Public Consultation
on the review of the EU copyright rules

Contents

I. Introduction

A. Context of the consultation

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

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

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

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

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

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

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

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

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

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

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

B. How to submit replies to this questionnaire

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

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

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

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

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

C. Confidentiality

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

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

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

Please read our Privacy statement.

PLEASE IDENTIFY YOURSELF:

Name:

…ARTICLE 19**……**

……..

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

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

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

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

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

TYPE OF RESPONDENT (Please underline the appropriate):

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

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

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

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

€ **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):

ARTICLE 19 is an international non-governmental organisation based in London that seeks to protect freedom of expression and freedom of information worldwide.

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II. Rights and the functioning of the Single Market

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

x **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)

UK residents have found themselves in the position where, despite paying the BBC licence fee, they are unable to access BBC's iPlayer when abroad. As explained on the BBC's own website, "*Rights agreements mean that BBC iPlayer Television programmes are only available to users in the UK*": http://iplayerhelp.external.bbc.co.uk/help/outside_the_uk/

In ARTICLE 19's view, this is plainly unacceptable, especially when the licence fee has already been paid. Moreover, there is no reason in principle why audio-visual content, for instance, should not be accessible across borders when cross-portability of content does not appear to be an issue for other types of digital content, such as online newspapers.

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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).

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NO

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

x NO OPINION

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

[Open question]

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……

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]

ARTICLE 19 believes that content should be equally accessible in all MS, irrespective of nationality or place of residence. Failure to ensure the right to receive and impart information across borders through an appropriate legal framework is arguably a breach of Member States' positive obligations under Article 10 of the European Convention on Human Rights. In our view, copyright harmonization through legal reform is essential to guarantee equal access to online content and services in all EU countries (see below).

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

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……

NO

x 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

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NO

x **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?

x **YES** – Please explain

Market-led solutions are plainly insufficient to address the current gap in access to cultural goods. This is especially obvious in the context of "illegal" file-sharing. We note, for instance, the experiment carried out by a French blogger and consumer Klaire. After testing 20 "legal" websites recommended by HADOPI to obtain cultural goods, she concluded that only three of them functioned properly: http://www.klaire.fr/2013/06/10/ivre-hadopi-adopte-le-label-pur-foutage-de-gueule/. Her blog post was subsequently cited in a news article in the Nouvel Observateur:

http://rue89.nouvelobs.com/2013/12/13/hadopi-jai-teste-nouveau-service-inutile-telechargement-legal-248325

ARTICLE 19 believes that copyright harmonization through EU-wide legal reform is needed to ensure online services are equally available in all EU countries.

NO – Please explain

NO OPINION

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

[The definition of the rights involved in digital transmissions]

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

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

[16] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
[17] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.
[18] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.
[19] Film and record producers, performers and broadcasters are holders of so-called "neighbouring rights" in, respectively, their films, records, performances and broadcast. Authors' content protected by copyright is referred to as a "work" or "works", while content protected by neighbouring rights is referred to as "other subject matter".

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

1. The act of "making available"

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

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

YES

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

"Making available" is commonly understood as "posting" or "sharing" content online. Unless the meaning of the "communication to the public" or "making available" right is more clearly defined, the default position is more likely to be that the scope of the right to make content available will be interpreted broadly at the expense of freedom of expression, particularly in the context of hyperlinking (see further below). ARTICLE 19 urges a narrower definition of the concept of 'making content available' to only those

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

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

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

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

well-established instances of commercial exploitation in which the concept has been clearly defined.

NO OPINION

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

YES – Please explain how such potential effects could be addressed

NO

x 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")

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NO

x NO OPINION

3. Linking and browsing

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

A user browsing the internet (e.g. viewing a web-page) regularly creates temporary copies of works and other subject-matter protected under copyright on the screen and in the 'cache'

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

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

memory of his computer. A question has been referred to the CJEU[26] as to whether such copies are always covered by the mandatory exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC.

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

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

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…….

x **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)

ARTICLE 19 believes that hyperlinks should not be subject to authorisation of the copyright holder in general. As the consultation itself recognises hyperlinks "are indispensable for the functioning of the Internet as a network". It is no exaggeration to say that the Internet itself is a series of hyperlinks. The use of links is also a basic feature of everyday online interaction. It is essential for work, study, personal enjoyment and other forms of recreation. As such, it is part and parcel of the right to receive and impart information under Article 10 of the European Convention on Human Rights (right to freedom of expression). Therefore, any restriction on linking should strictly comply with requirements of legality, necessity and proportionality under Article 10 ECHR.

For all intents and purposes, the right of communication to the public under Article 3 of the 2001/29 EC Directive could provide the legal basis for the restriction on the right to freedom of expression. If, however, the right of communication to the public of 'works' were to include linking to both authorized and unauthorized copies, this would amount to rights holders having the right to control linking to their own work. In practice, the vast majority – if not all – hyperlinks would need to be expressly licensed. This would be both absurd and plainly disproportionate.

ARTICLE 19 believes that once a work is published online, anyone should be free to link to it, regardless of whether or not the material linked to is an infringing copy. We agree with the European Copyright Society's Opinion in the *Svensson* case (C-466/12) that hyperlinking does not involve "transmission" of a work and should not be considered as "communication to the public". The High Court of England and Wales recently came to a similar conclusion in *Paramount Home Entertainment International and Others v British Sky Broadcasting Ltd and others* ([2013]EWHC 3479 (Ch)). Arnold J acknowledged that "*it is arguable that the mere provision of a hyperlink is not enough to constitute communication to the public (particularly if the hyperlink is not directly to a source of the copyright work). I also acknowledge that it is arguable that it makes no difference whether or not the source of the copyright work to which the hyperlink links is licensed by the copyright owner. I also acknowledge that it is arguable that it makes no*

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

***difference whether clicking on the links results in framing (i.e. the work being presented within the frame of the operator's website) or not*".**

Conversely, we consider that the CJEU's approach in *Svensson* is both impractical and likely to have a chilling effect on freedom of expression. While the Court confirmed that linking to copyright work made freely available on the Internet with the authority of the copyright holder does not infringe, it failed to provide clear rules to Internet users in other circumstances, for instance where copyright work is freely available on the internet but was never authorized by the copyright holder at any point. In other words, the Court's judgment has left Internet users in a position where it would be extremely difficult for them to know in advance whether or not they are infringing copyright when they are linking to material on the Internet. This is all the more so given the inherent cross-border nature of linking and the lack of harmonized exception in the EU. Several commentators have already pointed out the shortcomings of the decision and argued that the Court should have held that providing a link is not an "act of communication".

Like the European Copyright Society, ARTICLE 19 considers that hyperlinks are better viewed as a location tool or footnotes, i.e. references that Internet users are free to follow or not; they should not be considered as "communication to the public". To hold otherwise would have a serious chilling on freedom of expression. At the same time, we recognize that this should not prevent a finding of contributory liability for linking in limited circumstances, for instance when knowingly facilitating the making available of infringing copies.

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

……

……

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

The ordinary use of the Internet, including browsing and viewing a web page, involves the creation of temporary and cached copies at several stages. Accordingly, subjecting such copies to the authorisation of copyright holders in general would seriously limit the effective operation of the Internet as well as severely restricting the ability of users to access information. In ARTICLE 19's view, this would also constitute a breach of the right to freedom of expression, which implies the personal right to read, listen to, view and browse cultural goods without copyright restrictions, including online (Principle 7.1 of the Right to Share Principles).

ARTICLE 19 further believes that the UK Supreme Court adopted the correct approach to temporary copies in the *Meltwater* case (currently referred to the CJEU). The Supreme Court concluded that EU law (in particular Article 5 (1) of the 2001/29/EC

Directive) allows an exception to copyright for temporary copies generated by Internet users as a necessary part of the technical process supporting the browsing experience. The Supreme Court said that to hold otherwise would lead to the unacceptable result that millions of ordinary Internet users across the EU would be liable for copyright infringement for merely browsing web pages containing copyright material. The Supreme Court found that there was no sound reason why the unauthorised viewing or reading (as opposed to downloading or printing) of copyrighted material online should be considered an infringement, especially since this had never been the case in the offline world.

This approach is further supported by the fact that of all the exceptions and limitations to copyright provided for under the 2001/29/EC Directive, Article 5 (1) (temporary acts of reproduction) is the only *mandatory* exception.

In ARTICLE 19's opinion, temporary and cached copies should remain a clear exception to copyright protection. To hold otherwise would both defy common sense and be a clear breach of the right to read and browse online.

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)[27]. The issue that arises here is whether this principle can also be applied in the case of an act of transmission equivalent in its effect to distribution (i.e. where the buyer acquires the property of the copy)[28]. This raises difficult questions, notably relating to the practical application of such an approach (how to avoid re-sellers keeping and using a copy of a work after they have "re-sold" it – this is often referred to as the "forward and delete" question) as well as to the economic implications of the creation of a second-hand market of copies of perfect quality that never deteriorate (in contrast to the second-hand market for physical goods).

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

YES – Please explain by giving examples

……

……

NO

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

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

x NO OPINION

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

[Open question]

……

……

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

Registration is not often discussed in copyright in the EU as the existing international treaties in the area prohibit formalities as a condition for the protection and exercise of rights. However, this prohibition is not absolute[29]. Moreover a system of registration does not need to be made compulsory or constitute a precondition for the protection and exercise of rights. With a longer term of protection and with the increased opportunities that digital technology provides for the use of content (including older works and works that otherwise would not have been disseminated), the advantages and disadvantages of a system of registration are increasingly being considered[30].

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

YES

NO

x NO OPINION

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

[Open question]

……

……

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

[Open question]

……

……

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

[Open question]

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

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

…….

…….

D. How to improve the use and interoperability of identifiers

There are many private databases of works and other subject matter held by producers, collective management organisations, and institutions such as libraries, which are based to a greater or lesser extent on the use of (more or less) interoperable, internationally agreed 'identifiers'. Identifiers can be compared to a reference number embedded in a work, are specific to the sector in which they have been developed[31], and identify, variously, the work itself, the owner or the contributor to a work or other subject matter. There are notable examples of where industry is undertaking actions to improve the interoperability of such identifiers and databases. The Global Repertoire Database[32] should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition[33] was established to develop building blocks for the expression and management of rights and licensing across all content and media types. It includes the development of a Rights Reference Model (RRM) – a comprehensive data model for all types of rights in all types of content. The UK Copyright Hub[34] is seeking to take such identification systems a step further, and to create a linked platform, enabling automated licensing across different sectors.

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

[Open question]

…….

…….

E. Term of protection – is it appropriate?

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

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

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

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

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

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

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

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

YES – Please explain

……

……

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

ARTICLE 19 believes that copyright duration should be no longer than necessary to achieve its purpose without impairing the right to freedom of expression (Principle 5.1 of ARTICLE 19's Right to Share Principles). The steady increase of copyright terms is a major issue for access to culture as it effectively means that fewer and fewer works enter the public domain, hampering amateur creativity online. In our view, the current copyright duration of 70 years after the death of the author constitutes an unjustified restriction on the right to freedom of expression and an encroachment on the public domain (Principle 5.2. of the Right to Share Principles).

There is also ample evidence to suggest that the economic value attributed to long or longer copyright terms is grossly exaggerated. For instance, the UK's 2011 Hargreaves Review of Intellectual Property and Growth concluded that "*Economic evidence is clear that the likely deadweight loss to the economy exceeds any additional incentivising effect which might result from the extension of copyright term beyond its current levels... An international study found term extension to have no impact on output*" (page 19). Similarly, using empirical parameters, Cambridge economist, Rufus Pollock, estimated 15 years as the optimal copyright protection term extending up to 38 years. In 2003, the Economist suggested to go back to the initial 14-year copyright term of 18th century British and American copyright laws. For these reasons, we would support policies that seek to reduce copyright terms.

Furthermore, the copyright term laid down by the EU rules should be a maximum that no country should be allowed to override, for instance, through war-time exceptions, such as in France (see article L123-10 of the code la propriété intellectuelle). Allowing countries to extend copyright terms in this way creates legal uncertainty as the same content may be copyrighted in one country but not another.

NO OPINION

III. Limitations and exceptions in the Single Market

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

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

Exceptions and limitations in the national and EU copyright laws have to respect international law[37]. In accordance with international obligations, the EU acquis requires that limitations and exceptions can only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interest of the rightholders.

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

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

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

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

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

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

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

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

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

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

The obvious downside to making limitations and exception to copyright optional is the lack of legal certainty for both Internet users and businesses. Something that is legal in a member state may well be illegal in another. For instance, parody is a recognised exception to copyright under French law but not English law. By the same token, the absence of some copyright exceptions in some countries but not others is more likely to promote forum shopping, where powerful companies or artists seek to bring claims in countries where they are more likely to succeed.

Since limitations and exceptions are the internal mechanism whereby freedom of expression is protected under copyright law, the lack of harmonised exceptions can also be viewed as failure to provide for equal protection of freedom of expression across the EU. In other words, freedom of expression is protected to different degrees in different states.

Copyright limits freedom of expression. Whilst such limits may be justified, the exceptions and limitations should be interpreted broadly so as to give greater protection to freedom of expression (Principle 6.1 of the Right to Share Principles). In order to ensure that freedom of expression is sufficiently protected, all limitations and exceptions should be mandatory. This would also provide greater legal certainty and foster innovation across the EU.

NO – Please explain

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?

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

We find that there is no reason in principle why some exceptions should be made mandatory whilst others should remain optional. Moreover, this would defeat the purpose of bringing greater legal certainty in this area. Accordingly, we believe all exceptions should be made mandatory.

NO – Please explain.

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]

No limitations or exceptions should be removed from the existing catalogue. On the contrary, it should be made clear that the catalogue contains a non-exhaustive list of limitations and exceptions. This would provide greater flexibility by allowing new exceptions and limitations to be added where appropriate. For instance, it would be desirable to add an exception to copyright as regards user-generated content and the right to rip, mash and burn.

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?

x **YES** – Please explain why

It should be self-evident from reading Article 5 of the 2001/29/EC that a catalogue containing an exhaustive list of exceptions and limitations to copyright is not a flexible instrument to tackle the challenges of the digital environment. Article 5 contains 5 sub-paragraphs. Article 5 (2) in particular is subdivided into 15 clauses detailing specific exceptions to copyright in addition to those contained under Article 5 (1) and 5 (2).

The fact that some exceptions are optional does not render EU copyright law more flexible in the EU. It only gives more flexibility to the Member States in terms of implementation of the Directive and taking into account their countries' peculiarities. However, the same flexibility of implementation could be achieved with a simple mandatory fair-use provision that would also provide greater flexibility in terms of copyright law.

Copyright law needs to adapt to the digital environment. Regularly revisiting the Directive and updating an endless list of exceptions would not be a practical way of tackling the problem.

NO – Please explain why

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]

In ARTICLE 19's view, the best approach to provide for flexibility would be the adoption of a new fair-use or fair dealing provision (built-in flexibility). This would also give greater leeway to national courts and the CJEU to interpret exceptions to copyright flexibly to take into account changing circumstances, for instance new developments brought about by new technologies. This model has worked well in the US, where there is no suggestion that copyright is not strongly protected. It would also avoid the necessity of periodically reviewing the relevant Directives, which is a time-consuming and resource-intensive exercise. Interpretations of the Commission seem undesirable, as it is an executive –type of body. The Directive (or Regulation) themselves should already contain sufficient general principles of interpretation in the Recitals.

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

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

We reiterate our previous comments in question 21 above.

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

NO OPINION

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

[Open question]

…….

…….

A. Access to content in libraries and archives

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

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

1. Preservation and archiving

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

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

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

YES – Please explain, by Member State, sector, and the type of use in question.

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

NO

x NO OPINION

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

[Open question]

……

……

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

[Open question]

……

……

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

[Open question]

……

……

2. Off-premises access to library collections

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

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

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

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

[Open question]

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

[Open question]

ARTICLE 19 believes that copyright exceptions should allow libraries, broadcasters, museums and other cultural spaces to make available online, free-of-charge or at low cost, the widest possible range of content (Principle 13.4 of the Right to Share Principles). In particular, substantially publicly funded works should be recognised as a public good and made widely available to the public, including online (Principle 13.5, *op.cit.*).

To the extent that Article 5 (3) (n) of the Directive already provides for an exception covering research or private study in dedicated terminals at libraries, educational establishments, museums or archives, it is hard to understand on what basis remote access to library collections should not be covered under that exception. In practice, this has the effect of imposing a restriction on access to information online where no such restriction exists offline. This is surprising, given that any concern related to 'piracy' could easily be overcome by the provision of temporary access codes to libraries' registered users (something which is touched on as part of sub-section 3 below on e-lending).

Consistent with our recommendation under Q21 and 22, we believe that at a minimum, the exception under Article 5 (3) (n) should be mandatory and interpreted broadly along the lines outlined above so as to give meaningful effect to the right to freedom of expression.

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

[Open question]

…….

…….

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

[Open question]

…….

…….

3. E – lending

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

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

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

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

YES – Please explain with specific examples

NO

x NO OPINION

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

…….

…….

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

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

[Open question]

…….

…….

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

[Open question]

…….

…….

4. Mass digitisation

The term "mass digitisation" is normally used to refer to efforts by institutions such as libraries and archives to digitise (e.g. scan) the entire content or part of their collections with an objective to preserve these collections and, normally, to make them available to the public. Examples are efforts by libraries to digitise novels form the early part of the 20th century or whole collections of pictures of historical value. This matter has been partly addressed at the EU level by the 2011 Memorandum of Understanding (MoU) on key principles on the digitisation and making available of out of commerce works (i.e. works which are no longer

found in the normal channels of commerce), which is aiming to facilitate mass digitisation efforts (for books and learned journals) on the basis of licence agreements between libraries and similar cultural institutions on the one hand and the collecting societies representing authors and publishers on the other[44]. Provided the required funding is ensured (digitisation projects are extremely expensive), the result of this MoU should be that books that are currently to be found only in the archives of, for instance, libraries will be digitised and made available online to everyone. The MoU is based on voluntary licences (granted by Collective Management Organisations on the basis of the mandates they receive from authors and publishers). Some Member States may need to enact legislation to ensure the largest possible effect of such licences (e.g. by establishing in legislation a presumption of representation of a collecting society or the recognition of an "extended effect" to the licences granted)[45].

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

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

NO – Please explain

x NO OPINION

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

YES – Please explain

NO – Please explain

x NO OPINION

B. Teaching

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

[44] 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 .

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

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

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

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

YES – Please explain

NO

x NO OPINION

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

[Open question]

……

……

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

[Open question]

……

……

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

[Open question]

……

……

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

[Open question]

……

……

C. Research

Directive 2001/29/EC[47] enables Member States to choose whether to implement in their national laws a limitation for the purpose of non-commercial scientific research. The open

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

formulation of this (optional) provision allows for rather different implementations at Member States level.

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

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

YES – Please explain

NO

x NO OPINION

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

[Open question]

……

……

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

[Open question]

……

……

D. Disabilities

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

The Marrakesh Treaty[50] has been adopted to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled. The Treaty creates a mandatory exception to copyright that allows organisations for the blind to produce, distribute and make

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

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

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

available accessible format copies to visually impaired persons without the authorisation of the rightholders. The EU and its Member States have started work to sign and ratify the Treaty. This may require the adoption of certain provisions at EU level (e.g. to ensure the possibility to exchange accessible format copies across borders).

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

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

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

YES – Please explain by giving examples

……

……

NO

X NO OPINION

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

[Open question]

ARTICLE 19 submits that States must ensure that people with disabilities have equal access to knowledge (principle 13.6 of the Right to Share Principles). In line with our overall recommendation under Q21 and 22, we believe that, at a minimum, the exception for the benefit of people with a disability under Article 5 (3) (b) of the Directive should be made mandatory. In our view, Member States' failure to implement copyright exceptions benefiting people with sensory impairments is likely to breach their right to freedom of expression, private life and their right to participate in cultural life (see principle 13.6 cited above).

We further believe that the current lack of legal cross border exchange of accessible format copies could partly be overcome by swift ratification and implementation of the Marrakesh treaty. This would be achieved by introducing a mandatory exception to copyright which allows organisations for the blind to produce, distribute and make available accessible format copies to visually impaired persons without the authorisation of the rights holders. At the same time, such an exception should not necessarily be confined to blind or visually impaired persons but should include individuals with other sensory impairments.

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

[Open question]

……

……

E. Text and data mining

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

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

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

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

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

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

[51] For the purpose of the present document, the term "text and data mining" will be used.

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

(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

NO – Please explain

x NO OPINION

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

[Open question]

……

……

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

[Open question]

……

……

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

[Open question]

……

……

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

[Open question]

……

……

F. User-generated content

Technological and service developments mean that citizens can copy, use and distribute content at little to no financial cost. As a consequence, new types of online activities are developing rapidly, including the making of so-called "user-generated content". While users can create totally original content, they can also take one or several pre-existing works, change something in the work(s), and upload the result on the Internet e.g. to platforms and blogs[53]. User-generated content (UGC) can thus cover the modification of pre-existing works even if the newly-generated/"uploaded" work does not necessarily require a creative effort and results from merely adding, subtracting or associating some pre-existing content with

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

other pre-existing content. This kind of activity is not "new" as such. However, the development of social networking and social media sites that enable users to share content widely has vastly changed the scale of such activities and increased the potential economic impact for those holding rights in the pre-existing works. Re-use is no longer the preserve of a technically and artistically adept elite. With the possibilities offered by the new technologies, re-use is open to all, at no cost. This in turn raises questions with regard to fundamental rights such the freedom of expression and the right to property.

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

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

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

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

x **YES** – Please explain by giving examples

ARTICLE 19 has not experienced any particular problems in relation to content we upload on our website. However, we frequently refrain from using certain types of content, such as images or music to illustrate our written material in order to avoid any potential copyright issues. Put it simply, an NGO such as ours could not face the prospect of court action or even lengthy discussions about the question whether or not we may or may not have infringed copyright and the potential consequences. In short, we censor ourselves. In our view, the lack of strong fair use protection in the EU of the kind found in the US, including the absence of a right to remix (or mix, mash and burn), effectively has a powerful chilling effect on free expression and creativity.

Furthermore, unless users come forward about any potential difficulties they may have had regarding transformative uses of existing works online, very few such cases are known to the public and consistently documented. Most cases never go to court. Rather, the vast majority of them are likely to be dealt with, i.e. taken down, under the Terms and Conditions of a platform such as YouTube. In other words, vast swathes of creativity can vanish without a trace in the absence of proper scrutiny.

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

Finally, we would like to draw the Commission's attention to a recent 2013 report commissioned by Ofcom on User-Generated content, in which UGC was identified as a key driver for innovation and creativity in the UK. Conversely, the report noted that restrictive intellectual property practices hindered creative engagement. In particular, the report concluded that "*it would be both a shame and deeply ironic if copyright law, itself devised to drive innovation, were to end up limiting through overzealous application.*" http://stakeholders.ofcom.org.uk/binaries/research/research-publications/content.pdf .

NO

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?***

YES – Please explain

NO – Please explain

x NO OPINION

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

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

YES – Please explain

NO – Please explain

x NO OPINION

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

[Open question]

In ARTICLE 19's view, the cultural value of UGC must be both promoted and protected. In this regard, the current EU copyright framework is both overly rigid and out-dated. Its system of copyright exceptions is too narrowly drafted to cover UGC. It thus fails to provide the kind of protection and legal certainty that users need to protect their rights in this area. An additional exception to copyright would be a much more powerful means to do just that than a micro-licensing agreement where users are almost inevitably in a weaker position than copyright holders.

For this reason, we believe that new copyright exceptions should be created, including a new copyright exception to remix and/or strong fair use copyright exception similar to the one found in the US (Principle 6.2 of the Right to Share Principles). If only the fair use exception were to be adopted and made into law, it should be both drafted and interpreted broadly so as to cover creative and transformative uses of the original work.

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]

See Q 62 above. In our view, any legislative solution should have two components:

(i) a copyright exception to remix (or mix, mash and burn); and /or

(ii) a generous fair use exception as part of a new broader in-built flexibility in the EU copyright system (see Q21-26 above).

We further believe that any copyright exception to remix should not be confined to non-commercial activities. As bestseller author, Naomi Novik, recently said in her testimony to the US Congress, "*We all build on the work and ideas of people who came before us — in fact that's the only way to innovate. There isn't a hard line between remix work and work that stands on its own. They exist on a continuum.*"

She went on to explain "*Original work, work that stands alone, doesn't just pop up out of nowhere. It is at the end of a natural spectrum of transformation. Fair use protects this spectrum, this incubator if you will. It's a space where artists can play with ideas and develop our skills, and share our work within a community and learn. I cannot overstate the importance this space has been in the development of my own career, and that of many other professional writers and creators that I know.*"

In other words, whether it takes the form of a copyright exception to remix or fair use, the fact that the transformative work is subsequently used for a commercial purpose should not mean that it automatically becomes subject to copyright authorisation.

For the importance of transformative uses of original work, see Naomi Novik's testimony here:

http://judiciary.house.gov/_cache/files/858bc6ea-8a0d-4ab0-9f6e-1fb8413be179/012814-testimony---novik.pdf

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

[Open question]

……

……

IV. Private copying and reprography

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

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

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

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

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

YES – Please explain

NO – Please explain

x 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?[59]

YES – Please explain

NO – Please explain

x 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]

……

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

……

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

YES – Please explain

NO – Please explain

x NO OPINION

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

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

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.

NO – Please explain

x NO OPINION

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

[Open question]

……

……

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

[Open question]

……

……

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

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

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

[Open question]

…….

…….

V. Fair remuneration of authors and performers

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

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

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

[Open question]

…….

…….

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

YES – Please explain

NO – Please explain why

x NO OPINION

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

[Open question]

[62] See e.g. Directive 92/100/EEC, Art.2(4)-(7).

[63] See e.g. Art. 2.3. of Directive 2009/24/EC, Art. 4 of Directive 96/9/EC.

……

……

VI. Respect for rights

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

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

YES – Please explain

NO – Please explain

ARTICLE 19 notes at the outset that the concept of infringement of copyright for a "commercial" purpose should be clarified. We note, for instance, that three-strikes and Internet disconnection – an enforcement measure which currently does not feature in IPR Enforcement Directive (Directive 2004/48/EC)- was ordered against an individuals user under the French HADOPI law in circumstances which hardly qualify as infringement on a "commercial scale" (2 songs). The measure was eventually not applied.

In any event, ARTICLE 19 strongly opposes any additional enforcement tools such as Internet disconnection and other three-strikes-type of measures that have a chilling effect on the right to freedom of expression. The UN Special Rapporteur on Freedom of Expression has confirmed that this amounts to a disproportionate restriction on the right to freedom of expression in his report of 16 May 2011 (A/HRC/17/27 at paras. 78 and 79). Moreover, as the French experience demonstrates, such measures are ineffective as a matter of practice: the HADOPI scheme has been widely viewed as a failure and a vast waste of resources, which ultimately led to the repeal of the Internet disconnection provision in the HADOPI law.

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

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

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

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

Finally, we note that in both the *Scarlet Extended SA v SABAM* (C70-10) and *SABAM v Netlog* (C360-10) cases, the CJEU emphasised that intellectual property rights as enshrined in the EU Charter of Fundamental Rights are far from absolute and that there was nothing whatsoever in the Charter or the Court's jurisprudence to suggest that such rights must be protected *at all costs* (para. 43, our emphasis). In particular, the Court said that EU law did not allow states to require Internet service providers to install filtering systems to prevent the illegal downloading of files. The Court considered that such a filtering system would effectively require ISPs to monitor the information that it transmits on its network, which is prohibited under EU law.

In ARTICLE 19's opinion, the European Commission should not focus on enforcement of rigid, one-sided and out-dated copyright laws. Rather, it should concentrate its efforts on adapting those laws to make them fairer, more balanced and ultimately fit for the digital age along the lines outlined in our answers above.

NO OPINION

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

[Open question]

ARTICLE 19 is concerned by the way in which this question is framed. It suggests the European Commission's willingness to act as broker with a view to ensuring copyright enforcement by contract. In our view, this is both unnecessary and likely to be in breach of Article 52 of the EU Charter on Fundamental Rights, which requires that any limitations on the rights contained the Charter must be provided by law.

- In our view, intermediaries are already sufficiently involved through the use of notice-and-takedown procedures as a result of the E-Commerce Directive (ECD). Moreover, the IPR Enforcement Directive provides the basis for copyright holders to apply for website blocking injunctions. As we have noted on several occasions, these measures are already deeply problematic for freedom of expression.

- The Commission seems to be suggesting that intermediaries should adopt voluntary measures beyond their legal obligations and incentives already in place under the ECD. This kind of "cooperation" was at the heart of the enforcement scheme under the Anti-Counterfeiting Trade Agreement (ACTA), which was rejected by the European Parliament. In practice, "cooperation" usually involves three-strikes type of measures which may result in takedown, blocking or throttling depending on the service provider at issue (e.g. YouTube's Terms of Service and Copyright Policy and in the US, the memoranda of understanding between Comcast, AT&T and Time Warner Cable among others). In order for these measures to be effective, service providers usually rely, among other things, on monitoring technology (e.g. Content ID on YouTube) or software that enables them to analyse peer-to-peer networks and harvest vast swathes of IP addresses (see EDRi paper, Human Rights and Privatised Law Enforcement, February 2014, page 11). Other measures include blocking payments to websites deemed "illegal" and arbitrary domain name removals (Ibid.).

One of the reasons these types of measures are promoted is the belief that human rights obligations do not apply to contractual obligations and therefore may not be scrutinised

for their proportionality by the courts despite the fact that they are deeply inimical to free speech and threaten the right to privacy. In our view, however, voluntary measures that have the effect of a restriction on fundamental rights would be incompatible with Article 52 of the EU Charter. Moreover, it is questionable that measures such as giving preference to certain "legal" websites in search rankings (see, for instance, Lescure report in France, page 43) would be compatible with EU competition law.

ARTICLE 19 reiterates that Internet intermediaries should not be liable for infringing content disseminated by third parties (Principle 10.2 of the Right to Share Principles) and should not be required to monitor their services to prevent copyright infringement (Principle 10.3 of the Right to Share Principles). Strong protection of Internet intermediaries from liability is the corner stone of innovation and freedom of expression and communication online. In the EU, this is achieved by the safe harbour regime under Article 12-15 of the E-Commerce Directive. This fundamental principle should not be eroded by privatising online copyright enforcement through the use of self-regulatory measures that threaten fundamental rights, sidestep democratic processes and operate outside judicial scrutiny.

ARTICLE 19 believes that intermediaries should only be required to block or remove infringing content if the measure requiring it is provided by law and ordered by a court, tribunal or other independent adjudicatory body in accordance with the rule of law (Principle 10.4 of the Right to Share Principles). Notice-and-notice systems should be encouraged to deal with copyright claims rather than notice-and-takedown procedures that have a chilling effect on freedom of expression (*Ibid,* Principle 10.5). Equally, if copyright infringement is established, a court may order that advertising or payment services be withdrawn after balancing the competing interests at stake, including the right to freedom of expression.

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

x **NO** – Please explain

In ARTICLE 19's view, the current civil enforcement framework fails to properly balance the protection of copyright and the right to freedom of expression. While both rights are equally protected under the EU Charter, the interpretation of instruments aimed at protecting intellectual property almost inevitably results in the right to freedom of expression being ignored. For instance, the CJEU did not consider the impact of its ruling for the right to freedom of expression in the *Svensson* despite the fact that linking is central to the exercise of freedom of expression on the Internet. Similarly, while Arnold J considered free expression arguments in the *Newzbin 2* case [2011] EWHC 1981 (Ch), which concerned an application for a website blocking injunction, he dismissed those arguments as clearly outweighed by the interests of rights holders (see para. 200). ARTICLE 19 believes that the European Commission should do more to educate the various actors involved, including relevant public authorities and the judiciary, on the implications of copyright protection for fundamental rights, especially the right to freedom of expression.

We further believe that the right to privacy of individual users should be reinforced in relation to copyright claims. In particular, we note that despite protection of the right to

privacy and personal data under EU law (see also CJEU - *Bonnier Audio* C461-10), Internet users' subscriber information has been abused by "copyright trolls" in countries such as the UK (See ACS: Law case). In our view, this should be remedied, for instance, by penalising abusive copyright claims.

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

x NO OPINION

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

[Open question]

…….

…….

VIII. Other issues

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

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

[Open question]

…….

…….