

December 2016

## Modernisation of EU copyright rules

*Impact Assessment (SWD(2016) 301 final, SWD(2016) 302 final (summary)) of a Commission proposal for a Directive of the European Parliament and of the Council on copyright in the Digital Single Market (COM(2016) 593 final) and of a Commission proposal for a Regulation of the European Parliament and of the Council laying down rules on the exercise of copyright and related rights applicable to certain online transmissions of broadcasting organisations and retransmissions of television and radio programmes (COM(2016) 594 final)*

### Background

This note seeks to provide an initial analysis of the strengths and weaknesses of the European Commission's combined [Impact Assessment \(IA\)](#) accompanying the above proposals, adopted on 14 September 2016 and referred to Parliament's Committee on Legal Affairs.

Digital technologies are changing the way in which creative content is produced, distributed and accessed, which generates opportunities as well as new challenges.<sup>1</sup> With a view to adapting the EU copyright framework to the digital environment, the [Commission's Digital Single Market \(DSM\) Strategy](#), launched in 2015, called for initiatives to address copyright-related obstacles and to allow for wider online access for users. The [Commission's 2016 REFIT evaluation of the Satellite and Cable Directive](#), and several reviews of EU copyright rules between 2013 and 2016 (IA, Annex 4), confirmed the need for modernising the EU legislative framework. A first set of Commission proposals, tabled in late 2015, aims to address several specific issues, ranging from cross-border portability of online services and geo-blocking to audiovisual (AV) media services.<sup>2</sup> The Commission's second set of proposals, of September 2016, consists of instruments to implement the Marrakesh Treaty for the benefit of print-disabled persons,<sup>3</sup> and of the above proposals, which intend to modernise the EU's main instruments on copyright and on distribution of TV and radio content (2001 InfoSoc Directive<sup>4</sup> and 1993 Satellite and Cable Directive<sup>5</sup>).

### Problem definition

The IA identifies three problems: 1) difficulties faced by actors when trying to obtain permission to use copyright-protected works online (rights clearance); 2) legal uncertainty as to the acts allowed under the existing copyright exceptions, and 3) problems for right holders regarding distributions along the value chain (IA, pp. 14, 82, 134).

**Problem 1:** Players engaged in content distribution, in particular broadcasters, retransmission service providers, Video on Demand (VoD) platforms and cultural heritage institutions (CHIs), face **difficulties when trying to clear rights for online exploitation of protected works across the EU** (IA, pp. 11-12).

<sup>1</sup> See T. Madiaga, '[Copyright in the digital single market](#)', EPRS Briefing, EU Legislation in Progress, November 2016; for more details on the gaps and weaknesses in the existing EU copyright framework, see S. Reynolds, '[Review of the EU copyright framework](#)', EPRS European Implementation Assessment, October 2015.

<sup>2</sup> Commission proposals, [COM\(2015\) 627](#), 9 December 2015; [COM\(2016\) 289](#), 25 May 2016; [COM\(2016\) 287](#), 25 May 2016.

<sup>3</sup> Commission proposals, [COM\(2016\) 595](#) and [COM\(2016\) 596](#), 14 September 2016.

<sup>4</sup> [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.

<sup>5</sup> [Directive 93/83/EEC](#) of the Council of 27 September 1993 on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission.

The main source of problems for broadcasters relates to the need to clear rights for a substantial number of works used in broadcasts within short time-frames, as well as to the territorial nature of copyright protection, which requires territory by territory clearance if multi-territorial licences are unavailable. Retransmission service providers face similar problems. This is because they communicate content to the public by aggregating TV and radio channels into packages. These are then subsequently provided to consumers online, simultaneously to their initial transmission. The Satellite and Cable Directive addressed these issues for satellite broadcasts and for cable retransmissions, but these mechanisms do not extend to online broadcasts or retransmissions, which are increasingly preferred by consumers (IA, pp. 20-22, 39-42). Another issue is that EU AV works are only available on VoD platforms on a limited basis, and rarely outside the Member State in which they were produced, despite increasing consumer demand. Drivers of the above problems are the complexity of rights clearance, and the fact that right holders are reluctant to license to VoD platforms. This is largely because efficient licensing models are lacking, which results in poor return on investment for right holders (IA, pp. 52-55). CHIs, for their part, face difficulties when digitising and disseminating out-of-commerce (OoC) works. These are works which are not available via other channels, but which are still of cultural, scientific, educational, historical or entertainment value. Problem drivers in this context concern elements inherent to OoC works, such as their large size, age and the fact that many works were never intended for commercial circulation. In addition, existing solutions have a limited scope. Collective licensing for entire collections is not available for all types of works, and not all Member States allow extended collective licensing or presumptions of representation, which enable licences of collective management organisations (CMOs) to also cover rights of right holders they do not represent (IA, pp. 65-69).

**Problem 2:** Significant legal uncertainty has arisen over the **activities allowed under existing copyright exceptions**, in particular for teaching, text and data mining (TDM) by researchers and preservation undertakings by CHIs (IA, pp. 82-83). The IA identifies the following problem drivers. Firstly, Member States have implemented exceptions restrictively, which causes uncertainty as to whether exceptions apply to (all) digital uses. Secondly, these diverging interpretations, combined with the lack of cross-border effect of Member State exceptions, increase uncertainty for cross-border uses, as well as fragmentation of the internal market. Thirdly, existing licensing practices do not always provide an adequate solution, since often not all digital uses are covered and/or cross-border use is not allowed. For CHIs in particular, the transaction costs for licensing are disproportionate since locating right holders requires tremendous resources, while it is in fact unlikely that they would be interested in licensing (IA, pp. 87-89, 104-106, 120-123).

**Problem 3: Right holders increasingly face problems to ensure fair remuneration and maintain control over the distribution of their works.** The main problem drivers regarding online service providers are the large amount of content uploaded by users and the lack of clarity as to whether users, or rather platforms, 'communicate to the public' and must thus obtain licences (IA, pp. 141-142). As far as copyright in publications is concerned, the IA identifies the following problem drivers. Online service providers, as the recipients of the majority of online advertising revenue, have strong bargaining positions. Publishers, on the other hand, are important as content providers, but not recognised as separate right holders, contrary to broadcasters and producers, for example. Therefore, publishers can only exploit their content through the rights transferred to them by authors, which is complex and, sometimes, inefficient (IA, pp. 159-160). Regarding the lack of transparency in remuneration, the weak bargaining power of creators is problematic. Contractual counterparts often have access to this information, but do not share it with creators, and national legislative solutions have proven to be insufficient (IA, pp. 174-176).

The IA deliberately excludes certain important exceptions from its scope: 1) The consultation exception, which authorises libraries and other institutions to allow on-screen consultation of works for research and private study on their premises, is not addressed due to the potential impact of the outcome of a case in the Court of Justice of the EU,<sup>6</sup> decided after the IA's release; 2) the panorama exception, which concerns the use of pictures of works such as buildings or sculptures permanently located in public spaces. According to the Commission, the corresponding [public consultation](#) indicates no need for an approach at EU level in this respect (IA, p. 9).

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<sup>6</sup> Court of Justice of the EU, Case [C-174/15](#), Vereniging Openbare Bibliotheken v Stichting Leenrecht, 10 November 2016.

## Objectives of the legislative proposals and range of options considered

The overall aim of the Commission proposals is to ensure the smooth functioning of EU copyright (IA, p. 9).<sup>7</sup> The objectives defined largely determine the IA's structure: there are no less than ten subsidiary IAs for the two proposals, corresponding to the ten specific objectives. The proposed regulation is based on policy options intended to achieve the first two specific objectives, while the proposed directive responds to the eight remaining specific objectives. The *general* objectives (IA, p. 9) and the *specific* objectives (IA, pp. 13, 82, 134) are set out in the table below, as well as the policy options considered for each specific objective. The table also indicates the discarded options.<sup>8</sup> The Commission's preferred options are marked in grey. For each of the ten specific objectives, the IA presents two, three or four policy options in addition to the baseline (status quo). It discusses 36 options in all. The IA is lengthy, with 200 pages of core text (plus 226 pages of annexes), and does not therefore adhere to the recommendations of the Better Regulation Guidelines in this respect.<sup>9</sup>

<b>General objective 1: Allow for wider online access to protected content across the EU</b>	
Specific objective 1: Facilitate rights clearance for online TV and radio transmissions	<b>Covered by proposed regulation</b>
Policy options (IA, pp. 24-27): <ul style="list-style-type: none"> <li>- Baseline</li> <li>- Option 1: Voluntary agreements to facilitate the clearing of rights</li> <li>- Option 2: Application of country of origin to the clearing of rights for broadcasters' online services ancillary to their initial broadcast over the air</li> <li>- Option 3: Same as option 2 but also for any TV and radio-like linear online transmissions and services ancillary to such transmissions</li> </ul> <p><i>Discarded options: same as option 2 but also for all communication to the public; same as option 2 + restrictions to contractual freedom concerning territorial exploitation of content</i></p>	
Specific objective 2: Facilitate rights clearance for retransmissions by means other than cable	
Policy options (IA, pp. 43-44): <ul style="list-style-type: none"> <li>- Baseline</li> <li>- Option 1: Mandatory collective management of rights to retransmission of TV / radio broadcasts by means of <i>closed</i> electronic communications networks</li> <li>- Option 2: Same as option 1 but for any transmission, irrespective of technology as long as provided to a defined number of users</li> </ul>	<b>Covered by proposed directive</b>
Specific objective 3: Facilitate dialogue and negotiation for the exploitation of EU AV works on VoD platforms	
Policy options (IA, pp. 55-57): <ul style="list-style-type: none"> <li>- Baseline</li> <li>- Option 1: Stakeholder dialogue</li> <li>- Option 2: Option 1 + negotiation mechanism to increase availability of AV works on VoD platforms</li> </ul> <p><i>Discarded option: restrictions to contractual freedom</i></p>	
Specific objective 4: Facilitate rights clearance for OoC works held by CHIs	
Policy options (IA, pp. 69-71): <ul style="list-style-type: none"> <li>- Baseline</li> <li>- Option 1: Requiring Member States to facilitate collective licensing agreements for OoC books and learned journals + cross-border effect to these mechanisms</li> <li>- Option 2: Option 1 but for all types of OoC works</li> </ul>	

<sup>7</sup> See also European Commission, [Inception Impact Assessment - Modernising the EU copyright framework – second set of measures](#), October 2015.

<sup>8</sup> The Commission discarded some options because they were considered disproportionate due to their wide scope (IA, pp. 27, 163), would not allow the market to gradually adapt to changes driving smaller operators out of the market (IA, p. 27) or would be very difficult to implement while their positive impact would be uncertain (IA, p. 57).

<sup>9</sup> European Commission, [Better Regulation Guidelines](#), SWD(2015) 111, 19 May 2015, p. 31.

<b>General objective 2: Facilitate digital uses of protected content throughout the single market</b>	
Specific objective 5: Adapt the existing copyright exceptions for education	
Policy options (IA, pp. 90-93): <ul style="list-style-type: none"> <li>- Baseline</li> <li>- Option 1: Guidance to Member States + stakeholder dialogue on raising awareness</li> <li>- Option 2: Mandatory exception with cross-border effect covering digital uses for teaching illustration</li> <li>- Option 3: Option 2 but option for Member States to make it (partially or totally) subject to availability of licences</li> </ul>	
Specific objective 6: Adapt the existing copyright exceptions for research	
Policy options (IA, pp. 107-109): <ul style="list-style-type: none"> <li>- Baseline</li> <li>- Option 1: Fostering industry self-regulation initiatives</li> <li>- Option 2: Mandatory exception covering TDM for non-commercial scientific research purposes</li> <li>- Option 3: Same as option 2 but limited to public interest research organisations and extended to non-commercial and commercial scientific research purposes</li> <li>- Option 4: Same as option 2 but extended to anybody who has lawful access and extended to non-commercial and commercial scientific research purposes</li> </ul>	
Specific objective 7: Adapt the existing copyright exceptions for the preservation of works	
Policy options (IA, pp. 123-125): <ul style="list-style-type: none"> <li>- Baseline</li> <li>- Option 1: Guidance to Member States + peer review mechanism on the implementation of the EU exception on specific acts of reproduction for preservation purposes</li> <li>- Option 2 - Mandatory exception for preservation purposes by CHIs</li> </ul>	<b>Covered by proposed directive</b>
<b>General objective 3: Achieve a well-functioning marketplace for copyright</b>	
Specific objective 8: Improve right holders' control over, and remuneration for, the use of their content by online services	
Policy options (IA, pp. 144-147): <ul style="list-style-type: none"> <li>- Baseline</li> <li>- Option 1: Stakeholder dialogue</li> <li>- Option 2: Obligation on online services which store and give access to large amounts of content uploaded by their users to put in place appropriate technologies and to increase transparency vis-a-vis right holders</li> </ul>	
Specific objective 9: Ensure fair remuneration among the different relevant actors for use of publications	
Policy options (IA, pp. 161-163): <ul style="list-style-type: none"> <li>- Baseline</li> <li>- Option 1: Stakeholder dialogue</li> <li>- Option 2: Introduction of a related right covering the digital uses of press publications</li> <li>- Option 3: Option 2 + possibility for Member States to provide that all publishers (not only press publishers) may claim compensation for uses covered by an exception</li> </ul> <i>Discarded option: Related right covering all publications, including publications other than press</i>	
Specific objective 10: Increase legal certainty, transparency and balance for creators' remuneration	
Policy options (IA, pp. 177-180): <ul style="list-style-type: none"> <li>- Baseline</li> <li>- Option 1: Recommendation to Member States + stakeholder dialogue</li> <li>- Option 2: Transparency obligations on contractual counterparties of creators</li> <li>- Option 3: Same as option 2 + contract adjustment right and dispute resolution mechanism</li> </ul>	

*Source: IA, authors' reworking.*

In general, the Commission identifies reasonable options and examines them in a clear and balanced way. Non-regulatory options are always considered, with the exception of facilitating rights clearance for retransmissions (IA, p. 43). The Commission could have strengthened its IA on some points, in particular regarding rights in publications. For instance, the IA identifies two problems: press publishers face difficulties to digitally exploit and enforce rights in press publications, and publishers in general face difficulties regarding compensation for uses

under exceptions (IA, pp. 155-160). However, it seems unclear if the problems are equally important, as only the preferred option, option 3, deals with both problems, while options 1 and 2 are limited to press publishers' difficulties (IA, pp. 161-163). Furthermore, options 2 and 3 would provide press publishers with a new related ('ancillary') right, which they could enforce in addition to any rights transferred by authors (IA, pp. 162-163). The IA acknowledges that existing ancillary rights at national level (Germany and Spain) were unable to address press publishers' problems (IA, p. 160). It is argued that the new EU ancillary right would be more effective because of its EU-wide scale and more flexible nature (IA, p. 167). However, the Commission's argumentation could have been expanded, particularly since it does not address clearly how this would avoid press publishers granting free licences to preserve the advertising revenue generated by their website traffic (IA, pp. 156-157), as is the case under the German scheme (IA, p. 167). The Better Regulation Guidelines require an assessment of the options from the point of view of improved enforcement ([Better Regulation Guidelines](#), p. 23). The IA appears not to have done this, however, even though it might have been particularly relevant for publishers' difficulties 'in relation to [...] enforcement of rights in press publications' (IA, p. 155). However, in light of an ongoing [evaluation](#), enforcement of intellectual property rights might be addressed in the future.<sup>10</sup>

## Scope of the Impact Assessment

The IA discusses economic impacts, concerning *inter alia* transaction and compliance costs, licensing models and revenues, legal certainty and competitiveness. Economic impacts, however, seem to depend significantly on how Member States would implement the changes, in particular for the mandatory exceptions for teaching (IA, pp. 93-97). Social impacts and impacts on fundamental rights appear to have been assessed in a somewhat more limited way. In terms of social impacts, the IA analyses, among other things, cultural diversity, media pluralism, and content availability and discoverability. Impacts on employment are considered insignificant (IA, pp. 17, 86); more information on this aspect would have been useful, in particular in light of the important role of SMEs in creative industries and their significant, and increasing, role as employers. Regarding impacts on fundamental rights, both negative and positive impacts are often identified, for instance on copyright as a property right and on the right to freedom of information. However, no, or limited, further explanations are provided as to how the impact would materialise (see, for example, IA, pp. 35, 76, 100, 115-118, 126, 149). Interestingly, the IA distinguishes the proposed ancillary right for press publishers from the Spanish variant as far as its impact on consumers is concerned, but not with regard to the right to freedom of information (IA, p. 170). Yet, this national ancillary right clearly had a negative impact on visibility and access to information in Spain, since a major aggregator ceased to operate there (IA, pp. 167, 170). Finally, impacts on third countries and on the environment are considered marginal (IA, pp. 17, 86, 137).

## Subsidiarity / proportionality

The legal basis for both proposals is Article 114 TFEU. When discussing subsidiarity for each of the general objectives, the IA convincingly presents arguments for EU action, based on the online nature of the proposals' subject matter, which requires a cross-border solution. Intervention by Member States alone could not alter existing harmonisation efforts already carried out at EU level, and would furthermore be limited to national borders and might occur at a varying pace (IA, pp. 12-13, 81, 132-133). As a general rule, the IA discusses proportionality for the preferred options. No reasoned opinions were submitted by national parliaments by the submission deadline of 30 November 2016.

## Budgetary or public finance implications

The explanatory memoranda of the proposed regulation (p. 7) and of the proposed directive (p. 9) indicate that the proposals would have no impact on the EU budget. However, for OoC works held by CHIs, both options on facilitating rights clearance would create a European transparency web portal to provide information on the

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<sup>10</sup> European Commission, [Web page on evaluation of enforcement of intellectual property rights](#); European Commission, [Inception Impact Assessment - Modernising the enforcement of intellectual property rights](#), May 2016; European Commission, [Annex 1 to Commission Work Programme 2016](#), p. 4.

collections of works covered by a CMO licence (IA, pp. 70-71). This could involve limited costs for one EU agency, namely the European Union Intellectual Property Office (EUIPO) (IA, p. 75). The IA's analysis also appears rather limited as regards the possible costs of certain preferred options for Member States (IA, pp. 17, 85; Annex 3).

## **SME test / Competitiveness**

SMEs are crucial actors in the creative industries and both proposals indicate likely impacts on SMEs. The IA does not consider mitigating measures, nor does it exclude SMEs from the scope of either of the initiatives concerned. The IA argues in a convincing way that SMEs would be likely to benefit from certain proposed measures (such as licensing and negotiation mechanisms), that only marginal costs are expected (although no quantitative assessment is provided), and that the objectives could not be achieved if this dominant group of actors were to be excluded (IA, pp. 18, 86-87, 137). The IA considers SMEs in the general introductory sections and in detail only for some, and not all, policy options (for example, IA pp. 184-186).

Competitiveness considerations are prominent in the IA's analysis for broadcasting (IA, pp. 29-37) and retransmission services (IA, pp. 46-50), especially in relation to other service providers, which are excluded from the scope of the options. In a limited way, competitiveness is assessed for other policy objectives regarding, for example, copyright exceptions for education (IA, pp. 99, 102), use of content by online services (IA, pp. 149-153) and fair remuneration of authors and performers (IA, pp. 182, 186, 190).

## **Simplification and other regulatory implications**

The Commission points out that the proposed initiatives would complement and modernise existing EU instruments, in particular the InfoSoc Directive and the Satellite and Cable Directive. The IA states that the initiatives are coherent with proposed copyright DSM initiatives concerning geo-blocking and AV media services (IA, p. 8). Regarding the use of content by online services, the IA could have provided more guidance on the coherence and interaction with the E-Commerce Directive.<sup>11</sup> The preferred option, option 2, requires online services to put appropriate technologies in place which allow to automatically verify whether the content uploaded by users is authorised or not, based on data provided by right holders. Article 14 of the E-Commerce Directive exempts online intermediaries from liability for information they store at the request of a user, if the intermediary 1) does not have knowledge, actual or based on the circumstances, of illegal activity, or 2) acts expeditiously to remove or disable access to the information upon obtaining such knowledge. However, the IA does not seem to clarify how prior verification under the preferred option (option 2) would relate to both conditions of Article 14 of that directive. Moreover, Article 15 of the E-Commerce Directive prohibits Member States from requiring intermediaries to impose general monitoring duties regarding the information they store. Yet, option 2 seems to introduce such a general monitoring obligation. The IA notes that this obligation 'would not take away the safe harbour [provision of the E-Commerce Directive] provided that the conditions of Art. 14 are fulfilled' (IA, p. 147).

## **Quality of data, research and analysis**

The Commission relied on a broad range of up-to-date information sources, including market reviews, statistics, surveys and external studies,<sup>12</sup> as well as several public consultations conducted between 2013 and 2016,<sup>13</sup> and an ex-post evaluation of the Satellite and Cable Directive in 2015/2016.<sup>14</sup> There is, however, an apparent lack of quantitative data; the IA's analysis is, for the most part, qualitative in nature, despite external experts' agreement

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<sup>11</sup> [Directive 2000/31/EC](#) of the European Parliament and of the Council of 8 June 2000 on certain legal aspects of information society services, in particular electronic commerce, in the Internal Market (Directive on electronic commerce).

<sup>12</sup> For an overview, see IA, Annex 1.

<sup>13</sup> For an overview, see IA, Annex 2A.

<sup>14</sup> European Commission, Evaluation of Satellite and Cable Directive, [SWD\(2016\) 308](#), 14 September 2016.



that, as a first step, 'a number of key data sets need to be generated'.<sup>15</sup> The IA openly acknowledges the lack of specific data, for instance with regard to transaction costs and licensing revenues (IA, pp. 28, 45, 67, 93). In some instances, the IA explains the challenges of obtaining quantitative data: stakeholders were reluctant to provide relevant data, for example for reasons of confidentiality, or reported data was often unsuitable for comparison and aggregation (IA, pp. 57, 67, 86; Annexes 9D and 10D, pp. 124, 153). Accordingly, the IA often relies on quantitative examples, such as for transaction costs (IA, Annex 9D and Annex 14C). This is also the case when the IA discusses whether to allow TDM exceptions only for non-commercial actors (option 3), or also for commercial actors (option 4) (IA, pp. 116-118). In general, the IA's analysis is very dense, covering a broad range of issues, the ramifications of which are not entirely comprehensible for non-experts.

## Stakeholder consultation

The IA identifies the stakeholders affected by the problems and by the proposed initiatives.<sup>16</sup> The Commission consulted broadly and appears to have gathered the views of all relevant stakeholders, mainly through the open public consultations on the [review of EU copyright rules](#) (December 2013 - March 2014) and on the [EU Satellite and Cable Directive](#) (August - November 2015), as well as through other consultations (IA, Annex 2). The IA presents stakeholder support for each option; however, in some instances, such support does not seem reflected in a clear way. For example, it is indicated that stakeholders 'are likely to support/consider sufficient' and 'may favour' certain options for right clearance for broadcasters (IA, p. 25) and EU AV works on VoD platforms (IA, pp. 55-57), and that stakeholders 'may support' and 'are expected to favour/be rather supportive of' certain options for adaptations of the existing copyright exceptions for education (IA, pp. 90-93). The [public consultation](#)<sup>17</sup> on which the IA relies for options concerning content held by online services, seems to focus primarily on intermediaries' liability, and only briefly discusses copyright related issues. Furthermore, for exceptions for education, raising awareness on copyright rules gathered the strongest support from users and right holders (IA, p. 95), but the Commission considered that 'this option would not be sufficiently effective' (IA, p. 103).

## Monitoring and evaluation

The *operational* objectives for each preferred option are set out in section 6.3.2. on 'Operational objectives and monitoring indicators' (IA, pp. 197-200). However, these do not appear to be time-bound as required by Tool 13 of the [Better Regulation Toolbox](#). The Commission could have formulated in a more specific manner the operational objectives for the options to achieve a well-functioning marketplace for copyright. It intends to gather data on right holders' revenues, but appears to provide only general guidance on how this data would be collected (OoC works: indicator 6, IA, p. 198), or no guidance at all (education exception: indicator 8, IA, pp. 198-199). For the proposed directive on copyright in the DSM, a first phase would focus on transposition and a second on the direct effects. For the proposed regulation on online transmission of broadcasts, direct impacts would be monitored based on data gathered immediately after the adoption of the proposal and every two to three years afterwards. The IA also indicates that ex-post evaluations could take place 'at the latest 10 years after the adoption of the directive and 5 years after the adoption of the regulation' (IA, p. 196).

## Commission Regulatory Scrutiny Board (RSB)

The RSB issued a positive [opinion](#) on a draft version of the IA in July 2016 calling for certain improvements. The RSB mainly asked for 1) more elaboration on the existing national frameworks and Member States' views, 2) a more thorough analysis of the policy options, in particular whether they represent incremental or rather significant policy changes and 3) a clearer justification of the proportionality of policy options and the need for

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<sup>15</sup> S. Reynolds, 'Review of the EU copyright framework', EPRS European Implementation Assessment, October 2015, p. 32. See also European Economic and Social Committee, [Opinion on the Commission Communication Towards a modern, more European copyright framework](#), Rapporteur: D. Meynert (2016/C 264/06), 27 April 2016.

<sup>16</sup> See IA, Annex 3.

<sup>17</sup> Public consultation on the regulatory environment for platforms, online intermediaries, data and cloud computing and the collaborative economy, 2015-2016.

action at EU level. The overview of modifications as listed in Annex 1 to the IA appears to indicate that the RSB's remarks have generally been taken into account. Yet, some modifications appear rather limited. Assessments of Member States' views, for example, seem to remain somewhat brief. The analysis of proportionality also still appears to be inadequately developed for some of the highlighted areas, such as for options regarding use of content by online services (IA, p. 155). Interestingly, the Commission apparently significantly altered its preferred policy option regarding the use of protected content by online services *following* the issuing of the RSB opinion, without clearly acknowledging this or clarifying its reasoning. The draft IA's preferred option for this specific objective appears, according to the RSB's opinion (p. 3), to impose an obligation to negotiate. However, the final IA's discussion on this option does not include such an obligation, but suggests that service providers should be obliged to put in place appropriate technologies to allow right holders to determine better the conditions for the use of their content (IA, p. 146). The Commission merely indicates that the 'scope of option 2 has been adapted and its assessment has been revised' (IA, Annex 1, p. 6).

## Coherence between the Commission's legislative proposals and the IA

Overall, the IA's preferred options appear to be carried over into the legislative proposals. However, some divergences seem to be present. For example, to foster AV content on EU VoD platforms, the IA's preferred option appears to introduce a new stakeholder dialogue (IA, pp. 56-57) which is not included in the proposed directive.<sup>18</sup> Furthermore, Article 2(1) of the proposed directive requires that research results 'cannot be enjoyed on a preferential basis by an undertaking exercising a decisive influence upon [a research organisation benefitting from the exception]', which the IA does not seem to envisage (IA, p. 109). Moreover, the Commission proposals do not completely mirror the monitoring commitments mentioned in the IA (IA, pp. 195-196): the deadlines for data gathering are not included, and the proposed directive will be evaluated 'no sooner than [five years after the [transposition deadline]]' (Article 22(1) of the proposed directive) and the proposed regulation 'no later than [3 years after the [date of application]]' (Article 6(1) of the proposed regulation).

## Conclusions

The IA clearly defines the underlying problems and the objectives of the proposed initiatives. It relies on various recent external studies, reviews and evaluations. The Commission consulted widely and the IA appears to have analysed a broad range of options and their impacts on all relevant stakeholders. However, the IA, which is very dense, is based on limited quantitative data, which the Commission openly acknowledges. It would also perhaps have benefited from a more detailed assessment of social impacts and impacts on fundamental rights. Moreover, with regard to the third general objective of achieving a well-functioning marketplace for copyright, it would seem that some specific issues were not addressed: concerning the use of right holders' content by online services, it appears the Commission changed its preferred option *following* the issuing of the RSB opinion, since a negotiation obligation is no longer included in the final IA. The IA could also have given more guidance on the coherence of the proposed acts with the E-Commerce Directive. Finally, concerning rights in (press) publications, it would have been useful if the IA had provided more thorough reasoning regarding the new ancillary right.

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*This note, prepared by the Ex-Ante Impact Assessment Unit for the European Parliament's Committee on Legal Affairs (JURI), analyses whether the principal criteria laid down in the Commission's own Better Regulation Guidelines, as well as additional factors identified by the Parliament in its Impact Assessment Handbook, appear to be met by the IA. It does not attempt to deal with the substance of the proposal. It is drafted for informational and background purposes to assist the relevant parliamentary committee(s) and Members more widely in their work.*

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<sup>18</sup> The stakeholder dialogue '[Licences for Europe](#)' is ongoing since 2013.