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## **WHITE PAPER**

# **A COPYRIGHT POLICY FOR CREATIVITY AND INNOVATION IN THE EUROPEAN UNION**

# INTERNAL DRAFT

## A COPYRIGHT POLICY FOR CREATIVITY AND INNOVATION IN THE EUROPEAN UNION

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### 1. INTRODUCTION

Copyright and the internet are crucial drivers of economic development, innovation and creativity in Europe. They are also the subject of intense and, at times, confrontational discussions, which extend to the functioning of the European economic model, its international competitiveness and the optimal articulation between different public policy objectives. The benefits of considering copyright and the internet as mutually reinforcing assets have been often forgotten in these discussions.

By rewarding creativity and intellectual work, as well as investment in them, copyright<sup>1</sup> is an important driver of **economic growth and employment** in Europe. The EU relies on creation and on knowledge-intensive goods and services to compete globally and is a world leader in certain important, copyright-intensive sectors. According to a recent report<sup>2</sup>, in the period 2008-2010, industries primarily responsible for the creation and production of copyrighted works accounted for 3.2% of total employment and for 4.2% of GDP. These numbers go up to 7.8% and 6.7% respectively

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<sup>1</sup> "Copyright" is used in this document to encompass copyright and related rights. "Works" is used to encompass works and other protected subject matter.

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if related industries (for example those distributing copyrighted materials) are considered. The large majority of players in the sector are SMEs. For example, in the book and music publishing industries, 99% of companies are SMEs. A well-designed and stable copyright system is an essential tool to support the competitiveness. It is also a key asset to attract foreign investments in the EU.

Copyright also matters for people: as **consumers**, as creators, and as citizens, individuals participate in public life and engage in established and new forms of communication. They increasingly enjoy and consume creative content on digital networks, and hold ever stronger expectations as to these possibilities. Already today, 56% of Europeans use the internet for cultural purposes, of which 53% to read newspaper articles and 42% to listen to the radio or music<sup>3</sup>, which is telling as to the cultural, consumer and right of expression dimensions of this issue. By acting as incentive to create, the copyright system is also fundamental to ensure **cultural diversity** in a Union of 506 million citizens.

The **single market** provides the platform for maximising the role of copyright in supporting growth, employment and access to creative and intellectual works in the EU, for the benefit of society as a whole.

As reflected in the multifaceted debate around the internet, copyright is part of a **broader set of 'rules of the game'**. The behaviour and commercial choices of market players, and other rules and policies such as those applicable to online services, taxation and competition law are as relevant as the EU copyright framework in shaping markets for creative and intellectual work, particularly in the digital market place. Conversely, a well-functioning copyright system supports a number of objectives that the European Council has identified as fundamental for Europe's future. These include a **digital single market** that is recognised as such by right holders, consumers and businesses; the development of a European **industrial base**; and a strategic and integrated approach to **research and data-driven innovation**. The copyright framework is also a key element in the EU trade policy and in its relations with third countries.

A number of parameters matter for the design and functioning of copyright systems: the **definition** of **rights** and of **exceptions<sup>4</sup> to rights**, the mechanisms for **upholding** those rights, and the **licensing infrastructure**. It is by acting on these parameters that copyright can be adapted to changing, even disruptive, circumstances in order to fulfil its role. It is also important that copyright, its purpose and functioning are understood and supported by citizens and businesses. Awareness-raising is an essential tool in this respect.

Discussions on reviewing copyright systems are taking place in a number of EU Member States. Considering the cross-border nature of how digital content is disseminated, there is a need to identify common solutions. Those **common solutions** are warranted where national policy choices could cancel each other out, or where such choices would result in new obstacles for the distribution of, or access to, content across the single market. This does not mean, however, that *all* challenges have to be addressed at EU level. Flexibility for national solutions should be preserved whenever possible, in accordance with the **subsidiarity principle**.

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<sup>3</sup> Special Eurobarometer 399, "Cultural access and participation", November 2013.

<sup>4</sup> "Exceptions" is used in this document to encompass the concept of "limitations and exceptions" used in the EU copyright Directives.

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The purpose of this White Paper is to discuss the extent of the challenges described above and to examine whether and how further action on the current system of rights, their licensing and exercise, the exceptions to rights and their enforcement is warranted at EU level.

In doing so, it builds on the solutions that have been developed and implemented in the last few years to ensure wider access to works and to facilitate the licensing of rights<sup>5</sup>, and continues a process launched by the Commission on content in the Digital Single Market from December 2012<sup>6</sup>. As part of that process, the Commission launched the stakeholder dialogue "**Licences for Europe**", which ended in November 2013 and resulted in ten pledges by participants that, once put in practice, should foster the availability of content online.

The White Paper draws on the views expressed in the **public consultation** on the review of the EU copyright rules carried out between December 2013 and March 2014<sup>7</sup>. The consultation confirmed the great interest in EU copyright policy by individual members of the public, creators and organised stakeholders, with thousands of responses received by the Commission and an intense online and offline debate. The public consultation revealed often divergent views, highlighting the complexity of the exercise and **the need for an evidence-based approach** that provides specific solutions to clearly identified problems. Against this background, the ambition of this White Paper is to provide orientations to address current and future policy challenges in a rapidly evolving technological environment.

## 2. REASONS FOR A REVIEW: REAPING THE BENEFITS OF DIGITAL TECHNOLOGY AND OF THE SINGLE MARKET FOR ALL

### *New uses and markets*

Since the adoption of the Information Society Directive ('InfoSoc Directive')<sup>8</sup>, widespread **broadband connectivity and digital technologies** have reshaped the ways in which content is **created, distributed and accessed**. Mobile internet is becoming a common feature, storage capacity has increased exponentially and the cost of copying and disseminating content has radically diminished. Sharing content is extremely easy through dedicated platforms, with cloud computing offering great potential for providing services.

Digital has, for many, become the 'by default' way to enjoy music, games, films, newspapers and books. It offers range and convenience of access and retrieval, made possible by diverse distribution channels and apps. Access to, as opposed to ownership of, content is gaining ground. Services based on streaming rather than 'download-to-own' systems offer features that radically change and 'personalise' the consumer experience. User-generated content (UGC) platforms have become a popular phenomenon and one of the main channels for the distribution of content. In parallel, the ease of digital production and online dissemination has vastly expanded the scope for individuals to

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<sup>5</sup> The Orphan Works Directive (Directive 2012/28/EU), the Memorandum of Understanding on Out-of-commerce Works, the Collective Rights Management Directive (Directive 2014/26/EU).

<sup>6</sup> COM/2012/0789 final.

<sup>7</sup> Information on and the published responses to the public consultation are available here: [http://ec.europa.eu/internal\\_market/consultations/2013/copyright-rules/index\\_en.htm](http://ec.europa.eu/internal_market/consultations/2013/copyright-rules/index_en.htm). References to "the public consultation" hereafter all refer to this specific consultation.

<sup>8</sup> Directive 2001/29/EC, the main piece of EU legislation on copyright, part of a 10-strong set of other directives governing specific rights and aspects of copyright in the single market.

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self-publish. Digital technologies have also made their way into education and cultural institutions, improving access to knowledge and heritage, particularly through digitisation.

### ***A transformed value chain***

These changes have had an impact on **the complex value chain** for the production, distribution of and access to copyright works [*Internet value tree to be inserted*]. That value chain is part of a broader environment in which uses, practices and cooperation patterns that did not exist on such a scale in the analogue world have become commonplace.

New actors, mainly online services and platforms, compete with existing players in sectors as diverse as book and newspaper publishing, music, film and television. Innovative business models for the dissemination of content, often based on advertising or data management revenue, continue to be developed. These changes are an opportunity for creative and production processes in terms of innovation and dissemination.

At the same time, the widespread unauthorised distribution of content free rides on the creators' intellectual efforts, and on existing and new legal business models. It is a greatly disruptive factor to the creative industries and a challenge for policy makers.

These evolutions affect **the allocation of value among market participants** and, along with a number of factors other than copyright, widen the set of choices available for consumers, change their expectations and affect the way revenue flows in the internet economy.

From a general economic perspective, policy-making in this area must take into account both static and dynamic effects. In principle, lowering the level of copyright protection can, in the **short term**, have a **static**, downward effect on the cost of access to existing creative works for consumers and for institutional (e.g. educational or cultural establishments) and corporate users (in particular the internet economy). It could lead to lower prices and possibly less costly innovation. However, that would reduce creators' ability to reap the gains from their work – and producers' and publishers' capacity to recoup the investment needed to bring works to the market. The economic incentive to create and to invest in new works could weaken, with the **dynamic, medium- to longer-term** effect being that the production of creative content could be reduced. The faster the rate of obsolescence of creative content<sup>9</sup>, the more dominant the dynamic over the static effect becomes.

This trade-off has an important practical relevance for the sustainability of the value chains that are based on copyright works, particularly when professionally produced. Investment in creative and intellectual content remains an important driver of the European economy. While the distribution of copyright-protected content is only one aspect of the wide array of activities taking place through digital networks today, it represents an important part of modern economies and, at the same time, a pillar of cultural diversity and freedom of expression.

### ***Adapting EU copyright rules to the new challenges***

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<sup>9</sup> See among others: Pollock, R. (2009). “Forever Minus a Day? Calculating Optimal Copyright Term”. *Review of Economic Research on Copyright Issues* 6(1); 35-60 / Landes, W.M. and R.A. Posner. (1989). “An Economic Analysis of Copyright Law”. *Journal of Legal Studies* 18(2); 325-363 / Motta, M. (2004), “Competition Policy: Theory and Practice”, pp. 496-7, Cambridge University Press / Szymanski, S. & Valletti, T. (2005), “Parallel trade, price discrimination, investment and price caps”, *Economic Policy*, vol.20, No.44, pp.705-749.

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These new market conditions bring to the forefront fundamental issues about the **definition and the scope of 'rights in online transmissions'**. On the one hand, the question is whether copyright in some cases overstretches to activities that it was never meant to affect, thereby hampering innovation. On the other hand, how to maintain copyright relevant for its initial purpose remains an equally important question.

These changing conditions have also brought to the fore difficulties in accessing copyright works across the **single market**. While cultural preferences and linguistic differences can play a role in the level of demand for cross-border services, consumers aspire to ubiquitous access, across the EU, and expect flexibility in the use of protected content. They do not understand not being able to access legal content in a Member State other than one's own, something that is still frequently the case. The same is true for the lack of portability of certain subscription-based services across borders in the EU<sup>10</sup>. Key questions include whether the current definition of the scope of rights and the level of harmonisation adequately caters for a multi-territory and increasingly service-based digital single market, and what the economic effects of any possible initiative might be on specific industries.

New uses and opportunities to access content also require an assessment of the current copyright **exceptions**. Exceptions respond to clearly identified market failures, in particular related to transaction costs, and to public policy objectives. The impact of digital technology on the need for, and the function of, specific exceptions therefore has to be carefully examined. In doing so, the principle must be respected that exceptions should remain applicable only in certain special cases; to avoid interference with the normal exploitation of works or to avoid unreasonable prejudice to the legitimate interest of right holders<sup>11</sup>. The required level of harmonisation also needs to be examined; most exceptions are optional and have been implemented in different ways at national level.

Larger-scale and faster infringements of copyright rendered easy by technology add a challenging dimension to **enforcement**. At the same time, citizens are often concerned about the impact of enforcement on the respect of their fundamental rights. Remaining divergences in national regulatory frameworks, due in particular to differences in the implementation of the IP Enforcement Directive ("IPRED")<sup>12</sup>, also require re-examination, as they currently lead to different levels of enforcement and make it difficult to apply measures cross-border.

### 3. AREAS FOR REVIEW

The various issues covered in this White Paper broadly refer to **three main objectives**: (i) further facilitating the availability of and access to content in the **digital single market**, (ii) ensuring the **optimal articulation between copyright and other public policy objectives**, and (iii) achieving a copyright **marketplace** and value-chain that works efficiently for all players and gives the right incentives for investment in creative and intellectual work. The level of maturity of the issues treated and the availability of evidence for specific policy options vary significantly. The proposed next steps take these differences into account.

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<sup>10</sup> For example, subscribers to online audio-visual services are often denied access to services legally bought in their own EU country when they travel to other Member States.

<sup>11</sup> According to the 'three-step test', enshrined in international treaties and incorporated in EU law, exceptions shall only be applied (i) in certain special cases, (ii) provided that they do not conflict with the normal exploitation of the work, and (iii) do not unreasonably prejudice the legitimate interests of the right holders.

<sup>12</sup> Directive 2004/48/EC.

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## 3.1 Cross border dissemination of creative content in the single market

One of the key policy objectives of the digital single market is to make it easier for people to have access to online content services across borders. The right balance must be sought taking into account the nature and specificity of each creative sector (e.g. audio-visual, music, print) and of players within the sectors (e.g. film producers, broadcasters)<sup>13</sup>. Despite significant progress, there are still problems in this area. The most common is that consumers are not able to access content services available in Member States other than their own. This was frequently cited in individuals' responses to the public consultation. In some instances, even if the 'same' service is available in all Member States, they can only access their 'national' service. There are also instances where they cannot access their subscription-based services when travelling in Europe. These obstacles may stem from the territorial application of copyright rules and from the business practices of right holders and service providers. In other words, they can derive from issues related to the **definition** and to the **exercise** of rights, both of which need to be examined in assessing how to remove or reduce those obstacles.

There is no unitary copyright title in Europe, so works are protected on the basis of 28 national legislations. The use of a work in all EU Member States therefore requires the clearing of rights for 28 territories. The varying availability and accessibility of content services in the EU can thus be caused by the difficulties that service providers have in obtaining all the rights needed in all territories. As currently implemented in EU law, the **definition** of the right to make a copyright work available on the internet neither specifies what it covers (the upload of content by the service provider? accessibility by the public? the actual reception by the public?), nor where it is located (does the act take place in the country of the upload only? in each of the countries where the content is *potentially* accessible? in each of the countries where the content is *actually* accessed?). This may raise questions as regards the scope of the licences required to provide services online, and generate transaction costs when the transmission covers several territories. This is particularly true if the rights for different territories are in different hands. The recently adopted Directive on Collective Management in the Internal Market (the 'CRM Directive')<sup>14</sup> should help to mitigate these problems, as it promotes the aggregation of musical repertoire and multi-territorial licensing of rights.

The question arises as to whether there is a need to further define the act of 'making available' on the internet. One option would be to redefine it by localising the act in one single Member State ('**country of origin**'), for example where the centre of activities of the uploader is, or where the upload takes place. A licence from the relevant right holders for that country would suffice for service provision to take place legally in all Member States.

Another option, to some extent reflected in recent case-law by the Court of Justice of the European Union (CJEU), is to localise the act in the countries that the service provider '**targets**', i.e. those countries whose residents it directs its activity to, for instance through advertisements, promotions or choice of language. Licences would only be required for those territories.

A third option would be to substitute the current system of national copyright titles by a **single unitary copyright** title.

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<sup>13</sup> For audio-visual production in particular, see the Commission's Green Paper on the online distribution of audio-visual works in the European Union (COM(2011) 427 final).

<sup>14</sup> Directive 2014/26/EU.

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All three models could, to varying degrees, reduce the transaction costs of licensing in the single market. They would require a higher level of harmonisation than is the case today. The definition of a 'country of origin' is highly complex. A 'country of origin' approach could induce service providers to engage in forms of 'establishment shopping' to benefit from the Member States with lower copyright protection (including weaker collective management organisations and enforcement remedies). Furthermore, this approach is likely to prompt the withdrawal of digital rights from collective management organisations (CMOs). The resulting disaggregation of the CMO-managed repertoire could generate higher transaction costs and jeopardise some of the objectives of the CRM Directive. The alternative solution of establishing which Member States are 'targeted' would raise other difficulties, notably as regards legal certainty. The unitary copyright title would improve legal certainty but it would require a high degree of harmonisation as it would replace national titles.

Beyond the territorial definition of rights, issues related to the **exercise** of rights within the single market need to be considered in the assessment of the problems. For a variety of reasons, even right holders who have the rights for all Member States may opt, in some sectors, for licences with a limited territorial scope and may provide exclusivity in the given territory to the distributors therein. In exchange for exclusivity, the latter undertake not to provide services to consumers from other Member States. Cross-border access is thus blocked in practice. Furthermore, service providers themselves may also decide to offer their services on a territorial basis, for instance by launching 'national shops' that cannot be accessed by consumers residing in other Member States.

Whilst contractual freedom should be preserved as a principle, measures could be considered that prevent certain types of territorial restrictions in agreements between right holders and distributors, where such restrictions are not necessary to preserve the essential reward function of copyright. This could be the case, for example, where access to protected content is linked to payment by the end-user, or for the portability of subscription services when travelling. Consumers should be able to benefit from such measures irrespective of their place of residence.

### **Way forward**

An option in this area could be to further **define the act of 'making available' on the internet**. This could reduce the transaction costs of licensing in the single market but it could prove insufficient for the overall policy objective.

With a view to making sure that consumers have access to online content services across borders, addressing restrictions of cross-border access to content resulting from purely **contractual arrangements** could be envisaged.

Acting on the definition and the exercise of rights, as alternatives or in combination, could therefore be considered. Both courses of action present advantages and difficulties that should be weighed against each other. Any future initiative in this area should serve the objective of enhancing consumers' access to legitimate content services in the single market, whilst supporting the sustainability of the business models of creative industries.

The Commission should also monitor the implementation of the pledges related to cross-border access and portability of content made in the context of "Licences for Europe" and assess whether they bring to the market the expected improvements in this area.



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A separate issue relates to the **exhaustion of the distribution right**. Today, when a tangible article such as a CD or a book is sold, the owner of the book can give or sell this book to someone else. The question is whether this should also apply to copies acquired via digital transmissions (e.g. via a 'download-to-own' service). This raises both practical and economic questions (for example, the quality of a second-hand digital book does not deteriorate and the original owner of the digital book could keep 'his' or 'her' digital copy in addition to the one being sold).

### **Way forward**

Policy initiatives on the exhaustion principle would seem premature at this stage. It is important that the Commission continues to examine the issue. In particular, further observation of how licensing models and technologies evolve would be necessary, as well as an extensive assessment of the consequences that initiatives in this area could have on digital markets.

### **3.2 Copyright rules in support of other policy objectives in the digital environment**

To fully play their role, copyright rules must be clear and **balanced**. They should result in the effective recognition and enforcement of rights, so that incentives to create and invest remain. At the same time, they should take into account and support the pursuit of other public policy goals. This merits particular attention now that digital-led transformations like text and data mining (TDM), the digitisation of heritage and e-learning are bringing new opportunities. The overarching goal in this area should be to achieve the **best possible articulation** between different public policy objectives.

EU directives<sup>15</sup> provide for a list of **exceptions** to rights and are at a limited level of harmonisation. In most cases, Member States are free to reflect them or not in their national legislation. This, combined with the broad formulation of many of the exceptions has resulted in rather heterogeneous implementation. An exception present in the law of a given country may not exist in a neighbouring country or be subject to very different conditions. Furthermore, most exceptions in the EU do not have cross-border effect, i.e. a given exception will only apply in the territory of the individual Member State that decided to implement it. As a result, the use of a picture for illustration purposes in a school course allowed under an exception in country A could, for example, qualify as a copyright infringement in country B. This can create barriers and uncertainty in the single market.

Against this background, fundamental questions are, first, what is '**copyright relevant**' and what is not and, second, what **exceptions** to copyright are needed in the digital cross-border environment, and what their scope should be in light of the functioning of the markets and the public policy objectives being pursued. It is important to avoid a situation whereby certain exceptions become outdated and act as a brake on activities in the single market because of how they are formulated, differences in how they are implemented, or simply the lack of cross-border effect. In certain cases, guidance to Member States on the implementation of the exceptions and how beneficiaries can use them safely and effectively could help improve legal certainty. The merits of making certain exceptions mandatory and of giving them cross-border effect should also be assessed. If certain

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<sup>15</sup> Exceptions are set out in the InfoSoc Directive (article 5), which alone includes more than 20 exceptions, the Directive on the Legal Protection of Computer Programmes (Directive 2009/24/EC, articles 5 and 6), the Directive on the Legal Protection of Databases (Directive 96/9/EC, articles 6 and 9), the Directive on Rental Right and Lending Right (Directive 2006/115/EC, articles 6 and 10) and the Orphan Works Directive (Directive 2012/28/EU, article 6).

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exceptions in the EU legal framework are to be clarified or updated, a balance should be sought between the public interest objectives pursued and the goal of an efficient system of copyright protection. The 'three-step test'<sup>16</sup>; an obligation deriving from international treaties that subjects the application of exceptions to specific conditions, must be respected. It will also be important to factor in licensing and market developments.

There is an important point regarding **compensation** related to specific exceptions. When reviewing existing rules, there will be a need to decide whether or not there is a need to provide for the compensation of right holders for uses undertaken under the exceptions and, if so, on the right mechanisms for that. A general objective should be to avoid that compensation mechanisms, when warranted, become a source of fragmentation in the single market. There will also be a need to determine those instances where exceptions should not be overridden by contractual agreements.

Some respondents to the public consultation and commentators have suggested the introduction of **flexibility** in the application of EU exceptions via the introduction of fair use or equivalent mechanisms. This may be problematic as the EU is made up of 28 different jurisdictions, most of them of a civil law tradition (i.e. where courts are used to applying the law and not to developing it via jurisprudence). The key issues under this hypothetical scenario would be how to avoid courts in different Member taking very different directions, how long it would take to develop a sufficient body of precedent and, most importantly, what the effects would be in terms of legal certainty for the functioning of the national markets and of the single market. Indeed, it seems difficult to ensure adequate guidance to 28 different jurisdictions that need to work together in a single market, without a specialised European jurisdiction for copyright. Still, consideration could be given on whether there are other means for Member States to have a certain degree of flexibility while ensuring the level of harmonisation that a functioning single market requires (including in its cross border dimension).

### 3.2.1 The application of rights in digital networks: browsing and hyperlinking

**Browsing** content is part of everyone's experience of the internet. **Hyperlinks** are considered one of its basic building blocks. Asking whether these acts require authorisations from copyright owners, or are copyright-relevant at all, is therefore far from a purely theoretical exercise.

All of these activities imply the making of copies that is inherent to the functioning of digital technologies and of a mere technical nature (notably, copies on screens or 'cache' copies in internal memories). Despite recent guidance from the CJEU, questions remain as to whether some of these copies require the authorisation of right holders or are covered by the existing exception for temporary copies that are an "integral and essential part of a technological process", which is mandatory in the InfoSoc Directive. Similarly, the circumstances under which hyperlinks constitute a copyright-relevant act of communication to the public are not yet fully clear, although the CJEU has recently shed some light on this matter too. Finally, further certainty would be needed as regards different elements developed by the CJEU when defining what constitutes an act of 'communication to the public' (such as the concepts of 'new public' and of 'technical means').

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<sup>16</sup> See footnote 11.

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**Addressing uncertainty** on the status of acts like **browsing and hyperlinking** is of fundamental importance, both for the smooth functioning of digital networks and for the proper working and legitimacy of the copyright system. In order to ensure the right balance between different interests at stake, there may be a need to intervene to give a clear reply to these questions.

**Clarification** could also be provided as to the concepts of 'reproduction' and 'communication to the public' in digital networks, notably as regards browsing and hyperlinking.

### 3.2.2 Helping knowledge and heritage institutions to fulfil their public interest objectives

Libraries, educational establishments, museums and archives often argue that the copyright rules that are relevant to them, particularly exceptions to rights, do not allow them to take full advantage of the opportunities offered by digital technology in the pursuit of their public interest objectives, particularly across the single market. Those creating and producing the works that feed their collections warn against breaking the balance that they see the current rules as protecting. This debate is well reflected in the feedback obtained by the Commission through the public consultation.

The current EU rules allow these institutions to carry out preservation, indexing and similar copying operations (through a 'preservation exception'), to allow for consultation of materials on their premises for research or private study (based on a 'consultation exception'), and, in the case of public libraries, to make physical loans (allowed by a 'public lending exception').

The way in which the **preservation** exception is implemented varies greatly between Member States, and the applicable conditions, for example the types of works or the types of reproduction covered, diverge. This creates uncertainty among beneficiaries, and limits preservation activities. The **consultation** exception, requiring a person's physical presence on the premises of the institution, does not take into account technological possibilities for remote access. There is also uncertainty regarding what specific acts are covered, particularly those reproductions that may be in practice needed to allow for the consultation of a work online. Questions also remain on the interplay between the exception itself and purchase or licensing terms applicable to the work (the exception does not apply to works subject to those). Finally, today **e-lending** by public libraries only occurs through licence agreements concluded with publishers, since the 'public lending exception' only applies to physical copies. Libraries and their users have a strong expectation of equivalence between physical and digital formats; while right holders are equally concerned that seeking symmetry between the two poses a serious risk to the emerging e-book market.

In assessing the need for policy action, the role of licence agreements with right holders must stay in the picture, if the viability of new distribution models, like those emerging for e-books, and of sectors like educational and scientific publishing, is to be ensured in the EU.

#### **Way forward**

The Commission could consider targeted and differentiated action in this area. To maximise the purpose of the **preservation** exception, it could consider clarifying that it applies to all types of preservation copying and to all types of works and other protected subject matter. Equally, updating the **consultation** exception could be considered, to allow specific categories of establishments to provide remote consultation to researchers and enrolled students under certain conditions (including access via secure networks, conditions of use or embargo periods) while preserving license-based

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models. Further assessment of these conditions and of the possibility of making these exceptions mandatory and giving them cross-border effect in the EU is required.

A legislative initiative on **electronic lending** seems on the contrary premature given the level of development of the e-book market and the piloting and roll-out of licensing solutions. The Commission could therefore facilitate this process with a structured dialogue to work towards a blueprint for license arrangements, factoring in the needs of all players and helping to address the issues they raise, for example related to negotiation and contract conditions. The Commission would in parallel monitor developments and decide if further initiatives are required.

### 3.2.3 Harnessing new possibilities in education and research

Teaching and research activities make substantial use of copyright protected works. They also rely, in part, on certain exceptions to copyright, which are sometimes unclear and always confined to national territories. This contrasts with the increasing online and single market dimension of research and teaching, particularly in higher education, and the advent of new, data-intensive research techniques. These developments have an important potential for growth and scientific progress which the EU must seize in its pursuit for competitiveness and societal progress.

At the same time, consideration has to be given to the fact that in the scientific, technical and medical (STM) and educational publishing sectors, 'digital-born' materials and online forms of distribution are increasingly the norm. It should also be taken into account that licencing practices can and should facilitate online and cross-border use of works for research and teaching purposes.

Currently, **teaching** benefits from an exception allowing the use of works for **illustration** purposes, both in the classroom and online (for example in a dedicated website to complement the teaching, or in a distance learning programme). In some Member States, however, implementation has been restrictive, sometimes only covering face-to-face teaching. Furthermore, conditions defined in different countries diverge (e.g. on the acts, type of works and amount of use allowed and whether or not compensation is paid to right holders). Such limits can obstruct the development of online education. In addition, national disparities generate legal uncertainty for providers of online education across borders in the single market.

Under the current EU copyright rules, Member States can also have exceptions benefiting non-commercial scientific **research**. In this case too, optionality and the broad formulation of the exceptions in EU law have resulted in varying approaches between Member States, some of which have not introduced exceptions in this area at all. Furthermore, scientific research can be carried out today in ways that were unthinkable when those rules were devised. Techniques commonly referred to as 'data analysis' or '**text and data mining**' (**TDM**) have gained ground, allowing researchers to analyse large amounts of text and data in an automated way to generate new insights and acquire new knowledge faster. TDM reduces exponentially the time it takes to source and correlate relevant data. Its use, which has an enormous potential to foster innovation and bring about economic and societal benefits, has a clear cross-border dimension.

Commercial operators engaging in TDM for commercial purposes (for example for marketing purposes) benefit today from an emerging licencing market, with offer meeting demand and no apparently major problems in negotiating and concluding licencing agreements. Licensing solutions

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are also being tested for non-commercial research, but researchers seeking to use TDM in the context of non-commercial projects continue to report legal uncertainty and transaction costs that could result in the slowing down of the potential of TDM in the EU.

In principle, TDM activities for non-commercial research purposes can be considered as covered by the existing research exceptions (under both the InfoSoc Directive and the Directive on the Legal Protection of Databases, the 'Database Directive'<sup>17</sup>). However, their diverging implementation makes it difficult to rely on them, and even impossible in those Member States where there are no research exceptions at all. As a consequence, it is often not clear how copyright and the *sui generis* database rights<sup>18</sup>, as reflected in the EU legal framework, affect TDM. It is important to avoid legal uncertainty as to whether and when researchers who have lawfully purchased access to scientific publications (for example in the context of a subscription contract) may need a specific authorisation to text and data mine that same content .

### **Way forward**

The Commission could consider further harmonisation of the **teaching** exception , in particular in higher education where educational content becomes increasingly available across borders. In doing so, it will be important to take into account licensing agreements already in place (e.g. for the use of textbooks and digital educational resources), and recent developments in the educational publishing market (educational material developed for online uses). It could clarify that in the current legal framework the exception already covers online teaching, under certain conditions. It could further assess the need to further approximate national laws to remove legal uncertainty on the application of the exception in cross-border contexts, through more detailed conditions for application. Making the exception a self-standing one (it is currently included in a broader one that also covers research) could also be considered.

The scope of the current **research** exception as well as its level of flexibility would need to be further considered. In addition, it seems important to clarify the legal framework for **TDM** while facilitating and making it workable for all parties as soon as possible. To that effect, the Commission could issue appropriate guidance to Member States to clarify to what extent TDM activities/techniques are covered, or not, by copyright and to what extent they fall under the scope of existing research exceptions. To make sure that the legal space offered by the current framework is exploited to the maximum, the Commission could also encourage Member States to implement the research exceptions to facilitate TDM, and will encourage the further development of licence agreements and technical infrastructure which are essential to providing access to TDM for researchers.

In parallel to monitoring these developments, the Commission could consider the merits of a self-standing specific TDM-exception to facilitate non-commercial scientific research.

### **3.2.4 Improving access to information and knowledge for persons with a disability**

Today, only a limited proportion of all published works are accessible to persons with a print disability in the EU, but digital technology can play an important role in this area as it greatly

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<sup>17</sup> Directive 96/9/EC.

<sup>18</sup> The *sui generis* database right is granted in the Database Directive to makers of databases who have made a substantial investment in them.

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facilitates **accessible publishing**. Coupled with a balanced copyright regime, it can help disabled people to realise their right of access to information and right to participate in cultural life on an equal basis with others, as enshrined in UN Convention on the Rights of Persons with Disabilities.

In the EU, however, agreements between right holders and organisations serving persons with a print disability by making and supplying special formats are only in place in some Member States, do not apply to all types of disability, and only provide access to a fraction of the works available to the broader public.

The implementation of the existing optional **exception for persons with a disability** differs between the Member States. It is often limited in scope (e.g. excluding dyslexia or hearing impairments) or to certain works, uses or formats. In some cases the exception only applies when the relevant special format is not commercially available, and rules also vary as to the payment of compensation to right holders.

The result is higher transaction costs for organisations serving persons with a disability. Moreover, the lack of legal possibilities for beneficiaries to access special formats made under a copyright exception in other Member State results in double production costs for these organisations, even in countries speaking the same language.

The rapid ratification of the recent Marrakesh Treaty<sup>19</sup> will address some of the above problems, including the mandatory nature of the exception and the cross-border exchange of special formats, at least for persons with a print disability.

### **Way forward**

The Commission believes that full accessibility of content may only be achieved once accessibility features are built in by mainstream publishing and production, which should be encouraged.

In addition to the rapid ratification of the recent Marrakesh Treaty, it would be important to consider the further harmonisation of the current **exception for persons with disabilities** to ensure the smooth application of the Treaty and to extend the cross-border effects of an EU exception to a broader circle of beneficiaries (in particular persons with a hearing impairment).

### **3.2.5 Providing a legally sound space for user-generated content**

Digital technology has made it easier for individuals to 'generate' content online at low cost, resulting in what is generally referred to as '**user-generated content**' (**UGC**). UGC provides a substantial opportunity for increased **expression** and social participation, including through the re-use of pre-existing works, and has been taken up by users on an unprecedented scale. For example, over 130 hours of video are uploaded hourly on one of the most widely used internet platforms. UGC is equally a new, important channel for new and existing right holders to draw audiences to their work and to generate **remuneration**. It is becoming one of the main distribution channels and sources of remuneration for certain types of content.

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<sup>19</sup> Marrakesh Treaty to improve access to published works for persons who are blind, visually impaired or otherwise print disabled, signed by the EU on 30 April 2014.

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This success shows that there have not been significant market failures. There is a lack of evidence that the current legal framework for copyright puts a brake on or inhibits UGC (absence of 'chilling effect'). This is also reflected in the dearth of case-law in Europe, which is substantial in other areas of copyright law.

Policy initiatives in this area should aim to create an environment that is as **clear and legally certain** as possible for consumers, but also for right holders. Policy measures should seek to reduce any lack of clarity about the applicable rules and their scope. While problems have not necessarily manifested themselves on a significant scale, those that do arise can still matter for individual consumers or right holders, including authors. This was highlighted by various respondents to the public consultation, who stated that they do not fully understand what rules apply when engaging in UGC.

Copyright law is relevant for UGC both because UGC **creators** are themselves **potential holders of rights in a new work** and because UGC can result from the **re-use of pre-existing works** protected by copyright<sup>20</sup>. UGC creators should be able to claim and exercise their rights as creators if they wish to, and they should understand the rules that apply to works that include parts of works that are the fruit of others' creativity and investment. Right holders in pre-existing works should also be able to exercise their rights, as for any other use of their work.

In a number of cases, existing works are used in UGC as a quotation, for parody or similar purposes, or just incidentally, a typical example being a family celebration captured while music is played in the background. These uses are in fact already covered by **existing exceptions** in the EU framework. In these cases too, however, the relevant exceptions are optional for Member States to introduce (some of them have not done so), diverge in their national implementation and, in any event, have no cross-border effect. This reduces their otherwise primary relevance for UGC, which by its nature runs on a borderless internet.

For other uses (e.g. playing the latest music hit together with a homemade video, which implies the synchronisation of music with images), the clearance of rights in the pre-existing material used applies. This allows for UGC to establish itself as a normal but innovative source of exploitation of content (and therefore of revenue for right holders). At the same time it is fundamental to ensure **convenience and transparency** for those engaging in UGC. At the moment, **licencing** schemes or similar arrangements that respond to that need are already available. They are concluded directly by UGC-hosting platforms and right holders, and often allow users to upload content not only on those platforms but also in their personal blogs or social media space. Micro-licensing schemes, providing convenience for bloggers or small businesses for example, are also being developed. It is however important to ensure that the application and scope of these mechanisms are understood by those engaging in UGC activities and that they become common practice across the industry.

UGC show how important it is to have tools to allow people to **identify** works, their right holders and their copyright status (informing for instance about right claims or the entrance of a work into the public domain). If such tools are standardised, interoperable, easy to use and respected, they will be crucial in identifying, using and remunerating pre-existing works and in enabling UGC authors to claim their rights if they wish to do so.

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<sup>20</sup> It should be noted that, while no precise definition of UGC has yet been established, the mere sharing of existing copyright protected content ('file-sharing') does not constitute the creation of a new work. Nor does it imply a transformative use. The Commission does not therefore consider it part of UGC.

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### *Way forward*

A combination of different tools could be considered in order to reduce possible grey areas surrounding UGC, making sure that the full potential of the opportunities that are already widely available is exploited.

Recognising that technology and UGC have considerably increased scope for expression practices like quotation for criticism or review and parody, as well as incidental use of works, and in the absence of evidence of significant market failures, the EU should first consider ways to **clarify the application of relevant exceptions** as they exist in EU law, including their cross-border dimension.

In parallel, **licensing mechanisms** should be encouraged and facilitated for those uses that clearly do not fall into these exceptions. A wider uptake across the online services market should be pursued so that convenience and legal certainty increases across the board.

Finally, the Commission could continue to support **metadata and rights model** initiatives. **Awareness-raising** and education should also be encouraged.

### **3.2.6 Private copying and the single market**

Optional **private copying and reprography exceptions** to the reproduction right are implemented in most Member States. They allow for copies to be made by individuals for private use and for reprographic copies (e.g. photocopies). These exceptions are important for consumers as is having clarity as to which activities are covered by them. They are subject to compensation for the harm suffered by right holders. The majority of Member States use levies on equipment and media for that purpose. Such levies are a non-negligible source of revenue for right holders, valued by many as a substantial contribution to creativity and cultural diversity. At the same time, they can appear at odds with the possibilities offered by technology and digital licensing, affecting in particular those liable for payment (notably manufacturers and distributors of ICT products and consumers), and platforms distributing content. Against this background, the CJEU has provided important guidance, notably as to the requirements that need to be fulfilled in order for national systems to be compatible with the principles of the single market so as to not interfere with **cross-border trade** in the EU, and on the necessary relationship between harm and compensation.

### *Way forward*

Measures could be introduced to address the barriers to the **single market** that disparate levy systems can create. This could include the codification of recent principles drawn up by the CJEU, for example as regards the notion of harm and the minimum requirements levy schemes need to fulfil, in terms of transparency and exceptions and/or reimbursement of undue payments.

### **3.3. Effective tools for a functioning marketplace and value chain**

A fundamental function of copyright is to allow **a market for creative content** to be created and to operate; for the EU, the reference is its single market. In practice, this happens through the licensing or transferring of rights on the basis of negotiations between creators (and investors in creation, like producers) and distributors and users. The EU has already adopted a number of measures to make



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the licencing market work better, notably as regards rights managed by CMOs, through the CRM Directive<sup>21</sup>, and to facilitate the use of orphan works, through the Orphan Works Directive<sup>22</sup>. The stakeholder dialogue "Licences for Europe" concluded in November 2013 fostered discussions between the different market players and helped to identify new licensing practices in a number of areas.

The way the marketplace works must also be seen more broadly, considering the flow of revenue between all actors in the internet value chain, starting from those creating or investing in creation down to the individual person enjoying it. There is a growing perception among right holders, reflected in replies to the public consultation, that the new ways of disseminating and accessing the result of intellectual and creative work online do not assure a fair return on investment and, more generally, create an imbalance between internet players and right holders, putting cooperation under strain. This is an emerging debate which is likely to grow in importance. In this context, the Commission would need to assess the articulation between copyright and the broader legal framework.

### 3.3.1 The required infrastructure for the market to deliver efficient licensing

A well-functioning digital market for copyright-protected content requires clarity with respect to how works and ownership of rights are **identified** across territories in the EU, the interoperability of different 'identifiers', and efficient **data management** systems for the granting and administration of licences.

There are a number of **industry initiatives** being undertaken in different content sectors. The idea of 'copyright hubs', taking identification systems a step further and leading, eventually, to automated licensing across different sectors, is also important in this respect. The creation of a registration system at EU level is a more complex and far-reaching project that requires careful consideration, both from a practical and legal point of view, as regards its possible scope, costs and benefits.

#### **Way forward**

Solutions for the **identification of works and efficient data management** should, first and foremost, be delivered by the players in the **market**, i.e. right holders and distributors. Voluntary industry standards and practices can be supported in several ways, from encouraging their use via legislation to financing.

The creation of a registration system at EU level raises important practical and legal questions that require further analysis.

### 3.3.2 Fair remuneration of authors and performers

In addition to awarding rights over the exploitation of their work, EU law contains a few relevant provisions on the transfer of rights and the **remuneration of authors and performers**. Concerns have been raised that authors and performers are not adequately remunerated in particular, but not solely, for the online exploitation of their works. In the public consultation, authors and performers

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<sup>21</sup> Directive 2014/26/EU.

<sup>22</sup> Directive 2012/28/EU.

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were particularly critical of unfair contractual terms deriving from their weaker bargaining positions. Research points to differences in this regard between Member States and sectors.

Different areas can be examined when looking into ways to ensure adequate remuneration for authors and performers, including contractual arrangements and transfer of rights mechanisms, unwaivable remuneration rights, collective bargaining and collective management mechanisms.

### **Way forward**

The Commission believes that systems ensuring **fair remuneration** can be essential to encourage creative and artistic work. In this context there is a need to **further consider concerns in this area**, with decisions on the need for legislative action to be only taken at a second stage. Country-by-country legal and economic analysis could be carried out, with particular attention to cross-border online exploitation and to the effects on the single market. This should be complemented by an exchange of views with stakeholders and Member States.

### **3.3.3 Solutions for mass digitisation**

The question of 'mass digitisation' often emerges in relation to **cultural heritage institutions** who call for new means to digitise and make available parts of their collections protected by copyright through projects that typically include a high number of works, some of them orphans, some out of commerce or no longer available to the public<sup>23</sup>.

The main difficulties encountered in large-scale digitisation projects are the number of works that need to be digitised, the number of right holders from whom authorisation would have to be obtained and the associated costs. The **clearance of rights** is particularly difficult for works produced and/or published before the development of the internet, for which the rights pertaining to digital modes of exploitation have not been transferred.

Specific instruments have been developed in recent years to support mass digitisation efforts<sup>24</sup>, notably the **Memorandum of Understanding (MoU) on Out-of-Commerce Works** concluded in 2011 to facilitate the digitisation of out-of-commerce books and scientific journals. On the basis of the MoU, several Member States have started to develop solutions. A more systematic approach may be necessary to ensure the implementation of the MoU and the cross-border effect of licences granted under the existing national solutions.

Further steps need to be considered to support the digitising of European cultural heritage, without undermining the interests of right holders. Solutions based on the digitisation and dissemination of protected works without the right holders' consent would not achieve the desired balance and would be, in all likelihood, contrary to the EU and Member States' international obligations. As an alternative, solutions based on **collective management** of rights could be envisaged to reduce transaction costs and ensure legal certainty for cultural heritage institutions. However, the necessary safeguards would need to be put in place, in particular in terms of the representativeness of the

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<sup>23</sup> This includes books, but also journals, pictures, films, recordings, etc. Similar questions, to some extent, confront public broadcasters and press publishers as regards their own archives.

<sup>24</sup> Including the Orphan Works Directive (Directive 2012/28/EU, adopted in 2012). The database that will be established as a result will facilitate the digitisation and making available of orphan works.

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CMOs involved, the transparency of the agreements concluded and possibilities to 'opt out' or to reverse presumptions of representation.

Such solutions may be difficult to implement in all sectors, since the characteristics of transfer and management of rights vary, including in the newspaper and audio-visual sectors <sup>25</sup>. Thus, specific solutions may be required for specific sectors. In all cases, improving cross-border access to heritage in Europe should be a primary objective.

### **Way forward**

**Contractual and sector-specific measures** could be developed to streamline the clearance and licensing of rights and therefore facilitate **mass digitisation**. Solutions to favour the collective management of rights could be encouraged where appropriate, with the necessary safeguards for right holders. In any case, it seems essential that these mechanisms are mutually recognised between Member States in order to allow the cross-border dissemination of the digitised works.

### **3.3.4 Enforcing rights in a meaningful manner**

Respect for IP rights is an essential feature of the innovation value chain, since **rights that cannot be enforced are of no (economic) value**. The lack of a clear and predictable IP enforcement system has a chilling effect on investment in IP in general. In particular, a dysfunctional enforcement system increases the costs of enforcement thereby reducing the attractiveness of investing in creation and innovation. In the commercial IP market this favours large market players who can afford to use unclear and complex enforcement systems over innovative and creative start-ups who cannot do so. Likewise, for those right holders who wish to share their creativity and innovation freely (via well-enforced creative commons' licences), or, alternatively, wish to develop a business model based on enforcing licences of tailor-made services on the back of open-source software, an unclear and dysfunctional enforcement system also undermines their possibilities to do so.

Effective enforcement of copyright in the digital world is challenging because of the inherent cross-border nature of the internet, the remaining differences in national IP enforcement systems, and the speed with which commercial-scale infringers can change the sources and location of their infringing activity.

Right holders seeking respect of their rights in the online world need effective **cross-border court orders**. However that is difficult in the absence of a fully harmonised system of substantive law. More generally, although a number of legal tools exist at EU or Member State level to tackle infringements of copyright<sup>26</sup>, there are various problems with the accessibility and efficiency of these measures. There are also concerns regarding the protection of fundamental rights when those tools are applied, particularly against non-commercial scale infringers.

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<sup>25</sup> In the context of Licences for Europe, an agreement was reached to support the digitisation and making available of European cinematographic heritage works on a film-by-film basis.

<sup>26</sup> They can consist of criminal proceedings, civil enforcement mechanisms aiming for example at the cessation of infringement and/or the payment of damages, voluntary or imposed by law procedures aiming at removing non authorised content from the internet (notice and take down procedures) or, in several Member States, graduated response mechanisms involving a series of notifications to individual users and subsequent sanctions in order to reduce unauthorised file-sharing.

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The **remaining differences in the IP civil enforcement frameworks** of Member States and the aforementioned uncertainties surrounding how they are applied make cross-border actions slow and costly, whereas commercial-scale infringers can rapidly move within the single market. Thus, the current framework is not effective in ensuring respect of copyright, in particular in cross-border cases, which are very common on the internet.

The key challenge is to rapidly identify and tackle the **source** of such activities with the assistance of intermediaries, in particular the most harmful commercial-scale infringements that seek to generate profits. This is particularly difficult on the internet when the problematic service is located outside of the jurisdiction of the seized court and when the service facilitating the infringements is shielded from the specific liability regime provided for by the EU legal framework.

### **Way forward**

The enforcement of rights in the digital environment is a key aspect of the functioning of the market. The challenges range from collecting evidence to using a fragmented judicial system to actually 'catch' the illegal source. There is no single solution to address all the issues identified under the current legal framework. The following policy orientations should be pursued further.

A focus on enhancing due diligence obligations for all actors in the **value chain** of digital content distribution could be considered. Even if intermediaries do not necessarily carry out themselves acts that would require the authorisation of the right holders, they could be encouraged to pro-actively help in addressing the commercial offer of copyright-infringing content on the internet. This could be done through different means<sup>27</sup> that should be proportionate and balanced, and would help uphold the reward function of copyright for the creative industries.

More generally, in order to ensure that all potential measures are effective and proportionate, legal clarifications could be brought on the different intermediaries that can be involved, on the types, conditions and duration of these measures, as well as the articulation between the different fundamental rights involved. This would concern, in particular, the protection of privacy, of personal data, freedom of information and expression, freedom to conduct a business and the right to property.

Finally, there should also be a focus on the **'follow the money'** approach. Piracy will thrive as long as it is a 'business model', but its financial resources could be threatened by limiting the provision of payment services and advertising to such websites. Inspiration could be drawn from existing stakeholders' dialogues in Europe and beyond.

## 4. CONCLUSION AND NEXT STEPS

The Commission believes that **predictability** for all market participants is necessary for the digital single market and could be realised through a greater degree of harmonisation of copyright law in Europe in the future, complemented by guidance and other non-legislative initiatives where

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<sup>27</sup> It should be recalled in this context that the liability regime of intermediary service providers in the e-Commerce Directive (Directive 2000/31/EC) does not prevent efficient judicial measures being established in accordance with Directive 2000/48/EC and Directive 2001/29/EC.

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appropriate. Copyright rules must also reflect the **cross-border** potential of content dissemination in the single market, be future-proof and **adaptable** to rapidly developing technology and changing market conditions. In this respect, a reflection is warranted on what mechanisms could be built into the legal framework to enhance its flexibility so as to facilitate further adaptation and update of rules. Legislation must also respect subsidiarity and have cultural diversity as one of its objectives. It should also ensure a **balanced distribution of value** among market players, taking into account the initial investments in creative content and the new business models and licensing practices.

In this White Paper, the Commission has presented its views on the main issues and possible course of action with respect to a number of policy questions and suggested further analysis on a number of others. Policy decisions on the issues raised in this document should be considered during the upcoming 2014-2019 legislative period.

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