Public Consultation
on the review of the EU copyright rules

Contents

I. Introduction

A. Context of the consultation

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

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

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

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

As part of the review process, the Commission is now launching a public consultation on issues identified in the Communication on Content in the Digital Single Market, i.e.: *"territoriality in the Internal Market, harmonisation, limitations and exceptions to copyright in the digital age; fragmentation of the EU copyright market; and how to improve the effectiveness and efficiency of enforcement while underpinning its legitimacy in the wider context of copyright reform"*. As highlighted in the October 2013 European Council Conclusions[5] *"Providing digital services and content across the single market requires the establishment of a copyright regime for the digital age. The Commission will therefore complete its on-going review of the EU copyright framework in spring 2014. It is important to modernise Europe's copyright regime and facilitate licensing, while ensuring a high level protection of intellectual property rights and taking into account cultural diversity"*.

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[1] COM (2012)789 final, 18/12/2012.

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

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

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

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

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

B. How to submit replies to this questionnaire

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

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

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

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

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

C. Confidentiality

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

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.

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

PLEASE IDENTIFY YOURSELF:

Name:

The Society of Authors

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.

Not Registered……

TYPE OF RESPONDENT (Please underline the appropriate):

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

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. Rightsholders are, of course, in a position to grant a multi-territorial or pan-European licence, such that content services can be provided in several Member States and across borders. A number of steps have been taken at EU level to facilitate multi-territorial licences: the proposal for a Directive on Collective Rights Management[10] should significantly facilitate the delivery of multi-territorial licences in musical works for online services[11]; the structured stakeholder dialogue "Licences for Europe"[12] and market-led developments such as the on-going work in the Linked Content Coalition[13].

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

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

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).

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

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

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

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

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

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

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)

 NO

Where pan-European exploitation of works is not possible, the barrier to this does not lie with the copyright framework. Instead, authors or foreign co-publishers may decide that they only want their works to be exploited in certain territories and thus will only grant publishers rights accordingly. There have also been instances where the difficulty for consumers in one EU nation to access services of another have been due to the technical deficiencies in the retailer platform, often connected with difficulties in performing exchange rate conversion. Again, copyright is not part of the problem.

It is our view therefore that no further measures are needed at EU level to increase the cross-border availability of books in the Single Market, in either physical or ebook format.

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

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

…….

…….

 NO See answer to 1 above. There are adequate licensing solutions available to provide cross-border access.

 NO OPINION

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

[Open question]

The majority of publishing contracts entered into by our 9000 members (all professional authors) contain licences of multi- territorial rights. This does not cause significant problems in practice except that sometimes publishers demand rights which they then fail to exploit.

[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.

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]

…….

…….

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

☒ YES – Please explain by giving examples

Where there is demand and a business case, cross border licensing already takes place within the European Union. Where problems do arise they are not to do with copyright but factors such as:

-contractual arrangements: such as the licensee not wishing to purchase rights for more than one territory or because the service provider is not equipped to provide services in all territories,

-cultural differences between consumers: where there is no demand in some territories,

-language differences, meaning that books will need to be translated for many territories,

-limitations on online retail technology resulting from exchange rates or taxation

☐ NO

☐ NO OPINION

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

☐ YES – Please explain by giving examples

…….

…….

☐ NO

☒ NO OPINION

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

☐ YES – Please explain

…**We agree that further measures are needed but not in the field of copyright where flexible market led solutions have been developed. It is for service providers and commercial users to choose what creative content they want, which is not a copyright issue. However, it is our view**

that other aspects of cross-border availability of content services should be addressed such as payment measures, VAT, etc.

 NO – Please explain

…….

…….

 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[16] on the harmonisation of certain aspects of copyright and related rights in the information society. Other EU directives in this field that are relevant in the online environment are those relating to the protection of software[17] and databases[18].

Directive 2001/29/EC harmonises the rights of authors and neighbouring rightsholders[19] which are essential for the transmission of digital copies of works (e.g. an e-book) and other protected subject matter (e.g. a record in a MP3 format) over the internet or similar digital networks.

The most relevant rights for digital transmissions are the reproduction right, i.e. the right to authorise or prohibit the making of copies[20], (notably relevant at the start of the transmission – e.g. the uploading of a digital copy of a work to a server in view of making it available – and at the users' end – e.g. when a user downloads a digital copy of a work) and the communication to the public/making available right, i.e. the rights to authorise or prohibit the dissemination of the works in digital networks[21]. These rights are intrinsically linked in digital transmissions and both need to be cleared.

2. The act of "making available"

Directive 2001/29/EC specifies neither what is covered by the making available right (e.g. the upload, the accessibility by the public, the actual reception by the public) nor where the act of "making available" takes place. This does not raise questions if the act is limited to a single territory. Questions arise however when the transmission covers several territories and rights need to be cleared (does the act of "making available" happen in the country of the upload only? in each of the countries where the content is potentially accessible? in each of the countries where the content is effectively accessed?). The most recent case law of the Court of Justice of the European Union (CJEU) suggests that a relevant criterion is the "targeting" of a certain Member State's public[22]. According to this approach

[16] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

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

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

[19] Film and record producers, performers and broadcasters are holders of so-called "neighbouring rights" in, respectively, their films, records, performances and broadcast. Authors' content protected by copyright is referred to as a "work" or "works", while content protected by neighbouring rights is referred to as "other subject matter".

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

[21] The right to authorise or prohibit any communication to the public by wire or wireless means and to authorise or prohibit the making available to the public "on demand" (see Art. 3 of Directive 2001/29/EC).

[22] See in particular Case C-173/11 (Football Dataco vs Sportradar) and Case C-5/11 (Donner) for copyright and related rights, and Case C-324/09 (L'Oréal vs eBay) for trademarks. With regard to jurisdiction see also joined

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

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

☐ YES

☐ **NO – Please explain how this could be clarified and what type of clarification would be required (e.g. as in "targeting" approach explained above, as in "country of origin" approach[23])**

8.1 Making available should be understood to take place in both the country of upload and all countries where the content can be accessed (not just those that are 'targeted' by a website). This is not 100% clear at present because there is no CJEU judgment to confirm it. Reasons why the right applies in country of upload and all countries where accessible are:

(a) The making available right in the WIPO Copyright Treaty covers the 'entire transmission up to the terminal from which the member of the public gets access' (The WIPO Treaties 1996, Reinbothe and von Lewinski, (2002), p. 108).

(b) A 'country of origin' model would allow infringing sites to evade rights holders by moving servers to countries with poor copyright enforcement. Licensing would also be subject to regulatory arbitrage.

(c) Server location may change or involve multiple countries, making 'country of origin' overly complex to administer for licensing purposes.

(d) It is often difficult to say whether a copyright-infringing website targets a given country.

(e) Targeting is irrelevant to whether the site is prejudicing the rights holders' rights. Consumers access and download from illegal sites whether or not the site is in a given language or has advertising using a certain currency. In this respect, infringement of the making available right is different from infringing other rights, such as trade marks, where the negative business effect is subsequent to the internet activity.

8.2 We believe that clarification is needed on the overlap between the making available right and rights granted under the Rental and Lending Directive. For example there is confusion as to whether downloading of ebooks from outside library premises may constitute "communication to the public" rather than "lending".

a). Recital 10 of the Rental and Lending Directive says ***"(10) It is desirable, with a view to clarity, to exclude from rental and lending within the meaning of this Directive certain forms of making available, as for instance making available phonograms or films for the purpose of public performance or broadcasting, making available for the purpose of exhibition, or making available for on-the-spot reference use. Lending within the meaning of this Directive should not include making available between establishments which are accessible to the public."*** **There is no exclusion there for remote lending.**

b) Lending is defined as ***"1(b) "lending" means making available for use, for a limited period of time and not for direct or indirect economic or commercial advantage, when it is made through establishments which are accessible to the public*****"**

Cases C-585/08 and C-144/09 (Pammer and Hotel Alpenhof) and pending CaseC-441/13 (Pez Hejduk); see however, adopting a different approach, Case C-170/12 (Pinckney vs KDG Mediatech).

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

These provisions are distinctly unclear but when considering "*when it is made through establishments which are accessible to the public*". there is no obvious reason for reading "through" as suggesting that it only includes physical attendance at a library. Remote borrowing is also carried out "through" a library and it seems that remote ebook lending is a rental right. This should be clarified.

□ NO OPINION

9. *[In particular if you are a right holder:]* ***Could a clarification of the territorial scope of the "making available" right have an effect on the recognition of your rights (e.g. whether you are considered to be an author or not, whether you are considered to have transferred your rights or not), on your remuneration, or on the enforcement of rights (including the availability of injunctive relief[24])?***

□ 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")

□ <u>NO</u> Licensing different rights together is normal in many fields, not just online and is effective and simple. In some sectors e.g. publishing, literary and artistic works there is currently little distinction between the reproduction and making available rights. They are exploited simultaneously by the same rights holder and so do not cause problems in the online environment. Further, it is beneficial to have these two separate rights, as they allow for the greatest possible flexibility: whilst some users may wish to acquire a licence for and make use of the reproduction right, other users may wish to add the making available right to their licence. Keeping these two rights separate causes no identifiable problems and rather allows the greatest flexibility for users/would be licensees. To marry them together in a single act of exploitation would reduce choice for online business models and ultimately consumers.
As we have indicated above, there is confusion in relation to the overlap between lending and making available rights specifically in library lending of ebooks and it would be helpful to clarify this. That clarification would not necessitate reopening the Copyright Directive.

□ NO OPINION

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

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[25] in which the question has been raised whether the provision of a clickable link constitutes an act of communication to the public/making available to the public subject to the authorisation of the right holder.

A user browsing the internet (e.g. viewing a web-page) regularly creates temporary copies of works and other subject-matter protected under copyright on the screen and in the 'cache' memory of his computer. A question has been referred to the CJEU[26] as to whether such copies are always covered by the mandatory exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC.

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 right holder?

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

Reproductions that are both temporary and incidental to an authorised act should not require additional consent. However, in certain circumstances, such as the making available of such content or usage in any other way (i.e. not temporary or incidental), it should require the consent of the rights holders.

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

☐ NO OPINION

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

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

Reproductions that are both temporary and incidental to an authorised act should not require additional consent. However, in certain circumstances, such as the making available of such content or usage in any other way (i.e. not temporary or incidental), it should require the consent of the rights holders.

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

☐ NO OPINION

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

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

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

or by giving them as a gift). The principle of EU exhaustion of the distribution right applies in the case of the distribution of physical copies (e.g. when a tangible article such as a CD or a book, etc. is sold, the right holder cannot prevent the further distribution of that tangible article)[27]. The issue that arises here is whether this principle can also be applied in the case of an act of transmission equivalent in its effect to distribution (i.e. where the buyer acquires the property of the copy)[28]. This raises difficult questions, notably relating to the practical application of such an approach (how to avoid re-sellers keeping and using a copy of a work after they have "re-sold" it – this is often referred to as the "forward and delete" question) as well as to the economic implications of the creation of a second-hand market of copies of perfect quality that never deteriorate (in contrast to the second-hand market for physical goods).

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

☐ YES – Please explain by giving examples

NO.

We are extremely concerned that the doctrine of exhaustion might be applied to digital content and it is our view that this is a leading question which encourages end users and consumers to speak of bad experiences. Any such responses must be balanced against responses to question 14.

Digital content is acquired in a very different way legally from tangible hardback copies. With a printed book or a physical CD., the consumer purchases a tangible object (but not any IPR in the content) which they can choose to give away or sell as they wish. But digital content is acquired by a licence – an access licence – which contains terms as to how, where, when, for how long and by whom such content can be accessed. So it is wrong to apply to digital content the conventional thinking about ownership rights of a print publication. This is skeuomorphism which obscures the realities of the licensing market. Ebooks can be priced cheaper than physical books, both because of the saving of costs associated with the physical property (manufacturing, storage etc) but also because they will only be read by the licensee meaning that others will similarly have to purchase a licence if they wish to access the book. If licences were to allow free transfer then prices would have to be increased. This would be to the detriment of the consumer. Further, the second-hand market is largely indistinguishable from the first-hand, owing to four characteristics of digital goods:

(1) **Digital works in the second-hand market are identical to the original of the work only in the sense that they contain the same work; however, physical works in the second-hand market are identical in the strictest interpretation of the term "identical": i.e. the second-hand work is *one and the same thing* as the first-hand work. The only difference is the price and the fact that creators and publishers will not benefit from the resale thus cutting their incomes and the incentive and ability to produce new work.**

(2) **Digital copies can be numerous, to a near-infinite degree, and therefore the second-hand market can be larger than the first-hand market. In the physical world, this is impossible since the second-hand market can only ever be as large as the first-hand market and**

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

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

is always likely to actually be smaller. Given the trivial ease with which Digital Rights Management tools can be hacked and cracked, it is no comfort to say that a "forward and delete" approach could solve this issue.

(3) **Whereas digital copies are and remain pristine and faithful, physical copies suffer from deterioration- even a book which has been read once is noticeably different from a new book. This means that goods in the physical second-hand market are inferior to the first-hand (increasingly so over time) and so goods in each market are less substitutable.**

(4) **the cost of postage and time taken to deliver mean that there are frictions in the transfer process of physical books but digital copies can be transferred instantly and at no cost.**

The upshot of these factors is that the ability of the author/publisher to earn just reward would be severely curtailed by unrestricted reselling of digital content. Authors receive no payment for second-hand sales of their work .

Furthermore, the impact on levels of online copyright infringement would be likely to be significant. Monitoring unauthorised distribution is difficult enough in the prevailing conditions; however, it would become untenable to monitor and track infringement in a newly legitimised second-hand market in which there was no discernible difference in the product. Pirate copies would be indistinguishable from the legitimate copies.

Further, it is more difficult to determine whether a digital good has been sold; unlike a physical sale where there is a transfer to another user and the denial of the continuing use of the physical good by the seller, in the digital environment this is not the case – both the seller and purchaser can continue to use the digital product. The implications for widespread copyright infringement – and concurrent difficulties in enforcement – are clear.

☐ 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] **This would be incompatible with international law because removing digital resale from rights holder authorisation would involve creating new copyright exceptions to the reproduction and communication to the public rights. Neither are compatible with the Three Step Test as this is not a "special" case (i.e. it does not have a narrow scope), it conflicts with normal exploitation and prejudices the legitimate interests of rights holders.**

a) Initial licences of ebooks and other content would have to increase vastly to compensate for the huge loss of sales that would be generated by such a change.

b) resellers might not destroy originals and this could not be policed, effectively giving free rein to piracy; and

c) creators and publishers will not benefit from the resale thus cutting their incomes and the incentive and ability to produce new work.

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[29]. Moreover a system of registration does not need to be made compulsory or constitute a precondition for the protection and exercise of rights. With a longer term of protection and with the increased opportunities that digital technology provides for the use of content (including older works and works that otherwise would not have been disseminated), the advantages and disadvantages of a system of registration are increasingly being considered[30].

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

□ YES

□ **NO. The registration and identification of works in the publishing sector already takes place at a voluntary level via the ISBN system, created in 1965. We also reject the notion that registration should be a prerequisite for the protection and exercise of rights, and any compulsory registration system applicable to foreign works would of course fall foul of the Berne Convention.**

Registration would militate against the small or first-time creator. The need to register could be perceived as an administrative burden and thus a disincentive. Registration would create a two-tier structure of works: those non-registered would – presumably – be less well protected than those which were. In all likelihood this would mean that larger, more established rightsholders would enjoy greater protections than those new to the field.

The identification and licensing of works and other subject matter is better served by improvements in facilitating discoverability; and in the streamlining of licensing.

□ NO OPINION

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

None

……

……

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

We cannot see any benefits to be gained from a registration system in relation to books where good voluntary systems already exist. As discussed in response to Q15 above, Such a system is overly complex, costly and would place an additional burden on rightsholders for no obvious gain –Such a system could also violate Article 5 of the Berne Convention.

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

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

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

[Open question]

…….

…….

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[31], and identify, variously, the work itself, the owner or the contributor to a work or other subject matter. There are notable examples of where industry is undertaking actions to improve the interoperability of such identifiers and databases. The Global Repertoire Database[32] should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition[33] was established to develop building blocks for the expression and management of rights and licensing across all content and media types. It includes the development of a Rights Reference Model (RRM) – a comprehensive data model for all types of rights in all types of content. The UK Copyright Hub[34] is seeking to take such identification systems a step further, and to create a linked platform, enabling automated licensing across different sectors.

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

[Open question]

No Opinion……

…….

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[35] requires a minimum term of protection of 50 years after the death of the author. The EU rules extend this term of protection to 70 years after the death of the author (as do many other countries, e.g. the US).

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**

The current term of copyright provides a fair balance between the interests of creators and the right to be remunerated for their intellectual property and the interest of consumers and society

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

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

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

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

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

in access to knowledge and imagination. A key factor in striking this balance is average life expectancy, since it is generally held that an author should at least be rewarded for the use of work during their own lifetime and at least a part of that of the estate (likely to be close dependents). Copyright terms have gradually increased over the past 100 years in reflection of the increased life expectancy of the population (in the UK in 1911 life expectancy was 51 and 54 years for men and women respectively, compared with 79 and 82 in 2013.

Whether works are being produced, consumed or used in analogue or digital format is irrelevant to the question of for how long their creator should be rewarded.

…….
□ NO – Please explain if they should be longer or shorter
…….
…….
□ NO OPINION

III. Limitations and exceptions in the Single Market

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

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

Whereas the catalogue of limitations and exceptions included in EU law is exhaustive (no other exceptions can be applied to the rights harmonised at EU level)[38], these limitations and exceptions are often optional[39], in the sense that Member States are free to reflect in national legislation as many or as few of them as they wish. Moreover, the formulation of certain of the limitations and exceptions is general enough to give significant flexibility to the Member States as to how, and to what extent, to implement them (if they decide to do so). Finally, it is worth noting that not all of the limitations and exceptions included in the EU legal framework for copyright are of equivalent significance in policy terms and in terms of their potential effect on the functioning of the Single Market.

In addition, in the same manner that the definition of the rights is territorial (i.e. has an effect only within the territory of the Member State), the definition of the limitations and exceptions to the rights

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

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

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

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

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

The cross-border effect of limitations and exceptions also raises the question of fair compensation of rightsholders. In some instances, Member States are obliged to compensate rightsholders 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 rightsholders is required)? The main question here is whether a greater degree of flexibility can be introduced in the EU and Member States regulatory framework while ensuring the required legal certainty, including for the functioning of the Single Market, and respecting the EU's international obligations.

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

□ YES – Please explain by referring to specific cases

…….

…….

□ **NO – Please explain**

The limitations provide appropriate flexibility to deal with the very different cultural and commercial environments of the member states. According to Recital 32 of the Copyright Directive, the rationale for providing an extensive, optional list of exceptions is to take due account of the different legal traditions and markets in Member States while enabling the internal market to function. This approach acknowledges the fact that while rights are granted in a relatively uniform way, the limitations applied to those rights and any compensation for such limitation may be applied quite differently. For example, in the case of a book being copied for educational use, Member States may permit this subject to a voluntary licence, a statutory licence or a remuneration scheme. Through the network of agreements signed between European Reproduction Rights Organisations, any necessary mandates to copy works are secured and remuneration is exchanged. In this case the flexible nature of the exceptions regime enables the educational uses and right holder payments across the EU.

…….

□ NO OPINION

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

□ YES – Please explain by referring to specific cases

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

…….

…….

□ NO – Please explain

The existing catalogue is already sufficiently flexible and has worked well in practice in creating a fair balance of rights and interests. There is no reason to suggest that some or all copyright exceptions provided for should be mandatory and to make them so would undo the consensus reached during the debate that took place at the time the Copyright Directive was negotiated, which recognised the varying cultural traditions in each State and therefore the need for flexibility across the EU. Any attempt to make all exceptions mandatory would also cause problems of interpretation across Member States, which would by no means be consensual, unless interpretation of local courts was restricted in some way (for example interpretation via the CJEU alone), and at a possible risk to delays in justice and enforcement of rights.

□ NO OPINION

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

[Open question]

No There is no evidence to suggest that any new limitations and exceptions should be added to or removed from the existing catalogue.

It should be remembered that limitations and exceptions are by their very definition applied only in certain special cases where the Three Step Test has been complied with and therefore where there is no properly functioning licensing market. Until it has been demonstrated why where and how any new limitations and exceptions might apply, any proposal to interfere with rightsholders' exclusive rights remains extremely concerning.

In contrast to licensing solutions, which are being continuously developed and improved by rightsholders to meet user needs, exceptions and limitations can only be a blunt and often ineffective tool.

…….

…….

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

□ YES – Please explain why

…….

…….

□ NO – Please explain why

The current balance works well. More flexibility, such as the American fair use system leads to greater uncertainty and more litigation. This is not conducive to creativity or to a stable commercial environment

□ 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]

See 24 above

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

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

…….

…….

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

See 21 and 24 above

…….

 NO OPINION

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

[Open question]

…….

…….

A. Access to content in libraries and archives

Directive 2001/29/EC enables Member States to reflect in their national law a range of limitations and exceptions for the benefit of publicly accessible libraries, educational establishments and museums, as well as archives. If implemented, these exceptions allow acts of preservation and archiving[41] and enable on-site consultation of the works and other subject matter in the collections of such institutions[42]. The public lending (under an exception or limitation) by these establishments of physical copies of works and other subject matter is governed by the Rental and Lending Directive[43].

Questions arise as to whether the current framework continues to achieve the objectives envisaged or whether it needs to be clarified or updated to cover use in digital networks. At the same time, questions arise as to the effect of such a possible expansion on the normal exploitation of works and other subject matter and as to the prejudice this may cause to rightsholders. 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

[41] Article 5(2)c of Directive 2001/29.
[42] Article 5(3)n of Directive 2001/29.
[43] Article 5 of Directive 2006/115/EC.

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

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

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

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

□ NO

□ **NO OPINION**

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

[Open question]

…….

…….

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

[Open question]

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

[Open question]

…….

…….

2. Off-premises access to library collections

Directive 2001/29/EC provides an exception for the consultation of works and other subject-matter (consulting an e-book, watching a documentary) via dedicated terminals on the premises of such establishments for the purpose of research and private study. The online consultation of works and other subject-matter remotely (i.e. when the library user is not on the premises of the library) requires authorisation and is generally addressed in agreements between universities/libraries and publishers. Some argue that the law rather than agreements should provide for the possibility to, and the conditions for, granting online access to collections.

32. ***(a)*** *[In particular if you are an institutional user:]* ***Have you experienced specific problems when trying to negotiate agreements with rights holders that enable you to provide remote access, including across borders, to your collections (or parts thereof) for purposes of research and private study?***

(b) *[In particular if you are an end user/consumer:]* ***Have you experienced specific problems when trying to consult, including across borders, works and other subject-matter held in the collections of institutions such as universities and national libraries when you are not on the premises of the institutions in question?***

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

It is our experience that such issues are easily solved by licensing solutions. Any exception would have to satisfy the 3 Step Test and provide fair remuneration to creators, including, if necessary the extension of Public Lending Right payments to authors.

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

Contractual agreements exist between universities/libraries and publishers to facilitate off-premises (remote) access to library collections for the purposes of research and private study. Such licensing solutions should be extended as necessary with appropriate payments to creators.

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]

No legislative solution is needed.

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

[Open question]

……

……

3. E – lending

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

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

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

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

☐ YES – Please explain with specific examples

The Society of Authors has been very engaged with these questions and possible solutions in the UK and in Europe. The UK Government commissioned a thorough study into the question last year. (The Sieghart Review) https://www.gov.uk/government/publications/an-independent-review-of-e-lending-in-public-libraries-in-england

The Sieghart Review outlined the issues in detail and recommended:

- **The provisions in the Digital Economy Act 2010 that extend PLR to audio books and loans of on-site e-books should be enacted.**

• **Further legislative changes should be made to allow PLR to take account of remote e-loans**.

• **The overall PLR pot should be increased to recognise the increase in rights holders.**

• **A number of pilots in 2013 using established literary events should be set up to test business models and user behaviours, and provide a transparent evidence base: all major publishers and aggregators should participate in these pilots.**

• **Public libraries should offer both on-site and remote E-Lending service to their users, free at point of use.**

• **The interests of publishers and booksellers must be protected by building in frictions that set 21st-century versions of the limits to supply which are inherent in the physical loans market (and where possible, opportunities for purchase should be encouraged). These frictions include the lending of each digital copy to one reader at a time, that digital books could be securely removed after lending and that digital books would deteriorate after a number of loans. The exact nature of these frictions should evolve over time to accommodate changes in technology and the market.**

The Society of Authors broadly agrees with these recommendations which are beginning to be implemented

□ NO

□ NO OPINION

37. If there are problems, how would they best be solved?
We believe that any problems can be resolved within the current copyright directives by use of licensing models and (if necessary) already extant statutory exceptions

1 Publishers must accept that current models for ebook lending through aggregators are contractually sub-licences, not sales; and remunerate authors in line with their contractual obligations for both the "sale" and the "lending" aspect of the transaction.

2 Any models for elending should remunerate authors per loan as well as for the "sale" of the ebook.

3 An author's receipts from ebook lending should equate to the total earnings the author would have received on a physical copy over the lifetime of the book from the combination of royalties on sale and PLR on every loan.

4 If it does not prove possible to remunerate authors fully via licensing models, further legislative changes should be made to extend PLR to remote e-loans.

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

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

[Open question]

…….

…….

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

[Open question]

See 38 and 39 above. We believe that physical local libraries are at the core of a civilised and cultured society and are essential for the following reasons:

i) Fostering Imagination and Creating Readers

ii) Education and research skills

iii) Access to knowledge and research

Chris Smith when Secretary of State described public libraries as "the university of the street corner". Libraries have been and will continue to be a powerful resource in supporting literacy and the acquisition of knowledge and information.

iv) Access to entertainment

Reading for pleasure remains a favourite pastime of children and adults in the UK. While books remain cheap when compared to other forms of entertainment, the cost of regularly buying new books is out of the range of much of the UK population, particularly those from the most disadvantaged groups.

v) Community spaces

The library is a safe haven, a source of valuable information, a centre for education and entertainment, the provider of internet access and other valued services such as baby and toddler groups, homework clubs, internet access and home delivery to the housebound.

Some of the above can be offered by online access but others may be lost if the focus of libraries switches to e-access and e-lending. In particular libraries need librarians: the importance of curated offerings and personal advice and support cannot be underestimated and we remain strongly of the view that remote lending of ebooks, while desirable, is not an essential or primary role of an efficient library service. It also far more likely than physical or onsite lending to compete with the sale of ebooks thus destabilising a fragile market. These problems can be solved by appropriate and sensitive e-licensing solutions. These solutions are already being tested in many EU member states and we believe that it would be premature to introduce further exceptions at this stage. We do however urge the UK Government to forthwith fulfil its promises to introduce Public Lending Right payments to the provision of audiobooks and onsite lending ebooks and to consider the extension of PLR to remote elending.

4. Mass digitisation

The term "mass digitisation" is normally used to refer to efforts by institutions such as libraries and archives to digitise (e.g. scan) the entire content or part of their collections with an objective to preserve these collections and, normally, to make them available to the public. Examples are efforts by libraries to digitise novels form the early part of the 20th century or whole collections of pictures of historical value. This matter has been partly addressed at the EU level by the 2011 Memorandum of Understanding (MoU) on key principles on the digitisation and making available of out of commerce works (i.e. works which are no longer found in the normal channels of commerce), which is aiming to facilitate mass digitisation efforts (for books and learned journals) on the basis of licence agreements between libraries and similar cultural institutions on the one hand and the collecting societies representing authors and publishers on the other[44]. Provided the required funding is ensured (digitisation projects are extremely expensive), the result of this MoU should be that books that are currently to be found only in the archives of, for instance, libraries will be digitised and made available online to everyone. The MoU is based on voluntary licences (granted by Collective Management Organisations on the basis of the mandates they receive from authors and publishers). Some Member States may need to enact legislation to ensure the largest possible effect of such

[44] You will find more information about his MoU on the following website: http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm .

licences (e.g. by establishing in legislation a presumption of representation of a collecting society or the recognition of an "extended effect" to the licences granted)[45].

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

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

…….

…….

 NO – Please explain

NO We do not believe that any further legislation is needed to ensure that the 2011 MOU has cross-border effect. National solutions are now needed

…….

 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

…….

…….

 NO – Please explain

…….

…….

 NO OPINION

B. Teaching

Directive 2001/29/EC[46] enables Member States to implement in their national legislation limitations and exceptions for the purpose of illustration for non-commercial teaching. Such exceptions would typically allow a teacher to use parts of or full works to illustrate his course, e.g. by distributing copies of fragments of a book or of newspaper articles in the classroom or by showing protected content on a smart board without having to obtain authorisation from the right holders. The open formulation of this (optional) provision allows for rather different implementation at Member States level. The implementation of the exception differs from Member State to Member State, with several Member States providing instead a framework for the licensing of content for certain educational uses. Some argue that the law should provide for better possibilities for distance learning and study at home.

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

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

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

…….

…….

 NO. We believe that appropriate and balanced licensing solutions exist or can be agreed. Any extension of exceptions would not comply with the three step test.

 NO OPINION

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

[Open question]

…….

…….

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]

We adopt the response of ALCS here: "Educational use is a high-volume market demanding both quantity and breadth of material. Facilitating this kind of use requires solutions involving multiple rightsholders and rights. In the UK such solutions have been developed by building upon the exceptions providing for teaching activities.

Section 36 of the Copyright, Designs and Patents Act (1988) permits educational establishments to copy limited extract from books, serials and other materials for teaching purposes but also makes provision for licences covering educational copying. Through the Copyright Licensing Agency (CLA) bodies representing the relevant rightsholders in such works – ALCS for authors, DACS for artists and PLS for publishers – have developed schemes enabling far greater uses than those envisaged by the exception. These include extensions to digital formats of works, use of works on smartboards and distance learning via on-line networks.

Section 35 of the Act permits educational establishments to make recordings from broadcasts but, like section 36, also allows for a licensing scheme to operate. Through the Educational Recording Agency (ERA) ALCS and 19 other bodies representing the various rightsholders in audiovisual works provide a licensing scheme covering the different ways that broadcast material is accessed and used within modern teaching methods. The licensing scheme has expanded beyond the exception by including new digital services, such as on-line content delivery, within licensed repertoire and offering remote access rights to facilitate.

These licences achieve a near 100% penetration within the UK education sector providing flexible access to hundreds of thousands of works licensed by thousands of individual rightsholders. The success of these models is supported by two key findings from recent research in this area. Firstly, it has been demonstrated that educational licensing schemes generate significant costs savings for educational establishments. Economic analysis within Higher Education has found that the annual cost of clearing secondary use rights for individual published works would be between £145m - £720m, whereas the overall annual cost of a

collective licence for this sector is around £6.7m. For schools, the cost of a licence enabling them to copy and reuse extracts from all the books and serials in their collections represents 0.03% of their annual spend[47]; the annual cost to a high school of accessing and copying UK broadcast material is less than 60p per pupil. Secondly, it is clear that licensing revenue has a key role to play in sustaining the development of new educational materials. Economic analysis demonstrates that a reduction in this income could result in a drop in output amongst authors writing for the education sector of 29%, equating to an annual shortfall of 2,870 new educational works."

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]

…….

…….

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

[Open question]**The ALCS experience is that the UK model outlined above provides a solution that sets the right balance between access rights and rewards for rightsholders to the overall benefit of the teaching and education sector. This approach lessens uncertainties around the scope of activities covered by teaching exceptions by enabling rightsholders to offer a broad range of material and rights**.

…….

C. Research

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

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

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

☐ YES – Please explain

…….

…….

☐ **NO**

☐ NO OPINION

[47] *An economic analysis of educational exceptions in copyright,* PricewaterhouseCoopers LLP, March 2012, p.52

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

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

[Open question]

…….

…….

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

[Open question]

Content can be used for research purposes via the UK's version of the research and private study exception. Publishers also facilitate the use of content for research purposes under agreed licence terms, tailored to the needs of institutions and students.

D. Disabilities

Directive 2001/29/EC[49] provides for an exception/limitation for the benefit of people with a disability. The open formulation of this (optional) provision allows for rather different implementations at Member States level. At EU and international level projects have been launched to increase the accessibility of works and other subject-matter for persons with disabilities (notably by increasing the number of works published in special formats and facilitating their distribution across the European Union)[50].

The Marrakesh Treaty[51] has been adopted to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled. The Treaty creates a mandatory exception to copyright that allows organisations for the blind to produce, distribute and make available accessible format copies to visually impaired persons without the authorisation of the rightsholders. The EU and its Member States have started work to sign and ratify the Treaty. This may require the adoption of certain provisions at EU level (e.g. to ensure the possibility to exchange accessible format copies across borders).

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

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

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

☐ YES – Please explain by giving examples

…….

…….

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

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

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

☐ **NO - A voluntary system is already in place in the UK and it works well**

☐ NO OPINION

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

[Open question]

…….

…….

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

[Open question]

We support the detailed response on this point submitted by the Publishers Association. "The UK – and EU – has adequate legislation that sits alongside a robust licensing framework to allow for the distribution of works to the visually impaired. In the UK publishers enjoy a strong working relationship with the Royal National Institute for the Blind and publishers support the following initiatives to make their works accessible to the widest possible audience:

i. **Publishers mandate the Copyright Licensing Agency (via the Publishers Licensing Society) to provide licences, at no fee in most cases, that enable the production of accessible copies of copyright works for Reading Impaired People, but which also include important controls on authorised uses. The CLA Print Disability Licence launched in May 2010 with the support of the publishing industry and the PA, allows copyright works to be converted into accessible formats, reproduced and distributed to reading impaired people, but under secure conditions and only for their personal use. The licence also facilitates the use of such works by people with dyslexia.**

ii. **The PA has produced its own guidance: *The Publisher Guidelines for Meeting Permissions Requests on Behalf of Reading Impaired People.* These Guidelines, which include a model licence, have been developed to help publishers respond more effectively to requests for access to digital files on behalf of people with reading impairments.**

iii. **The PA collaborates with JISC TechDis, an advisory service focusing on technology and inclusion, to promote accessibility causes. The two main outcomes from this collaboration so far have been a website, *Publisher Lookup UK,* and a guidance document, the *Guide to Obtaining Textbooks in Alternative Formats.* Both are designed to support educational institutions with the provision of accessible versions of textbooks for the reading impaired.**

iv. **The PA and other representative bodies released a joint recommendation to publishers in October 2010 encouraging the use of accessibility functions on e-reading devices. The recommendation goes some way to enabling people with reading impairments to access the same text via e-readers as those without disabilities. Research is also ongoing into the extent to which text to speech and other accessibility formats are now being applied to bestselling titles.**

v. **A quarterly *Publisher Accessibility Newsletter*[52] produced in partnership with PLS aggregates recent news and developments within the publishing industry on accessibility is-**

[52] http://www.pls.org.uk/services/accessibility1/Pages/accessibilitynewsletter.aspx?PageView=Shared

sues, updating on the progress of legislation, pilot projects, new initiatives and individual publisher activity.

vi. **Delivered by RNIB and Dyslexia Action, Load2Learn is a free online resource which improves the school experience for learners who can't read standard print by providing an extensive online collection of educational materials. Members can access over 2,300 titles including textbooks and 2,400 images downloadable as accessible documents. Load2Learn also offers its members a book request service for titles not yet available on the site.**

The success of existing licensing and collaboration is clear from RNIB commissioned research into the availability of accessible versions of the most popular books in the UK. This research revealed that in 2012, 84 per cent of the top 1,000 titles were available in Braille, audio and large print formats thanks to accessible eBooks, which are opening up the world of reading for blind and partially sighted readers.

Publishers are also participating in global initiatives to increase access. The TIGAR project enables Trusted Intermediaries (TIs) to request accessible versions of books from participating TIs in other countries. For each request the project's 'permissions clearance co-ordinator' seeks permission clearance from rightsholders, and on receipt of this, electronic files are exchanged through secure and transparent processes. These files are then made available to print disabled members of the 'receiving' TIs through their existing services.

This enables each TI to make a massive increase in the choice of books available to its members without major production costs and reduces unnecessary duplication of effort.
has now developed and implemented a new ICT solution to facilitate the search, discovery and exchange of electronic files for accessible books held in existing collections of participating trusted intermediaries (TIs). Data for over 200,000 titles from TIs in Canada, USA, Sweden, Denmark, Norway, Australia, Switzerland, and Brazil is already included in this global, online catalogue and New Zealand, South Africa and France will be added shortly. New TIs in Iceland, Portugal and Switzerland have also recently signed up and more are expected over coming months.

Plans are also being prepared to further develop and extend the technology solutions. These will include enabling print disabled people to find and buy accessible versions of books from commercial suppliers, and trials of the use of publisher EPUB 3 files by TIs to add enhanced accessibility features or produce different formats. "

……

……

E. Text and data mining

Text and data mining/content mining/data analytics[53] 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

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

mine protected works or other subject matter, it is necessary to obtain authorisation from the right holders for the making of such copies unless such authorisation can be implied (e.g. content accessible to general public without restrictions on the internet, open access).

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

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results. At the same time, practical solutions to facilitate text and data mining of subscription-based scientific content were presented by publishers as an outcome of "Licences for Europe"[54]. In the context of these discussions, other stakeholders argued that no additional licences should be required to mine material to which access has been provided through a subscription agreement and considered that a specific exception for text and data mining should be introduced, possibly on the basis of a distinction between commercial and non-commercial.

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

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

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

☐ YES – Please explain

NO – Licensing solutions are already in place

…….

…….

☐ NO OPINION

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

[Open question]

…….

…….

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

[Open question]

…….

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

…….

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

[Open question]

…….

…….

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

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[55]. User-generated content (UGC) can thus cover the modification of pre-existing works even if the newly-generated/"uploaded" work does not necessarily require a creative effort and results from merely adding, subtracting or associating some pre-existing content with other pre-existing content. This kind of activity is not "new" as such. However, the development of social networking and social media sites that enable users to share content widely has vastly changed the scale of such activities and increased the potential economic impact for those holding rights in the pre-existing works. Re-use is no longer the preserve of a technically and artistically adept elite. With the possibilities offered by the new technologies, re-use is open to all, at no cost. This in turn raises questions with regard to fundamental rights such the freedom of expression and the right to property.

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results or even the definition of UGC. Nevertheless, a wide range of views were presented as to the best way to respond to this phenomenon. One view was to say that a new exception is needed to cover UGC, in particular non-commercial activities by individuals such as combining existing musical works with videos, sequences of photos, etc. Another view was that no legislative change is needed: UGC is flourishing, and licensing schemes are increasingly available (licence schemes concluded between rightsholders and platforms as well as micro-licences concluded between rightsholders 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 rightsholders across different sectors as a result of the "Licences for Europe" discussions[56].

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?

[55] 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.

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

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

 YES – Please explain by giving examples

…….

…….

 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

The first problem is that User Creators frequently do not understand what they have created so don't understand that they have rights.

The problem for User Creators and for many individual professional creators, performers and other smaller rights holders is that they do not know when their work is used and they have no means to monitor or police the market and even if they identify infringements they have insufficient resources (financial or otherwise) to pursue infringers.……

 NO – Please explain

…….

…….

 NO OPINION

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

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

 YES – Please explain

…….

…….

 NO – Please explain

…….

…….

 NO OPINION

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

[Open question]

Education and awareness……

……

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]

……

……

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

[Open question]

……

……

IV. Private copying and reprography

Directive 2001/29/EC enables Member States to implement in their national legislation exceptions or limitations to the reproduction right for copies made for private use and photocopying[57]. 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 rightsholders 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 rightsholders.

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 rightsholders 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[5859].

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[60] in the digital environment?

☐ YES – Please explain

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

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

[59] 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.

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

……

……

 NO – Please explain **The UK does not currently operate a system of levies for private copying or reprography and has no plans to do so.**

……

……

 NO OPINION

65. Should digital copies made by end users for private purposes in the context of a service that has been licensed by rightsholders, and where the harm to the right holder is minimal, be subject to private copying levies?[61]

 YES – Please explain

……

……

 NO – Please explain

……

……

 NO OPINION

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

[Open question]

……

……

67. Would you see an added value in making levies visible on the invoices for products subject to levies?[62]

 YES – Please explain

……

……

 NO – Please explain

……

……

 NO OPINION

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

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

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[63].

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

…….

…….

 NO OPINION

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

[Open question]

…….

…….

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]

…….

…….

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

[Open question]

…….

…….

V. Fair remuneration of authors and performers

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

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[64] 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[65]. 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]

A combination of contract and legislative measures

The Society of Authors welcomes the publication of the study *"Contractual arrangements applicable to creators: law and practice of selected Member States"* carried out by the Policy Department C: Citizens' Rights and Constitutional Affairs at the request of the Committee on Legal Affairs ("the Study"). The Study shows conclusively that the UK is lacking the legal frameworks which protect creators in many other EU countries. It also shows that EU creators are often subject to onerous contracts and do not receive a fair share of the reward for their creativity. The Study makes wide-ranging and practical recommendations for change which we wholly endorse.

1 Contracts:

Legislation to enforce fairer and clearer contracts including:

- **written contracts which set out the exact scope of the rights granted,**
- **proper accounting clauses, including regular reporting obligations on both publishers and sublicensees detailing all exploitations undertaken and revenues yielded. The Study says *" Revenues and profit margins of digital content providers must be known to adequately share the value generated by those services along the value chain."***
- **fair remuneration for all exploitation (which may prevent copyright buyouts in some circumstances),**
- **limited licences which can be changed as technologies develop. The Study highlighted the contradiction between a contract that is negotiated and agreed upon at one point in time and modes of exploitation that are increasingly dynamic and says " *The long duration of a contract, fixed in time, could elicit unfair consequences for authors, unless specific legal provisions or contractual clauses grant the author some fair participation to digital exploitation or allow rights reversion under certain circumstances"*.**
- **An obligation of exploitation for each mode of exploitation. Such "use it or lose it" clauses would allow authors to get their rights back if the publisher does not exploit the work and allow the author to either find another exploiter willing to make use of her work or self publish. The Study says " *This would guarantee that the assignment of rights effectively leads to an exploitation of the work, hence defeating***

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

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

buy-out contracts or the excessive scope of transferred rights". **The Study says "** ***a single obligation to exploit the work is not sufficient. If the producer buys all the rights but refrains from exploiting them or chooses only to engage in some exploitations, the author is deprived of some modes of exploitation for which she has transferred the rights. The obligation of exploitation should apply for*** ***<u>each</u>*** ***significant mode of exploitation for which the publisher has contracted the economic right transfer from the author and the author could get back the rights for which no exploitation has been executed. This is the French model for books, where collective agreements have resulted in an obligation for publishers to exploit the literary work in paper form and in e-books, the author being entitled to annul the transfer of her rights for each mode of exploitation that has not been developed".***

2 Unfair Terms Legislation

Legislation should include:

- **First, a list of defined clauses which are automatically deemed to be void including for example, clauses stipulating an indefinite duration without giving the author the possibility of reviewing the contract; providing unreasonably low remuneration for the transfer of rights; or covering unknown forms of exploitation without separate remuneration for the author;**
- **Second, a general provision that "*any contract provision that, contrary to the requirement of good faith, causes a significant imbalance in the parties' rights and obligations arising under the contract, to the detriment of the author shall be regarded as unfair".***

A partial way to achieve this suggestion would be to extend the Unfair Contract Terms Act to intellectual property contracts.

3 Fair Remuneration

The Study says "*The digital economy is based on creative works by authors. A basic principle is that they should be associated in the exploitation of their works; they should be entitled to partake in the determination of the scope and forms of exploitation and receive a fair remuneration each time the economic value of their work is exploited."* It recommends:

- **an economic study on the remuneration of authors**
- **contracts must set out determination of the remuneration of the author in the contract for each mode of exploitation, its mode of calculation, and, if proportional, the types of revenues on which it will be based.**
- **remuneration should be fair, Although some exploitations may be fairly remunerated by lump sums a supplementary royalty should be paid after a defined period of time. If the contract applies to unknown forms of exploitation, authors should also be entitled to an additional fair remuneration when they emerge.**
- **The rights to equitable remuneration or fair compensation should be unwaivable,**
- **Further research should be considered to study the impact of competition law on collective measures to enhance and secure fair remuneration for authors.**

G. 4 Futureproofing copyright contracts

- **The transfer of rights for unknown forms of exploitation should only be included in a contract in exchange for fair remuneration of the author and with an option for the author to have her rights reverted for that exploitation and to renegotiate the contract and remuneration.**
- **Contracts transferring copyright should be limited in time to enable some renegotiation (for the author) as business models evolve.**
- **Contracts should be subject to a revision clause in case of change of circumstances in the exploitation market or of commercial success of the work (best-seller clause).**

- **A general principle of reversion of transferred rights should be enacted in European law to enable authors to terminate for reasons including lack of exploitation, lack of payment and lack of regular reporting. The reversion right could also enable the author to get out of a contract after some period of time to exploit her rights herself or through another publisher.**
- **Dual licensing should be allowed to enable authors to develop some non-commercial exploitation by themselves despite assignment of their rights to CMOs.**

4 Stakeholder dialogue

In order to cope with the challenges posed by new technologies, the European institutions should foster dialogue among stakeholders towards more flexible contracts and exchange of best practices that could be encouraged all over Europe.

5 The Collective Dimension:

- **Collective agreements, model contracts, standard contractual practices or Memoranda of Understanding should be encouraged to secure fair protection and remuneration of authors in individual contracts, in conformity with competition law.**
- **to ensure that authors may effectively enforce their contractual rights or ensure that the exploitation of their work is undertaken and the remuneration paid. and because individual litigation is difficult for authors, Collective actions (or class actions) should be allowed against undertakings violating the rights of authors, namely by entitling the representatives of the authors to act on a collective basis**
- **Collective mechanisms of alternative dispute resolution and mediation procedures should be organised at the national level to facilitate conflict resolution as regards key contractual issues: for example when remuneration, renegotiation of a contract or a request for reversion is contested.**

Some efforts should be put in the education and awareness of creators, for the authors to be better informed as regards contractual practices, to know their rights and obligations and to have a more balanced bargaining process

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

YES – Please explain

We would recommend consideration of the seven points outlined in 72 above: all of which could be implemented without reopening the Directive.

NO – Please explain why

……

……

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]

……

……

VI. Respect for rights

Directive 2004/48/EE[66] 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[67]. 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[68]. One means to do this could be to clarify the role of intermediaries in the IP infrastructure[69]. At the same time, there could be clarification of the safeguards for respect of private life and data protection for private users.

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

 YES – Please explain

…….

…….

 NO – Please explain

…….

…….

 NO OPINION

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

No. We adopt the view of the Publishers Association here " The PA shares the view of the Commission that there is no need for the E-Commerce Directive to be reopened, we nevertheless believe that improvements can be made within the existing Directive framework, and which would have a significant impact on reducing copyright infringement.

i. Notice and Take Down

Overall the E-Commerce Directive provides a strong and workable framework for notice and Take down. However, a lack of clarity can currently prevent expeditious action by giving those who wish to avoid taking action upon notification an excuse for doing so. The EU has an important role to play in setting and issuing best practice guidelines and non binding minimum standards to ensure the Directive can be used effectively and with confidence by all players.

This could include specification on the following:

- **Providing guidance on a definition of 'expeditious removal'**

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

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

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

[69] 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.

- **Urging all sites to proactively remove infringing content if it has already been reported to them once**
- **Defining a best practice that sites ban repeat infringers**

Intermediaries, in particular search engines, need to do more to inhibit online copyright infringement, for example by de-ranking links in search results when the site in question has been the subject of numerous notice and take down actions."

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

…….

…….

 NO – Please explain

…….

…….

 NO OPINION

VII. A single EU Copyright Title

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

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

 YES

 NO

 NO OPINION

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

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.

Authors recognise that it is essential for copyright to keep pace with technological developments but firmly believe that to do this the framework that has been established under the Copyright Directive 2001/29 must remain as the secure basis from which policy is developed.

It is therefore of fundamental importance that that examination of issues in the area of copyright does not lead to a reopening of the Copyright Directive. The Copyright Directive provides the framework for the other issues to be debated and appropriate policies developed.

The Copyright Directive has proved to be sufficiently flexible to adapt to the changing environment, providing a framework within which issues can be debated and appropriate policies developed. It should be allowed to stand. Furthermore, we note the increasing number of decisions by the Court of Justice of the European Union interpreting the Copyright Directive, thus supporting a harmonised approach to copyright throughout the European Single Market. Any changes to the underlying framework endanger this harmonisation.

It is vital that this framework remains in place to provide a clear basis from which copyright based industries within EU Member States can continue to develop new and innovative communication models that will be world leaders.

So far the combination of licensing and exceptions promoted by the Directive has provided an excellent solution to most issues, and within the Licences for Europe stakeholder debates, licensing is being successfully streamlined for the needs of the digital environment.

On a practical level, the Copyright Directive has only been in place since 2001. It was, reputedly, one of the most lobbied Directives of all time and it took close to five years to get it adopted. The uncertainty engendered by a prolonged period of review (in the light of history) and revision, that re-opening the Directive would cause would be damaging to all stakeholders, but to the creative industries in particular and should be avoided.

In the absence of proven failure, re-opening the Copyright Directive would be premature.