CEPS SPECIAL REPORT

Thinking ahead for Europe

Policy Options for Improving the Functioning and Efficiency of the Digital Single Market in the Field of Copyright

Andrea Renda, Felice Simonelli, Giuseppe Mazziotti and Giacomo Luchetta

No. 121 / November 2015

Abstract

This study provides an ex-post evaluation of the EU copyright framework as provided by EU Directive 29/2001 on Copyright in the Information Society (InfoSoc Directive) and related legislation, focusing on four key criteria: effectiveness, efficiency, coherence and relevance. The evaluation finds that the EU copyright framework scores poorly on all four accounts. Of the four main goals pursued by the InfoSoc, only the alignment with international legislation can be said to have been fully achieved. The wider framework on copyright still generates costs by inhibiting content production, distribution and creation and generating productive, allocative and dynamic inefficiencies. Several problems also remain in terms of both internal and external coherence. Finally, despite its overall importance and relevance as a domain of legislation in the fields of content and media, the EU copyright framework is outdated in light of technological developments. Policy options to reform the current framework are provided in the CEPS companion study on the functioning and efficiency of the Digital Single Market in the field of copyright (CEPS Special Report No. 121/November 2015).

ISBN 978-94-6138-486-7

This study was carried out at the request of the Impact Assessment Unit of the Directorate for Impact Assessment and European Added Value, within the Directorate General for Parliamentary Research Services (DG EPRS) of the General Secretariat of the European Parliament. Originally entitled "The Internal Market aspects of EU copyright: The added value and options for improving the functioning and efficiency of the Single Market in the field of copyright", it is part of a larger, 3-part study entitled "Review of the EU copyright Framework: European Implementation Assessment", published on the Parliament's website (http://www.europarl.europa.eu/thinktank/en/document.html?reference=EPRS_STU%282015%29558762). It is republished here by CEPS with the kind permission of the European Parliament.

TABLE OF CONTENTS

List of Abbreviations

ARROW	Accessible Registries of Rights Information and Orphan Works
BEREC	Body of European Regulators of Electronic Communications
CJEU	Court of Justice of the European Union
CMO	Collective Management Organisation
ERG	European Regulators Group
GDP	Gross Domestic Product
InfoSoc	Information Society
IPRED	Directive on the enforcement of intellectual property rights
LCC	Linked Content Coalition
TFEU	Treaty on the Functioning of the European Union
TPM	Technological Protection Measure
TRIPS	[Agreement on] Trade-Related Aspects of Intellectual Property Rights
UGC	User-Generated Content
VPN	Virtual Private Network
WIPO	World Intellectual Property Organization

Executive Summary

This briefing paper explores the **existing policy problem** and the **possible options for reforming the EU copyright framework** as provided by EU Directive 29/2001 on Copyright in the Information Society (InfoSoc Directive) and related legislation, with specific focus on the **need to strengthen the Internal Market for creative content**. We find two main policy problems: **the non-functioning of the Single Market**, and **the tension generated between the current system of exceptions and limitations and emerging uses of information in the online environment**.

This briefing paper finds that **there are many gaps in the existing legal framework**. Of these, some gaps could be filled if the existing *acquis* was clarified and made more consistent both in terms of interpretation and implementation. However, **the majority of existing gaps would require legislative intervention**. These gaps include the absence of a clear legal framework for the remuneration and compensation of authors and performers; *the existing* uncertainty as regards the responsibility of online intermediaries; the lack of clear rules on 'geo-blocking' practices; the uncertainty as regards the determination of the applicable law in case of copyright infringements occurring online; uncertainty on the applicability of the exhaustion principle to the making available of 'download-to-own' content on intangible media; and the lack of clear rules on access to justice and collection of evidence to be used in civil proceedings. As demonstrated by the ongoing debate on copyright reform at the EU level, all these are issues that only legislative interventions could contribute to remedying. Addressing these gaps efficiently might lead to very significant gains in macroeconomic terms. To be sure, related benefits largely overlap with the expected benefits of enjoying a Digital Single Market, which are estimated conservatively as representing at least 1% of GDP.

In our view, **options available for addressing these gaps range from more narrowly crafted legislative actions** (e.g. establishing a 'black list' of agreements that are incompatible with the Internal Market) **to comprehensive legislation** (e.g. intervention to clarify the definition of rights, simplify the right of online transmission, introduce the principle of 'country of origin' for the online transmission of categories of works, modernise and further harmonise copyright exceptions and limitations); and even more ambitious options that would create a new EU copyright Title, by exploiting the possibility granted by the new Article 118 TFEU.

With no prejudice to future impact assessment work that will focus on more specific policy options, our analysis suggests **that 'more Europe' would be needed in the field of copyright**, even if a complete overhaul of the existing system appears difficult in the short term. Addressing the Internal Market issue in copyright would, in this respect, also lead to addressing many of the shortcomings the current framework presents in related domains such as general legal issues, and also industrial policy issues. Our analysis also shows that **'no action' is not a viable option**, due to the existence of very important gaps and significant fragmentation across Member States in this policy domain, which in turn creates potential shortcomings for the welfare of EU citizens and businesses.

Policy Options for Improving the Functioning and Efficiency of the Digital Single Market in the Field of Copyright

Andrea Renda, Felice Simonelli, Giuseppe Mazziotti and Giacomo Luchetta*

No. 121 / November 2015

1. Introduction

Since the diffusion of the Internet in the mid-1990s, governments around the world have sought to adapt copyright legislation to the new opportunities and challenges posed by the 'network of networks'. **The gradual digitisation of information and the Internet's end-to-end design have made the exchange of content (including copyrighted content) much easier for end-users, with both positive and negative consequences**. On the one hand, the new environment enables unprecedented communication, knowledge sharing and even creation of new content on the side of end-users; on the other hand, right-holders' attempts to preserve control of their copyrighted works have been so far systematically frustrated. After the adoption of two World Intellectual Property Organisation (WIPO) Treaties in 1996[1], the European Union (EU) has launched a far-reaching policy debate on the need for new copyright legislation, which culminated in the adoption, in 2001, of the Information Society (InfoSoc) Directive[2]. The InfoSoc Directive, rather than completely harmonising the copyright framework in the EU Member States, introduced a number of common definitions; streamlined the approach to technical protection measures (TPMs) and the treatment of their circumvention; and introduced a closed number of exceptions and limitations, which Member States had the option of implementing at national level. However, the **InfoSoc Directive**, as discussed in our companion ex-post evaluation Study, **appears today as having been largely ineffective and inefficient; increasingly outdated if one considers the evolution of markets and technologies; and far from coherent not only in terms of internal consistency, but also with respect to other important domains of legislation,** such as the e-

* Andrea Renda is Senior Research Fellow and Head of the Regulatory Affairs Programme at CEPS; Felice Simonelli is Researcher in the Regulatory Affairs Programme at CEPS and Giuseppe Mazziotti is Associate Research Fellow in the Regulatory Affairs Programme at CEPS. Giacomo Luchetta is Economist at Economisti Associati srl, in Bologna.

The authors would like to thank Romain Bosc, Research Assistant at CEPS, for excellent research assistance in the completion of this work, and Jacques Pelkmans, CEPS Senior Research Fellow, for peer-reviewing the entire study. They also thank Lee Gillette for providing editorial control of the text of the study.

[1] WIPO Copyright Treaty and WIPO Performances and Phonograms Treaty, adopted in Geneva in December 20, 1996 (www.wipo.int/treaties).

[2] See Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on *the harmonisation of certain aspects of copyright and related rights in the information society*.

commerce Directive, and even more important, fundamental rights such as the "right to privacy" and the "freedom to run a business".

EU institutions already started to recognise this problem a few years ago, and even more so since the launch of the Digital Agenda within the Europe 2020 strategy[3]. A Communication on the "Single Market for Intellectual Property Rights" was adopted in 2011 and set out *inter alia* an ambitious programme for copyright reform[4]. Since then, the most tangible results have been the adoption of the 2012 Directive on Orphan Works[5] and the Directive on Collective Rights Management, eventually adopted in February 2014[6].

Today, copyright reform is considered one of the top priorities for the EU and has been given a prominent role in the new Digital Single Market strategy presented by the European Commission in May 2015[7]. In the new strategy, the Commission announced that it will adopt legislative proposals before the end of 2015 to "reduce the differences between national copyright regimes" and "allow for wider online access to works by users across the EU, including through further harmonisation measures"[8]. As a result, it is possible to state that **the Internal Market dimension will be central to the ongoing modernisation efforts.**

In this briefing paper, we will outline possible policy options for the reform of the InfoSoc Directive and related legislation, with specific attention to Internal Market issues. Section 2 defines the existing policy problems and identifies the underlying drivers as well as the affected parties. Section 3 presents possible policy options. Finally, Section 4 discusses the policy objectives to be achieved and provides an assessment of the expected impacts of alternative policy options.

---

[3] See "Digital Agenda for Europe", launched in May 2010 as part of the broader Europe 2020 Strategy. In particular, the Digital Agenda aims among others at creating a Digital Single Market by: i) removing all barriers that might hamper the free flow of online services and entertainment across Member States' borders; ii) fostering a European market for online content; iii) establishing a single area for online payments; and iv) protecting EU consumers in cyberspace.

[4] See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Single Market for Intellectual Property Rights - Boosting creativity and innovation to provide economic growth, high quality jobs, and first class products and services in Europe*, COM(2011)287 final.

[5] See Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on *certain permitted uses of orphan works*, OJ L 299/5, 27 October 2012 (hereinafter Directive 2012/28/EU).

[6] See Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on *collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market*, OJ L 84/72, 20 March 2014 (hereinafter Directive 2014/26/EU).

[7] See European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, *A Digital Single Market Strategy for Europe*, COM(2015)192 final.

[8] The Commission also envisages that the proposals will include: i) portability of legally acquired content; ii) ensuring cross-border access to legally purchased online services while respecting the value of rights in the audiovisual sector; iii) greater legal certainty for the cross-border use of content for specific purposes (e.g. research, education, text and data mining, etc.) through harmonised exceptions; iv) clarifying the rules on the activities of intermediaries in relation to copyright-protected; and v) modernising enforcement of intellectual property rights, focusing on commercial-scale infringements (the 'follow the money' approach) as well as its cross-border applicability.

2. The policy problem

The main challenge that the existing EU copyright framework poses to the proper functioning of the Internal Market for creative works, especially in a borderless environment such as the Internet, is related to the **principle of territoriality**. **In spite of the significant and comprehensive harmonisation measures that have been enacted in the EU since the early 1990s, each Member State preserves a distinctive copyright system, which applies exclusively within its own borders**. A distinctive national dimension is still found in crucial aspects of the legal framework such as the definition of the rights granted to authors, performers and content producers, as well as the exceptions and limitations to such rights and the measures (e.g. injunctions) through which copyright can be enforced, also in web-based environments.

Stating that the territoriality of copyright hampers the Internal Market does not mean that removing the existing fragmentation would lead to the harmonisation of content available across the EU28: individual creators, content licensors and commercial exploiters would still be encouraged, in many circumstances, to adopt a 'country-by-country' approach in their respective businesses on the grounds of Europe's cultural diversity and linguistic specificities. Moreover, an unequal penetration of Internet broadband services and varying levels of *per capita* income from one Member State to another create different conditions of access to online content services and inevitably cause market distortions.

In other words, the nature and magnitude of the policy problem should be carefully assessed: the subject matter of this briefing paper is not the removal of national specificities; rather, we focus on the elimination of those barriers to the Internal Market that frustrate the legitimate interest of European citizens in respect of the free flow of information and content across borders. Below, we thus focus on two outstanding problems: the non-functioning of the Internal Market (Section 2.1) and the growing tensions created by the current system of optional exceptions and limitations introduced by the InfoSoc Directive in 2001 (Section 2.2).

2.1 Problem #1: The 'non-functioning' of the Internal Market for online copyrighted content

As widely recognised by EU institutions, the online distribution of audiovisual content in the EU is dominated by territorial licensing agreements that partition the Internal Market along national borders.[9] Such a territorial fragmentation persists also in the music sector[10] in spite

[9] See *inter alia* Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM(2015)192 final; European Commission, Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland, Press releases, 23 July 2015, Brussels; and KEA and MINES Paris Tech (2010), Multi-Territory Licensing of Audiovisual Works in the European Union, European Commission.

[10] For a discussion on the difficulties in the supply of multi-territorial licenses and the aggregation of the repertoire of musical works see Section 3.2. of Impact Assessment of the 2014 Directive on collective rights management (European Commission (2012), Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market, SWD(2012)2014 final).

of a significant attempt of the EU Commission to discourage[11] and, at a later stage, outlaw the firmly territorial segmentation of online music rights management in the Internal Market caused by the so-called mutual representation agreements concluded by national collecting societies.[12] The recently adopted EU Directive on collective rights management (Directive 2014/26/EU; hereinafter Collective Rights Management Directive) certainly improves the previous legislative framework and clarifies the conditions under which collecting societies and other entities can license music rights for digital uses. The Directive also facilitates the aggregation of national music repertoires, and the creation of licensing 'hubs' by groups of collecting societies or mono-repertoire licensing agencies, allowing commercial users to obtain multi-territorial or pan-European licenses for aggregated repertoires. However, it is still unclear whether these multi-territorial licenses will effectively develop, and whether the replacement of country-by-country licenses giving access to *all* music repertoires with EU-wide (or multi-territorial) licenses concerning *specific* repertoires will result in lower transaction costs for commercial users of digital music.

Against this background, territorial licensing schemes exert a twofold impact on the functioning of the Internal Market for online copyrighted works:

- First, they **limit the cross-border portability of copyrighted works**. In other words, consumers who lawfully subscribe to online services in a certain Member State (e.g. to stream music or audiovisual content) are often unable to access the same service when moving, even temporarily, to another one.[13]
- Second, they **limit cross-border trade**. Consumers living in a certain Member State are not able to subscribe to online services providing copyrighted content in another Member State. This situation generates two main effects: not only some consumers are unable to access copyrighted content that is instead available to other consumers in the EU,[14] but

---

[11] See Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services of 18 October 2005, OJ L 276, 21.10.2005, pp. 54-57.

[12] See Commission Decision Relating to a Proceeding Under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, C(2008) 3435 final, 16 July 2008. Interestingly, a much later judgment of the General Court of the European Union (see T-442/08 *CISAC* v. *Commission*, and all related/joined cases, 12 April 2013) annulled the Commission's decision in respect of the finding of the concerted practice which caused the above-mentioned territorial fragmentation.

[13] To better understand the current situation, it should be borne in mind that certain service providers that operate in more than one Member State allow for cross-border portability in geographic areas covered by their services. This is for instance the case of Spotify, which ensures full portability to premium users across 25 EU countries (Croatia, Romania, and Slovenia are still excluded). In such a context, cross-border portability is not due to an EU copyright framework that facilitates the creation a digital single market. Rather, full portability is the result of the business ability of some international companies that are able to meet a pan-European demand by acquiring licenses in more than one Member State, thus bypassing the obstacles posed by territorial licensing. In fact Spotify ensures portability in 60 countries worldwide.

[14] For instance, in the Impact Assessment of the 2014 Directive on collective rights management, the European Commission reported that the availability of online music services largely varied between EU countries: in 11 Member States less than five services were available in 2012; in seven Member States, between five and nine; only in nine Member States were more than ten services accessible. See European Commission (2012), Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and

even when the same service is provided in several EU Member States, consumers are often able to access only their 'national' offer, at local conditions and prices.[15]

2.1.1 Who is affected?

Limited cross-border portability and accessibility significantly harm EU consumers. According to a study carried out by Plum Consulting (2012) for the European Commission, portability issues may affect up to 4.7 million Europeans per day including short-term migrants and travellers. As for accessibility, cross-border demand of copyrighted content in the audiovisual sector is usually generated by people living away from their 'country of origin' (long-term migrant populations) as well as by people with foreign language skills or interests. In the EU, these groups comprise approximately 121 million citizens. About 13 million long-term migrants based in EU countries are estimated to generate a demand for subscription-based cross-border audiovisual services in the area of €760 million to €1,610 million per year. There is potential additional demand from around 108 million Europeans who are proficient in or learning another language. Nonetheless, costs to provide such services, especially given the current system of exclusive territorial sales of copyright content, leave this potential demand to a large extent untapped (Plum Consulting, 2012). **Besides consumers, also content creators, right-holders and commercial users might be damaged by this situation insofar as transaction costs hamper the exploitation of cross-border business opportunities**. This of course does not extend to all those cases in which territorial licensing schemes are the result of deliberate commercial decisions, based on the legitimate need to adapt content and related commercial offers to national specificities.

2.1.2 Main drivers of the identified policy problem

The current EU copyright framework plays a dual role in the fragmentation of the Internal Market for online copyrighted content. On the one hand, it facilitates territorial licensing and the partitioning of the EU market along national borders. On the other hand, it creates cost barriers to the development of pan-European offerings.

As regards territorial licensing, **the combined effect of the principle of territoriality**[16] **and the application of the principle of exhaustion only to the realm of tangible goods makes**

Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market, SWD(2012)2014 final). In line with the example provided in note 13, consumers from Croatia, Romania and Slovenia are currently not able to subscribe Spotify.

[15] For instance, Apple iTunes covers all Member States but consumers can purchase contents only from their national store and content availability varies between national web-stores. Local versions of YouTube are available in some EU countries and provide tailored content not accessible by consumers located in another Member State. Xbox Live filters content based on the consumer's location (Plum Consulting, 2012). When it comes to Spotify, although the premium service is fully portable, consumers can lawfully subscribe only their national service and this is reflected in price discrimination across EU: the monthly price for a premium account in euro ranges from €4.99 in Bulgaria to €9.99 in Belgium, Finland, France, Germany, Ireland, Italy, Luxembourg, the Netherlands, and Spain, going up to £9.99 in the UK.

[16] By way of example, Article 2(a) of the InfoSoc Directive does not provide the author of a musical work with a reproduction right that immediately covers all the territory of the EU. The author is in fact entitled to 28 separate national reproduction rights, each of which covers the territory of a single

the online exploitation of copyright and related rights in intangible works on a national basis perfectly legitimate.[17] In fact, under the legislative framework created by the InfoSoc Directive, the online delivery of intangible works is regarded as a supply of services. First, by relying on the territoriality principle the copyright holder can license his/her work on a country-by-country basis.[18] Second, by relying on the inapplicability of the exhaustion principle to online services, the copyright holder can legitimately prevent both *non-licensed* parties from giving access to the same copyrighted work in any territory and *licensed parties* from offering the same work in a territory outside the scope of their license.[19] Against this background, commercial users that are granted territorial exclusivity can also resort to geo-blocking practices (i.e. technological measures preventing online consumers from accessing online content based on geographic location) to avoid copyright infringement as well as breach of territorial licensing agreements. In this respect, geo-blocking measures may also protect consumers from copyright infringements resulting from exploiting online content in territories not covered by the license they have purchased.[20]

As mentioned above, **the current EU copyright framework poses obstacles to the Internal Market for online copyrighted content by increasing transaction costs for the clearance of online exploitation rights on a pan-European basis**. In particular, online commercial users might be required to negotiate licenses with a wide range of stakeholders located in various Member States rather than clearing all the required rights for all the territories of the EU in a single transaction (so-called 'one-stop shop' effect). Difficulties are exacerbated since the transmission of copyrighted content through digital networks involves two different rights: i) the reproduction right; and ii) the making available right. As a result, any single act of exploitation requires the clearing of two autonomous and independent rights, which might raise transaction costs and make clearance more complex and burdensome, especially in sectors where rights are held by different entities.

Member State. As a result, a right-holder can separately exercise each of these 28 rights on a strictly territorial basis.

[17] Article 4 of the InfoSoc Directive confines the scope of the exhaustion principle to the distribution right, which concerns only physical media embodying copyrighted works.

[18] As discussed in our companion Study on ex post evaluation of the InfoSoc Directive and related legislation (see Section II.2.2), right-holders and service providers may autonomously decide to partition the Internal Market on the grounds of commercial motivations, irrespectively of obstacles that national copyright systems may raise for multi-territorial licenses. It is worth stressing that while territorial licensing practices reflect lawful commercial strategies, competition policy issues may still arise, especially when licensing agreements are based on absolute territoriality exclusivity (cf. C-403/08, Football Association Premier League Ltd and Others v. QC Leisure and Others (2012)).

[19] At any rate, the interplay between the existing limitation to the scope of the principle of exhaustion and Article 20(2) of the 'Services Directive' (Directive 2006/123/EC), which aims at "limiting discriminatory provisions relating to the nationality or place of residence of the recipient", should be further investigated.

[20] It is worth stressing that geo-blocking measures are adopted also in e-commerce of non-copyrighted goods or services to discriminate among consumers located in different Member States or territories. Nonetheless, whereas for non–copyrighted goods or services geo-blocking reflects only commercial motivations, for copyrighted services this measure may also reflect the territorial scope of copyright and related rights.

This problem is perceived, in particular, in the music sector, where the application of different types of rights (i.e. the reproduction and public performance rights) and the existence of multiple right-holders (i.e. authors or co-authors and music publishers, performers and record producers) oblige online commercial users to conduct numerous parallel negotiations before launching an online music service in a given Member State or in a region of Europe. Moreover, it should be considered that, even though from 2005 onwards the market for online music rights has changed and has become more transnational, the scope of the licenses granted to commercial users by collecting societies (or their regional licensing 'hubs') and the specialised agencies set up by music publishers is still limited, either by *territory* or by *repertoire*.[21] This inflates transaction costs and creates substantial obstacles to the provision of pan-European online music services as well as other online services requiring the clearance of music copyright and related rights, such as audiovisual services. According to a study drafted by KEA & Vrije Universiteit Brussel (2012), commercial users operating in more than one Member State and providing more than one million titles face transaction costs up to €260,000 per year and need about six employees to deal with licensing issues; in particular, the identification of relevant right-holders may require up to six months and negotiations to clear rights may last up to two years. In principle, in both the audiovisual and book publishing sector, transaction costs generated by the current EU copyright framework are lower than in the music sector as the majority of relevant exploitation rights are in the hands of a single entity, respectively the film producer and the book publisher. Nonetheless, transactional obstacles to the online provision of copyrighted content still exist.

2.2 Problem #2: Tension between the system of copyright exceptions and limitations and emerging uses of information in the online environment

As mentioned above, the InfoSoc Directive introduced a closed number of exceptions and limitations, which enables uses of copyrighted works for certain purposes and to a certain extent without the authorisation of right-holders. Under the current system, the implementation of such exceptions and limitations remains optional for Member States, with one exception (transient and incidental copies; see Box 1). This has not only led to fragmentation due to the availability of some exceptions in certain Member States and not in others; disparities have gradually magnified since one Member State decided to adopt an exception that was not included in the original closed list (i.e. the UK on "text and data mining"). In addition, national courts have provided divergent interpretations of some of the exceptions, despite the attempts made over time by the Court of Justice of the European Union (CJEU) to foster convergence in interpretation.

[21] Please note that the Collective Rights Management Directive, which will have to be transposed by April 2016, aims *inter alia* at reducing fragmentation and facilitating the aggregation of music repertoires in the clearance of online rights (see Section 3.1).

Box 1. Exceptions and limitations in the InfoSoc Directive

Article 5(1) of the InfoSoc Directive provides the only mandatory copyright limitation which exempts transient and incidental copies, i.e. those reproductions that are part of a technological process and carried out to enable either efficient communication in a network between third parties by an intermediary or lawful uses of a copyrighted work.

Article 5(2) and 5(3) provide a list of exceptions and limitations which is: i) exhaustive, i.e. no additional exceptions or limitations can be enacted at national level; and ii) non-mandatory, i.e. Member States are free to choose whether implementing or not any of the listed exceptions and limitations.

Finally, Article 5(5) introduces into the EU copyright framework the so-called 'three-step test' according to which exceptions and limitations: i) can be applied only to certain special cases; ii) cannot be in conflict with a normal exploitation of the copyrighted work; and iii) cannot unreasonably prejudice the legitimate interests of right-holders.

It is worth stressing that not all exceptions and limitations have a clear Internal Market dimension and that their cross-border impacts need to be assessed on a case-by-case basis and taking into account technological developments. In light of the analysis carried out in Section II.2.3 of our companion ex post evaluation Study, obstacles to the functioning of the Internal Market for online copyrighted content are most likely to stem from the current diverging implementation of:

- The exception for the purpose of teaching or scientific research (Article 5(3)(a));
- The exception for the purpose of reporting of current events (Article 5(3)(c));
- The limitations for quotations (Article 5(3)(d);
- The parody exception (Article 5(3)(k));
- The 'freedom of panorama' exception (Article 5(3)(h)).

Concerning the exceptions having an impact on the Internal Market, a number of problems have been identified:

- First, **the list of exceptions and limitations available to Member States is closed and exhaustive and, to some extent, technologically non-neutral**. As a result, exceptions and limitations are not able to keep pace with technological developments and new market needs. This is, for instance, apparent for mass digitisation projects or e-lending, for text and data mining and for news aggregation.
- Second, **the ample discretion available to Member States in implementing exceptions and limitations** and striking the balance between exceptions and limitations on the one hand, and TPMs[22] on the other**, leads to a situation in which some uses are possible in certain Member States and not in others.**

[22] It is worth stressing that, contrary to the expectations when the InfoSoc Directive was enacted, TPMs turned out not to be a predominant mode of protecting online content. Nonetheless, TPMs are still central in the electronic publishing sector as well as in the distribution of digital copyrighted content on digital media (e.g. DVD, Blu-Ray).

- Third, the **InfoSoc Directive left Member States free to introduce levy schemes to compensate right-holders for some uses allowed by exceptions and limitations**. In particular, it explicitly requires fair remuneration for the reprography exception as well as for private copying.[23] Diverging levy schemes at national level generate three major problems affecting the functioning of the Internal Market:
  - ***Double payments*** in cross-border transactions of already levied products, which inflate costs for producers, importers, exporters and consumers;
  - ***Uncertainty*** in terms of media and devices covered as well as the amount to be paid, which increases business risks to serve new markets or sell new products;
  - ***Undue payments*** by professional users, which generate additional business costs for such users in some Member States.

2.2.1 Who is affected?

Diverging and outdated implementation and interpretation of exceptions and limitations affect both actual and potential beneficiaries as well as some commercial users engaging in certain activities. A non-exhaustive list of stakeholders involved would include: i) consumers engaging in exempted uses; ii) creators of so-called user-generated content (UGC) or, more generally, digital derivative works; iii) libraries, educational establishments, archives, and museums and patrons of these institutions; iv) teachers, teacher-practitioners, professors, researchers, universities and other education establishments providing distance learning services; v) media services and private individuals (e.g. bloggers) engaging in news reporting activities on the Internet; vi) commercial users producing and/or distributing derivative works; vii) producers, importers and/or exporters of levied media and equipment; viii) commercial users producing and/or distributing digital copyrighted content on tangible media protected by TPMs (e.g. DVD, CD).

2.2.2 Main drivers of the identified policy problem

The main drivers of the problem identified include the following:

- **The wording adopted in the InfoSoc Directive is too general and left significant discretion to Member States**. Our analysis of a sample of Member States (France, Germany, Ireland, Italy, Poland, and the UK) portrays a widely fragmented picture, exacerbated by divergent interpretations of some exceptions in national courts.[24] Only the national implementation of the mandatory exception for transient and incidental copies (Article 5(1)) carefully reflected the text of the InfoSoc Directive.
- **The principle of territoriality applies also to exceptions and limitations**, hence their effects are not occurring across borders. This means that an act exempted in a certain Member State can still require authorisation in another Member State.[25]

---

[23] Fair remuneration is also a requirement for reproductions of broadcasts made by social institutions such as hospitals and prisons.

[24] See companion Study on ex post evaluation of the InfoSoc Directive and related legislation.

[25] The CJEU has clarified that Member States should ensure a balance between their legal tradition and the proper functioning of the Internal Market, without undermining the objectives of market integration pursued by the InfoSoc Directive. See Case C-435/12 *ACI Adam BV and Others* v. *Stichting*

- **Article 6 of the InfoSoc Directive introduces an unlimited prohibition of acts of circumvention of TPMs**: this means that uses enabled by existing exceptions and limitations might still be precluded by TPMs adopted by right-holders. This leads to a situation in which right-holders are free to shape the scope of their rights irrespective of any limitation imposed by law, especially for online services to which the safeguard provision introduced by Article 6(4) does not apply.
- **The list of exceptions and limitations provided in the InfoSoc Directive leads to** a **limited adaptability to technological developments**. This problem chiefly affects emerging uses such as online news aggregation, text and data mining, mass digitisation projects, e-lending and off-premises access to library collections, e-learning services, online journalism, and posting pictures on social networks and non-profit online platforms such as Wikipedia (see the 'freedom of panorama' exception).

3. Policy options

This Section identifies and takes into consideration **distinct policy options** that could help the EU to achieve a higher degree of market integration and ensure a smooth, cross-border dissemination of copyrighted works on an EU-wide basis.

3.1 'Zero' option (no new policy action)

Under this option, no further policy intervention would be introduced. The assessment of this option thus entails a forward-looking analysis of how the situation would evolve in the absence of further policy intervention. This, in the case at hand, implies that both the impact of recent legislation that has not fully produced its effects, and the impact of future technological developments are taken into account. This also entails the consideration of past rulings of the CJEU on crucial aspects of copyright, such as originality, the scope of the exclusive rights of reproduction, communication to the public and distribution and copyright exceptions and limitations;[26] the need to secure the enforcement of constitutional principles enshrined in the Charter of Fundamental Rights (especially when it comes to copyright enforcement measures) and in the Treaty on the Functioning of the European Union (TFEU), in particular the provisions on free movement of goods and services and competition law. In this respect, the *Premier League* judgment has shown the potential and the limits of judicial interpretation of the existing law provisions for the attainment of a more integrated market for creative works. In this case the CJEU was asked to review the compatibility with EU law of a licensing agreement between the organiser of football matches and a Greek broadcaster under which a regime of absolute territorial exclusivity

---

de Thuiskope and Stichting Onderhandelingen (2014). As of today, the only cross-border exception within the EU copyright framework is represented by the 'mutual recognition of orphan work status' under Article 4 of the Directive 2012/28/EU on certain permitted uses of orphan works.

[26] Such rulings have gone beyond mere interpretation and clarification of existing provisions by setting out new standards and unitary concepts whose creation was justified on the grounds of the harmonisation purposes of all EU copyright Directives. If EU policy- and lawmakers decided not to undertake any legislative action, such a court-led law making process would continue anyway, at a pace that has proven to be increasingly fast and with largely unpredictable results.

was created for such a commercial user to broadcast football matches from the UK just on the Greek territory to the benefit of Greek residents/customers.[27]

It is important to assess the extent to which the implementation of the two most recent pieces of legislation adopted in this domain, *i.e.* the Orphan Works Directive and Collective Rights Management Directive, might well improve the functioning of the Internal Market in the field of copyright and whose impact will have to be assessed in the near future:

- **The Orphan Works Directive has a rather limited/specific scope of application,** which concerns certain uses of works whose right-holders are unknown and/or cannot be located and whose orphan status is certified, after a diligent search, by public sector institutions acting for the pursuit of their institutional missions. **The fact that orphan works can be used only for non-commercial purposes significantly constrains the application of this mandatory and cross-border copyright exception**. Another limit of the Directive is that **it does not apply to photographs**, which constitute a high portion of the orphan works held by public libraries, museums, archives and broadcasters.
- **The Collective Rights Management Directive is expected to improve the functioning of collecting societies in Europe**, through the transposition, by April 2016, of a detailed and pervasive (harmonised) set of provisions aiming at imposing higher standards of efficiency and transparency to such institutions and obliging them to modernise their licensing activities. In addition, the Directive seeks to facilitate the aggregation of music repertoires in the clearance of online rights, with the creation of 'hubs' and one-stop shops for commercial users of such works.

Finally, for what concerns technological evolutions, it is important to take into account at least two relevant aspects:

- ***The ongoing diffusion of access-based services such as on-demand streaming*** in the music and audiovisual sector (e.g. Spotify, Apple Music, and Netflix) seems to be exerting a significant impact on the market and, at the same time, reducing the incentive to engage in illegal downloading.
- ***The increasing diffusion of virtual private networks (VPNs)*** enables users to increasingly bypass territorial restrictions created by licensing schemes designed on a purely country-by-country basis (i.e. geo-blocking).[28]

3.2 Option 1: A 'Soft law' approach

An alternative option could entail that EU institutions, and in particular the European Commission, rely on soft law initiatives in order to set out better/common standards in the implementation of existing EU law provisions and to foster the development of industry-led

---

[27] See C-403/08 *Football Association Premier League Ltd and Others* v. *QC Leisure and Others,* 2012.

[28] A virtual private network (VPN) extends a private network across a public network, such as the Internet. It enables a computer or network-enabled device to send and receive data across shared or public networks as if it were directly connected to the private network, while benefiting from the functionality, security and management policies of the private network. Use of a VPN thus bypasses territorial restrictions by allowing users to connect directly to servers located in countries in which copyrighted content is available. VPNs are widely available, easy to use, and often, free of charge.

solutions to Internal Market-related problems that have emerged in certain areas of copyright. Non-legislative initiatives were already developed with regard to collective rights management,[29] copyright levies[30] and new licensing schemes in areas such as user-generated content (envisaging licenses for small-scale users) and text and data mining.[31] It should be recalled, however, that none of the above-mentioned initiatives has brought significant improvements.[32] That said, even though these initiatives have not proven to be effective, they could be explored further for certain aspects of copyright where a higher degree of harmonisation is either allowed under existing rules or required by the new unitary standards and notions coming from the case law of the CJEU. This could be done in two ways:

- ***By offering more guidance on provisions of the InfoSoc Directive*** (and of the related legislative acts) whose broader and unitary interpretation at national level could significantly reduce or remove barriers to cross-border uses. Such provisions include:
  - ***Copyright exceptions and limitations such as quotations and parody*** for which the CJEU, in spite of their optional character, found that these provisions should necessarily be interpreted in a uniform way across the EU, in order to preserve the harmonisation purposes of copyright directives. A uniform notion for these exceptions would be ensured by the removal of all those national law requirements that narrow the scope of these provisions and end up making them inapplicable to new digital uses.
  - ***Exceptions and limitations that have been transposed in national legal systems in a way that makes their scope limited to non-digital settings, in the main***: copying by libraries, archives and museums for purposes of preservation and archiving; copying aimed at enabling both on-site and remote consultation as well as e-lending; uses for purposes of illustration for teaching and scientific research; temporary copying aimed at mining text and data after having accessed such materials lawfully. National lawmakers could modify all of these exceptions slightly in order to enable the same uses in both analogue and digital settings. The enforcement of the so-called 'three-step test'[33] would ensure that a broader scope of these exceptions would not prejudice the interests of copyright-holders in an unreasonable way.
  - ***Exceptions of reprography and private copying***, for which Member States could be encouraged to adopt ideas, criteria and methods of implementation of levy systems

[29] See Commission Recommendation on *collective cross-border management of copyright and related rights for legitimate online music services* of 18 October 2005, OJ L 276, 21.10.2005.

[30] See Vitorino, A. (2013), *Recommendations Resulting from the Mediation on Private Copying and Reprographic Levies* (http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf).

[31] See License for Europe, Structured stakeholder dialogue 2013 (http://ec.europa.eu/licences-for-europe-dialogue/en).

[32] In particular, the failure of the 2005 Recommendation to achieve the expected objectives with regard to the diffusion of pan-European licenses for music works persuaded the European Commission that a legislative action (which resulted in Directive 2014/26/EU) should have been taken.

[33] See Box 1.

incorporated into the recommendations issued by the Commission's mediator Antonio Vitorino in 2013 or suggested by the CJEU in its judgments.[34]

- ***By providing guidance on the interplay between copyright law and competition law.*** A Commission recommendation could incorporate a number of best licensing practices that would help copyright holders, especially in the audiovisual sector, identify the conditions under which they are entitled to exploit their intellectual property at national level, while taking advantage of the remuneration opportunities associated with a particular territory, without infringing Article 101 TFEU and the principle of free movement.
- ***By further promoting initiatives aimed at ensuring that rights data and metadata are effectively made available by their respective holders to commercial and non-commercial users and, more generally, to the public***. Identification systems and repertoire databases such as the Global Repertoire Database,[35] the Linked Content Coalition[36] and Accessible Registries of Rights Information and Orphan Works[37] are expected to simplify, modernise and improve the conditions of licensing in the online market. The European Commission might consider continuing to support such initiatives, which also aim at setting out standardised rights expression languages in those sectors where digital right management systems are still used and relied on by content producers. One additional possibility would be to make the grant of further subsidies conditional on the definition and preventive approval of ownership regimes over rights management data and databases and on the related licensing policies by all consortium / project participants (i.e. associations of rights holders, collecting societies, online intermediaries, technology companies, etc.).

---

[34] These measures include among others (i) the application of levies only in the country of destination of levied products in case of cross-border transactions; (ii) a simplification of the methods of calculation and collection of levies, with a shift of the liability to pay them from the manufacturer (or importer) level to the retailer level and a drastic simplification of the applied tariffs (which would give retailers the possibility of reasonably handling the new above-mentioned task). These changes would solve the problem of products that are levied twice (in both the countries of manufacture / import and of destination) and of the subsequent reimbursements, (cf. C-467 / 08, *Padawan SL* v. *SGAE*, 2010; C-462 / 09, *Stichting de Thuiskopie* v. *Opus Supplies Deutschland*, 2011; and C-521 / 11, *Amazon* v. *Austro Mechana*, 2013).

[35] The 'Global Repertoire Database' is an attempt to create a single global and authoritative source of multi-territory information about the ownership or control of the musical repertoires.

[36] Linked Content Coalition (LCC) is a non-profit global consortium of standards bodies and registries, for more details, see: http: / / linkedcontentcoalition.org.

[37] The Accessible Registries of Rights Information and Orphan Works towards Europeana (ARROW) is a platform aimed at facilitating the management of rights and keep track records of diligent searches, see: http: / / www.arrow-net.eu / .

3.3 Option 2: Legislative intervention

3.3.1 Option 2a: 'light-handed regulation', aimed at specifying licensing agreements and territorial restrictions that are incompatible with the free movement of goods and services (so-called 'black list')

Under this option, a new legal provision would specify the types of licensing agreements and territorial restrictions that should be regarded as incompatible with the free movement of goods and services. This provision might be shaped so as to ensure a higher degree of legal certainty for copyright-holders and commercial users of creative works, with the introduction of a safety mechanism enabling rights-holders to show that territorial licenses are the only way to achieve appropriate remuneration. Such intervention would preserve the principle that, under certain circumstances, the protection of intellectual property at national level and the related remuneration opportunities associated with a particular territory might constitute a legitimate exception to free movement, as contemplated by Article 36 TFEU.

3.3.2 Option 2b: 'comprehensive legislative reform'

A broader reform of EU copyright law might consist of several measures / variants aimed at consolidating the existing framework and ensuring more consistency and uniformity, especially for its cross-border application. This option would entail the following interventions:

- ***A Better/Clearer definition of exclusive rights.*** Even though CJEU case law has shed light on the scope of the exclusive rights granted by the InfoSoc Directive, there are still unclear aspects of such rights when they are applied in digital settings. These include current uncertainties on the applicability of exceptions to text and data mining, on the treatment of hyperlinking as a form of communication to an extended audience (a 'new public'), and on the application of the exhaustion principle to the online distribution of copyrighted works, following recent CJEU decisions in landmark cases such as *Bestwater*, *Svensson* and *UsedSoft.*[38]
- ***Simplification of the right of online transmission.*** Although the InfoSoc Directive already provides for a right of making content available to the public specifically conceived to cover web-based interactive exploitation (Article 3.2), this right has not been conceived as an independent right of online transmission. This means that, given that the category of 'online rights' is not codified under EU law, online exploitations of protected works trigger the simultaneous application of both the rights of reproduction and making content available. Such a simultaneous application, which occurs irrespective of whether a commercial use entails the creation of permanent copies (i.e. download) or just streaming, increases transaction costs dramatically whenever these rights belong to distinct rights-holders, as happens often in the music business. Options in this respect include i) the creation of a single right of online transmission, or at least ii) simplifying licensing to make the bundling of the aforementioned rights indispensable for each license to be valid. This obligation would guarantee that each license granted by a copyright-holder enables a concrete and autonomous type of digital use.

[38] See C-348 / 13, *Bestwater International GmbH* v. *Michael Mebes* (2014); C-466 / 12, *Svensson* v. *Retriever Sverige AB* (2014); C-128 / 11, *UsedSoft GmbH* v. *Oracle International Corp.* (2012).

- ***Introduction under EU copyright law of a principle of 'country of origin' (or country of upload) for online transmissions of categories of works*** for which the problem of territorial exclusivity is particularly evident. Considering that the availability of audiovisual works on the Internet is much lower than that of music, this measure could be confined to the realm of films and other audiovisual works (e.g. TV series).[39] Such a remedy would extend and adapt to online content a principle that has already been implemented under EU law for the determination of the applicable law to satellite broadcasts and digital TV services. This policy option aims at making online transmissions of copyrighted works subject to one single national law instead of making them subject to the laws of all EU countries where the transmission can be accessed, in accordance with the principle of territoriality and with the accessibility criterion recently developed by the CJEU for the identification of the law applicable to online infringements. This provision should not deprive the parties of the possibility of agreeing by contract on the territorial scope of the licence, which would allow them to calculate license fees on the basis of the audiences and territories reached by online deliveries.
- ***Modernisation and further harmonisation of copyright exceptions and limitations.*** As already mentioned, the adaptation of exceptions to the digital environment and their application in a technology-neutral manner is significantly restricted by the exhaustive character of the exceptions provided under Article 5 of the InfoSoc Directive. In addition, as emphasized by the CJEU in recent judgments, the so-called 'three-step test', which is incorporated into international treaties and, as a result, has a binding force for the EU, makes the applicability of exceptions in digital settings more difficult or impossible.[40] This means that if EU lawmakers, as suggested below, decided to undertake legislative initiatives aimed at expanding the scope of copyright exceptions, they would either need to consider a re-negotiation and amendment of the international copyright treaties or propose a broader interpretation of the test at international level. To further harmonise and modernise copyright exceptions, the following initiatives could be envisaged:
    - ***Making a core set of exceptions having an impact on cross-border uses mandatory for Member States*** in order to preserve values such as freedom of expression and information, online media freedom, teaching and research purposes. Such exceptions might include uses such as text and data mining for non-commercial purposes, quotations for purposes of research and teaching, copies and transmissions of works for the purposes of e-lending, e-learning, and enabling freedom of panorama.
    - ***Mandating that exceptions enabling transformative or productive uses of copyright materials or encouraging research and innovation cannot be overridden through contract under national law****,* in the same way as for exceptions provided under

[39] Such a decision would need to take the existing online music licensing schemes into consideration in order to assess their efficiency and desirability. Moreover, EU policy makers should also evaluate the impact of the 2014 Directive on Collective Rights Management on the transaction costs that commercial users of online music have to bear in order to launch pan-European or multi-territorial online music services.

[40] The three-step test embodied into Article 9.2 of the Berne Convention and Article 13 of the TRIPS Agreement provides that exceptions and limitations may be provided just in certain special cases in a way that does not affect the normal exploitation of the copyright work and does not unreasonably undermine the interests of the rights holders.

sector-specific legislation on the legal protection of computer programmes. Similarly, ***TPMs could be shaped as not having the effect of restricting the exercise of such exceptions and limitations.***

- ***Injecting flexibility into the current system of exceptions***. Courts might be allowed to freely estimate whether a certain usage should be considered 'fair' by relying on a mixed system where unauthorised uses of copyrighted materials could be permitted by analogy, i.e. when they are similar but not identical to the ones expressly intended by the law.
- ***Creating additional exceptions in order to ensure a nuanced and balanced legal treatment at EU level of technology-enabled uses for which exceptions and licensing schemes could become complementary***. Exceptions might apply to non-profit uses, whereas licensing schemes could be developed for uses that are directly or indirectly commercial. Confining the scope of a certain copyright exception to the realm of non-profit uses is a criterion that EU law has already embraced under the InfoSoc Directive (cf. Article 5) and, more recently, under the Orphan Works Directive (cf. Article 6). Following the same criterion with regard to future exceptions permitting certain technology-enabled uses might be a suitable policy option.
- ***Creating an additional exception to the right of reproduction to enable text and data mining uses***. In this case, the amended version of the InfoSoc Directive would need to be coordinated with that of Directive 96/9/EC on the legal protection of databases, where the extraction and reutilisation of data from non-original databases (i.e. mere aggregation of data) is currently restricted by an exclusive *sui generis* right.
- ***Clarifying and streamlining exceptions for reprography and private copying***. In those Member States where the exception applies, several measures could help reduce the impact of copyright levies on the free movement of levied products within the EU. Among other options, it would be important to: i) adopt a uniform concept of harm caused by unauthorized private copying to right-holders across the EU; ii) clarify that copies falling within the scope of application of private copying and levy systems cannot be validly licensed by right-holders and that licensing schemes should be used as an alternative to levies before their phasing-out (to avoid that consumers end up paying twice for the same copy); iii) clarify that only equipment and media that are deemed to be used by individuals acting for non-professional ends can be subject to the levy scheme;[41] iv) prescribe that permission to make private copies is subject to the condition that copies come from a lawful source (i.e. a lawfully acquired copy of the work); v) ensure that levies are applied (only) in the country of destination of levied products in case of cross-border transactions; vi) shift the liability to pay the levy from the manufacturer (or importer) level to the retailer level in order to avoid the problem of products that are levied twice and that of subsequent reimbursements; vii) radically simplify the tariffs applied in order enable retailers to handle this new task in conjunction with the task of providing a customer receipt where the levy is visible for the consumer.

[41] As held by the CJEU in *Padawan* v. *SGAE*, this means that private copying levies cannot be applied with respect to equipment and media not made available to private users and clearly reserved for uses other than private copying (i.e. professional uses).

3.4 Option 3: Unitary copyright title and a European copyright Code

This option entails the **unification of legislation through a uniformly applicable regulation across the EU**. This option would fall in line with the unification of intellectual property rights legislation that emerged at EU level after the entry into force of the Lisbon Treaty (Article 118 TFEU). However, contrary to the case of patents, trademarks and industrial designs, for copyright, which subsists independently of registration and for whose recognition international agreements provide a 'no formalities' principle, the co-existence of unitary and national titles would be more problematic and, as briefly explained below, would depend mostly on where the EU can legitimately create a registration system for copyrighted works. Accordingly, we distinguish between two sub-options.

3.4.1 Option 3a: 'complete unification'

For a complete unification of copyright law and for the creation of a genuinely pan-European system of copyright entitlements, the EU would need to adopt a regulation that would replace national legislation in this field. This means that national copyright systems would be dismantled by the regulation, with a subsequent loss for Member States of the prerogatives they still enjoy under the current system of EU copyright Directives and territorial (i.e. country-by-country) protection. This new EU regulation would need to deal with all aspects of copyright law, such as:

- **The definition of rights**: on this front, EU lawmakers might easily draw on the *acquis communautaire* regarding the subject matter of exclusive rights, as harmonised by the InfoSoc Directive and the case law of the CJEU.
- **The definition of the right to authorise the alteration, modification and translation of original works**: no formal harmonisation measure has been adopted so far in the EU, even though the CJEU has started focusing on exceptions such as parody, which presuppose the limitation of such an exclusive right; unification might also be facilitated by the circumstance in which this category of right is internationally harmonised by the Berne Convention and the related international agreements.
- **The definition of protected subject matter**: on this issue, an EU regulation might merely codify the EU standard of the 'author's own intellectual creation' for all types of copyrighted works.
- **Authorship**: different concepts of authorship still apply in the various EU Member States, especially with regard to certain types of works (e.g. films) for which different categories of creators are regarded as 'authors'.
- **Ownership**: ownership regimes, especially in the context of employment relationships where the employer might automatically acquire the economic rights of exploitation of a creative work, still vary considerably from a Member State to another.
- **Moral rights**: it is the area of copyright law where the 'distance' at national level is more evident.
- **Terms of protection:** these terms are all harmonised by copyright directives.
- **Exceptions and limitations**: harmonisation has so far only been achieved to a very limited extent, and this option should entail more specific provisions aimed at removing existing national disparities.

- **Copyright contract law**: significant differences still apply, also with regard to the formalities which are required for copyright titles to be validly transferred from original right-holders to subsequent copyright-holders (e.g. publishers).
- **Enforcement law and practice**: there is significant disparity between Member States as regards the types, conditions and effects of such measures; the principle of territoriality of copyright inevitably limits the effect of these measures (e.g. injunctions) to the national level.

3.4.2 Option 3b: 'optional EU copyright registration system'

An alternative legislative initiative might be developed through the adoption of an EU regulation, the aim of which could be the introduction of an EU-wide copyright Code (i.e. a set of rules similar to the one sketched in the previous Section) and an **optional registration system that would run on top of national copyright systems and titles and would apply specifically to registered works.** Such a system might become appealing for copyright holders wishing to effectively exploit their works on a pan-European basis and take advantage of unified and simplified rules, including access to EU-wide enforcement measures (which would work as an incentive for prospective right-holders under this new regime).[42] The optional registration system might prove to be compatible with the aforementioned 'no formalities' principle under international copyright law insofar as registration of copyright works were required for the sole purpose of choosing the desired layer of protection, and not as a formality for the protection to subsist. In case of co-authorship, if authors did not agree with each other on the desired level of copyright protection, registration would not be possible, in a way that the new joint work would be protected, by default, only under national law.

4. Assessing the added value of alternative policy options: selected assessment questions

In this Section, we offer insights on the possible impacts that would be associated with the alternative policy options listed in Section 3 above. Section 4.1 below explains the main assessment criteria, which include effectiveness, efficiency and coherence. This Section clarifies which benefits and costs are most likely to be relevant for the ex-ante impact assessment of the proposed options. Section 4.2 applies specific assessment questions selected by the European Parliament to the alternative options and provides an impact matrix.

[42] Please note that an 'optional EU copyright registration system' was envisaged in the Green Paper on the online distribution of audiovisual works (European Commission (2011), Green Paper on the Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges towards a Digital Single Market, COM(2011)427final). While 225 respondents took part in the related public consultation, which gathered *inter alia* the views on the introduction of an optional unitary EU Copyright Title, the results of the consultation have not been published yet.

4.1 Methodological framework

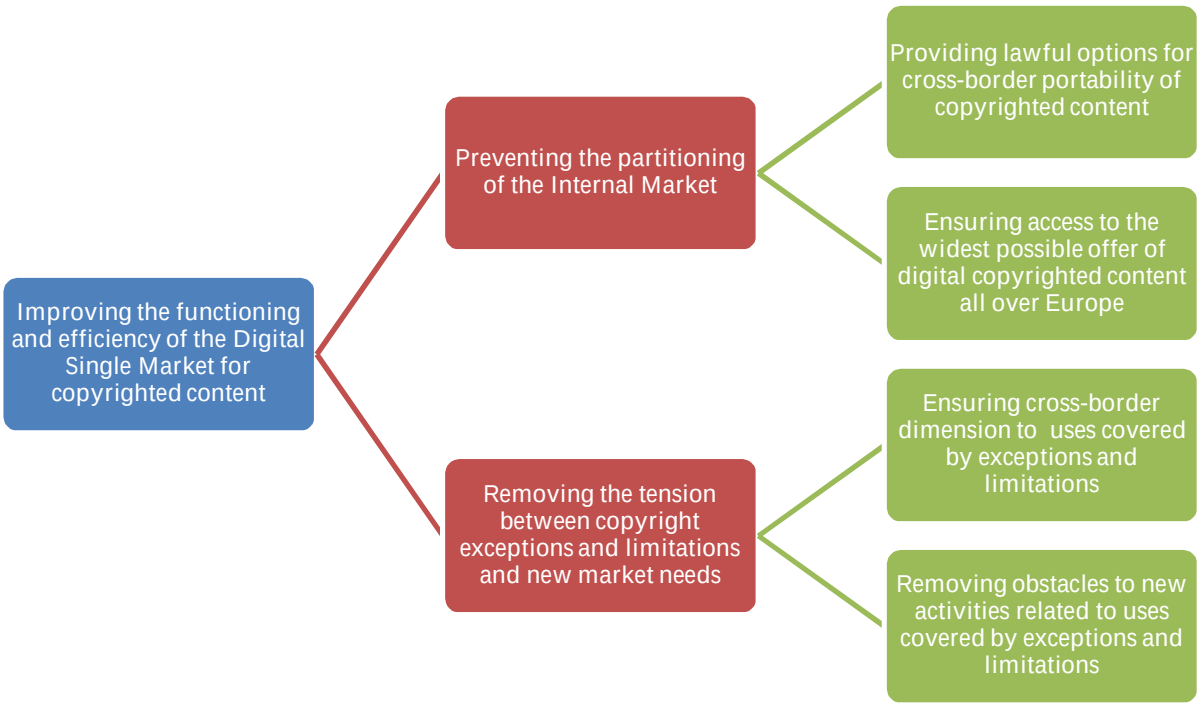
We base our comparison of the alternative policy options on three main criteria: effectiveness, efficiency and coherence.

- **Effectiveness** relates to the extent to which the proposed options achieved the intended general, specific and operational objectives.
- **Efficiency** refers to the overall impact of the proposed options on social welfare. It implies an evaluation of both the expected costs and the expected benefits of each option.
- **Coherence** refers both to how the internal components of the EU copyright framework operate together (so-called 'internal' coherence) and to the consistency of the proposed options with other EU legislation (so-called 'external' coherence).

4.1.1 Effectiveness: Policy objectives

Any intervention aiming to address the policy problems would need to be based on consistent general, specific and operational objectives. These policy objectives are summarised in *Figure* ***1*** below. Our assessment of the options' relative effectiveness will be based on these intended objectives. In addition, the ancillary objective of removing obstacles to the free movement of media and devices subject to copyright levies will be taken into account.

Figure 1. Policy objectives



Notes: General objectives in blue; specific objectives in red; operational objectives in green.

Source: Authors' own elaboration.

4.1.2 Efficiency: Relevant costs and benefits

Although a fully-fledged cost-benefit analysis of the proposed options falls outside the scope of the present analysis, it is very important to identify the categories of costs and benefits that such options are likely to generate. This, in turn, makes it easier to evaluate the possible distributional impacts of each option, i.e. the impact broken down per category of stakeholder. We base our analysis on the taxonomy of costs and benefits provided in Renda *et al.* (2014),[43] now fully embedded in the toolkit attached to the new better regulation guidelines of the European Commission.[44]

4.1.2.1 Possible benefits

Expected benefits of the selected options include the following:

- ***Increased content availability***. A legal system that provides efficient incentives to authors can lead to increased production of content; likewise, better rules for online copyright and a more effective enforcement can incentivise the dissemination of content on the Internet, whereas such dissemination is clearly discouraged by the absence of suitable remedies in case of a violation of copyright rules. Increased content production and dissemination is coupled with increased content consumption by the users, which can in turn lead to the greater production of user-generated content.
- ***Cost savings, enhanced producer and consumer surplus***. To the extent that policy options can solve allocative inefficiencies, reduce transaction costs and administrative burdens, this can benefit society as a whole. In this respect, eliminating the need to negotiate licenses for different rights and for different countries can certainly lead to benefits for specific categories of industry players and for consumers in general. The above-mentioned policy options do not envisage a scenario where right-holders such as the EU's comparatively small independent film producers would be obliged to license their rights on an EU-wide basis. Especially under option 3b, these right-holders would be free to decide whether or not to exploit their works on a national or multi-territorial basis. In addition to that, it should be considered that EU-wide licenses would have to reflect the value of the audiences reached by cross-border online transmissions, in a way that a lesser number of licences would not necessarily entail a lower income for right-holders.
- ***Benefits in specific fields (e.g. research) or activities (e.g. text and data mining)***. Reform in the domain of exceptions and limitations can benefit specific sectors, such as research and education; it can also benefit specific cross-sectoral activities, as in the case of text and data mining. In both cases, societal benefits can be generated.
- ***Development of pan-European services***. This is a more specific, EU-related benefit that can be considered a stand-alone benefit for a policy oriented at contributing to the achievement of the Digital Single Market. Policies aimed at tackling EU market

---

[43] See Renda *et al.* (2014), *Assessing the costs and benefits of Regulation,* a CEPS-Economisti Associati Study, for the European Commission (http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/131210_cba_study_sg_final.pdf).

[44] See the website of the European Commission on the guidelines for Better Regulation (http://ec.europa.eu/smart-regulation/guidelines/tool_51_en.htm).

segmentation stemming from territorial licensing agreements and 'geo-blocking' must be appraised also in light of this possible benefit.

- ***Increased legal certainty***. As illustrated in the previous Sections, there are several areas of copyright legislation that, due to gaps, fragmentation or technological evolution, are today characterised by significant uncertainty. Removing sources of uncertainty could in turn incentivise further content availability and welfare-enhancing behaviour.

4.1.2.2 Expected costs

Such as for the benefits, costs accruing from alternative policy options can also be broken down into different types. These include:

- **Direct costs.** Certain policy options might be more costly than available alternatives in terms of resulting charges (e.g. levies); substantive compliance costs (e.g. need to use filtering technologies, renegotiation of existing license agreements); or administrative burdens (e.g. introduction of new reporting obligations for market monitoring). Such costs are typically incurred by industry players.
- **Enforcement costs**. This category can include costs from enhanced litigation, administering and applying sanctions, and monitoring compliance. Such costs typically affect public authorities, but they can also affect private players. The latter can face costs of this type both in the form of opportunity cost of the time spent engaging in litigation, and as a result of the existence of private regulation such as codes of conduct, which place enforcement activities directly in the responsibility of private players.
- **Indirect costs** are likely to emerge in various forms:
  - *Indirect compliance costs* occur when costs generated by compliance with legal rules are passed on downstream in the form of higher prices (e.g. the cost of an e-book increases since the device producer cannot rely on TPMs).
  - *Substitution effects and technological avoidance measures* (e.g. VPNs). These refer to the case in which end-users rely on a second-best, socially suboptimal course of action (e.g. the use of VPNs to circumvent territorial restrictions).
  - *Reduced efficiency, competition, or innovation.* These effects occur any time a specific policy option falls short of achieving productive, allocative or dynamic efficiency.

4.1.3 Coherence

Another important aspect of the assessment of alternative policy options is their coherence with the existing EU *acquis* on copyright, as well as with other, important areas of EU legislation. More specifically, our assessment below will look at the following issues:

- Coherence with CJEU latest case law;
- Coherence with other areas of EU legislation.

4.1.4 Summary of policy options

Prior to the assessment of benefits and costs stemming from policy interventions, Table 1 summarises the alternative policy options devised in Section 3.

Table 1. Summary table of alternative policy options

Option 1 ***"Soft law approach"***	• More guidance on specific provisions of the InfoSoc Directive, especially those concerning exceptions and limitations • Guidance on the interplay between copyright law and competition law • Promotion of initiatives aiming at making available information about copyright (and related rights) and right-holders toward commercial and non-commercial users.
Option 2a ***"Light-handed regulation"***	• Introduction of new legal provision specifying the types of licensing agreements and territorial restrictions that should be regarded as incompatible with the free movement of goods and services in the Internal Market
Option 2b ***"Comprehensive legislative reform"***	• Better / clearer definition of exclusive rights • Simplification of the right of online transmission • Introduction of a principle of 'country of origin' (or country of upload) for online transmissions of selected categories of copyrighted works • Modernisation and further harmonisation of copyright exceptions and limitations
Option 3a ***"Complete Unification"***	• Introduction of an EU copyright Code and copyright title replacing national legislation and titles
Option 3b ***"Optional EU copyright registration system"***	• Introduction of an EU copyright Code and copyright title running on top of national legislation and titles and only applicable to registered works • Introduction of an optional registration system for copyrighted works

4.2 Assessment of policy options

Below, we describe our appraisal of the identified policy options, based on our appraisal of their likely impacts, with a *caveat*: this is only a preliminary assessment, which would need to be further elaborated upon by a full-fledged analysis of the economic, social, and environmental impacts of each of the alternative policy options.

4.2.1 Effectiveness

4.2.1.1 Preventing the partitioning of the Internal Market

The specific objective of **preventing the partitioning of the Internal Market** is addressed to different degrees by all the suggested policy options.

- Under the **zero option** (**baseline scenario**), this objective would be partially achieved via the implementation of the 2014 Collective Rights Management Directive (Directive 2014/26/EU) that aims *inter alia* at facilitating the clearance of online rights for music repertoires. More specifically, with respect to the music sector, this Directive is expected

to reduce transaction costs for acquiring multi-territorial and pan-European licenses. This would reduce cost barriers to cross-border services for online music, with positive impacts on both portability and the multi-territorial availability of copyrighted content. Insofar as licensing of music content constitutes an obstacle to multi-territorial licenses in the film sector (see issues related to licensing pre-existing musical compositions or film soundtracks), the Directive 2014/26/EU would reduce costs also in the provision of audiovisual digital content on a pan-European basis.

- Compared to the baseline, **option 1 ('soft law' approach)** would further facilitate the right clearance processes by enhancing identification systems and repertoire databases, provided that the efforts of the EU institutions in promoting such systems will be more effective than previous, comparable initiatives. Increased transparency and better access to information on relevant rights and right-holders are expected to lower transaction costs for multi-territorial licensing in all sectors of EU copyright, reducing obstacles to the provision of pan-European services. In addition, guidelines to clarify the interplay between copyright law and competition law might progressively set aside anticompetitive territorial restrictions with expected positive impacts on cross-border portability and trade.
- The effectiveness of **option 2a ('black list')** is likely to be greater than that of either of the two previous options, as those territorial restrictions, which are incompatible with the free movements of goods and services, would *per se* be prohibited and legal certainty would be enhanced. Crucially, this should also address the problem of cross-border portability of content. A more nuanced assessment is related to the impact on the availability of copyrighted content across Member States: while this approach would not affect the transaction costs incurred to acquire multi-territorial licenses, it might end up jeopardising vertical agreements and price discrimination strategies currently adopted by right-holders and/or commercial users, even when those strategies are perfectly legitimate and efficient. As a result, in some Member States (especially those characterised by a low level of *per capita* income) there would be a risk that access to digital content becomes more expensive for end-users. To mitigate that risk, a 'safety mechanism' should be designed to ensure that the 'appropriate remuneration test' is carried out on a country-by-country basis rather than based on the EU average.
- By clarifying the definition of exclusive rights, simplifying the right of online transmission and introducing the principle of 'country of origin' for the online transmission of copyrighted content, **option 2b (comprehensive legislative reform)** is expected to substantially reduce transaction costs for granting and acquiring multi-territorial licenses. In addition, this option still leaves room for contractual agreements aiming at limiting the territorial scope of the licenses granted. As a result, positive impacts should accrue both in terms of lawful options for cross-border portability and the availability of digital copyrighted content throughout the EU.
- The **complete unification introduced by option 3a** eradicates the principle of copyright territoriality based on national laws and fully equates copyrighted and non-copyrighted goods and services. This would virtually remove any obstacles imposed by the EU copyright framework on the free movement of copyrighted content, thus leaving the floor entirely to market forces for what concerns both cross-border portability and trade. Vertical agreements and territorial restrictions, which can still be included in contracts, will be subject to the scrutiny of national and EU competition authorities.

- The '**opt-in' approach provided by option 3b** enables right-holders to choose between a unitary copyright title and the current protection system based on 28 different national copyright legislations and titles. The impact of this option is rather difficult to assess and would largely depend on the level of uptake of the EU title, which in turn is the result of a trade-off between the greater flexibility in territorial exploitation provided by national titles and the simplified licensing and enforcement mechanisms connected to pan-European rights.

4.2.1.2 Removing the tension between copyright exceptions and limitations and new market needs

As already recalled in this briefing paper as well as in our companion ex post evaluation Study, the **zero option** has proven powerless to address the tension between copyright exceptions and limitations and new market needs. Only non-commercial uses of orphan works would be addressed given the existence of legislation enacted in 2012. Even option 2a (**'black list')** does not significantly contribute to the achievement of this policy objective. The level of effectiveness largely varies across the remaining suggested policy options.

- By providing uniform and digital-friendly notions for some exceptions and limitations whose scope has been limited to a non-digital setting by national implementation or by the formulation of the InfoSoc Directive itself, **the 'soft-law' approach** may contribute to the removal of obstacles to new activities enabled by technological developments. Nonetheless, the issue of cross-border effects of exceptions and limitations would only marginally be tackled, as the optional character of the closed list provided in Article 5 of the InfoSoc Directive would remain as well as, to some extent, existing divergences in national implementation.
- On the contrary, the **comprehensive legislative reform envisaged by option 2b** would remove all obstacles to new technology-enabled uses by: i) creating additional exceptions and limitations for non-commercial purposes; ii) allowing text and data mining through the extension of the transient copy exceptions included in Article 5(1) of the InfoSoc Directive; iii) enabling national courts to apply the 'analogy criterion' to allow new unauthorised uses; iv) shielding relevant exceptions and limitations from both a contractual override and TPMs. At the same time, market fragmentation generated by the territorial scope of exceptions and limitations would be reduced by identifying a core set of mandatory exceptions and limitations on the grounds of their cross-border relevance. In particular, for text and data mining, a cross-border dimension would be ensured by the mandatory character of Article 5(1). If national courts ended up creating or endorsing a different scope for specific exceptions and limitations, copyright obstacles to cross-border uses might still affect the functioning of the Internal Market.
- **Option 3a (unitary title and enactment of an EU Copyright Code)** would radically solve all problems connected with the cross-border effects of exceptions and limitations as uses that do not require authorisation would be permitted by European legal provisions, applied uniformly in each Member State. New activities enabled by technological developments would become possible insofar as up-to-date exceptions and limitations are included in the EU Copyrighted Code. In order to be entirely future-proof, the new provisions would have to be drafted in a technologically neutral way. One possibility to ensure enhanced technology responsiveness would be to introduce a 'fair use' approach based on the three-step test and extend exceptions and limitations to new uses that are similar but not identical to those already covered by the EU Code.

- The **optional registration system provided by option 3b** applies EU-wide exceptions and limitations to creative content registered in the EU system and national exceptions and limitations to content protected under national copyright legislation. The overall result would depend on the level of uptake of the EU title as well as on the ease of access to information included in the EU register, especially for what concerns user-generated content and other derivative works. Accordingly, this would provide legal certainty on the unauthorised uses of a given copyrighted work. Interestingly, the more new exceptions and limitations would be introduced by the new EU Code, the less the EU title would become attractive for right-holders, who might then choose to retain the right to license certain uses and a greater control over transformative uses.

4.2.1.3 Additional remarks

The ancillary objective to improve the functioning of the Internal Market for tangible media and devices subject to copyright levies is addressed by three out of six suggested policy options.

- The **'soft law approach' under option 1** is intended to provide guidance on criteria and methods of implementation of levy systems based on Mr Vitorino's recommendations and the landmark decisions of the CJEU. The effectiveness of this approach is limited: Member States have already introduced in their national law some of the recommendations, together with harmonising interpretations provided by the CJEU. Nonetheless, in several countries, the new provisions such as ex ante exemptions or reimbursement mechanisms to avoid or mitigate both double payments in cross-border transactions and undue payments for professional uses as well as new methods to set levies, have created substantial administrative and compliance costs and have been largely ineffective.
- The effectiveness of **option 2b** is certainly higher when compared to option 1 insofar as the harmonisation of national levy systems results from an EU **legislative intervention** aimed at solving the main issues raised by Mr Vitorino and already partially fixed in several cases by the Court of Justice.
- Whereas the opt-in approach provided by option 3b would still require national systems to ensure fair compensation, **the complete unification under option 3a** may entail the creation of an EU levy system, that could be designed e.g. on the basis of the experience gained in the field of EU customs union legislation. The highest level of effectiveness in integrating the Internal Market for levied media and devices would stem from such an approach.

The baseline scenario as well as all the policy interventions proposed above will be affected by technological developments. At the time of writing, two main trends are worth discussing.

1. The **increasing diffusion of access-based services constitutes a paradigm shift from 'copyrighted goods' to 'copyrighted services'**. As things stand now, 'copyrighted services' have access to a higher level of protection as they are fully shielded from the principle of exhaustion, which some national courts are extending to download-to-own

copyrighted content[45] and from any Member States' intervention to balance exceptions and TPMs. Any policy option keeping different levels of protection for the online and the offline world has to cope with the growing importance of new services, such as on-demand streaming, enabled by ultra-fast Internet access and cloud computing that are transforming the copyright industry in a service sector activity.

2. **VPNs provide technological measures to circumvent 'geo-blocking'** and to access online copyrighted content licensed in a certain Member State from another country. VPN users that want access to fast services enabling the streaming of digital content are usually willing to pay a monthly fee to use premium VPN packages.[46] While this circumvention method is proven to be very successful to bypassing existing obstacles to cross-border portability, cross-border trade of digital works can still effectively be limited by additional measures aiming at partitioning the Internal Market on the ground of the country of residence, such as solutions based on the country that issued the credit card required for payments. Nonetheless, other measures to bypass this additional obstacle are also available to end-users.[47] Interestingly, when it comes to copyrighted content, any activity enabled by 'geo-blocking' circumvention constitutes copyright infringement as well as breach of licensing contracts. Therefore, VPNs might fall under Article 6.2 of the InfoSoc Directive and become unlawful if it was proven that they have only a limited commercially significant purpose or use other than to circumvent 'geo-blocking'. In principle, technical solutions to curtail the use of VPNs are already available.[48] Nonetheless, rather than fighting VPNs, right-holders and commercial users adopting a system of territorial licenses might increase their revenues by providing lawful options to meet this demand generated by users with a positive willingness to pay for cross-border access.

4.2.2 Efficiency

The largest share of expected benefits and costs stemming from a reform of the EU copyright system will accrue not only by interventions aiming at improving the functioning of the Internal Market, but also from potential changes in rules affecting authors' and performers' remuneration and copyright enforcement. In what follows, benefits and costs will be identified from the Internal Market standpoint.

4.2.2.1 Benefits

- **Increased content availability** is fostered by those policy options that reduce transaction costs for granting and acquiring multi-territorial licenses, and at the same time leave enough room to right-holders and commercial users to enter vertical agreements and

[45] In a recent decision, the Dutch Court of Appeals (Hof Amsterdam) extended the rationale based on the CJEU *UsedSoft* case to the resale of eBooks. For further details (http://kluwercopyrightblog.com/2015/01/28/the-dutch-courts-apply-usedsoft-to-the-resale-of-ebooks/).

[46] For further details see Box 2 of the companion Study on ex post evaluation of the InfoSoc Directive and related legislation.

[47] For instance online payment systems such as 'Paypal'.

[48] For further details, see "China blocks virtual private network use" (www.bbc.com/news/technology-30982198).

pursue price discrimination strategies where efficient. The analysis of this potential benefit to some degree overlaps with the assessment of the effectiveness in achieving the operational goal of ensuring the widest possible offer of copyrighted content throughout the EU (see Section 4.2.1.1 above). The **zero option/baseline scenario** is expected to increase content availability in the music sector and, to a lesser degree, in the film sector. These benefits are comparable to those accruing under **option 1:** however, the latter option is to be preferred due to better identification systems for rights and right-holders and enhanced certainty provided by competition law guidelines. While limiting strategic options available to right-holders and commercial users for partitioning the Internal Market, **option 2a ('black list')** would not necessarily reduce transaction costs, which leads to ambiguous, if not even negative, effects on content availability. Uncertain effects are also generated by the **optional registration system required by option 3b**, in which the impact on transactional barriers to cross-border availability of content largely depends on the level of uptake of the pan-European title. The **comprehensive legislative reform under option 2b** appears, in this respect, as a more balanced strategy that would lead at once to lower transaction costs and broad flexibility to right-holders and commercial users; this option is thus likely to generate substantial benefits in terms of content availability across the EU. In this respect, a **'complete unification' of the EU copyright framework (option 3a)** would exert the most significant impact in terms of lowering transaction costs. In addition, this option would require deep changes in the system of territorial restrictions, which would now be subject to the scrutiny of competition authorities; in the long run, this would potentially remove any unjustified obstacle to the free movement of copyrighted goods and services.

- The reduction of transaction costs related to the granting and acquisition of licenses for copyrighted works is the main source of **cost savings accruing from a reform aiming at creating a Digital Single Market for copyrighted content**. As mentioned above, transaction costs are substantially lowered by the mandatory **EU copyright title under option 3a** as well as by the combined effect of a better/clearer definition of exclusive rights, the simplification of the right of online transmission, and the introduction of the principle of 'country of origin' for online transmission provided by **option 2b**. Arguably, **option 3b** would also reduce transaction costs at least for a subset of copyrighted content available in the EU. The impact of the **'black list' approach**, the **'soft law' approach** and the **zero option** depend *inter alia* on the implementation and impact of the 2014 Directive on Collective Rights Management. Under **option 1**, guidelines for the exceptions of reprography and private copying would lower costs for cross-border transactions of levied media and devices.
- **Benefits in certain fields/activities** are mainly linked to the specific objective of removing the tension between copyright exceptions and limitations and new market needs (see Section 4.2.1.2 above). The **zero option** and **option 2a** fall short of this target. However, both **the 'soft law' approach** and, to a larger extent, **the legislative reform under option 2b** are able to foster new technology-enabled activities that are deemed to generate wide societal benefits such as e-learning, mass digitisation and the online consultation of copyrighted content available in libraries and other educational institutions, e-lending, text and data mining, and any other use related to digital settings. The legislative intervention is more likely to generate the expected benefits stemming from activities meeting new market needs on the grounds of: i) the mandatory and non-waivable character provided to a core set of exceptions (including a new exception for text and data mining) having an impact on cross-border uses; and ii) the flexibility

injected by leaving the option to national courts to expand the scope of application of existing exceptions. Comparable results are achieved by **the enactment of an EU copyright Code (Option 3a)**; under this option, as mentioned above, in light of the slow pace of the EU legislative process, mechanisms to ensure the responsiveness of EU-wide exceptions and limitations to technological development should be designed in order to gradually cover new activities that are unforeseeable by the legislator, thus preserving the relevance of the EU intervention. Again, the effects of **the optional registration system envisaged by option 3b** are conditional on the level of uptake.

- If the **availability of pan-European, online services** were considered as a stand-alone benefit for a policy intervention oriented at improving the functioning and efficiency of the Digital Single Market, it would be necessary to take into account the impact of each policy option on two dimensions: i) transaction costs; ii) the interplay between copyright law and competition law. On the one hand, substantial transaction costs pose obstacles to pan-European services irrespective of the commercial strategy pursued by right-holders or service providers. On the other hand, copyright territoriality is able to mitigate the 'constraints' imposed by competition law provisions, thus leaving more room to commercial users and/or copyright-holders to partition the market along national borders. As mentioned above, while **options 3a, 2b, and (partially) 3b** are more effective in lowering transaction costs, **option 2a** identifies which territorial restrictions are not compatible with the free movement of goods and services within the EU. Only **option 3a** equates copyrighted works with any other goods or service available on the European market, thus fully unleashing the market integration potential exerted by competition. Importantly, the development of pan-European services would not necessarily ensure affordable access to copyrighted content in all Member States, as convergence toward a single pan-European price is likely to *de facto* make copyrighted content too expensive in lower-income Member States.
- As regards **legal certainty**, the **baseline scenario** would leave the breadth of problems highlighted in our companion ex post evaluation Study unaddressed. A higher and broader level of certainty would be ensured by the availability of **guidance on provisions of the InfoSoc Directive, as contained in option 1;** and to an even greater degree by the **comprehensive legislative reform envisaged by option 2b**. **Option 2a** would only provide a list of territorial restrictions that should not be included in licensing agreements. At any rate, legal uncertainty rooted in the principle of territoriality based on national legal orders would persist under all the proposed options, with the exception of **complete unification (option 3a)**, which would create a genuine pan-European system of copyright entitlements, covering also aspects related to copyright contract law and enforcement law and practices. On the contrary, **option 3b** would only marginally increase the level of legal certainty and only for a limited share of copyrighted content.

4.2.2.2 Costs

- In terms of costs, options vary significantly and furthermore might generate **direct financial expenses** as well as both **substantive compliance costs** and **administrative burdens.** While the **zero option** leaves matters as they stand and accordingly would not entail any additional **direct cost**, the **optional registration system envisaged by option 3b** may lead to the payment of regular **registration fees or other charges** necessary to fund the new pan-European register; in addition, the registration system would entail **one-off administrative burdens** related to the processing of information required for the registration of copyrighted works. To a lesser extent, the inclusion of new works in

identification systems and repertoire databases supported by EU interventions under **option 1** may also generate **one-off administrative burdens**. Such burdens belong to the so-called 'voluntary' information obligations, given the optional nature of the behaviour that triggers them. Conversely, **one-off compliance costs** (mostly in the form of 'adaptation costs') are imposed on right-holders and commercial users by all the remaining policy options and to some degree also by **option 1**. Indeed, the guidance on the interplay between competition law and copyright law foreseen in **option 1** (**'soft law')** would likely require amendments to existing licensing agreements. Contractual changes will certainly ensue from the 'black list' prohibiting certain territorial restrictions that are not compatible with the free movement of goods and services unless the involved parties, and especially right-holders, would be able to rely on the related safety mechanisms provided by **option 2a**. Larger one-off compliance costs connected to deeper contractual changes are expected to be incurred on the grounds of **the comprehensive legislative intervention under option 2b** (especially as a result of the simplification of the right of online transmission and the introduction of the 'country of origin' principle) as well as of the **'complete unification' under option 3a** that would dramatically alter the existing system of rights (similar costs are likely to stem from **option 3b** for content that is optionally protected by the new EU copyright title). The creation of a pan-European copyright title is also likely to create challenges for the functioning of collective management organisations, and to generate **one-off compliance costs** related to the need to re-draft contracts between such organisations and right-holders, as well as representation agreements between organisations operating in different Member States. It is worth stressing that there is no direct connection between compliance costs and transaction costs: policy interventions that substantially reduce transaction costs for entering licensing agreements may generate initial compliance costs to adapt existing agreements to the new system of rights. Finally, the option to **reform national levy systems** (entailed in options 1, 2b, and 3a) by shifting the liability to pay from the manufacturer (or importer) to the retailer would impose additional **compliance and administrative costs** on the latter.

- The zero option, as already stressed, does not generate any additional **enforcement cost** or **cost of other nature affecting public authorities** and sets the baseline to compare the impacts of the proposed actions. Indeed, the impact of new technological solutions on enforcement costs is uncertain, since access-based streaming services might reduce the need to police copyright infringements, but the diffusion of VPNs and other technologies (e.g. peer-to-peer torrent download clients) might call for more costly enforcement approaches. All the suggested interventions but the 'black list' under **option 2a** impose one-off costs on national authorities stemming from the implementation and/or application of new EU rules. In this respect, **option 1** could generate costs, depending on whether national authorities decide to adapt their systems of exceptions and limitations as suggested by EU soft law. Similarly, costs are expected to emerge from the optional registration system under **option 3b**, which would leave national copyright legislation unaffected for non-registered copyrighted content. Substantial costs are likely to result from a comprehensive legislative reform (**option 2b**), since this option would preserve the principle of territoriality; and also from the enactment of an EU copyright Code (**option 3a**), which would replace national copyright legislation. This latter option would require an even more significant broader adaptation of related national provisions.
- As mentioned in our companion ex-post evaluation Study, the proposed policy options might also generate **indirect costs.** Under the **zero option**: i) commercial users would be

exposed to growing incentives to substitute download-to-own business models with access-based services; ii) the demand by end-users for technological measures, such as VPNs, to overcome limited cross-border content availability would likely increase; iii) territorial restrictions would likely soften competition among service providers; iv) new activities enabled by technological evolution as well as cross-border online uses of copyrighted material would increasingly be hampered by the rigid, outdated system of exceptions and limitations. Interestingly, a new policy intervention might reduce costs when compared to the baseline scenario and **any cost reduction would count as a benefit**. In this respect, the **'soft law' approach** is expected to foster both competition among commercial users, by clarifying the role played by competition law in the copyright industry, and innovation, by covering new activities with the existing exceptions. Increased competition might lower incentives to resort to VPN technologies in order to gain access to copyrighted content. The **'black list' approach** (**option 2a**) would further improve cross-border competition among service providers compared to option 1. But **option 2a** would not encourage new technology-enabled uses and would likely create indirect compliance costs, especially when amendments to territorial restrictions make contracts more costly (the 'black list' may impose a burdensome constraint on contractual freedom and lead to the so-called 'straitjacket effect') and these costs are passed on to subscribers. Although one-off compliance costs for right-holders and commercial users are expected to be higher under the **comprehensive legislation reform (option 2b)** and the **'complete unification' (option 3a)**, contracting parties might be better positioned to re-draft efficient agreements than under **option 2a**; hence, the 'pass on' effects on consumers is likely to be more limited. Concerning innovation, **option 2b** and **3a** should lead to comparable results. Conversely, the effect on competition of **option 3a** is likely to be more prominent as the constraints of copyright territoriality based on national legal orders are totally removed. The more cross-border services will be available, the less consumers will seek solutions to circumvent 'geo-blocking'. Interestingly, the incentives to move toward access-based services will depend on any difference in the level of protection that the new EU copyright Code will set between the online and offline world. Again, indirect costs generated by **option 3b** will depend on the level of uptake of the new European register.

4.2.3 Coherence

The main problems of **external coherence**, i.e. the interplay between the EU copyright legislation and other EU instruments affecting the same or related policy areas, are generated in the fields of copyright enforcement and right-holders' remuneration, hence, they fall outside the scope of this briefing paper.

Nonetheless, **the 'soft law' approach** under **option 1** as well as the **'black list' provided by option 2a** and the **partial (option 3b)** and **complete (option 3a) unification** of the EU copyright system are likely to solve, to a different degree, the existing **discrepancies between EU competition law** (which aims *inter alia* at avoiding territorial restrictions along national borders) and **EU copyright law** (which enables right-holders to exercise 28 independent, national rights on the ground of the territoriality principle). Indeed, the introduction of a pan-European system of copyright entitlements would also tackle the additional issues of external coherence as well as internal coherence that have been recorded in the companion Study carrying out an ex post evaluation of the InfoSoc Directive. Besides the 'hard approach' under **option 3a**, **the comprehensive legislative intervention entailed in option 2b** and to some degree **the guidance provided under option 1** would improve

internal coherence of the EU copyright framework, especially when it comes to the interpretation of the law provided over the years by the CJEU.

Table 2. Summary table of assessment ('impact matrix')

	Baseline	Option 1	Option 2		Option 3	
	Zero option	**Soft law**	**2a: 'Black list'**	**2b: Comprehensive legislative reform**	**3a: Complete unification**	**3b: Optional EU copyright registration system**
Effectiveness						
Specific objectives						
- Preventing partitioning of Single Market	•	••	•••	••••	•••••	•••
- Removing tensions between available exceptions and new needs	•	••	•	••••	•••••	•••
Operational objectives						
- Providing lawful options for cross-border portability	•	••	•••	••••	•••••	•••
- Widest possible offer of copyrighted content	•	••	••	••••	•••••	•••
- Cross border dimension of uses covered by exceptions and limitations	•	•	•	••••	•••••	•••
- Removing obstacles to activities related to uses covered by exceptions / limitations	•	•••	•	•••••	•••••	••
Efficiency						
Benefits						
- Increased content availability	•	••	••	••••	•••••	•••
- Cost savings, enhanced surplus	•	•	•	••••	•••••	•••
- Benefits in specific fields / activities	•	••	•	••••	•••••	•••
- Pan-European services	•	•	••	•••	•••••	•••
- Legal certainty	•	•••	••	••••	•••••	••
Costs						
- Direct costs	•	••	•••	••••	•••••	•••
- Enforcement costs	•	••	•	••••	••••	••
- Indirect costs	•••••	•••	•••	••	•	•••
Coherence						
- With CJEU latest case law	•	••	•	••••	•••••	•••
- With other areas of EU legislation	•	••	••	••	••••	•••

Legend: • (lowest likely impact) to ••••• (highest likely impact)

5. Conclusions: Specific assessment questions

This briefing paper explores the existing policy problems and the possible options for reforming the EU copyright framework, with specific respect to the need to strengthen the Internal Market for creative content. Although the identification of the preferred policy option would fall outside the scope of this paper, our analysis certainly shows that "no action" is not a viable option, due to the existence of very important gaps and significant fragmentation across Member States in this policy domain, which in turn creates potential shortcomings for the welfare of EU citizens and businesses.

Our analysis also allows us to answer a number of specific questions as required by the European Parliament.

- There are many gaps in the existing legal framework, as shown in our ex post evaluation Study. Among these gaps, **only a narrow subset could be partly filled if the existing *acquis* were clarified and made more consistent in terms of both interpretation and implementation**. This is perhaps the case for the compatibility of the InfoSoc and IPRED Directives with other legislation, most notably on fundamental rights, data protection and e-commerce, for which non-legislative documents and clarification efforts could probably address some outstanding problems without requiring legislative reform. Similarly, the lack of flexibility and adaptability of exceptions and limitations to new uses (mass digitisation, text and data mining, e-lending, e-learning, UGC) could partly be remedied if, for example, text and data mining were directly included within the scope of the mandatory exception for transient copies. The lack of clarity on the implementation of specific exceptions (e.g. for the parody, caricature and pastiche exception) could be remedied, at least partly, through more coordinated and consistent implementation. **Gaps that would require legislative intervention** include: the absence of a clear legal framework for the remuneration and compensation of authors and performers; the existing uncertainty as regards the responsibility of online intermediaries; the lack of clear rules on 'geo-blocking' practices; the uncertainty as regards the determination of the applicable law in case of copyright infringements occurring online; uncertainty on the applicability of the exhaustion principle to the making available of 'download-to-own' content on intangible media; and the lack of clear rules on access to justice and collection of evidence to be used in civil proceedings. As demonstrated by the ongoing debate on copyright reform at the EU level, all these are issues that only legislative intervention could contribute to remedying.
- **Options available for addressing these gaps** range from more narrowly crafted legislative options (e.g. our **option 2a**, which only aims at establishing a 'black list' of agreements that are incompatible with the Internal Market) to comprehensive legislation (e.g. our **option 2b**, which entails intervention to clarify the definition of rights, to simplify the right of online transmission, and to introduce the principle of 'country of origin' for the online transmission of categories of works, modernise and further harmonise copyright exceptions and limitations) and even more ambitious options that would create a new EU copyright title, by exploiting the possibility granted by the new Article 118 TFEU. The latter option, however, seems somewhat impractical or unrealistic based on our findings in terms of costs and administrative difficulties associated to dismantling the existing system.
- From an economic perspective**, efficient intervention** would at once reduce existing costs generated by the current framework, and create benefits for industry players and

end-users. Among the several sources of costs that can be identified in the existing framework, we include direct costs in the form of substantive compliance costs and transaction costs due to the need to negotiate licenses on a country-by-country or multi-territorial basis with one or more counter-parties; reductions in content availability generated by the territoriality of copyright offerings; uncertainty for what concerns the rights and obligations of industry players, as well as on enforcement patterns; inefficiency generated by confusing and contradictory interpretations of certain exceptions and limitations, as well as by the interaction between the use of TPMs and available exceptions and limitations; the lack of legal certainty on text and data mining; the lack of a level playing field between 'traditional' distributors and online intermediaries; likelihood of significant market power emerging on the side of specific players; and an overall reduction of the value end-users derive from Internet access. Although it is difficult to estimate these costs in terms of GDP, available data show that a fully integrated Digital Single Market could contribute between €260 billion and €520 billion to European GDP.[49] The long-run growth impact of the already observed digital reform effort has been conservatively estimated at above 1%, and the further efforts in line with the Digital Agenda for Europe targets are expected to generate an additional 2.1% in GDP growth[50]. It is worth stressing that creative industries already represent a substantial part of EU GDP. In 2012, they generated over €500 billion in revenues, or 4.2% of the EU economy, and employed more than 7 million people.[51]

- **In terms of possible costs generated by the infrastructure necessary to overcome the identified gaps**, **these depend on the option that is preferred.** To the extent that territoriality is preserved (as in our **options 2a and 2b, but also 3b**), the need to achieve further convergence in the interpretation and implementation of exceptions and limitations might suggest the creation of a permanent platform for the exchange of practices between national authorities, or specific cross-country groups or a dedicated agency in charge of producing implementation reports (e.g. in the case of e-communications, the creation of national regulatory authorities, the European Regulators Group (ERG) and later the Body of European Regulators of Electronic Communications (BEREC), has greatly facilitated the comparison of implementation practices in Member States). This would certainly be beneficial in terms of regulatory consistency across the EU28, but would also entail implementation costs due to the need to set up a dedicated structure and a secretariat, and other related costs. Certainly, any option that requires a pan-EU registration system would also entail additional administrative costs, related to all activities that would necessarily be related to the new system.

With no prejudice to future impact assessment work that will focus more on specific policy options, our analysis suggests that 'more Europe' would be needed in the field of copyright, given the existing sources of productive, allocative and dynamic efficiency associated with the current system. Addressing the Internal Market issue in copyright would, in this respect,

---

[49] European Parliamentary Research Service (2014), Mapping the Cost of Non-Europe 2014-2019, European Added Value Unit.

[50] Lorenzani, D., Varga, J. (2014), "The Economic Impact of Digital Structural Reforms", European Economy. Economic Paper, No. 529.

[51] Ernst & Young (2014), Creating growth measuring cultural and creative markets in the EU, Report for GESAC.

also lead to addressing many of the shortcomings the current framework presents in related domains such as general legal and industrial policy issues.

Selected references and case law

Main references

Ernst & Young (2014), Creating growth measuring cultural and creative markets in the EU, Report for GESAC.

European Parliamentary Research Service (2014), Mapping the Cost of Non-Europe 2014-2019, European Added Value Unit.

KEA and MINES Paris Tech (2010), Multi-Territory Licensing of Audiovisual Works in the European Union, European Commission.

KEA and Vrije Universiteit Brussel (2012), *Licensing music works and transaction costs in Europe.*

Lorenzani, D., Varga, J. (2014), "The Economic Impact of Digital Structural Reforms", European Economy. Economic Paper, No. 529.

Plum Consulting (2012), *The economic potential of cross-border pay-to-view and listen audiovisual media services*, for the European Commission.

Renda et al. (2014), *Assessing the costs and benefits of Regulation*, a CEPS-Economisti Associati Study for the European Commission (http://ec.europa.eu/smart-regulation/impact/commission_guidelines/docs/131210_cba_study_sg_final.pdf).

Official documents

Commission Decision Relating to a Proceeding Under Article 81 of the EC Treaty and Article 53 of the EEA Agreement, C(2008) 3435 final, 16 July 2008.

Commission Recommendation on collective cross-border management of copyright and related rights for legitimate online music services of 18 October 2005, OJ L 276, 21 October 2005.

Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A digital Single Market Strategy for Europe, COM(2015)192 final.

Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society OJ L 167, 22 June 2001.

Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, OJ L 299/5, 27 October 2012.

Directive 2014/26/EU of the European Parliament and of the Council of 26 February 2014 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online use in the internal market, OJ L 84/72, 20 March 2014.

European Commission, Antitrust: Commission sends Statement of Objections on cross-border provision of pay-TV services available in UK and Ireland, Press releases, 23 July 2015, Brussels.

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Single Market for Intellectual Property Rights - Boosting creativity and innovation to provide economic growth, high quality jobs, and first class products and services in Europe, COM(2011)287 final.

European Commission, Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions, A Digital Single Market Strategy for Europe, COM(2015)192 final.

European Commission, Green Paper on the Online Distribution of Audiovisual Works in the European Union: Opportunities and Challenges towards a Digital Single Market, COM(2011)427final.

European Commission, Impact Assessment Accompanying the Document Proposal for a Directive of the European Parliament and of the Council on Collective Management of Copyright and Related Rights and Multi-territorial Licensing of Rights in Musical Works for Online Uses in the Internal Market, SWD(2012)2014 final.

Vitorino, A. (2013), Recommendations Resulting from the Mediation on Private Copying and Reprographic Levies (http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf).

Other sources

China blocks virtual private network use (www.bbc.com/news/technology-30982198).

Copyright Blog of the Wolters Kluwer Law & Business Company (http://kluwercopyrightblog.com/2015/01/28/the-dutch-courts-apply-usedsoft-to-the-resale-of-ebooks/).

Website of the European Commission, on 'License for Europe, Structured stakeholder dialogue 2013' (http://ec.europa.eu/licences-for-europe-dialogue/en).

Website of the European Commission, on the guidelines for Better Regulation (http://ec.europa.eu/smart-regulation/guidelines/tool_51_en.htm).

EU Case law

C-128/11, *UsedSoft GmbH* v. *Oracle International Corp.* (2012).

C-348/13, *Bestwater International GmbH* v. *Michael Mebes* (2014).

C-403/08, *Football Association Premier League Ltd and Others* v. *QC Leisure and Others* (2012).

C-435/12, *ACI Adam BV and Others* v. *Stichting de Thuiskope and Stichting Onderhandelingen* (2014).

C-462/09, *Stichting de Thuiskopie* v. *Opus Supplies Deutschland* (2011).

C-466/12, *Svensson* v. *Retriever Sverige AB* (2014).

C-467/08, *Padawan SL* v. *SGAE* (2010).

C-521/11, *Amazon* v. *Austro Mechana* (2013).

T-442/08, *CISAC v. Commission* (2013).

ABOUT CEPS

Founded in Brussels in 1983, the Centre for European Policy Studies (CEPS) is widely recognised as the most experienced and authoritative think tank operating in the European Union today. CEPS acts as a leading forum for debate on EU affairs, distinguished by its strong in-house research capacity, complemented by an extensive network of partner institutes throughout the world.

Goals

- Carry out state-of-the-art policy research leading to innovative solutions to the challenges facing Europe today,
- Maintain the highest standards of academic excellence and unqualified independence
- Act as a forum for discussion among all stakeholders in the European policy process, and
- Provide a regular flow of authoritative publications offering policy analysis and recommendations,

Assets

- Multidisciplinary, multinational & multicultural research team of knowledgeable analysts,
- Participation in several research networks, comprising other highly reputable research institutes from throughout Europe, to complement and consolidate CEPS' research expertise and to extend its outreach,
- An extensive membership base of some 132 Corporate Members and 118 Institutional Members, which provide expertise and practical experience and act as a sounding board for the feasibility of CEPS policy proposals.

Programme Structure

In-house Research Programmes

Economic and Social Welfare Policies
Financial Institutions and Markets
Energy and Climate Change
EU Foreign, Security and Neighbourhood Policy
Justice and Home Affairs
Politics and Institutions
Regulatory Affairs
Agricultural and Rural Policy

Independent Research Institutes managed by CEPS

European Capital Markets Institute (ECMI)
European Credit Research Institute (ECRI)

Research Networks organised by CEPS

European Climate Platform (ECP)
European Network for Better Regulation (ENBR)
European Network of Economic Policy Research Institutes (ENEPRI)
European Policy Institutes Network (EPIN)