Public Consultation
on the review of the EU copyright rules

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I. Introduction

A. *Context of the consultation*

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

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

In its "Communication on Content in the Digital Single Market"[1] the Commission set out two parallel tracks of action: on the one hand, to complete its on-going effort to review and to modernise the EU copyright legislative framework[2][3] with a view to a decision in 2014 on whether to table legislative reform proposals, and on the other, to facilitate practical industry-led solutions through the stakeholder dialogue "Licences for Europe" on issues on which rapid progress was deemed necessary and possible.

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

As part of the review process, the Commission is now launching a public consultation on issues identified in the Communication on Content in the Digital Single Market, i.e.: *"territoriality in the Internal Market, harmonisation, limitations and exceptions to copyright in the digital age; fragmentation of the EU copyright market; and how to improve the*

[1] COM (2012)789 final, 18/12/2012.
[2] As announced in the Intellectual Property Strategy ' A single market for Intellectual Property Rights: COM (2011)287 final, 24/05/2011.
[3] *"Based on market studies and impact assessment and legal drafting work"* as announced in the Communication (2012)789.
[4] See the document "Licences for Europe – tem pledges to bring more content online": http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf .

effectiveness and efficiency of enforcement while underpinning its legitimacy in the wider context of copyright reform". As highlighted in the October 2013 European Council Conclusions[5] *"Providing digital services and content across the single market requires the establishment of a copyright regime for the digital age. The Commission will therefore complete its on-going review of the EU copyright framework in spring 2014. It is important to modernise Europe's copyright regime and facilitate licensing, while ensuring a high level protection of intellectual property rights and taking into account cultural diversity"*.

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

B. How to submit replies to this questionnaire

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

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

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

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

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

[5] EUCO 169/13, 24/25 October 2013.
[6] COM(2008) 466/3, http://ec.europa.eu/internal_market/copyright/copyright-infso/index_en.htm#maincontentSec2.
[7] COM(2011) 427 final, http://ec.europa.eu/internal_market/consultations/2011/audiovisual_en.htm.
[8] http://ec.europa.eu/internal_market/consultations/2009/content_online_en.htm.

C. Confidentiality

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

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

Please read our Privacy statement.

PLEASE IDENTIFY YOURSELF:

Name:

Copyright for Creativity (C4C)

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.

Transparency Register Number 342464912839-08

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

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

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

TYPE OF RESPONDENT (Please underline the appropriate):

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

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

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

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

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

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

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

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

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

- ☐ **Collective Management Organisation**

- ☐ **Public authority**

- ☐ **Member State**

- ☐ **Other** (Please explain):

……

……

II. Rights and the functioning of the Single Market

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

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

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

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

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

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

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

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

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

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

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

[14] See the document "Licences for Europe – tem pledges to bring more content online": http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf .

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).

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

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

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

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

Yes.

The Internet has revealed itself to be a crucial tool in the development of a digital single market across physical borders, thanks to which EU citizens can communicate, share information and access goods and services regardless of their origin or location.

Yet, today, most content are licensed and distributed on a territorial basis, which means that the content accessible varies from one country to another. Therefore, citizens often have problems accessing content from another country, or they cannot access the same content as citizens in another EU Member States. It creates unjustified barriers to enjoy cultural goods.

Vice-President Neelie Kroes aptly summarised the situation when she stated:[16]

"Today our fragmented copyright system is ill-adapted to the real essence of art, which has no frontiers. Instead, that system has ended up giving a more prominent role to intermediaries than to artists. It irritates the public who often cannot access what artists want to offer and leaves a vacuum which is served by illegal content , depriving the artists of their well deserved remuneration"

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

[16] Kroes, N. (2010, 5 November). *A Digital World of Opportunities* [SPEECH/10/619]. Forum d'Avignon – Les rencontres internationales de la culture, de l'économie et des medias, Avignon, France. Available at, http://europa.eu/rapid/press-release_SPEECH-10-619_en.htm?locale=FR.

This analysis was equally shared by Competition Commissioner Joaquin Almunia, when he pointed out that:[17]

"The distribution of online content across the EU is expensive, difficult and primitive if compared to the technology we now have. In particular, we need to address the persistent market fragmentation for online rights management, which harms consumers, rightholders and everyone else in between."

Well-known symptoms of this fragmentation are the Spotify and Netflix roll-outs in Europe.

Spotify was not available in every EU Member State a full four years after its launch and had to undergo long discussions with GEMA (German Collecting Society) before launching the service in Germany due to excessive fees requests.

From a user point of view, the situation has been well summarised in a blog post entitled 'Territorial Restrictions: Spotify's Exclusive Music for None', which paints the following scenario at a time where Spotify was not yet available in Germany:[18]

"*Most regular Spotify users will have seen a message like this before: "This Album Is Currently Not Available in United Kingdom" (or whichever country you live in). It's an annoying by-product of the music industry's licensing practices and the source of constant joy/disappointment for those that follow the "what's new on Spotify" announcements and services. But now users can see what's going on: a feature of Spotify's new metadata API is that it lets you see these territorial restrictions for each album. This shows where you have to live to listen to an album. But it also reveals that some albums are only available in countries where Spotify itself isn't available: in other words, there seems to be a growing archive of unplayable music in Spotify! (...) Australia's Parralox have recently released their second album "State of Decay" via Germany's Conzoom Records. It was added to Spotify recently, but check this: http://ws.spotify.com/lookup/1/?uri=spotify:album:0aYzMf83b8kQyhiUn7PRgN It's licensed for Austria, Switzerland, and Germany only."*

In a similar vein, Netflix currently faces very long discussions and negotiations before being able to launch its service in different EU Member States (France being one example). And these are the success stories! Pandora and Yahoo! Music had to exit the EU market due to the complexity of the licensing system.

[17] Almunia, J. (2010, 29 November). *Competition Policy for an Open and Fair Digital Economy* [SPEECH/10/610]. Second NEREC Research Conference on Electronic Communications, Madrid, Spain. Available at, http://europa.eu/rapid/press-release_SPEECH-10-610_en.htm?locale=en.

[18] White, J. (2009, December). *Territorial Restrictions: Spotify's Exclusive Music for None*. Available at, http://pansentient.com/2009/12/territorial-restrictions-spotifys-exclusive-music-for-none/.

This is incomprehensible and unacceptable: EU citizens are told that they live in a Single Market yet the reality they face online is one of fragmentation and artificial borders. As pointed out by BEUC in its Copyright Strategy Report, the "*US market for online music is four times bigger than Europe, whereas Europe's population is larger than that of the US*".[19] Surely that can only be seen as a sign of profound failure.

☐ 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).

Yes.

There are multiple examples of business that can be launched in some EU countries and not in others due to copyright complexities.

As pointed out in our answer to Q1, well-known cases of service providers facing barriers to entry in certain EU Member States include Spotify and Netflix.

Spotify was not available in every EU Member State a full four years after its launch and had to undergo long discussions with GEMA (German Collecting Society) before launching the service in Germany due to excessive fees requests.

In a similar vein, Netflix currently faces very long discussions and negotiations before being able to launch its service in different EU Member States (France being one example).

And these are the 'success stories'! Pandora and Yahoo! Music had to exit the EU market due to the complexity of the licensing system.

The impact of the hurdles faced by companies wishing to provide cross-border services in the EU should not be underestimated. In a survey conducted with 54 European angel investors, 20 US venture capitalists and 10 European, Booz & Co found that "*decreasing the cost and complexity of*

[19] BEUC. (2012, November). *Copyright Strategy: How to Make Copyright Work for both Creators & Consumers. See section on 'Access Diversity'*. Available at, http://www.beuc.eu/BEUCNoFrame/Common/GetFile.asp?ID=44174&mfd=off&LogonName=Guesten.

obtaining licensing agreements would increase the pool of investment funds available to DCIs [Digital Content Intermediaries]", as investors' interest in putting money into an EU service provider increased by 38% "*if regulations were altered to decrease the cost and complexity of obtaining licensing agreements*".[20]

☐ NO

☐ NO OPINION

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

[Open question]

C4C would encourage the Commission to avoid easy correlations between the number of requests for multi-territorial licences and the interest is such licences. Indeed other factors such as complexity of negotiation and cost of acquisition could also play a role.

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

[Open question]

As set out in our responses to Q1 to Q3, there are problems.

Copyright reform is needed to adapt to the digital world we live in. The rules must be harmonised to create a EU digital single market without borders and give EU citizens the same access to content and services. This means that innovative services should be able to flourish and EU citizens should be able to enjoy those services across the EU. It is simply unacceptable that getting a digital single market is so complicated due to digital borders that should not exist on the Internet and that users and service providers are constantly wondering if what they do is legal or not.

We have set out more detailed recommendations as regards the changes that are required in our answer to Q26.

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)?***

[20] Le Merle, M., Sarma, R., Ahmed, T., & Pencavel, C. (2012). *The Impact of the E.U. Internet Copyright Regulations on Early-Stage Investment – A Quantitative Study*. Booz & Company. p. 19. Available at, http://www.booz.com/media/file/BoozCo-Impact-EU-Internet-Copyright-Regulations-Early-Stage-Investment.pdf.

☐ **YES** – Please explain by giving examples

C4C cannot understand why rightholders and collective management organisations would consider it appropriate to create such restrictions, as the purpose of creating content should surely be to share with a maximum of users and hence to enable a maximum of users to access it. We can only wonder if such restrictions are not based on speculative motives, to the detriment of the single market.

The 'Study on the application of Directive 2001/29/EC on copyright and related rights in the information society', prepared by a Belgian law firm De Wolf & Partners at the request of the European Commission, points out that:[21]

"Right holders may use contractual constructions to restrict the exploitation of the work to national territories, thus requiring uploaders/service providers to make a work available in one Member State and to restrict access to the work to users being present on the territory of that Member State (i.e. excluding access from outside the Member State). The effect of localising the act of making available in one Member State is thus undermined by contractual practice. Such practices may constitute an infringement on the freedom to provide services within the EU or competition law. Such restrictions may however be justified by demonstrating that these are necessary to protect the essential subject matter of copyright protection."

☐ NO

☐ NO OPINION

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

☐ YES – Please explain by giving examples

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☐ **NO**

C4C does not see how you can justify territorial restrictions when service providers have the right to make it accessible throughout the EU.

☐ NO OPINION

[21] Triaille, J-P., Dusollier, S., Depreeuw, S., Hubin, J-B., Coppens, F., de Francquen, A. (2013). *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "InfoSoc Directive")*. De Wolf & Partners. p. 160. Available at, http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf.

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

Yes.

A reform of the copyright rules is needed to adapt to the digital world we live in. The rules must be harmonised to create an EU digital single market without borders and give EU citizens the same access to content and services. This means that innovative services should be able to flourish and EU citizens should be able to enjoy those services across the EU. It is simply unacceptable that getting a digital single market is so complicated due to digital borders that should not exist on the Internet and that users and service providers are constantly wondering if what they do is legal or not.

We have set out more detailed recommendations as regards the changes that are required in our answer to Q26.

□ NO – Please explain

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□ NO OPINION

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

1. [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[22] on the harmonisation of certain aspects of copyright and related rights in the information society. Other EU directives in this field that are relevant in the online environment are those relating to the protection of software[23] and databases[24].

Directive 2001/29/EC harmonises the rights of authors and neighbouring rightholders[25] which are essential for the transmission of digital copies of works (e.g. an e-book) and other

[22] 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.

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

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

[25] 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".

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[26], (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[27]. These rights are intrinsically linked in digital transmissions and both need to be cleared.

2. The act of "making available"

Directive 2001/29/EC specifies neither <u>what</u> is covered by the making available right (e.g. the upload, the accessibility by the public, the actual reception by the public) nor <u>where</u> 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[28]. According to this approach the copyright-relevant act (which has to be licensed) occurs at least in those countries which are "targeted" by the online service provider. A service provider "targets" a group of customers residing in a specific country when it directs its activity to that group, e.g. via advertisement, promotions, a language or a currency specifically targeted at that group.

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

☐ YES

☐ **<u>NO</u>** – 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[29])

No, it is not.

[26] 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).

[27] 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).

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

[29] 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).

The 'Study on the application of Directive 2001/29/EC on copyright and related rights in the information society'[30], prepared by a Belgian law firm De Wolf & Partners at the request of the European Commission, identifies in its section on the 'Study on the territoriality of the making available right - Localisation of the act of making available to the public and its consequences' that there are quite a few bottlenecks and uncertainties.

The Study notably points out that:[31]

"*The absence of a definition of the making available right creates some legal uncertainty as to the territorial reach of the online accessibility of protected subject matter. Different elements of this complex act could be considered relevant to establish the application of the national right of making available to the public: the availability on a server or the transmission to a Member State, even accessibility of the work has not explicitly been ruled out as a relevant element for the making available right. Consequently if all Member States are free to determine which element of the complex act is relevant to establish an act of making available, then each could subject this constitutive part to the prior authorisation of the author (and to the corresponding payment of a licence fee). The Member States could define the same or different criteria to apply their national making available right. At least in theory, this would lead to the accumulation of distinct acts of making available under the national copyright legislations concerned that do not necessarily correspond to the same technical and/or economic criteria. Without a clarification of this restricted act, its relation to the other exclusive economic rights and the localisation criterion, it remains speculative which facts will trigger an infringement and in which Member State.*"

As a result, it concludes that, on the one hand *"the exact scope of the making available right* (...) *is not clear"* and on the other, *"the territorial reach of the making available right is uncertain"*.[32]

Looking at the specific case of cultural heritage institutions, we see that they are increasingly asked to provide access to cultural heritage across the entire EU. In the majority of cases works made available on the websites of cultural heritage institutions are made available without territorial restrictions. In this situation there is substantial uncertainty about the scope of the 'making available' right when making works available to audiences in all of Europe.

[30] Triaille, J-P., Dusollier, S., Depreeuw, S., Hubin, J-B., Coppens, F., de Francquen, A. (2013). *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "InfoSoc Directive")*. De Wolf & Partners. Available at, http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf.
[31] Triaille, J-P., et. al. (2013). *Ibid*. p. 176-177.
[32] Triaille, J-P., et. al. (2013). *Ibid*. p. 21.

Given that cultural heritage institutions have limited resources to spend on rights clearance the only acceptable way to provide more clarity with regards to the scope of the 'making available' right would be to apply a country of origin principle,[33] making sure that the scope of this principle is clearly defined and does not generate new bottlenecks.

C4C considers that an approach based on targeted audiences would create increased burdens since dissemination through platforms like Europeana is explicitly targeted at users in all Member States.[34] Applying a target country approach would make it more difficult for cultural heritage institutions to make their works available via internationals projects like Europeana.

The same is true more broadly for all service providers and institutions making content available.

☐ 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[35])?***

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

Yes.

C4C agrees with the 'Study on the application of Directive 2001/29/EC on copyright and related rights in the information society', prepared by a Belgian law firm De Wolf & Partners at the request of the European Commission, which states that:[36]

"According to the Information Society Directive, the making available right is an exclusive right (art. 3(1)(2)), which entitles its owner to authorise or prohibit the restricted acts under this right. Broadly speaking, this entails, on the one hand the right holder's consent should be cleared before making the work available and, on the other hand, that she has the right to enforce it in case of infringement. Since the making available right may contain several constitutive elements that may take place on

[33] Hargreaves, I., & Hugenholtz, B. (2013, 29 May). *Copyright Reform for Growth and Jobs: Modernising the European Copyright Framework* [Interactive Policy Brief 13/2013]. The Lisbon Council. p. 10. Available at, http://www.lisboncouncil.net//index.php?option=com_downloads&id=847.

[34] This thus covers the scenario set out by Triaille, J-P., et. al. (2013). *Ibid*. p. 166, where: "in cases where it would be impossible to localise the exploitation in one or several identified countries, then there is a risk that the act of making available would be considered to occur in all the countries where the work is accessible.'

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

[36] Triaille, J-P., Dusollier, S., Depreeuw, S., Hubin, J-B., Coppens, F., de Francquen, A. (2013). *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "InfoSoc Directive")*. De Wolf & Partners. p. 98. Available at, http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf.

the territories of several Member States, divergent national rules on authorship and ownership may raise complications, in particular for the clearing of rights and for their enforcement."

C4C believes that a clarification – through the application of the country of origin principle – would reduce the type of complications described in the study.

□ NO

□ NO OPINION

3. 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")

Yes.

Under the current rules, the categories of rights are not adapted to digital uses.

As a service provider, this delays the possibility to quickly offer new and innovative services, because you need to go into lengthy, complicated and often expensive negotiations.

This was pointed out in the 'Study on the application of Directive 2001/29/EC on copyright and related rights in the information society', prepared by a Belgian law firm De Wolf & Partners at the request of the European Commission, which states that:[37]

"a service provider is expected to acquire the consent of the person holding the rights in each Member State where a constitutive element of complex act of making available can be found. Given the circumstance that this may not be the same person in each relevant Member State, the candidate licensee should verify who owns which rights for the territory where such relevant act is performed. The uncertainty with regard to the definition of the making available right and the localisation criteria

[37] Triaille, J-P., Dusollier, S., Depreeuw, S., Hubin, J-B., Coppens, F., de Francquen, A. (2013). *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "InfoSoc Directive")*. De Wolf & Partners. p. 106. Available at, http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf.

may thus affect the position of this candidate-licensee. Inversely, a right holder should verify whether she holds the relevant rights in each territory where an infringement may be found."

As an end-user, this means you often have access to less attractive and innovative services and have less choice. A good example is the roll-out of services such as Spotify and Netflix, which occur country-per country and in some cases at the pace of a snail.

□ NO

□ NO OPINION

4. 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[38] 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[39] 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

……

……

□ **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.

The provision of a hyperlink leading to a work or other subject matter protected by copyright should under no circumstances be subject to the authorisation of the rightholder.

Hyperlinking is one of the most fundamental and basic activities of Internet use.

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

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

From a user perspective, most Internet users hyperlink on a daily basis: they post or share on social networks such as Tumblr, Twitter or Facebook, write blog posts, make comments, recommendations, etc. Hyperlinks are their modern referencing tool – they communicate the existence of content but not the content itself – and an integral part of their interactions with other users.

From an innovation perspective, users' ability to freely link to information and to share the 'online address' of that information has led to an unprecedented amount of online innovation driving economic growth. As a general rule, people should continue to be able to reference and refer to all publicly available materials via a hyperlink. Referring to a copyright-protected work without authorisation has always been and should remain legal.

From a technical perspective, hyperlinking is part of the Internet's conception of a network in which hyperlinks need to be understood as paths leading users from one source of information to the other. Hyperlinks are, in the words of Sir Tim Berners-Lee, the inventor of the World Wide Web, nothing more than a reference or footnote and referring to publicly accessible information is a fundamental right of free speech.[40] In other words, hyperlinking must be understood in the context of Sir Tim Berners-Lee's underlying concept of the World Wide Web, namely "*that any person could share information with anyone else, anywhere*".[41] Making hyperlinks fall under copyright protection would hence break the Internet as we know it. If rightholders want to exert greater control over the availability of their works online, they have various means to do so including the use of 'paywalls', the Robots Exclusion Protocol (robots.txt), etc..

From a legal point of view, hyperlinking is not covered by copyright protection because it is outside the scope of the right of communication enshrined in Article 3 of the InfoSoc Directive.

The European Copyright Society, comprised of independent copyright academics, issued an opinion[42] on the *Svensson* case, in which it identifies three main reasons for this conclusion, summarised as follows in the 'Study on the application of Directive 2001/29/EC on copyright and related rights in the information society', prepared by a Belgian law firm De Wolf & Partners at the request of the European Commission:[43]

[40] Berners-Lee, T. (1997, April). *Axioms of the Web Architecture. Links and Law: Myths*. Available at, http://www.w3.org/DesignIssues/LinkMyths.html.

[41] Berners-Lee, T. (2010, December). *Long Live the Web: A Call for Continued Open Standards and Neutrality*. Scientific American. Available at, http://www.scientificamerican.com/article/long-live-the-web/.

[42] European Copyright Society. (2013, February). *Opinion on the Reference to the CJEU in Case C-466/12 Svenssson*. Available at, http://www.ivir.nl/news/European_Copyright_Society_Opinion_on_Svensson.pdf.

[43] Triaille, J-P., Dusollier, S., Depreeuw, S., Hubin, J-B., Coppens, F., de Francquen, A. (2013). *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "InfoSoc Directive")*. De Wolf & Partners. p. 34. Available at, http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf.

"*Firstly, it was contended that the right of communication to the public requires a transmission that is absent when merely a hyperlink is provided. It is merely a location tool, but exists independently from the actual availability of the work. Secondly, the communication should address a public or a "new" public. The hyperlink does not extend the public of the work, published online: those who had access to the web page will still have access, those who did not have access (e.g. absent the payment of a fee) will not gain access through the hyperlink*."

The European Copyright Society also argued that even if a transmission was to be held not necessary for there to be 'communication', copyright law only catches communication of a 'work'. A hyperlink is clearly not a 'work' and as explained above, it is a location tool helping and allowing the user to find where a work is. In fact, a hyperlink cannot be equated with a work because works can be removed from the Internet at any time while hyperlinks remain intact.

The German Supreme Court came to the same conclusion in the *Paperboy*[44] case stating that a search engine setting a hyperlink to a website with copyright-protected content which has already been made available to the public by the rightholder does not infringe copyright law. The Court made clear that hyperlinks only refer to works facilitating access to them which has already been provided making them *"no different to a reference to a print or to a website in the footnote of a publication"*.[45] With regard to Article 3 of the InfoSoc Directive the Court unmistakably concluded that the *"setting of hyperlinks is not a communication in this sense"*.[46]

The Court of Justice of the EU (CJEU) did not, however, render such a clear-cut decision: though it did rule[47] that the InfoSoc Directive must be interpreted to mean that the provision of a hyperlink leading users to works that are freely available on the Internet is *not* subject to copyright protection, it's reasoning triggers more question marks for the future. Indeed, the CJEU does not consider that hyperlinks are beyond the scope of copyright protection, as the German Supreme Court did in the Paperboy case. The CJEU on the contrary considers that a hyperlink falls within that scope as it defines it as an 'act of communication of a work'. The only remaining question to assess the need to request permission or the legality of the link is then the fact that this communication is done to a

[44] Der Bundesgerichtshof. (2003, 17 July). *Paperboy-Urteil* [ZR 259/00]. Available at, http://juris.bundesgerichtshof.de/cgi-bin/rechtsprechung/document.py?Gericht=bgh&Art=en&Datum=2003&Sort=3&Seite=5&client=3&anz=1706&pos=171&nr=27035.
[45] Der Bundesgerichtshof. (2003, 17 July). *Ibid*. para. 42.
[46] Der Bundesgerichtshof. (2003, 17 July). *Ibid*. para. 43.
[47] Court of Justice of the European Union. (2014, 13 Feb). *Judgment of the Court (Fourth Chamber). 13 February 2014. In Case C-466/12*. Available at http://curia.europa.eu/juris/document/document.jsf?text=&docid=147847&pageIndex=0&doclang=en&mode=lst&dir=&occ=first&part=1&cid=29226.

'new' public or not.[48] Though the impact of this new line of reasoning is difficult to assess, C4C can only guess that this could lead to renewed uncertainty relating to one of the most basic acts on the Internet, and a foundation of its underlying architecture, namely hyperlinking.

In conclusion, C4C strongly believes that providing a hyperlink leading users to already publicly available material should not require any authorisation. Hyperlinking is a modern referencing tool communicating the online addresses of works, not the works themselves.

□ NO OPINION

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

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

……

……

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

No.

The viewing of a web-page should under no circumstances be subject to the authorisation of the rightholder.

As pointed out by Christina Angelopoulos from the Institute for Information Law (IViR), asking this question amounts to asking 'whether the Internet is Legal'.[49] This question actually shows the risks of extensive interpretations and excessive legal claims.

Users' everyday uses of digital technology create multiple temporary digital copies of content which are essential to accessing and sharing content on the Internet. When a user views a web-page on his computer, this triggers the making of a temporary copy on the screen as well as in the cache on the hard disk. These copies are in inherent feature of today's browsing technology enabling people to actually read content on the screen of their e-reader, computer, tablet, smartphone, etc..

[48] Court of Justice of the European Union. (2014, 13 Feb). *Ibid*. par. 27, 30.

[49] Angelopoulos, C. (2013, 8 July). *UK Supreme Court Asks CJEU Whether the Internet is Legal*. Kluwer Copyright Blog. Available at, http://kluwercopyrightblog.com/2013/07/08/uk-supreme-court-asks-cjeu-whether-the-internet-is-legal/.

Requiring the authorisation of the rightholder for viewing and reading content that is already available amounts to an additional permission which could lead to citizens infringing the law by merely surfing on the Internet. This is clearly not socially tolerable and would further reduce the acceptability of copyright law by citizens.

Moreover, this directly touches on users' fundamental rights to receive and impart information. Critically, this is about citizens' right to read and, as pointed out by the UK Supreme Court in a judgment dated 17 April 2013:[50]

"it has never been an infringement, in either English or EU law, for a person merely to view or read an infringing article in physical form. This state of affairs, which is recognised in the enumeration of the copyright owner's rights in articles 2, 3 and 4 of the Directive, has never been thought inconsistent with a high level of protection for intellectual property. All that article 5.1 of the Directive achieves is to treat the viewing of copyright material on the internet in the same way as its viewing in physical form, notwithstanding that the technical processes involved incidentally include the making of temporary copies within the electronic equipment employed."

In the same judgment, the UK Supreme Court points out that:[51]

"Once it is accepted that part of the purpose of article 5.1 is to authorise the making of copies to enable the end-user to view copyright material on the internet, the various conditions laid down by that article must be construed so far as possible in a manner consistent with that purpose. It must, if the exception is to be coherent, apply to the ordinary technical processes associated with internet browsing."

The InfoSoc Directive itself stipulates under Recital 33 that "this *exception* [set out under Article 5(1)] *should include acts which* ***enable browsing as well as acts of caching*** *to take place"* [our emphasis added], so we can only encourage the Commission to ensure that this provision is applied and interpreted in a coherent manner and that any revision of the copyright framework strengthens it further. We refer you also to our answers to Q28 to Q41 (related to archiving), Q53 to Q57 (on text and data mining) and Q64 to Q71 (related to private copying).

☐ NO OPINION

[50] United Kingdom Supreme Court. (2013, 17 April). *Public Relations Consultants Association Ltd v The Newspaper Licensing Agency Ltd & Ors* [[2013] UKSC 18]. par. 36. Available at, http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKSC/2013/18.html&query=Meltwater&method=boolean.
[51] United Kingdom Supreme Court. (2013, 17 April). *Ibid*. par. 28.

5. Download to own digital content

Digital content is increasingly being bought via digital transmission (e.g. download to own). Questions arise as to the possibility for users to dispose of the files they buy in this manner (e.g. by selling them or by giving them as a gift). The principle of EU exhaustion of the distribution right applies in the case of the distribution of physical copies (e.g. when a tangible article such as a CD or a book, etc. is sold, the right holder cannot prevent the further distribution of that tangible article)[52]. 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)[53]. 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

Yes.

Though C4C as an organisation does not encounter such restriction, we do in our personal capacity know the frustrations stemming from the so called technical protection measures (TPMs) tools that stop you from using a file from one device to another or to copy it.

These types of restrictions do not apply to the offline world, where you can simply take a physical book and give it, lend it or resell to a friend to read so why would they be allowed in the online world? C4C actually thinks that this question should look more broadly at all the uses limitations stemming from TPMs, rather than limit itself to re-sale scenarios.

Common restrictions on digital files purchased by users comprise restrictions of back-up copies, restrictions as regards the conversion to other formats, limitations of compatibility to only certain devices, technical impossibility to remix, etc..

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

[53] 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).

A Europe Economics Study conducted for the European Commission in 2011 notably found that:[54]

"Information and transparency problems relating to licensing rules, interoperability (i.e. degree of compatibility) between products and/or services and Digital Rights Management (DRM) technologies have been found to be potential sources of consumer detriment where consumers are inadequately informed about how these are applied and when, which may result in consumers being unable to use digital content and services in accordance with their expectations. These include, for example, regional coding imposed by DRM preventing DVDs being played in different regions; the inability to use certain products or services together due to a lack of interoperability (such as transferring mobile phone applications from one model of phone to another); and differences in copyright rules between tangible digital products and those accessed online, resulting in consumers expecting to be able to share online films in the same way as they share tangible CDs."

The circumvention of digital restrictions is prohibited by the InfoSoc Directive, even when this circumvention is done in order to benefit from flexibilities that are provided for in national and European law. It is an absurdity that technological progress has led to a situation where, actions that were possible before this technology was used – such as buying and selling second-hand cultural goods – are now being prohibited, to the detriment of citizens.

☐ NO

☐ NO OPINION

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

[Open question]

The resale of previously purchased digital content should be allowed. This well-established 'user'-right in the non-digital / offline world must be recognised by law in the digital / online environment.

A legal framework that enables the resale of previously purchased digital content would allow the creation of secondary markets where 'used' goods are traded, adding the possibility for users to obtain a product at lower prices.

The reality however is that in most cases, digital goods are not 'bought' as such: at most, users have a licence to use them. Reselling is therefore not an option. Moreover, the use of technical protection measures (TPMs) should be curbed to avoid technology prohibiting de facto users from reselling.

[54] Europe Economics. (2011, 15 June). *Digital Content Services for Consumers: Assessment of Problems Experienced by Consumers (Lot 1). Report 4: Final Report*. p. 57 – par. 4.9. Available at, http://ec.europa.eu/justice/consumer-marketing/files/empirical_report_final_-_2011-06-15.pdf.

D. 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[55]. 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[56].

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

□ **YES**

Yes.

It is currently sometimes difficult to know which works are protected by copyright and who you should ask for permission when you want to use them. A registration system at EU level would make this easier and create more legal certainty.

Such a registration system should also contain information on works that are in the Public Domain and on works that have been made available under open content licenses such as the Creative Commons Licenses. As a matter of fact the continued growth of Creative Commons illustrates that registration-like systems work and provide substantial benefits to the public.

□ NO

□ NO OPINION

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

[Open question]

The creation of a registration system at the EU level would be beneficial to both authors and users of works. It would also be in line with the overall objectives of EU copyright policy as stated in this consultation document, namely to 'support creation and innovation, tap the full potential of the Single Market, foster growth and investment in our economy and promote cultural diversity'.

[55] 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.

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

The advantages of a registration system have notably been listed by WIPO[57] and go beyond facilitating licensing:

- Access to rights information: A registration system would give everyone a clear and equal access to rights information. It could also integrate a variety of rights information, *e.g.* by indicating open licensing for authors that wish to distribute broadly under liberal terms.
- Legal certainty: It would increase the certainty of who is the rightholder to a work and provide a stable catalogue of information so that rightholders can be easily ascertained. This would help mitigate the problem of orphan works for future works, as there will be a formal registry of rightholders. It would also help in defining which works are in the public domain and hence do not require any authorisation from the rightholder. It would finally prevent unnecessary and unwanted protection of works of authorship, by notably avoiding that works are awarded copyright protection even though their authors do not require or desire this protection.
- More efficient and less costly licensing: A registration system could provide a more efficient mechanism for commercial licensing opportunities. Moreover, in general, a registration system will help reduce the transaction costs between rightholders and potential users.

Other benefits: If the registration system were developed using open standards and formats, it would provide a rich set of rights information as open data to be used in third party applications and services. This could for example enable tools that give a more accurate overview of creativity and culture in the EU.

Registration systems can lead to having embedded information to permit quicker and instantaneous payment. If this is the case, this should in no case be used to restrict the freedoms of end-users.

If a registration system is created, rightholders should be required to register their works in order to be granted particular protections, such as the ability to start an enforcement action (see our answer to Q18 for more details and other possible incentives).

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

[Open question]

There could be a few disadvantages of a registration system, which would however not outweigh the benefits listed in our answer to Q16 and could be compensated by the incentives we list in our answer to Q18:

[57] WIPO. (n.d.). *Copyright Registration and Documentation*. Available at, http://www.wipo.int/copyright/en/activities/copyright_registration/.

- Volume: Since today it is so easy to create and share huge numbers of digital works, it could be seen as burdensome to impose a registration requirement on authors for every piece of content they create. At the same time, many of these same creators may not want copyright protection (or at least do not care for copyright protection that lasts for 100+ years). So, these creators may not care to register their works, or may be selective in registering their works. This could be seen as a positive for the copyright ecosystem. On the other hand, by slightly increasing the threshold for a rightholder to receive certain types of protection, it would decrease the number of potential copyright actions because only those works that authors truly wish to protect would be registered.
- Cost of implementation of the registry: It could take a significant monetary investment to develop and implement a registration system, even though this has not been the case for example for the Creative Commons platform. But in the long run, this cost would most likely be massively outweighed by the benefits of reducing transaction costs overall.
- Effort: Having a (mandatory) registration system will require an extra effort from rightholders. This small extra effort would however be minimal compared to the benefits of having the registration information available. Moreover, in the digital environment both registering a work and searching for registered works can be done with very little effort.

Moreover, if registration was incentivised by stipulating that rightholders are required to register their works in order to be granted particular protections, such as the ability to start an enforcement action, this would change the way the copyright enforcement system currently works in many Member States.

However, registration systems carry the risk that they are used to undermine existing rights and flexibilities, amongst others by being associated to an obligations to filter and block content. This is not a result that C4C would find acceptable and safeguards must be put in place to avoid such risks.

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

[Open question]

There could be several incentives for rightholders to register their works. However, one can wonder why incentives beyond the created transparency and legal clarity would be required to start with.

Rules could be put in place whereby certain elements of copyright protection are only available to rightholders who have registered their works, for example:

- Registration might be required for a rightholder to start an enforcement action (such as notice and takedown) or would be required to access a particular type or level of damage awards in a successful infringement judgment.
- Registration might be required for rightholders to be eligible to collect royalties through collective rights management organisations.
- Finally, registration could be made a prerequisite for prolonging copyright protection after an initial term (this would assume a much shorter duration than the current term). For example, with an initial copyright term of protection of 20 years (similar to patents), rightholders who register their works in the system would have the ability to extend the term for works they intend to exploit after the first 20 years of protection.

In principle this could apply to any element of copyright protection that is not required by the Berne convention.

E. 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[58], 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[59] should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition[60] 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[61] is seeking to take such identification systems a step further, and to create a linked platform, enabling automated licensing across different sectors.

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

[Open question]

[58] E.g. the International Standard Recording Code (ISRC) is used to identify recordings, the International Standard Book Number (ISBN) is used to identify books.
[59] You will find more information about this initiative on the following website: http://www.globalrepertoiredatabase.com/.
[60] You will find more information about this initiative (funded in part by the European Commission) on the following website: www.linkedcontentcoalition.org.
[61] You will find more information about this initiative on the following website: http://www.copyrighthub.co.uk/.

The European Union's role in the adoption of identifiers in the content sector should be two-fold:

1) The EU should ensure that identifiers as well as rights ownership and permission databases are based on open standards, available to all content creators and able to be read by all market participants free of charge, as well as ensuring they are publicly accessible via machine readable interfaces; and

2) The EU should ensure that all identifiers as well as rights ownership and permission databases are interoperable across all of Europe (and beyond).

From a methodological/procedural point of view, any system that is put in place must be developed in a true multi-stakeholder approach (*e.g.* not only by rights holders and intermediaries) and should reflect work already undertaken (for example by Europeana). Rights ownership and permission databases must also include the ability to store information on out-of-copyright (public domain) and openly licensed works.

The scope of permission databases also needs to be carefully considered, to avoid rightholders setting unilaterally permissions including for acts which are not subject to copyright, and an overbroad expansion of identifiers for example in all types of content, including user-generated content (UGC). The latter is both unrealistic, burdensome considering the volumes of UGC generated on an hourly basis on the Internet and creates issues in terms of user privacy and anonymity.

The European Commission's approach on this subject seems fundamentally flawed to us. Indeed the Commission has opted to support the vastly and unnecessarily complicated and expensive 'linked content coalition' of exceptionally well-funded organisations to assert their rights on content. It seems to C4C that a much fairer, simpler, more efficient and more effective approach would be to promote the standardised inclusion of information such as payment details in digital content, to enable commercial users to easily obtain all relevant information when they need it.

F. 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[62] 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).

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

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

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

☐ YES – Please explain

……

……

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

No.

The 'logic' of copyright rests on the fact that a monopoly right is granted for a limited time in order to encourage and reward creativity. This monopoly restricts competition and imposes restrictions on the access and use by consumers of the copyrighted works.

In the EU, copyrighted material remains protected up to 70 years after the death of the author when it concerns artistic works, and up to 70 years after the death of the last surviving major contributor (*e.g.* director, composer, screenwriter), when it concerns films and audio-visual content.

These current terms of copyright protection (including neighbouring rights protection) are excessive and do not reflect sound economic and legal considerations of the actual duration required for creators to recoup their investment in their works and their creativity rather than transforming copyright into a rent-seeking tool. . Indeed, the term of protection of life plus 70 years stands in stark contrast with the comparatively short commercial life of the large majority of in-copyright works.[63]

From a user/creator perspective, public domain works are a key foundation on which both old and new forms of expression (such as remix) can flourish thanks to the lack of copyright restrictions. The longer copyright term, the less public domain works are available for distribution, use and re-use.

Moreover, the term is not always counted from the moment of the author's death and it is not always clear whether the person indicated as the author is the only creative contributor to the work.

[63] Heald. P. J. (2013, 5 July). *How Copyright Makes Books and Music Disappear (and How Secondary Liability Rules Help Resurrect Old Songs)*. Illinois Program in Law, Behavior and Social Science Paper No. LBSS14-07; Illinois Public Law Research Paper No. 13-54. Available at, http://ssrn.com/abstract=2290181.

From the specific perspective of cultural heritage institutions, these institutions hold large collections of works that are still under copyright (or where the copyright status is unclear) but that are not exploited commercially anymore.

There are barriers to the incentive to digitise and make available online the large collections of works that are no longer commercially exploited but are or may still be protected by copyright. The rightholders lack the economic incentive to recover the costs of digitising an out of commerce work whilst the cultural heritage institution, incentivised by their own public mission, are confronted with the additional cost of rights clearance without the promise of economic return. As a result the length of copyright protection prevents cultural heritage institutions digitising and making available in-copyright works. This in turn means they cannot effectively fulfil their public mission.

One of the outcomes of this vicious circle is the existence of the so called '20th century black hole' when it comes to online availability of copyrighted works. This black hole notably means that there are significantly fewer works from the mid to late 20th century available on europeana.eu than works from the centuries before (many of which are clearly in the public domain) or from the 21st century (many of which are still available commercially and whose rightholders can generally be contacted quite easily), as set out in the chart below.

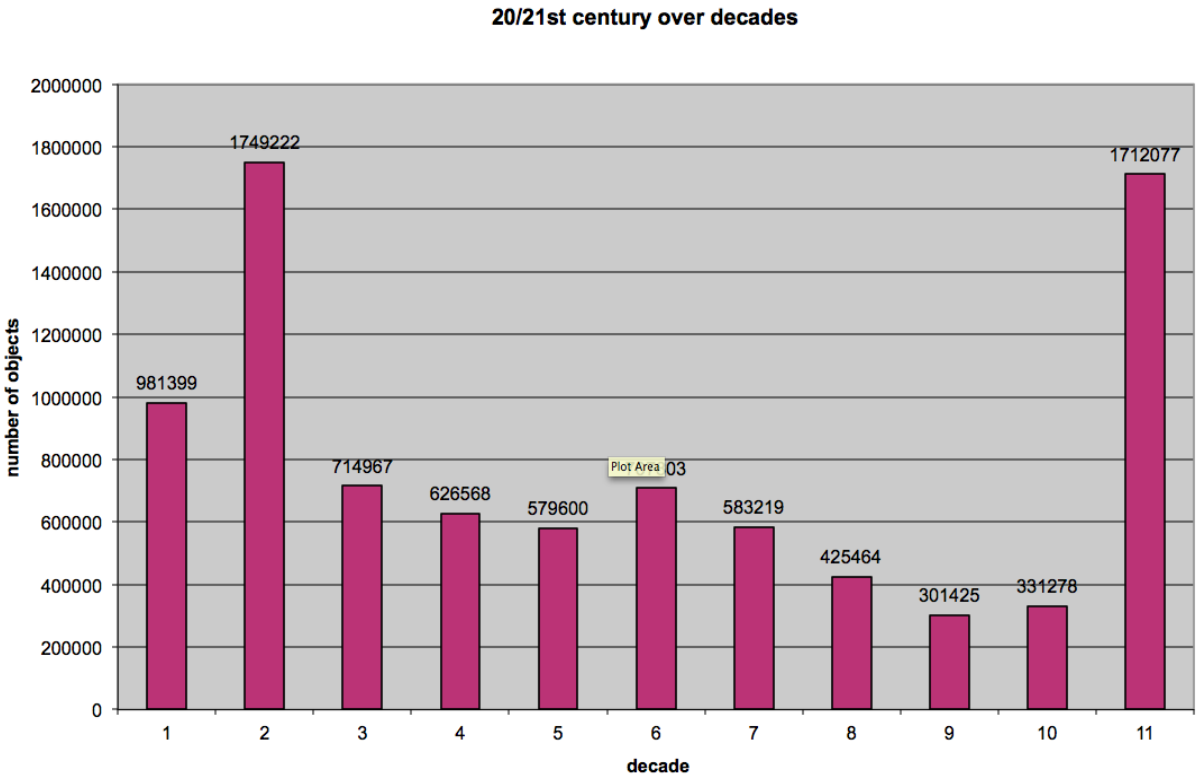

Figure 1: Europeana Collections and Data Analysis, Strategy and Plan, July 2012

The same effect has been observed in studies dealing with the commercial availability of books on Amazon.com.[64]

The term of copyright protection must hence be reduced to enhance access to knowledge and culture much more quickly. 15[65] to 25 years seems a more proportionate duration, or even 50 years, which is the minimum requirement established by the Berne Convention (life of the creator plus 50 years). Similar limitation of term should be processed with regard to neighbouring rights and in the field of databases, where there is a clear risk of the latter remaining indefinitely under copyright protection if their creator 'updates' them every 20 years to start a new term.

Shortening the term of protection will decrease the number of works that are in copyright but out of commercial exploitation and will thus reduce the scope of the problems outlined above.

Moreover, society needs not only shorter copyright term but also a mechanism enabling faster transfer to the public domain of works whose right owners abandon them (as in the case of some orphan works) or do not use them commercially (out of commerce works).

At the same time, the EU should take action within WIPO in order to revise the Berne standard in order to shorten it.

□ 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[66].

Exceptions and limitations in the national and EU copyright laws have to respect international law[67]. 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.

[64] Heald. P. J. (2013, 5 July). *Ibid.*

[65] Pollock, R. (2009, 15 June). *Forever Minus a Day? Calculating Optimal Copyright Term*. University of Cambridge. P. 24. Available at, http://rufuspollock.org/papers/optimal_copyright_term.pdf. According to Pollock the reasonable protection term is about 15 years.

[66] 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.

[67] 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).

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)[68], these limitations and exceptions are often optional[69], in the sense that Member States are free to reflect in national legislation as many or as few of them as they wish. Moreover, the formulation of certain of the limitations and exceptions is general enough to give significant flexibility to the Member States as to how, and to what extent, to implement them (if they decide to do so). Finally, it is worth noting that not all of the limitations and exceptions included in the EU legal framework for copyright are of equivalent significance in policy terms and in terms of their potential effect on the functioning of the Single Market.

In addition, in the same manner that the definition of the rights is territorial (i.e. has an effect only within the territory of the Member State), the definition of the limitations and exceptions to the rights is territorial too (so an act that is covered by an exception in a Member State "A" may still require the authorisation of the rightholder once we move to the Member State "B")[70].

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

Yes.

[68] 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)).

[69] 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.

[70] 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.

The optional nature of the list of exceptions and limitations has resulted in a patchwork of approaches across the EU, creating confusion and legal uncertainty for users and an uneven playing field for organisations.

For users, even though something they do in their country might be perfectly legal, it could be illegal when put online or shared with friends, family or colleagues in another country. That is confusing and scary. A 2009 Survey conducted by Consumer Focus in the UK found that 73% of UK users are *"never quite sure what is legal and illegal under current copyright law"*.[71] An example of how unworkable a non-compulsory implementation of the limitations and exceptions is can be found here: http://www.smarimccarthy.is/2011/08/copyright-combinatorics/.

"The directive outlines 21 different optional exceptions or limitations to the right of reproduction of copyrighted works. Each country implementing the directive can choose to either include or leave out the exception clause. This gives us ***2.097.152 different ways*** *to implement the directive."*

Even 'experts' in the copyright field are confused by the rules in place, as evidenced by the results – set out in the table below[72] – of a survey by the Norwegian Council asking various institutions to assess the legality of specific acts.

[71] Consumer Focus. (2011, March). *Consumer Focus Response to Independent Review of IP and Growth. Part 2 – The Copyright Framework: Innovation and Growth through Fair Use, Licensing Solutions and Appropriate Enforcement*. p. 15. Available at, http://www.consumerfocus.org.uk/files/2009/06/Response-to-independent-review-of-IP-and-Growth-Part-2-fair-use-licensing-solutions-and-appropriate-enforcement.pdf.pdf.

[72] Quoted in BEUC. (2012, November). *EU Copyright Directive: A Glance at Exceptions & Limitations. The Need for Revision*. p. 5. Available at, http://www.beuc.eu/BEUCNoFrame/Common/GetFile.asp?ID=44130&mfd=off&LogonName=Guesten. Acronyms used are: IFPI – International Federation of the Phonographic Industry; EFN – Electronic Frontier Norway; and, Kripos – Norwegian National Criminal Investigation Service.

Issue	The Ministry	Professor Jon Bing	Kripos	IFPI	EFN
Arne is interested in Japanese samurai films. They can only be bought from Japan, and are only available in **region 3**. Arne makes his DVD-player (including the player on his PC) **multi-region capable** in order to be able to watch these films.	Legal	Legal	Legal, certain limts	Legal	Legal
Arne's 3-year-old daughter has a tendency to mangle the children's DVDs that he buys for her. She has destroyed a number of them. Arne therefore starts **backing up his DVDs** after buying them. As he isn't great with computers, he gets a colleague to do it for him.	Legal, certain limts	Undecided	Illegal	Illegal	Illegal
Arne has a lot of DVDs. When he is travelling, he **transfers some of them to his iPod** in order to watch them during flights.	Undecided	Undecided	Undecided	Illegal	Undecided
Arne has downloaded thousands of songs from various online shops. This has cost him hundreds of pounds. Arne isn't able to back up everthing himself, but he knows that backups are important. He therefore uses an **external data warehousing service** (e.g. mp3tunes.com) in order to ensure that his music won't disappear if his computer dies.	Legal	Undecided	Legal	Illegal	Illegal
Arne uses some of the songs that he has bought online as **ring tones for his mobile**.	Legal, certain limts	Undecided	Undecided	Illegal	Legal, certain limts
Arne's mother was given a Creative MP3-player for Christmas. Arne has bought loads of music from iTunes that she would like to listen to. So Arne **converts** the music he bought on iTunes so that it can be played on his mother's Creative MP3-player.	Undecided	Undecided	Undecided	Legal, certain limts	Undecided
In the US, Arne found a great computer game for children. When he got home, he found that it couldn't be used because it had been bought in the wrong zone. He therefore wants to **modify his Playstation** so that his daughter can use the game.	Legal	Legal	Illegal	Legal	Legal
Arne's wife is **blind**. Many of her favourite authors have published books that are only available as **e-books**. She would like to get the books read on to an audio book. This is impossible. Therefore Arne uses a programme he finds on the Internet to read the books.	Legal	Legal	Undecided	Legal	Undecided

European citizens should have the same rights as regards access to knowledge and culture regardless of where they live, and should feel more secure about what their rights are in this area. This is especially true when looking at all exceptions that affect users' fundamental rights.

For organisations, similar undertakings should be able to enjoy the same exceptions (user rights) in all member states. This is essential to create a level playing field and to ensure core single market principles such as the free movement of goods and services are preserved. It is also important to the competitiveness of Europe, as pointed out by EDRi in its 'Shadow IPR Strategy Report' published in May 2011:[73]

"For intellectual property rights to act as an effective driver for high quality products and services, the legal framework must enable a maximum of availability of protected works, in the most coherent and predictable legal framework possible.

Many of the most successful recent online services are based on reasonable exceptions and limitations from copyright. However, in an environment with 15 optional exceptions/limitations implemented according to 27 different interpretations of the WIPO 3-step test, the safest approach

[73] EDRi. (2011, May). *Shadow IPR Strategy Report*. p. 8. Available at, http://edri.org/files/IPR_shadowreport_110523.pdf.

for an European innovator is to move to the USA, take advantage of the real single market there, which employs a simpler and more coherent approach and come back to the EU once the service has developed to a stage that it can afford the court costs and unpredictable results of European court cases."

Looking at the specific situation of cultural heritage institutions, we can see that these institutions are increasingly working together on digitisation projects (*e.g.* Europeana) and the fact that the exceptions benefitting publicly accessible libraries, museums and archives have not been implemented (uniformly) in all Member States, creates unnecessary uncertainties and disadvantages institutions in some Member States vis-à-vis institutions in others. The transition to digital services enables cultural heritage institutions to collaborate across borders and make their collections available across all of Europe and this needs to be mirrored by harmonising the exceptions benefitting these institutions.

The list of exceptions thus needs to be the same in every EU country and must be more flexible to adapt to technological change. We refer you for more details to our answer to Q22 and 24.

More fundamentally, the approach whereby everything falls under copyright except when an 'exception' gives a user more freedom is flawed to start with and it should be the other way round: human rights and freedoms should be the rule and copyright the exception.

□ NO – Please explain

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□ NO OPINION

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

□ **YES** – Please explain by referring to specific cases

Yes.

As set out in our answer to Q21, the optional nature of the list of exceptions and limitations has resulted in a patchwork of approaches across the EU, creating confusion and legal uncertainty for users and an uneven playing field for organisations. This issue becomes more pressing as more and more activities are taking place online.[74]

[74] Hargreaves, I., & Hugenholtz, B. (2013, 29 May). *Copyright Reform for Growth and Jobs: Modernising the European Copyright Framework* [Interactive Policy Brief 13/2013]. The Lisbon Council. p. 10. Available at,

A reform of copyright rules is hence needed to ensure that all exceptions be made mandatory for all Member States, and specified as not exhaustive. This list should cover at least the existing list of exceptions, as well as the various additional exceptions put forward by C4C in this submission (exception on e-lending, text and data mining (TDM), etc.) and should be required to be transposed literally into national law by each Member State to ensure that the flexibility included in the current list of exceptions does not get cancelled by an improper transposition. All the exceptions provided by the EU copyright Directives are drafted on the basis that they do not interfere with the normal exploitation of the work and, therefore, do not unreasonably prejudice rightholders. This means that making them mandatory in all Member States should have no negative effect on rightholders, while in many cases this will substantially benefit citizens and other public policy objectives such as access to knowledge and culture or inclusive education.

It should also be stated that the listed exceptions must be interpreted as applying to 'similar uses' and a more general open flexible norm should be included. It should also be made clearer that exceptions apply regardless of the type of work (neighbouring right) and regardless of the technical nature of use (whether the work is fixed on a tangible medium or not). Finally, it is crucial that the copyright framework confirms that exceptions cannot be contractually limited and that users are authorised to remove technical restriction measures that prevent them from exercising their rights stemming from an exception.

However, such a reform will take time and immediate action is required now. Therefore, the European Commission should already state in in the documents it plans to release before summer 2014 that Member States should make maximum use of the existing flexibilities in the current copyright Directives to ensure their copyright laws are fit-for-purpose in the digital age. As pointed out by Professors Hugenholtz and Senftleben, "*the EU acquis, in other words, contains flexibilities that may be invisible at the national level because of an overly cautious and restrictive implementation*".[75]

☐ NO – Please explain

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☐ NO OPINION

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http://www.lisboncouncil.net//index.php?option=com_downloads&id=847. This policy brief includes eight very concrete options for reform to make copyright fit for purpose in the digital age.

[75] Hugenholtz, B., & Senftleben, M. R. F. (2011, November). *Fair Use in Europe. In Search of Flexibilities*. IViR, Amsterdam, Netherlands. p. 17. Available at, http://www.ivir.nl/publications/hugenholtz/Fair%20Use%20Report%20PUB.pdf.

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

[Open question]

Removing exceptions is unacceptable. On the contrary, a more flexible approach is needed, combining the current system of a list of exceptions (but made mandatory for all EU countries and specified as not exhaustive), but stating specifically that these cases must be interpreted as applying to 'similar uses' and add a more general open norm that can adapt as technology changes (see our answer to Q24).

As pointed out by Professors Hugenholtz and Senftleben:[76]

"(*…) the area of limitations and exceptions – an area where more than elsewhere in the law of copyright rules have become detailed, rigid and connected to specific states of technology. Examples abound. Whereas social media have in recent times become an essential means of social and cultural communication, current copyright law leaves little or no room for sharing 'user-generated content' that builds upon pre-existing works. By the same token, current limitations and exceptions rarely take into consideration current educational and scholarly practices, such as the use of copyright protected content in Powerpoint presentations, in 'digital classrooms', on university websites or in scholarly e-mail correspondence. Existing limitations and exceptions in many Member States' copyright laws also find it hard to accommodate such essential information tools as search engines. By impeding these and other uses that should arguably remain outside the reach of copyright protection, the law's overly rigorous structure impedes not only cultural, social and economic progress, but also undermines the social legitimacy of copyright law proper."*

Moreover, specific exceptions should be added to create immediate clarity rather than rely on the use of an open norm or 'similar uses' principles:

- For user generated content (UGC): users must notably be allowed to share protected works and adaptation for non-commercial purposes. For users to express themselves online it is necessary that they can use copyright protected material that others have created as part of their own expressions (*e.g.* remixes).
- For text and data mining (TDM): It should be clarified that TDM does not fall under copyright provisions. On top of this, a specific exception allowing the copying of content for the purpose of text and data mining is necessary. It should also be explicitly stated in the law that technical protection measures (TPMs) and contracts should not override such an exception, nor any other

[76] Hugenholtz, B., & Senftleben, M. R. F. (2011, November). *Fair Use in Europe. In Search of Flexibilities*. IViR, Amsterdam, Netherlands. p. 10. Available at, http://www.ivir.nl/publications/hugenholtz/Fair%20Use%20Report%20PUB.pdf.

exception. Finally, such an exception should not distinguish between commercial and non-commercial purposes as, for research institutions, this would prevent knowledge transfer and such a differentiation would not be in the public interest.

With regards to the cultural heritage institutions the status of e-lending should be clarified (see the answers to Q36 and Q37) possibly via a new exception. In addition there cultural heritage institutions need to be enabled to make works in their collections available online for non-commercial purposes. As outlined in the answer to question 34 this does not require a new exception or limitation but can be achieved by expanding the scope of the existing provision in Article 5(3)(n) of the InfoSoc Directive.

Finally there is a need to introduce an open ended norm (see our answer to Q24).

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

Yes.

The current EU copyright regime offers some form of flexibility, but in practice everything tends to fall under copyright unless it is covered by an exception or limitation.

The exceptions and limitations in the InfoSoc Directive were drafted in a non-technologically neutral manner, and well before YouTube and Facebook were created, or before anyone could foresee the impact of sophisticated search techniques for research. As a result, everyday habits of online users could be considered copyright infringements.

From a methodological perspective, it seems glaringly obvious that, by definition, exception and limitations that apply to specific uses cannot ensure that as of yet unknown forms of use are covered by them. Technological innovation can be expected to lead to new forms of use in the near future and Europe would be well advised to create a copyright framework that is flexible enough to deal with such developments and foster innovation rather than hold it back.

As pointed out by Professors Hugenholtz and Senftleben, such a flexible approach is not only necessary but is also in line with the origins of copyright in the EU:[77]

"There appear to be good reasons and ample opportunity to (re)introduce a measure of flexibility in the national copyright systems of Europe. The need for having more openness in copyright law is almost self-evident in this 'information society' of highly dynamic and unpredictable change. A

[77] Hugenholtz, B., & Senftleben, M. R. F. (2011, November). *Fair Use in Europe. In Search of Flexibilities*. IViR, Amsterdam, Netherlands. p. 29. Available at, http://www.ivir.nl/publications/hugenholtz/Fair%20Use%20Report%20PUB.pdf.

historic perspective also suggests that, due to a variety of circumstances, copyright law, particularly in the civil law jurisdictions of Europe, has lost much of its flexibility in the course of the past century. In other words, making copyright law in author's rights regimes more flexible would not go against the grain of legal tradition. (…) *We would therefore recommend to introduce a measure of flexibility alongside the existing structure of well-defined limitations and exceptions, and thus combine the advantages of legal security and technological neutrality."*

From an economic perspective, the current EU copyright regime puts Europe at a competitive disadvantage with the rest of the world, as knowledge intensive economies such as the US, South Korea, Taiwan and Singapore benefit from 'Fair Use' exceptions. In the US for example, the added value of the Fair Use-related industry was estimated at 16% of the GDP in 2007.[78]

Europe would benefit from a more flexible, open norm approach that allows the legislative framework to adapt to technological evolutions and innovations, and avoids situations where users are criminalised for their behaviour or new technological uses are stifled in their development due to legal uncertainty. The current discussion about text and data mining is a good example of this. European researchers have to deal with legal uncertainties about the status of text and data mining activities because the InfoSoc Directive fails to address this form of use that was (relatively) unknown when the Directive was adopted.

An open norm would provide mechanism provide more certainty on the legal aspects of activities like text and data mining without having to undertake legislative changes (which take years to implement).

A greater degree of flexibility is also desirable from the perspective of cultural heritage institutions as it should allow them to react to new ways of making their collections available without the need for legislative reform. Compared to institutions in countries that have a more flexible approach to exceptions and limitations European institutions face a competitive disadvantage. Compare for example the scope of the Google books project in the US and in Europe: In Europe Google and the libraries are only digitising out-of-copyright works, while in the US the project also includes in copyright titles. As a result citizens of the US have better access to their recent (20th century) culture than European citizens.

□ NO – Please explain why

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

……

□ NO OPINION

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

[Open question]

The existing non-harmonised EU system, combined with the application of international rules (3-step test), has not created full legal certainty and created a system that is too static to cope with the dynamism of our society.

Instead, the EU should combine its current system of a precise list of limitations and exceptions (made mandatory for all EU countries), state that the list is non-exhaustive and that is should be interpreted as applying to 'similar uses' and add a more general open and flexible norm as set out in our answer to Q24.

The main disadvantage of an open norm is that it relies on court decisions to get defined and can thus reduce legal security the first years of their introduction. However, this legal uncertainty threat flagged by some stakeholders is vastly exaggerated if one takes the approach of combining an open norm with a robust list of exceptions and limitations.

Moreover, C4C considers that this disadvantage is vastly outweighed by the benefits of introducing additional flexibility, namely:

- Open norms allow justice to be applied in a fairer manner in concrete cases.
- The US example has shown that an open norm becomes more predictable as to its interpretation as more courts issue their views on it and studies have demonstrated that the US fair use doctrine has delivered flexibility and room for innovation with relatively low rates of litigation[79]. The same applies to Israel, where 'fair use' was introduced more recently.[80]

[79] Beebe, B. (2008). An Empirical Study of U.S. Copyright Fair Use Opinions, 1978-2005. *University of Pennsylvania Law Review, 156(3)*. Available at, http://www.bartonbeebe.com/documents/Beebe%20-%20Empirical%20Study%20of%20FU%20Opinions.pdf.

[80] Van der Noll, R., et al. (2012, August). *Flexible Copyright: The Law and Economics of Introducing an Open Norm in the Netherlands*. SEO Economic Research. Amsterdam, Netherlands. p. ii. Available at, http://www.ivir.nl/publications/vangompel/Flexible_Copyright.pdf. This Report concludes that: "*the case study of fair use in Israel shows that the change may decrease legal certainty in the short run (as case law needs time to develop), but improve legal certainty in the longer run, as the legal position of acts that do not 'fit' a rigid system with an exhaustive list of static exceptions is being clarified*."

- Flexible norms avoid having to adapt the list of limitations and exceptions every X years, and will encourage 'tomorrow's inventions', creative re-use and the development of new business models.
- The current copyright regime has not exactly induced crystal clear rules, as evidenced by the number of CJEU referrals by national courts, and by the application of the three-step test to the implementation of the InfoSoc Directive.

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

Yes.

At present, even though the EU has identified a list of exceptions in the InfoSoc Directive, each Member State can choose which of these exceptions are put into national law. As a result, a legal practice in one Member State could be deemed a copyright infringement elsewhere.

For example, the UK and Ireland do not have a private copying exception, so an act that is legal in Spain or the Netherland suddenly becomes an offence in the UK. Finland hardly has a parody exception, so a work considered legal in Germany could be infringing copyright in Finland. And Professors Hugenholtz and Senftleben have analysed how the diverging transpositions and interpretations of the quotation right can lead to very different approaches between France, the Nordic countries and the Netherlands.[81]

From a research perspective, while the EU claims there is European Research Area (ERA), in reality a true internal market for research depends on a joined-up copyright regime wherein researchers all have genuine access to the knowledge they need. Currently, for example, inter-library loans are hampered across borders. A joined-up, harmonised loan and preservation system across Europe will not only considerably increase efficiency, but also enhance the ERA.

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

……

……

☐ 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?)

[81] Hugenholtz, B., & Senftleben, M. R. F. (2011, November). *Fair Use in Europe. In Search of Flexibilities*. IViR, Amsterdam, Netherlands. p. 15. Available at, http://www.ivir.nl/publications/hugenholtz/Fair%20Use%20Report%20PUB.pdf.

[Open question]

Creators are entitled to receive fair compensation for the use of their works.

There is however no evidence that every use of work without compensation constitutes harm to the author while there exists evidence that certain uses positively affect revenue from other uses. in case of full harmonisation of exceptions, there should not be a problem with fair compensation. Generally speaking, the whole concept of fair compensation should be revisited. Member States should be explicitly obliged to introduce compensation schemes only if there is evidence of specific harm to authors that cannot be remedied in other way.

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[82] and enable on-site consultation of the works and other subject matter in the collections of such institutions[83]. 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[84].

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.

[82] Article 5(2)c of Directive 2001/29.
[83] Article 5(3)n of Directive 2001/29.
[84] 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.

Yes.

Whilst the use of the preservation exception is reasonably unproblematic in an 'analogue' context, it becomes an issue when applied in a digital context.

As a preliminary remark, we would like to point out that, whilst the consultation document limits itself to activities of libraries and archives the questions in this section are equally relevant for museums and other cultural heritage institutions.

In fact the relevant exceptions and limitations explicitly apply to *"publicly accessible libraries, educational establishments or museums, or (…) archives"*. The Orphan Works Directive clarifies this to include *"film or audio heritage institutions and public-service broadcasting organisations"*. In line with this, the answers to Q28-35 and Q39-41 should be read as applying to all cultural heritage institutions falling within this scope and not only to libraries and archives.

The main problem with the existing exception is that it does not cover all situations in which cultural heritage institutions (libraries and archives but also museums) need to make reproductions as part of their public mission to preserve and make available the works in their collections. On top of that, the existing exception is not implemented in the same way across the EU. As a result, most EU countries do not allow the making of copies for crucial activities like format shifting and structural digitisation of collections or putting all kinds of artificial constraints to digitalisation. This, and the fact that they cannot make digitised works available on-line without a license (see question 32 as well), severely limits institutions in how they can leverage digital technologies.

As a result of the difference in implementation of the relevant exception across the Member States, it is difficult to identify specific problems that occur on a European level. However it is essential for cultural heritage institutions that they can digitise their collections in order to continue to preserve them and to keep them available. Institutions increasingly digitise works in their collections not only to prevent harm to the work, but to be able to better fulfil their missions. Digital copies of cultural heritage works provide many advantages such as being (automatically) indexable, being easier to access and having lower storage costs. The current national implementations of the exception contained in Article 5(2)(n) of the InfoSoc Directive do not allow cultural heritage institutions to

structurally create digital copies of works in their collection. This is highly detrimental in an environment where, as the 'New Renaissance' Report on bringing Europe's cultural heritage online puts it, "*digitisation is more than a technical option, it is a moral obligation"*.[85]

In addition Recital 40 of the InfoSoc Directive which states that "s*uch an exception or limitation should not cover uses made in the context of online delivery of protected works or other subject-matter*" is highly problematic. As online dissemination of works becomes more and more important for cultural heritage institutions, limiting the reproduction exception in such a way is simply anachronistic as it prevents institutions from using digitised works in a meaningful way. From the perspective of Europeana which was set up by the European Commission as a platform for online delivery of cultural heritage objects such a limitation is highly regrettable.

Also technological measures and their relationship with the exceptions benefitting cultural heritage institutions create problems.

For example, CDs and DVDs are often protected by technological measures, the removal of which would require the cooperation of the producer. Article 6 of the InfoSoc Directive provides that technological protection measures are protected per se, independently of the scope of protection, entrusting to voluntary agreements or to subsidiary interventions of Member States the adoption of appropriate measures to ensure that legitimate users can make effective use of licensed content. As a result, many libraries are not able to reproduce CDs and DVDs legally acquired and, in a few years, these materials become unusable due to technological obsolescence.

The situation is actually worse when looking at online works, where the rightholder has full control and libraries need for example to pay yearly subscription with no preservation guarantees and often a prohibition to create back-up files for conservation.

The absence of a comprehensive policy on the preservation of digital content (relevant for any public or private organisation) poses a substantial threat to the survival of digitised material and may also result in the loss of material produced in digital format (born digital material).

□ NO

□ NO OPINION

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

[Open question]

[85] Niggemann, E., Decker, J. D., & Lévy, M. (2011, 10 January). *The New Renaissance. Report of the 'Comité des sages'. Reflection Group on Bringing Europe's Cultural Heritage Online*. Brussels. p. 14. Available at, http://ec.europa.eu/culture/documents/report_comite_des_sages.pdf.

The problems identified in our answer to Q29 could be solved by clarifying the scope of the existing EU legislation and explicitly broadening the existing exception in Article 5(2)(c) of the InfoSoc Directive, so that it allows institutions to make reproductions of all works in their collection as long as these are not intended for direct commercial advantage.[86]

This broadened exception would of course need to be applied in the same way in every Member State.

Moreover, Article 6 of the InfoSoc Directive should be revised in order to enforce exceptions and limitations and to ensure legitimate utilisations of protected works, regardless of format or mode of dissemination.

Finally, with regards to subscribed online materials, libraries should be granted a nonexclusive, royalty-free, perpetual right to archive one complete copy of the subscribed online materials, and to use the archived materials in the event that access on the original platform is discontinued or suspended. An exception should ensure, at the request of the library, the availability of back-up files for long-term preservation, regardless of the format of publication.

National library or other national infrastructure of the country of utilisation (*i.e.* the country of the purchasing library) could be responsible for local hosting for preservation purpose, as well as for permanent access and use of the licensed materials by authorised users after the termination of a license contract.

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

[Open question]

The main element would be a broadening of the existing exception in Article 5(2)(c) of the InfoSoc Directive. Instead of only allowing only specific acts of reproductions it should allow all acts of reproduction necessary for publicly accessible libraries, educational establishments or museums, or by archives to achieve aims related to their public-interest missions. This should include reproductions made as part of mass digitisation efforts and reproductions for format shifting.

Reproductions should be limited to internal use which is not for direct commercial or economic advantage or use in line with other exceptions and limitations allowed for by the InfoSoc Directive (such as the broadened version of the exception foreseen in Article 5(3)(n) that we propose in

[86] Triaille, J-P., Dusollier, S., Depreeuw, S., Hubin, J-B., Coppens, F., de Francquen, A. (2013). *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "InfoSoc Directive")*. De Wolf & Partners. p. 289ff. Available at, http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf.

answer to Q34). Reproductions would explicitly be allowed for the purposes of increasing the operational efficiency and reducing costs of the beneficiary institutions. The exception should only apply to works that are part of the permanent collection of an institution and not to works that have been loaned from other institutions (such as interlibrary loans or loans from museum exhibitions).

Broadening the scope of the extension along these lines mirrors the recommendations made as part of the European Commission commissioned 'Study on the application of Directive 2001/29/EC on copyright and related rights in the information society' from December 2013.[87]

Also Article 6 of the InfoSoc Directive should be revised in order to enforce exceptions and limitations and to ensure legitimate utilisations of protected works, regardless of format or mode of dissemination.

Finally, as set out in our answer to Q29, libraries should be granted a nonexclusive, royalty-free, perpetual right to archive one complete copy of the subscribed online materials, and to use the archived materials in the event that access on the original platform is discontinued or suspended. An exception should ensure, at the request of the library, the availability of back-up files for long-term preservation, regardless of the format of publication.

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

[Open question]

C4C has no comments.

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***

[87] Triaille, J-P., Dusollier, S., Depreeuw, S., Hubin, J-B., Coppens, F., de Francquen, A. (2013). *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "InfoSoc Directive")*. De Wolf & Partners. p. 291ff. Available at, http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf.

the collections of institutions such as universities and national libraries when you are not on the premises of the institutions in question?

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

[Open question]

[a – Institutional user] Libraries are subject to complex and lengthy negotiations with publishers and database vendors, which impact upon collection development, duration of access, permitted uses. Negotiation with publishers is an expensive and time consuming process and most licences are presented as final, without the ability to negotiate on terms, which are often taken over from other jurisdictions.

Often libraries entrust negotiation and management of contracts to national or regional institutional consortia to increase their bargaining power. But the use of consortia for the negotiations is a remedy, not an optimal solution, and the logic of large numbers may introduce rigidities in pricing and business models, encouraging the purchase or subscription of large packages of content rather than the selection of targeted works. It is also extremely common for licences to prevent cross border access to digital content for research and study by imposing limitations to specific territory(ies) and/or category of users, on a take-it-or-leave-it basis. Licensors holding significant market power happen to re-negotiate licensing fees annually and there have been threats of refusing to grant licenses at all.

In more general terms this question fails to address the most urgent issue confronting cultural heritage institutions today: providing online access to works in their collection. Among the existing exceptions the exception for the consultation of works and other subject-matter via dedicated terminals on the premises of such establishments for the purpose of research and private study comes closest to a mechanism that could enable such uses.

From both the perspective of publicly available libraries, archives and museums as well as the perspective of our patrons (end users/consumers) the existing exception that allows institutions to make works in their collections available 'for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises' (Article 5(3)n of the InfoSoc Directive) is extremely limited and not in line with the technological possibilities and the expectations of citizens anymore.

Limiting the availability of digitised works to dedicated terminals on the premises of cultural heritage institutions prevents them from reaching citizens that cannot travel to the premises (for example

because they are disabled or because they lack the economic means to do so). Furthermore it is out of line with the legitimate expectation of users that have been shaped by universal online accessibility of other services. Europe's citizens and researchers would greatly benefit from online access to the collections of Europe's publicly funded institutions.

For cultural heritage institutions to fully participate in the digital public space they must be enabled to offer online services that are available from everywhere and by anyone seeking to "*to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits*", as enshrined by Article 27.1 of the Universal Declaration of Human Rights. Online universal access to the collections of all publicly accessible libraries, Museums and Archives can play an important role in realising this objective. Being able to offer online access to works in our collections will also allow these institutions to reach bigger and more diverse audiences. For these reasons we consider the current exception to be too narrow.

The legal gaps that are present in the current EU copyright framework reinforce the lack of balance in negotiation powers between institutional users on the one hand and rightholders on the other (and in some cases between various types of rightholders). These unbalanced power relations do not contribute to establish an environment which allows the emerging of best practices for negotiation and contracts.

As a result, licences are not satisfactory at a variety of levels:

- Technical accessibility;
- Inter-library loan and document supply;
- Remote access to born-digital or digitised content (e-lending);
- Utilisations for distance learning courses and programmes;
- Open access to research results;
- Text and Data mining;
- Access and reuse of bibliographic metadata for integration within the library discovery systems; and,
- Post-termination access.

[b – End user/consumer] From the perspective of citizens, researchers and other end users it does not make sense that publicly funded cultural heritage institutions are not allowed to make works in their collection that are not in commercial circulation anymore available. These institutions have

built and maintained their collections with public funds. Their mission is to provide access to the knowledge and culture contained in these collections. As long as there are sufficient safeguards that prevent these institutions from interfering with the normal exploitations of works in their collection they should be enabled to make their collections available online for non-commercial uses by the general public. Preventing institutions from doing so means that users will look for information elsewhere (on platforms such as Wikipedia or Google).

In the long run limiting what cultural heritage institutions can do online with works that are not in commercial circulation anymore means undermining the position of these institutions. Younger generations that have been socialised with near universal online access to services will be driven away from these institutions, annihilating centuries of public investment into these institutions.

For citizens it is perfectly understandable that they cannot expect cultural heritage institutions to provide unlimited free access to works that still are in commercial circulation, but it does not make sense at all that institutions have to restrict access to works that are not in circulation anymore because they are still under copyright protection. It should be noted here that this is also true for authors who may have a legitimate interest that works that they have created are kept available via cultural heritage institutions and who often rely on access to works of others as part of their own creative process.

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

[Open question]

The best solution for the problem is broadening the scope of the exception currently provided for in Article 5(3)(n) of the InfoSoc Directive in order to ensure that anyone can make their collections available on-line via electronic networks, such as the Internet, for scientific and educational purposes without restriction to on-site terminals. This broadened exception should be made mandatory and implemented in the same manner in all Member States.

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

[Open question]

The main element would be a broadening of the existing exception in Article 5(3)(n) of the InfoSoc Directive. Instead of limiting the making available to dedicated terminals on the premises of the institutions it should apply to making the works available online via public networks such as the internet. The scope of the exception should further be expanded to not only include 'the purpose of

research or private study' by 'individual members of the public' but should apply to all non-commercial uses (including education).

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

These conditions are crucial to ensure that the new broadened exception meets the requirements of the three step test. Limiting the scope of the exception to publicly accessible cultural heritage institutions and to out-of-commerce works and works that are not subject to licensing terms should satisfy the 'certain special cases' criterium and cannot, by definition, be in conflict with the 'normal exploitation' of the works in question. The fact that the exception would be limited to non-commercial uses of the works made available and that authors can decide to opt-out of the exception would further ensure that 'the legitimate interests of the author' are not necessarily prejudiced.

In fact many authors would benefit from improving online access to out-of-commerce works because works that they have created are kept available via cultural heritage institutions (and are available to them to build upon or to do research). As a result citizens also greatly benefit, because they are granted access to works that wouldn't be available through markets players. We refer you also to our answer to Q37.

This solution would also be in line with the relevant recommendations made in the 'New Renaissance' Report. The Report recommends that "*national governments and the European Commission should promote solutions for the digitisation of and cross-border access to out of distribution works*" and that "*for cultural institutions collective licensing solutions and a window of opportunity should be backed by legislation, to digitise and bring out of distribution works online, if rights holders and commercial providers do not do so*".[88]

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

[Open question]

We do not consider another solution would be appropriate and refer you to our answer to Q34.

[88] Niggemann, E., Decker, J. D., & Lévy, M. (2011, 10 January). *The New Renaissance. Report of the 'Comité des sages'. Reflection Group on Bringing Europe's Cultural Heritage Online*. Brussels. p. 5. Available at, http://ec.europa.eu/culture/documents/report_comite_des_sages.pdf.

3. E – lending

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

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

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

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

□ **YES** – Please explain with specific examples

Yes.

[a – Libraries] Libraries face a number of problems when attempting to negotiate agreements to enable and facilitate electronic lending. These include:

- Denial of sales of electronic books to libraries by publishers;
- Removal of content that was available for e-lending without informing the library;
- The use of multiple licences and different models, which creates a lack of clarity on the condition of access to the content for users; and,
- A deterioration of registered users' rights (crossing a border with a borrowed book was not a problem. Transborder online access to an electronic copy offered by a library is often impossible as the result of restrictive licensing conditions.

More generally the question is if it is necessary and desirable to negotiate agreements to enable electronic lending. Contrary to what is stated in the introduction to this question there is considerable uncertainty about the status of e-lending under EU law. The Directive on rental and lending rights (2006/115/EC) does not explicitly exclude e-lending or lending of digital items from its scope and some libraries argue that based on the current acquis and the UsedSoft decision by the CJEU (Case C-128/11) they should be allowed to provide e-books in libraries for download. In the Netherlands the Association of Public Libraries (Vereniging van Openbare Bibliotheken) has brought

the matter before the courts. They started a test case against the collective management organisation in charge of the lending right arguing that they should be allowed to provide e-books in libraries for download.

[b - End users] There is currently a lack of clarity on the conditions of access to content for users. In practice, this means that registered users' rights are being deteriorated: in the physical offline world, crossing a border with a borrowed book is not a problem yet it is impossible to have online access to a library across a border.

□ NO

□ NO OPINION

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

[Open question]

The best solution for the problem would be to create legal certainty by unambiguously including the right to e-lending in the EU acquis. While the lending of analogue works is currently being enabled by the Directive on rental and lending right (2006/115/EC), which is most often considered as an act of making available, it would probably need to be regulated via an (additional) exception in the InfoSoc Directive.

In line with our answers to the issues of online availability and reproductions given above, we consider it necessary that e-lending is covered by a mandatory exception that is harmonised across the EU. Since e-lending must be available for all books (commercially available or not), it should be treated separately from the general exception for making works available online that we argue for in response to Q34. Instead, a new exception should be created specifically for e-lending. This exception could take the form of a statutory licence with fair compensation for authors.

Moreover, C4C's signatory EBLIDA (European Bureau of Library Information and Documentation Associations) has identified the following 'key principles on the acquisition of and access to e-books by libraries'[89] that should be put in place across the EU in order to solve the issues currently encountered:

- All e-book titles available for sale to the public should be available to libraries for acquisition and access;
- All e-book titles should be available to libraries at the time of publication;

[89] EBLIDA. (2012, 22 October). *EBLIDA Key Principles on the Acquisition of and Access to E-books by Libraries*. Available at, http://www.eblida.org/Special%20Events/Key-principles-acquistion-eBooks-November2012/GB_English%20Version%20Key%20Principles.pdf.

- Publishers should deliver e-books in interoperable formats;
- Libraries should be permitted to make available acquired or licensed e-books for a limited period of time to a user;
- It should be possible to use the same e-book title simultaneously; and,
- Registered users should be able to download an e-book either in the library or by way of remote access via authentication systems.

We refer you for more details to the full set of Principles.

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

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

[Open question]

From the perspective of cultural heritage institutions there are enormous differences between physical and online collections. These differences are so fundamental that it does not makes sense to compare the two. The ability to offer access to their collections online frees cultural heritage institutions from many of the constraints imposed by them by the properties of analogue media and their physical infrastructure (such as buildings). Being able to offer access to collections online means that in theory access can be provided to full collections independent from the location of the viewer or the time of the day. This has the potential to radically improve the ability of publicly funded cultural heritage institutions to carry out their public mission to provide access to knowledge and culture.

Unfortunately this enormous potential is currently being held back by copyright rules that unnecessarily restrict how cultural heritage institutions can exercise their mission in the online environment. Under the current EU copyright rules cultural heritage institutions are dependent on permission from rightholders in order to make protected works in their collection available online. As we have argued above this makes no sense in situations where the majority of works held by these institutions are not even commercially available.

With the increasing digitisation of our society and media production in particular this has other, potentially far reaching consequences. Libraries for example can buy all physical publications to ensure that they are available to the public both during the period of their commercial availability and thereafter.

The same is not true for digital publications that are not being sold, but licensed: currently libraries cannot buy licences to all commercially available content because rightholders are free to decide whether they want to give access to a specific work, and to decide on the terms for such access. Often such conditions make it impossible to keep such works indefinitely or to make it available to the community by lending it out.

The consequence of this is that the collection building policy of libraries is increasingly determined by the publishers and not by the institutions. In the long run this development threatens to undermine the core function of cultural heritage institutions to preserve the knowledge and culture of our societies and to keep it available to the public.

With regards to the above the 'Study on the application of Directive 2001/29/EC on copyright and related rights in the information society' that was commissioned by the European Commission and published in December 2013[90] contains an interesting observation. At the end of the section discussing inter alia the exception benefitting cultural heritage institutions, the authors observe that:[91]

"The large-scale digitization projects ultimately aim at the making available of the collection, (...) *the making available for consultation is increasingly requested to apply at distance and online; and the lending is shifting to cover the online transmission of digital items. The exception-by-exception reasoning, which is the model of the InfoSoc Directive, might not be relevant anymore. Maybe it is time to look at different uses that some categories of users (libraries or educational institutions) or some objectives (access to culture and knowledge or education) would be privileged to undertake under a limitation of copyright.* (...) *the space of non-infringing uses could be defined by their objective and some general conditions, including a more open requirement that the use does not exceed what is necessary for its objective. This is a radical move that this study has not made. It could make our system of exceptions more fit for its purpose and understandable for users and copyright owners alike. If the requirements for each exception are adequate and legitimate, it would not sacrifice the high level of protection of copyright and related rights that the EU law has adopted."*

From the perspective of cultural heritage institutions such an approach would have many benefits. It would create room for rethinking Europe's rich tradition of providing access to knowledge and

[90] Triaille, J-P., Dusollier, S., Depreeuw, S., Hubin, J-B., Coppens, F., de Francquen, A. (2013). *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "InfoSoc Directive")*. De Wolf & Partners. Available at, http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf.
[91] Triaille, J-P., et al. (2013). *Ibid.* p. 403.

culture through public institutions and it would enable our institutions to fully leverage the possibilities offered by digitisation and near universal connectivity.

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

[Open question]

From a users' perspective, there is no difference in these activities, aside from the convenience of online tools.

4. Mass digitisation

The term "mass digitisation" is normally used to refer to efforts by institutions such as libraries and archives to digitise (e.g. scan) the entire content or part of their collections with an objective to preserve these collections and, normally, to make them available to the public. Examples are efforts by libraries to digitise novels form the early part of the 20th century or whole collections of pictures of historical value. This matter has been partly addressed at the EU level by the 2011 Memorandum of Understanding (MoU) on key principles on the digitisation and making available of out of commerce works (i.e. works which are no longer found in the normal channels of commerce), which is aiming to facilitate mass digitisation efforts (for books and learned journals) on the basis of licence agreements between libraries and similar cultural institutions on the one hand and the collecting societies representing authors and publishers on the other[92]. 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)[93].

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

[92] 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 .

[93] 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.

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☐ **NO** – Please explain

No.

From the perspective of cultural heritage institutions this question (and the following) are too limited.

The issue of mass digitisation is far broader than what can be addressed with the 2011 Memorandum of Understanding (MoU) and the Orphan Works Directive (the other relevant European policy instrument in this area). Copyright issues related to the mass digitisation of collections and the subsequent making available of digitised works require a comprehensive approach that cannot be based the principles of due diligence search and licensing. If we want to enable European cultural heritage institutions to transfer their collections into the digital age (and there cannot be any doubt that this is both an important policy objective and a reasonable expectation of users who as taxpayers fund these organisations) we need a far more comprehensive approach.

Both the Orphan Works Directive and the 2011 MoU on out of commerce works are insufficient to address the copyright issues arising from mass digitisation projects. In addition, the extremely slow uptake of the MoU (according to the 2013 'Study on the application of Directive 2001/29/EC on copyright and related rights in the information society' there is one single project that is 'inspired' by the MoU)[94] clearly illustrates that the MoU is not a suitable mechanism for enabling mass digitisation on a large scale.

The Orphan Works Directive is ill-suited to enable mass digitisation projects. While it will enable publicly accessible libraries, museums and archives to make orphan works available after a due diligence search has been carried out for specific works, the requirement of carrying out due diligence search makes it effectively unusable for mass digitisation projects as this would require huge additional investments in both time and money.

The inadequacies of both the Orphan Works Directive as well as the MoU can be addressed by an extension of the scope of the exception created by Article 5(3)(n) of the InfoSoc Directive as outlined in the answer to Q34 above. Doing this would provide cultural heritage institutions a clear legal framework for operating in the digital environment that would allow us to achieve the aims related to our public-interest missions.

[94] Triaille, J-P., Dusollier, S., Depreeuw, S., Hubin, J-B., Coppens, F., de Francquen, A. (2013). *Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "InfoSoc Directive")*. De Wolf & Partners. p. 279. Available at, http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf.

Taken together this approach would mean that the online activities of cultural heritage institutions are covered by three targeted exceptions:

- An exception covering the making of reproductions (an expanded version of the current exception defined in Article 5(2)(c) of the InfoSoc Directive);
- An exception covering the making available of out-of-commerce works an expanded version of the current exception defined in Article 5(3)(n) of the InfoSoc Directive; and,
- A new exception covering e-lending, as suggested in our answer to Q37.

☐ NO OPINION

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

☐ **YES** – Please explain

Yes.

This is certainly necessary. The public has a legitimate interest in having online access to the collections of all publicly accessible libraries, museums and archives across Europe (see Article 27.1 of the Universal Declaration of Human Rights). There is no good reason for limiting mechanisms that create such access to certain types of content. The solution referred to in answer to Q40 and Q34 above namely extending the scope of the exception in Article 5(3)n of the InfoSoc Directive, should cover all types of works and other subject matters that are held by these institutions.

This solution would also be in line with the relevant recommendation made in the 'New Renaissance' Report of the Commission appointed 'Comité des Sages' that was published in 2011. The Report recommended that *"solutions for orphan works and out of distribution works must cover all the different sectors: audio-visual, text, visual arts, sound"*.[95]

☐ NO – Please explain

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☐ NO OPINION

[95] Niggemann, E., Decker, J. D., & Lévy, M. (2011, 10 January). *The New Renaissance. Report of the 'Comité des sages'. Reflection Group on Bringing Europe's Cultural Heritage Online*. Brussels. p. 5. Available at, http://ec.europa.eu/culture/documents/report_comite_des_sages.pdf.

B. Teaching

Directive 2001/29/EC[96] enables Member States to implement in their national legislation limitations and exceptions for the purpose of illustration for non-commercial teaching. Such exceptions would typically allow a teacher to use parts of or full works to illustrate his course, e.g. by distributing copies of fragments of a book or of newspaper articles in the classroom or by showing protected content on a smart board without having to obtain authorisation from the right holders. The open formulation of this (optional) provision allows for rather different implementation at Member States level. The implementation of the exception differs from Member State to Member State, with several Member States providing instead a framework for the licensing of content for certain educational uses. Some argue that the law should provide for better possibilities for distance learning and study at home.

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

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

☐ **YES** – Please explain

Yes.

The current exception for teaching in the EU law is written in a rather broad and open way but none of the EU countries have implemented it as broadly as allowed by the InfoSoc Directive.

For example, according to the Polish implementation of the InfoSoc Directive, there is no legal certainty as regards the use of works for teaching purposes in any manner except for authorised physical copies on-site. In other words, on-line access is open to question, given the limitation to on-site terminals which applies also to schools. Therefore, many educational institutions do not engage in any activities except for traditional on-site teaching, or they seek explicit licenses. At the same time, many teachers who want to make their classes more attractive and to prepare their students to the use of ICT, operate in a grey area.

If implemented broadly into the national laws the exception allows for use of any copyrighted material, including text, film, and multimedia for illustration of teaching in classrooms and also in online courses. It should also allow for using copyrighted works in teaching compilations, analogue or digital. Such uses should not require a license. Compensation is not required but allowed and compensation schemes should be based on actual and proven economic harm.

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

Because of the narrow implementations of the broad exception provided in the Directive, permitted use of works in education differs between Member States. This presents special difficulties for the providers of online open courses that can be access by citizens of various Member States.

The issue not only concerns the types of uses permissible under specific Member States' educational exceptions but also the applicable law aspect, as highlighted in our answer regarding the 'act of making available' and its consequences in terms of the definition of the applicable law.

There is thus a need to seek harmonised solutions, if not at international at least at EU level, in order to create a real single market, without the current fragmentation we experience. Otherwise legal uncertainty will govern on both sides, with the absurd results we see today: the educational institutions will continue to seek licenses for uses that do not need to be licensed (and maybe they will be refused) and the rightholders will be reluctant to grant license for online uses.

The end result is what we face today, *i.e.* an uncertain climate for public policy for education, as core matters are left to market forces (in the form of unreasonable prices and conditions, prohibition to use material online, technical protection measures and restrictive licensing conditions in general).[97]

C4C therefore considers that, in the absence of clear guidelines in the law, the temptation is big for rightholders to determine the extent to which the dissemination of knowledge can take place exclusively through contractual arrangements, which restrict the acts normally allowed under the statutory exceptions and limitations.[98]

☐ NO

☐ NO OPINION

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

[Open question]

The problem would best be solved by making a broad educational exception mandatory for all Member States. This mandatory educational exception should cover all uses of all types of works for illustration of teaching, regardless of the institution, and no room should be left to Member States for narrow interpretations, as we see them today. It is important to stress that uses of computer programs, databases and multimedia works (such as video games) should be expressly included.

[97] Papadopoulou, M. D. (2010). Copyright Limitations and Exceptions in an E-Education Environment. *European Journal of Law and Technology, 1(2)*. Available at, http://ejlt.org/article/view/38/56.

[98] Guibault, L. (2010). Why Cherry-Picking Never Leads to Harmonisation. The Case of the Limitations on Copyright under Directive 2001/29/EC. *JIPITEC, 1(2)*. pp. 55-66. p.65. Available at, http://www.jipitec.eu/issues/jipitec-1-2-2010/2603/JIPITEC%202%20-%20Guibault-Cherrypicking.pdf.pdf.

Moreover, there is also need for education and wide dissemination of information about the scope of the existing and any future exceptions. For example, in Poland Centrum Cyfrowe conducted a series of workshops for educators (school and academia teachers) on the issue of the current educational exception. The school teachers involved demonstrated hardly no knowledge of the existence of the educational exception. For instance they were afraid of the legal consequences of showing movies in classrooms, even though this is a clearly allowed under the Polish teaching exception.

This corroborates the findings of the Hargreaves report, which noted that:[99]

"Many university academics – along with teachers elsewhere in the education sector – are uncertain what copyright permits for themselves and their students. Administrators spend substantial sums of public money to entitle academics and research students to access works which have often been produced at public expense by academics and research students in the first place. (…) *Senior figures and institutions in the university sector have told the Review of the urgent need reform copyright to realise opportunities, and to make it clear what researchers and educators are allowed to do."*

This legal uncertainty experienced by the educational sector only gets worse when engaging in cross-border activities such as e-learning, due to the patchwork implementation of the exception in Article 5.3 of the InfoSoc Directive.

Hence we believe that not only the legislative solution as outlined below in Q45 would be needed. Campaigns to raise awareness and 'educate the educators' in all Member States with respect of the scope of their rights should also be organised on a regular basis.

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

[Open question]

Various mechanisms exists and have been listed both in the European Commission 'Green Paper on Copyright in the Knowledge Economy'[100] and the recently published 'Study on the application of Directive 2001/29/EC on copyright and related rights in the information society'.[101]

[99] Hargreaves, I. (2011, May). *Digital Opportunity: A Review of Intellectual Property and Growth*. p. 41. Available at, http://www.ipo.gov.uk/ipreview-finalreport.pdf.

[100] European Commission. (2008). Green Paper: Copyright in the Knowledge Economy (COM(2008) 466/3). Brussels, Belgium. Available at, http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/greenpaper_en.pdf.

[101] Triaille, J-P., Dusollier, S., Depreeuw, S., Hubin, J-B., Coppens, F., de Francquen, A. (2013). Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "InfoSoc Directive"). De Wolf & Partners. Available at, http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf.

These mechanisms mainly involve extensive collective licensing or agreements with publishers at national level. For example, universities in Spain pay to collecting societies a flat fee of 5 euro per student to allow reproduction and online uses of works for teaching purposes.

In France, the works are licensed under special agreements with collecting societies. Each time a teacher wishes to use a work for the purpose of illustration of teaching, it is checked if the work and the teacher's educational institution are covered by the agreement. Such use must be then registered and reported.

In Finland, the works are licensed under collective licensing schemes.

These mechanisms often create legal uncertainty for educational institutions, since there is a risk that no agreement or a restricted one will be reached (*e.g.* in Denmark no agreement has been reached on digital copying between the collective rights societies and educational institutions, apart from one with teacher training colleges). They also enhance the inconsistency of use of works across Member States for educational purposes.

C4C therefore considers that these mechanisms are counter-productive and lead to inefficient results, as on the one hand educational institutions sometimes end up seeking licenses for uses that do not require to be licensed, and on the other hand, certain rightholders prohibit certain permitted uses by employing technical protection measures (TPMs) or imposing restrictive contractual clauses.

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

[Open question]

A legislative solution at the EU level is needed.

The current educational exception is actually quite broad and many flaws in the current national systems result from its implementation. Therefore, the exception needs to be made 'fully' mandatory, to ensure educators in all Member States can benefit from it to its full extent.

It should also be made explicitly possible for anyone to make works available on-line for educational purposes without restriction to on-site terminals, both in original form, as well as in the form of an adaptation or compilation, both in analogue and digital form.

Moreover, the educational exception should cover all uses of all types of works for illustration of teaching, including text, film, and multimedia for illustration of teaching in classrooms as well as in distance learning. It should not be limited to any types of institution but rather defined by its purpose: teaching. The same is true as regards the source of financing: the exception should apply

regardless of the source of financing of an educational institution – public or private – as long as the purpose is non-commercial.

The no license and no compensation model also seems the most appropriate one. Under this model, the uses for illustration of teaching should not require the consent (license) nor any remuneration to rightholders. Should fair compensation however be required, notably due to the application of the three-step test if there is evidence of actual harm, and in a cross-border context (*e.g.* e-learning) then the 'country of origin' principle should apply, and the educational institution located in the country where the uploading of the educational materials takes place should pay a fair remuneration, which should in turn be fairly distributed. This is similar to the country of origin principle in the Satellite and Cable Directive (93/83/EEC), which has been functioning for close to a decade and has induced a substantial body of case law.

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

[Open question]

Only a legislative approach could solve the current uncertainties. See our answer to Q43 and Q45: the problem would best be solved by making a broad educational exception mandatory for all Member states.

This mandatory educational exception should cover all uses of all types of works for illustration of teaching, regardless of the institution. It is important to stress that uses of computer programs, databases and multimedia works (such as video games) should be expressly included.

In the interim, the Commission should clarify in in the documents it plans to release before summer 2014 that all the exceptions in the existing InfoSoc Directive should be interpreted with a maximum of flexibility, and encourage Member States to broaden their views.

C. Research

Directive 2001/29/EC[102] 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?

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

(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

Yes.

Currently research activities are covered by the same exception as educational uses. It is therefore a broad provision. The type of research institution is not relevant: it may be publicly funded or private as long as the research itself is non-commercial.

Contrary to the educational exception, the exception for research is not restrictively adopted in national laws. However, the main problems with accessing and using scientific materials are mainly practical. The exception allows for their use for research purposes, but they are usually protected by restrictive licenses or technical protection measures (TPMs) – or simply only published in hard copies and not accessible. For example, licenses require that works are made available using certain networks or software only. Also, text and data mining (TDM) is often explicitly prohibited in licenses, or allowed only to a limited extent.

□ NO

□ NO OPINION

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

[Open question]

The main problems are the lack of access to scientific material due to prohibitive licensing and/or technical protection measures (TPMs).

A twin track approach seems most appropriate.

On the one hand, a legislative track should be pursued whereby a specific exception for research should be introduced, that is both mandatory and with a clear scope. Indeed, the current 'voluntary' approach to the list of exceptions leads to legal uncertainty and abuse by some rightholders.

Once again, the approach should be purpose-driven, *i.e.* the exception should not apply to particular beneficiaries but be defined by its purpose: conducting research. It should extend to works, subject matters of related rights, computer programs and databases. The uses allowed for research should not be limited by way of illustration and should cover a wide range of possibilities in order to enable unrestricted digital research. Scientists should be free to subject any article published or made available online to data mining, extractions, variations or other digital manipulations provided they

give proper attribution. The exception should cover commercial and non-commercial activities. If deemed necessary, uses for the purpose of commercial research could be subject to fair compensation but the levies should be low and well administered. However, under this option, guidelines on the meaning of commercial should be provided by EU legislation.

As should be the case for all exceptions and limitations, it should be clearly stated by in the legislation that contractual or technical (TPM) overrides of this exception are prohibited.

C4C reminds the European Commission that the legislative approach outlined above has been proposed and substantiated by the Max Planck Institute for Intellectual Property, Competition and Tax Law in its response to the 'Green Paper Copyright in the Knowledge Economy' consultations in 2008[103] and further defined and supported by Reichman and Okediji.[104]

Apart from this legislative solution, the access problems could also in part be solved by promoting and implementing open access principles. As recommended by the Commission itself,[105] the results of publicly funded research project should be published in open access models. The Commission should further promote and encourage open access models, notably in its Horizon 2020 research framework programme.

Finally, there is also a need to promote among researchers and publishers data awareness and a culture of sharing. This could notably be done by establishing mechanisms and processes to recognise and reward and even require good data sharing practices.

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

[Open question]

Open access to scientific articles and other types of research result is recognised by the EU and research institutions in Europe as an important mechanism for facilitating access to research content. Horizon 2020, EU's research initiative, includes an obligation to make research results openly available. However, as noted above in Q48, there is a need for formulating policies that encourage implementations of open access and sharing of knowledge in a more systematic manner. Moreover,

[103] Hilty, R. M., et al. (2008). *European Commission – Green Paper: Copyright in the Knowledge Economy – Comments by the Max Planck Institute for Intellectual Property, Competition and Tax Law*. Max Planck Institute for Intellectual Property, Competition & Tax Law Research Paper Series No. 08-05. Available at, http://www.ip.mpg.de/files/pdf1/Comments-GreenPaperCopyrigthKnowledgeEconomy4.pdf.

[104] Reichman, J. H., & Okediji, R. L. (2009, 5 April). Empowering Digitally Integrated Scientific Research: The Pivotal Role of Copyright Law's Limitations and Exceptions. Available at, http://policydialogue.org/files/events/Reichman_Okediji_Empowering_Digitally_Integrated_Scientific_Research.pdf.

[105] European Commission. (2012, 17 July). *Commission Recommendation of 17.7.2012 on Access to and Preservation of Scientific Information* (C(2012) 4890 final). Brussels, Belgium. Available at, http://ec.europa.eu/research/science-society/document_library/pdf_06/recommendation-access-and-preservation-scientific-information_en.pdf.

publishers should be prohibited from forcing researchers to sign contracts that do not allow them to adopt an open access approach.

Alternatively, some Member States use extended collective licensing mechanisms to cover also research activities.

However, researchers more often face restrictive individual licences and/or technical restrictions (see our answer to Q47). Publishers, for example, offer individual licenses to allow text and data mining, which often comprise restrictive conditions that can be incompatible with the terms and conditions of other publishers. The drawbacks of such mechanisms are the same as described for the mechanisms in the teaching exception (see our answer to Q44).

D. Disabilities

Directive 2001/29/EC[106] 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) [107].

The Marrakesh Treaty[108] 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***

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

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

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

distribution/communication of works published in special formats, including across borders?

□ **YES** – Please explain by giving examples

[a – Person with a disability or an organisation representing persons with disabilities]

Yes.

At present, persons with disabilities – in particular the visually impaired, deaf , dyslexic and other print disabled persons – in the EU and globally, only have access to a very small fraction of the reading material published each year.

This situation is especially limited with regards to the cross border shipment or exchange of accessible formats for persons with disabilities given that Member States and International law up until now does not allow the legal cross border exchange of reading content among institutions and organisations that serve the cultural and academic needs of persons with disabilities.

The ratification and effective implementation by the EU and its Member States of the World Intellectual Property Organisation (WIPO) Marrakech Treaty[109] could overcome much of this problem for visually impaired persons, but these exceptions and limitations to copyright should also be extended to person with other disabilities.

[b – Organisation providing services for persons with disabilities]

Yes.

The distribution, copying and communication of works published in special formats across borders are not included in EU legislation. Copyright exceptions are applied on a Member State level and do not permit cross border shipments of protected works.

□ NO

□ NO OPINION

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

[Open question]

[109] WIPO. (2013). *Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired, or Otherwise Print Disabled, adopted by the Diplomatic Conference to Conclude a Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities in Marrakesh, on June 27, 2013*. Available at, http://www.wipo.int/treaties/en/text.jsp?file_id=301016.

The swift ratification, implementation and application of the WIPO Marrakech Treaty[110] by the EU and its Member States is needed to improve accessibility for persons with disabilities.

A broader interpretation of EU exceptions applied to other disabilities should also be included in EU and national legislations.

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

[Open question]

There are not enough mechanisms in place at present.

To a great extent there has been a market failure to supply accessible formats for persons with disabilities. Despite the great technical advancements in the digital space, most persons with disabilities cannot take advantage of these possibilities due to the lack of availability of formats, cost and legal restrictions in copyright laws.

E. Text and data mining

Text and data mining/content mining/data analytics[111] 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).

[110] WIPO. (2013). *Ibid.*

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

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results. At the same time, practical solutions to facilitate text and data mining of subscription-based scientific content were presented by publishers as an outcome of "Licences for Europe"[112]. 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

[a – End user/consumer or an institutional user]

Yes.

From a legal point of view, the problem with text and data mining is that some consider it may infringe copyright because it is necessary to make copies of content to convert it into machine readable format. Moreover, because it prevents the copying of large portions of databases, the Database Directive is also seen as a legal barrier to text and data mining. As a result of the legal uncertainty hence created, the full potential of text and data mining for Europe is hardly exploited, which represents a loss in productivity and competitiveness for Europe, as well as missed innovation opportunities to the benefit of users, notably in the health sector.[113]

From a practical/technical point of view, technical protection measures (TPMs), which are protected by law, can prevent users from downloading content in order to 'mine' it. These measures hence also seriously impede research.

[112] 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

[113] Manyika, J., et al. (2011, June). *Big Data: The Next Frontier for Innovation, Competition, and Productivity*. McKinsey Global Institute. Available at, http://www.mckinsey.com/insights/business_technology/big_data_the_next_frontier_for_innovation, and McDonald, D., & Kelly, U. (2012, March). *The Value and Benefits of Text Mining*. JISC. Available at, http://www.jisc.ac.uk/sites/default/files/value-text-mining.pdf.

□ NO – Please explain

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□ NO OPINION

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

[Open question]

Researchers must be able to share the results of text and data mining, as long as these results are not substitutable for the original copyright work - irrespective of copyright law, database law or contractual terms to the contrary.

For C4C, it should be clarified that text and data mining does not fall under copyright protection, insofar as it merely extracts new information or data from existing materials and consists of a transformative use that does not take away value from the original or acts as a substitute.

Moreover, a specific exception to this effect allowing the copying of content for the purpose of text and data mining is necessary. It should also be explicitly stated in the law that technical protection measures (TPMs) and contracts should not override such an exception. Finally, such an exception should not distinguish between commercial and non-commercial purposes as, for research institutions, this would prevent knowledge transfer and such a differentiation would not be in the public interest.

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

[Open question]

As stated in our answer to Q54, it should be clarified that text and data mining does not fall under copyright protection, insofar as it merely extracts new information or data from existing materials and consists of a transformative use that does not take away value from the original or acts as a substitute.

Moreover, a specific exception to this effect allowing the copying of content for the purpose of text and data mining is necessary.[114] It should also be explicitly stated in the law that technical protection measures (TPMs) and contracts should not override such an exception. Finally, such an exception should not distinguish between commercial and non-commercial purposes as, for research

[114] The UK government took such an approach, with the stated objective to '*shift some of the current uncertainty about whether something can be done lawfully into a question of whether a licence is needed or not*'. See, Intellectual Property Office. (2012, December). *Modernising Copyright: A Modern, Robust and Flexible Framework. Government Response to Consultation on Copyright Exceptions and Clarifying Copyright Law*. p. 6, 36. Available at, http://www.ipo.gov.uk/response-2011-copyright-final.pdf.

institutions, this would prevent knowledge transfer and such a differentiation would not be in the public interest.

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

[Open question]

Only a legislative approach can solve the issues faced (see our answer to Q54 and Q55).

It is crucial to realise that licensing will not work as an alternative solution.

- First, the negotiation of licences is resource intensive and un-scalable, and the starting point is often one of lack of balance of negotiating powers.
- Secondly, licences do not address the current ambiguity around the mining of the open Web.; and,
- Finally, licensing text and data mining (TDM) is unjustifiable as no licence should be required to mine.

An illustration of the vicious circle created by licensing in a TDM context can be found in the recent discussions triggered by the new policy on TDM proposed by Elsevier.[115] Whilst extensive analysis is available online[116] on the flaws this policy comprises, C4C would like to highlight a few key shortcomings:[117]

- Artificial limitations in terms of the number of articles that can be accessed per week per institution.
- Mandatory use of Elsevier's ScienceDirect application programming interface (API), prohibiting researchers to use their own mining robots and tools that are often customized to the specific needs of their research.
- Obligation for libraries to sign up to the licensing terms, as well as for each researcher to do so and to declare the purpose for which the researcher will be using the minded data.

[115] Shillum, C. (2014, 31 Jan). *Elsevier Updates Text-Mining Policy to Improve Access for Researchers*. Elsevier Connect. Available at, http://www.elsevier.com/connect/elsevier-updates-text-mining-policy-to-improve-access-for-researchers.

[116] Murray Rust, P. (2014, 6 Feb). *Content-Mining Elsevier's TDM; Why Researchers and Libraries Should Think Very Carefully and then Not Sign (1)*. Available at, http://blogs.ch.cam.ac.uk/pmr/2014/02/06/content-mining-elseviers-tdm-why-researchers-and-libraries-should-think-very-carefully-and-then-not-sign-1/; Murray Rust, P. (2014, 6 Feb). *#elsevier's TDM Terms (TaC): Can they Force Us to Copyright Data? (2)*. Available at, http://blogs.ch.cam.ac.uk/pmr/2014/02/06/elseviers-tdm-terms-tac-can-they-force-us-to-copyright-data-2/.

[117] For a very good summary, see SPARC. (18 Feb, 2014). *Developments in Publishers' Text and Data Mining (TDM) Policy*. Available at, http://www.sparc.arl.org/resource/developments-publishers%E2%80%99-text-and-data-mining-tdm-policy.

- Prohibition for anyone agreeing to sign the licence to 'not disadvantage Elsevier's product', hence implying that researchers finding flaws in articles they mine might not be able to share these findings publicly.[118]
- Limitation of the mining to text, to the exclusion of images, even though for many researchers, figures, charts, etc. – which are actually data – are sometimes more important than text.[119]
- Obligation for the output of the TDM research to be licensed under Creative Commons CC-BY-NC licence,[120] which means that the product of the mining cannot be used for commercial purposes.

To that one must add that in such a logic of licensing for TDM, new hurdles are being created for researchers wishing to mine articles from different publishers (as they would need to sign agreements with each of them, even if their works are available in the same library) are wishing to collaborate across different institutions.

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

[Open question]

From a practical/technical point of view, technical protection measures (TPMs) can prevent users from downloading content in order to 'mine' it. This notably seriously impedes research.

Moreover, there is still a gap in the availability of technology and skills for text and data mining, but as legal barriers are reduced, market-led solutions to fill these gaps should emerge.

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[121]. 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

[118] Murray-Rust, P. (2014, 18 Feb). *Machines Are Better Referees Than Humans But We'll Be Sued If We Use Them*. Available at http://blogs.ch.cam.ac.uk/pmr/2014/02/18/machines-are-better-referees-than-humans-but-well-be-sued-if-we-use-them/

[119] On the importance of mining images, see Mounce, R. (20 Feb, 2014). *The Importance of Providing Data, and Not Just Images of Data', F1000 Research*. Available at http://blog.f1000research.com/2014/02/20/the-importance-of-providing-data-and-not-just-images-of-data/.

[120] Creative Commons. (n.d.). *Attribution-NonCommercial 4.0 International (CC BY-NC 4.0)*. Available at, http://creativecommons.org/licenses/by-nc/4.0/.

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

development of social networking and social media sites that enable users to share content widely has vastly changed the scale of such activities and increased the potential economic impact for those holding rights in the pre-existing works. Re-use is no longer the preserve of a technically and artistically adept elite. With the possibilities offered by the new technologies, re-use is open to all, at no cost. This in turn raises questions with regard to fundamental rights such the freedom of expression and the right to property.

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results or even the definition of UGC. Nevertheless, a wide range of views were presented as to the best way to respond to this phenomenon. One view was to say that a new exception is needed to cover UGC, in particular non-commercial activities by individuals such as combining existing musical works with videos, sequences of photos, etc. Another view was that no legislative change is needed: UGC is flourishing, and licensing schemes are increasingly available (licence schemes concluded between rightholders and platforms as well as micro-licences concluded between rightholders and the users generating the content. In any event, practical solutions to ease user-generated content and facilitate micro-licensing for small users were pledged by rightholders across different sectors as a result of the "Licences for Europe" discussions[122].

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

Current EU laws make it virtually impossible to share remixes and mashups of pre-existing works online, even in non-commercial contexts and when only very minor parts of works are re-used.[123]

There are several reasons for this:

- *Use of minor parts:* often the use of pre-existing works implies the re-combination of many but only very minor parts of these works (*e.g.* few seconds of an hour-long movie in a video mashup), which makes efforts for clearing the respective rights disproportionate.

[122] 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 .
[123] Digitale Gesellschaft. (2013). *Right 2 Remix*. Available at, http://right2remix.org/#05-recht.

- *Recombination of different types of works:* Not only are the parts used often very minor, but often remix videos are combined with short samples of musical works, which further complicates rights clearing.
- *Use in non-commercial contexts:* many cases of the use of pre-existing works happen in non-commercial contexts (*e.g.* smartphone-videos with copyrighted music).

A practical illustration of these problems can be found in Germany, during the last election campaigns in 2013. Several mashup and remix videos were disseminated, made of short parts of pre-existing works. Even though these videos were released by major parties (SPD, FDP) and trade unions (IG Metall), none of these actors were able to clear the rights for these videos.

While this is a major obstacle for freedom of creative expression in general, it is particularly problematic that Europeans have substantially fewer rights than, for instance, US citizens, which in many cases can refer to the Fair Use clause in US copyright law.

□ NO

□ NO OPINION

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

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

□ YES – Please explain

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□ NO – Please explain

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□ **NO OPINION**

C4C has no comments on this question.

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

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

□ YES – Please explain

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□ NO – Please explain

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□ **NO OPINION**

C4C has no comments on this question.

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

[Open question]

The overly rigid and outdated list of limitations and exceptions in the InfoSoc Directive has to be opened up. While in the US Copyright system the general Fair Use clause allows for at least some flexibility, the European system of limitations and exceptions cannot deal with new usage practices.

A more flexible approach is needed, combining the current system of a list of exceptions (but made mandatory for all Member States and specified as not exhaustive), but stating specifically that these cases must be interpreted as applying to 'similar uses' and add a more general open norm based on 'fair use' or general principles of fairness. Additional exceptions also need to be added to make the list more robust in light of technological evolution and changes in users' behaviour.

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

[Open question]

Two main legislative changes are necessary:

1) More flexibility: A more flexible approach is needed, combining the current system of a list of exceptions (but made mandatory for all EU countries and specified as not exhaustive), but stating specifically that these cases must be interpreted as applying to 'similar uses' and add a more general open norm based on 'fair use' or general principles of fairness. The German 'bagatelle clause' can also be considered as a possible starting point for such an open norm that would render legal many everyday online activities that currently infringe copyright even though they cause no harm to the rightholders.

2) Introduction of a remix exception: In addition to more flexibility, there should be an explicit remix exception to the InfoSoc Directive. This remix exception would permit creative re-combinations based on existing works. Such an approach was taken with success in Canada, under Article 29.21 of the UGC Canada Copyright Act.[124]

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

[Open question]

We see no feasible alternative to legislative changes. See our answers to Q61 and Q 62.

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

With the constant developments in digital technology, the question arises as to whether the copying of files by consumers/end-users who have purchased content online - e.g. when a person has bought an MP3 file and goes on to store multiple copies of that file (in her computer, her tablet and her mobile phone) - also triggers, or should trigger, the application of private copying levies. It is argued that, in some cases, these levies may indeed be claimed by rightholders whether or not the licence fee paid by the service provider already covers copies made by the end user. This approach could potentially lead to instances of double payments whereby levies could be claimed on top of service providers' licence fees[126][127].

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[128] in the digital environment*?**

☐ **YES** – Please explain

Yes.

[124] Government of Canada. (2012). *Copyright Act (R.S.C.,1985, c. C-42)*. Available at, http://laws-lois.justice.gc.ca/eng/acts/c-42/page-19.html/.

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

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

[127] 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.

[128] Art. 5.2(a) and 5.2(b) of Directive 2001/29/EC.

C4C believes that the lack of harmonisation of the exception for private copying creates legal uncertainty that hinders legitimate uses of content and innovation.

Take for example Wizzgo, this online digital video recording service was launched in France in May 2008. The service allowed to obtain copies of programmes broadcasted on terrestrial television channels. Users faced two limitations: 1) a quota of monthly hours, and 2) that a recording could only be requested before a programme started. The service offered was thus quite similar to having a traditional video cassette recorder (VCR), except for the fact that the user does not own the device making the recording.

Wizzgo considered that their service was covered by the private copying exception. The Paris Tribunal de Grande Instance decided differently following a copyright infringement claim from a group of French television channels. The Court considered that the private copying exception could not be granted, because Wizzgo was considered as a third party making the copy, and the French law at that time required the person making the copy and the user of the copy being one and the same person. The Court ordered Wizzgo to pay damages for copyright infringement, which led to the discontinuation of the service.[129]

The European Commission commissioned 'Study on the application of Directive 2001/29/EC on copyright and related rights in the information society' from December 2013, also observes that *"diametrically opposed principles may be followed in different Member States"*.[130]

The fact that European courts have ruled differently on such services creates a situation wherein entrepreneurs wanting to launch comparable platforms are facing a legal minefield, instead of a true single market. Especially, compared with the situation in the United States, where one court case has created a clear and predictable legal environment.

This uncertainty does not only impact service providers, also users are affected by the legal uncertainty of private copying in the digital environment and the different rules from one Member State to another. In the analogue world, citizens are allowed to use the content they legally acquired more freely, while the digital age should permit easier access and uses of this content, the opposite is true as copying and moving files is made harder.

[129] Based on, Allaeys, P. (2009, 19 February). *Rise and Fall of Online Digital Video Recorders*. International Law Office. Available at, http://www.internationallawoffice.com/newsletters/detail.aspx?g=a08cc455-b5ae-42d4-881d-fa85fc7c3a53.

[130] Triaille, J-P., Dusollier, S., Depreeuw, S., Hubin, J-B., Coppens, F., de Francquen, A. (2013). Study on the Application of Directive 2001/29/EC on Copyright and Related Rights in the Information Society (the "InfoSoc Directive"). De Wolf & Partners. p. 113. Available at, http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf.

C4C believes that the rules must be harmonised to create a EU digital single market without borders and give EU citizens the same access to content and services. This means that innovative services should be able to flourish and EU citizens should be able to enjoy those services across the EU. It is simply unacceptable that getting a digital single market is so complicated due to digital borders that should not exist on the Internet and that users and service providers are constantly wondering if what they do is legal or not.

□ NO – Please explain

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□ NO OPINION

65. Should digital copies made by end users for private purposes in the context of a service that has been licensed by rightholders, and where the harm to the rightholder is minimal, be subject to private copying levies?[131]

□ YES – Please explain

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…….

□ **NO** – Please explain

No.

C4C believes this question mixes two issues.

First, the question raises the issue that a user could be subjected to a private copying levy to make a private copy of content that he or she legally acquired. We believe that the copyright framework should be flexible enough to allow for uses such as, private copying, parody, etc.. Such exceptions are implemented on the basis that they do not interfere with the normal exploitation of a work, and, therefore, do not unreasonably prejudice the rightholder.

Moreover, there is no clear evidence that every uncompensated usage of a work constitutes harm to the rightholder, just the opposite, seeing that it can be demonstrated that certain usages can positively affect revenue stream from other means of exploitations.

Moby, for example, decided in October 2013 to open up his 11th album 'innocents' to the Internet, and made the album's singles, videos and stem collection available for free to download as a BitTorrent Bundle.[132] This resulted in:[133]

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

- 8.9 million people downloading the Bundle;
- 419 thousand of them opted into Moby's mailing list;
- 130 thousand of them went to the album on iTunes; and,
- 68 thousand new remixes were created as a result of the Bundle.

Moby's 'innocents' Bundle ended up being to the Internet's most downloaded torrent in 2013.

Secondly, C4C notices that more and more service licence the content to the user. In practice this means that when users purchase content online they are allowed to make a certain number of copies. These copies are included in the purchasing price. So, adding a private copying levy on top, would imply that users are charged twice (*i.e.* in the form of a licence and a levy) for the same use of the content they acquired.

It should be emphasised that licensing of content should not hinder users in enjoying cultural goods, as this would be a restriction of their freedom of communication and access to cultural heritage.

In general, C4C considers that Member States should only be allowed to introduce compensation mechanisms, if 1) evidence shows a clear harm that cannot be remedied through other means and if 2) they can clearly demonstrate that the benefits will outweigh the costs.

□ NO OPINION

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

[Open question]

It is hard to imagine that the European Commission would consider hindering the development of its cloud computing industry by raising the possibility of imposing private copying levies, and as such create legal and financial uncertainty.

Private copying is recognised as an exception in the InfoSoc Directive, as it does not interfere with the normal exploitation of a work or other subject matter of the rightholder. There is an unexplained – and possibly inexplicable – assumption that all technological development negatively impacts rightholders, and that they need to be compensated for the assumed losses arising from them.

[132] BitTorrent Blog. (2013, 9 October). *Moby X BitTorrent: Unlock and Remix Innocents*. Available at, http://blog.bittorrent.com/2013/10/09/moby-x-bittorrent-unlock-and-remix-innocents/.

[133] BitTorrent Blog. (2014, 16 January). *The BitTorrent Report, 2013 Edition*. Available at, http://blog.bittorrent.com/2014/01/16/the-bittorrent-report-2013-edition/.

While, more user-friendly means of accessing and using copyrighted works could encourage citizens to purchase content – boosting and not reducing rightholders' revenues.

The reasoning behind private copying levies is to compensate for alleged economic losses. Introducing any levy should therefore be based on credible empirical evidence that rightholders suffer a loss. At the time being, such a loss has never been clearly evidenced. Even if evidenced, it should be considered if it is proportionate to add layers of bureaucracy and costs in recovering this loss through levies. If so, it should be ensured that the most economically viable option is chosen in order to impose and collect these levies.

It should be emphasised that technological developments have a great impact on content delivery. Antonió Vitorino underlined in his recommendations, resulting from the mediation on private copying and reprography levies entrusted by the European Commission, that stakeholders expect a shift from an ownership to a access based model.[134] Important market changes can be observed, and new means of usage not even requiring a private copy to be made are appearing, such as, video-on-demand (VOD), catch-up television, etc.. With these new usages no longer requiring private copies it is difficult to allege any harm.

In the interest of democratic legitimacy, we also believe that the European Commission should rethink Article 6 of the InfoSoc Directive, as it difficult to grasp that legislation can create a right to avail of exceptions and simultaneously provide for legal protection of technological protection measures hindering these same rights.

67. Would you see an added value in making levies visible on the invoices for products subject to levies?[135]

☐ **YES** – Please explain

Yes.

C4C considers that if private copying or any other levies apply, citizens need to be informed about:

1) How much is being levied;

2) For what purpose the levy is collected; and,

3) How the collected levy is being put to use.

[134] Vitorino, A. (2013, 31 January). *Recommendations Resulting from the Mediation on Private Copying and Reprography Levies*. Available at, http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf.

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

Increased transparency means more trust from consumers. Any mechanism that would educate the general public about the fact and amounts of money collected and distributed through schemes, such as levies, is thus a good idea.

Redistribution mechanisms need to be transparent to not lose their legitimacy in the eyes of citizens. Especially, as a large chunk of the collected levies is currently lost to administrative costs. According to an economic analysis of alternative models of compensation for private copying by ENTER there is an *"economic waste of at least 51.2 Cents for each 1 Euro collected"*.[136] The inadequacy and inefficiency of the current copyright levy systems lead the authors to conclude that these levies are *"a poison to the economic system and do not even support right-holders as mandated"*.[137]

☐ NO – Please explain

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……

☐ NO OPINION

Diverging national systems levy different products and apply different tariffs. This results in obstacles to the free circulation of goods and services in the Single Market. At the same time, many Member States continue to allow the indiscriminate application of private copying levies to all transactions irrespective of the person to whom the product subject to a levy is sold (e.g. private person or business). In that context, not all Member States have ex ante exemption and/or ex post reimbursement schemes which could remedy these situations and reduce the number of undue payments[138].

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

……

……

[136] ENTER. (2011, May). *Compensation for Private copying: An Economic Analysis of Alternative Models*. p. 3. Available at, http://www.ametic.es/CLI_AETIC/ftpportalweb/documentos/migracion/media-Ou1-Informe%20Alternativas%20al%20Canon%20Digital_%20Ingles.pdf.

[137] ENTER. (2011, May). *Ibid.* p. 3.

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

☐ **NO OPINION**

C4C has no comments to this question.

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

[Open question]

Imposing a levy on various digital media and devices bought by consumers or others, such as freelancers, businesses and even creators themselves, that will never be used to make private copies of copyrighted material is hard to grasp. This results in consumers and others ending up paying to reproduce material they authored, when making a back-up of their computer files on an external hard drive, transferring their pictures from the memory card of their digital camera to their computer, printing their resume or a business proposal. Levies are even charged on devices that are perhaps never used to reproduce content, such as smartphone used for calling, texting and e-mailing.

The European Economic and Social Committee (EESC) already recognised the unfairness of private copying levy systems, and consider that they should *"certainly not apply to hard drives used by businesses in the course of their industrial and commercial activities"*.[139]

C4C also finds it remarkable that the European Commission has not been in a position to collect this information itself and present facts and figures.

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

[Open question]

C4C has no comments to this question.

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

[Open question]

The reasoning behind private copying levies is to compensate for alleged economic losses. Introducing any levy should therefore be based on credible empirical evidence that rightholders suffer a loss. At the time being, such a loss has never been clearly evidenced. Even if evidenced, it

[139] European Economic and Social Committee. (2012). *Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and at the Committee of the Regions – A single Market for Intellectual Property Rights – Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe'*. Official Journal of the European Union. Point 1.5. Available at, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:068:0028:0034:EN:PDF.

should be considered if it is proportionate to add layers of bureaucracy and costs in recovering this loss through levies. If so, it should be ensured that the most economically viable option is chosen in order to impose and collect these levies.

C4C considers that if private copying or any other levies apply, citizens need to be informed about:

1) How much is being levied;

2) For what purpose the levy is collected; and,

3) How the collected levy is being put to use.

Increased transparency means more trust from consumers. Any mechanism that would educate the general public about the fact and amounts of money collected and distributed through schemes, such as levies, is thus a good idea.

Redistribution mechanisms need to be transparent to not lose their legitimacy in the eyes of citizens. Especially, as a large chunk of the collected levies is currently lost to administrative costs. According to an economic analysis of alternative models of compensation for private copying by ENTER there is an *"economic waste of at least 51.2 Cents for each 1 Euro collected"*.[140] The inadequacy and inefficiency of the current copyright levy systems lead the authors to conclude that these levies are *"a poison to the economic system and do not even support right-holders as mandated"*.[141]

Moreover, imposing a levy on various digital media and devices bought by consumers or others, such as freelancers, businesses and even creators themselves, that will never be used to make private copies of copyrighted material is hard to grasp. This results in consumers and others ending up paying to reproduce material they authored, when making a back-up of their computer files on an external hard drive, transferring their pictures from the memory card of their digital camera to their computer, printing their resume or a business proposal. Levies are even charged on devices that are perhaps never used to reproduce content, such as smartphones used for calling, texting and e-mailing.

[140] ENTER. (2011, May). *Compensation for Private copying: An Economic Analysis of Alternative Models*. p. 3. Available at, http://www.ametic.es/CLI_AETIC/ftpportalweb/documentos/migracion/media-Ou1-Informe%20Alternativas%20al%20Canon%20Digital_%20Ingles.pdf.
[141] ENTER. (2011, May). *Ibid.* p. 3.

The European Economic and Social Committee (EESC) already recognised the unfairness of private copying levy systems, and consider that they should *"certainly not apply to hard drives used by businesses in the course of their industrial and commercial activities"*.[142]

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[143] 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[144]. This is an area that has been traditionally left for Member States to regulate and there are significant differences in regulatory approaches. Substantial differences also exist between different sectors of the creative industries.

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

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

[Open question]

While this consultation is about copyright and not about developing legislation-based business models for the authors and performers, we believe that the position of authors and performers can be improved by strengthening their rights vis-à-vis publishers and other distributors of their work. Authors and performers should have the ability to regain control of works that they have assigned to third parties if those third parties do not actively exploit their works (anymore). Such a *non-usus* clause can for example be found in the changes to the Dutch copyright act that is currently being reviewed by the Dutch parliament.

[142] European Economic and Social Committee. (2012). *Opinion of the European Economic and Social Committee on the 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and at the Committee of the Regions – A single Market for Intellectual Property Rights – Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe'*. Official Journal of the European Union. Point 1.5. Available at, http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:068:0028:0034:EN:PDF.

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

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

Moreover, authors of scientific articles and other short works (such as contributions to proceeding of academic proceedings should have the (time delayed) right to publish such works in an open access publication that cannot be waived or transferred to another party such as a scientific publisher. Such clauses aimed at ensuring public access to publicly funded academic research can be found in the German copyright law and in the proposed revisions to the Dutch copyright act.

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

□ **YES** – Please explain

Yes.

Given that the European Union is currently promoting open access to publicly funded research as part of the Horizon2020 program it seems reasonable to create the legal conditions that ensure that authors of academic works can fulfil their open access obligations even when they also work with scientific publishers. In addition and in line with our previous answers we believe that any other measure to improve the standing of authors and performers vis-à-vis publishers and other distributors can best be strengthened at the EU level.

□ NO – Please explain why

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……

□ NO OPINION

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

[Open question]

There is a need to undertake a thorough analysis of the economics underlying the creation and dissemination of culture, since currently it is often wrongly assumed that every use of work should be remunerated in order to satisfy creators' interests.

There exists evidence that these interests are not harmed, or that the public interest benefits, in cases where some uses are not remunerated, and this evidence should be systematically gathered and analysed before any legislative action is undertaken to further empower copyright monopolies.

VI. Respect for rights

Directive 2004/48/EE[145] 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[146]. Concerns have been raised as to whether some of its provisions are still fit to ensure a proper respect for copyright in the digital age. On the one hand, the current measures seem to be insufficient to deal with the new challenges brought by the dissemination of digital content on the internet; on the other hand, there are concerns about the current balance between enforcement of copyright and the protection of fundamental rights, in particular the right for a private life and data protection. While it cannot be contested that enforcement measures should always be available in case of infringement of copyright, measures could be proposed to strengthen respect for copyright when the infringed content is used for a commercial purpose[147]. One means to do this could be to clarify the role of intermediaries in the IP infrastructure[148]. At the same time, there could be clarification of the safeguards for respect of private life and data protection for private users.

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

□ YES – Please explain

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□ **NO** – Please explain

No.

Respect for rights is not created by enforcement, but by establishing rules that are perceived as fair and balanced by as many people as possible. The most effective way to improve 'respect for rights' would be to take user concerns seriously when addressing the other issues identified throughout our answers to the entire consultation.

The focus should be on adapting the rules to the digital era and not on strengthening enforcement, which is already misused – one illustration of this misuse is the 'blackmail' practised in Germany by certain legal practitioners who exploit the ease of access to personal data through the IPR Enforcement Directive (2004/48/EC).

□ NO OPINION

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

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

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

[148] 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.

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

[Open question]

The limitation of intermediaries' liability is important and is a cornerstone of the functioning of the Internet.

Without it, there is a high risk of censorship and of going against freedom of expression, freedom of communication but also freedom to conduct a business. Middlemen should not be liable and privatised enforcement is not the solution. The rule of law needs to apply and the SOPA/PIPA discussions triggered by the US have shown that there is no support for such enforcement actions among citizens.

The problem is that community wireless networks, anonymising services, fixed internet service providers, online data storage places, search engines and other actors suffer uncertainty because of the intermediary liability in copyright. As a result, they sometimes take down things that are legal, out of fear of being sued. That is bad for EU citizens' free speech rights and can chill innovation and creativity.

The European Commission should hence not promote or encourage 'cooperation' of intermediaries, as this would be in breach of Article 52 of the Charter of Fundamental Rights.

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

□ YES – Please explain

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□ **NO** – Please explain

No.

The current copyright system is completely tilted towards the rightholders, and does not take users' much into consideration, if at all.

Copyright should aim to encourage creativity and innovation for the benefit of the society as a whole. However, current copyright law fails to achieve its dual mission, as the notion of consumers' rights is absent and enforcement measures are often in contradiction with fundamental rights such as freedom of speech, privacy and right to access information.

Consumers do not know what they can and cannot do with copyright protected material. The current legislation is simply out of date and fails to respond to the challenges of the digital environment.

□ 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**

No opinion.

Whilst C4C considers harmonization as important for the EU single market, the Commission has given insufficient information as to what it is suggesting under the heading 'single EU Copyright Title' to allow an informed answer to be given to this question.

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

[Open question]

Harmonisation should be dealt with in the near future. There is too much legal uncertainty and the adaptation to the digital era needs to happen now! The more the EU waits the less attractive the European market is, the less innovation can be developed and the less EU citizens have access to the same content and services.

While looking at reviewing the current EU laws, EU countries should be encouraged to promote more flexibility and a user-friendly approach to how they implement their copyright laws.

Interim solutions such as clarifying the current InfoSoc Directive to ensure it is adapted in the broadest and most flexible manner by Member States is an immediate action point that the

European Commission could already undertake in the documents it plans to release before summer 2014. Interpretative guidelines could also allow to create more clarity at an EU level.

Moreover, the adoption of such a single Title should not result into the adoption of a set of rules representing the lowest common denominator between all Member States.

VIII. Other issues

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

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

[Open question]

Users need to be protected from the adverse effects of technical protection measures (TPMs). Circumvention of TPMs must be allowed when exercising user rights created by Exceptions and Limitations or when using Public Domain works. Using TPMs to hinder or impede privileged uses of a protected work or access to public domain material should be sanctioned.

There is also a problem due to excessive enforcement of copyright in the EU notably due to misuses of the IPR Enforcement Directive (2004/48/EC), but also excessive removal of content. This needs to be stopped and framed in a proper manner that balances the different rights and freedoms at stake.