



Brussels, 28 May 2015

Minutes of the second meeting of the Copyright review Inter-Service Steering Group. Brussels, 13 May 2015

The Chair, [REDACTED] (SG.E2), recalled that since the first meeting of the Copyright review Inter-Service Steering Group (ISSG) took place the Communication on the DSM Strategy had been adopted. The DSM Strategy sets out concrete objectives in the area of copyright, in line with the conclusions of the DSM orientation debate in the College.

[REDACTED] (DG CNECT) stated that the current version of the draft Impact Assessment (IA) did not identify the preferred policy options – as per the instructions of Commissioner Oettinger's Cabinet – on some of which a final decision remains to be taken. Moreover, no information had yet been included in the IA on problem 2 ('Deficiencies in the functioning of the online market place') as there is still ongoing analysis as regards the appropriate way to approach this issue. Generally, it should be kept in mind that the present exercise does not cover all copyright-related matters and does not preclude other initiatives on specific issues should the need arise in the future, for instance on the remuneration of authors (studies are currently being prepared) or as regards the review of the Satellite and Cable Directive announced in the DSM Strategy. The timing of the submission to the IA Board will depend on the timing of the decision on the preferred policy options.

The ISSG reviewed the draft IA text section by section and made the following principal comments:

Problem definition

DG JRC stressed their role as provider of empirical evidence on the one hand and their more direct stake in policy decisions regarding the application of copyright to scientific research. Overall, the economic perspective adopted in the document does not give enough prominence to the expected benefits for consumers and for the creative sector. The amount of creative content produced by a cultural sector is not necessarily connected to the level of the sector's revenues, as demonstrated by DG JRC for the music sector.

DG GROW asked for a reference in the text to the e-Commerce Directive to be clarified (information society providers should be replaced by online intermediaries).

DG EAC expressed satisfaction that most of their comments had been incorporated into the revised text. However, the problem definition related to text and data mining (TDM) could be further balanced, for instance by reflecting the efforts undertaken by publishers to provide solutions, even if there are yet to yield tangible results. Beyond copyright, other obstacles affecting the demand for TDM should also be mentioned e.g. lack of

skills. Another way to improve legal certainty would be to clarify what is already possible or not possible under the current legal framework.

DG JUST took note of the inclusion of an annex describing copyright-related issues not covered by this exercise but regretted that this information was not included in the main part of the document. More details should be provided about the reasons for not addressing them.

DG GROW informed that an evaluation of the IPR Enforcement Directive would be launched in 2016, with a public consultation expected before the end of the year. One of the policy options concerning portability and cross-border access makes reference to an enforcement implication (policy option 4 – 'pan-European licences'). In the case that this policy option would be the preferred one, this aspect would need to be elaborated further.

DG RTD emphasised the importance of TDM for researchers and underlined that the related problem definition was very well described.

DG ECFIN made suggestions concerning the structure and readability of the document, in particular including TDM in the scope of pillar 3 (i.e. issues related to access to information) rather than addressing it separately.

The SG called for consistency in the qualification of the size of the demand for cross-border access to content (problem 1) across the IA (currently described as 'significant' in the problem description section while it is deemed to be 'marginal' in the assessment of impacts). The SG also called for the statement that the IA takes as a starting point that absolute territorial restrictions are the rule in the audiovisual sector to be substantiated. The description of the problem in the area of TDM could be strengthened, e.g. when it comes to demonstrating the potential underuse of TDM in Europe as compared with other parts of the world.

██████████ (DG CNECT) explained the choice made by DG CNECT to present TDM as a distinct problem: while problems 3 to 5 concern access to knowledge, problem 6 (TDM) is more about the use of a particular technique to process knowledge that is already accessible. As regards problem 1, references to the demand for cross-border access to content and to possible absolute territorial restrictions in the audiovisual sector will be reviewed and appropriately nuanced. Efforts have been made to present the most balanced picture of the situation regarding TDM. The possibility to cover additional elements will be considered. In terms of available evidence, caution is required in using certain studies or data which have been challenged by stakeholders.

██████████ (SG) indicated that the assessment of impacts should be moved to the main part of the document and not presented as annexes. In principle, the assessment should be proportionate to the size and importance of the problems.

██████████ (DG CNECT) asked for more specific guidance from the SG as regards the total length of the document, stressing the large number of complex issues that need to be analysed.

Section 5.1: Policy options to remove barriers and create incentives for portability and cross-border access to content services

DG JRC pointed to a range of studies it has recently published concerning the creative sector, mostly concerning the music sector. New studies focussing on the audiovisual sector are about to be launched from which the first quantitative results will not be available before the end of the year (at the earliest). Data will be collected to investigate the link between revenues and content production in the audiovisual sector, as has been done for music. The IA does not sufficiently underline the positive impact of measures on cross-border access for consumers, in terms of increased choice. Impacts should be taken into account in an aggregate manner. Finally, DG CNECT was asked to clarify how pan-European licenses (option 4 for problem 1) would solve the problem of cross-border access.

DG COMP reiterated their concern about the current exclusion of content accessed against other forms of remuneration than direct payment (notably advertisement) from the scope of the measures addressing cross-border access/portability. This discrimination could also be problematic in view of competition law principles.

DG EAC enquired about the inclusion of live sports events in the scope of measures on portability and cross-border access. If so, a specific analysis of impacts on this sector would be required. Aside from sports, DG EAC has strong concerns about the impact of the envisaged measures on cultural diversity, in particular as a consequence of a potential decrease in the financing of EU audiovisual content. The functioning of the European audiovisual sector is based on complex and delicate dynamics, which should be analysed in more detail. In case certain negative impacts could not be avoided, the overall benefit (e.g. for consumers) should be clearly demonstrated.

DG JUST offered to provide some contribution on policy option 4 (pan-European licences), which appears to be a conflict of law matter. As regards the cross-border dimension of enforcement, a recently adopted Regulation has made injunctions directly applicable across the EU.

DG GROW clarified that while it may indeed be theoretically possible to enforce certain types of injunctions in other EU Member States, this appears highly unlikely in practice, at least as far as injunctions related to IPR enforcement are concerned. A recent public consultation held on the topic indeed identified a number of concrete hurdles, including the underlying lack of harmonisation of the regulatory framework. Concerning cross-border access, the line between passive and active sales will be very difficult to draw in the online context and requires careful consideration. Even if service providers themselves are not allowed to actively market their offers in other EU Member States, other intermediaries may set up websites providing links to legal content that can be obtained through passive sales, as is already common practice for pirated content.

DG GROW (Services Unit) further emphasised the need to define the concept of passive sales. More clarity on this aspect, as well as more evidence in the form of hard data, are required in order to be able to assess the impacts of option 3 (cross-border access through passive sales).

DG COMP asked whether the holdback period proposed as a safeguard in the context of the measures on passive sales would apply to all types of content without distinction.

When defining these measures, it is necessary to ensure that there is still scope for the application of competition on a case-by-case basis.

The SG stressed the need to streamline and shorten the assessment of impacts. As the strongest impacts will be felt by the audiovisual sector, the IA should focus more on this sector and go less into detail as regards other sectors. The policy options should provide certain additional information which is essential in order to assess their impacts. On portability, the description of the policy option should specify what would be considered as a 'temporary stay', what would be the authentication method, and whether compensation for rights holders would be envisaged. On cross-border access, the distinction between passive and active sales should be defined precisely, particularly as this distinction will be difficult to enforce in an online environment. The IA acknowledges that the overall effect of measures enabling passive sales in terms of added revenues for rights holders depends on the business model of the service provider and its contractual relation with the rights holders. In order to assess the potential new revenues for rights holders stemming from passive requests by customers located in Member States where their content is not distributed, the IA should thus include data regarding the most common model of remuneration (by streaming/download or lump sum).

██████████ (DG CNECT) reacted to the various comments by indicating that:

- Any additional contribution providing facts and data, e.g. from DG COMP's sector inquiry, would be very useful.
- The choice to focus on content provided against direct payment (as opposed to other forms of remuneration) is driven by realism. The proposed measures are already very ambitious and require striking a delicate balance between the respect of the fundamental rights of rights holders and the need to ensure free movement, while ensuring appropriate remuneration of content owners. This balance would be even more difficult to ensure if free/ad-based content was also covered.
- Live sports programmes will not be covered as the main transactions occurring between sports content owners and distributors are not related to copyright (or are so only to a minor extent).
- It does not appear feasible to define a specific quantitative threshold regarding the distinction between passive and active sales.
- The holdback period envisaged in option 3 (passive sales) would apply to AV content.
- The proposed measures will be without prejudice to the application of competition law.
- Country of origin in Policy option 4 (pan-European licences) would indeed not per se ensure cross-border access; hence the proposal to complement it with a prohibition of contractual restrictions between services providers and consumers.
- Policy option 4 (pan-European licences) would create a legal fiction whereby the act relevant for the copyright exploitation of the content would be deemed to take place in one country (country of origin). This does not amount to a conflict of law mechanism.
- Regarding enforcement, the cross-border applicability of injunctions currently requires an assessment by a national judge on the basis of an infringement that took place in his/her Member State of competence. In a country of origin scenario, there would be no

infringement taking place in the judge's own country. In case option 4 (pan-European licences) would be the chosen option, a solution to this problem would need to be found.

- As regards portability, the concept of 'temporary stay' needs to be defined. There should be no particular issue regarding technological aspects (authentication, quality of service). Remuneration of rights holders should not be a problem.

- The potential impact of measures on passive sales on rights holders' revenues depends indeed on the type of contractual arrangement between rights holders and service providers (remuneration on lump-sum or per-use basis), as well as on their respective bargaining positions. There is a lack of transparency regarding these contractual arrangements. It is however not intended to address this issue as it would require interfering too strongly with business decisions.

Section 5.5.1: Policy options to facilitate the use, including across borders, of protected content in digitally-supported teaching practices

DG EAC asked for further clarification on a number of points, such as the exact mandatory elements to be included in the exception and the definition of beneficiaries. As regards beneficiaries, the approach should be in line with the current Copyright Directive, which provides that the commercial or non-commercial nature of the purposes should be analysed with regard to the type of activity, not to the status of the establishment.

██████████ (DG CNECT) indicated that there was no intention to depart from the current approach regarding beneficiaries.

Section 5.6: Policy options to establish clear conditions and facilitate text and data-mining activities

DG RTD stressed the important added value of policy intervention in this area (although option 5 is perhaps too far-reaching). A number of suggestions will be provided in writing in order to complement the description of impacts. A reference to the EU open access policy should be added. The text currently focuses on text mining but more could be added about data mining. It should be clarified that the proposed exception cannot be overridden by contracts.

DG EAC expressed concerns with regard to policy options 4 and 5, as they would give rise to too many risks of abuse. More data should be added concerning cost implications in the context of public-private partnerships (PPP). Another sensitive issue is the potential illegal downloading of the material. Proposals to address this aspect should be strengthened. The impact on cultural diversity should be further elaborated.

██████████ (DG CNECT) recognised that the issue of illegal access was a strong concern for rights holders. This issue may be further addressed during the legislative process through specific clauses (e.g. anti-circumvention measures). A more detailed analysis of the way PPPs are run in the research area will be added. It appears, however, unlikely that major companies would enter into a PPP arrangement for the sole purpose of benefiting from the TDM exception. As far as cultural diversity is concerned, the impact should be very limited as this exception is about scientific publications. The impact on the publishing industry, which is relevant to cultural diversity, is assessed separately.

[REDACTED] (SG) concluded the meeting by stressing the importance of clearly identifying the impacts on SMEs and start-ups, as well as on employment. The IA should also specify whether micro-enterprises would be covered by the envisaged measures.

Next steps:

DGs are invited to send their comments or contributions to DG CNECT ([REDACTED]), with copy to the SG ([REDACTED]), by **20 May**. The next meeting of the ISSG is tentatively scheduled for early June.

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