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PROPOSAL

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OF THE 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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COMMISSION STAFF WORKING DOCUMENT
EXECUTIVE SUMMARY OF THE 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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Executive Summary Sheet

Impact assessment on the modernisation of EU copyright rules

A. Need for action

What is the problem and why is it a problem at EU level?

This IA examines a number of issues linked to the functioning of EU copyright rules in the Digital Single Market. It considers adjusting existing rules or introducing new rules in three distinct areas: (i) access to content online; (ii) the functioning of key exceptions in the digital and cross-border environment; and (iii) the functioning of the copyright marketplace.

In the first area, the problems addressed in the IA are directly related to difficulties encountered with the clearance of online rights, by broadcasters, retransmission services, Video-on-Demand (VoD) platforms or cultural heritage institutions (CHIs). Broadcasters face difficulties in particular when clearing rights for making TV and radio programmes available online across borders; similarly, the clearance of rights can be complex for retransmission services other than cable operators when they offer channels from other Member States (MS). The main findings of the evaluation of the functioning of the Satellite and Cable Directive (Directive 93/83/EEC) have been taken into account when assessing the extent of these problems and the possible solutions. Also, difficulties in acquiring online rights contribute to the limited availability of European audiovisual works on VoD platforms. Finally, CHIs face important difficulties when clearing rights for digitising out-of-commerce (OOC) works of their collections and disseminating them to the public.

In the second area, the legal uncertainty as to the acts allowed under the existing copyright exceptions, in particular the digital environment, has been identified as a major issue for the functioning of the Digital Single Market. Teachers and students are affected by legal uncertainty when using content in digitally-supported and cross-border teaching activities. Researchers face legal uncertainty with regard to the possibility to carry out text and data mining (TDM) on content they have lawful access to. Preservation of works by CHIs, in particular in digital forms, may also be hampered by legal uncertainty and disproportionate transaction costs.

In the third area, the IA concentrates on issues related to the distribution of value in the online environment, with a distinction between the problems faced 'upstream' by right holders when trying to license their content to certain types of online services and those faced 'downstream' by creators when negotiating contracts for the exploitation of their works. Right holders face difficulties when seeking to control and monetize the use of their content by online services storing and giving access to content uploaded by end-users. It has also become difficult for press publishers to license their publications and prevent unauthorized uses by online services. Also, all publishers face legal uncertainty as regards the possibility for them to receive a share in the compensation for uses of works under an exception. Finally, authors and performers (creators) may not always have sufficient information on the exploitation of their works allowing them to negotiate an appropriate remuneration in exchange for the exploitation of their rights.

What should be achieved?

Three general objectives have been identified:

- (i) allow for wider online access to protected content across the EU, focusing on TV and radio programmes, European audiovisual works and cultural heritage;
- (ii) facilitate digital uses of protected content for education, research and preservation in the single market; and
- (iii) ensure that the online copyright marketplace works efficiently for all players and gives the right incentives for investment in and dissemination of creative content.

What is the value added of action at the EU level (subsidiarity)?

By concentrating on the functioning of EU copyright rules in the digital and online environment, this IA addresses problems which have an important cross-border dimension.

As regards the first area, national solutions for the above mentioned problems related to online access to content, including cross-border, may generate further fragmentation in the Digital Single Market. Therefore, in order to produce clear benefits, a common approach and action should be provided at EU level.

As regards the second area, the existing level of harmonisation limits the possibility for MS to act in the area of copyright, as they cannot unilaterally alter the scope of the harmonised rights and exceptions. Moreover, EU intervention is indispensable to guarantee legal certainty in cross border situations. As regards the third area, the

rationale for EU action stems both from the harmonisation already in place (notably in terms of rights) and the cross-border nature of the distribution of content online. Intervention at national level would not be sufficiently efficient to address the identified problems (notably because it would lack scale) and could create new obstacles and market fragmentation. Action at EU level is necessary in order to ensure legal certainty for creators and those investing in content, for distributors and for users. It will also allow right holders to better exercise their rights in the online environment and guarantee a level playing field in the Digital Single Market.

B. Solutions

What are the various options to achieve the objectives? Is there a preferred option or not? If not, why?

The options examined for each topic include the baseline option, in most cases a non-legislative option (in the form of Commission's guidance or recommendation and/or stakeholders' dialogue) and one or several legislative options. A preferred option has been identified for each topic.

In the area of *access to content online*, different licensing regimes, considered as enabling mechanisms to facilitate the clearance of rights, are examined in the legislative options.

- The preferred option in relation to online transmissions of broadcasting organisations is the application of the country of origin principle to the clearing of rights for their online services which are ancillary to their initial broadcast.
- As for the digital retransmissions of TV/radio programmes, the preferred option is the application of the mandatory collective management of rights to retransmission services provided over "closed" electronic communication networks.
- For the licensing of VoD rights, the preferred option includes a European stakeholders' dialogue and a negotiation mechanism that would facilitate the conclusion of licences for the online exploitation of audiovisual works by removing contractual blockages.
- Finally, for OOO works, the preferred option is a legislative intervention at EU level enabling MS to put in place specific legal mechanisms for the conclusion of collective licensing agreements for the use of OOO works by cultural heritage institutions (CHIs) and on the introduction of a cross-border effect for such agreements.

In relation to *exceptions*, the legislative options are designed in a way to complement the existing exceptions (in the case of preservation and teaching) or introduce a new exception for specific uses (e.g. text and data mining). Different options are envisaged, with variations on the scope of the exception, the beneficiaries and/or the relationship with the licensing market.

- The preferred option for teaching activities is a mandatory exception covering digital uses undertaken in the context of illustration for teaching with the option for MS to make it subject to the availability of adequate licences covering the same uses (digital and cross border).
- For TDM, the preferred option is a mandatory exception applicable to research organisations acting in the public interest such as universities or research institutes. The exception would allow them to carry out TDM on content they have lawful access to, for the purposes of scientific research.
- For preservation of cultural heritage, the preferred option is a mandatory exception for preservation purposes by cultural heritage institutions (CHIs).

Concerning the *functioning of the copyright marketplace*, the legislative options considered aim at ensuring a fair sharing of the value in the online environment, notably through the introduction of specific obligations on certain types of online services or on those contracting with authors and performers.

- In relation to the use of content by user uploaded content services, the preferred solution is an obligation on online services storing and giving access to large amount of content uploaded by their users to put in place appropriate and proportionate technologies, and to increase transparency vis à vis right holders.
- Concerning the rights in publications, the preferred solution is the introduction in EU law of a related right for publishers covering the digital uses of their press publications and of a provision enabling MS to allow all publishers (news, books, scientific, etc) to receive a share in the compensation for uses under an exception.
- In relation to the lack of transparency on the remuneration of creators, the preferred option consists in the introduction in EU legislation of transparency obligations on the creators' contractual counterparties (notably producers and publishers), supported by a contract adjustment and dispute resolution mechanism.

What are different stakeholders' views? Who supports which option?

The options considered in this IA would affect a wide range of stakeholders, notably: authors and performers, collective management organisations, producers, publishers, broadcasters, providers of retransmission services, distributors, online services, institutional users, researchers, consumers. Stakeholders' views are very specific to each topic and are therefore presented in relation to each option in the IA. The results of the public consultations held in 2013-2016 which support the analysis in this IA are presented in Annex 2.

C. Impacts of the preferred option

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

The preferred options identified in relation to online transmissions and retransmissions of TV and radio programmes would reduce the transaction costs linked to the clearance of rights faced by broadcasters for their cross-border online transmissions and by retransmission services provided over "closed" electronic communications networks (e.g. IPTV). They are also expected to enhance the cross-border distribution of and access to broadcasters' TV and radio programmes.

Concerning the licensing of VoD rights, the preferred option would help removing contractual blockages and could therefore improve the availability of European audiovisual works on VoD platforms.

For OOC works, the preferred option would favour a reduction of transaction costs and make possible the specific licences required for the digitisation and dissemination of OOC works by cultural heritage institutions, for all types of works and in all MS, including across borders

The new exception for digital uses of protected content in the context of illustration for teaching would bring full legal certainty to educational establishments and teachers, which is expected to increase the uptake and quality of digital technologies and innovative methods in education and provide an enriched learning environment and improved outcomes for students. The possibility for MS to make the exception subject to the availability of licences covering the same uses would bring the necessary flexibility without reducing the legal certainty for users or hampering cross-border uses.

The new TDM exception would increase legal certainty and reduce rights clearance costs for research organisations, including when research projects are carried with a possible commercial outcome, eg. in the context of PPPs.

The preferred option for preservation would provide full legal certainty to CHI carrying out preservation reproductions of works in their permanent collections, including with digital technologies.

In the third area covered by this IA, the preferred options are expected to allow right holders to better exploit and control the distribution of their content online. The obligation for user uploaded content services to deploy technical means would allow right holder to better decide on the availability of their content on these services. It is likely to encourage the conclusion of agreements for the use of content and to generate additional revenues for right holders.

As for press publishers, the preferred option would increase their legal certainty, strengthen their bargaining position and have a positive impact on their ability to license content and enforce the rights on their press publications. The preferred option would also increase legal certainty for all publishers as regards the possibility for them to receive a share in the compensation for uses under an exception.

The transparency obligations imposed on their contractual counterparties would provide creators with the information necessary to assess whether their remuneration is appropriate and with the legal means to request, where necessary, adjustment of the remuneration (contract adjustment mechanism).

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

The application of the country of origin to the right clearance for broadcasters' ancillary services online would be a new situation for right holders when licensing their content to broadcasters for online transmissions. However, it is a targeted intervention (limited to broadcasters' ancillary online services and not affecting the contractual freedom of broadcasters and right holders) which is expected to facilitate the development of the market without disruption of the existing business models and distribution strategies.

The application of mandatory collective management for certain types of digital retransmission services would affect the right holders' licensing choices in a limited manner. The compliance costs would be marginal as the same network of collective management organisations (CMOs) which is used to license rights to cable retransmissions could be used to license rights to retransmissions by means other than cable.

As regards the negotiation mechanism aimed at facilitating the licensing of VoD rights, the implementation costs would be limited, as MS could rely on existing structures with the necessary expertise. Stakeholders (right holders,

distributors, VoD platforms) may incur some costs for participating in the negotiation mechanism. These costs would however be offset by the efficiency gains deriving from successful negotiation.

The preferred option for OOC works would not imply any direct costs as such. In case the legal mechanisms are used, CMOs would incur some costs related to transparency requirements, handling of opt-outs and administration of the licence.

In the area of exceptions, the preferred options are not expected to affect right holders' licensing revenues to any significant extent. Very limited compliance costs may arise from the need to adapt the scope of existing licences to take account of the new exceptions.

For teaching, the new exception is not expected to have an impact on the right holders' primary market, notably because of the purpose and conditions attached to the exception (illustration for teaching, digital uses under secure electronic networks). It may imply some compliance costs for MS deciding to make the application of the exception subject to the availability of licences covering the same uses, because of the requirement to ensure availability and visibility of such licences. However, these costs would allow to significantly reduce the educational establishments' administrative burden.

In the case of TDM, the lawful access condition foreseen for the use of the exception would ensure that the preferred option does not affect the right holders' subscription market.

The preferred option for preservation of cultural heritage would not generate particular compliance costs; impact on revenues for rights holders would be minimum and even negligible, as this exception would only apply to works that CHIs already have in their permanent collections and have no bearing on the acquisition of permanent copies into a collection.

For online services distributing content uploaded by end-users, there would be compliance costs deriving from the technologies to be put in place. These costs would depend on the quantity and the type of content to be identified. They are expected to be limited by the fact that the technologies to be put in place need to be proportionate, and that a majority of the services covered already deploy some content identification technologies.

The introduction of a related right covering digital uses of press publications is not expected to generate higher licence fees for online service providers which already conclude licences covering specifically the use of digital news content. It would only imply costs for those online services providers which are not concluding licences for the reuse of publishers' content today when they should in principle do so, pursuant to copyright law. The possibility for MS to allow all publishers to receive a share in the compensation for uses under an exception is not expected to generate costs as collecting societies, in charge of collecting compensation for publishers, are already in place in a majority of MS. For remuneration of creators, the transparency obligations would generate compliance costs for the creators' contractual counterparties, which are however expected to be reasonable. The very limited availability of data did not allow for an overall quantification of these costs; however estimates are included in the IA on the basis of the few examples reported by stakeholders. The contract adjustment mechanism is expected to generate limited costs (e.g. renegotiation costs) since it is likely to be used mainly as a leverage in negotiation. MS could use existing structures in order to reduce the possible costs related to setting up the dispute resolution mechanism.

What are the impacts on SMEs and competitiveness?

The high share of SMEs in the creative industries has been taken into account in the assessment of the policy options. The preferred options in the area of access to content are expected to benefit SMEs (as TV/radio broadcasters, service providers or right holders), by reducing the administrative burden linked to the clearance or licensing of rights. In the case of exceptions, the preferred options constitute solutions which are not expected to have any significant impact on the licensing market or revenues of SMEs (right holders). An exclusion of micro-companies has not been considered appropriate as it would create major legal uncertainty for users.

In the third area of this IA, the preferred options would support SMEs (right holders) in concluding agreements with online content services. Where they would generate obligations for SMEs, exemptions or mitigating measures have not been deemed appropriate as they may create possibilities for businesses to circumvent the obligations and would not allow reaching the desired objectives.

Will there be significant impacts on national budgets and administrations?

The preferred options will not generate any significant impacts on national budgets or administrations. Nevertheless, certain options include specific obligations for MS, e.g. identification or creation of an impartial instance to facilitate negotiation between the relevant parties for the licensing of VoD rights; measures to ensure the visibility of licences for educational uses; organisation of stakeholders' dialogues on the reporting to authors and performers and setting up of a dispute resolution mechanism between authors/performers and their contractual counterparties. Indications of costs, where available, are mentioned in the relevant sections of the IA.

Will there be other significant impacts?

N.a.

Proportionality?

The preferred options have been elaborated in a way to effectively address the original problems without going beyond what is needed to achieve the objectives. Other options, sometimes with a wider scope, have been excluded as they would not allow a balanced and proportionate response to the problems presented in this IA.

D. Follow up**When will the policy be reviewed?**

Specific indicators have been defined to monitor progress in the achievement of the objectives, with data collection foreseen to take place every 2 or 3 years. A comprehensive evaluation could take place at the latest 10 years after the adoption of the legislative measures, in order to measure their impacts and added value.