

# **Public Consultation** **on the review of the EU copyright rules**

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# **I. Introduction**

## ***A. Context of the consultation***

Over the last two decades, digital technology and the Internet have reshaped the ways in which content is created, distributed, and accessed. New opportunities have materialised for those that create and produce content (e.g. a film, a novel, a song), for new and existing distribution platforms, for institutions such as libraries, for activities such as research and for citizens who now expect to be able to access content – for information, education or entertainment purposes – regardless of geographical borders.

This new environment also presents challenges. One of them is for the market to continue to adapt to new forms of distribution and use. Another one is for the legislator to ensure that the system of rights, limitations to rights and enforcement remains appropriate and is adapted to the new environment. This consultation focuses on the second of these challenges: ensuring that the EU copyright regulatory framework stays fit for purpose in the digital environment to support creation and innovation, tap the full potential of the Single Market, foster growth and investment in our economy and promote cultural diversity.

In its "Communication on Content in the Digital Single Market"<sup>1</sup> the Commission set out two parallel tracks of action: on the one hand, to complete its on-going effort to review and to modernise the EU copyright legislative framework<sup>23</sup> with a view to a decision in 2014 on whether to table legislative reform proposals, and on the other, to facilitate practical industry-led solutions through the stakeholder dialogue "Licences for Europe" on issues on which rapid progress was deemed necessary and possible.

The "Licences for Europe" process has been finalised now<sup>4</sup>. The Commission welcomes the practical solutions stakeholders have put forward in this context and will monitor their progress. Pledges have been made by stakeholders in all four Working Groups (cross border portability of services, user-generated content, audiovisual and film heritage and text and data mining). Taken together, the Commission expects these pledges to be a further step in making the user environment easier in many different situations. The Commission also takes note of the fact that two groups – user-generated content and text and data mining – did not reach consensus among participating stakeholders on either the problems to be addressed or on the results. The discussions and results of "Licences for Europe" will be also taken into account in the context of the review of the legislative framework.

As part of the review process, the Commission is now launching a public consultation on issues identified in the Communication on Content in the Digital Single Market, i.e.: *"territoriality in the Internal Market, harmonisation, limitations and exceptions to copyright in the digital age; fragmentation of the EU copyright market; and how to improve the effectiveness and efficiency of enforcement while underpinning its legitimacy in the wider context of copyright reform"*. As highlighted in the October 2013 European Council

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<sup>1</sup> COM (2012)789 final, 18/12/2012.

<sup>2</sup> As announced in the Intellectual Property Strategy ' A single market for Intellectual Property Rights: COM (2011)287 final, 24/05/2011.

<sup>3</sup> "Based on market studies and impact assessment and legal drafting work" as announced in the Communication (2012)789.

<sup>4</sup> See the document "Licences for Europe – ten pledges to bring more content online": [http://ec.europa.eu/internal\\_market/copyright/docs/licences-for-europe/131113\\_ten-pledges\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf).

Conclusions<sup>5</sup> *"Providing digital services and content across the single market requires the establishment of a copyright regime for the digital age. The Commission will therefore complete its on-going review of the EU copyright framework in spring 2014. It is important to modernise Europe's copyright regime and facilitate licensing, while ensuring a high level protection of intellectual property rights and taking into account cultural diversity"*.

This consultation builds on previous consultations and public hearings, in particular those on the "Green Paper on copyright in the knowledge economy"<sup>6</sup>, the "Green Paper on the online distribution of audiovisual works"<sup>7</sup> and "Content Online"<sup>8</sup>. These consultations provided valuable feedback from stakeholders on a number of questions, on issues as diverse as the territoriality of copyright and possible ways to overcome territoriality, exceptions related to the online dissemination of knowledge, and rightholders' remuneration, particularly in the audiovisual sector. Views were expressed by stakeholders representing all stages in the value chain, including right holders, distributors, consumers, and academics. The questions elicited widely diverging views on the best way to proceed. The "Green Paper on Copyright in the Knowledge Economy" was followed up by a Communication. The replies to the "Green Paper on the online distribution of audiovisual works" have fed into subsequent discussions on the Collective Rights Management Directive and into the current review process.

### ***B. How to submit replies to this questionnaire***

You are kindly asked to send your replies **by 5 February 2014** in a MS Word, PDF or OpenDocument format to the following e-mail address of DG Internal Market and Services: **markt-copyright-consultation@ec.europa.eu**. Please note that replies sent after that date will not be taken into account.

This consultation is addressed to different categories of stakeholders. To the extent possible, the questions indicate the category/ies of respondents most likely to be concerned by them (annotation in brackets, before the actual question). Respondents should nevertheless feel free to reply to any/all of the questions. Also, please note that, apart from the question concerning the identification of the respondent, none of the questions is obligatory. Replies containing answers only to part of the questions will be also accepted.

You are requested to provide your answers directly within this consultation document. For the "Yes/No/No opinion" questions please put the selected answer in **bold** and underline it so it is easy for us to see your selection.

In your answers to the questions, you are invited to refer to the situation in EU Member States. *You are also invited in particular to indicate, where relevant, what would be the impact of options you put forward in terms of costs, opportunities and revenues.*

The public consultation is available in English. Responses may, however, be sent in any of the 24 official languages of the EU.

### ***C. Confidentiality***

The contributions received in this round of consultation as well as a summary report presenting the responses in a statistical and aggregated form will be published on the website of DG MARKT.

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<sup>5</sup> EUCO 169/13, 24/25 October 2013.

<sup>6</sup> COM(2008) 466/3, [http://ec.europa.eu/internal\\_market/copyright/copyright-info/index\\_en.htm#maincontentSec2](http://ec.europa.eu/internal_market/copyright/copyright-info/index_en.htm#maincontentSec2).

<sup>7</sup> COM(2011) 427 final, [http://ec.europa.eu/internal\\_market/consultations/2011/audiovisual\\_en.htm](http://ec.europa.eu/internal_market/consultations/2011/audiovisual_en.htm).

<sup>8</sup> [http://ec.europa.eu/internal\\_market/consultations/2009/content\\_online\\_en.htm](http://ec.europa.eu/internal_market/consultations/2009/content_online_en.htm).

Please note that all contributions received will be published together with the identity of the contributor, unless the contributor objects to the publication of their personal data on the grounds that such publication would harm his or her legitimate interests. In this case, the contribution will be published in anonymous form upon the contributor's explicit request. Otherwise the contribution will not be published nor will its content be reflected in the summary report.

Please read our [Privacy statement](#).

**PLEASE IDENTIFY YOURSELF:**

**Name:**

**Hungarian Copyright Forum Association** (*Magyar Szerzői Jogi Forum Egyesület (MSzJF)*); professional association; Hungarian Group of the International Literary and Artistic Association (ALAI)

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In the interests of transparency, organisations (including, for example, NGOs, trade associations and commercial enterprises) are invited to provide the public with relevant information about themselves by registering in the Interest Representative Register and subscribing to its Code of Conduct.

- If you are a Registered organisation, please indicate your Register ID number below. Your contribution will then be considered as representing the views of your organisation.

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- If your organisation is not registered, you have the opportunity to [register now](#). Responses from organisations not registered will be published separately.

**If you would like to submit your reply on an anonymous basis please indicate it below by underlining the following answer:**

- **Yes, I would like to submit my reply on an anonymous basis**

**TYPE OF RESPONDENT** (Please underline the appropriate):

- End user/consumer** (e.g. internet user, reader, subscriber to music or audiovisual service, researcher, student) **OR Representative of end users/consumers**  
→ for the purposes of this questionnaire normally referred to in questions as "**end users/consumers**"
  
- Institutional user** (e.g. school, university, research centre, library, archive) **OR Representative of institutional users**  
→ for the purposes of this questionnaire normally referred to in questions as "**institutional users**"
  
- Author/Performer OR Representative of authors/performers**
  
- Publisher/Producer/Broadcaster OR Representative of publishers/producers/broadcasters**  
  
→ the two above categories are, for the purposes of this questionnaire, normally referred to in questions as "**right holders**"
  
- Intermediary/Distributor/Other service provider** (e.g. online music or audiovisual service, games platform, social media, search engine, ICT industry) **OR Representative of intermediaries/distributors/other service providers**  
→ for the purposes of this questionnaire normally referred to in questions as "**service providers**"
  
- Collective Management Organisation**
  
- Public authority**
  
- Member State**
  
- Other** (Please explain):

As mentioned above, *MSzJF* is the Hungarian national group of the International Literary and Artistic Association (ALAI). Its objectives correspond to those of ALAI: to follow national, EU-level and international developments in the field of copyright and related rights and to participate in the dialogue on how the protection and application of these rights should be adapted to new technological, social and business model developments. Our Association does not represent any specific interest groups; its membership includes

the representatives of different stakeholders (both owners of rights and users) and their organizations, as well as practicing lawyers and government officials.

## **II. Rights and the functioning of the Single Market**

### ***A. Why is it not possible to access many online content services from anywhere in Europe?***

#### **[The territorial scope of the rights involved in digital transmissions and the segmentation of the market through licensing agreements]**

Holders of copyright and related rights – e.g. writers, singers, musicians - do not enjoy a single protection in the EU. Instead, they are protected on the basis of a bundle of national rights in each Member State. Those rights have been largely harmonised by the existing EU Directives. However, differences remain and the geographical scope of the rights is limited to the territory of the Member State granting them. Copyright is thus territorial in the sense that rights are acquired and enforced on a country-by-country basis under national law<sup>9</sup>.

The dissemination of copyright-protected content on the Internet – e.g. by a music streaming service, or by an online e-book seller – therefore requires, in principle, an authorisation for each national territory in which the content is communicated to the public. Rightholders are, of course, in a position to grant a multi-territorial or pan-European licence, such that content services can be provided in several Member States and across borders. A number of steps have been taken at EU level to facilitate multi-territorial licences: the proposal for a Directive on Collective Rights Management<sup>10</sup> should significantly facilitate the delivery of multi-territorial licences in musical works for online services<sup>11</sup>; the structured stakeholder dialogue “Licences for Europe”<sup>12</sup> and market-led developments such as the on-going work in the Linked Content Coalition<sup>13</sup>.

"Licences for Europe" addressed in particular the specific issue of cross-border portability, i.e. the ability of consumers having subscribed to online services in their Member State to keep accessing them when travelling temporarily to other Member States. As a result, representatives of the audio-visual sector issued a joint statement affirming their commitment to continue working towards the further development of cross-border portability<sup>14</sup>.

Despite progress, there are continued problems with the cross-border provision of, and access to, services. These problems are most obvious to consumers wanting to access services that are made available in Member States other than the one in which they live. Not all online services are available in all Member States and consumers face problems when trying to access such services across borders. In some instances, even if the “same” service is available in all Member States, consumers cannot access the service across borders (they can

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<sup>9</sup> This principle has been confirmed by the Court of justice on several occasions.

<sup>10</sup> Proposal for a Directive of the European Parliament and of the Council of 11 July 2012 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, COM(2012) 372 final.

<sup>11</sup> Collective Management Organisations play a significant role in the management of online rights for musical works in contrast to the situation where online rights are licensed directly by right holders such as film or record producers or by newspaper or book publishers.

<sup>12</sup> You can find more information on the following website: <http://ec.europa.eu/licences-for-europe-dialogue/>.

<sup>13</sup> You can find more information on the following website: <http://www.linkedcontentcoalition.org/>.

<sup>14</sup> See the document “Licences for Europe – ten pledges to bring more content online”: [http://ec.europa.eu/internal\\_market/copyright/docs/licences-for-europe/131113\\_ten-pledges\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf).

only access their “national” service, and if they try to access the "same" service in another Member State they are redirected to the one designated for their country of residence).

This situation may in part stem from the territoriality of rights and difficulties associated with the clearing of rights in different territories. Contractual clauses in licensing agreements between right holders and distributors and/or between distributors and end users may also be at the origin of some of the problems (denial of access, redirection).

The main issue at stake here is, therefore, whether further measures (legislative or non-legislative, including market-led solutions) need to be taken at EU level in the medium term<sup>15</sup> to increase the cross-border availability of content services in the Single Market, while ensuring an adequate level of protection for right holders.

**1. [In particular if you are an end user/consumer:] Have you faced problems when trying to access online services in an EU Member State other than the one in which you live?**

YES - Please provide examples indicating the Member State, the sector and the type of content concerned (e.g. premium content such as certain films and TV series, audio-visual content in general, music, e-books, magazines, journals and newspapers, games, applications and other software)

.....  
.....

- NO
- NO OPINION

*See joint response at Question 7.*

**2. [In particular if you are a service provider:] Have you faced problems when seeking to provide online services across borders in the EU?**

YES - Please explain whether such problems, in your experience, are related to copyright or to other issues (e.g. business decisions relating to the cost of providing services across borders, compliance with other laws such as consumer protection)? Please provide examples indicating the Member State, the sector and the type of content concerned (e.g. premium content such as certain films and TV series, audio-visual content in general, music, e-books, magazines, journals and newspapers, games, applications and other software).

.....  
.....

- NO
- NO OPINION

*See joint response at Question 7.*

**3. [In particular if you are a right holder or a collective management organisation:] How often are you asked to grant multi-territorial licences? Please indicate, if possible, the number of requests per year and provide examples indicating the Member State, the sector and the type of content concerned.**

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<sup>15</sup> For possible long term measures such as the establishment of a European Copyright Code (establishing a single title) see section VII of this consultation document.



[Open question]

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*See joint response at Question 7.*

**4. If you have identified problems in the answers to any of the questions above – what would be the best way to tackle them?**

[Open question]

.....  
.....

*See joint response at Question 7.*

**5. [In particular if you are a right holder or a collective management organisation:] Are there reasons why, even in cases where you hold all the necessary rights for all the territories in question, you would still find it necessary or justified to impose territorial restrictions on a service provider (in order, for instance, to ensure that access to certain content is not possible in certain European countries)?**

YES – Please explain by giving examples

.....  
.....

NO

NO OPINION

*See joint response at Question 7.*

**6. [In particular if you are e.g. a broadcaster or a service provider:] Are there reasons why, even in cases where you have acquired all the necessary rights for all the territories in question, you would still find it necessary or justified to impose territorial restrictions on the service recipient (in order for instance, to redirect the consumer to a different website than the one he is trying to access)?**

YES – Please explain by giving examples

.....  
.....

NO

NO OPINION

*See joint response at Question 7.*

**7. Do you think that further measures (legislative or non-legislative, including market-led solutions) are needed at EU level to increase the cross-border availability of content services in the Single Market, while ensuring an adequate level of protection for right holders?**

YES – Please explain

.....  
.....

**X NO** – Please explain

Questions 1 to 6 are addressed to different specific groups of stakeholders. As mentioned above, our Association does not represent specifically any of them. At the same time, we are aware of the current situation regarding those aspects to which these questions seem to refer. On this basis, we give a negative response to Question 7 (and this is a direct or indirect response also to Questions 1 to 6) for the following reasons:

1. The territoriality of copyright and related rights – which must be maintained – is not a real obstacle to online use of works and objects of related rights.
2. The present level of harmonization of copyright and related rights and the scope of exceptions to and limitations of those rights is satisfactory.
3. During the preparation of the Directive on collective management, serious doubts emerged similar to those which were identified in the Resolution of the European Parliament adopted on March 13, 2007 (P6\_TA/2007/0064) on the 2005 Recommendation on trans-border online licensing (2005/327/EC). Namely, that the measures foreseen in the draft directive may undermine cultural diversity (as a result of constraining the collective management organizations (hereinafter: CMOs) of smaller Member States with smaller cultural markets to “compete” with much stronger CMOs of bigger and richer Member States and, at the same time, limiting their potential to compete. It would be advisable to consolidate the situation in this respect and not to take similar steps for a while until the cultural, social and economic consequences of this interference into the cultural policy of the Member States will have been seen and evaluated.
4. The way copyright and related rights are protected, applied and enforced is an important element of cultural policy of the Member States (cultural policy in respect of which – as provided in Article 6(c) of the TFEU – the EU bodies do not have either exclusive nor shared competence but only the possibility of supporting, coordinating and supplementing activities). The maintenance of this sanctuary of the Member States’ sovereignty is an indispensable guarantee of the protection of cultural diversity. Cultural diversity is both a specific definitional criterion of Europe and a great advantage in the international cultural markets. Therefore, in this field, special caution is needed with any attempts at even higher level trans-border harmonization of the protection and exercise of copyright and related right. While in other fields, such centralizing efforts may really produce “more Europe,” in this respect, such efforts may inevitably lead to “less Europe”, less rich in cultural expressions, productions and services.
5. If certain foreign online services are not available in such a country as Hungary with a small language market, it is not due to the territoriality of copyright and related rights, to the status of EU harmonization, and to the current level of copyright and related rights protection. It is rather due to the business strategy of the providers of such services. They tend not to care for such smaller markets. The adaptation of their systems to the differing language environment and the establishment of organizational machinery for such markets are not attractive to them as a matter of sheer cost/benefit analysis. In our view, it would not be a right reaction to this selective business policy of the providers of online services to fulfil any of their demands made with the objective of maximizing their profit with as big ease as possible. It would not be reasonable to give up our principles laid down in the TFEU about subsidiarity, proportionality and the cultural sovereignty of Member States for the sake of their easier profit or for some abstract constraint to make everything uniform. Instead of this, the competent EU bodies would have to ensure that, if such providers of cultural services intend to exploit their repertoire in the EU, they should only be able to do so if they do not

discriminate the smaller cultural markets; if they offer the same services in different languages for all the Member States under reasonable terms.

Of course, we are aware that some of these providers of online services have obtained strong dominant market and political position. They tend to use this position ever more frequently to constrain governments to give in to their demands or give up any kind of modernization of the relevant norms as a result of which the providers of online services might reduce their profit margin. Thus, if the EU prescribed equal service for all Member States as a condition of access to the EU cultural market, they might do apply their ever more fashionable “negotiation tool”: a menace that they would suspend their services in Europe. However, if they were faced with the solidarity of the EU Member States duly supported by the competent EU bodies, they might give up such aggressive blackmailing tactics. They would hardly consider seriously losing the entire big EU market.

NO OPINION

***B. Is there a need for more clarity as regards the scope of what needs to be authorised (or not) in digital transmissions?***

***[The definition of the rights involved in digital transmissions]***

The EU framework for the protection of copyright and related rights in the digital environment is largely established by Directive 2001/29/EC<sup>16</sup> on the harmonisation of certain aspects of copyright and related rights in the information society. Other EU directives in this field that are relevant in the online environment are those relating to the protection of software<sup>17</sup> and databases<sup>18</sup>.

Directive 2001/29/EC harmonises the rights of authors and neighbouring rightholders<sup>19</sup> which are essential for the transmission of digital copies of works (e.g. an e-book) and other protected subject matter (e.g. a record in a MP3 format) over the internet or similar digital networks.

The most relevant rights for digital transmissions are the reproduction right, i.e. the right to authorise or prohibit the making of copies<sup>20</sup>, (notably relevant at the start of the transmission – e.g. the uploading of a digital copy of a work to a server in view of making it available – and at the users’ end – e.g. when a user downloads a digital copy of a work) and the communication to the public/making available right, i.e. the rights to authorise or prohibit the dissemination of the works in digital networks<sup>21</sup>. These rights are intrinsically linked in digital transmissions and both need to be cleared.

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<sup>16</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

<sup>17</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.

<sup>18</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

<sup>19</sup> Film and record producers, performers and broadcasters are holders of so-called “neighbouring rights” in, respectively, their films, records, performances and broadcast. Authors’ content protected by copyright is referred to as a “work” or “works”, while content protected by neighbouring rights is referred to as “other subject matter”.

<sup>20</sup> The right to “authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part” (see Art. 2 of Directive 2001/29/EC) although temporary acts of reproduction of a transient or incidental nature are, under certain conditions, excluded (see art. 5(1) of Directive 2001/29/EC).

<sup>21</sup> The right to authorise or prohibit any communication to the public by wire or wireless means and to authorise or prohibit the making available to the public “on demand” (see Art. 3 of Directive 2001/29/EC).

## 1. The act of “making available”

Directive 2001/29/EC specifies neither what is covered by the making available right (e.g. the upload, the accessibility by the public, the actual reception by the public) nor where the act of “making available” takes place. This does not raise questions if the act is limited to a single territory. Questions arise however when the transmission covers several territories and rights need to be cleared (does the act of "making available" happen 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 effectively accessed?). The most recent case law of the Court of Justice of the European Union (CJEU) suggests that a relevant criterion is the “targeting” of a certain Member State's public<sup>22</sup>. According to this approach the copyright-relevant act (which has to be licensed) occurs at least in those countries which are “targeted” by the online service provider. A service provider “targets” a group of customers residing in a specific country when it directs its activity to that group, e.g. via advertisement, promotions, a language or a currency specifically targeted at that group.

8. *Is the scope of the “making available” right in cross-border situations – i.e. when content is disseminated across borders – sufficiently clear?*

### X YES

In the field of copyright, the principle of *lex loci protectionis* prevails. It is laid down in the second sentence of Article 5(1) of the Convention (to be applied by reference also under the TRIPS Agreement (see Article 9.1) and the WCT (see Article 1(4)): “the extent of protection, as well as the means of redress afforded to the author to protect his rights, shall be governed exclusively by the laws of the country *where protection is claimed*” (emphasis added).

As Professor A. Lucas has pointed out in his seminal study prepared for WIPO on private international law aspects of copyright, the dominant (and, in our view, correct) interpretation of the expression “the laws of the country where protection is claimed” is that it means “the laws of the country *for which protection is claimed*.” (André Lucas: “Private International Law Aspects of the Protection of Works and of the Subject Matter of Related Rights Transmitted through Digital Networks”, WIPO document WIPO/PIL/01/1. Prov., in particular, paragraphs 6 and 31.) In view of this, the decisive question concerning the applicable law is where the act covered by a right of authors or owners of related rights takes place. In the case of infringements, this basically means *lex loci delicti commissi* with the possibility of applying certain other supplementary collision principles. In Hungary, there is consensus that the relevant provision of the Hungarian Law-Decree 13 of 1979 on private international law (Article 19) – “Concerning authors’ rights, the law of that country shall apply in the territory of which protection is claimed” – should also be interpreted in this way.

This means that, under the WCT, in general, the law of that country would be applicable in which the act of making available takes place. Under Article 8 of the WCT, Articles 10 and 14 of the WPPT and Article 3(1) and (2) of the Information Society Directive the act involved is “making *available* to the public of [works and subject matter of related rights] in such a way that member of the public *may access them* from a place and at a time individually chosen by them” (emphasis added). On the basis of this language, the act of “making available” takes place as soon as a work or an object of related rights is uploaded and becomes *accessible* for interactive online uses.

<sup>22</sup> See in particular Case C-173/11 (Football Dataco vs Sportradar) and Case C-5/11 (Donner) for copyright and related rights, and Case C-324/09 (L’Oréal vs eBay) for trademarks. With regard to jurisdiction see also joined Cases C-585/08 and C-144/09 (Pammer and Hotel Alpenhof) and pending Case C-441/13 (Pez Hejduk); see however, adopting a different approach, Case C-170/12 (Pinckney vs KDG Mediatech).

By this, of course, the issue is not completely settled yet, since different options are available to determine the place of making available of protected material. It is also necessary to take into account the realities created by the galloping development of digital online technology and business methods (now also those which are related to cloud technology). Furthermore, there is also need to consider certain alternatives in view of the fact that protected contents may be – and, unfortunately, frequently are – made available from places where there is no adequate copyright protection. The criteria of Article 1(2) of the Satellites and Cable Directive may hardly be applied here directly. However, the underlining principle – following from the private international law context – that the most relevant and workable collision criteria related to the act in question should be applied is relevant here too (possible candidates: the top-level domain name used by the “content provider”, the country of registration or headquarters or place of real business activity, etc., of the “content provider”). Supplementary criteria would also be needed where the criteria linked to EU Member States could not be applied (because all possible relevant places would be outside the Union). This would be an appropriate issue for EU harmonization, and the provisions and “preparatory work” of the Satellites and Cable Directive clearly show that this is hardly a matter just for the CJEU. The possible regulation of these issues would require the participation and decision of the EU bodies that are responsible for law making in the EU (taking into account the views and legitimate interests of all the interested stakeholders – which is not sufficiently possible in the much closed and less transparent procedures of the CJEU).

The application of the law that has the closest relationship with the (source of the) acts of making available would allow exercising the right of making available – and enforcing it against possible infringers – for the entire activity and its impact (such as non-authorized downloading in, and streaming to, another country). It is where violation of rights may be prevented or eliminated with the greatest chance with all EU effect. The law of the countries where the acts of unauthorized making available cause damages may also be chosen, but in that case the court of any of those countries may only rule on the issue of damages having emerged in the given country.

The preliminary ruling of the CJEU in the *Pinkney* case (Case 170/12) has interpreted Article 5(3) of the Brussels I Regulation in the same way. The Court found that the expression ‘place where the harmful event occurred or may occur’ in Article 5(3) of the Brussels I Regulation covers both the place where the damage occurs (such as the damage caused by unauthorized downloading) and the place of the event giving rise to it (in this case the place of the act of making available to the public), so that a defendant may be sued, at the option of the plaintiff, in the courts for either of those places. However, it pointed out as follows:

“[T]he answer to the questions referred is that Article 5(3) of the Regulation must be interpreted as meaning that, in the event of alleged infringement of copyrights protected by the Member State of the court seised, the latter has jurisdiction to hear an action to establish liability brought by the author of a work against a company established in another Member State and which has, in the latter State, reproduced that work on a material support which is subsequently sold by companies established in a third Member State through an internet site also accessible with the jurisdiction of the court seised. That court has jurisdiction only to determine the damage caused in the Member State within which it is situated.”

NO – Please explain how this could be clarified and what type of clarification would be required (e.g. as in "targeting" approach explained above, as in "country of origin" approach<sup>23</sup>)

NO OPINION

**9.** *[In particular if you are a right holder:] Could a clarification of the territorial scope of the “making available” right have an effect on the recognition of your rights (e.g. whether you are considered to be an author or not, whether you are considered to have transferred your rights or not), on your remuneration, or on the enforcement of rights (including the availability of injunctive relief<sup>24</sup>)?*

**X YES** – Please explain how such potential effects could be addressed

With respect to the issues involved, and the way they may have to be addressed, see our response to Question 8 above.

NO

NO OPINION

## **2. Two rights involved in a single act of exploitation**

Each act of transmission in digital networks entails (in the current state of technology and law) several reproductions. This means that there are two rights that apply to digital transmissions: the reproduction right and the making available right. This may complicate the licensing of works for online use notably when the two rights are held by different persons/entities.

**10.** *[In particular if you a service provider or a right holder:] Does the application of two rights to a single act of economic exploitation in the online environment (e.g. a download) create problems for you?*

YES – Please explain what type of measures would be needed in order to address such problems (e.g. facilitation of joint licences when the rights are in different hands, legislation to achieve the "bundling of rights")

**X NO**

We do not believe that EU legislation would be necessary to achieve the “bundling of rights”. The practice of European and other CMOs shows that any possible problem may be solved through joint licenses even if where communication rights and copy-related rights (“mechanical rights”) are managed by different CMOs (but, in fact, in many Member States, they are managed by the same CMOs).

NO OPINION

<sup>23</sup> The objective of implementing a “country of origin” approach is to localise the copyright relevant act that must be licenced in a single Member State (the "country of origin", which could be for example the Member State in which the content is uploaded or where the service provider is established), regardless of in how many Member States the work can be accessed or received. Such an approach has already been introduced at EU level with regard to broadcasting by satellite (see Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission).

<sup>24</sup> Injunctive relief is a temporary or permanent remedy allowing the right holder to stop or prevent an infringement of his/her right.



### 3. Linking and browsing

Hyperlinks are references to data that lead a user from one location in the Internet to another. They are indispensable for the functioning of the Internet as a network. Several cases are pending before the CJEU<sup>25</sup> in which the question has been raised whether the provision of a clickable link constitutes an act of communication to the public/making available to the public subject to the authorisation of the rightholder.

A user browsing the internet (e.g. viewing a web-page) regularly creates temporary copies of works and other subject-matter protected under copyright on the screen and in the 'cache' memory of his computer. A question has been referred to the CJEU<sup>26</sup> as to whether such copies are always covered by the mandatory exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC.

**11. *Should the provision of a hyperlink leading to a work or other subject matter protected under copyright, either in general or under specific circumstances, be subject to the authorisation of the rightholder?***

**X YES** – Please explain whether you consider this to be the case in general, or under specific circumstances, and why:

In general, the provision of a hyperlink makes a work or other protected material available to the public to access it at a time and place individually chosen by them. Accordingly, it is an act of making available on demand to be subjected to the authorisation by the owners of rights. Hyperlinks are essential tools for online content delivery and thus the exploitation of works.

Despite the fact that making available on demand is subject to an exclusive right, consumers should be able to participate in online activities which involve providing hyperlinks in a manner that does not infringe copyright. Accordingly, simple systems are needed whereby consumers receive authorisation for doing this and the owners of rights receive remuneration for the use made of their works in this manner. There are licensing mechanisms available to enable lawful users' access. This is one more reason for which there is no justification to exempt the act of hyperlinking to a work or other protected subject matter from the requirement of authorisation by the owners of rights. This view was held, for example, by the District Court of The Hague when it ruled in the case initiated by *Buma/Stemra* against the operator of radio streaming websites *Nederland.fm* and *Op.fm*. The Court has found that the websites embedding of or linking to radio-streams without licence infringe copyright (see decision No. 40 7402/HA ZA 11-2675 of December 19, 2012).

Not all linking should necessarily be made subject to authorisation. In this respect, we refer to the “Executive Summary” of the “Report and opinion on the making available and communication to the public in the internet environment – focus on linking techniques on the Internet” adopted by the Executive Committee of ALAI on September 16, 2014 ([www.alai.org/en/assets/files/resolutions/making-availbale-right-report-opinion.pdf](http://www.alai.org/en/assets/files/resolutions/making-availbale-right-report-opinion.pdf)):

<sup>25</sup> Cases C-466/12 (Svensson), C-348/13 (Bestwater International) and C-279/13 (C More entertainment).

<sup>26</sup> Case C-360/13 (Public Relations Consultants Association Ltd). See also [http://www.supremecourt.gov.uk/decided-cases/docs/UKSC\\_2011\\_0202\\_PressSummary.pdf](http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0202_PressSummary.pdf).

(i) The making available right covers links that enable members of the public to access specific protected material; (ii) the making available right does not cover links that merely *refer* to a source from which a work may subsequently be accessed.

It is irrelevant whether the link takes the user to specific content on a third-party website, or whether the linking site retains a frame around the content, so that the user is not aware that she is accessing the content from a third-party website. It is also irrelevant to the act of offering access whether the work made available through the link is itself infringing: it is the *act* of offering that triggers the making available right, and that act is the same whatever the copyright status of the work that is made available.

There is obviously no *infringement* of the “making available” right where the rightholder's decision whether and under which conditions the targeted content is made available on the internet is respected. In contrast, this means in particular that linking to targeted content infringes the “making available” right if (i) the content is initially made available without the rightholder’s consent, or (ii) technical protection measures have been circumvented or (iii) the availability of the content, even if initially disclosed over the Internet with consent, otherwise clashes with the declared or clearly implied will of the rightholder.

Accordingly, courts should not introduce a *general presumption* of the rightholder’s consent to *further communication* to the public of what initially has been posted on the Internet with the rightholder’s consent, since this would amount to introducing an exception or limitation to the right, while general exceptions to the scope of the “making available” right require legislative action. This finding does not exclude that a court may be inclined to infer such consent to permit the link based on the individual circumstances of a case.

The preliminary ruling of the CJEU in the *Swensson* case (C-466/12) still needs thorough analysis. It seems, however, that although it partly corresponds to the findings of the ALAI opinion it also contradicts it. The ruling differs from the ALAI opinion in an important aspect and it seems that, exactly due to that difference, it is in conflict with EU law and also with EU's international obligations. In fact, the Court has modified the EU law, and since such legislative acts are not in its competence, the validity of the preliminary ruling is questionable.

The important difference is the introduction by the Court of the “new public” requirement as a *sine-qua-non* criterion of the application of the right of on demand making available within the broader scope of the right of communication to the public provided in Article 8 of the WCT and Article 3(1) of the Information Society Directive.

The “public” to which communication is made means always all potential members of the public. The actual impact of a communication depends on how many members of the public make use of the availability of a work through the communication. According to the Court’s theory, when a work is communicated and is thus currently available, it cannot be communicated again since the same broad public is targeted irrespective of how many members of the public receive actually the communication. Therefore, by definition, there is no new public and thus the Court believes that there cannot be a new act of communication to the public.



This theory is in conflict with the international norms and the EU law. There is no such kind of exhaustion of the right of communication to the public and there is no provision in the international treaties and/or the Information Society Directive according to which the right of communication to the public would not be applicable in the case of a work currently communicated to the public through simultaneous acts of communication.

A simple reading of the provisions of the Berne Convention reveals it in a crystal-clear manner why the Court's new theory contradicts those provisions. Under Article 11*bis*(1)(ii) of the Berne Convention, although a broadcast work is by definition communicated to the public, it is an exclusive right to authorize the (simultaneous) rebroadcasting or retransmission by cable of the works thus communicated to the public. It is no condition that the broadcast works are rebroadcast or retransmitted by cable to a "new public;" the only condition is that such further exploitation of broadcast works (= works communicated to the public) is made by others than the original organizations. Article 11*bis*(1)(iii) on simultaneous public communication of broadcast works (that is, works just being communicated to the public) by loudspeakers, etc. similarly rebuts the Court's "new public" theory.

In the concrete case, the hyperlinks were included in the system of a hyperlink-farm news aggregator to articles published on the website of a newspaper. Since on the newspaper's website, the articles were not protected by technological measures, they were freely available to the visitors of that website. As a result of the hyperlinks on the news aggregator's website, the articles were made available in an easier, more intensive manner and to a broader scope of members of the public as a commercial activity of the website (activity which would have been meaningless without the availability of such articles). The journalists who initiated the lawsuit demanded remuneration from the news aggregator for this kind of exploitation of their works going beyond what would have just followed from the making the works available to those members of the public who visited the newspaper's website.

The CJEU erred when it based its ruling on the "new public" theory. As discussed above, such a theory does not stand a serious scrutiny on the basis of the international and EU norms. The principle of exhaustion of rights is not applicable in the case of such communication rights. Therefore, the court ruling, according to which the exploitation of articles made available on a newspaper website by offering hyperlinks to them is free may only be understood as an exception to the right of communication to the public (more precisely to the right of on demand making available to the public as a "sub-right" of the right of communication to the public). However, even this kind of "spin-doctoring" of the ruling does not make it acceptable from the viewpoint of EU law for two serious reasons. First, Article 5 of the Information Society Directive offers an exhaustive list of exceptions to the rights provided in the Directive (including the broad right of communication to the public under Article 3(2)) and an exception corresponding to the CJEU's ruling does not appear in the list. Secondly, and most importantly, the competence of the CJEU does not extend to legislative acts of amending EU Directives.

The Court has characterized its ruling as an interpretation of the right of communication to the public which, thus, according to it, would be obligatory for all Member States. If the Court's ruling were valid, Member States would not be allowed even to provide compensation for such new forms of exploitation of works by hyperlink-farm aggregators. Under the international treaties and the EU law, through such linking, a new act of communication to the public takes place and, thus, as discussed above, the ruling could only be understood as providing for an exception. The Court not only has entered the field of legislative activity,

which is not in its competence, but by declaring the new exception obligatory, it has also contradicted the spirit and letters of Article 5 of the Information Directive which – fortunately and rightly – (with the exception of what is provided in Article 5(1)) has made the application of the exceptions and limitations optional maintaining a relative freedom of Member States.

The question is whether or not it would be justified to adopt such an exception to the right of communication (online making available) to the public by those EU bodies – the Parliament and the Council – which, contrary to the Court, truly have competence for legislative amendments. We are of the view that this would not be justified. The journalists of the newspapers whose articles have been exploited by the hyperlink aggregator by making them available in a much easier, more intensive manner and for a broader scope of members of the public had fully justified legal (and moral) basis to demand remuneration for such extended use of their works (producing income for the news aggregator without any investment into the creation and production of the relevant works and without any proportional compensation for the exploitation thereof).

- NO – Please explain whether you consider this to be the case in general, or under specific circumstances, and why (e.g. because it does not amount to an act of communication to the public – or to a new public, or because it should be covered by a copyright exception)
  
- NO OPINION

**12. Should the viewing of a web-page where this implies the temporary reproduction of a work or other subject matter protected under copyright on the screen and in the cache memory of the user’s computer, either in general or under specific circumstances, be subject to the authorisation of the rightholder?**

- YES – Please explain whether you consider this to be the case in general, or under specific circumstances, and why  
.....  
.....
- NO – Please explain whether you consider this to be the case in general, or under specific circumstances, and why (e.g. because it is or should be covered by a copyright exception)  
.....  
.....
- NO OPINION

We have to give a **fourth kind of response** because we cannot respond by “Yes” or by “No” but we still do have opinion concerning these issues. The reason is that the question does not seem to be sufficiently clear and it relates to two different things.

The question of temporary reproduction – not just necessarily on the screen but in a computer memory as a result of which something may become visible on the screen – have been regulated in Article 5(1) of the Information Society Directive and under that provision it depends on a number of criteria whether a “Yes” or “No” answer would be justified.

More or less the same may be said about copies in respect of the issue of cash memory. This issue, at least from the viewpoint of service providers, has been regulated in Article 12 of the Electronic Commerce Directive which provides various criteria on which a “Yes” or “No” response might be given.

#### 4. Download to own digital content

Digital content is increasingly being bought via digital transmission (e.g. download to own). Questions arise as to the possibility for users to dispose of the files they buy in this manner (e.g. by selling them or by giving them as a gift). The principle of EU exhaustion of the distribution right applies in the case of the distribution of physical copies (e.g. when a tangible article such as a CD or a book, etc. is sold, the right holder cannot prevent the further distribution of that tangible article)<sup>27</sup>. The issue that arises here is whether this principle can also be applied in the case of an act of transmission equivalent in its effect to distribution (i.e. where the buyer acquires the property of the copy)<sup>28</sup>. This raises difficult questions, notably relating to the practical application of such an approach (how to avoid re-sellers keeping and using a copy of a work after they have “re-sold” it – this is often referred to as the “forward and delete” question) as well as to the economic implications of the creation of a second-hand market of copies of perfect quality that never deteriorate (in contrast to the second-hand market for physical goods).

**13.** *[In particular if you are an end user/consumer:] Have you faced restrictions when trying to resell digital files that you have purchased (e.g. mp3 file, e-book)?*

YES – Please explain by giving examples

.....  
.....

**X NO**

**Our opinion is presented in response to Question 14.**

NO OPINION

**14.** *[In particular if you are a right holder or a service provider:] What would be the consequences of providing a legal framework enabling the resale of previously purchased digital content? Please specify per market (type of content) concerned.*

[Open question]

We do agree with the analysis of the Questionnaire in that the principle of EU exhaustion of the distribution right only applies in case of distribution of physical copies (when a tangible article such as a CD or a book, etc. is sold, the right holder cannot prevent the further distribution of that tangible article). This follows unequivocally from the Information Society Directive, in particular from its Recital (29):

*“The question of exhaustion does not arise in the case of services and on-line services in particular. This also applies with regard to a material copy of a work or other subject-matter made by a user of such a service with the consent of the rightholder. Therefore, the same applies to rental and lending of the original and copies of works or other subject-matter which are services by nature. Unlike CD-ROM or CD-I, where the*

<sup>27</sup> See also recital 28 of Directive 2001/29/EC.

<sup>28</sup> In Case C-128/11 (Oracle vs. UsedSoft) the CJEU ruled that an author cannot oppose the resale of a second-hand licence that allows downloading his computer program from his website and using it for an unlimited period of time. The exclusive right of distribution of a copy of a computer program covered by such a licence is exhausted on its first sale. While it is thus admitted that the distribution right may be subject to exhaustion in case of computer programs offered for download with the right holder’s consent, the Court was careful to emphasise that it reached this decision based on the Computer Programs Directive. It was stressed that this exhaustion rule constituted a *lex specialis* in relation to the Information Society Directive (UsedSoft, par. 51, 56).

intellectual property is incorporated in a material medium, namely an item of goods, every on-line service is in fact an act which should be subject to authorisation where the copyright or related right so provides.” (Emphasis added.)

One of the main objectives of the Information Society was the implementation of the WCT and the WPPT. The limitation of the exhaustion of rights to the sale or other transfer of ownership of *tangible* copies was – and still is – indispensable in order to be in accordance with the minimum obligations under the Treaties. Article 6(2) of the WCT and Articles 8(2) and 12(2) of the WPPT only allow exhaustion of the right of distribution as provided in Article 6(1) of the WCT and Articles 8(1) and 12(1) of the WPPT as interpreted by the agreed statements concerning those articles.

The agreed statements limit the application of the right of distribution “exclusively to fixed copies that can be put into circulation as *tangible* copies.” It is possible – under the “umbrella solution” – to characterize making available to the public of works and other protected materials for downloading intangible digital copies as “distribution” of copies. This is, however, still an act covered by the obligation to grant an exclusive right of (interactive) making available to the public, and it also implies (by downloading of digital intangible copies in electronic memories) the right of reproduction. The two Treaties do not allow exhaustion of these rights, and the limitation of these right by exhaustion cannot be introduced by changing the legal characterization of the acts which, under the Treaties, are covered by the non-exhaustible rights of making available and reproduction (see the “principle of *relative* freedom of legal characterization of acts and rights” in the WIPO Glossary on the Copyright and Related Rights Terms”, WIPO publication N° 891 (E), 2003, p.).

“Online exhaustion”, as mentioned above in the Questionnaire, would be supposed to take place in a way that the original copy “resold” would disappear from the electronic memory of the “seller” and only the copy of the new owner would remain in the latter’s electronic memory. This inevitably leads to the creation of a new copy in the electronic memory of the “buyer” – and also an intermediary copy (not covered by Article 5(1) of the Information Society Directive) in the system of the “online second-hand shop.” The making of such copies is covered by the exclusive right of reproduction; a right in the case of which the international norms and the EU directives do not allow the application of the principle of exhaustion of rights.

The Questionnaire – rightly enough – refers to “difficult questions, notably relating to the practical application of such an approach (how to avoid re-sellers keeping and using a copy of a work after they have ‘re-sold’ it.” This would be a decisive problem even if the principle of exhaustion of rights were applicable (but it is not) under the international treaties and the *acquis* in the cases described in the Questionnaire. There would be no real guarantee that an original owner of a copy would not make a “back-up” copy in an external storage device before, or in parallel with, the transmission for the creation of a new copy. This fundamental problem could hardly be shrugged off with cynical remarks (i) that, since this would not be allowed under the copyright law, if somebody (or even everybody) still made another copy in this way it would be an infringement of copyright; (ii) that, since under the concept of an online resale system this, in principle, would be prohibited, if the customers still committed such infringements, it would be alien to the concept of the system; and (iii) that, therefore, the owners of rights simply might do the same as in case of any other infringements; they might try to make use of the available enforcement measures.

It may occur to someone that the making of new copies on the basis of (in principle, instead of, but due to the unresolvable “difficult questions” mentioned above, practically in addition to) an existing copy through online transmission might be a special case in which an

exception to the right of reproduction might be applied. In fact, the *ReDigi* company had tried to make use of this idea in a dispute ruled on by the District Court of the Southern District of New York (decision No. 12-009/2012 of March 30, 2013). *ReDigi* claimed that the online “transfer” (in fact, copying) of used sound recordings through its system would be allowed not only on the basis of the first sale doctrine (a claim rejected by the Court for the obvious reason that there is no exhaustion in respect of the right of reproduction) but also under the fair use doctrine. The Court considered the four factors to be taken into account for any fair use defense as codified in section 107 of the US Copyright Court, and found that the given use did not correspond to any of those factors.

The Court has pointed out that allowing free subsequent copying by the costumers of these kinds of “online secondary markets” would undermine the chance for normal exploitation of the works and other protected materials concerned. Thus, any possible free use for such purposes would be in conflict also with the three-step test under Article 5(5) of the Information Society Directives (and under the relevant provisions of the international treaties).

The Court has described in a persuasive manner the decisive differences between traditional secondary markets of tangible used copies and subsequent online copying of intangible copies. The fact mentioned by the Questionnaire above – namely that perfect qualities of intangible copies never deteriorate irrespective of the number of subsequent recopying (in contrast with what takes place in the second-hand market for physical goods) – is only one of the reasons for which allowing such activity would create conflicts with a normal exploitation of works and would unreasonably prejudice the legitimate interest of the owners of rights.

The other – and much weightier – reason for which such conflict and prejudice would emerge is the combination of the perfect quality of subsequent copies with the extremely increased ease and speed with which the “used” copies could be transferred to others. This kind of transfer of copies would take place after full consumptive use (reading a book, watching a movie, etc.) and would create unfair competition for the owners of rights. The owners of right are constrained to apply prices that may guarantee recouping their creative and financial investments with a modest profit margin necessary for sustainable creation and production. The second-hand “online shops” could offer the same perfect copies at a much lower – and foreseeably, due to the subsequent “resales”, ever lower – prices.

This would not be like reading a book, then deciding to resell it to a second-hand bookshop, with the result that the book then might spend there a shorter or longer time before somebody else may by it. In the case of an on-line “second-hand bookshop”, as soon as an original buyer of an e-book has read the last sentence of a thriller, within a couple of minutes, somebody else could begin reading it at a lower price (and then a third, a tenth, a hundredth one). This could take place within a fraction of time in comparison with the slow speed of changing ownership in traditional second-hand markets which has been taken as a model for the doctrine of exhaustion of rights. Its *impact for the economic rights of the owners of rights* would be like a practice where the viewers of a new film would be allowed to resell their entry tickets when they come out from the cinema; the buyers of the cheaper “resold” tickets would not be obligated to buy tickets from the cinema operator, and at the end of the projection of the film, they could also sell the second-hand tickets possibly at an even lower price to the viewers of still another presentation of the film.

The Questionnaire also refers to possible differing impact of “online exhaustion” depending on the “types of content.” It is true that the ways of use of different categories of works and other protected materials – in particular from the viewpoint of the way of their “consumption” – do differ. The impact would not be the same in the case of a computer program as in the

case of a movie or an e-book. Nevertheless, the same provisions of the international treaties and the Information Society Directive apply to all categories. Fortunately, the *UsedSoft* ruling of the CJEU is restricted to computers programs (and thus it is not applicable for other categories, including data bases and video games which are operated by computer programs but they are much more and different than just programs). As the Questionnaire stresses, the *UsedSoft* ruling is based on certain findings that, in respect of the issues of online exhaustion, the Computer Programs Directive includes *lex specialis* rules in comparison with the relevant provisions of the Information Society Directive. It seems, however, that there may be well-founded doubts as to whether the alleged *lex specialis* elements truly exist. For the reasons of these doubts and concerning the issues discussed above, we refer to Mihály Ficsor’s study “Current issues of exhaustion of rights (Kirtsaeng & Quality King, ReDigi v. UsedSoft)” published on the website [www.copyrightseesaw.net](http://www.copyrightseesaw.net).

### **C. Registration of works and other subject matter – is it a good idea?**

Registration is not often discussed in copyright in the EU as the existing international treaties in the area prohibit formalities as a condition for the protection and exercise of rights. However, this prohibition is not absolute<sup>29</sup>. Moreover a system of registration does not need to be made compulsory or constitute a precondition for the protection and exercise of rights. With a longer term of protection and with the increased opportunities that digital technology provides for the use of content (including older works and works that otherwise would not have been disseminated), the advantages and disadvantages of a system of registration are increasingly being considered<sup>30</sup>.

#### **15. Would the creation of a registration system at EU level help in the identification and licensing of works and other subject matter?**

YES

NO

According to the question, registration would facilitate licensing. In our view, the voluntary registration of works and other protected materials, authorship, ownership, transfer of rights, licensing conditions within the collective management system combined with the rights management information developed and managed by CMOs is the best and most workable framework for facilitating licensing. In certain specific aspects for certain specific purposes, some kind of EU-level registration may be justified (like registration of orphan works), but there is no visible justification to transform the well-functioning voluntary registration systems of CMOs. Removing registration from CMO systems might also create the danger that registration could turn – even if not into a *de iure* but in certain elements and impacts – into *de facto* formality.

NO OPINION

#### **16. What would be the possible advantages of such a system?**

[Open question]

<sup>29</sup> For example, it does not affect “domestic” works – i.e. works originating in the country imposing the formalities as opposed to works originating in another country.

<sup>30</sup> On the basis of Article 3.6 of the Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, a publicly accessible online database is currently being set up by the Office for Harmonisation of the Internal Market (OHIM) for the registration of orphan works.



See our response to Question 15.

**17. What would be the possible disadvantages of such a system?**

[Open question]

See our response to Question 15.

**18. What incentives for registration by rightholders could be envisaged?**

[Open question]

See our response to Question 15.

#### ***D. How to improve the use and interoperability of identifiers***

There are many private databases of works and other subject matter held by producers, collective management organisations, and institutions such as libraries, which are based to a greater or lesser extent on the use of (more or less) interoperable, internationally agreed ‘identifiers’. Identifiers can be compared to a reference number embedded in a work, are specific to the sector in which they have been developed<sup>31</sup>, and identify, variously, the work itself, the owner or the contributor to a work or other subject matter. There are notable examples of where industry is undertaking actions to improve the interoperability of such identifiers and databases. The Global Repertoire Database<sup>32</sup> should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition<sup>33</sup> was established to develop building blocks for the expression and management of rights and licensing across all content and media types. It includes the development of a Rights Reference Model (RRM) – a comprehensive data model for all types of rights in all types of content. The UK Copyright Hub<sup>34</sup> is seeking to take such identification systems a step further, and to create a linked platform, enabling automated licensing across different sectors.

**19. What should be the role of the EU in promoting the adoption of identifiers in the content sector, and in promoting the development and interoperability of rights ownership and permissions databases?**

Our basic response is that this is typically a matter to be left to CMOs representing different categories of owners of rights and their European and international organizations.

It is to be noted that EC-sponsored projects such as ARROW and ARROW-Plus include references to the desirability of using international identifier standards such as ISNI (International Standard Name Identifier, ISO 27729) and ISTC (International Standard text Code, ISO 21047). This could be facilitated by the transposition of ISO 21047 and ISO 27729 into European standards.

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<sup>31</sup> E.g. the International Standard Recording Code (ISRC) is used to identify recordings, the International Standard Book Number (ISBN) is used to identify books.

<sup>32</sup> You will find more information about this initiative on the following website: <http://www.globalrepertoiredatabase.com/>.

<sup>33</sup> You will find more information about this initiative (funded in part by the European Commission) on the following website: [www.linkedcontentcoalition.org](http://www.linkedcontentcoalition.org).

<sup>34</sup> You will find more information about this initiative on the following website: <http://www.copyrighthub.co.uk/>.

**E. Term of protection – is it appropriate?**

Works and other subject matter are protected under copyright for a limited period of time. After the term of protection has expired, a work falls into the public domain and can be freely used by anyone (in accordance with the applicable national rules on moral rights). The Berne Convention<sup>35</sup> requires a minimum term of protection of 50 years after the death of the author. The EU rules extend this term of protection to 70 years after the death of the author (as do many other countries, e.g. the US).

With regard to performers in the music sector and phonogram producers, the term provided for in the EU rules also extend 20 years beyond what is mandated in international agreements, providing for a term of protection of 70 years after the first publication. Performers and producers in the audio-visual sector, however, do not benefit from such an extended term of protection.

**20. Are the current terms of copyright protection still appropriate in the digital environment?**

**YES** – Please explain

In general, there is no reason for which the terms of protection of works and other protected materials under the *acquis communautaire* would have to be changed.

In our view, it is not truly the case that producers of audiovisual works do not benefit from the 70 year term of protection. Since the economic rights are consolidated in different ways in the hand of the producers, they do benefit from the longer term of protection even if the rights transferred to them are granted originally for audiovisual authors. It is only the special “related right” established in the *acquis* where no longer protection applies (in fact, it would be difficult speak about a term of protection longer than what is prescribed by international treaties, since there is no international treaty on this specific EU-created “related right”).

We refer, however, to the obligation of the European Commission prescribed in Article 3(2) of the Terms Extension Directive to assess the need for extending the Directive to audiovisual performances. We consider such extension justified and we believe that the principle of double assimilation of the status of audiovisual performers (partly to the status of performers whose performances are fixed on phonograms and partly to the status of audiovisual authors) served as a basis for the Beijing Treaty on Audiovisual Performers further confirmed that such an extension take place.

NO – Please explain if they should be longer or shorter

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NO OPINION

**I. Limitations and exceptions in the Single Market**

Limitations and exceptions to copyright and related rights enable the use of works and other protected subject-matter, without obtaining authorisation from the rightholders, for certain purposes and to a certain extent (for instance the use for illustration purposes of an extract

<sup>35</sup> Berne Convention for the Protection of Literary and Artistic Works, <http://www.wipo.int/treaties/en/ip/berne/>.



from a novel by a teacher in a literature class). At EU level they are established in a number of copyright directives, most notably Directive 2001/29/EC<sup>36</sup>.

Exceptions and limitations in the national and EU copyright laws have to respect international law<sup>37</sup>. In accordance with international obligations, the EU *acquis* requires that limitations and exceptions can only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interest of the rightholders.

Whereas the catalogue of limitations and exceptions included in EU law is exhaustive (no other exceptions can be applied to the rights harmonised at EU level)<sup>38</sup>, these limitations and exceptions are often optional<sup>39</sup>, in the sense that Member States are free to reflect in national legislation as many or as few of them as they wish. Moreover, the formulation of certain of the limitations and exceptions is general enough to give significant flexibility to the Member States as to how, and to what extent, to implement them (if they decide to do so). Finally, it is worth noting that not all of the limitations and exceptions included in the EU legal framework for copyright are of equivalent significance in policy terms and in terms of their potential effect on the functioning of the Single Market.

In addition, in the same manner that the definition of the rights is territorial (i.e. has an effect only within the territory of the Member State), the definition of the limitations and exceptions to the rights is territorial too (so an act that is covered by an exception in a Member State "A" may still require the authorisation of the rightholder once we move to the Member State "B")<sup>40</sup>.

The cross-border effect of limitations and exceptions also raises the question of fair compensation of rightholders. In some instances, Member States are obliged to compensate rightholders for the harm inflicted on them by a limitation or exception to their rights. In other instances Member States are not obliged, but may decide, to provide for such compensation. If a limitation or exception triggering a mechanism of fair compensation were to be given cross-border effect (e.g. the books are used for illustration in an online course given by an university in a Member State "A" and the students are in a Member State "B") then there would also be a need to clarify which national law should determine the level of that compensation and who should pay it.

Finally, the question of flexibility and adaptability is being raised: what is the best mechanism to ensure that the EU and Member States' regulatory frameworks adapt when necessary (either to clarify that certain uses are covered by an exception or to confirm that for certain uses the authorisation of rightholders is required)? The main question here is whether a greater degree of flexibility can be introduced in the EU and Member States regulatory

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<sup>36</sup> Plus Directive 96/9/EC on the legal protection of databases; Directive 2009/24/EC on the legal protection of computer programs, and Directive 92/100/EC on rental right and lending right.

<sup>37</sup> Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (1971); Article 13 of the TRIPS Agreement (Trade Related Intellectual Property Rights) 1994; Article 16(2) of the WIPO Performers and Phonograms Treaty (1996); Article 9(2) of the WIPO Copyright Treaty (1996).

<sup>38</sup> Other than the grandfathering of the exceptions of minor importance for analogue uses existing in Member States at the time of adoption of Directive 2001/29/EC (see, Art. 5(3)(o)).

<sup>39</sup> With the exception of certain limitations: (i) in the Computer Programs Directive, (ii) in the Database Directive, (iii) Article 5(1) in the Directive 2001/29/EC and (iv) the Orphan Works Directive.

<sup>40</sup> Only the exception established in the recent Orphan Works Directive (a mandatory exception to copyright and related rights in the case where the rightholders are not known or cannot be located) has been given a cross-border effect, which means that, for instance, once a literary work – for instance a novel – is considered an orphan work in a Member State, that same novel shall be considered an orphan work in all Member States and can be used and accessed in all Member States.

framework while ensuring the required legal certainty, including for the functioning of the Single Market, and respecting the EU's international obligations.

**21. Are there problems arising from the fact that most limitations and exceptions provided in the EU copyright directives are optional for the Member States?**

YES – Please explain by referring to specific cases

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**X NO** – Please explain

There are no problems arising from the optional nature of limitations and exceptions. It would not be justified to make them mandatory and, thus, to remove the Member States’ flexibility to adopt certain variations of the relevant norms to their social and cultural policies. The principles of subsidiarity and proportionality require that the present level of harmonization be maintained.

NO OPINION

**22. Should some/all of the exceptions be made mandatory and, if so, is there a need for a higher level of harmonisation of such exceptions?**

YES – Please explain by referring to specific cases

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**X NO** – Please explain

No, not at all. See our response to Question 21.

NO OPINION

**23. Should any new limitations and exceptions be added to or removed from the existing catalogue? Please explain by referring to specific cases.**

[Open question]

There is no need to extend the current list of exceptions and limitations. They are satisfactory both for the “traditional” and online environment. The EU bodies and the Members States should reject the demands for new exceptions and limitations behind which, covered by certain slogans about “public interests” and the private interests of consumers, there are, in fact, hard private interests of those who would like to establish and operate profit-making services without remunerating the owners of rights for the use of their works and other protected materials.

**24. Independently from the questions above, is there a need to provide for a greater degree of flexibility in the EU regulatory framework for limitations and exceptions?**

YES – Please explain why

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**X NO** – Please explain why

See our responses to Questions 21 to 23.

NO OPINION

**25. If yes, what would be the best approach to provide for flexibility? (e.g. interpretation by national courts and the ECJ, periodic revisions of the directives, interpretations by the Commission, built-in flexibility, e.g. in the form of a fair-use or fair dealing provision / open norm, etc.)? Please explain indicating what would be the relative advantages and disadvantages of such an approach as well as its possible effects on the functioning of the Internal Market.**

[Open question]

We do not agree with the basic thrust of this question. There is no need for further flexibility beyond what is rightly offered to the Member States. The fair dealing system applied in a couple of Member States – supported by old traditions and well-developed case law – seems to be in accordance with the current *acquis*.

We strongly reject the idea of extending the US fair use system to Europe or even considering it as a possible option. It is well known that this idea is promoted by certain “copyright minimalist” ideologues and NGOs behind which it would be difficult not to see some big and prosperous online intermediaries who believe (wrongly even from the viewpoint of their own genuine long-term interests) that they benefit from an as low level of copyright protection as possible. In Europe, the introduction of a fair use system, in the absence of underlining traditions and of a rich case law, dangerous legal uncertainty would emerge. It would be detrimental to European cultural creativity and productivity in the current atmosphere when many politicians tend to give in to populists slogans and “mass movements” (among the generators, financiers and aggressive promoters of which again we can see certain profit-hungry actors of the IT industries).

**26. Does the territoriality of limitations and exceptions, in your experience, constitute a problem?**

YES – Please explain why and specify which exceptions you are referring to

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**X NO** – Please explain why and specify which exceptions you are referring to

It would be difficult to explain why territoriality constitutes a problem since there is no such problem.

NO OPINION

**27. In the event that limitations and exceptions established at national level were to have cross-border effect, how should the question of “fair compensation” be addressed, when such compensation is part of the exception? (e.g. who pays whom, where?)**

[Open question]

[See our responses to the previous Questions.](#)

#### **A. Access to content in libraries and archives**

Directive 2001/29/EC enables Member States to reflect in their national law a range of limitations and exceptions for the benefit of publicly accessible libraries, educational establishments and museums, as well as archives. If implemented, these exceptions allow acts of preservation and archiving<sup>41</sup> and enable on-site consultation of the works and other subject matter in the collections of such institutions<sup>42</sup>. The public lending (under an exception or limitation) by these establishments of physical copies of works and other subject matter is governed by the Rental and Lending Directive<sup>43</sup>.

Questions arise as to whether the current framework continues to achieve the objectives envisaged or whether it needs to be clarified or updated to cover use in digital networks. At the same time, questions arise as to the effect of such a possible expansion on the normal exploitation of works and other subject matter and as to the prejudice this may cause to rightholders. The role of licensing and possible framework agreements between different stakeholders also needs to be considered here.

#### **1. Preservation and archiving**

The preservation of the copies of works or other subject-matter held in the collections of cultural establishments (e.g. books, records, or films) – the restoration or replacement of works, the copying of fragile works - may involve the creation of another copy/ies of these works or other subject matter. Most Member States provide for an exception in their national laws allowing for the making of such preservation copies. The scope of the exception differs from Member State to Member State (as regards the type of beneficiary establishments, the types of works/subject-matter covered by the exception, the mode of copying and the number of reproductions that a beneficiary establishment may make). Also, the current legal status of new types of preservation activities (e.g. harvesting and archiving publicly available web content) is often uncertain.

**28. (a) [In particular if you are an institutional user:] Have you experienced specific problems when trying to use an exception to preserve and archive specific works or other subject matter in your collection?**

**(b) [In particular if you are a right holder:] Have you experienced problems with the use by libraries, educational establishments, museum or archives of the preservation exception?**

YES – Please explain, by Member State, sector, and the type of use in question.

**In our Association, there are representatives of all kinds of stakeholders, but we cannot experience such problems.**

NO OPINION

**29. If there are problems, how would they best be solved?**

<sup>41</sup> Article 5(2)c of Directive 2001/29.

<sup>42</sup> Article 5(3)n of Directive 2001/29.

<sup>43</sup> Article 5 of Directive 2006/115/EC.

[Open question]

See our negative response to Question 28.

**30. If your view is that a legislative solution is needed, what would be its main elements? Which activities of the beneficiary institutions should be covered and under which conditions?**

[Open question]

See our negative response to Question 28.

**31. If your view is that a different solution is needed, what would it be?**

[Open question]

See our negative response to Question 28

## **1. Off-premises access to library collections**

Directive 2001/29/EC provides an exception for the consultation of works and other subject-matter (consulting an e-book, watching a documentary) via dedicated terminals on the premises of such establishments for the purpose of research and private study. The online consultation of works and other subject-matter remotely (i.e. when the library user is not on the premises of the library) requires authorisation and is generally addressed in agreements between universities/libraries and publishers. Some argue that the law rather than agreements should provide for the possibility to, and the conditions for, granting online access to collections.

**32. (a) [In particular if you are an institutional user:] Have you experienced specific problems when trying to negotiate agreements with rights holders that enable you to provide remote access, including across borders, to your collections (or parts thereof) for purposes of research and private study?**

**(b) [In particular if you are an end user/consumer:] Have you experienced specific problems when trying to consult, including across borders, works and other subject-matter held in the collections of institutions such as universities and national libraries when you are not on the premises of the institutions in question?**

**(c) [In particular if you are a right holder:] Have you negotiated agreements with institutional users that enable those institutions to provide remote access, including across borders, to the works or other subject-matter in their collections, for purposes of research and private study?**

We have to give the same kind of negative response to this Question as to Question 28 above.

**33. If there are problems, how would they best be solved?**

[Open question]

See our negative response to Question 32.

**34. If your view is that a legislative solution is needed, what would be its main elements? Which activities of the beneficiary institutions should be covered and under which conditions?**

[Open question]

See our negative response to Question 32.

**35. If your view is that a different solution is needed, what would it be?**

[Open question]

See our negative response to Question 32.

## **2. E – lending**

Traditionally, public libraries have loaned physical copies of works (i.e. books, sometimes also CDs and DVDs) to their users. Recent technological developments have made it technically possible for libraries to provide users with temporary access to digital content, such as e-books, music or films via networks. Under the current legal framework, libraries need to obtain the authorisation of the rights holders to organise such e-lending activities. In various Member States, publishers and libraries are currently experimenting with different business models for the making available of works online, including direct supply of e-books to libraries by publishers or bundling by aggregators.

**36. (a) [In particular if you are a library:] Have you experienced specific problems when trying to negotiate agreements to enable the electronic lending (e-lending), including across borders, of books or other materials held in your collection?**

**(b) [In particular if you are an end user/consumer:] Have you experienced specific problems when trying to borrow books or other materials electronically (e-lending), including across borders, from institutions such as public libraries?**

**(c) [In particular if you are a right holder:] Have you negotiated agreements with libraries to enable them to lend books or other materials electronically, including across borders?**

YES – Please explain with specific examples

**X NO**

We have to give the same kind of negative response as to Questions 28 and 32.

NO OPINION

**37. If there are problems, how would they best be solved?**

[Open question]

See our negative response to Question 36.

The following two questions are relevant both to this point (n° 3) and the previous one (n° 2).

**38. [In particular if you are an institutional user:] What differences do you see in the management of physical and online collections, including providing access to your subscribers? What problems have you encountered?**

See our negative response to Question 36.

**39. [In particular if you are a right holder:] What difference do you see between libraries' traditional activities such as on-premises consultation or public lending and activities such as off-premises (online, at a distance) consultation and e-lending? What problems have you encountered?**

[Open question]

See our negative response to Question 36.

### 3. Mass digitisation

The term “mass digitisation” is normally used to refer to efforts by institutions such as libraries and archives to digitise (e.g. scan) the entire content or part of their collections with an objective to preserve these collections and, normally, to make them available to the public. Examples are efforts by libraries to digitise novels from the early part of the 20<sup>th</sup> century or whole collections of pictures of historical value. This matter has been partly addressed at the EU level by the 2011 Memorandum of Understanding (MoU) on key principles on the digitisation and making available of out of commerce works (i.e. works which are no longer found in the normal channels of commerce), which is aiming to facilitate mass digitisation efforts (for books and learned journals) on the basis of licence agreements between libraries and similar cultural institutions on the one hand and the collecting societies representing authors and publishers on the other<sup>44</sup>. Provided the required funding is ensured (digitisation projects are extremely expensive), the result of this MoU should be that books that are currently to be found only in the archives of, for instance, libraries will be digitised and made available online to everyone. The MoU is based on voluntary licences (granted by Collective Management Organisations on the basis of the mandates they receive from authors and publishers). Some Member States may need to enact legislation to ensure the largest possible effect of such licences (e.g. by establishing in legislation a presumption of representation of a collecting society or the recognition of an “extended effect” to the licences granted)<sup>45</sup>.

**40.** *[In particular if you are an institutional user, engaging or wanting to engage in mass digitisation projects, a right holder, a collective management organisation:] Would it be necessary in your country to enact legislation to ensure that the results of the 2011 MoU (i.e. the agreements concluded between libraries and collecting societies) have a cross-border effect so that out of commerce works can be accessed across the EU?*

YES – Please explain why and how it could best be achieved

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.....

**X NO** – Please explain

Although such agreements may be useful, we cannot see any reason for which legislation described in the question would be necessary and justified.

NO OPINION

<sup>44</sup> You will find more information about his MoU on the following website: [http://ec.europa.eu/internal\\_market/copyright/out-of-commerce/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm).

<sup>45</sup> France and Germany have already adopted legislation to back the effects of the MoU. The French act (LOI n° 2012-287 du 1er mars 2012 relative à l'exploitation numérique des livres indisponibles du xxe siècle) foresees collective management, unless the author or publisher in question opposes such management. The German act (Gesetz zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes vom 1. Oktober 2013) contains a legal presumption of representation by a collecting society in relation to works whose rightholders are not members of the collecting society.



**41. Would it be necessary to develop mechanisms, beyond those already agreed for other types of content (e.g. for audio- or audio-visual collections, broadcasters' archives)?**

YES – Please explain

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**X NO** – Please explain

For the time being, we can see no reason for developing such mechanisms.

NO OPINION

## **B. Teaching**

Directive 2001/29/EC<sup>46</sup> enables Member States to implement in their national legislation limitations and exceptions for the purpose of illustration for non-commercial teaching. Such exceptions would typically allow a teacher to use parts of or full works to illustrate his course, e.g. by distributing copies of fragments of a book or of newspaper articles in the classroom or by showing protected content on a smart board without having to obtain authorisation from the right holders. The open formulation of this (optional) provision allows for rather different implementation at Member States level. The implementation of the exception differs from Member State to Member State, with several Member States providing instead a framework for the licensing of content for certain educational uses. Some argue that the law should provide for better possibilities for distance learning and study at home.

**42. (a) [In particular if you are an end user/consumer or an institutional user:] Have you experienced specific problems when trying to use works or other subject-matter for illustration for teaching, including across borders?**

**(b) [In particular if you are a right holder:] Have you experienced specific problems resulting from the way in which works or other subject-matter are used for illustration for teaching, including across borders?**

YES – Please explain

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.....

**X NO**

We have to give the same negative response as to Questions 28, 32 and 36.

NO OPINION

**43. If there are problems, how would they best be solved?**

[Open question]

See our negative response to Question 42.

**44. What mechanisms exist in the market place to facilitate the use of content for illustration for teaching purposes? How successful are they?**

[Open question]

<sup>46</sup> Article 5(3)a of Directive 2001/29.



In our country, such “mechanism” is used satisfactorily, in general without major infringement of copyright, in the system of book publishing for educational purposes

**45. If your view is that a legislative solution is needed, what would be its main elements? Which activities of the beneficiary institutions should be covered and under what conditions?**

[Open question]

No, this is definitely not our view.

**46. If your view is that a different solution is needed, what would it be?**

[Open question]

See our negative responses to the previous Questions.

### **C. Research**

Directive 2001/29/EC<sup>47</sup> enables Member States to choose whether to implement in their national laws a limitation for the purpose of non-commercial scientific research. The open formulation of this (optional) provision allows for rather different implementations at Member States level.

**47. (a) [In particular if you are an end user/consumer or an institutional user:] Have you experienced specific problems when trying to use works or other subject matter in the context of research projects/activities, including across borders?**

**(b) [In particular if you are a right holder:] Have you experienced specific problems resulting from the way in which works or other subject-matter are used in the context of research projects/activities, including across borders?**

YES – Please explain

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**X NO**

We have to give the same kind of negative response to this Question as to Questions 28, 32, 36 and 42.

NO OPINION

**48. If there are problems, how would they best be solved?**

[Open question]

See our negative response to Question 47.

<sup>47</sup> Article 5(3)a of Directive 2001/29.

**49. What mechanisms exist in the Member States to facilitate the use of content for research purposes? How successful are they?**

[Open question]

General and specialized libraries, including those functioning in educational establishments and archives do function in a satisfactory manner in accordance with the international, E-level and national copyright norms.

#### **D. Disabilities**

Directive 2001/29/EC<sup>48</sup> provides for an exception/limitation for the benefit of people with a disability. The open formulation of this (optional) provision allows for rather different implementations at Member States level. At EU and international level projects have been launched to increase the accessibility of works and other subject-matter for persons with disabilities (notably by increasing the number of works published in special formats and facilitating their distribution across the European Union)<sup>49</sup>.

The Marrakesh Treaty<sup>50</sup> has been adopted to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled. The Treaty creates a mandatory exception to copyright that allows organisations for the blind to produce, distribute and make available accessible format copies to visually impaired persons without the authorisation of the rightholders. The EU and its Member States have started work to sign and ratify the Treaty. This may require the adoption of certain provisions at EU level (e.g. to ensure the possibility to exchange accessible format copies across borders).

**50. (a) [In particular if you are a person with a disability or an organisation representing persons with disabilities:] Have you experienced problems with accessibility to content, including across borders, arising from Member States' implementation of this exception?**

**(b) [In particular if you are an organisation providing services for persons with disabilities:] Have you experienced problems when distributing/communicating works published in special formats across the EU?**

**(c) [In particular if you are a right holder:] Have you experienced specific problems resulting from the application of limitations or exceptions allowing for the distribution/communication of works published in special formats, including across borders?**

YES – Please explain by giving examples

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**X NO**

<sup>48</sup> Article 5 (3)b of Directive 2001/29.

<sup>49</sup> The European Trusted Intermediaries Network (ETIN) resulting from a Memorandum of Understanding between representatives of the right-holder community (publishers, authors, collecting societies) and interested parties such as associations for blind and dyslexic persons ([http://ec.europa.eu/internal\\_market/copyright/initiatives/access/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/initiatives/access/index_en.htm)) and the Trusted Intermediary Global Accessible Resources (TIGAR) project in WIPO (<http://www.visionip.org/portal/en/>).

<sup>50</sup> Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities, Marrakesh, June 17 to 28 2013.

We have to give the same kind of negative response as to Questions 28, 32, 36, 42 and 47.

NO OPINION

**51. *If there are problems, what could be done to improve accessibility?***

[Open question]

See our negative response to Question 50.

**52. *What mechanisms exist in the market place to facilitate accessibility to content? How successful are they?***

[Open question]

Article 41(1) of our Copyright Law (Law LXXVI of 1999 amended several times) offers adequate framework in accordance with Article 5(3)(b) of the Information Society Directive.

### ***E. Text and data mining***

Text and data mining/content mining/data analytics<sup>51</sup> are different terms used to describe increasingly important techniques used in particular by researchers for the exploration of vast amounts of existing texts and data (e.g., journals, web sites, databases etc.). Through the use of software or other automated processes, an analysis is made of relevant texts and data in order to obtain new insights, patterns and trends.

The texts and data used for mining are either freely accessible on the internet or accessible through subscriptions to e.g. journals and periodicals that give access to the databases of publishers. A copy is made of the relevant texts and data (e.g. on browser cache memories or in computers RAM memories or onto the hard disk of a computer), prior to the actual analysis. Normally, it is considered that to mine protected works or other subject matter, it is necessary to obtain authorisation from the right holders for the making of such copies unless such authorisation can be implied (e.g. content accessible to general public without restrictions on the internet, open access).

Some argue that the copies required for text and data mining are covered by the exception for temporary copies in Article 5.1 of Directive 2001/29/EC. Others consider that text and data mining activities should not even be seen as covered by copyright. None of this is clear, in particular since text and data mining does not consist only of a single method, but can be undertaken in several different ways. Important questions also remain as to whether the main problems arising in relation to this issue go beyond copyright (i.e. beyond the necessity or not to obtain the authorisation to use content) and relate rather to the need to obtain “access” to content (i.e. being able to use e.g. commercial databases).

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results. At the same time, practical solutions to facilitate text and data mining of subscription-based scientific content were presented by publishers as an outcome of “Licences for Europe”<sup>52</sup>. In the context of these discussions,

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<sup>51</sup> For the purpose of the present document, the term “text and data mining” will be used.

<sup>52</sup> See the document “Licences for Europe – ten pledges to bring more content online”:  
[http://ec.europa.eu/internal\\_market/copyright/docs/licences-for-europe/131113\\_ten-pledges\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf).

other stakeholders argued that no additional licences should be required to mine material to which access has been provided through a subscription agreement and considered that a specific exception for text and data mining should be introduced, possibly on the basis of a distinction between commercial and non-commercial.

**53. (a) [In particular if you are an end user/consumer or an institutional user:] Have you experienced obstacles, linked to copyright, when trying to use text or data mining methods, including across borders?**

**(b) [In particular if you are a service provider:] Have you experienced obstacles, linked to copyright, when providing services based on text or data mining methods, including across borders?**

**(c) [In particular if you are a right holder:] Have you experienced specific problems resulting from the use of text and data mining in relation to copyright protected content, including across borders?**

YES – Please explain

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.....

**X NO** – Please explain

We have to give the same kind of negative response as to Questions 28, 32, 36, 42, 47 and 50.

NO OPINION

**54. If there are problems, how would they best be solved?**

[Open question]

See our negative response to Question 53.

**55. If your view is that a legislative solution is needed, what would be its main elements? Which activities should be covered and under what conditions?**

[Open question]

See our negative response to Question 53.

**56. If your view is that a different solution is needed, what would it be?**

[Open question]

See our negative response to Question 53.

**57. Are there other issues, unrelated to copyright, that constitute barriers to the use of text or data mining methods?**

[Open question]

See our negative response to Question 53.

**F. User-generated content**

Technological and service developments mean that citizens can copy, use and distribute content at little to no financial cost. As a consequence, new types of online activities are developing rapidly, including the making of so-called “user-generated content”. While users can create totally original content, they can also take one or several pre-existing works, change something in the work(s), and upload the result on the Internet e.g. to platforms and blogs<sup>53</sup>. User-generated content (UGC) can thus cover the modification of pre-existing works even if the newly-generated/"uploaded" work does not necessarily require a creative effort and results from merely adding, subtracting or associating some pre-existing content with other pre-existing content. This kind of activity is not “new” as such. However, the development of social networking and social media sites that enable users to share content widely has vastly changed the scale of such activities and increased the potential economic impact for those holding rights in the pre-existing works. Re-use is no longer the preserve of a technically and artistically adept elite. With the possibilities offered by the new technologies, re-use is open to all, at no cost. This in turn raises questions with regard to fundamental rights such the freedom of expression and the right to property.

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results or even the definition of UGC. Nevertheless, a wide range of views were presented as to the best way to respond to this phenomenon. One view was to say that a new exception is needed to cover UGC, in particular non-commercial activities by individuals such as combining existing musical works with videos, sequences of photos, etc. Another view was that no legislative change is needed: UGC is flourishing, and licensing schemes are increasingly available (licence schemes concluded between rightholders and platforms as well as micro-licences concluded between rightholders and the users generating the content. In any event, practical solutions to ease user-generated content and facilitate micro-licensing for small users were pledged by rightholders across different sectors as a result of the “Licences for Europe” discussions<sup>54</sup>.

**58. (a) [In particular if you are an end user/consumer:] Have you experienced problems when trying to use pre-existing works or other subject matter to disseminate new content on the Internet, including across borders?**

**(b) [In particular if you are a service provider:] Have you experienced problems when users publish/disseminate new content based on the pre-existing works or other subject-matter through your service, including across borders?**

**(c) [In particular if you are a right holder:] Have you experienced problems resulting from the way the users are using pre-existing works or other subject-matter to disseminate new content on the Internet, including across borders?**

YES – Please explain by giving examples

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**X NO** – Please explain

<sup>53</sup> A typical example could be the “kitchen” or “wedding” video (adding one's own video to a pre-existing sound recording), or adding one's own text to a pre-existing photograph. Other examples are “mash-ups” (blending two sound recordings), and reproducing parts of journalistic work (report, review etc.) in a blog.

<sup>54</sup> See the document “Licences for Europe – ten pledges to bring more content online”:  
[http://ec.europa.eu/internal\\_market/copyright/docs/licences-for-europe/131113\\_ten-pledges\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf).

Similarly to our negative responses to Questions 28, 32, 36, 42, 47, 50 and 53, we have to give a negative response to this Question too. As regards how derivative works based on pre-existing works may be used (to which these questions seem to relate), see our responses to Questions 59 and 60 below.

NO OPINION

**59. (a) [In particular if you are an end user/consumer or a right holder:] Have you experienced problems when trying to ensure that the work you have created (on the basis of pre-existing works) is properly identified for online use? Are proprietary systems sufficient in this context?**

**(b) [In particular if you are a service provider:] Do you provide possibilities for users that are publishing/disseminating the works they have created (on the basis of pre-existing works) through your service to properly identify these works for online use?**

YES – Please explain

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NO – Please explain

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NO OPINION

We have to give a **fourth kind of response**. Simply we do not understand to which cases and to what kinds of derivative works these questions relate. We do not understand either for what reasons the questions do not differentiate depending on whether or not the adaptations or other alterations of the pre-existing works have been authorized by the authors in accordance with the right of adaptation under Article 12 of the Berne Convention or by law in the form of an exception (in particular for parody in accordance with Article 5(3)(k) of the Information Society Directive). It is important to note this since, in case of derivative works created without authorization of the authors or by the law, we are faced with infringements and, in view of the basic legal principle of *nemo auditur suam turpitudinem allegans*, it is hardly justified to consider copyright claims as well founded that are based on such infringing acts.

**60. (a) [In particular if you are an end user/consumer or a right holder:] Have you experienced problems when trying to be remunerated for the use of the work you have created (on the basis of pre-existing works)?**

**(b) [In particular if you are a service provider:] Do you provide remuneration schemes for users publishing/disseminating the works they have created (on the basis of pre-existing works) through your service?**

YES – Please explain

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**X NO** – Please explain

While we give a definite negative response to these questions, we have to add that we do not believe that such questions may emerge specifically for user-generated works.

This is so because basically two possible cases may be involved.

First, if a lawful derivative work is involved, since it has been authorized by the authors on the basis of their exclusive right provided in Article 12 of the Berne Convention or by the law, for example as a parody, its status is exactly the same as the status of any work protected under the international treaties. Since this is the case, if there is any question concerning due remuneration of authors for online uses of their works, the question is necessarily the same from the viewpoint of the authors of all categories of works irrespective of whether they are pre-existing works or derivative works.

Second, if – in contrast – someone makes a derivative work without authorization by the authors or by the law, due to the above-mentioned legal principle of *nemo auditur suam turpitudinem allegans*, the very question of how the infringer may hardly be justified. If the work is used either in its pre-existing form or in a form adapted or otherwise altered by such infringers, the remuneration is due to the author of the original work. (It may be an issue to discuss how the principle of “theft is prohibited even from a thief” might be applied in such a case, and how the maker of an infringing derivative version might oppose the use thereof. However, it does not change the legal situation that, if such non-authorized altered versions of pre-existing works are used, the authors of those works are in the position to exercise their rights, including the right to receive remuneration.

In fact, in many cases, in addition to special licensing systems and tariffs for “small users” (the existence of which has been recognized as a result of the “Licensing Europe” consultations), it may be a solution for the authors of pre-existing works not to pay attention necessarily to the question of whether unauthorized non-commercial “UGC” versions truly amount to derivative works or not, but just to exercise and enforce their rights in respect of such versions too on the basis of their rights in the pre-existing works.

NO OPINION

**61. *If there are problems, how would they best be solved?***

[Open question]

For the reasons for which there is no problem – other than, of course, the implied encouraging of making and use of infringing derivative works that might hide behind such questions – see our responses to Questions 58 to 60.

**62. *If your view is that a legislative solution is needed, what would be its main elements? Which activities should be covered and under what conditions?***

[Open question]

See our response to Question 61.

**63. *If your view is that a different solution is needed, what would it be?***

[Open question]

See our response to Question 61. The licensing systems applied by CMOs for small non-commercial users recognized as appropriate in the framework of the “Licensing Europe” consultation facilitate lawful UGC uses where it is justified.



## II. Private copying and reprography

Directive 2001/29/EC enables Member States to implement in their national legislation exceptions or limitations to the reproduction right for copies made for private use and photocopying<sup>55</sup>. Levies are charges imposed at national level on goods typically used for such purposes (blank media, recording equipment, photocopying machines, mobile listening devices such as mp3/mp4 players, computers, etc.) with a view to compensating rightholders for the harm they suffer when copies are made without their authorisation by certain categories of persons (i.e. natural persons making copies for their private use) or through use of certain technique (i.e. reprography). In that context, levies are important for rightholders.

With the constant developments in digital technology, the question arises as to whether the copying of files by consumers/end-users who have purchased content online - e.g. when a person has bought an MP3 file and goes on to store multiple copies of that file (in her computer, her tablet and her mobile phone) - also triggers, or should trigger, the application of private copying levies. It is argued that, in some cases, these levies may indeed be claimed by rightholders whether or not the licence fee paid by the service provider already covers copies made by the end user. This approach could potentially lead to instances of double payments whereby levies could be claimed on top of service providers' licence fees<sup>5657</sup>.

There is also an on-going discussion as to the application or not of levies to certain types of cloud-based services such as personal lockers or personal video recorders.

**64. In your view, is there a need to clarify at the EU level the scope and application of the private copying and reprography exceptions<sup>58</sup> in the digital environment?**

YES – Please explain

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**X NO** – Please explain

If 'the need to clarify' means a revision of Article 5(2)(a) and (b) of the Information Society Directive, we do not see any need and justification for such a "clarification".

It goes without saying that the private copying limitation (it is a limitation of the exclusive right to a right to remuneration in accordance with, and controlled by, the three-step test under Article 5(5) of the Directive) as provided in Article 5(2)(b) equally applies in the digital environment.

The rulings of the CJEU on the application of this limitation have contributed to the clarification of the various issues that have truly emerged.

It follows from the three-step test that it is an obligation of Contracting Parties to the international copyright treaties to diminish the unreasonable prejudice created by widespread

<sup>55</sup> Article 5. 2)(a) and (b) of Directive 2001/29.

<sup>56</sup> Communication "Unleashing the Potential of Cloud Computing in Europe", COM(2012) 529 final.

<sup>57</sup> These issues were addressed in the recommendations of Mr António Vitorino resulting from the mediation on private copying and reprography levies. You can consult these recommendations on the following website: [http://ec.europa.eu/internal\\_market/copyright/docs/levy\\_reform/130131\\_levies-vitorino-recommendations\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf).

<sup>58</sup> Art. 5.2(a) and 5.2(b) of Directive 2001/29/EC.



private copying to the legitimate interests of authors and other the owners of rights at least to a reasonable level.

The existing private copying systems – which do function adequately when they are applied in accordance with the international treaty obligations and the provision of Article 5(2)(b) of the Directive – have become the target of unjustified and badly founded attacks: (i) by the big and rich entertainment equipment and recording material manufactures which do not accept even such a marginal contribution to remunerating the creators, producers and publishers of works and other materials without which their equipment and recording materials would totally or at least to a great extent meaningless and which use their enormous economic power and lobbying capacity against the fully justified system foreseen in the Directive; (ii) by neo-anarchist groups which attack practically everything that is indispensable for adequate protection of the rights of authors and other owners of rights; (iii) by the governments of certain Member States which simply have not implemented Article 5(2)(b) and now they would like to adapt the EU copyright system in a way that they may find “retroactive” justification for violating their obligations under the *acquis*.

Along with all the authors, performers and other owners of copyright and related rights of the EU, we are of the view that a kind of radical overhaul of the private copying provisions, such as what has occurred unfortunately in Spain, or what might follow from the adoption of certain recommendations in the not duly informed and badly founded Vitorino report would be not only in conflict with the *acquis communautaire* and the international obligations binding the EU and its Member States, but it would also undermine the potentials of cultural creativity and production of the Union (which is still an existing comparative advantage in the global markets and which is and indispensable element of European identity).

NO OPINION

**65. *Should digital copies made by end users for private purposes in the context of a service that has been licensed by rightholders, and where the harm to the rightholder is minimal, be subject to private copying levies?*<sup>59</sup>**

**X YES** – Please explain

The question includes an implied allegation with which we do not agree. Digital copies made following initial downloads cannot be exempted from the private copying remuneration systems. In view of current consumer practices, one cannot reasonably consider such acts of private copying as causing “minimal harm”.

It should be noted that that the approach proposed in the Vitorino report in this respect is also in conflict with the ruling adopted by the CJEU in the VG Wort case (C-457/11).

NO – Please explain

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NO OPINION

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<sup>59</sup> This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies

**66. How would changes in levies with respect to the application to online services (e.g. services based on cloud computing allowing, for instance, users to have copies on different devices) impact the development and functioning of new business models on the one hand and rightholders' revenue on the other?**

[Open question]

We do not fully understand the question. However, if it suggests that Article 5(2)(b) might not be equally applicable with respect to such services, we, of course, do not agree with this kind of suggestion.

**67. Would you see an added value in making levies visible on the invoices for products subject to levies?<sup>60</sup>**

**X YES** – Please explain

This would certainly create a better understanding among consumers provided it went along with creating or strengthening public awareness that what is involved is not a tax but an indispensable remuneration to guarantee sustainable cultural creativity and productivity (otherwise, from this viewpoint, even the now “traditional” use of the expression “levy” is not fortunate).

We have to add, however, that for the purpose of creating awareness in this way, there is no need to review Article 5(2)(b) of the Information Society Directive.

NO – Please explain

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NO OPINION

Diverging national systems levy different products and apply different tariffs. This results in obstacles to the free circulation of goods and services in the Single Market. At the same time, many Member States continue to allow the indiscriminate application of private copying levies to all transactions irrespective of the person to whom the product subject to a levy is sold (e.g. private person or business). In that context, not all Member States have ex ante exemption and/or ex post reimbursement schemes which could remedy these situations and reduce the number of undue payments<sup>61</sup>.

**68. Have you experienced a situation where a cross-border transaction resulted in undue levy payments, or duplicate payments of the same levy, or other obstacles to the free movement of goods or services?**

**X YES** – Please specify the type of transaction and indicate the percentage of the undue payments. Please also indicate how a priori exemption and/or ex post reimbursement schemes could help to remedy the situation.

<sup>60</sup> This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies.

<sup>61</sup> This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies.

This phenomenon does exist. However, due to the shortage of available time, we have not been able to create a more concrete analysis and to offer precise statistics.

NO – Please explain

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NO OPINION

**69. What percentage of products subject to a levy is sold to persons other than natural persons for purposes clearly unrelated to private copying? Do any of those transactions result in undue payments? Please explain in detail the example you provide (type of products, type of transaction, stakeholders, etc.).**

[Open question]

For the reasons mentioned in our response to Question 68, we cannot offer detailed information in this respect.

**70. Where such undue payments arise, what percentage of trade do they affect? To what extent could a priori exemptions and/or ex post reimbursement schemes existing in some Member States help to remedy the situation?**

[Open question]

For the reasons mentioned in our response to Question 68, we cannot offer detailed information in this respect.

**71. If you have identified specific problems with the current functioning of the levy system, how would these problems best be solved?**

[Open question]

Our basic response is that what is the most important is to apply Article 5(2)(b) adequately in accordance with the international norms, in particular the provisions on the three-step test. This would require persuading the Member States that have not done so yet – there is a well-known mechanism of the EU for a case where a Member State fails apply EU norms – to duly implement the right to remuneration for private copying. Such measures as those taken in Spain recently get quite clearly in conflict with the Article 5(2)(b) and the relevant international norms. The same would be the result of several badly informed and poorly founded recommendations of the Vitorino report.

### **III. Fair remuneration of authors and performers**

The EU copyright acquis recognises for authors and performers a number of exclusive rights and, in the case of performers whose performances are fixed in phonograms, remuneration rights. There are few provisions in the EU copyright law governing the *transfer* of rights from authors or performers to producers<sup>62</sup> or determining who the owner of the rights is when the

<sup>62</sup> See e.g. Directive 92/100/EEC, Art.2(4)-(7).

work or other subject matter is created in the context of an employment contract<sup>63</sup>. This is an area that has been traditionally left for Member States to regulate and there are significant differences in regulatory approaches. Substantial differences also exist between different sectors of the creative industries.

Concerns continue to be raised that authors and performers are not adequately remunerated, in particular but not solely, as regards online exploitation. Many consider that the economic benefit of new forms of exploitation is not being fairly shared along the whole value chain. Another commonly raised issue concerns contractual practices, negotiation mechanisms, presumptions of transfer of rights, buy-out clauses and the lack of possibility to terminate contracts. Some stakeholders are of the opinion that rules at national level do not suffice to improve their situation and that action at EU level is necessary.

**72. [In particular if you are an author/performer:] What is the best mechanism (or combination of mechanisms) to ensure that you receive an adequate remuneration for the exploitation of your works and performances?**

[Open question]

We do agree that authors and performers are in general badly remunerated. However, we are of the view that, for the time being, no further EU-level legislation is needed. Due to the broadly differing economic and social conditions of the Member States, this should rather be left to national legislation, if any, in accordance with the principles of subsidiarity and proportionality.

Apart from this, the best mechanism to ensure adequate exercise of the rights of authors and performers and obtain due remuneration is collective management. Our impression is that this fact is not duly recognized by certain EU bodies and national governments.

**73. Is there a need to act at the EU level (for instance to prohibit certain clauses in contracts)?**

YES

**X NO** – Please explain why

Real problems are involved; however, for the time being, the settlement thereof should be left to the Member States

NO OPINION

**74. If you consider that the current rules are not effective, what would you suggest to address the shortcomings you identify?**

[Open question]

In accordance with our response to Question 72, we are of the view that new legal-political approach would be needed to collective management of the rights of authors and performers. Recently too much and too unilateral attention has been devoted to certain abstract issues, such as the application of general competition rules, without recognizing the specific requirements of collective management. It has been neglected that collective management is an indispensable means of exercising the rights of creators, contributing to economic, social and cultural development of Member States with different conditions and requirements and, in

<sup>63</sup> See e.g. Art. 2.3. of Directive 2009/24/EC, Art. 4 of Directive 96/9/EC.

accordance with this, protecting cultural diversity – which is one of the most precious assets of Europe.

#### IV. Respect for rights

Directive 2004/48/EE<sup>64</sup> provides for a harmonised framework for the civil enforcement of intellectual property rights, including copyright and related rights. The Commission has consulted broadly on this text<sup>65</sup>. Concerns have been raised as to whether some of its provisions are still fit to ensure a proper respect for copyright in the digital age. On the one hand, the current measures seem to be insufficient to deal with the new challenges brought by the dissemination of digital content on the internet; on the other hand, there are concerns about the current balance between enforcement of copyright and the protection of fundamental rights, in particular the right for a private life and data protection. While it cannot be contested that enforcement measures should always be available in case of infringement of copyright, measures could be proposed to strengthen respect for copyright when the infringed content is used for a commercial purpose<sup>66</sup>. One means to do this could be to clarify the role of intermediaries in the IP infrastructure<sup>67</sup>. At the same time, there could be clarification of the safeguards for respect of private life and data protection for private users.

**75. *Should the civil enforcement system in the EU be rendered more efficient for infringements of copyright committed with a commercial purpose?***

**YES** – Please explain

We give a strong affirmative response to this question. This seems is one of the most important current tasks in the field of copyright – which has been badly neglected recently in the EU copyright policy and projects.

It should be stressed that due civil enforcement is necessary not only in the case infringements committed for commercial purposes but for any infringements. (Otherwise, it would be desirable to replace the concept of infringements committed with a commercial purpose by the concept of infringements on a commercial scale.) The application of enforcement measures should take place in accordance with the recognition that, from the viewpoint of owners of rights, it is completely irrelevant whether someone undermines their chance for normal exploitation of their rights or creates serious prejudice to their legitimate interests with or without a commercial purpose. The impact of the infringement is exactly the same irrespective of whether the infringer would like to obtain commercial income or he or she just happens to disagree with the copyright system and, under some neo-anarchist slogan of free access to everything, makes available protected works and other materials to the entire internet population without authorization. The conflict with normal exploitation and the prejudice will be exactly the same; and the application of enforcement measures should be in accordance with this important fact.

**NO** – Please explain

<sup>64</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

<sup>65</sup> You will find more information on the following website:

[http://ec.europa.eu/internal\\_market/ipenforcement/directive/index\\_en.htm](http://ec.europa.eu/internal_market/ipenforcement/directive/index_en.htm)

<sup>66</sup> For example when the infringing content is offered on a website which gets advertising revenues that depend on the volume of traffic.

<sup>67</sup> This clarification should not affect the liability regime of intermediary service providers established by Directive 2000/31/EC on electronic commerce, which will remain unchanged.

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 NO OPINION

**76. In particular, is the current legal framework clear enough to allow for sufficient involvement of intermediaries (such as Internet service providers, advertising brokers, payment service providers, domain name registrars, etc.) in inhibiting online copyright infringements with a commercial purpose? If not, what measures would be useful to foster the cooperation of intermediaries?**

[Open question]

Currently this is truly the most important aspect of re-establishing the badly disrupted balance of interests to the detriment of authors, performers and other owners of copyright and related rights. The provisions of the Electronic Commerce Directive are not suitable anymore to guarantee due cooperation of internet intermediaries with the owners of rights. Adequate regulation and application of notice-and-take-down systems, as a minimum obligation, should be prescribed. In Hungary, such a system has been set up specifically for copyright and related rights infringements as part of the Electronic Commerce Act (Act CVIII of 2001) implementing the Electronic Commerce Directive, and it functions appropriately.

It should also be taken into account, however, that this is not a sufficient measure against widespread infringements and, in particular against the phenomenon of immediate re-uploading of infringing copies “taken down.” It cannot be disregarded anymore that adequate filtering technologies are available – as a matter of technological process without any danger of conflicting with privacy considerations – that allow duly targeted, and not general, monitoring and blocking of infringing copies taken down but re-uploaded. On the basis of such targeted filtering systems, in order to re-establish a reasonable level of online protection of owners of rights, it is justified to transform the mere notice-and-take-down systems to well-balanced notice-and-take-down-and-stay-down systems.

Even this is not sufficient, however, against rogue websites, such as Pirate Bay, which are set up and operated with complete disrespect of copyright and related rights. Against such websites, the obligation of access providers prescribed on the basis of due procedures is an indispensable measure.

It is obvious that the application of such indispensable enforcement measures may be only one element of a complex strategy to address the problems of massive unauthorized and unremunerated online use of works and other protected materials. Lawful sources, inventive licensing techniques on the basis of exclusive rights, and remuneration systems (including systems where online intermediaries are obligated to pay remuneration from their income obtained from advertisers) are equally necessary.

**77. Does the current civil enforcement framework ensure that the right balance is achieved between the right to have one’s copyright respected and other rights such as the protection of private life and protection of personal data?**

YES – Please explain

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**X NO** – Please explain

The balance has been disrupted *to the detriment of owners of rights* on the basis of not duly substantiated slogan-type allegations about potential violations of private life and the protection of personal data. Due to technological developments, now adequate automatic systems are available which may be applied – with due cooperation by online intermediaries – simply with the result of preventing and eliminating serious infringements without any impact whatsoever on “private life” and without any the need for revealing personal data to the owners of rights.

NO OPINION

## V. A single EU Copyright Title

The idea of establishing a unified EU Copyright Title has been present in the copyright debate for quite some time now, although views as to the merits and the feasibility of such an objective are divided. A unified EU Copyright Title would totally harmonise the area of copyright law in the EU and replace national laws. There would then be a single EU title instead of a bundle of national rights. Some see this as the only manner in which a truly Single Market for content protected by copyright can be ensured, while others believe that the same objective can better be achieved by establishing a higher level of harmonisation while allowing for a certain degree of flexibility and specificity in Member States’ legal systems.

**78.** *Should the EU pursue the establishment of a single EU Copyright Title, as a means of establishing a consistent framework for rights and exceptions to copyright across the EU, as well as a single framework for enforcement?*

YES

**X NO**

No; not at all. The need and the justification for such a copyright title (on the basis of a “European Copyright Code”) do not exist at all (except for a certain group of academics with whom other academics – rightly enough – do not agree). It is useless even to deal with the very idea which belongs to the world of dreams (nightmare kinds of dreams). There are many serious copyright issues that truly exist; they should be addressed.

NO OPINION

**79.** *Should this be the next step in the development of copyright in the EU? Does the current level of difference among the Member State legislation mean that this is a longer term project?*

[Open question]

For the time being, we do not believe that this should be considered either as a next step (not at all) or a longer term project in the foreseeable future.

## VI. Other issues



The above questionnaire aims to provide a comprehensive consultation on the most important matters relating to the current EU legal framework for copyright. Should any important matters have been omitted, we would appreciate if you could bring them to our attention, so they can be properly addressed in the future.

**80. *Are there any other important matters related to the EU legal framework for copyright? Please explain and indicate how such matters should be addressed.***

[Open question]

There is a fundamentally important matter. The system of adequate protection and enforcement of copyright has been eroded recently as a result of successful lobbying of certain special interests groups (ever more powerful IT industries, online intermediaries, entertainment equipment and material manufactures, etc.) and by neo-anarchist movements supported and aggressively promoted by them. There is a need for a serious reconsideration of the EU's copyright policy in close connection with its cultural policy, with the objective of re-establishing an adequate balance of interests seriously disrupted to the detriment of creators and producers of cultural goods and services. This Questionnaire seems to be better balanced than certain previous documents issued by the Commission but it still reflects a trend to prefer considerations trying to justify weakening of copyright protection. We believe that this approach should be changed; it is not only a cultural interest of the EU, but also its weighty economic and social interest.