



EUROPEAN COMMISSION
Regulatory Scrutiny Board

Brussels,
Ares(2016)

Opinion

Title

DG CNECT – Modernisation of EU copyright rules

(version of 1 July 2016)*

(A) Context

The Digital Single Market (DSM) Strategy, adopted in May 2015, called for addressing a set of key obstacles to the functioning of the DSM in the EU copyright framework and announced legislative action "to reduce the differences between national copyright regimes and allow for wider online access to works by users across the EU", notably as regards portability and cross border access to copyright-protected content services; exceptions in particular in the area of education and research; and the role of intermediaries in the distribution of copyright protected content. It also indicated that the Commission would review the Satellite and Cable Directive to assess whether it has facilitated consumers' access to satellite broadcasting services across borders, as well as the possible extension of some of the Directive principles/mechanisms to the licensing of rights required for certain broadcasters' online service. EU action in the area of copyright complements other EU initiatives recently adopted in the context of the Digital Single Market Strategy, notably the revision of the Audiovisual Media Services Directive (AVMSD).

(B) Overall opinion: POSITIVE

The Board gives a positive opinion, on the understanding that the impact assessment report will be further improved with respect to aspects mentioned below and in particular for the areas where more robust evidence is needed to justify the need for EU action and proportionality of the measures. The opinion provides recommendations for the overall report as well as specific advice related to the three distinct areas covered in the report.

(1) The existing national frameworks, current trends and national initiatives in the pipeline, as well as the views of Member States should be presented for all the issues under consideration.

(2) The report should clarify which measures represent significant versus incremental policy changes, and the extent to which they are likely to have significant (disruptive) effects on relevant industry sectors, business models and right holders' rights management. It should also elaborate on the implications of the shift to the country of origin principle for public and commercial broadcasters, and on the proportionality of the measures, in particular as regards the video-on-demand and the fair remuneration in contracts of authors and performers.

* Note that this opinion concerns a draft impact assessment report which may differ from the one adopted.

(3) In some cases, the evidence put forward in the problem definition does not allow to confirm the need for intervention at EU level and the proportionality of the measures proposed. This applies to the measures supposed to achieve a well-functioning market place for copyright (use of protected content in user uploaded content, fair remuneration of authors and performers) and audio visual content on Video on Demand platforms.

The lead DG shall ensure that these recommendations are integrated in the report prior to launching the interservice consultation.

(C) Main recommendations for improvements

(1) Problem definition and situation in Member States. The report should briefly explain on what basis it was decided to tackle certain topics now and why other issues that were announced in the 2015 Communication on modernisation of the copyright framework were not considered. It should better assess the likely magnitude of each of the problems, providing at least anecdotal evidence at Member State level. The report should indicate which drivers are dealt with by the initiative and their relative importance should be better assessed in order to set the expectations at the right level, in particular for consumers. The report should also present the views of Member States and of the European Parliament, and include tables showing the applicable national frameworks. Moreover, the baseline scenario should be further developed, by presenting current trends or developments at national level.

(2) Need to act at EU level. Given the rapid evolution of the digital single market, the on-going regulatory and self-regulatory initiatives, competition cases and pending law cases, the report should better justify, using robust evidence, that the problems identified will not be resolved without regulatory intervention. Moreover, based on a clearer picture of the situation in the different Member States, the report should better justify why action is needed at EU level, in particular if national authorities did not regulate in the area.

(3) Analysis of options. The report should outline which legal instruments are most appropriate to be used for each of the measures. It should also clarify which measures represent significant versus incremental policy changes, and to what extent the options under consideration are likely to have significant impacts on the relevant industry sectors and disrupt current business models or rights management patterns. It should clearly spell out how the separate measures are likely to change the distribution of income among the actors (for instance, following the extension of the **country of origin principle**). The report should also better assess the proportionality of the different measures and explain why lighter regimes are not presented for SMEs, given the likely disproportionate level of compliance costs (e.g. regarding the **fair remuneration in contracts of authors and performers**). The proportionality of the options should be better assessed, among others by better presenting the likely magnitude of impacts in the various Member States that the implementation of the preferred options would imply on the ground. Given the reference to impacts on fundamental rights, in particular regarding property rights and freedom to conduct a business, the report should better justify why the measures are considered as proportionate. The report should clarify to what extent the package of measures is balanced between the interests of consumers, or users, and of right holders and further explain the likely impacts on fundamental rights.

Ensuring wider access to content

Online transmission of broadcasting organisations: The report should more convincingly demonstrate, based on robust evidence, that the benefits of introducing the country of origin principle to clear the rights for certain online services of broadcasters would outweigh the costs for right holders.

Digital retransmission of TV and radio programmes: The management of rights through collective management or licensing should be better described.

Video-on-demand (VoD) platforms: The report should better justify the need to act at EU level, present in more detail how the options would work in practice (e.g. the negotiation mechanism), and assess the likely costs they would entail (e.g. costs for national authorities depending on the existing structures and the frequency of use). Moreover, it should clarify the link and coherence with the review of the AVMSD, which relies on an extension of obligations to the VoD services to create a level playing field and imposes new obligations on European content.

Adapting exceptions to digital and cross-border environment

Tables summarizing the national legal frameworks should be included in the main text (rather than only in the annexes). Regarding the **text and data mining exception**, the reasons for the apparent underachievement of the voluntary approach (taken up with the "Licences for Europe") should be further explained.

Achieving a well-functioning market place for copyright

Use of protected content by online services storing and giving access to user uploaded content: The report should further assess the effectiveness of the preferred Option 2, given the disproportionate bargaining power between the service providers and right holders when there is an obligation to engage in negotiations but no obligation to conclude them. It should more convincingly demonstrate the need to act at EU level and, based on evidence, show that the preferred option would effectively ensure more balanced relations across the copyright value chain and will positively affect the situation of right holders, while taking into account impacts on the online ecosystem. It should be clarified that the proposal would not impose a certain technology.

Rights in publications: The report should more convincingly demonstrate that the creation of a new standalone right for news publishers would effectively contribute to reinforcing their role in the digital world and that action at EU level is needed.

Fair remuneration in contracts of authors and performers: The report should justify, using more robust evidence, that the remuneration of authors and performance is unfair in the online environment, with a proper reflection of remuneration issues and new opportunities brought by the new online services. Moreover, the cross-border dimension of the problem should be better demonstrated, as well as why national solutions are likely to be less effective. Given that contracts are usually private matters, the legal justification for intervention should be clearly set out, and the proportionality of the measures duly justified.

Some more technical comments have been transmitted directly to the author DG and are expected to be incorporated into the final version of the impact assessment report.

(D) Procedure and presentation

In order to make the report more accessible for non-specialists, technical terms should be explained in an extended glossary and all acronyms inserted in an annex. Moreover, the main messages of each section should be clearly presented and, where possible, visual aids explaining complex issues at stake should be included. The report should clearly mention when it presents results from studies commissioned by interested parties and label them with the necessary caveats. The executive summary should be more informative, in particular on the problems to be tackled for each of the areas, on the need to act at EU level, on the preferred options and their likely costs and benefits. Benchmarks/targets

should be set out for the monitoring indicators in order to judge the effectiveness of the framework when conducting the retrospective evaluation.

(E) RSB scrutiny process	
Reference number	2016/CNECT/009
External expertise used	No
Date of RSB meeting	20 July 2016