Public Consultation
on the review of the EU copyright rules

Contents

I. Introduction

A. Context of the consultation

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

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

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

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

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

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

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

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

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

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

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

B. How to submit replies to this questionnaire

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

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

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

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

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

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.

---

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

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

Please read our Privacy statement.

PLEASE IDENTIFY YOURSELF:

Name: The Center for Democracy and Technology (CDT)

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.

  57305017757-64

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

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

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

TYPE OF RESPONDENT (Please underline the appropriate):

- **End user/consumer** (e.g. internet user, reader, subscriber to music or audiovisual service, researcher, student**) OR Representative of end users/consumers**
- → for the purposes of this questionnaire normally referred to in questions as **"end users/consumers"**

- **Institutional user** (e.g. school, university, research centre, library, archive) **OR Representative of institutional users**
- → for the purposes of this questionnaire normally referred to in questions as **"institutional users"**

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

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

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

- **Intermediary/Distributor/Other service provider** (e.g. online music or audiovisual service, games platform, social media, search engine, ICT industry) **OR Representative of intermediaries/distributors/other service providers**
- → for the purposes of this questionnaire normally referred to in questions as **"service providers"**

- **Collective Management Organisation**

- **Public authority**

- **Member State**

- **Other** (Please explain):

- CDT is a non-profit organisation. CDT's mission is to conceptualize and implement public policies that will keep the Internet open, innovative, and free. CDT is committed to finding innovative, practical, and balanced solutions to the tough policy challenges facing the rapidly evolving Internet environment. We provide thought

leadership and advocacy to help shape the direction of both government policy and industry best practices. CDT has offices in Washington, DC, and San Francisco and representation in London and Brussels. Website: www.cdt.org

NB: We have focused our contribution on the following issues and questions:

Linking and browsing: Questions 11 and 12

Download to own: Question 14

Term of protection: Question 20

Limitations and exceptions: Questions 22, 24 and 25

Text and data mining: Question 55

Private copying and reprography: Questions 64 and 65

Respect for rights: Question 76

II. Rights and the functioning of the Single Market

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

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

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

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

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

Despite progress, there are continued problems with the cross-border provision of, and access to, services. These problems are most obvious to consumers wanting to access services that 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 – tem 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 term[15] to increase the cross-border availability of content services in the Single Market, while ensuring an adequate level of protection for right holders.

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

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

…….

…….

NO

NO OPINION

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

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

…….

…….

NO

NO OPINION

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

[Open question]

…….

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

…….

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

[Open question]

…….

…….

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

YES – Please explain by giving examples

…….

…….

NO

NO OPINION

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

YES – Please explain by giving examples

…….

…….

NO

NO OPINION

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

YES – Please explain

…….

…….

NO – Please explain

…….

…….

NO OPINION

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

[The definition of the rights involved in digital transmissions]

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

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

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

1. The act of "making available"

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

[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).

a certain Member State's public[22]. According to this approach the copyright-relevant act (which has to be licensed) occurs at least in those countries which are "targeted" by the online service provider. A service provider "targets" a group of customers residing in a specific country when it directs its activity to that group, e.g. via advertisement, promotions, a language or a currency specifically targeted at that group.

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

YES

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

……

……

NO OPINION

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

YES – Please explain how such potential effects could be addressed

……

……

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.

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

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

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

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")

…….

…….

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

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

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

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)

The provision of a hyperlink leading to copyrighted content should not be treated as "making available" or otherwise communicating that content to the public. A contrary rule, making the provision of hyperlinks subject to rightholder authorization, would severely damage the ability of the World Wide Web to continue to serve as a uniquely rich forum for free expression and the robust exchange of information.

The act of linking does not make content available – it merely informs users about content that is already available online. A link is best understood as a pointer or navigation tool. It adds no new copyrighted material to the body of what can be found online, just as maps or street signs add no new locations to the physical environment they help travelers to navigate. Indeed, the actual availability of the copyrighted content to which a link may point is entirely independent of the link: the content can remain available even if the link is removed, or the content can cease to be available (because the original poster has removed it) while the link pointing to the content's former location remains online.

[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.

Reflecting this reality, the party who is treated as making content "available to the public" within the meaning of Article 3 of Directive 2001/29/EC should be the one who uploads the content to an Internet-connected server that allows public access and responds to requests. The act of providing hyperlinks to content that has been uploaded by others should not be treated as requiring rightholder authorization.

A contrary legal approach, under which linking to content could be deemed to constitute making that content available to the public, would jeopardize the widespread practice of hyperlinking and ultimately the utility of the Web. People and entities link to websites and materials they judge to be useful, informative, funny, or otherwise noteworthy. But the linkers generally lack any ability to verify the copyright status of those websites or materials. They simply do not know whether the unaffiliated websites to which they link truly own or have acquired the rights to the content they feature. If linkers faced potential legal responsibility for the copyright transgressions of all the sites they linked to, then each decision to add a new link would carry with it a new area of legal exposure and risk. Websites, bloggers, and all other users of the Web would have a strong incentive to sharply curtail their linking.

That would greatly undermine the usefulness of the Web. Hyperlinks are central to the Web's nature; they are what enable users to navigate and discover a virtually endless universe of websites and content, based on what other people and entities have identified as relevant, noteworthy, interesting, or funny. Hyperlinks enable a rich form of free expression, giving depth and context to online commentary and debate. They also promote competition and diversity of expression, by enabling formerly little-known speakers or websites to "go viral" and become popular quickly. But if linking carried liability risk, few Internet users would be willing to take the risk of linking to any but the most trusted and well-known sites. Any legal rule that discourages the practice of hyperlinking would constrain the Web's ability to serve as a robust forum for free expression and competition.

As the Commission's Public Consultation questionnaire notes, however, EU law is not clear on this crucial legal point; Directive 2001/29/EC does not specify precisely what acts constitute "making available," and there are several cases relating to hyperlinking pending before the CJEU.

Moreover, some courts have suggested that if the provision of hyperlinks substantially and intentionally increases the size of the public accessing the copyrighted content, then the linking may constitute communication to the public. The problem with this line of reasoning is that hyperlinks always increase the audience of the content to which they link. Any link offered in a publicly read blog, website, or online news source has the effect of referring a new public to the linked content. Just as important, linkers can direct a new audience to online content only if the persons who uploaded the content have chosen to allow uncontrolled access to it. There are ample technical tools for limiting online access to authorized persons (such as paid subscribers). If content owners instead choose to upload content to publicly available websites with no form of access control, courts should not treat the linkers as having made the content available. And where other parties upload content to publicly available websites without authorization from the content owners, it is those parties who should be deemed to have violated the making available right.

Nor should the provision of embedded links be treated differently from regular hyperlinks. There is no reason why the precise manner in which linked content is displayed – on a separate website, or in a window on the website that provided the link – should have any bearing on the legal question of who made the content available. Providers of embedded links, just like providers of regular hyperlinks, generally have no way to assess the legal status of the online content to which they wish to link. Treating embedded linkers as the persons who

make the content available would sharply discourage embedded linking, which has become a significant communicative aspect of the online medium. The legal framework should not needlessly constrain the expressive options and features of online communication.

An appropriate, EU-wide legal rule would establish that the provision of hyperlinks to copyrighted content does not require rightholder authorization.

Such a rule need not excuse truly culpable behavior. For example, in cases where linking is deliberately aimed at promoting and profiting from large-scale infringement, it may be appropriate to consider some form of secondary liability – that is, liability for intentionally and systematically assisting or enabling infringement. But any such liability would need to be clearly premised on demonstrable bad intent, whereas the right of communicating or making available to the public does not depend on intent at all. The fact that there may be occasional instances in which linking activities may seem far from innocent is no justification for the legal framework to confuse the mere act of linking with the act of making content available in the first place.

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?

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)

The principle that temporary reproductions associated with viewing webpages should not require rightholder authorization is essential to the daily activities of Internet users everywhere.

Browsing the Web requires the temporary reproduction of text, images, and other content that websites make available. Because these reproductions are incidental byproducts of the technological process of viewing a website, they should fall squarely within the exception set forth in Article 5.1 of Directive 2001/29/EC.

Requiring rightholder authorization for website browsing would fundamentally disrupt the ability of Internet users to take advantage of the wealth of information that the Web offers. Internet users have no way to evaluate whether the websites they want to visit have lawfully acquired the rights to the content posted there. Thus, even if Internet users could assume that each website operator authorizes website visitors to make temporary reproductions of the content found there, users would always face the possibility that the mere act of visiting a website would make them liable for copyright infringement. All it would take would be the failure of a website (whether intentionally or not) to acquire the rights to an image or article it posts, and its visitors could be deemed to infringe the reproduction right.

This is not a tenable result. One of the great virtues of the Web is that it gives users wide latitude to sample and serendipitously explore information, opinions, and ideas from a nearly infinite range of sources. This freedom to read and research widely and casually cannot exist if every visit to every website exposes the reader to unknown legal responsibilities and risks. For their part, website operators, as well as bloggers and Internet speakers of all stripes, expect and hope that the material they post will be widely viewed. Speakers are not well

served by a legal regime that discourages Internet users from browsing widely. And where website operators do wish to limit their audience, they have ample technological tools for imposing restrictions such as paywalls and limiting access to authorized users. They do not need to rely on copyright law for this.

4. Download to own digital content

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

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

YES – Please explain by giving examples

…….

…….

NO

NO OPINION

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

Resale markets for digital content could generate significant benefits. There are also significant questions that would need to be worked out regarding their appropriate scope, operations, and safeguards against abuse. Providing a legal framework for the resale of previously purchased digital content would be useful and important, because it would enable innovators to begin the work of developing the systems and technologies that could facilitate and operationalize an appropriate digital resale market. Without a stable legal framework, companies are unlikely to invest in exploring "forward and delete" or other creative solutions, to make digital resale markets a workable reality.

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

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

To be clear, some of today's digital content distribution models do not lend themselves to resale. Where consumers buy access to large libraries of content – for example, via cloud-based subscription services such as Spotify or Netflix – the consumer may not acquire an ownership interest that is properly subject to resale. A legal framework may need to distinguish those scenarios where resale rights should apply from those where they should not.

But failing to provide any legal framework for digital resale would mean that, as commerce in copyrighted works increasingly goes all-digital, the substantial benefits of resale markets would be lost. That would be an unfortunate result. In the market for physical goods, online resale markets, far from being a minor economic phenomenon, have become a thriving and durable part of the consumer economy. For creative works in particular, resale markets offer a number of distinct benefits:

- They provide lower-priced options for consumers.
- They spur innovation in the marketplace. Exhaustion and the possibility of resale enables third parties to develop new distribution models (such as, for example, video rental) that generate new options for consumers and prompt rightholders to compete more effectively.
- They help preserve access and availability. If the original distributor ceases to distribute a work – due to commercial decisions, going out of business, or for any other reason – resale markets allow interested parties to find alternative sources for obtaining copies of the work. This function has flourished online thanks to new tools that make it practical to locate and obtain even obscure, rare, or far-flung copies of works.
- They help limit the amount of control rightholders can exercise over how downstream users engage with works, because they prevent rightholders from having privity of contract with all downstream users or purchasers. This means more freedom for users and more full enjoyment of copyrighted works. For example, rightholders cannot force e-book purchasers to agree to read chapters in a specific order, or prohibit purchasers of artworks from framing or mounting them as they see fit.
- They protect privacy by making it impossible for rightholders to track the identities of all consumers who have obtained copies of their works. The "right to read anonymously" is protected by the ability to obtain works via resale.
- They reduce consumer lock-in with respect to technology platforms. For example, users might have been more reluctant to upgrade to CDs if they were not allowed to resell their vinyl records and thus recoup some of their investment in earlier technology.

Developing a suitable legal framework could help encourage the innovation necessary to ensure that these various benefits are not sacrificed as content delivery goes digital.

…….

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

Registration is not often discussed in copyright in the EU as the existing international treaties in the area prohibit formalities as a condition for the protection and exercise of rights. However, this prohibition is not absolute[29]. Moreover a system of registration does not need to be made compulsory or constitute a precondition for the protection and exercise of rights.

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

With a longer term of protection and with the increased opportunities that digital technology provides for the use of content (including older works and works that otherwise would not have been disseminated), the advantages and disadvantages of a system of registration are increasingly being considered[30].

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

YES

NO

NO OPINION

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

[Open question]

……

……

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

[Open question]

……

……

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

[Open question]

……

……

D. How to improve the use and interoperability of identifiers

There are many private databases of works and other subject matter held by producers, collective management organisations, and institutions such as libraries, which are based to a greater or lesser extent on the use of (more or less) interoperable, internationally agreed 'identifiers'. Identifiers can be compared to a reference number embedded in a work, are specific to the sector in which they have been developed[31], and identify, variously, the work itself, the owner or the contributor to a work or other subject matter. There are notable examples of where industry is undertaking actions to improve the interoperability of such identifiers and databases. The Global Repertoire Database[32] should, once operational, provide

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

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

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

a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition[33] was established to develop building blocks for the expression and management of rights and licensing across all content and media types. It includes the development of a Rights Reference Model (RRM) – a comprehensive data model for all types of rights in all types of content. The UK Copyright Hub[34] is seeking to take such identification systems a step further, and to create a linked platform, enabling automated licensing across different sectors.

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

[Open question]

…….

…….

E. Term of protection – is it appropriate?

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

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

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

NO – Please explain if they should be longer or shorter

The phrasing of the question assumes that existing terms of protection are appropriate. It is worth recalling the objectives for which copyright protection terms were originally introduced. The goal was to create incentives for creative and intellectual production by granting the creator a temporary monopoly on the work and exclusive exploitation rights. When first introduced in the early 18th century, the copyright term was 14 years with option to renew. Although copyright protection involves considerations other than provision of economic incentives, it is also clear that protection terms should ideally be only long enough to provide an optimal level of incentives. Monopoly ownership involves cost to society as a whole, and the cost should not outweigh the benefits.

After a series of extensions, most of them retroactive, terms of protection in Europe and other parts of the world now exceed 70 years (+ life of the author).

[33] You will find more information about this initiative (funded in part by the European Commission) on the following website: www.linkedcontentcoalition.org.
[34] You will find more information about this initiative on the following website: http://www.copyrighthub.co.uk/.
[35] Berne Convention for the Protection of Literary and Artistic Works, http://www.wipo.int/treaties/en/ip/berne/.

As late as 2011 (http://ec.europa.eu/internal_market/copyright/term-protection/index_en.htm) the European Union adopted legislation to extend the term of protection for performers and sound recordings from 50 to 70 years. The extension was enacted retroactively.

The rationale and arguments for repeated term extensions have been carefully examined by researchers and academics. In 2006, the UK Government undertook an extensive and thorough review of copyright and IP legislation – known as the 'Gowers Review' (http://webarchive.nationalarchives.gov.uk/20130129110402/http://www.hm-treasury.gov.uk/d/pbr06_gowers_report_755.pdf). The conclusions from this review – and other economic analyses – are quite unambiguous and unequivocal. The long terms of protection in force in Europe today cannot be justified based on their potential to stimulate creative production, and they impose overall economic loss to European societies. A further review of IP legislation was completed by the UK Intellectual Property Office in 2011 (the Hargreaves Review, http://www.ipo.gov.uk/ipreview-finalreport.pdf) confirmed these conclusions.

The transition to the digital environment increases the potential negative impact of excessive terms of protection. New technologies are expanding the pool of creators, empowering creative output by citizens and entities outside the traditional media and entertainment industries. Digitization offers new flexibility to combine, incorporate, and interact with creative works in useful and entertaining ways. These trends mean that the opportunities for society to use and benefit from a robust public domain of works not protected by copyright are greater than ever before.

Overlong copyright terms unduly constrain the public domain without meaningfully increasing incentives to create new works, and thus represent poor public policy. On this basis it is clear that a review of European copyright legislation should under no circumstances include proposals to extend protection terms even further. On the contrary, there are powerful arguments for proposing a significant shortening of terms of protection. Some researchers have presented ideas and proposals for how such reform could be brought forward whilst respecting obligations under international treaties (http://www.cippm.org.uk/publications/Kretschmer-term-reversion.pdf). Such innovative approaches should be part of the European Commission's reflections.

III. Limitations and exceptions in the Single Market

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

Exceptions and limitations in the national and EU copyright laws have to respect international law[37]. In accordance with international obligations, the EU acquis requires that limitations and exceptions can only be applied in certain special cases which do not conflict with a normal

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

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

exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interest of the rightholders.

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

In addition, in the same manner that the definition of the rights is territorial (i.e. has an effect only within the territory of the Member State), the definition of the limitations and exceptions to the rights is territorial too (so an act that is covered by an exception in a Member State "A" may still require the authorisation of the rightholder once we move to the Member State "B")[40].

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

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

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

YES – Please explain by referring to specific cases

See answer to question 22.

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

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

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

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

The Internet is a borderless platform for communication that by its very nature continually raises novel questions relating to copyright. Communication on the Internet necessarily involves copying – on servers, router buffers, and individual computers, etc. Thus, services ranging from user-generated content sites to distance education systems to search engines can implicate copyright, even where their impact on creators' and rightholders' reputations and the market for their works is minimal. In the Internet environment, limitations and exceptions are therefore not insubstantial "extras" added onto copyright's framework of rights and incentives for largely extraneous, non-economic reasons; they are essential.

Because of how important exceptions can be, the harmonising of rights and licensing alone is not sufficient to facilitate the development of a single European market for Internet-based services and technologies. Where a particular service relies on one or more exceptions in order to operate, its ability to offer services across jurisdictions will be impeded by differences in the availability of exceptions from one Member State to the next. Promoting the growth of the European single market thus requires both rights and protections for rightholders and harmonised imitations and exceptions to those rights.

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

[Open question]

As discussed below, there is a need for a more flexible limitation or exception that can accommodate future technology innovations that cannot be anticipated today.

…….

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

Limitations and exceptions facilitate much more than criticism, teaching, and creative re-uses of works. They are also crucial to technological innovation and the development of Internet-based services in Europe. A flexible approach that creates space for new uses and technologies to improve accessibility of creative works is essential for spurring such development, identified as a flagship goal of the Europe 2020 Strategy in the Digital Agenda for Europe.

By definition, the currency of innovation is new ideas. On the Internet, where copying is commonplace and any new service can raise unpredictable questions related to the application of copyright, a lack of flexibility will be obstacle to innovation. No matter how comprehensive a static list of exceptions appears at the time it is written into law, there will be no way for legislators to predict all future uses and applications, especially in a sector that is developing and evolving so quickly. A static list of exceptions removes any incentive for entrepreneurs and developers to try anything that doesn't appear on the list. This is true even

of uses that pose no threat to the market for protected works, but which nonetheless implicate the strict letter of copyright law because they involve some measure of copying.

The US fair use doctrine is replete with examples of the benefits of a flexible approach. In a 1984 case observers have called "the legal foundation of the digital age," fair use's flexibility created the space for private non-commercial copying that allowed the VCR to remain on the market. The US growth in the technology sector over the past 30 years is attributable in no small part to this decision. In subsequent cases, the doctrine has explicitly enabled search engines and mass digitization and indexing projects. Without fair use's flexible approach to novel applications of technology, these innovations and countless others would not have taken hold in the US and succeeded to anywhere near the degree they have.

Some European courts, seeming to recognize the value in a flexible approach, have attempted to inject a modicum of flexibility into the current EU framework, for example by engaging in rights-balancing analysis or applying the safe harbors of the E-Commerce Directive. But these approaches are likely to be inconsistent and incomplete, and will not solve the problems of cross-border inconsistency discussed above. An EU-level review of copyright presents the opportunity to establish a more harmonized approach to flexibility that will help spur the development of Europe's digital economy.

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.

Some form of built-in flexibility, in the form of a concrete and durable legal provision, is important to technology innovation and the growth of Europe's digital economy. A company considering launching an innovative technology or service – and the investors considering backing such a company – must be able to make a reasonable assessment of the legal viability of its proposed project under existing legal provisions. In fast-moving technology markets, it is not sufficient to force innovators to wait for periodic revisions of the directives or interpretations by the Commission. If European innovators are forced to rely on such ad hoc proceedings in order to get permission to go ahead, the European technology sector will face a perpetual disadvantage.

…….

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

Please see answer to question 22.

…….

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

…….

…….

NO OPINION

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

[Open question]

…….

…….

A. Access to content in libraries and archives

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

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

…….

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

…….

NO

NO OPINION

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

[Open question]

…….

…….

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

[Open question]

…….

…….

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

[Open question]

…….

…….

2. Off-premises access to library collections

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

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

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

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

[Open question]

…….

…….

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

[Open question]

…….

…….

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

[Open question]

…….

…….

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

[Open question]

…….

…….

3. E – lending

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

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

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

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

YES – Please explain with specific examples

…….

…….

NO

NO OPINION

37. If there are problems, how would they best be solved?
[Open question]

…….

…….

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

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

[Open question]

…….

…….

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

[Open question]

…….

…….

4. Mass digitisation

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

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

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)[45].

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

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

…….

…….

NO – Please explain

…….

…….

NO OPINION

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

YES – Please explain

…….

…….

NO – Please explain

…….

…….

NO OPINION

B. Teaching

Directive 2001/29/EC[46] enables Member States to implement in their national legislation limitations and exceptions for the purpose of illustration for non-commercial teaching. Such exceptions would typically allow a teacher to use parts of or full works to illustrate his course, e.g. by distributing copies of fragments of a book or of newspaper articles in the classroom or by showing protected content on a smart board without having to obtain authorisation from the right holders. The open formulation of this (optional) provision allows for rather different implementation at Member States level. The implementation of the exception differs from

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

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

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

…….

…….

NO

NO OPINION

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

[Open question]

…….

…….

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

[Open question]

…….

…….

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

[Open question]

…….

…….

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

[Open question]

…….

…….

C. Research

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

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

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

YES – Please explain

…….

…….

NO

NO OPINION

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

[Open question]

…….

…….

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

[Open question]

…….

…….

D. Disabilities

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

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

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

[49] The European Trusted Intermediaries Network (ETIN) resulting from a Memorandum of Understanding between representatives of the right-holder community (publishers, authors, collecting societies) and interested parties such as associations for blind and dyslexic persons

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

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

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

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

YES – Please explain by giving examples

…….

…….

NO

NO OPINION

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

[Open question]

…….

…….

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

[Open question]

…….

…….

(http://ec.europa.eu/internal_market/copyright/initiatives/access/index_en.htm) and the Trusted Intermediary Global Accessible Resources (TIGAR) project in WIPO (http://www.visionip.org/portal/en/).

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

E. Text and data mining

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

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

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

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

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

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

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

YES – Please explain

[51] For the purpose of the present document, the term "text and data mining" will be used.
[52] See the document "Licences for Europe – ten pledges to bring more content online": http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf .

…….

…….

NO – Please explain

…….

…….

NO OPINION

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

[Open question]

…….

…….

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

A flexible copyright exception targeted at text and data mining could remove obstacles to potentially beneficial applications of these practices. As the Commission notes, the copying of text and data sets required for mining may not qualify for the temporary copying exception. Nonetheless, there are likely to be non-consumptive mining activities that do not prejudice the rights or economic interests of authors or rights holders, for which copyright should therefore not be an obstacle. For example, linguistic and lexicographic research on textual works would typically have no impact on traditional markets for copyrighted works. Other mining activities may simply involve the extraction and analysis of facts, which are not covered by copyright. The literal acts of copying required to carry out activities irrelevant to copyright protection should not in such cases trigger liability.

…….

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

[Open question]

…….

…….

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

[Open question]

…….

…….

F. User-generated content

Technological and service developments mean that citizens can copy, use and distribute content at little to no financial cost. As a consequence, new types of online activities are developing rapidly, including the making of so-called "user-generated content". While users

can create totally original content, they can also take one or several pre-existing works, change something in the work(s), and upload the result on the Internet e.g. to platforms and blogs[53]. User-generated content (UGC) can thus cover the modification of pre-existing works even if the newly-generated/"uploaded" work does not necessarily require a creative effort and results from merely adding, subtracting or associating some pre-existing content with other pre-existing content. This kind of activity is not "new" as such. However, the development of social networking and social media sites that enable users to share content widely has vastly changed the scale of such activities and increased the potential economic impact for those holding rights in the pre-existing works. Re-use is no longer the preserve of a technically and artistically adept elite. With the possibilities offered by the new technologies, re-use is open to all, at no cost. This in turn raises questions with regard to fundamental rights such the freedom of expression and the right to property.

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

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

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

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

YES – Please explain by giving examples

…….

…….

NO

NO OPINION

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

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

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

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

YES – Please explain

…….

…….

NO – Please explain

…….

…….

NO OPINION

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

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

YES – Please explain

…….

…….

NO – Please explain

…….

…….

NO OPINION

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

[Open question]

…….

…….

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

[Open question]

…….

……

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

[Open question]

……

……

IV. Private copying and reprography

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

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

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

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

YES – Please explain

For several years, the European institutions, Member State governments and courts have wrestled with the problems associated with the concept of fair compensation for private copying in Directive 2001/29/EC. The difficulty in applying the Directive is illustrated by the large number of court cases that come before the Court of Justice of the EU on this matter. There is little consistency in Member States' application of the Directive on these issues, which gives rise to serious Single Market problems. These problems have been well

[55] Article 5. 2)(a) and (b) of Directive 2001/29.
[56] Communication "Unleashing the Potential of Cloud Computing in Europe", COM(2012) 529 final.
[57] These issues were addressed in the recommendations of Mr António Vitorino resulting from the mediation on private copying and reprography levies. You can consult these recommendations on the following website: http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf.
[58] Art. 5.2(a) and 5.2(b) of Directive 2001/29/EC.

documented over the past decade, not least by the Commission itself (http://ec.europa.eu/internal_market/copyright/levy_reform/index_en.htm).

A fundamental problem is that the copyright levies system was designed for an environment where there were few legitimate sources of copyrighted audio/video/written content, and the few types of equipment that could be used to make copies, were dedicated to one type of recording/copying. For example, audio tapes were the medium for making copies of music and video tapes were the medium for recording broadcast TV.

In today's environment, digital devices from PCs to smartphones store and hold any type of content, much of it professional or personal without any relevance for compensation, and content in digital form is available from a myriad of sources. It is therefore virtually impossible to estimate with any precision the value of the storage of copyrighted digital content on any on class of device, let alone by any particular user. In addition, the rapid shift in consumption of entertainment content from purchases of physical items (which can then in some cases be legally copied for private use, unless fitted with technical protection measures), to streaming and rental of works – subject to direct licensing and accounting – means that the concept of a private copy is often not relevant. In addition, consumers and businesses now use remote (cloud) storage, and in this scenario, they do not themselves own the storage medium.

The copyright levies systems operated across many European countries are fundamentally not well-suited to today's digital environment, and they can be seen to be a rather arbitrary tax on the technologies that Europe needs to improve competitiveness, innovation, commerce, and education.

There is no question that the current state of affairs creates legal and economic uncertainty both for rightholders, consumers, and the manufacturers of products that may or may not be subject to copyright levies in one or some or no EU Member States. A more harmonized, consistent, transparent, and efficient system would surely be to the advantage of all stakeholders.

The Commission has consulted with stakeholders repeatedly and conducted several reviews to ensure a better level of consistency in application across the EU. The latest instalment was the mediation undertaken by Antonio Vitorino, former Member of the European Commission for Justice and Home Affairs. Mr. Vitorino delivered his recommendations in January 2013 (http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf).

Mr. Vitorino brought forward several significant and sensible ideas, which should form the basis for the Commissions future policy reform.

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

NO – Please explain

The copyright system should not discourage private copying that merely enables or enhances an end user's private use and enjoyment of content lawfully acquired via licensed services. Such private copying ultimately benefits rightholders as well as end users. It increases the utility and hence the appeal, value and demand for licensed content, which translates into increased revenues for content providers. As no harm is occurring to the rightholder, no

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

justification for additional compensation arises. Any concerns over private copying from subscription services that does not result in users' obtaining ownership of particular copies of digital content would be best addressed in the licenses for the service in question, not through levying.

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

[Open question]

…….

…….

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

YES – Please explain

…….

…….

NO – Please explain

…….

…….

NO OPINION

Diverging national systems levy different products and apply different tariffs. This results in obstacles to the free circulation of goods and services in the Single Market. At the same time, many Member States continue to allow the indiscriminate application of private copying levies to all transactions irrespective of the person to whom the product subject to a levy is sold (e.g. private person or business). In that context, not all Member States have ex ante exemption and/or ex post reimbursement schemes which could remedy these situations and reduce the number of undue payments[61].

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

NO OPINION

CDT does not engage in such cross-border transactions. However, the subject has been addressed by Mr. Vitorino in his report.

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

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

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

[Open question]

…….

…….

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

[Open question]

…….

…….

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

CDT would refer to Mr. Vitorino's report, the considerable evidence of problems documented in the Commission's own consultations, and in the numerous court cases before the CJEU.

…….

V. Fair remuneration of authors and performers

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

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

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

[62] See e.g. Directive 92/100/EEC, Art.2(4)-(7).
[63] See e.g. Art. 2.3. of Directive 2009/24/EC, Art. 4 of Directive 96/9/EC.

[Open question]

…….

…….

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

YES – Please explain

…….

…….

NO – Please explain why

…….

…….

NO OPINION

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

[Open question]

…….

…….

VI. Respect for rights

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

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

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

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

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

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

YES – Please explain

…….

…….

NO – Please explain

…….

…….

NO OPINION

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

For purposes of responding to this question, we will distinguish between Internet intermediaries (companies that directly enable online communication, such as content hosts and "mere conduit" access providers) and financial intermediaries (companies that enable the business or financial arrangements for online communication, such as advertising networks and payment platforms).

Internet Intermediaries

The legal framework should not be altered to require or pressure Internet intermediaries such as content hosts and Internet access providers to play an increased role in online copyright enforcement. The existing framework offers sufficiently powerful tools to combat infringement, and is at times already in tension with important provisions of the E-Commerce Directive that are essential to maintaining the Internet as a robust platform for innovation, European economic development, and free expression.

Policies protecting intermediaries from liability or gatekeeping responsibilities – as embodied in Articles 12-15 of the E-Commerce Directive – have been a tremendous success, driving investment in innovative services and communications networks. Society benefits from these empowering technologies in the form of increased opportunities for expression, access to information, collaboration, civic engagement, and economic growth. (CDT discussed these benefits in a 2012 paper, https://www.cdt.org/paper/shielding-messengers-protecting-platforms-expression-and-innovation) In contrast, mandating new policing obligations would create new barriers to innovation and competition in European communications offerings and force existing service providers to focus on gatekeeping and surveillance functions instead of investing in valuable new services.

At the same time, the existing enforcement framework, including the notice-and-action system of the ECD, offers strong and expedient tools to combat infringement. In addition to lawsuits, rightholders can demand that Internet intermediaries remove or disable access to

infringing material without pursuing legal action – indeed without any court oversight at all. The structure of the liability protection offered by the ECD creates strong incentives for intermediaries to comply with takedown requests. And the scale of many intermediaries' operations and the volume of notices they receive mean they have little opportunity to scrutinize notices, which means that in most cases notices are quickly honored – even those that may not be justified.

In addition, it is already possible under the existing framework for courts to issue injunctions against intermediaries whose services are used for proven infringement. Some national courts are indeed already moving in this direction, having issued blocking injunctions against access providers (e.g., http://www.bailii.org/ew/cases/EWHC/Ch/2013/379.html, http://curia.europa.eu/juris/liste.jsf?pro=&lgrec=en&nat=or&oqp=&dates=&lg=&language=en&jur=C%2CT%2CF&cit=none%252CC%252CCJ%252CR%252C2008E%252C%252C%252C%252C%252C%252C%252C%252C%252C%252Ctrue%252Cfalse%252Cfalse&num=C-314%252F12&td=ALL&pcs=Oor&avg=&page=1&mat=or&jge=&for=&cid=297210).

Such injunctions already raise serious concerns regarding the protection of fundamental rights. Given these concerns, the Commission should avoid any action that would invite or require greater policing responsibilities by Internet intermediaries.

First, blocking injunctions are in direct tension with Article 15 of the ECD, which expressly prohibits Member States from obligating intermediaries to monitor the information they transmit or store or to seek out indications of illegal activity. This provision is essential to the ability of intermediaries to offer robust online services without ongoing, broad-based surveillance features that would jeopardize user privacy and can be expensive if not entirely impractical to operate at Internet scale. Yet to implement even a targeted blocking order, an access provider must monitor all traffic in order to ferret out requests for the blocked site. It is therefore impossible to reconcile blocking orders with the prohibition on general monitoring obligations. The CJEU has overturned content-filtering mandates on Internet access providers and social-networking sites on the basis of Article 15. See SABAM v. Scarlet, ECJ C-70/10 and SABAM v. Netlog, ECJ C-360/10 (http://curia.europa.eu/juris/document/document.jsf?text=&docid=115202&pageIndex=0&doclang=EN&mode=doc&dir=&occ=first&part=1&cid=996022).

In addition, blocking by access providers can be dramatically overbroad, thus posing serious risk to free expression and raising questions of proportionality. Many blocking methods, including IP-address and domain-name blocking, can inadvertently block more than just the intended site. Moreover, blocking is a very blunt instrument. Rather than enabling targeted action against specific infringing content, it targets entire platforms, which may well contain a mix of lawful and infringing content. Issuing blocking orders for such platforms – even those that may have come to be commonly used for infringement – can impair the ability of some users to access lawful expressive material. Domain-name blocking poses additional risks to the security and stability of the domain name system (http://domainincite.com/docs/PROTECT-IP-Technical-Whitepaper-Final.pdf).

Indeed, in an advisory opinion in an Internet-blocking case currently pending before the CJEU, Advocate General Pedro Cruz Villalon concluded that injunctions ordering blocking by access providers require a careful balancing of fundamental rights, including the access provider's freedom to operate its business and its customers' free expression rights (http://curia.europa.eu/juris/document/document.jsf?text=&docid=144944&pageIndex=0&doclang=FR&mode=req&dir=&occ=first&part=1&cid=330161). Moreover, he found that general injunctions to stop infringement, without specifying the precise steps to be taken, are

incompatible with the balancing of fundamental rights required. For more specific injunctions, the Advocate General concluded that "it is for the national courts to balance, in each particular case, taking into account all relevant circumstances, the fundamental rights of the parties concerned and to ensure a fair balance between those fundamental rights." Notably, the Dutch Court of Appeals recently overturned court-ordered blocking of The Pirate Bay, holding the because the measures ordered were easily circumvented and ineffective at stopping infringement, they were disproportionate (http://uitspraken.rechtspraak.nl/inziendocument?id=ECLI:NL:GHDHA:2014:88).

Internet intermediaries are simply not suited to conducting a full analysis and balancing of fundamental rights on their own, without guidance from courts. Thus, we believe it would be unwise for the EU to mandate or press for a more active role for Internet intermediaries that may limit or eliminate court oversight.

Financial Intermediaries

Approaches to copyright enforcement focused on financial intermediaries such as advertising networks and payment processors could be preferable in some respects to measures relying on Internet intermediaries, but would also carry significant risks for free expression and online innovation.

If a criminal website cannot make money – either through payments from users or from advertisers – then it likely cannot operate at a substantial scale. Moreover, financial blockades are likely to be more difficult to circumvent than blocking or filtering by Internet intermediaries.

Focusing on the business relationships that enable sites to profit from illegal activity may avoid some of the negative side effects of focusing on the communications infrastructure. For example, "follow the money" remedies do not interfere with the Internet's addressing system or other technical architecture, and therefore can avoid unintended technical consequences such as undermining cybersecurity or splintering the global Internet.

If applied too broadly, however, even the threat of financial sanctions could pose serious risk for online free expression and the operation of legitimate platforms and businesses. The impact of cutting off a website operator's revenue can be severe. For example, in October 2011, Wikileaks announced that it was suspending all publishing because of the financial blockade against it, illuminating the significant speech implications of allowing financial intermediaries to decide such difficult questions. The threat of financial cutoff could also prompt substantial self-censorship. For example, for a brief time in 2012, PayPal threatened to cut off its services to an e-book platform unless it removed books with certain categories of sexual content. This would have forced the platform and its authors to censor lawful content in order to avoid losing access to an important sales channel. PayPal wisely changed course, but the episode demonstrates that threatening websites and online services with private financial sanctions based on their users' behavior can chill online speech in much the same way as threatening to impose liability for it.

These risks would need to be carefully addressed as a part of initiatives to enlist financial intermediaries to take action against infringing content. At a minimum, there would need to be precise standards to ensure that financial sanctions were used only against true bad actors in egregious and straightforward cases, while carefully avoiding more complicated situations where lawful and unlawful content are comingled. There would also need to be ample legal process and safeguards to protect against mistakes.

…….

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

YES – Please explain

…….

…….

NO – Please explain

…….

…….

NO OPINION

VII. A single EU Copyright Title

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

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

YES

NO

NO OPINION

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

[Open question]

…….

…….

VIII. Other issues

The above questionnaire aims to provide a comprehensive consultation on the most important matters relating to the current EU legal framework for copyright. Should any important

matters have been omitted, we would appreciate if you could bring them to our attention, so they can be properly addressed in the future.

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

[Open question]

…….

…….