Public Consultation
on the review of the EU copyright rules

Contents

I. Introduction

A. Context of the consultation

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

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

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

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

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

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

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

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

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

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

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

B. How to submit replies to this questionnaire

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

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

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

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

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

C. Confidentiality

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

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

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:

……European Federation of Journalists……..

……..

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.

…… 27471236588-39……..

……..

- 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"**

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

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

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

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

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

- **Collective Management Organisation**

- **Public authority**

- **Member State**

- **Other** (Please explain):

……

……

II. Rights and the functioning of the Single Market

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

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

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

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

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

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

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[9] This principle has been confirmed by the Court of justice on several occasions.

[10] Proposal for a Directive of the European Parliament and of the Council of 11 July 2012 on collective management of copyright and related rights and multi-territorial licensing of rights in musical works for online uses in the internal market, COM(2012) 372 final.

[11] Collective Management Organisations play a significant role in the management of online rights for musical works in contrast to the situation where online rights are licensed directly by right holders such as film or record producers or by newspaper or book publishers.

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

[13] You can find more information on the following website: http://www.linkedcontentcoalition.org/.

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

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

The main issue at stake here is, therefore, whether further measures (legislative or non-legislative, including market-led solutions) need to be taken at EU level in the medium term[15] to increase the cross-border availability of content services in the Single Market, while ensuring an adequate level of protection for right holders.

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

☐

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

☐

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

[Open question]

Journalists usually license to publishers and broadcasters their exclusive rights in their works for specific purposes, for a limited time period. This can be done either in a contract for an individual piece of work, in an individual employment contract or in a collective agreement. Licences usually mention the place where the work will be exploited, be it in the analogue or digital environment. Sometimes journalists are forced to sign individual buy-out contracts whereby all their authors' rights are transferred to publishers and broadcasters without any geographical limits and without additional remuneration for these uses.

When their rights have not been assigned, or have reverted to journalists following a specific time period, journalists can also decide to grant collecting societies exclusive rights or allow them to manage secondary uses of their works on multiple territories – or issue further individual licences for re-use of the work. All these possibilities represent important sources of income, enabling journalists to continue to work as independent professionals.

……
……

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

[Open question]

No particular problem have been identified, apart from the practice of some broadcasters and publishers, mentioned above, particularly in the UK and Ireland, of imposing contracts that

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

prevent journalists obtaining income from re-use of their work, frustrating the intention of the law.

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** –

… Press freedom does not have the same level of protection in each EU member state. Defamation, for instance is handled very differently in the UK and in France. Rules on blasphemy and privacy vary from one country to another.

For all these reasons a journalist may find it necessary to impose territorial restrictions on the service provider, and may face legal penalties if these are not respected.

In addition, the protection of the moral right of journalists to object to use contrary to their honour or reputation implies that they must have the right to insist that their work is not used on a platform that the author does not agree to be published or accessible on.

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)?***

□

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?

NO The current legal system does not prevent authors from making their work available across borders.

Abusive contractual clauses and compensation for using authors' rights will be addressed under question 72.

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

[The definition of the rights involved in digital transmissions]

The EU framework for the protection of copyright and related rights in the digital environment is largely established by Directive 2001/29/EC[16] on the harmonisation of certain aspects of copyright and related rights in the information society. Other EU directives in this

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

field that are relevant in the online environment are those relating to the protection of software[17] and databases[18].

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

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

1. The act of "making available"

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

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

□ **YES:** see our response to Q9.

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

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

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

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

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

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

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[23])?***

 NO. No clarification is needed for the making available right to have an effect on the recognition of journalists' rights. As soon as a journalistic work is created, exclusive rights belong to the author, including the making-available and reproduction rights. The exploitation of these rights must be made clear, and adequate remuneration must be paid for these exploitations. See question 72.

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?***

NO. When journalistic works are made available online, both rights are usually licenced to the publisher/broadcaster to the extent necessary for the exploitation of the work. However, the need to remunerate the exploitation of these rights is key.

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[24] 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[25] 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/NO –

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

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

[25] Case C-360/13 (Public Relations Consultants Association Ltd). See also http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0202_PressSummary.pdf.

Article 2(a) of Directive 2001/29 provides that authors have the exclusive right to authorise or prohibit reproduction, in whole or in part, of their works. In the Infopaq case (C-5/08) the CJEU decided that "an act occurring during a data capture process, which consists of storing an extract of a protected work comprising 11 words and printing out that extract, is such as to come within the concept of reproduction in part within the meaning of Article 2 of Directive 2001/29/EC".

It is, however, important to draw a distinction between (A) links that appear on a newspaper web page, linking to content prepared by a journalist working for this web site (an "internal link"), for which authorisation is not needed because it is part of the normal exploitation of that web site and secured in a contract or a collective agreement, and (B) "external links" to content on another web site.

There are, further, different cases of "external links". Permission should not be required, for example, for links which are of the nature of a citation and which do not have a distinct economic function or value. It is not entirely clear, even given recent jurisprudence, whether such links are the concern of authors' rights law. Guidance to the courts in deciding this issue can be offered *by analogy* to the "three-step test" setting out in the WTO TRIPS Agreement the boundaries of exceptions to authors' rights, and in the exceptions in the InfoSoc directive. Does the link:

(a) go to a work which has *not* been genuinely made available to the public (genuinely so – accidental failure to secure a pre-publication page, for example, should not count)?

(b) *affect* the normal exploitation of the work linked to? or

(c) *fail to* offer sufficient attribution, in the circumstances, to the work linked to?

If the answer to any of the above is "yes" then the link requires permission – as found by the United Kingdom Court of Appeal in its ruling on the large collections of links considered in *Meltwater*.In addition, any linking that attempts to "*pass off"* another's work as that of the person making the link is of course infringing, and likely to be a breach of the moral rights of the author of the linked work.

…

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

NO – Temporary acts of reproduction which are an essential part of a technological process for the purpose of lawful permitted use fall under Article 5.1 of Directive 2001/29/EC.

Recital 33 of the above-mentioned Directive provides a very clear answer to this question, limiting this exception to transient or incidental reproductions forming an integral and essential part of a technological process and carried out for the sole purpose of enabling either efficient transmission in a network between third parties by an intermediary or a lawful use of a work o other subject matter to be made. Importantly, the acts of reproduction should have no separate economic value on their own..

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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)[26]. The issue that arises here is whether this principle can also be applied in the case of an act of transmission equivalent in its effect to distribution (i.e. where the buyer acquires the property of the copy)[27]. 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)?***

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 exhaustion principle is only relevant to hard copies of work and should not apply to online services and online copies that will remain of perfect quality and never deteriorate, including in cases where the author has authorised the reproduction or making available of his/her work. This is in line with recital 29 of directive 2001/29. Any attempt to apply the exhaustion principle would result in an obvious reduction of income for authors who rely on the possibility to licence their work.…….

…….

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

Registration is not often discussed in copyright in the EU as the existing international treaties in the area prohibit formalities as a condition for the protection and exercise of rights. However, this prohibition is not absolute[28]. Moreover a system of registration does not need to be made compulsory or constitute a precondition for the protection and exercise of rights.

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

[27] 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).

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

With a longer term of protection and with the increased opportunities that digital technology provides for the use of content (including older works and works that otherwise would not have been disseminated), the advantages and disadvantages of a system of registration are increasingly being considered[29].

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

□ **NO**

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

[Open question]

……

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

A work generates authors' rights protection by its very existence and should not be subject to any formality: this is required by article 5.2 of the Berne Convention. In addition, in the news sector where journalists often produce several stories or images a day, any requirement to register works would be a severe burden for any professional (and for their employer or client).

However, the European Commission should explore ways to support and encourage the voluntary use of standardised identifiers for works and authors, and strengthen legal protection of such identifiers.

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

[Open question]

…none……
……

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[30], 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[31] should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The

[29] 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.

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

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

Linked Content Coalition[32] was established to develop building blocks for the expression and management of rights and licensing across all content and media types. It includes the development of a Rights Reference Model (RRM) – a comprehensive data model for all types of rights in all types of content. The UK Copyright Hub[33] is seeking to take such identification systems a step further, and to create a linked platform, enabling automated licensing across different sectors.

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

[Open question]

Identifiers are crucial when it comes to identifying online uses of works – and in the reduction of the number of "orphan works" in circulation. While press articles are generally put online without specific identifiers, photographers usually incorporate a specific tag to protect their work. Metadata incorporated in a photograph with sufficient information about its author will enable the latter to track the uses of his/her work. It also allows users to find a specific photographer more easily.

The EU has a role to play in promoting the importance for authors to identify their work and highlight the benefit that those identifications can have for users too.

Awareness-raising campaigns on the importance of protecting identifiers, and sanctions for their removal are also key, as noted above.

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…….

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[34] 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?

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

YES –The 70-year term of protection is even more justified when works are available in the digital environment, are accessible and reproduced for very limited costs on a very wide scale, in perfect quality condition, for an unlimited time. The length of copyright protection is justified to compensate authors for the income lost due to improved copying technologies in the digital environment through leaving a legacy for their heirs.

…….

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[35].

Exceptions and limitations in the national and EU copyright laws have to respect international law[36]. In accordance with international obligations, the EU acquis requires that limitations and exceptions can only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interest of the rightholders.

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

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

[35] 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.

[36] 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).

[37] 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)).

[38] 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.

[39] 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.

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

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

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

NO . Authors' rights' legislation in EU member states reflects different traditions and practices and this is particularly so in the case of exceptions and limitations. There are problems in some member states when exceptions are not fairly compensated or where some authors are not adequately protected against certain uses and abuses, but this is a different issue.

In addition, the three-step test serves as a sound safeguard to ensure that any exception does not unduly harm authors and impact their income. ……

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 – See above. The importance of providing fair compensation to authors for the use of their work is key to secure creators' income, and thus their incentive to create and being able to function as dedicated, independent professionals. In particular Article 5 (2) (b) of directive 2001/29 should be enforced properly by ensuring that fair compensation is paid in cases of copies being made for private uses. The same should apply to all exceptions and limitations that member states decide …….

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

[Open question]

…

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

NO – There is wide and sufficient degree of flexibility at EU level. The need to compensate authors for using their work as part of exceptions and limitations should be a priority. Many

online uses tend to compete with the normal exploitation of authors' rights and infringe the 3-steps test.

……

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.

[Open question]

…

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

NO

See comments above.

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?)

The first user should bear the compensation. In the case of private copying for instance, it should be collected through the manufacturer.……

…….

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[40] and enable on-site consultation of the works and other subject matter in the collections of such institutions[41]. 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[42].

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

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

rightholders. The role of licensing and possible framework agreements between different stakeholders also needs to be considered here.

1. Preservation and archiving

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

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

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

…….

□ **NO**

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

……

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

[Op

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

…….

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?***

Collecting societies negotiate this directly on behalf of authors. Journalists would not enter these contracts individually……
……

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

Solutions can be found within the sector by involving all relevant parties. *The Memorandum of Understanding on key principles on the digitisation and making-available of –out –of-commerce works* is a good example of this……
……
……

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?***

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

……

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?***

☐ **NO**

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

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?***

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?***

Recital 2 of Directive 2006/115/EC on rental and lending right points out that the rental and lending of copyright works for authors, especially in connection with piracy operations plays an increasingly important role. Recital 4 also suggests that copyright and related rights protection must adapt to new economic developments such as new forms of exploitation. On this basis, it can be stated that electronic lending processes have different effects in terms of economic interests of authors as renting procedures adopted in the analogue environment. The sale of a book after its first sale might not be of great financial interest to the author, but the electronic lending of digital content of excellent quality may very well have a significant impact on its business model. The electronic access to an author's work including by way of electronic renting must therefore remain subject to his/her consent.

4. Mass digitisation

The term "mass digitisation" is normally used to refer to efforts by institutions such as libraries and archives to digitise (e.g. scan) the entire content or part of their collections with an objective to preserve these collections and, normally, to make them available to the public. Examples are efforts by libraries to digitise novels form the early part of the 20th century or whole collections of pictures of historical value. This matter has been partly addressed at the EU level by the 2011 Memorandum of Understanding (MoU) on key principles on the digitisation and making available of out of commerce works (i.e. works which are no longer found in the normal channels of commerce), which is aiming to facilitate mass digitisation efforts (for books and learned journals) on the basis of licence agreements between libraries and similar cultural institutions on the one hand and the collecting societies representing authors and publishers on the other[43]. 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

[43] 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 .

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)[44].

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?***

NO OPINION. The signatories to the *Memorandum of Understanding on key principles on the digitisation and making-available of out-of-commerce works*, including the EFJ, agreed to call "on the European Commission, to the extent required to ensure legal certainty in a cross-border context, to consider the type of legislation to be enacted to ensure that publicly accessible cultural institutions and collective management organisations which enter into a licence in good faith applying these key principles are legally protected with regard to licensed uses of works of rightholders who have been presumed to be within the scope of the licence."

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

YES – It would be useful to explore industry-led solutions in these sector, which would include all relevant stakeholders……

B. Teaching

Directive 2001/29/EC[45] 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.

[44] 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.

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

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. The implementation of Article 5 (3) (a) must meet the objective of illustrating for teaching purposes and should not overtake this purpose. In particular, the fact that this exception specifies *non –commercial* use is important in order not to compete with journalists' activities and their right to syndicate their work.

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

[Open question]

The public's perception of the legitimacy of an exception including compensation is depend on them having confidence that a fair share of this compensation is distributed to the author. Problem can occur when journalists do not receive any remuneration for the use of their work for illustration for teaching. This can be the case when they are forced to sign away their exclusive rights to their employers.

It would be useful to raise awareness on the extent of exception 5 (3) (a): illustration for teaching or scientific research only, the need to include the source and the authors' name, the non-commercial purpose only. This means that the exception does not grant the user a licence to make available, reproduce, distribute, broadcast the entire journalistic work (either print, audiovisual or photograph).

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

Unless they have assigned their exclusive rights to their employers, journalists usually grant a licence to a collecting society to manage their rights and this would cover the exception for teaching of illustration purposes.……

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

[Open question]

No legislative solution is needed

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

[Open question]

See response to question 43……

C. Research

Directive 2001/29/EC[46] 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?***

NO Journalistic works must be accessible for research as long as the source including authors' name is mentioned and the non-commercial purposes of the activity are respected. If journalists have not assigned their exclusive rights to their employers, collecting societies are responsible for licensing these uses on their behalf.

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

The public's perception of the legitimacy of an exception including compensation will occur when they are confident that a share of this compensation is distributed to the author. Problem can occur when journalists do not receive any remuneration for the use of their work for research purposes. This can be the case when they are forced to sign away their exclusive rights to their employers.

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

Some collecting societies offer online platforms to enable users to access journalistic works, usually those already included in newspapers or magazines. However, it is difficult to trace the remuneration that is paid to journalists via these platforms.……

D. Disabilities

Directive 2001/29/EC[47] provides for an exception/limitation for the benefit of people with a disability. The open formulation of this (optional) provision allows for rather different implementations at Member States level. At EU and international level projects have been launched to increase the accessibility of works and other subject-matter for persons with disabilities (notably by increasing the number of works published in special formats and facilitating their distribution across the European Union) [48].

[46] Article 5(3)a of Directive 2001/29.
[47] Article 5 (3)b of Directive 2001/29.
[48] The European Trusted Intermediaries Network (ETIN) resulting from a Memorandum of Understanding between representatives of the right-holder community (publishers, authors, collecting societies) and interested parties such as associations for blind and dyslexic persons (http://ec.europa.eu/internal_market/copyright/initiatives/access/index_en.htm) and the Trusted Intermediary Global Accessible Resources (TIGAR) project in WIPO (http://www.visionip.org/portal/en/).

The Marrakesh Treaty[49] has been adopted to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled. The Treaty creates a mandatory exception to copyright that allows organisations for the blind to produce, distribute and make available accessible format copies to visually impaired persons without the authorisation of the rightholders. The EU and its Member States have started work to sign and ratify the Treaty. This may require the adoption of certain provisions at EU level (e.g. to ensure the possibility to exchange accessible format copies across borders).

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

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

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

YES –It is crucial to increasing the availability of special format copies of textual works including journalistic works for persons with print disabilities whilst respecting authors' rights. Any use of a work must also ensure that the author is compensated for the use of his/her work. Journalists and authors are forced to sign away their exclusive rights to their employers. This means that no remuneration is paid to them in return.……

51. If there are problems, what could be done to improve accessibility?
52. What mechanisms exist in the market place to facilitate accessibility to content? How successful are they?

……

E. Text and data mining

Text and data mining/content mining/data analytics[50] are different terms used to describe increasingly important techniques used in particular by researchers for the exploration of vast amounts of existing texts and data (e.g., journals, web sites, databases etc.). Through the use of software or other automated processes, an analysis is made of relevant texts and data in order to obtain new insights, patterns and trends.

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

[49] Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities, Marrakesh, June 17 to 28 2013.
[50] For the purpose of the present document, the term "text and data mining" will be used.

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"[51]. 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?***

 NO –The use of information and data from outside sources is part of the normal journalistic work. It falls under the quotation exception – or requires consent from the author if the use is significant and would amount to an act of reproduction.

……

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

[Open question]

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

[Open question]

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

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

[51] 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 .

[Open question]

……

……

F. User-generated content

Technological and service developments mean that citizens can copy, use and distribute content at little to no financial cost. As a consequence, new types of online activities are developing rapidly, including the making of so-called "user-generated content". While users can create totally original content, they can also take one or several pre-existing works, change something in the work(s), and upload the result on the Internet e.g. to platforms and blogs[52]. User-generated content (UGC) can thus cover the modification of pre-existing works even if the newly-generated/"uploaded" work does not necessarily require a creative effort and results from merely adding, subtracting or associating some pre-existing content with other pre-existing content. This kind of activity is not "new" as such. However, the development of social networking and social media sites that enable users to share content widely has vastly changed the scale of such activities and increased the potential economic impact for those holding rights in the pre-existing works. Re-use is no longer the preserve of a technically and artistically adept elite. With the possibilities offered by the new technologies, re-use is open to all, at no cost. This in turn raises questions with regard to fundamental rights such the freedom of expression and the right to property.

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results or even the definition of UGC. Nevertheless, a wide range of views were presented as to the best way to respond to this phenomenon. One view was to say that a new exception is needed to cover UGC, in particular non-commercial activities by individuals such as combining existing musical works with videos, sequences of photos, etc. Another view was that no legislative change is needed: UGC is flourishing, and licensing schemes are increasingly available (licence schemes concluded between rightholders and platforms as well as micro-licences concluded between rightholders and the users generating the content. In any event, practical solutions to ease user-generated content and facilitate micro-licensing for small users were pledged by rightholders across different sectors as a result of the "Licences for Europe" discussions[53].

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

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

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

[52] 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.

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

☒ **YES –** Too often photographs are used on the internet for UGC purposes without any authorisation of the photograph. An illustration for UGC in journalism would be the one of press photographs used with musical background and made available on the internet.

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

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

☒ **YES –** Too often, metadata on photographs can be removed thus impeding the possibility to identify the author and seek permission to use his/her work. This authorization could be given either via a collecting society (if the author has decided to allow them to licence his/her exclusive right) or by the author himself, individually.

We additionally observe that the concept "user-generated content" is used to cover several very different activities, including:

a) original works created by users, such as comments on newspaper articles; and

b) derivative works, from "humorously" re-sub-titled video clips or more creative and transformative works.

In the first case, authors' rights legislation should apply as it does to any original work. The second case illustrates the need for statutory right to fair remuneration, both by the creators of the underlying works and those of the derivative works. Consider the case in which a derivative work is so skilful that it generates very significant revenue: both its creator and those of the underlying works need to have a right against the service provider that gathers that revenue, including a "windfall" provision to cover the use being much more valuable than was envisaged at the time any contracts were agreed to.

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?***

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

[Open question]

By enforcing journalists' and other authors' moral rights, providing adequate protection against circumvention of technological protection measures (article 6 2001/29 Directive); enforcing article 6 (circumvention of technological protection measures) and 7 (prevention of removal of rights management information) of directive 2001/29. Support work to develop identifiers that allow to identify authors and provide users with terms and conditions for using the works……
……
……

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

[Open question]

…

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

[Open question]

…

IV. Private copying and reprography

Directive 2001/29/EC enables Member States to implement in their national legislation exceptions or limitations to the reproduction right for copies made for private use and photocopying[54]. 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[5556].

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[57] in the digital environment?

□ **YES** Devices which enable or host private copies as well as their storage capacities have grown exponentially. It would be important to clarify that the private copy exception also apply in the digital environment including on the cloud. ……

……

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

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

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

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

……

65. Should digital copies made by end users for private purposes in the context of a service that has been licensed by rightholders, and where the harm to the rightholder is minimal, be subject to private copying levies?[58]

YES – A distinction must be made between digital copies made by private individuals in clouds to which they have sole access and private copying exception applies, and clouds accessible to several persons outside the family circle, where the reproduction is not equivalent to private copy but unauthorised use of protected work not covered under Directive 5 .2. b) of directive 2001/29.

Additionally, the "VG Wort and others" CJEU ruling (C-457/11 to C-460/11)[59] stated that "an act by which a rightholder may have authorised the reproduction of his protected work or other subject-matter has no bearing on the fair compensation owed, whether it is provided for on a compulsory or an optional basis" .

In its ruling in the "Padawan" case (C-467/08)[60] the CJEU made clear that "fair compensation must be calculated on the basis of the criterion of the harm caused to authors. Account must be taken – as a 'valuable criterion' – of the 'possible harm' suffered by the author as a result of the act of reproduction concerned.

……

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?

Consumers make copies more than ever before on devices that are interconnected and store copies in the cloud. Unless private copy is paid to compensate authors for these news uses of their works their revenue will necessarily suffer from this lack of consideration of additional uses. Moreover, a licence would not ensure that authors are compensated in any form, while a levy collected by a collecting society that is duly representative of authors will ensure that.

67. Would you see an added value in making levies visible on the invoices for products subject to levies?[61]

YES – The need for transparency is important in order not to mislead consumers and inform them on the amount collected and the destination of this compensation. Private copying levies should be made clearly visible on all invoices and contracts in the products' sales

chain, including on consumers' invoices and till receipts.

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

[59] http://curia.europa.eu/juris/document/document.jsf?text=&docid=138854&pageIndex=0&doclang=EN&mode=lst&dir=&occ=first&part=1&cid=4780021

[60] http://curia.europa.eu/juris/liste.jsf?language=en&num=C-467/08

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

…….

…….

Diverging national systems levy different products and apply different tariffs. This results in obstacles to the free circulation of goods and services in the Single Market. At the same time, many Member States continue to allow the indiscriminate application of private copying levies to all transactions irrespective of the person to whom the product subject to a levy is sold (e.g. private person or business). In that context, not all Member States have ex ante exemption and/or ex post reimbursement schemes which could remedy these situations and reduce the number of undue payments[62].

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

□ NO OPINION

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

[Open question]

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

[Open question]

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

[Open question]

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[63] 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[64]. 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.

[62] This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies.
[63] See e.g. Directive 92/100/EEC, Art.2(4)-(7).
[64] See e.g. Art. 2.3. of Directive 2009/24/EC, Art. 4 of Directive 96/9/EC.

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

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

[Open question]

A 2013 UN report on *The right to freedom of artistic expression and creativity*[65] points at "coercive contracts that authors and artists identify as a primary obstacle to fair remuneration. Under such contracts, which are frequent, creators sign away all their rights to their creation in order to gain a commission for creating a work. Consequently, they lose control over their creation, which can be used in contradiction to their own vision".

Collective agreements remain the best solution to ensure that journalists are paid for primary (first publication or broadcast) and secondary uses (archiving, publication in another title, in the other media group, rebroadcasting, sale to another newspaper) of their works.

These agreements should be combined with the work done by collecting societies duly representative of journalists, to collect remuneration for other secondary uses such as private copy, reprography, lending. Collective agreements should also be applicable to freelance journalists and photographers who are often considered as self-entrepreneurs with no possibility to act collectively and often forced to assign their exclusive rights for a unique lump sum, independent of the futures uses that can be made of their works.

Section 32 of the German Copyright Act provides a sound basis for revising contracts that are deemed to be unequitable.

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

YES – A number of unfair clauses should be prohibited in the EU legislation in order to compensate for the uneven bargaining situation that journalists and other authors have to face. For instance, clauses that assign rights in future works for unknown uses, buy-outs clauses (lumps sumps agreed in return for the transfer of all exclusive rights for an indefinite time), clauses allowing for moral right transfer, clauses unreasonably restricting the right for journalists to work in a similar sector, clauses that only allow a journalist to be paid in authors' rights and not in salary thus impeding him/her for social protection and social benefits.

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

It would be key for the European Commission to investigate the contractual bargaining power at stake in the creative sector that forbids most authors from any possibility to claim

[65] http://www.ifj.org/en/articles/un-report-on-the-right-to-artistic-expression-and-creation

additional remuneration for the use of their works, due in particular to abusive clauses and rights transfer mechanisms embedded in employment contracts. Section 32 of the German copyright act, 2002 allowing for a review of the employment contract when the remuneration received by the author is unequitable could be considered as a sound basis. In accordance with this section German association of journalists (DJU an DJV) and the Federation of German Newspaper Publishers agreed on "joint remuneration rules for free journalists at daily newspapers".

Another area of action is the need for professional associations and trade unions to be able to start legal proceedings against those who use these types of contracts is crucial to avoid freelance journalists becoming isolated and black listed for future assignments…….

…….

VI. Respect for rights

Directive 2004/48/EE[66] 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[67]. 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[68]. One means to do this could be to clarify the role of intermediaries in the IP infrastructure[69]. 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** –

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?

It would be useful to clarify the level of involvement of internet service providers, which cannot be considered as pure intermediaries especially when legal prosecutions are at stake.……

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

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

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

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

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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 OPINION

VII. A single EU Copyright Title

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

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

□ NO

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

[Open question]

No……

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VIII. Other issues

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

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

[Open question]

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