

# Public Consultation on the review of the EU copyright rules

## *Contents*

<b>I. Introduction</b> .....	2
A. Context of the consultation.....	2
B. How to submit replies to this questionnaire .....	3
C. Confidentiality.....	3
<b>II. Rights and the functioning of the Single Market</b> .....	5
A. Why is it not possible to access many online content services from anywhere in Europe?.....	5
B. Is there a need for more clarity as regards the scope of what needs to be authorised (or not) in digital transmissions?.....	8
1. The act of “making available”.....	9
2. Two rights involved in a single act of exploitation .....	10
3. Linking and browsing.....	11
4. Download to own digital content .....	11
C. Registration of works and other subject matter – is it a good idea?.....	12
D. How to improve the use and interoperability of identifiers.....	13
E. Term of protection – is it appropriate?.....	14
<b>III. Limitations and exceptions in the Single Market</b> .....	14
A. Access to content in libraries and archives .....	17
1. Preservation and archiving .....	17
2. Off-premises access to library collections.....	18
3. E – lending .....	19
4. Mass digitisation .....	20
B. Teaching .....	21
C. Research .....	22
D. Disabilities.....	22
E. Text and data mining.....	23
F. User-generated content.....	25
<b>IV. Private copying and reprography</b> .....	27
<b>V. Fair remuneration of authors and performers</b> .....	29
<b>VI. Respect for rights</b> .....	30
<b>VII. A single EU Copyright Title</b> .....	31
<b>VIII. Other issues</b> .....	32

# **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"<sup>1</sup> 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<sup>23</sup> 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<sup>4</sup>. 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

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<sup>1</sup> COM (2012)789 final, 18/12/2012.

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

<sup>3</sup> *"Based on market studies and impact assessment and legal drafting work"* as announced in the Communication (2012)789.

<sup>4</sup> 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](http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf).

Conclusions<sup>5</sup> *"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"<sup>6</sup>, the "Green Paper on the online distribution of audiovisual works"<sup>7</sup> and "Content Online"<sup>8</sup>. 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.

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<sup>5</sup> EUCO 169/13, 24/25 October 2013.

<sup>6</sup> COM(2008) 466/3, [http://ec.europa.eu/internal\\_market/copyright/copyright-info/index\\_en.htm#maincontentSec2](http://ec.europa.eu/internal_market/copyright/copyright-info/index_en.htm#maincontentSec2).

<sup>7</sup> COM(2011) 427 final, [http://ec.europa.eu/internal\\_market/consultations/2011/audiovisual\\_en.htm](http://ec.europa.eu/internal_market/consultations/2011/audiovisual_en.htm).

<sup>8</sup> [http://ec.europa.eu/internal\\_market/consultations/2009/content\\_online\\_en.htm](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:**                      **British Copyright Council**

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

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

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

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

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

**TYPE OF RESPONDENT** (Please underline the appropriate):

€ **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**"

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

## **YES 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**"

## **YES Representative of Collective Management Organisation**

€ **Public authority**

€ **Member State**

### **YES Other (Please explain):**

The British Copyright Council represents those who create, hold interests or manage rights in literary, dramatic, musical and artistic works, performances, films, sound recordings, broadcasts and other material in which there are rights of copyright and related rights.

Our members include professional associations, industry bodies and trade unions which together represent hundreds of thousands of authors, creators, performers, publishers and producers (see member list appended). These right holders include many individual freelancers, sole traders and SMEs as well as larger corporations within the creative and cultural industries. Our members also include collecting societies which represent right holders and which enable access to works of creativity.

## **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<sup>9</sup>.

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<sup>10</sup> should significantly facilitate the delivery of multi-territorial licences in musical works for online services<sup>11</sup>; the structured stakeholder dialogue “Licences for Europe”<sup>12</sup> and market-led developments such as the on-going work in the Linked Content Coalition<sup>13</sup>.

“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<sup>14</sup>.

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

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

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<sup>15</sup> to increase the cross-border availability of content services in the Single Market, while ensuring an adequate level of protection for right holders.

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<sup>9</sup> This principle has been confirmed by the Court of justice on several occasions.

<sup>10</sup> 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.

<sup>11</sup> 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.

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

<sup>13</sup> You can find more information on the following website: <http://www.linkedcontentcoalition.org/>.

<sup>14</sup> 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](http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf).

<sup>15</sup> 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.

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?*

**NO**

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

**NO**

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.*

The British Copyright Council leaves it to its individual members to provide this information in response to this question in their individual submissions.

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

Not applicable.

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.** Where there is demand and a business case, cross border licensing already takes place within the European Union. The extent to which it takes place differs according to the creative industry sector in which our members operate. Where concerns do arise they are related to competition within the marketplace (particularly in the context of one stop licensing), market needs and requirements, or cultural or language differences. They are not due to copyright. To the extent that there is any unmet demand within the creative industries, it is clearly a matter for the Commission to address on a sectoral basis. From a consumer perspective, problems are more likely to relate to the limitations of online retail technology, or restrictions due to exchange rates, or taxation, than they are to do with copyright

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)?*

Again, our reply is **YES for some of our members**.

The relevance of market regulations on content, contempt of court, defamation, taxation rules and insurance rules must be taken into account. In addition, the price paid to cover the costs of translation or the provision of additional services which makes material or programmes attractive to the majority of an audience within a particular Member State.

**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.** We agree that further measures are needed but not in the field of copyright where flexible and creative industries have developed and will continue to develop market led solutions. It is for service providers and commercial users to choose what creative content they want. This is not a copyright issue. However, it is our view that other legislative aspects of cross-border availability of content services should be addressed such as payment measures, VAT harmonisation, anti-piracy action, etc. We would also welcome EU involvement in copyright awareness and education activities for consumers.

**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<sup>16</sup> 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<sup>17</sup> and databases<sup>18</sup>.

Directive 2001/29/EC harmonises the rights of authors and neighbouring rightholders<sup>19</sup> 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<sup>20</sup>, (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

<sup>16</sup> 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.

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

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

<sup>19</sup> 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".

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



communication to the public/making available right, i.e. the rights to authorise or prohibit the dissemination of the works in digital networks<sup>21</sup>. These rights are intrinsically linked in digital transmissions and both need to be cleared.

### 1. The act of “making available”

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

**NO.** Making available of works electronically or by wire or wireless means should be understood to take place in both the country from which a transmission emanates and all countries where the content transmitted can be accessed (not just those that are ‘targeted’ by a website). This is not entirely clear at present because there is no CJEU judgment to confirm it. Reasons why the right applies in country from which a transmission emanates and all countries where accessible are:

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

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

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

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

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

<sup>21</sup> 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).

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

We believe that where there is a need for further clarification it is on the overlap between the making available right and rights granted under the rental and lending Directive e.g. there is confusion as to whether downloading of e-books from outside library premises may constitute “communication to the public rather than “lending”.

The way in which an electronic communication of copyright works is treated for the purposes of copyright law does require a more harmonised approach at international level, to reflect the increasing number of ways in which transmission across borders will form a part of the delivery of copyright works for subsequent use or reuse by consumers or businesses who are able to access such transmissions (on agreed terms).

It will be vital for the act of “communication to the public” to continue to be able to be treated separately from application of other restricted acts depending upon how a “communication” is received and how the work so received is re-used beyond the communication itself.

This reuse must continue to be subject to the national rules relevant in the territory within which a communication is received and “reused” in terms of relevant copyright restricted acts.

**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<sup>23</sup>)?*

**YES.** It affects application of “reuse” of works in ways that involve restricted acts recognised by copyright above and beyond the “making available” right. Examples including the generation of remuneration for private copying and for cable retransmission rights or other forms of commercial electronic relays by parties who are not responsible for the original “making available”. If “making available” is only recognised at the point of upload, in a world of bit torrent delivery and cloud storage it will become increasingly difficult to monitor and to enforce rights. Those who seek to evade legitimate payments to rights owners will move servers to territories outside the EU with lower protection. The country of origin principle applies more easily to services that are made subject to local licence requirements at the point where the service is originated (including conditions concerning the scope of reception).

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

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

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

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<sup>23</sup> Injunctive relief is a temporary or permanent remedy allowing the right holder to stop or prevent an infringement of his/her right.

**NO.** Licensing different rights together is normal in many fields of copyright consents, not just online. It is done efficiently and does not present any problems. That is, there is no problem in practice, either in terms of managing the rights or in licensing the rights relevant to the end use.

See the individual submissions provided by our members which explain how licensing rights together works for their sector

### 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<sup>24</sup> 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<sup>25</sup> as to whether such copies are always covered by the mandatory exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC.

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

**YES,** in certain circumstances. The main problem is when sites link to illegal content which are, potentially, making money, from that illegal content. Such links should be more clearly seen as authorising a breach of copyright.

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

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

### 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)<sup>26</sup>. The issue that arises here is whether this principle can

<sup>24</sup> Cases C-466/12 (Svensson), C-348/13 (Bestwater International) and C-279/13 (C More entertainment).

<sup>25</sup> Case C-360/13 (Public Relations Consultants Association Ltd). See also

[http://www.supremecourt.gov.uk/decided-cases/docs/UKSC\\_2011\\_0202\\_PressSummary.pdf](http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0202_PressSummary.pdf).

<sup>26</sup> See also recital 28 of Directive 2001/29/EC.

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)<sup>27</sup>. 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)?*

**NO.** We are extremely concerned that the doctrine of exhaustion might be applied to digital content. We are also concerned that the way in which this question is framed may lead end users and consumers to speak of bad experiences. Any such responses must be balanced against responses to question 14.

Digital content is acquired in a very different way legally from tangible hardback copies. With a hardback book or a physical CD etc., you purchase a tangible object (but not any IPR in the content) which you can choose to give away or sell etc., as you wish. But digital content is acquired by a licence – an access licence – which contains terms as to how, where, when, for how long and by whom such content can be accessed. So it is wrong to apply to digital content the conventional thinking about ownership rights of a print publication.

**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.*

The practical consequences of providing a legal framework enabling the resale of previously purchased digital content would be that:

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

and

(b) the resold file would be identical to the original resulting in prices for the original files being driven down inexorably.

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

### **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.

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<sup>27</sup> 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).

However, this prohibition is not absolute<sup>28</sup>. Moreover a system of registration does not need to be made compulsory or constitute a precondition for the protection and exercise of rights. With a longer term of protection and with the increased opportunities that digital technology provides for the use of content (including older works and works that otherwise would not have been disseminated), the advantages and disadvantages of a system of registration are increasingly being considered<sup>29</sup>.

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

**NO.** The BCC cannot see that a registration system at EU level would add value above and beyond the voluntary systems already in place at national level.

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

No response.

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

The BCC cannot see that there are any benefits to be obtained from a registration system that did not link to improved metadata for discoverability.

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

No response.

**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<sup>30</sup>, 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<sup>31</sup> should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition<sup>32</sup> was established to develop building blocks for the expression and management of rights and licensing across all content and media types. It includes the

<sup>28</sup> 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.

<sup>29</sup> 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.

<sup>30</sup> E.g. the International Standard Recording Code (ISRC) is used to identify recordings, the International Standard Book Number (ISBN) is used to identify books.

<sup>31</sup> You will find more information about this initiative on the following website: <http://www.globalrepertoiredatabase.com/>.

<sup>32</sup> You will find more information about this initiative (funded in part by the European Commission) on the following website: [www.linkedcontentcoalition.org](http://www.linkedcontentcoalition.org).

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<sup>33</sup> is seeking to take such identification systems a step further, and to create a linked platform, enabling automated licensing across different sectors.

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

The role of the European Union should be to encourage the adoption of standard identifiers and to emphasise the importance of enforcement through preventing their removal and by increasing sanctions to prevent the removal of metadata.

### ***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<sup>34</sup> requires a minimum term of protection of 50 years after the death of the author. The EU rules extend this term of protection to 70 years after the death of the author (as do many other countries, e.g. the US).

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

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

**YES.** However, the BCC recognises that there are harmonisation issues for audiovisual performers, particularly in view of expected international adoption of the Beijing Treaty. The BCC supports parity between creators and performers.

## **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<sup>35</sup>.

Exceptions and limitations in the national and EU copyright laws have to respect international law<sup>36</sup>. In accordance with international obligations, the EU acquis requires that limitations and

<sup>33</sup> You will find more information about this initiative on the following website: <http://www.copyrighthub.co.uk/>.

<sup>34</sup> Berne Convention for the Protection of Literary and Artistic Works, <http://www.wipo.int/treaties/en/ip/berne/>.

<sup>35</sup> 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.

<sup>36</sup> 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).

exceptions can only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interest of the rightholders.

Whereas the catalogue of limitations and exceptions included in EU law is exhaustive (no other exceptions can be applied to the rights harmonised at EU level)<sup>37</sup>, these limitations and exceptions are often optional<sup>38</sup>, 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")<sup>39</sup>.

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.

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<sup>37</sup> 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)).

<sup>38</sup> 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.

<sup>39</sup> 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.

**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?***

**NO** In support of this view, we note that a recent report prepared for the European Commission states<sup>1</sup>: “We argue that, absent clearly identified and persistent market inefficiencies, exceptions are not likely to be warranted from an economic perspective.”

<sup>1</sup>. “Assessing the economic impacts of adapting certain limitations and exceptions to copyright and related rights in the EU”, prepared for DG Markt, by Charles River Associations, October 2013 [http://ec.europa.eu/internal\\_market/copyright/docs/studies/131001-study\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/studies/131001-study_en.pdf)

**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?***

**NO.**

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

**NO.** The existing catalogue is already sufficiently flexible. As the UK Government states in its response<sup>2</sup>, to this consultation, new limitations and exceptions should only be considered where specific problems are identified with consideration being given to the scope of licensing to solve these issues.

<sup>2</sup>. <http://www.ipso.gov.uk/response-eucopyrightrules.pdf>

**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?***

**NO.** There is no need to provide for a greater degree of flexibility for limitations and exceptions. Greater flexibility, beyond that which already enables recognition of important local cultural differences, is likely to create greater uncertainty, which would increase commercial and litigation costs.

The BCC is opposed to the introduction of a US style “fair use” doctrine into European law, which would be damaging and disruptive. The European Union already has a body of law interpreting limitations and exceptions at national level, linked to fair dealing which is serving the market well. There is significant concern that the fair use doctrine results in complexity and uncertainty.

We note also that the analysis in the De Wolf report reaches a similar conclusion.

There is no case for introducing fair use in the European Union.

**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.***

No response.



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

No response.

**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?)**

Given that one of the benefits of the copyright frameworks is its flexibility in allowing Member States to apply the right balance according to their own country’s legal, economic and cultural needs, it is possible that limitations and exceptions established at national level could have a cross-border effect. Where that is the case then, whether there is a licensing solution or an exception in place at national level, “fair compensation” whether in the form of a licence fee, or as a share of a levy or other equitable remuneration recognised under international law, should be paid from the any licensing agent or collecting society (administering a levy or collective licensing scheme) in the country in which the use is made, to the right holder in the country where they reside.

## ***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<sup>40</sup> and enable on-site consultation of the works and other subject matter in the collections of such institutions<sup>41</sup>. 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<sup>42</sup>.

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.

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<sup>40</sup> Article 5(2)c of Directive 2001/29.

<sup>41</sup> Article 5(3)n of Directive 2001/29.

<sup>42</sup> Article 5 of Directive 2006/115/EC.

**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?**

**(b) NO.**

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

No response.

**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?**

No response.

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

No response.

## **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?**

**(c).** The BCC has no direct experience of such agreements. We understand from our members that any such issues are easily solved through the use of licensing solutions. Any exceptions for such use would have to satisfy the three-step test and provide fair

remuneration to rights holders, including, if necessary the extension of Public Lending Right payments to authors.

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

No response.

**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?***

No response.

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

No response.

### **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?***

**(c) YES.** The British Copyright Council's members have negotiated agreements. The BCC leaves it to its members to provide examples.

Our member, the Society of Authors, has been very engaged with these questions and possible solutions in the UK and in Europe. The UK Government commissioned a thorough study into the question in 2013 (The Sieghert Review). Our member, the Society of Authors, summarises the recommendations made by that review in its response to this consultation and broadly supports those recommendations. The UK Government's Department for Culture Media and Sport has now published a consultation on the extension of PLR to audio and e-books for on-site (in public libraries) loans.

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

No response.

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?*

No response.

**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?*

No response.

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

The term “mass digitisation” is normally used to refer to efforts by institutions such as libraries and archives to digitise (e.g. scan) the entire content or part of their collections with an objective to preserve these collections and, normally, to make them available to the public. Examples are efforts by libraries to digitise novels from the early part of the 20<sup>th</sup> 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<sup>43</sup>. Provided the required funding is ensured (digitisation projects are extremely expensive), the result of this MoU should be that books that are currently to be found only in the archives of, for instance, libraries will be digitised and made available online to everyone. The MoU is based on voluntary licences (granted by Collective Management Organisations on the basis of the mandates they receive from authors and publishers). Some Member States may need to enact legislation to ensure the largest possible effect of such licences (e.g. by establishing in legislation a presumption of representation of a collecting society or the recognition of an “extended effect” to the licences granted)<sup>44</sup>.

**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?*

<sup>43</sup> 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](http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm).

<sup>44</sup> 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.

**NO.** The 2011 MoU is already in place so there is no need to enact legislation on “out of commerce works”. We would like the European Union address proper implementation of the MoU at national level.

**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)?***

No response.

## **B. Teaching**

Directive 2001/29/EC<sup>45</sup> enables Member States to implement in their national legislation limitations and exceptions for the purpose of illustration for non-commercial teaching. Such exceptions would typically allow a teacher to use parts of or full works to illustrate his course, e.g. by distributing copies of fragments of a book or of newspaper articles in the classroom or by showing protected content on a smart board without having to obtain authorisation from the right holders. The open formulation of this (optional) provision allows for rather different implementation at Member States level. The implementation of the exception differs from Member State to Member State, with several Member States providing instead a framework for the licensing of content for certain educational uses. Some argue that the law should provide for better possibilities for distance learning and study at home.

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

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

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

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

No response.

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

The British Copyright Council strongly supports the UK’s established approach for educational use of conditional exceptions, i.e. exception subject to licence.

Providing for such a “conditional” exception, which applies in circumstances when rights holders do not offer a licensed alternative, has encouraged them to come together to provide effective licensing within the UK. This more specific approach offers greater certainty to users, reducing litigation and legal costs, whilst ensuring fair compensation to rights holders.

The recent UK Government copyright review has highlighted a number of concerns about the lack of clarity in applying exceptions related to non-commercial educational use and separate

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<sup>45</sup> Article 5(3)a of Directive 2001/29.

and distinct acts that are regarded as “illustration for teaching” over and above the non-commercial educational uses (to which licensing solutions are applied).

**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?***

No response.

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

No response.

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

Directive 2001/29/EC<sup>46</sup> 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?***

**(b) NO.**

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

No reply.

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

No reply.

### **D. *Disabilities***

Directive 2001/29/EC<sup>47</sup> 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

<sup>46</sup> Article 5(3)a of Directive 2001/29.

<sup>47</sup> Article 5 (3)b of Directive 2001/29.

disabilities (notably by increasing the number of works published in special formats and facilitating their distribution across the European Union)<sup>48</sup>.

The Marrakesh Treaty<sup>49</sup> 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?**

**(c) YES.** A voluntary system is already in place in the UK and works well.

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

No response.

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

We support the detailed response to these questions submitted by the UK Publishers Association.

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

Text and data mining/content mining/data analytics<sup>50</sup> 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.

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<sup>48</sup> The European Trusted Intermediaries Network (ETIN) resulting from a Memorandum of Understanding between representatives of the right-holder community (publishers, authors, collecting societies) and interested parties such as associations for blind and dyslexic persons ([http://ec.europa.eu/internal\\_market/copyright/initiatives/access/index\\_en.htm](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/>).

<sup>49</sup> Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities, Marrakesh, June 17 to 28 2013.

<sup>50</sup> For the purpose of the present document, the term “text and data mining” will be used.

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”<sup>51</sup>. 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?**

**(c) NO.** Licensing solutions are already in place.

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

No response.

**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?**

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<sup>51</sup> 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](http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf).



No response.

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

No response.

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

No response.

## ***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<sup>52</sup>. 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 as 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<sup>53</sup>.

**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?***

<sup>52</sup> 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.

<sup>53</sup> 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](http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf).

**(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?*

**(c)** The BCC is aware that User generated content, whether adaptation of pre-existing works or other subject matter, or new material created entirely by the user, is a rapidly developing and complex area.

The opportunity for consumers to create and share derivative content on the internet is valuable and should be supported. The development of consumer creativity is not in opposition to authors' exclusive rights. It is not a question of 'either or'. Consumer adaptations are not prevented by the exercise of exclusive rights, rather the original author can license the adaptation of the pre-existing (derivative) work. Consumers who upload derivative content to websites, while using others' copyright content, are creating new copyright content. In that respect, it is important that their rights are also protected.

Licensing solutions exist to license the platforms that monetise the distribution and dissemination of derivative works. Where consumers create entirely new copyright content they can in turn adopt those licensing solutions or use Creative Commons. There is no need for an exception.

The right of authors to object to derivative works on moral rights grounds (or other grounds) should be respected.

**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?*

No response.

**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?*

**(a) YES.** From our members' experiences with User Creators, the problem is that they frequently do not understand what they have created so don't understand that they have rights.

A problem for both for User Creators and for many individual professional creators, performers and other smaller rights holders (whose "pre-existing works" may have been

incorporated in User Generated Content), is that they do not know when their work is used and they have no means to monitor or police the market and even if they identify infringements they have insufficient resources (financial or otherwise) to pursue infringers.

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

There are three areas where research could valuably be carried out and the BCC would welcome further work by the European Commission on these. They are:-

- Consumer understanding of copyright and licensing and to consider whether improvement of information is required;
- Whether there are areas or sectors where there are gaps in licensing, or website takedown procedures and whether improvements should be sought;
- Whether the rights of consumers in their own creative content is adequately protected.

**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?***

No response.

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

No response.

## **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<sup>54</sup>. 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<sup>5556</sup>.

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<sup>54</sup> Article 5. 2)(a) and (b) of Directive 2001/29.

<sup>55</sup> Communication "Unleashing the Potential of Cloud Computing in Europe", COM(2012) 529 final.

<sup>56</sup> 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:

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<sup>57</sup> in the digital environment?***

**YES** but we comment only in relation to private copying.

The British Copyright Council does not believe that clarification is needed at legislative level, there are numerous European Union Court of Justice decisions interpreting the scope of the exception and the fair compensation system. Where there is a real need, is for consistent implementation of the exception at national level, including specific provisions for compensation to be recognised.

Rights holders in the UK recognise that a private copying exception is of benefit to consumers and creators and performers alike. The real problem arises when countries such as the UK choose not to implement the exception (thus penalising consumers in the UK) or choose to implement the exception without the provision for compensation envisaged by the Directive and application of the three step test (thus penalising creators and performers across the European Union).

**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?<sup>58</sup>***

No response.

**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?***

No response.

**67. *Would you see an added value in making levies visible on the invoices for products subject to levies?<sup>59</sup>***

No response.

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,

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[http://ec.europa.eu/internal\\_market/copyright/docs/levy\\_reform/130131\\_levies-vitorino-recommendations\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf).

<sup>57</sup> Art. 5.2(a) and 5.2(b) of Directive 2001/29/EC.

<sup>58</sup> This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies

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

many Member States continue to allow the indiscriminate application of private copying levies to all transactions irrespective of the person to whom the product subject to a levy is sold (e.g. private person or business). In that context, not all Member States have ex ante exemption and/or ex post reimbursement schemes which could remedy these situations and reduce the number of undue payments<sup>60</sup>.

**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 response.

**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.).***

No response.

**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?***

No response.

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

The BCC regrets that it is unable to assist with any answer to this question. Given the UK position (see our response to question 64) rights holders have no experience of the levy system and no private copying.

## **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<sup>61</sup> 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<sup>62</sup>. 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.

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

<sup>61</sup> See e.g. Directive 92/100/EEC, Art.2(4)-(7).

<sup>62</sup> See e.g. Art. 2.3. of Directive 2009/24/EC, Art. 4 of Directive 96/9/EC.

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?**

The best mechanism to ensure that copyright owners receive adequate remuneration for the exploitation of their works and performances is a strong copyright framework, fair payment for use and fair terms of business.

The copyright framework makes an important contribution to jobs and growth in the European Union but those jobs and growth would not exist without creative content, and much of that creative content is created by individual authors and performers. The British Copyright Council believed that it is also worthwhile for the European Commission to investigate whether they are rewarded adequately for the use of their works and performances.

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

No response.

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

No response.

## **VI. Respect for rights**

Directive 2004/48/EE<sup>63</sup> 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<sup>64</sup>. 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<sup>65</sup>. One means to do this could be to clarify the role

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<sup>63</sup> Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

<sup>64</sup> You will find more information on the following website:

[http://ec.europa.eu/internal\\_market/iprenforcement/directive/index\\_en.htm](http://ec.europa.eu/internal_market/iprenforcement/directive/index_en.htm)

<sup>65</sup> For example when the infringing content is offered on a website which gets advertising revenues that depend on the volume of traffic.

of intermediaries in the IP infrastructure<sup>66</sup>. At the same time, there could be clarification of the safeguards for respect of private life and data protection for private users.

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

**YES.** Whilst on the whole, the civil enforcement system in the EU works well, there are a number of things the Commission could do to make it more efficient. In this context, the BCC supports the detailed response to this question made by the UK's Alliance for IP.

**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?***

The legal framework is not sufficiently clear. While there is no need for the E-Commerce Directive to be re-opened, we nevertheless believe that improvements can be made within the existing framework of the Directive which would have a significant impact.

The British Copyright Council supports the detailed submission made in response to this question by the UK's Alliance for IP.

**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?***

No response.

## **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?***

**NO.** The BCC found the previous European debate on this subject interesting and encouraged academic debate, but the results of the Wittem Project were not fit for purpose and took very little account of the needs and interests of creators and performers or the perspective of the creative industries. We see little point in revisiting this debate.

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<sup>66</sup> 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.

The European Commission's time is better spent supporting further development and streamlining of licensing as a means of increasing access to works, strengthening enforcement and supporting initiatives to improve discoverability.

**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?***

**NO. NO.**

## **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.***

BCC members recognise that it is essential for copyright to keep pace with technological developments but firmly believe that to enable and support this, the framework established under the Copyright Directive 2001/29 must remain as the secure basis from which policy is developed for Europe's economic stability, future growth and cultural diversity.

It is therefore of fundamental importance that any examination of issues in the area of copyright does not lead to a reopening of the Copyright Directive as a whole, for it is the Copyright Directive that provides the framework within which other issues can be debated and appropriate policies developed, whilst enabling copyright based industries within EU Member States to continue to develop new, innovative and world leading communication models.

Furthermore, we note the increasing number of decisions by the Court of Justice of the European Union interpreting the Copyright Directive, thus providing the case law that supports a harmonised approach to copyright throughout the European Single Market whilst respecting the cultural differences that support and encourage growth within the creative industries of the European Union. Any changes to the underlying framework endanger this harmonisation.

To date the combination of licensing and exceptions promoted by the Directive has enabled a suitable balance for application of recognised exceptions and limitations in ways which do not prejudice the legitimate interests of rights owners. In addition licensing is being successfully streamlined for the needs of the digital environment and the technical opportunities for such licensing are being successfully promoted through EU initiatives, such as Licences for Europe.

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

It is the BCC's view that, in the absence of proven failure, re-opening the Copyright Directive would be premature.



