

Public Consultation

on the review of the EU copyright rules

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I. Introduction

A. Context of the consultation

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

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

In its "Communication on Content in the Digital Single Market"¹ the Commission set out two parallel tracks of action: on the one hand, to complete its on-going effort to review and to modernise the EU copyright legislative framework²³ 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 now⁴. The Commission welcomes the practical solutions stakeholders have put forward in this context and will monitor their progress. Pledges have been made by stakeholders in all four Working Groups (cross border portability of services, user-generated content, audiovisual and film heritage and text and data mining). Taken together, the Commission expects these pledges to be a further step in making the user environment easier in many different situations. The Commission also takes note of the fact that two groups – user-generated content and text and data mining – did not reach consensus among participating stakeholders on either the problems to be addressed or on the results. The discussions and results of "Licences for Europe" will be also taken into account in the context of the review of the legislative framework.

As part of the review process, the Commission is now launching a public consultation on issues identified in the Communication on Content in the Digital Single Market, i.e.: *"territoriality in the Internal Market, harmonisation, limitations and exceptions to copyright in the digital age; fragmentation of the EU copyright market; and how to improve the effectiveness and efficiency of enforcement while underpinning its legitimacy in the wider context of copyright reform"*. As highlighted in the October 2013 European Council Conclusions⁵ *"Providing digital services and content across the single market requires the establishment of a copyright regime for the digital age. The Commission will therefore*

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 – ten pledges to bring more content online": http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf.

⁵ EUCO 169/13, 24/25 October 2013.

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

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

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

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

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

C. Confidentiality

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

Please note that all contributions received will be published together with the identity of the contributor, unless the contributor objects to the publication of their personal data on the

⁶ COM(2008) 466/3, http://ec.europa.eu/internal_market/copyright/copyright_info/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.

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:

The Libraries and Archives Copyright Alliance (LACA) UK

In the interests of transparency, organisations (including, for example, NGOs, trade associations and commercial enterprises) are invited to provide the public with relevant information about themselves by registering in the Interest Representative Register and subscribing to its Code of Conduct.

- If you are a Registered organisation, please indicate your Register ID number below. Your contribution will then be considered as representing the views of your organisation.

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

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

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

TYPE OF RESPONDENT (Please underline the appropriate):

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 law⁹.

The dissemination of copyright-protected content on the Internet – e.g. by a music streaming service, or by an online e-book seller – therefore requires, in principle, an authorisation for each national territory in which the content is communicated to the public. Rightsholders are, of course, in a position to grant a multi-territorial or pan-European licence, such that content services can be provided in several Member States and across borders. A number of steps have been taken at EU level to facilitate multi-territorial licences: the proposal for a Directive on Collective Rights Management¹⁰ should significantly facilitate the delivery of multi-territorial licences in musical works for online services¹¹; the structured stakeholder dialogue “Licences for Europe”¹² and market-led developments such as the on-going work in the Linked Content Coalition¹³.

“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 portability¹⁴.

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

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 – ten pledges to bring more content online”:

http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf.

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

The main issue at stake here is, therefore, whether further measures (legislative or non-legislative, including market-led solutions) need to be taken at EU level in the medium term¹⁵ 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)

It is not possible to access broadcasts (both recorded and real time) in any country outside of the UK because of licensing and broadcast restrictions. This is particularly detrimental to students who are taking UK university courses at partner institutions overseas in the EU and/or where the UK Universities have overseas campuses because they are not permitted access to the same resources via a secure electronic network and/or the provisions of any blanket licences negotiated by the UK University do not extend to students based outside of the UK. Licence fees increase but the provision of services does not improve, and this hinders the breadth of teaching and learning resources to which students based at partner institutions have access.

NO

NO OPINION

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

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

NO

NO OPINION

3. [In particular if you are a right holder or a collective management organisation:] How often are you asked to grant multi-territorial licences? Please indicate, if possible, the

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.

number of requests per year and provide examples indicating the Member State, the sector and the type of content concerned.

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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?*

An exception or limitation permitting both the recording of broadcasts and the communication of those broadcasts via secure networks for educational purposes, with the caveat that contract terms and technical protection measures cannot override these exceptions. The licensing body for educational broadcasts in the UK cannot provide a licence for the making available of broadcasts via a secure network to the rest of the EU because other Member States do not have a provision in their national laws which permits the recording of broadcasts for educational purposes. This must be addressed in EU legislation.

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

YES – Please explain by giving examples

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NO

NO OPINION

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

YES – Please explain by giving examples

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NO

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

Territoriality in licensing is a barrier to cross-border availability of content and services. For a Single Market to be able to function in the digital realm any measures or regulations which unnecessarily complicate the use of content and services via the Internet should be investigated and simplified.

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/EC¹⁶ 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 software¹⁷ and databases¹⁸.

Directive 2001/29/EC harmonises the rights of authors and neighbouring rightholders¹⁹ 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 copies²⁰, (notably relevant at the start of the transmission – e.g. the uploading of a digital copy of a work to a server in view of making it available – and at the users' end – e.g. when a user downloads a digital copy of a work) and the communication to the public/making available right, i.e. the rights to authorise or prohibit the dissemination of the works in digital networks²¹. These rights are intrinsically linked in digital transmissions and both need to be cleared.

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

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

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

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

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

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

1. The act of “making available”

Directive 2001/29/EC specifies neither what is covered by the making available right (e.g. the upload, the accessibility by the public, the actual reception by the public) nor where the act of “making available” takes place. This does not raise questions if the act is limited to a single territory. Questions arise however when the transmission covers several territories and rights need to be cleared (does the act of “making available” happen in the country of the upload only? in each of the countries where the content is potentially accessible? in each of the countries where the content is effectively accessed?). The most recent case law of the Court of Justice of the European Union (CJEU) suggests that a relevant criterion is the “targeting” of a certain Member State’s public²². 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” approach²³)**

The law of the supplying country (“country of origin” approach) should apply with regard to copyright exceptions. These exceptions should be implemented as a mandatory minimum norm across the EU. Users and service providers should not have to understand another EU country’s copyright law to be able to use and provide content and services, particularly given the wide variety of languages across the EU. A principled and technology neutral definition of “making available” is needed.

An approach which targets groups of customers would be detrimental to the advance of the cultural heritage sector in the EU as it would increase the burden of rights clearances and undermine the public interest objective of dissemination of culture and knowledge throughout the EU.

- 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*

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 Case C-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).

transferred your rights or not), on your remuneration, or on the enforcement of rights (including the availability of injunctive relief²⁴)?

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

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 CJEU²⁵ 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 CJEU²⁶ 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.

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

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

²⁶ Case C-360/13 (Public Relations Consultants Association Ltd). See also

http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0202_PressSummary.pdf.

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

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

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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)

In our opinion, a hyperlink is equivalent to a signpost directing the end user to the resource/information and should not therefore be protected by copyright. Without the ability to link Web sites and move from one site to another, users of the Internet will not be able to function lawfully. The Association Litteraire et Artistique Internationale (ALAI) produced a report and opinion in 2013 which investigated many different types of hyperlinking. This report found that not all hyperlinks are equal in their ‘communicating’ of copyright works (i.e. some hyperlinks are factual) and that in order to relieve confusion for users (some of which has arisen as a result of various court cases) the EU should instigate limitations and exceptions for the use of hyperlinks²⁷. This question has recently been addressed by the Court of Justice in case C-466/12 Svensson. The Court found that hyperlinks are an act of public communication but are not infringing unless they are addressed to a “new public” (a public that was not taken into account by the copyright holders when the initial communication was authorised).

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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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)

²⁷ ALAI, [REPORT and OPINION on the making available and communication to the public in the internet environment – focus on linking techniques on the Internet](#). ADOPTED UNANIMOUSLY BY THE EXECUTIVE COMMITTEE 16 SEPTEMBER 2013. p.10. (the irony of including a link to the report is not lost here – should referencing require the permission of the rightsholder??)

The viewing of a webpage is the standard result of any use of the Internet; there is no reason why such a reproduction on screen should be subject to the authorisation of the rightsholder. If the rightsholder wanted such control over webpages, they should use technical measures (such as placing the content behind a password-protected site) to prevent such viewing without payment/permission. The temporary copying exception permits the storage of pages within the cache, but does not appear to extend to the viewing on screen. If the EU Parliament considers it necessary, then an exception should be created for viewing on screen, but the EU Parliament should not become confused between access rights and copyright. Just because an item is available online should not make it any different than if one were to go to a library or archive to view such an item. The fact that the original is reproduced in order to transmit the content quickly over the Internet is not the fault of the end user and therefore there should not be a penalty on those who view information in that way. If the rightsholder did not want a user to view the content, they should not have made Web pages available in the first place; the Internet is for the dissemination of information.

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)²⁸. 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)²⁹. 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

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NO

NO OPINION

²⁸ See also recital 28 of Directive 2001/29/EC.

²⁹ 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).

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.

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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 absolute³⁰. 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 considered³¹.

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

YES

A registration system at EU level would help to identify works which are protected by copyright and who the rightsowners are. At present, it is often difficult to discover and/or contact rightsowners for permission to use works outside the scope of limitations and exceptions. A registration system at EU level would have to be a voluntary system with incentives for rightsholders to register. Other information, such as works where copyright has expired, could also be included, as well as links to repositories such as Europeana.

The registration system would need to be marketed well across the EU. Rightsholders should be able to self-register and fields must be mandatory rather than optional when filling in information. There must a requirement to keep the data within the registration system current. Much of this work would need to be done by rightsholders, but the EU would benefit from using information professionals to ensure that the data and metadata is appropriately managed and arranged. Rightsholders of non-commercial works should not have to pay to register/deposit their works provided they maintain their own data. The system should also be funded by the EU.

NO

NO OPINION

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

Registration of copyright works would lead to fewer works becoming orphans in the future, because rightsholders could be traced more easily and also the copyright inherent in a lot of user generated content would eventually be eliminated. It would also make it easier for

³⁰ 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.

³¹ 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.

authors/creators to take action for copyright infringement, as they would be able to prove their ownership of copyright simply and cheaply.

The current requirement for non-registration applies to Berne Convention works, whose duration is typically author's life plus 50 years. One incentive of the scheme could be if the rightsholder wished to take advantage of an extra 20 years of copyright protection in the EU (i.e. author's life plus 70 years). This could be done without any need to change the Berne Convention.

Registration for the extra period would also mean that only those who wish to assert their copyright for the extra period would benefit from twenty extra years, and provide a practical way of differentiating between the authors of works who wish to commercially exploit them, and those who have no interest in benefitting commercially.

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

There are some disadvantages. Firstly, copyright registration for all works from EU Member States would need a lot of administration, and the EU should look to the US Copyright Office to better understand registration of copyright works. Several years ago there was a backlog of approximately 24 months of works still to be registered at the US Copyright Office³². Secondly, there is a question around whether the copyright works themselves should be deposited or just the metadata. If it is the works themselves, the technical infrastructure must be robust enough to handle all the different types of works from literary to audiovisual works (often extremely large files), and this must be easily searchable via an online interface. Finally, copyright lasts for author's life plus 70 years, and there are concerns that a repository/registration system would be able to move in line with the technology and ensure format shifting of works for the next 100 years at least. As such, the practicalities would need serious consideration before such a system was implemented.

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

As we have indicated in Q16, one advantage would be to get the full benefit of copyright duration of author's life + 70 years rather than author's life + 50 years. Further incentives could be drawn from modelling the registration system on the US system, including the requirement for works to be registered in order for authors/creators to begin legal proceedings against those who use their work unlawfully.

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 developed³³, 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 Database³⁴ should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The

³² <http://firemark.com/2010/03/08/backlog-at-the-copyright-office-grows-to-two-2-years/>

³³ E.g. the International Standard Recording Code (ISRC) is used to identify recordings, the International Standard Book Number (ISBN) is used to identify books.

³⁴ You will find more information about this initiative on the following website: <http://www.globalrepertoiredatabase.com/>.

Linked Content Coalition³⁵ was established to develop building blocks for the expression and management of rights and licensing across all content and media types. It includes the development of a Rights Reference Model (RRM) – a comprehensive data model for all types of rights in all types of content. The UK Copyright Hub³⁶ 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?

The EU should continue to promote the adoption of identifiers and ensure that silos of content are not created. Rights and permissions databases must be interoperable and available to all content creators, and identifiers must be based on standards to ensure consistency. The EU should encourage participation from all stakeholders, including libraries, archives and users, so that databases are developed with the users in mind. Databases should link up with the work already done as listed above, and also with other work done around standards and cataloguing (e.g. by Europeana).

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 Convention³⁷ 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

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NO – Please explain if they should be longer or shorter

Many of the problems we now have derive from the fact that copyright term is too long. Most commercially-released works are only financially viable for about 10 years from publication, which suggests that the current copyright term of 70 years from the death of the author/creator is too long. Most older works are often only available in and accessible via libraries and archives, who receive deposits of works rather than the transfer of copyright in the majority of

³⁵ You will find more information about this initiative (funded in part by the European Commission) on the following website: www.linkedcontentcoalition.org.

³⁶ You will find more information about this initiative on the following website: <http://www.copyrighthub.co.uk/>.

³⁷ Berne Convention for the Protection of Literary and Artistic Works, <http://www.wipo.int/treaties/en/ip/berne/>.

cases. This can cause problems in that users wishing to use older works in ways which are outside the scope of the limitations and exceptions have to attempt to contact rightsholders, who may be several generations on from the original author and have different ideas about how the works should be used. In the fast-paced digital environment, the current term of copyright is too long and hinders sharing of culture and knowledge across borders.

It is now time for the EU to evaluate the duration of copyright to establish:

- o Whether the current copyright term of author's life plus 70 years brings any significant benefits to rightsholders;
- o Whether these benefits outweigh the burdens to education and research, e.g. a growing body of orphan works;
- o What economic gains and possibilities could arise for all stakeholders if the copyright term in the EU were to be shortened (e.g. to duration of author's life only, or author's life plus 50 years), allowing works to enter the public domain at an earlier point than currently.

NO OPINION

III. Limitations and exceptions in the Single Market

Limitations and exceptions to copyright and related rights enable the use of works and other protected subject-matter, without obtaining authorisation from the rightsholders, for certain purposes and to a certain extent (for instance the use for illustration purposes of an extract from a novel by a teacher in a literature class). At EU level they are established in a number of copyright directives, most notably Directive 2001/29/EC³⁸.

Exceptions and limitations in the national and EU copyright laws have to respect international law³⁹. In accordance with international obligations, the EU acquis requires that limitations and exceptions can only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interest of the rightsholders.

Whereas the catalogue of limitations and exceptions included in EU law is exhaustive (no other exceptions can be applied to the rights harmonised at EU level)⁴⁰, these limitations and exceptions are often optional⁴¹, 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"

³⁸ 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.

³⁹ 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).

⁴⁰ 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)).

⁴¹ 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")⁴².

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

The current copyright *acquis* has required copyright exceptions to be implemented piecemeal across the EU, making the law inconsistent between Member States and therefore making it more difficult for cross-border collaboration in the fields of culture, education and research. There is a danger that without mandatory minimum norms for copyright exceptions, areas such as culture, education and research will suffer in the cross-border digital environment, making it impossible to achieve world-class research and free movement of knowledge. In the Internet age, such sentiments apply not only to the EU Single Market, but also to the worldwide digital environment, and the EU should seek to address this.

As research and teaching activity across national borders is now commonplace, the differences in national copyright law create divisions that undermine effective collaboration and knowledge sharing. This situation gives rise to an unfair imbalance allowing rights holders to benefit from harmonised protection and enforcement measures whilst not allowing libraries, archives and their users to benefit from mandatory minimum exceptions to ensure effective working in the digital environment. This is particularly pertinent when scientists and researchers from different countries are collaborating on research projects with particular research outputs. The imbalance of copyright exceptions across the EU means that some researchers can be disadvantaged from accessing and using certain copyright works depending upon where they are based.

Libraries and archives are essential components in the information and copyright chain, yet they and their users (including the very people who invent, create and discover) are at a

⁴² 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.

permanent disadvantage and treated unequally compared with copyright holders, because they have to engage in costly and time-consuming struggles with complex national exceptions and licensing regimes.

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

Ideally, to ensure harmonisation, all exceptions in the Information Society Directive 2001/29/EC and other existing and future Directives in the copyright *acquis* should be implemented as a minimum throughout the EU. There should also be a simple mechanism to expand or add exceptions as required at an EU level which is responsive to technological developments.

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.*

All of the suggestions listed below are expanded on elsewhere in this consultation document. We recommend:

1. Introducing the principle that contracts and technical protection measures are never allowed to override existing and new limitations and exceptions in the EU. Furthermore, it should be an offence to impose technical protection measures on any material that is no longer in copyright;
2. Introducing a ‘right to lend’ for libraries, to include the right to lend digital media such as e-books by remote download;
3. Introducing a specific exception for text and data mining which applies to both commercial and non-commercial purposes, as well as published and unpublished works;
4. Make it an offence for any person or organisation to falsely claim that they own the copyright to a work, make unjustified threats of an infringement action, or set up business models based on infringements by not fully disclosing that works are in copyright;
5. Introducing an exception permitting libraries, archives and museums to undertake mass digitisation of out-of-commerce works (including orphan works) for non-commercial purposes and to communicate them to the public, without the need for a diligent search for each individual rights holder;

6. Introducing an exception, as has recently occurred in Germany, requiring publicly and charity-funded published research to be made available to the public free of charge in an Open Access online repository within a stated number of months following original publication;
7. Introducing an exception to the communication to the public right to permit research access to retracted and withdrawn works held in libraries and archives in digital formats that had previously been communicated to the public;
8. Introducing an exception for recording and communicating of broadcasts by educational establishments to students based elsewhere in the EU.

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

There may be a need for a broader fair use provision which is flexible in light of new technologies and would allow the creation of a level playing field in the areas of education and research between the EU and the US.

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.*

Built-in flexibility in the form of a fair use provision would be the best and quickest approach, although periodic reviews of the copyright *acquis* would be a preferred secondary option.

A study undertaken in 2007 and confirmed in 2010 in the “Fair Use in the US Economy” report by the Computer & Communications Industry Association (CCIA), assessed and quantified in financial terms the benefits deriving from the application of the “fair use” doctrine in the US⁴³. It identified certain economic sectors as “fair use industries” (industries where reliance on “fair use” is critical to their business) and analysed the contributions of these industries to the American economy, their potential to grow, the number of people they employed and other positive economic features.

The study found that:

1. Fair-use dependent industries combined grew faster than the economy as a whole between 2002 and 2007, rising 31% during this period and accounting for around 18% of the US economic growth. From 2002-2007, revenues grew from \$3.5 trillion to \$4.5 trillion.
2. In 2006, “fair use” related industry value added was \$2.2 trillion, one-sixth of the total gross domestic product (GDP) of the United States (where “value added” is defined in the

⁴³ <http://copyright4creativity.eu/2011/07/24/ccia-publishes-report-on-us-fair-use-economy/>

report as "...a firm's total output minus its purchases of intermediate inputs and is the best measurement of an industry's economic contribution to national GDP.").

3. Exports from companies that benefit from "fair use" grew by 41% between 2002 and 2007.
4. The industry contributes significantly to US employment. Indeed, the so called "fair-use economy": (i) employed nearly 11 million people in the 2002-2007 period, with a \$1.2 trillion payroll; (ii) accounted for a \$300 billion growth in the period considered, with the outcome that firms that benefit from "fair use" employed about one out of every eight US workers.

On the other hand, industries bound by copyright control with no "fair use" aspect contributed just \$1.3 trillion to the US economy.

These studies show that the US economy is becoming more knowledge-based and is increasingly dependent on information industries. In particular, the findings show that industries that depend on "fair use" exceptions make a large contribution to US productivity. Growth areas dependent on "fair use" include:

- o manufacturers of consumer devices that allow individual copying of copyrighted programming
- o educational institutions
- o software developers
- o Internet search and Web hosting providers.

This indicates that a flexible copyright regime, which includes appropriate exceptions, stimulates growth, creativity and innovation, in particular in the field of technology. The US "fair use" regime enables economic growth in its information industries. This would imply that unless the EU also adopts a similar flexible general 'fair use' exceptions framework, it will always play second fiddle to the US in one of the few remaining growth industries open to it.

The disadvantage of a fair use regime is that it opens the door for more uncertainty and litigation. Periodic reviews of the copyright *acquis* may be slow and dependent on the Parliament in charge. There are advantages and disadvantages to all approaches, but flexibility is necessary to ensure the proper functionality of the copyright regime.

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

See the comments made in Q21 for an explanation of why the inconsistency of exceptions between member states causes problems. These inconsistencies would be removed if all EU Member States had to implement all the exceptions as a mandatory minimum norm. This would preserve their autonomy but ensure that market transactions could occur both for non-commercial and commercial purposes.

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?)

This should be addressed by the laws of the EU Member State which is supplying the service or content; the laws of the supplying country should apply.

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 archiving⁴⁴ and enable on-site consultation of the works and other subject matter in the collections of such institutions⁴⁵. The public lending (under an exception or limitation) by these establishments of physical copies of works and other subject matter is governed by the Rental and Lending Directive⁴⁶.

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.

UK: Cultural Heritage Sector: copying for preservation purposes (including format-shifting).

A public sector initiative to harvest websites for preservation purposes encountered repeated problems with third party copyright material displayed on the websites. The archive had to discover whether the government departments that created the websites had obtained licences

⁴⁴ Article 5(2)c of Directive 2001/29.

⁴⁵ Article 5(3)n of Directive 2001/29.

⁴⁶ Article 5 of Directive 2006/115/EC.

that covered archiving. In many cases, they had not. The archive then had to try to contact the rights owners for permission; often, there was no response from the rightsholder (in which case the material was copied but kept in a dark archive), or permission was refused (so the third party material had to be deleted).

Archivists and librarians in the UK struggle with the preservation exception because even though they are primarily havens for research and learning, they cannot guarantee that the items will not be used at some stage for direct or indirect commercial advantage. Archives in particular are reliant on commercial transactions with companies wishing to use archival material on merchandise such as crockery, and if an original item had been copied in order to preserve it, that copy may be used as the basis for the commercial gain.

The preservation exception is very limited in its use within the UK as a result of the language; the term “indirect commercial advantage” in Article 5.2(c) of the Information Society Directive is too broad and covers too wide an area for this exception to be of much use. Preservation is fundamental to the mission of the cultural sector, and all cultural heritage institutions (as well as a significant proportion of private individuals) already copy to preserve because the risks of NOT copying for preservation far outweigh the risk of abiding by current legislation. There is no evidence that this type of copying has been economically disadvantageous to rightsholders.

- NO
- NO OPINION

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

The cultural heritage sector should be permitted to make copies of works in their collections for preservation purposes regardless of whether they are commercial or non-commercial organisations. Preservation of copyright works is a core activity of the mission of the cultural heritage sector and should be an essential part of EU policy; too many works have already been lost as a result of failure to preserve or back-up. The EU must clarify the scope of the existing EU legislation and broaden the existing exception to allow institutions across the EU to reproduce all types of copyright works in their collection, otherwise archives and special collections risk losing large amounts of audio-visual material without having the lawful ability to copy from one medium to another to keep up with changes in technology. Waiting until copyright expires also dramatically increases the cost of preservation as the expertise, techniques and hardware required become rarer and rarer.

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?*

See the comments in Q28 and Q29

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?

[a: institutional user from UK Higher Education library]: No specific problems have been experienced because we do not tend to deal with the actual rights holders of e-Books or e-Journals articles. Our contractual licences are either with publishers, content providers or intermediary bodies such as Jisc or Eduserv. These require little or no negotiation in terms of rights access as the contracts are written up with the Higher Education Institution in mind. The only grey area is around what constitutes an 'affiliate institution'. We are currently looking into extending our licences in one or two cases to cover these since there are a few smaller institutions that have fairly informal agreements with some of our colleges around use of resources.

More broadly, having to negotiate agreements with rightsholders can lead to a large variety of differing contracts, meaning that an activity which is permitted by one rightsholder is not permitted by another. This can create closed communities and end up stifling research. National libraries in the UK do not make their databases available to users to consult online because they cannot negotiate the appropriate permissions from rightsholders. Yet users expect to be able to access and use databases nowadays from wherever they are. The view of the UK government is that authors can be rewarded for e-loans made on the library premises but not for remote loans. Making a proper, online service available to users will be difficult under current legislation and policy, both nationally and at an EU level, so change is needed to ensure appropriate availability of works for patrons.

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

Changes in legislation are needed so that libraries across the EU are always permitted to allow off-site access for any patron to any materials which it owns or has a licence for, and that any contractual term that purports to restrict this ability shall be deemed null and void.

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?

See comment in Q33. The conditions should be that the services should be provided to registered users via the Internet.

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

[a: a UK Higher Education library] No. All our e-resources are available online to all our current students and staff, regardless of where they are in the world. The only exception is BoB (Box of Broadcasts) which uses an IP geo-blocking mechanism to bar access to off-air recordings from outside of the UK. This is due to the restrictions of the Educational Recording Agency licence. In order to strengthen this, we also have to use an additional eduperson attribute in our Shibboleth set-up which guarantees that our users are registered at the university.

Public libraries: There are key differences in the way scholarly publishers and trade publishers operate and, as a result, they take different approaches to digital sales and digital lending. As the primary market for scholarly publishing is academic libraries, and public libraries purchase mainly trade books, some of the challenges faced by the two sectors are fundamentally different. Digital distribution of scholarly publications to academic libraries is long standing and there are established protocols on the use of the content. In contrast, the market demand for trade e-books is a recent development directly tied to the explosion in e-reader sales in 2010. Some trade publishers view library availability of e-books as a direct

threat to their economic interest and are withholding sales. They argue that, if people can borrow an e-book, why would they buy one? Piracy of popular titles is also a concern.

As a consequence of the legal context and uncertainty over whether the principle of EU exhaustion of the distribution right that applies in the case of the distribution of physical copies can also be applied in the case of e-books, many of the practices and policies that were under the exclusive control of the library are now a matter of negotiation with publishers and/or distributors. For the first time the ability to acquire commercially published books for library collections is constrained. The supplier decides what is in a subscription package. The result is that the library may not be able to present to its users the very best literature or the most specialized literature on a subject.

The right to interlibrary loan an e-book also requires both negotiated licence conditions and a technical capability that many public libraries do not have access to.

Research conducted in February 2013 by Shelf Free, an independent group set up and led by librarians to raise awareness of the opportunities and issues around e-books in public libraries, found that 85% of e-books were not available to public libraries. Out of the top 50 most borrowed adult fiction books of 2012, only 7 were available for public libraries to buy as e-books – and even then it depended on which supplier the library service was signed up to. With one supplier, only two titles were available.

In November 2013, Surrey libraries submitted evidence to EBLIDA of the difficulties public libraries are having getting licences for e-content from some publishers and the excessive terms and conditions that are being imposed on any sales:

Libraries have difficulty in getting e- content from some Publishers.

- 1) Top publishers such as Macmillan, Penguin and Simon and Schuster will not make titles available for the UK market.
- 2) Even publishers such as Random House who do offer e-books through Surrey Libraries' supplier withhold the front list titles.
- 3) From the Bookseller official top 50 ranking for eBooks in August 2013, only six were available for purchase and five of these were from the same author and were published in 2012.
- 4) Popular titles such as Dan Brown's Inferno are available in the US but not in e-book format in the UK (just e-Audio).

Excessive Terms and Conditions

- 1) Most licence agreements are one user one copy (although Overdrive, Surrey's supplier, does offer simultaneous access and metered access titles).
- 2) HarperCollins metered access only allows 26 checkouts. This is limiting and not good value for money. Titles are slightly cheaper, but can still be expensive for public libraries who have small stock budgets, given more copies may need to be purchased for the more popular titles.
- 3) Titles are expensive. New and popular titles that are available are usually around £42.50.

Given this cost you cannot always buy the required number to satisfy user demand. Some titles are available to buy from the bookseller for as little as 99p.

For example: Some vendors able to mark down titles such as Khaled Hosseini's "And The Mountains Echoed" to 99p, Nook "Hot Summer Reads" and Amazon matched the price. The same title through OverDrive cost £42.50 to buy.

4) There are some simultaneous access plans offered, however the ones available at the moment do not appear to be good value for money. Whilst they give unlimited access, many of them are not titles that might get excessive demand. They also usually restrict you to 25 titles and some can be around £2,000, which is not cost effective. Libraries like to supply a breadth of titles, so with this amount of money and with limited budgets, often more one user, one copy titles are purchased instead.

NO

NO OPINION

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

By creating an exception allowing libraries to purchase e-books for lending virtually through remote downloads or by streaming. It is important that libraries' collection building policies are consistent and decided by the librarians themselves, not by publishers and vendors, in the digital world just as it is in the analogue world.

Secondly, the EU should confirm that the principle of exhaustion applies to sales of all digital materials as indicated in the Court of Justice of the European Union's *UsedSoft* ruling. This would create more legal certainty around sale and loan of digital materials.

Finally, as the Public Lending Right applies to physical lending of books and materials, so it should also apply to the digital lending of copyright works by EU public libraries to ensure that authors and creators are rewarded for the use of their works.

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?

[UK public libraries]: Within the conceptual system of copyright legislation, lending constitutes a subgroup under the category of "distribution". The rightsholder has exclusive control over whether to publish or not, but after the first sale the distribution right is exhausted. Once exhausted, the rightsholder cannot control subsequent lending or re-sale of the physical object, which includes printed books. As a consequence, the library decides in accordance with its collection building policy what books to buy and use for lending. The library can keep these books indefinitely or sell/ give them away. Publishers and some legal scholars, in their interpretation of copyright law, argue that e-lending is a service, whereby content is "communicated to the public", but the exhaustion doctrine does not apply to services. As a result the library can only acquire an e-book by entering into a licence agreement with the rightsholders and the rightsholders are free to decide whether they want to give access to a specific work, and to decide on the terms for such access. The library cannot loan e-books without authorisation and e-books cannot be sold or given away. In addition, public library e-books cannot be downloaded onto the popular Kindle e-reader in the UK at present because Amazon, who own the Kindle, will not allow it. These challenges are making it difficult for public libraries to manage digital collections and are severely limiting their ability to provide a wide range of e-books, to mirror what they do with printed books. The UK and Ireland have recognised that this is a problem and have acknowledged that work needs to be done to ensure that contracts do not override exceptions to copyright.

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?

There is little difference these days between 'on-premises consultation' and 'off-premises consultation'. There may still be a few more hindrances to effective communication online, compared to face-to-face, but the medium through which consultation takes place should not affect the help or advice imparted to the user.

UK Higher Education library: Problematic differences between traditional lending and e-lending centre around access (or lack of access) to material. The advantages of electronic over print in terms of 24/7 access are obvious and well-documented, but when things go wrong, such as authentication issues (user accounts), hosted content server issues, network issues, etc., then the attractiveness of being able to hold a physical book or journal in the patron's hands dramatically increases. However, it is frustrating for a user to spend time, money and effort getting to a physical library during opening hours, only to discover that the physical book or journal that they wanted cannot be found on the shelves, or has been defaced or damaged.

UK Public libraries: Through traditional activities such as on-premises consultation or public lending and activities such as off-premises consultation and e-lending, public libraries promote reading and learning, thereby contributing to key policy objectives, such as the creation of literate and articulate individuals and communities that can better support themselves.

Remote access is integral to the concept of e-lending and is essential if public libraries are to continue to be an integral part of a networked society. There is substantial demand for remote downloading, especially in the evenings when many public libraries are closed. However not all supply models allow for remote downloading in addition to on-site access. In the digital age library users expect nothing less. On-site only e-lending is overly restrictive, runs counter to social inclusion policies, and will have a detrimental effect on library membership and therefore the public library service, threatening its very existence. An "Independent Review of E-Lending in Public Libraries in England", commissioned by the UK Government and written by William Sieghart, recommended in March 2013 that public libraries should be able to offer remote e-Lending service to their readers. This recommendation was accepted by the UK government.

As stated above, publishers are concerned that, if people can borrow e-books, especially remotely, they will not buy them. However, research has found that libraries enhance rather than damage sales and are important customers for publishers. In 2012 The Pew Research Centre found that "the majority of readers of e-books (61%) prefer to purchase their own copies rather than borrow them". Research by the Centre also shows that libraries and librarians are a prominent source (21%) for owners of e-reading devices to get recommendations for reading materials⁴⁷. Libraries are ideally placed to showcase a wide range of publishers' output. A 2011 study by Library Journal and Bowker PubTrack Consumer reports that 50% of all library users in the USA report purchasing books by an author they were introduced to in the library⁴⁸. OverDrive reported that, during March 2012, 5.02 million visitors viewed 146 million pages over 12.6 million visits to OverDrive-hosted

⁴⁷ Pew Research Center's Internet & American Life Project, April 2012, The rise of e-reading

<http://tinyurl.com/9qgskwa>

⁴⁸ Andrew Albanese, 2011. Survey Says Library Users Are Your Best Customers <http://tinyurl.com/3nebvb2>

digital catalogues. Visitors experienced more than 630 million digital book cover images while browsing⁴⁹. Following a recommendation made by the Sieghart Independent Review of E-Lending in Public Libraries in England, a number of pilots have been set up in English public libraries to test business models and user behaviours to provide more evidence of the impact of e-lending on publishers' business models.

4. Mass digitisation

The term "mass digitisation" is normally used to refer to efforts by institutions such as libraries and archives to digitise (e.g. scan) the entire content or part of their collections with an objective to preserve these collections and, normally, to make them available to the public. Examples are efforts by libraries to digitise novels from the early part of the 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 other⁵⁰. Provided the required funding is ensured (digitisation projects are extremely expensive), the result of this MoU should be that books that are currently to be found only in the archives of, for instance, libraries will be digitised and made available online to everyone. The MoU is based on voluntary licences (granted by Collective Management Organisations on the basis of the mandates they receive from authors and publishers). Some Member States may need to enact legislation to ensure the largest possible effect of such licences (e.g. by establishing in legislation a presumption of representation of a collecting society or the recognition of an "extended effect" to the licences granted)⁵¹.

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

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

.....

.....

NO – Please explain

The 2011 Memorandum of Understanding is too limited to be of any assistance to cultural heritage organisations wishing to undertake mass digitisation of copyright works. A Memorandum of Understanding cannot be enforced and is not the appropriate vehicle for

⁴⁹ OverDrive, March 2012. Library Media Network eBook Report: Summary of Select Traffic and User Behavior Statistics, p2

⁵⁰ More information about the MoU can be found at: http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm .

⁵¹ 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 xx^e siècle) foresees collective management, unless the author or publisher in question opposes such management. The German act (Gesetz zur Nutzung verwaister und vergriffener Werke und einer weiteren Änderung des Urheberrechtsgesetzes vom 1. Oktober 2013) contains a legal presumption of representation by a collecting society in relation to works whose rightsholders are not members of the collecting society.

setting mandatory minimum norms across the EU, as demonstrated by the fact that only two countries have acted on it to date. Additionally, no Memorandum of Understanding will ever be of any use for archives, since there are no collecting societies for the bulk of archival materials (e.g. unpublished literary works, documentary photographs, and oral sound recordings).

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

We need exceptions that combine the mandatory minimum norms alongside extended collective licensing schemes. Much material (including orphan works) held in cultural heritage organisations such as libraries and archives was never commercially produced. This includes a large quantity of audio-visual material where performers involved never had a commercial purpose in mind.

NO – Please explain

NO OPINION

B. Teaching

Directive 2001/29/EC⁵² 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

It is difficult to pinpoint specific problems, seeing as many teachers in the UK use images to illustrate their presentations without knowing whether they are infringing copyright. However, academics in the Arts and Humanities subjects often visit European archives and are allowed to take copies of works for their own personal study as a result of licences given by the archives. When they return to the UK, they want to prepare lectures to show students these items and further to make the slides available to their students via a secure network. At

⁵² Article 5(3)a of Directive 2001/29.

the moment, the licence restricts them from doing these activities, limiting the learning and sharing of information in these subjects.

[UK Higher Education institution]: There is currently a discrepancy between the ‘on premises’ acts of teaching and the same acts but in a ‘virtual’ environment. For example, film clips may be shown to students in class but may not be made available to a class of the same students learning overseas in the EU via the secure network of the Virtual Learning Environment (VLE). One lecturer recently wanted to make a selection of short clips of feature films available for viewing over the VLE to show students based across EU borders examples of good and bad teaching styles and methods. However, under UK copyright law this type of use is not covered under an exception, and it was also not possible to clear the rights in these films for this type of use (the films ranged from Hollywood blockbusters to obscure Iranian films). There was also no known collecting society through which a blanket licence for this activity could be purchased. If all EU Member States implemented the exceptions as mandatory minimum norms, this activity could have been done and ensured that students in the virtual class were able to view the same material as students in the actual class on the premises.

All Higher Education institutions in the UK have students studying in many different parts of the world. It is reported that 12% of students (approximately 72,000) taking a degree outside the UK are in the EU⁵³. The University of Kent has campuses and centres in the EU at Canterbury, Medway, Brussels, Paris, Athens and Rome. The University of Central Lancashire has established a campus in Cyprus with taught subjects of business and management, law, computing and mathematics. Cypriots traditionally study in Greece, where approximately 10% of university places are reserved for Cypriots, and in the UK. According to HESA statistics, 2.8% of non-UK students at UK higher education institutions in 2009-10 were from Cyprus. It is therefore vital that teaching becomes borderless, enabling Higher Education institutions to share resources via a secure network with students overseas. It is unfair to treat students who choose to study in the EU any differently to students who study in the UK, and at present copyright law is creating restrictive boundaries which stifle learning and development and take precious time away from the academics and administrators who are trying to secure necessary permissions.

In most cases, time is too short to think about copyright or for getting the necessary permissions; the focus is on teaching the subject in the most stimulating and visually appealing way possible. Teachers should have the freedom to include material in their lessons/presentations with minimal or no formality, because it is for the greater public good. Licensing the use is not the solution, because usually the rights organisations want a detailed list of everything that has been used, to whom and when, and this is not practical.

As online open courses (such as Massive Open Online Courses) continue to rapidly increase, a teaching exception purely for face-to-face teaching is becoming less useful. Currently course co-ordinators must rely on licensing rather than exceptions when creating MOOCs, yet it could be argued that as the courses are online for a matter of weeks, they are purely a teaching and learning resource and should therefore benefit from an exception. The US model has succeeded because of the legislative provision of fair use, whereas in the EU it is more difficult if not impossible to create an online course based on legislative provision alone. The EU should set mandatory minimum norms across the EU and needs appropriate public policy space to do this, especially as accessibility through licensing can be removed with little or no warning.

⁵³ Report by the Observatory on Borderless Higher Education <http://www.obhe.ac.uk/>

- NO
- NO OPINION

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

A mandatory minimum norm across the EU for the use of any copyright material for illustration in teaching, which cannot be overridden by contract. At the moment, the piecemeal approach means that the UK does not currently have this exception implemented, resulting in potential infringement by teachers on a daily basis. Yet it is a requirement of the quality assurance agencies such as Ofsted that lessons are appealing and stimulating, ensuring that all children with all learning styles are included and can learn. Copyright law is failing teachers and needs to be amended.

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

There are resources that can be purchased on subscription, and there are licences, which can be purchased from collecting societies, or teachers can use works licensed under Creative Commons licences. None of these is totally satisfactory: subscription resources often are not exactly what teachers require for particular lessons, collecting society licences carry too heavy an administrative reporting burden, and CC-licensed works are not always high quality enough, or diverse enough for the specific subject matter that teachers need. An exception is the only way for teachers to use the works they need.

The discrepancy across the EU with regards to this exception is staggering. In some Member States, educational uses require a licence (e.g. universities in Spain pay collecting societies a flat fee of 5 euro per student to allow reproduction and online uses of works for teaching purposes). In France, each time a teacher wishes to use a work for the purpose of illustration of teaching, the work and the teacher's educational institution are checked to see whether they are covered by the agreement. Such use must be then registered and reported. Collective licensing schemes operate in other countries such as Denmark and Finland. A mandatory minimum exception for teaching must be established across all Member States to ensure consistency and provide the ability for teachers and lecturers to use the material they need without having to check, pay or register use.

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*

Mandatory minimum norms for copyright exceptions must be introduced throughout the EU, allowing Member States the flexibility to widen exceptions as they see fit. These exceptions must not be overridden by contracts or technical protection measures and must cover the use of any copyright material for illustration in all types of face to face teaching.

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

See answer to Q44 and Q45.

C. Research

Directive 2001/29/EC⁵⁴ enables Member States to choose whether to implement in their national laws a limitation for the purpose of non-commercial scientific research. The open

⁵⁴ Article 5(3)a of Directive 2001/29.

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

The difficulty here is the language of the Information Society Directive. It should be made clearer that “scientific research” includes research in the arts and humanities. The capture of information has increasingly become more varied and copyright law needs to reflect this to allow students and academics a greater degree of flexibility when putting together their research. Currently, students and staff researching and accessing audio-visual materials are limited by premises (i.e. they may not take away a copy to work with in their own study environment), which means that in order to continue their research, they may have to return to specialist archives and libraries several times. Many researchers are publicly funded and have limited travel budgets. Online access would transform this situation and this would be particularly helpful to citizens in the EU’s poorest countries.

Furthermore, all publishers require academics to clear third party copyright material included in their journal articles or monographs. Academics are encouraged by some rightsholders to go overboard on rights clearances for very small amounts of third party material, as it takes experience to recognise what material requires clearance and what is covered under a permitted act. For some, the only option is to remove all third party material, particularly where permission has been refused, have been ignored, or rights clearances take too long; yet academics and researchers need to be able to show their knowledge of other research in their area and give credibility to their own work. This can contribute to a chilling effect; people self-censor themselves for fear of being unable to cope with complicated rights clearances. Acquiring permissions can also be expensive and not all researchers will have a grant to fund this activity.

Academics and students often want to present their research at conferences, or publish it online via an institutional repository. Rights clearance for extracts from films, sound recordings and broadcasts is often impossible, and this places researchers at a disadvantage as they cannot communicate the full details of their research. Additionally, many academic researchers now create short films to showcase their research (particularly in science). The launch of new peer-reviewed scholarly journals that encourage researchers to include film and video presentations as part of their submissions will exacerbate the problem.

NO

NO OPINION

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

Main problems concern the lack of access to scientific material due to prohibitive licensing and/or technological protection measures (TPMs). They could best be solved by promoting and implementing open access principles. Perhaps in some cases collective licensing schemes could be used in order to encourage publishers to make their publications available for

research activities. Such schemes (where a fee would be due) should cover commercial as well as non-commercial research.

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

In the UK, the national copyright law includes a defence of fair dealing for non-commercial research or private study. At present, this defence is restricted to certain types of works, and is therefore not as useful as it should be. However, legislative changes are expected to come into force in 2014 to extend this defence to all types of copyright work⁵⁵. Another mechanism is the licensing of use of works for the purposes of research and study; academic libraries in particular pay substantial subscription fees so that students and academics can access journal articles, but the terms and conditions may only permit the download of one single copy for the purposes of personal use. Licences are costly and restrictive, and as a result of the continual increases in price, libraries are not able to subscribe to the full breadth of journals and other e-resources that they would like. To illustrate this, in the UK, university expenditure on electronic resources (including e-only journals, print and electronic journals, databases, e-books and other digital documents) was £198,071,000 in 2011-12 (source: SCONUL). This is over twice as much as universities pay for hard copy resources, and is a figure which is set to rise given the increasing ways in which publishers bundle and sell their content. It is becoming unsustainable for universities which, with dwindling government funds and fluctuating student numbers, must find other ways to continue to fund the library in the face of a number of changes and challenges within the Higher Education sector.

D. Disabilities

Directive 2001/29/EC⁵⁶ 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)⁵⁷.

The Marrakesh Treaty⁵⁸ has been adopted to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled. The Treaty creates a mandatory exception to copyright that allows organisations for the blind to produce, distribute and make available accessible format copies to visually impaired persons without the authorisation of the rightsholders. The EU and its Member States have started work to sign and ratify the Treaty. This may require the adoption of certain provisions at EU level (e.g. to ensure the possibility to exchange accessible format copies across borders).

⁵⁵ <http://www.ipo.gov.uk/types/hargreaves.htm>

⁵⁶ Article 5 (3)b of Directive 2001/29.

⁵⁷ 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/>).

⁵⁸ Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities, Marrakesh, June 17 to 28 2013.

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

[UK libraries]: The biggest problem is access to accessible formats for persons with disabilities. This is often due to technical protection measures in the works which do not always work with software that the person with disabilities has available to them.

NO

NO OPINION

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

We would urge the EU to quickly sign up to the Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities and then ratify it which would bring about its implementation in all Member States.

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

The market has failed many persons with disabilities in that costs for accessible formats greatly restrict access. Neither libraries nor individuals can always afford these, and licences (as well as restrictive national exceptions for persons with disabilities) often prevent libraries and individuals from copying or re-using the works to benefit other disabled persons.

E. Text and data mining

Text and data mining/content mining/data analytics⁵⁹ 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

⁵⁹ For the purpose of the present document, the term “text and data mining” will be used.

such authorisation can be implied (e.g. content accessible to general public without restrictions on the internet, open access).

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

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results. At the same time, practical solutions to facilitate text and data mining of subscription-based scientific content were presented by publishers as an outcome of "Licences for Europe"⁶⁰. 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

[UK service provider]: A national library was involved in a project to archive UK web sites on a permissions basis from the rightsholders of websites. Having analysed the time it took for the licensing department to actively negotiate full contracts (as opposed to simpler permissions), an average 38 contracts successfully negotiated revealed a figure of around 475 days (circa 16 months) taken to negotiate from start to signature. This figure by definition does not include contracts not successfully negotiated. Given the thousands of publishers that exist globally for the approximate 645 million websites (source: Netcraft) it is not practical to negotiate access to this material on a case by case basis in order to mine it for text or factual data.

It is also difficult to ensure that one licence is interoperable with another given that all contracts are different. Knowledge and research is undertaken across borders and across a wide range of materials and sources, therefore differences in publishers' subjective views as

⁶⁰ 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.

to what constitutes ‘text and data mining’ will inhibit innovation and progress within research. Researchers should be able to access and use data more quickly in the digital age owing to the technology that is available to enable them to do this. Finally, data mining covers the extraction of facts and data which may not be protected by copyright but may be protected by database right; this is also an obstacle to end users when trying to data mine.

NO – Please explain

.....
.....

NO OPINION

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

There are many problems for researchers and libraries around text and data mining in terms of the practicalities of it being a licensed activity. But there are questions over whether this is an activity which falls under copyright law in the first place. Copyright holders have authorised access to and communication of their works to libraries with the resultant knowledge that users of libraries will have access to the works. To what extent does text and data mining infringe or activate the exclusive rights within copyright? If it does, the authorisation of the rights holders for access to their works is consistent with the concept of not making works available to a “new public” as discussed by the Court of Justice in case C-466/12 Svensson. If it is determined that text and data mining does fall under copyright, a specific exception for text and data mining which applies to both commercial and non-commercial purposes should be introduced to include a prohibition on technical protection measures and contracts overriding it. This would provide a more level playing field for researchers. Both the USA and Japan have legislative mechanisms which enable text and data mining; this puts the EU at a major competitive disadvantage. Furthermore, the USA has recently passed a Bill on open access which requires all publically funded research to be made available in formats and under terms which specifically permit text and data mining⁶¹. This type of legislative solution would be welcome in the EU. The territoriality of copyright laws and plethora of different licensing agreements makes it very difficult for cross-border text and data mining to take place across different countries and international library collections.

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?*

See response to Q54.

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

We do not think that any solution other than a legislative one is feasible, provided that text and data mining is subject to copyright in the first place.

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

⁶¹ US Omnibus Appropriations Bill 2014 <http://www.sparc.arl.org/news/omnibus-appropriations-bill-codifies-white-house-directive>

The Database Directive could potentially be a barrier to the use of text or data mining methods. It has failed to protect the EU database community from competition from the US and is of little use.

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 blogs⁶². User-generated content (UGC) can thus cover the modification of pre-existing works even if the newly-generated/“uploaded” work does not necessarily require a creative effort and results from merely adding, subtracting or associating some pre-existing content with other pre-existing content. This kind of activity is not “new” as such. However, the development of social networking and social media sites that enable users to share content widely has vastly changed the scale of such activities and increased the potential economic impact for those holding rights in the pre-existing works. Re-use is no longer the preserve of a technically and artistically adept elite. With the possibilities offered by the new technologies, re-use is open to all, at no cost. This in turn raises questions with regard to fundamental rights such the freedom of expression and the right to property.

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results or even the definition of UGC. Nevertheless, a wide range of views were presented as to the best way to respond to this phenomenon. One view was to say that a new exception is needed to cover UGC, in particular non-commercial activities by individuals such as combining existing musical works with videos, sequences of photos, etc. Another view was that no legislative change is needed: UGC is flourishing, and licensing schemes are increasingly available (licence schemes concluded between rightholders and platforms as well as micro-licences concluded between rightholders and the users generating the content. In any event, practical solutions to ease user-generated content and facilitate micro-licensing for small users were pledged by rightholders across different sectors as a result of the “Licences for Europe” discussions⁶³.

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

⁶² 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.

⁶³ See the document “Licences for Europe – ten pledges to bring more content online”:

http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf.

NO

NO OPINION

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

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

YES – Please explain

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NO – Please explain

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NO OPINION

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?*

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

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

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 photocopying⁶⁴. 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 fees⁶⁵⁶⁶.

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 exceptions⁶⁷ in the digital environment?

YES – Please explain

The act of reproduction should occur once only, when a digital file is purchased and transferred to the end user's media. The fact that individual users back up and transfer digital files for preservation as much as for practical use on different forms of media should not mean that the reproduction right as described under Article 5.2(b) should trigger the application (if applicable) of private copying levies. The principle of exhaustion should apply to digital purchases as it does to physical ones; this will prevent instances of double payment. The EU should clarify this to ensure that the scope is not so broad as to cover every single digital reproduction once a digital file has been purchased.

NO – Please explain

NO OPINION

⁶⁴ Article 5. 2(a) and (b) of Directive 2001/29.

⁶⁵ Communication "Unleashing the Potential of Cloud Computing in Europe", COM(2012) 529 final.

⁶⁶ 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.

⁶⁷ Art. 5.2(a) and 5.2(b) of Directive 2001/29/EC.

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?⁶⁸

YES – Please explain

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NO – Please explain

No, because any harm to the rights holder is minimal; it is being done for private purposes, and the service is already licensed, i.e., payment is already being made. Users should not be penalised for doing that which is prudent and a natural part of the digital environment, for example, backing up their private collections of material. Different regimes mean that there cannot be a ‘one-size-fits-all’ approach to this issue.

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?

The biggest problem with levies on online services is that not all users will be using online services for the storage/back up of copyright material. It would be unfair to force a researcher to pay levies for copyright works when the only reason they need to use the service is to store and back up their own copyright works. This makes an unfair balance in the regime and penalises copyright owners storing their own works.

67. Would you see an added value in making levies visible on the invoices for products subject to levies?⁶⁹

YES – Please explain

In those countries where levies apply, it would be useful because people who did not want to be subject to levies could decide whether or not they choose to pay them. A corporate entity would also be able to challenge being charged for a levy by mistake.

NO – Please explain

NO OPINION

Diverging national systems levy different products and apply different tariffs. This results in obstacles to the free circulation of goods and services in the Single Market. At the same time, many Member States continue to allow the indiscriminate application of private copying levies to all transactions irrespective of the person to whom the product subject to a levy is sold (e.g. private person or business). In that context, not all Member States have ex ante

⁶⁸ This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies

⁶⁹ This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies.

exemption and/or ex post reimbursement schemes which could remedy these situations and reduce the number of undue payments⁷⁰.

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.).*

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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?*

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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?*

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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

⁷⁰ This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies.

authors or performers to producers⁷¹ or determining who the owner of the rights is when the work or other subject matter is created in the context of an employment contract⁷². 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?

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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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NO OPINION

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

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VI. Respect for rights

Directive 2004/48/EE⁷³ provides for a harmonised framework for the civil enforcement of intellectual property rights, including copyright and related rights. The Commission has

⁷¹ See e.g. Directive 92/100/EEC, Art.2(4)-(7).

⁷² See e.g. Art. 2.3. of Directive 2009/24/EC, Art. 4 of Directive 96/9/EC.

⁷³ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

consulted broadly on this text⁷⁴. 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 purpose⁷⁵. One means to do this could be to clarify the role of intermediaries in the IP infrastructure⁷⁶. 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

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?*

We believe any legislation dealing with intermediaries on the Internet has to be extremely well thought through and defined appropriately. In the UK, poor drafting of some legislation meant that organisations like schools, archives, libraries and universities were essentially defined as intermediaries in the same way as internet service providers. We believe it very important that organisation with a public policy function such as a library or educational establishment should NOT be treated as an intermediary of any description and that protection is provided for such bodies from secondary liability due to copyright infringement by their patrons.

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

⁷⁴ You will find more information on the following website:

http://ec.europa.eu/internal_market/ipenforcement/directive/index_en.htm

⁷⁵ For example when the infringing content is offered on a website which gets advertising revenues that depend on the volume of traffic.

⁷⁶ 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.

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NO – Please explain

Suspicion continues to grow around private copying by citizens which can lead to invasions of privacy by companies whose business model is to ‘troll’ for copyright infringement, causing distress to innocent citizens. This is coupled with the fact that many negotiations at a trade level (such as the Transatlantic Trade and Investment Partnership⁷⁷) are still being conducted in secret when they involve intellectual property issues and enforcement which impact on citizens’ liberties. There is a concern that the EU will concede various rights, protections and exceptions in order to advance trade negotiations.

NO OPINION

VII. A single EU Copyright Title

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

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

YES

NO

The EU should not attempt to introduce a single Title or a Regulation for copyright. As far as protection of copyright is concerned the mechanism of Directives serves well enough, however achieving a more even national treatment within the Single Market would be best achieved by the EU using Directives to establish a floor of minimum norms for copyright limitations and exceptions throughout the Single Market. This would ensure that Member States must implement limitations and exceptions at the same minimum level, but also ensures they retain their existing autonomy to offer additional exceptions or to expand the scope of exceptions at national level beyond the minimum as appropriate to their national needs.

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?*

See answer to Q78.

⁷⁷ <http://ec.europa.eu/trade/policy/in-focus/ttip/>

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.

As noted earlier, we believe that knowingly making false claims of copyright ownership, unjustified demands on third parties to take out licences when there is no evidence that they are infringing copyright, and unjustified threats of infringement should be made offences. This is the case for other forms of intellectual property such as registered trade marks and patents, and acts as a deterrent to this type of behaviour.

Currently, universities, public libraries and schools subscribe to large amounts of electronic content, via hundreds of contracts. It is NOT copyright that dictates how such content can be used in the digital world, but contracts.

Every contract has different terms and conditions that have to be complied with in order not to be in breach of the agreement. Just as it was not possible to have a separate agreement for every book on a shelf, it is not possible for the thousands of libraries across Europe to negotiate each contract to guarantee what their users can do with the large amounts of electronic content now available for purchase. Across the library sector, we do not have the resource or legal expertise required to do this.

Irrespective of the many varying terms of contracts, and the large number of contracts libraries have to negotiate, all libraries, students, researchers and citizens should have certainty around what they can always do with the electronic contents they have purchased or to which they have legal access.

Protection of the copyright exceptions from override by contract already exists in Irish, Portuguese and Belgian copyright law, and in proposals to change UK law. It is therefore essential that across Europe, people know that as a bare minimum they can apply the norms of copyright exceptions to lawfully accessible content. Without this, every librarian, student, researcher and citizen across Europe is expected to be an expert in contract law, and have read and understood all the terms and conditions for every eBook or e-database they access through a library.

Technical protection measures (TPMs) should also be addressed, particularly when they prevent libraries from making accessible copies available to persons with disabilities. The EU should permit the breaking of TPMs in certain circumstances; the fact that it is currently a criminal offence to do so is not prudent nor useful in the digital age when the making of an accessible copy from a print text could be done under an exception to copyright.