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.:

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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 .

"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".*

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

B. How to submit replies to this questionnaire

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

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

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

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

[6] COM(2008) 466/3, http://ec.europa.eu/internal_market/copyright/copyright-infso/index_en.htm#maincontentSec2.

[7] COM(2011) 427 final, http://ec.europa.eu/internal_market/consultations/2011/audiovisual_en.htm.

[8] http://ec.europa.eu/internal_market/consultations/2009/content_online_en.htm.

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.

PLEASE IDENTIFY YOURSELF:

Name:

Werkgroep Auteursrecht Nederlandse Erfgoedinstellingen (Copyright working group of Dutch cultural heritage institutions).

The answers below have been drafted by the copyright working group of dutch cultural heritage institutions, an informal coordinating body. This response to the consultation is supported by the following organisations:

- **BRAIN www.archiefbrain.nl**
- **Centraal Museum Utrecht www.centraalmuseum.nl/en**
- **Stichting Digitaal Erfgoed Nederland www.den.nl**
- **Erfgoed Leiden www.erfgoedleiden.nl**
- **EYE Film Instituut Nederland www.eyefilm.nl**
- **Het Nieuwe Instituut www.hetnieuweinstituut.nl/en**
- **Kennisland www.kl.nl**
- **Koninklijke Bibliotheek www.kb.nl**
- **Museumvereniging www.museumvereniging.nl**
- **Nederlands Instituut voor Beeld en Geluid www.beeldengeluid.nl**
- **Nederlands Fotogenootschap www.fotogenootschap.nl**
- **Rijksmuseum www.rijksmuseum.nl**
- **Stadsarchief Amsterdam stadsarchief.amsterdam.nl**

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.

……..

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

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

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

TYPE OF RESPONDENT (Please underline the appropriate):

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

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

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

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

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

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

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

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

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

- **Collective Management Organisation**

- **Public authority**

- **Member State**

- **Other** (Please explain):

……

……

II. Rights and the functioning of the Single Market

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

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

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

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

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

Despite progress, there are continued problems with the cross-border provision of, and access to, services. These problems are most obvious to consumers wanting to access services that

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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 .

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).

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

NO OPINION

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

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

……

NO

NO OPINION

[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.

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]

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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]

…….

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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

…….

…….

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

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NO – Please explain

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……

NO OPINION

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

[The definition of the rights involved in digital transmissions]

The EU framework for the protection of copyright and related rights in the digital environment is largely established by Directive 2001/29/EC[16] on the harmonisation of certain aspects of copyright and related rights in the information society. Other EU directives in this field that are relevant in the online environment are those relating to the protection of software[17] and databases[18].

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

The most relevant rights for digital transmissions are the reproduction right, i.e. the right to authorise or prohibit the making of copies[20], (notably relevant at the start of the transmission – e.g. the uploading of a digital copy of a work to a server in view of making it available – and at the users' end – e.g. when a user downloads a digital copy of a work) and the

[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).

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.

1. The act of "making available"

Directive 2001/29/EC specifies neither what is covered by the making available right (e.g. the upload, the accessibility by the public, the actual reception by the public) nor where the act of "making available" takes place. This does not raise questions if the act is limited to a single territory. Questions arise however when the transmission covers several territories and rights need to be cleared (does the act of "making available" happen in the country of the upload only? in each of the countries where the content is potentially accessible? in each of the countries where the content is effectively accessed?). The most recent case law of the Court of Justice of the European Union (CJEU) suggests that a relevant criterion is the "targeting" of a certain Member State's public[22]. According to this approach the copyright-relevant act (which has to be licensed) occurs at least in those countries which are "targeted" by the online service provider. A service provider "targets" a group of customers residing in a specific country when it directs its activity to that group, e.g. via advertisement, promotions, a language or a currency specifically targeted at that group.

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

YES

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

No it is not. Cultural Heritage institutions are increasingly asked to provide access to cultural heritage across the entire EU. In the majority of cases works made available on the websites of cultural heritage institutions are made available without territorial restrictions. In this situation there is substantial uncertainty about the scope of the "making available" right when making works available to audiences in all of Europe.

Given that cultural heritage institutions have limited resources to spend on rights clearance the only acceptable way to provide more clarity with regards to the scope of the "making available" right would be to apply a country of origin principe[1]. An approach based on targeted audiences would create increased burdens since dissemination through platforms like

[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 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).

Europeana is explicitly targeted at users in all member states. Applying a target country approach would make it more difficult for cultural heritage institutions to make their works available via internationals projects like Europeana.

[1] Compare Hargreaves and Hugenholtz: Copyright Reform for Growth and Jobs - Modernising the European Copyright Framework (page 10), Brussels 29/05/2013. Available at: http:// www.lisboncouncil.net/publication/publication/95-copyright-reform-for-growth-and-jobs-modernising-the -european-copyright-framework.html

NO OPINION

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

YES – Please explain how such potential effects could be addressed

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……

NO

NO OPINION

2. Two rights involved in a single act of exploitation

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

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

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

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NO

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

NO OPINION

3. Linking and browsing

Hyperlinks are references to data that lead a user from one location in the Internet to another. They are indispensable for the functioning of the Internet as a network. Several cases are pending before the CJEU[25] in which the question has been raised whether the provision of a clickable link constitutes an act of communication to the public/making available to the public subject to the authorisation of the rightholder.

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

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

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

……

……

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

……

……

NO OPINION

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

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

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[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.

…….

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

…….

…….

NO OPINION

4. Download to own digital content

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

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

YES – Please explain by giving examples

…….

…….

NO

NO OPINION

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

[Open question]

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[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).

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

Registration is not often discussed in copyright in the EU as the existing international treaties in the area prohibit formalities as a condition for the protection and exercise of rights. However, this prohibition is not absolute[29]. Moreover a system of registration does not need to be made compulsory or constitute a precondition for the protection and exercise of rights. With a longer term of protection and with the increased opportunities that digital technology provides for the use of content (including older works and works that otherwise would not have been disseminated), the advantages and disadvantages of a system of registration are increasingly being considered[30].

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

YES

NO

NO OPINION

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

From the perspective of the Dutch cultural heritage institutions there are a number of advantages: Such a system would increase the amount of information about rights holders available to all types of users including cultural heritage institutions. One of the biggest

problems facing cultural heritage institutions attempting to make their collections available online is the lack of comprehensive and easy (read automatically) access information about the copyright status of works and the identity and location of rights holders. Introducing a registration system on the European level would be a first step in ensuring that such information is more readily available in the future.

To be useful such a system needs to record transfers of rights throughout the duration of the copyright protection of the registered works. In addition a registration system must be transparent and easy to use, so that it allows all types of rights holders (including individual creators) to register their works. The system should also include information on works that are out of copyright as a means to provide legal clarity for users of Public Domain works.

On the more general level a registration system would decrease transaction costs and improve the availability of rights information to all market participants. In particular a registration system should be beneficial for rightholders since it makes it easier for interested parties to obtain permission for reuse of protected works and to comply with copyright law.

[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.

Note, that a registration system will not be able to retroactively solve the existing problem with orphan works and mass digitisation (see more about this in reaction to questions 40 and 41).

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

[Open question]

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

There could be several incentives for rightholders to register their works. Policies could be enacted whereby certain elements of copyright protection are only available to rightholders who have registered their works. In principle this could apply to any element of copyright protection that is not required by the Berne convention.

For example, registration might be required for a rightsholder to start an enforcement action (such as notice and takedown), or would be required to access a particular type or level of damage awards in a successful infringement judgment. Another incentive might be that rightholders need to register their works in order to be eligible to collect royalties through collective rights management organizations. Finally, registration could be made a prerequisite for prolonging copyright protection beyond the term the minimum term required by the Berne convention. (see our answer to question 20 as well).

D. How to improve the use and interoperability of identifiers

There are many private databases of works and other subject matter held by producers, collective management organisations, and institutions such as libraries, which are based to a greater or lesser extent on the use of (more or less) interoperable, internationally agreed 'identifiers'. Identifiers can be compared to a reference number embedded in a work, are specific to the sector in which they have been developed[31], and identify, variously, the work itself, the owner or the contributor to a work or other subject matter. There are notable examples of where industry is undertaking actions to improve the interoperability of such identifiers and databases. The Global Repertoire Database[32] should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition[33] was established to develop building blocks for the expression and management of rights and licensing across all content and media types. It includes the development of a Rights Reference Model (RRM) – a comprehensive data model for all types

[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.

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?

At the minimum the European Union should ensure two things: (1) that identifiers as well as rights ownership and permission databases are based on open standards, that they are available to all content creators and that they can be read by all market participants free of charge. (2) the EU should also ensure that all identifiers as as well as rights ownership and permission databases are interoperable work across all of Europe (and beyond).

Any system that is developed must be developed in a true multi stakeholder approach (e.g not only by rights holders and intermediaries) and should be reflective of work already undertaken (for example by Europeana). Rights ownership and permission databases in particular must be publicly accessible via machine readable interfaces. They must also include the ability to store information on out-of-copyright (Public Domain) and openly licensed works

E. Term of protection – is it appropriate?

Works and other subject matter are protected under copyright for a limited period of time. After the term of protection has expired, a work falls into the public domain and can be freely used by anyone (in accordance with the applicable national rules on moral rights). The Berne Convention[35] requires a minimum term of protection of 50 years after the death of the author. The EU rules extend this term of protection to 70 years after the death of the author (as do many other countries, e.g. the US).

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

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

YES – Please explain

……

……

NO – Please explain if they should be longer or shorter

[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/.

No, from the perspective of cultural heritage institutions in the Netherlands the current terms of copyright protection (including neighbouring rights protection) are too long. Cultural heritage institutions hold large collections of works that are still under copyright (or where the copyright status is unclear) but that are not exploited commercially anymore. A term of protection of life plus 70 years stands in stark contrast with the commercial life of the large majority of copyright protected works that is much shorter[2] . As a result the disproportionate length of copyright protection prevents our institutions from effectively fulfilling our mission in the digital environment.

In many cases the cost for digitisation of copyrighted works that are no longer in commercial exploitation exceeds by far the potential economic value of these works. As a result these are not made available online by the rightholders who lack an economic incentive. While Cultural heritage Institutions that have such works in their collections have an incentive to make such works available (it is our public task to provide access to our collections) they are confronted with costs for rights clearance that increase the costs for making these collections available (without generating economic benefit for rightholders).

One of the outcomes of this is the existence of the so called '20th century black hole' when it comes to online availability of copyrighted works. Works from the 20th century are significantly less likely to be available than works from the centuries before (many of which are clearly in the public domain) or from the 21st century (many of which are still available commercially)[3] .

Shortening the term of protection will decrease the number of out-of-commerce works that are in copyright and will thus reduce the scope of the problems outlined above. Given this the term of copyright protection should be reduced to at least the minimum requirement established by the Berne Convention (life of the creator plus 50 years).

In addition the European Union should work in the relevant international fora to further reduce the term. This should include efforts to agree on a system where extended copyright protection after an initial automatically granted term would be only granted if the work is registered by the rightholder. The duration of the initial term should be brought into line with the duration of protection of other IP rights such as patented inventions (20 years) databases (15 years) and industrial design rights (25 years)[4] . Given this, 20 years appears to be a reasonable initial term of protection that should guarantee protection to the vast majority of protected works. Rightholders should have the ability to extend the term of protection for works that they intend to exploit after the end of the initial period by registering such works.

In addition it should be examined if it is possible to establish a cut-off date for copyright protection that ensures that all works published before that date are not protected by copyright anymore. Such a cut of date could vary by sector (European Film Heritage institutions for example advocate 1920 as a cut off date for filmographic works).

[2] See: Heald, Paul J., How Copyright Makes Books and Music Disappear (and How Secondary Liability Rules Help Resurrect Old Songs) (July 5, 2013). Illinois Program in Law, Behavior and Social Science Paper No. LBSS14-07; Illinois Public Law Research Paper No. 13-54. Available at SSRN: http://ssrn.com/abstract=2290181 or http://dx.doi.org/10.2139/ssrn.2290181

[3] idem.

[4] See also Hargreaves and Hugenholtz: Copyright Reform for Growth and Jobs - Modernising the European Copyright Framework (pages 8-9), Brussels 29/05/2013. Available at: http://www.lisboncouncil.net/publication/publication/95-copyright-reform-for-growth-and-jobs-modernising-the -european-copyright-framework.html

NO OPINION

III. Limitations and exceptions in the Single Market

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

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

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

In addition, in the same manner that the definition of the rights is territorial (i.e. has an effect only within the territory of the Member State), the definition of the limitations and exceptions to the rights is territorial too (so an act that is covered by an exception in a Member State "A"

[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.

may still require the authorisation of the rightholder once we move to the Member State "B")[40].

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

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

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

YES – Please explain by referring to specific cases

Yes this creates an uneven playing field. Users of the same type should be able to enjoy the same exceptions (user rights) in all member states. Cultural Heritage Institutions are increasingly working together on digitisation projects (for example in the context Europeana) and the fact that the exceptions benefitting publicly accessible libraries, museums and archives have not been implemented (uniformly) in all member states, creates unnecessary uncertainties and disadvantages institutions in some member states vis-a-vis institutions in others5 .

The 'New renaissance' report6 on bringing Europe's cultural heritage online specifically recommended such collaborations between institutions. The lack of harmonization introduces unnecessary friction costs for institutions engaging in cross border collaborations.

The transition to digital services enables cultural heritage institutions to collaborate across borders and make their collections available across all of Europe and this needs to be mirrored by harmonising the exceptions benefitting these institutions. The most comprehensive way to address this issue would be to establish a unified EU copyright title (compare our answer to question 78)

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

[5] Compare De Wolff and Partners: Study on the application of Directive 2001/29/EC on copyright and related rights in the information society (pages 283-284), Brussels 16/12/2013. Available at: http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf

[6] COMITÉ DES SAGES, The New Renaissance, Report of the Reflection group on bringing Europe's cultural heritage online, 2011, http://ec.europa.eu/information_society/activities/digital_libraries/doc/refgroup/ final_report_cds.pdf, p. 14

NO – Please explain

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NO OPINION

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

YES – Please explain by referring to specific cases

Yes, all existing and additional exceptions should be made mandatory and harmonised to the fullest extent possible (obviously after they have been broadened in line with our response to the relevant questions below). It is not acceptable that citizens in some members state enjoy a lesser level of access to the collections held by publicly funded cultural heritage institutions simply because of an uneven implementation of exceptions and limitations of the InfoSoc directive. This issue becomes more pressing as more and more activities of cultural heritage institutions are taking place online.

All the exceptions provided by the EU copyright directives are drafted on the basis that they do not interfere with the normal exploitation of the work and, therefore, do not unreasonably prejudice rightholders. This means that making them mandatory in all member states should have no negative effect on rightholders, while in many cases this will substantially benefit citizens and other public policy objectives such as access to knowledge and culture or inclusive education.

NO – Please explain

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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.

With regards to the cultural heritage institutions the status of e-lending should be clarified (see the answers to questions 37 and 38) possibly via a new exception. In addition cultural heritage institutions need to be enabled to make works in their collections available online for non-commercial purposes. As outlined in the answer to question 34 this does not require a

new exception but can be achieved by expanding the scope of the existing provision in article 5(3)n of the directive.

In addition we also see a need for new exceptions that enable certain forms of usage by the general public that allow citizens and researchers to fully leverage the increased access to protected works. New exceptions should be added that allow non-commercial sharing for protected works by individuals, as well as text and data mining. Finally there is a need to introduce an open ended norm (see next question).

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

YES – Please explain why

Yes, there is a need for more flexibility in the EU regulatory framework for limitations and exceptions[7] . The exceptions and limitations in the 2001 InfoSoc directive were not drafted in a technologically neutral manner which is problematic in times of accelerated technological progress.

By definition exception and limitations that apply to specific uses cannot ensure that as of yet unknown forms of use are covered by them. Technological innovation can be expected to lead to new forms of use in the near future and Europe would be well advised to create a copyright framework that is flexible enough to deal with such developments. The current discussion about text and data mining is a good example of this. European researchers have to deal with legal uncertainties about the status of text and data mining activities because the InfoSoc directive fails to address this form of use that was (relatively) unknown when it was adopted. Having an open norm would have provided the structure for creating more certainty on the legal aspects of text and data mining at the time when the issue started to arise.

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

[7] See also: Hugenholtz, P. B. and Senftleben, Martin, Fair Use in Europe: In Search of Flexibilities (November 14, 2011). Available at SSRN: http://ssrn.com/abstract=1959554 or http://dx.doi.org/10.2139/ssrn.1959554

NO – Please explain why

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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.

The best approach would be one that provides built in flexibility in reaction to new technological developments or new forms of use. An open norm such as fair use fits this description. It should be implemented EU-wide (see also answer to Question 22) and in addition to (existing) targeted exceptions and limitations. As long as an open norm is implemented EU wide it's effect on the functioning of the single market would be minimal while it can be expected to improve the competitive position of European market actors vis a vis market participants in other jurisdictions that have an open norm.

*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

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

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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]

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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

[41] Article 5(2)c of Directive 2001/29.

[42] Article 5(3)n of Directive 2001/29.

limitation) by these establishments of physical copies of works and other subject matter is governed by the Rental and Lending Directive[43].

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

1. Preservation and archiving

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

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

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

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

With regards to all questions in this section it should be stressed that while the consultation document limits itself to activities of libraries and archives the questions in this section are equally relevant for museums and other cultural heritage institutions. In fact the relevant exceptions and limitations explicitly apply to ‘publicly accessible libraries, educational establishments or museums, or [...] archives’. The 2012 Orphan Works directive clarifies this to include 'film or audio heritage institutions and public-service broadcasting organisations'. In line with this, the following answers (28-35 and 39-41) should be read as applying to all cultural heritage institutions falling within this scope and not only to libraries and archives. These answers have been drafted by the copyright working group of the Dutch cultural heritage institutions which includes representatives from libraries, archives, museums and audio-visual archives and their sector organisations.

The Netherlands have implemented article 5(2)c of the InfoSoc directive as an exception in its national copyright law (article 16n). This exception formulates three specific acts of reproduction: restoration, preservation of material that threatens to decay and format shifting

[43] Article 5 of Directive 2006/115/EC.

if formats become inaccessible. These narrowly defined, specific acts of reproduction, do not fully cover the needs of cultural heritage institutions in the digital environment.

Institutions increasingly digitize works in their collections not only to prevent harm, but to be able to better fulfill their missions. Digital copies of cultural heritage works provide many advantages such as being (automatically) indexable, being easier to access and having lower storage costs. The current Dutch implementation of article 5(2)c of the InfoSoc directive does not allow institutions to structurally create digital copies of works in their collection. This prevents institutions from fully realizing the potential inherent to digitisation of their collections. This is highly detrimental in an environment where, as the 'New Renaissance' report[8] puts it, “digitization is more than a technical option, it is a moral obligation”.

In addition recital 40 of the directive which states that 'Such an exception or limitation should not cover uses made in the context of online delivery of protected works or other subject-matter' is highly problematic. As online dissemination of works becomes more and more important for cultural heritage institutions, limiting the reproduction exception in such a way is simply anachronistic as it prevents institutions from using digitized works in a meaningful way.

Also technological measures and their relationship with the exceptions benefitting cultural heritage institutions are highly problematic: Often CDs and DVDs are protected by technological measures, the removal of which would require the cooperation of the producer. Art. 6 of the InfoSoc Directive provides that technological protection measures are protected per se, independently on the scope of protection, entrusting to voluntary agreements or to subsidiary interventions of Member States the adoption of appropriate measures to ensure that legitimate users can make effective use of licensed content.

[8] COMITÉ DES SAGES, The New Renaissance, Report of the Reflection group on bringing Europe’s cultural heritage online, 2011, http://ec.europa.eu/information_society/activities/ digital_libraries/doc/refgroup/ final_report_cds.pdf, p. 14

NO

NO OPINION

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

From our perspective the best solution would be to broaden the existing exception in article 5(2)c of the InfoSoc directive, so that it allows institutions to make reproductions of all works in their collection as long as these are not intended for direct commercial advantage. In line with our answer to Question 22 this exception should be made mandatory for all member states.

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

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?

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

Reproductions should be limited to use by the heritage institution itself which is not for direct commercial or economic advantage or use in line with other exceptions and limitations allowed for by the directive (such as the broadened version of the exception foreseen in article 5(3)n that we propose in answer to question 34). Reproductions would explicitly be allowed for the purposes of increasing the operational efficiency and reducing costs of the beneficiary institutions.

Broadening the scope of the extension along these lines mirrors the recommendations made as part of the European Commission commissioned 'Study on the application of directive 2001/29/EC on copyright and related rights in the information society' from december 2013[9].

[9] Compare De Wolff and Partners: Study on the application of Directive 2001/29/EC on copyright and related rights in the information society (pages 291-302), Brussels 16/12/2013. Available at: http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf

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

[Open question]

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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?***

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

Often libraries entrust negotiation and management of contracts to national or regional institutional consortia to increase their bargaining power. But the use of consortia for the negotiations is a remedy, not an optimal solution, and the logic of large numbers may introduce rigidities in pricing and business models, encouraging the purchase or subscription of large packages of content rather than the selection of targeted works. Also it is extremely common for licences to prevent cross border access to digital content for research and study.

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

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

Limiting the availability of digitised works to dedicated terminals on the premises of cultural heritage institutions prevents them from reaching citizens that cannot travel to the premises (for example because they are disabled or because they lack the economic means to do so). Furthermore it is out of line with the legitimate expectation of users that have been shaped by universal online accessibility of other services. Citizens, researchers and educators would greatly benefit from online access to the collections of Europe's publicly funded institutions.

For our institutions to fully participate in the digital public space we must be enabled to offer online services that are available from everywhere and by anyone seeking to ‘to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits’, as enshrined by article 27.1 of the Universal Declaration of Human Rights. Online universal access to the collections of all publicly accessible libraries, Museums and Archives can play an important role in realising this objective. Being able to offer online

access to works in our collections will also allow our institutions to reach bigger and more diverse audiences. For these reasons we consider the current exception to be too narrow.

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

From our perspective, the best solution would be to broaden the existing exception in article 5(3)n of the InfoSoc directive, so that it allows institutions to make available digital copies of out-of-commerce works in their collections via electronic networks such as the internet for non commercial purposes.

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?

The main element would be a broadening of the existing exception in article 5(3)n of the InfoSoc directive. Instead of limiting the making available to dedicated terminals on the premises of the institutions it should also apply to making the works available online via public networks such as the internet. The scope of the exception should further be expanded to not only include 'the purpose of research or private study' by 'individual members of the public' but should apply to all non commercial uses.

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

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

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

This solution would also be in line with the relevant recommendations made in the 'New Renaissance' report. The report recommended that 'National governments and the European Commission should promote solutions for the digitisation of and cross-border access to out of distribution works' and that 'For cultural institutions collective licensing solutions and a window of opportunity should be backed by legislation, to digitise and bring out of distribution works online, if rights holders and commercial providers do not do so'[10].

[10] COMITÉ DES SAGES, The New Renaissance, Report of the Reflection group on bringing Europe's cultural heritage online, 2011, http://ec.europa.eu/information_society/activities/ digital_libraries/doc/refgroup/ final_report_cds.pdf, p. 5

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

[Open question]

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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

Libraries have faced a number of problems when attempting to negotiate agreements to facilitate electronic lending. These include:

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

More generally the question is if it is necessary and desirable to negotiate agreements to enable electronic lending. Contrary to what is stated in the introduction to this question there is considerable uncertainty about the status of e-lending under EU law. The directive on rental

and lending does not explicitly excludes e-lending or lending of digital items from its scope and some libraries argue that based on the current acquis and the UsedSoft decision by the ECJ they should be allowed to provide e-books in libraries for download. In the Netherlands the Association of Public Libraries (Vereniging van Openbare Bibliotheken) has brought the matter before the courts. They have started a test case against the collective management organisation in charge of the lending right arguing that they should be allowed to provide e-books in libraries for download.

NO

NO OPINION

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

The best solution for the problem would be to create legal certainty by unambiguously including the right to e-lending in the EU aquis. While the lending of analogue works is currently being enabled by directive 2006/115 e-lending, which is most often considered as an act of making available, would probably need to be regulated via an (additional) mandatory exception in the InfoSoc directive. Such a new exception could take the form of a statutory license with fair compensation for authors.

Since e-lending must be available for all books (commercially available or not) it should be treated separately from the general exception for making out-of-commerce works available online that we argue for in response to question 34.

Given the fact that e-books are generally not sold, but licensed there are a number of additional issues that would need to be addressed:

- All e-book titles available for sale to the public should be available to libraries for acquisition and access;
- All e-books titles should be available to libraries at the time of publication;
- Publishers should be required to deliver e-books in interoperable formats;
- Libraries should be permitted to make available acquired or licensed e-books to users only for limited periods of time.
- It should be possible to use the same e-book title simultaneously;
- Registered users should be able to download an e-book either in the library or by way of remote access via authentication systems.

Given that many e-book vendors currently employ technical measures that restrict certain forms of use the proposed introduction of an exception for e-lending reinforces the need for to revise Art. 6 of the InfoSoc in order to enforce exceptions and limitations and to ensure legitimate utilizations of protected works, regardless of format or mode of dissemination.

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?***

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

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

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

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

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

With regards to the above the 'study on the application of directive 2001/29/EC on copyright and related rights in the information society' that was commissioned by the European Commission and published in december 2013[11] contains an interesting observation. At the end of the section discussing inter alia the exception benefitting cultural heritage institutions, the authors observe that:

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

understandable for users and copyright owners alike. If the requirements for each exception are adequate and legitimate, it would not sacrifice the high level of protection of copyright and related rights that the EU law has adopted."

From the perspective of (Dutch) cultural heritage institutions such an approach would have many benefits. It would create room for rethinking Europe's rich tradition of providing access to knowledge and culture through public institutions and it would enable our institutions to fully leverage the possibilities offered by digitization and near universal connectivity.

[11] Compare De Wolff and Partners: *Study on the application of Directive 2001/29/EC on copyright and related rights in the information society* (page 403), Brussels 16/12/2013. Available at: http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf

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]

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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

[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 .

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

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

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

From the perspective of cultural heritage institutions this question (and the following) are too limited. The issue of mass digitization is far broader than what can be addressed with the 2011 MoU and the 2012 Orphan works directive (the other relevant European policy instrument in this area). Copyright issues related to the mass digitization of collections and the subsequent making available of digitized works require a comprehensive approach that cannot be based the principles of due diligence search and licensing. If we want to enable European cultural heritage institutions to transfer their collections into the digital age (and there cannot be any doubt that this is both an important policy objective and a reasonable expectation of users who as taxpayers fund these organisations) we need a far more comprehensive approach.

Both the 2012 directive on certain permitted uses of orphan works and the 2011 MoU on out of commerce works are insufficient to address the copyright issues arising from mass digitisation projects. In addition, the extremely slow uptake of the MoU (according to the 2013 the 'study on the application of directive 2001/29/EC on copyright and related rights in the information society' there is one single project that is "inspired" by the MoU[12]) clearly illustrates that the MoU is not a suitable mechanism for enabling mass digitization on a large scale.

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

The inadequacies of both the OW directive as well as the Memorandum of Understanding can be addressed by an extension of the scope of the exception created by article 5(3)n of the InfoSoc directive as outlined in the answer to question 34 above. Doing this would provide cultural heritage institutions a clear legal framework for operating in the digital environment that would allow us to to achieve the aims related to our public-interest missions. Under this approach the online activities of cultural heritage institutions would be covered by three targeted exceptions:

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

- An exception covering the making of reproductions (an expanded version of the current exception defined in 5(2)c)
- An exception covering the making available online of out-of-commerce works (an expanded version of the current exception defined in 5(3)n)
- A new exception covering e-lending

[12] idem. (page 279)

NO – Please explain

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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

This is certainly necessary. The public has a legitimate interest in having online access to the collections of all publicly accessible libraries, museums and archives across Europe (see article 27.1 of the Universal Declaration of Human Rights). There is no good reason for limiting mechanisms that create such access to certain types of content. The approach proposed in reaction to questions 40 and 34 above, would cover all types of works and other subject matter that are held by these institutions.

This solution would also be in line with the relevant recommendation made in the 'New Renaissance' report of the Commission appointed 'Comite de Sages' that was published in 2011. The report recommended that 'solutions for orphan works and out of distribution works must cover all the different sectors: audiovisual, text, visual arts, sound'[13].

[13] COMITÉ DES SAGES, The New Renaissance, Report of the Reflection group on bringing Europe's cultural heritage online, 2011, http://ec.europa.eu/information_society/activities/ digital_libraries/doc/refgroup/ final_report_cds.pdf, p. 5

NO – Please explain

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NO OPINION

B. Teaching

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

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

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

YES – Please explain

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NO

NO OPINION

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

[Open question]

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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]

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

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

[Open question]

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

[Open question]

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C. Research

Directive 2001/29/EC[47] enables Member States to choose whether to implement in their national laws a limitation for the purpose of non-commercial scientific research. The open formulation of this (optional) provision allows for rather different implementations at Member States level.

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

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

YES – Please explain

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NO

NO OPINION

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

[Open question]

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

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

[Open question]

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D. Disabilities

Directive 2001/29/EC[48] provides for an exception/limitation for the benefit of people with a disability. The open formulation of this (optional) provision allows for rather different implementations at Member States level. At EU and international level projects have been launched to increase the accessibility of works and other subject-matter for persons with disabilities (notably by increasing the number of works published in special formats and facilitating their distribution across the European Union) [49].

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

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

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

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

YES – Please explain by giving examples

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

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

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

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NO

NO OPINION

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

[Open question]

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

[Open question]

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E. Text and data mining

Text and data mining/content mining/data analytics[51] are different terms used to describe increasingly important techniques used in particular by researchers for the exploration of vast amounts of existing texts and data (e.g., journals, web sites, databases etc.). Through the use of software or other automated processes, an analysis is made of relevant texts and data in order to obtain new insights, patterns and trends.

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

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

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

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results. At the same time, practical solutions to facilitate text and data mining of subscription-based scientific content were presented by publishers as an outcome of "Licences for Europe"[52]. In the context of these discussions, other stakeholders argued that no additional licences should be required to mine material to which access has been provided through a subscription agreement and considered that a specific exception for text and data mining should be introduced, possibly on the basis of a distinction between commercial and non-commercial.

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

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

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

YES – Please explain

Yes, since in most cases it is necessary to make a copy of the content in order for a machine to extract facts and data for mining, the act of text and data mining there is a lot of uncertainty among users of online services provided by cultural heritage institutions that want to make use of text and data mining. Because it restricts the copying of large portions of databases, the Database Directive may also a legal barrier to text and data mining. Although text and data mining is concerned with the extraction of facts and data and as such should not be subject to an exclusive right, the results of text and data mining research are currently being suppressed because of a lack of legal clarity.

We observe that the resulting legal uncertainties create a situation where the wealth information made available by our institutions is not fully accessible to researchers employing text and data mining technologies.

NO – Please explain

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NO OPINION

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

[Open question]

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

From our perspective, the best solution would be an additional mandatory exception that is added to the list of targeted exceptions contained in the InfoSoc directive.

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?

A legislative solution should take the form of an exception which allows the copying of content and the circumvention of TPMs for text and data mining purposes. Researchers must be able to share the results of text and data mining, as long as these results are not substitutable for the original copyright work - irrespective of copyright law, database law or contractual terms to the contrary. A specific exception to this effect allowing the copying of content for the purpose of text and data mining is necessary. Such an exception should not distinguish between commercial and non-commercial purposes as, for research institutions, this would prevent knowledge transfer.

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

[Open question]

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

[Open question]

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F. User-generated content

Technological and service developments mean that citizens can copy, use and distribute content at little to no financial cost. As a consequence, new types of online activities are developing rapidly, including the making of so-called "user-generated content". While users can create totally original content, they can also take one or several pre-existing works, change something in the work(s), and upload the result on the Internet e.g. to platforms and blogs[53]. User-generated content (UGC) can thus cover the modification of pre-existing works even if the newly-generated/"uploaded" work does not necessarily require a creative effort and results from merely adding, subtracting or associating some pre-existing content with other pre-existing content. This kind of activity is not "new" as such. However, the 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

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

technologies, re-use is open to all, at no cost. This in turn raises questions with regard to fundamental rights such the freedom of expression and the right to property.

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results or even the definition of UGC. Nevertheless, a wide range of views were presented as to the best way to respond to this phenomenon. One view was to say that a new exception is needed to cover UGC, in particular non-commercial activities by individuals such as combining existing musical works with videos, sequences of photos, etc. Another view was that no legislative change is needed: UGC is flourishing, and licensing schemes are increasingly available (licence schemes concluded between rightholders and platforms as well as micro-licences concluded between rightholders and the users generating the content. In any event, practical solutions to ease user-generated content and facilitate micro-licensing for small users were pledged by rightholders across different sectors as a result of the "Licences for Europe" discussions[54].

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

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

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

YES – Please explain by giving examples

From the perspective of cultural heritage institutions it would be desirable if users would not only be allowed to make private copies of material that cultural heritage institutions offer but if individuals also had the right to share protected works for non-commercial purposes. From our perspective it is beneficial if cultural heritage content can not only be accessed but also become part of conversations between citizens.

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?***

[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 .

YES – Please explain

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NO – Please explain

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NO OPINION

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

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

YES – Please explain

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NO – Please explain

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NO OPINION

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

[Open question]

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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?***

From the perspective of cultural heritage institutions a additional exception that allows non-commercial sharing of protected works by individuals would provide sufficient room for online engagement with works made available by cultural heritage institutions (note that this should not be limited to works that are made available by cultural heritage institutions but apply to all protected works)

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

[Open question]

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IV. Private copying and reprography

Directive 2001/29/EC enables Member States to implement in their national legislation exceptions or limitations to the reproduction right for copies made for private use and photocopying[55]. Levies are charges imposed at national level on goods typically used for such purposes (blank media, recording equipment, photocopying machines, mobile listening devices such as mp3/mp4 players, computers, etc.) with a view to compensating rightholders for the harm they suffer when copies are made without their authorisation by certain categories of persons (i.e. natural persons making copies for their private use) or through use of certain technique (i.e. reprography). In that context, levies are important for rightholders.

With the constant developments in digital technology, the question arises as to whether the copying of files by consumers/end-users who have purchased content online - e.g. when a person has bought an MP3 file and goes on to store multiple copies of that file (in her computer, her tablet and her mobile phone) - also triggers, or should trigger, the application of private copying levies. It is argued that, in some cases, these levies may indeed be claimed by rightholders whether or not the licence fee paid by the service provider already covers copies made by the end user. This approach could potentially lead to instances of double payments whereby levies could be claimed on top of service providers' licence fees[5657].

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

64. ***In your view, is there a need to clarify at the EU level the scope and application of the private copying and reprography exceptions[58] in the digital environment***?

YES – Please explain

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NO – Please explain

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

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

[57] These issues were addressed in the recommendations of Mr António Vitorino resulting from the mediation on private copying and reprography levies. You can consult these recommendations on the following website: http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf.

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

NO OPINION

65. Should digital copies made by end users for private purposes in the context of a service that has been licensed by rightholders, and where the harm to the rightholder is minimal, be subject to private copying levies?[59]

YES – Please explain

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NO – Please explain

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NO OPINION

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

[Open question]

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

YES – Please explain

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NO – Please explain

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NO OPINION

Diverging national systems levy different products and apply different tariffs. This results in obstacles to the free circulation of goods and services in the Single Market. At the same time,

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

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

many Member States continue to allow the indiscriminate application of private copying levies to all transactions irrespective of the person to whom the product subject to a levy is sold (e.g. private person or business). In that context, not all Member States have ex ante exemption and/or ex post reimbursement schemes which could remedy these situations and reduce the number of undue payments[61].

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

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

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NO – Please explain

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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]

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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]

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

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

[Open question]

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V. Fair remuneration of authors and performers

The EU copyright acquis recognises for authors and performers a number of exclusive rights and, in the case of performers whose performances are fixed in phonograms, remuneration rights. There are few provisions in the EU copyright law governing the *transfer* of rights from authors or performers to producers[62] or determining who the owner of the rights is when the work or other subject matter is created in the context of an employment contract[63]. This is an area that has been traditionally left for Member States to regulate and there are significant differences in regulatory approaches. Substantial differences also exist between different sectors of the creative industries.

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

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

[Open question]

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

YES – Please explain

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NO – Please explain why

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

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

NO OPINION

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

[Open question]

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VI. Respect for rights

Directive 2004/48/EE[64] provides for a harmonised framework for the civil enforcement of intellectual property rights, including copyright and related rights. The Commission has consulted broadly on this text[65]. Concerns have been raised as to whether some of its provisions are still fit to ensure a proper respect for copyright in the digital age. On the one hand, the current measures seem to be insufficient to deal with the new challenges brought by the dissemination of digital content on the internet; on the other hand, there are concerns about the current balance between enforcement of copyright and the protection of fundamental rights, in particular the right for a private life and data protection. While it cannot be contested that enforcement measures should always be available in case of infringement of copyright, measures could be proposed to strengthen respect for copyright when the infringed content is used for a commercial purpose[66]. One means to do this could be to clarify the role of intermediaries in the IP infrastructure[67]. At the same time, there could be clarification of the safeguards for respect of private life and data protection for private users.

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

YES – Please explain

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NO – Please explain

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NO OPINION

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

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

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

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

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

[Open question]

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

YES – Please explain

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NO – Please explain

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NO OPINION

VII. A single EU Copyright Title

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

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

YES

In line with our previous answers (see questions 21 and 22) any tool that would provide more coherence into the EU copyright system would be very welcome. A single EU copyright title is necessary in order to achieve a fully functioning single digital market.

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?

This should be the next step and should be undertaken as soon as possible.

VIII. Other issues

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

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

[Open question]

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