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## **Minutes of the sixth and seventh meetings of the Copyright review Inter-Service Steering Group**

**Brussels, 14 and 27 June 2016**

*Two ISSG meetings were convened to finalise discussions on the various sections of the draft impact assessment report. At the first meeting, held on 14 June, the ISSG was invited to provide comments and inputs on the draft evaluation of the Satellite and Cable Directive and to raise any outstanding comments on the revised versions of the sections of the draft impact assessment, related to (i) measures on access to content and (ii) exceptions, that had been examined during previous ISSG meetings. These documents were submitted to the RSB on 22 June. The second meeting, held on 27 June, examined the sections related to (i) the use of protected content by online service providers storing and giving access to user uploaded content, (ii) the rights in publishing and (iii) the fair remuneration in contracts of authors and performers.*

The Chair, [REDACTED] (SG.E2), opened both meetings, invited comments and inputs by the ISSG members on the various documents under consideration and outlined the next steps in the process towards adoption of the copyright reform, scheduled for 21 September.

### **1. Draft REFIT evaluation report of the Satellite and Cable Directive**

DG CNECT briefly outlined the content of the draft report and explained that no modifications to the Satellite and Cable Directive would be proposed. The evaluation indeed concluded that the mechanisms in place for satellite and cable distribution remain relevant, that they have achieved their objectives to a large extent and have led to low administrative burden and compliance costs. The draft evaluation does not examine the opportunity of extending these mechanisms to the online world. This forward-looking aspect is addressed in the draft IA.

SG made a number of comments, stressing in particular the need to establish a causality link between facts and conclusions. The evaluation is based on very limited evidence therefore the conclusions should be toned down. The assessment of coherence, EU added value and the section on limitations should be further elaborated. The baseline (i.e. situation before the Directive was adopted) should be exposed. All available sources of information should be used. SG also asked when the study on the Directive would be published.

DG CNECT indicated that the study was not finalised yet but that its main results had been incorporated into the draft evaluation and impact assessment reports. The study will be published in September.

## **2. Draft Impact Assessment**

During the two meetings, the group reviewed the draft report chapter by chapter and made the following principal comments:

### **a) Ensuring wider access to content**

#### *Online transmissions and retransmission of TV/radio programmes*

DG JUST asked for clarifications about the scope (why only simulcast and catch-up?) and added value of Option 2 (Online transmissions of broadcasting organisations). A review clause could be included in order to consider the extension of the country of origin principle (COO) to video-on-demand services in the future.

DG CNECT recalled that the scope of the country of origin principle had been subject to prior discussions, in particular when preparing the Copyright Communication of last December. It was acknowledged that video-on-demand services had different characteristics and that the effect of applying the COO to on-demand services would have disproportionate impacts on certain types of content. In terms of added value, the COO should lead to lower transaction costs and ensure legal certainty, which should facilitate the cross-border availability of more TV broadcasters' programmes online.

DG TRADE pointed out in relation to the application of the COO to certain types of online services (option 2) that there was uncertainty around the possibility in the future for right holders to exercise contractual freedom in order to limit the distribution of their content to certain territories. In particular, these practices could be significantly affected by outcome of the ongoing related antitrust investigation by DG COMP. It is therefore a major source of concern for most audiovisual right holders and should be reflected in the report. In this regard, the different positions of public and commercial broadcasters should be clearly indicated.

DG COMP reiterated their earlier comment about the scope of the proposal, which in their view should cover also OTT services. Moreover, the language of the IA should be aligned with the existing legislative documents (the Portability and Geo-blocking Regulations) when it comes to references to cross-border licensing issues. Drafting suggestions aimed at avoiding any incorrect statements and avoiding unnecessary references to competition law, case- and fact-specific, as a factor affecting industry-wide licensing practices. will be sent after the meeting. The report should also not give undue deference to documents prepared for/by the industry (including the film studios).

SG regretted that despite repeated requests by DG CNECT public broadcasters did not provide more data on potential savings in transaction costs. The reference to the study by Oxera should clearly indicate that the study was commissioned by industry.

#### *Out of commerce works*

DG TRADE asked for more details about the determination of the out of commerce status of works and whether the ARROW project could be used for this purpose.

DG EAC asked whether under option 2 accompanying measures could be envisaged in order to support the process of identifying whether or not a piece of work is out of commerce.

DG CNECT explained that the proposed measures would not dictate how and to which extent the determination of the out of commerce status should be carried out. It is more appropriate to leave Member States the possibility to adopt more detailed guidelines on this point. Existing databases, such as the ARROW project, are not relevant in this context as they are focussing on different types of works. Supporting initiatives or other measures might be provided for at national level on a sector by sector basis.

## **b) Adapting exceptions to the digital and cross-border environment**

### *Use of protected content in digital and cross-border teaching*

SG recommended reinstating the discarded option that was included in an earlier version of the report consisting of a mandatory exception with a broader scope.

DG GROW asked for clarification about the choice of a mandatory exception as opposed to more flexible systems such as extended collective licensing.

DG CNECT explained that illustration for the purpose of teaching was an activity already addressed through an exception in the current copyright framework, which is however optional for Member States to implement. It is therefore logical to follow the same approach and make the existing exception mandatory while keeping an adequate balance with right holders' interests by leaving the possibility for Member States to make it subject to the availability of licences.

### *Text and data mining*

DG RTD expressed support for the preferred option but raised concerns about the wording used in the IA to define its beneficiaries, considered too restrictive. It was also suggested to include a reference to the recent Council conclusions of 27 May on Open Science as well as to the Commission Framework for State aid for research.

DG CNECT indicated that the text of the draft IA would be reviewed in order to make clear that the intention is to cover all organisations carrying out research for public interest purposes. An exact definition of beneficiaries would then be provided in the legislative text.

### *Preservation of cultural heritage*

DG EAC asked for clarification about the definition of cultural heritage institutions. The criteria used to determine which institutions can benefit from the exception could have an effect on the impacts of option 2.

DG CNECT indicated the scope of the exception in terms of beneficiaries should be sufficiently broad to ensure that all institutions which have the ability to preserve works, including but not limited to public and national libraries, can benefit from it.

## **c) Achieving a well-functioning market place for copyright**

### *Rights in publishing*

DG CNECT explained that the main problem addressed in this section is the difficulty faced by news publishers in monetising their content online. To improve their situation, it is proposed to grant them a related right covering online uses of news publications (Option 3-part 1). In addition, the draft IA also deals with the issue of the publisher's ability to receive compensation under exceptions, which came to the fore after a recent ECJ judgment

('Reprobel'). Contrary to the first problem, the compensation issue does not require granting a new right and thus, for proportionality reasons, it is proposed to address it in a different way, i.e. by allowing Member States to provide that publishers may claim compensation for uses under an exception (Option 3- part 2)

DG COMP expressed general support for this initiative and suggested complementing the creation of a related right with an obligation on online service providers to seek, in good faith and without delay, to conclude licencing agreements with news publishers for use of publishers' content. DG COMP also asked if image rights were covered by this measure. More generally, any concrete proposal made in this context should also ensure that no excessive burden is created for smaller operators and new entrants.

JRC informed that additional evidence on the issue of a related right for publishers, based on research carried out by the JRC, would be provided to DG CNECT after the meeting and asked for this evidence to be referred to in the IA report.

DG JUST asked for clarification as to how and to what extent the preferred option would improve the situation of the publishing sector in practice and whether it affects the status of hyperlinks.

DG CNECT clarified that the scope of the right of communication to the public, including the issue of hyperlinking, would not be affected by this intervention. The objective is to strengthen the bargaining position of news publishers vis à vis online service providers. The introduction of a new related right is expected to contribute towards this objective and to have a positive impact on enforcement. The JRC contribution is welcome and will be reflected in the report. As regards the comments by DG COMP, DG CNECT clarified that images were already protected as works. The image sector is expected to benefit from the obligation for certain online service providers to negotiate in good faith, which is proposed in the section dealing with the use of protected content by online service providers.

DG EAC expressed support for the objective of this initiative, as it is expected to benefit both publishers and authors. This will have positive impacts on media pluralism and cultural diversity.

DG EMPL informed that bilateral discussions would be held with DG CNECT about all accessibility aspects of the copyright reform.

DG TRADE expressed support for the preferred option.

SG asked for the need for EU action to be demonstrated more convincingly. The problem definition should distinguish between the drivers to be directly addressed by the proposed intervention and others that are outside its scope (decline in advertising revenues due stronger competition; choice of business model – making online content available without payment). As regards Options 2 and 3, stakeholders' views should be reflected more precisely, in particular those who do not support EU actions or have reservations (consumers, journalists, some publishers). Explanations should be provided concerning the proposed 10-year term for the related right, particularly in terms of proportionality. Given that stakeholders and in particular the legislator may prefer a shorter or longer periods as these may come with differences in terms of benefits and costs, variants should be considered (1, 3, 5 years) in the IA. Attempted national solutions (DE and ES laws) should be analysed in terms of effectiveness of the proposed EU solution, as well as the impacts of self-standing protection for publishers where it already exists.

## *Fair remuneration in contracts of authors and performers*

DG CNECT indicated that intervention in this area had been called for by authors for some time already and that the problems they are pointing at had intensified with the development of new forms of online exploitation. However, this is generally a matter that so far has been, to a large extent, addressed by Member States at national level. The proposed measure (Option 3) takes into account this context and seeks to ensure proportionality by focussing on increasing transparency, without defining what constitutes fair remuneration, as well as introducing a right to adjust contracts in certain situations and a mediation mechanism.

DG EAC expressed strong interest in the preferred option and considered EU-level intervention justified as creators are increasingly facing problems when trying to know how their works are being exploited online. The need to respect proportionality and subsidiarity by focussing on ex-post aspects (instead of intervening on contractual terms) is also well understood. Nevertheless, specific issues raised by stakeholders from the various sectors and exposed in studies should be reflected in more detail. A stakeholder dialogue to exchange best practices should be envisaged as an accompanying process.

DG COMP noted that, from the competition perspective, any initiative taken in this field should (i) be limited to the necessary minimum as regards encouraging collective bargaining mechanisms, which favour concerted over individual action and (ii) ensure the right balance between the need to enable creators to compare deals and offers and to avoid that, especially in the case of concentrated markets, transparency does not prompt or encourage collusion. In this respect, it should be carefully considered whether option 2 (reporting obligation) is indeed insufficient to address the problems identified.

DG TRADE indicated support for this approach.

DG JRC welcomed the section on fair remuneration to authors. Although the issue of remuneration is not of major relevance for the scientific community, differences in bargaining power do force scientists and researchers to enter into non-negotiable, all-encompassing contracts that go far beyond to what publishers actually need. To tackle this problem, DG JRC supports the proposal by DG EAC of launching an accompanying measure that would support the exchange and dissemination of best practices all over Europe.

SG stated that the need for EU action should be further elaborated, particularly by better demonstrating the cross-border dimension and by better explaining why national solutions are likely to be less effective. Figures on compliance costs for the whole sector presented in the Annex should be integrated into the report to provide a comprehensive view of the number of companies affected and the aggregated compliance costs. A possible exemption for micro-enterprises should be considered given that they appear to be disproportionately affected by compliance costs and that there is little evidence that they have a particular strong bargaining position compared to the other operators.

DG CNECT indicated openness to consider flanking measures, in line with the proposal by EAC. In response to DG COMP, the intended measures would not have any consequence in terms of favouring collective bargaining or individual action. As regards SG comments on compliance costs, the most relevant figures presented in the Annex will be incorporated into the report. Excluding micro-enterprises would strongly undermine the effect of the measures since they represent a substantial share of the market.

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

DG CNECT explained that the increase in consumption of creative content from online sharing platforms had created difficulties in the market. These are due to two main factors: legal uncertainty as to the status of their activities under copyright law and as to the application of the e-Commerce Directive (liability provisions). The proposed intervention does not deal with the definition of the acts under copyright law but introduces an obligation for these platforms to negotiate in good faith with right holders. It also foresees an obligation for platforms to adopt measures to avoid unauthorized content in their services, which should serve as an incentive to negotiate and conclude agreements with right holders.

DG TRADE stated that the alternative approach of clarifying the communication to the public right should figure in the IA and be one of the options (even if it is dismissed) since right holders raised the issue and have expectations. The 'good faith' negotiations should be accompanied by some form of supplementary pressure to ensure a suitable outcome. The obligation to put in place identification technologies should be mandatory and accompanied by monitoring between right holders and platforms. In order to ensure a balanced outcome for authors, the possibility of including a right to remuneration for authors associated with the result of the negotiation between related rights holders and platforms should be considered.

DG EAC stated that the IA needed to reflect the analysis of the alternative option based on the legal clarification on the application of the right of communication to the public, which has been called for by the creative sector, and clearly refer to stakeholders' views on the different intervention options.

DG JRC indicated that they would submit additional empirical evidence for integration in the draft report. In addition, more clarity would be welcome as regards the articulation between the option finally retained and the provisions in the Electronic Commerce Directive (interdiction to impose monitoring obligation, liability regime, etc.).

DG COMP indicated support for this initiative. Generally, any concrete proposal made in this context should also ensure that no excessive burden is created for smaller operators and new entrants.

DG JUST suggested further substantiating the assessment of the impacts of the favoured option on consumers. The draft should provide a more solid assessment on the impact on fundamental rights of the obligation for platforms to take measures in order to detect and prevent unauthorised content, given the sensitivity of such measures to branches of civil society and the possible effect on freedom of expression.

SG also requested the inclusion and analysis of the option of clarifying the right of communication to the public, which is expected to be favoured by certain categories of stakeholders. The concept of "giving access to large amounts of content" should be defined as without, neither the costs nor the benefits of the preferred option can be properly assessed (given that the number of affected companies will be not known). The analysis of fundamental rights/consumers impacts of the obligation to implement content identification systems should be substantially strengthened (freedom of expression, risk of unjustified take-downs, etc.).



**List of participants ISG meeting of 27/06/2016**

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**Annex: Written comments sent after the meetings**  
(excluding those introduced in the documents themselves)

## **DG COMP**

### **Ensuring wider access to content**

As indicated in the meeting, we reiterate our earlier comments regarding the limited scope of the proposal, excluding the OTTs, and consider, inter alia, that the IA should:

- be aligned with the existing legislative documents (the Portability and Geo-blocking Regulations) in terms of the descriptions of cross-border licensing issues,
- avoid any incorrect statements, e.g. as to what is considered as premium content or what the prevalent licensing practices are, or give undue deference to documents prepared for/by the industry (including the Studios); and
- avoid unnecessary references to competition law, case- and fact-specific, as a factor affecting industry-wide licensing practices.

### **Rights in publications**

We understand that option 3) is considered the preferred option as it would increase the level of legal certainty, strengthen publishers' bargaining position and have a positive impact on their ability to license their content and enforce the rights on their news publications. We believe that creating a copyright for news publishers at EU level is an appropriate tool for tackling specific problems related to the use of publishers' content online. In order to ensure effective implementation of such a right, it would seem appropriate to complement it with measures that would oblige online service providers to seek, in good faith and without delay, to conclude licencing agreements with news publishers for use of publishers' content. This would mirror the proposal being considered by DG CNECT with regard to online intermediaries and "user-generated" content. This is something which could be enforceable in national courts.

More generally, any concrete proposal made in this context should also ensure that no excessive burden is created for smaller operators and new entrants.

### **Use of protected content by online service providers storing and giving access to user uploaded content**

From the competition perspective, and in the absence of more detailed information as to how each of the two options is to be implemented, both options put forward may offer similar benefits, though option 2 seems to be more concrete and easier to implement. That said, it is important that any measure accordingly taken does not impose an excessive burden on smaller operators and new entrants. At the same time, as noted above, there is a need for consistency with the initiative on publishers' rights, taking into account the specificities of each of these industries.

### **Fair Remuneration in contracts of authors and performers**

From the competition perspective, we note that any initiative taken in this field should (i) be limited to the necessary minimum as regards encouraging collective bargaining mechanisms, which favour concerted over individual action and (ii) ensure the right balance between the need to enable creators to compare deals and offers and to avoid that, especially in the case of concentrated markets, transparency does not prompt or encourage collusion. In this respect, it should be carefully considered whether option 2 (reporting obligation) is indeed insufficient to address the problems identified.

## **DG EAC**

### **Ensuring wider access to content**

We appreciate the further clarifications introduced in this part and reiterate our position in support of the targeted approach and related assessment conclusions in favour of policy options which aim at wider access to and greater availability of content while preserving a balanced regulatory landscape for right-holders.

### **Use of protected content in digital and cross-border teaching**

We welcome the improvements made to the previous version and the fact that the assessment is also a qualitative one besides the consideration of economic indicators. On the other hand, as anticipated in our meeting we would have some comments, notably regarding the clarification/presentation of aspects related to costs in the education field and consistency between the impacts assessed for users and right-holders (see our track changes in the attachment).

### **Text and Data mining**

We thank the drafters for the clarifications made in the revised version. Regarding the preferred option (n°3), we would just like to reiterate that while we understand the need to address research activities in the context of Public/Private partnerships, its defendability essentially relies on the proper definition of the closed list of beneficiaries as "public interest research organisations" (formula used in the text) to ensure that the impact on right-holders is equivalent to that of option 2 as argued by the impact assessment and differentiate it clearly from option 4 which would touch the purely corporate market. Furthermore, another essential aspect to balance the intervention will be the proper safeguards in the legislation to guarantee that content owners can take measures to protect the databases together with stakeholders' cooperation incentives on technical aspects.

### **Preservation of cultural heritage**

Apart from the typo to be corrected in the description of option 2 concerning institutions currently excluded under national exceptions, we take note of the explanation concerning the extension of the range of beneficiary institutions in the envisaged intervention. However, this would make it even more important to be crystal clear in the legal draft about the type of preservation activities the exception is meant to cover: i.e. long term preservation of heritage in the institutions' collections. Regarding the impact on revenues for right-holders, the text should perhaps motivate why the loss from replacement copies that could have been bought on the market is expected to be negligible.

### **Fair Remuneration in contracts of authors and performers**

DG EAC supports the analysis and the related intervention as an important positive step to make progress on this issue. As discussed in the group, DG EAC considers that the rationale for excluding an intervention on ex ante aspects needs to appear more clearly in the IA and that flanking measures in the form of stakeholders' forum bring added value to support and further build on the process initiated by the legislative intervention. Comments in tc are provided in the attachment. On the stakeholders' process proposed as a flanking measure, we welcome the constructive discussion and the openness of DG CONECT and support also the point made on the relevance to address in this context the role of collective bargaining mechanisms.

### **Use of protected content by online service providers storing and giving access to user uploaded content**

Like DG TRADE, for DG EAC the IA needs to reflect the analysis of the alternative option based on the legal clarification on the application of the right of communication to the public to online services engaged in the distribution of creative content and clearly refer to stakeholders' views on the different intervention options.

The draft at this stage gives a misleading impression that right-holders may support the intervention as the most effective solution to address the value gap whereas stakeholders from the categories most concerned (such as those in the music and images sectors) are unlikely to consider that the option based on an obligation to negotiate provides a solution to the situation of legal uncertainty in a market situation where the online services at issue represent the main entry for the digital exploitation of protected creative works. The fact that right-holders would retain their legal options against unauthorised content in case no agreement is reached is not a satisfactory option either for creative sectors or for consumers.

The obligation to negotiate in good faith agreements with right-holders does not seem to credibly stand a comparative analysis in terms of positive effect on legal certainty and related impacts on cultural diversity and property right as suggested by the ++ of the table in page 17. To justify such benefits, it would at least be necessary to ensure that the legislative intervention provides a sufficient basis for right-holders to claim that online platforms need to agree a fair deal with them for the online exploitation of the content they own. To this end, the intervention should at least provide an indication of the types of agreements to be sought and parameters (such as a non-exhaustive list of criteria) which make clear what good faith negotiation can mean: e.g. transparency regarding the content consumption data, adequate remuneration of content owners based on market value, etc.

We also support the suggestion of DG TRADE to have some form of supplementary pressure to ensure a suitable outcome of the agreements and make mandatory identification technology measures with joint monitoring between right holders and platforms.

### **Rights in publications**

DG EAC supports the analysis justifying an intervention combining the introduction of a self-standing right to address the specific gap affecting news publishers with a legal clarification enabling publishers across all sectors to claim compensation for uses under the exceptions whilst ensuring that the benefits are shared with authors. This intervention is clearly relevant for the protection of cultural diversity and media pluralism.

### **DG ECFIN**

#### **General comment**

We think it is very good practice to systematically show the stakeholders' opinions after each option. However this exposes you to the need to provide punctual replies to the concerns that stakeholders raise. We noticed that the IA is not always consistent on this. For example under section 3.1 "right in publication" the analysis of impacts of option 2 on service providers does not really address the complaints raised by the stakeholders about potential negative effects on innovation and small businesses. The analysis should therefore be expanded to take these issues into consideration and provide a reply.

#### **Use of protected content by online service providers storing and giving access to user uploaded content**

There seems to be the need to better clarify how exactly preferred Option 2 would address the first problem driver "legal uncertainty". As it is presented the Option seems to be targeting only the second problem driver on the "unauthorized content".

### **DG EMPL**

First of all the comments are meant to complement the proposals related to the Marrakesh Treaty which are well on line with our policies and where we will be sending small comments through the ISC.

The issue is that the proposal under the Marrakesh Treaty only covers exceptions of the copy right related to print material and for print disabled persons. It would not cover audio-visual material or online content and also does not cover for example deaf persons. Consequently we see the need to address also the disability concerns in these areas.

The impact assessment should acknowledge the problems for disabled person and include solutions for those problems.

- In the absence of a copy right exception for persons with disabilities related AVMS and online material and for all type of disabilities covered by the UN Convention on the Rights of Persons with Disabilities there is a problem for consumers with disabilities to get access to those materials on equal basis as other customers. It is important that copy right cannot be used as the reason for not allowing the provision of accessibility features in this type of material. We understood from disability organisations that they have difficulties to add for example audio description in films or incorporating sign language or even adding subtitles in other languages than those provided already.
- The in the audio-visual and on line materials, the Copy right exception needs to cover not only print disabled persons but also other type of disabilities as for example deaf and hard of hearing persons would otherwise be excluded from being able to adapt those materials in order to have access.
- In addition, it is very important that in the text it becomes clear that the copy right of “accessibility information” must not be a barrier for the circulation of accessible works. This could be an issue when for example having made a film audio described following national copy rights exceptions and then not being able to use the audio description in other countries.

As a minimum approach, in the areas already covered by the Impact assessment, when describing the impact on consumers, the situation and problems for person with disabilities should be briefly described and in the options a solution should be included. This includes the sections on ensuring wider access to content for example in relation to online transmission of broadcasting, or when dealing with the retransmission of TV programmes. In addition, the copy right exceptions should cover audio-visual works in Video on Demand platforms and cultural heritage material so that persons with disabilities or their organisations could add accessibility information.

In addition, looking at the IA, it is very important that also in the exceptions already provided for example for education purposes the copy rights cannot be a barrier to develop accessible formats or add accessibility features in the works (AVMS and online). We already know that there is a famine of accessible printed material what has led to the Marrakesh treaty to try to solve the problem and now we are confronted with a similar situation for persons with disabilities in the area of digital content. Being explicit about the fact that accessibility elements are covered under the educational exceptions is essential to align this work with the UN Convention on the Rights of Persons with Disabilities. These issues could be covered in the section on consumers or when dealing with Fundamental rights issues given the article in the charter on integration of person with disabilities. If the current text would in principle already address this issue it is very important to be explicit about it.

## **DG GROW**

### **Use of protected content by online service providers storing and giving access to user uploaded content.**

DG GROW is not convinced that the proposed Option 2, will achieve the specific objective proposed.

For that reason, DG GROW supports DG TRADE and EAC to include in the IA a new policy option to clarify the scope of the rights of communication to the public and making available in connection with the activity of online service providers which host and make available large quantities of protected content or links to such content.

At the same time, to facilitate the creation and development of micro and small enterprises and support innovation, this option should contain a de minimis clause, in order that the payment of copyright licenses is not due by online service providers whose service contains small quantities or a marginal amount of protected content. The scope of this de minimis clause should also well-defined and justified. The position of different stakeholders and impacts of this option, in particular on SMEs, should also be included.

DG GROW supports DG TRADE and EAC in requesting an obligation for licensed online services to use identification technology measures with joint monitoring between online services and right holders, so online services provide sufficient information to rightholders to calculate the amount due to be invoiced and to enable a proper distribution of the revenue between the various rightholders.

### **Rights in publications**

DG GROW finds it would be necessary to include in option 3 a well justified and defined de minimis clause, to facilitate the creation and development of micro and small enterprises.

### **Fair remuneration in contracts for authors and performers**

Since the impact option 3 on the creation and survival of micro-enterprises could be disproportionate to the objective, its impact on micro-enterprises should be well analysed, described and minimised wherever possible.

### **DG JRC**

#### **Ensuring wider access to content**

These documents are very clear in the sense that they create an easier copyright clearance system (lower transaction costs) for linear services and a CoO regime for online linear broadcasting, which we welcome. However, none of this applies to non-linear VoD. As a number of other DGs have already pointed out, this will create an uneven playing field between these two types of AV services. We believe that the impact assessment needs to spell out much more clearly the justification for this, particularly since it is inconsistent with the new AVMSD, which has extended the domestic content and domestic financings obligations from linear to non-linear AV, precisely with the argument that a regulatory playing field between the two needs to be created.

I understand that the ISG meeting briefly discussed footnote 63 in this document, on the Oxera study that claims a very negative impact of the DSM on EU consumers and the audio-visual industry. I wanted to share with you the attached short JRC note that explains where the methodology in the Oxera study goes wrong and is rather self-serving. It also explains why a recent JRC study on the same subject has a better methodology and shows positive results for consumers and industry – as well as for cultural diversity in the EU audio-visual market.

We suggest to change the text of that footnote as follows: "See e.g, "The Impact of cross-border access to audiovisual content on EU consumers" (May 2016), a report by Oxera and O&O, prepared for a group of members of the international audiovisual industry, analysing the effects of the full cross-border access. By contrast, a JRC study "Digitization, the European Digital Single Market, and their Effects on Film Consumers and Producers"(Aguiar & Waldfogel, 2016) shows a positive impact on EU consumers and producers, and on cultural diversity in the EU. "

I don't think we should hide the evidence that pushes back the industry's anti-DSM arguments.

## **Text and data mining**

We appreciate the work done in relation to the Text and Data Mining exception, a subject of high concern for our DG given our function as a research performing organisation.

We believe, that the preferred option, option 3, fits well with the interest of our DG, as it will presumably qualify as a "public interest research organisation" and will therefore be able to carry out text and data mining (TDM) on content we have lawful access to.

However, as we have pointed out previously, under this option, citizen scientists could not benefit from the exception. This is important if we wish to promote the rise of 'citizen science.' It would also exclude independent researchers, journalists and authors, who are not affiliated to a university or a research institute, but are doing valuable work.

We therefore suggested to include an additional option that would combine option 2 (mandatory exception covering text and data mining for non-commercial scientific research purposes) with option 3 (mandatory exception applicable to public interest research organisations covering text and data mining for the purposes of both non-commercial and commercial scientific research), so that (1) any lawful user can benefit from the exception provided the use is non-commercial and (2) only public interest research organisation could benefit for the purposes of commercial and non-commercial research.

We are disappointed that this suggestion has not been taken up. It has been argued that there is no evidence of the need of facilitating TDM in this context. However, we believe that legislation relating to research should, by its very nature, be forward looking, seeking to facilitate the emergence of potential new techniques, rather than waiting until problems arise, which then block or slow down their emergence.

## **Rights in publications**

As promised in yesterday's meeting, I enclose a short paper on 'the economic impact of online news intermediaries'. It has been prepared by Bertin Martens, who is a researcher at the JRC working on the economics of copyright in digital media.

It should be stressed that this paper is for internal discussion among Commission services only. The main points are as follows:

- The paper looks at the impact of news aggregators on the revenue of publishers. This is driven by two opposing forces:
- The substitution effect, i.e. the extent to which unlicensed distribution displaces and reduces (the revenue derived from) unlicensed distribution.
- The quantity effect, i.e. the extent to which unlicensed distribution increases revenue by re-directing traffic or sales to licensed channels.

The net effect of these two forces is an empirical question, which cannot be settled by economic theory or legal reasoning. Only data can answer it. The paper therefore reviews the available empirical evidence, which suggests that the quantity effect dominates the substitution effect. In other words, aggregators are complementary, rather than competing, services to newspapers' original websites and convey more benefit to publishers than harm.

This explains why, even though they have technical options to exclude aggregators from referring to their articles, nearly all published have allowed aggregators to continue scraping their websites, without compensation. In other words, the empirical evidence can be linked to their observed behaviour.

- The issue is whether it is possible, via regulatory intervention establishing neighbouring rights, to strengthen the bargaining power of the publishers, so that, in addition to the additional traffic that newspapers get through the aggregation websites (indirect compensation), they can also get direct compensation. The paper looks, in some detail, at the real-life experiments in Germany and Spain. It finds that, in both countries, the legal interventions granting neighbouring rights to news publishers have not so far been effective. This is because, while publishers may hold an ownership right, the price they can get for it is determined by market forces. In Germany, a zero price market emerged. In Spain, the legislation provided for mandatory payment of licence fees through a collection society by online news aggregators. This led Google to withdraw its new service from Spain.
- The paper also explains the formal opinions of the Spanish and German competition authorities, which question the economic rationale for the introduction of neighbouring rights for news publishers vis a vis news aggregators.

We are submitting this study because we feel that the empirical evidence that it summarises, as well as the formal opinions of the Spanish and German competition authorities, should be referred to in the impact assessment.

Finally, we would add that consumers reap considerable benefits from news aggregators and social media news providers. They reduce transaction costs for users, especially mobile phone users, because they combine many news articles from different sources in a single location. The impact assessment does not perhaps adequately acknowledge this or consider in sufficient depth whether the favoured option might reduce these benefits.

### **Fair remuneration in contracts of authors and performers**

We welcome the section on fair remuneration to authors. As a research organisation, DG JRC is particularly concerned about the position of the scientific community. Although the issue of remuneration is not of major relevance for the scientific community, differences in bargaining power do force scientists and researchers to enter into non-negotiable, all-encompassing contracts that go far beyond to what publishers actually need. This may prevent scientists and researchers from engaging in open access publishing or from pursuing the use or exploitation of the work in non-competing contexts (see EP study on Contractual agreements for creators, 2014, p. 82 cited in the IA). In order to tackle this problem, we would suggest, in line with the comments made during last meeting by DG EAC, launching an accompanying measure that would support the exchange and dissemination of best practices all over Europe. DG JRC could actively contribute to such initiative with our experience in negotiating with scientific publishers.

### **Use of protected content by online service providers storing and giving access to user uploaded content**

As with the rights in publications issue, a more nuanced distinction between direct and indirect remuneration of the rights holders could be introduced in the Impact Assessment section on the value gap. Rights holders may accept the unlicensed activity of the content platforms because it generates additional licensed sales revenue. That depends on the substitution effect or the extent to which unlicensed content displaces revenue from legal sales. The degree of substitution depends on the quality of unlicensed products on the content platform. If the quality is identical to legal sales, it may well displace sales; if the quality is lower, it may complement and reinforce legal sales. As highlighted in relation to the newspaper aggregators, the empirical evidence points towards complementarity rather than substitution. In the case of content platforms, there is conflicting empirical evidence regarding YouTube. Hiller & Kim (2015) find evidence in favour of substitution. Kretchmer & Peukert (2015) find complementarity (detailed reference at the end of the document). We would invite you to consider including this evidence in the document.

We would also welcome more clarity as regards the articulation between the option finally retained and the provisions in the Electronic Commerce Directive (interdiction to impose monitoring

obligation, liability regime, etc.) as well as a reflection on the mechanisms that could be put in place in order to ensure the enforceability of the obligation to negotiate in good faith.

## **DG JUST**

### **Ensuring wider access to content**

DG JUST questioned whether the proposal would have a real impact and added value for consumers given that the scope is narrow (VOD and webcasting are excluded) and the country of origin principle does not by itself improve cross-border access to content. DG JUST noted that there is no obligation for broadcasters to provide cross-border access, that no limits are placed on the contractual freedom of broadcasters and right holders, that their business models are unaffected by the proposal, and that right holders would be able to negotiate with broadcasters limitations on catch-up services. In the ensuing discussion, following on from a question by DG TRADE on the position of commercial broadcasters as presented in the draft IA, DG CNECT explained that commercial broadcasters may not avail themselves of the possibility to only have to clear rights for the country of origin of the broadcasting organisation because this may interfere with /affect the (territorial) way in which their activities are organised. DG JUST noted that this confirms the limited impact of the application of the country of origin (mere reduction of transaction costs) on effectively improving cross-border access to content.

DG JUST also noted that it would be useful to extend the scope of the proposal to webcasting services given that the "grey zone" between these services and VOD services is not only a reason to exclude webcasting services but an opportunity to test the market's reaction to a moderately more ambitious proposal and prepare market players for more consistent rules.

Finally, DG JUST argued that in view of the uncertainties regarding the actual impacts of the initiative, a review clause should be included in the proposal

### **Text and data mining**

In addition, concerning the section on TDM in the IA, it should also refer to the other legal obligations which will still be applicable, and in particular to the protection of personal data under the current national implementing legislation of Directive 95/46/EC and EU Regulation 2016/679 (the General Data Protection Regulation) (which entered into force on 24 May 2016 and will be applicable on 25 May 2018).

### **Fair Remuneration In Contracts Of Authors And Performers**

Very minor TC's provided recognising that the transparency requirements will have an impact on the freedom to contract. Clarification sought on indirect impact on consumers.

### **Rights In Publications**

- We suggest that the IA more clearly explains how the publishers will effectively and concretely be able to benefit from the new rights given that the Svensson judgement concludes that linking in any event is not considered as making content available to a new audience.
- Request in TC's not only to explain that fundamental rights will be affected but also how
- Request to also clarify/explain in the IA what the impacts/lessons learned from similar national initiatives have been

### **Use Of Protected Content By Online Service Providers Storing And Giving Access To User Uploaded Content**

- In relation to the favoured option, we suggest clarifying whether a dispute settlement mechanism would be available should right holders and user uploaded content services do not manage to conclude an agreement.
- We also suggest to further substantiate the assessment of the impacts of the favoured option on consumers.
- We are interested to see that the IA puts forward as the favoured option, the obligation for platforms to take "measures that would be reasonably expected by them in order to detect and prevent unauthorised content without it amounting to active monitoring". Indeed, such measures should also be contemplated for other types of content that are made illegal by means of criminal law, such as cases of manifestly illegal hate speech, that if allowed to spread may have devastating impacts not only on its victims but that could also have a chilling effect on freedom of expression and impede the democratic debate.
- Nevertheless, we think from experience and given the sensitivity of such measures to branches of civil society and the possible effect on freedom of expression, such an initiative should be coupled with solid assessment on the impact on fundamental rights. More in particular we note that the IA does not assess the impact of potential impact in terms of an increase in excessive action against legal content as a consequence of such measures. It is recalled that the IA for the discarded notice and action initiative of 2013 identified a number of sources that would point to excessive take downs in particular in the field of copyrights (see page 20 and onwards). Given the sensitivity amongst civil society actors to any pro-active monitoring initiatives it is strongly advised to show that an assessment of the potential or an increase in excessive take-downs has been done (suggestion to look at documents and comments in the old CIS).
- We would also advise CNECT to consider whether such measures should be flanked with appropriate and legally binding safeguards for users. The IA details that "services already put in place procedures in the context of notice and take down requests to allow the users to contest unjustified removals of their content" but does not provide any further evidence as to the prevalence of such measures. Furthermore, these procedures are not statutory and it is not clear how they would mitigate the risk of excessive takedowns that are made as a consequence of content identification technologies measures since these will not be based on a notice.

## **DG RTD**

### **Text and data mining**

- SMEs: they rightly are considered the backbone of Europe's economy. Therefore, there should be one paragraph on SMEs not as right holders, but as beneficiaries of exceptions. We offer a suggestion for the section 4.1.4 Methodology / Impact of policy options / Impact on SMEs: "Small and medium-sized enterprises (SMEs) are the backbone of Europe's economy. They represent 99% of all businesses in the EU. In the past five years, they have created around 85% of new jobs and provided two-thirds of the total private sector employment in the EU. The European Commission considers SMEs and entrepreneurship as key to ensuring economic growth, innovation, job creation, and social integration in the EU." (source: DG GROW website, link)
- Option 3: Although it would limit the beneficiaries to the research exception, we would support this option, which could however be further clarified. Member States and the EU promote research and innovation because the society at large can benefit from the results of research. Therefore, we believe that referring to beneficiaries simply as "research organisations", such as in the Commission Communication Framework for state aid for research and development and innovation of 21.5.2014 C(2014) 3282, would be the most suitable terminology.

### **General comment related to sections on fair remuneration, rights in publications**

DG RTD considers important to ensure that the consequences of the envisaged measures are balanced between all stakeholders. As it stands, the IA is often weak in justifying the reasons for intervention. It does not always provide a robust cost/benefit analysis of the options on all stakeholders that include academics/researchers (in particular as authors) and innovative SMEs.

### **Fair remuneration in contracts of authors and performers**

Scientific publishers do not return a “payment of appropriate remuneration” to the authors of scientific articles they get the right from. The situation can be slightly different for authors of scientific books, but scientific articles published in scientific journals are the core of the business resulting in the usual situation that authors are not paid.

Concepts such as “new modes of distribution of works online” and “the measurement of the actual online exploitation” are familiar to scientific publishers. Likewise, a driver such as “weaker bargaining power of authors [...] in contractual negotiations” is familiar to scientific authors too. The problem addressed in the IA applies to authors of scientific papers: they “face a lack of transparency in their contractual relationship as to the exploitation of their works [...] and as to what remuneration is owed for the exploitation”.

The text indicates that Option 3 is preferred (“Imposing transparency obligations to contractual counterparty of authors and performers supported by a contract adjustment right and dispute resolution mechanisms”).

DG RTD would support this option. It would promote transparency in particular when non-disclosure agreements are often a condition from scientific publishers in their negotiation for journal subscriptions with research libraries. The Council Conclusions on Open Science of 27 May 2016 also stressed the importance of clarity in scientific publishing agreements.

However, in view in particular the reference to remuneration of authors or absence thereof, DG RTD would welcome a clarification on the consequences for authors of scientific publications and, generally speaking, the impact that the implementation of the option would have on the whole ecosystem of scholarly communication.

### **Rights in publications**

DG RTD understand that it is very sensitive to introduce in EU law a related right covering online uses of news publications, and the possibility for Member States to provide that publishers may claim compensation for use under an exception (Option 3, the preferred option).

Option 3 is the combination of Option 2 (related right but for news and/or press publishers) plus a possibility, then for any publisher, to claim compensation. How would the exclusion of scientific publishers from related right be guaranteed?

The IA reads that specifically for scientific publishers, the compensation “is highly significant, as their publications are often used under an exception such as private copying”. Some Member States may grant the compensation possibility, others may not – a situation that may bring more problems in the ecosystem of scholarly communication, but also among scientific publishers, depending on where they are based and operate.

DG RTD received the replies to the Public consultation on the role of publishers in the copyright value chain from both trade association STM-Publishing and scientific publisher Springer-Nature. Both support the introduction of neighbouring rights for scientific publishers. STM-Publishing replied that they would prefer “press publishers” as meaning “periodical publishers”: under this interpretation, publishers of scientific journals could be included and the references to news or to press publishers are not without ambiguity. STM-Publishing rejected as “ill-founded and misleading” the allegation that neighbouring rights “would adversely influence Open Access” but the IA does not clarify this either. Nature-Publishing stressed that “it is only by being acknowledged as rightsholders in EU copyright law that [scientific] publishers will be able to maintain

compensation with respect to limitations and exceptions” adding that “[...] at least [scientific] publishers could expect some compensation for the use of their works under exceptions.”

DG RTD also read the reply from Helmholtz Association of German Research Centres. The largest scientific research organisation in Germany, which is 70% publically funded, wrote that “considering that vagueness of the suggestion for a neighbouring right for publishers, we believe that the idea is far from being in a state ready for a serious evaluation and therefore far from ready for any decision. We therefore urge the Commission to disentangle this idea until further refinement from the announced copyright reform as part of the Digital Single Market strategy.” DG RTD also read the position of LIBER (the Association of European Research Libraries) that the introduction of neighbouring rights for publishers would further limit the pace and scale of research, and would add an extra layer of rights.

In short, there were no known strong concerns from scientific publishers for additional rights until the Public consultation was launched. The demand for the option is far from being unanimous and may not appear sufficiently justified in the IA. The question of compensation for limitations and exceptions seems important to some scientific publishers. This is directly challenging the exception for scientific research and TDM. If it is an issue for scientific publishers, there should be a better cost/benefit analysis.

At this stage, it is difficult to find arguments that are convincing enough to fully comprehend the consequences of the chosen option and for DG RTD to responsibly support it.

## **DG TRADE**

### **Rights in publications**

We support the preferred option (creation of neighbouring right and possibility for publishers to claim compensation ...). Since most news aggregators are from the US and copy devices are manufactured outside the EU, this issue will certainly be raised in discussions with the third countries in question.

### **Fair remuneration in contracts of authors and performers**

TRADE supports the approach.

### **Use of protected content by online service providers storing and giving access to user uploaded content**

We believe that the analysis of the communication to the public right should figure in the IA and be one of the options (even if it is dismissed) since right holders raised the issue and have expectations.

The 'good faith' negotiations should be accompanied by some form of supplementary pressure to ensure a suitable outcome – MS should have an obligation to do more than just 'facilitate' cooperation. In a similar vein, in the identification technologies, we believe the mechanism should be mandatory with joint monitoring between right holders and platforms.

We are concerned that the measures seem to favour related rights holders rather than authors – this seems unfair in that it was the authors that initially sounded the alarm on the value gap – could one include a right to remuneration for authors associated with the result of the negotiation between related rights holders and platforms? This would provide a fairer outcome.

## **Legal Service**

### **Use of protected content by online service providers storing and giving access to user uploaded content**

You are aware that it is the view of the LS that the platforms are not doing an act of communication to the public within the meaning of Article 3 of Directive 2001/29. Hence, the problem should be more correctly described as the need to find a way to give a bigger "share of the [online] pie" for certain major rightholders due to the success of online platforms. It should not be dressed up as an enforcement problem as that would imply an infringement and the proposed solution would not support the problem.

The reasoning should be balanced as regards the current legal framework both for copyright and for e-commerce and in particular it should reflect the advice given by the Legal Service. At present, it appears to undermine that framework and this casts doubt on the chosen option.

### **Fair remuneration in contracts of authors and performers**

We have not previously advised on this. So these are initial comments. It seems that what is proposed would be an interference with the freedom to contract. At present, the majority of MS apply the general law of contract to copyright licensing and assignment of rights. In certain instances, it is also the general law of property especially for assignments. Germany is an exception but only for certain types of copyright contract.

It is difficult on the basis of this draft to see the legal justification for intervention. The main legal problem here is that the case for harmonisation is not set out. Contracts are usually private matters, therefore it cannot be said that there is a lack of transparency as such and that leads to an obstacle.

Further reflection is needed to meet the legal base of Article 114.

In addition, the draft gives the impression that certain online uses require a licence when it is now settled case law that they do not (see below as well).

### **Rights in publications**

It is incorrect to say that there is legal uncertainty. There is none. The Court has expressly said that publishers are not rightholders in its Reprobel judgment. If you simply wish to give this group of rightholders a right following the consultation—then you should state this clearly but there is no legal uncertainty about the current position of publishers in law.

In addition, certain uses are described as requiring a licence (or in future?) when it follows from the Court's case law in Svensson etc that this is not the case for example for the use of hyperlinks. It is extremely important not to disturb the effect of those judgments (inadvertently or otherwise) as there will unforeseen consequences for the internal market and the freedom of expression.

**SG**

### **Rights in publications**

- Need for EU action to be further demonstrated
- Need to explain why a self-regulatory approach was not considered relevant/effective.
- Problem definition should distinguish between the drivers to be addressed by the proposed intervention and others that are outside its scope (decline in print advertising revenues; choice of business model). This should help to get a better understanding of the actual size of the problem
- Stakeholders' views should be reflected more precisely, in particular those who do not support EU actions or have reservations (consumers, journalists, some publishers)

- Need to explain why a proposed 10-year term for the new neighbouring right, particularly in terms of proportionality. In case there is a chance that the legislator may prefer a shorter or longer periods variants should be considered.
- Need to provide analysis of attempted national solutions for online distribution (DE and ES approaches) and their impacts, as well as impact of self-standing protection for publishers where it already exists. Overall there is a need to better demonstrate the need for EU action by better underlining the transnational effects and by showing why the EU action will be more effective than action at the national level.
- Table on comparison of options: baseline to be marked '0'.

### **Fair remuneration in contracts of authors and performers**

- Need for EU action to be further elaborated, particularly by demonstrating the cross-border effects
- Need to explain why a self-regulatory approach was not considered relevant/effective
- Figures on compliance costs presented in the Annex should be integrated into the report to provide a comprehensive view of the number of companies affected and the aggregated compliance costs
- Possible exemption for micro-enterprises should be considered given that they appear to be disproportionately affected by compliance costs.

### **Use of protected content by online service providers storing and giving access to user uploaded content**

- The option of clarifying the right of communication to the public as well as article 14 of ECD, which received strong stakeholders' support, should be presented in the draft IA
- There is a need to define the concept of "giving access to large amounts of content" as without, neither the costs nor the benefits of the preferred option can be assessed (given that the number of affected companies will be not known).
- The analysis of fundamental rights/consumers impacts of the obligation to implement content identification systems should be substantially strengthened (freedom of expression, risk of unjustified take-downs, etc.).
- Stakeholders' views should be reflected more precisely (for ex: box on page 10, please explain 'other content services providers')

### **REFIT evaluation of Satellite and Cable Directive**

Overall: Acronyms need to be explained; Too many long quotes from study; Causality analysis is missing, explanation on the "how" and "why" and the link between the market situation and Directive needs to be brought out more strongly; There are contradictions within the document.

Baseline: What was the situation at MS level when the Directive was introduced?

Methodology: The document only refers to the study and the Public open consultation. What about the other sources (e.g. MS questionnaire)? Why are they not used?

Limitation section needs to be expanded considerably

Evaluation criteria:

- Efficiency: confusion between admin costs; burden; direct costs; indirect costs etc. section needs to be expanded. Analysis of benefits missing
- Coherence: lack of evidence; what about competition law?
- EU added: lack of assessment/evidence
- Relevance: argumentation missing

Conclusions: The conclusions need to reflect the evidence and level of analysis. Given that it is rather weak, the conclusions need to be substantially toned down; Conclusions need to reflect REFIT element; Conclusions need to be drawn on the lack of monitoring system which did not allow for a sufficient data to be collected etc.