

# **European Copyright Society**

## **Answer to the EC Consultation on the review of the EU copyright rules**

### **I. Introduction**

The European Copyright Society (ECS) was founded in January 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law. Its members are renowned scholars and academics from various countries of the European Union, seeking to promote their views of the overall public interest. The Society is not funded, nor has been instructed by any particular stakeholders.

The answer to this consultation has been prepared by : Prof. Lionel Bently (Cambridge University), Prof. Séverine Dusollier (Namur University / CRIDS,), Prof. Christophe Geiger (Center for International Intellectual Property Studies (CEIPI), University of Strasbourg), Prof. Bernt Hugenholtz, (Amsterdam University/ IVIR), Prof. Martin Senftleben (VU University Amsterdam), Prof. Raquel Xalabarder (Universitat Oberta de Catalunya).

Not all questions have been answered. The ECS has decided to focus on some questions addressing issues of consistency of the EU copyright legal framework. Particularly, the questions specifically addressed to stakeholders to assess their difficulties in the exercise and enjoyment of copyright provisions, have not been answered.

The signatories of this answer to the consultation are :

Prof. Lionel Bently, Cambridge University, UK

Prof. Ronan Deazley, CREATE, University of Glasgow, UK

Prof. Estelle Derclaye, University of Nottingham, UK

Prof. Graeme B. Dinwoodie, University of Oxford, Director of Oxford Intellectual Property Law Research Centre, UK

Prof. Séverine Dusollier, Director of CRIDS (Centre de Recherche Information, Droit et Société), University of Namur, Belgium

Prof. Christophe Geiger, Director General of Center for International Intellectual Property Studies (CEIPI), University of Strasbourg, France

Prof. Jonathan Griffiths, Queen Mary, University of London

Prof. Reto Hilty, Director of Max-Planck-Institut für Innovation und Wettbewerb, Germany

Prof. Bernt Hugenholtz, Amsterdam University, Director of IVIR (Institute for Information Law), The Netherlands

Prof. Martin Kretschmer, Director CREATE, University of Glasgow, UK

Prof. Marie-Christine Janssens, University of Leuven (KU Leuven), Belgium

Prof. Ole-Andreas Rognstad, University of Oslo, Norway

Prof. Martin Senftleben, VU University Amsterdam, The Netherlands

Prof. Michel Vivant, Ecole de Droit de Sciences-Po Paris, France

Prof. Raquel Xalabarder, Universitat Oberta de Catalunya, Spain

**PLEASE IDENTIFY YOURSELF:**

**Name:**

**European Copyright Society**

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.

278153413127-87

.....

- 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):

.....Group of Copyright Law Professors

The European Copyright Society (ECS) was founded in January 2012 with the aim of creating a platform for critical and independent scholarly thinking on European Copyright Law. Its members are renowned scholars and academics from various countries of the European Union, seeking to promote their views of the overall public interest. The Society is not funded, nor has been instructed by any particular stakeholders.

## **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]**

Questions 1 to 7 have not been answered.

### ***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]***

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

**NO**

The right of making available is a central exclusive right for the use of copyrighted material in the digital environment. For the further development of online platforms and services, and ongoing innovation in the digital internal market, it is desirable that distributors of protected content have clarity about the point of rights clearance. We are concerned by suggestions, particularly from the Advocate General in the Sportradar decision, that the act of making available occurs in a multiplicity of places and thus that permissions need to be sought in all such places. In the short term, it would be useful to clarify precisely the impact of the Sportradar decision, preferably minimising the number of places in which permission must be sought.

In the longer term and given the particular complexity of rights clearance in the EU, the “country of introduction” or “country of origin” rule embodied in the Satellite Broadcasting Directive, at least as far as that country falls within the EU, would be an important step forward in facilitating the rights clearance process and paving the way for more efficient and Europe-wide licensing in the area of online communications. As the next question indicates, such an approach almost certainly requires deeper harmonization of copyright rules (for example on authorship, ownership) within the EU. In fact, were there to be a unitary ‘European copyright’, it would be the case that permission from one copyright owner would suffice for exploitation throughout the Union.

As in the Satellite Broadcasting Directive, however, this should not mean that the target audience of the communication is irrelevant. By contrast, the size of the target audience should be a factor to be taken into account when fixing the licensing fee. Therefore, the countries to which the act of making available is directed should be relevant to the calculation of the licence fee, at which countries the act of making available is directed.

Moreover, an appropriate legal fiction would have to be developed with regard to the situation that the country of origin is a country outside the EU. As in the Satellite Broadcasting Directive, the use of communication facilities in a Member State, or an establishment of the service provider in a Member State may serve as points of attachment.

***Question 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)?***

**YES**

As pointed out above, the country of origin approach should only be taken as a starting point. To avoid negative effects on the amount of remuneration and the possibility of rights enforcement, this approach must be refined in several respects.

With regard to remuneration, the calculation of the amount of the license fee to be paid in the country of origin, as also pointed out above, should depend on the size of the target audience. In this way, the reduction of remuneration for acts of making available can be avoided.

As to enforcement possibilities, it is to be considered that the limitation of the concept of making available to the country of origin for rights clearance purposes need not imply the same limitation when it comes to remedies for infringement. It is conceivable that the target audience be taken into account in respect of enforcement.

As a result, EU law would assist distributors of protected content who seek to conclude a licence agreement by applying the country of origin approach for rights clearance purposes. At the same time, infringers without a licence or other authorization to use would still be subject to liability commensurate with the scope of their target audience.

Finally, it is certainly conceivable that if issues of authorship, ownership and remuneration fall to be decided under the law of the “country of introduction”, the results might vary from country to country. Ultimately, the sensible way to deal with these issues is to harmonize these aspects of EU law. Other solutions might include identifying a choice of law rule to determine these matters under a single law.

## **2. Two rights involved in a single act of exploitation**

***Question 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**

In the digital environment, the act of making available will often constitute the centre of gravity of the use of copyrighted material. A work’s appearance on the Internet – its availability for the community of Internet users – is the decisive factor in the equation. Acts

of reproduction necessary to arrive at this making available in the digital environment may have little or no independent economic significance in comparison with the act of making available (even when they are more substantial than acts of temporary copying exempted under Article 5(1) of the Information Society Directive). Therefore, it may be considered to let the act of making available prevail and qualify rights clearance in respect of the making available right as sufficient also with regard to preparatory acts of reproduction. For instance, if the ultimate purpose of the digitization of cultural material is the making available of that material for Internet users, a licence covering this act of making available may be understood to implicitly include the preceding act of reproduction necessary for the digitization of the work, as well as copies inherent to the downloading of the works.

### 3. Linking and browsing

***Question 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**

We regard the recent CJEU ruling in Svensson as a lost opportunity to provide the clarity necessary to enable legitimate actors to engage in linking free of uncertainty. It would have been better to decide that the act of hyperlinking does not involve making available “a work”, but rather provides an internet address or location. There is no difference in this respect between a “clickable link” and one that could be “cut-and-paste” into a browser.

The criterion of the “new public” may prove problematic. Much depends on precisely how the criterion is applied to material that is accessible on the Internet but which has been placed there without the consent of the rightholder. If the concept of the “new public” is interpreted in a way that linking to such material is always making available to a “new public”, then the freedom offered by Svensson become unworkable for individuals and automated systems, neither of which will be able to tell, except in a few cases, whether material on the Internet originated with the relevant rights-holder. If that were the case, the law would inhibit the development of search tools and the progressive evolution of the Web as an information resource. That is not to say that the creation, aggregation of **\*some\*** hyperlinks should not be prohibitable, in so far as they knowingly facilitate the exploitation of infringing copies. Perhaps these conducts are better addressed through means outside Copyright (such as unfair competition and secondary liability) rather than turning links into a direct act of exploitation.

In the face of this uncertainty, we ask now that the European legislature ascertains that hyperlinking is not a restricted act, absent knowledge that the material to which a link is being made is infringing

***Question 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**

In the absence of violation of some sort of technological access control, we favour treating the Internet as a space where all are free to browse. This is best achieved by clarifying that the act of browsing, and any intermediate acts of copying that facilitate browsing, are permissible. This is the interpretation offered by the UK Supreme Court in *NLA v Meltwater*, but on which the CJEU has yet to rule. The European legislature should take the earliest opportunity to clarify that such browsing is permissible.

Of course, uploading and downloading material without the relevant authorisations from rightholders is a different matter, as is illegally accessing content that has been subjected to TPMS. But the browsing acts of users of the Internet should not be illegal, even where the material being browsed has itself been wrongfully made available.

#### **4. Download to own digital content**

Questions 13 to 14 have not been answered as they rather try to assess the difficulties and consequences of the possible application of a first sale doctrine on downloaded content.

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

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

***Question 16- What would be the possible advantages of such a system?***

The creation of a registration system containing metadata on copyright works would indeed facilitate rights clearance and licensing of works. However, we would not at this point in time advocate the reintroduction of compulsory constitutive formalities in the European Union, since doing so would likely be contrary to the Berne Convention, and while perhaps not problematic for the content industries it might create an unnecessary hurdle for artists and creators.

However, some formalities might be considered. For instance it would be very useful to oblige the right owners to attach some publicity to the transfer of their rights. The profusion of content available makes it very difficult to know who the copyright owner is and, more importantly, whom the user should contact to get the authorisation to use a work. Copyright notices typically served that purpose by identifying the initial right holder and the publication date of the work. While prohibiting notice as a condition to enjoy or enforce the right, the Berne Convention also encourages the use of such mechanisms for other purposes by providing that such indication would serve as a presumption of authorship.

One could even take a further step and put in place public registers, in which could be indicated the transfer of the copyright from the original author to the subsequent right owner and, then, the chain of the successive transfers of the rights. An incomplete registration of the authorship status of a work would not lead to the forfeiture of copyright or of the possibility to claim enforcement, but only to the impossibility to claim rights ownership against a user/infringer in lack of proper publicity of copyright transfer. Such a system might equally reduce the issue of orphan works, by making known the transfer of copyright and the name of any derivative copyright owner.

Proposals for formalities conditioning additional protections of copyright, such as the protection against the circumvention of technological measures, could also be considered. The publication of the source code or the interface specification (or any other useful information) of the means developed to protect and secure the content could be made a prerequisite to the protection of such technical means. The law could impose on the copyright owner the obligation to publish certain information about the technological measure used to protect the work. Such a publication could have two effects. The first one would be to enable competitors to develop interoperable products. The second effect of the publication of information about the operation of a technological measure, would be to help the organisations in charge of reconciling the presence of DRM with the availability of copyright exceptions as contemplated by article 6(4) of the Information Society Directive.

#### ***D. How to improve the use and interoperability of identifiers***

The question 19 is not answered.

#### ***E. Term of protection – is it appropriate?***

The question 20 is not answered.

### **III. Limitations and exceptions in the Single Market**

***Question 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**

As limitations and exceptions found in applicable directives are largely optional, the limitations and exceptions infrastructure differs from country to country. This means that a use falling under a limitation or exception in one Member State need not necessarily be exempted in other Member States as well. In the digital environment, these differences become an obstacle to cross-border information services and Internet platforms allowing users to benefit from limitations and exceptions.



For instance:

- 1) the present fragmented legal framework has led to substantially different legal responses to questions arising from advanced search engine services. While courts in EU Member States agree that search engine services must be privileged to support freedom of expression and information in the digital environment, the solutions developed for the exemption of image search results range from the application of the right of quotation in the Netherlands<sup>1</sup> and the assumption of implied consent in Germany<sup>2</sup> to the invocation of safe harbour provisions in France<sup>3</sup> and the application of general legal principles, such as misuse of rights, in Spain.<sup>4</sup> These differences are a source of legal uncertainty for search engine providers. They may even lead to differences in the scope of the services offered in the different Member States;
- 2) the diversity of private copying regimes in the different Member States can easily become an obstacle to the development of cross-country cloud locker or cloud video recorder services in the internal market. As the scope of private copying exemptions differs markedly from country to country, these services must be tailored to the individual legal framework in a given Member State. If private copying to a cloud storage space occurs in a way that requires the payment of fair compensation to right holders, the country differences in the area of levy systems further complicate the development of cross-border services;
- 3) the development of e-learning programs across Europe with universities or teachers spread in several Member States would be greatly impaired by the fragmented approach of exceptions for teaching, if the inclusion of a work to illustrate the teaching in the modules directed to students in different countries would be subject to different treatment depending on the country.

***Question 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**

Given the difficulties arising from the diversity of national limitation and exception systems, it is desirable to make more limitations and exceptions mandatory, in particular those serving central social, cultural or economic purposes, such as the right of quotation, the exemption of parody, press privileges, the teaching and research exemptions, use privileges for disabled

---

<sup>1</sup> Court of Appeals of Arnhem, 4 July 2006, *Tijdschrift voor auteurs-, media- en informatierecht* 2007, p. 93.

<sup>2</sup> German Federal Court of Justice, 29 April 2010, case I ZR 69/08, p. 11-12, online available in German at [www.bundesgerichtshof.de](http://www.bundesgerichtshof.de), published in *Gewerblicher Rechtsschutz und Urheberrecht* 2010, p. 628; German Federal Court of Justice, 19 October 2011, case I ZR 140/10, online available in German at [www.bundesgerichtshof.de](http://www.bundesgerichtshof.de), published in *Gewerblicher Rechtsschutz und Urheberrecht* 2012, p. 602.

<sup>3</sup> Court of Appeals of Paris, 26 January 2011, case 08/13423 (SAIF v. Google France); Supreme Court of France, 12 July 2012, judgment 827, joint cases 11-15.165 and 11-15.188 (H et K v. Aufeminin.com and Google France).

<sup>4</sup> Spanish Supreme Court, 3 April 2012, judgment 172/2012 (Megakini.com v. Google Spain), part 5, para. 5.

persons and the regulation of private copying. The mandatory nature of copyright exceptions will be justified when necessary for internal market operation (when different degrees of implementation in Member States would distort the proper functioning of the internal market), when the exceptions are related to fundamental freedoms recognised by the EU Charter on Fundamental Rights, or when the exceptions are necessary to support a European public interest objective (allowing the European Union to achieve such objectives through exceptions at the national level).

Lacking a European copyright title which could provide for exceptions applicable throughout the territory of the European Union, making the implementation of some exceptions mandatory exceptions would avoid inconsistencies at the national level that would render impossible the benefit of any socially beneficial exception at the European level.

Once additional limitations and exceptions are made mandatory, CJEU decisions dealing with these mandatory provisions will directly enhance the harmonization effect, as the Court's ruling will apply universally to all Member States. Against this background, a further specification of the individual limitations and exceptions is unnecessary. Their conceptual contours will be delineated and appropriately adapted to new, unforeseen circumstances in CJEU case law.

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

The present list of permissible limitations and exceptions in EU copyright law is more than ten years old. Not surprisingly, it does not appropriately reflect several forms of use with fundamental social, cultural or economic importance that play a decisive role in the present online environment, in particular:

- 1) the creation and dissemination of user-generated content;
- 2) text and data mining by research institutions and online service providers, such as search engines; and
- 3) mass digitization and dissemination of cultural material.

Those cases are further explained below.

What is paramount is to avoid an unnecessary restriction of subsequent creation and expression (by third parties), by turning any unauthorized online use of a work into an infringement; Any uses which are incidental and have minimal economic significance for the right holder should not be included within the scope of the exclusive rights (or should be exempted by law). A *de minimis* threshold for the exercise of exclusive rights is necessary if we want to avoid unnecessary stifling subsequent creation, particularly in online and digital contexts where any use may amount to an act of exploitation.

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

**YES**

Given the rapid development of the Internet, a closed system of limitations and exceptions, as presently set forth in EU copyright law, is incapable of keeping pace with constantly changing technologies and new forms of using copyrighted material. Given the broad scope of harmonized exclusive rights, new forms of use are likely to fall under these rights of copyright holders, even though this may be undesirable in the light of competing social, cultural or economic interests, or even impermissible given the need to safeguard fundamental freedoms, in particular freedom of expression and information.

Against this background, it is necessary to include an opening clause in the catalogue of limitations and exceptions that allows the courts in the EU to devise tailor-made solutions and safeguard the delicate balance between rights and freedoms in EU copyright law when it comes to new technologies that offer new opportunities for the use of copyrighted material and the development of new business models, as contemplated by the WIPO Copyright Treaty of 1996.

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

The required opening clause should not replace but supplement the list of permissible specific limitations and exceptions in Article 5 of the Information Society Directive in such a way that the courts can develop new use privileges in the light of the forms of use that are presently exempted. On its merits, this would empower the courts to apply the specific limitations and exceptions in Article 5 by analogy to comparable, new situations that also justify the adoption of a use privilege. Accordingly, the specific limitations and exceptions listed in Article 5 would serve as a reference point for the identification of further cases of permissible unauthorized use. It follows from this approach that these further cases would have to be comparable with those reflected in the list, for instance, in the sense that they serve comparable purposes or are justified by comparable public policies. To provide guidelines for the courts, several open-ended factors should be formulated that are to be taken into account when identifying new use privileges in this way.

Technically speaking, this result could be achieved by recalibrating the three-step test of Article 5(5) of the Information Society Directive as follows:

*In certain special cases comparable to those reflected by the exceptions and limitations provided for in paragraphs 1, 2, 3 and 4, the use of works or other subject-matter may also be exempted from the reproduction right provided for in Article 2 and/or the right of communication and making available to the public provided for in Article 3, provided that such use does not conflict with a normal*

*exploitation of the work or other subject-matter and does not unreasonably prejudice the legitimate interests of the rightholder.*<sup>5</sup>

It is important to note that prior to the adoption of the Information Society Directive, the Supreme Court of the Netherlands already had developed jurisprudence that can be regarded as a precursor of this legislative reform. In the national *Dior/Evora* decision preceding the later judgment of the CJEU,<sup>6</sup> the Dutch Supreme Court sought to open up the closed catalogue of exceptions in the Dutch Copyright Act and pave the way for more flexibility that would allow the adequate balancing of interests in the light of new developments in the area of copyright law. In this national decision the Dutch Supreme Court identified the following room for the creation of additional breathing space within the Dutch system of exceptions:

*In § 6 of Chapter 1 of the Dutch Copyright Act, several exceptions to copyright are enumerated which, as a general rule, are based on a balancing of the interests of copyright owners against social or economic interests of third parties or against the public interest. However, these explicit exceptions do not exclude the possibility that the limits of copyright must also be determined more closely in other cases on the basis of a comparable balancing of interests, in particular when the lawmaker was not aware of the need for the limitation concerned and the latter fits in the system of the law – this in the light of the development of copyright as a means of protecting commercial interests. For the required balancing of interests, one or more of the exceptions enumerated in the law can be used as a reference point.*<sup>7</sup>

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

**YES**

As indicated above, copyright limitations and exceptions can facilitate provision of online platforms and services. Search engine providers may have to rely on the right of quotation. Cloud storage providers may rely on private copying exceptions. Platforms for user-generated content may invoke the right of quotation or the exemption of parody.

In these cases of cross-border Internet services, the territoriality of limitations and exceptions can become an obstacle to the EU-wide availability of services. It may even frustrate the development of new online platforms and services if the legal uncertainty about potential copyright infringement in different EU Member States makes it impossible to find sufficient support among investors. The legal uncertainty surrounding the scope of copyright limitations and exceptions in different EU Member States may also lead to market concentration. While small and medium-sized enterprises may shy away from the financial risks involved in

---

<sup>5</sup> This proposal is in line with Article 5.5 of the European Copyright Code that is the result of the Wittem Project that was established in 2002 as a collaboration between copyright scholars across the European Union concerned with the future development of European copyright law. The proposed European Copyright Code of the Wittem Project is available at [www.copyrightcode.eu](http://www.copyrightcode.eu).

<sup>6</sup> CJEU, 4 November 1997, case C-337/95, *Dior/Evora*, para. 58-59, available at [www.curia.eu](http://www.curia.eu). The Court did not comment on the opening up of the closed catalogue of exceptions in the Netherlands.

<sup>7</sup> Supreme Court of the Netherlands, 20 October 1995, *Nederlandse Jurisprudentie* 1996, no. 682 (*Dior v. Evora*), para. 3.6.2 (translation by the European Copyright Society).

potential copyright infringement, well-established online businesses may have less difficulty bearing that risk. Hence, new online platforms and services may sell their concepts for new online platforms and services to larger market players who are then able to further strengthen their position.

***Question 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?)***

For cross-border situations, a central EU collecting society would be desirable that collects fair compensation payments and redistributes this revenue among the traditional national collecting societies.

Another solution would be to locate the harm that the fair compensation is deemed to compensate in the country where the act of reproduction or making available takes place (see the question above about the application of the “country of origin” principle to the online making available) and to apply the levy in that country.

## ***A. Access to content in libraries and archives***

### **1. Preservation and archiving**

Questions 28 & 29 are directed towards stakeholders and will not be answered.

***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?***

Preservation and archiving are an essential role of libraries and archives. It is particularly with the shift to digital technologies and formats that such activities triggered copyright questions. The mere technological change should not motivate a further expansion of copyright if the harm to copyright owners is not altered.

The exception provided for in the article 5(2)(c) of the Information Society Directive is rather open as to the objectives of the authorised activities, that are not restricted. However, the limitation of the authorised acts of reproduction to *specific* acts, seemingly restrains the possibility for libraries to undertake a comprehensive effort of digitization of their collection, but only covers acts of preservation of works in case of deterioration, lost or frailness, not of mass-digitization (that seemed unattainable at the time of adoption of the directive 2001/29).

Since then, the need to digitize the European and national cultural heritage to make it available for future generations has been recognised as a key objective of the European Union. The current exception, as usually interpreted, does not appear to allow for such acts of digitization. Yet, libraries, archives and museums in Europe have relied on that exception to engage in mass digitization, despite the absence of any legal security.

Excluding mass-digitization is not justified. Digitizing the collections of libraries and archives, whatever the type of works or content, does not harm copyright or related rights owners, the act of making available of such content left aside. It should pass the scrutiny of the three-step test as it pursues a legitimate objective and is a special case, it does not harm the normal exploitation of the works, the digitized copies being not exploited by the libraries, and it does not unreasonably prejudice the legitimate interests of the right owners.

Consequently, the exception could be revised to indicate clearly that it does allow for digitisation of any type of work. It could be done by deleting the condition of ‘specific acts’. The exception does not specify the objective that should be pursued by the acts of reproduction, but it is generally understood as preservation and archiving. In that context, ‘preservation’ should not be construed too restrictively and should not be limited only to preservation of a work in its current form (i.e. the restoration of a damaged work), but should also cover the preservation of a work in a format that would warrant its accessibility in the future and its sustainability whatever the technological changes.

Format-shifting should be explicitly authorized, as it is essential to preserve a work against its obsolescence and the rapid evolution of reading devices, and could legitimately require the making of multiple copies. For instance, 16 mm films have been made until the late 1990’s, and still are, but the projectors to screen such format have become rare. Absent digitisation of such audiovisual content, such content might become unreadable very soon.

The exception should thus be organised in the Directive in a way that prevents Member States from applying conditions that restrict the mission of libraries and archives in preservation. The following obstacles to preservation activities should be banned: libraries should generally have the possibility to make a digital copy for preservation purposes, the preservation of authorised copies should not be restricted to the making of a single copy, exclusions of some categories of works should be abolished (e.g. literary works or audiovisual works should not be excluded in some Member States).

## **2. Off-premises access to library collections**

The questions 32-33 are formulated so as to assess the efficiency of the exception of the article 5(3)(n) and of licensing agreements for remote access to libraries’ collections and will not be answered as we consider that a legislative solution is needed to extend the exception, as suggested by the question 34.

***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?***

The exception provided by the article 5(3)(n) of the Information Society Directive for the on-site consultation of works is limited on several accounts:

- the consultation can only occur on dedicated terminals: this technical restriction proved to be rather constraining for libraries and their visitors. Works that have been digitised cannot be viewed on users' PCs but only on the computers installed by the library for that purpose, computers that have been generally restrained to prevent the making of copies or the plug in of USB keys.
- the consultation is limited to the premises of the establishment: this spatial restriction is linked to the technical limitation and prevents the on-line or remote consultation. Researchers sometimes complain that they cannot get an online access to some documentation material hosted in a library situated in another country.
- The purpose of the consultation is limited to research and private study
- The exception does not apply to works "subject to purchase or licensing terms".

The restriction to dedicated terminals is outdated and too narrow and does not grant enough leeway to libraries in providing services to their patrons. A teleological approach of the exception, as recently admitted by the CJEU for another exception, should be preferred. The CJEU has held that the interpretation of the conditions of an exception must "enable the effectiveness of the exception thereby established to be safeguarded and its purpose to be observed"<sup>8</sup>. What matters here is the consultation for research and private study, whatever the technical means of consultation. The exception could be opened by allowing the consultation on other devices as soon as it maintains some limitation to the consultation of works and does not interfere with the normal exploitation of the work. The restriction to the premises of the library might also allow for consultation from researchers of the university of the library. Other criteria, not strictly related to technical or spatial limitations, could be developed to secure the consultation, e.g. the requirement that the works are only viewable in a format that enables the consultation for research, possibly the printing out of the material, but not the permanent copying on the researcher's device or retransmission on-line.

The exclusion of the exception for works subject to licensing conditions should not be modified as it protects the development of adapted offers by publishers. Its exact meaning will soon be clarified by the CJEU when addressing the prejudicial questions asked by the German Federal Court of Justice in the Darmstadt Technische Universität case<sup>9</sup>. The question is whether this condition refers to the mere existence of an offer to conclude a contract by the rights owners or to the actual conclusion of a contract between the library and the right owner.

---

<sup>8</sup> C.J.E.U., judgment of 1 December 2011, C-145/10, *Painer*, paragraph 133. See also C.J.E.U., judgment of 4 October 2011, C-403/08 and C-429/08, *Football Association Premier League and others*, paragraphs 163-164.

<sup>9</sup> Request for a preliminary ruling by the Bundesgerichtshof, 14 March 2013, C.J.E.U., pending case, C-117/13, *Technische Universität Darmstadt*, question 1.

### 3. E – lending

**Question 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?**

The question 36 presumes that e-lending should only occur through agreements with rights owners. E-lending has indeed developed on the basis of licensing models, on the basis that the lending right and public lending limitation only apply to the making available of tangible copies of works. We consider that market-based solutions should not be the only ones. Public lending is an important avenue to get access to works and culture, particularly for access to research material, for young readers or other persons who are not in the material conditions to rely only on the market to get access to works (for economic or other reasons).

Libraries are a third sector providing access to works, aside to the market and non-market exchanges between individuals. This role should not lose its relevance in the digital context or it would culturally impoverish future generations of readers. When some works will only be available in a digital format and downloadable files (e.g. e-books, audiovisual works, music), access to such cultural content should still be ensured from public libraries. The development of license-based models of e-learning, involving commercial actors and intermediaries, also present some risks for the cultural diversity and for the privacy of readers, two key concerns of public libraries. When some works will not be exploited anymore from the publishers' catalogue, for whatever reason (end of contract with the author, bankruptcy of publisher, withdrawal of the work from the available catalogue), such works will disappear from the offer of the library, if its making available only relies on the licensing with the publisher.

Therefore the question of extension of lending to on-line making available of works would merit further discussion. However, particular conditions should then be applied, notably as to the types of works concerned, the technical requirements, the modalities of lending (a limited duration, one simultaneous user per title etc.), the provision of an embargo period, the obligation of a remuneration, as well as the possible cross-border offer of e-books by libraries. In no case e-lending could substitute to the overall offer of works on the market. But that does not mean that each time a work is available on a digital platform for downloading, it could prevent its making available under the limitation for public e-lending.



#### **4. Mass digitisation**

The questions 40 to 41 of the consultation presume that mass-digitisation efforts are not allowed under the general exception for specific acts of reproduction of Article 5(2)(c) of the Information Society Directive, but would be facilitated by specific agreements for some types of contents such as the MoU on out-of-commerce works or current licensing projects sustained by the Licences for Europe initiative.

We consider that mass-digitisation should be allowed under the exception of article 5(2)(c) of the Information Society Directive, to be revised to welcome acts of digitisation and format-shifting necessary for preservation of the collection of libraries, museums and archives (see our answer to question 30 above).

That would not allow for acts of making available of such content for which the solution of the Orphan Works Directive or the MoU on out-of-commerce works would still be relevant.

#### ***B. Teaching***

#### ***C. Research***

Question 42 is directed towards stakeholders and will not be answered. The other questions related to teaching and research will be answered together.

The key issues for the teaching exception are the following:

##### **1.- NO HARMONIZATION HAS BEEN ACHIEVED**

No harmonization has been achieved in the field of exempted uses for teaching and research purposes and this is highly regrettable since cultural development is fundamental for the building of the EU.

Article 5(3) of the Information Society Directive provides for a flexible and technology neutral exception for teaching and research purposes, which may exempt any use done as part of the instruction in any formats (analogue or digital), thus clearly intended to cover face-to-face, as well as distance and on-line teaching. However, **most national laws fail to grant proper treatment to the needs of education and research –specially in online markets– and** little harmonization has been achieved in that field.

Most national provisions tend to be restricted in terms of acts of exploitation (i.e., reproduction and/or performance or display, but not making available –which leaves out online and distance education), works (some works are excluded from the limitation) and amounts (fragments, short fragments, percentages, pages, etc) that can be used, and in some cases private (non-public) for-profit institutions are left out.

Licensing (on a voluntary basis) becomes, thus, necessary to clear, at least, some teaching uses –especially online –, the scope of the licensing needed depending on the scope of the

exempted uses under each law. In addition, efficient licensing systems for teaching and research uses (beyond reprography) do not exist in all countries.

This **lack of harmonization** –which is especially acute when dealing with education and research conducted online- could be overcome by means of further guidance issued for the implementation of Article 5(3)(a) by Member States, or –as proposed above- by means of a mandatory limitation.

The following issues could be examined:

- **The meaning of “illustration for teaching” is subject to different interpretations.**

National laws **use different terminology**, which may in some cases severely restrict the scope of the exempted uses. For the sake of harmonization, some further guidance would be advisable to cover any acts that are necessary to convey the teaching purpose, *as part of the instruction*, be it as explanation by the instructor or an exercise, a test or examination, but also as a reading (proposed by the teacher) to write a paper, participate in a debate or for the student to study.<sup>10</sup>

- Article 5(3)(a) expressly refers to both rights of *reproduction and communication to the public* (including the right of *making available online*) and domestic laws may extend it to *distribution*, according to Article 5(4). However, only a few national laws exempt all three exclusive rights under the teaching and research exceptions, and many still restrict them to “physical” teaching and research contexts. In these cases, digital teaching and research environments are clearly discriminated. The **public interest** that justifies these exceptions is the same regardless of the means used to conduct the teaching or research. The distinction between face-to-face and on-line teaching will soon be **obsolete**, digital formats being far too common (and valuable) so as to treat them differently.
- Nothing is said about the right of **adaptation (i.e., translations)**, which is not harmonized. Member States are free to include translations and/or any other adaptation of works within their national teaching exceptions (an option which becomes especially important for minority language countries).
- Similarly, Article 5(3)(a) is silent about whether **digitization** is allowed or not; to the extent that digitization (scanning) amounts to a reproduction and since the exception is technology-neutral, domestic laws (and national courts) have some discretion.

---

<sup>10</sup> One may argue that ‘illustration for teaching’ should be narrowly interpreted, so as to exempt only those uses that ornament or exemplify the teaching. But this would leave out precisely the teaching uses that are substantial –not merely illustrative- for the teaching and, in consequence, would void this exception of any meaning. The Directive also mentions ‘for the purpose of education and teaching’ (Recital 14), ‘educational ... purposes’ (Recital 34) or ‘education, learning and research’ (as considered by the Parliament but they were discarded in favor of the more familiar Art.10(2) BC wording); Nothing indicates that ‘illustration for teaching’ is intended to have a narrower scope than any of the terms in the Recitals and examined by the Parliament; See Report of the EP Committee on Legal Affairs and Citizens’ Rights of 28 Jan.1999, A4-0026/1999, pp.43 and 58 (Amendments 18 and 24, to Art.5(3) EUCD).

- Instead of the open-ended clause ‘*to the extent justified by the non-commercial purpose to be achieved,*’ national solutions tend to be more specific (and divergent) as to which **kind of works** are covered by the national teaching exceptions and which are not, as well as to the **amount** (“fragments” “short fragments” and even percentages) **of the work** that can be used (depending on the nature of the work). Member States should be reminded that flexible formulas such as “to the extent justified by the non-commercial purpose to be achieved” better serve the purposes of teaching and research, always within the parameters of the three-step-test; then, if necessary, distinction must be done –i.e., in terms of remuneration- regarding the amount of work used to the extent justified, etc.
- Further guidance could also be given as to **the establishments which may benefit** from the exceptions since member States have, once again, chosen different solutions; some of them directly exclude university education or privately owned institutions. Other requirements such as “officially recognized” or “*official education*” are further used to restrict the scope of the limitation. In that sense, it should be reminded that recital 42 states that the *non-commercial nature of the activity* in question should be determined by that activity as such; The *organisational structure* and the *means of funding* of the establishment concerned are not the decisive factors. In other words, instruction and research may be done in exchange for some payment, but this alone should not disqualify the institution from the benefits of this limitation (albeit it may be subject to a higher remuneration than public institutions).
- **The requirement of compensation** is another important ground for national dissimilarities. Compensation for teaching uses is only expressly required in 5 countries (Belgium, France, Germany, Switzerland and the Netherlands). Luxembourg, Portugal and Italy remain silent; while the rest expressly exclude any kind of remuneration or compensation to authors or right holders. Bearing in mind that **the lack of remuneration justifies a narrower scope of the exempted uses** –which may be contrary to the EU legislators intent when setting Article 5(3)(a), Member States should be reminded that remuneration schemes are possible under this limitation and that wider teaching and research uses could be allowed under it, subject to remuneration.
- Divergence also exists as to the **specific beneficiaries of the exemption**: any *educational institution*” or “*by a teacher and his pupils*” or “*by a teacher for teaching in class*”)... Who is entitled to conduct the teaching use: only teachers or also students? This may cast some doubt as to whether uses done by the students as part of the teaching would also be exempted or not. And what about libraries? Are they also allowed to do the copies needed to convey the illustration for teaching or research exempted under Art.5(3)(a)? This brings us to the issue of “interaction” amongst different limitations and exceptions.

- The Directive's *fragmented* approach (only some exploitation rights are harmonized and the corresponding exceptions only refer to the harmonized rights) may also jeopardize the effectiveness of the exempted teaching uses throughout the internal market. Not all national legislators have been alert, when implementing the EU CD provisions, to maintain the balance –and consistency- within their copyright laws; Some national laws preferred to simply 'replicate' the fragmented Directive structure instead of finding complete and coherent solutions to exempt acts for teaching purposes. For instance, it *makes sense* that the scope of exempted uses under Article 5(3)(a) should **go beyond what is already exempted as a quotation** (Article 5(3)(d) –which, in line with Article 10(1) of the Berne Convention, could have been regarded as a mandatory exception within the EU); otherwise, there would be no need for a separate exception specifically for teaching and research purposes. If only for the sake of logic, it also makes sense that any acts done –for the same teaching and research purposes- **by students** (as the recipients of the teaching uses) or **by libraries** (usually as the providers of the contents used for research and *teaching*) *should* also be exempted under Article 5(3)(a). A higher degree of integration between different limitations in national laws (as well as in the Information Society Directive) would be advisable.

## 2.- VOLUNTARY LICENSING IS NOT ENOUGH

One may argue that no exceptions would be necessary if solid **voluntary licensing systems were available**, and that efforts should be devoted to building these systems instead of the 'old-fashioned' legal technique of exceptions. It is true that licensing systems are steadily developing (in some countries faster than in others) and that technology may eventually allow the granting of individual licenses for every *specific use* of a work. However, public policy concerns –such as teaching and research- are **a fundamental part of copyright law** and can only be correctly addressed by the law, as a matter of strict **public policy**. DRM and licensing alone (no matter how perfect and evolved) are not likely to find the right balance between public and private interests at stake.

Licensing schemes are not in place in all countries; In many countries the clearance costs for obtaining licenses for teaching and research uses are far too high (in addition to sometimes insurmountable practical difficulties). Even where voluntary licensing schemes *are in place*, education and research may be severely constrained if the copyright **owners have the power to refuse license for a work to be used for teaching or research purposes**, or to unilaterally establish any conditions and pricing for such uses (including the implementation of DRM to restrict them and the prohibition to circumvent them). Lacking any counterbalance (i.e., a mandatory exception or limitation for teaching and research purposes), the exercise of copyright may endanger academic freedom and, overall, the development of research and culture. And this holds true also for distance (and *online*) teaching and research.

### 3.- APPLICABLE LAW FOR DISTANCE AND ONLINE USES

Education and research, when conducted online, must still face another problem: that of **applicable law**. According to Article 5(2) of the Berne Convention, as well as to Article 8 Rome II Regulation, several copyright laws may be applied in a networked teaching or research environment: the law where the institution has its headquarters, as well as the laws of every country of reception -where the work is accessed and downloaded by students or researchers- may apply to govern the teaching/research acts done online. Accordingly, the institution will need to assess whether its acts of exploitation may benefit from the specific teaching & research exceptions in all of these countries; and the answers (having seen the fragmentation and lack of harmonization of national laws) may not always coincide. The need to comply with all national copyright laws may deter online teaching and research initiatives within the EU.

For instance, a “for-profit” educational institution may benefit from the teaching exception in the Netherlands, but not in Germany (since it is not for profit) or in Belgium (since it has not been accredited). Similarly, posting (reproduction and making available) a work may qualify under the teaching exception in Switzerland and Luxembourg (where students may be also allowed to download the work) but not in Spain (where only face-to-face teaching uses are exempted under the law) and it is licensed in the UK. Furthermore, if licensed, the territorial scope of the license may not cover all the countries where students reside, since licenses for online teaching uses tend to cover only the territory of the CMO (or publisher) granting it –or, at most, countries under reciprocity agreements, but not beyond. An effective licensing system for online teaching uses would require a complete system of reciprocity agreements between CMOs and educational institutions which is –for the time being- unavailable.

In order to comply with all these applicable laws (countries of reception), the university must either go through an **incumbent process of copyright clearance** under each of these national laws or **deny access to the students** residing in the countries for which the teaching material has not been cleared. Neither one is feasible or desirable for the building of the European Union.

As an alternative –as already proposed above-, a choice of law rule which points **to one only applicable law** (the country of origin: based on headquarters location or “degree-granting-country” ...) would certainly facilitate copyright clearance and teaching uses throughout all the internal market. In a harmonized context like the EU, the risk of “copyright havens” for education and research (countries with a generous copyright exception for teaching and research purposes) is unlikely. It is, after all, the same country of origin approach prescribed for the internal market by Directive on satellite and cable.

### 4.- A MANDATORY, UNIFORM, PROVISION FOR TEACHING AND RESEARCH

At the end, it may well be that the only way to overcome both problems (non-harmonized and fragmented national solutions and territoriality/choice of law) and ensure a real internal market for teaching and research services –at least, online- would be by means of a

**mandatory and uniform exception / limitation for teaching and research purposes within the EU territory.**

As proposed above, it may be time to consider whether this one (as well as other exceptions and limitations which ensure rights and interests which are fundamental to the building of the EU society and the functioning of the internal market) should become mandatory and defined uniformly throughout the EU.

***D. Disabilities***

Questions 50 to 52 are not answered.

***E. Text and data mining***

Questions 53-54 are not answered as they aim at assessing the difficulties encountered in practice.

***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?***

The process of text and data mining only copies works as a technical incident to the research it purports to achieve. Technically many copies of copyrighted content can be done by text and data mining but only to get access to the information contained in the resources so scanned and mined. It could be said that the only objective of such technical activity is to retrieve information that should not be protected by copyright on the ground of the idea/expression dichotomy. It would be unfortunate that the digital development that enables research on a more effective way than the time-consuming human reading and analysis that was used before, would be prevented by copyright on the sole basis of its technical process.

In a way, text and data mining resembles to the exceptions that were considered as necessary at the time of the computer programs directive to allow for access to unprotected information lying under the protected code (for instance exception for testing or studying the program, decompilation exception) due to the fact that such acts would necessarily copy, even fugitively, the protected code. In no way it does use or exploit the expression of the works. Therefore it should not even be considered as an act subject to the authorisation of the copyright owners. However, the *acquis communautaire* already includes a number of acts of technical reproductions in the scope of copyright or exempts them under an exception when legitimate.

For the same reason than the exceptions of the computer program directive and on the ground that text and data mining for research would have no impact in the normal exploitation of works, an exception should be introduced in copyright law to authorise text and data mining, and more precisely the reproduction and reuse by search engines, automated knowledge

discovery tools or other digital means for purposes of research, under the condition they do not counter the normal exploitation of the work.

## ***F. User-generated content***

***Question 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?***

User-generated content is the result of increased user participation and interaction in the creation of online content. With this increased user autonomy, the citizenship engagement in media production has increased tremendously. Media production has become much more democratic. The shift to a participatory online culture allows users to express their individual views and opinions without dependence on content selection mechanisms of traditional news and media providers. If pre-existing material underlies the creation of user-generated content, this expression may include a comment, criticism or parody of the sources used. In the debate on user-generated content, it must therefore not be overlooked that the expression at issue falls under the fundamental guarantee of freedom of expression in the EU Charter, and that the decisions taken in this area will have an immediate impact on the individual freedom experienced by EU citizens in the digital environment.

Against this background, the question of user-generated content should not be left to negotiations between the content industry and online distribution platforms. The EU legislator himself must take the steps necessary to safeguard the freedom of expression of individual citizens in the participatory online environment that is presently available.

The questions raised in this context, then, go beyond an evaluation of the extent of user-generated content made available under the present legal framework. This framework poses several legal problems. For average Internet users, it will be impossible to determine whether their creations are permissible under the right of quotation, the exemption of parody or national rules on free adaptations of copyrighted material. In particular, it remains an open question whether the different nature of user-generated content – an amateur creation that pays tribute to the professional original work without competing with that work – is a decisive factor in the analysis of applicable copyright limitations and exceptions. Even if the courts were willing to apply existing limitations and exceptions flexibly, the copyright rules on quotations, parody and free adaptations are not tailored to user-generated content. They are unlikely to allow the courts to arrive at satisfactory responses to the phenomenon in its entirety. With regard to service providers, the legal uncertainty following from the unclear

scope of copyright limitations and exceptions may frustrate the development of new online platforms. Instead, it is likely to strengthen the market position of those service providers that already have a strong position and can afford the risk of potential infringement proceedings. The unsatisfactory legal framework thus entails a risk of undesirable market concentration. For copyright holders, the legal uncertainty surrounding user-generated content may lead to a loss of extra income from the use of their works. A future regulation of user-generated content could provide for the payment of fair compensation in cases where substantial revenue accrues from the dissemination of user-generated content, such as advertising revenue of online platforms.

Given the legal uncertainty surrounding the creation and dissemination of user-generated content in the existing legal framework, it can be expected that a more specific, reliable regulation of user-generated in the future would provide important impulses for the enhancement of online freedom of expression of EU citizens, the diversification of platforms for user-generated content, and an appropriate remuneration of copyright holders.

Whatever the solution, what is paramount is that copyright does not become a tool that unnecessarily restricts (deters) subsequent creation and expression (by third parties), by turning any unauthorized online use of a work into an infringement, including uses which are incidental and have minimal economic significance for the right holder. A *de minimis* threshold for the exercise of exclusive rights is necessary if we want to avoid unnecessary stifling subsequent creation in online and digital contexts.

***Questions 59 to 61 investigate the specific problems encountered by users or right holders and will not be answered.***

***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?***

For an appropriate legislative solution in EU copyright law, the legislation of Canada on user-generated content could be taken as a starting point. Under the new article 29.21 of the Copyright Act of Canada, as introduced by Bill C-11, “Copyright Modernization Act”, adopted on 18 June 2012, non-commercial user-generated content that is based on copyrighted material does not amount to infringement. This rule would provide the legal certainty necessary for users to engage in content production, even if this involves the use of pre-existing copyrighted material.

In the EU context, this basic rule may be supplemented with an obligation for the providers of online platforms to pay fair compensation in accordance with the advertising revenue (or other sources of revenue) accruing from the presentation and dissemination of user-generated content.



#### **IV. Private copying and reprography**

This part is not answered.

#### **V. Fair remuneration of authors and performers**

*Question 72 - 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?*

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

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

We consider that a thriving digital economy cannot be achieved at the expense of creators and performers that provide the content and creation that makes that economy culturally alive and valuable. The fair remuneration of the authors and performers has so far been neglected by the EU legislative efforts, even though some interesting mechanisms have been introduced in the 2011 Directive extending the duration of rights of performers and publishers of phonograms.

Ensuring a fair share of the author in the economic revenues yielded by the exploitation of her works would require some legislative action on the following points:

- harmonisation of the contractual protection of authors: it is a field where the national laws of Member States have not been harmonised. Authors can benefit from protective provisions for the contracts they sign with their publishers or producers in some States or be left to the freedom of contract altogether in others. Contractual protection will not be sufficient in itself but help authors to transfer their copyright with informed consent. Some rules would be particularly important to protect authors: the obligation of a written form, an explicit mention of the rights to be transferred and for which exploitations, the determination of a fair remuneration, an obligation for the assignee of copyright to effectively exploit the works in the modes of exploitation for which he has been granted the copyright, reporting obligations from transferees on the exploitations and revenues, conditions for reversion of rights in some circumstances. A general principle of a limitation in time of contract should be promoted when the transfer of copyright for the whole duration of the contract is not necessary. Similarly, contracts of copyright transfer should be limited to what is necessary for the envisaged exploitation and buy-out contracts (all rights of the author being transferred against a lump sum) should be considered as illegitimate.

- the enactment of some unwaivable rights of remuneration for some exploitations;
- the unwaivability of existing rights to equitable remuneration, as upheld by the CJEU in the Luksan case;
- the encouragement of collective agreements to be concluded amongst representatives of authors and representatives of publishers and producers, as achieved in some countries.

## **VI. Respect for rights**

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

**NO**

The guarantee of an efficient legal framework for civil enforcement in the EU is of course indispensable to secure the attractiveness of the European copyright system. The dissemination of digital content on the internet, especially through unauthorised file sharing of copyrighted works on peer-to-peer platforms, has certainly brought new challenges. Nevertheless, it is equally necessary to respect the restrictions that result from the legal framework laid down by the Treaties of the European Union and their founding principles. The implementation of an appropriate legal framework on civil enforcement necessarily involves a fair balance between the implementation of an effective protection of copyright and the respect of freedom of competition and fundamental rights.<sup>11</sup> The procedures, measures and compensations introduced by the EU framework should thus take into account other competing rights such as the right to a fair trial, the right to the respect of privacy and freedom of expression. The Court of Justice of the European Union, in an important decision concerning the enforcement of copyright in the digital environment, insisted explicitly on the necessity to ensure a “fair balance between the different fundamental rights protected by the Community order”.<sup>12</sup>

In addition, the social acceptance of intellectual property rights is today an important factor to be taken into account. According to a recent study of European Observatory on Infringements of Intellectual Property Rights<sup>13</sup>, the younger generation in Europe “is particularly inclined to consider that illegal downloading or accessing copyright-protected content is acceptable, even

---

<sup>11</sup> See also in this spirit the resolution of the European Parliaments of 12 May 2011 on unlocking of cultural and creative industries (2010/2156(INI)), emphasizing the need for effective enforcement of IPR in both offline and online environments but also stressing in that connection that “all measures should be carefully evaluated in order to guarantee their efficiency, proportionality and compatibility with the Charter of Fundamental Rights of the European Union” (No. 62) (emphasis added)..

<sup>12</sup> ECJ, Grand chamber, 29 Jan. 2008, *Productores de Música de España (Promusicae) v. Telefónica de España SAU*, Case No. C-275/06: OJ C 64 dated 8 March 2008, p. 9 (No. 71).

<sup>13</sup> OHIM, *European Citizens and Intellectual Property: Perception, Awareness and Behaviour*, November 2013.

if a majority of them do share the general attachment to the overarching principles of IP<sup>14</sup>. According to this study, 49% of EU citizens between 15 and 24 years old even agree that the purchase of counterfeit can be seen as “an act of protest”. The question of appropriate enforcement of copyright in the digital environment is therefore a highly sensitive issue, as the rejection of the Anti-Counterfeiting Trade Agreement by the European Parliament with an overwhelming majority in July 2012 has clearly demonstrated.

For all the above reasons, we consider that any action of the European legislator in the field of civil enforcement needs to be very carefully conducted and based on serious economic analyses and impact studies, thus permitting to estimate in advance the possible effect of the legislative action on the promotion of creativity and on the improvement of competitiveness in the EU. In its evaluation report on the enforcement directive 2004/48/EE, the Commission admitted that it has not been able so far to conduct “a critical economic analysis of the impact that the Directive has had on innovation and on the development of the information society, as provided for in Article 18 of the Directive.”<sup>15</sup>. At this stage, it might therefore be more prudent to observe the manner in which rightholders adapt their legal offer, to gather further (independent) empirical data and to conduct comparative law as well as interdisciplinary studies to design without pressure an adequate and balanced framework for enforcement in the digital environment. Moreover, the integration of the question of enforcement in the revision process of EU copyright rules might complicate significantly the political process, thus preventing progress on other urgent issues highlighted above in our response to the consultation.

## **VII. A single EU Copyright Title**

***Question 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**

Article 118 TFEU creates a specific competence for Union-wide intellectual property rights. We believe that Article 118 TFEU not only allows for the introduction of Union-wide copyright titles, but also for the simultaneous abolishment of national titles, which would be necessary for unification of copyright to take full effect and effectively remove territorial restrictions. The advantages of a Union-wide copyright title are undeniable. A unified ‘European Copyright Law’ would immediately establish a truly unified copyright framework,

---

<sup>14</sup> For example, 42% of Europeans consider it acceptable to download or access copyright-protected content illegally when it is for personal use. This number rises by 15 points to 57% amongst citizens from 15 to 24 years old’.

<sup>15</sup> Report from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions on the application of Directive 2004/48/EC of the European Parliament and the Council of 29 April 2004 on the enforcement of intellectual property rights, SEC(2010) 779 final, p. 4.

replacing the multitude of occasionally diverging national rules of the present. More importantly, it would also remove the territorial barriers that persist in the current European framework of (harmonized) national copyright laws, and establish a single European market for copyrights and related rights, both online and offline. It would also enhance legal security and transparency for right holders and users alike, and greatly reduce licensing and transaction costs. Unification of copyright law could also restore the asymmetry that is inherent in the current *acquis*, which mandates basic economic rights but merely permits limitations.

While we realize that drafting a European Copyright Law would be a legislative project of the long term, we urge the European Commission to take the first steps in this direction. The *European Copyright Code* that was drafted by the Wittem Group (available at <http://www.copyrightcode.eu>) demonstrates that a European Copyright Law that assimilates both the continental European authors' rights tradition and the British copyright tradition is feasible. Work on a European Copyright Law could be undertaken in parallel with short-term revision – in the form of further harmonization – of copyright law in the EU.

March 2014