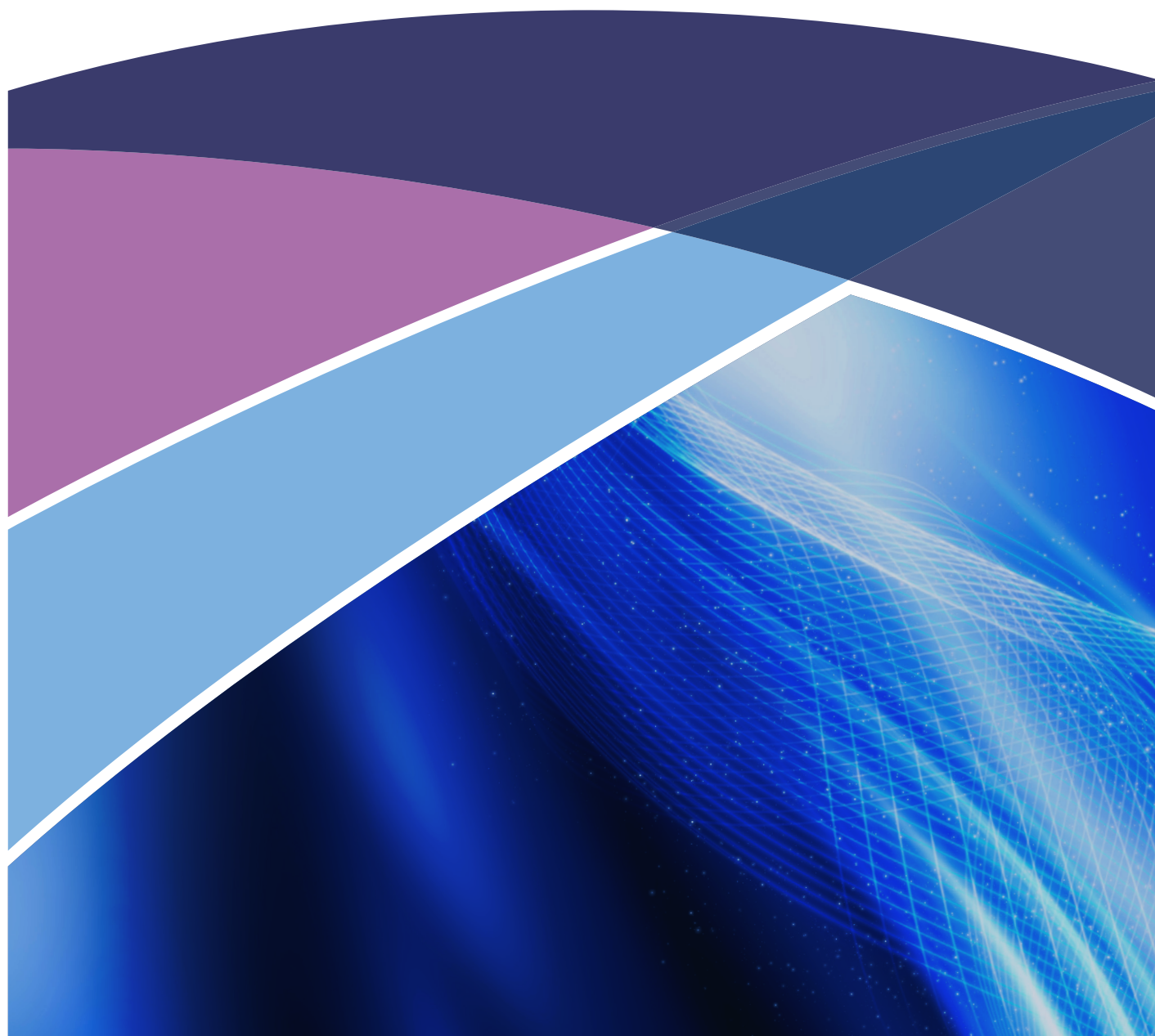




Intellectual
Property
Office

Government Response to Marrakesh Consultation

September 2018





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Introduction

1. The Marrakesh Treaty¹ is an international legal instrument which aims to improve visually-impaired and print-disabled people's access to copyright works around the world. It does this by requiring its members to provide exceptions to copyright allowing the making of accessible format copies and the transfer of such copies across borders.
2. In 2017, the European Union published a Directive and a Regulation to implement this Treaty. EU Directive 2017/1564² (the Marrakesh Directive) and a related Regulation³ aim to ensure EU compliance with, and allow EU ratification of, the Marrakesh Treaty. This legislation is due to come into force on 12 October 2018, and EU Member States must have in place domestic legislation to implement the Directive by this date.
3. From 8 May to 19 June 2018, the Government consulted on how the UK should approach implementing the Marrakesh Directive. The consultation paper set out proposed amendments to those areas of the Copyright, Designs and Patents Act 1988 ("the CDPA") which are not currently compatible with the Marrakesh Directive. It sought views on whether the UK should implement a compensation scheme for rightholders, and whether this should be through collective licensing or direct payment. It also asked whether other safeguards should be introduced, to the extent permitted by the Directive. It placed an emphasis on ensuring that the law is implemented in a way which promotes greater availability of accessible format works, while continuing to provide robust protection for copyright owners.
4. The consultation paper also sought industry views on the implementation of the Marrakesh Directive in the context of the UK's exit from the EU.
5. There were 15 responses to the consultation, received from bodies identifying as authorised entities, collecting societies and organisations representing rightholders. Respondents addressed some or all of the questions set out in the consultation paper.
6. This document provides a summary of the responses and sets out the Government's response.

1 Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled; http://www.wipo.int/wipolex/en/treaties/text.jsp?file_id=301019

2 Directive (EU) 2017/1564 of the European Parliament and of the Council of 13 September 2017 on certain permitted uses of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled and amending Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society; http://ec.europa.eu/information_society/newsroom/image/document/2017-39/directive_marrakech_3F0C5F3D-C1A8-F9E1-9B9AEA464FAE7982_47216.pdf

3 Regulation (EU) 2017/1563 of the European Parliament and of the Council of 13 September 2017 on the cross-border exchange between the Union and third countries of accessible format copies of certain works and other subject matter protected by copyright and related rights for the benefit of persons who are blind, visually impaired or otherwise print-disabled; http://ec.europa.eu/information_society/newsroom/image/document/2017-39/regulation_marrakech_3F1846C9-C2C1-82CD-3C0EF8178EE8C012_47217.pdf

Summary of consultation responses

EU Exit implications

7. The consultation paper noted that the Directive and Regulation will enter into force before the UK leaves the EU, and the Government intends that the UK will remain party to the Marrakesh Treaty following EU exit and will ratify the Treaty in its own name at the appropriate point. The Government asked for views on the implementation of the Marrakesh Directive in the context of the UK's exit from the EU.
8. Two-thirds of the respondents addressed this in their response, with almost all of them stating that ideally there should be no gap in legal provision. Some authorised entities were concerned that a gap in legal provision could affect their ability to exchange accessible format copies across borders. Others asked the Government to confirm what arrangements it is making for other copyright legislation affected by the UK's exit from the EU.
9. Respondents who addressed this point stated their support for the Government's intention to ratify the Marrakesh Treaty in the UK's own name.

Approach to implementing the Directive

10. The current UK disability exceptions⁴ cover all types of disability which prevent a person from accessing a copyright work and cover all types of copyright works. In line with its overall policy not to discriminate between people with different types of disabilities, the Government proposed that changes made to the CDPA would, where possible, be applied to all forms of disability which prevent a person from accessing a copyright work, and all types of work, rather than just those specified in the Directive. Respondents to the consultation were asked whether or not they agreed with this approach.
11. Almost all of the respondents agreed with the Government's proposed approach to apply all changes to the CDPA to all types of disability which prevent people from accessing copyright works. However, one respondent representing the audiovisual sector noted that there are statutory obligations which require audiovisual content to be made available in accessible forms when included in terrestrial broadcasts and other forms of content delivery and was concerned that the potential interplay between these obligations and the copyright exceptions may have additional unintended impacts on the audiovisual sector.

⁴ Sections 31A-31F of the Copyright, Designs and Patents Act 1988

Commercial availability

12. The consultation paper explains that the Marrakesh Directive does not allow the UK to retain its current “commercial availability” restrictions, under which the exceptions for people with visual impairment provided by the CDPA only apply when accessible copies in a particular format are unavailable on the commercial market. As such, the Government intends to remove such provisions from the CDPA, but sought further information on the potential impact of doing so.
13. The consultation paper noted that a “call for views” was published by the Government in October 2016 which sought evidence on the impact of the commercial availability clause in UK law, among other things. It asked what the removal of the commercial availability clause would mean in terms of the number of accessible format copies available to visually impaired people and the costs to commercial markets.
14. Although the call for views identified support for commercial availability restrictions among groups representing rightholders, it elicited little economic evidence on the impact of the clauses and none to allow us to monetise costs and benefits. At the time of consulting, it was therefore unclear what impact removing commercial availability restrictions would have on the UK’s disability exceptions and on rightholders. As such, the consultation paper asked respondents to consider the following questions:

Question 2.1.1: If you are a commercial publisher of accessible format copies, how many have you sold, or made available, in the last year? If possible, can you provide the average price of these copies, and the formats in which they are available?

Question 2.1.2: Does your organisation, business or industry currently experience any administration costs relating to the ‘commercial availability’ provision? Please explain the source of these costs and provide a monetary value along with evidence on how this has been calculated.

Question 2.1.3: What impacts would removing the ‘commercial availability’ provision have on your organisation, business or industry? What evidence is there for the impact? Please explain the impact and provide evidence on the costs and benefits to support this.

15. Most respondents did not, or were unable to, provide specific evidence of costs in response to these questions.
16. A number of respondents which currently rely on copyright exceptions to provide accessible copies stated that the primary cost related to the commercial availability provision arose from the administrative task of researching the commercial availability of each title. These respondents stated that the removal of the commercial availability provision would be a positive move, as this would save time and cost in trying to establish if a commercially available copy exists. It was also stated that it can be difficult, and sometimes impossible, to establish the commercial availability of accessible format copies in other countries.

17. Some respondents who rely on these exceptions stated that they would continue not to make accessible-format copies where such copies are commercially available, as it would not be cost-effective for them to do so. As such, these respondents believed that removing the commercial availability clause would not in practice have a negative impact on rightholders.
18. Some respondents, representing rightholders, were against the removal of commercial availability clauses, arguing that it would undercut investment in accessible-format content by publishers and disincentivise the creation of born-accessible content. They argued that this could lead to a reduction in the number of born-accessible books available on the market.
19. However, limited economic evidence of the costs and benefits of commercial availability provisions was provided in the responses.

Obligations on authorised entities

20. An “authorised entity” is a body which is permitted to make accessible format copies and supply them to beneficiaries of the Treaty. The Treaty and Directive require an “authorised entity” to establish and follow its own practices to ensure that it:
 - Distributes, communicates and makes available accessible format copies only to beneficiary persons or other authorised entities;
 - Takes appropriate steps to discourage the unauthorised reproduction, distribution, communication to the public and making available to the public of accessible format copies;
 - Demonstrates due care in, and maintains records of, its handling of works or other subject matter and of accessible format copies thereof; and
 - Publishes and updates, on its website if appropriate, or through other online or offline channels, information on how it complies with these obligations.
21. For consistency with the Directive, the Government proposed simply to transpose the obligations from the Directive directly into the CDPA. The consultation document asked the following questions:

Question 2.2.1: Do you agree or disagree with our approach? If so, please explain and provide evidence on the impact this would have on you as an organisation or as a beneficiary person.

Question 2.2.2: Do you think there are other alternatives to ensuring authorised entity obligations are compatible with the Directive? If so, please explain and provide details of your proposal.

22. Almost all of the respondents agreed with the Government’s proposed approach, stating that it would provide clarity. Most of the respondents agreed that there is no need for any alternative approach. Others stated that they did not have a view on this.

Acts to which the exception applies

23. The Government proposed to amend the permitted acts allowed by the disability exceptions in the CDPA so that they are consistent with the acts set out in the Directive.

Question 2.3.1: Do you agree or disagree with our approach? If so, please explain and provide evidence on the impact this would have on you as an organisation or as a beneficiary person.

24. Almost all the respondents agreed with the proposed approach. One respondent noted that publishers have specific concerns with the drafting of Article 3 1(b) of the Marrakesh Directive; in particular that the term 'lawful access' only appeared to relate to the making of copies, and not the ability to communicate, make available, distribute or lend.
25. We believe that 'lawful access' is intended to apply to making copies and the acts listed in Article 3 1(b) of the Directive – that is, communicating, making available, distributing and lending accessible format copies.

Sui Generis database rights

26. *Sui Generis* database rights are not covered by existing disability exceptions in UK law. The Directive requires that the exceptions which it provides apply to database rights as well as copyright. The Government proposed in its consultation paper, consistent with its overall approach, that any amendments to the database right should apply to accessible format copies made for any form of disability, and not only those expressly provided for by the Directive. Respondents were asked whether or not they agreed with this approach.
27. All the respondents agreed with the proposed approach. More than one respondent stated that in the digital age, those with disabilities will need to be able to access databases in the same way as printed materials.

Technological Protection Measures

28. Sometimes it is difficult to use exceptions because rightholders have applied technological measures to prevent their works being copied. Consistent with EU law, the CDPA provides a complaints mechanism allowing users to complain when technological measures prevent their use of works under certain exceptions.⁵ However, in line with Directive 2001/29/EC ("the Information Society Directive"), the CDPA does not apply this mechanism where works have been made available in such a manner that they can be accessed by the public at a time and place of their choosing.⁶

5 Section 296ZE of the Copyright, Designs and Patents Act 1988

6 Article 6 of 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

29. Under the Marrakesh Directive, however, Member States are required to apply such mechanisms to works which have been made available in such a manner. As such, in the consultation paper, the Government proposed to amend its existing complaints mechanism so that it is consistent with the Directive.
30. However, owing to the constraints of EU law in this area, the Government proposed to amend this provision only in relation to works and beneficiaries covered by the Marrakesh Directive, and not to other types of work or disability. This is because other works and disabilities would fall within the scope of the disability exception in the Information Society Directive, rather than the Marrakesh Directive, and so Member States are specifically prohibited from applying their complaints mechanism to such content.

Question 2.5.1: Do you agree or disagree with our approach? If so, please explain and provide evidence on the impact this would have on you as an organisation or as a beneficiary person.

Question 2.5.2: If changes are made to the complaints mechanism in Section 296ZE of the CDPA, should this be in relation to all forms of disability, or just for visual impairments and print disabilities?

31. Most of the respondents agreed with the proposed approach. Two respondents stated that the consultation paper does not explain why the UK would amend legislation regarding TPMs to be compliant with the Directive in respect of people with visual impairment but not other disability groups – whereas the amendments to other areas include all types of disabilities and all types of works.
32. Some respondents called for a review of the current complaints mechanism, citing it as slow and cumbersome. We bear in mind this suggestion; however, we ask respondents to note that this is outside the scope of the consultation exercise.

Compensation schemes

33. The Directive gives Member States the option to provide a compensation scheme for any harm caused to rightholders by the use of the exception by authorised entities. The UK does not currently provide for compensation; however, with the removal of the commercial availability clause, the Government set out to establish whether a compensation scheme would be warranted.
34. The consultation paper identified three potential policy choices for compensation:
 - No compensation scheme;
 - Compensation via collective licensing;
 - Compensation via direct payment.



No compensation scheme

Question 3.1.1: Will the changes to the UK disability exception, in particular the removal of the commercial availability provisions, result in lost sales? If so, how? Is it possible to estimate the economic impact this may have? Will any impacts be such as to justify payment of compensation to rightholders?

35. The respondents were divided in their views on compensation schemes. The majority of respondents agreed with the Government that any such scheme would need to be justified in light of robust evidence of economic harm to rightholders, and that consideration should be given to the costs of administering a compensation scheme. Some respondents stated that a compensation scheme would place unnecessary and undue burdens on them.
36. One respondent provided an estimated loss to one publisher of close to £13m in annual turnover if there were to be a 20% reduction in purchases, but no evidence was provided to suggest that this reduction in sales would take place. The same respondent stated that there would be a substantial knock-on effect on other stakeholders, such as retailers and authors, and supported the introduction of a compensation scheme given the potential loss to rightholders.

Compensation via collective licensing

Question 3.2.1: If the Government were to make provision for compensation, should it be delivered through collective licensing?

Question 3.2.2: What potential issues (if any) do you foresee with the use of collective licences to provide compensation to rightholders?

37. Most respondents stated that they would not support a compensation scheme, and reiterated that there was no adequate evidence to support the introduction of such a scheme. One respondent asked how this would work in practice. Only one respondent stated that would be open to a compensation scheme being delivered through collective licensing.
38. Most respondents raised a number of issues with this proposed approach. They noted that there would be administrative burdens in establishing, amongst other things, the level of harm; identifying and contacting the rightholder; and reporting all actions to the scheme licensor. They also said that the increased costs through the creation of such a scheme would have to be funded by the authorised entities. Generally, there was little support for such a compensation scheme.

Compensation via direct claims by rightholders

Question 3.3.1: If the Government were to make provision for compensation, should it be delivered in the manner described above?

Question 3.3.2: What potential issues (if any) do you foresee with the use of this approach to provide compensation to rightholders?

39. Some respondents stated that this approach would be fairer than running a compensation scheme via collective licensing, but they stressed the need to ensure proportionality in assessing the impact on publishers. One respondent asked if this option was merely a deterrent to authorised entities producing copies which are already commercially available.
40. Potential issues identified were how to establish proof of damage and harm incurred by the rightholder, and how to establish the level of compensation. One respondent stated that such an approach would create uncertainty for authorised entities, and so could result in a reduction in the availability of accessible-format content.


Other potential safeguards

Retention of the commercial availability clause for certain types of disability

Question 4.1.1: What would be the impact on you or your organisation of retaining a commercial availability clause in relation to accessible format copies made for types of disability not covered by the Directive?

Question 4.1.2: Is there evidence to justify retaining this provision in relation to accessible format copies made for types of disability, or in relation to types of work, not covered by the Directive?

41. Most respondents stated that the retention of the commercial availability clause for certain types of disability would not have an impact on their organisation.
42. Other respondents stated that this would result in administrative delays, increased costs and be harmful in cross-border work where it is difficult to ascertain if a work is commercially available in another country. One respondent stated that it would have a knock-on effect on the ability to serve disabled users equally and fairly.

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43. Most respondents stated that they were unaware of any evidence to justify the retention of the commercial availability clause. One respondent stated that the commercial availability clause should be retained either for all disabilities and types of work, or for none at all. Another respondent stated that retaining the commercial availability clause is important for other disabilities where progress is needed to improve the provision of accessible works in the UK. Another respondent wished to retain the commercial availability clause for audiovisual content only.

Other measures consistent with the Berne “Three Step Test”

Question 4.2.1: Is there scope to provide additional requirements on use of the disability exception which are consistent with the three step test? Would such an approach help to minimise potential harm to rightholders?

Question 4.2.2: Is there a risk that such an approach would result in greater legal uncertainty for authorised bodies?

44. Many respondents stated that additional requirements would be unnecessary as there already appear to be appropriate safeguards in place. Some of the risks identified were legal uncertainty for, and an atmosphere of risk aversion among, authorised entities.

Cross-border exchange of accessible format copies

45. The consultation paper stated that the CDPA is already compliant with the UK's obligations on cross-border exchange of accessible format copies. However, the Government may wish to expressly provide rules on this.

Question 5.1: What are your views on this proposed approach?

Question 5.2: Are there any areas in which the existing legislation creates a barrier to the exchange of accessible format copies? If so, what changes will be needed to overcome them?


46. Some respondents agreed with the proposed approach, while many respondents stated that no additional rules were needed, especially if the CDPA is already compliant with the Marrakesh Treaty and Directive. One respondent stated that should the Government provide additional rules, these would need to be consulted on. Other respondents stated that they would welcome guidance on this issue.

Government response

47. The Government welcomes the responses received and the overall support for the implementation of the Marrakesh Directive. In most areas, there was agreement from the respondents in support of the Government's proposed approach, including that amendments should be made in relation to all works and disabilities where possible.
48. In these areas, the Government intends to proceed as set out in its consultation paper, with one exception. This is in relation to the sui generis database right, where the Government has concluded that, on reflection, the Database Directive does not provide sufficient discretion for us to extend the new exception to those types of work and disability not covered by the Marrakesh Directive. In practice, though, we believe the impact of this will be minimal as most of these works are unlikely to fall within the definition of a "database" for the purpose of the Database Directive.

Compensation schemes

49. The main areas where there was a divergence of views related to the removal of the commercial availability restrictions, and the Government's policy options for compensation.
50. Regarding commercial availability, some respondents questioned whether or not the Directive does require deletion of the CDPA's current commercial availability restrictions. The Government maintains the position set out in its consultation paper that keeping such restrictions would be in breach of the Directive.
51. However, the Government recognised that removal of such restrictions may impact on rightholders, and so may justify compensation, which is permitted by the Directive. The consultation paper therefore asked respondents to provide economic evidence of the impact of removal of the commercial availability clauses. We stated in the consultation paper the importance of having clear evidence of harm to rightholders to justify the introduction of a compensation scheme.
52. Limited evidence has been provided in the responses to the consultation. Respondents representing users of disability exceptions noted that market availability of copies is a strong disincentive to making copies under the exception, given the costs involved in doing so, and as such they expect there will not be significant impact on commercial markets when commercial availability restrictions are removed.
53. Many respondents did, however, state that the introduction of a compensation scheme, whether through collective licensing or by direct claim by the rightholders, would place administrative burdens on authorised entities. Some respondents stated that they did not have the resources to handle such work.

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54. Rightholders' main concerns in this area appeared to relate to copies imported from or exported to other countries, as they generally have good working relationships with authorised entities based in the UK. However, the Directive precludes the UK from applying a compensation scheme to entities based in other countries. The Government understands that certain other English-speaking countries intend to accede to the Treaty without commercial availability provisions or compensation schemes. Copies made by entities in these countries would therefore be able to enter the UK without being subject to a compensation scheme.
55. The Government considers that there is insufficient evidence of harm to rightholders that would justify introduction of a compensation scheme. The Government also considers that it would not be fair to subject UK-based entities to such requirements when those based outside the UK are not subject to the same obligations, for the reasons outlined above.
56. It is also difficult to conceive of a scheme which would accurately determine the level of harm and subsequent level of compensation. While this could conceivably be easier to determine under the direct claim system, it would still lead to disputes as to the level of harm. This may create practical difficulties and cost with regards to any potential system we may introduce, and may raise questions around proportionality.
57. In light of the lack of robust evidence of harm to rightholders, and our desire for fair outcomes for authorised entities, we have chosen not to implement any form of compensation scheme. However, we commit to issuing guidance on this matter, ensuring that authorised entities are clear as to when it is appropriate to make an accessible copy, and who should be entitled to access them. We will also introduce a review clause, which will allow us to assess the impacts of this decision five years following implementation of the Directive, or sooner if evidence of economic harm and an associated need for compensation becomes apparent.
58. We note that it is important to ensure that the new arrangements do not undermine the possibility of investment in this sector, and commit to working with industry to understand the impact of changes in the market.
59. Although the Government does not intend to introduce a compensation scheme at this point, we note for the record ahead of any future review that the "direct compensation" approach would appear to be more feasible and was better supported by respondents than a collectively licensed approach.

Guidance

60. The Government thanks respondents for their requests for guidance on obligations on authorised entities and the cross-border exchange of accessible format copies. The Government will be issuing guidance, and will take the points raised into consideration.

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