Public Consultation
on the review of the EU copyright rules

Contents

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 framework[2][3] with a view to a decision in 2014 on whether to table legislative reform proposals, and on the other, to facilitate practical industry-led solutions through the stakeholder dialogue "Licences for Europe" on issues on which rapid progress was deemed necessary and possible.

The "Licences for Europe" process has been finalised now[4]. 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 – tem pledges to bring more content online": http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf .

Conclusions[5] *"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** as a word or pdf document to the following e-mail address of DG Internal Market and Services: **markt-copyright-consultation@ec.europa.eu**. Please note that replies sent after that date will not be taken into account.

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

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

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

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

C. Confidentiality

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

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[5] EUCO 169/13, 24/25 October 2013.
[6] COM(2008) 466/3, http://ec.europa.eu/internal_market/copyright/copyright-infso/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:

EUROCOPYA

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

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

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

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

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

TYPE OF RESPONDENT (Please underline the appropriate):

- ☐ **End user/consumer** (e.g. internet user, reader, subscriber to music or audiovisual service, researcher, student**) OR Representative of end users/consumers**

  → for the purposes of this questionnaire normally referred to in questions as **"end users/consumers"**

- ☐ **Institutional user** (e.g. school, university, research centre, library, archive) **OR Representative of institutional users**

  → for the purposes of this questionnaire normally referred to in questions as **"institutional users"**

- ☐ **Author/Performer OR Representative of authors/performers**

- ✓ **Publisher/Producer/Broadcaster OR Representative of publishers/producers/broadcasters**

  → the two above categories are, for the purposes of this questionnaire, normally referred to in questions as **"right holders"**

- ☐ **Intermediary/Distributor/Other service provider** (e.g. online music or audiovisual service, games platform, social media, search engine, ICT industry) **OR Representative of intermediaries/distributors/other service providers**

  → for the purposes of this questionnaire normally referred to in questions as **"service providers"**

- ☐ Collective Management Organisation

- ☐ **Public authority**

- ☐ **Member State**

- ☐ **Other** (Please explain):

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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 law[9].

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

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

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).

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[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 – tem 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 f

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

The main issue at stake here is, therefore, whether further measures (legislative or non-legislative, including market-led solutions) need to be taken at EU level in the medium term[15] 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)

X NO

First, it has to be recalled that national offers (especially in the audiovisual area) are plentiful. This question is phrased in a one-sided manner, pre-supposing that there are no means currently available to access content across borders – when in fact, there are a variety of ways such as the electronic-sell-through market, as well as situations where local operators provide content portability for subscribers to watch their content on mobile devices regardless of their location. See also "Licenses for Europe" WG1 pledge of audiovisual industry representatives to continue to develop cross-border portability of subscription services. The biggest obstacle at this time to the digital single market is in fact the absence of sufficient demand to incentivize distributors to provide commercially viable pan-EU services for all content. As a matter of fact, nothing in the EU copyright *acquis* precludes audiovisual licensors and licensees to agree on viable licensing terms, be it on a linguistic, territorial, multi-country, pan-European or even global basis. But consumers overwhelmingly favor nationally based services, and those from linguistically and culturally similar countries. This is empirically demonstrated by the experience with cable and satellite television, for example.

□ 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).

[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.

X 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]

The actual demand is very rare especially if one sets aside the matter of linguistically connected countries/regions (see above response to Q.1).

Content owners seek to ensure that their works are made available to consumers in a way that is most responsive to market needs and capacities. At present, this tends to take place primarily on a territorial basis, due to cultural/language, regulatory and structural realities – not to mention demand. And especially as far as European works are concerned, one has to bear in mind that said works are mainly financed by national-oriented broadcasters and platforms.

The current legal framework enables the content sector to distribute their works on a multi-territorial basis, but it also enables them to respect important market factors such as demands of localization, territorial exclusivity for those who significantly co-finance the production of the work, and cultural diversity (see also below response to Q.5).

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]

We are not aware of any problems having occurred (other than possible disagreements on the level of remuneration in exchange for the rights granted, as may be in any negotiation). At the same time, it is in the genuine interest of rightholders to know of any such problems: rightholders are in the business of providing access, not of creating problems to access, and problems with access mean in principle less revenues for rightholders.

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

While the approaches of individual licensors will obviously vary, there are objective reasons for territorial licensing (see also above response to Q.3). One is that it is most responsive to addressing local consumer demand which tends towards a preference for local and non-EU content, with language playing a role and due to cultural differences and consumer preferences. Another is that market and regulatory conditions vary from country to country, de-facto imposing territorial licensing in certain circumstances or dictating release schedules that may vary from country to country. For certain types of audiovisual content, production models are built around joint ventures (co-productions or co-financings) which rely for a substantial proportion of the financing on territorial splits of the rights amongst the partners. Consequently, in exchange for assuming part of the risk of production, a

local financing partner often acquires exclusive rights to license or distribute a film in a particular territory and/or language, but not others. These territorial splits would be substantially de-valued, would their exclusivity be taken away. The local distributor, often a co-financer would then have to face another factor threatening the recoupment of his investment if its content was accessed by the national consumer through any means in another country before the national release. Without the practice of co-productions/co-financings, production levels for European works would drop precipitously, unless the EU or the member states stepped in with additional direct financing support. Thus, a non-differentiated and quasi imposed « single audiovisual market » would come at the high price of a the loss of cultural diversity, which protection the European Union is aiming for in its Treaty.

□ 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

□ 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

X NO – Please explain

No further measures are needed in terms of the copyright related *acquis*. The current legislative framework provides the necessary foundation for cross-border availability of services and in fact cross border licensing exists. It permits licensing of content territorially, or on cross-border or even pan-EU bases and is not an obstacle per se. We would like to stress in this regard that the European single internal market is about the freedom to provide services, not about an obligation[16]. Thus service provider which chose to provide cross-border services are free to do so already under the existing *acquis.* Instances do exist where it may make sense commercially for a digital service provider to do so.

□ NO OPINION

[16] Article 56 of the Treaty of the European Union

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

[The definition of the rights involved in digital transmissions]

The EU framework for the protection of copyright and related rights in the digital environment is largely established by Directive 2001/29/EC[17] on the harmonisation of certain aspects of copyright and related rights in the information society. Other EU directives in this field that are relevant in the online environment are those relating to the protection of software[18] and databases[19].

Directive 2001/29/EC harmonises the rights of authors and neighbouring rightholders[20] which are essential for the transmission of digital copies of works (e.g. an e-book) and other protected subject matter (e.g. a record in a MP3 format) over the internet or similar digital networks.

The most relevant rights for digital transmissions are the reproduction right, i.e. the right to authorise or prohibit the making of copies[21], (notably relevant at the start of the transmission – e.g. the uploading of a digital copy of a work to a server in view of making it available – and at the users' end – e.g. when a user downloads a digital copy of a work) and the communication to the public/making available right, i.e. the rights to authorise or prohibit the dissemination of the works in digital networks[22]. 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 a certain Member State's public[23]. 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

[17] 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.

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

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

[20] 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".

[21] 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).

[22] 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).

[23] 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 CaseC-441/13 (Pez Hejduk); see however, adopting a different approach, Case C-170/12 (Pinckney vs KDG Mediatech).

service provider. A service provider "targets" a group of customers residing in a specific country when it directs its activity to that group, e.g. via advertisement, promotions, a language or a currency specifically targeted at that group.

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

X YES

The scope of the making available in cross-border situations is sufficiently clear – particularly in light of recent jurisprudence of the CJEU. This jurisprudence confirms that this right is intended to be broad, durable, flexible and adaptable to technological development.

The exclusive right of "making available", as established by the WIPO Copyright Treaty and implemented in the EU by the 2001 Copyright Directive, extends to the offering to the public of a work for individualized streaming or downloading as well as the actual transmission of a work to members of the public – from a place and at a time individually chosen by them, irrespective of the technical means used for making available. The very nature of the making available right for copyright works is such that it takes place both where the offer is made and where it is capable of being accessed by consumers. This is a reflection of the interactive nature of the right. This is important not only to the licensing of content but also to determining the jurisdiction and/or the applicable law for rightholders to enforce their rights against infringers and online intermediaries (see below our response to question 9).

Overall, the indeed perceived "elasticity" of the right has enhanced the development of new on-demand services beyond what was known in 1996 when WCT was concluded. This is a right intended to accommodate technological change and accordingly must retain some degree of flexibility.

☐ NO – Please explain how this could be clarified and what type of clarification would be required (e.g. as in "targeting" approach explained above, as in "country of origin" approach[24])

☐ NO OPINION

9. *[In particular if you are a right holder:]* ***Could a clarification of the territorial scope of the "making available" right have an effect on the recognition of your rights (e.g. whether you are considered to be an author or not, whether you are considered to have transferred your rights or not), on your remuneration, or on the enforcement of rights (including the availability of injunctive relief[25])?***

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

Should a "clarification" notably be seen as implementing more broadly a "country of origin" principle as suggested by the consultation document (see footnote 23), this would be in contradiction with general principles of copyright (which ensure as of today an appropriate recognition of rights) and the objective to safeguard a high level of protection for rightholders.

[24] 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).

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

As a general rule of copyright, it is the law of the country of destination that applies to the exploitation of rights. This rule (close to what is above described as "targeting" approach) is also enshrined in international conventions. This principle has an effect on the scope of the rights and any applicable exceptions; on the rules regarding the transfer of rights; on the status of the rightholder (as a beneficiary of protection, e.g., as author or co-author); on collective rights management; and on the enforcement of the rights.

The principle of the country of destination is valid, and no clarification is needed. It has to be maintained. In the audiovisual sector, this principle is applied without prejudice of international private law and contractual agreements.

The country of origin principle, on the other hand, does not apply to copyright, and this has been recognised by the relevant Directives (e.g., the Services Directive). If it were applied to copyright, this would not only be in contradiction to international law, but it would also create serious imbalances: due to the different interpretation/application of limitations/exceptions and differences in enforcement and transfers/contract law in Member States, applying the country of origin principle to copyright would lead to a "race to the bottom". "Making available" services would originate in the Member States with the lowest level of protection and the lowest revenues for rightholders. This would be in contradiction to the explicitly declared objective of the *acquis communautaire*, in particular Directive 2001/29, which is to safeguard a high level of protection for rightholders.

The only area in copyright where such "country of origin" principle has been introduced (see article 1.2.b of Directive 93/83/EEC ("La communication au public par satellite a lieu uniquement dans l'État membre dans lequel, sous le contrôle et la responsabilité de l'organisme de radiodiffusion, les signaux porteurs de programmes sont introduits dans une chaîne ininterrompue de communication conduisant au satellite et revenant vers la terre") has not proven to facilitate clarification of rights and/or paneuropean broadcasting of copyright protected content (especially for European works), and it is only when the « country of destination » principle was reintroduced (through conditional access systems and encryption of the satellite signals) that the satellite market in Europe (mainly based on local-demand oriented satellite platforms) really took off.

□ NO

□ NO OPINION

2. Two rights involved in a single act of exploitation

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

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

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

X NO

In many goods and services protected by copyright (CDs, DVDs, films, broadcasting) rights of several different rightholders subsist. This has never caused any problems due to the (presumed or negotiated) transfer of rights and their bundling, often in the hands of the producer or publisher. In addition, where rights cannot be administered by rightholders themselves, usually collecting societies as their trustees are in charge of the management of rights. In any case, rightholders tend to organise themselves in order to provide users with a

"one-stop-shop" for the use of rights (or at least categories of rights), and this also holds true for the digital/on-line environment.

A legislative intervention which would operate to limit the scope of the making available and/or reproduction rights and thereby hinder the ability of audio-visual producer to license their works would also raise issues with the EU's obligations under international copyright norms. In addition to the potential violation of the fundamental right protected under Article 17(2) of the EU Charter of Fundamental Rights and Freedoms ("Intellectual property shall be protected"), international rules are also relevant to either wholesale abolition or curtailment of an exclusive right protected by international copyright treaties. In this regard, the provisions establishing the making available and reproduction rights in the WCT, the TRIPs Agreement and Berne Convention collectively would prohibit contracting parties from suspending protection for acts of exploitation subject to these exclusive rights – unless of course they can be justified pursuant to the three-step test (see Berne Article 9, TRIPs Article 13 and WCT Article 10) or other provisions (e.g., Article 11*bis(2)* which is not relevant to making available or reproduction), quod non.

☐ 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 CJEU[26] in which the question has been raised whether the provision of a clickable link constitutes an act of communication to the public/making available to the public subject to the authorisation of the rightholder.

A user browsing the internet (e.g. viewing a web-page) regularly creates temporary copies of works and other subject-matter protected under copyright on the screen and in the 'cache' memory of his computer. A question has been referred to the CJEU[27] as to whether such copies are always covered by the mandatory exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC.

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

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

A work or other subject matter protected by copyright can only be published with the authorisation of the rightholder. Only if the rightholder has agreed to the publication and availability of the work on-line and has not reserved his/her rights, the provision of a hyperlink leading to the work requires no separate authorisation by the rightholder. In all other cases, an authorisation of the rightholder should be required for the provision of the hyperlink.

The importance that hyperlinking plays with regard to content delivery online means that a broad exclusion from copyright would not only undermine basic licensing scenarios online but it would also seriously hinder the ability of rightholders to fight copyright infringement online.

CJEU case law provides a workable and detailed "manual" for answering fact-specific questions related to when and under what circumstances linking or indeed other technical operations online amount to a communication to the public. As a result, we take the position that further legislative action is not needed in this area. It is vital that the Courts retain the possibility to respond to specific fact patterns. In this area, any legislation that attempted to establish a specific or rigid rule as to whether a particular technical operation online would necessarily amount to

[26] Cases C-466/12 (Svensson), C-348/13 (Bestwater International) and C-279/13 (C More entertainment).
[27] Case C-360/13 (Public Relations Consultants Association Ltd). See also http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0202_PressSummary.pdf.

a communication to the public or not risks being outdated quickly and could remove the ability for the courts to consider the specific circumstances of a given case. The complexities of online copyright infringement are such that this could have the unintended effect to hindering enforcement – or indeed forms of licensing which operate by means of linking (indeed licenses would no longer be relevant).

The Judgment of the Court of Justice of the EU (CJEU) of 13th February 2014 in the Svensson Case (C- 466/12) states that (Recital 20)*"….the provision of clickable links to protected works must be considered to be 'making available' and, therefore, an 'act of communication', within the meaning of that provision*".

It specifies that (Recital 27) " *In those circumstances, it must be held that, where all the users of another site to whom the works at issue have been communicated by means of a clickable link could access those works directly on the site on which they were initially communicated, without the involvement of the manager of that other site, the users of the site managed by the latter must be deemed to be potential recipients of the initial communication and, therefore, as being part of the public taken into account by the copyright holders when they authorized the initial communication*".

The Judgment then states that (Recital 31) "*On the other hand, where a clickable link makes it possible for users of the site on which that link appears to circumvent restrictions put in place by the site on which the protected work appears in order to restrict public access to that work to the latter site's subscribers only, and the link accordingly constitutes an intervention without which those users would not be able to access the works transmitted, all those users must be deemed to be a new public, which was not taken into account by the copyright holders when they authorized the initial communication, and accordingly the holders' authorization is required for such a communication to the public. This is the case, in particular, where the work is no longer available to the public on the site on which it was initially communicated or where it is henceforth available on that site only to a restricted public, while being accessible on another Internet site without the copyright holders' authorization*".

This means in particular that the link to content that is made available without the consent of the copyright holder (e.g. via a sharing site) or is made available through a restricted access (such as, for example, via Netflix) is likely to constitute an infringement of copyright.

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

☐ NO OPINION

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

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

A work or other subject matter protected by copyright can only be published with the authorisation of the rightholder. Only if the rightholder has agreed to the publication and availability of the work on a web-page and has not reserved his/her rights, its temporary reproduction in the computer (on the screen and in the cache memory) requires no separate authorisation by the rightholder. In all other cases, an authorisation of the rightholder is required for such acts of reproduction.

As a general matter, the exclusive right of reproduction in Article 2 of the Copyright Directive extends to temporary reproductions. Beyond the actual text of that provision, the Court of Justice has already confirmed this

point (see e.g., FAPL). Subject to the provisions of the Article 5(1) itself and CJEU's jurisprudence, national courts should retain the possibility to consider specific circumstances to determine for example whether or not the exception for certain temporary copies in Article 5(1) is applicable. There may be cases where the copies on the screen or in the cache memory are fully covered by Article 5(1). However, in the event those copies are from illegal sources or whose purpose is to enable an unlawful use (see Article 5(1)(b)) the exception may not apply. This can be crucial to the application of Article 8(3) where it may be necessary to show that a third party is using an intermediary's service to infringe copyright in order to secure injunctive relief. The Court of Justice has already shown it is fully capable of providing guidance as to when Article 5(1) applies and we would expect it will continue to do so. It is also worth recalling that Article 5(1) is a mandatory exception. It therefore represents a fully harmonised provision already somewhat bolstered by CJEU jurisprudence.

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

☐ NO OPINION

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)[28]. 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)[29]. This raises difficult questions, notably relating to the practical application of such an approach (how to avoid re-sellers keeping and using a copy of a work after they have "re-sold" it – this is often referred to as the "forward and delete" question) as well as to the economic implications of the creation of a second-hand market of copies of perfect quality that never deteriorate (in contrast to the second-hand market for physical goods).

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

☐ YES – Please explain by giving examples

X NO

No undue restrictions are known. If such acts of resale are restricted depends on the purchasing agreement between the purchaser and the seller, which both parties have to respect.

☐ NO OPINION

[28] See also recital 28 of Directive 2001/29/EC.

[29] 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).

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]

In legal terms, allowing the resale of previously purchased digital content by law irrespective of the conditions of the sale agreement would amount to a statutory compulsory license. It would be a severe interference with the contract and de facto provide for the exhaustion of the right of making available. However, it should be noted that the principle of exhaustion only applies to the right of distribution, which is related to the distribution of physical copies only, and not to services, such as the making available and sale on-line. Preventing the rightholder from prohibiting the resale would, therefore, be contrary to EU Directives (for software, the Computer Programs Directive 2009/24, under the reserve of the CJEU "Oracle against UsedSoft" jurisprudence, for other works Directive 2001/29, notably whereas 29 of said directive) and international obligations, in particular the WCT, the WPPT and the WTO/TRIPs Agreement. It should be noted, in particular, that the list of permitted exceptions contained in Directive 2001/29 is exhaustive and does not allow for additional exceptions to be introduced on top of that list. Moreover, such an undue limitation of the right of making available would also be a violation of the so-called three-steps-test, which applies to all exceptions and limitations to the rights and is included in the Directives and the above-mentioned international treaties.

In economic terms, allowing an additional making available by law would seriously interfere with the primary market (e.g., for the on-line making available to the public of films or music). As a consequence, the "first" on-line making-available would have to become much more expensive for consumers, because the seller (rightholder) would have to adapt his/her calculation and business model accordingly. Regarding the audiovisual industry, where the market is organized through "release windows" which enable a much longer life-cycle and already implement a kind of "second hand" access to audiovisual content organised by rightholders (the lower the price for consumer, the later the access to audiovisual content), implementing a framework authorizing systematically the additional making available of previously obtained digital content would actually question the very existence of said windows, reducing very significantly the rightholders' revenues (confronted with competition from resale of "second hand" digital products with same features as new) and questioning the financing of new works.

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

Registration is not often discussed in copyright in the EU as the existing international treaties in the area prohibit formalities as a condition for the protection and exercise of rights. However, this prohibition is not absolute[30]. Moreover a system of registration does not need to be made compulsory or constitute a precondition for the protection and exercise of rights. With a longer term of protection and with the increased opportunities that digital technology provides for the use of content (including older works and works that otherwise would not have been disseminated), the advantages and disadvantages of a system of registration are increasingly being considered[31].

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

[30] 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.

[31] 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.

A difference should be made here between a system of registration regarding works only (for the purpose of an easier identification of said works, such as it is the case with ISAN) and a system of registration of rights, and in the latest case if said rights registration would precondition actual exercise of these rights (which would seem in such case contrary to international treaties) or not.

X YES

Bearing in mind that copyright protection should not be conditioned to formalities such as previous registration of works and rights, as provided by International Treaties applicable (notably the Berne Convention), and avoiding confusion between registration of works (for the purpose of their identification, such as is the case in the audiovisual sector through ISO's international standard audiovisual work identifier ISAN) and registration of rights (for the purpose of identifying the various rightholders, which is a much more complex task, achieved today through very specific and local rights registries, if any), there seems to be some room (and even a request from European stakeholders) for a more proactive intervention of the European Commission in order to facilitate the development of international identifiers in Member States, notably where the audiovisual sector might not be structured enough to invest in the development of such identifiers.

Although aiming only at the identification of the work itself, and not giving directly information about rights or rightholders involved, standard identifiers are key for the purpose of digital distribution management and transparency. They are also meant to be (or become) a single entry point to those databases where information about rights is stored (CMOs, public registries, rights libraries, etc.): this is especially the case in the audiovisual sector with ISAN, ISO's International Standard Audiovisual work Number (see www.isan.org), which is today already broadly used by European producers' and authors' collecting societies.

The need for a more proactive approach on audiovisual identifiers has also been acted during the "Licenses for Europe" dialogue, which ended notably in WG3 with pledge # 9 about "improving identification and discoverability of audio-visual content online", which:

1. Recognizes the essential contribution of internationally recognized standard and interoperable audiovisual work identifiers to increase the availability of audiovisual content online, by facilitating rights management, discoverability, and distribution of such content;

2. Recommends the systematic registration of all newly produced audiovisual works with such international recognized standard audiovisual work identifiers, and calls on stakeholders at Member States and European level to consider implementing measures facilitating wider use of such identifiers;

3. Calls for studying the possibility of systematic use of an international recognized standard audiovisual work identifier for all audiovisual and cinematographic works benefitting from support of the Media/Creative Europe programme;

4. Recommends the full implementation of the interoperability between ISAN and EIDR (see Question 19 below);

5. Calls for further interoperability and increased synergies between said identifiers and rights registries where these identifiers are used.

X NO

Should on the contrary a European registration system be envisaged as a formality that would condition the actual exercise of IP rights, there would be immediate opposition on our side, as this would clearly contradict applicable international treaties, notably the Berne Convention (as stated in the consultation document itself).

It is true that the USA do have a registration system for copyright with several other conditions attached. However, this system was introduced at the time as a pre-condition for copyright protection and with a view to determining its initial duration of (then) 28 years after registration. Such a system would have no added value in Europe, where copyright and neighbouring rights protection starts with the creation/performance/production (without any conditions of formality applying) and is calculated from the death of the author or the performance/fixation respectively. And even in the US, the registration requirement no longer applies to non-US works and subject matter; this as a pre-condition for adhering to the Berne Convention that prohibits any

formalities.In principle, no system is needed for the identification and licensing of works. All works and subject matter and their rightholders can rather easily be identified, be it through indications on the product, with the help of collecting societies, clearing houses or, nowadays, with the help of the internet. Even if there should be a problem with respect to such identification for orphan works (which has not proven, in the cinematographic sector, to be an actual issue), a registration system would not help, because it cannot be applied retroactively.

□ NO OPINION

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

[Open question]

A registration system would not provide legal certainty about the copyrightability of the work, the protectability of the subject matter, the rightholder(s), the transfer of rights, or the duration of protection, because it would only be of a declaratory nature, and presumably be based on claims only (establishing a copyright office for verification of the claims would entail high costs and bureaucracy without any clear added value). In any event, legal certainty about the above-mentioned features can only be provided by the courts.

But on the other hand, as stated in the conclusions of the "Licenses for Europe" exercise (see pledge #9 mentioned above under Q.15), a European policy supporting implementation of international identifiers would "help to take audio-visual works out of the digital 'black hole' and streamline their distribution and discoverability".

Unlike the idea of a central registry of rights, and as shown by the broad support to the above mentioned pledge, there is a strong consensus on the need for audiovisual work identifiers as a key milestone to improve discoverability, rights clearance and distribution of audiovisual works.

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

[Open question]

Should the consultation on the contrary consider a central registration system for rights, the disadvantages of such system would be numerous:

(1) No legal certainty. Registration would only reflect claimed protection which is not proven and may not be upheld in court;

(2) Costs and administrative burden. Registration would necessitate a registration office, hence bureaucracy, and it would not come for free. This would be a disadvantage particularly for individual authors and SME rightholders, who would have to pay fees upfront before knowing the success of their work/subject matter on the market; it would also double-up with costs already implemented by collecting societies and libraries to set up such databases of rights: it seems therefore more realistic to build on existing local databases which could be inter-related (or accessed) through common standard and/or interoperable work identifiers such as ISAN in Europe.

(3) Foreign rightholders would be at a disadvantage: it is technically more difficult for foreigners to meet a registration requirement, because they are not "sur place" of the registration office, wherever it would be located;

(4) If the registration requirement were to apply to foreign rightholders, it would violate international obligations. All relevant international copyright conventions include a prohibition of formality requirements and notably registration – for very good reasons as explained above.

(5) However, if foreign rightholders were to be excluded from its application, it would leave the financial burden exclusively on domestic rightholders – and it would eventually demonstrate that the registration has no added value in the first place, because the EU is a huge market for foreign rightholders, in particular from the USA.

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

[Open question]

Rightholders, small and big, are in Europe usually on record/registered with their collecting society or professional organisations. There is no reason for obliging rightholders to an additional registration of their rights, if already done. But there is a logic to make existing database more easily manageable, accessible and interoperable, though common indexes or identifiers (see Q. 15 and 16 above and Q.19 below).

In any case would registration (of works only in our approach) have to be on cost-recovery bases exclusively.

D. How to improve the use and interoperability of identifiers

There are many private databases of works and other subject matter held by producers, collective management organisations, and institutions such as libraries, which are based to a greater or lesser extent on the use of (more or less) interoperable, internationally agreed 'identifiers'. Identifiers can be compared to a reference number embedded in a work, are specific to the sector in which they have been developed[32], and identify, variously, the work itself, the owner or the contributor to a work or other subject matter. There are notable examples of where industry is undertaking actions to improve the interoperability of such identifiers and databases. The Global Repertoire Database[33] should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition[34] was established to develop building blocks for the expression and management of rights and licensing across all content and media types. It includes the development of a Rights Reference Model (RRM) – a comprehensive data model for all types of rights in all types of content. The UK Copyright Hub[35] 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]

As stated before (see Q. 15-18), we see significant merit in continuing to develop "identification systems" for audiovisual works such as ISAN, which is an open ISO certified standard that addresses a comprehensive spectrum of audiovisual work types and versions thereof, being able to allocate a unique identifier to each of them, is cost effective and able to address both large and small rightholders and volumes of registration, is interoperable with other identifiers (such as EIDR) and rights registries, notably in Europe (used by CMOs such as AGICOA, or CISAC member companies).

The Commission is already well aware of the substantial development of ISAN, the International Standard Audiovisual Number (www.isan.org). It constitutes a very promising response and we are encouraged by the support of European Union institutions and media players, alongside of course any other similarly geared interoperable initiatives such as EIDR (http://eidr.org/).

The role of the EU should be to encourage such marketplace solutions to become interoperability norms for rights database, even if necessary through regulatory intervention in situations where the industry is not structured

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

[33] You will find more information about this initiative on the following website: http://www.globalrepertoiredatabase.com/.

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

[35] You will find more information about this initiative on the following website: http://www.copyrighthub.co.uk/.

enough to fully implement such standards. Given the risk of discrepancies between Member States in their respective efforts for standardisation, there should be room here for EU intervention in this area.

E. Term of protection – is it appropriate?

Works and other subject matter are protected under copyright for a limited period of time. After the term of protection has expired, a work falls into the public domain and can be freely used by anyone (in accordance with the applicable national rules on moral rights). The Berne Convention[36] requires a minimum term of protection of 50 years after the death of the author. The EU rules extend this term of protection to 70 years after the death of the author (as do many other countries, e.g. the US).

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

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

X YES – Please explain

It has been confirmed by the courts and legislators that intellectual property is true property and of equal value as classical property in tangible goods. And yet, as a compromise, all forms of intellectual property with the exceptions of trademarks are limited in time, i.e., have a limited duration. This is a compromise and, in the case of copyright, due to the fact that, at some point in time, cultural goods and services should become part of the public domain. This point in time has usually come when the cultural value of the works or other subject matter becomes more important than their economic value.

Many older works have a very long economic life span: recordings of the Beatles or European films like those from Fritz Lang or Federico Fellini are still doing very well on the market, all the more since digital technology preserves them much better than before. The duration of copyright protection should, therefore, rather be longer in the digital environment, not shorter. This was the reasoning behind the recent prolongation of the duration of the protection of sound recordings at EU level.

On the whole, the current terms are a good and sustainable compromise and have, therefore, been recognised worldwide in international conventions.

Concerning performers and producers in the audiovisual sector, there is no need to extend the terms of protection. As the Commission explains in its impact assessment related to the Directive extending the term of protection for the related rights of music performers and producers, "*AV performers and producers are not considered as their economic and legal structure is significantly different*". This concerns their legal status as well as the assignment and transfers of their rights.

☐ NO – Please explain if they should be longer or shorter

☐ NO OPINION

[36] Berne Convention for the Protection of Literary and Artistic Works, http://www.wipo.int/treaties/en/ip/berne/.

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/EC[37].

Exceptions and limitations in the national and EU copyright laws have to respect international law[38]. 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)[39], these limitations and exceptions are often optional[40], in the sense that Member States are free to reflect in national legislation as many or as few of them as they wish. Moreover, the formulation of certain of the limitations and exceptions is general enough to give significant flexibility to the Member States as to how, and to what extent, to implement them (if they decide to do so). Finally, it is worth noting that not all of the limitations and exceptions included in the EU legal framework for copyright are of equivalent significance in policy terms and in terms of their potential effect on the functioning of the Single Market.

In addition, in the same manner that the definition of the rights is territorial (i.e. has an effect only within the territory of the Member State), the definition of the limitations and exceptions to the rights is territorial too (so an act that is covered by an exception in a Member State "A" may still require the authorisation of the rightholder once we move to the Member State "B")[41].

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.

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[37] 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.

[38] 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).

[39] 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)).

[40] 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.

[41] 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.

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?

☐ YES – Please explain by referring to specific cases

X NO – Please explain

Rightholders, as well as users and consumers have lived very well with the catalogue of exceptions that has been shaped by the copyright Directives and implemented in detail by the national laws of Member States. Copyright protection, much more than industrial property, is based on cultural traditions that have grown over time. Each Member State applies limitations and exceptions to its own needs. To give an example, exceptions for library use are not needed in Member States with less or no library infrastructure or use; exceptions for education and teaching purposes may be more needed in Member States without a functioning network of collecting societies. Said collecting societies can also help adapting existing exceptions to the actual needs of users (such as it is the case in France through agreements between CMOs and the Ministry of Education which have actually extended the scope of the exception).

There is no need to derogate from the principle "as much harmonisation as needed, but as much flexibility for Member States as possible". Member States are entitled to apply tailor-made solutions to limitations and exceptions to the rights, i.e., to the balance of rights and interests that is crucial in the area of copyright. It is obvious that users insist on strong exceptions and preferably on imposing the respective obligations on Member States via EU law. However, there are only limited cases, where imposing obligatory limitations/exceptions on Member States is justified against the principle of subsidiarity. One example is Article 5(1) of Directive 2001/29.

☐ 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

X NO – Please explain

There is no reason nor is there a justification for such a step. The principle of subsidiarity has to be respected. The exceptions that are enshrined in the copyright Directives (like the obligatory ones in Directive 2009/24 and in Article 5(1) of Directive 2001/29, or the non-obligatory ones) function well in practice (see above on question 21). It is very important in this respect and has some harmonisation effect that the list of exceptions contained in Directive 2001/29 is exhaustive, so that Member States are not allowed to introduce other limitations/exceptions than the ones listed there.

☐ NO OPINION

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

[Open question]

There is no need to add or remove limitations and exceptions to/from the existing catalogue. The existing catalogue reflects a good compromise at EU level. It has been accepted and continues to be acceptable by all parties. It has always been difficult to reach a compromise: particular examples are the exceptions in the Software Directive 2009/24 for decompilation and back-up copying or the exceptions in Directive 2001/29 for private copying, on-site consultation or technical copies (Article 5(1)).

EU law hence provides for an appropriate (and exhaustive, see above) framework of limitations and exceptions at EU level. Any necessary adaptations may be applied by national law within this framework and do not necessitate EU legislation. The European Court of Justice is the appropriate institution to safeguard compliance of national law in this respect with EU law.

Modifying the EU framework for such adaptations is neither necessary nor worth the while. Moreover, any attempts of doing so would only risk opening up Pandora's box, tilting the delicate balance of rights and other interests enshrined in the Directives, and not respecting the international law obligations of the relevant treaties (Berne Convention, WCT, WPPT and TRIPs Agreement).

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

☐ YES – Please explain why

X NO – Please explain why

Providing Member States with more flexibility on limitations and exceptions is not necessary because, as is rightly stated in Section III above, they already enjoy a sufficient degree of flexibility; nor would it be appropriate in view of the functioning of the Internal Market. For this reason, the list limitations/exceptions contained in Directive 2001/29 is exhaustive and does not allow Member States to introduce others.

Providing users with more flexibility would risk modifying the balance of rights and interests enshrined in the Directives. It would potentially reduce the level of protection, and by consequence risk being in violation of the Directives and international obligations, notably the three-steps-test (Article 5(5) of Directive 2001/29; Article 10 WCT, Article 16 WPPT).

☐ 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]

As said before, the EU legal framework on copyright provides Member States and stakeholders with sufficient flexibility while providing for the necessary degree of harmonisation. When discussing the issue of (more) flexibility, it should be noted, in particular, that the concept of "fair use" or "fair dealing" is alien to the EU

Directives and has no basis in international copyright law. The two so-called "Internet Treaties" WCT and WPPT of 1996 already provide for appropriate solutions for the protection of copyright in the new digital environment and have deliberately not adopted this concept. In our view, it must not be adopted in EU law, as it is contrary to the three-steps-test.

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

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

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

Territoriality does not constitute a problem regarding the **substance** of the limitations and exceptions. True, in theory, limitations and exceptions, as well as the rights that they refer to, are shaped in detail by the national legislator and apply only within its jurisdiction. In practice, however, there are not too many differences between Member States in this respect, especially not in the digital environment where basically very similar, if not the same, limitations and exceptions apply (for example, for technical copies, private use, education and teaching). In this respect, applying the three-steps-test has had a harmonising effect, too.

Territoriality does not constitute a problem, either, for the **management** of rights/limitations and exceptions. Many exceptions, in particular remuneration rights, are centrally managed by collecting societies that have/should have cross-licensing agreements with sister societies and function as a one-stop-shop for a broad range of repertoire. Moreover, these societies increasingly manage the rights together with clearing organisations that operate on a multi-territorial level.

In the event that current exceptions were to apply cross-border, this could lead to the imposition of the respective exception of one Member State in another – although that Member State may not have implemented the exception or limitation or may have implemented in a narrower manner. In such a case, the exception in question would cross the border and "override" the copyright law of the country where protection is sought.

At this stage, the Commission has not presented any evidence or an impact assessment which would justify extending the reach of exceptions and limitations established at a national level beyond their borders.

☐ NO OPINION

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

[Open question]

Rights, as well as limitations and exceptions, apply to the relevant acts that are undertaken in the territory of exploitation. Consequently, equitable remuneration or fair compensation is only due for private copying, public performance, public lending, etc., if the relevant acts take place in the jurisdiction in question. In the example of equitable remuneration for private copying, rightholders are not entitled to collect, through their collecting society, levies for private copying that takes place abroad, i.e., outside the jurisdiction that grants the remuneration rights. The latter, therefore, have no "cross-border" effect.

At present, such remuneration rights are not granted by the EU Directives: the Directives harmonise these rights to some extent, but the latter are granted by national law. If, in the future, EU law should grant these rights directly (e.g., through a Regulation), they would still have to be managed and the remuneration be collected by the collecting society in charge depending on where the relevant acts take place.

A. Access to content in libraries and archives

Directive 2001/29/EC enables Member States to reflect in their national law a range of limitations and exceptions for the benefit of publicly accessible libraries, educational establishments and museums, as well as archives. If implemented, these exceptions allow acts of preservation and archiving[42] and enable on-site consultation of the works and other subject matter in the collections of such institutions[43]. The public lending (under an exception or limitation) by these establishments of physical copies of works and other subject matter is governed by the Rental and Lending Directive[44].

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

1. Preservation and archiving

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

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

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

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

X NO

☐ NO OPINION

29. If there are problems, how would they best be solved?
[Open question]

……

[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.

……

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]

……

……

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

[Open question]

……

JOINT RESPONSE TO QUESTIONS 28 to 31:

We are NOT aware of problems related to the use of the preservation exception for the preservation purposes. We are deeply committed to the preservation of Europe's film heritage and to providing access to it for cultural, educational and research purposes. Collection of films are available by way of legal (mandatory) deposit rules or under voluntary deposit arrangements with film heritage institutions – where there is a need to preserve these materials the institutions in question can either rely on the relevant exception or have recourse to the rightholders. In this regard, we would notably like to draw attention to the framework agreement on voluntary deposit with film heritage institutions, which FIAPF (International Federation of Film Producers Association) entered into already in 1972, and which was recently updated to take into account the digital environment. We are also fully supportive of more current endeavours including the work on audiovisual heritage in the context of "Licenses for Europe" (WG3). We note also the important role of the recently adopted Orphan Works Directive. Indeed, that Directive, Article 5(2)(c) and national implementations thereof operate on the basis of a clear distinction between, on the one hand, conditions that are needed to ensure that public bodies entrusted with the public interest missions are provided with the required legal certainty to fulfil their responsibilities and, on the other hand, processes and practices that might go beyond these public interest missions. In this context, we recognise archives and film heritage institutions are interested in embracing digitisation including by digitising their archives, making them available online and projecting them in digital format in their cinematheques. Such institutions' activities should not go beyond their public interest mission of collecting, cataloguing, preserving, restoring and making accessible for educational, cultural, research or other non-commercial uses cinematographic and other audiovisual works. Where they do go beyond this mission, then licensing will be relevant as there is a risk of other conflicting with the normal exploitation of works in the sector. That said, the audiovisual sector is encouraged by the work that stakeholder platforms, achieve (see above reference to the most recent work of the WG3 of the License for Europe process), which encourage contractual arrangements between rightholders and users for the implementation of copyright exceptions, are very useful to further concrete solutions between stakeholders.

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]

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

[Open question]

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]

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

[Open question]

JOINT RESPONSE TO QUESTIONS 32-35

We have serious concerns about a possible extension of Article 5(3)(n) off the premises of libraries and archives. We believe such arrangements should be left to licensing (such is already the case for instance in France regarding the similar situation of Educational institutions' extranet) so that they can address a host of important questions including robust means of ensuring that only intended beneficiaries have access and the use of technological measures to prevent leakage of protected works online. An exception that applied online and permitted remote access to protected works would risk conflicting with the normal exploitation of works by on-demand services online.

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

□ NO

□ NO OPINION

37. If there are problems, how would they best be solved?
[Open question]

……

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]

……

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]

Depending on the medium, on-line consultation and e-lending may be tantamount to on-line making available. For example, if films or music are offered for on-line lending, rightholders must enjoy the exclusive right of making available to safeguard their economic interests. Anything less than the exclusive right would undermine the commercial benefits of rightholders and their business models of distribution. It would also be a violation of EU and international law.

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 form 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 other[45]. 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

X NO – Please explain

Bearing in mind that the concept of "out of commerce work" is hardly applicable to the audiovisual sector (audiovisual works are not only edited in DVD; they may be unavailable for good reasons according to the applicable release window; etc.), there is no any evidence that films and other audiovisual content should be concerned by such legislation.

It would be highly surprising that the results of the 2011 MoU, intended for books and printed material only, and implemented in French and German law only (resp. in 2012 and 2013), be already extended at European level, and even to other types of works, without an assessment of the results of said French and German legislations.

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)?

☐ YES – Please explain

X NO – Please explain

[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.

See response to Q.40 above.

NO OPINION

B. Teaching

Directive 2001/29/EC[47] enables Member States to implement in their national legislation limitations and exceptions for the purpose of illustration for non-commercial teaching. Such exceptions would typically allow a teacher to use parts of or full works to illustrate his course, e.g. by distributing copies of fragments of a book or of newspaper articles in the classroom or by showing protected content on a smart board without having to obtain authorisation from the right holders. The open formulation of this (optional) provision allows for rather different implementation at Member States level. The implementation of the exception differs from Member State to Member State, with several Member States providing instead a framework for the licensing of content for certain educational uses. Some argue that the law should provide for better possibilities for distance learning and study at home.

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

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

☐ YES – Please explain

X NO

☐ NO OPINION

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

[Open question]

Any problems can be (and are) solved on the basis of agreements, especially with collecting societies, on the use of AV material in class.

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]

See reply to question 43 above.

As stated also in Q.23 above, collecting societies can authorize such uses or help adapting existing exceptions to the actual needs of users (such as it is the case in France through agreements between CMOs and the Ministry of Education which have actually extended the scope of the exception).

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

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]

A legislative solution at EU level is not needed. In any case, any such solution would have to respect the three-steps-test and the principle of subsidiarity (see above, on questions 21 et seq.).

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

[Open question]

C. Research

Directive 2001/29/EC[48] enables Member States to choose whether to implement in their national laws a limitation for the purpose of non-commercial scientific research. The open formulation of this (optional) provision allows for rather different implementations at Member States level.

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

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

□ YES – Please explain

……

……

X 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]

Framework agreements exist between research institutions and rightholders' associations and are usually managed through collecting societies. These mechanisms are not reported to have caused any problems. If there is an issue at all, then the real issue is not access, but payment.

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

D. Disabilities

Directive 2001/29/EC[49] 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 Treaty[51] 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

X NO

☐ NO OPINION

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

[Open question]

[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.

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

[Open question]

Framework agreements exist between research institutions and rightholders' associations and are usually managed through collecting societies. These mechanisms are not reported to have caused any problems. If there is an issue, it is payment, not access.

With respect to the recent conclusion of the Marrakesh Treaty to facilitate access to works by visually impaired persons, the European Union's acquis in the area of copyright and related rights appears to already be in conformity with this new international instrument. Directive 2001/29/EC provides the necessary flexibility to permit signature and ratification of the treaty by the EU. Consequently, we disagree with the view that new provisions are necessary at EU level, since it has not been established that existing provisions do not give satisfactory results in the geographical area concerned.

E. Text and data mining

Text and data mining/content mining/data analytics[52] 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

……

……

X NO – Please explain

The right of reproduction is and should remain an exclusive right (to authorise and prohibit). If mining is private use, or made in the context of other known exceptions (for research, education, etc.), corresponding limitations apply to the right of reproduction, mostly combined with a right to obtain equitable remuneration. If mining is considered to be a commercial activity, what is allowed should be subject to an agreement with the rightholder(s).

We oppose an exception for commercial text and data mining.

……

☐ NO OPINION

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

[Open question]

……

……

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]

……

……

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

[Open question]

……

……

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

[Open question]

……

……

F. User-generated content

Technological and service developments mean that citizens can copy, use and distribute content at little to no financial cost. As a consequence, new types of online activities are developing rapidly, including the making of so-called "user-generated content". While users can create totally original content, they can also take one or several pre-existing works, change something in the work(s), and upload the result on the Internet e.g. to platforms and blogs[54]. User-generated content (UGC) can thus cover the modification of pre-existing works even if the newly-generated/"uploaded" work does not necessarily require a creative effort and results from merely adding, subtracting or associating some pre-existing content with other pre-existing content. This kind of activity is not "new" as such. However, the development of social networking and social media sites that enable users to share content widely has vastly changed the scale of such activities and increased the potential economic impact for those holding rights in the pre-existing works. Re-use is no longer the preserve of a technically and artistically adept elite. With the possibilities offered by the new technologies, re-use is open to all, at no cost. This in turn raises questions with regard to fundamental rights such the freedom of expression and the right to property.

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results or even the definition of UGC. Nevertheless, a wide range of views were presented as to the best way to respond to this phenomenon. One view was to say that a new exception is needed to cover UGC, in particular non-commercial activities by individuals such as combining existing musical works with videos, sequences of photos, etc. Another view was that no legislative change is needed: UGC is flourishing, and licensing schemes are increasingly available (licence schemes concluded between rightholders and platforms as well as micro-licences concluded between rightholders and the users generating the content. In any event, practical solutions to ease user-generated content and facilitate micro-licensing for small users were pledged by rightholders across different sectors as a result of the "Licences for Europe" discussions[55].

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?

[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 .

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

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

X YES – Please explain by giving examples

The problems encountered are twofold:

First there is the re-use of pre-existing audio-visual works or parts thereof for creating and disseminating a combination or a new derived audio-visual feature on-line without asking rightholders for permission. It is sometimes difficult to spot such acts and to identify the actors.

Second the problem becomes even bigger when such content is disseminated on-line (i.e. in huge quantities and to a broad public) through so-called "UGC platforms" (YouTube or Dailymotion for instance), as those platforms are using the Electronic Commerce Directive provisions on hosting as an umbrella to avoid any real responsibility in preventing such dissemination.

☐ 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?***

X YES – Please explain

Comment on (b): works made available on-line usually carry an indication of the rightholders and the rights preserved. Other descriptive metadata (titles, identifiers, …) can also help (and should be encouraged) so that enquiries on both can be addressed to the rightholders as indicated and, if needed also, to collecting societies or other available rights databases.

☐ NO – Please explain

☐ 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?***

X YES – Please explain

Comment on (a): First of all, this is not just a problem of remuneration. This type of use/adaptation touches upon the exclusive rights of authors (rights of adaptation; reproduction; moral rights) and is therefore subject to their authorisation.

Second, many authors of derived works do not ask the authors of the pre-existing works for their permission, nor are they ready to pay anything. If the adaptation is private use, collecting societies would manage the rights of both the authors of the pre-existing works and the authors of the derived works. However, in both cases, they are faced with an enforcement problem (see responses to Q.58 above and Q.61 below).

☐ NO – Please explain

☐ NO OPINION

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

[Open question]

The problems described above largely relate to enforcement and awareness. Between the author of the pre-existing work and the author of the derived work, notice and take down (Article 8(3) of Directive 2001(3)) is an option, but this requires cooperation of the intermediaries.

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]

We take the view that there are no problems that require a legislative solution. The industry, however, is undertaking several approaches to work across sectors to develop service and technology while at the same time protecting copyright.

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

[Open question]

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 photocopying[56]. 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

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

categories of persons (i.e. natural persons making copies for their private use) or through use of certain technique (i.e. reprography). In that context, levies are important for rightholders.

With the constant developments in digital technology, the question arises as to whether the copying of files by consumers/end-users who have purchased content online - e.g. when a person has bought an MP3 file and goes on to store multiple copies of that file (in her computer, her tablet and her mobile phone) - also triggers, or should trigger, the application of private copying levies. It is argued that, in some cases, these levies may indeed be claimed by rightholders whether or not the licence fee paid by the service provider already covers copies made by the end user. This approach could potentially lead to instances of double payments whereby levies could be claimed on top of service providers' licence fees[57][58].

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

64. In your view, is there a need to clarify at the EU level the scope and application of the private copying and reprography exceptions[59] in the digital environment?

☐ YES – Please explain

X NO – Please explain

The relevant provisions on these exceptions are contained in the Directive 2001/29. They are sufficiently clear while leaving enough flexibility to Member States. In particular, the interface of these exceptions with the protection and use of technical protection measures and the fact that the exceptions apply to the evolving digital environment are addressed and well explained in several Recitals of the above-mentioned Directive.

The scope and application of these exceptions also take due account of the principle of subsidiarity and have not led to problems in practice (apart from the constant complaints of some parts of the industry about the levies, but this is a separate issue, see below).

☐ 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]

X YES – Please explain

This question seems to confuse several issues, and doesn't take into account recent CJEU jurisprudence regarding private copy and reprography which contradicts Mr Vitorino's recommendations on which the questionnaire has been based.

First, if the private copies were made "in the context of" a licensed service, but are not clearly covered by the license (which is notably the case for subsequent copies made by a consumer for its private use in a Member

[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.
[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

State where a private copy exception has been implemented in national law, pursuant to the CJEU "VG Wort" jurisprudence), they should be subject to the payment of levies.

Furthermore, whether such private copying causes any harm or not, is irrelevant (and, in this respect, the introduction to this Section IV, based on Mr Vitorino's opinion that such copies should necessarily be considered as outside the scope of private copy, and in all cases as harmless, is misleading): Member States have not introduced levies to compensate rightholders for any "harm" (although recitals 35 and 38 of 2001/29/CE Copyright Directive indicate that "harm" can be one of the criteria that can be used to assess the level of remuneration), but to provide rightholders with an "equitable remuneration" as a fair share of the economic success of their works in the market and the economic benefits business draws from it through offering the necessary copying devices. Although recital 35 of the Copyright Directive includes a so-called "de minimis" clause (but which is not mandatory), the CJEU has also reaffirmed in its "Padawan" ruling that the simple potential use of a product for private copy purposes was enough to justify corresponding remuneration.

In accordance with art. 5.2.b of the Copyright Directive and CJEU's "VG Wort" ruling, it is therefore up to each Member State to decide to introduce (or not) a private copy exception in its national law. If so, compensation has to be provided for, and any act of private copy, including those made by users for private purposes in the context of a service licensed by rightholders, should give rise to remuneration.

☐ NO – Please explain

☐ 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]

By definition, levies already apply under Member States' legislation to all recordings/storage devices that allow for private copies to be made. It is not relevant in this respect if business models are "old" or "new". As levies are about sharing the economic benefit, fairness and economic justice can only be achieved if all producers/providers of such recording/storage devices are treated alike in this respect. This corresponds to the underlying rationale that rightholders are entitled to their share of the economic gains made on the basis of their protected works and subject matter, irrespective of whether the business models are "old" or "new".

Reversely, there is no any evidence that existing levies are a barrier to the development of new products and/or on-line services, as there is no discrepancy in the development of such products or services between Member States where a private copy legislation exists and is implemented, and Member States where no exception or remuneration is implemented.

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

X YES – Please explain

For the sake of transparency, consumers are entitled to know how much of the product/services price is due to copyright levies. With the same logic, cable distributors usually indicate explicitly the copyright fees in their bills to customers. When the levies were introduced for the first time in Germany in the 1960s, initially many producers of recording equipment indicated the share of the levies on the sales price tag.

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

However, it should not be forgotten that putting a visible price tag to copyright levies will demonstrate how minimal they are in comparison to the overall retail price of the product or service in question.

The proposal to make the fee visible has been made years ago by rightholder representatives in the 2008-2009 stakeholder dialogue organised by the European Commission. It was one of the only non-controversial points of the Vitorino report, and it has since then been implemented in French law.

□ NO – Please explain

□ NO OPINION

Diverging national systems levy different products and apply different tariffs. This results in obstacles to the free circulation of goods and services in the Single Market. At the same time, many Member States continue to allow the indiscriminate application of private copying levies to all transactions irrespective of the person to whom the product subject to a levy is sold (e.g. private person or business). In that context, not all Member States have ex ante exemption and/or ex post reimbursement schemes which could remedy these situations and reduce the number of undue payments[62].

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.

X NO – Please explain

First, the assumption of the questionnaire that differences in tariffs would result in obstacles to the free circulation of goods and services in the Single Market is highly questionable: private copy levies apply only to goods (and not services) in the country of destination where the consumer is located (see notably CJEU "Opus" and "Padawan" rulings). Furthermore, to the contrary of what was stated in the Vitorino report as well as in the present questionnaire, Member States, be it by law or through contractual arrangements with collecting societies, provide for legitimate upfront exemption or reimbursement of levies when products eligible to such levies are exported or used for professional purposes only, said reimbursement schemes being perfectly compatible with EU law as reaffirmed by the CJEU in its July 11th 2013 "Amazon" ruling.

As regards a cross border transaction that would result in undue levy payment or duplicate payment of the levy, no such situation is therefore known. Copyright levies are usually collected and administered by collecting societies that are subject to regulation, including tariff-setting and tariff-transparency obligations, and control by supervisory authorities and/or the courts/arbitration. By consequence, any occurring problems should be solvable in cooperation amongst collecting societies.

□ 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.).

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

[Open question]

As said above under Q.68, and to the contrary of what was stated in the Vitorino report as well as in the present questionnaire, Member States, be it by law or through contractual arrangements with collecting societies, provide for legitimate upfront exemption of devices used for professional purposes only, said reimbursement schemes being perfectly compatible with EU law as reaffirmed by the CJEU in its July 11th 2013 "Amazon" ruling (case C-521/11).

As one cannot necessarily assume that a product sold to a person other that a natural person will necessarily be used for purposes other than private copying (see for instance smartphones with integrated MP3/iPod player purchased by companies for their employees), there will be numerous situations where reimbursement schemes are the only proper solution to address exemption of professional uses. This does not preclude collecting societies from upfront exemption in cases where products subject to a levy are sold to persons other than natural persons for purposes clearly unrelated to private copying.

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]

See the reply to question 68 and 69 above.

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

[Open question]

Although they remain characterised by a high degree of subsidiarity and national specificities, as allowed under the 2001 Copyright Directive and reaffirmed by CJEU "Padawan" ruling, there are no real issues with the current functioning of the various levy systems in Europe other than the clear whish of those who pay said levies to phase them out and ultimately be exempted from their payment. Rightholder organisations on their part have proven during the various stakeholder dialogues (2008-2009 and then again in 2012) that they were willing to study ways to make the system more transparent (see notably Q. 67 above about the visible fee) as well as more understandable for all parties involved (notably by working on a harmonised list of products eligible to such levies). The remaining issues are up to the negotiation and/or the Member States to be resolved.

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 producers[63] or determining who the owner of the rights is when the work or other subject matter is created in the context of an employment contract[64]. 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

[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.

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]

The starting point always has to be the exclusive right (to authorise and prohibit), as it is the backbone of copyright/neighbouring rights protection and the bargaining chip for the rightholders vesting them with the necessary negotiating power to obtain adequate payment.

Where the exclusive right has been reduced by law to the right to obtain an equitable remuneration (e.g., for private copying, reprography, or public performance), it is most easily administered by collecting societies, with the understanding that such collecting societies are subject to regulation, including their tariff-setting and the distribution of revenues.

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

☐ YES – Please explain

X NO – Please explain why

There is no need to act at EU level: contracts vary from sector to sector, and so do national rules from one Member State to another. It does not appear to be necessary to harmonise these rules in any more detail, as no problems have occurred in practice and the principle of subsidiarity should prevail. Harmonising these rules would probably also be very difficult, as traditions and the needs as well as the structure of copyright industries differ too much from Member State to Member State, and finding a common denominator, other than the lowest one, cannot be expected.

☐ 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]

Even if the current rules may have their shortcomings, they seem to work well in practice. If needed, they can more easily be adapted at national than at EU level, while respecting the general framework of the EU copyright Directives.

VI. Respect for rights

Directive 2004/48/EE[65] provides for a harmonised framework for the civil enforcement of intellectual property rights, including copyright and related rights. The Commission has

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

consulted broadly on this text[66]. Concerns have been raised as to whether some of its provisions are still fit to ensure a proper respect for copyright in the digital age. On the one hand, the current measures seem to be insufficient to deal with the new challenges brought by the dissemination of digital content on the internet; on the other hand, there are concerns about the current balance between enforcement of copyright and the protection of fundamental rights, in particular the right for a private life and data protection. While it cannot be contested that enforcement measures should always be available in case of infringement of copyright, measures could be proposed to strengthen respect for copyright when the infringed content is used for a commercial purpose[67]. One means to do this could be to clarify the role of intermediaries in the IP infrastructure[68]. 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

☐ NO – Please explain

X NO OPINION

Break of copyright not only negatively affects rightholders, but also the State and consumers.

The Enforcement Directive (Directive 2004/48/EC) already includes obligations on sanctions and remedies for intellectual property infringements, though they remain fairly general.

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

[Open question]

Under both the Directive on Copyright in the Information Society 2001/29 (Article 8(3)) and the Enforcement Directive 2004/48 (Article 11(3)), intermediaries have to respond to claims for injunctive relief. Cooperation of intermediaries could be fostered by creating permanent coordination bodies and obliging them to provide for transparency regarding their identity. Moreover, it is crucial that the Commission sees to it that the above-mentioned provisions on injunctive relief are properly implemented by all Member States (which to our knowledge is not yet the case).

Obliging intermediaries to engage in monitoring would also be desirable and appropriate, but would require amendments to the E-Commerce Directive.

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?

[66] You will find more information on the following website: http://ec.europa.eu/internal_market/iprenforcement/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.

X YES – Please explain

Several provisions and Recitals of the copyright Directives and of the Enforcement Directive already explicitly enable Member States to ring-fence the protection of private life and personal data. All Member States have implemented the Directives in due respect of this protection. Moreover, the obligations under these Directives are handled in practice in a pragmatic manner and have not given rise to problems or complaints in this respect.

☐ NO – Please explain

☐ 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?

☐ YES

X NO

(1) There is no need, nor would it be feasible, to impose on all Member States an identical copyright law. In fact, besides the necessary harmonisation through the copyright *acquis communautaire*, copyright laws and practice in Member States vary considerably. There are good reasons for the remaining differences: some Member States are net importers, some are net exporters of cultural goods protected by copyright and have thus different economic interests. Languages are different, to begin with; cultural traditions, which are particularly relevant for copyright protection, differ, too; and each Member State has a genuine interest to protect its own cultural identity and cultural diversity. For example, the markets for books are very different, and the same is true for film production. Moreover, there are still significant differences in the concepts of continental European copyright law as compared with some Member States and the USA. Examples are the different level of protection of moral rights or the comprehensive copyright concept of countries such as France and Germany, which consider copyright to be not just a "bundle of rights", but one integral concept of personality-related property.

(2) An important, though not the only, element of copyright protection are rights and limitations/exceptions – and here, there are several (and justified) differences across the EU for the reasons mentioned above, due to different markets, traditions and copyright concepts. But rights and limitations/exceptions remain theoretical without enforcement - and here, differences in Member States with respect to civil procedure and criminal sanctions are even bigger than with respect to the scope of substantive rights. In addition, the national laws of collecting societies and of contracts/licenses also form an indispensable part of national copyright protection. Differences in this area are enormous, with harmonisation not even having started on copyright contract law.

(3) Pursuing the project of a single EU Copyright Title would make no sense without codifying all these elements of copyright protection at EU level. But including them all in EU legislation would be tantamount to an overregulation by the EU without a clearly demonstrated need for doing so. Centralising copyright protection in such a manner would deprive Member States of their required flexibility in a culturally very sensitive sector and would therefore be an obvious violation of the principle of subsidiarity.

(4) It is true that EU titles have been created in the area of industrial property (trademarks, models and designs, patents). But they cannot serve as a model for copyright: such industrial property protection is dependent on registration and other formalities, whereas copyright protection is not, and applying formalities to copyright protection is even forbidden by international law (see above in the reply to questions 15 et seq.). Therefore, different from, e.g., trademarks, the rights under a single EU Copyright Title could not be contested or confirmed by a "European Copyright Office", but would still have to be enforced through and interpreted by national courts.

(5) Finally, creating a single EU Copyright Title would hardly be realistic in procedural terms, as its adoption would probably require unanimity (Article 115 TFEU). But also on substance, it would not be desirable, because, in the light of the above, any attempts to agree on a single EU Copyright Title would risk leading to the search for the (potentially lowest) common denominator.

□ 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]

Not only would this be a "long term project", but for the reasons outlined above it is not worth pursuing in the first place.

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]