

DSM Commissioner Project Team meeting – 20 July 2016

Copyright reform (second stage)

The aim of this note is to provide an overview of the main measures that are likely to form part of the copyright reform, which is scheduled for adoption on 21 September 2016. These measures are based on the political guidelines contained in the DSM Strategy and in the December 2015 Copyright Communication. The note also highlights a number of specific issues that require particular attention. These issues relate to the sharing of value between actors involved in the online distribution of content ('value gap', 'publishers' right' and fair remuneration of creators) which have been [REDACTED] subject to recent public consultations¹.

Context

The 6 May 2015 DSM Strategy set out the main parameters for a review of the copyright framework with a view to modernising the current copyright system. The DSM Strategy thus focussed on key areas where the current copyright system could be improved and adapted to the borderless digital world, while stressing the importance of keeping a fair balance between the interests of consumers, right holders and service providers.

The September 2016 copyright package will address three priorities areas identified in the DSM Strategy i.e. (i) harmonised exceptions in the area of access to knowledge (e.g. education and research including text and data mining, as well as disabled persons) (ii) cross-border access to digital content and (iii) a better functioning of the online market for the distribution of copyright-protected content. For another DSM priority, cross-border portability of online content services, a draft Regulation was adopted in December 2015. Furthermore, the DSM strategy announced that these measures should be complemented by a review of the IPR Enforcement Directive. Proposals on this are scheduled towards the end of 2016.

The measures envisaged under each of the three main priority areas are discussed below.

1. Adapting copyright exceptions in certain key areas

Copyright exceptions allow the use of protected works **without the authorisation of right holders**. Most Member States have enacted some form of exception in these areas but these national versions of the exceptions vary in a number of respects, thus creating legal uncertainty and fragmentation. Further harmonising existing exceptions is thus an **important element of the forthcoming reform**. The overall objective is to accommodate new uses, particularly those which have important societal relevance (i.e. **education, research, cultural heritage preservation**). [REDACTED]

¹ Public consultation on the regulatory environment for platforms, cloud & data, liability of intermediaries, collaborative economy, which ran from 24 September to 6 January 2016 and Public consultation on the role of publishers in the copyright value chain and on the 'panorama exception', open from 23 March until 15 June 2016.

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- **Education:** The current EU legal framework allows, under certain conditions, the use of protected works for the purpose of illustration for teaching. The proposed measure would make this exception mandatory for Member States and clarify and update its scope, in particular to take account of the use of digital teaching tools and the development of distance learning programmes and will allow cross-border uses of protected works for teaching purposes, thus providing legal certainty for users (educational establishments, teachers, students). However, since a change in the scope of the teaching exception may significantly affect national educational markets, including educational publishers, mitigating element has been included in the proposed measure, i.e. Member States would have the possibility to decide that the exception would come into play only if licences covering the same uses are not available on the market.

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

- **Research:** Although the Copyright Directive already includes an exception for research purposes, this exception does not provide for a sufficiently clear framework for **text and data mining (TDM)** activities carried out by researchers. Therefore it is proposed to create a new, self-standing exception for TDM. Since TDM is becoming a **key tool in the area of research**, intervention in this area is important to support Europe's future competitiveness. It is proposed to give this exception a relatively **broad scope**, i.e. to apply it to all entities carrying out public interest research, for all types of research activities (non-commercial and commercial). Commercial organisations however, would need to continue acquiring licences for carrying out text and data mining.

Proposed measure: Mandatory exception applicable to public interest research organisations covering text and data mining for the purposes of both non-commercial and commercial scientific research.

- **Preservation of cultural heritage:** intervention is meant to enable cultural heritage institutions (e.g. museums and film heritage institutions) to preserve the vast amount of works they hold in their collection without having to seek prior authorisation of right holders.

Proposed measure: Mandatory harmonised exception for preservation purposes by cultural heritage institutions.

- **Disabled people:** a legislative proposal implementing the Marrakesh Treaty (disability exception for all types of print disabilities) will also be part of the copyright package.

Areas where no legislative action is envisaged at this stage

Other exceptions were listed in the December Communication as areas where EU action may be considered in the short or longer term. A recent public consultation covered the issue of the '**panorama exception**'². Preliminary assessment of the results revealed no clear evidence of a need for and value added of EU action, in particular since solutions already exist in most Member States and new legislation in this field has recently been adopted in several Member States where it was still missing (FR and BE).

In relation to **remote consultation of works held in libraries**, a pending ECJ Court case on the closely related question of electronic lending is expected to indicate whether this activity is already permitted under EU law. As regards **private copy**, as announced in the December Communication, no legislative action is envisaged at this stage.

2. Measures to ensure wider access to content across borders

A first deliverable for consumers in this area was already adopted last December, i.e. a **draft Regulation on the portability** of online content services. Negotiations are progressing well and could be concluded by mid-2017. Moreover, the Copyright Communication announced **further measures to facilitate rights clearance** for online cross-border distribution of content. In line with the political guidelines of the Communication, these measures would aim at **gradually increasing cross-border offers** across the EU, without however forcing right holders to license their content on a pan-European basis.

- **Measures to increase cross-border availability of online TV and radio programmes:** the proposed measures are inspired by mechanisms in place in the Cable and Satellite Directive.

(i) It is proposed to apply the **country of origin principle** to clear the rights required for certain **online services of broadcasters**.

² Public consultation on the role of publishers in the copyright value chain and on the 'panorama exception', open from 23 March until 15 June 2016.

[REDACTED]

(ii) Moreover, it is proposed to extend the **cable copyright clearance** regime to **other forms of similar re-transmissions**. This should lead to more channels from other Member States being made available through these other re-transmission services (e.g. IPTV).

Proposed measures: (1) Application of country of origin to the clearing of rights for broadcasters' online services ancillary to their initial broadcast, **and** (2) Mandatory collective management of rights to retransmission of TV / radio broadcasts by means of IPTV and other equivalent retransmission services.

- **Measures to facilitate the exploitation of European works on video-on-demand platforms:** this would be promoted by a mechanism supporting right holders and distributors to reach agreements on licences. A dialogue with industry would also be initiated to find ways to increase exploitation of works⁴.

Proposed measure: Stakeholders' dialogue + Obligation for Member States to establish a negotiation mechanism to overcome obstacles to the availability of audiovisual works on VoD.

- **Measures to facilitate licensing of heritage content (out of commerce works):** this would enable cultural heritage institutions to digitise and disseminate works that are out of commerce, which in many cases can still hold great cultural, scientific, educational, historical and entertainment value.

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

3. Achieving a well-functioning copyright market place

[REDACTED]

⁴ These measures would be complemented by non-legislative actions to be presented in a separate Communication (development of 'ready-to-offer' catalogues of European films; licensing hubs; improved interoperability of standard identifiers; development of an EU-level aggregator of legal offers; EU support for dubbing and subtitling of works).

- **'Value gap':** The main issue here relates to the bargaining position of certain categories of right holders (mainly in the music, images and news publishing sectors), who find themselves in a difficult situation when trying to negotiate licences and obtain remuneration from online platforms [REDACTED] for the use of their content and deplore what they call a **'value gap'**. These right holders claim that the current legal regime contains some grey areas, which deprives them of clear legal arguments and adds to their disadvantage in terms of market position. This situation also affects the level playing field between various types of online services, to the detriment of those who acquire licences from right holders and distribute protected content directly to end users [REDACTED]. The objective of the intervention is thus to promote fair allocation of value and adequate remuneration generated by online distribution of copyright-protected content, where online platforms derive financial benefits from providing access to copyright-protected material.

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

⁵ [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]

Proposed measure:

Increased clarity as regards the use of online content by platforms, which store and give access to the public to large amounts of content uploaded by their users, in particular through specific content identification obligations.

- **News publishers** are also affected by the problem of 'value gap' described above and therefore support action to clarify the legal framework of the activities of online intermediaries. However, they are claiming that this action should be complemented by the recognition of a **new, exclusive right for publishers in EU law**. They point out that this would strengthen their bargaining position, give them more control over the use of their content, facilitate enforcement and put them on par with other content producers (broadcasters, music and film producers), who already benefit from an exclusive right.

Over the past years news publishers, which perform an essential role in democracies and invest significant resources in journalistic content and online services, have faced significant difficulties in their dealings with online platforms. [REDACTED]

[REDACTED]

At national level, in Germany and in Spain, two types of legal solutions also dubbed 'Google taxes' have been attempted, however with mixed results in both cases and even a highly confrontational situation in Spain (Google suspended its Google News service). The German and Spanish schemes followed however an approach distinct from the creation of a new fully-fledged right⁶ and entailed mandatory remuneration, which is not the case of the envisaged EU intervention.

Proposed measure: Introduction in EU law of a related right covering online uses of news publications + introduction, in EU law, of the possibility for MS to provide that publishers may claim compensation for uses under an exception (in relation to national copyright levy systems)

- **Fair remuneration of authors and performers:** With the development of new online distribution channels, the lack of information available to authors and performers as regards the exploitation of their works by producers or publishers (to whom authors and performers often transfer their rights) has become more acute. EU intervention in this area should take into account that, as they relate to contractual relationships, these issues have generally been addressed at national level. The proposed measures would improve reporting to authors and performers and improve their negotiating position. The IA carefully considers the need to ensure the proportionality of any intervention.

Proposed measure: Imposing transparency obligations on the contractual counterparty of creators that may be supported by a contract adjustment right and a dispute resolution mechanism.

4. Questions

Do you consider that taken as a whole these measures represent an ambitious, while realistic, approach that ensures a balance between the interests of consumers and of right-holders, contributes to jobs and growth, and that can materialise within a reasonable timeframe?

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[REDACTED]

[REDACTED]