



**UK Music**

**Response to the public consultation on the review of EU copyright rules**

**5 March 2014**

# Public Consultation on the review of the EU copyright rules

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# **I. Introduction**

## ***A. Context of the consultation***

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

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

In its "Communication on Content in the Digital Single Market"<sup>1</sup> the Commission set out two parallel tracks of action: on the one hand, to complete its on-going effort to review and to modernise the EU copyright legislative framework<sup>23</sup> with a view to a decision in 2014 on whether to table legislative reform proposals, and on the other, to facilitate practical industry-led solutions through the stakeholder dialogue "Licences for Europe" on issues on which rapid progress was deemed necessary and possible.

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

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

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

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

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

<sup>4</sup> See the document "Licences for Europe – ten pledges to bring more content online": [http://ec.europa.eu/internal\\_market/copyright/docs/licences-for-europe/131113\\_ten-pledges\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf).

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

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

## ***B. How to submit replies to this questionnaire***

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

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

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

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

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

## ***C. Confidentiality***

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

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

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

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

<sup>8</sup> [http://ec.europa.eu/internal\\_market/consultations/2009/content\\_online\\_en.htm](http://ec.europa.eu/internal_market/consultations/2009/content_online_en.htm).

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

Please read our [Privacy statement](#).

**PLEASE IDENTIFY YOURSELF:**

**Name:**

**UK Music [www.ukmusic.org](http://www.ukmusic.org)**

**British Music House, 26 Berners Street, London W1T 3LR**

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

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

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

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

€ **End user/consumer** (e.g. internet user, reader, subscriber to music or audiovisual service, researcher, student) **OR Representative of end users/consumers**

→ for the purposes of this questionnaire normally referred to in questions as "**end users/consumers**"

€ **Institutional user** (e.g. school, university, research centre, library, archive) **OR Representative of institutional users**

→ for the purposes of this questionnaire normally referred to in questions as "**institutional users**"

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

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

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

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

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

€ **Collective Management Organisation**

€ **Public authority**

€ **Member State**

€ **Other** (Please explain):

UK Music is the umbrella body representing the collective interests of the UK's commercial music industry, from songwriters and composers to artists and musicians, studio producers, music managers, music publishers, major and independent record labels, music licensing companies and the live music sector.

UK Music's membership comprises of:-

- AIM – Association of Independent Music - representing over 850 small and medium sized independent music companies
- BASCA - British Academy of Songwriters, Composers and Authors – with over 2,000 members, BASCA is the professional association for music writers and exists to support and protect the artistic, professional, commercial and copyright interests of songwriters, lyricists and composers of all genres of music and to celebrate and encourage excellence in British music writing
- BPI - the trade body of the recorded music industry representing 3 major record labels and over 300 independent record labels.
- MMF - Music Managers Forum - representing 425 managers throughout the music Industry
- MPG - Music Producers Guild - representing and promoting the interests of all those involved in the production of recorded music – including producers, engineers, mixers, re-mixers, programmers and mastering engineers
- MPA - Music Publishers Association - with 260 major and independent music publishers in membership, representing close to 4,000 catalogues across all genres of music
- Musicians' Union representing 30,000 musicians
- PPL is the music licensing company which, on behalf of over 75,000 members (65,000 performer members and 10,000 recording right holder members), licences the use of recorded music in the UK
- *PRS for Music* is responsible for the collective licensing of rights in the musical works of 100,000 composers, songwriters and publishers and an international repertoire of 10 million songs
- UK Live Music Group, representing the main trade associations and representative bodies of the live music sector

## **II. Rights and the functioning of the Single Market**

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

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

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

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

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

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

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

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

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

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

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

<sup>14</sup> See the document “Licences for Europe – ten pledges to bring more content online”: [http://ec.europa.eu/internal\\_market/copyright/docs/licences-for-europe/131113\\_ten-pledges\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf).

only access their “national” service, and if they try to access the "same" service in another Member State they are redirected to the one designated for their country of residence).

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

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

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

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

.....  
.....

- NO
- NO OPINION

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

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

.....  
.....

**NO**

**As established in the Licences for Europe process, cross border accessibility is based on a market decision by service providers/ retailers. A variety of pan European copyright licences are available for online content services but the provision of such services is based on the commercial decision how and when to roll out the services. That decision is made by the service provider, not the content provider and there are many sensible reasons why they decide not to launch pan-European services.**

NO OPINION

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

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]

**We refer to the responses of our members who are granting a variety of such licences.**

**The existing copyright framework has been enabling the development of numerous licensing models at UK and European level. The commercial negotiations require certainty.**

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]

**Whilst we do not identify any problems, we feel that it is helpful to put the issue in context.**

**The market has been developing at considerable speed in the music sector based on commercial negotiations between the music industry and online content services. The existing copyright framework has been enabling the development of numerous licensing models at UK and European level. The commercial negotiations require certainty of the law and flexibility in its application.**

**From the perspective of right holder or collective management organisations the main problem relates to online infringement and further activities would be welcome both regarding the impact of injunctive relief under Art 8 (3) Information Society Directive and Art 11 Enforcement Directive respectively. UK Music members, in particular music publishers and record companies as well as the collective management organisations who also represent composers and performers, offer licences for online content services at UK and EU level.**

**The scope of the actual offers to consumers is based on a decision at retail level. Online content services decide in which territories to offer which services. This decision is based on their assessment of the legal and economic conditions of the relevant market, such as consumer demand for online services in the respective market, credit card penetration, consumer laws, technological infrastructure, etc.**

**Cross-border Access and the Portability of Services was one of the areas discussed in the Licences for Europe process, concluding that copyright licences were available for use of online content services as required.**

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

YES – Please explain by giving examples

.....  
.....  
 **NO**

**Online content services often impose territorial restriction when rolling out their services throughout member states of the European Union. This is based on their assessment of the market conditions in individual member states. This has nothing to do with Copyright law or licensing.**

NO OPINION

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

YES – Please explain by giving examples  
.....  
.....

NO

NO OPINION

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

YES – Please explain  
.....  
.....

**NO** – Please explain

**Pan European licences are already available from right holders. We do not think it is appropriate for European Union institutions to interfere with commercial decisions of online content services.**

**UK Music highlights music industry initiatives which are aimed at making the licensing process simpler for online content services, such as more streamlined licensing via groupings of collective management organisations working together with rights owners in hubs (we expect the Collective Rights Management Directive to be a substantial part of this). We also highlight the work by composers, performers, right holders as well as users on the [Global Repertoire Database](#) which is in the mobilisation phase. Once operational this database will provide an authoritative list of ownership of rights in musical works. A similar initiative is also being undertaken in relation to sound recordings by our member [PPL](#). We would ask the European institutions to support those industry initiatives.**

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

***[The definition of the rights involved in digital transmissions]***

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

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

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

**1. The act of “making available”**

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

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

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

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

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

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

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

<sup>22</sup> See in particular Case C-173/11 (Football Dataco vs Sportradar) and Case C-5/11 (Donner) for copyright and related rights, and Case C-324/09 (L’Oréal vs eBay) for trademarks. With regard to jurisdiction see also joined

(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**

**We are not convinced that there is a need for more clarity to be introduced by any measures by the European Union executive regarding digital transmissions. The Court of Justice of the European Union has clarified many concepts surrounding Communication to the Public (e.g. C 173-11 Football Dataco) and the making available right (nb. the decision in C 466-12 Svensson Retreiver) as well as the reproduction right as far as this is covered by the digital transmission (InfoPaq I and II as well as the expected case between NLA v PRCA). As far as jurisdiction is concerned the decision in Case 170-12 Pinkney v KG Mediatech provided clear guidelines.**

**We believe that making available takes place in both the country of upload and in every country where the website is accessible. This is also reflected in some of the decisions above. We do not support the “country of origin approach” which is sometimes discussed.**

**We note in particular the conclusion of the recent academic [study](#) on the application of the Information Society Directive by De Wolf and Partners that in none of the particular aspects of making available analysed they could identify any practical problems reported by stakeholders. We therefore conclude that there is no need for more clarity through legislative initiatives. Further clarity is introduced by the licensing negotiations in practice addressing the factual requirements of the parties negotiating.**

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

.....  
.....

NO OPINION

**9. *[In particular if you are a right holder:] Could a clarification of the territorial scope of the “making available” right have an effect on the recognition of your rights (e.g. whether you are considered to be an author or not, whether you are considered to have***

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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).

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

*transferred your rights or not), on your remuneration, or on the enforcement of rights (including the availability of injunctive relief<sup>24</sup>)?*

**YES** – Please explain how such potential effects could be addressed

**This question contains three distinct aspects.**

+ **The territorial scope of the “making available” right has no relevance for the subsistence of copyright as referred to in the question. The subsistence and the transfer of rights is covered in different areas of the European and national Copyright Framework.**

+ **In our view the territorial scope of the “making available” right is sufficiently clarified by the Courts and within existing licences.**

+ **However, as already referred, it would be useful to provide for pan European application of injunctive relief (under Article 8 (3) Information Society Directive and Article 11 Enforcement Directive). The implementation of these articles under UK law (Section 97A CDPA 1988) has provided a very valuable tool for right holders. Given that this is an area of remedies which is harmonised at European level we would urge the European institutions to look into ways to ensure that such a harmonised remedy is available to right holders for pan European application of enforcement measures.**

NO

NO OPINION

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

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

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

**YES** – Please explain what type of measures would be needed in order to address such problems (e.g. facilitation of joint licences when the rights are in different hands, legislation to achieve the "bundling of rights")

.....  
.....

**NO**

**Two rights do not make a wrong. Mechanisms are in place to cover the application of two rights in a single act of digital transmission in practice. The application of two rights to a single act of economic exploitation in the online environment is an internal issue for the music industry.**

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

NO OPINION

### 3. Linking and browsing

Hyperlinks are references to data that lead a user from one location in the Internet to another. They are indispensable for the functioning of the Internet as a network. Several cases are pending before the CJEU<sup>25</sup> in which the question has been raised whether the provision of a clickable link constitutes an act of communication to the public/making available to the public subject to the authorisation of the rightholder.

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

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

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

**Only under specific circumstances. In our view the nature of a hyperlink should be considered in a broader context including the copyright status of the sites it links to, and whether the latter have been made available with the authorisation of the right holder for the specific original use. This approach seems to correspond with the finding of the Court of Justice in C 466-12 Svensson Retriever. We expressly agree with the paper of ALAI on the issue of hyper linking which concludes that hyperlinks are infringing (only) if linking to an infringing work, the making available of which has not been authorised by the right holder.**

NO – Please explain whether you consider this to be the case in general, or under specific circumstances, and why (e.g. because it does not amount to an act of communication to the public – or to a new public, or because it should be covered by a copyright exception)

.....  
.....

NO OPINION

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

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

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

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

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

**UK Music refers to the expected decision at the Court of Justice of the European Union on the pertinent issues; Case C-360/13, Public Relations Consultants Association v NLA which considers the scope of Art 5 (1) Information Society Directive, i.e. “whether end users, who view web-pages on their computers without downloading or printing them, are committing infringements of copyright.” We would be cautious to undertake any initiative on behalf of the European Union executive when the judiciary is already deliberating responses to the questions asked.**

NO – Please explain whether you consider this to be the case in general, or under specific circumstances, and why (e.g. because it is or should be covered by a copyright exception)

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.....

NO OPINION

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

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

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

YES – Please explain by giving examples

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.....

NO

<sup>27</sup> See also recital 28 of Directive 2001/29/EC.

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

NO OPINION

**Reselling digital files by an end user/ consumer who has purchased them infringes existing copyright laws (c.f. Art 3 (3) Information Society Directive) and is thus illegal if unlicensed. Any restrictions are consequentially based on existing legislation.**

**The law was based on an intentional decision of the European Union institutions to protect, in particular, the secondary market for digital goods. Digital files are different to analogue goods in that they do not lose any quality upon use and resale. The way the digital market developed means that the ownership model of a copy incorporating the work is being replaced by an access model based on licensing. Applying exhaustion to an access based model is inappropriate.**

**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.**

[Open question]

**Reselling digital files would have a significant impact for the markets for right holders. Given that the quality of digital files which are resold is the same as the original digital file, the former will directly compete with the latter if they are offered on the market. Given that the resold copy will be offered at a lower price (even if it's the same quality) it will negatively impact on the value of the original digital file. Equally, any change to the system will negatively impact on new and existing online services.**

**Additionally, it will be impossible to enforce that only one digital copy exists. The reseller will always be able to keep a copy of the original file. There will be an unlimited amount of digital files given that it is impossible to enforce any requirement to delete the original digital file in practice.**

### ***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<sup>29</sup>. Moreover a system of registration does not need to be made compulsory or constitute a precondition for the protection and exercise of rights. With a longer term of protection and with the increased opportunities that digital technology provides for the use of content (including older works and works that otherwise would not have been disseminated), the advantages and disadvantages of a system of registration are increasingly being considered<sup>30</sup>.

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

YES

**NO**

<sup>29</sup> For example, it does not affect “domestic” works – i.e. works originating in the country imposing the formalities as opposed to works originating in another country.

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

**In addition to the inadmissibility of formal requirements under Art 5 (2) Berne Convention, we note that the absence of a requirement of registration ensures that copyright is accessible to every creator and not subject to any costly registration process. Copyright constitutes a democratic right catering for all kind of creators notwithstanding their financial or professional status. In our view, a mandatory registration system at EU level will limit the access to copyright protection, in particular for smaller creators. A voluntary registration system already exists in the form of collective management organisations.**

**In practice, registration of works will take place through collective management organisations. Creators interested in earning money from their creativity will voluntarily register with a collecting society to administer their work. At the commercial level the registration of works is already general practice.**

NO OPINION

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

[Open question]

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

[Open question]

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

[Open question]

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#### ***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<sup>31</sup> in which they have been developed, and identify, variously, the work itself, the owner or the contributor to a work or other subject matter. There are notable examples of where industry is undertaking actions to improve the interoperability of such identifiers and databases. The Global Repertoire Database<sup>32</sup> should, once operational, provide

<sup>31</sup> E.g. the International Standard Recording Code (ISRC) is used to identify recordings, the International Standard Book Number (ISBN) is used to identify books.

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

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

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

[Open question]

**We ask the Commission to support industry activities, such as the Global Repertoire Database / Linked Coalition. The Commission has a positive history in supporting industry activities constructively.**

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

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

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

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

**YES** – Please explain

**The term of copyright protection has been considered in the context of the recently adopted amendment to the Term Directive (2011). We are not aware of any new circumstances which require further discussion on the term of protection.**

**NO** – Please explain if they should be longer or shorter

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 .....

**NO OPINION**

<sup>33</sup> You will find more information about this initiative (funded in part by the European Commission) on the following website: [www.linkedcontentcoalition.org](http://www.linkedcontentcoalition.org).

<sup>34</sup> You will find more information about this initiative on the following website: <http://www.copyrighthub.co.uk/>.

<sup>35</sup> Berne Convention for the Protection of Literary and Artistic Works, <http://www.wipo.int/treaties/en/ip/berne/>.

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

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

Exceptions and limitations in the national and EU copyright laws have to respect international law<sup>37</sup>. 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)<sup>38</sup>, these limitations and exceptions are often optional<sup>39</sup>, in the sense that Member States are free to reflect in national legislation as many or as few of them as they wish. Moreover, the formulation of certain of the limitations and exceptions is general enough to give significant flexibility to the Member States as to how, and to what extent, to implement them (if they decide to do so). Finally, it is worth noting that not all of the limitations and exceptions included in the EU legal framework for copyright are of equivalent significance in policy terms and in terms of their potential effect on the functioning of the Single Market.

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

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

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

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

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

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

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

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

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

**YES** – Please explain by referring to specific cases  
 .....  
 .....

**NO** – Please explain

**The way in which limitations and exceptions have been provided for constitute a compromise that has been treated by the CJEU as an autonomous concept of EU law.**

**NO OPINION**

**22. Should some/all of the exceptions be made mandatory and, if so, is there a need for a higher level of harmonisation of such exceptions?**

**YES** – Please explain by referring to specific cases  
 .....  
 .....

**NO** – Please explain

**Philosophical differences between civil and common law has led to the compromise in the Information Society Directive, i.e. the provision of optional exceptions. The different legal traditions remain within the European Union. We do not think that such a mandatory harmonisation is required in practice.**

**NO OPINION**

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

[Open question]

**As recommended in [the recent review of intellectual property](#) by Professor Hargreaves, the development of IP policy should be “driven as far as possible by objective evidence. Policy should balance measurable economic objectives against social goals and potential benefits for rights holders against impacts on consumers and other interests.” In view of his policy disposition he added that “(t)hese concerns will be of particular importance in assessing future claims to extend rights or in determining desirable limits to rights.” It is ironic that Professor Hargreaves had so little regard to his own ethos in the conclusion to his review (and that the UK Government has similarly not followed this advice) yet the concept is one which should be borne in mind.**

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

**YES** – Please explain why

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**NO** – Please explain why

**The doctrine of Fair Use is a concept which leads to a certain amount of uncertainties. Even in the US where the concept has been established in 170 years of US case law, there are still cases pending on the exact scope of the fair use exception. The European approach to exceptions and limitations provides certainty (rather than a “right to hire a lawyer” as the fair use doctrine has been described).**

**NO OPINION**

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

[Open question]

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

**YES** – Please explain why and specify which exceptions you are referring to

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

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.....

**NO OPINION**

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

[Open question]

**Detailed questions on private copying and fair compensation had been subject to decisions of the Court of Justice of the European Union, in particular interpretative rules were established in C 462 -09 Stichting de Thuiskopie v Opus and C 521-11 Austro**

**Mechana v Amazon. The United Kingdom Government plans to introduce an exception which does not provide for fair compensation, a position which we contest strongly.**

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

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

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

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

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

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

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

YES – Please explain, by Member State, sector, and the type of use in question.  
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NO

NO OPINION

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

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

[Open question]

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

[Open question]

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

[Open question]

**The issue of preservation and archiving has been addressed in recent reviews of the Copyright system in the United Kingdom, such as the Gowers review of 2006 and the Hargreaves review in 2011. The recommendations of both reviews were based on the current approach in the Information Society Directive. All stakeholders concerned agreed with the proposals. We suggest that the existing system is sufficient, Art 5 (2c) and Art 5 (3n).**

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

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

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

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

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

[Open question]

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

[Open question]

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

[Open question]

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.....

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

[Open question]

**In response to questions 32 to 35, we would refer the European Commission to the UK approach which provides a clear licensing based solution which works for all stakeholders involved.**

### **3. E – lending**

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

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

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

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

YES – Please explain with specific examples

- .....  
.....
- NO
  - NO OPINION

**The music industry has a variety of agreements with libraries, of particular note is the fact that UK Music members deposit sound recordings at the British Library Sound Archive which is available at the premises.**

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

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

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

[Open question]

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.....

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

[Open question]

**We are very concerned that e-Lending of sound recordings and musical works might directly compete with the commercial offerings by online content services thus undermining the diversity of commercial offerings as well as the income for composers and performers. We thus suggest an express carve out for sound recordings should further activities on e-Lending be considered. Any legislative approach to e-Lending needs to consider the commercial impact of e-Lending on the primary market (in the light of the Three Step Test). Licensing is paramount.**

**Publicly funded libraries should not be in a position to compete with online content services. This will not only damage the price for right holders but also prevent the development of further business models in the online music sector, such as streaming services like Spotify. This is neither in the interest of right holders, service providers or end consumers.**

**We are aware of the commercial discussions and pilot projects operated by book publishers and libraries which aim to enable the remote lending of books, whilst recognising the interests of book publishers following the Sieghart review in 2013.**

**We urge the Commission to wait for the outcome of those pan industry projects before considering any form of European initiatives. In our experience, approaches built on stakeholders' agreement provide the best solutions.**

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

The term “mass digitisation” is normally used to refer to efforts by institutions such as libraries and archives to digitise (e.g. scan) the entire content or part of their collections with an objective to preserve these collections and, normally, to make them available to the public. Examples are efforts by libraries to digitise novels from the early part of the 20<sup>th</sup> century or whole collections of pictures of historical value. This matter has been partly addressed at the EU level by the 2011 Memorandum of Understanding (MoU) on key principles on the digitisation and making available of out of commerce works (i.e. works which are no longer found in the normal channels of commerce), which is aiming to facilitate mass digitisation efforts (for books and learned journals) on the basis of licence agreements between libraries and similar cultural institutions on the one hand and the collecting societies representing authors and publishers on the other<sup>44</sup>. Provided the required funding is ensured (digitisation projects are extremely expensive), the result of this MoU should be that books that are currently to be found only in the archives of, for instance, libraries will be digitised and made available online to everyone. The MoU is based on voluntary licences (granted by Collective Management Organisations on the basis of the mandates they receive from authors and publishers). Some Member States may need to enact legislation to ensure the largest possible effect of such licences (e.g. by establishing in legislation a presumption of representation of a collecting society or the recognition of an “extended effect” to the licences granted)<sup>45</sup>.

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

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

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.....

NO – Please explain

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<sup>44</sup> You will find more information about his MoU on the following website: [http://ec.europa.eu/internal\\_market/copyright/out-of-commerce/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm).

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

.....  
 NO OPINION

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

YES – Please explain

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 NO – Please explain

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 NO OPINION

## **B. Teaching**

Directive 2001/29/EC<sup>46</sup> enables Member States to implement in their national legislation limitations and exceptions for the purpose of illustration for non-commercial teaching. Such exceptions would typically allow a teacher to use parts of or full works to illustrate his course, e.g. by distributing copies of fragments of a book or of newspaper articles in the classroom or by showing protected content on a smart board without having to obtain authorisation from the right holders. The open formulation of this (optional) provision allows for rather different implementation at Member States level. The implementation of the exception differs from Member State to Member State, with several Member States providing instead a framework for the licensing of content for certain educational uses. Some argue that the law should provide for better possibilities for distance learning and study at home.

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

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

YES – Please explain

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.....  
 **NO**

**At the time of writing, we are not aware of any problems given the licensing solutions available, however, whilst we are not aware of any cross-border problems in the UK, we would highlight the current developments in the UK where Government is in the process of changing the exceptions towards a new fair dealing exception for instruction (new Section 32 CDPA: “Fair Dealing” provision for the purpose of instruction”). We are concerned about the scope of such an exception. In particular we are concerned that the**

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

UK Government decided to use the term “instruction” instead of implementing the terminology used in the Information Society Directive (“illustration”).

NO OPINION

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

[Open question]

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

[Open question]

**As outlined in the introduction to this paragraph the solutions developed by right holders via collective management organisations offer a one stop shop for educational establishments to access and make available creative works for teaching purposes. This approach has been welcomed by right holders as well as educational establishments.**

**Specifically, in the UK the Educational Recording Agency (ERA) grants licences to institutions in accordance with a Licensing Scheme, which has been certified by the Secretary of State. The licences issued by ERA under Section 35 CDPA authorise the following activities:**

- + **Recording from broadcasts made in the UK of the works and performances owned or represented by ERA members for non-commercial and educational uses.**
- + **Electronic communication of licensed recordings within an educational establishment (Including distance learning).**
- + **The licence fee is then divided up between all creators and right holders involved who have signed up to the ERA scheme, including the majority of members of UK Music.**
- + **The system works for users (educational establishments) as a convenient licensing mechanism as well as for the creators and right holders of the works included in a broadcast. Collective management organisations have had the infrastructure in place to deal with the ERA licence since 1990.**

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

[Open question]

.....  
.....

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

[Open question]

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### C. Research

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

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

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

YES – Please explain

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**NO**

**In our view the exception as drafted in the Information Society Directive has been working well despite uncertainties created by the sometimes inadequate interpretation of the meaning of non-commercial purposes. These uncertainties have become obvious during the recent discussions on changes to copyright in the UK, i.e. at what point in time will the non commercial nature be assessed. In particular if the purpose of the research has changed. The act might have been for genuine academic purposes at the time the act was carried out but the results of the scientific research might be used subsequently for commercial purposes.**

NO OPINION

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

[Open question]

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

[Open question]

**The use of music for scientific research is not very prevalent. As always, licences are available from right holders. We are not aware of any problems for end users/consumers in this area.**

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

**As far as the UK implementation of the exception provided in Art 5 (2c) and (3n) Information Society Directive is concerned, we note that at this stage (5<sup>th</sup> February 2014) it does not reflect the limitation of the exception to scientific research.**

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

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

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

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

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

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

YES – Please explain by giving examples

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.....

**NO**

NO OPINION

<sup>48</sup> Article 5 (3)b of Directive 2001/29.

<sup>49</sup> The European Trusted Intermediaries Network (ETIN) resulting from a Memorandum of Understanding between representatives of the right-holder community (publishers, authors, collecting societies) and interested parties such as associations for blind and dyslexic persons ([http://ec.europa.eu/internal\\_market/copyright/initiatives/access/index\\_en.htm](http://ec.europa.eu/internal_market/copyright/initiatives/access/index_en.htm)) and the Trusted Intermediary Global Accessible Resources (TIGAR) project in WIPO (<http://www.visionip.org/portal/en/>).

<sup>50</sup> Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities, Marrakesh, June 17 to 28 2013.

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

[Open question]

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

[Open question]

**The music industry has been providing products that are accessible for visually impaired people for a considerable time now, complying with the requirement under the UK Copyright (Visually Impaired Persons) Act 2002. This approach has been operating to the satisfaction of end users and music publishers.**

**The Music Publishers Association (MPA), a member of UK Music, has developed a licensing scheme under the Copyright (Visually Impaired Persons) Act 2002 which governs multiple copying of printed music for the benefit of visually impaired people by educational and not for profit bodies.**

**Companies who wish to reproduce printed music using Braille or large print formats can do so by applying for a license through the MPA by using an [application form](#).**

**The MPA has also agreed a [Code](#) of fair practice which was amended to take into account the needs of disabled persons such as dyslexic people.**

**As a general remark we would stress the need for certainty of the definitions and how they relate to the accessibility/ use of creative works.**

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

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

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

Some argue that the copies required for text and data mining are covered by the exception for temporary copies in Article 5.1 of Directive 2001/29/EC. Others consider that text and data mining activities should not even be seen as covered by copyright. None of this is clear, in

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<sup>51</sup> For the purpose of the present document, the term “text and data mining” will be used.

particular since text and data mining does not consist only of a single method, but can be undertaken in several different ways. Important questions also remain as to whether the main problems arising in relation to this issue go beyond copyright (i.e. beyond the necessity or not to obtain the authorisation to use content) and relate rather to the need to obtain “access” to content (i.e. being able to use e.g. commercial databases).

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

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

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

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

YES – Please explain

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.....

**NO** – Please explain

**This area is not particularly relevant for the music industry but we stress the need for the supremacy of already available licensing solutions in order to comply with the international binding Three Step Test.**

NO OPINION

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

[Open question]

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<sup>52</sup> See the document “Licences for Europe – ten pledges to bring more content online”:  
[http://ec.europa.eu/internal\\_market/copyright/docs/licences-for-europe/131113\\_ten-pledges\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf) .

**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]

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

[Open question]

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

[Open question]

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

Technological and service developments mean that citizens can copy, use and distribute content at little to no financial cost. As a consequence, new types of online activities are developing rapidly, including the making of so-called “user-generated content”. While users can create totally original content, they can also take one or several pre-existing works, change something in the work(s), and upload the result on the Internet e.g. to platforms and blogs<sup>53</sup>. User-generated content (UGC) can thus cover the modification of pre-existing works even if the newly-generated/"uploaded" work does not necessarily require a creative effort and results from merely adding, subtracting or associating some pre-existing content with other pre-existing content. This kind of activity is not “new” as such. However, the development of social networking and social media sites that enable users to share content widely has vastly changed the scale of such activities and increased the potential economic impact for those holding rights in the pre-existing works. Re-use is no longer the preserve of a technically and artistically adept elite. With the possibilities offered by the new technologies, re-use is open to all, at no cost. This in turn raises questions with regard to fundamental rights such 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

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

between rightholders and platforms as well as micro-licences concluded between rightholders and the users generating the content. In any event, practical solutions to ease user-generated content and facilitate micro-licensing for small users were pledged by rightholders across different sectors as a result of the “Licences for Europe” discussions<sup>54</sup>.

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

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

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

YES – Please explain by giving examples

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**NO**

**In our experience there are limited instances in which right holders intervene in genuine User-generated content material uploaded to a licensed platform. Following the discussions in Working Group 2 of the Licences for Europe dialogue, we reiterate that there seems to be no problem in practice. This has also been the conclusion of the recent study on the application of the Information Society Directive by De Wolf and Partners. The study states that there is no evidence that the current legal framework had the often claimed “chilling effect”. As stated on page 510: “Yet, there is very little (if any) case-law and apparently not much opposition from right holders.”**

**An important element for creators and performers is their moral right to object to derogatory treatment. We are aware of some composers who consider the treatment of their work derogatory and hence ask the right holders to initiate a takedown procedure against the online content service.**

**It is notable that there has not been a universally agreed definition of user-generated content. It would be helpful if the Commission’s work could focus on this.**

NO OPINION

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

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

<sup>54</sup> See the document “Licences for Europe – ten pledges to bring more content online”:  
[http://ec.europa.eu/internal\\_market/copyright/docs/licences-for-europe/131113\\_ten-pledges\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf).

YES – Please explain

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NO – Please explain

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NO OPINION

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

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

YES – Please explain

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NO – Please explain

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**NO OPINION**

**Remuneration is based on the agreements of our members with service providers. Generally, uncertainties only exist if online content services decide not to conclude such agreements and right holders have to challenge their position in Court. Such services have argued that they are subject to the limitation of liability provided in Article 14 e-Commerce directive.**

**Industry is developing technologies which enable the original creator to be remunerated for his original work when used in a new user-generated work.**

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

[Open question]

**Some of our members were represented at the Licences for Europe stakeholders' dialogue last year. It is notable that the focus of the initial discussions was the identification of the definition of User-generated content in practice. To our knowledge this has not happened (and this is reflected in the conclusions of the De Wolf study) and we suggest that before any further initiatives are considered a clear outline of "User-generated content" is provided for each creative sector. The situation on User-generated content is different for different creative industries.**

**We note that the key starting point is the definition of User-generated content. The study by De Wolf and Partners singled out situations where a "user" (there from the**

expression “User-Generated-Content”) relies on a pre-existing work, “arranges” it, and then uploads it on a website or web platform of some kind.

The use of the term “User-generated content” implies primarily that the activities are of a non-commercial nature. The commercial status of the activity seems, in our view, irrelevant as to whether a licence is required.

Providers of User-generated content platforms should also not be able to benefit from the limitation of liability provided under Art 14 e-Commerce Directive automatically.

*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]

We agree with the conclusion of the recent study on the application of the Information Society Directive by De Wolf and Partners (page 534) that “(t)he lack of evidence of any real chilling effect of the existing legal framework – at least as far as we could identify it – renders it unnecessary to provide for a new sweeping User-generated content exception. A solution based upon the existing exceptions should prove sufficient to guarantee both a sufficient protection of the authors and sufficient freedom for the users.”

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

[Open question]

As established there is no need for a different solution at this stage. We highlight the conclusion of the recent study on the application of the Information Society Directive by De Wolf and Partners (page 538), that the adoption of a flexible, horizontal exception or of a provision which would introduce some kind of flexibility to the exceptions within the list seems attractive, but may ultimately give rise to more questions than it will provide answers.”

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

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

With the constant developments in digital technology, the question arises as to whether the copying of files by consumers/end-users who have purchased content online - e.g. when a person has bought an MP3 file and goes on to store multiple copies of that file (in her computer, her tablet and her mobile phone) - also triggers, or should trigger, the application of

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<sup>55</sup> Article 5. 2)(a) and (b) of Directive 2001/29.

private copying levies. It is argued that, in some cases, these levies may indeed be claimed by rightholders whether or not the licence fee paid by the service provider already covers copies made by the end user. This approach could potentially lead to instances of double payments whereby levies could be claimed on top of service providers' licence fees<sup>5657</sup>.

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

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

- YES – Please explain  
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- NO** – Please explain

**In as far as clarification is concerned, we note the CJEU decisions interpreting Art 5 (2b) of the Information Society Directive (and Recital 35). We also note the report from the mediation process by Mr Vitorino published in January 2013.**

- NO OPINION

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

- YES – Please explain  
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- NO – Please explain  
.....  
.....
- NO OPINION

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

[Open question]

<sup>56</sup> Communication "Unleashing the Potential of Cloud Computing in Europe", COM(2012) 529 final.  
<sup>57</sup> These issues were addressed in the recommendations of Mr António Vitorino resulting from the mediation on private copying and reprography levies. You can consult these recommendations on the following website: [http://ec.europa.eu/internal\\_market/copyright/docs/levy\\_reform/130131\\_levies-vitorino-recommendations\\_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf).  
<sup>58</sup> Art. 5.2(a) and 5.2(b) of Directive 2001/29/EC.  
<sup>59</sup> This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies

Licensed services are available so there is no need to extend the exception to cloud services. Any such interference would also conflict with existing business models and consequentially infringe the Three Step Test Art 5 (5) Information Society Directive).

**67. Would you see an added value in making levies visible on the invoices for products subject to levies?<sup>60</sup>**

YES – Please explain

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NO – Please explain

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NO OPINION

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

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

YES – Please specify the type of transaction and indicate the percentage of the undue payments. Please also indicate how a priori exemption and/or ex post reimbursement schemes could help to remedy the situation.

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NO – Please explain

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NO OPINION

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

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

<sup>61</sup> This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies.

[Open question]

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

[Open question]

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

[Open question]

**The UK decided in 1988 not to introduce a levy system in its Copyright Act despite the recommendation of the Whitford Committee's review of Copyright in 1977. Nor did they introduce an exception for acts of private copying such as format shifting. Hence, we cannot answer the questions on the functioning and operation of the levy system.**

**At the time of writing, the UK Government intends to introduce a new exception for uses of a copy of a copyright work by an individual lawfully acquired by him to make a further copy of that work, with additional conditions such as:-**

- + the copy is for that individual's private use and for ends that are neither directly nor indirectly commercial, and**
- + the original copy is held by the individual on a permanent basis.**

**This is expected to be section 28B of the Copyright Designs and Patents Act 1988**

**As it stands, the Government's proposal and failure to provide for fair compensation infringes mandatory European legislation as interpreted by the CJEU (mainly in Case C-467/08 Padawan v SGAE and Case C-462/09 Stichting de Thuiskopie v Opus). We expect more clarity from the decision in the pending Copydan case. We understand that European Institutions are monitoring the developments at UK level, in particular as to whether these developments would justify infringement proceedings against the UK Government should they decide to proceed.**

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

The EU copyright acquis recognises for authors and performers a number of exclusive rights and, in the case of performers whose performances are fixed in phonograms, remuneration rights. There are few provisions in the EU copyright law governing the *transfer* of rights from authors or performers to producers<sup>62</sup> or determining who the owner of the rights is when the

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<sup>62</sup> See e.g. Directive 92/100/EEC, Art.2(4)-(7).

work or other subject matter is created in the context of an employment contract<sup>63</sup>. This is an area that has been traditionally left for Member States to regulate and there are significant differences in regulatory approaches. Substantial differences also exist between different sectors of the creative industries.

Concerns continue to be raised that authors and performers are not adequately remunerated, in particular but not solely, as regards online exploitation. Many consider that the economic benefit of new forms of exploitation is not being fairly shared along the whole value chain. 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]

**Generally, the best mechanism is an effective copyright system in which the rights of authors, musicians, performers and right holders are being upheld and enforced. Copyright subsists to provide fair remuneration to creators, performers and right holders. In recent reviews of copyright the aspect of the value of creativity for culture, society as well as economy has been neglected. The ultimate objective for the Copyright framework in the digital environment is to facilitate growth of the licensed digital market by encouraging platform providers, content aggregators and mobile operators to co-operate with right holders and develop competitive and mutually-beneficial services that ultimately serve the needs of consumers and creators.**

**The main objective of Copyright and the underlying European framework is “a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property (Recital 9 Information Society Directive).” The underlying economic, social, societal and cultural implications of the information society have not changed since the adoption of this Directive.**

**At the centre of any deliberations on copyright need to be creators and performers. They have to “receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as “on-demand” services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment (Recital 10 Information Society Directive).”**

**Copyright (or “author’s right”) is based on the natural right of the individual creator in his creativity. Copyright is built upon two fundamental and overarching principles - rewarding and protecting the creator and allowing a mechanism by which those who invest in creativity can be rewarded. Copyright also provides the enabling framework**

<sup>63</sup> See e.g. Art. 2.3. of Directive 2009/24/EC, Art. 4 of Directive 96/9/EC.

**for right holders, content for online services and other commercial users to offer creative works to end consumers in the way they want to consume.**

**We refer to the submissions of individual UK Music members.**

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

YES – Please explain

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NO – Please explain why

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**NO OPINION**

**While recognising that no action by the EU may be needed in this regard, it is important that non-disclosure agreements between contracting parties do not prejudice corresponding audit rights that writers and performers may have with those contracting parties.**

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

[Open question]

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## **VI. Respect for rights**

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

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

<sup>65</sup> You will find more information on the following website:

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

<sup>66</sup> For example when the infringing content is offered on a website which gets advertising revenues that depend on the volume of traffic.

of intermediaries in the IP infrastructure<sup>67</sup>. At the same time, there could be clarification of the safeguards for respect of private life and data protection for private users.

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

**YES** – Please explain

We would suggest to render the application of injunctive relief under Art 8 (3) Information Society Directive and Art 11 (1) Enforcement Directive applicable at a Pan European level, as well as with interim injunctive relief.

We are concerned with the costs and duration of civil law court proceedings. We note that the Digital Economy Act (DEA) 2010 established an enforcement mechanism within our jurisdiction which addresses these points, by making the process for notification for infringing material faster and more proportionate. The DEA 2010 was passed into UK law on 8th April 2010 but the implementation has been delayed.

The main principle which the DEA recognised relates to the role of ISPs whose responsibility has now been spelled out de lege lata.

Additionally the notice and takedown procedure could be further strengthened. This could be done by clarifying that the takedown relates to the actual notified infringing works and is not limited to individual links.

We highlight the approach laid out by the German Federal Court of Justice – Bundesgerichtshof (BGH) in August 13 in GEMA v Rapidshare. According to the highest German Court of Justice a file hosting service provider has a duty to scan and monitor the uploads to check whether the uploads contain links to infringing works which they were notified about. They have a „Marktbeobachtungspflicht,“ i.e. an obligation to monitor the market; they have to check whether there are links to notified infringing works using web crawlers, as well as search engines such as Google, Facebook or Twitter.

We recommend that the Commission considers non legislative measures to harmonise this approach which already complies with the existing e-Commerce Directive, so not requiring legislative activities.

The existing limitations to the liability of service providers should be clearly defined to avoid abuse by illegitimate online music services. This will have the benefit of increasing the economic value of new business models.

NO – Please explain

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NO OPINION

**76. In particular, is the current legal framework clear enough to allow for sufficient involvement of intermediaries (such as Internet service providers, advertising brokers, payment service providers, domain name registrars, etc.) in inhibiting online copyright**

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

*infringements with a commercial purpose? If not, what measures would be useful to foster the cooperation of intermediaries?*

[Open question]

**UK Music stated in its response to the public consultation on “the efficiency of proceedings and accessibility of measures”:-**

*“The enforcement by civil measures (in addition to the criminal route right holders use with the help of amongst others Trading Standards authorities) is becoming increasingly important in the digital world. We like to specifically point out the orders against internet access providers available in the UK under Section 97A CDPA (implementing Art 8 (3) Information Society Directive).*

*The principles of Section 97A CDPA have been established in various court cases since 2010 (most notably Twentieth Century Fox Film Corp and others v British Telecommunications plc and others [2011] EWHC 1981 (Ch) and Dramatico Entertainment Ltd and others v British Sky Broadcasting Ltd and others [2012] EWHC 268 (Ch)). We highlight the application of the principles of Section 97A CDPA 1988 in the recent case EMI Records Ltd and others v British Sky Broadcasting Ltd and others ([2013] EWHC 379 (Ch) – BPI v Sky.*

*The civil measure in Section 97A CDPA is straightforward in its application (under Part 8 of the UK Civil Procedure Rules and Practice Direction 8A). The latter case establishes 4 conditions for Section 97A CDPA to apply (which are being elaborated in detail based on the facts of the respective case)*

- + *The defendants are service providers*
- + *The users or the operators of the Websites infringe copyright*
- + *The users or the operators of the Websites use the defendant ISPs' services*
- + *The defendants have actual knowledge of this.*

*The application of Section 97A CDPA has become very important for the music industry given the failure of the UK Government to implement the Digital Economy Act 2010. However, there are various aspects which could be improved on the application of Section 97A CDPA, in particular concerning its application on a European and international level.*

+ *Costs: the costs for gathering admissible evidence for one application for a Section 97A CDPA order are considerable (in addition to the costs of the application to the Court). The costs will invariably increase given the number of applications required to have an impact on the activities of the website provider. We ask the Commission to look at further harmonisation of this process under Art 8 (3) Information Society Directive.*

+ *Timing: until the order is passed, access to infringing websites remains open leading to considerable damage to right holders. We suggest further consideration of an interim order.*

+ *Scope of the application: the Order under Section 97A CDPA seems currently limited to the UK; the Commission could support the pan European application of such an Order*

*under Article 11 (1) of the Enforcement Directive (which corresponds with Art 8 (3) Information Society Directive. We note the legal precedent in the UK which extends to the international application of the rule of law in copyright infringement cases. In Lucasfilm Limited and others v Ainsworth and another (Trinity Term [2011] UKSC 39 - On appeal from: [2009] EWCA Civ 1328), the UK Supreme Court held that in the case of a claim for infringement of copyright of a specific kind, the claim is one over which the English Court has jurisdiction, provided that there is a basis for in personam jurisdiction over the defendant in the UK. In that case, Lucasfilm was held to be entitled to a remedy which could be enforced in the UK based on US copyright law. We ask the Commission to consider the impact of the application of the principles established in Lucasfilm v Ainsworth at European level.”*

**UK Music restates this position and supports other initiatives, such as the traffic lights proposal from PRS for Music, which “promotes an industry technical solution that would give consumers information about illegal sites so that they know whether a site is illegal or legal BEFORE they access it.”**

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

YES – Please explain

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NO – Please explain

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NO OPINION

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

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

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

YES

**NO**

**A single European Copyright title is not realistic, nor will it have any substantial or practical impact. It is also politically unachievable. Harmonisation has been achieved in**

most areas. Further harmonisation might be appropriate in specific areas of Copyright law such as moral rights.

NO OPINION

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

[Open question]

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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]

### **Copyright Education**

**Copyright education is an important area not dealt with by this questionnaire directly. UK Music is involved in a number of initiatives at a domestic level, primarily aimed at young people, which should be considered by European institutions to support the education of citizens in member states about the importance of the Copyright legal framework.**

**In 2014 UK Music is working with the Intellectual Property Office on the Music Biz competition. In its 2<sup>nd</sup> year, Music Biz is a competition for young people to design or film an advert that demonstrates the importance of royalties and copyright.**

**We have also launched an app based game, Music Inc. This is a game for 14 – 18 year olds. This game offers us as an industry a chance to engage with music and game fans in a new and exciting way. The game carries subtle messages about the time and process of signing artists and launching acts and the trials and tribulations of this. This is an education campaign that will highlight some of the complexities of the music industry whilst showing how important copyright is for earning a living from your own creativity.**

**In 2013, UK Music launched a Skills Academy to act as a network for people aiming to work in the music industry. This work is being further developed with our Skills and**

**Schools initiative whereby the importance of intellectual property rights will be emphasised to children considering a career within the music industry.**

**Copyright education is not just about young people however. There is a need for a wider understanding about the importance of copyright across the whole of the European Union. We look forward to our work developing in this area and would seek collaboration with European Union bodies on our agenda.**

### **General Concluding Remarks**

**Intellectual property is the protection of the interests of European creators and performers who not only define European culture, but also contribute significantly to the European economy.**

**The main objective of copyright, and the underlying European framework, is “a high level of protection, since such rights are crucial to intellectual creation. Their protection helps to ensure the maintenance and development of creativity in the interests of authors, performers, producers, consumers, culture, industry and the public at large. Intellectual property has therefore been recognised as an integral part of property (Recital 9 Information Society Directive).” The underlying economic, social, societal and cultural implications of the information society have not changed since the adoption of this Directive.**

**At the centre of any deliberations on copyright need to be the creators and performers who have to “receive an appropriate reward for the use of their work, as must producers in order to be able to finance this work. The investment required to produce products such as phonograms, films or multimedia products, and services such as "on-demand" services, is considerable. Adequate legal protection of intellectual property rights is necessary in order to guarantee the availability of such a reward and provide the opportunity for satisfactory returns on this investment (Recital 10 Information Society Directive).”**

**This ensures that the European Union will continue to have a professional and diverse culture, as well as an economically strong creative industry contributing substantially to the EU gross domestic product. According to research we conducted last year, the core UK music industry contributes £3.5 billion to the UK economy annually. This is made up of £1.6 billion from musicians, composers and songwriters, £634 million from recorded music, £662 million from live music, £402 million from music publishing, £151 million from music representatives and £80 million from music producers and recording studios. In terms of exports, the UK music industry is valued at £1.4 billion. The industry sustains 101,680 full time jobs.**

**This is in addition to the economic importance of music for related sectors such as tourism. We also carried out research on the impact of music on tourism in the UK. The key findings being:-**

- + 6.5 million music tourists attended a festival or gig, generating £2.2 billion spending in the process.**
- + Music tourism provides a massive boost to the UK’s nations, regions and local economies, including at least 24,000 jobs each year.**

**UK Music produced a report in September of last year entitled A Year of Innovation. This report looked at the licensing landscape in the UK and EU, demonstrating the efforts UK music businesses have gone to innovate licensing in order to grow new markets, digital services and assist SME's.**

**The existing copyright framework has been enabling the development of numerous licensing models at UK and European level. The legal and technological framework needs to foster and optimise the commercial arrangements between right holders and commercial users without interfering with the commercial negotiations at business to business level.**

**The main objective of any activities on the European Copyright Acquis should be to improve cooperation between European institutions and all stakeholders in the value chain to ensure a successful digital single market for creators, performers, right holders, commercial users of music such as digital platform providers and ultimately European consumers.**

**Any changes to the legal framework need to be based on solid economic evidence and clearly demonstrate that possible solutions via licensing are not available.**

**The main issue for the digital market is the efficient operation of business models. This is based on transactions between right holders and commercial users as part of their business to business transactions. These transactions are based on the exchange of data between right holders and commercial users at national, European and international level. The practical operation of such transactions depends on a certain legal framework and accurate data.**

**We suggest further focussing on education of all stakeholders on copyright, in particular on the value for the individual European consumer.**

**Timing of Questionnaire:**

**+ The timing for an assessment of the Copyright Acquis is premature given pending cases at the CJEU interpreting important concepts of the Information Society Directive.**

**+ The impact of adopted and soon to be adopted Directives (Orphan Works Directive and Collective Rights Management Directive respectively) cannot yet be assessed. These Directives address some of the issues identified in the questionnaire.**

**+ It is too early to assess the impact of the pledges by right holders as a result of the Licenses for Europe stakeholders' dialogue which ended on 13<sup>th</sup> November 2013.**

**The European Commission should support industry activities in relation to online infringement.**