

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"¹ 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 framework²³ 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 now⁴. 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

¹ COM (2012)789 final, 18/12/2012.

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

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

⁴ 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.

Conclusions⁵ "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"⁶, the "Green Paper on the online distribution of audiovisual works"⁷ and "Content Online"⁸. 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.

⁵ EUCO 169/13, 24/25 October 2013.

⁶ COM(2008) 466/3, http://ec.europa.eu/internal_market/copyright/copyright-info/index_en.htm#maincontentSec2.

⁷ COM(2011) 427 final, http://ec.europa.eu/internal_market/consultations/2011/audiovisual_en.htm.

⁸ 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:

Association des Cinémathèques Européennes (ACE)

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.

Reg: 45960464757-14

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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**"

€ **X 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):

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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 law⁹.

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 Management¹⁰ should significantly facilitate the delivery of multi-territorial licences in musical works for online services¹¹; the structured stakeholder dialogue “Licences for Europe”¹² and market-led developments such as the on-going work in the Linked Content Coalition¹³.

"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 portability¹⁴.

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 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).

⁹ This principle has been confirmed by the Court of justice on several occasions.

¹⁰ 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.

¹¹ 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.

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

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

¹⁴ 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.

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 term¹⁵ 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)

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- NO
- NO OPINION

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

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.

[Open question]

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¹⁵ 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.

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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]
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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
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NO

NO OPINION

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
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NO

NO OPINION

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
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NO – Please explain
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 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/EC¹⁶ 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 software¹⁷ and databases¹⁸.

Directive 2001/29/EC harmonises the rights of authors and neighbouring rightholders¹⁹ 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 copies²⁰, (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 networks²¹. These rights are intrinsically linked in digital transmissions and both need to be cleared.

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

¹⁶ 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.

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

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

¹⁹ 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”.

²⁰ 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).

²¹ 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).

a certain Member State's public²². 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?

YES

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" approach²³)

This is not sufficiently clear at the moment. As a precaution Film Heritage Institutions tend to make sure they have worldwide licenses. A “country of origin” approach would be preferred, as this would allow for more legal certainty as to the required permission.

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 relief²⁴)?

YES – Please explain how such potential effects could be addressed

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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.

²² 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).

²³ 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).

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

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")

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NO

NO OPINION

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 CJEU²⁵ 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 CJEU²⁶ 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?*

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

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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)

In our opinion, providing a hyperlink leading users to already publicly available material should not be subject to authorisation by the rights holder. Hyperlinking is a modern referencing tool communicating the online addresses of works, not the works themselves..

NO OPINION

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

²⁶ Case C-360/13 (Public Relations Consultants Association Ltd). See also

http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0202_PressSummary.pdf.

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

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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)

In general this should not be subject to authorisation by the rights holder, as this is not an act of communication to the public.

The InfoSoc Directive stipulates under Recital 33 that “this exception [Article 5(1)] should include acts which enable browsing as well as acts of caching to take place”, so we encourage the Commission to ensure that this provision is applied and interpreted in a coherent manner and that any revision of the copyright framework strengthens it further.

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NO OPINION

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)²⁷. 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)²⁸. 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).

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

²⁸ 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).

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

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NO

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]

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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 absolute²⁹. 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 considered³⁰.

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

NO OPINION

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

[Open question]

Such a system would increase the amount of information about the work available to all types of users including Film Heritage Institutions. The main problem facing Film Heritage Institutions attempting to make their collections available online is the lack of comprehensive and easy (read automatically) accessible information about the copyright status of works and the identity and location of rights holders. Introducing a registration system on the European

²⁹ 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.

³⁰ 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.

level would be a first step in ensuring that such information is more readily available in the future.

On the more general level a registration system would decrease transaction costs and improve the availability of rights information to all market participants.

To be useful such a system needs to record rights transfers throughout the duration of the copyright protection of the registered works. In addition a registration system must be transparent and easy to use, so that it allows all types of rights holders (including individual creators) to register their works. (The system should also include information on works that are out of copyright as a means to provide legal clarity for users of Public Domain works. It should be researched if FORWARD is suitable, or could be made suitable for this task.

Note, that a registration system will not be able to retroactively solve the existing problem with orphan works and mass digitisation (see more about this in reaction to question 41).

In the long run it should be explored if registration of works can be made a prerequisite for prolonging copyright protection after an initial terms (much shorter than the current term) that is granted automatically (see our answer to question 20 as well).

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

[Open question]

As stressed under question 16, a system of registration only really adds value if subsequent rights holders to a work have to register as well.

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

[Open question]

In general terms it should be considered to make certain elements of copyright protection only available to rights holders who have registered their works in a publicly available registry. Such elements could be the ability to collect royalties through collective rights management organizations, or the ability to start (all or some) enforcement actions such as the right to claim additional damages. In addition registration could be made a prerequisite for prolonging copyright protection after an initial term (much shorter than the current term) that is granted automatically.

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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 developed³¹, 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

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

identifiers and databases. The Global Repertoire Database³² should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition³³ 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 Hub³⁴ 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?

[Open question]

At the minimum the European Union should ensure two things:

- (1) that identifiers as well as rights ownership and permission databases are based on open standards and therefore fully interoperable.
- (2) the EU should also ensure that all identifiers as well as rights ownership and permission databases are interoperable across all of Europe (and beyond).

Any system that is developed must be developed in a true multi stakeholder approach (e.g. not only by rights holders and intermediaries) and should be reflective of work already undertaken (for example by FORWARD). Rights ownership and permission databases in particular must be publicly accessible via machine readable interfaces. They must also include the ability to store information on out-of-copyright (Public Domain) works. Again, it should be researched if FORWARD is suitable for this task.

While it is necessary to find ways to encourage, and possibly impose, registration and consequently the use of identifiers, it is also important that the field is left open to innovation and the introduction of solutions that better suit different markets or sections thereof. Top down approaches supporting or privileging one solution against another or precluding new solutions to be introduced in the future will have negative effect as it will reduce innovation.

Any identifier that also keeps track of rights holders, should be kept up-to-date in this respect and also register subsequent rights holders to a work.

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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 Convention³⁵ requires a minimum term of protection of 50 years after the death of the author.

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

³³ You will find more information about this initiative (funded in part by the European Commission) on the following website: www.linkedcontentcoalition.org.

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

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

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

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NO – Please explain if they should be longer or shorter

No, from the perspective of Film Heritage Institutions the current terms of copyright protection (including neighbouring rights protection) are too long.

Film Heritage Institutions hold large collections of works that are still under copyright (or for which the copyright status is unclear) but that are not exploited commercially anymore. As a result, these works become ‘dead’, useless for both commercial and cultural, educational purposes.

The current term of protection of 70 years pma stands in stark contrast with the commercial life of the large majority of copyright protected works. As a result the disproportionate length of copyright protection prevents Film Heritage Institutions from effectively fulfilling their mission in the digital environment.

In the many cases the costs for digitisation of copyrighted works that are no longer in commercial exploitation exceeds the potential economic value of these works. As a result these are not made available online by the rights holders (who lack an economic incentive and a viable business model). While Film Heritage Institutions that have such works in their collections have an incentive to make such works available (their public mission to provide access to their collections and to support education and culture) they are confronted with costs for rights clearance that increase the costs for making these collections available without providing any effective economic benefits to rights holders.

One of the outcomes of this is the existence of the so called ‘20th century black hole’ when it comes to online availability of copyrighted works. Works from the 20th century are significantly less likely to be available than works from the centuries before (many of which are clearly in the public domain) or from the 21st century (many of which are still available commercially).

Shortening the term of protection will decrease the number of works that are in copyright but out of commercial exploitation. Given this the term of protection should be reduced to the minimum requirement established by the Berne Convention (life of the creator(s) plus 50 years).

In addition the European Union should work to further reduce the term. This should include efforts to agree on a system where extended copyright protection after an initial automatically granted term would be only granted if the work is registered by the rights holder. The duration

of the initial term should be brought into line with the duration of protection of other IP rights such as patented inventions (20 years) databases (15 years) and industrial design rights (25 years). Given this 20 years appears to be a reasonable initial term of protection that should guarantee protection to the vast majority of protected works. Protection for works that are actively exploited by their rights holders after such an initial period can be extended by registering such works.

In addition it should be examined if it is possible to establish a cut-off date for the protection of works that are currently protected. Such a cut off date could vary by sector. As European Film Heritage Institutions we advocate 1923 as a cut-off date for audiovisual works, in line with the situation in the US.

Beyond direct and immediate impact on the missions of FHI (and in general other cultural, educational non-profit institutions) such a change would enormously favor the development of new services for the digital economy that require content to be made available.

NO OPINION

III. 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 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/EC³⁶.

Exceptions and limitations in the national and EU copyright laws have to respect international law³⁷. 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)³⁸, these limitations and exceptions are often optional³⁹, 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

³⁶ 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.

³⁷ 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).

³⁸ 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)).

³⁹ 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.

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")⁴⁰.

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 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?

x YES – Please explain by referring to specific cases

Yes this creates an uneven playing field. Similar organisations should be able to enjoy the same exceptions (user rights) in all member states. Film Heritage Institutions are increasingly working together on digitisation projects (like European Film Gateway) and the fact that the exceptions benefitting publicly accessible libraries, museums and archives have not been implemented in all Member States, creates unnecessary uncertainties and disadvantages for institutions in some member states vis-a-vis institutions in others. Input of FHI to projects like the European Film Gateway differ considerably which, in turn, affects the capacity to provide material to Europeana. The inconsistent transposition of the Directive also interferes with the policy of the European Commission to encourage, for economical reasons, transnational digitisation projects aiming at creating synergies and avoiding the duplication of digitisation efforts (see the Recommendation of 24 August 2006 on the digitisation and online accessibility of cultural material and digital preservation).

The transition to digital services enables Film Heritage Institutions to collaborate across borders and make their collections available across all of Europe and this needs to be mirrored by harmonising the exceptions benefitting these institutions.

Moreover, lack of harmonisation creates legal uncertainty when making collections available cross-border.

The complexity and to some extent uncertainty of the situation created by differing transpositions in the various MS that was due to a combination of limitations and exceptions

⁴⁰ 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.

being non mandatory and sometimes not clearly defined is a well established fact. Beyond everyday's experience, it is demonstrated beyond any doubt by the finding of the recent Report "Study on the application of the Directive 2001/29/EC on copyright and related rights in the information society (the INFOSOC Directive)" funded by the Commission and published in 2013.

NO – Please explain

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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

All exceptions should be made mandatory and be harmonised to the fullest extent possible. It is not acceptable that citizens in some Member States enjoy a lesser level of access to the collections held by publicly funded Film Heritage Institutions simply because of an uneven implementation of exceptions and limitations of the Copyright Directive. This issue becomes more pressing as more and more activities of Film Heritage Institutions are taking place online.

All the exceptions introduced by the EU Copyright Directives are drafted on the basis that they do not interfere with the normal exploitation of the work and, therefore, do not unreasonably prejudice rights holders. This means that making them mandatory in all Member States should have no negative effect on said rights holders, while at the same time in many cases this will substantially benefit citizens and other public policy objectives such as access to knowledge and culture.

As an example we can quote the findings of the Report "Study on the application of the Directive 2001/29/EC on copyright and related rights in the information society (the INFOSOC Directive)" in the case of the Article 5(3)n:

Nine MS have not transposed Article 5(3) of the Directive: Austria, Cyprus, the Czech Republic, Greece, Ireland, Latvia, Slovenia, Sweden and the UK. In Germany, the exception doesn't apply to films. Making available an archive copy to 3rd parties requires the consent from the rights holder, while other MS profit from this exception. Regardless of the fact that article 5(3)n is dysfunctional in a digital environment, because it doesn't meet the legitimate expectation of nowadays users and needs to be extended to online access, its implementation should be made mandatory and harmonized across the member states.

Harmonization is required on the level of beneficiaries and type of works: It should be clearly stated in the InfoSoc Directive that all publicly funded heritage institutions (including film heritage) and educational establishments with a public interest, non-for-profit mission should benefit from the exceptions and limitations. The Directive should cover all type of works (books, films, sound recordings, unpublished as well as born-digital works etc.).

Similar considerations are made by the Report for each of the exceptions; furthermore, in some cases the purposes, the terms and the materials to which the exceptions are not fully defined in the INFOSOC Directive and as a result are deeply different in the MS, even when it is transposed in all MS, like Art 5(2)c for certain acts of reproduction made by libraries. In

this case the variations of the legislation in the different MS is huge in all aspects. Sadly, one common trait is that most of the legislators did not take the digital world in any consideration: digital copies are often forbidden (like in Germany and Italy), and format shifting is explicitly authorised only in the Netherlands.

Again, we make reference to the above mentioned Report illustrating how unacceptable the situation is.

NO – Please explain

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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]

Yes, there should be new exceptions and limitations that allow Film Heritage Institutions to make works in their collections available for non-commercial purposes. As outlined in the answer to question 34 this does not require a new exception or limitation but can be achieved by expanding the scope of the existing provision in article 5(3)n of the Directive. Furthermore, and in line with this, FHI’s should be allowed to make their collections available on their premises and not only via dedicated terminals but also by means of screenings and exhibitions. FHI’s should also be allowed to make unlimited amounts of copies of the works in their collections, see under question 28.

Finally there is a need to additionally introduce an open ended exception (see next question).

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?

X YES – Please explain why

Yes, there is a need for more flexibility in the EU regulatory framework for limitations and exceptions. By definition exceptions and limitations that apply to specific uses cannot ensure that as of yet unknown forms of use are covered by them. Technological innovations can be expected to lead to new forms of use in the near future and Europe would be well advised to create a copyright framework that is flexible enough to deal with such developments. An open norm would provide mechanisms to provide more legal certainty without having to undertake legislative changes (which might take years to implement).

A greater degree of flexibility is also desirable from the perspective of Film Heritage Institutions as it should allow them to react to new ways of making their collections available without the need for legislative reforms.

From an economic perspective, the current EU copyright regime puts Europe institutions at a competitive disadvantage with other countries in the world that benefit from the ‘Fair Use’

exceptions (US, South Korea, Taiwan and Singapore). In the US for example, the added value of the Fair Use-related industry was estimated at 16% of the GDP in 2007.⁴¹

NO – Please explain why

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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]

The best approach would be one that provides the flexibility in reaction to new technological developments or new forms of use. An open norm such as fair use fits this description. It should be implemented EU-wide (see also answer to Question 22) and in addition to (existing) targeted exceptions and limitations. As long as an open norm is implemented EU wide its effect on the functioning of the single market can be considered minimal while it can be expected to improve the competitive position of European market actors vis-à-vis market participants in other jurisdictions that have an open norm.

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

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

While territoriality might not create problems in the case of certain exceptions (e.g. reproduction for preservation), the principle of territoriality is generally detrimental to the creation of a single digital market and as such it should be seen detrimental to the interests and the strategy of the future of Europe as a single market and a knowledge-based society.

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

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NO OPINION

⁴¹ Rogers, T., Szamoszegi, A. (2010). *Fair Use in the U.S. Economy. Economic Contribution of Industries Relying on Fair Use*. Capital Trade Incorporated. p. 8. Available at, http://www.wired.com/images_blogs/threatlevel/2010/04/fairuseeconomy.pdf.

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]

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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 archiving⁴² and enable on-site consultation of the works and other subject matter in the collections of such institutions⁴³. 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 Directive⁴⁴.

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?

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

It must be stressed that while the consultation limits itself to activities of libraries and archives, the questions in this section are equally relevant for museums and other Cultural Heritage Institutions. In fact the relevant exceptions and limitations explicitly apply to ‘publicly accessible libraries, educational establishments or museums, or [...] archives’. The 2012 Orphan Works Directive clarifies this to include ‘film or audio heritage institutions and

⁴² Article 5(2)c of Directive 2001/29.

⁴³ Article 5(3)n of Directive 2001/29.

⁴⁴ Article 5 of Directive 2006/115/EC.

public-service broadcasting organisations'. In line with this, the following answers should be read as applying to all Cultural Heritage Institutions falling within this scope, such as Film Heritage Institutions, and not only to libraries and archives.

Institutions increasingly digitize works in their collections not only to prevent harm, but to be able to better fulfil their missions. Digital copies of cultural heritage works provide many advantages such as being (automatically) searchable, being easier to access and having lower storage costs. However, non of the national implementations allow structural digitisation. In addition recital 40 of the Directive which states that “Such an exception or limitation should not cover uses made in the context of online delivery of protected works or other subject-matter” is highly problematic. As online dissemination of works becomes more and more important for Film Heritage Institutions, limiting the reproduction exception in such a way is simply anachronistic as it prevents institutions from using digitized works in a meaningful way.

NB Archiving, in the sense of merely (passive) collecting and storing, should not be considered as a copyright related act as this does not involve duplication or communicating to the public.

The copyright exception (article 5(3)c)) authorises “specific acts of reproduction”. These acts are interpreted differently in the MS: In some countries the purpose of preservation is restricted to restoration or replacement of a damaged or lost item (UK, PL), to copying when the work is threaten to deoriate (NL), or to archiving (HU, DE).

Examples:

- In The Netherlands article 5(2)c of the Copyright Directive has been implemented as an exception in the national copyright law (article 16n Aw). This exception formulates three specific acts of reproduction: restoration, preservation of material that would otherwise become unusable and format shifting if formats become inaccessible. These narrowly defined, specific acts of reproduction, do not fully cover the needs of Film Heritage Institutions in the digital environment. The current Dutch implementation of article 5(2)c of the Copyright Directive does not allow institutions to structurally create digital copies of works in their collection. This prevents institutions from fully realising the potential inherent to digitization of their collections.

- Germany has not transposed the exception in this respect, preservation is not explicitly mentioned. Copying is allowed for the “inclusion in a personal archive” and for “other personal uses” (§ 53(1)UrhG). Given the fact that the preservation purpose is missing, the making of multiple digital copies and format shifting is not covered by § 53(1).

- UK: the exception does not apply to films

(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?

NO

NO OPINION

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

[Open question]

The best solution would be to broaden the existing exception in article 5(2)c of the Copyright Directive, so that it allows institutions to make unlimited reproductions of all works in their collection. In line with our answer to Question 22 this exception should be made mandatory for all Member States.

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]

The main element would be a broadening of the existing exception in article 5(2)c of the Copyright Directive. Instead of only allowing specific acts of reproductions it should allow all acts of reproduction necessary for publicly accessible libraries, educational establishments and film archives or museums, to achieve aims related to their public-interest missions.

Reproductions should be limited to use which is not for direct commercial or economic advantage or use in line with other exceptions and limitations allowed for by the Directive. Reproductions would explicitly be allowed for the purposes of increasing the operational efficiency and reducing costs of the beneficiary institutions (which possibly qualify as direct or indirect economic advantage under the current directive).

The “specific acts of reproduction” undertaken by heritage institutions should be better defined and its exact scope determined: Restoration– replacement –preservation of fragile works – format-shifting – copying for archiving, including web harvesting – copying and supplying upon request.

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

[Open question]

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2. 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?

[Open question]

(a + b) It must be stressed that while the consultation limits itself to activities of libraries and archives, the questions in this section are equally relevant for museums and other Cultural Heritage Institutions. In fact the relevant exceptions and limitations explicitly apply to 'publicly accessible libraries, educational establishments or museums, or [...] archives'. The 2012 Orphan Works Directive clarifies this to include 'film or audio heritage institutions and public-service broadcasting organisations'. In line with this, the following answers should be read as applying to all Cultural Heritage Institutions falling within this scope, such as Film Heritage Institutions, and not only to libraries and archives.

From both the perspective of publicly available libraries, archives and museums as well as the perspective of their patrons (end users/consumers) the existing exception that allows institutions to make works in their collections available 'for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises' (article 5(3)n) is extremely limited and not in line with the technological possibilities and the expectations of citizens. Limiting the availability of digitized works to dedicated terminals on the premises of Film Heritage Institutions prevents them from reaching citizens that cannot travel to the premises (for example because they are disabled or because they lack the economic means to do so). Furthermore it is out of line with the legitimate expectation of users that have been shaped by universal online accessibility of other services. Europe's citizens deserve online access to the collections of publicly funded institutions. [also compare the policy objectives of the PSI directive in this regard].

For publicly funded Film Heritage Institutions to fully participate in the digital public space they must be enabled to offer online services that are available from everywhere and by anyone seeking to 'to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits', as enshrined by article 27.1 of the Universal Declaration of Human Rights. Online universal access to the collections of publicly accessible libraries, museums and archives can play an important role in realising this objective. For this reason the current exception must be considered as too narrow.

As far as negotiating with rights holders goes, in the scope of mass digitization and making available of the collections of FHI, it is extremely time and therefore money consuming to clear the necessary rights. Moreover and in the absence of Extended Collective Licensing, or in the case of audiovisual works any form of Collective Management for that matter, finding rights holders is extremely difficult. When found they are often reluctant to give permission for non-commercial use by FHI, or demand an exorbitant amount of money.

Example: The EFG1914 project (co-funded by the European Commission) has digitised 660 hrs of film from and about WWI. The films are freely available for consultation at the European Film Gateway <http://www.europeanfilmgateway.eu/content/efg1914-project>

Approx. 40% of the films are public domain or orphans, for approx. 35% of the films the partners - 21 FHI in Europe hold the rights to the material. Rights clearing with 3rd parties is too costly and time consuming for a non-profit, cultural project like EFG1914, given the fact

that there is no cross-border ECL model in place. As already mentioned above, negotiations with rights holders turned out to be difficult:

a) from a financial point of view because some rights holders want to get paid by the FHI for making their films available (even if the use is non-commercial and the quality low res).

b) from an administrative point of view because the payment of royalties is based on the number of users watching the respective film on the EFG portal.

While for citizens it is perfectly understandable that cultural heritage institutions cannot provide free access to works that are still commercially available, it does not make sense that institutions have to restrict access to works that are not in circulation anymore because they are still copyright protected..

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

[Open question]

The best solution would be to broaden the existing exception in article 5(3)n of the Copyright Directive, so that it allows institutions to make digital copies of all works in their collections available via electronic networks such as the internet for non-commercial purposes.

This broadened exception should be implemented in the same manner in all EU countries.

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]

The main element would be a broadening of the existing exception in article 5(3)n of the Copyright Directive. Instead of limiting the making available to dedicated terminals on the premises of the institutions it should apply to making the works available online via public networks such as the internet. The scope of the exception should further be expanded to not only include 'the purpose of research or private study' by 'individual members of the public' but should apply to all non-commercial uses.

Furthermore, it seems reasonable to limit the scope of the exception to 'works and other subject-matter not subject to purchase or licensing terms' as long as they are still commercially available. This could be combined with an opt out-clause that would allow rights holders to either prevent the making available of their works or to negotiate licensing terms with the institutions (either on an individual basis or collectively).

In the case of audiovisual works a further restriction could be that making available under an exception would be limited to low res formats and streaming only. That way the normal exploitation of the work (in case of audiovisual works this could be exploitation via a VoD-platform) is not jeopardized.

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

[Open question]

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3. 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

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NO

NO OPINION

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

[Open question]

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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?

[Open question]

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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]

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4. 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 20th 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 other⁴⁵. 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)⁴⁶.

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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NO – Please explain

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NO OPINION

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)?*

⁴⁵ 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.

⁴⁶ 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.

YES – Please explain

This is certainly necessary. The public has a legitimate interest in having online access to the collections of all publicly accessible libraries, museums and archives across Europe (see article 27.1 of the Universal Declaration of Human Rights). There is no good reason for limiting mechanisms that create such access to certain types of content. The approach proposed here and in reaction to question 34, would cover all types of works and other subject matter contained in the collections of these institutions.

The 2012 Directive on certain permitted uses of Orphan Works is, although it constitutes a welcome step forward, only partly solving the copyright issues arising from mass digitization projects. While it will enable publicly accessible libraries, museums and archives to make orphan works available after a due diligence search has been carried out for specific works, the requirement of carrying out due diligence search makes it effectively less suitable for mass digitisation projects as this would require an immense investment in both time and money.

This problem can be addressed by an extension of the scope of the exception created by article 5(3)n of the Copyright Directive as outlined in the answer to question 34 above. Doing this would provide Europe's Film Heritage Institutions a clear legal framework for operating in the digital environment that would allow them to achieve aims related to their public-interest missions.

NO – Please explain

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NO OPINION

B. Teaching

Directive 2001/29/EC⁴⁷ 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?

YES – Please explain

The possibilities for FHI's to use audiovisual material for teaching purposes are very limited as there is no general teaching exception. This means that for most educational use the rights

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

holder(s) have to be traced to ask permission which can be time consuming and therefore extremely costly.

This is costly in two ways: first it is costly to identify the rights-holders, a task that is basically impossible to any Education Institution. It is not conceivable that a public elementary school in a small village contact a rights-owner in another EU country (or in the US or Japan!) to be able to show an AV work in its entirety to illustrate the Shoah.

Secondly, even admitting that this was possible, current ‘non-commercial fees’ for a screening for a school of a feature film are in a range between 600€ and 300€. No school or University in the present budgetary environment can realistically afford that.

As a result, not only teaching any 20th century subject by the aid of AV becomes basically impossible, but also the students in EU schools are never confronted with images, if not on their facebook pages or on YouTube. In other words, they come to the modern media environment completely ignorant of the language of the dominant form of entertainment in our present culture.

See also answer to question 45

(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?

- NO
- NO OPINION

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

[Open question]

The best solution would be the introduction of a more general exception that includes the use of audiovisual materials for illustration of teaching, regardless of the institution, and no room should be left to Member States for narrow interpretations.

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]

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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]

As proposed in question 43 the introduction of a new exception which allows the for the use of audiovisual materials for educational dvd's, online platforms, lectures, educational

packages for schools etc. FHI's should be included in the beneficiary institutions. As condition a reasonable remuneration for rights holders made payable to a CMO might be considered.

The exception "illustration for teaching" should apply for all type of works and all kind of beneficiaries which promote culture and carry out educational activities, including e-learning. The notion "teaching" is not defined in the InfoSoc Directive. In its recital 14 it refers to education as well: "this Directive should seek to promote learning and culture by protecting works and other subject-matter while permitting exceptions or limitations in the public interest for the purpose of education and teaching". Also, article 5(3)a does not limit the use of works for illustration for teaching and education to excerpts only, while most of the MS do so. It has also been stated in the Green Paper on Copyright in the Knowledge Economy (2008) that the national implementations are too restrictive. Again, the exception need to be made mandatory and should be harmonized among the MS.

Examples:

- If the purpose is an educational one, there is no reason why the exception allows pupils to watch a film in a classroom but not in the cinemas of FHIs.
- Media education and film literacy should be covered by the education and teaching exception: Film museums should be allowed to provide extracts of films in their exhibitions to illustrate the history of the cinema, the basic elements of the filmic narrative and the effect that film produces, without paying royalties to the rights owner out of scale. Publicly funded FHI cannot afford to pay for a 1,500 EUR licence fee to show one minute of a French film from 1930 to illustrate film history. They renounce to use it their exhibition – very much to the detriment of the citizen.

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

[Open question]

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C. Research

Directive 2001/29/EC⁴⁸ 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?

X YES – Please explain

⁴⁸ Article 5(3)a of Directive 2001/29.

Use of copyrighted AV content for reasearch is basically impossible in the present context, beyond what is currently commercially available. Limitation to access to in-situ, requirement to obtain the rights-owners' authorization for any access, even for one indiviudal researcher or professor or for exchange between FHI so that the copy could be made available to the researchers in-situ make any research extremely complicated to the extent of becoming impossible.

On the other hand, as the results of the research cannot be easily published, the research become of little use. Under the current situation, if a scholar wants to illustrate a publication (online or printed) with images from a copyrighted AV work, in absence of any Fair Use legislation, s(he has to ask for rights-owners authorization.

Again, it is a matter of complexity: how are the owners to be identified? But also of costs and problems. We can give an example of a book that was supposed to be a published containing a purely academical study on a major EU cartoonist except that the author was threatened of legal action and the book was dropped altogether. In another case, the author of an essay about the image composition in the work of a documentarist whose work is historically and scientifically relevant but commercially without any value, asked for the permissssion to publish 20 frame enlargements provided by an FHI; the heirs of the documentarist asked for 4.000€. The essay was dropped from the publication. The documentarist will be forgotten and the research on him completely stifled.

These examples are happening everyday and everywhere. The result is a trend of decreasing interest in the production of EU research on AV subjects, when compared to countries where the Fair Use legislation exists.

(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?

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- NO
- NO OPINION

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

[Open question]

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

[Open question]

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D. Disabilities

Directive 2001/29/EC⁴⁹ 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)⁵⁰.

The Marrakesh Treaty⁵¹ 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

As making available for non-commercial purposes outside of premises is basically not possible in the EU, as it is any activity to facilitate the access to people with disabilities without proper authorisation of the rights-owners, the reality on the ground is that disabled people are basically cut out from any help in accessing AV content in the EU outside of commercial channels, which are, by definition, small and insufficient.

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NO

⁴⁹ Article 5 (3)b of Directive 2001/29.

⁵⁰ 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) and the Trusted Intermediary Global Accessible Resources (TIGAR) project in WIPO (<http://www.visionip.org/portal/en/>).

⁵¹ Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities, Marrakesh, June 17 to 28 2013.

NO OPINION

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

[Open question]

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

[Open question]

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E. Text and data mining

Text and data mining/content mining/data analytics⁵² 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”⁵³. In the context of these discussions,

⁵² For the purpose of the present document, the term “text and data mining” will be used.

⁵³ 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.

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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NO – Please explain

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NO OPINION

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

[Open question]

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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]

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

[Open question]

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

[Open question]

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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 blogs⁵⁴. 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” discussions⁵⁵.

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?

⁵⁴ 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.

⁵⁵ 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.

(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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NO

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

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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NO – Please explain

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NO OPINION

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

[Open question]

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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]

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

[Open question]

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IV. 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 photocopying⁵⁶. 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 fees⁵⁷⁵⁸.

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.

⁵⁶ Article 5. 2)(a) and (b) of Directive 2001/29.

⁵⁷ Communication "Unleashing the Potential of Cloud Computing in Europe", COM(2012) 529 final.

⁵⁸ 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.

64. In your view, is there a need to clarify at the EU level the scope and application of the private copying and reprography exceptions⁵⁹ in the digital environment?

YES – Please explain

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NO – Please explain

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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?⁶⁰

YES – Please explain

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NO – Please explain

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NO OPINION

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]

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67. Would you see an added value in making levies visible on the invoices for products subject to levies?⁶¹

YES – Please explain

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⁵⁹ Art. 5.2(a) and 5.2(b) of Directive 2001/29/EC.

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

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

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 payments⁶².

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?

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.

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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]

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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]

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⁶² This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies.

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

[Open question]

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V. 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 producers⁶³ or determining who the owner of the rights is when the work or other subject matter is created in the context of an employment contract⁶⁴. 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]

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

YES – Please explain

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NO – Please explain why

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⁶³ See e.g. Directive 92/100/EEC, Art.2(4)-(7).

⁶⁴ See e.g. Art. 2.3. of Directive 2009/24/EC, Art. 4 of Directive 96/9/EC.

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]

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VI. Respect for rights

Directive 2004/48/EE⁶⁵ 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 text⁶⁶. 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 purpose⁶⁷. One means to do this could be to clarify the role of intermediaries in the IP infrastructure⁶⁸. 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

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NO – Please explain

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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

⁶⁵ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

⁶⁶ You will find more information on the following website:

http://ec.europa.eu/internal_market/ipenforcement/directive/index_en.htm

⁶⁷ For example when the infringing content is offered on a website which gets advertising revenues that depend on the volume of traffic.

⁶⁸ 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.

infringements with a commercial purpose? If not, what measures would be useful to foster the cooperation of intermediaries?

[Open question]

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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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NO – Please explain

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NO OPINION

VII. 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?

x YES

NO

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]

This is something to gradually work towards. Given the current level of differences this likely to be a long term project.

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VIII. 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]

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