

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

### *Contents*

|   |    |
|---|----|
| <b>I. Introduction</b> .....  | 2  |
| A. Context of the consultation .....  | 2  |
| B. How to submit replies to this questionnaire .....  | 3  |
| C. Confidentiality.....   | 3  |
| <b>II. Rights and the functioning of the Single Market</b> .....  | 8  |
| A. Why is it not possible to access many online content services from anywhere in Europe?.....                                  | 8  |
| B. Is there a need for more clarity as regards the scope of what needs to be authorised (or not) in digital transmissions?..... | 11 |
| 1. The act of “making available” .....  | 12 |
| 2. Two rights involved in a single act of exploitation .....  | 13 |
| 3. Linking and browsing.....  | 14 |
| 4. Download to own digital content .....  | 15 |
| C. Registration of works and other subject matter – is it a good idea?.....   | 17 |
| D. How to improve the use and interoperability of identifiers .....   | 18 |
| E. Term of protection – is it appropriate?.....   | 19 |
| <b>III. Limitations and exceptions in the Single Market</b> .....   | 19 |
| A. Access to content in libraries and archives .....  | 23 |
| 1. Preservation and archiving .....   | 23 |
| 2. Off-premises access to library collections.....  | 24 |
| 3. E – lending .....  | 25 |
| 4. Mass digitisation .....  | 27 |
| B. Teaching .....   | 28 |
| C. Research .....   | 30 |
| D. Disabilities.....  | 31 |
| E. Text and data mining .....   | 33 |
| F. User-generated content.....  | 35 |
| <b>IV. Private copying and reprography</b> .....  | 37 |
| <b>V. Fair remuneration of authors and performers</b> .....   | 41 |
| <b>VI. Respect for rights</b> .....   | 41 |
| <b>VII. A single EU Copyright Title</b> .....   | 43 |
| <b>VIII. Other issues</b> .....   | 44 |

## I. Introduction

### A. *Context of the consultation*

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

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

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

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

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

---

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

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

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

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

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

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

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

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

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

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

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

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

## ***C. Confidentiality***

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

---

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

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

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

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

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

Please read our [Privacy statement](#).

**PLEASE IDENTIFY YOURSELF:**

**Name:**

**International Federation of Reproduction Rights Organisations (IFRRO)**

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.

**Interest Representative Register ID number: 91217342449-83**

- 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**"

**X Collective Management Organisation**

This submission is made by the International Federation of Reproduction Rights Organisations (IFRRO). The members of IFRRO are national Reproduction Rights Organisations (RROs) and national and international associations of authors and publishers worldwide, a total of 141 member organisations in 78 countries as at 1 February 2014. RROs are Collective Management Organisations (CMO) in the text and image sector. This sector includes the publication of books, journals, magazine newspapers, musical works in print and the like. The RROs administer reproduction and other relevant rights, including certain forms of digital uses, in copyright text- and image-based works on behalf of publishers and authors, including visual artists, when the authors and publishers do not want to or cannot administer the rights themselves.

In print and publishing, the primary use of books, journals, newspapers, magazines, etc., be it in the form of sales, licensing or other ways of offering access, is generally provided directly by the publisher, author or other copyright holder, or via a retailer or an agent. RROs typically administer rights for certain secondary uses of already published works.

The remuneration for such uses is vital to encourage authors and publishers to continue to create and publish high quality works. It is therefore crucial that the issue of remuneration of copyright holders for uses of their works is addressed appropriately.

We limit our submission to the questions most relevant to the IFRRO community.

- 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<sup>9</sup>.

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

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

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

---

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

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

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

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

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

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

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

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

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

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

NO

NO OPINION

**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.**

In the text sector, where rights for primary uses are normally managed individually, the issue of territoriality is different from what it is in other work categories. Generally, the text author provides a licence directly to the publisher for the commercial exploitation of a book (whether in physical or e-book form), and publishers usually acquire and manage worldwide, exclusive (digital and analogue) rights for books in a specific language, enabling the sale of books across the whole internal market, without limitations.

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

IFRRO represents and links RROs, which grant licences, but we do not grant licences ourselves. The last five years we have received less than 10 specific enquiries regarding multi-territorial licensing. Also, our RRO members report that requests for such licences for secondary uses of already published text and image works only occur occasionally, with the exception of requests for the licensing of the use of images on websites and various e-products, where multi-territorial licences can represent up to 25% of all licences. IFRRO has, nevertheless, proactively sponsored initiatives with the aim to assist in developing solutions and, for instance, the UK RRO, CLA, offers multi-territorial licences for corporations.

For the type of secondary uses administered by RROs, the main problem does not seem to be multi-territory but rather multi-repertoire licensing. CMOs face problems in trying to obtain repertoires from other territories, where competition law presents obstacles, making it difficult to develop pan-European licensing agreements for more than a partial, typically national-based, repertoire.

**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 respect of the type of rights administered by RROs, no particular problems have been reported to IFRRO regarding multi-territory licensing.

**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

The copyright holder is at liberty to limit the scope of the mandate granted to the RRO, including limitations on the basis of territoriality. The RRO would respect such limitation of the mandate.

Rights administration by RROs of certain secondary uses of already published works is often supported by national legislation. This could take the form of a legal licence, a remuneration right, or the extension of licensing agreements concluded on the basis of exclusive rights to include works of non-mandating authors and publishers. Such extension by law is in most cases limited to national territories, the exception being the licensing of the use of orphan works, which may be extended to cover all EU Member States.

NO

NO OPINION

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

YES – Please explain by giving examples

NO

NO OPINION

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

YES – Please explain

**NO** – Please explain

In the text and image sector, current legislation is of no hindrance to the development of multi-territorial solutions. This is also confirmed in documents from the European Commission (EC)<sup>16</sup>. Commercial users can generally ask for permission to use a work directly from the publisher or author and obtain it on a contractual and up to worldwide basis. Equally, RROs are used to administering rights for secondary uses across borders on the basis of different legislation and models of RRO operation. Rights for foreign authors and publishers are generally administered through the network of bilateral agreements between RROs. The IFRRO-recommended Repertoire Exchange Mandate (REM) for digital licensing by RROs<sup>17</sup> does not impose any territorial limitations.

As noted by the EU Advocate General *Eleanor Sharpston* in her Opinion (case C-351/12)<sup>18</sup>, typically in the EU, CMOs operate (whether by virtue of a statutory or *de facto* monopoly) within the territory of a single Member State and may be required to accept as members any rightholder resident or established within that State. In such cases, they monitor and grant licences to users within the same Member State. A user may obtain a licence for a repertoire managed by a CMO established in another Member State by means of reciprocal arrangements between CMOs, each of them acting on behalf of the other(s) within its own territory.<sup>19</sup> The principle of copyright territoriality has also been reconfirmed in the Court of Justice of the European Union's (CJEU's) "*Premier League*" case (C-403/08)<sup>20</sup>.

NO OPINION

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

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

The EU framework for the protection of copyright and related rights in the digital environment is largely established by Directive 2001/29/EC<sup>21</sup> on the harmonisation of certain aspects of copyright and related rights in the information society. Other EU directives in this

<sup>16</sup> For instance, the Reflection Document on "Creative Content in a European Digital Single Market: Challenges for the Future", 22 October 2009, page 12, second paragraph, lines 5-7, states that: "the present legal framework does not in itself prevent rightholders from commercialising their works on a multi-territory basis".

<sup>17</sup> <http://www.ifrrro.org/node/1114>

<sup>18</sup> [http://curia.europa.eu/juris/document/document.jsf?text=&docid=144496&pageIndex=0&doclang=EN&mode=\\_lst&dir=&occ=first&part=1&cid=399913](http://curia.europa.eu/juris/document/document.jsf?text=&docid=144496&pageIndex=0&doclang=EN&mode=_lst&dir=&occ=first&part=1&cid=399913)

<sup>19</sup> *Supra*, para. 72.

<sup>20</sup> <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-403/08>

<sup>21</sup> Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

field that are relevant in the online environment are those relating to the protection of software<sup>22</sup> and databases<sup>23</sup>.

Directive 2001/29/EC harmonises the rights of authors and neighbouring rightholders<sup>24</sup> which are essential for the transmission of digital copies of works (e.g. an e-book) and other protected subject matter (e.g. a record in a MP3 format) over the internet or similar digital networks.

The most relevant rights for digital transmissions are the reproduction right, i.e. the right to authorise or prohibit the making of copies<sup>25</sup>, (notably relevant at the start of the transmission – e.g. the uploading of a digital copy of a work to a server in view of making it available – and at the users’ end – e.g. when a user downloads a digital copy of a work) and the communication to the public/making available right, i.e. the rights to authorise or prohibit the dissemination of the works in digital networks<sup>26</sup>. These rights are intrinsically linked in digital transmissions and both need to be cleared.

### 1. The act of “making available”

Directive 2001/29/EC specifies neither what is covered by the making available right (e.g. the upload, the accessibility by the public, the actual reception by the public) nor where the act of “making available” takes place. This does not raise questions if the act is limited to a single territory. Questions arise however when the transmission covers several territories and rights need to be cleared (does the act of “making available” happen in the country of the upload only? in each of the countries where the content is potentially accessible? in each of the countries where the content is effectively accessed?). The most recent case law of the Court of Justice of the European Union (CJEU) suggests that a relevant criterion is the “targeting” of a certain Member State’s public<sup>27</sup>. According to this approach the copyright-relevant act (which has to be licensed) occurs at least in those countries which are “targeted” by the online service provider. A service provider “targets” a group of customers residing in a specific country when it directs its activity to that group, e.g. via advertisement, promotions, a language or a currency specifically targeted at that group.

---

<sup>22</sup> Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.

<sup>23</sup> Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

<sup>24</sup> Film and record producers, performers and broadcasters are holders of so-called “neighbouring rights” in, respectively, their films, records, performances and broadcast. Authors’ content protected by copyright is referred to as a “work” or “works”, while content protected by neighbouring rights is referred to as “other subject matter”.

<sup>25</sup> The right to “authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part” (see Art. 2 of Directive 2001/29/EC) although temporary acts of reproduction of a transient or incidental nature are, under certain conditions, excluded (see art. 5(1) of Directive 2001/29/EC).

<sup>26</sup> The right to authorise or prohibit any communication to the public by wire or wireless means and to authorise or prohibit the making available to the public “on demand” (see Art. 3 of Directive 2001/29/EC).

<sup>27</sup> See in particular Case C-173/11 (Football Dataco vs Sportradar) and Case C-5/11 (Donner) for copyright and related rights, and Case C-324/09 (L’Oréal vs eBay) for trademarks. With regard to jurisdiction see also joined Cases C-585/08 and C-144/09 (Pammer and Hotel Alpenhof) and pending Case C-441/13 (Pez Hejduk); see however, adopting a different approach, Case C-170/12 (Pinckney vs KDG Mediatech).

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

**X YES**

NO – Please explain how this could be clarified and what type of clarification would be required (e.g. as in "targeting" approach explained above, as in "country of origin" approach<sup>28</sup>)

NO OPINION

9. *[In particular if you are a right holder:] Could a clarification of the territorial scope of the “making available” right have an effect on the recognition of your rights (e.g. whether you are considered to be an author or not, whether you are considered to have transferred your rights or not), on your remuneration, or on the enforcement of rights (including the availability of injunctive relief<sup>29</sup>)?*

YES – Please explain how such potential effects could be addressed

**X NO**

NO OPINION

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

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

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

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

**X NO**

The question is not applicable to the text and image sector.

NO OPINION

<sup>28</sup> The objective of implementing a “country of origin” approach is to localise the copyright relevant act that must be licenced in a single Member State (the "country of origin", which could be for example the Member State in which the content is uploaded or where the service provider is established), regardless of in how many Member States the work can be accessed or received. Such an approach has already been introduced at EU level with regard to broadcasting by satellite (see Directive 93/83/EEC on the coordination of certain rules concerning copyright and rights related to copyright applicable to satellite broadcasting and cable retransmission).

<sup>29</sup> Injunctive relief is a temporary or permanent remedy allowing the right holder to stop or prevent an infringement of his/her right.

### 3. Linking and browsing

Hyperlinks are references to data that lead a user from one location in the Internet to another. They are indispensable for the functioning of the Internet as a network. Several cases are pending before the CJEU<sup>30</sup> in which the question has been raised whether the provision of a clickable link constitutes an act of communication to the public/making available to the public subject to the authorisation of the rightholder.

A user browsing the internet (e.g. viewing a web-page) regularly creates temporary copies of works and other subject-matter protected under copyright on the screen and in the 'cache' memory of his computer. A question has been referred to the CJEU<sup>31</sup> as to whether such copies are always covered by the mandatory exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC.

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

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

Hyperlinks are essential tools for online content delivery and form a part of the communication process. Specifically, where a hyperlink is comprised of or includes text protected as the whole or part of a copyright work (see *The Newspaper Licensing Agency Ltd & Ors v Meltwater Holding BV & Ors* [2011] EWCA Civ 890), the 'provision' of a hyperlink would involve the making available of the whole or part of a copyright work. In such circumstances, the authorisation of the rightholder would be appropriate. This is especially relevant to the provision of paid-for services to business users, which would otherwise substitute for services which currently generate important income streams for content owners.

We understand the purpose of the question as being that of providing relevant user access to copyright works. There are licensing mechanisms in place to enable legal user access, so there is no reason to exempt the act of hyperlinking to a copyright work or other subject matter from the requirement of rightholder authorisation. This view was also held by the District Court of The Hague when it ruled in the case of *Buma/Stemra* against the operator of radio streaming websites 'Nederland.fm' and 'Op.fm', that a website, which is embedding or linking to radio-streams without a licence, infringes copyright<sup>32</sup>. Nevertheless, not all linking should necessarily be made subject to authorisation. There might be an implied licence to link in a loyal manner to other websites, as long as the material that is being linked to has been made available with the consent of the copyright holder.

**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**

<sup>30</sup> Cases C-466/12 (Svensson), C-348/13 (Bestwater International) and C-279/13 (C More entertainment).

<sup>31</sup> Case C-360/13 (Public Relations Consultants Association Ltd). See also

[http://www.supremecourt.gov.uk/decided-cases/docs/UKSC\\_2011\\_0202\\_PressSummary.pdf](http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0202_PressSummary.pdf).

<sup>32</sup> In English: <https://www.bumastemra.nl/wp-content/uploads/2012-12-19-judgment-Buma-Stemra-Souren-Eng.pdf>

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

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

Reproductions that are both temporary and incidental to an authorised act should not require additional consent from the copyright holder. This does not mean that all “cache” memory copies are to be considered “temporary” or strictly “incidental” ones. The facts of the case need to be analysed and that is best left to the courts.

Technological development has had the effect that copyright content is increasingly viewed or listened to (“streamed”) through computer browsers rather than by the making of downloaded copies. The increasing use of streaming is documented, for example, in a report prepared for Ofcom<sup>33</sup>, which tracked digital behaviours and attitudes among persons aged 12+, in the United Kingdom. The report noted that the incidence of streaming of TV programmes was much more common than downloading (33% for streaming, compared to 9% for downloading). Streaming services are one variety of “on-demand” service, which is specifically referred to in Recital 10 to Directive 2001/29/EC as requiring protection.

It would not be compatible with common sense of justice that essentially the same act – making a copy of the monitoring report for the purpose of reading its content – should not require a licence in one case (when accessed online), while it does in the other (when accessed by e-mail). If viewing and streaming were not subject to rightholder authorisation, this anomaly would exist in the online environment generally, where the problem of piracy is notorious.

Accessing the same content by the easy alternative of visiting the website of an unlicensed website (claiming to avoid the payment of a licence fee) obviously conflicts with the normal exploitation of the works and unreasonably prejudices the legitimate interests of the copyright holders, thereby infringing the three-step test in international conventions that the EU Member States are party to, as well as Article 5(5) of European Union Copyright Directive (EUCD). The computer user deliberately creates a copy of the work on his computer screen. It is his very purpose in opening his browser and going to a webpage for a book or article, and/or streaming a sound recording or film. The end user must therefore be obliged to obtain a licence to access the underlying work. This does not prevent a user from reading, viewing or listening to content that has been made legally available on the web with the consent of the copyright holder. Any further use is, however, subject to authorisation or licensing.

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

<sup>33</sup> See: <http://stakeholders.ofcom.org.uk/binaries/research/telecoms-research/online-copyright/deep-dive.pdf>

(e.g. by selling them or by giving them as a gift). The principle of EU exhaustion of the distribution right applies in the case of the distribution of physical copies (e.g. when a tangible article such as a CD or a book, etc. is sold, the right holder cannot prevent the further distribution of that tangible article)<sup>34</sup>. The issue that arises here is whether this principle can also be applied in the case of an act of transmission equivalent in its effect to distribution (i.e. where the buyer acquires the property of the copy)<sup>35</sup>. This raises difficult questions, notably relating to the practical application of such an approach (how to avoid re-sellers keeping and using a copy of a work after they have “re-sold” it – this is often referred to as the “forward and delete” question) as well as to the economic implications of the creation of a second-hand market of copies of perfect quality that never deteriorate (in contrast to the second-hand market for physical goods).

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

- YES – Please explain by giving examples
- 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.*

The creation of a legal framework enabling the resale of previously purchased digital content would have many negative business effects. If users were to be allowed to sell e-books or articles of the same quality as the initial copy, and without wear and tear, it could eventually lead to the destruction of (parts of) the primary market. This risks, in turn, impacting negatively on the EU’s foreign relations, given that EU publishers would be less interested in making low-cost digital content available in countries that cannot afford to pay the full EU price.

From the perspective of rightholders, by confirming the possibility for sole owners of a digital copy to invoke successfully the exhaustion doctrine, this might incentivise the drafting of relevant terms and conditions as mere rights of use, rather than transfers of ownership. Licences, purporting to grant rights of use without conveying ownership, would likely become more prevalent.

Large scale digital retailers, Apple and Amazon, have both obtained patents for systems of resale for digital items<sup>36</sup>, which indicates that these retailers may be thinking about setting up their own marketplace or lending library for the transfer of user-owned digital content. Unless these marketplaces allow original content creators to benefit from the resale of their goods, reduced earnings prospects could seriously reduce the creators’ incentive to create.

<sup>34</sup> See also recital 28 of Directive 2001/29/EC.

<sup>35</sup> In Case C-128/11 (Oracle vs. UsedSoft) the CJEU ruled that an author cannot oppose the resale of a second-hand licence that allows downloading his computer program from his website and using it for an unlimited period of time. The exclusive right of distribution of a copy of a computer program covered by such a licence is exhausted on its first sale. While it is thus admitted that the distribution right may be subject to exhaustion in case of computer programs offered for download with the right holder’s consent, the Court was careful to emphasise that it reached this decision based on the Computer Programs Directive. It was stressed that this exhaustion rule constituted a *lex specialis* in relation to the Information Society Directive (UsedSoft, par. 51, 56).

<sup>36</sup> See: <http://mashable.com/2013/03/08/apple-amazon-used-goods-marketplaces/>

The ownership of digital files and the possibility of their resale are linked to the application of the principle of exhaustion to the distribution of tangible copies of works. The answer provided by CJEU's case law in the *Oracle vs. UsedSoft* decision, Case C-128/11<sup>37</sup>, is limited only to the specific case of software.

According to the German Regional Court of Bielefeld, the CJEU's *UsedSoft* decision is not applicable to the resale of other digital content.<sup>38</sup> More specifically, the German court held that, because of the nature of the Software Directive 2009/24/EC as *lex specialis* to Directive 2001/29/EC, the reasoning in *UsedSoft* could not be applied to other subject-matter. In this vein, the Landgericht Bielefeld concluded that the EUCD does not permit the application of the principle of exhaustion to works in non-analogue form.

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

Registration is not often discussed in copyright in the EU as the existing international treaties in the area prohibit formalities as a condition for the protection and exercise of rights. However, this prohibition is not absolute<sup>39</sup>. Moreover a system of registration does not need to be made compulsory or constitute a precondition for the protection and exercise of rights. With a longer term of protection and with the increased opportunities that digital technology provides for the use of content (including older works and works that otherwise would not have been disseminated), the advantages and disadvantages of a system of registration are increasingly being considered<sup>40</sup>.

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

YES

**NO**

NO OPINION

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

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

Under current international copyright legislation, registration cannot be made compulsory or constitute a precondition for the protection and exercise of rights. A registry could be established on a voluntary basis. The possible advantages of registration, provided it is established on a voluntary basis, include the identification and proof of rights and the facilitation of copyright licensing. However, authors and publishers cannot be required or expected to monitor notifications in the EU and its Member States. Also, in the print sector,

<sup>37</sup> <http://curia.europa.eu/juris/documents.jsf?num=C-128/11>

<sup>38</sup> Case No 4 O 191/11, Landgericht (German Regional Court) Bielefeld, 5 March 2013, available (in German) here: [http://www.ifrrro.org/sites/default/files/lg\\_bielefeld\\_vom\\_05.03.13\\_klage\\_verbraucherzentralen.pdf](http://www.ifrrro.org/sites/default/files/lg_bielefeld_vom_05.03.13_klage_verbraucherzentralen.pdf)

<sup>39</sup> For example, it does not affect “domestic” works – i.e. works originating in the country imposing the formalities as opposed to works originating in another country.

<sup>40</sup> On the basis of Article 3.6 of the Directive 2012/28/EU of the European Parliament and of the Council of 25 October 2012 on certain permitted uses of orphan works, a publicly accessible online database is currently being set up by the Office for Harmonisation of the Internal Market (OHIM) for the registration of orphan works.

there are already identifiers being used to identify the text, the publication and the author and publisher, in the form of the ISO standard identifiers ISBN, ISSN, ISTC, ISNI and DOI.

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

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

There are many private databases of works and other subject matter held by producers, collective management organisations, and institutions such as libraries, which are based to a greater or lesser extent on the use of (more or less) interoperable, internationally agreed ‘identifiers’. Identifiers can be compared to a reference number embedded in a work, are specific to the sector in which they have been developed<sup>41</sup>, and identify, variously, the work itself, the owner or the contributor to a work or other subject matter. There are notable examples of where industry is undertaking actions to improve the interoperability of such identifiers and databases. The Global Repertoire Database<sup>42</sup> should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition<sup>43</sup> was established to develop building blocks for the expression and management of rights and licensing across all content and media types. It includes the development of a Rights Reference Model (RRM) – a comprehensive data model for all types of rights in all types of content. The UK Copyright Hub<sup>44</sup> is seeking to take such identification systems a step further, and to create a linked platform, enabling automated licensing across different sectors.

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

Identifiers are crucial for the efficiency and transparency of CMO operations. EC-sponsored projects such as ARROW and ARROW Plus include references to the desirability of using international identifier standards such as ISNI (International Standard Name Identifier, ISO 27729) and ISTC (International Standard text Code, ISO 21047). This could be facilitated by the transposition of ISO 21047 and ISO 27729 into European standards.

EC support could also be given for projects to populate vital databases being used by EU Projects with agreed international standards. In particular the TEL (The European Library) database, used also for the ARROW project, could be funded to acquire ISNIs and ISTCs, for the free use also by other databases, such as those of CMOs and Books in Print. There is a need for CMOs to be able to use such standards to optimise their distribution activities, as required under the EU CRM Directive. A feasibility study is desirable to see how the international standards ISNI and ISTC can be interfaced with the private databases of the CMOs, for instance, in the text and data field, so that distribution of revenue can be better automated. Such a study could be financed, totally or partially, by the European Commission.

<sup>41</sup> E.g. the International Standard Recording Code (ISRC) is used to identify recordings, the International Standard Book Number (ISBN) is used to identify books.

<sup>42</sup> You will find more information about this initiative on the following website: <http://www.globalrepertoiredatabase.com/>.

<sup>43</sup> You will find more information about this initiative (funded in part by the European Commission) on the following website: [www.linkedcontentcoalition.org](http://www.linkedcontentcoalition.org).

<sup>44</sup> You will find more information about this initiative on the following website: <http://www.copyrighthub.co.uk/>.

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

Works and other subject matter are protected under copyright for a limited period of time. After the term of protection has expired, a work falls into the public domain and can be freely used by anyone (in accordance with the applicable national rules on moral rights). The Berne Convention<sup>45</sup> requires a minimum term of protection of 50 years after the death of the author. The EU rules extend this term of protection to 70 years after the death of the author (as do many other countries, e.g. the US).

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

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

**X YES** – Please explain

Whether the environment is digital or analogue is irrelevant to the question of term of protection. IFRRO sees no need for a change of the term of copyright at this stage.

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<sup>46</sup>.

Exceptions and limitations in the national and EU copyright laws have to respect international law<sup>47</sup>. In accordance with international obligations, the EU *acquis* requires that limitations and exceptions can only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interest of the rightholders.

Whereas the catalogue of limitations and exceptions included in EU law is exhaustive (no other exceptions can be applied to the rights harmonised at EU level)<sup>48</sup>, these limitations and exceptions are often optional<sup>49</sup>, in the sense that Member States are free to reflect in national

<sup>45</sup> Berne Convention for the Protection of Literary and Artistic Works, <http://www.wipo.int/treaties/en/ip/berne/>.

<sup>46</sup> Plus Directive 96/9/EC on the legal protection of databases; Directive 2009/24/EC on the legal protection of computer programs, and Directive 92/100/EC on rental right and lending right.

<sup>47</sup> Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (1971); Article 13 of the TRIPS Agreement (Trade Related Intellectual Property Rights) 1994; Article 16(2) of the WIPO Performers and Phonograms Treaty (1996); Article 9(2) of the WIPO Copyright Treaty (1996).

<sup>48</sup> Other than the grandfathering of the exceptions of minor importance for analogue uses existing in Member States at the time of adoption of Directive 2001/29/EC (see, Art. 5(3)(o)).

<sup>49</sup> With the exception of certain limitations: (i) in the Computer Programs Directive, (ii) in the Database Directive, (iii) Article 5(1) in the Directive 2001/29/EC and (iv) the Orphan Works Directive.

legislation as many or as few of them as they wish. Moreover, the formulation of certain of the limitations and exceptions is general enough to give significant flexibility to the Member States as to how, and to what extent, to implement them (if they decide to do so). Finally, it is worth noting that not all of the limitations and exceptions included in the EU legal framework for copyright are of equivalent significance in policy terms and in terms of their potential effect on the functioning of the Single Market.

In addition, in the same manner that the definition of the rights is territorial (i.e. has an effect only within the territory of the Member State), the definition of the limitations and exceptions to the rights is territorial too (so an act that is covered by an exception in a Member State "A" may still require the authorisation of the rightholder once we move to the Member State "B")<sup>50</sup>.

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

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

**NO** – Please explain

The European Union model is based on the various legal and other models and traditions of its Member States. They vary substantially and encompass those of civil and common law countries. This poses challenges to the European Union but it also represents its strength.

There is nothing to indicate that more mandatory exceptions and limitations would have led to a better result than the pragmatic approach chosen by the EU, based on optional exceptions and limitations, combined with the development of practical solutions on a case-by-case basis to enhance harmonisation, when required and appropriate. To the contrary, it has allowed European countries to play "*a major part in shaping a modern and balanced system of IP rights which not only guarantees innovators their due reward but also stimulates a*

---

<sup>50</sup> Only the exception established in the recent Orphan Works Directive (a mandatory exception to copyright and related rights in the case where the rightholders are not known or cannot be located) has been given a cross-border effect, which means that, for instance, once a literary work – for instance a novel – is considered an orphan work in a Member State, that same novel shall be considered an orphan work in all Member States and can be used and accessed in all Member States.

*competitive market*”, as noted by *António Campinos*, the President of the Office for Harmonization of the Internal Market (OHIM), and *Benoît Battistelli*, the President of the European Patent Office (EPO).<sup>51</sup> It has also allowed Europe to take the lead in the development of innovative solutions, such as Viber, Skype and Spotify, and enabled that European “*IPR-intensive industries account for more than 56 million jobs, or 26% of total employment, in the EU*” compared with, for instance, 19% in the U.S.<sup>52</sup>

Moreover, copyright legislation remains but one of several elements in the package that makes up the framework for the creative industries on a national basis. The mix of elements is carefully chosen to address national requirements and traditions. Flexibility can only be built on general principles, which leaves implementation to the Member States and the parties concerned. In the field of copyright, exceptions and limitations in national legislation are subject to compliance with the three-step test of the Berne Convention, reiterated in EU CD Article 5.5, and adapted to the special needs and legal and other traditions of the individual Member State. In the EU, this general principle is combined with a mandatory and several optional exceptions and limitations. We do not see how more detailed norms on a Community level could serve the purpose of improved access to copyright works or enhanced competitiveness in a changing technological and media environment.

Any further limitations or exceptions would cause a serious risk to publishers’ existing business models and to the development of new digital business models. This would ultimately lead to a threat to the publishers’ ability to continue fulfilling their democratic mission in society, and also place media diversity at risk.

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

**NO** – Please explain

In accordance with our response to *Question 21*, we do not see any particular issue with the optionality of exceptions and limitations in the EU Directives. There does not seem to be a need for existing exceptions to be made mandatory. Flexibility is important to ensure that the copyright framework matches the needs of the individual Member State. Those needs may vary from one Member State to the other.

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.**

Rather than considering whether to remove or add to the current exceptions and limitations focus should be on the implementation of the existing ones and stakeholder solutions developed on the basis of them. Examples of such stakeholder-driven solutions, which still

<sup>51</sup> [http://ec.europa.eu/internal\\_market/intellectual-property/docs/joint-report-epo-ohim-final-version\\_en.pdf](http://ec.europa.eu/internal_market/intellectual-property/docs/joint-report-epo-ohim-final-version_en.pdf), page 3

<sup>52</sup> [http://ec.europa.eu/internal\\_market/intellectual-property/docs/joint-report-epo-ohim-final-version\\_en.pdf](http://ec.europa.eu/internal_market/intellectual-property/docs/joint-report-epo-ohim-final-version_en.pdf) page 59.

need to be fully implemented, are the ARROW<sup>53</sup> system to facilitate rights information management, the Memorandum of Understanding (MoU) on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works<sup>54</sup>, and the EU Stakeholders Dialogue Memorandum of Understanding (MoU) on access to works by people with print disabilities<sup>55</sup>. Also, we see a need for the EU to adopt an overarching policy on Intellectual Property (IP).

**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** – Please explain why

The optionality of exceptions and limitations in the EU CD provides for a sufficient degree of flexibility.

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.***

**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 general, in respect of licensing by RROs, the territoriality of limitations and exceptions does not constitute particular problems. User requests related to rights administered by RROs are to a large extent confined to uses and users within the territory of the headquarters of the national RRO; demands for cross-border or multi-territory licensing are limited and can be satisfactorily addressed on the basis of the current models of operation.

Nonetheless, some clarification of the territorial scope of certain limitations may be appropriate. Rights administration by RROs for certain secondary uses of already published text and image works is, in most EU Member States, supported by legislation, with the result that the scope of the agreement signed between the RRO and the user (which is normally an institution, corporation or organisation), or the rights administered by the RRO, comprise also works of non-mandating authors and publishers. RROs authorise the posting of works to internal networks (intranets) for strictly internal, personal and not directly commercial use, Virtual Learning Environments (VLE) and cloud computing. Internal networks are not always confined to territorial borders. Provided that the RRO concerned is sufficiently representative for the works concerned, and under the condition that there is an opt-out possibility, it may be appropriate to clarify that limitations referred to above apply to the complete internal

<sup>53</sup> See : <http://www.arrow-net.eu/>

<sup>54</sup> See : [http://ec.europa.eu/internal\\_market/copyright/out-of-commerce/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm)

<sup>55</sup> [http://ec.europa.eu/internal\\_market/copyright/docs/copyright-info/2010/20100914\\_mou\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/copyright-info/2010/20100914_mou_en.pdf)

network covered by an agreement with the RRO, and for the specific uses and users authorised by it, in accordance with the Member States' international obligations, national legal mechanisms and collective licensing traditions.

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?)***

With respect to rights administered by RROs, in situations as described in Q26, remuneration must be paid by the organism that signs the agreement with/is authorised by the RRO, and the remuneration should be collected by the RRO granting the authorisation or collecting the compensation. In cases of cross-border uses, the question of fair remuneration may raise difficult questions in this period of public deficits and, in particular, for the big linguistic areas.

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

Directive 2001/29/EC enables Member States to reflect in their national law a range of limitations and exceptions for the benefit of publicly accessible libraries, educational establishments and museums, as well as archives. If implemented, these exceptions allow acts of preservation and archiving<sup>56</sup> and enable on-site consultation of the works and other subject matter in the collections of such institutions<sup>57</sup>. The public lending (under an exception or limitation) by these establishments of physical copies of works and other subject matter is governed by the Rental and Lending Directive<sup>58</sup>.

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

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

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

<sup>56</sup> Article 5(2)c of Directive 2001/29.

<sup>57</sup> Article 5(3)n of Directive 2001/29.

<sup>58</sup> Article 5 of Directive 2006/115/EC.

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.

**NO**

NO OPINION

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

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?*

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

## 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?*

RROs negotiate agreements with libraries that enable them to provide remote access, including across borders, to text and image works, normally for internal, personal, not for direct commercial use of fragments of works, and for document delivery. For example, CLA, the UK RRO, signs licences on document delivery for organisations and institutions offering such services<sup>59</sup>; it signed already in the middle of the 1990s a licensing agreement with the

<sup>59</sup> [http://www.cla.co.uk/licences\\_available/document\\_delivery/](http://www.cla.co.uk/licences_available/document_delivery/)

British Library on International Document Delivery (IDD). Other examples are the licensing agreement on digital document delivery for registered end-users between the Czech RRO, DILIA, and the Czech national library (representing all libraries), the licensing by the French RRO, CFC, of the Centre National de la Recherche Scientifique (CNRS) for its document delivery, and the agreements between the German RRO for images, VG Bild-Kunst, and universities and libraries concerning password-protected access to copyright-protected images for a reduced licence fee. IFRRO has also adopted a set of IDD principles<sup>60</sup>.

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

Problem-solving depends on the type and character of the problem. Without specifying the problems the question becomes too imprecise to provide an appropriate answer. However, in general, problems are best solved through licensing arrangements, whenever appropriate, and through stakeholder dialogues. Organisations representing libraries, archives, authors, publishers and CMOs have a proven track record in developing solutions for libraries and archives through stakeholder dialogues. Examples<sup>61</sup> are principles for rights clearance and registries of orphan works and out-of-commerce works; model licensing agreements for the making available of out-of-commerce works in closed and open networks; the Memorandum of Understanding on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works by libraries; and the development and deployment of ARROW to facilitate and reduce costs in rights information management<sup>62</sup>.

**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?***

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

The main challenge is the implementation of solutions already developed and made available.

**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?***

<sup>60</sup> [http://www.ifrrro.org/issues\\_list/642](http://www.ifrrro.org/issues_list/642)

<sup>61</sup> <http://www.ifrrro.org/content/i2010-digital-libraries>

<sup>62</sup> <http://www.arrow-net.eu/>

**(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

IFRRO has not negotiated agreements with libraries on e-lending directly. However, many IFRRO members and their members again have negotiated such agreements, in order to enable libraries to lend books or other materials electronically, including, when possible, across borders.

NO

NO OPINION

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

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?**

**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?**

Libraries remain, also in the digital world, important institutions for readers. There is a difference between genres of publishing, especially between academic and trade, where the former business model is about licensing 99% of the content to academic libraries, and the second, of which libraries represent at best 5% of its revenues, which means that in most countries 99% of the publishers' revenues are sales through bookshops. As selling access to copyright works, rather than physical copies, is an essential part of the business model in the digital environment, in particular in trade-book publishing, library e-lending will more easily conflict with the normal exploitation of the work and unreasonably prejudice the legitimate interest of the rightholder. Also, it may no longer be seen to represent a special case, and thus easily conflict with all three criteria of the three-step test in international conventions that EU Member States are party to.

E-lending from libraries can, and should, nonetheless, take place, on the basis of contractual arrangements with copyright holders or their representatives. Arrangements already exist in several EU Member States. Various models are being explored, and the main challenge now is to identify and communicate best practices on the range of models that best serve the assortment of purposes.

One should also note that the e-book market is only at a nascent stage (with 15% in the UK, but between 2 and 3% in Germany, France, Italy, Scandinavia and Spain and less than 1% everywhere else), and that sales to consumers represent the majority of the trade-book market.

#### 4. Mass digitisation

The term “mass digitisation” is normally used to refer to efforts by institutions such as libraries and archives to digitise (e.g. scan) the entire content or part of their collections with an objective to preserve these collections and, normally, to make them available to the public. Examples are efforts by libraries to digitise novels from the early part of the 20<sup>th</sup> century or whole collections of pictures of historical value. This matter has been partly addressed at the EU level by the 2011 Memorandum of Understanding (MoU) on key principles on the digitisation and making available of out of commerce works (i.e. works which are no longer found in the normal channels of commerce), which is aiming to facilitate mass digitisation efforts (for books and learned journals) on the basis of licence agreements between libraries and similar cultural institutions on the one hand and the collecting societies representing authors and publishers on the other<sup>63</sup>. Provided the required funding is ensured (digitisation projects are extremely expensive), the result of this MoU should be that books that are currently to be found only in the archives of, for instance, libraries will be digitised and made available online to everyone. The MoU is based on voluntary licences (granted by Collective Management Organisations on the basis of the mandates they receive from authors and publishers). Some Member States may need to enact legislation to ensure the largest possible effect of such licences (e.g. by establishing in legislation a presumption of representation of a collecting society or the recognition of an “extended effect” to the licences granted)<sup>64</sup>.

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

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

NO – Please explain

#### **X NO OPINION**

Some EU Member States have already incorporated legislation to enable large scale digitisation and making available of cultural heritage through licensing. Whether EU or national legislation is required depends on and can only be answered when the EC has made known its proposed solution for cross-border accessibility.

Principle 3 of the MoU ensures that, in case the scope of a voluntary agreement includes cross-border and/or commercial uses, the CMO may limit its licence of works that are out-of-commerce to those of represented rightholders. Also, a specific procedure should be considered in order to reach the rightholders who are presumed to be represented and whose works are used frequently or intensively. Subject to this, the legal presumption should also apply to acts of use of the work covered by the licence which occur in a Member State which is not the Member State in which the licence was agreed.

<sup>63</sup> You will find more information about his MoU on the following website: [http://ec.europa.eu/internal\\_market/copyright/out-of-commerce/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm).

<sup>64</sup> France and Germany have already adopted legislation to back the effects of the MoU. The French act (LOI n° 2012-287 du 1er mars 2012 relative à l'exploitation numérique des livres indisponibles du xxe siècle) foresees collective management, unless the author or publisher in question opposes such management. The German act (Gesetz zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes vom 1. Oktober 2013) contains a legal presumption of representation by a collecting society in relation to works whose rightholders are not members of the collecting society.

The signatories to the EC-facilitated MoU on Key principles on the digitisation and making available of out-of-commerce works agreed to call “*on the European Commission, to the extent required to ensure legal certainty in a cross-border context, to consider the type of legislation to be enacted to ensure that publicly accessible cultural institutions and collective management organisations which enter into a licence in good faith applying these key principles are legally protected with regard to licensed uses of works of rightholders who have been presumed to be within the scope of the licence.*”

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

- YES – Please explain
- NO – Please explain
- NO OPINION

## **B. Teaching**

Directive 2001/29/EC<sup>65</sup> enables Member States to implement in their national legislation limitations and exceptions for the purpose of illustration for non-commercial teaching. Such exceptions would typically allow a teacher to use parts of or full works to illustrate his course, e.g. by distributing copies of fragments of a book or of newspaper articles in the classroom or by showing protected content on a smart board without having to obtain authorisation from the right holders. The open formulation of this (optional) provision allows for rather different implementation at Member States level. The implementation of the exception differs from Member State to Member State, with several Member States providing instead a framework for the licensing of content for certain educational uses. Some argue that the law should provide for better possibilities for distance learning and study at home.

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

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

**X YES** – Please explain

The concept of “illustration for teaching” often causes uncertainties, which can also result in litigation. RROs began their activities in response to requests from educational institutions for the facilitating of large scale reproduction of chapters and other fragments of the world’s scientific and cultural heritage for teaching and research purposes. Educational institutions continue to be among the main beneficiaries of the RRO services.

Lately, there are educational institutions that have claimed that “illustration for teaching” includes multiple copying and other forms of uses which have traditionally been authorised through agreements with RROs, or made subject to remuneration, including under

<sup>65</sup> Article 5(3)a of Directive 2001/29.

remuneration rights schemes. On this basis, they refuse to take up a licence with the appropriate RRO.

IFRRO understands the exception in Article 5(3)(a) as being a narrow exception to the exclusive rights, aimed at enabling exactly what it reads: to illustrate; which is far from being the same as planned producing of teaching material. The underlying rationale for the concept of “illustration for teaching” is to cover minor acts of copying, for instance a teacher writing something down on the blackboard or a whiteboard, or a student copying a passage of a text for revision or exam purposes. This understanding of the concept is in accordance with its wording as well as of the opinions expressed by the foremost experts on it. Teaching material in whatever format, including multiple copying for classroom use, cannot and is not destined to be made under this exception, as it would definitely undermine the normal exploitation of these works.

### **X NO**

Textbook publishers take a proactive role in offering their books in paper and digital formats to educational establishments.

NO OPINION

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

Clarification on both Community and national levels that “illustration for teaching” does not comprise the reproduction, making available and distribution of teaching material, such as in the form of arranged, planned or structured multiple copies for classroom use, compilations, e-reserves and the sort would be appropriate. Such access to works is offered by authors and publishers directly, or through rights administration by RROs and other CMOs.

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

Scientific and research communities already make extensive use of individual licensing schemes offered by publishers, combined with collective schemes offered by RROs, also for online use of works for teaching or research purposes.

RROs exist in virtually all Member States to offer legal uses of copyright works that complements licensing by authors and publishers. Collective schemes administered by RROs include scanning of books, journals, magazines, etc., copying from electronic carriers and Internet downloads for a variety of uses, including for the printing out of a hard copy, posting to internal networks accessible to authorised users specified in the licence, inclusion in course packs, and other relevant uses. The arrangements encompass and clarify the use of works for “illustration for teaching”. Examples of tools offered by RROs and other CMOs to legally use copyright protected text and image works, also for education, were presented as a part of the result of the EC initiative Licences for Europe, WG2<sup>66</sup>.

#### **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?***

<sup>66</sup> <http://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/4-Toolkit-texts-images.pdf>

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

The preferred option is to encourage solutions and to protect market-based offers by ensuring that: any limitation for the benefit of teaching is limited to small parts; copies made under the limitation remain in the hands of the teacher; rightholders are named and receive fair remuneration; certain categories of works can be excluded from the limitation or exception; educational material is promoted as crucial to a sound education, providing cultural vitality and economic prosperity; interoperability is an important criterion when providing for e-reading possibilities and/or e-reading material in education.

The EC's and EU Member State's support, as required by national legal traditions and requirements, to individual and collective rights management schemes would be appropriate and welcome. Entering into individual and collective licensing schemes offered to educational establishments by rightholders and RROs is what provides the broadest and most adequate legal access to intellectual property to the teaching and research communities. In a fast changing world, where technologies move with an unprecedented speed, regulations do not have the ability to offer the required flexibility. Licensing agreements do. They offer comprehensive tailor-made solutions to access scientific and literary works to meet the needs of educational institutions. This is the safest, simplest, fastest, most innovative, most convenient and most cost efficient way to seamless access to high quality teaching material from multiple authors and publishers. What's more, flourishing local cultural industries and a healthy educational system with broad access to local resources contributes significantly to the nation's economy and employment.

**C. Research**

Directive 2001/29/EC<sup>67</sup> enables Member States to choose whether to implement in their national laws a limitation for the purpose of non-commercial scientific research. The open formulation of this (optional) provision allows for rather different implementations at Member States level.

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

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

YES – Please explain

**X NO**

NO OPINION

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

<sup>67</sup> Article 5(3)a of Directive 2001/29.

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

The use of copyright material for research purposes is commonly comprised in the licences offered by publishers. Training opportunities for teachers and professors regarding the inclusion of digital content in the national curriculum, in addition to support for public funding for academic libraries, could be further promoted.

Certain uses of copyright works in conjunction with research may also be licensed by RROs. This is the case, for instance, in the Czech Republic, Denmark, Finland, France, Spain, Sweden and the UK. Research institutes may sign separate licensing agreements with the RRO, or the use of works in relation to research may be included in agreements with educational institutions.

As an example, CEDRO, the Spanish RRO, offers an online platform – Conlicencia.com<sup>68</sup> - to their various licensing solutions that enables seamless access to and secondary uses of more than 20 million books, journals, magazines, newspapers and sheet music published in more than 30 countries that CEDRO holds in its repertoire.<sup>69</sup> This includes “pay per use”. Through its RightsLink<sup>70</sup> service, the US RRO Copyright Clearance Center (CCC) offers point-of-content licenses for digital uses and photocopying of text-based materials by users in for-profit and not-for-profit business organisations, libraries, academic institutions of all types, government agencies, medical centers, research institutes, document suppliers, and producers of academic course-packs, as well as individuals. RightsLink has also been deployed in Europe.

There are Member States where certain uses of copyright material in relation to research is authorised through statutory limitations with remuneration to authors and publishers, such as in Austria, Germany and Belgium, or exceptions without remuneration to copyright holders, which is the case in Poland. In the case of Germany, the limitations are reported by the beneficiary institutions to be too narrow, while the copyright holders are not satisfied with the remuneration paid for the uses allowed under the limitations. In the case of the exceptions in Poland, copyright holders question whether the exceptions in the legislation in favour of research are compliant with the three-step test in international legal instruments that those countries are party to.

## **D. Disabilities**

Directive 2001/29/EC<sup>71</sup> provides for an exception/limitation for the benefit of people with a disability. The open formulation of this (optional) provision allows for rather different implementations at Member States level. At EU and international level projects have been launched to increase the accessibility of works and other subject-matter for persons with disabilities (notably by increasing the number of works published in special formats and facilitating their distribution across the European Union)<sup>72</sup>.

<sup>68</sup> <http://conlicencia.com/>

<sup>69</sup> See: <http://www.ifrrro.org/content/cedro-launches-conlicenciacom>

<sup>70</sup> More information: <http://www.copyright.com/content/cc3/en/toolbar/productsAndSolutions/rightslink.html>

<sup>71</sup> Article 5 (3)b of Directive 2001/29.

<sup>72</sup> The European Trusted Intermediaries Network (ETIN) resulting from a Memorandum of Understanding between representatives of the right-holder community (publishers, authors, collecting societies) and interested parties such as associations for blind and dyslexic persons ([http://ec.europa.eu/internal\\_market/copyright/initiatives/access/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/initiatives/access/index_en.htm)) and the Trusted Intermediary Global Accessible Resources (TIGAR) project in WIPO (<http://www.visionip.org/portal/en/>).

The Marrakesh Treaty<sup>73</sup> has been adopted to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled. The Treaty creates a mandatory exception to copyright that allows organisations for the blind to produce, distribute and make available accessible format copies to visually impaired persons without the authorisation of the rightholders. The EU and its Member States have started work to sign and ratify the Treaty. This may require the adoption of certain provisions at EU level (e.g. to ensure the possibility to exchange accessible format copies across borders).

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

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

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

YES – Please explain by giving examples

**X NO**

NO OPINION

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

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

Publishers are increasingly publishing books in the e-Pub format, which can be directly converted into files accessible to persons who are print disabled.<sup>74</sup> Those files can be sold to users directly or to institutions serving the community of the print disabled.

Exceptions and limitations to the exclusive rights in favour of persons who are blind, visually impaired, or otherwise print disabled, exist in all EU Member States. Also, RROs administer statutory provisions or offer licensing agreements to facilitate access to copyright published works for those user groups.

The main challenge is linked to the cross-border exchange of accessible format copies. The WIPO Treaty to Facilitate Access to Published Works for Persons who are Blind, Visually Impaired, or otherwise Print Disabled, will undoubtedly contribute to the enhancement of the cross-border exchange of such copies. It will, however, take time for the Treaty to come into force and be implemented in national legislation. Also, it may not alone solve all challenges.

The licensing agreement offered by the UK RRO, Copyright Licensing Agency Ltd. (CLA), allows for the distribution of accessible format copies within the EU<sup>75</sup>. The Austrian and

<sup>73</sup> Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities, Marrakesh, June 17 to 28 2013.

<sup>74</sup> More information: <http://idpf.org/epub>

German RROs, Literar-Mechana and VG Wort, administer statutory licences and have developed solutions for certain cross-border issues regarding material in the German language. IFRRO offers tools to its members, which also address the cross-border exchange of accessible format copies.<sup>76</sup> Furthermore, with the view to enhance the cross-border exchange of accessible format copies, IFRRO participates actively, with representatives of persons with print disabilities, authors and publishers, in the EC-facilitated ETIN (European Trusted Intermediary Network)<sup>77</sup> and the WIPO-facilitated TIGAR (Trusted Intermediary Global Accessible Resources)<sup>78</sup> projects on enhanced access to copyright works by persons with print disabilities.

Thus, there exist solutions in the market place, as well as initiatives and pilots that can be built further on. Their success in the EU is dependent on the willingness of the EC and the EU Member States to invest in them and also support financially the development of the required networks that the stakeholders stand ready to establish and maintain.

### *E. Text and data mining*

Text and data mining/content mining/data analytics<sup>79</sup> are different terms used to describe increasingly important techniques used in particular by researchers for the exploration of vast amounts of existing texts and data (e.g., journals, web sites, databases etc.). Through the use of software or other automated processes, an analysis is made of relevant texts and data in order to obtain new insights, patterns and trends.

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

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

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results. At the same time, practical solutions to facilitate text and data mining of subscription-based scientific content were presented by

---

<sup>75</sup> [http://www.cla.co.uk/licences/licences\\_available/visual\\_impaired](http://www.cla.co.uk/licences/licences_available/visual_impaired)

<sup>76</sup> See: <http://www.ifrrro.org/content/access-persons-print-disabilities>

<sup>77</sup> Two documents on the role of RROs in facilitating cross-border access for the print impaired community within the ETIN initiative are available here: an [overview of the ETIN project](#) and a document setting out the [role of RROs within ETIN](#).

<sup>78</sup> <http://www.visionip.org/tigar/en/>

<sup>79</sup> For the purpose of the present document, the term “text and data mining” will be used.

publishers as an outcome of “Licences for Europe”<sup>80</sup>. 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

**NO** – Please explain

There are no impediments to Text and Data Mining (TDM). Authors and publishers are not blocking access for TDM. Rather, they are offering solutions, and, to this end, for instance, the International Association of Scientific, Technical and Medical publishers (STM) has issued a statement and a sample licence<sup>81</sup>. Through this statement, signatory publishers commit to granting the necessary copyright licences to permit the text and data mining of copyright-protected works and other subject-matter on reasonable terms for non-commercial scientific research purposes in the EU. They will work with rights clearance agents as necessary, implement licensing systems to facilitate easy “one-to-many” rights clearance and platforms, and continue to develop relevant technological solutions to facilitate the access in an efficient way.

Licensing solutions exist both for commercial and non-commercial uses, offered by copyright holders directly, or via collective rights management. IFRRO member solutions include the central clearing for permissions for TDM licenses by the Publishers Licensing Society (PLS) in the UK<sup>82</sup>, primarily for non-commercial uses, and the TDM licensing offered by the US RRO Copyright Clearance Center (CCC)<sup>83</sup>.

NO OPINION

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

Q53 is presented in a way that it requires a “No”-response from us. This does, however, not mean that there are no problems linked to Text and Data Mining (TDM) from the side of the copyright holder or their representatives. The main ones are the need for clear and agreed definitions of text mining and data mining; right of the copyright holder to control access to

<sup>80</sup> See the document “Licences for Europe – ten pledges to bring more content online”:  
[http://ec.europa.eu/internal\\_market/copyright/docs/licences-for-europe/131113\\_ten-pledges\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf).

<sup>81</sup> <http://www.stm-assoc.org/text-and-data-mining-stm-statement-sample-licence/>

<sup>82</sup> <https://ec.europa.eu/licences-for-europe-dialogue/.../TDM-PLS.ppt>

<sup>83</sup> <http://www.copyright.com/content/dam/cc3/marketing/documents/pdfs/CCCTextandDataMiningPilot-UserGuide.pdf>

their databases; protection against unfair competition linked to commercial exploitation of text and data mining; and the lack of constructive dialogue with some key user groups, in particular those who walked out of the European Commission Licences for Europe stakeholder dialogue initiative. The preferred way to solve this is to clarify that there will be no exception for TDM.

**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?***

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

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

## ***F. User-generated content***

Technological and service developments mean that citizens can copy, use and distribute content at little to no financial cost. As a consequence, new types of online activities are developing rapidly, including the making of so-called “user-generated content”. While users can create totally original content, they can also take one or several pre-existing works, change something in the work(s), and upload the result on the Internet e.g. to platforms and blogs<sup>84</sup>. User-generated content (UGC) can thus cover the modification of pre-existing works even if the newly-generated/“uploaded” work does not necessarily require a creative effort and results from merely adding, subtracting or associating some pre-existing content with other pre-existing content. This kind of activity is not “new” as such. However, the development of social networking and social media sites that enable users to share content widely has vastly changed the scale of such activities and increased the potential economic impact for those holding rights in the pre-existing works. Re-use is no longer the preserve of a technically and artistically adept elite. With the possibilities offered by the new technologies, re-use is open to all, at no cost. This in turn raises questions with regard to fundamental rights such the freedom of expression and the right to property.

A specific Working Group was set up on this issue in the framework of the “Licences for Europe” stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results or even the definition of UGC. Nevertheless, a wide range of views were presented as to the best way to respond to this phenomenon. One view was to say that a new exception is needed to cover UGC, in particular non-commercial activities by individuals such as combining existing musical works with videos, sequences of photos, etc. Another view was that no legislative change is needed: UGC is flourishing, and licensing schemes are increasingly available (licence schemes concluded between rightholders and platforms as well as micro-licences concluded between rightholders and the users generating the content. In any event, practical solutions to ease user-generated content and facilitate micro-licensing for small users were pledged by rightholders across different sectors as a result of the “Licences for Europe” discussions<sup>85</sup>.

---

<sup>84</sup> A typical example could be the “kitchen” or “wedding” video (adding one's own video to a pre-existing sound recording), or adding one's own text to a pre-existing photograph. Other examples are “mash-ups” (blending two sound recordings), and reproducing parts of journalistic work (report, review etc.) in a blog.

<sup>85</sup> See the document “Licences for Europe – ten pledges to bring more content online”:  
[http://ec.europa.eu/internal\\_market/copyright/docs/licences-for-europe/131113\\_ten-pledges\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf).

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

NO

NO OPINION

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

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

YES – Please explain

**NO** – Please explain

NO OPINION

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

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

YES – Please explain

NO – Please explain

NO OPINION

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

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?*

In the digital environment, press publishers have started using more straightforward digital solutions to share their content legally, and as widely as possible.<sup>86</sup>

Technology is being further developed to facilitate click-through licensing solutions for users. In particular, a cross-media, multinational coalition of more than 40 partners from the media and creative industries, including representatives of authors and artists, are working together with their standards bodies to establish automated and semi-automated communications, based on identifiers and interoperable metadata standards, between rightholders and those who wish to use content<sup>87</sup>. Similarly, any web user creating new content, whether it involves re-use of existing content or not, should be able to add such identifiers to enable them to better protect and potentially monetise their content.<sup>88</sup>

Also, a toolkit for licensing has been developed within the framework of the Licences for Europe initiative, in its Working Group on UGC and Licensing for small-scale users of protected material (WG2). This document, which has been signed by EFJ, EPC, EVA, EWC, FEP, STM and IFRRO, brings together, for the first time, a range of licensing solutions, namely:

- Solutions for the identification of rightholders, their agents or other representatives (such as CMOs) from whom permission can be sought;
- Solutions to give users information about licensing and licensing conditions: how the licensing process works and what users can do with a work under a chosen licence;
- Streamlined one-click/click through/accessible and easy pay-per-use transactional systems that make the licensing process quicker and easier.

#### **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<sup>89</sup>. Levies are charges imposed at national level on goods typically used for such purposes (blank media, recording equipment, photocopying machines, mobile listening devices such as mp3/mp4 players, computers, etc.) with a view to compensating rightholders for the harm they suffer when copies are made without their authorisation by certain categories of persons (i.e. natural persons making copies for their private use) or through use of certain technique (i.e. reprography). In that context, levies are important for rightholders.

With the constant developments in digital technology, the question arises as to whether the copying of files by consumers/end-users who have purchased content online - e.g. when a person has bought an MP3 file and goes on to store multiple copies of that file (in her computer, her tablet and her mobile phone) - also triggers, or should trigger, the application of private copying levies. It is argued that, in some cases, these levies may indeed be claimed by

<sup>86</sup> These solutions include for example the Press Database and Licensing Network (PDLN) (see <http://www.pdln.info>), as well as the Copyright Clearance Centre (CCC) (see <http://www.copyright.com/rightsphere>), both of which were presented during the L4E process.

<sup>87</sup> <https://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/6-Users-online-press.pdf> The Linked Content Coalition (LCC): see <http://www.linkedcontentcoalition.org>

<sup>88</sup> See presentation on “Infrastructure developments for the declaration and access to rights for all content types” Godfrey Rust, Linked Content Coalition <http://ec.europa.eu/licences-for-europe-dialogue/en/content/wg2-presentations-6th-meeting-25-october>

<sup>89</sup> Article 5. 2)(a) and (b) of Directive 2001/29.

rightholders whether or not the licence fee paid by the service provider already covers copies made by the end user. This approach could potentially lead to instances of double payments whereby levies could be claimed on top of service providers' licence fees<sup>9091</sup>.

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

**64. In your view, is there a need to clarify at the EU level the scope and application of the private copying and reprography exceptions<sup>92</sup> in the digital environment?**

YES – Please explain

**NO** – Please explain

There is no need to change Articles 5.2 (a) and 5.2 (b) of the EUCD. In particular, it must continue to be a requirement that certain exceptions are only permissible if fair compensation is provided to the rightholders.

There is, however, a need for clarification that, in respect of text and image levies, “rightholders” eligible for “fair compensation” comprise both authors and publishers.

NO OPINION

**65. Should digital copies made by end users for private purposes in the context of a service that has been licensed by rightholders, and where the harm to the rightholder is minimal, be subject to private copying levies?<sup>93</sup>**

YES – Please explain

NO – Please explain

**NO OPINION**

The CJEU decided in the *VG Wort* case (C-457/11 to C-460/11) that a possible consent by the copyright holder to the copying of his work or other protected material in the context of the exceptions or limitations provided for in EUCD Article 5.2 and 5.3 has no effect on fair remuneration payable under the exception. This means that remuneration paid to the author or publisher under a licence does not preclude receiving the fair compensation for the exception or limitation. Such copies may therefore be covered by the levies.

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

Where authors and publishers are remunerated for certain uses on the basis of copyright levies, the device and storage medium remuneration is also payable if protected works are

<sup>90</sup> Communication "Unleashing the Potential of Cloud Computing in Europe", COM(2012) 529 final.

<sup>91</sup> These issues were addressed in the recommendations of Mr *António Vitorino*, resulting from the mediation on private copying and reprography levies. You can consult these recommendations on the following website: [http://ec.europa.eu/internal\\_market/copyright/docs/levy\\_reform/130131\\_levies-vitorino-recommendations\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf).

<sup>92</sup> Art. 5.2(a) and 5.2(b) of Directive 2001/29/EC.

<sup>93</sup> This issue was also addressed in the recommendations of Mr *António Vitorino*, resulting from the mediation on private copying and reprography levies

copied in connection with online services (e.g. cloud computing). That is, for example, the case if works are downloaded from a cloud portal and stored on a PC or storage medium.

**67. Would you see an added value in making levies visible on the invoices for products subject to levies?<sup>94</sup>**

**YES** – Please explain

IFRRO has favoured the making of levies visible on the invoices, both in the discussions led by the EC-appointed mediator *António Vitorino*, and in the levy working groups preceding those discussions. It appears to make sense, *inter alia* for reasons of transparency, to show the device and storage medium remuneration on the invoices. For several countries this is already the case.

NO – Please explain

NO OPINION

Diverging national systems levy different products and apply different tariffs. This results in obstacles to the free circulation of goods and services in the Single Market. At the same time, many Member States continue to allow the indiscriminate application of private copying levies to all transactions irrespective of the person to whom the product subject to a levy is sold (e.g. private person or business). In that context, not all Member States have ex ante exemption and/or ex post reimbursement schemes which could remedy these situations and reduce the number of undue payments<sup>95</sup>.

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

**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.

**NO** – Please explain

In respect of text and image levies, the refund of device and storage medium remuneration in the event of export takes place through the responsible RRO, without problems in the vast majority of cases. On the other hand, there are substantial problems linked to vendors of devices based in another EU Member State refusing to pay the levy.<sup>96</sup>

EU regulations are required to ensure that, in relation to import/export of devices, there is no ambiguity with respect to the obligation to pay the levy according to the tariffs and methods of the country of destination to the RRO in that country. In this respect, it should also be clarified that any dispute should be regulated in and in accordance with the rules of the country where the levy shall be collected.

NO OPINION

<sup>94</sup> This issue was also addressed in the recommendations of Mr *António Vitorino*, resulting from the mediation on private copying and reprography levies.

<sup>95</sup> This issue was also addressed in the recommendations of Mr *António Vitorino*, resulting from the mediation on private copying and reprography levies.

<sup>96</sup> See, for instance: Case C 521/11, *Amazon v. Austro-Mechana*, 11 July, 2013, <http://curia.europa.eu/juris/document/document.jsf?doclang=EN&text=&pageIndex=0&part=1&mode=DOC&docid=139407&occ=first&dir=&cid=7739717>

**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.).**

In respect of text and image (reprography) levies, the question is irrelevant, as noted also in the report from the EC-appointed mediator *António Vitorino*<sup>97</sup>. Unlike the scope of the private copying exception under EUCD Article 5.2(b), which is limited to reproductions that serve a specific purpose ("for private use") regardless of the type of device and method, the reprography exception under EUCD Article 5.2(a) covers reproductions on a specific medium (paper), using a specific method ("any kind of photographic technique"), regardless of its purpose, which may be for professional, educational, private and other uses.<sup>98</sup> This means that the reprography levies cover both private and professional uses.

Consequently, when it comes to analysing the impact of reprography levies, it is not relevant to make a distinction between private and professional uses, since both of them are subject to the payment of a levy. Against this background, it is also unnecessary to distinguish between sales of devices in the private and business sectors. The point is that copies are permitted by law in both the private and business spheres. The – unified – device and storage medium remuneration can therefore be justified both for sales to private persons and sales to business end users.

**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?**

We refer to our response to question 69, which, in short, states that, under EUCD Article 5.2(a), text and image (reprography) levies also covers professional uses. Question 70 therefore becomes irrelevant in relation to text and image (reprography) levies.

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

A main problem is the tendency to mix private copying levies and text and image (reprography) levies, and to discuss the reprography levy as if it were identical to private copy levies. This is not the case; the two levy schemes are different (see question 69). The EU could contribute to clarification through sensitising EC officials and EU policy makers and institutions that text and image (reprography) and private levies are different, and ensure consistency in their dealing with the two different levy schemes.

Also, as mentioned under question 68, the obligation for exporters to pay the levy according to the rules of the country of destination should be regulated.

<sup>97</sup> [http://ec.europa.eu/internal\\_market/copyright/docs/levy\\_reform/130131\\_levies-vitorino-recommendations\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf), page 10

<sup>98</sup> [http://ec.europa.eu/internal\\_market/copyright/docs/levy\\_reform/130131\\_levies-vitorino-recommendations\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf) page 16.

## 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<sup>99</sup> 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<sup>100</sup>. This is an area that has been traditionally left for Member States to regulate and there are significant differences in regulatory approaches. Substantial differences also exist between different sectors of the creative industries.

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

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

For secondary uses administered by RROs, fair compensation is ensured via the RROs' distribution rules and the requirement of appropriate representation by both authors and publishers on its decision-making bodies.

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

- YES – Please explain
- NO – Please explain why

**X NO OPINION**

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

## VI. Respect for rights

Directive 2004/48/EE<sup>101</sup> provides for a harmonised framework for the civil enforcement of intellectual property rights, including copyright and related rights. The Commission has consulted broadly on this text<sup>102</sup>. Concerns have been raised as to whether some of its provisions are still fit to ensure a proper respect for copyright in the digital age. On the one hand, the current measures seem to be insufficient to deal with the new challenges brought by the dissemination of digital content on the internet; on the other hand, there are concerns

<sup>99</sup> See e.g. Directive 92/100/EEC, Art.2(4)-(7).

<sup>100</sup> See e.g. Art. 2.3. of Directive 2009/24/EC, Art. 4 of Directive 96/9/EC.

<sup>101</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

<sup>102</sup> You will find more information on the following website:

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

about the current balance between enforcement of copyright and the protection of fundamental rights, in particular the right for a private life and data protection. While it cannot be contested that enforcement measures should always be available in case of infringement of copyright, measures could be proposed to strengthen respect for copyright when the infringed content is used for a commercial purpose<sup>103</sup>. One means to do this could be to clarify the role of intermediaries in the IP infrastructure<sup>104</sup>. At the same time, there could be clarification of the safeguards for respect of private life and data protection for private users.

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

**YES** – Please explain

Wider legal access to works can only be achieved through appropriate mechanisms which include direct licensing by authors and publishers and collective management of rights, combined with financial incentives, protection against infringement and copyright enforcement, including efficient combating of piracy and other forms of unauthorised reproduction. CMOs play an indispensable role in assisting authors and publishers to enable wider legal access to their works and in awareness raising and enforcement of rights.

NO – Please explain

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?***

Collaboration with Internet Service Providers (ISPs) to address copyright infringement and enforcement issues is welcome. The Commission could facilitate initiatives in this respect through financial contributions to awareness-raising campaigns. The use of systems to inform about authorised use (e.g. through search engines using the ACAP<sup>105</sup>) are also highly welcome and should be encouraged. These actions help in enforcing contractual terms and preventing the networks from being used to infringe intellectual property.

The Commission should also encourage the investment in new business models. The establishment of a sustainable legal offer, reflecting the cultural diversity of the European written sector, can only take place in an environment ensuring the full respect of copyright and, therefore, the – financial – independence of creators. Against this background, we request that the Commission maintains a stable and predictable legal framework, promoting its rationale and its enforcement by all players.

<sup>103</sup> For example when the infringing content is offered on a website which gets advertising revenues that depend on the volume of traffic.

<sup>104</sup> This clarification should not affect the liability regime of intermediary service providers established by Directive 2000/31/EC on electronic commerce, which will remain unchanged.

<sup>105</sup> <http://www.the-acap.org/>

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

**YES** – Please explain

The right balance of protection of copyright with other fundamental rights, such as privacy and protection of personal data, needs to be found on the basis of the principle of proportionality, in the discretion of Member States (see the cases *Productores de Música de España (Promusicae) v Telefónica de España SAU* (C-275/06<sup>106</sup>) and *LSG-Gesellschaft zur Wahrnehmung von Leistungsschutzrechten GmbH v Tele2 Telecommunication GmbH* (C-557/07<sup>107</sup>)).

NO – Please explain

NO OPINION

## VII. A single EU Copyright Title

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

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

YES

**NO**

NO OPINION

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

In respect of the copyright legal framework, the EU should continue to pursue a pragmatic approach. Rather than emphasising a single EU Copyright Title, the focus should be on the adoption of an overall intellectual property (IP) strategy. Several studies have documented the importance of the IP sector to the EU economy and employment: For example, IPR intensive industries contribute to 39% of the EU's GDP and 26% of the EU's employment; 90% of its export comes from IP intensive industries. Within the IP sector, the copyright sector contributes with a positive trade balance. On a short, medium and longer term, an overarching EU IP strategy is required and urgent to maintain this situation.

<sup>106</sup> <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-275/06>

<sup>107</sup> <http://curia.europa.eu/juris/liste.jsf?language=en&num=C-557/07>

Work on a single EU Copyright Title would require substantial resources and unnecessarily distract focus from the important work on an overall EU IP strategy. Also, it is difficult to see how it could be established on the basis of Article 118 of the Lisbon Treaty (TFEU). The different traditions and systems, which include both common and civil law practices benefit from being maintained. Even if sufficient unanimity should be reached amongst EU Member States as to the nature of EU copyright legislation, it is difficult to see that an overarching EU Copyright Title is required.

## **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.***

We suggest that the creation of a specialised panel of judges, responsible for copyright legal matters, is created at the CJEU. More and more cases on copyright issues are decided by the CJEU. This requires a stable institution with copyright experts.