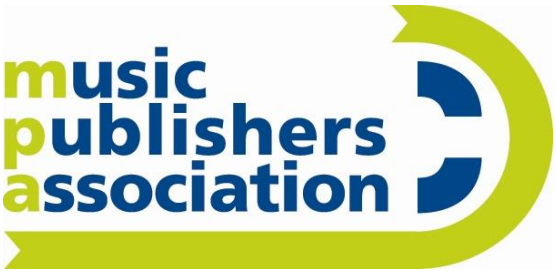

MUSIC PUBLISHERS ASSOCIATION

Response to the public consultation on the review of EU copyright rules

4 March 2014

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 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".*

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[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 .

[5] EUCO 169/13, 24/25 October 2013.

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

B. How to submit replies to this questionnaire

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

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

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

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

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

C. Confidentiality

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

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.

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[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 IDENTIFY YOURSELF:

Name: Music Publishers Association Limited www.mpaonline.org.uk

British Music House, 26 Berners Street, London W1T 3LR

The Music Publishers Association ("MPA") is a trade association representing and safeguarding the interests of its members, who are UK music publishing companies. The MPA also owns two collection societies, the Mechanical-Copyright Protection Society Ltd ("MCPS") which licenses mechanical rights to music users, collects fees and distributes royalties to its 20 thousand, mostly unpublished, writer members and 6.5 thousand publisher members who in turn represent tens of thousands of writers; and Printed Music Licensing Ltd ("PMLL") which manages a licence, on behalf of over 75 print publishers, for the copying of printed sheet music in schools and distributes royalties to its members.

Background

Musical works created by UK composers and songwriters and licensed by UK music publishers are the starting point for a huge variety of business models – both traditional and digital. The music industry has had to adapt rapidly to meet this demand and inevitably there have been challenges along the way.

Whilst the UK music publishing industry is working hard to deliver practical solutions to these challenges, we are concerned that plans by national and international governments to review the current copyright system will destabilise the market and undermine these efforts.

Our industry invests hundreds of millions of Euros into musical culture throughout Europe each year. This will not continue if there is not a copyright environment which is as strong, if not stronger than the copyright environment which currently exists.

The current copyright framework has shown itself to be sufficiently flexible to allow for the development of consumer driven digital business models and also is the key to providing certainty and fair remuneration to rights holders and creators. The EU must be robust in ensuring that any future changes to copyright legislation should only occur if it is proven beyond doubt that the creative industries are not able to deliver a business led licensing solution. Any proposed changes must be supported by rigorous economic evidence and well-documented proof of a problem which needs to be solved. We call upon the EU to support the efforts of the creative industries in developing a business led market rather than pursuing an agenda for change to copyright law. So far the industry has shown it can meet the challenges it faces in music licensing and we are confident that we can continue to do so without the need for legislative intervention.

The EU must also continue to pursue initiatives to champion the importance of enforcement of intellectual property rights in Europe.

Our members believe that the optimal way to address the challenges posed by the exploitation of content on the internet is to balance the interests of content owners against the interests of those seeking to exploit the content. The market is proving capable of achieving that balance through licensing, and if backed by a supportive regime for enforcement of intellectual property rights, we believe that there is no evidence of a need for copyright legislation to be amended.

The MPA also supports the submissions made by our international trade association ICMP, our national umbrella organisation UK Music and our domestic collection society PRS for Music as well as that of the British Copyright Council.

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):

…….

…….

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

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

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 NO

 NO OPINION

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

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

……

……

 NO

 NO OPINION

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

[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.

Our members support the concept of the Digital Single Market, and have been working hard, both cross border and cross sector to deliver practical solutions for end users of creative content. At all times, however, we are also aware of the cultural sensitivities which exist across the member states.

The UK music publishing industry has adapted rapidly to meet the demand for new services and to date has successfully licensed a number of online service providers including iTunes, YouTube, Spotify and Amazon. All of these licences operate on a multi-territory basis. We estimate that these licences represent in the region of 90% of the value of the market for digital use of musical works.

In the area of print and classical music, we are regularly asked to grant multi-territorial, and very often global licences. For example:

i) Print right requests (requests to print musical works as sheet music or in books or as digital files for printing by the end user). This type of request is very frequent and can run to hundreds per year.

ii) Media licences for grand right works, particularly operas (the right to stream and make opera productions available on-line, to broadcast them, to make them available as cinema presentations and DVDs). Whilst only a small number of these licences might be granted annually, they are a valuable source of income to a classical music publisher.

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

In the very recent "Licences for Europe" dialogues it was recognised that there were no major barriers for online service providers looking to license rights in musical works on a multi-territory basis.

Multi-territory licensing is an area which is developing rapidly as music companies adapt their business models away from a point of sale model towards delivering flexible licensing solutions. Evidence of the success of this migration from physical to digital is the number of multi-territory licensing deals in place with major online service providers. In the UK, our collection society, PRS for Music has been an innovator in this field and has licensed over 30 pan European digital music services. No online service provider who has required a multi-territory licence has been denied one on the basis of territory alone.

PRS for Music has also made much progress in the UK in simplifying licensing for small-scale users (the introduction of their Limited Online Music Licence - a straightforward one-stop, pre-paid licence targeted at online start-ups – is one such example). PRS has committed to work closely with collection societies across Europe to develop similar solutions for users of copyright content in other member states.

In order to support the roll out of flexible multi-territory licensing solutions which address the demands of the consumer, it is crucial that the copyright industries work together to streamline their back office functions and data processing. The Global Repertoire Database ("GRD") will be a central and authoritative database detailing the ownership of musical works. Separately, collection societies across Europe are working hard to develop back office "hubs" which will facilitate more efficient data processing. Back office systems, such as the International Copyright Exchange ("ICE"), also have a role to play in facilitating multi-territory licensing. We cannot see how legislative intervention would do anything but disrupt these initiatives which the Commission should be supporting. We would welcome EU support for the development of these licensing tools which some societies regard as an erosion of their national powers.

Areas where we are aware of problems for online service providers looking to roll out on a multi-territorial basis include the lack of reduced VAT for online cultural products and the non-harmonised system of taxation and accounting standards. It should be noted that digital services are likely to be less vocal about these issues because by targeting copyright they would hope to reduce their costs.

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

 YES – Please explain by giving examples

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……

 NO

Music publishers are in the business of licensing rights, at a fair price, whenever possible and have developed flexible and sophisticated licensing solutions for a number of multi-territory online services.

Territorial restrictions on online services are at the discretion of the online service provider, who may choose to limit their service for a multitude of reasons which may include cultural differences which exist between different markets, the speed at which they are able to establish relationships with local ISPs, testing new business models or for financial reasons.

Our members have given examples of large, international services which they have licensed on a multi-territory basis many months ahead of their launch in individual territories. Reasons given are often due to cultural sensitivities or securing agreements with local telecoms providers.

 NO OPINION

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

 YES – Please explain by giving examples

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 NO

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

 YES – Please explain

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 NO

Legislative intervention is not required. Music publishers strongly support the introduction of the CRM Directive. Not only will this improve standards of governance and transparency, but it will also set standards for multi-territory licensing of musical works, to the extent that they are not already in existence.

In addition it should be noted that the existing copyright framework has in no way hindered the availability of copyright works for licensing on a multi-territorial basis.

To support and streamline multi-territory licensing the music publishing industry is working hard with collecting societies to develop systems to make the relationship with our industry easier for the online service provider (e.g. GRD, Hubs & ICE). These non-legislative measures are industry led and industry funded and would benefit from the support of EU and national governments to champion their roll out, rather than have them jeopardised by challenges to copyright.

There is however, a need for the EU to review areas which are regularly reported to cause problems for online service providers, such as areas of non harmonised fiscal policy. In addition, infringing services which compete with the business models of licensed services continue to be an enormous problem for both rights holders and new business entrants. Further legislative intervention and support for the protection of the interests of rights holders and their licencees is critical to ensuring that these new businesses can contribute to the growth of the content services in the EU.

 NO OPINION

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

[The definition of the rights involved in digital transmissions]

The EU framework for the protection of copyright and related rights in the digital environment is largely established by Directive 2001/29/EC[16] 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[17] and databases[18].

Directive 2001/29/EC harmonises the rights of authors and neighbouring rightholders[19] 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[20], (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[21]. These rights are intrinsically linked in digital transmissions and both need to be cleared.

[16] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
[17] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.
[18] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.
[19] Film and record producers, performers and broadcasters are holders of so-called "neighbouring rights" in, respectively, their films, records, performances and broadcast. Authors' content protected by copyright is referred to as a "work" or "works", while content protected by neighbouring rights is referred to as "other subject matter".
[20] The right to "authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part" (see Art. 2 of Directive 2001/29/EC) although temporary acts of reproduction of a transient or incidental nature are, under certain conditions, excluded (see art. 5(1) of Directive 2001/29/EC).
[21] The right to authorise or prohibit any communication to the public by wire or wireless means and to authorise or prohibit the making available to the public "on demand" (see Art. 3 of Directive 2001/29/EC).

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[22]. According to this approach the copyright-relevant act (which has to be licensed) occurs at least in those countries which are "targeted" by the online service provider. A service provider "targets" a group of customers residing in a specific country when it directs its activity to that group, e.g. via advertisement, promotions, a language or a currency specifically targeted at that group.

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

 YES

We do not believe that the Commission has shown that there is further need for clarity with regards to the "making available" right through new legislative measures. Clarity has been given in the past through various judgements made by the Court of Justice of the European Union.

 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[23])

……

……

 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[24])?

 YES – Please explain how such potential effects could be addressed

There is no need to clarify the scope of the "making available" right as our rights are bundled and available to be licensed on a multi-territory basis as and when required.

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

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

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

Injunctive and compensatory relief should always be available to rights holders in the event of infringement, including against intermediaries.

We are concerned that there is a significant risk that new legislation on this issue, which has not proved to be necessary, would put rights holders in an increasingly fragile position.

 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")

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 NO

In the online environment, in the vast majority of cases, the two separate rights involved in a digital download are simply bundled together and as such are not visible to the end user. The music industry is working on many measures to simplify the licensing process through business led solutions – and this the bundling of rights is one example of such a practice and is in the interests of both rights holders and end users. Legislative intervention would disrupt the development of these simpler licensing solutions.

 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[25] 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[26] 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.

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

[26] Case C-360/13 (Public Relations Consultants Association Ltd). See also http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0202_PressSummary.pdf.

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

 YES

Whether or not the provision of a hyperlink leading to a copyright work requires the authorisation of the rightholder depends on the context in which the link is being used and the legitimacy of the site to which it is linking. If a hyperlink takes a user to a site which is using content without the consent of rights holders, then the link should be considered to be infringing.

We look forward to further clarification from the courts following judgements to come from cases currently before the CJEU.

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

……

……

 NO OPINION

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

 YES

We believe that his is already addressed by the Copyright Directive in Article 5.1 and as such we see no requirement for a broadening of this exception.

In addition, it should also be noted, that the viewing of a web page, as described in the circumstances above, is regularly included in the terms of licensing arrangements negotiated by rights holders – for example for online music streaming services where the activity could be considered to be 'browsing'.

 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)[27]. The issue that arises here is whether this principle can also be applied in the case of an act of transmission equivalent in its effect to distribution (i.e. where the buyer acquires the property of the copy)[28]. This raises difficult questions, notably relating to the practical application of such an approach (how to avoid re-sellers keeping and using a copy of a work after they have "re-sold" it – this is often referred to as the "forward and delete" question) as well as to the economic implications of the creation of a second-hand market of copies of perfect quality that never deteriorate (in contrast to the second-hand market for physical goods).

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)?***

This practice is currently illegal under existing copyright laws (c.f. Art 3 (3) Information Society Directive) and restrictions are therefore in line with current legislation. We are concerned that this question seems to suggest that this is a legal/acceptable acceptable practice and the question is likely to reinforce this view amongst respondents.

 YES – Please explain by giving examples

 NO

 NO OPINION

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

[Open question]

The music industry has licensed many online service providers who are able to develop flexible and compelling digital music services to customers at an attractive price point.

The consumption of content by consumers in the digital environment is not comparable with the purchase of physical content in the analogue world. Digital music files are available to consumers by way of a licence and not a purchase. As such we do not think it is appropriate to try and mirror business practices from the physical world in the digital world.

Providing a legal framework enabling the resale of previously purchased digital content would be devastating to the primary market for digital musical works. It would undermine the value of existing licensing agreements in place with service providers as it would allow users to create perfect copies of original content which would compete with the primary download. In addition there is no way of monitoring the dissemination of digital files without the use of expensive and complex technological protection measures and it would open the door to legitimising piracy.

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

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

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[29]. 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[30].

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

 YES

 NO Establishing a compulsory system of registration would go against the requirements of the Berne Convention, Article 5 (2) which states that copyright should not be subject to any formality. In addition it would force an unnecessary administrative burden on creators and rights holders.

At the moment creators and rights holders have the choice of registering their works within collective management organisations. This voluntary system of registration allows rights holders and creators to be equitably paid for the use of their work, which therefore creates a commercial incentive to register.

The music publishing industry has been working with collecting societies to build the GRD – this database will provide an authoritative and comprehensive point of reference for the ownership and control of musical works. The project is well underway and will provide a de facto point of registry. The EU should be supporting this initiative which will contain accurate information rather than considering a new, competing database.

 NO OPINION

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

[Open question]

None…….

…….

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

[Open question]

With no commercial incentive to register, such a system would inevitably create a database of inaccuracies and which would slow down the licensing process whilst at the same time adding cost to

[29] For example, it does not affect "domestic" works – i.e. works originating in the country imposing the formalities as opposed to works originating in another country.

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

the industry in terms of additional staff, given the number of new copyrights which would need to be added on a daily basis.

……

……

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

Please see our answer to question 15.

……

……

D. How to improve the use and interoperability of identifiers

There are many private databases of works and other subject matter held by producers, collective management organisations, and institutions such as libraries, which are based to a greater or lesser extent on the use of (more or less) interoperable, internationally agreed 'identifiers'. Identifiers can be compared to a reference number embedded in a work, are specific to the sector in which they have been developed[31], 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[32] should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition[33] 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[34] 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?

As mentioned in our response to question 15, we believe it would be useful to look at how the EU could work with the industry to promote the initiatives currently underway to improve efficiency in licensing such as GRD for the music industry and the Linked Content Coalition.

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[35] 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).

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

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

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

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

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

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

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

 YES There is no discernible reason why the term of protection should be altered in the digital environment. The term of copyright has been thoroughly reviewed recently and subject to full consultation by all member states which led to the adoption of the Term Directive in 2011. This was implemented in the UK on 1 November 2013. The environment for copyright has not changed sufficiently in the past few months to imagine that it is appropriate to review term of copyright again.

 NO – Please explain if they should be longer or shorter

…….

…….

 NO OPINION

III. Limitations and exceptions in the Single Market

Limitations and exceptions to copyright and related rights enable the use of works and other protected subject-matter, without obtaining authorisation from the rightholders, for certain purposes and to a certain extent (for instance the use for illustration purposes of an extract from a novel by a teacher in a literature class). At EU level they are established in a number of copyright directives, most notably Directive 2001/29/EC[36].

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

Whereas the catalogue of limitations and exceptions included in EU law is exhaustive (no other exceptions can be applied to the rights harmonised at EU level)[38], these limitations and exceptions are often optional[39], 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

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

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

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

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

territorial too (so an act that is covered by an exception in a Member State "A" may still require the authorisation of the rightholder once we move to the Member State "B")[40].

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

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

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

 YES – Please explain by referring to specific cases

……

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……

 NO – Please explain

Our members have not encountered any problems with the current catalogue of limitations and exceptions. They have been designed to be sufficiently flexible to allow member states to reflect existing practices and cultural differences.

The majority of the most relevant exceptions have now been adopted by member states and where they have not been adopted this has been due to cultural practices in that jurisdiction.

 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

……

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

……

 NO

We see no need for a higher level of harmonisation or for exceptions to be made mandatory in member states.

The current framework has not hindered the roll out of multi-territory licences in the music industry and the flexibility of the framework is a perfect way to allow member states to adapt their own framework which allows for cultural diversity. Market led licensing solutions, coupled with a flexible copyright framework have addressed the requirements of the majority of end users and consumers.

 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.

We are happy that the current list of exceptions provides the correct balance between market demands and the rights of creators and rights holders. As they currently stand they have not stopped the roll out of online music services or stood in the way of consumer access to digital content.

It is also important to note that the current list of exceptions and limitations is in line with the internationally recognised Three Step Test which only allows exceptions in cases which do not conflict with the normal exploitation of the work and do not unreasonably prejudice the legitimate interests of the rights holder.

Calls for additional limitations and exceptions are unlikely to comply with the Three Step Test and are generally called for by commercial enterprises seeking to avoid paying rights holders and creators for their content. We are particularly concerned by the proposals for a User Generated Content ("UGC") exception. Please see our response to Qs 58 – 63.

If it is the case that additional exceptions and limitations are proposed, their inclusion in the copyright framework must only be suggested on the basis of robust economic evidence and independent research with clear, worked examples of how and why the current framework and licensing environment is unable to adapt to the demands of the marketplace. Exceptions must only be introduced to address market failure and must not in any way harm existing business practices or diminish returns to creators. We believe that there is no evidence of market failure.

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

……

……

 NO

We have seen no evidence to suggest this; the music industry has been devastated by piracy but remains a viable business. This will not be the case if further exceptions and limitations are introduced. Our concern is that it is very difficult to get some digital services to the negotiating table. Their position vis-a-vis the content industries is that royalty prices need to be low to enable them to compete with piracy. It will be impossible to maintain the value of music with further exceptions. The music industry

and European culture will be at risk of further declining revenues which will impact upon investment into creativity in the region.

The way in which European law has developed in the area of limitations and exceptions is to provide certainty for rights holders and end users of copyright content whilst maintaining sufficient flexibility for member states to adapt the law to meet the needs of their own jurisdiction.

Greater flexibility suggests the introduction of a "fair use" concept, which we believe leads to unacceptable levels of uncertainty for all involved in the licensing of copyright works and to increased legal costs. Certainly in the US, where the concept of "fair use" exists (supported by over 170 years of case law), cases still arise regularly questioning the exact scope of the "fair use" exception.

For businesses wishing to establish themselves in Europe based around the use of copyright, we believe that commercial certainty provided by the existing copyright exceptions and limitations would be preferable to any "fair use" alternative.

 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]

…….

…….

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

…….

…….

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

In the experience of our members, the territoriality of limitations and exceptions does not constitute a problem and we have seen no evidence to suggest that it does. As referred to in answers above, it exists to provide member states with flexibility and to reflect their specific national requirements.

 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?)

In the UK we have no direct experience of the application of "fair compensation". Our view is that this issue has been addressed in recent ECJ judgements (Stichting de Thuiskopie v Opus and Austro Mechana v Amazon) and that the current system works and should be preserved.

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[41] and enable on-site consultation of the works and other subject matter in the collections of such institutions[42]. 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[43].

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.

…….

…We have seen no evidence of a problem.

…….

 NO

 NO OPINION

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

…….

…….

[41] Article 5(2)c of Directive 2001/29.
[42] Article 5(3)n of Directive 2001/29.
[43] 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]

Evidence of a problem must be provided before legislation is considered.

…….

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

[Open question]

…….

…….

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]

……

……

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

We have never been asked by libraries to license this service and would welcome discussions if they perceive a problem.

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]

……

……

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[44]. 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)[45].

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?***

[44] 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 .

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

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

……

……

 NO – Please explain

……

……

 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 –

……

……

 NO – Please explain

The MOU on key principles on the digitisation and making available of out of commerce works signed in 2011 was intended to facilitate agreements in the print sector between parties such as authors, publishers and libraries on collective licensing schemes for the digitisation and making available by public institutions of "out of commerce" printed works. The agreement was very specific and sector driven. We see no case for a similar arrangement regarding music as digitisation is a common feature and the chances of music being both in analogue form and out of commerce are remote.

 NO OPINION

B. Teaching

Directive 2001/29/EC[46] 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

……

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

…….

☐ **NO**

☐ NO OPINION

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

[Open question]

Evidence of a problem must be provided before legislation is considered.

…….

…….

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

Licensing schools and educational establishments for the copying of copyright material is a long established model in the UK. In line with this in 2013, the MPA launched its 'Printed Music Licensing Scheme', whereby schools in the UK are able to copy musical works (and make arrangements thereof) in return for a licence fee. The scheme has been backed by the Department for Education and is administered by the CLA (Copyright Licensing Agency).

This is an example of a successful, market-led solution and any broadening of an education exception to override licensing schemes would damage the income stream rights holders receive from schools. Further information on this scheme can be found here.

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?

We do not think that any legislative solution is required as there is no evidence of market failure. Licensing schemes for certain uses of copyright works in schools are well established in the UK. Much work is currently being undertaken by the UK copyright industries aimed at improving information to schools and educational establishments on the availability of licensing schemes. Examples of this are the development of the Copyright Hub and the work of the CLA. Any broadening of this exception would conflict with the Berne Three Step Test as it would interrupt the normal business of copyright licensing, such as the Printed Music Licensing scheme we run in the UK.

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

[Open question]

…….

…….

C. Research

Directive 2001/29/EC[47] 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

……

……

 NO

 NO OPINION

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

[Open question]

Evidence of a problem must be provided before legislation is considered.

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

[Open question]

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D. Disabilities

Directive 2001/29/EC[48] 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) [49].

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

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

[49] 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/).

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

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

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

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

 YES – Please explain by giving examples

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 NO

 NO OPINION

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

[Open question]

Evidence of a problem must be provided before legislation is considered.

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

The MPA has a Code of Fair Practice and within this there are guidelines relating to the use of printed music material by disabled persons. The MPA has also developed a licensing scheme under the Copyright (Visually Impaired Persons) Act 2002. The scheme governs multiple copying of printed music for the benefit of visually impaired people by educational and not for profit bodies in place of the Act.

Companies who wish to reproduce printed music using Braille or large print formats can do so by applying for a licence through the MPA rather than having to directly approach MPA member companies who hold copyright in the music.

The existence of licensing schemes such as this, which are flexible and meet the demands of the end user, mitigate the requirement for further legislative intervention.

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

E. Text and data mining

Text and data mining/content mining/data analytics[51] 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"[52]. In the context of these discussions, other stakeholders argued that no additional licences should be required to mine material to which access has been provided through a subscription agreement and considered that a specific exception for text and data mining should be introduced, possibly on the basis of a distinction between commercial and non-commercial.

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

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

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

 YES – Please explain

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[51] For the purpose of the present document, the term "text and data mining" will be used.
[52] 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 .

 NO – Please explain

Data mining should not be treated differently from other copyright uses, it should remain subject to existing copyright laws and exceptions.

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 NO OPINION

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

[Open question]

Evidence of a problem must be provided before legislation is considered.

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

[Open question]

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

[Open question]

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

[Open question] …….

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F. User-generated content

Technological and service developments mean that citizens can copy, use and distribute content at little to no financial cost. As a consequence, new types of online activities are developing rapidly, including the making of so-called "user-generated content". While users can create totally original content, they can also take one or several pre-existing works, change something in the work(s), and upload the result on the Internet e.g. to platforms and blogs[53]. 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

[53] 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.

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[54].

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

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

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

 YES – Please explain by giving examples

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 NO

The music publishing industry was represented in the 'Licences for Europe' working group (WG2) looking at the issue of User Generated Content. As the Commission noted, there was no consensus on the definition of UGC or what the exact issues were around UGC which the group was trying to address.

The creation of user generated content is undoubtedly an area which will continue to grow in popularity and be served over a range of digital platforms. The aim of the music industry is to license platforms so that individual users do not have to secure individual licences. Licensing of UGC is now established in the UK. Recently our collection society, PRS for Music, concluded a renegotiation of its deal with YouTube, which will continue to secure a flow of income back to UK songwriters, composers and music publishers.

Our view is that UGC should be treated no differently to an adaptation or a derivative work as long as it is correctly licensed. Music Publishers are happy to license derivative works and indeed have a blanket licences in place with online service providers which ensures that rights holders are remunerated fairly

[54] 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 .

for their work, without placing any unnecessary burden or legal risk on the end user who is adapting the content.

That said, it is vital in the realm of adaptation/derivative works/UGC, that the rights holder is able to exercise their Moral Rights to ensure that their work is not used in a way which is offensive to them. The enforcement of Moral Rights should not be confused with making it difficult to license UGC, and is easily dealt with by the provision of "notice or takedown" provisions in UGC licences.

 NO OPINION

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

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

 YES – Please explain

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 NO

This market is developing rapidly and the industry is working closely with online service providers to ensure works are correctly identified for online use. There is no evidence that the introduction of identifiers by way of expensive and distracting copyright legislation is necessary.

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 NO OPINION

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

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

 YES – Please explain

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 NO

Publishers are in the business of licensing rights and as we have said above, the licensing of UGC content does not differ enormously from existing licensing models which have evolved to deal with derivative works, adaptation and the well-established market for synchronisation. In addition,

increasingly sophisticated systems for monitoring usage and data mean that rights holders and creators are able to be remunerated appropriately.

What does concern us, however, is the idea of an exception for UGC, which appears to imply that creators of UGC will be able to receive remuneration for their work (through advertising for example) whilst payment of the underlying rights holders whose works have been used will be exempted. This is not acceptable; both the individual uploading the UGC and the rights holder should be remunerated, as is currently the case. It is absolutely essential that the creators get rewarded for their works being used. Any changes to legislation on this issue will deprive the creative industries of a growing and increasingly important income stream which will reduce the levels of investment in the European creative industries.

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

One area where our members have reported problems, and which may fall into the scope of User Generated Content, is the area of printed music material where there are examples of either user generated or user uploaded files of scanned sheet music forming the basis of illegal sites such as PianoFiles.

Sites such as these are having a negative impact on the print music industry and frequently offend creators. Music publishers are making headway in licensing these services, and are having some success - for example Ultimate Guitar (user generated guitar tabs) which is a huge file sharing service, has now been licensed.

An exception for user generated content would potentially legitimise the infringing activity of this type of site and allow them to compete with licensed service providers. We need enforced, not reduced protection to deal with such sites.

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?

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

We do not think that a legislative solution is needed. Market led solutions have been developed and are functioning for the benefit of the consumer, rights holder and online service provider. This is a market which is expected to deliver significant growth in the coming years and this is essential in a world where physical sales and other paid for music consumption are declining. Interrupting current licensing activity with an exception for UGC would undermine the development of this market and have a devastating effect on our ability to continue to invest in musical/cultural works.

We do believe, however, that there is a place for educating the market about what is a legitimate use of another's content and what is not – and signposting towards sites which are licensed and providing remuneration to rights holders and those which are not. Any help from the EU in supporting the copyright industries with this initiative would be greatly appreciated (The UK's Copyright Hub is a good example of progress being made in this area).

We would be fundamentally opposed to a "fair use" exception for user generated content as it would not give sufficient clarity to the end user or the rights holder and would be likely to result in costly legal battles. The EU system currently provides a good balance between legal certainty and flexibility.

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[55]. Levies are charges imposed at national level on goods typically used for such purposes (blank media, recording equipment, photocopying machines, mobile listening devices such as mp3/mp4 players, computers, etc.) with a view to compensating rightholders for the harm they suffer when copies are made without their authorisation by certain categories of persons (i.e. natural persons making copies for their private use) or through use of certain technique (i.e. reprography). In that context, levies are important for rightholders.

With the constant developments in digital technology, the question arises as to whether the copying of files by consumers/end-users who have purchased content online - e.g. when a person has bought an MP3 file and goes on to store multiple copies of that file (in her computer, her tablet and her mobile phone) - also triggers, or should trigger, the application of private copying levies. It is argued that, in some cases, these levies may indeed be claimed by rightholders whether or not the licence fee paid by the service provider already covers copies made by the end user. This approach could potentially lead to instances of double payments whereby levies could be claimed on top of service providers' licence fees[56][57].

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[58] in the digital environment?

☐ YES – Please explain

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☐ **NO**

There have been a number of CJEU decisions interpreting the Copyright Directive made over recent years which have confirmed that in countries where consumers are allowed by law to make private copies of copyright protected material, that rights holders have the right to be compensated for those reproductions. This approach was also confirmed by Mr Vitorino in his report on private copying.

Levies compensate the rights holder and creator when licensing is not workable or enforceable. It would be helpful if there was harmonisation across EU member states relating to which devices attract a private copying levy, but recognise that harmonisation of tariffs on devices is unrealistic. We support the position of UK Music and other UK rights holder organisations, that the proposed introduction of a

[55] Article 5. 2)(a) and (b) of Directive 2001/29.
[56] Communication "Unleashing the Potential of Cloud Computing in Europe", COM(2012) 529 final.
[57] 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.
[58] Art. 5.2(a) and 5.2(b) of Directive 2001/29/EC.

private copying exception in the UK, without fair compensation to rights holders, is completely unacceptable and is a major threat to our members' continued ability to invest in music.

 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?[59]

 YES

Any copy which is made without remuneration to the rights holder is harmful. Why should a creator or publisher invest in creation if users can access it for free? Licensing is always our first option, but where this is not possible, levies are essential.

 NO – Please explain

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 NO OPINION

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

Online services, such as cloud computing services, should be and are being licensed by our members. The development of new, licensed business models over recent years is proving that the system of licensing is working well for service providers and rights holders and would not have been possible if there had been a copyright environment which supported un-compensated private copying.

There is no evidence that the existence of levies in Europe has interrupted the development of online services. As previously mentioned in this document, multi-territory licences are in place with online service providers such as Spotify, Deezer, iTunes, Amazon and levies have not been a hindrance to the development of these services.

In the UK discussions are on-going as to whether certain (dumb locker) cloud services should be covered by a private copying exception if they provide no additional functionality. We view this as impractical as in reality such 'dumb locker' services do not exist and will infringe EU law if they are subject to an exception without fair compensation to rights holders.

67. Would you see an added value in making levies visible on the invoices for products subject to levies?[60]

 YES

In the interests of transparency and accountability this would be useful. It would also ensure no avoidance of payment and double payment in the case of export.

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

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

 NO – Please explain

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 NO OPINION

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

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

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

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 NO

Although there are differences in the way levy tariffs are calculated in different markets, the situation is well managed. Where problems do occur there is a refund system now in place.

 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.).

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?

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

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

The UK Government is currently pushing ahead to introduce a private copying exception without fair compensation for rights holders by way of introducing a new Section 28B to the CDPA. Our view is that the UK Government's plans infringe mandatory European legislation as has been interpreted by the CJEU in recent years. We note the forthcoming decision on the Copydan case and hope that this will provide further clarity.

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[62] 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[63]. This is an area that has been traditionally left for Member States to regulate and there are significant differences in regulatory approaches. Substantial differences also exist between different sectors of the creative industries.

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

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

Copyright is based on the principle that it enables the creator to be rewarded and provides protection. It also enables those who support creators to be rewarded for their investment.

Music publishers act on behalf of tens of thousands of songwriters and composers and it is our belief that all those we represent deserve fair remuneration for their artistic creations. Music publishers can only invest in their songwriters and composers if there is a strong and fair copyright regime, the ability to deal swiftly with piracy, and fair remuneration for any validly created copyright exceptions.

Contracts between music publishers and composers/songwriters are freely negotiated and operate at arms-length. The best protection for writers is the fiercely competitive nature of the music publishing market and that writers have a huge number of publishers from whom to choose. This means that the market essentially is self regulating through a combination of both choice and competition.

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

 YES – Please explain

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 NO – Please explain why

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[62] See e.g. Directive 92/100/EEC, Art.2(4)-(7).
[63] See e.g. Art. 2.3. of Directive 2009/24/EC, Art. 4 of Directive 96/9/EC.

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 NO OPINION

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

[Open question]

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VI. Respect for rights

Directive 2004/48/EE[64] provides for a harmonised framework for the civil enforcement of intellectual property rights, including copyright and related rights. The Commission has consulted broadly on this text[65]. 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[66]. One means to do this could be to clarify the role of intermediaries in the IP infrastructure[67]. 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

We believe that in order for there to be a level playing field which is able to allow licensed services to respond to the demands of the consumer and whilst ensuring the creator is appropriately remunerated, that there needs to be a far greater focus at the EU level on the enforcement of intellectual property rights.

This is an area where we would appreciate some clarity at an EU level and we would suggest the following improvements could be made to support efforts in this area:

i) It could be useful to establish a set of clear rules for fast track proceedings for civil law cases concerning infringements and EU guidelines for the calculation of damages. In UK Law the question of how to calculate damages in relation to infringement is assessed by addressing the question as to what would be a reasonable licence fee had the use been properly licensed? This has worked well for many years and is essentially an exercise in comparison with similar licensed exploitation and a similar formula could be used in addressing the question of fair compensation across borders.

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

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

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

[67] 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.

ii) The provisions on injunctions and damages should also be harmonised between all EU member states as there is currently great inconsistency.

We do not think it is appropriate to distinguish between commercial and non-commercial purposes as often the financial gains made from piracy are substantial but difficult to quantify accurately.

 NO – Please explain

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 NO OPINION

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

The "Mere Conduit" and "Hosting" exceptions were intended to protect service providers and website operators from liability in circumstances where their services were being used to infringe copyright without their knowledge or consent. That is a legitimate aim. However, due to their broad drafting they have been interpreted far more widely and they both need to be re-drawn so as to be limited to that specific purpose. Furthermore, the remedy available to rights owners (once the host or service provider is on notice of infringement) is limited to injunctive relief requiring them to remove or block the infringing material. This of course addresses future damage although it would be far more effective if an injunction obtained in the court of a Member State were to have automatic pan-European direct effect.

However, there is no reason why disregard of notice by an ISP or Host (which currently triggers the right to injunctive relief) should not also give rise to an entitlement to damages (with an uplift for flagrancy) for harm suffered since provision of notice. There is no justification for such additional protection and the upshot is that there is no incentive for ISP/Hosts to take any action to limit access to infringing material and every incentive for them to maintain the access because the resulting traffic generates revenue. If this layer of protection were removed so that Hosts and ISPs were liable in damages once on notice (with an uplift for flagrant disregard), it would inevitably have a major impact on piracy because of the deterrent effect of the consequences of disregarding notice (currently rife) and would promote greater co-operation and a fairer balance between the interests of content owners and service providers.

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

 YES

Any intrusion into private life or personal data is only permitted in circumstances where the subject of that intrusion has committed an illegal act, in common with other areas of law those rights are not intended to shield wrongdoers.

 NO – Please explain

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 NO OPINION

VII. A single EU Copyright Title

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

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

 YES

 NO

The concept of a single European copyright law was examined by the Wittem Group and was subsequently abandoned. Cultural differences between the member states mean that a single copyright code would be incredibly difficult to achieve at a political level. Contracts have been traded for value, on a territorial basis, for centuries and any attempt to change this would be fraught with dangers. We see no value in pursuing this idea.

 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?

No, we believe that this is unachievable and unlikely to deliver any tangible benefits to the creator or the consumer; rather it would cause confusion as contracts are reworked and entities losing out would require financial compensation.

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VIII. Other issues

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

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

[Open question]

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