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PART 2/3

COMMISSION STAFF WORKING DOCUMENT

IMPACT ASSESSMENT

on the modernisation of EU copyright rules

Accompanying the document

Proposal for a

Directive of the European Parliament and of the Council on copyright in the Digital Single Market

and

Proposal for a

Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes

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ANNEXES TO THE IMPACT ASSESSMENT

on the modernisation of EU copyright rules

ANNEX 1 – PROCEDURAL INFORMATION

Consultation within the Commission

DG CONNECT has the lead of this file which is in the Commission Work Programme for 2016. The number of the entry in the Agenda Planning is 2016/CNECT/009.

The work on the IA started in December 2014. The first meeting of the Copyright Inter-Service Steering Group ("ISSG"), chaired by the SG, took place on 25 March 2015, and the second meeting on 13 May 2015. The ISSG met in the second half of 2015 to discuss the IA accompanying the regulation on cross-border portability and the Communication "Towards a modern, more European copyright framework" which were both adopted on 9 December 2015. Discussions on the topics covered by this IA were resumed in April 2016, with four additional meetings taking place on 28 April, 23 May, 14 June and 27 June.

In addition to DG CONNECT, DG COMP, EAC, ECFIN, EMPL, ESTAT, GROW, JRC, JUST, LS, RTD and TRADE participated to the ISSG.

Consultation of the RSB

The Impact Assessment Report was examined by the Regulatory Scrutiny Board on 20 July 2016. Recommendations from the Board were transmitted on 22 July 2016 and were implemented as follows:

Recommendations of the RSB	Changes in the IA report
1) Problem definition and situation in Member States. The report should briefly explain on what basis it was decided to tackle certain topics now and why other issues that were announced in the 2015 Communication on modernisation of the copyright framework were not considered. It should better assess the likely magnitude of each of the problems, providing at least anecdotal evidence at Member State level. The report should indicate which drivers are dealt with by the initiative and their relative importance should be better assessed in order to set the expectations at the right level, in particular for consumers. The report should also present the views of Member States and of the European Parliament, and include tables showing the applicable national frameworks. Moreover, the baseline scenario should be further developed, by presenting current trends or developments at national level.	– The introduction has been revised to better explain why certain issues are not covered by the IA (section 1.2) – Where relevant, the relative importance of the different drivers has been clarified. – The views of Member States and of the European Parliament on the different issues covered by the IA have been added in the introduction to each area (sections 3.1, 4.1 and 5.1) – Information related to the existing national legislations in the areas covered by this IA has been added where relevant (tables added in relation to exceptions, rights in publications, fair remuneration of authors and performers). – The impacts of the preferred option on MS has been specifically added after the comparison of the options for each topic.
2) Need to act at EU level. Given the rapid evolution of the digital single market, the on-going regulatory and self-regulatory initiatives,	– Where relevant, the impacts of the baseline option have been further developed to better explain why the problems identified would

competition cases and pending law cases, the report should better justify, using robust evidence, that the problems identified will not be resolved without regulatory intervention. Moreover, based on a clearer picture of the situation in the different Member States, the report should better justify why action is needed at EU level, in particular if national authorities did not regulate in the area.	not be solved without EU intervention. - The arguments justifying the need to act at EU level have been further elaborated (under sections 3.1.2 and 5.1.2).
(3) Analysis of options. The report should outline which legal instruments are most appropriate to be used for each of the measures. It should also clarify which measures represent significant versus incremental policy changes, and to what extent the options under consideration are likely to have significant impacts on the relevant industry sectors and disrupt current business models or rights management patterns. It should clearly spell out how the separate measures are likely to change the distribution of income among the actors (for instance, following the extension of the **country of origin principle**). The report should also better assess the proportionality of the different measures and explain why lighter regimes are not presented for SMEs, given the likely disproportionate level of compliance costs (e.g. regarding the **fair remuneration in contracts of authors and performers**). The proportionality of the options should be better assessed, among others by better presenting the likely magnitude of impacts in the various Member States that the implementation of the preferred options would imply on the ground. Given the reference to impacts on fundamental rights, in particular regarding property rights and freedom to conduct a business, the report should better justify why the measures are considered as proportionate. The report should clarify to what extent the package of measures is balanced between the interests of consumers, or users, and of right holders and further explain the likely impacts on fundamental rights.	- The IA now includes a sub-section on the choice of the legal instrument (section 6.2.3). - The analysis of impacts of the legislative options has been revised in order to specify the extent of the changes for the different stakeholders (notably in terms of business models, revenues and management of rights). - For each topic, a short paragraph has been added after the comparison of options in order to explain the proportionality of the preferred option, including in relation to fundamental rights. The impacts of the preferred option on MS has also been clarified after the comparison of the options. - Section 6.2 presents an analysis of the combned application of the preferred options, including in terms of balance between the interests of consumers/users and right holders.
<u>Ensuring wider access to content</u> **Online transmission of broadcasting organisations:** The report should more convincingly demonstrate, based on robust evidence, that the benefits of introducing the country of origin principle to clear the rights for certain online services of broadcasters would outweigh the costs for right holders. **Digital retransmission of TV and radio**	- The impacts on right holders of the option introducing the country of origin for the clearing of rights for broadcasters' online ancillary services have been further clarified (section 3.2.2.3, Option 2) - The analysis of the options introducing mandatory collective management for the retransmissions of TV and radio programmes by means other than cable now

programmes: The management of rights through collective management or licensing should be better described. **Video-on-demand (VoD) platforms**: The report should better justify the need to act at EU level, present in more detail how the options would work in practice (e.g. the negotiation mechanism), and assess the likely costs they would entail (e.g. costs for national authorities depending on the existing structures and the frequency of use). Moreover, it should clarify the link and coherence with the review of the AVMSD, which relies on an extension of obligations to the VoD services to create a level playing field and imposes new obligations on European content.	includes an assessment of the impacts in terms of management of rights (section 3.2.3.3., Options 1 and 2). – The option introducing an obligation to have a negotiation mechanism to facilitate the licensing of EU AV works on VoD platforms has been further assessed (section 3.3.3, Option 2). Additional elements have been provided on the costs for Member States and the link with the review of the AVMSD.
<u>Adapting exceptions to digital and cross-border environment</u> Tables summarizing the national legal frameworks should be included in the main text (rather than only in the annexes). Regarding the **text and data mining exception,** the reasons for the apparent underachievement of the voluntary approach (taken up with the "Licences for Europe") should be further explained.	– A table summarizing the main differences in the implementation of the exceptions in MS has been added in section 4.1.4, in addition to the detailed tables provided in Annex 4. – The limits of the voluntary approach for TDM has been further explained in the problem definition (section 4.3.1) and in the analysis of Option 1 ("industry self-regulation initiatives")
<u>Achieving a well-functioning market place for copyright</u> **Use of protected content by online services storing and giving access to user uploaded content:** The report should further assess the effectiveness of the preferred Option 2, given the disproportionate bargaining power between the service providers and right holders when there is an obligation to engage in negotiations but no obligation to conclude them. It should more convincingly demonstrate the need to act at EU level and, based on evidence, show that the preferred option would effectively ensure more balanced relations across the copyright value chain and will positively affect the situation of right holders, while taking into account impacts on the online ecosystem. It should be clarified that the proposal would not impose a certain technology. **Rights in publications:** The report should more convincingly demonstrate that the creation of a new standalone right for news publishers would effectively contribute to reinforcing their role in the digital world and that action at EU level is needed. **Fair remuneration in contracts of authors and performers:** The report should justify, using more robust evidence, that the	– In relation to the use of protected content by online services storing and giving access to user uploaded content, the scope of Option 2 has been adapted and its assessment has been revised. – The benefits of the option introducing a new right for news publishers have been further explained and substantially beefed up (section 5.3.3, Option 2) – The problem definition related to the remuneration of authors and performers has been amended in order to clarify the extent of the problem (lack of transparency on the exploitation of works and on the owed remuneraiton). The EU dimension of the problem has been strenghtened, including on the basis of data illustrating the importance of the cross-border exploitation of content. Additional elements have been included to better explain the need to act at EU level. (section 5.4.1 and 5.1.2 in relation to subsidiarity).

remuneration of authors and performance is unfair in the online environment, with a proper reflection of remuneration issues and new opportunities brought by the new online services. Moreover, the cross-border dimension of the problem should be better demonstrated, as well as why national solutions are likely to be less effective. Given that contracts are usually private matters, the legal justification for intervention should be clearly set out, and the proportionality of the measures duly justified.	
Procedure and presentation In order to make the report more accessible for non-specialists, technical terms should be explained in an extended glossary and all acronyms inserted in an annex. Moreover, the main messages of each section should be clearly presented and, where possible, visual aids explaining complex issues at stake should be included. The report should clearly mention when it presents results from studies commissioned by interested parties and label them with the necessary caveats. The executive summary should be more informative, in particular on the problems to be tackled for each of the areas, on the need to act at EU level, on the preferred options and their likely costs and benefits. Benchmarks/targets should be set out for the monitoring indicators in order to judge the effectiveness of the framework when conducting the retrospective evaluation.	- A new Annex 15 has been introduced, provinding the list of the main relevant Directives related to this IA and a glossary of technical terms. - The executive summary has been beefed up **and now it contains more detailed informaiton as requested.** - The monitoring indicators have been completed with quantitative benchmarks were availble. - Generally presentation has been improved in several parts of the document.

Evidence used in the IA

The IA was prepared using diversified sources of information, including information received from stakeholders, input from external experts, market reviews, sources of statistics (including Eurostat), external studies (see below) and surveys (Eurobarometer surveys or specific surveys carried out in the context of studies).

The Commission carried out several public consultations, a stakeholder dialogue ("Licences for Europe") and a series of meetings with stakeholders (see Annex 2). These exercises brought input from various stakeholders, which was taken into account in the IA.

For certain topics, the Commission also used evidence presented in reports on the implementation of existing EU policies, notably:

- European Commission, "Report on the Implementation of Commission Recommendation 2011/711/EU - 2013-2015 on digitisation, online accessibility and digital preservation", 2016;
- European Commission, "Report on the Implementation of the European Parliament and Council Recommendation on Film Heritage 2012-2013", 2014.

External expertise used in the IA process

Studies and surveys

A series of legal and economic studies were conducted for the Commission on various aspects of the existing copyright rules:

- "Study on the application of Directive 2001/29/EC on copyright and related rights in the information society (The InfoSoc Directive)" (December 2013):[1] the study provides an analysis of the existing national rules implementing the InfoSoc Directive in eleven EU countries (Germany, France, the United Kingdom, Italy, Spain, Poland, Denmark, Hungary, Belgium, Luxembourg and the Netherlands). It concentrates on the functioning of exclusive rights (in particular the "making available" right) and of certain exceptions (including the exceptions benefiting to libraries and the exceptions for teaching and scientific research) in the digital environment. The study also provides an analysis of the right of retransmission by cable and assesses the relevant provisions of the SatCab Directive.

- "Study on the making available right and its relationship with the reproduction right in cross-border digital transmissions", (December 2014):[2] the study complements the "Study on the application of Directive 2001/29/EC on copyright and related rights in the information society" by providing an analysis of the relation between the making available right and the reproduction right.

- "Economic analysis of the territoriality of the making available right in the EU" (March 2014):[3] the study analyses the use of territorial licensing in the music and audiovisual industries, identifies key economic mechanisms underlying the choice of territorial licensing (vertical agreements, price discrimination and transaction costs) and assesses the impacts of different policy scenarios on the existing licensing models.

- "Survey and data gathering to support the evaluation of the Satellite and Cable Directive 93/83/EEC and assessment of its possible extension" (ongoing): the study provides an overview of the EU TV/radio market, an analysis of the geographic coverage of TV channels and an analysis of cross-border availability of broadcasters' online services. It includes an analysis of the legal frameworks implemented in the Member States concerning cross-border (re)transmissions of broadcasting services. It also assesses the performance of the Satellite and Cable Directive and identifies the legal issues to be assessed in case of a possible extension of its mechanisms to online (re)transmissions of TV/radio programmes.

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1 J-P. Triaille et alii, "Study on the application of Directive 2001/29/EC on copyright and related rights in the information society (The InfoSoc Directive)", De Wolf & Partners, December 2013 http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf

2 S. Depreeuw et alii, "Study on the making available right and its relationship with the reproduction right in cross-border digital transmissions", De Wolf & Partners, December 2014, http://ec.europa.eu/internal_market/copyright/docs/studies/141219-study_en.pdf

3 G. Langus et alii, "Economic analysis of the territoriality of the making available right in the EU", CRA, March 2014 http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study1_en.pdf

– "Survey Report on Digitisation in European Cultural Heritage Institutions 2015" (June 2015), and "Survey Report on Digitisation in European Cultural Heritage Institutions 2014" (June 2014), produced as part of the ENUMERATE projects, co-funded by the European Commission: the surveys provide information on the status of digitisation of cultural heritage in EU based on a detailed questionnaire submitted to cultural heritage institutions across the EU. They include data on institutional holdings, including born digital collection, types of holdings, ways to provide digital access and, for the 2014 issue only, an indicative break-down of the incidental and structural costs of digitisation, including copyright clearance and the cost of licensing.

– "The Cost of Digitising Europe's Cultural Heritage. A Report for the Comité des Sages of the European Commission" (November 2010): the study estimated the total cost of digitising Europe's cultural heritage, looking into different types of material in different categories of cultural heritage institutions. It also provides an aggregate estimate of cultural heritage institutions and their holdings in Europe and fed into the recommendations of "The new Renaissance. Report of the "Comité des sages", which were delivered in 2011 to the Commission on the digitisation, online accessibility and preservation of cultural heritage.

– "Challenges of the Digital Era for Film Heritage Institutions", (December 2011): the study looked into challenges and opportunities for film heritage institutions in preserving and continuing to provide access to film heritage in Europe. It provides an analysis of the market and technological developments affecting European film heritage, evaluates the cost of digitising and looks at various issues including copyright aspects.

– "Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU – Analysis of specific policy options" (May 2014): [4] the study provides an economic analysis of specific policy options regarding exceptions (including preservation and text and data mining), based on the methodology set out in the related report: "Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU" (October 2013).[5] The study identifies the economic mechanisms at play in relation to copyright exceptions and provides a qualitative assessment of the potential effects of different policy options on various stakeholders.

– "Assessment of the impact of the European copyright framework on digitally supported education and training practices": the study provides a mapping of the exceptions relevant to education in national laws and identifies legal uncertainties and obstacles on

[4] J. Boulanger et alii, "Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU – Analysis of specific policy options", CRA, May 2014, http://ec.europa.eu/internal_market/copyright/docs/studies/140623-limitations-economic-impacts-study_en.pdf

[5] G. Langus et alii, "Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU", CRA, October 2013, http://ec.europa.eu/internal_market/copyright/docs/studies/131001-study_en.pdf

the use of copyright-protected works in digital education. The findings of the study are based on desk research, interviews with stakeholders and on two online surveys.

– "Showing films and other audiovisual content in European Schools : Obstacles and best practices" (May 2015):[6] the study analyses how films are used in schools and identifies obstacles and best practices. One chapter of the study is dedicated to the copyright framework applicable to the use of audiovisual works in the context of education.

– "Study on the legal framework of text and data mining (TDM)" (March 2014): [7] the study identifies the rights relevant for TDM activities and assesses how current exceptions can apply to such activities. It also examines legal provisions, decisions or judgments affecting TDM in 11 Member States (Germany, France, the United Kingdom, Italy, Spain, Poland, Denmark, Hungary, Belgium, Luxembourg and the Netherlands). The objective was to examine the need for legislative changes in this specific area.

– "Standardisation in the area of innovation and technological development, notably in the field of Text and Data Mining, Report from the expert group" – European Commisson, DG Research and Innovation, 2014. The report looked at TDM from an economic and legal point of view in the context of the EU policy for research and innovation.

– "Remuneration of authors and performers for the use of their works and the fixations of their performances" (July 2015): the study compares, from legal and economic perspectives, the existing national systems of remuneration for authors and performers in the music and audio-visual sectors in ten EU countries (France, United Kingdom, Germany, Spain, Poland, Italy, Hungary, the Netherlands, Denmark and Lithuania). The objective was to gather evidence whether, and to what extent, the differences that exist among the Member States affect levels of remuneration and the functioning of the internal market.

– "Remuneration of authors of books and scientific journals, translators, journalists and visual artists for the use of their works" (ongoing): the study compares, from legal and economic perspectives, the existing national systems of remuneration for authors in the print sectors in ten EU countries (France, United Kingdom, Germany, Spain, Poland, Italy, Hungary, the Netherlands, Denmark and Ireland). The objective was to gather evidence whether, and to what extent, the differences that exist among the Member States affect levels of remuneration and the functioning of the internal market. Drawing upon statistical analysis of a survey of authors to test and corroborate the findings of the legal analysis, the study draws a number of policy recommendations to improve the functioning of the Single Market in this area.

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6 J-M Pérez Tornero et alii, "Showing films and other audiovisual content in European Schools : Obstacles and best practices – Final report" https://ec.europa.eu/digital-single-market/en/news/schools-europe-are-not-using-films-and-audiovisual-material-full-concluded-eu-study

7 J-P. Triaille et alii, "Study on the legal framework of text and data mining (TDM)", De Wolf & partners, March 2014, http://ec.europa.eu/internal_market/copyright/docs/studies/1403_study2_en.pdf

ANNEX 2 – STAKEHOLDER CONSULTATION

ANNEX 2A – STAKEHOLDERS' CONSULTATION STRATEGY

The consultation strategy supporting the modernisation of EU copyright rules included a **stakeholders' dialogue**, several **public consultations** and **Eurobarometer surveys**. The Commission also organised several **roundtable discussions** with stakeholders and took part to a number of **conferences and seminars** on the issues covered by this IA. In addition, DG CONNECT held a series of ad**-hoc meetings with stakeholders** to discuss specific issues and gather detailed input on various policy options. The IA largely builds on the outcome of these consultations with stakeholders.

Stakeholders' dialogue

The Commission held a structured stakeholder dialogue "Licences for Europe" between February 2013 and November 2013.[8] As announced in the 2012 communication on content in the digital single market,[9] the purpose of this dialogue was to address a number of issues on which rapid progress was considered necessary and possible.

The dialogue consisted in four Working Groups, which led to 'Ten Pledges to bring more content online'[10] presented at a final plenary session on 13 November 2013. In the context of this dialogue, the areas of text and data mining and digitisation of film heritage were discussed, in particular, to explore possible concrete solutions (such as for instance standard licensing models).

Public consultations

– Public consultation on the review of the EU copyright rules ('the 2013-2014 public consultation'): [11] the consultation was held between 5 December 2013 and 5 March 2014. It allowed to gather input from all types of stakeholders on the Commission's review of the EU copyright rules, including in the areas of access to cross-border content, exceptions, and remuneration of authors and performers. The report on the responses received was published in July 2014.[12] An extract of the report covering the issues dealt with in this IA is included in Annex 2B.

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8 For further details concerning this stakeholder dialogue see https://ec.europa.eu/licences-for-europe-dialogue/en/content/about-site

9 COM(2012) 789 final, cit.

10 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

11 For further details concerning this public consultation see http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm.

12 Report on the responses to the Public Consultation on the Review of the EU Copyright Rules, July 2014 http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/docs/contributions/consultation-report_en.pdf

– Public consultation on the review of the EU Satellite and Cable Directive[13]: the consultation was held from 24 August to 16 November 2015. It invited respondents to give feedback on the functioning of the rules related to the clearance of rights for satellite broadcasters and cable companies, notably with regards to cross-border access to broadcasting services, and to assess the possible need to extend these rules to online transmissions/retransmissions. The report on the responses received has been published in May 2016.[14] It is presented in Annex 2C.

– Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy:[15] the consultation was held between 24 September 2015 and 6 January 2016. It covered a broad range of issues including, in particular, the role of online intermediaries as well as ways to tackle illegal content on the Internet. Insofar as relevant, the consultation provided evidence and views from all stakeholders on the liability of intermediaries. A first brief overview of the results of the consultation has been published in January 2016.[16] The report on the responses received has been published in May 2016.[17]

– Public consultation on the role of publishers in the copyright value chain and on the 'panorama exception':[18] the consultation was held between 23 March 2016 and 15 June 2016. It focussed on two specific issues that were flagged in the communication "Towards a modern, more European copyright framework"[19] but had not been covered by the previous copyright consultations: the possible introduction in EU law of a new neighbouring right for publishers and the so-called 'panorama exception'. With regard to the possible introduction of a new neighbouring right for publishers, the objective of the consultation was twofold. First, to gather views on the impact that granting an EU neighbouring right to publishers could have on the publishing sector, on citizens and creative industries. Second, to collect input for the Commission's analysis whether the need (or not) for intervention is different in the press as compared to other publishing sectors. The report on the responses received on the role of publishers in the copyright value chain is published at the same time of this IA.[20]

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13 For further details concerning this public consultation see https://ec.europa.eu/digital-single-market/en/news/contributions-and-preliminary-trends-public-consultation-review-eu-satellite-and-cable

14 Synopsis Report on the Responses to the Public Consultation on the Review of the Satellite and Cable Directive https://ec.europa.eu/digital-single-market/en/news/full-report-public-consultation-review-eu-satellite-and-cable-directive

15 For further details concerning this public consultation see https://ec.europa.eu/digital-agenda/en/news/public-consultation-regulatory-environment-platforms-online-intermediaries-data-and-cloud

16 First brief results of the public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy, https://ec.europa.eu/digital-single-market/news/first-brief-results-public-consultation-regulatory-environment-platforms-online-intermediaries

17 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

18 For further details concerning this public consultation see https://ec.europa.eu/digital-single-market/en/news/public-consultation-role-publishers-copyright-value-chain-and-panorama-exception

19 COM(2015) 626 final, cit.

20 The report on the responses received concerning the 'panorama exception' (which is not addressed in this IA) is also published at the same time of this IA.

Surveys

– A Flash Eurobarometer on "Cross-border access to online content"[21] was carried out in January 2015 among 26.586 respondents in 28 EU Member States (telephone interviews). The survey allowed to gather information on consumers' experience with online content in general, as well as consumers' experience and possible interest as regards cross-border portability of online subscriptions and cross-border access to online content.

– A Eurobarometer online survey on "Internet users' preferences for accessing content online" was carried out in March 2016 among 13.483 Internet users aged 15-45 in 28 Member States. The survey gathers data illustrating online content consumption patterns for music, films and TV series, news and images. It provides information on the type of services chosen by Internet users to access content online and on the main criteria for choosing a service to access and consume content online.

Meetings with stakeholders

There have been regular contacts with all relevant stakeholders, to gather further information and data and to discuss specific issues, in particular, the options presented in this IA.[22]

Access to content

A first roundtable discussion with Commissioner Oettinger took place on 30 January 2015 on **territoriality and cross-border access to content**, with representatives of the AV, music and print sectors. In particular, AV right holders (authors, actors, producers), public and commercial broadcasters, VoD/SVoD platforms, cable and telecom companies, and consumer organisations participated to the discussion.

Two further roundtable discussions were held with representatives of the audiovisual sector: one in February 2016 in the context of the Berlinale Film Festival, covering different aspects of cross-border access to audiovisual works as well as ways to tackle copyright infringements; and another one in May 2016, during the Cannes Film Festival, concerning online transmissions and retransmissions of TV/radio programmes as well as access to and availability of EU audiovisual works on VoD platforms.

The Commission also attended a meeting of the ad hoc "IPR and copyright reform" Working Group of the European Parliament (EP)[23] which discussed ways to improve cross-border accessibility and availability of audiovisual works in the EU, with representatives of producers, distributors, broadcasters, and film archives on 17 September 2015.

Issues related to **online transmissions and retransmissions of TV and radio programmes** were further discussed during bilateral meetings held with associations of public and commercial televisions and radios, CMOs and a number of individual stakeholders, including public and commercial broadcasters, telecommunications operators and right holders.

With regard to the **availability of EU audiovisual works on VoD platforms,** various meetings and discussions were organised in the first half of 2016 with relevant stakeholders,

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21 Flash Eurobarometer 411, http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/instruments/FLASH/surveyKy/2059

22 A short summary of stakeholders' positions is presented in the Impact Assessment under each option.

23 The agenda and minutes of the meetings of the working group are available under: http://www.europarl.europa.eu/committees/en/juri/subject-files.html?id=20150128CDT00182

including VoD platforms, distributors, film producers, aggregators and/or organisations representing audiovisual authors. The reasons of the limited availability of European audiovisual works on VoD platforms, as well as the solutions that could be envisaged, were discussed.

Copyright aspects relevant for the digitisation and dissemination of **out-of-commerce (OOC) works** in the collections of Cultural Heritage Institutions (CHIs) were discussed on various occasions with representatives of CHIs and practitioners, including during recent meetings of the Member States Expert Group (MSEG) on digitisation and digital preservation (June and October 2015), at a meeting of the Film Heritage Expert Group in March 2016, at two Licensing workshops organised by Europeana in November 2014 and November 2015, and with National Archives at meetings of the European Archives Group (EAG) in June and October 2015, in addition to meetings with practitioners on the field. Several meetings to discuss these issues were also held with representatives of authors, publishers and producers, and collecting management organisations between 2014 and 2016. This matter was also part of the agenda at the roundtable with Commissioner Oettinger on access to knowledge and heritage held on 19 February (see below).

Exceptions

A roundtable discussion between stakeholders and Commissioner Oettinger took place on 19 February 2015 on **access to knowledge and heritage through libraries, education and cultural heritage institutions.** The roundtable gathered representatives of universities, libraries, cultural heritage institutions, consumers as well as representatives of authors, scientific and educational publishers, film producers, and CMOs. The need to adapt the exceptions for preservation and illustration for teaching to digital and cross-border uses was discussed in this context.

Discussions on existing licensing mechanisms and exceptions, in particular in relation to the print sector, were also discussed at a meeting of the "IPR and copyright reform" Working Group of the EP on 12 February 2015. The Commission attended this meeting, together with representatives of public libraries, publishers, authors, journalists and distributors.

Copyright issues related to uses of protected content in the context of **teaching** were discussed with representatives of universities and, more largely, educational users at various occasions (for example, 2014 Media and Learning conference in November 2014[24] and a policy debate organised in the European Parliament in November 2015). In addition, the interviews and surveys of educators and learners carried out in the context of the study "Assessment of the impact of the European copyright framework on digitally supported education and training practices"[25] allowed to gather more detailed feedback from this group of stakeholders. Several meetings took place with representatives of publishers (in particular educational and academic publishers and sheet music publishers), reproduction rights organisation and collecting societies between 2014 and 2016.

Given the relevance of the subject for the same categories of user stakeholders, copyright issues and the practicalities of the **preservation**, notably digital, of works in cultural heritage collections was discussed with institutional users and practitioners broadly on the same occasions and the same modalities as described above for out-of-commerce works. These issues were also covered on several occasions in meetings and telephone contacts with

[24] http://www.media-and-learning.eu/files/pdf/Media-and-Learning-2014_public_report.pdf

[25] Over 60 interviews of learners, educators and librarians were carried out in the context of this study to establish illustrative case studies. In addition, an online survey was conducted in 2015 among more than 2000 respondents from 9 Member States.

publishers, and other right holder organisations, and with third-party organisations engaged in preservation of scientific literature between 2014 and 2016.

Views of a wide range of stakeholders have been gathered on **TDM** which informed the analysis carried out in this IA. TDM was the subject of one dedicated working group in the stakeholder dialogue "Licences for Europe" carried out throughout much of 2013[26]. The mandate of the Licences for Europe group was to "explore solutions such as standard licensing models as well as technology platforms to facilitate TDM access"[27]. A continues constant dialogue with all relevant stakeholders was carried out after Licences for Europe and in the context of the preparation of the IA. Several meetings and a constant exchange took place with representatives from researchers and universities, from scientific publishers, including open access publishers, news and books publishers, technology and life science companies, consumer representatives. The Commission attended a meeting of the ad hoc "IPR and copyright reform" working group of the European Parliament which discussed TDM, in the presence of representatives of publishers and researchers, on 26 March 2015. The Commission also attended a number of public events which focussed specifically on TDM in the context of the copyright modernisation (e.g. *Digital Agenda Intergroup and LERU hosted breakfast on research related reform on EU Copyright*[28] in October 2015, EP event "*Demystifying TDM in copyright context*" in April 2016, etc). TDM was discussed in a specific roundtable stakeholder meeting called by Commissioner Oettinger which took place on 3 February 2015.

Well-functioning marketplace for copyright

On the **sharing of value in the online environment**, a variety of stakeholders, representing right holders from different sectors, consumers, online platforms, online service providers, etc. expressed their positions through the public consultation on online platforms carried out between September 2015 and January 2016. Views of the various stakeholders were also sought through a number of meetings to discuss the role of online intermediaries which took place (on a bilateral basis or through their associations) between May 2015 and in the course of 2016. The role of online intermediaries was also discussed in the EP Working group on "IPR and copyright reform", notably at the meeting held on 16 March 2016, in which the Commission participated.

The **role of publishers** in the copyright value chain and the rights in publications were discussed in a number of stakeholder meetings before and during the public consultation which took place between March and June 2016. The Commission discussed these issues with representatives of journalists, consumers, publishers, media monitoring services, digital media associations, as well as the main online service providers providing access to news and other publications.

On the issues related to the **remuneration of authors and performers,** apart from the 2013-2014 public consultation, stakeholders were regularly invited, both directly and through their organisations, to provide information and evidence. On top of numerous bilateral meetings with relevant organisations and stakeholders, dedicated meetings were organised to discuss the issue with representatives of authors, performers and their contractual counterparties (i.e. producers, publishers, broadcasters, record labels) during spring 2016. Some of these

[26] Representatives from researchers, academics, technology companies, publishers and other right holders attended the discussions in all or some of the meetings.

[27] See the Commission's services document summarising the results of the Licences for Europe discussions, including on TDM "Ten pledges to bring more content online". http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf

[28] http://www.leru.org/index.php/public/news/the-right-to-read-is-the-right-to-mine/

dedicated discussions were sector specific (e.g. for the audiovisual sector), while others were horizontal (e.g. discussion with contractual counterparties). The issue of remuneration of authors and performers was also discussed in the EP Working group on "IPR and copyright reform", notably at the meetings held on 12 February 2015 and 23 June 2015, in which the Commission participated.

ANNEX 2B – EXTRACT OF THE REPORT ON THE RESPONSES TO THE PUBLIC CONSULTATION ON THE REVIEW OF EU COPYRIGHT RULES

The summary of the replies to the public consultation concerning the areas covered by this IA, i.e. **out-of-commerce works**, **exceptions** (preservation, teaching, research and TDM) and **remuneration of authors and performers** are presented below.

1. Out-of-commerce works (Questions 40 and 41)

40. [In particular if you are an institutional user, engaging or wanting to engage in mass digitisation projects, a right holder, a collective management organisation:] Would it be necessary in your country to enact legislation to ensure that the results of the 2011 MoU (i.e. the agreements concluded between libraries and collecting societies) have a cross-border effect so that out of commerce works can be accessed across the EU?

41. Would it be necessary to develop mechanisms, beyond those already agreed for other types of content (e.g. for audio- or audio-visual collections, broadcasters' archives)?

The first question on mass digitisation concerned the possible need to enact legislation to give cross-border effect to the 2011 Memorandum of Understanding (MoU) on out-of-commerce works[29]. The second question was more general and related to the possible need to develop new mechanisms to ensure the digitisation and making available of other types of content.

End users/consumers

Only few individual end users replied to the questions related to mass digitisation. End users/consumers and their organisations refer to two main reasons when acknowledging the importance of mass digitisation: firstly, the need to ensure the preservation of works for future generations, in particular for educational and cultural resources; secondly, the legitimate interest of the public in having online access to the collections of cultural heritage institutions across Europe.

Users consider than an exception is necessary to allow cultural heritage institutions to make their collections available online. Some respondents suggest extending the scope of the existing exception for the consultation of works for the purpose of research and private study. Others consider that the mass digitisation could be facilitated by reducing the terms of copyright protection. Another possible solution mentioned in the replies (but not as the favoured solution) is the use of compulsory licences.

End users generally consider that mechanisms facilitating mass digitisation should be adopted for all type of works beyond the print sector, including audio and audio-visual works. Several replies point to the need to make available broadcasters' archives, especially material produced with the contribution of public funds.

Institutional users

Most institutional users consider that the MoU on out-of-commerce works and the Orphan Works Directive[30] are insufficient to address the copyright issues arising from mass digitisation projects. In particular, they consider that the requirement of diligence searches makes the Orphan Works Directive unsuitable for mass digitisation projects. Some academic libraries express concerns about the possibility of finding a balance, without arbitration by public authorities, between licensing conditions imposed by rightholders for digitising collections and the limited financial resources available for mass digitisation.

Many cultural heritage institutions report a large demand from citizens, teachers, students and researchers for the digitisation of 20th century works. Some university libraries also explain that students and researchers increasingly make use of audio and audio-visual materials.

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29 The Memorandum of Understanding on key principles on the digitisation and making available of out-of-commerce works aims to facilitate mass digitisation efforts for books and learned journals on the basis of licence agreements between libraries and similar cultural institutions on the one hand and the collecting societies representing authors and publishers on the other. See: http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm

30 Directive 2012/28/EU on certain permitted uses of orphan works.

Institutional users generally consider that legislation allowing cross-border use of the digitised works is necessary, but many of them indicate that this objective would be better achieved by an exception allowing for mass digitisation of out-of-commerce works (for example, by the introduction of a new exception or an expanded version of the existing preservation and consultation exceptions in the InfoSoc Directive to cover the reproduction and making available of out-of-commerce works). They suggest that such an exception should cover all types of works. Alternatively, they suggest considering solutions based on the collective management of rights, such as extended collective licensing, which are in place in some Member States. Museums explain that without a mass digitisation exception they are prevented from presenting their digital collections to the public and also from sharing them with other museums for research purposes.

Institutional users generally consider that mechanisms facilitating mass digitisation and online access to collections should not be limited to certain types of content. Certain respondents suggest to set up further Memoranda of Understanding for sound recordings and audio-visual works. Languages research centres indicate that EU-wide access to broadcasters' archives would be very helpful to enhance contemporary language research.

Authors/performers

Quite a large number of authors and their organisations consider that the mechanisms in place at national level are sufficient and that no legislative intervention is needed. A few respondents argue that it would be unrealistic to carry out mass digitisation for cross-border uses considering the marginal demand for access to works available only in national languages.

On the other hand, other authors and authors' organisations suggest that a mutual recognition system would be necessary to give a cross-border effect to the licences issued at national level under collective rights management systems. Several respondents highlight in their replies that the signatories of the MoU called on the Commission to consider legislation to ensure legal certainty in the cross-border context. Others argue that legislation enabling mass digitisation applicable throughout the EU would be preferable, with an unwaivable remuneration for right holders.

Certain authors express a clear opposition to solutions based on mandatory collective management with opt-out mechanisms. They consider that the consent of each author needs to be obtained for mass digitisation projects and that the remuneration has to be individually negotiated.

Several organisations representing visual artists, particularly photographers raise the question of the use of images embedded within other works, which in their view, is not considered properly in the 2011 MoU.

Different views are put forward on the development of further mechanisms for other types of works. Audio-visual authors in particular support further discussions on the digitisation of works in the archives of public broadcasters. A few respondents consider that the mechanisms in place in their countries (e.g. extended collective licensing) already provide a satisfactory solution for broadcasters' archives. Film directors indicate that they are committed to the statement agreed for mass digitisation of cinematographic works in the context of Licences for Europe. Performing arts organisations favour an MoU for the digitisation and making available of out-of-commerce works in the performing arts sector (e.g. sound or video recordings of theatre productions and concerts). They indicate that a stakeholder dialogue including organisations, collecting societies and publishers could be helpful to prepare such an MoU. Other authors insist on the need to foresee an unwaivable remuneration for rightholders, whatever solution is chosen.

Collective management organisations (CMOs)

CMOs put forward mixed views on the need to enact legislation to give a cross-border effect to the MoU on out-of-commerce works. Several CMOs refer to the national frameworks in place, in particular the extending collective licensing system in Denmark, the law on out-of-commerce books in France establishing a system of collective management and the recent law based on legal presumption of representation of rights in Germany.

While certain CMOs indicate clearly that they would welcome solutions for the recognition of national laws and licensing mechanisms across borders, others simply highlight that the MoU calls on the Commission to propose solutions for cross-border availability.

Concerning the possibility of extending this type of solution to other sectors, the views of CMOs are also quite heterogeneous. Certain CMOs in the audio-visual sector express their willingness to implement the principles agreed in the context of Licences for Europe and to continue the dialogue on broadcasters' archives. CMOs representing visual artists express a preference for legislative solutions allowing mass digitisation with a fair remuneration. Other CMOs prefer to deal with digitisation questions through voluntary agreements between the interested parties.

Several CMOs underline that the main obstacle to mass digitisation projects is the lack of public funding, in particular in the audio-visual sector where digitisation costs are very high.

Publishers/producers/broadcasters

Many *publishers* in the print sector consider that there is no need for further legislation at EU level if the MoU on out-of-commerce works is effectively implemented in all Member States. Instead, voluntary agreements should be promoted to ensure access to digitised works (e.g. bilateral agreements between collective management organisations). Publishers explain that the main obstacle to large scale digitisation projects is very often the lack of public funding. In general, this category of respondents does consider there is an urgent need to develop mechanisms similar to the MoU in sectors other than the print sector

Representatives of the *newspaper publishers* consider that providing mechanisms to facilitate the mass digitisation of newspaper content would threaten publishers' business models and their ability to respond to digital challenges. They note that the solutions set out in the 2011 MoU were specific to the book sectors and cannot be automatically extended to publishing of newspapers.

Public service broadcasters explain that rights clearance on an individual basis for making available the content of their archives is practically impossible. The main difficulties are related to the large amount of audio and audio-visual material and the large number of contracts and rightholders. Therefore they favour the introduction of an EU framework which would encourage the adoption of legislative solutions based on collective licensing (for example on the extended collective licences model) in Member States to facilitate the digitisation of their archives. *Commercial broadcasters* express a different view and do not report any problems with the clearing of archives for new uses. They consider that there is no need for collective management to ensure the digitisation of audio-visual collections or broadcasters' archives. Certain broadcasters mention that the decision of whether or not to exploit archives is based on consumer demand rather than on rights clearance challenges. The exploitation of archives has been facilitated by the multiplication of TV channels and online platforms and constitutes an asset for broadcasters.

A large number of *film producers* consider that the approach used for the print sector (i.e. voluntary collective management backed by extended collective management or presumptions of representation) is not appropriate for audio-visual works, where individual rights licensing should be preferred. They are however in favour of a stakeholder dialogue to facilitate licensing solutions for the digitisation and making available of public broadcasters' archives. The use of extended collective licensing or presumption of representation in this context should be consistent with the three-step test and offer sufficient guarantees to rightholders. *Music publishers* explain that mass digitisation is not an issue for music and that rightholders can licence their work directly. They say that digitisation is common in the music industry and the chances of music being both in analogue form and out-of-commerce are remote.

Intermediaries/distributors/other service providers

This category of respondents did not express specific opinions on the questions related to mass digitisation.

Member States

Only a few Member States replied to the questions related to mass digitisation, explaining the systems in place at national level to allow mass digitisation of protected content (for example, extended collective management). In general, Member States favour contractual mechanisms and discussions between CMOs and cultural heritage institutions to address the challenges of mass digitisation. One Member State suggests establishing a provision at EU level to facilitate the digitisation of audio-visual works for archiving purposes, with the exploitation of the digitised works remaining subject to an agreement with rightholders.

Other

Certain academics suggest that mass digitisation should be allowed under the preservation exception, which should include digitisation and format shifting but not acts of making available (which would remain covered by Orphan Works Directive and the MoU on out-of-commerce works). Other respondents support the introduction of a specific exception to enable libraries and archives to undertake mass digitisation of their collections.

2. Exceptions

Preservation and archiving (Questions 28 to 31)

28. (a) [In particular if you are an institutional user:] Have you experienced specific problems when trying to use an exception to preserve and archive specific works or other subject matter in your collection?

(b) [In particular if you are a right holder:] Have you experienced problems with the use by libraries, educational establishments, museum or archives of the preservation exception?

29. If there are problems, how would they best be solved?

30. If your view is that a legislative solution is needed, what would be its main elements? Which activities of the beneficiary institutions should be covered and under which conditions?

31. If your view is that a different solution is needed, what would it be?

These questions concern the exception allowing publicly accessible libraries, educational establishments, museums and archives to undertake specific acts of reproduction which are not for direct or indirect economic advantage (the preservation exception – Article 5(2)(c) of the InfoSoc Directive). Respondents were asked to give feed-back on their experiences with preservation activities carried out by these institutions and to provide their views on how problems, if identified, should be solved.

End users/consumers

A relatively small number of respondents in this category responded to the questions on the preservation exception. In some cases, end users/consumers are concerned about the divergent implementation of the preservation exceptions across the EU and consider that more harmonisation of the preservation exception is needed in view of technological developments. Some end users/consumers also suggest broadening the scope of this exception, notably to allow public libraries and other beneficiaries to make the works in their collections available online.

Institutional users

The vast majority of institutional users report that they have experienced problems when trying to use an exception to preserve and archive specific works in their collections. Respondents consider that both the scope of this exception and the way Member States have implemented it cause problems. Member States' implementations are excessively divergent and in many cases this exception has been implemented in a too narrow or unclear way. Examples given include Member States' laws that limit the number of copies that can be made or that reduce the range of beneficiary institutions and prohibit or limit format shifting (the conversion of the copy of a work into a new format, something that is considered to be particularly important when a certain format – and devices used to read it - become obsolete or unavailable).

Institutional users stress that the limited level of harmonisation of the current exception and the fact that it does not have cross-border effect have a negative impact on collaborative digitisation projects across countries.

They generally believe that the preservation exception is too narrow. Some point out that the mere preservation of works in their collection is not the sole reason why libraries and other institutions wish to reproduce them. Other objectives include making these works more easily searchable or available across digital networks, including across research platforms and infrastructures. Some respondents highlight problems in relation to recital 40 of the InfoSoc Directive, according to which this exception should not cover uses made in the context of online delivery of content It is also stressed by some respondents that the exception should allow beneficiaries to go beyond the specific acts of reproduction which are currently allowed and that it should allow mass digitisation.

Institutional users also raise issues with 'born-digital' content and highlight that the preservation exception does not allow them to produce back-up copies of content (for examples articles) that they subscribe to.

More broadly, institutional users consider that licences are not a sustainable solution for the digital preservation of content in the long run. Licensors, for example publishers, may cease to exist and subscriptions may be stopped and, as a consequence, libraries and other institutions may lose access to content, which would prevent them from fulfilling their role as custodians of cultural heritage. Some institutional users also point to problems related to technological protection measures and their protection under the InfoSoc Directive, which they consider unbalanced and having negative effects on preservation activities. They also mention some difficulties with the fact that this exception only covers acts carried out without direct or indirect commercial advantage: they consider this requirement too broad and potentially problematic, for example when institutional users cooperate with commercial entities for preservation or other purposes. Other areas where difficulties are reported include, for example, website harvesting projects, the creation of open access directories and the provision of copies for evaluation purposes in academic settings.

Proposed solutions include the harmonisation and broadening of the existing exception so that it would allow, for example, institutions to make multiple or unlimited reproductions of all types of works in their collection (i.e. mass digitisation), including born-digital content acquired through subscriptions and specific categories of works like old computer software. It is also proposed that the exception's scope should clearly include format shifting. Some respondents in this category also call for the current exception to be made mandatory and for a clarification that contracts cannot override exceptions. They also call for a revision of provisions related to

technological protection measures. Finally, some respondents suggest that the introduction of a 'fair use' approach in EU copyright law would help libraries and cultural institutions to fulfil their role.

Authors/performers

Most authors and performers report having not experienced major problems with the existing preservation exception. They believe this exception allows institutions to fulfil their public interest missions, and that uses beyond the scope of this exception should rely on licensing solutions. Some of these respondents acknowledge that digitisation for preservation is an important public policy objective but consider that this objective is often hindered by budgetary, rather than copyright, restrictions. They consider that a lack of funding for public libraries should not be to the detriment of the remuneration of rightholders in the content held by these institutions. Licensing, both individual and collective, is generally considered to be the solution, if and when problems arise.

Collective management organisations (CMOs)

CMOs' views on this subject are generally close to those of publishers, producers and broadcasters, with a general preference for market-based solutions - particularly collective management - where problems are present. Some CMOs report that cultural heritage institutions in certain Member States digitise not only for preservation purposes but also to make digitised content easily accessible (online) to a wider public. Some respondents point out that licences are available to cover both activities (at least in a number of Member States) but report that, in their view, cultural institutions are not always willing to use them and remunerate rightholders for their use of copyright protected content.

Publishers/producers/broadcasters

Publishers, *producers* and *broadcasters* mostly argue that they have not experienced major problems, if at any, with the preservation exception. They emphasise the importance of licensing solutions and voluntary cooperation to solve possible issues in this area, instead of legislative changes. They consider in particular that the preservation exception should not be broadened nor made mandatory. Generally speaking, for respondents in this category, legislative changes should only be considered in the presence of a market failure. They consider that stakeholder cooperation and agreements should be pursued in this area. *Audio-visual producers* refer to the principles and procedures for the digitisation of film heritage agreed upon in the context of Licences for Europe. Other concrete examples of market-based solutions are mentioned, for example *STM (Scientifical Technical and Medical) publishers* mention the PORTICO and CLOCKSS projects.

Some respondents point to the fact that some public libraries request to be able to engage in certain preservation activities despite the fact that they do not qualify in their opinion as heritage libraries. In order to prevent unnecessary harm to commercial markets, a distinction should be made between heritage/deposit libraries, which have a clear preservation mission, and other libraries when defining the beneficiaries of libraries exceptions and the conditions attached to them.

Intermediaries/distributors/other service providers

Only a small portion of respondents in this category provided feedback on this matter, and their answers vary, in particular on whether problems with this exception exist. In some cases, service providers highlight the need for more legal certainty for libraries. Other respondents express a preference for cooperation and agreements among interested parties over legislative intervention. Some distributors in the audio-visual sector consider that there are no problems in this area and report examples where they themselves have a role in the preservation of cultural heritage (for example in Austria, in relation to public funding of audio-visual production).

Member States

Some Member States believe that there is no need to expand the scope of the current preservation exception. Others, while not necessarily against legislative changes, highlight the importance of formulating exceptions in this area in a technologically neutral way, or consider that this exception should cover all types of media. Other Member States suggest the possible extension of this exception to other essential uses not yet contemplated, taking into account that, currently, copies made under the existing exception cannot subsequently be made available to the public.

Other respondents

A number of academics consider that the current preservation exception should be revised, since the focus on specific acts of reproduction is too narrow. Feedback from respondents such as experts, non-governmental organisations and chambers of commerce range from very detailed comments on issues such as format shifting, web harvesting and the archiving of born-digital content to more general considerations on the importance of finding a balance between rightholders' remuneration and opportunities offered by digital networks. A group of

respondents from the performing arts industry (e.g. theatre, opera houses, performing arts companies) present views similar to those of institutional users and advocate the broadening of the beneficiaries of the current exception.

Teaching (Questions 42 to 46)

42. (a) [In particular if you are an end user/consumer or an institutional user:] Have you experienced specific problems when trying to use works or other subject-matter for illustration for teaching, including across borders?

(b) [In particular if you are a right holder:] Have you experienced specific problems resulting from the way in which works or other subject-matter are used for illustration for teaching, including across borders?

43. If there are problems, how would they best be solved?

44. What mechanisms exist in the market place to facilitate the use of content for illustration for teaching purposes? How successful are they?

45. If your view is that a legislative solution is needed, what would be its main elements? Which activities of the beneficiary institutions should be covered and under what conditions?

46. If your view is that a different solution is needed, what would it be?

These questions related to the teaching exception (Article 5(3)(a) of the InfoSoc Directive). Respondents were asked to share their experiences with the use of protected works for teaching purposes, including under existing market mechanisms, and to provide their views on how problems, if identified, should be solved.

End users/consumers

Organisations representing end users underline the restrictive implementation of the exception in Member States and the resulting legal uncertainty for teachers and students. In particular, some users report problems faced by teachers/trainers involved in the development of open educational resources (OERs), notably content such as images or parts of textbooks being removed from educational platforms at the publishers' request. Other users consider that copyright rules are too complex and negotiations with rightholders too costly, making innovative learning methods impossible to use.

As to the possible solutions, users call for a broad exception for non-commercial use of protected works in educational contexts: they believe that the exception should not be limited to educational establishments, teachers and students but should cover all educational activities (including non-formal education) and should not give rise to compensation. According to respondents, the exception should be technologically neutral, to cover face-to-face teaching and online education. They also point out that works produced by students should benefit from the same protection as other authors. Several civil society organisations support a broad educational exception that is mandatory for all Member States while others suggest a fair use mechanism, allowing teachers to use illustrative resources and to share their works. In addition, certain respondents propose an exception for non-commercial sharing and consider that educational resources funded by public money should be disseminated under free licences.

Institutional users

A large number of institutional users highlight the restrictive implementation of the teaching exception in the Member States and report practical problems in particular for distance learning and cross-border uses. Several respondents illustrate the difficulties faced by universities having campuses abroad and virtual learning environments. They consider that the current situation creates difficulties for the development of online educational resources involving a cross-border audience. Film heritage institutions explain that the possibilities to use audio-visual material for teaching purposes are very limited.

Several respondents in this category mention the existence of licensing schemes in place at national level and the possibility to conclude licensing agreements with publishers. However a large number of institutional users consider that licensing solutions are expensive and create an administrative burden for schools and universities. Some libraries consider that licences are costly and conditions imposed by collecting societies do not guarantee the use of all works for educational purposes. Various respondents argue that licences should not be introduced to cover uses allowed under the exception. A certain number of respondents also mention open licences and massive online open courses (MOOCs) which provide valuable resources for teaching purposes.

Concerning the possible solutions, institutional users nearly unanimously call for a broad mandatory teaching exception. They consider that the exception should cover all types of works (such as text, film, multimedia and born-digital resources) and should not include any limits on the amount of the work that can be used. It should cover uses in the classroom and in virtual teaching environments, as long as it is not for commercial purposes. It

should not be limited to any type of institution but rather defined by the teaching purpose. Less frequently mentioned conditions include the use of content for teaching compilations and the right of transformation.

A number of institutional users are of the view that the exception should not be overridden by contracts. Certain respondents consider that the exception should not give rise to compensation, while others believe that a reasonable compensation could be considered to satisfy the three-step test.

In the short term, certain institutional users consider that the Commission should clarify the scope of the teaching exception to encourage Member States to use the flexibility offered by the InfoSoc Directive. A small number of replies also insist on the need to increase awareness among teachers and students on the scope of their rights, through information campaigns or workshops.

Authors/performers

For a large number of authors' representatives, the use of works for illustration for teaching does not raise specific problems. However, certain authors point to the lack of compensation (in particular in Belgium, where compensation is foreseen for the uses under the exception but no agreement has been reached on the amount to be received by rightholders) or to extensive uses of their works by educational establishments. Journalists refer to possible problems when their rights are assigned to their employers (in this case they do not receive any remuneration for the use of their works under the teaching exception).

Several authors' organisations explain in their replies the system in place in their respective Member State: in particular the licensing system existing in the UK, the national agreements between the Ministry of Education and collective management organisations in France and the extended collective licensing system in Denmark.

The majority of organisations representing authors, performers and film directors express a strong preference for licensing mechanisms and agreements between collective management organisations and educational establishments. Some respondents favour a compulsory collective management system while others highlight the benefits of the extended collective licensing model. Representatives of journalists suggest raising awareness in schools of what is allowed under the exception.

Collective management organisations (CMOs)

Several collective management organisations in the category of reproduction rights organisations (RROs) underline that the notion of illustration for teaching in the teaching exception generates uncertainties which have resulted in litigation in some cases, with certain educational establishments refusing to take up a licence on the basis of the exception. Certain respondents in this category refer to the negative effects of the recent reform in Canada, where a new fair dealing provision covering education has been introduced, leading to extensive interpretations of the authorised uses by educational establishments and to legal proceedings. Other collecting societies consider that the existing framework for exceptions is appropriate and that cross-border access is not a pressing issue for schools.

RROs refer to the individual licensing solutions offered by publishers which are frequently combined with collective schemes. A number of respondents explain the functioning of the collective agreements set out at a national level. For example, certain RROs indicate that the system of sector-specific agreements developed in France is appropriate but some stress the lack of budget to ensure a sufficient remuneration of right holders. The extended collective licences used in the large majority of schools in Denmark, Sweden and Finland were mentioned in several replies. Another RRO illustrates the functioning of the platform 'Conlicencia', in Spain, allows the use of works in the digital environment. Other respondents explain that the UK law foresees an educational exception which is subject to a licence.

RROs ask for a clarification of the exception at EU and national level. They defend a narrow understanding of the notion of illustration for teaching which should not comprise the reproduction, making available and distribution of educational resources (for compilations, course packs, textbooks, e-reserves, etc.). They state that the exception should allow the use of small parts of works (or non-relevant excerpts), that copies should remain in the hand of teachers and that rightholders should be named and receive remuneration. In addition, they consider that the best solution would be to encourage licensing agreements which offer comprehensive, tailor-made solutions.

Collecting societies representing authors consider that there is no need to make the exception mandatory, to extend it or to introduce new exceptions. They are of the view that it would be impossible to define the exception more precisely, given the difference in national education systems.

Visual artists' collecting societies consider that a legislative solution can be envisaged if the scope of uses is not too wide and if authors receive a fair remuneration. In addition, moral rights of the authors should be preserved and opt-out solutions need to be foreseen.

Publishers/producers/broadcasters

The majority of *publisher*s and *producers* do not mention particular problems with the use of works for illustration in the context of teaching activities. They consider that the wording of the exception in the InfoSoc Directive is sufficiently broad to cover different types of uses, including in the digital environment. In addition, licensing solutions are in place to complement the exception where necessary. Several publishers' associations indicate that, so far, cross-border needs have not been reported in primary and secondary education, mainly because of the national nature of curricula.

However, certain book publishers point to problems in the interpretation of the current exception, notably its application in the digital environment. They consider that schools and universities make extensive use of the exception, going beyond what is allowed by national laws. Problems are reported in particular in Germany and Spain. Several German publishers explain that large parts of books were made available on the intranet of certain universities, creating direct competition with the primary market. Surveys by the German collecting society VG Wort have shown that over 400 million copies of textbooks fragments are made each year in schools in Germany. Spanish publishers refer to legal disputes with universities on the scope of the activities allowed under the exception. Certain publishers express concerns on the fact that, in several Member States, national laws do not exclude from the scope of the exception works whose primary market is teaching.

Many publishers refer to the innovative solutions proposed to respond to the needs of educational establishments in the digital environment (e.g. digital formats of works, use of interactive white boards, distance learning). Initiatives mentioned include the 'Wizwiz' in France, 'Knooppunt' and 'Digiportail' in Belgium; 'Digitale Schulbücher' in Germany; 'Scuolabook' in Italy. Several digital platforms or portals are available in Member States where teachers can find resources to be used in the classroom or in a digital learning environment. Publishers also propose providing customised eBooks to universities. Respondents from the software industry explain that the new digital textbook licensing model provides numerous benefits to students and teachers, including in terms of costs (digital textbooks are generally cheaper than print textbooks and are available for rental by students). The toolkit developed in the context of Licences for Europe for micro-licences (allowing the legal use of protected texts or images, including for education) is also mentioned. A few respondents in this category refer to open sources licensing models, indicating that they may offer flexible solutions in this area. Several publishers highlight in their replies the initiatives developed at national level to increase information and transparency on licensing schemes for educational establishments (e.g. the '*onderwijsenauteursrecht.nl*' website in the Netherlands; including a practical 'guide' that answers questions from users; and the '*schools*' website of the UK Copyright Licensing Agency in the UK.

A large number of publishers consider that there is no need to modify the teaching exception in the EU legal framework. In their view, the absence of specific problems and the fact that they do not perceive there to be any market failure means that a legislative solution is not justified, and that if one is introduced it could limit new business models and consumer choice. Instead, they consider that individual and collective licensing solutions should be encouraged. They believe that licences offer more flexibility than a legislative solution and reduce possible uncertainties around the scope of the activities allowed under the exception. Moreover, licensing agreements can be easily adapted to rapidly-changing technologies.

Some publishers suggest maintaining a limited teaching exception (covering only small parts of works, for the benefits of teachers and students only, with the indication of the author's name, a fair remuneration for right holders and the exclusion of textbooks and resources produced specifically for the education market). A further suggestion is to confer a supervisory role to CMOs in order for them to check whether educational establishments respect the terms of licences.

Educational publishers and representatives of the software industry warn that a further harmonisation of the teaching exception could undermine the role of licences and the investment in the production of quality educational material, including educational software. (The educational publishing market represents about 20% of the publishing industry at EU level).

Intermediaries/distributors/other service providers

Only a few distributors and service providers expressed their views on the questions related to the teaching exception. They generally consider that there is no need for new legislation, given the recent developments in the market offering sufficient flexibility (for example, innovative tools developed by publishers, pay-per-use licences, open educational resources and open licensing models). Their main concern is that legislative solutions risk hampering the development of market-based solutions. One respondent notes that the market of open educational resources is still very young and believes that it would be premature for the Commission to regulate it.

Film distributors agree that educational establishments can use clips of works for the purposes of illustration but are of the view that schools should pay a licence when they use an entire film (in the classroom or in distance learning). They consider that an extension of the exception would not be compliant with the three-step test (remote access to a film by distance learners would conflict with the normal exploitation of a work).

Member States

Certain Member States underline in their replies the differences in the transposition of the teaching exception and in particular the different interpretations given to the term illustration for teaching. Several Member States acknowledge the cross-border relevance of the exception in the case of distance learning and argue that copyright rules should not hinder cross-border provision of courses in the EU.

Clarifying the maximum scope of the teaching exception, in particular in relation to online uses, was suggested by several Member States among those that replied to the consultation, with some stressing the importance of ensuring a technology-neutral definition of the teaching exception. Several Member States favour a greater harmonisation, which would require making the teaching exception mandatory across the EU. For other Member States, there is no need to further harmonise or extend the scope of the existing exception.

Other

Groups of academics replying to these questions generally consider that there is a lack of harmonisation of the uses allowed under the teaching exception and that voluntary licensing is not sufficient to achieve the right balance between public and private interests.

They suggest further guidance on the implementation of Article 5(3)(a) of the InfoSoc Directive as well as the introduction of a mandatory and uniform exception. According to other academics, the current system works quite well even if some modifications could be considered (for example, allowing the use of entire works rather than fragments).

Research (Questions 47 to 49)

47. (a) [In particular if you are an end user/consumer or an institutional user:] Have you experienced specific problems when trying to use works or other subject matter in the context of research projects/activities, including across borders?

(b) [In particular if you are a right holder:] Have you experienced specific problems resulting from the way in which works or other subject-matter are used in the context of research projects/activities, including across borders?

48. If there are problems, how would they best be solved?

49. What mechanisms exist in the Member States to facilitate the use of content for research purposes? How successful are they?

These questions concerned the research exception set out in Article 5(3)(a) of the InfoSoc Directive and were intended to gather respondents' experiences of the use of copyright protected works in the context of research projects/activities, including across borders, and their views on how problems, if identified, should be solved.

End users/consumers

End users/consumers, in particular researchers, are generally unsatisfied with the current situation. Even though a research exception exists in some Member States, respondents still report problems in accessing scientific publications or scholarly articles. Students and researchers highlight that access to the greatest possible range of academic publications is key for the completeness and accuracy of their research. They indicate not being able to access online certain material they would need for their academic work. Some respondents consider that the more reputable and high-quality scientific journals are usually those making access to their content more difficult, through 'paywall' restrictions. The cost of subscriptions is seen as disproportionate and excessive for individual researchers.

Researchers consider that this situation is particularly difficult to accept in the case of publicly-funded research. They believe that publications which present the results of publicly funded research should always be made available without restriction.

Most respondents consider that open access publishing is a suitable solution to increase access to research content. They mention in this context some examples of open access archives and networks. At the same time, many respondents argue that there are barriers that prevent open access from working in an optimal way and consider that open access should be better supported. It is also mentioned that open access journals are sometimes considered to be not very prestigious or have low citation index scores, making it less attractive to

publish in such a journal. A problem often raised by researchers is that scientific publishers often require that they (as authors of scientific publications) agree upon unduly restrictive contract conditions, for example that their work cannot be put in open access databases.

Institutional users

Many institutional users report problems in the practical implementation of the research exception at national level. Many find that this exception has been implemented too narrowly by some Member States, which, they argue, has resulted in a limited use of the exception by its intended beneficiaries. It is reported that only few Member States (e.g. Estonia) have applied the exception in a technology-neutral manner.

More generally, some institutional users highlight that considerable online content that is relevant for scientific research is only available for payment and is burdened with digital rights management tools. They stress that remote access to university libraries collections should be further facilitated in the area of research as it is a much more practical option than onsite consultation. Some respondents note that licences for scientific articles often limit the amount of users that can access the material at the same time. This is problematic, they say, given that research projects often involve several researchers, sometimes from different universities or institutes including across borders which need to have access at the same time. A number of institutional users, in particular from Northern Europe, report their experiences with extended collective licences. Some point out that such mechanisms have not been very useful so far in the area of research as they are cumbersome to negotiate and limited in scope.

As a solution, these respondents consider that a mandatory and technology-neutral research exception should be adopted at EU level. More generally, they express strong support for open access publishing.

Authors/performers

The vast majority of authors - other than researchers as authors of scientific publications - consider that there are generally no problems with access to content for research purposes and with current research exception. These respondents argue that the combination of licences and exceptions offer users considerable flexibility to access content for research purposes. Respondents argue that licences are a good addition to whatever use would not be covered by a national exception. However, some note that it can be difficult for them to track uses and receive adequate remuneration.

Collective management organisations (CMOs)

The majority of CMOs consider that the current research exception does not pose specific problems. They favour licensing agreements and other market-based commercial solutions as the preferred way to distribute scientific publications. However, one CMO in the visual arts sector considers that clarification of the term 'non-commercial' - currently employed as a condition for the application of the research exception under the Infosoc Directive– would be welcomed.

Publishers/producers/broadcasters

Respondents in this category consider that the current exception works well. Any possible shortcomings with access to research publications can be easily dealt with through licensing agreements. They consider that licences are the preferred option in the field of research as they ensure quality and security and protect against possible abuses (i.e. uses for purposes other than research). Licences terms are broad enough to allow for the exchange of information necessary to carry out research, including across borders.

Some respondents state that scientific publishers already offer 90% of their products through licensing to educational institutions, which allows researchers, students and teachers to have access to that content. Representative of *STM publishers* report alternative access models that are being developed, such as 'pay-per-view' or rental for online viewing, which they consider particularly useful for researchers not affiliated to an institution or requiring only occasional access. Specific market-led initiatives are also mentioned, such as one in France where textbook publishers have been making works available in digital format via certain online portals (for example '*Canal Numérique des Savoirs*' and '*WizWiz*'). Other licensing projects mentioned include the '*RightsLink*' platform and '*Conlicencia*' in Spain.

Intermediaries/distributors/other service provider

This category of respondents did not express specific opinions beyond those put forward by other stakeholders groups on the questions related to research. Some of them generally supported the views of users, while others raised points similar to those of rightholders.

Member States

Some Member States would welcome further harmonising the research exception at EU level, in particular to take account of online uses (one of them emphasises that if there are changes the exception should keep only covering non-commercial uses, as it is currently the case). One Member States considers that this exception should be made mandatory. Other Member States would, on the contrary, prefer that the exception remains as it is. They stress the importance to maintain flexibility for national implementation approaches and licensing mechanisms as well as the need to comply with limits imposed by international law (in particular with the 'three step test'). One Member State refers to its national policy, which requires publicly funded research to be made available through open access mechanisms.

Text and data mining (Questions 53 to 57)

53. (a) [In particular if you are an end user/consumer or an institutional user:] Have you experienced obstacles, linked to copyright, when trying to use text or data mining methods, including across borders?

(b) [In particular if you are a service provider:] Have you experienced obstacles, linked to copyright, when providing services based on text or data mining methods, including across borders?

(c) [In particular if you are a right holder:] Have you experienced specific problems resulting from the use of text and data mining in relation to copyright protected content, including across borders?

54. If there are problems, how would they best be solved?

55. If your view is that a legislative solution is needed, what would be its main elements? Which activities should be covered and under what conditions?

56. If your view is that a different solution is needed, what would it be?

57. Are there other issues, unrelated to copyright, that constitute barriers to the use of text or data mining methods?

Respondents were invited to share their experiences of using or providing services based on text and data mining. They were also asked to provide their views on how problems, if identified, should be solved.

End users, consumers and institutional users

Most respondents that provided views on this issue under the category of "end users" were individual researchers. In most cases, these respondents had similar views as research institutions, universities and similar undertakings which provided their views as part of the "institutional user" category. In addition some consumers provided answers to this topic in the consultation.

Researchers and institutional users are generally dissatisfied with the current situation. They highlight that text and data mining is a fundamental tool for research and consider that, at present, Europe is missing out on the benefits that text and data mining can bring to competitiveness and innovation and to citizens. They put forward two main categories of obstacles to text and data mining: legal uncertainty on whether and how copyright may apply to text and data mining and problems with existing licensing mechanisms, which they generally consider inadequate.

These respondents stress that it is not clear whether and to what extent text and data mining fall under current EU legislation on copyright and the database right and, if so, whether any of the existing exceptions may apply. They consider that mining should not be copyright relevant as it does not involve the expression of an idea that copyright law intends to protect, but just analyses the underlying facts. Some point out that the reproduction of copyright protected works for non-commercial research based on text and data mining could already be covered by existing exceptions and limitations to copyright and the database right in the laws of the Member States. However, they argue that in many Member States it is not clear whether the current exceptions, in particular the research exception (when implemented), could apply to text and data mining.

According to these respondents, licences are not an appropriate solution to solve the uncertainty concerning text and data mining and rather constitute a barrier and a source of transaction costs. They report that using the breadth of works needed for successful mining require working through a wide variety of contractual negotiations and agreements. This situation, these respondents say, often limits the data that can be used for mining purposes to that available on the basis of licences that explicitly allow mining (such as some in the Creative Commons family of licences).

Researchers and research institutions consider that licence terms currently proposed by scientific publishers are unreasonable, particularly because they argue that they require researchers to disclose information about their projects, limit the number of articles that can be mined and – they say - unduly interfere with how researchers can make available the output of mining.

Some of these respondents consider that text and data mining is easier in non-EU countries that have 'fair use' provisions in their legal systems. According to them, this gives North American universities a competitive advantage over universities and companies based in the EU.

Several respondents also refer to issues related to technical access to content for mining purposes. They are concerned about the use of technological protection measures that block access to content, thus preventing text and data mining or rendering it more difficult. It is also suggested that the concerns of publishers on reduced performance and security issues linked to their infrastructure when crawled by mining robots are not shared by open access publishers.

Researchers and institutional users consider that text and data mining should not be subject to licences. They believe that a legislative change is needed to introduce a specific mandatory exception for text and data mining in EU copyright law. They consider that the exception should cover both commercial and non-commercial scientific research, as confining it to non-commercial uses would create legal uncertainty and impede the full development of the potential of text and data mining. According to them, technological protection measures and contracts should not be permitted to override the exception. These respondents also consider that researchers should be entitled to share the results of mining with fellow researchers as long as such results are not substitutable for the original works which have been mined.

Finally, a number of consumers' replies raise concerns in relation to privacy and data protection. They believe that access and analysis of all data available on the Internet represents a tangible impediment to the constitutional rights of European citizens.

Authors/performers and collective management organisations (CMOs)

Authors, such as journalists and writers (individual researchers expressed their views mainly under the category of 'end users') and their representatives, as well as CMOs, generally consider that there is no major problem in the field of text and data mining. They state that licensing solutions are being developed and are the preferred way forward. They consider that more work could be done through dialogue between interested parties and between rightholders and governments to improve licensing practices. They also point to the fact that text and data mining is a new activity and that a lot of uncertainty still exists as to what exactly is meant by text and data mining. In their view, it would, therefore, be premature to deal with text and data mining in legislation.

Authors and CMOs believe that if an exception is nevertheless considered (which they generally oppose) it should be limited to non-commercial uses. They consider that a broad and general text and data mining exception, covering both non-commercial and commercial uses, would be contrary to EU's international obligations. Respondents in this category are concerned that an exception could favour commercial operators, in particular news aggregators or commercial news monitoring services. They highlight that it is essential that the output of text and data mining does not become a substitutable product for the original works that are subject to mining.

Some respondents also point to the role that collective management could play in this area and a few suggest that if an exception is introduced, it should be linked to the payment of fair compensation to rightholders. The introduction of a remuneration right is also suggested as an alternative by some.

Publishers/producers/broadcasters

Publishers, in particular *Science, technology and medical (STM) publishers* indicate that they already meet requests and offer solutions allowing the possibility of mining texts and data. However, such requests are still rather limited in number, even if this is expected to grow. Licences are often granted under standard terms and at no cost to researchers who want to mine subscription-based content for the purposes of non-commercial scientific research.

STM publishers, as well as *book and newspaper publishers*, report that practical and innovative solutions based on licensing mechanisms are being developed to ensure the effective use of mining technologies in Europe. Some of these solutions are already successfully implemented by publishers and researchers. Others are being launched or soon will be. They refer to initiatives presented in the Licences for Europe dialogue, in particular a sample licence clause and the mining hub 'Prospect', developed in the context of the '*Cross-Ref*' initiative and the 'Text and data mining Declaration' signed by a number of STM publishers. They report that these initiatives make it possible to access cross-publisher content in one standardised format via a click-through licence for non-commercial uses. Other initiatives such as the digital clearing house 'PLS Cle*ar'* in the UK and a pilot project

from the CCC (Copyright Clearance Centre) are mentioned. STM publishers also report that they have developed licences for commercial uses of text and data mining in the pharmaceutical sector in collaboration with the 'Pharma Documentation Ring' (PDR).

With regards to the way forward, publishers generally oppose the introduction of a text and data mining exception. They consider that there is no evidence of market failure for text and data mining that would justify the introduction of an exception, and that text and data mining is best dealt with through market-based licensing. They indicate that an exception would affect the licensing offers that publishers are currently developing.

Moreover, according to these respondents, an exception would not solve issues other than copyright which are raised by text and data mining, such as the protection of data privacy, the risks of unfair competition and technical aspects which require the intervention and investments by publishers (e.g. to set up a specific technical environment, such as dedicated platforms from which researchers may download the content before mining it). Publishers are also concerned that an exception would increase the risk of damage to databases and infrastructure hosting their content when they are crawled by mining robots (as with an exception, they say, it will be more difficult for them to control access to these databases, in particular through contractual terms). More generally, some respondents also signal that an exception could give rise to abuses and facilitate piracy.

Intermediaries/distributors/other service provider

Many service providers - software companies in particular - refer to the dynamic market for text and data mining services, and to the new innovative solutions that are being developed in this area. In particular, new technologies for speech recognition, subtitling and software analytics, for example, rely on large amounts of data as input, including but not limited to materials found on the Internet. These technologies underpin the development of applications used in life sciences, humanities and health care and many other markets and applications.

Software producers and telecom providers are, in general, concerned with the legal uncertainty that surrounds text and data mining. Some consider that text and data mining does not, and should not, involve copyright or database rights. Generally, these service providers consider that text and data mining should not be subject to licensing (although some say they are already acquiring licences to engage in text and data mining). Technological protection measures are considered to be obstacles to mining as they prevent the downloading of large amounts of content and the application of text and data mining techniques.

On the other hand, other service providers that provide technical solutions for licensing (such as clearing centres), state that the rightholders with whom they work frequently report adverse implications from unauthorised mining of their websites and business models, particularly as Text and data mining-related crawling of websites poses security risks and can adversely affect website performance. Such respondents also highlight the risk of text and data mining facilitating the unauthorised creation of derivative works, and that it is not always possible to distinguish between a legitimate researcher and an entity who wishes to scan or copy content for piratical purposes.

With regard to the possible way forward, opinions diverge. Many service providers, in particular from the software and telecom industry, would favour the introduction of a new exception to copyright and to the database right to make it clear that text and data mining is not subject to authorisation from the rightholder. Alternatively, they believe that it should be clarified that text and data mining is not covered by the reproduction right and hence, is not copyright relevant. Some consider that text and data mining should be exempted from authorisation by encompassing it an open ended 'fair use' general clause. At the same time some service providers specifically say that they consider that the exception should only kicks in when the user has lawful access to content to be mined.

Another group of service providers argue that text and data mining licensing should be encouraged: for them, an exception would not solve several of the issues raised by text and data mining (e.g. data protection, unfair competition and technical needs).

Member States

Many of the Member States that responded to the public consultation recognise the benefit that text and data mining can offer to scientific research and highlight the need to deal with it appropriately and on the basis of sound evidence. Some Member States believe that the possibility to introduce a specific text and data mining exception in EU law should be considered. In particular, one Member State highlights the need to make sure that European researchers are not at a competitive disadvantage internationally. Some argue that, even within an exception-based approach, it would be important to maintain sufficient incentives for value-added services to be developed based on licences. One Member State points out that any exception should not give users free access

to content they would otherwise not have access to. Some Member States stress the need to make sure that the technical security of content repositories and databases is preserved.

Other Member States, on the other hand, would oppose legislative changes. These Member States stress that text and data mining is a new issue and that introducing legislation would therefore be premature, all the more since licences are being developed. More generally, reference is made to the need to comply with international obligations, in particular with the 'three-step test'. Some Member States also point to the need to further clarify whether existing exceptions, such as the one for research in Article 5(3)(a) of the InfoSoc Directive, already cover text and data mining.

3. Fair remuneration of authors and performers (Questions 72 to 74)

72. [In particular if you are an author/performer:] What is the best mechanism (or combination of mechanisms) to ensure that you receive an adequate remuneration for the exploitation of your works and performances?

73. Is there a need to act at the EU level (for instance to prohibit certain clauses in contracts)?

74. If you consider that the current rules are not effective, what would you suggest to address the shortcomings you identify?

With regard to the remuneration of authors and performers, the public consultation attempted to explore views on the best mechanism to ensure that creators receive adequate remuneration for the exploitation of their works and performances. Views were sought on the possible need to intervene at EU level and, if the existing rules are considered ineffective, on the suggested ways to address the shortcomings.

End users/consumers

Some users point out that many contracts for the exploitation of works were concluded before the emergence of digital content distribution, hence they do not explicitly provide for royalties for online exploitation. According to some, the way in which new online streaming services are licensed may circumvent the payment of digital royalties to artists and hence contravene the aim of ensuring appropriate remuneration for creators and right holders in the digital world.

The vast majority of end users/consumers consider that there is a need for EU intervention in this area in order to ensure adequate remuneration for authors/performers. Suggestions include the introduction of a 'use it or lose it' clause in legislation that would allow authors/performers to regain their rights if they are not exploited by the publisher/producer; or of a 'best-seller' clause that would give authors/performers the right to renegotiate their contract and increase their participation in the proceeds from exploitation under certain circumstances. Other suggestions include the obligation to conclude separate contracts for digital use, with terms being adjusted to this type of exploitation, and the prohibition of 'buy-out' contracts (one-off payment in exchange for the transfer of rights).

Institutional users

Institutional users generally consider that there is a need for the EU to act in this area. The provisions of the German Copyright Act, which aim at ensuring adequate remuneration for creators, are often cited as a possible model for EU intervention.

Some institutional users stress the importance of prohibiting certain contractual clauses, as well as confidentiality clauses in contracts as this widespread practice leads to the loss of information and bargaining power for authors/performers who enter into agreements with publishers/producers and service providers. Some respondents in this category argue in favour of an unwaivable right of remuneration for the benefit of authors and performers; others note that acting at an EU level would have added value at least in improving transparency. Some respondents, however, consider that this would be unnecessary and costly. Finally, certain respondents, due to the different economic and social conditions of the Member States, suggest leaving this matter to national legislation.

Authors/performers

Most authors and performers who responded report problems with contractual terms applied in different sectors of the creative industries. They do not question the need for the transfer of their rights to the publisher or the producer (i.e. the transferee) for the exploitation of their work or performance but they do argue that their weaker bargaining position in the market often leads to unfair contractual terms in their initial contracts. Authors and performers from the music and audio-visual sectors in particular, as well as from some segments of the print sector (e.g. journalists and translators) often mention that contractual terms are imposed on them.

The contractual terms that they consider problematic relate to a number of different issues. Firstly, respondents often mention that any contract that involves the transfer of rights in exchange for a one-off payment (a 'buy-out' contract), by definition, prevents their adequate or fair remuneration as the payment does not relate to the

use, and even less to the success, of their work or performance. It is very often raised that the contracts imply a global transfer of rights, going beyond what is necessary for the exploitation of the work or performance by the transferee and/or they contain clauses that imply a transfer of rights of future works or for yet-unknown forms of exploitation. They criticise the duration of the contract as it often coincides with the term of the copyright protection without the possibility of the author or performer being able to renegotiate or terminate the contract. Such contracts are often accompanied by non-disclosure agreements. Another matter that is frequently raised is the poor quality 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.

Authors and performers see a need for EU intervention in this area. With regard to contractual clauses, many argue that legislation should prohibit the global or general transfer of rights to the publisher or producer and the transfer of rights for yet-unknown forms of exploitation as well as the transfer or licensing of rights for future works. In specific circumstances, and especially where the transferee does not exploit the work, the author should have a reversion right (i.e. a possibility to regain his/her rights). Others suggest granting a right to renegotiate or terminate the contract in certain cases, setting a time-limit on the term of the contract, imposing so-called 'best-seller' clauses (a right to request the renegotiation of the contract under certain circumstances) and banning non-disclosure agreements by law. It is occasionally mentioned that these measures would not suit all authors and performers in all sectors equally, and that appropriate solutions have to be explored sector by sector. Many respondents also emphasise the need for imposing transparency with regards to accounts and regular reporting by the publisher or producer to the author or performer.

Moreover, authors and performers, in particular in the music and audio-visual sectors, often 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. In particular, the remuneration of an author or performer not only depends on the fair or unfair terms of the initial contract with the publisher or performer but also on the content of the multiplicity of contracts entered into by the transferee with broadcasters, online service providers, etc. for the exploitation of the work or performance. According to many authors and performers, in particular in the audio-visual sector, only the creation of an unwaivable remuneration right for the benefit of authors and performers, in particular if it is managed by collective management organisations, would be suitable to ensure adequate and fair remuneration in the case of online exploitation. Other authors and performers, in particular in countries with a strong tradition of collective bargaining, however express concerns that the introduction of an unwaivable remuneration right would reduce the value of the author's or performer's exclusive right and weaken their bargaining position, which traditionally relies on these exclusive rights.

A high number of respondents in this stakeholder group highlight the importance of collective bargaining in ensuring fair and adequate remuneration to authors and performers. Industrial agreements and model contracts can both improve their situation and counterbalance the weaker bargaining position of individuals. In this respect, the US system and German law are often cited as best practices. Competition law is often highlighted as a barrier to successful collective negotiations in the Member States and some authors and performers argue in favour of derogation to the competition rules to improve the situation in this respect. Some also encourage the Commission to foster a dialogue between stakeholders, at EU level, towards more flexible contracts.
Finally, some respondents (journalists and photographers, in particular) express concerns about the waiver or transfer of their moral rights and argue in favour of a legal ban on such contractual provisions.

Publishers/producers/broadcasters
Most publishers/producers/broadcasters are of the opinion that authors and performers are appropriately remunerated thanks to existing law and practice in all sectors of the creative industries. They consider that this area should be regulated by the market and the most important issue is ensuring that there is contractual freedom, freedom of negotiation and the right for an author to choose his/her representative. *Music publishers* advance the argument that the existing competition between them in the market is an important means to ensure the fair remuneration of authors. *Book publishers* underline that publishing contracts are almost always based on individual negotiations with authors. They also note that German rules on 'adequate remuneration' resulted in a drop in the translation market in the country. *Audio-visual and phonogram producers* often argue the decline of revenue in the industry is the result of piracy and not of the contractual relationship between producers and creators. They, as well as some broadcasters, underline that investment in creative content entails high financial risk and that more complex contractual arrangements would result in higher costs and consequently a decline in the competitiveness of the European creative industry. A number of respondents in this category underline the importance of the collective bargaining agreements that exist in a number of Member States. However,

newspaper publishers in particular argue that these arrangements should only be addressed at national level due to their close connection to labour law.

Most of these stakeholders do not think that there is any reason for the EU to intervene in this area (or argue that the EU lacks competence to intervene), because they consider that contract law is a national competence, and because there are differences between sectors which are best addressed at as low a level as possible. Newspaper publishers in particular point to the risks of a 'one-size-fits-all' approach. Stakeholders in this category also argue that there is no evidence underpinning the need for action at EU level. They strongly object to the introduction of an unwaivable right to remuneration managed by collective management organisations as they feel that this would lead to an increasing fragmentation of rights and would prevent the centralisation of rights in the hands of the producer, therefore making licensing slower and more difficult. They also believe this would increase administrative costs for creators and hamper the accessibility of content to consumers.

It is often proposed that Europe-wide or global technological development towards a database on rights ownership as well as towards managing rights in a machine-readable way (tracking usages, etc.) should be encouraged. However, even when the idea of a common EU platform as a centralised location for licensing and the collection of remuneration is supported, the respondents argue that it should only function as the 'umbrella' gathering information and acting on behalf of the national organisations without interfering in contractual matters. Finally, some stakeholders in this category suggest that an obligation imposed on online platforms to co-finance audio-visual productions, as is the case for traditional broadcasters, would further improve the situation for creators.

Collective management organisations (CMOs)

CMOs usually underline the importance of collective rights management in assisting individual authors and performers so they can effectively enforce their rights. In their view, collective management not only facilitates rights clearance and increases legal certainty but is also the best solution to ensure the fair and adequate remuneration of creators as it rebalances unequal bargaining positions in the market. Some note that the exclusivity of mandates is necessary so that CMOs can play this role. They also refer to the recently adopted Collective Rights Management Directive as a guarantee of the transparency and accountability of these organisations.

Like authors and performers, a number of CMOs report what they consider to be unfair contractual practices and a majority see a need for intervention at EU level along the same lines as the former group of stakeholders.

Finally, CMOs, particularly in the audio-visual sector and, to some extent, in the music sector, strongly argue in favour of an unwaivable remuneration right in relation to the making available right, that should be based on the revenues generated from online distribution and which is collected by collective management organisations from the final distributor (e.g. from online platforms). They cite the remuneration right granted for performers by Article 8(2) of the Rental and Lending Directive, for example, for the broadcasting and communication to the public of phonograms.

Intermediaries/distributors/other service providers

Intermediaries, distributors and service providers who responded underline the importance of adequate or fair remuneration for authors and performers. They generally argue in favour of maintaining contractual freedom while some note that there is a need to ensure fairer contractual terms between the author or performer and the publisher or producer by legislative intervention. These respondents generally can see no reason to act at EU level.

Some respondents in this category consider that the remuneration of creators is a matter for the initial contract with the producer or the publisher; hence they do not see the introduction of an unwaivable remuneration right as a suitable solution. Some raise concerns about the effect that such a right may have on the provision of multi-territorial or pan-European services, if such remuneration is due and collected in each and every Member State. Some other consider that a collectively managed remuneration right would increase the role and management fees of collective management organisations but would benefit authors and performers to a lesser extent. They also note that the introduction of such a remuneration right would reduce the value of the exclusive rights and consequently the payments distributors were willing to make to the producer or publisher.

Others note that an increasing number of creators use alternative methods of getting their works and performances to the public (e.g. by directly placing it online). These authors and performers may have very different sources of revenue to those using traditional channels and should be taken into account in any policy intervention.

Finally, intermediaries, distributors and service providers often emphasise that levies should not be considered as a solution for ensuring the remuneration of authors and performers. This issue should be addressed separately.

Member States

Member States which responded highlight the importance of appropriate and fair remuneration for authors and performers but consider that it is for Member States to decide whether or not to intervene in this matter by legislative means. One Member State underlines the need for a thorough impact assessment before any policy intervention is proposed.

Other

Other respondents provided divergent replies but most of them see a need for action at EU level in order to ensure an adequate remuneration for authors and performers. Suggestions include the harmonisation of certain contractual terms (the prohibition of 'buy-out' contracts, specifying that the transfer of rights can be for a limited time, etc.), an unwaivable remuneration right for some forms of exploitation and the encouragement of collective bargaining. Some note that while an overarching harmonisation of copyright contract law does not seem realistic, targeted provisions to address certain question (e.g. written form of contracts) seem feasible and could add value. Any provisions however should seek a balanced split of economic risk between the creator and the exploiter. Other respondents, on the contrary, are against any intervention and favour the freedom of contract and negotiation.

ANNEX 2C – SYNOPSIS REPORT ON THE RESPONSES TO THE PUBLIC CONSULTATION ON THE REVIEW OF THE SATELLITE AND CABLE DIRECTIVE

1. Introduction

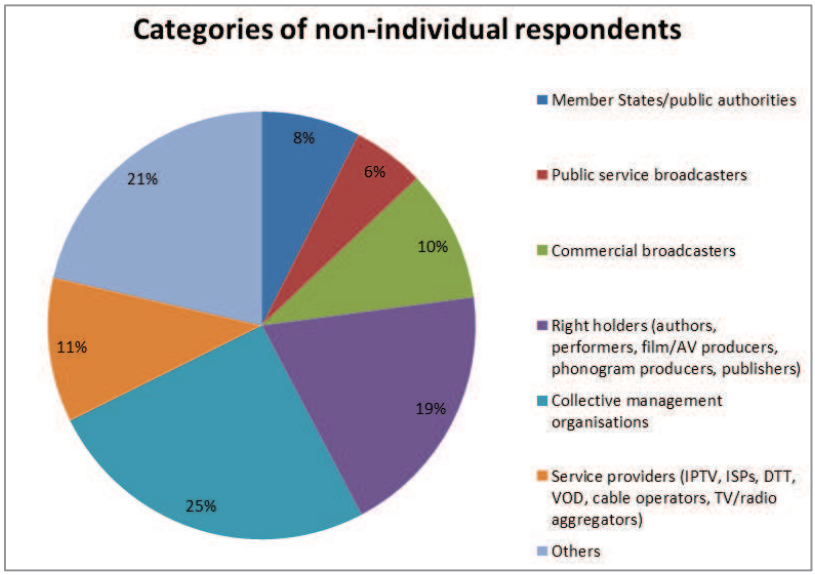
The public consultation on the review of Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission (the "Directive") was held from 24 August 2015 until 16 November 2015. This review is part of the Digital Single Market Strategy which has as one of its objectives to enhance cross-border access to TV and radio programmes in the European Union.

This report provides an overview of the responses received, grouping them by category of stakeholder. The responses of those stakeholders who gave their consent to publication are also publicly available.

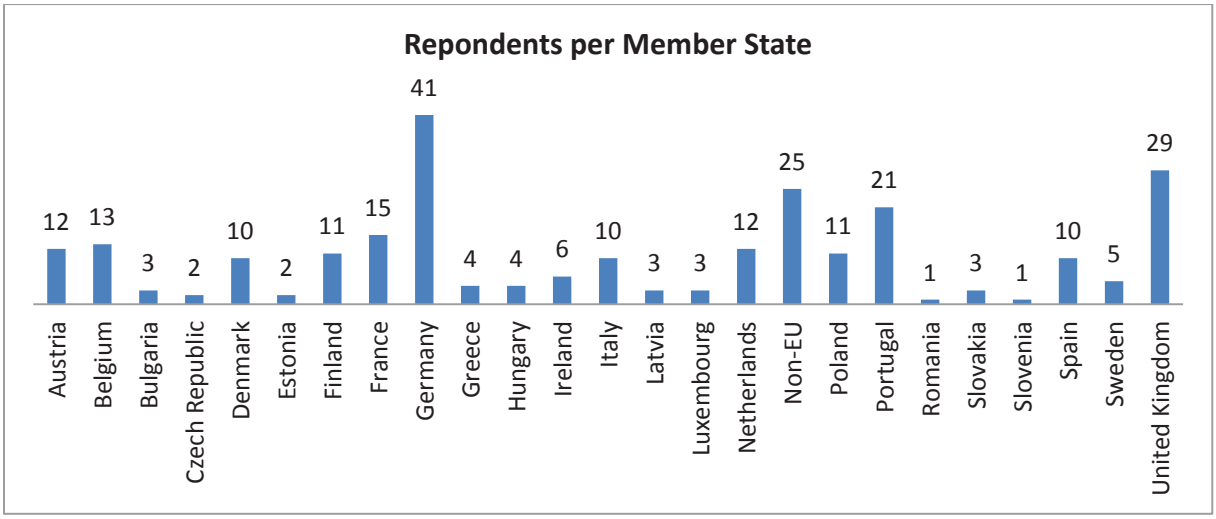
2. Overview of responses: statistics

The public consultation gathered a total of 257 replies. Of these responses, 56 are from individuals and 201 are from organisations, companies or institutions ("non-individual respondents").

The below graph provides a breakdown of non-individual respondents by category.



As to the geographical distribution of all responses, contributions came from 24 EU Member States. The largest number of responses came from Germany (41), the United Kingdom (29) and Portugal (21). 25 responses are from non-EU countries.



3. Analysis of responses

3.1. The principle of country of origin

Respondents were asked about the functioning of the existing rules applicable to clearance of copyright and related rights for satellite broadcasting (the "country of origin" principle).

Respondents were also asked about their views on the impact of a possible extension of the application of the principle to the different online services.

Evaluation of the current provisions

Overall, about half of the respondents consider that the existing provisions facilitated the clearance of rights at least to some extent. Respondents' views are split as to whether the application of the country of origin principle has increased consumers' access to satellite broadcasting services across borders.

A significant part of **consumers** and their representatives raise that the current provisions of the Directive do not sufficiently ensure access to content available in other Member States. Some consumers underline that these problems concern not only premium content (such as sports and films) but also other content, for instance cultural programmes.

The majority of **Member States' public authorities** consider that the country of origin principle facilitated the clearance of rights. Some of them, however, underline that the practical application of this principle is limited for audiovisual.

The majority of **right holders** do not consider that the application of the country of origin principle facilitates the clearance of rights. Right holders indicate that multi-territorial licences are available and that therefore there are no problems with acquiring them. In their view, cross-border offerings of content are limited because of insufficient consumer demand, language barriers as well as commercial choices of service providers. Certain right holders, in particular *film/AV producers*, argue that the application of the country of origin principle diminishes the scope of their rights because it limits their freedom to license the rights as they see fit.

A significant proportion of **collective management organisations (CMOs)** considers that the application of the principle of country of origin has not facilitated copyright clearance. The majority of CMOs do not have an opinion on whether its application has increased consumers' cross-border access to TV and radio programmes.

The vast majority of **broadcasters** consider that the country of origin principle facilitates the clearance of rights at least to some extent. Also, they generally consider that this principle increased consumers' cross-border access to satellite broadcasting services. A number of *commercial broadcasters* submit that there are obstacles to cross-border access which are not related to copyright. Similarly to right holders, they mention insufficient consumers' demand and language barriers.

Other service providers (internet service providers (ISPs), internet protocol television (IPTV) operators, digital terrestrial television (DTT) providers, cable operators, telecommunication network operators and video on demand (VOD) operators) do not have much experience with the practical application of the country of origin principle. Yet, the majority of them consider that it facilitates the right clearance and cross-border access by consumers.

Assessment of the need for the extension

Views are divided as concerns the need of an extension of the country of origin principle to online transmissions.

Consumers representatives call for a broad extension of the country of origin principle to cover all online services. In addition, certain argue that introducing this principle with regard to online transmissions would not be sufficient on its own - such an intervention would need to be accompanied by a rule explicitly prohibiting technical or contractual restrictions on "passive sales" across EU borders (restrictions on responding to unsolicited requests from consumers residing in other Member States).

While a number of **Member States/public authorities** are open for discussions with the view of enabling more cross-border access to content, there is a strong call for caution. In their view, any reform should not undermine contractual freedom, a high level of protection of intellectual property and the exclusivity of rights and should ensure a level playing field. Certain Member States submit that they are against any extension of the application of the country of origin principle because of risks of unintended negative consequences, especially for the audiovisual sector.

Right holders are, in general, against any extension of the application of the country of origin principle. They consider that any such extension would de facto lead to pan-European licences and would restrict their ability to license rights on a territorial basis. They are in particular concerned about an extension which would cover broadcasters' VOD services and, even more so, any online services by any service providers. The main reasons given against it are:

- negative consequences for the value chain of the production (e.g. financing of AV works) and the distribution of creative content (notably for AV works, as producers would no longer be able to rely on pre-sales of distribution rights with territorial exclusivity);
- right holders would be no longer able to decide for which territories in the EU they license their rights;
- not needed, as voluntary multi-territorial licensing schemes already exist;
- the application of the principle to online services and the consequential focus of the licensing system on the country of origin could have a negative impact on creators' revenues;
- risk of forum shopping by service providers and more complicated enforcement by right holders;
- risk that rights in musical works may be withdrawn from CMOs if right holders come to the conclusion that CMOs cannot ensure the effective collective management of rights across the entire EU.

CMOs do not favour any extension of the principle. They raise the same arguments against it as right holders.

Broadcasters' views on the extension are split along the public service versus commercial broadcaster line. However, all broadcasters share the view that in all cases full contractual freedom should be maintained, enabling them to limit the exploitation of rights by territories.

The majority of *commercial broadcasters* argue that an extension of the principle would amount to pan-European licences. They raise the same arguments against the extension as right holders. By contrast, all *public service broadcasters* as well as commercial radios call for the application of the principle to EU broadcasters' transmissions by any technological means as well as to all broadcast-related online services. The main reasons given by those in favour of such an extension are:

- it would enable broadcasters to expand their services to other Member States;
- it would provide broadcasters with legal certainty;
- it would reduce significant administrative burden and costs associated with clearance of rights;
- it would provide for additional revenues for right holders by ensuring a wider dissemination of TV and radio programmes and, therefore, of their works and other protected subject matter.

Views of **other service providers** vary, though most of them call for a careful and measured approach. *ISPs* express most favourable views: they argue that it would enable digital content providers to offer services EU-wide. *Telecommunications network operators, cable operators, IPTV operators, DTT providers and VOD operators* are more cautious, even though some of them indicate that they favour technology-neutral approach. All of service providers other than broadcasters underline the importance of a level playing field. Also, many of them argue that contractual freedom should be maintained. They claim that if the extension of the application of the principle were to lead to pan-European licencing, it would put European and local market players at a competitive disadvantage in relation to multinational operators as they would not have the means to acquire pan-European licences.

3.2. The management of retransmission rights

First, respondents were asked about the existing rules applicable to clearance of copyright and related rights for the simultaneous cable retransmission. Second, respondents were asked about the impact of a possible extension of the mandatory collective management regime to different forms of online simultaneous retransmissions.

Evaluation of the current provisions

The majority of respondents consider that the Directive has facilitated the clearance of rights for the simultaneous retransmission by cable of programmes broadcast from other Member States and has helped consumers to have more access to broadcasting services across borders.

The few **consumers** who have replied to the questions related to cable retransmission have a rather negative view of the effectiveness of the current provisions and the degree to which they increased consumers' access to broadcasting services. Some of them stress the existence of gaps in the offer of channels on cable networks.

Member States / public authorities consider that the Directive has facilitated the clearance of rights for cable retransmission and has helped increasing consumers' access to broadcasting services across the EU. Some, however, underline that sometimes it is not clear which rights are managed by collective management organisations and which are managed by broadcasters.

The majority of **right holders** do not think that the current cable retransmission rules have either facilitated the clearance of rights or have resulted in greater consumers' access to broadcasting services across the EU. *Phonogram producers*, *music publishers* and *audiovisual producers* consider that they are adversely affected by these rules, because they cannot issue licences on fair market terms. Some right holders highlight the limited consumer demand for cross-border access to audiovisual content services or the limited business demand for foreign TV channels or multi-territorial licences. Respondents representing *authors and performers* have a much more positive view.

The vast majority of **collective management organisations (CMOs)** consider that the Directive has facilitated the clearance of rights and has helped increasing consumers' access to broadcasting services across the EU.

Similarly, a clear majority of **broadcasters** evaluate positively the current provisions and their role in ensuring consumers' access to broadcasting services across the EU. This is especially the case for *public service broadcasters*. However, some *commercial broadcasters* point to the scope for double payments in case CMOs assert their rights to license all rights irrespective whether they have been transferred to broadcasters or not.

Finally, the majority of **other service providers** (including cable operators) also consider that the Directive has facilitated the clearance of rights and has helped increasing consumers' access to broadcasting services across the EU. Still, according to some of them, it is not always clear which rights are managed by CMOs and which by broadcasters.

Assessment of the need for the extension

The few **consumers** who have replied to these questions tend to consider that the extension of the regime to the simultaneous retransmission of TV and radio programmes on platforms other than cable is likely to increase the cross-border accessibility of online services. They also tend to oppose maintaining the different treatment of rights held by broadcasting organisations.

Member States/public authorities, but also right holders, CMOs and broadcasters, recall that voluntary collective management, extended collective licensing and individual licensing are all used to clear rights relevant for the different new TV and radio transmission and re-transmission methods and services.

In this respect some Member States argue that voluntary approaches lead to legal uncertainty since service providers cannot be sure that they have cleared all the rights or that the distinction between transmission and retransmission is not always clear.

Regarding the possible extension of the mandatory collective management regime to the simultaneous retransmissions on platforms other than cable, some Member States note that certain platforms (e.g. IPTV) are already covered by national provisions. Others are in favour of the extension.

Finally, the Member States that expressed an opinion on a possible introduction of a system of extended collective licensing conveyed concern with regard to the possibility of using opt-outs, the risk of repertoire fragmentation and the lower level of legal certainty for retransmission service providers compared to mandatory collective management.

Right holders underline the important role of individual licensing and argue that current licensing approaches work well and no changes are required.

Most right holders are against the possible extension of the mandatory collective management regime to the simultaneous retransmissions on platforms other than cable due to potential disruptive effect on the markets.

Right holders also argue that extending the mandatory collective management regime could raise questions regarding compliance with international copyright obligations.

Some right holders point to the potential negative effect on the value of rights.

CMOs' views on the licensing of the different new TV and radio transmission and retransmission methods and services differ: some note that such "new services" are sometimes reluctant to engage in licensing; others consider that the current licensing approaches, notably voluntary collective management, work well. Some are concerned that the "direct injection" technology has led to challenges to the retransmission regime by cable operators in some Member States.

The vast majority of CMOs are in favour of a possible extension of the mandatory collective management regime and do not find it problematic in the context of the international copyright obligations. Many insist that the extension should be limited to "closed environments" or services functioning "in a territorially limited way" because those services resemble cable retransmission services and should benefit from a level playing field.

Some CMOs, alongside some *right holders* and *other service providers*, see a need to abolish or change the provisions on the different treatment of rights held by broadcasting organisations, e.g. by making the transfer of rights from audiovisual producers to broadcasters conditional on the payment of effective remuneration to producers.

Finally, while for some CMOs extended collective licensing is a well-working and recommendable system, many expressed concern as regards the possibility of using opt-outs, the risk of repertoire fragmentation and the lower level of legal certainty for retransmission service providers compared to mandatory collective management.

Many **broadcasters** see value in individual licensing of the different new TV and radio transmission and retransmission methods and services and consider that current licencing approaches work well. However, some *public service broadcasters* highlight the lack of an effective licensing system for third parties' services allowing interactive access to broadcasters' content (e.g. catch-up TV).

Broadcasters are divided on the question of the possible extension of the mandatory collective management: *commercial broadcasters* tend to oppose it, while *public service broadcasters* support the extension and argue that no problems of compliance with the international copyright obligations would arise. Most of the latter suggest limiting the extension to "closed" networks or territorially-limited services provided using open internet.

Both *commercial broadcasters* and *public service broadcasters* (alongside some right holders, cable operators and CMOs) consider that the different treatment of rights held by broadcasting organisations should be maintained.

Broadcasters are also divided on the merits of introducing a system of extended collective licensing: while for many *commercial broadcasters* direct licensing should be favoured whenever possible, some *public service broadcasters* support using extended collective licensing to enable the provision by third parties of services giving access to broadcasters' content on an interactive basis where such content is clearly related to broadcasters' linear (non-interactive) transmissions.

A range of **other service providers** complain, in general, about difficulties in clearing copyright for innovative audiovisual services. Some stress that the distinction between transmission and retransmission is not always clear.

Cable and telecoms operators tend to be in favour of the possible extension of the mandatory collective management regime and consider that it could result in greater cross-border accessibility of online services. While some of them insist that the extension should be limited to "closed" networks, others argue that it should not be tied to particular means of communication, devices or "technology environments". Nevertheless, some VOD providers see a danger that the extension could result in competitive distortions.

3.2. The mediation system and obligation to negotiate

First, respondents were asked if they had used the existing negotiation and mediation mechanisms established under the Directive. They were invited to describe their experience. Second, respondents were asked to give their view about a possible extension of these rules to facilitate the cross border availability of online services, and they were invited to suggest any other measure that could facilitate contractual solutions and negotiations in good faith.

Evaluation of the current provisions

Overall the replies to the public consultation indicate that the mediation mechanism has had very limited practical relevance.

Consumers did not express any particular view concerning the application of the current provisions.

Member States and **public authorities** in general did not address this issue.

Right holders and most of **collective management organisations (CMOs), broadcasters** and **other service providers** such as *ISPs*, *IPTVs*, *DTTs* and *telecom operators* indicated that the mechanism has not been used or has been used only occasionally. These respondents list as the main reasons for this situation the fact that the negotiations usually bring expected results and hence there is no need to resort to mediation, the non-existence of the appropriate mediation mechanism or alternatively the inefficiency of the existing system. On the latter, the respondents pointed to time-consuming procedures, deficiencies as to the confidentiality of the process, high costs involved and the fact that the results of mediation are not binding for the parties. Occasional use of the mechanism and the overall positive role played by the mechanism was reported by *cable operators* and a limited number of CMOs. Despite a very limited practical relevance of the mechanism, some CMOs, broadcasters and IPTV operators support its application but complemented and reinforced e.g. by a firm timeframe to ensure efficient process.

Assessment of the need for the extension

The majority of respondents do not support the extension of the application of the mediation mechanism.

Consumers did not express any particular view.

Out of the **Member States/public authorities** which responded to the public consultation only one respondent commented on this matter, supporting the possible extension of the negotiation mechanism while also expressing doubts about its practical implementation.

In general **right holders** are against the extension of the application of the mechanism. The vast majority of *authors* oppose the extension, due to their negative view of the current mechanism's application. They also do not see the need for additional measures. *Film/AV producers* stressed their preference for freedom of commercial negotiations. All *phonogram producers* were against the extension of the mediation to online services, indicating potential interferences with right holders' freedom to exercise their exclusive rights. As regards new measures, they all referred to the need for a level playing field and a better balance in the digital markets, demanding that all online services which make the content available to the public comply with right holders' exclusive rights (and are not sheltered by Articles 12-14 of the E-commerce Directive[31]). Most of *publishers* did not express any particular opinion. As regards additional facilitating measures, they mentioned the need to engage stakeholders in cooperation on enforcement issues as well as the need to encourage investment in new business models.

Most **collective management organisations (CMOs)** were sceptical about the possible extension arguing that the current system has had only limited results. Some indicated that the Collective Rights Management Directive[32] already contained provisions in this respect covering CMOs' activities, while other highlighted their preference for freedom to exercise exclusive rights. Only a minority of CMOs supported the idea of extending this mechanism to online services.

CMOs suggested a variety of possible measures for facilitating contractual solutions, such as greater transparency and quality of data and information, the obligation to conduct negotiations in good faith, the recognition of CMOs' mandate to represent audiovisual authors and the need for all online services to comply with the rules related to right holders' exclusive rights.

Broadcasters are split on the issue. Most of *public broadcasters* responding to this question supported the extension of the mediation to all broadcasters' services, while only few opposed it. They mentioned the need for effective, binding and cost-efficient mechanisms, called for extending the application to any use covered by the Directive and recommended the use of similar mechanisms as those already present in the Collective Rights Management Directive. Most of *commercial broadcasters* are reluctant as regards the extension of the mediation mechanism.

Other service providers such as *TV and radio aggregators*, *VOD and DTT operators* did not provide any views on the potential extension. *ISPs*, *IPTV operators*, *cable operators and some other service providers* supported the extension on condition that the current lack of effectiveness of the mediation mechanism is redressed. As regards additional measures, some recommended to focus on the respect of competition law and the Collective Rights Management Directive by the CMOs as well as on the facilitation of market entry for new businesses.

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31 Directive 2000/31/EC of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market, OJ L 178, 17.7.2000, p. 1–16.

32 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.

Some *cable operators* mentioned the need for a more transparent, rapid and non-discriminatory mediation procedure.

ANNEX 3 – WHO IS AFFECTED BY THE INITIATIVE AND HOW

This annex sets out the practical implications of the initiative for affected stakeholders, namely right holders, CMOs and service providers, as well as for public authorities in Member States. It focuses on the key obligations foreseen under the preferred policy options (see section 6.1) and indicates how these obligations could be fulfilled. Indications of possible costs are provided where available.

Practical implications of the initiative in the area of "access to content"

Online transmissions of broadcasting organisations

The introduction of the "country of origin" rule for the clearance of rights (Option 2 under section 3.2.3.1) would not generate any obligation for businesses or public authorities.

The measure would provide that the licence fee payable to right holders have to take into account all aspects of the online transmission of the broadcast, including the audience, unless agreed otherwise with right holders. In practice, where licence fees are based on the actual or potential audience or calculated on a 'per-view' / 'per-stream' basis, or as a percentage of broadcasters' revenues, this would not have any significant impact. Otherwise, the contracts would need to be renegotiated during the transition period, but the extent of such renegotiations is expected to be limited.

Digital retransmissions of TV and radio programmes

The introduction of mandatory collective management of rights to retransmissions by IPTV or other retransmission services over closed electronic communication networks (Option 1 under section 3.2.3.2) would impose obligations both on right holders and retransmission services: right holders would be obliged to have their retransmissions rights managed by CMOs (or broadcasters) and IPTV and similar retransmission services would be obliged to obtain such rights through CMOs (or through broadcasters).

In practice, it is likely that the existing CMOs representing right holders for the purpose of cable retransmission rights would be in charge of managing retransmission rights for IPTV and other retransmission services offered over closed networks. The possibility to use existing structures of collective management to new retransmission service providers would therefore allow this option to be implemented with limited costs. Also, a number of the CMOs are already licensing rights to such new retransmission services (in such cases the implementation of the proposed rule would not result in any additional cost).

Access to and availability of EU audiovisual works on VoD platforms

The negotiation mechanism aimed at addressing problems related to the licensing of online rights for VoD exploitation (Option 2 under section 3.3.2) would create an obligation for Member States to identify or create an impartial instance to facilitate negotiation between the relevant parties.

The possible costs for MS are assessed under section 3.3.3 (impacts of Option 2). The one-off costs are expected to be limited, since MS could rely on existing bodies with the relevant expertise in the AV sector to implement the negotiation mechanism. The operating costs would vary according to the structure of the negotiation body, the choices made by MS on

whether the parties resorting to the negotiation mechanism should bear part of the costs, and the number of cases. Examples of existing arbitration or mediation mechanisms are presented in section 3.3.3 in order to estimate the range of operating costs.

Out-of-commerce (OOC) works in the collections of cultural heritage institutions

The preferred option (Option 2 under section 3.4.2) does not include any obligation for right holders or cultural heritage institutions to conclude licensing agreements for the digitisation and dissemination of OOC works.

When such licensing agreements are concluded and if the use is intended for cross-border effect within the EU, one of the contracting parties or another other entity (as determined nationally) would be required to publish relevant information concerning the OOC collection to be digitised and/or disseminated in the EU transparency portal to be created and managed by the EU Intellectual Property Office (EUIPO). The administrative burden is expected to be limited because such information would have to be available for the purposes of the national agreement anyway.

Practical implications of the initiative in the area of exceptions

Use of protected content in digital and cross-border teaching activities

The introduction of a mandatory exception for digital and online uses in the context of illustration for teaching (Option 3 under section 4.2.2) is not expected to generate any obligation for businesses or public authorities, except in MS that would decide to use the flexibility foreseen under this Option and make the exception subject to the availability of licences:

In this case, Member States would have to take specific measures to ensure the availability and visibility of licences for educational establishments. A wide range of measures could be envisaged by MS: stakeholder dialogue to encourage the development of specific educational licensing schemes by CMOs and right holders; information campaign targeted at educational establishments and teachers to make the existing licensing schemes more visible; development of online verification tools to check the availability of licences by work or type of works. Given that the measures to be taken would be at the discretion of Member States, the costs are difficult to estimate.

Text and data mining

The introduction of a mandatory exception for text and data mining benefitting public interest research organisations (Option 3 under section 4.3.2) is not expected to generate any obligation for businesses or public authorities. In particular, the lawful access condition which is a condition for the exception to apply means that right holders of the content being mined would not be required to make the content available for mining in specific formats (different from the format of the content made available for the purposes of the lawful access).

Preservation of cultural heritage

The introduction of a mandatory exception for preservation purposes by cultural heritage institutions (Option 2 under section 4.4.2) is not expected to generate any obligation for businesses or public authorities.

Practical implications of the initiative in the area of "well-functioning market place"

Use of protected content by online services providers storing and giving access to user uploaded content

The legal intervention (Option 2 under section 5.2.2) imposes an obligation on online services storing and giving access to large amounts of user uploaded content to put in place

appropriate and proportionate content identification technologies and to provide sufficient transparency to right holders with regard to the functioning of the deployed technologies. The services would also be obliged to put in place appropriate procedures allowing users to contest limitations on the uploaded content. Compliance costs can be expected for the online service providers as a result of the possible investments needed to put in place the required measures (where online service providers are not yet using such technologies) and procedures. A more detailed assessment of the impacts can be found in section 5.2.3 of the impact assessment.

Publishers' right

The introduction of a new related right for press publishers (Option 2 under section 5.3.2) would not create as such any specific obligations for businesses or public authorities. The same goes with the clarification in EU legislation concerning publishers' ability to claim compensation for uses under exceptions.

Remuneration of authors and performers

The preferred option (Option 3 under section 5.4.2) includes reporting obligations on businesses (notably publishers, producers, broadcasters) which have contractual relationships with creators (authors or performers). The reporting should, in particular, include information on the modes of exploitation of the works or performances and on the corresponding revenues. The impacts of such obligation, including in terms of compliance costs, are assessed in section 5.4.3 (impacts of Option 2).

This option also foresees an obligation for Member States to organise stakeholders' dialogues. The costs of organising such dialogues would vary according to the number of stakeholders involved and the number of meetings required.

Finally, MS would be required to set up a dispute resolution mechanism. The costs for MS are assessed in section 5.4.3 (impacts of Option 3). 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 collective societies 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 per year.

ANNEX 4 – THE COPYRIGHT REVIEW PROCESS: SUMMARY OF THE MAIN RELEVANT FINDINGS

1.1. Purpose and scope of this Annex

This Annex summarises the key relevant findings of the process of review of the EU copyright rules carried out by the Commission in the period 2013-2016 (See Section 1.2. of the main IA Report) as they are relevant for the subjects presented in this Impact Assessment.

With the copyright review process, the Commission intended at the same time to assess the functioning of the existing copyright rules (retrospective analysis) and to devise possible changes to these rules with the declared objective to "ensure that copyright and copyright-related practices stay fit for purpose in the new digital context" (Communication from the Commission on content in the Digital Single Market of 18 December 2012[33]).

The copyright review process started before the adoption of the Commission's Better Regulation Agenda in May 2015,[34] and the related guidelines. Therefore, a formal evaluation process within the meaning of Better Regulation was not carried out. However, a retrospective assessment of the existing rules was done and it formed a key element of the analysis presented in the main IA report in particular as regards the definition of the problems to be addressed. Accordingly, even if not formally subject to it, the copyright review was carried out in the spirit of the Better Regulation Agenda, according to which "*major policies should be continuously assessed and evaluated over their lifetime to ensure they stay fit for purpose*" and "*policy preparation should be supported by both retrospective performance evaluations and forward-looking impact assessments*".

This Annex encompasses those subjects covered by the review process and by the IA that are directly related to existing EU copyright rules or policies: the exceptions on illustration for teaching, research (as it relates to text and data mining) and on specific acts of reproductions (as it relates to preservation), as well as the digitisation and dissemination of out-of-commerce works (often referred to simply as "mass digitisation"). In doing so, it focuses only on whether existing provisions and policies have delivered expected outputs and does not aim at presenting a complete analysis of the reasons behind. To the extent relevant, this analysis is presented in the problem definition sections of each of those subjects in the main IA report.

For each topic reference is made in this document to the existing EU copyright legislative framework (and, where relevant, soft law and policy) as well as to the preparatory work undertaken by the Commission in the context of the review process and the key relevant results emerged. In some cases the same source (e.g. studies or public consultations encompassing several areas) is relevant for more than one subject. When this is the case, the same source is mentioned under different subject-specific sections of this Annex (sections 2 and 3), with the explanation of how it specifically relates to each topic of the review.

[33] COM(2012) 789 final.
[34] COM(2015) 215 final.

Transparency for authors and creators, The use of protected content by online services storing and giving access to large amount of content uploaded by the users, rights in publications and fair remuneration in contracts of authors and performers – i.e. the topics mentioned under section 5 of the IA ("Achieving a well-functioning market place for Copyright") – are not specifically discussed in this Annex as no EU copyright rules exist in these areas. Evidence collected to inform the IA on these three topics, including the relevant public consultations, is described in Annexes 1 and 2A.

This Annex does not extend either to the REFIT evaluation of Directive 93/83/EEC ('the Satellite and Cable Directive').[35] This REFIT evaluation, which took place against the backdrop of the Digital Single Market Strategy,[36] is described separately, in a separate Staff Working Document.Stakeholder consultations and studies carried out during the review process also covered aspects of the existing copyright rules which are not discussed in the IA nor directly form the part of the copyright modernisation initiative backed by this IA (see Section 1.2. of the main IA report). These topics are not discussed in this Annex. Additional information on the findings of the review process including as regards areas not covered by the IA (in particular all the studies commissioned in the context of the review process as well as the summary results of the public consultation on the review of the EU copyright rules conducted between 2013 and 2014) can be found in the website http://ec.europa.eu (pages related to the EU copyright policy).[37]

1.2. The EU copyright rules covered by the review process: notably the InfoSoc Directive

The EU copyright framework is composed by several directives which have been adopted over the last twenty-five years. A number of these directives cover specific aspects of copyright and/or specific subject matters of protection. The general framework of EU rules on rights and exceptions and limitations is set out in the InfoSoc Directive. Therefore, even if not strictly confined to this directive, worked carried out in the context of the process of review of the EU copyright rules has particularly focussed on this instrument.

As regards the topics specifically covered in this Annex, rules on exceptions and limitations on illustration for teaching and research are laid down in particular in Article 5(3)(a) of the InfoSoc Directive[38] and rules on exceptions and limitations allowing cultural heritage institutions to carry out specific acts of reproduction (relevant in particular for preservation purposes) are laid down in Article 5(2)(c) of the InfoSoc Directive. The mass digitisation of out-of-commerce works is not covered by specific existing EU rules but has been the subject of non-legislative policy action at EU level over the last few years.

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

36 COM(2015) 192 final.

37 Studies are available at: http://ec.europa.eu/internal_market/copyright/docs/studies/; the summary of the 2013/2014 public consultation at http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm

38 OJ L 167, 22.6.2001, p. 10. Rules on exceptions and limitations on teaching and research are also laid down, in a similar way, in Articles 6(2)(b) and 9(b) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases, and Article 10(1)(d) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property. See also infra, section 2.1.

The InfoSoc Directive was adopted on 22 June 2001 (the initial Commission proposal had been tabled on 10 December 1997 and an amended proposal on 21 May 1999). It had to be implemented by Member States (MS) in national law by 22 December 2002. It was one of the centrepieces of the Lisbon Agenda of 2000, which aimed to make the European Union "the most dynamic and competitive knowledge-based economy in the world" by 2010.

The adoption of the directive marked the conclusion of several years of Commission's preliminary work on the challenges brought about for the information society by the emergence of the digital networked environment. One of the key documents published on the issue was the Commission's Green Paper of 1995 on Copyright and Related Rights in the Information Society.[39]

The explanatory memorandum to the proposal explains[40] that this directive was designed to provide a harmonised and appropriate European legal framework for copyright and related rights in the (then nascent) information society. It aimed at complementing the existing framework so as to "*ensure the smooth functioning of the Internal Market and bring about a favourable environment which protects and stimulates creativity and innovative activities*" within the EU. Recital 1 of the directive recalls that "*the Treaty provides for the establishment of an internal market ...*" and that "*Harmonisation of the laws of the MS on copyright and related rights contributes to the achievement of these objectives*". As recital 2 in the preamble to the directive clarifies, it was considered that a favourable legal framework at EU level which fosters the development of the information society in Europe "*requires, inter alia, the existence of an internal market for new products and services*" and "*copyright and related rights play an important role in this context as they protect and stimulate the development and marketing of new products and services and the creation and exploitation of their creative content.*"

In particular, action was considered necessary in two areas: "*first, through harmonised legal protection, by adapting copyright and related rights to the new risks and opportunities, in order to achieve a level playing field for copyright protection across national borders to allow the Internal Market to become a reality for new products and services containing intellectual property. Secondly, on the technological side, by developing adequate systems allowing for electronic rights management and protection.*"[41] As recital 9 clarifies, it was considered that copyright and related rights "*are crucial to the intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interest of authors, performers, producers, consumers, culture, industry and the public at large*."

Moreover the InfoSoc Directive aimed at bringing EU copyright rules in line with international obligations. As recital 15 recalls,[42] the Diplomatic Conference held under the auspices of the World Intellectual Property Organisation (WIPO) in December 1996 led to the adoption of two (then new) treaties, which constitute a major step forward in international protection of copyright and related rights: the WIPO Copyright Treaty[43] the WIPO Performances and Phonograms Treaty.[44] At the time the directive was adopted, both treaties

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39 COM(95) 382 final.

40 Explanatory memorandum to the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, COM(97) 628 final, p. 2 point 1.

41 *Ivi*, p. 3 point 4.

42 In the same sense see also Explanatory memorandum, cit., p. 3 point 5.

43 http://www.wipo.int/treaties/en/ip/wct/

44 http://www.wipo.int/treaties/en/ip/wppt/

required to be implemented in the EU in the light of the acquis and of the needs of the internal market.

These general objectives also inform the specific rules of the InfoSoc Directive in the area of exceptions, and therefore have to be taken into account when looking retrospectively at how specific rules of the directive have been working overtime as regards the relevant topics covered by the copyright modernisation IA. The specific rules and objectives as regards the exceptions on teaching and research and on specific acts of reproduction are described in each of the section below, which summarise the findings of the review process in these areas.

2. The main findings of the review process in the area of exceptions and limitations covered by the copyright modernisation impact assessment

2.1. Use of protected content in digital and cross-border teaching activities

The existing EU framework

The exceptions and limitations on teaching and research are laid down in the same provision of the InfoSoc Directive, i.e. Article 5(3)(a). This article provides that MS may adopt exceptions and limitations to the rights provided for in Article 2 (the reproduction right) and Article 3 (the communication to the public right) covering the "*use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved*". Article 5(4) of the InfoSoc Directive provides that MS may also provide for exceptions to the act of distribution to the extent justified by the purpose of the authorised act of reproduction.

Similar provisions providing for exceptions in the area of teaching and research are laid down in the Database Directive[45] and in the and in the Rental and Lending Directive.[46] These provisions are specific to these directives and thus not discussed in this document.

Recital 14 in the preamble to the InfoSoc Directive indicates that the main objectives of the teaching exception are "*to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching*." The explanatory memorandum to the proposal indicates[47] that, under this provision, MS may "*exempt the use of a work, such as a work of literature or photography, or other subject matter, such as a sound or visual recording, or parts of it, for instance for a compilation of an anthology provided that such use exclusively serves the purpose of illustration for teaching* […]" and that this exception "*does not only cover traditional forms of using protected material, such as through print or broadcasted media,*

[45] Articles 6(2)(b) and 9(b) of Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases (OJ L 077 of 27/03/1996, p.20-28) provides similar exceptions, respectively, to copyright and to the *sui generis* right.

[46] Article 10(1)(d) of Directive 2006/115/EC of the European Parliament and of the Council of 12 December 2006 on rental right and lending right and on certain rights related to copyright in the field of intellectual property (codified version) (OJ L 376, 27.12.2006, p. 28-35).

[47] Explanatory memorandum to the Proposal for a European Parliament and Council Directive on the harmonisation of certain aspects of copyright and related rights in the Information Society, COM(97) 628 final, p. 32.

but might also serve to exempt certain uses in the context of on-demand delivery of works and other protected matter."

Main sources of the review process in this area

The implementation of the teaching exception has been analysed by the "Study on the application of Directive 2001/29/EC on copyright and related rights in the information society"(hereinafter "the 2013 study" or just "the study").[48] The study, in particular, aimed at "*assessing whether there is a need to adapt limitations and exceptions provided for teaching and research to the digital environment in order to ensure that their application remains relevant – while, at the same time, ensuring the required balance with rightholders' legitimate interests and the normal exploitation of the work and other protected subject matter*."[49]

To this aim, the study examined national legislation implementing the teaching exception in 11 MS: Belgium, Luxembourg, the Netherlands, Denmark, France, Germany, Hungary, Italy, Poland, Spain and the United Kingdom.[50] Information about implementation of this exception in other MS has been collected as far as possible through discussions with MS and stakeholders and is presented in Table 1 in this Annex.

The teaching exception was also covered by the 2013-2014 public consultation on the review of EU copyright rules: respondents were asked to share their experiences with the use of protected works for teaching purposes, including under existing market mechanisms, and to provide their views on how problems, if identified, should be solved (see Annex 2B).[51]

(see Annex 2A).

Key relevant results

Evidence collected throughout the review process suggests the following findings:

- Limited and/or unclear transposition into national legislation

The 2013 study finds that, although optional, the exception provided for in Article 5(3)(a) of the InfoSoc Directive has been transposed in all the MS analysed.[52] The study highlights at the same time that "*The open-ended content of* [this exception] *left ample manoeuvre for the Member States to enact the conditions under which the exception could be enjoyed. Nothing prevents domestic laws to further define the beneficiaries, the types and quantities of works that can be used, as well as the type of use*."[53]

As a consequence, national transpositions of this exception vary widely. In some cases, evidence suggests that the implementation of the exception is unclear or narrower than what the directive permits, for example:

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48 J-P. Triaille *et alii,* "Study on the application of Directive 2001/29/EC ", cit. See in particular p. 357-387.

49 *Ivi*, p. 245.

50 *Ivi*, p. 3.

51 "Public Consultation on the review of the EU copyright rules", Questions 42-46.

52 J-P. Triaille *et alii,* op. cit., p.368. Examples of national implementation of this exception in all MS, are illustrated in Table 1.

53 *Ivi*, p. 380.

- The condition of illustration is sometimes missing in certain national copyright laws (e.g. PL, IT, DK).[54]

- National exceptions sometimes limit the type, format and extent of works that can be used.[55] For instance, music scores are out of the scope of the exception in FR and audiovisual works can be used under the exception in DE only after two years upon release. Some MS (e.g. FR, DE, AT) do not admit the exception for textbooks or other works made explicitly for educational purposes. In several Member States, the exception applies only to extracts or parts of works (e.g. BE, LU, IT), while in others a specific limit is set in legislation (e.g. UK). The format can also be determined (e.g. low resolution and degraded images in IT).

- Moreover, national laws do not always clearly deal with e-learning, even if recital 42 in the preamble to the directive explicitly includes distance learning within the scope of the exception.[56] In some cases, face-to-face teaching seemed to be the only situation to which the exception applies (e.g. HU, ES[57]). In countries where the exception applies to e-learning, national rules generally determine specific conditions (e.g. communication within a closed electronic network), to prevent dissemination of teaching material outside the students enrolled in the course (e.g. BE, FR, UK).

- Another difference concerns the provision of a fair compensation for rightholders, which recital 36 in the preamble to the directive leaves at the discretion of MS.[58] While in some countries the use of works under this exception does not give rise to the payment of compensation, in others (e.g. BE, FR, DE, NL) the exception is accompanied by a fair compensation system, which can be put into practice through collective agreements.

Differences in the transposition of this exception (in particular as regards digital uses) and, in particular, different interpretations given to the term 'illustration for teaching' were also reported by a number of stakeholders responding to the 2013-2014 public consultation.[59] Collective right management organisations and publishers pointed to problems due to the broad interpretation of the notion of illustration for teaching, institutional users including schools and universities indicated on the other hand that the restrictive implementation of the exception in some countries caused problems and legal uncertainty for teachers and students.[60]

- <u>Limited harmonisation as regards digital uses and lack of cross-border effect</u>

According to the 2013 study, the significant differences that exist in national laws, notably as regards the uses permitted under the teaching exception and additional conditions, "*become real obstacles when the teaching occurs totally or partially on-line in an e-learning program*

54 *Ivi,* p. 368-369.
55 *Ivi*, p. 372-373.
56 *Ivi*, p. 374-376.
57 The teaching exception was recently amended in Spain in order to cover digital and online uses.
58 *Ivi*, p. 377.
59 Report on the responses to the Public Consultation on the review of the EU copyright rules, July 2014, p. 58.
60 See also Annex 2B, reporting relevant extracts from the report to the public consultation.

or supported by e-learning tools."[61] The study in particular finds that "*This complexity, which could probably be mastered by teachers accustomed to their national system, becomes difficult to tackle when several laws need to be complied with, due to a cross-border dimension of e-learning that requires the application of more than one law*."[62]

The study therefore concludes that, "*Due to such diversity, the current exception cannot be said to be harmonised at EU level, which renders the task of developing a legally compliant offer of online education all the more daunting*."[63]

Similarly, many institutional users (libraries, universities) responding to the 2013-2014 public consultation brought forward difficulties in particular for distance learning and cross-border uses (e.g. problems faced by universities with campuses abroad or virtual learning environments or by universities located close to a national border and attracting students from several MS, problems for the development of resources in the context of Lifelong Learning and Erasmus+ programmes involving with a cross-border audience).[64]

- Insufficient or inadequate licensing mechanisms covering illustration for teaching (at least in some MS)

The teaching exception is put into practice or completed by collective agreements or particular licensing mechanisms in several MS. The 2013 study identifies different models[65]:

- Collective mechanisms putting the exception into practice and organising the remuneration associated thereto (e.g. FR);

- Collective mechanisms extending the scope of the exception by adding further authorised uses (e.g. FR, ES);

- Collective mechanisms implementing the exception of the EU directive into an extended collective licensing system (e.g. DK, FI, SE).

In addition, the application of the exception is subject to the availability of licences in certain countries (e.g. UK, IE).

In the 2013-2014 public consultation, authors, publishers and collecting societies considered that licensing solutions are in place to complement the exception where necessary and offer flexible and appropriate solutions for educational establishments.[66] Several institutional users also mentioned the existence of licenses schemes in place at national level and the possibility to conclude licensing agreement with publishers, but considered that such licensing solutions are expensive, create an administrative burden for schools and universities and do not guarantee the use of all works for educational purposes.[67]

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61 J-P. Triaille *et alii,* op. cit., p. 381.

62 *Ibidem.*

63 *Ibidem.*

64 Report on the responses to the Public Consultation on the review of the EU copyright rules, cit., p. 54-55.

65 J-P. Triaille *et alii,* op. cit., p. 378-379.

66 *Ivi*, p. 55 (on Authors/performers) and p. 56-57 (on Publishers/producers/broadcasters).

67 *Ivi*, p. 54.

Conclusion: The evidence collected during the review process suggests that the key objective of the teaching exception of promoting learning and culture "*by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching*" (recital 14) has been achieved to a large extent. However the review process highlighted the legal uncertainty coming from the different way the exception has been implemented across MS and pointed to problems for the use of protected content in digital and cross-border education, at least in certain MS. This appears to be mainly due to the sometimes narrow implementation of the exception, to the differences existing between national provisions and to the lack of cross-border effect of the exception.

2.2. Text and data mining

The existing EU framework

No specific EU rules exist explicitly covering text and data mining (hereinafter TDM). As explained in the IA,[68] TDM techniques generally involve the making of copies of copyright protected content. If these copies go beyond the specific conditions for the exception on temporary acts of reproduction under Article 5(1) of the InfoSoc Directive to apply, under the current EU rules, prior rightholder authorisation has in principle to be sought. At the same time, since TDM is a particularly relevant technique used in the field of research, the research exceptions laid down in the EU copyright rules, in particular in the already mentioned Article 5(3)(a) of the InfoSoc Directive are particularly relevant here.

Under the already mentioned Article 5(3)(a), MS may (in addition to teaching) "*to the extent justified by the non-commercial purpose to be achieved*" also provide for exceptions and limitations for the purposes of scientific research. As in the case of teaching, research exceptions are also laid down in other directives, notably in the database directive.

Main sources of the review process in this area

As already mentioned, The 2013 study analyses the national implementation of the teaching and research exceptions provided for in Article 5(3)(a) of the InfoSoc Directive in 11 MS.[69] Moreover, information about implementation of this exception in other MS has been collected as far as possible through discussions with MS and stakeholders and is presented in Table 2 in this Annex.

In addition, TDM has been specifically analysed in the context of the 2014 "Study on the legal framework of text and data mining (TDM)" (the 2014 study).[70] This study inter alia aimed at: "*Assess whether text and data mining activities* […] *could be covered by the current exceptions and limitations to copyright and/or to the sui generis right*.[…]; *Verify whether there are explicit legal provisions (e.g. different from general provisions implementing the Information Society Directive or the Directive on the legal protection of databases such as generally worded exceptions "for research purposes") in the MS, decisions or judgments affecting text and data mining*".[71]

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68 See the part on text and data mining of the IA, and in particular Annex 11C, which explains the EU legal framework applicable to TDM.

69 See section 2.1 of this Annex.

70 J-P. Triaille *et alii,* "Study on the legal framework of text and data mining (TDM)", cit.

71 *Ivi*, p. 6.

Like the teaching exception, the research exception and in particular TDM was covered by the 2013-2014 public consultation (see Annex 2B): respondents were asked to share their experiences of the use of the research exception set out in Article 5(3)(a) of the InfoSoc Directive and to provide their views on how problems, if identified, should be solved.[72] Moreover, they were invited to share their experiences of using or providing services based on text and data mining and to provide their views on how problems, if identified, should be solved.[73]

Moreover, as announced in the 2012 Communication[74], TDM was discussed at length in the context of the structured stakeholder dialogue "Licenses for Europe"[75] carried out throughout 2013 with the assigned objective of "*identify*[ing] *the scale of demand for TDM access at EU level for text mining of scientific publications and underlying data for research purposes, and appropriate means of meeting this demand*" and of "*explor*[ing] *the potential and possible limits of standard licensing models, as well as assess the appropriateness and feasibility of technology platforms to facilitate TDM access*."

In addition, after the Licences for Europe dialogue and in the context of the preparation of the IA, regular stakeholder meetings, including a high level round table focussing specifically on TDM were conducted (see Annex 2A)

Key relevant results

Evidence collected throughout the review process suggests the following findings:

- Limited harmonisation of the research exception and legal uncertainty with specific regard to TDM activities

The 2013 study highlights that the (optional) research exception set out in Article 5(3)(a) of the InfoSoc Directive has not been specifically transposed in all the MS (e.g. ES, NL).[76] Accordingly, this situation "*could put researchers in those countries in a less easy situation than their foreign peers*."[77]

Moreover, the two studies[78] report that, due to the open-ended content of the research exception, national transpositions – where present – vary widely and are in a number of cases narrower than what the directive permits, including as regards TDM:

  - The beneficiaries of the research exception vary across MS and the 2014 study highlights that this aspect could "*raise difficulties for data mining activities (allowed for some MS under this exception and not in others)*".[79] E.g. according to the 2014 study PL applies it to research and educational institutions, BE to establishments

72 "Public Consultation on the review of the EU copyright rules", cit., Questions 47-49.
73 *Ivi*, Questions 53-57.
74 COM(2012) 789 final, cit.
75 https://ec.europa.eu/licences-for-europe-dialogue/en/content/about-site
76 J-P. Triaille *et alii,* "Study on the application of Directive 2001/29/EC ", cit., p. 370.
77 *Ivi*, p. 388.
78 J-P. Triaille *et alii,* "Study on the application of Directive 2001/29/EC", cit., p. 388; J-P. Triaille *et alii,* "Study on the legal framework of text and data mining (TDM)", cit., p. 53.
79 J-P. Triaille *et alii,* "Study on the legal framework of text and data mining (TDM)", cit., p. 55.

officially recognised by public authorities, FR to the strict circle of "students, teachers or researchers".[80]

- There are no judgements of the CJEU to date as to whether the condition of "illustration" applies only to teaching or also to research. Accordingly, different interpretations exist throughout MS. The 2014 study highlights that national exceptions which specifically refer to the concept of "illustration" in relation to the research exception may be difficult to apply to TDM given that "*data analysis involves de facto the use of the work for enriching the scientific research taking place and not just for "illustration" of scientific research*".[81]

- In several MS, the exception only allow the reproduction of extracts or parts of works (e.g. BE, LU, IT), which, as well, "*can be problematic for data analysis which involves, most of the time, the use of the works in full*".[82]

- Another difference concerns the authorised acts. For instance, the DE copyright act limits the research exception to certain copyright relevant acts, such as the making available of limited parts of a work to e.g., specifically limited circle of persons for their personal scientific research. As regards reproduction, the German act provides that it shall be "*permissible to make single copies of a work or to have these made* […] *for one's own scientific use if and to the extent that such reproduction is necessary for the purpose and it does not serve a commercial purpose*".

The 2013 study highlights that such discrepancies between national laws "*complicate the compliance by scientists concerned with a possible exception*"[83] and specific uncertainties arise in particular as regards the nascent TDM techniques.

At the moment of the publication of the two above mentioned studies, no MS had in place a specific exception covering specifically TDM. In June 2014, the UK adopted an exception on "Copies for text and data analysis for non-commercial research".[84] Discussions concerning the possible adoption of national exceptions on TDM have taken place in other MS, e.g. EE, FR, DE.

Concerns about legal uncertainty for TDM under the current EU copyright rules were also reported by many institutional users (libraries, universities) responding to the 2013-2014 public consultation.[85] In particular, these respondents considered that, under the current framework, it is not clear whether and to what extent TDM may fall under current EU legislation, notably the research exception (when implemented).[86]

- Diversity of licensing practices

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80 *Ibidem*.
81 *Ivi*, p. 61.
82 *Ivi*, p. 56.
83 J-P. Triaille *et alii,* "Study on the application of Directive 2001/29/EC", cit., p. 389.
84 http://www.legislation.gov.uk/uksi/2014/1372/contents/made
85 Report, cit., p. 59.
86 *Ivi*, p. 63-64.

TDM licensing practices were discussed in particular in the context of the 2013 Licences for Europe process[87]. As an outcome, a group of STM publishers presented a declaration of commitment covering both contractual and technical initiatives to streamline licences for non-commercial mining of subscription based scientific publications.[88] Specific initiatives to facilitate TDM licencing have been further developed in particular by STM publishers as a follow up to that declaration as described in the IA.

At the same time, researchers have generally considered that licences-based solutions would not be able to fully solve the problems of legal uncertainty they face as regards the use of TDM techniques. This was also confirmed in these stakeholders' replies to the 2013-2014 public consultation (institutional users such as libraries and universities generally considered licences an inadequate source of transaction costs for TDM and indicated that a legislative change is needed to introduce a mandatory exception for text and data mining in EU copyright law).[89] On the other hand, rightholders, in particular publishers, highlighted in their replies to the public consultation the efforts made as a follow up to Licences for Europe to improve licencing solutions for TDM.[90]

Conclusion: Evidence gathered through the review process has highlighted that the research exception has not been implemented in all MS and that in any event it has generally been implemented without explicitly taking into account TDM (which can be explained by the relatively novelty of these techniques). A specific TDM exception in the context of the research exception has been adopted by only one MS so far, the UK. As a consequence, considerable legal uncertainty exists as to the EU framework applicable to TDM in scientific research and different conditions apply depending on the MS and rightholders' licencing practices.

2.3. Preservation of cultural heritage

The existing EU framework

Article 5(2)(c) of Directive 2001/29/EC sets out an optional exception to the reproduction right, which MS can implement in their national legislation, provided that it comply with the conditions enshrined in this article. In particular, this exception covers "*specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage*".[91]

As to the objectives of this provision, recital 40 clarifies that the exception should be limited to certain special cases, and it should not cover uses made in the context of online delivery of protected works. This was also clarified in the explanatory memorandum to the proposal, which states: "*The provision does not define those acts of reproduction which may be*

87 The Licences for Europe process as it relates to text and data mining is discussed in more details in the IA section on TDM and related Annexes.

88 http://www.stm-assoc.org/2013_11_11_Text_and_Data_Mining_Declaration.pdf. See also the Commission document "Licences for Europe: ten pledges to bring more content online", cit.

89 *Ivi*, p. 64.

90 *Ivi*, p. 65.

91 Copying of works and other subject matter constitutes an act of reproduction protected under the rightholders' exclusive rights granted by Article 3 of Directive 2001/29/EC, Article 5 of Directive 96/9/EC ('Database Directive') and Article 4 of Directive 2009/24/EC ('Software Directive'). However, differently from Directive 2001/29/EC, the Database and Software Directives do not foresee any exception for preservation acts carried out by cultural heritage institutions.

exempted by Member States. In line with the "three step test", Member States may not, however, exempt all acts of reproduction, but will have to identify certain special cases of reproduction, such as the copying of works which are no longer available on the market."[92] According to the 2013 study, "*It is generally understood that the objective served by this provision is to enable libraries to copy works for preservation purposes*".[93]

Policy recommendations on preservation were also issued to MS by the European Parliament and Council in their Recommendation of 16 November 2005 on film heritage and the competitiveness of related industrial activities (2005/865/CE, hereinafter "the 2005 Recommendation"). The 2005 Recommendation called on the MS, in particular, to take measures with a view to *"adopting legislation or using other methods in accordance with national practices in order to ensure preservation of deposited cinematographic works"* and mentioned *"the reproduction of films on new storage media"* as part of those *"preservation measures"*.

Complementing the 2005 Recommendation on film heritage, policy recommendations on cultural heritage works more broadly were issued to MS by the Commission with its Recommendation on the digitisation and online accessibility of cultural material and digital preservation (2011/711/EU, hereinafter "the 2011 Recommendation").

The 2011 Recommendation invited MS, inter alia, 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 *"the necessary legal framework conditions for long-term digital preservation in terms of multiple copying and migration of digital cultural material by public institutions for preservation purposes, in full respect of European Union and international property rights"*.

Main sources of the review process in this area

The exception provided for in Article 5(2)(c) of the InfoSoc Directive, as well as its implementation across the MS, has been analysed in the context of the above mentioned 2013 study, which focussed on the implementation in 11 MS.[94] Information about implementation of this exception has also been collected through a review of national laws and discussions with MS and stakeholders and are presented in Table 3 in this Annex. With regard to this exception, in particular, the study aimed at *"examin*[ing] *whether major problems have emerged in Member States as a consequence of the implementation of this exception to the reproduction right; assess*[ing] *whether clarifications are needed as regards the type (analogue or digital) and number of copies that may be authorised and whether the precise objective of the permitted acts of reproduction should be specified; assess*[ing] *whether other updates to this exception are needed to ensure the right balance between the interests of users of public establishments and rightholders*."[95]

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92 Explanatory memorandum, cit., p. 31.

93 J-P. Triaille *et alii,* "Study on the application of Directive 2001/29/EC", cit., p. 265.

94 *Ivi*, p. 264-284.

95 *Ivi*, p. 264.

The impact of the relevant points of the 2005 and 2011 Recommendations was reviewed in periodical implementation reports. The latest ones were published in 2014 for the 2005 Recommendation[96] and in 2016 for the 2011 Recommendation,[97] based on individual MS reports.

2013-2014 public consultation and discussed in several meetings with stakeholders, including a high-level roundtable (See Annexes 2A and 2B).

Key relevant results

Evidence collected throughout the review process suggests the following findings:

- Variable, unclear and/or narrow transposition into national legislation

The 2013 study finds that, although optional, the exception provided for in Article 5(2)(c) of the InfoSoc Directive has been transposed in all the MS analysed.[98] However, it highlights that "*many disparities have resulted from national implementations and from the ample discretion that the provision of the directive leaves to Member States. Particularly, Member states have been generally more detailed in the requirements imposed on the conditions and in many cases, more restrictive than the directive.*"[99] According to the study, this can be due to four main reasons:[100]

- First, the purpose of the exception has been generally interpreted strictly by some MS. For instance, while several national laws refer to the general purpose of preservation (e.g. DK, LU, FR) or similar notions (e.g. archiving in HU, conservation in ES, maintaining and protecting collections in PL), other laws have even restricted the notion of preservation to more limited specific cases (the NL for example restricts the purpose of the exception to restoration or replacement).[101]

- Second, not all categories of works are covered by the national laws (e.g. text-based works are not covered for some CHIs by the exception in IT).[102]

- Third, only few MS have elaborated on the types of copies that are be allowed (only the NL, for example, explicitly allow format shifting – the practice by which the copy of a work is converted into a new format, to counter obsolescence – by mentioning the purpose of "keeping the work in a condition in which it can be consulted if there is no technology available to render it accessible").[103]

96 "Report on the Implementation of the European Parliament and Council Recommendation on Film heritage 2012-2013", October 2014.

97 "Report on the Implementation of Commission Recommendation 2011/711/EU - 2013-2015", 2016.

98 Ivi, p.272. Examples of implementation of this exception at MS level are illustrated in Table 3.

99 *Ibidem*.

100 *Ivi*, p. 281-282.

101 *Ivi*, p. 272-273.

102 *Ivi*, p. 282.

103 *Ivi*, p. 276-277.

- Fourth, some national laws further limit the scope of the exception via additional conditions not foreseen in the directive, notably as regards the number of copies authorised for preservation (e.g. BE, NL, IT).[104]

The 2013 study indicates that these diverging implementations can be a barrier to preservation activities taking place across borders, for example "*if a library or other eligible institution wants to outsource the digitisation of works abroad*", or if libraries or other eligible institutions want "*to mutualise their digitisation activities to do economies of scale.*"[105] The study highlights the difficulties arising in such cases, and notably the uncertainty due to the cross-border elements, and concludes that "*more efforts should be put on increasing the harmonisation in relation to the exception for certain acts of reproduction made by libraries*."[106]

The most recent report (2014) on the implementation of the 2005 Recommendations confirmed variations and a *"rather restrictive"* implementation of Article 5(2)(c) of the InfoSoc Directive for preservation purposes as found by the 2013 study. It concluded that such situation *"may hamper preservation activities of FHI* [film heritage institutions]*, particularly in the digital era and could prevent or render very expensive the emergence of pan-European projects and cross-border sharing of digital preservation infrastructures"*. The 2016 report on the implementation of the 2011 Recommendation says that despite the fact that *"a growing number of countries report explicit provisions to allow format-shifting and migration of cultural material for preservation purposes […] some […] are only applicable to some sectors, institutions or government layers, or lacking the necessary comprehensiveness for a fully-fledged migration or format-shifting of all cultural material, wherever required for preservation purposes"*.

Problems resulting from the limited or unclear implementation of the existing exceptions are also reflected in the submissions of a vast majority of institutional users (libraries, museums, archives and other cultural heritage institutions) responding to the 2013-2014 public consultation.[107] In their view, both the scope of this exception and the way MS have implemented it cause concerns and are not adapted to digital environments. Examples given are similar to the ones identified by the 2013 study and include national laws that limit the number of copies that can be made or reduce the categories of beneficiary institutions and prohibit or limit format-shifting.[108] They also reported that that the lack of harmonisation and the territorial effect of the current exception have a negative impact on collaborative digitisation projects across countries.[109] Representatives of right holders and collective management organisations (CMOs) responding to the 2013-2014 public consultation, however, generally reported not having experienced major problems with the use of the existing exception, which, in their view, allows institutions to fulfil their public interest missions. Some of these respondents also highlighted that the digitisation for preservation is an important public policy objective but is often held back by budgetary, rather than copyright, restrictions.

Conclusion: Evidence gathered in the context of the copyright review process suggests that the exception's objective of providing a conducive environment for preservation acts carried

104 *Ivi*, p. 277.
105 J-P. Triaille *et alii,* op. cit., p. 283.
106 *Ivi*, p. 284.
107 Report, cit., p. 40.
108 *Ibidem.*
109 *Ibidem*.

out by cultural heritage institutions has been achieved to a limited extent only. This appears to be mainly due to the divergent and limited and/or unclear implementations of the exception, which can raise difficulties for certain types of preservation copies, at least in certain MS. This problem is exacerbated in a digital environment, where preservation activities take different and new shapes than in an analogue one.

3. The main findings of the review process as regards EU policy relevant for the digitisation and dissemination of out-of-commerce works in the collections of cultural heritage institutions

The existing EU framework

The current EU copyright legal framework does not include specific provisions on the mass digitisation and dissemination of out-of-commerce (OOC) works in the collections of cultural heritage institutions (CHIs), including as regards cross-border dissemination.[110] Mass digitisation and dissemination of these works is currently carried out at national level by means of licencing agreements.

Policy recommendations to MS as regards film heritage were issued by the European Parliament and Council in their Recommendation of 16 November 2005 on film heritage and the competitiveness of related industrial activities (2005/865/CE, hereinafter "the 2005 Recommendation").

The 2005 Recommendation calls on MS to "*improve conditions of conservation, restoration and exploitation of film heritage and remove obstacles to the development and full competitiveness of the European film industry"* inter alia *"by adopting, by 16 November 2007, legislative, administrative or other appropriate measures to ensure that cinematographic works forming part of their audiovisual heritage are systematically collected, catalogued, preserved, restored and made accessible for educational, cultural, research or other non-commercial uses of a similar nature, in all cases in compliance with copyright and related rights" […] adopting the necessary legislative or administrative measures to allow designated bodies to make deposited cinematographic works accessible for educational, cultural, research or other non-commercial uses of a similar nature, in all cases in compliance with copyright and related rights*".

Complementing the 2005 Recommendation on film heritage, policy recommendations on cultural heritage works more broadly were issued to MS by the Commission with its Recommendation on the digitisation and online accessibility of cultural material and digital preservation (2011/711/EU, hereinafter "the 2011 Recommendation").

The 2011 Recommendation emphasises that "*for the large-scale digitisation of out-of-commerce works, legislative backing for licensing solutions voluntarily developed by stakeholders may be needed in the Member States, taking into account the need to ensure a cross-border effect. In this context, the approach followed in the stakeholders' dialogue, sponsored by the Commission, on out-of-commerce books and learned journals, which*

[110] For the specific case of orphan works (works whose rightholders are not identified or cannot be located despite a diligent search) digitisation and making available has been addressed at EU level in the 2012/26/EU Orphan Works Directive. According to recital 4 in the preamble to this directive, "*this Directive is without prejudice to specific solutions being developed in MS to address large mass digitisation issues such as in the case of so called "out-of-commerce" works.*"

resulted in a Memorandum of Understanding signed in Brussels on 20 September 2011, should be seen as a model for further dialogues to facilitate agreements for the digitisation of as much of the out-of-commerce material as possible".

The Recommendation recommends that MS "*improve conditions for the digitisation and online accessibility of in-copyright material by"* inter alia *"creating 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*". Similarly, the Council Conclusions on the digitisation and online preservation of cultural material and digital preservation of 10-11 May 2012 underlined *"the need to actively promote voluntary agreements on the large-scale digitisation and online availability of out-of-commerce works and to take the necessary measures to provide for the required legal certainty in a national and cross-border context"*.

The Commission also sponsored a stakeholder dialogue on out-of-commerce books and learned journals, which resulted in a Memorandum of Understanding on "Key Principles on the Digitisation and Making Available of Out-of-Commerce Works" (hereinafter, "the 2011 MoU"),[111] which was signed by library and right holder organisations on 20 September 2011. These principles are intended as a reference to assist with and promote collective licensing agreements in this area, covering books, learned journals and embedded images. The MoU indicates that, for the purposes of agreements concluded according to its principles, "*where a rightholder whose work was first published in a particular Member State has not transferred the management of his rights to a collective management organisation, the collective management organisation which manages rights of the same category in that Member State of first publication shall be presumed to manage the rights in respect of such work*".

It recognises, however, that, for such scenario to be possible "*legislation might be required to create a legal basis to ensure that publicly accessible cultural institutions and collective management organisations benefit from legal certainty when, under an applicable presumption, the collective management organisations represent rightholders that have not transferred the management of their rights to them"*. It therefore recommends that MS *"in keeping their international obligations, may give effect to the key principles mentioned* [in the MoU] *in accordance with their national legal mechanisms and collective licensing traditions*". It also calls on the 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*".

Finally, in the context of the Licences for Europe stakeholder dialogue, a Statement of Principles and Procedures for facilitating the digitisation of, access to and increased interest of European citizens in European cinematographic heritage works was undersigned by film heritage and film right holder organisations.

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111 Memorandum of Understanding on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works, signed in Brussels on 20 September 2011 by the Association of European Research Libraries (LIBER), the Conference of European National Librarians (CENL), the European Bureau of Library, Information and Documentation Association (EBLIDA), the European Federation of Journalists (EFJ), the European Publishers Council (EPC), the European Writers' Council (EWC), European Visual Artists (EVA), the Federation of European Publishers (FEP), the International Association of Scientific, Technical & Medical Publications (STM), the International Federation of Reprographic Rights Organisations (IFFRO).

Main sources of the review process in this area

The impact of the relevant points of the 2005 and 2011 Recommendations was reviewed in periodical implementation reports. The latest ones were published in 2014 for the 2005 Recommendation and in 2016 for the 2011 Recommendation, based on individual MS reports.

In the context of the 2013-2014 public consultation respondents were asked whether they considered necessary to enact legislation underpinning the 2011 MoU for cross-border effect, and whether mechanisms should be developed for other types of content than books and learned journals.

The Commission has monitored the practical application the of the 2011 MoU since its adoption through regular contacts with stakeholders and MS to gather information on concrete licencing agreements adopted following its principles and the possible adoption of MS measures aiming to provide a legal space for licencing practices based on the principles of the MoU. Existing relevant provisions at national level at the time of writing are presented in Annex 9E to the IA.

including a high level roundtable focussing on access to knowledge and cultural heritage were conducted (see Annex 2A).

Key relevant results

Evidence collected throughout the review process suggests the following finding:

- Suitable licensing mechanisms underpinned by legislative provisions only available in some MS and with no cross-border effect.

The most recent report (2016) on the implementation of the 2011 Recommendation indicated that "*fourteen countries already provide for some mechanism to facilitate digitisation and online accessibility of works which are out-of-commerce",* with developments taking place *"particularly in the print sector".*

The 2014 report on the implementation of the 2005 Recommendation on film heritage concluded that "*the current legal framework does not facilitate the emergence of mass digitisation projects*". The report does not refer to any development on legal mechanisms at national level to facilitate the mass digitisation and dissemination of OOC works part of film heritage. It reports however that the Statement of Principles and Procedures for facilitating the digitisation of, access to and increased interest of European citizens in European cinematographic heritage works "*has not yet been used for the conclusion of digitisation agreements*".

The 2013 study, which predates the above reports, also confirms the presence of relevant legal mechanisms in some MS only, with projects inspired by the 2011 MoU "*starting to emerge*".

During the 2013-2014 consultation, institutional users considered the 2011 MoU insufficient to address copyright issues related to mass digitisation, and that legislation allowing for cross-border uses was necessary (many indicated an exception as the preferred solution). They also indicated that solutions should be present for all types of works. Right holders had varying views regarding the best way ahead, both on the need for legislation (including to give cross-border effect to national solutions) and on basing solutions on collective management.

Conclusions: Evidence gathered throughout the review process indicates that the objectives set out in the 2005 and 2011 Recommendations have been only partially achieved, with mechanisms facilitating collective licences for the digitisation and dissemination of OOC works also covering the rights of right holders that are not members of the licensor CMO, as referred to in the 2011 MoU, only present in certain MS and not having cross-border effect. While actual collective licences of this type are concluded, they are no widespread across the EU and only in very few cases/MS extend beyond books and learned journals.

Table 1 – Examples of limitations and exceptions in MS legislation based on Article 5(3)(a) of the InfoSoc Directive – illustration for teaching[112]			
MS	**Implementation of the teaching exception**	**Compensation foreseen for use under the teaching exception[113]**	**Examples of specific conditions under the exception or under collective agreements**
AT	Exception	Yes	• Resources specifically intended for schools (e.g. textbooks) excluded
BE	Exception	Yes, compensation foreseen under a legal license subject to compulsory collective management (not yet implemented)	
BG	Exception	No	
CZ	Exception	No	
CY	Exception	No	
DK	Extended collective licensing (ECL)	Yes (remuneration under ECL)	• Specific limitations on the extent of copying (20% of a publication but not more than 20 pages) • Cinematographic works that are part of the general cinema repertoire of feature films are excluded from the ECL
DE	Exception	Yes, compensation through collecting societies Specific licensing agreement for textbooks.	• Resources specifically intended for schools (e.g. textbooks) and recently released cinematographic works excluded.
EE	Exception	No	
EL	Exception	No	• Uncertainty on whether digital uses are allowed • Uncertainty on the use of AV works
ES	• One general exception for illustration for teaching, applicable to all education levels • One specific exception (for printed works only) for universities and public research, allowing to use a chapter of a book or an article in a magazine or journal	• General exception not subject to compensation • Exception for universities and public research subject to compensation through compulsory collective management	• Use of textbooks and academic books not allowed under the general exception
FI	Extended collective licensing (ECL)	Yes (remuneration under ECL)	• Cinematographic works not covered under ECL • Specific limitations on the extent of use (different for each education level)
FR	Exception implemented through several sectoral agreements	Yes – compensation defined in the sectoral agreement based on voluntary licensing.	• Resources specifically intended for education (e.g. textbooks) and sheet music excluded from the exception but covered by sectoral agreement.
HR	Exception	Yes	• Reproduction is allowed only on

112 Sources: J-P. Triaille *et alii,* "Study on the application of Directive 2001/29/EC ", cit.; Study on copyright limitations and exceptions for educational activities in North America, Europe, Caucasus, Central Asia and Israel, Raquel Xalabarder, 2009 (WIPO); Study "Assessment of the impact of the European copyright framework on digitally-supported education and training practices",; Information received from publishers (FEP).

113 Only the compensation foreseen under the "illustration for teaching" exception is mentioned in the table (the compensation existing under the reprography exception is not mentioned).

			paper or a similar medium
HU	Exception	No	• Uncertainty on whether digital uses are allowed
IE	• Fair dealing provision for research and private study • Exception for reprographic copying and recording of broadcasts and cable programmes by educational establishments subject to the availability of licences	Remuneration under licence	
IT	Exception implemented partially (quotation and teaching exceptions are intertwined)	Partially: compensation foreseen only for reproduction of works in anthologies.	• Online publications of images and musical works for educational or research purposes allowed only in low resolution / degraded quality; not allowed for AV works
LT	Exception	No	
LV	Exception	No	
LU	Exception	No	
MT	Exception	No	
NL	Exception	Yes – through collecting societies	• The current collective arrangements allow reproductions with maximum of 10% of a work or 10 pages
PL	Exception	Yes	• Uncertainty on whether digital uses are allowed
PT	Exception	Partially: compensation foreseen for the making of teaching compilations	
RO	Exception	No	
SE	Extended collective licensing (ECL)	Yes (remuneration under ECL)	• Specific limitations on the extent of copying (15% of a publication but not more than 15 pages) • Cinematographic works not covered under ECL
SK	Exception	No	
SI	Exception	Partially: compensation foreseen only for reproduction of works in textbooks	• Uncertainty on whether digital uses are allowed
UK	• Fair dealing provision for illustration for instruction • Exception for copying and use of extracts of works and for recording of broadcasts by educational establishments subject to the availability of licences	Remuneration under licence	• Specific limitation in the law on the extent of copying (5% of a work)

Table 2 – Examples of limitations and exceptions in MS legislation based on Article 5(3)(a) of the InfoSoc Directive – scientific research[114]		
MS	**Implementation of the research exception**	**Examples of specific conditions under the existing exception**
BE	Exception	• Making available limited to the establishments recognised or officially organised for that purpose by the public authorities • Specific limitation in the law on the works concerned (articles or works of fine art in part or in whole or short fragments of other works)
DK	Exception	• Limited to works of art and works of a descriptive nature for the use in scientific presentation
DE	Exception	• Limited to reproduction "for one's own scientific use" and making available "for a specifically limited circle of persons for their personal scientific research to be made available to the public" • Specific limitation in the law on the works concerned (small parts of a work, small-scale works or individual articles released in newspapers or periodicals or made available to the public)
ES	No exception (only provided for databases)	
FR	Exception	• Limited to short works or excerpts for purposes of illustration or analysis, provided that these works or excerpts are communicated within strictly limited circles of students, teachers, or researchers
HU	Exception	• Limited to part of a literary or musical work or such a type of an entire work of a minor volume disclosed to the public
IT	Exception	• Limited to fragments or parts of works
LU	Exception	• Publication on the internet limited to short fragments of works
NL	No exception (the national law only allows for quotation in scientific writing)	
PL	Exception	• Applies to research and educational institutions (individual researchers not covered) • Limited to fragments of disseminated works
UK	Exception	• In June 2014, the UK adopted a specific exception on "Copies for text and data analysis for non-commercial research"[115]

[114] Sources: J-P. Triaille *et alii,* "Study on the application of Directive 2001/29/EC ", cit.; J-P. Triaille *et alii,* "Study on the legal framework of text and data mining (TDM)", cit.

[115] http://www.legislation.gov.uk/uksi/2014/1372/contents/made

Table 3 – Examples of limitations and exceptions in MS legislation based on Article 5(2)(c) of the InfoSoc Directive – specific acts of reproduction[116]		
MS	**Preservation purpose explicitly mentioned**	**Examples of specific uses or conditions under the existing exception (as relevant for preservation)**
BE	Yes	• Number of copies allowed determined according to and justified by the preservation objective.
DK	Yes	• Computer games explicitly included.
DE	No specific reference to preservation	• Limited to personal archives or archives acting in the public interest. • Restriction to reprography on paper or similar medium and analogue uses if the reproduction is necessary for inclusion in a personal archive.
ES	Reference to conservation	• Record libraries, film libraries, newspaper archives explicitly included.
FR	Reference to conservation	
HU	No specific reference to preservation	• Copies possible for archiving purposes. • Picture and audio archives qualifying as public collections are explicitly included. • Copies possible for internal purposes of the organisation but limited to a minor part of a published work or an article of a newspaper or periodical.
IT	No explicit reference to preservation	• Reprography only for publicly accessible and school libraries, public museums and archives for their own services. • A single copy of phonograms and videograms only for state and public libraries, record and film archive.
LU	Yes	• Libraries, film archives, documentation centres and other non-commercial scientific or cultural institution can reproduce works to preserve heritage and carry out all activities that are reasonably needed to safeguard the work.
NL	Yes	• Copies of literary, scientific or artistic works can be made for restoration and to preserve them if at risk of degradation. • Format-shifting explicitly allowed if the technology to access a work becomes obsolete.
PL	Yes	
UK	Yes	

116 Sources: J-P. Triaille *et al.,* "Study on the application of Directive 2001/29/EC", cit. complemented by review of national laws and information through discussions with MS and stakeholders.

ANNEX 5 – CREATIVE INDUSTRIES IN THE EU ECONOMY

33 sectors of the EU economy are considered to be copyright-intensive (for example: book publishing, news agencies, TV/movie business, and advertising agencies). These copyright-intensive industries account directly for 3.2% of employment in the EU with around 7.05 million jobs (on average in 2008-2010). Overall, 4.2% of the EU's GDP is generated in copyright-intensive sectors (on average in 2008-2010). Copyright-intensive industries account for 4.2% of EU's exports, with net exports of around €15 billion in 2010.[117]

In the EU, more than 120.000 companies are involved in motion picture, video and television programme production, sound recording and music publishing activities, providing over 400,000 jobs, with net contribution to the EU economy of over €25 billion. In addition, 11.800 companies are active in programming and broadcasting activities, employing 255.000 persons, and accounting for an added value of €27billion. The publishing sector (including publishing of books, journals, newspapers and software) includes 90.000 companies, accounting for 900.000 jobs and a value added of €60 billion.[118]

The creative industries in the EU are dominated by micro firms with 95% having fewer than 10 employees coexisting with very large corporations.

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

[118] Eurostat data 2012.

ANNEX 6 – ONLINE TRANSMISSIONS OF BROADCASTING ORGANISATIONS

ANNEX 6A – EUROPEAN TV AND RADIO MARKETS

Overview of European TV market

The EU-28 TV market is worth around €86 billion. This comprises direct revenues from three main sources: public funding (29%), television advertising (34%) and pay-television revenues (37%).[119]

Around 86 million homes in the EU receive free to air TV only, compared to 136 million that subscribe to a TV service, equivalent to a TV subscription per 3.7 people in a total population of over half a billion.[120] The annual value of satellite, cable and IPTV subscriptions is over €30 billion. Satellite services represent around half the total consumer spending on pay TV subscriptions, while cable accounts for 36% and IPTV account for 14%.[121]

The average TV viewing time for the whole EU population in 2013 was 223 minutes per day.[122] Viewing habits differ widely among Member States. In some countries, like Austria, Finland and Sweden these numbers are lower: 2:42, 2:56 and 2:33 hours/minutes per day respectively. In countries like Romania, Portugal and Hungary the viewing time reaches 5:42, 4:56 and 4:49 hours/minutes per day respectively.

Since 2012, television viewing has reached a plateau in average in the European Union. As time-shifted television viewing has been increasingly included in television audience measurement, this stability implies that live television viewing has declined.[123]

Europeans predominantly watch television on a TV set (94% at least once a week, -1 percentage point). Although Europeans are far less likely to watch television over the Internet, this practice continues to gain ground: 20% of Europeans watch television online at least once a week (+2% versus autumn 2013 and +3% versus the EB78 report of autumn 2012). Europeans in the 15-24 age group are the most likely to watch television via the Internet: 40% do so at least once a week. The proportion of respondent who watch television via the Internet decreases gradually with age: 26% of 25-39 year-olds, 18% of 40-54 year-olds and 8% of those in the 55-plus age group watch television via the Internet at least once a week. Watching television via the Internet is particularly widespread in Sweden (48% do so at least once a week) and Finland (39%), but less so in Bulgaria (11%), Greece (12%) and Portugal (12%).[124]

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119 Source: European Audiovisual Observatory Yearbook, 2015. Figures for 2014.

120 Source: *informitv* analysis, SatCab Study, p. 7-8.

121 Source: European Audiovisual Observatory. Yearbook 2015. Figures for 2014.

The development of the European market for on-demand audiovisual services. The figures include linear TV as well as short term catch-up (up to 7 days in some countries).

123 EAO On-demand Audiovisual Markets in the European Union (2014 and 2015 developments).

124 Standard Eurobarometer 82, Autumn 2014. Media use in the EU. See: http://ec.europa.eu/COMMFrontOffice/PublicOpinion/index.cfm/Survey/getSurveyDetail/yearFrom/1973/yearTo/2014/surveyKy/2041

Television is the most frequently used source of European political news by all age groups, but respondents in the 55+ age group are the most frequent users of this medium (83%).

Online advertising revenues are growing globally, including online TV and video advertising's share.[125] Online television advertising revenue in Western Europe is estimated to be worth just under €0.75 billion in 2015, although it is forecast to rise to €1.6 billion in 2019. The EU 28 advertising revenue for 2014 is €29.28 billion.[126]

While TV remains the preferred media for advertising (32% of the market), the Internet is likely to become the main advertising platform within the next two years, given its rapid development (+8.4% vs. 2012) and the market share already captured in 2013 (27.4%).[127]

In 2014, Internet advertising spending was higher than TV advertising spending in a number of EU countries: Czech Republic, Denmark, Germany, Netherlands, Sweden, the United Kingdom.

According to the EAO Study on online advertising in the EU,[128] the total size of the online advertising market in the EU in 2013 was €27.2 billion, an increase of 11.6% compared to the total of €23.2 billion in 2013. On the other hand, television advertising in the EU lost in 2013 more than EUR 300 million out of EUR 27.748 million overall investments (-1.1% vs. 2012).[129]

In 2009, EU broadcasters invested around 1/3 of their revenues in EU quality content. In that year, out of the EUR 34.5 billion programme spend in the EU by broadcasters approximately EUR 15.6 billion was spent on acquiring rights, EUR 5.8 billion on sports rights and EUR 9.8 billion on film and TV acquisitions.[130]

In 2014, European public broadcasters invested 84% of their programming expenditure in original content, amounting to 14.04 billion EUR.[131]

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125 Share of online in global advertising spending in 2013 was 20%, however it is increasing, see http://www.statista.com/statistics/272943/forecast-of-global-online-advertising-spending/ 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.

126 SatCab Study, p. 57.

127 Source: European Audiovisual Observatory/WARC

128 Published in September 2015

129 Source: WARC

130 See SWD (2016) 168 final COMMISSION STAFF WORKING DOCUMENT, IMPACT ASSESSMENT Accompanying the document Proposal for a Directive of the European Parliament and of the Council amending Directive 2010/13/EU on the coordination of certain provisions laid down by law, regulation or administrative action in Member States concerning the provision of audiovisual media services in view of changing market realities, Annex 6, p. 148.

131 EBU information, available at http://www.ebu.ch/files/live/sites/ebu/files/Publications/EBU-MIS%20-%20PSM%20Investment%20in%20European%20Content.pdf

Extracts from the SatCab Study

2.1.2. Overview of the distribution of broadcast channels

The European Audiovisual Observatory MAVISE database lists over 13,000 television channels available in Europe, including over 5,000 international, national or regional channels established in the EU and over 1,900 free channels. In addition, there are thousands of radio channels or stations, which are not listed in the database.

A television channel, in this context, is defined as a sequential presentation of audiovisual programmes provided for simultaneous viewing on the basis of a schedule. Individual broadcasters normally hold the regulatory licence for a particular channel and are editorially responsible for its content. A single channel brand may be available in different languages or regional variants, each of which counts as a separate channel. A radio channel, for the purpose of this Report, is defined as a service that offers a sequential presentation of audio programmes linked to a particular channel for simultaneous listening on the basis of a schedule using a technical method of (re)transmission that can be used also for television channels.

Broadcasters may be public bodies, traded corporations or private companies. Public service broadcasters generally have a specific licence remit for one or more of their channels. Commercial broadcasters are partly funded by advertising. **These categories are not mutually exclusive**. For example, a broadcaster may be state-owned with a public service remit, offering some of its channels primarily funded by advertising and others on a subscription basis. In this report a public broadcaster refers to organisations that are owned by the public or the state.

A channel typically originates as part of the playout function (i.e. the transmission of the channel) normally at the originating broadcaster. From this point there is necessarily an uninterrupted chain of communication to the point through the broadcasting network at which the signal is received and accessed in real time by the ultimate audience.

A broadcaster may make a channel available directly through a traditional terrestrial transmission, or via a satellite, cable or other telecommunications network. Different channels may be delivered by any or all of these methods.

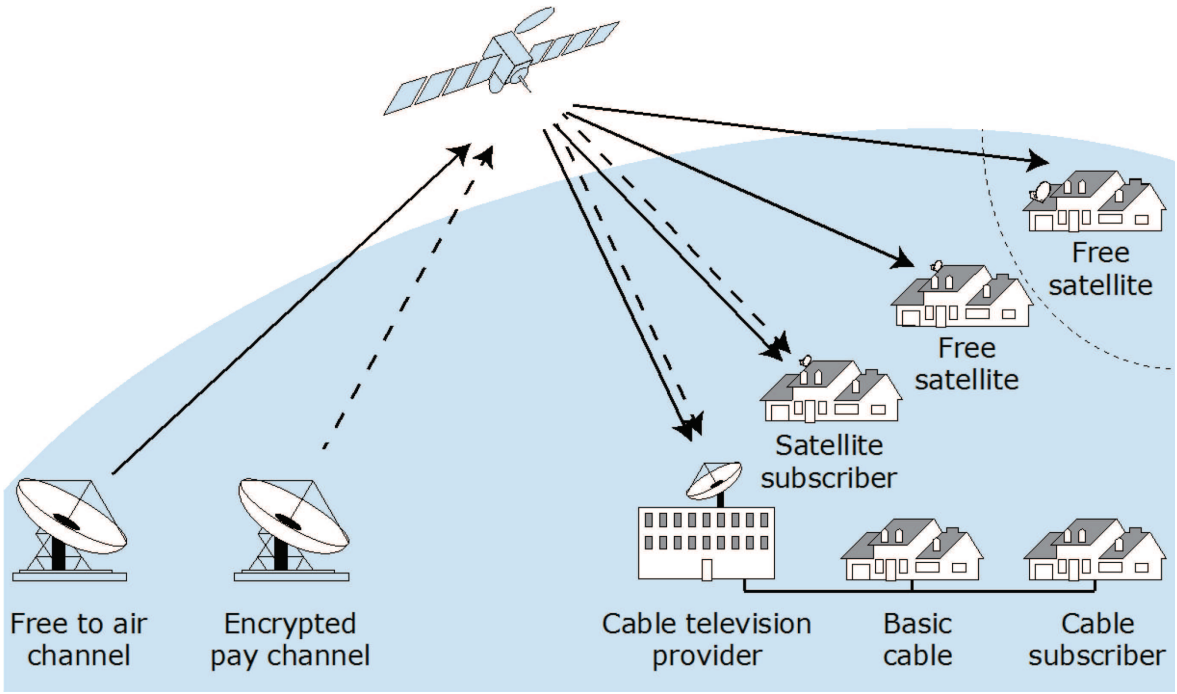
Terrestrial radio and services are broadcast from transmission towers and received through an antenna. Traditionally, radio and television broadcasts have been **free-to-air** i.e. meaning they are accessible to anyone that has the technology to receive them. Some satellite services are free-to-air given that they can be received by holders of the necessary equipment. However, many satellite services are encrypted and therefore users are also required to pay for a subscription in order to access the content.

Free channels are those which are **free to view** (i.e. meaning they are accessible to the public without payment) although they may be subject to a licence fee. 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).

Services that are free-to-air (i.e. those that can be accessed by holders of the relevant technology) are effectively those which are free to view (although some free-to-air channels can be encrypted).

A simplified overview of the provision of broadcasting services by direct to home satellite and cable redistribution is indicated in Figure 2.1.

Figure 2.1 Direct to home satellite distribution and cable redistribution of free-to-air and encrypted pay television channels



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 such as Arqiva (UK), MEDIA BROADCAST (DE) or rt1.tv (DE), by a satellite operator such as SES or Eutelsat, or by a television service provider like Sky (UK and IE) or Cyfrowy Polsat (PL). Satellite radio and television services are relayed through satellites in geostationary orbit and received through a dish antenna.

Many broadcasters make their channels available via satellite as it provides broad geographic coverage at relatively low cost. Some channels, including some channels that are free to view, are encrypted and can only be decoded and viewed using a uniquely identifiable receiver. Pay channels are generally encrypted and are available on a subscription basis and therefore reception requires authorisation from the service provider.

The satellite, generally operated by a satellite operator such SES, relays a signal that can be received anywhere within the service footprint, across national borders. Therefore, free satellite channels that are not encrypted can be received outside of a targeted country market as a result of signal overspill. However, some channels are intended for distribution across an entire continent, whereas other channels are mainly intended for reception in particular territories.

Satellite television service providers typically aggregate and package multiple satellite channels as one or more service propositions or bundles. Service providers may originate and transmit their own channels, for which they may be considered broadcasters. The service platform provides features such as an electronic programme guide, through which users can find information about programmes and tune to channels. Such guides may be regulated to provide prominence to certain channels. The channel package may include a combination of free to view channels and subscription channels. Users may be able to add other available channels that are not part of the standard package (normally as part of premium subscription packages). However, some satellite platforms are free to view and simply require the purchase of a compatible receiver. Users can also purchase receivers that can be set up to tune to any available channels without reference to a service provider, although this is a less common consumer practice.

Satellite television service providers like Sky Italia and NC+ (Poland) offer packages of services to satellite subscribers that may include encrypted pay television channels as well as television and radio channels that are available free-to-air. Some satellite packages of television and radio channels, such as Freesat, are available entirely free-to-air, without charge or subscription.

Satellite channels can be received outside the country in which they are established by anyone with a compatible

receiver, anywhere within the satellite service footprint. Encrypted channels can only be decrypted with the authorisation of the service provider, so access can be individually restricted to the addresses of premises in particular territories.

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. A cable television provider such as Liberty Global, can receive cross-border satellite signals and retransmit them via cable to customer homes. However, signals can also be received via direct injection of signals by arrangement with broadcasters, for instance through a satellite or fibre-optic feed. The channels are redistributed, typically over a fibre-optic network to neighbourhood nodes, from where they are delivered to homes over conventional co-axial cables. The cable service provider determines which channels will be available on its network and therefore needs to have the relevant rights to redistribute the respective channels. Service providers may also originate and distribute their own channels. 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. National regulations may require some channels to be carried or offered for carriage on cable services. Some broadcasters may seek carriage fees for the redistribution of their channels.

It is now possible for other telecommunications companies (which may be either former national telephone companies or competing providers of communications services) to distribute radio and television channels and other audiovisual services over fixed or wireless broadband data networks using internet protocols. Such services can offer a range of channels comparable to conventional cable networks. This is sometimes referred to as internet protocol television, or IPTV. Since any network, including cable networks, can potentially employ internet protocols, this report will refer to services delivered by telecommunications providers other than conventional cable companies as 'telco television'.

Television and radio channels can also be offered online over the open internet. Many satellite, cable and telco operators offer such services to their subscribers. There are also some standalone online services for example YouTube channels or iTunes radio. Many broadcasters also offer online simulcasts of their broadcast channels. It is technically possible to limit access to online services by internet address, service provider network, or subscriber account. This can be used to geo-restrict online services to an extent to particular territories.

A problem faced by the industry relates to measurement of audience viewing behaviour. Typically, surveying methods, such as home panel surveys, are used that vary in their scale. As a result, viewer behaviour is normally based on estimations using sample data. Despite their shortcomings these provide the basis for advertising sales.

On the other hand, online viewing can be much more accurately monitored through software code that can record actual usage. There are initiatives in some countries that make use of existing home panel surveys with a view to also monitoring their use of online services.[132]

2.1.3. Overall main findings of the market analysis

Given the extensive volume of data examined by the market analysis, the main findings of this chapter are presented in the introductory section with a view to addressing the main research questions.

Table 2.1 provides some of the key quantitative findings in terms of the overall assessment of the EU-28 television market.

Table 2.1 Overall assessment of the EU-28 television market (2014)

Indicators	Results
Overall EU-28 television revenues	€86 billion
Sources of overall EU-28 television revenues	Advertising 34% Subscriptions 31.81% Public funding 29%

132 http://www.barb.co.uk/project-dovetail/

Break down of EU-28 subscription revenues by satellite, cable and telco platforms	Satellite: €15 billion (50%) Cable: €11 billion (36%) Telco €4.29 billion (14%)[133]
Number of households in the EU with subscriptions	136 million[134]
Number of households in the EU receiving free-to-air services only[135]	Total: 86 million[136]
Number of households in the EU receiving satellite services	Pay: 41.2 million[137] Free: 28.7 million
Number of households in the EU receiving cable services	56.4 million[138]
Number of households in the EU receiving telco services	28.3 million[139]
EU-28 Member State geographical coverage of number of pay TV subscribers	Highest: France 25 million Lowest: Cyprus 100 thousand[140]
EU-28 Member State geographical coverage of pay TV subscribers as a proportion of the population	Highest: Denmark 46.3% Lowest: Greece 8.1%[141]

The assessment of industry data indicates that the EU28 television market is well developed. Around 86 million homes in the European Union receive only free-to-air television, compared to 136 million that subscribe to a television service, equivalent to 1 television subscription per 3.7 people in a total population of over half a billion.[142]

The annual value of satellite, cable and telco subscriptions is over €30 billion. Satellite services count for around half of the market with cable representing over a third and telco at less than fifteen percent. While there are more cable homes than satellite, nearly half of cable homes are still analogue, which limits revenue potential i.e. fewer channels and no high definition. Whereas average revenue per user for advanced satellite platforms such as Sky Deutschland is much higher.

However, the geographical coverage of services is highly uneven across the EU-28 Member States. The proportion of pay TV subscription holders ranges from 46.3% in Demark to 8.1% in Greece. An overview of the geographical coverage of channels is provided in Table 2.2.

Table 2.2 Overall assessment of the coverage of channels across the EU-28 and 11 sample countries (2015)

Indicators	Results
Total number 'international', 'national' or 'regional' channels available across the 28 European Union Member States	Overall: 5720 Free channels: 1903
Total number 'international', 'national' or 'regional' channels available in total across the 11 sample countries	Overall: 5,231 Free: 483
Total number 'international', 'national' or 'regional' channels established in the 11 sample countries	Overall: 3883 Free: 1187
Balance of trade (channels available minus channels established) for the 11 sample countries	Overall: -1348 Free: 704

133 European Audiovisual Observatory Yearbook, 2015.
134 Ibid
135 i.e. services accessible to the public without payment
136 Digital TV World Databook, 2015
137 European Audiovisual Observatory Yearbook, 2015.
138 Ibid
139 Ibid
140 Ibid
141 Ibid
142 informitv analysis

Total number of channels available by platform in the 11 sample countries:	Terrestrial: 483 Pay terrestrial: 283 Satellite: 2628 Cable: 2640 Telco: 2298 Mobile / other: 299
Number of channels established in one of the 11 sample countries which was indicated as available in another sample country	One country: 2839 Two countries: 625 Three countries: 97 Five countries: 29 Six countries: 23 Seven countries: 20 Eight countries: 11 Nine countries: 7 Ten countries: 5 Eleven countries: 5

The assessment of the MAVISE database (2015) indicates that the number of television channels available in the EU-28 stands at 5720, with 5231 of those channels available in the 11 sample countries. Out of the 3883 channels established in the 11 sample countries, only 822 were indicated available in two or more of the sample countries.

The analysis of availability in the 11 sample countries indicates that the distribution of television channels is mainly territorial. […]

On the evidence of this analysis of channel availability, it appears that much of the international traffic in television channels is increasingly within the pay-television system. However, pay television service providers may still rely upon the availability of channels from the main national broadcasters to sustain their programming packages.

While satellite services could potentially all be offered on a multinational basis, the analysis suggests that in practice there are relatively few pan-European services. With the exception of services such as some news and sports channels, the majority of satellite services are aimed at specific geographic markets.

Although broadcast television is widely enjoyed in all countries in Europe, the television market in Europe is dominated by some of the larger Member States, notably the United Kingdom, which is a net exporter of channels.

Table 2.3 Analysis of the market development of satellite broadcasting, cable and telco services

Indicators for EU-28	Results
2020 - forecast of the market development for satellite services in terms of the number of subscriptions	18% share (flat growth rate since 2010)[143]
2020 - forecast of the market development for cable services in terms of the number of subscriptions	24% share (slowly declining since 2010)[144]
2020 - forecast of the market development for telco services in terms of the number of subscriptions	16% share (steady rise since 2010)[145]
Overall pay television market share by 2020	59% (steady increase since 2010)[146]

143 Digital TV Research, Global Pay TV Operator Forecasts 2015
144 Ibid
145 Ibid
146 Ibid

2016 number of digital television subscribers by platform	Satellite: 41.17 million Cable: 30.74 million Telco: 28.32 million[147]

The market data (see Table 2.3) suggest that the current satellite and cable television markets are mature given their forecasts for flat growth or likely decline. The markets for other retransmission platforms, based on internet technologies, are developing rapidly. Key findings are as follows:

- The adoption of satellite subscriptions is forecast by Digital TV Research to remain relatively flat through to 2020, at around 18% of television homes in the current 28 European Union countries;
- Cable service providers are migrating from analogue to digital, a process that is forecast to be almost complete by 2020, giving digital cable a share of almost 24% of television homes;
- The overall share for cable is forecast to decline, while that for telco television will continue to rise, to just below 16%;
- Overall, pay television is forecast to rise to approaching 60% of households in the European Union by 2020.

Table 2.4 Analysis of the market development of broadcast-related online services

Indicators	Results
Number of households with online video on demand services	23 million in 2015 to 61 million in 2020[148]
2015 - Number of online video on demand services available (11 sample countries)	2207
2015 - Number of online video on demand services established (11 sample countries)	1343
2015 - Number of catch-up TV services available (11 sample countries)	629
2015 - Number of catch-up TV established (11 sample countries)	462

Online video-on-demand services (see Table 2.4) are expected to grow by 270% in the coming years (i.e. from 2015 to 2020). There are already 1343 broadcaster related online video services established in the 11 sample countries, with 2207 available. However, there appears to be a lower level of international availability of catch-up television services. […]

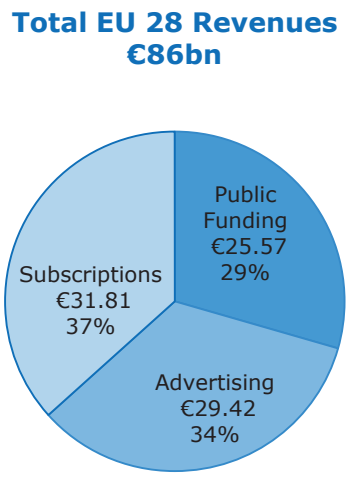
2.2.1. Assessment of the main revenue sources of the EU-28 broadcasting market and overall size of the market for pay TV and free-to-air services

According to the European Audiovisual Observatory, based on figures for 2014, the television market in the European Union is worth around €86 billion a year (Figure 2.2). This comprises direct revenues from three main sources; public funding, television advertising and pay-television revenues. Pay-television subscriptions represent the largest proportion of direct television revenue at 37%.

Figure 2.2 Direct television revenues for EU28 (2014)

147 European Audiovisual Observatory Yearbook 2015.

148 *Digital TV Research Global SVOD Forecasts*, 2015 Edition.



Source: European Audiovisual Observatory Yearbook 2015
Figures for 2014

Considering all three revenue sources, there are clear differences in the size of the markets of the EU-28 countries. By far the most valuable markets are the United Kingdom and Germany, each worth around €18 billion a year, followed by France (€12bn), Italy (€8bn), and Spain (€5bn) (Figure 2.3). These figures do not include the value of other revenue streams, such as the licensing of individual programmes for distribution by other broadcasters or platforms.

In terms of the size of the market, there are approximately 136 million homes subscribing to television services in the EU-28, out of a total population of over half a billion, representing around one subscription per 3.7 people:

- Over 41 million homes in the EU subscribe to satellite television services;
- There are 56 million cable households, of which 30 million receive digital cable;
- There are a further 28 million subscribers to telco television services;
- There are around 6 million terrestrial television subscribers.[149]

In addition, around 86 million homes in the European Union receive only free-to-air television. The majority of these receive digital terrestrial television. Most of these homes are in Italy, Spain and the United Kingdom. Over 28 million homes receive free-to-air satellite services. More than half of these are in Germany.[150]

[…]

Table 2.17 International, national or regional channels available in EU28 by genre (2015)

Channel Genre	Total TV Channels	Free TV
High definition simulcast of an existing channel	**1063**	174
Sports	**585**	40
Regional/local	**481**	342
Entertainment	**399**	130
Film	**344**	27
Music	**296**	95
Children's	**269**	51
Adult	**263**	72
General	**243**	192

149 European Audiovisual Observatory Yearbook, 2015.
150 Digital TV World Databook, 2015.

Window	**232**	215
Documentary	**226**	11
TV fiction	**203**	14
Lifestyle/specific leisure	**188**	52
News	**156**	107
Time-shifted versions	**110**	30
Home shopping	**109**	89
Promotional/information channel of multi-channel packager	**92**	19
Religious	**88**	74
Cultural/educational	**81**	40
Others	**71**	26
International linguistic and cultural	**53**	34
Minority interest groups	**50**	30
Games/lottery/betting	**35**	8
Travel	**32**	3
Parliamentary/government/administration	**20**	14
Business	**17**	11
Weather	**11**	
Dating/classified ads	**3**	3
TOTAL	**5720**	1903

Source: European Audiovisual Observatory MAVISE database
informitv analysis

[…]

Table 2.19 Comparison of international, national or regional channels available versus channels established in 11 sample EU countries for organisations with public or mixed ownership (2015)

	Channels established in country										
Viewing country	**DK**	**DE**	**IE**	**ES**	**FR**	**IT**	**HU**	**NL**	**PL**	**SE**	**UK**
Denmark	20	8		2	6	2			1	4	6
Germany		44		2	20	5	1	1	3		5
Ireland			12		8						30
Spain		1		23	19	1			1		1
France		8		8	31	6			4		4
Italy		7		2	17	23		1	1		6
Hungary		6		1	16	2	14		1		4
Netherlands		32		2	25	1		18	1		11
Poland		5			18	4			16		10
Sweden	3	2		1	3	2	2		1	7	9
United Kingdom			3	1	7						57

Source: European Audiovisual Observatory MAVISE database extract
informitv analysis

[…]

Table 2.25 Comparison of international, national or regional channels available versus channels established in 11 sample EU countries (2015)

	Channels established in country										
Viewing country	**DK**	**DE**	**IE**	**ES**	**FR**	**IT**	**HU**	**NL**	**PL**	**SE**	**UK**
Denmark	44	17		2	11	3		11	2	46	96

Germany		316		3	32	10	1	7	6		51
Ireland			26		13			5			436
Spain		1		201	28	1		1	1		33
France		34		10	352	14		24	6	2	90
Italy		7		2	23	348		2	2		44
Hungary		14		2	35	2	44	10	1		139
Netherlands		65		2	45	2		165	2		94
Poland		11			34	12		16	122		114
Sweden	3	3		1	18	3	2	11	2	127	134
United Kingdom			5	1	14	1		10			617

Source: European Audiovisual Observatory MAVISE database extract informitv analysis

Clearing underlying rights for TV programmes: examples

In their daily operations, TV broadcasters face significant transaction costs related to the clearance of underlying rights for their programmes. A number of rights and time-line to clear them depend on the types of the programme. As the below examples demonstrate, one episode of series produced by a broadcaster may include up to 100 underlying rights. Other types of programmes (e.g. documentaries, cultural programmes, entertainment programmes) may require clearing a smaller but still significant number of underlying rights.

An example of BBC TV series *Doctor Who* shows that more than 80 contributions per episode needed to be cleared[151]:

The table below shows the number of underlying contributor rights usually included in a single episode of Doctor Who archives. […]

Average number of contributions per episode

Type of contribution	*Average number of contributions per episode*
Music tracks+	2
Orchestras+	1
Specially commissioned music+	16
Walk-ons+	14
Actors+	15
Supporting or Additional Dialogue artists+	12
Directors+	1
Script*	1-2
Character format*	2+
Show runner*	1
Literary extracts*	1
Photographic stills*	23

+ Collective body with mandate
** Individual contract binding to third party group required (not retrospective)*

In 2007-2008, the BBC issued 305,000 contracts to contributors for in-house programming alone, and each week some 250,000 items of music are reported to the music collecting societies.

In **ZDF (Germany)** experience, 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.). ZDF concludes more than 70 000 contracts a year.[152]

ORF (Austria) examples: [153]

- For the "Documentary on the History of the National Anthem", the rights on 26 clips had to be cleared, including 17 external license holders to be dealt with.
- Culture programmes:

151 See http://webarchive.nationalarchives.gov.uk/20140603093549/http://www.ipo.gov.uk/ipreview-c4e-sub-bbc.pdf

152 Source: EBU.

153 Source: EBU.

- for the programme "Kultur Montag", in average 4-6 rights holders have to be dealt with;
- For the documentary "Künstlerportait" 32 rights to clear (13 clips).

- Family/entertainment programmes: for the programme "Willkommen Österreich" (comedy talk) 12 rights to clear (7 clips).

In addition music rights have to be cleared. These are cleared with CMOs. ORF has framework agreements with them, which run over several years.

TVP (Poland) example

In one episode of very popular TVP serial „M jak miłość" („L like love") 18 underlying rights of contributors to the episode (director, author of screenplay, scenographer, 2 composers, operator of camera, cutter, 2 sound operators, 8 actors, 2 music performers) and 24 pre-existing works were embedded (mainly music).

EU radio markets

Radio in the EU is normally free-to-air, transmitted via wire or wireless means. Radio programmes typically consists of talk, stories, entertainment, news, music and surprises.

80% of the EU population listens to radio for at least 2 to 3 hours a day – and mostly to local or regional programmes, as shown by national audience measurement. There are 4 to 5 radio receivers in every household in Europe.[154] On average, 6 to 8% of total listening of radio is done online in Europe.[155]

There is a large number of radios in Europe. For example, the Association of European Radios (AER) represents the interests of over 4,500 private/commercial radio stations across the EU28 and in Switzerland. As in the TV market, radios can be divided into commercial and public radios. Some radios function on regional or local scale, while others are national or offer services beyond a Member State.

For example, in 2014 France there were 800 commercial radios and 7 networks of public radios; in the UK there were 344 commercial radios and 57 public radios: the BBC had 11 national stations, 6 in the nations and 40 local stations (as well as BBC World Service); in Lithuania, there were 18 national commercial radios, 10 regional and 21 local commercial radios, 3 public radios (total 52 radios); in Spain there were 3040 radios, of which 1724 public. [156]

Radio broadcasters acquire licences for protected content, mostly for music rights from CMOs. They also acquire licences for using e.g. drama works and literature works. For the use of extracts from works (such as books, science works, etc) in their programmes, radio broadcasters often rely on exceptions and limitations, e.g. quotation.

The detailed analysis of the radio market in ten EU Member States is presented below, showing the number of radios, turnover and advertisement revenues per Member State as well as advertisement market shares of radio, TV and online.

154 Source: AER press release, 2014.
155 Source: AER reply to the public consultation on the SatCab review, 2015.
156 Source: AER.

Number of radio stations in ten Member States[157]

Number of radio stations	Austria	Denmark	Finland	France	Germany	Ireland	Italy	Lithuania	Spain	UK
Total commercial	45	Approximately 70	73	800	274	34	780	49 http://www.zilionis.lt/rtv/px.php?R	1'575	340 (FM 238, AM 56 and DAB 48) in 2014
National commercial	1	6 (5 on FM and DAB, 1 on FM)	12	N / A	18	2	14	18	N / A	N/A
Regional commercial	44	50	See below	N / A	74	4 (also have 1 multicity licensed radio station)	No distinction between regional and local	10	N / A	N/A
Local commercial	0	See above	61 (incl. local and regional radios total)	N / A	182	27	766	21	N / A	N/A
Public	12: 3 national 9 regional	4 FM / DAB national (one of them a regional network composed of 10 stations)	7	Radio France is divided into 7 radio networks	70 terrestrial (approximately 100 web channels and loop streams)	10	5	3	1'346	57 The BBC has 11 national stations, 6 in the nations and 40 local stations (and BBC World Service)

Turnover and advertising revenues of radio stations and public broadcasters in ten Member States[158]

Radio income (by category)	Austria	Denmark	Finland	France	Germany	Ireland	Italy	Lithuania	Spain	UK
Remarks		*All Euro figures are calculated at a rate of 1 DKK = 0.134275 €*					*A substantial part of the data is from 2013*	*All Euro figures are calculated at a rate of 1 LTL = 0.29 €*		*All Euro figures are calculated at a rate 1£ = 1.2 €*

157 This table is based on data provided by AER; this data dates 2012/2014 (some data was updated in 2016).

158 This table is based on data provided by AER; this data dates 2012/2014 (some data was updated in 2016).

Annual turnover (*private and commercial radio stations)*	N / A	N / A	59,4 million €	680 million € (estimate)	In total: 4'468 million € [2012] Commercial radios: 665 million € [2012] source: ZAW-Jahrbuch 2013, Wirtschaftliche Lage des Rundfunks in Deutschland 2012/2013	No information	382 million € (2013) national + local commercial (without Radio Radicale - no advertising income)	6.37 million € http://www.lrta.eu/Naujienos/Aktualijos/Transliuotoju-ir-retransliuotoju-pajamos-2013-metais	N / A	710 million €
Advertising income (*private and commercial radio stations)*	N / A	Approx. 45 million €	100%	It depends on the company / some examples in 2013: Les indés Radios : 165 million € (all activities) NRJ Group: 203 million € (for the audio department, including radio) Next radio TV: 75 million € (for the radio department)	746,11 million € [2013, net]; 737,66 million € [2014, net]; 742,79 million € [2015, net] source: ZAW-Jahrbuch	See above	351 million € (2013) national + local comercial (without Radio Radicale - no advertising income)	N / A	N / A	710 million €
Amount of the compensation <u>public broadcasters</u> receive to accomplish their general interest mission	2014: 589 million € (for radio and TV)	DR receives approx. 492,824 million €, and the regional TV2 regions 68.7835 million € every year	approx. 100 million €	2012: 583 million € (Rapport d'Activités Radio France 2012)	2'757 million € [2012] "Licence fee" = approximately 2'797.96 million € [2011] (ARD + Deutschlandradio, GEZ 2011)	RTE receives 182 million € from the television licence fee, in addition to being able to access additional funding distributed by the regulator t	N /A	LRT radios and LRT TVs receive 20,559 million € per year	N / A	Licence-fee income currently: 4'327.2 million € per year
Total turnover of public <u>radio</u> broadcasters	N/A	N / A	approx. 100 million €	650,141 million € (Rapport d'Activités Radio France 2012)	Total income: 3'504 million € Other income: 532 million € [2012] source: Wirtsch. Lage des Rundfunks in Deutschland 12/13	N / A	139 million € (2013)	Total income: 5,797 million €	N / A	Total licence-fee income currently (4'327.2 million € per year) + other income generated (1'338.96 million €) = 5'666.1 million € Source: BBC annual report 2011

Advertising income of public broadcasters	2014: approx. 300 million € (for radio and TV)	0 €	No advertising income allowed	40,423 million € (Rapport d'Activités Radio France 2012)	214'63 million € [2012]	Roughly 22 million €	29 million €	5,217 million €	N / A	0 - although some BBC Worldwide profits (187 million € redirected to radio)
Total (TV, radio, online) income of public broadcasters	2014: 912 million €	561 million € per year	470,7 million €	N / A	8'648 million € [planned for 2014]; 8'505 million € [2013]; 8'525 million € [2012] source: Public broadcaster ARD, ZDF, Deutschland radio	307 million €	2'746 million € (2013)	31,573 million €	N / A	5'666.1 million € Source: BBC annual report 2012/13

Advertising market turnover and expenditure share for TV, radio and online[159]

The below table shows that in the ten Member States for which data is available, radio advertisement expenditure amounts to between 2.3% (in Denmark) and 17% (in Ireland) of the total advertisement expenditure; TV advertisement expenditure amounts to between 17.66% (Denmark) to 55% (Italy).

Advertising market share expenditure	**Austria**	**Denmark**	**Finland**	**France**	**Germany**	**Ireland**	**Italy**	**Lithuania**	**Spain**	**UK**
Source	*Focus Media Research*	*TNS Gallup*	*N / A*	*IREP: http://www.irep.asso.fr/marche-publicitaire-chiffres-annuels.php#a*	*ZAW-Jahrbuch 2013*	*N / A*	*Nielsen*	*http://www.respublika.lt/lt/naujienos/lietuva/verslas/tns_lt_ziniasklaidos_reklamos_rinka_stabilizuojasi/,print.1*		*Warc: http://www.warc.com/*
Total advertising market in 2015 for all media	3'522 million € (gross income; 2015)	1'681.37 million €	1'155,4 million €	13'282 million €	15'517 million € [2012, net] = 100 %; 15'254 million € [2013, net] = 100 %	N / A	6'359.4 million € (2013)	N / A (94 million € (2010))	5'570 million €	N/A

159 This table is based on data provided by AER; this data dates 2012/2014 (some data was updated in 2016).

TV	28%	17.66%	22.10%	24.23%	4'038 million € [2012, net] = 26.0 %; 4'125 million € [2013, net] = 27.0 %	29%	55%	47% (2010)	41.60%	43.60%
Radio	6%	2.30%	5.10%	N/A (between 5 and 10%)	720 million € [2012, net] = 4.6 %; 746 million € [2013, net] = 4.9 %	17%	6.00%	8% (2010)	9.10%	5.5%
Internet	7%	39.33%	24.80%	17.30%	1'079 million € [2012, net] = 7.0 %; 1'152 million € [2013, net] = 7.6 %	21%	7% (without Search or Social)	7,7% (2010)	1.30%	15.10%

ANNEX 6B – AVAILABILITY OF BROADCASTERS' ONLINE SERVICES ACROSS BORDERS

This Annex provides data on cross-border availability of broadcasters' online services (simulcasting and catch-up-TV/radio). It contains data provided by EBU on public broadcasters' services from 14 EEA countries as well as data from the SatCab Study covering services from 11 MS (three commercial/public broadcasters' channels from each covered MS).

According to the initial findings of the Commission's e-commerce sector inquiry[160], 82% of public broadcasters and 62% of commercial broadcasters covered by the sector inquiry implement at least one type of geo-blocking for their online services. The proportion of agreements requiring service providers to geo-block news (including current events) is 23% and 50% for other non-fiction TV.[161]

Examples of cross-border availability of broadcasters' online services[162]

Public broadcasters:

- SVT (Sweden) geo-blocks its simulcasting TV services (they are available only in Sweden);
- LTV (Lithuania) does not geo-block most of its simulcasting services, except for certain international entertainment;
- Mediathek, the livestream channel of ZDF (Germany), is geo-blocked and cross-border access is allowed only to selected programmes;
- BBC (UK) channels BBC1, BBC2, BBC4 online services (BBC iPlayer) are available only in the United Kingdom while BBC World News online services are available in other MS.

Commercial broadcasters:

- TV4 Play (Sweden) geo-blocks online simulcasting TV services except live TV news;
- TV3 (Lithuania) news and own production is not geo-blocked but 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);
- ITV (UK) free online services are only available for individuals located in the United Kingdom, Channel Islands or Isle of Man, however, ITV offers ITV Essentials, a paid service which provides a selection of programmes available in 11 Member States.

160 An issues paper presenting initial findings is available at http://ec.europa.eu/competition/antitrust/ecommerce_swd_en.pdf.

161 Ibid, p. 55.

162 These examples are based on the information from the SatCab Study, information provided by EBU and own research.

PUBLIC SERVICE BROADCASTERS

The below table provides detailed information about online services of public service broadcasters and their availability across borders for 13 EU Member States and Norway (based on information received from EBU):

Member State	Name of broadcaster	Type of broadcaster **(commercial / public)**	Name and type of TV channel (e.g. news, films, cultural)	Simulcasting of the channel available in the Member State **(yes/no)**	Simulcasting available across-borders in the EU **(fully/partially/no/NA)** **If partially**, please (i) explain which content is geo-blocked; (ii) provide an estimate percentage of geo-blocked content	Online catch-up services available in the Member State **(yes/no)**	Online catch-up services available across-borders in the EU **(fully/partially/no/NA)** **If partially, please explain** which content is geo-blocked
Austria	ORF	public	ORF1; ORF2; ORF III (culture & information) ; ORFSport+	No. About 200 programmes from the 4 ORF-TV-Channels ORF eins, ORF2, ORF III and ORF Sport + are made regularly available as livestream but no entire channel.	Partially- Geo blocking is required due to contractual obligations especially for most of the sport-live-broadcasts but for all other kind of other programme categories as well. Percentage of geoblocked content: - not available it depends on the program […]	Yes	Partially - Only small parts of the programmes available as Video-on-Demand have to be geo-blocked. The geo-blocked programmes can be from all categories. 5-10% is geoblocked
Czech Republic	CT	Public	- CT1 (general) - CT Sport (Sport)s - CT 24 (news & current affairs)	-CT1- **Yes** (not sports news) -CT Sport- **Yes** (not sports news) CT24- **Yes** (not sports	- CT1- Not available - CT Sport- not available - CT 24- **partially** (no sports news)	-CT1- **Yes** (not sports news) -CT Sport- **Yes** (not sports news) CT24- **Yes** (not sports news)	-CT1- Not available -CT Sport- not available -CT 24- **partially** (no sports news)

Member State	Name of broadcaster	Type of broadcaster **(commercial / public)**	Name and type of TV channel (e.g. news, films, cultural)	Simulcasting of the channel available in the Member State **(yes/no)**	Simulcasting available across-borders in the EU **(fully/partially/no/NA)** **If partially**, please (i) explain which content is geo-blocked; (ii) provide an estimate percentage of geo-blocked content	Online catch-up services available in the Member State **(yes/no)**	Online catch-up services available across-borders in the EU **(fully/partially/no/NA)** **If partially, please explain** which content is geo-blocked
				news)			
Denmark	TV2	Public	TV2 DANMARK	**Yes**	**Partially-** TV 2's own produced content, e.g. news programming, and some Danish content produced for TV 2, e.g. documentaries, Danish series (fiction), is not geo-blocked. A number of Danish programmes produced for TV 2, e.g. entertainment, is based on foreign formats and is therefore geo-blocked to Danish ip-addresses. The same applies to licensed non-Danish programme, such as documentaries, fiction (series), and feature films which are also geo-blocked as geo-blocking is required by the content providers. Furthermore, sports programming – news and licensed programming, in particular foreign sports events, is geo-blocked as geo-blocking is required by rights holders. Danish sports events are not geo-	**Yes**	**Partially-** Own produced news and current affairs programming is not geo-blocked. That also applies to current affairs programming commissioned by TV 2 with independent Danish producers. Information programming and other Danish programming commissioned by TV 2 is not geo-blocked in general, but entertainment programming based on foreign formats is often geo-blocked. That also applies to sports news programming and coverage of international sports events. Danish sports events, however, for which rights are licensed from Danish sports associations, are not geo-blocked. Series (fiction) commissioned by TV 2 is generally not geo-blocked, but series licensed from foreign licensors as well as foreign feature films are

Member State	Name of broadcaster	Type of broadcaster **(commercial / public)**	Name and type of TV channel (e.g. news, films, cultural)	Simulcasting of the channel available in the Member State **(yes/no)**	Simulcasting available across-borders in the EU **(fully/partially/no/NA)** **If partially**, please (i) explain which content is geo-blocked; (ii) provide an estimate percentage of geo-blocked content	Online catch-up services available in the Member State **(yes/no)**	Online catch-up services available across-borders in the EU **(fully/partially/no/NA)** **If partially, please explain** which content is geo-blocked
					blocked. It is not possible to provide a precise estimate of the percentage of geo-blocked content, but approximately 69% of TV 2's programme service consists of Danish language programming, which is not geo-blocked in general. However, it is not possible to say if this is the correct percentage of content that is not geo-blocked.		geo-blocked.
Finland	YLE	Public	YLE1; YLE2; YLE Teema; YLE Fem	**Yes**	**Partially** – - Some of sports, fiction, co-production, entertainment especially content where music plays a central role. - About 40 percent is geo-blocked.	**Yes**	**Partially** – - Some of sports, fiction, co-production, entertainment especially content where music plays a central role.
Germany	ZDF	Public	-ZDF main channel (General) Market share: 12 % . -ZDFinfo (Information and current	-ZDF.de: http://live.ZDF.de -ZDFinfo.de: http://live.ZDFinfo.de	Cross-border access via the **general livestream button in the ZDF Mediathek** (main page) to the different ZDF channels (ZDF, ZDF neo, ZDF info and others) is not possible since there is legal	**Yes**– Around 75% of the linear programme is available as catch-up services.	**Partially** The most important part of the ZDF main channel consists of **news, reportage, information programmes, consumer programmes** (around 40%). This is made

Member State	Name of broadcaster	Type of broadcaster **(commercial / public)**	Name and type of TV channel (e.g. news, films, cultural)	Simulcasting of the channel available in the Member State **(yes/no)**	Simulcasting available across-borders in the EU **(fully/partially/no/NA)** **If partially**, please (i) explain which content is geo-blocked; (ii) provide an estimate percentage of geo-blocked content	Online catch-up services available in the Member State **(yes/no)**	Online catch-up services available across-borders in the EU **(fully/partially/no/NA)** **If partially, please explain** which content is geo-blocked
			affairs) Market share : around 1% -ZDFneo (General with stronger focus on fiction and entertainment) Market share: around 1%	-ZDFneo.de: http://live.ZDFneo.de **YES**: All 3 channels are available as 24/7 Livestream	insecurity whether the CoO applies to livestream. Since 28 different laws have to be respected and different provisions on the limitations on copyright might be applicable, ZDF gives cross-border access to the livestream only for individual programmes items accessible through a **specific subpage of the ZDF Mediathek (ZDF Einzelne Live Sendungen 'live.zdf.de/start').**		– wherever possible – accessible on a cross border basis. Main problem: high number of still pictures, short audio-visual material and/or sound included/embedded. Whereas music-rights can be cleared on the basis of the collective agreements (see recommendation GESAC, EBU, ICMP and ECSA), this is not the case for the other parts included in the programme. Daily Practice - if not all embedded/included parts are cleared: (1) The entire programme has to be geoblocked. (2) Embedded material has to be geoblocked (black screen within a programme). (3) Embedded materials have to be changed in a post-production process before making this programme available without geoblocking.

Member State	Name of broadcaster	Type of broadcaster **(commercial / public)**	Name and type of TV channel (e.g. news, films, cultural)	Simulcasting of the channel available in the Member State **(yes/no)**	Simulcasting available across-borders in the EU **(fully/partially/no/NA)** **If partially**, please (i) explain which content is geo-blocked; (ii) provide an estimate percentage of geo-blocked content	Online catch-up services available in the Member State **(yes/no)**	Online catch-up services available across-borders in the EU **(fully/partially/no/NA)** **If partially, please explain** which content is geo-blocked
							No acquired fiction – sport very restricted: German media law prescribes that acquired feature films and acquired episodes of television series which have not been commissioned must not be offered on demand by public service broadcaster. Equally the availability of sport (events) on demand is very much restricted by media law. **Commissioned production and co-production** are made available wherever possible, in the case of international co-production normally only the German language version can be made available.
	ARD	Public	-Das Erste -MDR Fernsehen	**Das Erste:** Yes	**Das Erste**: About 2-3 programs per week cannot be simulcasted due to copyright. Between 15%-20% of the programmes are geoblocked outside of Germany, amongst which: - Sport content, as well as programmes containing sports	**Das Erste:** Yes	**Das Erste**: Das Erste's content is offered online as a catch-up service (insofar as the Channel has the necessary rights and the making available is allowed under German Media Law). Whether the content is geoblocked abroad is decided by the same criteria

Member State	Name of broadcaster	Type of broadcaster **(commercial / public)**	Name and type of TV channel (e.g. news, films, cultural)	Simulcasting of the channel available in the Member State **(yes/no)**	Simulcasting available across-borders in the EU **(fully/partially/no/NA)** **If partially**, please (i) explain which content is geo-blocked; (ii) provide an estimate percentage of geo-blocked content	Online catch-up services available in the Member State **(yes/no)**	Online catch-up services available across-borders in the EU **(fully/partially/no/NA)** **If partially, please explain** which content is geo-blocked
					content - International motion pictures - Other TV-films, for which ARD only obtained the rights for Germany - New films & series, whenever geoblocking is requested - Singular programmes due to personality rights - About 80-85% is not geoblocked, even though there might be legal uncertainty with regard to still pictures or short audio-visual materiel.		used for simulcasting.
				MDR fernsehen: Yes	**MDR Fernsehen:** Everything is blocked outside of Germany because it is too expensive and too burdensome to check the contractual situation in each individual case	**MDR Fernsehen**: Yes	**MDR Fernsehen**: catch-up services are offered for the content for which the channel has the on demand-rights. However, content is blocked whenever required by the contractual situation.
Ireland	RTE	Public	-RTE1 (general)	None are simulcast	None are available outside the island of Ireland	**Yes** (all 3)	**Partially for all three channels;** essentially the

Member State	Name of broadcaster	Type of broadcaster **(commercial / public)**	Name and type of TV channel (e.g. news, films, cultural)	Simulcasting of the channel available in the Member State **(yes/no)**	Simulcasting available across-borders in the EU **(fully/partially/no/NA)** **If partially**, please (i) explain which content is geo-blocked; (ii) provide an estimate percentage of geo-blocked content	Online catch-up services available in the Member State **(yes/no)**	Online catch-up services available across-borders in the EU **(fully/partially/no/NA)** **If partially, please explain** which content is geo-blocked
			-RTE2 (general) -RTEjr (childrens')				situation is: A. fully RTE funded inhouse productions can be available non-geo-blocked B. Programmes that are produced for RTE by independent producers where RTE the majority source of funding can be available non-geo-blocked if such availability will not have the effect of stopping the programme being sold internationally by the producer C. Programmes where RTE is not the majority funder and programming consisting of third party owned content such as sport, movies etc are geo-blocked and not available internationally. In some cases the geo-blocking is to island of Ireland and sometimes the geo-blocking is to Republic of Ireland, depending on who the UK rightsholder to the relevant programme is**.**
Italy	RAI	Public	-RAI UNO –	**Yes**	- fully RAI NEWS	**Yes**- except for	**Partially -** RAI only

Member State	Name of broadcaster	Type of broadcaster **(commercial / public)**	Name and type of TV channel (e.g. news, films, cultural)	Simulcasting of the channel available in the Member State **(yes/no)**	Simulcasting available across-borders in the EU **(fully/partially/no/NA)** **If partially**, please (i) explain which content is geo-blocked; (ii) provide an estimate percentage of geo-blocked content	Online catch-up services available in the Member State **(yes/no)**	Online catch-up services available across-borders in the EU **(fully/partially/no/NA)** **If partially, please explain** which content is geo-blocked
			general -RAI TRE – general -RAI NEWS - news		- partially; RAI UNO , RAI TRE The programming schedule of RAI UNO and RAI TRE are partially available in streaming via internet. RAI is not able to apply a "selective encryption system" for those programmes which RAI does not hold the right for the distribution over the web outside the Italian territory. Programmes with limited access are mainly: sports/fiction/co-productions.	RAI NEWS for which there is no on line catch-up services	provides catch-up services for the programmes for which RAI holds the rights for the web, regardless if the end-user is in Italy or abroad. The programmes which are geo-blocked are sports/fiction/co-productions.
The Netherlands	NPO	Public	-NPO1, NPO2: general. Largest audience -NPO Cultura (cultural) -NPO Best (general, drama)	**Yes**	- NPO1, NPO2: partially, In principle geo blocked, but per programme geo blocking can be turned off, if all rights are available. Most content is geo blocked, mainly: sports, acquired and commissioned fiction,	**Yes -** (npogemist.nl, catch up service for most programmes of the general NPO-channels)	**Partially:** in principle available, but per programme geo blocking can be applied. Geo blocking mainly sports, acquired and commissioned fiction, entertainment. NB some categories are not offered at all because rights are not available at all for catch up services

Member State	Name of broadcaster	Type of broadcaster **(commercial / public)**	Name and type of TV channel (e.g. news, films, cultural)	Simulcasting of the channel available in the Member State **(yes/no)**	Simulcasting available across-borders in the EU **(fully/partially/no/NA)** **If partially**, please (i) explain which content is geo-blocked; (ii) provide an estimate percentage of geo-blocked content	Online catch-up services available in the Member State **(yes/no)**	Online catch-up services available across-borders in the EU **(fully/partially/no/NA)** **If partially, please explain** which content is geo-blocked
			-NPO Nieuws (news). Thematic channels with niche audiences		entertainment. Fully available material is a small percentage. - NPO Cultura en NPO Best; not available - NPO Nieuws: fully available		[…]
Norway	NRK	Public	-NRK 1 -NRK 2 NRK 3/NRK-super	**Yes**	**No**, since some content needs to be geo-blocked due to copyright reasons, and it is technically difficult to easily change from geo-blocking to no-blocking and back, all three of NRKs linear TV-channels are geo-blocked when simulcasted on Internet.	**Yes**	**Partially**- This is due to copyright reasons, especially regarding acquired content where NRK only has acquired rights for Norway.
Poland	TVP	Public	-TVP1 & TVP2 (general) -TVPinfo (information & current affairs) -TVP3 (regional channels)	**TVP1 and TVP2 -** no constant simulcasting. Only selected programmes are simulcast (e.g. ESC, some sports transmissions - if acquired rights permit, some official	**Yes –** TVPInfo & TVP3	TVP makes available online of almost all current programmes (e.g. films, series, news bulletins, current affairs programmes, etc.) that are produced by TVP in the VOD.TVP.PL service, including	Depending on licences and rights acquired. In case of TVP productions, where TVP normally acquires all relevant rights - they are available in the EU. Commissioned productions - depending on agreements. Third parties' content (e.g. films and sports) are normally not available outside Poland.

Member State	Name of broadcaster	Type of broadcaster **(commercial / public)**	Name and type of TV channel (e.g. news, films, cultural)	Simulcasting of the channel available in the Member State **(yes/no)**	Simulcasting available across-borders in the EU **(fully/partially/no/NA)** **If partially**, please (i) explain which content is geo-blocked; (ii) provide an estimate percentage of geo-blocked content	Online catch-up services available in the Member State **(yes/no)**	Online catch-up services available across-borders in the EU **(fully/partially/no/NA)** **If partially, please explain** which content is geo-blocked
				state events). **TVPInfo and TVP3 -** yes (constant simulcast in TVP STREAM service, available also as mobile app.)		those broadcast on channels that are not simulcast (TVP1, TVP2) and those broadcast on channels simulcast online (TVP3, TVPInfo).	
Slovakia	RTVS	Public	-Jednotka, Dvojka (Both multi genre channels, at present RTVS broadcasts only two TV channels)	**Yes**	**Partially -** news and current affairs as well as other own or commissioned programmes (information programmes, entertainment, educational) are in general available acquired, sports, co-productions and entertainment based on licence format are usually geo-blocked although it depends on the certain licence agreements - no percentages available	**Yes**	**Partially -** It is rather similar to the simulcasting, programmes that are geo-blocked for simulcasting are usually also geo-blocked for the online catch-up service -no percentages available
Slovenia	RTVSlovenia	Public	- TV SLO 1 – general with emphasis on	**Yes**	**Partially-** the non-Slovene origin content is fully geo-blocked, when to Slovene	**Yes**	**Yes, partially –** the same rule as for the simulcasting (streaming)

Member State	Name of broadcaster	Type of broadcaster **(commercial / public)**	Name and type of TV channel (e.g. news, films, cultural)	Simulcasting of the channel available in the Member State **(yes/no)**	Simulcasting available across-borders in the EU **(fully/partially/no/NA)** **If partially**, please (i) explain which content is geo-blocked; (ii) provide an estimate percentage of geo-blocked content	Online catch-up services available in the Member State **(yes/no)**	Online catch-up services available across-borders in the EU **(fully/partially/no/NA)** **If partially, please explain** which content is geo-blocked
			news/culture/high level entertainment/ documentary/high quality films and series -TV SLO 2 – sport/leisure/regional -TV SLO 3 – mainly news		origin only not in-house, some co-production program (depending on the contract), all sports and some licensed program (formats acquired, depending on the contract) is geo-blocked		
Spain	RTVE	Public	-La1: general -La2 cultural & films & documentaries - CLAN Kids channel (CLAN is only available " on de-mand").	**Yes-** The content included in the channels wich is produced by RTVE is always available on simulcasting, but the content licenced by third parties may vary according to the agreement with the corresponding licensor.	**partially in the cases of La1, La2** The content is geo-blocked based on the programme categories (depending on the rights): sports, fiction (acquired), co-production. An estimate percentage of geo-blocked content would be about 30 % **- not available in the case of CLAN**	**Yes-** but depending on the rights.	**- partially-** in the cases of La1, La2 The content is geo-blocked based on programme categories (depending on the rights): sports, fiction (acquired), co-production. An estimate percentage of geo-blocked content about 30 % **- not available in the case of CLAN**

Member State	Name of broadcaster	Type of broadcaster **(commercial / public)**	Name and type of TV channel (e.g. news, films, cultural)	Simulcasting of the channel available in the Member State **(yes/no)**	Simulcasting available across-borders in the EU **(fully/partially/no/NA)** **If partially**, please (i) explain which content is geo-blocked; (ii) provide an estimate percentage of geo-blocked content	Online catch-up services available in the Member State **(yes/no)**	Online catch-up services available across-borders in the EU **(fully/partially/no/NA)** **If partially, please explain** which content is geo-blocked
Sweden	SVT	public	-SVT1 -SVT2 -Barnkanalen (Childrens Channel)	**Yes**	Not available	**Yes**	**Partially-** Geoblocked content: - News & current affairs: **no** - Information programmes (eg. Consumer programmes): **no** - Sports: **yes, when acquired and has a potential demand in other countries** - Fiction: acquired **yes generally**; commissioned or own **only if based upon restricted formats** - Educational: **no educational programmes in catch-up services** - Single programmes: **yes, it happens** Percentage of geo-blocked content: **42-44%**
	SR (radio)	public	All SR channels	**Yes**	**Yes-** However geoblocking some major sports events	**Yes**	**Yes –** However, geoblocking some major sports events

AVAILABILITY OF CROSS-BORDER ONLINE SERVICES IN 11 MEMBER STATES: DATA FROM THE SATCAB STUDY[163]

Table 1.1 Online services of leading broadcasters in 11 sample EU countries

Country	Broadcaster	Type	Online service
Denmark	DR	Public	DR TV
	TV 2	Public (subscription)	TV 2 Play
	MTG	Private	TV3 Play
Germany	ZDF	Public	ZDF Mediathek
	ARD	Public	ARD Mediathek / DasErste.de
	RTL	Private	RTL TV NOW
Ireland	RTÉ	Public	RTÉ Player
	TV3	Private	3Player
	TG4	Public	TG4 PLAYER
Spain	Mediaset	Private	mitele
	Antena 3	Private	Atres Player
	RTVE	Public	RTVE A la carta
France	TF1	Private	MyTF1
	France Télévisions	Public	Francetvpluzz
	M6	Private	6play
Italy	RAI	Public	Replay TV
	Mediaset	Private	mediaset.it
	La 7	Private	Riveldi La7
Hungary	RTL	Private	RTLMOST
	TV2	Private	tv2.hu
	Duna	Public	Mediaklikk
Netherlands	NPO	Public	NPO
	RTL	Private	RTLXL.NL
	SBS	Private	net5.nl
Poland	TVP	Public	TVP PL VOD
	TVN	Private	Player
	Polsat	Private	ipla
Sweden	SVT	Public (non-commercial)	SVT Play
	TV4	Private	TV4 Play
	MTG	Private	TV3 Play
United Kingdom	BBC	Public (non-commercial)	BBC iPlayer
	ITV	Private	ITV Hub
	Channel 4	Public	All4

Source: informitv analysis, based on broadcaster total share of viewing

[163] See Section 3 of the SatCab Study for further details; in this Annex, the tables are renumbered for convenience.

Table 1.2 Categories of online programme availability

Category	Definition
Not offered in country of origin	Programming not apparent in the online player
Available in country of origin only	Programming available online in the country of origin but either not offered or not accessible from the other countries tested
Available in country of origin only with exclusions	Programming available online in the country of origin although some programmes were marked as being unavailable
Available in country of origin only by subscription	Programming promoted as available online in the country of origin on a subscription basis, which was not tested
Available in some other countries	Programming available online in one or more but not all of the test countries
Available in some other countries with exclusions	Programming available online in one or more but not all of the test countries, although some programmes are marked as being unavailable
Available in some other countries by subscription	Programming promoted as available online in one or more but not all of the test countries on a subscription basis, which was not tested
Available across borders	Programming available online in the country of origin and three other test countries without any apparent limitation
Available across borders with exclusions	Programming available online in the country of origin and three other test countries but some programmes were marked as being unavailable
Available across borders by subscription	Programming available online in the country of origin and three other test countries, although some or all programmes required a subscription, which was not tested

Source: informitv analysis, based on online accessibility

Table 1.3 Summary of main types of online programme availability

Availability	Symbol
Country of origin only	■
Country of origin only with some exclusions	□
Some other countries with some exclusions	◆
Across-borders	●
Across-borders with some exclusions	○
By subscription	€
Programme type not apparent in the online service	-

Moreover, these symbols can be combined where the analysis indicated varied results for a particular online service. For example, a combination such as o/o€ (open square slash open square euro) indicates that some programming is available free to view and some is available on a paid basis. So■ /○/○€ (solid square slash open circle slash open circle euro) indicates that programming is available in the country of origin, with some programming available internationally free to view and some available internationally on subscription.

Table 1.4 Online availability of simulcast services from leading broadcasters in 11 sample EU countries

Country	Online service	Live Radio	Live TV	Live TV News
DK	DR TV	●	■	-
	TV 2 Play	-	■€	●€
	TV3 Play	-	-	-
DE	ZDF Mediathek	-	■	-
	ARD / DasErste.de	●	■	●
	RTL TV NOW	-	■€	●€
IE	RTÉ Player	●	○	●
	3Player	-	□	-
	TG4 PLAYER	-	●	-
ES	mitele	-	●	-
	Atres Player	●	□/□€	-
	RTVE A la carta	●	●	●
FR	MyTF1	-	■	●
	Francetvpluzz	-	□	-
	6play	-	■	-
IT	Replay TV	●	■	●
	mediaset.it	-	■	■
	Riveldi La7	-	○	●
HU	RTLMOST	-	-	-
	tv2.hu	-	-	●
	Mediaklikk	●	●	●
NL	NPO	●	■	●
	RTLXL.NL	-	-	□
	net5.nl	-	-	-
PL	TVP PL VOD	-	-	-
	Player	-	■€	●€
	ipla	-	-	●€
SE	SVT Play	-	■	-
	TV4 Play	-	■€	●
	TV3 Play	-	-	-
UK	BBC iPlayer	●	■	■
	ITV Hub	-	■	-
	All4	-	■	-

Source: informitv analysis, based on online accessibility

Table 1.5 Online availability of video-on-demand services from leading broadcasters in 11 sample EU countries (catch-up TV/radio)[164] [165]

Country	Online service	News	Entertainment		Drama	
			Local[166]	Other	Local	Other
DK	DR TV	●	●	-	○	-
	TV 2 Play	○€	○€	■	○€	■€
	TV3 Play	-	○	■	-	■
DE	ZDF Mediathek	●	●	-	○	■
	ARD / DasErste.de	●	●	-	●	-
	RTL TV NOW	●	○/□€	-	◆/□€	◆/□€
IE	RTÉ Player	●	●	-	●	-
	3Player	●	■	■	■	■
	TG4 PLAYER	●	●	-	●	-
ES	mitele	●	○	■	●	■
	Atres Player	○€	○	-	○€	-
	RTVE A la carta	●	●	-	●	-
FR	MyTF1	●	○	-	◆	■
	Francetvpluzz	●	■	-	■	-
	6play	●	○	-	■	■
IT	Replay TV	●	○	-	○	-
	mediaset.it	●	●	-	○	-
	Riveldi La7	●	●	-	-	■
HU	RTLMOST	●	●	-	●	-
	tv2.hu	●	●	-	○	-
	Mediaklikk	●	●	-	-	-
NL	NPO	●	●	■	●	■
	RTLXL.NL	●	○/□€	■	■	■
	net5.nl	■	■	-	■	■
PL	TVP PL VOD	●	□	-	□	-
	Player	■	■	■	-	□
	ipla	●	■/○/○€	-	■/○/○€	-
SE	SVT Play	●	○	-	■	○
	TV4 Play	●	○	○	○	■
	TV3 Play	-	●	■	●	■
UK	BBC iPlayer	■	■	-	■	-
	ITV Hub	■	■/◆€	■	■/◆€	■
	All4	●	■	-	■	■

Source: informitv analysis, based on online accessibility

164 The SatCab Study explains concerning these data that "*Individual programmes are also typically offered for access on demand, at the convenience of the user. In many cases, this is limited to a certain time after the initial broadcast. This so-called catch-up window is generally open for a period of 7, 14 or 28 days after broadcast. Other library titles may also be available for a longer period.*"

165 For entertainment and drama programming a distinction was made where possible between local programming that appeared to be produced in or for the local market and international programming apparently produced in another country for international distribution.

166 For entertainment and drama programming a distinction was made where possible between local programming that appeared to be produced in or for the local market and international programming apparently produced in another country for international distribution.

ANNEX 7 – DIGITAL RETRANSMISSIONS OF TV AND RADIO PROGRAMMES

ANNEX 7A – APPLICATION OF LICENSING FACILITATION REGIMES (COLLECTIVE LICENSING) TO THE RETRANSMISSION SERVICES OTHER THAN CABLE

EU Member State	Licensing facilitation regime (collective licensing) applies to IPTV?	If yes, on what basis (legislation, case-law, market practice)?	Licensing facilitation regime (collective licensing) applies to other retransmission services (OTT, mobile, satellite, DTT)?	If yes, on what basis (legislation, case-law, market practice)?
MSs where licensing facilitation regimes apply to various retransmission services other than cable				
Denmark	Yes (ECL)	Legislation	Yes (ECL), service neutral application	Legislation
Finland	Yes (ECL without opt-out)	Legislation	Yes (ECL without opt-out), service neutral application	Legislation
Sweden	Yes (ECL without opt-out)	Legislation	Yes (ECL without opt-out), service neutral application	Legislation
Hungary	Yes	Legislation, case-law	Yes, service neutral application	Legislation, case-law
Slovakia	Yes (ECL for retransmissions over electronic communications networks other than cable)	Legislation	Yes (ECL for retransmissions over electronic communications networks other than cable)	Legislation
Austria	Yes	Legislation, case-law	Yes, point to point rebroadcasting	Legislation, case-law
Ireland	Yes	Market practice	Yes, DTT	Legislation
Netherlands	Yes	Market practice	Yes, DTT	Market practice
France	Yes	Market practice	Yes, satellite	Market practice
Poland	Yes	Market practice	Yes, satellite	Market practice

EU Member State	Licensing facilitation regime (collective licensing) applies to IPTV?	If yes, on what basis (legislation, case-law, market practice)?	Licensing facilitation regime (collective licensing) applies to other retransmission services (OTT, mobile, satellite, DTT)?	If yes, on what basis (legislation, case-law, market practice)?
MSs where licensing facilitation regimes apply to IPTV only				
Italy	Yes	Legislation	No	-
Bulgaria	Yes	Legislation	No	-
Belgium	Yes	Market practice	No	-
Germany	Yes	Market practice	No	-
Spain	Yes	Market practice	No	-
MSs where no licensing facilitation regimes apply to the retransmission services other than cable				
Greece	No	-	No	-
Cyprus	No	-	No	-
Czech Republic	No	-	No	-
Estonia	No	-	No	-
Croatia	No	-	No	-
Latvia	No	-	No	-
Luxembourg	No	-	No	-
Malta	No	-	No	-
Romania	No	-	No	-
UK	No	-	No	-

ANNEX 7B – TV CHANNELS AVAILABLE ON CABLE AND IPTV RETRANSMISSION SERVICES

Comparison of international, national or regional channels available on cable services versus channels established in 11 sample EU countries (2015)[167]

	Channels established in country										
Viewing country	**DK**	**DE**	**IE**	**ES**	**FR**	**IT**	**HU**	**NL**	**PL**	**SE**	**UK**
Denmark	24	17		1	11	2		7	1	22	74
Germany		262		3	26	8	1	5	6		45
Ireland			21		11						155
Spain		1		85	12			1	1		22
France		14		3	164	11		8	1		39
Italy											
Hungary		13		2	34	2	41	7	1		124
Netherlands		16		1	19	2		105	1		73
Poland		4			23	4		12	102		85
Sweden	3	3		1	9	3	2	7	2	61	70
United Kingdom			3	1	12	1					300

Source: European Audiovisual Observatory MAVISE database extract
informitv analysis

Comparison of international, national or regional channels available on telco (IPTV) services versus channels established in 11 sample EU countries (2015)[168]

	Channels established in country										
Viewing country	**DK**	**DE**	**IE**	**ES**	**FR**	**IT**	**HU**	**NL**	**PL**	**SE**	**UK**
Denmark	23	14		2	5	3		7	2	19	62
Germany		253			10	5		4	4		16
Ireland			16		1						98
Spain		1		88	9	1					25
France		31		9	240	10		21	6	2	85
Italy											
Hungary		7		1	13	1	42	5			63
Netherlands		11		1	15	2		68			53
Poland		7			10	4		9	64		53
Sweden	3	2		1	6	2		8	2	59	57
United Kingdom			3		2	1					178

Source: European Audiovisual Observatory MAVISE database extract
informitv analysis

167 SatCab Study, Table 2.27.
168 SatCab Study, Table 2.28.

ANNEX 8 – THE VOD MARKET AND ITS LICENSING SYSTEM

ANNEX 8A – THE EUROPEAN FILM INDUSTRY WITH A SPECIAL FOCUS ON THE VOD MARKET[169]

Overview

The production of films can be characterised by high sunk costs at an early stage of the lifecycle (i.e. development and production stages) and great uncertainty surrounding the financial return of the film project (as it is difficult to predict the success of the film until it is actually shown in cinemas).

The European film production industry is relatively fragmented and is made up of a large number of small independent production companies with the majority of them producing no more than one film per year. The supply chain is vertically disintegrated and individual parties in each stage of the supply chain are exposed to some risk and uncertainty with respect to their investments or inputs. For instance, producers and screen-writers, in the early stages of a film production, would not be guaranteed that adequate finance would be obtained to put their works into action. In recent years, however, a number of larger production companies, such as Canal Plus (France), Gaumont (France) and Sogepay (Spain), have started to adopt the Hollywood approach[170], particularly in the distribution of products.

European consumers tend to favour US films whereas consumption of European films varies heavily across Member States. Indeed, the EU has had a trade deficit with the US for film products for many years, reflecting the high penetration rate of American films in the EU. The market share of US films, defined in terms of cinema admissions in EU, was around 62 per cent while EU films (both domestic and non-domestic productions) only represented around 37 per cent in 2012[171]. As regards Video-on-Demand ('VoD')[172], in a recent case study covering 75 VoD services and 16 SVoD services, it was found that European non-national films accounted only for 14.7% of the films available in the VoD catalogues and 22.8% of the SVoD catalogues[173].

Traditionally, a key point of consumption for both US and European films has been cinemas. Despite the significant technological changes in recent years, there is little evidence that

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169 Large excerpts of this annex are copied from the Study on the "Remuneration of authors and performers for the use of their works and the fixations of their performances", 2015, prepared for the European Commission (CONNECT) by Europe Economics and IViR.

170 The six very large Hollywood studios opt for a vertically and horizontally integrated approach to completing the different stages of the production process, financed by complex financial instruments. In addition, they also dominate the distribution and exploitation chains with their large network and substantial resources.

171 Measured by cinema admissions.

172 According to the Study on the "Fragmentation of the single market for on-line video-on-demand services: point of view of content providers", commissioned by the European Commission (DG CONNECT) and prepared by iMinds (SMIT), 2014, "Television licensing revenues are for instance seen as significantly more valuable to rights holders than VoD licensing revenue. Some interviewed players noted that, as a result, the prices for VoD licenses are set too high by content owners, which makes it impossible to generate a return on investment".

173 On-demand audiovisual markets in the European Union - Developments 2014-2015, European Audiovisual Observatory, November 2015. Calculations based on the number of unique film titles.

cinemas are becoming significantly less important as a means of film consumption. Cinema admission numbers remain stable across the European Union: admissions amounted to 968 million in 2011 and slightly increased in 2015 with 976 million cinema admissions.[174] As regards gross box office, after a decrease in 2013, revenues are now increasing again. In 2015, gross box office amounted to EUR 7 346.7 million, which represents an increase of 17% compared to revenues in 2013.[175]

Recent developments

There have been significant **developments in** both the physical-format video and **VoD markets** during the past decade.

In the early 2000s, the European video software market was shifting from video to DVD and high definition Blu-ray discs. In 2011, the estimated penetration rates of DVD and Blu-ray hardware in TV households in selected EU countries were 75.6 per cent and 3.1 per cent respectively. The introduction of VoD has changed the physical rental and sales markets dramatically. With the increasing use of VoD, consumers no longer need to rely on a specific TV broadcast time to watch their preferred films/TV programmes or wait for the delivery of a physical DVD, but can choose to watch it at any time. A range of new devices, such as laptops, tablets, smartphones and hand-held DVD players have also developed to support VoD systems so that users can play films when and where they want. As such, film distributors face some pressure to change their business models to ensure that the timeline of a film's delivery fits the time preference of the targeted audience rather than what suits their traditional sequence of exploitation windows.

The VoD market is still an emerging market

The number of VoD services has increased significantly over the years and amount to around 2,000 services in Europe[176]. The main players include iTunes, Xbox Video, Netflix, Video Unlimited, Lovefilm, Ace Lrax, Crackle, Google play, HBO (central Europe), MUBI, VoYo etc. The majority of the film services (80%) are online while the remaining 20% operate on TV digital platforms. It is expected that the popularity of VoD services will continue in the future: by 2020, projections suggest that more than 20% of European households will have a subscription to a SVoD service[177]. In the meanwhile, physical medial sales and rentals are expected to fall as a result.

Despite these promising figures, the VoD market is still an emerging market. Currently, revenues from theatrical exploitation largely outweigh VoD revenues. For instance, in 2013, VoD revenues amounted to €1 526 million[178] which represents approximatively one fourth of cinema gross box-office over the same period. As regards the global linear television market in the European Union amounted to EUR 83.6 bn in 2013.[179]

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174 European audiovisual observatory, World film market trends, 2016, p. 18

175 Compared to EUR 6 321.8 million in 2014 and EUR 6 273.1 million in 2013 – European audiovisual observatory, World film market trends, 2016, p. 15.

176 Data for February 2014. European Audiovisual Observatory, Study on on-demand audiovisual markets in the European Union, 2014.

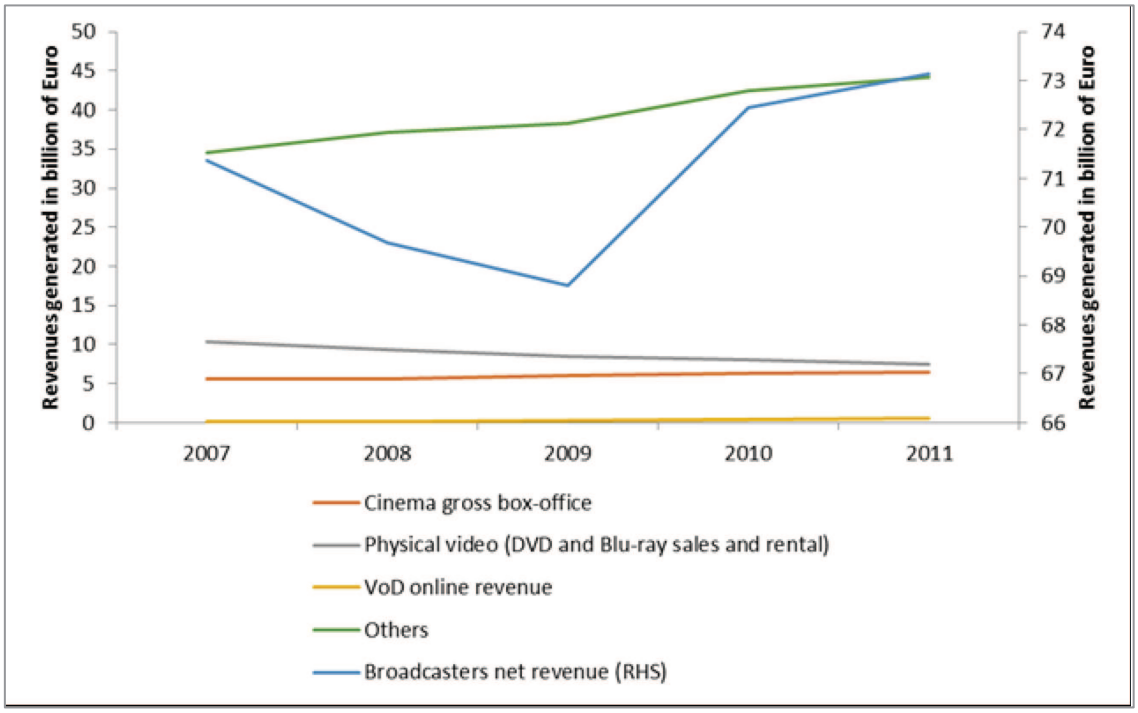
177 Report 'Promoting growth, pluralism and choice: The Country of Origin principle and Europe's audiovisual sector', March 2016, p. 16.

178 The development of the European market for on-demand services, European Audiovisual Observatory, March 2015.

179 Studies from the European Audiovisual Observatory on trends on video-on-demand revenues (November 2015) and trends in linear television revenues (October 2015)

Between 2009 and 2012, the size of the audiovisual market in the EU has increased from EUR 28 046 523 million to EUR 35 526 810 million[180].The following graph, partly covering the same period, provides a good overview of revenues of difference sources in the audiovisual sector.

Evolution of EU film market revenues broken by source



VoD as a means to fight piracy

VoD – and more generally, legal online offer of works – is seen as one of the main solutions to fight piracy. According to a recent survey, the availability of affordable content via legal sources would be the primary reason to stop using illegal sources (almost two thirds (58%) of respondents). It is indeed estimated that 22% of Europeans[181], and around one third of young Europeans[182], believe that illegal download or illegal access to copyright-protected content is acceptable if there is no legal offer in their country. In countries where use of digital content from legal sources is considered as mainstream behaviour, legal sources have been on the market longer, but they are not only numerous, they also provide a broad and recent offer[183]. To help promoting legal offer, the EUIPO and some Member States have put in place tools to help users in finding audiovisual legal content[184]. In France, the CNC has developed a search engine to help finding legal offers[185]. Unavailability remains however an important issue. For instance, it was found that only 12,000 of the 28.000 existing French movies are available

180 The development of the European market for on-demand services, European Audiovisual Observatory, March 2015.

181 "European Citizens and Intellectual Property: perception, awareness and behaviour", 2013. European Observatory of audiovisual.

182 Respondents to Intellectual Property and Youth, Scoreboard 2016. EUIPO Survey (April 2016).

183 Intellectual Property and Youth, Scoreboard 2016. EUIPO Survey (April 2016)

184 E.g. Spain (me sientodecine.com), UK (findanyfilm.com, thecontentmap.com), France (offrelegale.fr), Poland (www.legalnakultura.pl), Netherlands (thecontentmap.nl), Italy (www.mappadeicontenuti.it), Denmark (www.sharewithcare.dk). For the EUIPO: https://euipo.europa.eu/ohimportal/en/web/observatory/where-to-buy-legally

185 Which can be accessed on the following website: http://vad.cnc.fr/

online[186]. The HADOPI has already received almost 640 unavailability notifications from users[187]. The lack of availability is more stringent as regards some categories of works. For instance, despite a clear interest in that sense, the Hadopi report shows that 32% of the unavailability notifications concerned movies from between the 1950s and 1980s. A study has recently confirmed that the older a film, the smaller the number of countries on which it is available on VoD[188].

Exclusivity plays a limited role in the VoD market

VoD platforms offer a wide variety of audiovisual works. A distinction has to be made between original content developed by platforms (e.g. House of cards by Netflix), content that is covered by an exclusive deal (mostly TV series and blockbusters) and other audiovisual works (the largest category that includes most of EU audiovisual works). For the two first categories, exclusivity is a key element destined to attract consumers and to differentiate a platform from its competitors. There is no lack of exploitation in those cases. For the third category, there is no exclusivity: works are simultaneously available on different platforms. Limited exclusivity (e.g. exclusivity granted for a few weeks) can occur, but this remains the exception (e.g. TV series). Rights are generally transferred for short-time periods. Most of the audiovisual works fall under this last category.

Technical costs

Technical costs can include (i) digitisation costs (however, recent works are generally already available in digital format); (ii) formatting costs (there is no uniform format; platforms request different formats); (iii) encryption costs; (iv) sub-titles costs (+/- 8 EUR per); etc. In principle, producers are the ones bearing the main costs, although some platforms also do. These costs could amount up to +/- 1,000 EUR (excluding sub-titles costs).

ANNEX 8B – MAIN ACTORS IN THE AUDIO-VISUAL INDUSTRY[189]

Producers are a very important part of the productions process for both the film and the TV industry. A producer can either be an independent individual or may work on behalf of a studio company to develop the concept of a film and oversee the whole creation and production process of a film. There are several different types of production companies with their activities ranging from being solely concentrated on video production (film, TV show etc.) to being parts of vertically integrated organisations that are active in additional parts of the supply chain such as distribution and marketing. The European film production industry is relatively fragmented and is made up of a large number of small independent production companies with the majority of them producing no more than one film per year.

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186 See 'exposé sommaire' of the French draft law amending Article L.132-27 of the Intellectual Property Code.

187 Notifications (from March 2014 to August 2015) concerning cinema and TV works consumers could not find online See the Hadopi's report, "Rapport intermédiaire sur le signalement des oeuvres introuvables", (2015). Not all works that have been notified were unavailable.

188 C. Grece, "How do films travel on VoD and in cinemas in the European Union – A comparative analysis", May 2016. This study also shows that the genre of a work has an impact on its availability on VoD platforms.

189 From the Study on the "Remuneration of authors and performers for the use of their works and the fixations of their performances", 2015, prepared for the European Commission (CONNECT) by Europe Economics and IViR.

The producer can sometimes act as a creator and work along with other creators to develop different parts of a film, such as the screenplay. In such cases, he would also share the right of his creation, along with other creators of the film. Besides the creation role, he would be responsible for all parts of the production, including acquiring the rights from creators and music rights from external parties and arranging finance for the production process. In principle, the rights that the producer will need to acquire from different rights holders would depend on the forms and mediums in which the producer intends to exploit the final product (e.g. online or offline).

The producer will also be responsible for maximising the revenue of the completed film by securing favourable distribution and exhibition deals. Given their central role in the film making process, the producer is typically the main licensing entity of most, if not all, of the associated economic rights of the completed film product.

Distributors are the entities that have the right to generate revenues from copyrighted material through releasing works to the public or managing the licensing to sub-distribution parties that are responsible for other areas of distribution (in terms of territory, language and medium). In order for distributors to be able to engage in the above activities they will need to have obtained clearance from the right holders (i.e. the producers). The combination of rights that will need to be obtained depends on the intended use.

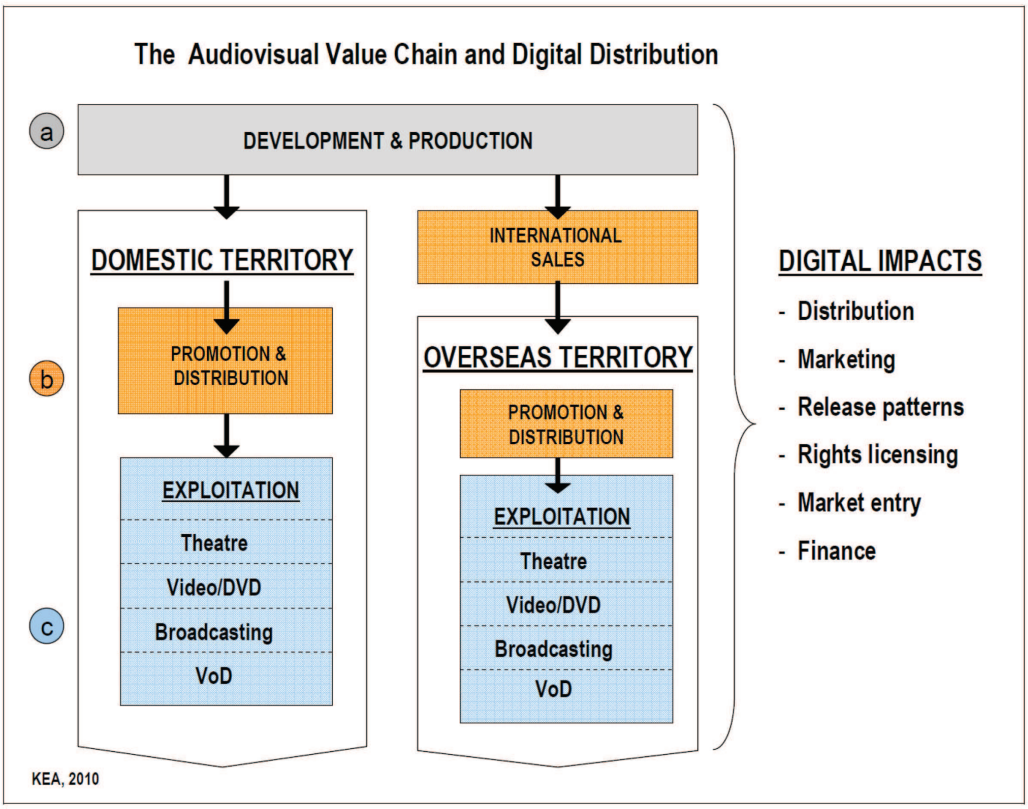
They are also responsible for the marketing of the product and often help fund the project (e.g. through pre-sales). Distributors can be established as part of a large studio company (such as StudioCanal in France) or an independent film distributor (such as Momentum Pictures in UK). Their size could vary from large international company to small local distributor specialising in certain types of films.

Aggregators serve a similar function to traditional distributors but only focus on the online retail market. The aggregators operating in Europe include but are not limited to Juice, Under the Milky Way, LevelK, Do&Co Digital and the Movie Partnership. They act as a distribution outlet and maintain a network of video-on-demand platforms, through which content of film products are converted and distributed to the online service providers such as iTunes, Netflix, Google Play and Amazon Prime etc. They would also collect the revenue generated from the providers and distribute them to the right holders through the producer.

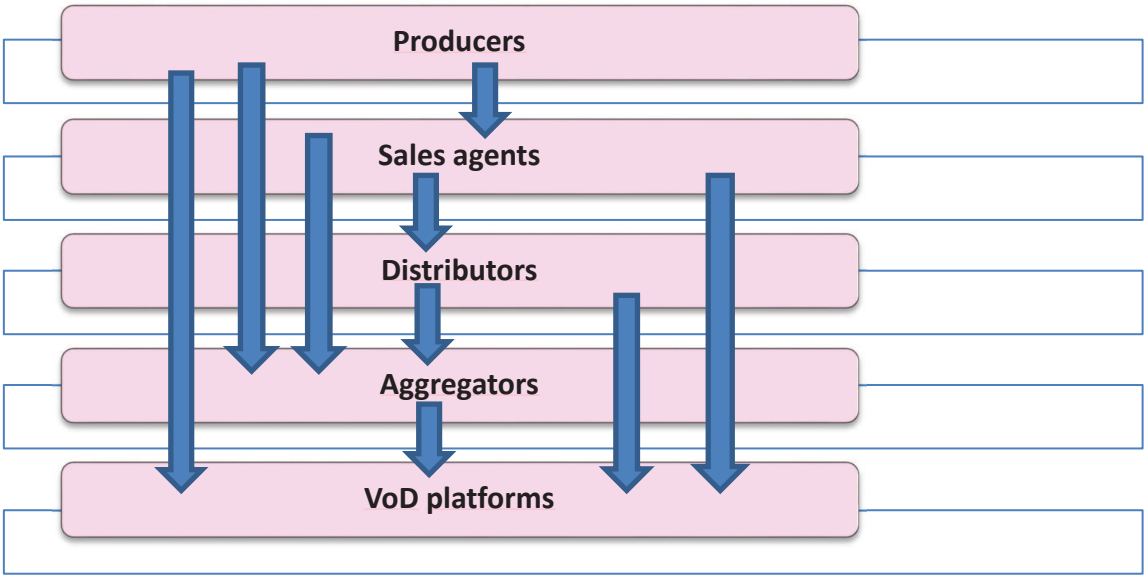
Broadcasters distribute audio-visual content to their audience via terrestrial radio signals, through cable or satellite, as well as IPTV, either free-to-view or on a subscription basis. They are required to obtain the rights to broadcast the audio-visual products from the right holders. This can be done through a number of parties, including the producers, distributors, original broadcasters or the CRMOs of the right holders. Broadcasters can also undertake in-house production of TV programmes.

The contractual practice in the audio-visual sector revolves around the figure of the producer. The producer tends to concentrate all economic rights in an audio-visual work, which means that he represents a '*one-stop-shop'* for the clearance of rights. The pivotal role of the producer in today´s audio-visual contractual practice has not suffered under the structural changes brought about by digitalisation.

ANNEX 8C – VALUE CHAINS[190]: THE AUDIOVISUAL SECTOR AND DIGITAL DISTRIBUTION, AND THE VIDEO-ON-DEMAND SERVICES



Value chain of video on demand services



190 From "Multi-territory licencing of audiovisual works in the European Union", 2010, Study prepared for the European Commission (DG INFSO) and prepared by KEA European affairs and Mines ParisTech Cema and and the Study "New French and European film markets – Digital: a new growth driver for intra-community circulation and export?", Ernst& Young and uniFrance films, March 2015.

ANNEX 8D – REVENUE STREAMS IN THE VIDEO ON DEMAND (VOD) SECTOR[191]

For online platforms, revenues are collected where consumers pay a fee for their subscription to the online film library (SVoD) or pay per view of each film/TV programme (TVoD). Authors and performers are remunerated for the reproduction and making available rights according to their agreements with the exploiter.

Three major business models are used by rights holders:

- Indirect sales through a distributor: This is the most frequent model. The distributor acquires the VOD and SVOD as part of a set of bundled exploitation rights (in most cases, all of them) from the rights holder. These rights are integrated into the minimum guarantee paid by the distributor.

- Sales through an aggregator: The aggregators play an intermediary role between rights holders and platforms, facilitating the access to the rights holders to VoD platforms for making available their audiovisual content. They handle the negotiations with local platforms and manage the aggregation of content and marketing materials for the producer.

- Direct sales to platforms: Direct sale implies a "direct" negotiation between producers and platforms. It requires an additional commercial investment. This is a minority practice, but it is used by big studios. Direct sales mainly involve "big" films, which are self-driven and do not need a marketing intermediary to sell.

ANNEX 8E – COPYRIGHT ACCOMPANYING MEASURES

To ensure a wider access to audiovisual content across borders, the Copyright Communication "Towards a modern, more European copyright framework" sets an agenda of measures to accompany the legislative copyright reform.

The rationale is that wider access to audiovisual works also requires investment without which the public will not be available to find them and watch them online. European works need to be available in formats and catalogues ready for use and to be understood (issue of language versions). They also need to appear prominently in the VoD services available. Otherwise the public will not watch them online.

For this purpose, the Communication has identified 8 different measures, which are now being implemented through:

- A structured dialogue intensified with the audiovisual industry: public conferences, closed door debates with the different segments of the audiovisual sector, structured partnership with national film funds (EFADs: European Film Agency Directors) and a continuous dialogue with stakeholders;

191 From the Study on the "Remuneration of authors and performers for the use of their works and the fixations of their performances", 2015, prepared for the European Commission (CONNECT) by Europe Economics and IViR and the Study "New French and European film markets – Digital: a new growth driver for intra-community circulation and export?", Ernst& Young and uniFrance films, March 2015.

- support projects/initiatives: grants proceeding from the Creative Europe programme, especially the MEDIA strand and also in some cases from H2020 and new financial instruments such as the guarantee facility.

Support measures are not only a way to co-finance projects but also indirectly a policy instrument notably through the choice of conditions to which the support can be made subject.

1) Making films available in unsold territories

Films in Europe are produced by a large number of small production companies and are distributed through individual exclusive distribution agreements territory per territory and are released successively in cinema, DVD, TV, VoD.

In territories where no agreements have been signed with a local distributor (unsold territories), films are not released at all and are not available.

(i) Ready to offer catalogue of European films

For small producers, it is impossible to negotiate individual deals with VoD services in countries where their films have not been acquired by a local distributor. The reason is that, in general, VoD services do not deal on an individual basis. To address this problem, activities of **aggregation** have developed these last years. They directly offer to VoD services different films coming from different producers within a well curated coherent and attractive catalogue.

Since 2015, the MEDIA programme supports "ready-to-offer" catalogues of European films from several producers aggregated and proposed together to VoD services: budget of 650.000 €.

Next steps will be:

- to monitor, showcase and share results of existing projects;
- the launch of a study on the activity of aggregation of films in Europe (end 2016);
- to monitor and increase the financial support to 1.3 million in 2016.

(ii) Develop Licensing hubs to help licensing of works

The purpose is to foster the development of **online tools making possible legal access and monetisation** in territories where films have not been acquired by local distributors.

Currently the MEDIA programme supports a prototype of licensing hub i.e. ICE (International Cinema exchange) since 2015 (260.000 €) and H2020 supports RDI (Rights data Integration).

The next steps will be to:

- to help foster the deployment, step-up and scale-up of ICE or other licensing hub through financial support (via grants, guarantee facility). ICE has been showcased during the Cannes Film Festival of 2016.
- to encourage the use of licensing hubs; showcase and share results; and the dialogue with the film industry through EFF.

2) Promote a common system of identification of films through

(iii) Larger use of standard identifiers of works

Unlike in the book sector where works are clearly identified by an identification number (ISBN), the audiovisual sector suffers from the absence of a common identification number, which would facilitate findability and licensing activities. Two main ISO standard identifiers coexist on the market i.e. ISAN and EIDR, which are not interoperable.

The envisaged action is to promote either the use of a common identification system or the interoperability between the existing ones. This discussion with stakeholders takes place in the framework of the EFF.

Next steps will include (i) to assess the last state of play of standard identifiers on the market and discuss with corresponding organisations (ii) to make access to the MEDIA distribution schemes conditional to the use of solution taken.

3) Make European films more findable and prominent

The visibility and prominence of European works in the VoD services available online is a key condition for reaching audiences. Following actions have this purpose:

(iv) Support the development of a European aggregator

The purpose of this search tool is to enable people to find more easily films they would be interested to watch online (interesting model developed in FR).

The current actions are:

- Discussions with EFADs on search tools developed by both public and private sectors;
- Follow-up of the prototype of EU aggregator developed by the European Observatory on infringements

The next steps will include (i) to agree on appropriate features and encourage MS to develop and deploy search tools; (ii) to work with the Observatory on the EU aggregator and on the toolkits for the development of national search tools; and (iii) to showcase continuous progress through the EFF (this theme was developed at the last Berlinale in February 2016).

(v) Promote legal offers and the discoverability and findability of films

More widely the Communication foresees an intensified discussion with the audiovisual industry on promoting legal offers and on improving discoverability of European films

The Commission will support online activities (VoD services and new models of distribution) and the promotion and development of attractive offers.

4) Promote more efficient funding for, and use of, subtitling and dubbing supported by public funds(vi)

Subtitling/dubbing is essential for cross-border circulation of European works. It is supported by public funds both at national and European level. There is a need to make the existing funds more efficient.

The envisaged actions include:

- to provide support through online distribution schemes (beyond support for subtitling through classic distribution scheme);
- to fund a pilot project and a preparatory action for expanding the audience of specific existing cultural audiovisual media services (ARTE and VPRO) to other territories through support to subtitling;
- to fund a preparatory action on how to achieve innovative cost-effective subtitling.

In the meantime, the Commission will continue its on-going support actions to subtitling and increase the efficiency of the current support and the use of subtitling through a dialogue with the sector and the development of a new online tool through a preparatory action.

5) Promote new models of financing and exploitation

(vii) Find ways for a more sustained exploitation of existing European films

The increasing number of channels of distribution allowed by digital technology (VoD, catch-up TV, TV channels) allows to make an infinite number of films available and to enable anybody to access them online. Nevertheless, a lot of European films cannot be found online after their exploitation cycle.

The Commission will maintain the Expert group on film heritage and will launch studies on distribution and the value of film heritage.

(viii) Explore alternative models of financing, production and distribution in the animation sector

To foster alternative models of distribution requires a holistic approach: Modes of financing have an impact on the way films are distributed as well as on the forms of collaboration between the different actors across the value chain. Animation is a specific sector. Envisaged actions include continuing the dialogue with the animation sector and studying options for fostering the scale up of their activities at EU level.