benefit from a legal framework allowing them to better control and be remunerated for the use of their content vis-à-vis online services storing and giving access to large amounts of content uploaded by their users</b>		
<i>Operational objective:</i> Increase the number of agreements between online services storing and giving access to large amounts of content uploaded by their users and right holders for the use of copyright protected content and reduce unauthorised content on the services	<ol style="list-style-type: none"> <li>1. Number of agreements concluded between the user uploaded content services and right holders for the use of content</li> <li>2. Right holders' revenues resulting from the concluded agreements</li> <li>3. Take-up of efficient content identification technologies</li> </ol>	This information would be gathered from right holders and services covered by the intervention, mainly through surveys and reports, as well as technology providers
<b>Ensure a fair share of revenues stemming from the use of publications among the different players of the publishing value chain</b>		
<i>Operational objective:</i> Ensure that the increase in the consumption of publications is reflected in a return on the required investments	<ol style="list-style-type: none"> <li>1. Number of users who have access to news content (directly through publishers' websites and apps or indirectly through online service providers)</li> <li>2. Online revenues obtained by news publishers (licences, subscriptions or advertising revenues)</li> <li>3. Revenues obtained by publishers on the basis of compensation stemming from exceptions to copyright</li> </ol>	This information would be gathered from periodically-published reports on the publishing industry (Reuters News Report, PwC Global entertainment and media outlook, etc.) or directly through questionnaires/surveys to publishers. Figures to measure indicator 3 will be obtained from collective management organisations.
<b>Increase legal certainty, transparency and balance in the system that governs the remuneration of creators</b>		
<i>Operational objectives:</i> Facilitate contract enforcement in relation to transparency and remuneration Increase the number of reporting (where missing), Increase the quality (where the quality is not sufficient).	<ol style="list-style-type: none"> <li>1. Number of creators receiving reporting statements</li> <li>2. Of which: number of those who receive satisfactory reporting (to have an indication on quality of reporting)</li> <li>3. Number of companies producing reporting statements</li> <li>4. Number of cases brought before the alternative dispute resolution bodies</li> <li>5. Number of cases of use of contract adjustment mechanism</li> <li>6. Satisfaction of creators: perception of impact of reporting obligation on remuneration</li> </ol>	This information would be gathered on the basis of surveys among creators (authors and performers associations) and surveys of the contractual counterparties (depending on the sector – publishers, producers, broadcasters).