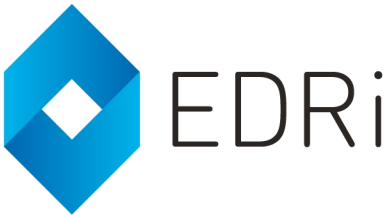

PROTECTING DIGITAL FREEDOM

EDRi's answer

to the European Commission's public consultation on the review of the EU copyright rules

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Public Consultation
on the review of the EU copyright rules

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I. Introduction

A. Context of the consultation

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

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

In its "Communication on Content in the Digital Single Market"[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 Conclusions[5] *"Providing digital services and content across the single market requires the*

[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 .

[5] EUCO 169/13, 24/25 October 2013.

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.

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

[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.

grounds that such publication would harm his or her legitimate interests. In this case, the contribution will be published in anonymous form upon the contributor's explicit request. Otherwise the contribution will not be published nor will its content be reflected in the summary report.

Please read our Privacy statement.

PLEASE IDENTIFY YOURSELF:

Name:

European Digital Rights (EDRi)

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):

…….

…….

II. Rights and the functioning of the Single Market

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

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

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

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

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

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

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

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

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

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

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

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

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

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

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

· **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)

Most of the content is distributed and licensed on a territorial basis. Consequently, the content accessible differs from one Member State to another. Citizens face problems accessing content from another countries and the accessibility of the content is not the same for citizens in different countries. The content is often geo-blocked, it means that the access is denied if you are not in the right country. In a digital single market, these barriers are unjustifiable and citizens are not allowed to enjoy the same access to cultural content.

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).

As EDRi uses flexible licences for its work, we are able to avoid the common problems faced with providing services which are made exclusively out of our works. However, we have to self-censor, in order to ensure that none of our content re-uses work which might not comply with, for example, the parody freedoms that are given to citizens in four EU countries, but not accorded in the other 24 countries. As services like YouTube will not – understandably – take the time to verify the legality of a reasonable re-use of content in every EU country on the basis of every complaint, it will simply take the content down or geo-block European citizens.

Online services provided to citizens differ from one Member State to another. There are few examples of online services that have faced copyright complexities to launch in several Member States. Getting rights clearance to launch an online service is already difficult and this complexity has to be multiplied by 28 to launch in each and every Member State. If we take the example of Spotify, the service was still not available in Germany a full four years after its launch due to difficult

[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.

negotiations with the collecting societies (GEMA) Netflix is currently facing problems to launch his service in different EU countries (in France for example). The complexity of the current system is discouraging and de facto discriminatory for small online service providers and is very costly. Citizens across the EU therefore do not have access to the same services and the legal offers available are not always very attractive for the citizens.

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.***

Not applicable

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]

There are indeed problems and copyright needs to adapt to the digital era. A digital single market must be achieved and a harmonisation of copyright rules is needed. The legislative framework should give legal certainty and allow innovative services to develop and give greater access to EU citizens to these services. Too many digital borders are created and do not allow the achievement of a digital single market. These unacceptable digital barriers and legal uncertainty due to the difference in copyright legislations should be addressed. We need a flexible, efficient EU-wide copyright regime, to bring an end to the costly, complex and anti-culture regime that is currently in place. The alternative is a system that prevents the enjoyment of culture and barriers for both creators and intermediaries, thus denying creators an audience and additional income.

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)?***

· **NO**

If the EU believes in the value of a single market, territorial restrictions cannot be justified. Citizens around Europe should be able to enjoy the same access to cultural content.

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)?***

· **NO**

How can territorial restrictions be justified if a service provider has the right to make it accessible in all EU Member States?

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

· **YES** – Please explain

Regarding non-legislative solutions, it is patently obvious that the market has not been able to deliver adapted, innovative and flexible solutions. Harmonisation is urgently needed. Europe must have a legal framework that allows the achievement of a digital single market. So far, the European Union is a mosaic of 28 copyright systems. This is not sustainable and is damaging for European citizens, for creators and for innovators. A copyright reform is needed to adapt to the digital era and to allow a digital single market to develop. Furthermore, this would give legal certainty, which so far does not exist, most particularly with regard to the innovation generated by flexible exceptions and limitations.

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.

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

[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".

[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).

dissemination of the works in digital networks[21]. These rights are intrinsically linked in digital transmissions and both need to be cleared.

a. 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?

· **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])

The phrasing of the question implies that the lack of clarity only affects cross-border situations, when the issue is actually broader. The problem with "making available" is that the 2001/29/EC Directive does not specify what "making available" means nor where it takes place. It is a complex notion that has different interpretations across the EU Member States, especially when applied to the online environment. There are still a lot of unanswered questions about this subject, creating legal uncertainty. The "targeting" a public criterion, for example, is unclear and assumes artificial and theoretical barriers that the Internet does not know (nationality, territory etc...).

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])?***

[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).

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

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

· **NO**

It is not possible to answer such a broad question with definitely yes or definitely no.

This question is too dependent on any number of variables per author that it does not make sense whatsoever. But in any case, the rule should not differ from one Member States to another. A clarification of what "making available" is and how it is applied is needed.

b. 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")

The current categories of rights do not seem adapted to digital uses. It delays service providers from providing services to citizens. Therefore, users often have access to less attractive and innovative services and have less choice thereby increasing the attractiveness of faster, but less legally conforming services.

The task at hand is to simplify and speed up methods of economic exploitation in the online environment – maintaining bureaucracy and complexity is, ultimately, bad for all stakeholders, even if this is not obvious for some non-creative intermediaries.

The availability of injunctive relief has given copyright owners a false promise that they can rely on court orders, even though there is no evidence to show this. Indeed, it is likely that the opposite is the case. There are also unintended consequences of some forms of injunctive relief in the fields of competition and freedom of speech.

c. 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' memory of his computer. A question has been referred to the CJEU[26] as to whether such

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

[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.

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?

· **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)

One of the core components of the Internet, the web in particular, is to freely link from one source to another. Linking to other online content helps with organising the information online into a Web of interconnected and (crucially) dynamic resources. The necessity to request authorisation prior to linking to a source that is available on the Internet would break the essence of the Internet. Linking to content is what online users do every day via LinkedIn, Facebook, Twitter and so on. EDRi believes that rightsholders already have sufficient rights allowing them to control the availability of their works online. Linking to a work that is available online should be freely possible. Imagine if you had to request authorisation before adding a footnote to a document. That would not make any sense.

In so far as a hyperlink itself does not generate a copy, the hyperlink cannot logically breach the right to copy the content it is linking to. Furthermore, it is worth pointing out that if you are not the publisher of the target content, you have no control over it - as the British government's Japanese pornography problem illustrate (http://www.abc.net.au/news/2009-04-07/uk-government-website-links-to-japanese-porn/1643430). This example also shows that the dynamic nature of online content renders such an obligation meaningless. If we imagine that an entity has Creative Commons or public domain content at www.example.com/example.html on any given day and somebody links to it. Then, the next day, the content is replaced with protected content, it would be absurd to suggest that the person *who linked to non-protected content* is then guilty of some form of infringement. For cases that are not clear-cut, there is already jurisprudence in Member States that proves that tort liability is sufficient to combat egregious cases of facilitating copyright infringement. Moreover, we believe that disseminating information about the current source of the work is not the same as making available, and the risk of legal liability related to such a conduct would affect the foundation of freedom of speech.

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

· **NO** – 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)

It is not possible to view/read/access any online content without some form of temporary copy being made. Temporary copies are essential for the functioning of digital technologies and the Internet, for the actions and interactions on the Internet. The question is actually: could web-browsing be considered as infringing copyright because users unintentionally make commercially irrelevant copies of which they are generally unaware? When users browse the Internet, temporary copies are created, so-called "cache" copies. They are stored automatically by browsing and also automatically

deleted after a certain lapse of time coupled with the browser use and are not dependent on human intervention. Temporary copies are essential to the functioning of the Internet and to access and share content online. Requiring authorisation of the rightsholders before viewing or reading content available online would create an unacceptable and unworkable result that would consider millions of ordinary users to be copyright infringers by dint of merely accessing a webpage containing copyright material. Article 5.1 of Directive 2001/29/EC explicitly and necessarily exempts temporary, incidental technical copies from copyright obligations – it is logical that this exception should also apply to end-user devices.

d. 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

The circumvention of digital restrictions is prohibited by the 2001/29/EC Directive, even when this is done in order to avail of flexibilities that are provided for in national and European law. It is an absurdity that technological progress has led to a situation where actions that were possible – such as buying and selling second-hand cultural goods – which in turn resulted in a regression in the ability of individuals in this regard.

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]

The resale of previously purchased digital content should quite obviously be allowed. It is about recognising a well-established "user"-right in the analogue world in the digital environment. Restricting the right to resell digital property cannot be justified. Enabling the resale of previously

[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).

purchased digital content would allow the development of a secondary market where users would be able to obtain the same product at a lower price, and would allow them to resale the content they do not use any more. It also creates an avenue for access to culture for low-income users that are otherwise deprived from it and by that virtue removes another incentive for unauthorised sharing of culture online.

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**

EDRi thinks that a mandatory, electronic registration system can be acceptable under certain circumstances. It should solely be for the transfers of right and commercial reuse. This would be useful in order to clearly identify the different rightsholders and give legal certainty. It would also be helpful if such a registration system would contain information on works that are in – or soon to enter - the public domain and works that are available under open licensing schemes.

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

[Open question]

A registration system would be beneficial for authors and for users, allowing easier identification of rightsholders and facilitating commercial licensing opportunities. Embedded payment information would also permit near instantaneous payment of royalties for commercial use. However, such a system should not be implemented in a way which detrimental to the implementation of the freedoms of end-users to benefit from exceptions and limitations to copyright.

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

[Open question]

There is a significant risk that the existence of a registration scheme would be used to undermine existing rights and flexibilities and to place obligations on intermediaries to block or filter non-registered content.

[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.

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

[Open question]

The lack of registration should render the transfer or assignation of rights invalid.

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]

The European Commission's approach on this subject is exactly the wrong one. It has opted to support vastly and unnecessarily the complicated and expensive "Linked Content Coalition" of exceptionally well-funded organisations to assert their rights on content. It would be far simpler, more efficient and more effective to promote the standardised inclusion of information such as payment details in digital content, to enable commercial users to easily obtain all relevant information when they need it.

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.

[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/.

The EU rules extend this term of protection to 70 years after the death of the author (as do many other countries, e.g. the US).

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

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

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

The studies prepared by the European Commission on this subject were clear that no extension was needed, prior to the Commission ignoring its own evidence and proposing the term extension Directive.

The 70-year term reduces access to knowledge and culture. The main purpose of copyright is ostensibly to give creators and authors an added incentive to create and innovate and this goal is quite obviously not served by a copyright term which is so long. The EU should repeal the term extension Directive (2011/77/EC) and work towards a proportionate, downward revision of the minimum period in the Berne Convention, rather than needlessly going beyond that already excessive period.

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].

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

[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.

[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.

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?

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

The citizens' freedoms provided for in the list of limitations and exceptions in Directive 2001/29/EC may only be implemented if they are in compliance with the three-step test. Logically, therefore, all of the exceptions can be assumed not to conflict with a normal exploitation of the work and not to unreasonably prejudice the legitimate interests of the authors.

Insofar as they do not – and legally cannot – interfere with the normal exploitation of the work or unreasonably prejudice the legitimate interests of the authors, the EU's failure to make all exceptions mandatory, and the Member States' failure to transpose all exceptions, create unnecessary barriers to the single market, in contravention to the legal basis of the Directive. This, in turn, logically leads to a restriction on the freedoms provided for in Article 22 of the Charter and, indeed, to the freedoms provided for in other instruments, such as the International Covenant on Economic, Social and Cultural Rights.

So far, only one exception has to be adopted by the Member States (concerning temporary acts of reproduction), the other exceptions are optional and this creates an unworkable situation where the EU 28 Member States are a mosaic of exceptions and limitations. It creates legal uncertainty as something that is legal in one Member State can (unjustifiably) be illegal in another.

This is generating particular problems in the online environment. What should a non-EU video hosting platform do if a parody is uploaded in a Member State where an exception exists and it

[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.

receives a complaint from the rightsholder, who is based in a country without such an exception? Relying on licensing to solve this problem would be disastrous, as it would give a huge competitive advantage to larger companies.

The number of possibilities on how the exceptions and limitations can be implemented shows how unworkable the current optional system is. A system that offers more than millions of possibilities (http://edri.org/edrigramnumber9-22copyright-combinatronics/) is just not workable, logically *cannot* create harmonisation and creates great legal uncertainty.

The optional system should be replaced with a mandatory system and the list of exceptions should leave room for more flexibility to allow the exceptions and limitations systems to adapt to future changes.

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

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

As we stated in the previous question, an optional system of exceptions and limitations is unworkable and creates great legal uncertainty. This approach is also quite clearly not compatible with the concept of harmonisation.

Exceptions and limitations should be made mandatory in order to achieve harmonisation and give legal certainty. Innovators, citizens, service providers and so on should be given legal certainty on what they can and cannot do across all EU Member States. Moreover, regarding the access to culture and knowledge, European citizens should enjoy the same rights.

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]

Yes.

The list of exceptions and limitations should firstly be made mandatory to achieve a single market and offer legal certainty (as stated in question 22) and it would be unacceptable to remove any exception or limitation.

The list should also allow for more flexibility and adaptability to technology changes. Therefore a more flexible exception to copyright should be added. The US "fair use" principle actually gives the flexibility necessary to adapt to technology changes. The use of copyrighted material is allowed as long as it is fair, this includes news, parody.

New users' behaviour should also be taken into account. More and more citizens produce works, write blogs, creates new work using copyrighted works (remix) and so on and then share these works online. There is a risk, unknown by many of these users, that this could be seen as a violation of copyright. Therefore, EDRi believes that a user-generated content exception should be foreseen by the list of exceptions and limitations.

Copyright reform brings the opportunity to bring software copyright in more harmony with traditional copyright. First of all, all exceptions and limitations for traditional works should apply equally to software. Furthermore, the reverse engineering exception for software for the purpose of interoperability should get a wider scope by removing most of the constraints it is currently subject to. This exception should also apply to any form of Digital Rights Management (DRM, sometimes also called Digital Restrictions Management).

It may also be worth considering an underserved market exception – the *de facto* implication of what, for example, Bill Gates described regarding the value to him of infringements to his own IPR. “And as long as they're going to steal it, we want them to steal ours. They'll get sort of addicted, and

then we'll somehow figure out how to collect sometime in the next decade." An underserved market exception is clearly preferable from a societal perspective.

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

· **YES** – Please explain why

The current exceptions and limitations offered by the 2001/29/EC Directive are narrow, specific and not adapted to technological changes. Since 2001, online uses have changed, technology has evolved. Online users communicate via so-called memes based on copyrighted material, they link to content they like, they remix copyrighted works and share their new works online: all these activities can be problematic for those who share them online.

A more flexible exception, such as a fair-use exception that is clear enough to permit individuals to rely on it, is necessary to adapt to new technology and uses. Technology will continue to evolve and an exception that can adapt to future change is essential. Europe, its citizens, its innovators and its creators would benefit from a more flexible exception.

A mandatory list would with the existing exceptions and limitations give legal certainty and a usable fair-use exception will give the flexibility necessary to adapt to changes.

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]

Currently, the system gives no legal certainty and cannot adapt to technology changes. The combination of a flexible norm and the current system of limitations and exceptions but made mandatory will help create the necessary legal certainty. Adding to this list a "fair-use" exception will provide enough flexibility to adapt to the future changes, without having to change the list every 10 years because it becomes outdated. The interpretation of "fair-use" should rely on court decisions. However, as we have seen with private copying in the context of virtual video recording, individual courts will produce different rulings in different EU Member States, so clear guidance is needed through the law and interpretations by the Commission. Otherwise we will remain in the current system where European innovators are better off going to the US to build their businesses there, before engaging in the costly task of laborously wading through the legal pitfalls of each individual EU Member State.

The disadvantage of an open norm - i.e. reducing legal certainty before a court gives an interpretation of what is "fair" - is counter-balanced by also having mandatory list of exceptions that provide clear situations where exceptions and limitations to copyright apply.

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

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

The current territoriality approach of limitations and exceptions constitutes a major problem as the EU is facing a mosaic of copyright legislation. This creates an unworkable system, where a legal and three-steps test compliant use of copyrighted material can be illegal in another country.

Harmonisation is urgently needed to achieve a digital single market and to reduce the legal uncertainty created by the current optional system.

Innovators have great difficulties to deal with a fragmented EU copyright framework. They have to guess what is legal and what is not. Currently, it is more interesting for innovators to develop their services/innovations in the US, where they have more legal certainty and have access to more users/consumers when they launch their services. To launch innovative services in Europe, service providers have to deal with 28 sets of copyright legislation and therefore have to launch Member State after Member State, or even sometimes don't want to take the risk of launching a service that could in some countries be considered illegal.

Adding to the confusion, the interpretation of the exceptions and limitations varies from one Member State to another. It leaves EU citizens with less access to innovative services, less choice and offers that differ from one Member States to another.

A system that shows so much confusion is not a sustainable system. The EU urgently needs a modernisation and harmonisation of the copyright framework.

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 "fair compensation" should only be addressed if a harm to the author resulting from exceptions and limitations has been proven. So far, there is no evidence that a harm is suffered by the authors in such circumstances. A compensation scheme should only be introduced if the harm is proven and if it is, then the calculation of a "fair remuneration" should be based on an agreed, evidence-based methodology.

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.

[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.

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.

The existing framework does not cover all situations and cultural heritage institutions are facing different interpretations of the exceptions, which in some cases do not allow for digitalisation of works. Moreover, they cannot make digitised work available online without a licence and this limits the opportunities offered by technology.

For citizens, it means that cultural goods are being needlessly locked away from them and that institutional users are not able to fulfil their public mission to preserve and make available the works in their collections.

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

[Open question]

The exception in article 5(2)(c) of the 2001 Directive should be clarified, allowing institutions to make reproductions of all works in their collection and to make these works available online, as long as it is not intended for direct commercial advantages.

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]

Article 5(2)(c) of the 2001/29 Directive should be broadened including all reproductions necessary for cultural heritage institutions to achieve their public interest missions. This should include digitalisation and the possibility to make digitalised copies.

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

[Open question]

Only a legislative clarification and harmonisation would solve the issue addressed.

b. 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]

The mission of cultural heritage institutions is to provide access to knowledge and culture. There is no reason why publicly funded institutions cannot make works that are not in commercial circulation available to citizens, when these works are part of their collection. If the cultural heritage institutions do not interfere with the normal exploitation of the works, EDRi does not understand why cultural heritage institutions should not be allowed to make their collections available to the public.

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

[Open question]

EDRi suggests broadening the scope of the exception provided in Article 5(3)(n) of the 2001/29 Directive. The exception should cover the digital uses of the collection of cultural heritage institutions. The broadening coupled with the harmonisation should be sufficient to solve the issues.

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]

A legislative solution is highly needed. As long as it does not interfere with the normal exploitation of the works, the collection of cultural heritage institutions should be made available on public networks, such as the Internet. It could be considered to limit the scope of the exception to works that are not in commercial circulation and to allow rightsholders to opt out of the exception, ensuring that the legitimate interests of rightsholders are not harmed while allowing cultural heritage institutions to bring large part of their collection online to a wider public. It should be stressed that the task at hand is encouraging access to European cultural heritage.

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

[Open question]

The current problems can only be solved by a legislative clarification and harmonisation.

c. 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

Since EDRi licenses all of its content under a Creative Commons licence, there are no specific agreements necessary to facilitate e-lending. Creative Commons licences are flexible enough to preempt a need for such specific agreements since they allow for e-lending in general.

At the moment, access conditions for users are unclear. For example, e-lending should allow EU citizens to borrow e-books from libraries that are not in their Member States but this is not possible. Moreover e-lending should allow libraries to make e-books simultaneously accessible to different users, but this is not the case so far. Bureaucratic and over-complicated copyright rules are preventing libraries and citizens from benefiting from the opportunities offered by technological development.

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

[Open question]

A few problems need to be solved:

- all e-book titles available for sale to the public should be available to libraries for acquisition and access;

- e-books should be interoperable;

- Libraries should be permitted to make available acquired or licensed e-books for a limited period of time to a user. However, as there is no need to use DRM to implement such a system, we would strongly oppose such technology being used in this context;

- e-book title simultaneous lending should be possible;

- registered users should be able to download an e-book either in the library or by way of remote access via authentication systems.

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]

New technologies are such a great opportunity to make cultural goods available to a wider audience. Currently, libraries can buy any book and make it available to its users when they are physical publication, but buying licenses for digital content is much more complicated as it depends on the willingness of rightsholders to give access to a specific work and the terms they wish to impose. The collections of the libraries in digital format are therefore being defined by the publishers, rather than by the willingness to give wider access to culture and knowledge. The models used for physical goods are hardly defensible for digital uses and the wider public interest should be taken into account.

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]

Online consultation and e-lending increase the possibility to access cultural content and knowledge. EDRi sees this as a great opportunity that should be embraced rather than strangled by unnecessary barriers.

d. 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

[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 .

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?***

· **NO** – Please explain

To enable cultural heritage institutions to properly transfer their collections in digital the 2011 MoU is not sufficient. A memorandum of understanding is too limited and the 2011 MoU is so far not being used by the intended beneficiaries.

What is needed is a legislative proposal that would give the cultural heritage institutions a clear legal framework that allow them to digitalise their collections and make them available online. Copyright is a serious impediment to digitisation. For example, a single page from a newspaper from the 1950's will have dozens of rightsholders, with the majority of them untraceable.

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

Having online access to the collections of all publicly accessible libraries, museums and archives would help achieve a broad public interest. This would be in line with Article 27.1 of the Universal Declaration of Human Rights which states that "*Everyone has the right freely to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits.* "

This could be achieved through the extension of the scope of Article 5(3)(n) of the 2001/29 Directive.

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.

[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

The exception provided by the 2001/29 Directive for education has been implemented differently in EU Member States. Moreover, the exception was intended to allow for a broad interpretation but unfortunately no EU Member State decided to implement it broadly.

If implemented broadly, the exception would allow the use of any copyrighted material to teach and would also include online courses. A broad implementation would also allow the use of copyrighted material in teaching compilations.

The narrow implementation and the mosaic of copyright frameworks create difficulties particularly for online courses accessible to all EU citizens.

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

[Open question]

Creating a broad educational exception mandatory for all EU countries, covering all types of works and regardless of the institution.

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]

This is outside EDRi's scope.

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]

A legislative solution is needed that would be mandatory and would explicitly cover off line and online uses of works for educational purposes - in its original form and in the form of an adaptation -.

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

[Open question]

The only solution is a legislative approach.

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 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

For research activities, the exception has been broadly implemented. However, a practical problem has appeared with the use of digital rights management (DRM) systems and restrictive licensing schemes or the availability of publications only in hard copy. In the licensing scheme, text and data mining is often prohibited or at least allow only to a limited extend.

This creates barriers to an exception that was foreseen as being broad and it imposes greater restrictions on a use of content t than intended.

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

[Open question]

Licensing schemes or DRM should not prohibit the use of a legally recognised exception for research purposes.

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

[Open question]

This is outside EDRi's scope.

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].

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

[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

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 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

Persons with disabilities, in particular the visually impaired, deaf, dyslexic and other print disabled persons in the EU currently only have access to a very small fraction of the reading material published each year. This situation is worse with regard to the cross-border access to content for persons with disabilities. This is due to the fact that EU countries and international law does not yet allow the legal cross border exchange of reading content among institutions and organisations that serve the cultural and academic needs of persons with disabilities.

The ratification and effective implementation by the EU and its Member States of the World Intellectual Property Organization Marrakesh Treaty could overcome much of this problem for visually impaired persons but these exceptions and limitations to copyright should also be extended to persons with other disabilities.

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

[Open question]

A swift ratification and implementation of the Marrakesh Treaty is needed. Moreover, other disabilities must be included in the exception and must be made mandatory. This is also needed in order to ensure a complete and harmonised implementation of the UN Convention on the Rights of Persons with Disabilities.

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

[Open question]

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.

Despite technological innovation, there is a market failure to supply accessible formats to persons with disabilities. This is due to the lack of formats available, costs and legal restriction due to copyright legislation.

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

Text and data mining legally require unauthorised copies of protected materials as this is necessary to convert the material into a machine-readable format. Moreover, DRM systems can prevent users to download content to do text and data mining. The current situation hinders research.

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

[Open question]

An exception for text and data mining would provide legal certainty. It should also be explicitly stated in the law that digital rights management (DRM) systems and contracts should not override such an exception. Circumvention of DRM for the purpose of benefiting from a legally permitted exception must be legalised.

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]

A specific exception for text and data mining is needed. The legislation should also explicitly states that Digital Rights Management (DRM) system and contracts should not override such an exception.

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

[Open question]

The legislative approach is the only solution that can solve the issue.

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

[Open question]

DRM systems are also a barrier to text and data mining. If text and data mining are legally recognised under a copyright exception, no DRM should prevent it from being possible.

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

[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.

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

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

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

It is impossible for users to know if, when or why content that has been fairly reused under current exceptions will be taken down by hosting providers. International video hosting companies, for example, will remove content if they receive DMCA requests, regionally block if they fear that content is in breach of copyright in some European countries or will use content recognition software to remove often hundreds of videos on the basis of complaints from rightsholders, using their vague terms of service as a legal justification. See http://www.cbsnews.com/news/hitler-downfall-parodies-removed-from-youtube/ for example.

(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?***

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?***

[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 .

· **YES** – Please explain

Current EU copyright laws make it virtually impossible to share remixes and mash-ups of pre-existing works online, even for non-commercial uses and when only very minor parts of works are reused. While this is a major obstacle for freedom of creative expression in general, it is particularly problematic that Europeans have substantially fewer rights than, for instance, US citizens, which in many cases can refer to the fair use principle recognised in US copyright law.

The problem is made worse by the fact that the liability provisions for hosting providers are sufficiently unclear that take-downs are generally on the basis of terms of service rather than predictable laws.

(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?

Due to the lack of legal clarity across the EU, it seems impossible for such a service to be offered.

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?

· Please explain

This question cannot generate coherent answers as it does not explain whether the works in question would comply with one of the exceptions provided for in Directive 2001/29/EC.

If the works in question do not comply with the exceptions, then the law requires payment of royalties.

If the works in question are in compliance with the foreseen exceptions, then they do not interfere with the normal exploitation of the work by the rightsholder and, consequently, there is no reason for the rightsholder to be compensated for a non-existent loss.

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

[Open question]

The overly rigid and outdated list of limitations and exceptions in the European Copyright Directive has to be opened up and should be able to adapt to technological changes. A more flexible approach is needed. One approach could be the combining the current system of a list of exceptions (but made mandatory for all EU countries and specified as not exhaustive), stating specifically that these cases must be interpreted as applying to 'similar uses' and add a more general open norm based on 'fair use' exception.

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]

A legislative solution is the only approach that would solve the issue, as the current system is unquestionably unfit for purpose. For user-generated content, two changes are necessary:

- the introduction of a remix exception. This would allow creative recombinations based on existing works. There should not be a compensation scheme for non-commercial uses;

- the introduction of a more flexible approach: the combination of a mandatory exceptions and limitations list combined with a more flexible exception, such as a fair use exception.

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

[Open question]

The legislative approach is the only solution.

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

So far, the copyright exception for private copying is far from being harmonised, leading to legal uncertainty and creating barriers to the legal use of content and innovation.

A good example is the virtual video recorder, where instead of recording on a domestic video recorder the recorder does a virtual video recording online. European courts have viewed the use of such technologies in very different ways, depending on complex analyses of the way in which they are implemented and financed. This leads to a situation where any company trying to launch any

[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.

comparable technology is faced with an almost impossible set of legal barriers. Compare this with the United States, where one case has created a clear, predictable legal environment.

It is antithetical to the cultural and economical aims of the European Union to maintain a system which actively discriminates against European companies, restricts access to culture and generates *no* benefit for any stakeholder.

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]

· **NO** – Please explain

We start with the principle that the harm to the rightsholders is, at most, minimal. We then need to consider that the flexibility to make private copies will encourage individuals to acquire the licensed content in question and, conversely, that the lack of such flexibility would generate a probably less-than-minimal disincentive to acquire the licences in question.

In essence, therefore, the question is: should rightsholders be "compensated" for the existence of a flexibility that is probably beneficial to them? If there is no cost, there is logically no need for compensation.

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]

The flexibility mentioned in the question creates new functionalities and increases the value of cultural goods for end-users. This will grow the market and will be of direct economic benefit for rightsholders. It would be absurd to endanger new business models and new opportunities for the enjoyment of cultural heritage by adding new layers of a complex bureaucracy in these circumstances.

Private copying is a legitimate practice that is recognised by dint of being part of the list of (albeit optional) exceptions in the Directive as not interfering with the normal exploitation of the work or other subject matter of the rightsholder. There is an unexplained – and possibly inexplicable – assumption that all technological developments impact negatively on rightsholders and they must be compensated for such assumed losses. It seems more likely that more user-friendly ways of using protected material will boost the attractiveness of purchasing content – boosting and not reducing rightsholders' revenue.

It seems incredible that the EU would contemplate burdening its nascent cloud computing industry with levies. Indeed, it is absurd that the Commission has felt it necessary to create legal and financial uncertainty by raising this as a possibility.

The reason for private copying levies to exist is to compensate an alleged economic loss. The introduction of any levy should be based on credible, empirical evidence that there is a significant loss suffered by the authors and creators. So far, such a loss has never been clearly proven. If and when such a loss is identified, the question then needs to be asked if it is proportionate to add bureaucracy and cost in order to cover this cost. Finally, it would also need to be established whether most economically viable option is the imposition such a levy.

It is worth stressing that the development of new technologies has greatly changed the way content is delivered. As Mr Vitorino underlined in his recommendation, the system is moving from a model based on ownership to a model based on access. We observe important market changes and new uses not even requiring an act of private copying are growing, such as video on demand, catch-up

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

TV, etc. In such situations it is difficult to allege any harm as the private copy does not even take place.

Finally, in the interest of democratic legitimacy, it is essential to substantially reform Article 6 of Directive 2001/29/EC. It is hard to understand that the legislator can create a right to avail of copyright exceptions and for legal protection to be given to software imposed by rightsholders which removes this right.

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

· **YES** – Please explain

If a system of private copying levies should apply (i.e. in case the harm suffered by the authors and creators has been clearly determined and demonstrated and, separately, that levies have been demonstrated to be the most effective way of generating compensation for this proven harm), it is clearly necessary to establish a relationship of trust with consumers and to clearly and explicitly display the levy on the invoices of products subject to levies. Transparency should also be promoted in the redistribution of the money collected. In addition, a large portion of these amounts is lost in the administrative costs (For 1 Euro collected, there is a loss of 51.2 cents on the economy system. ENTER Report - p.6 - http://www.ametic.es/CLI_AETIC/ftpportalweb/documentos/migracion/media-Ou1-Informe%20Alternativas%20al%20Canon%20Digital_%20Ingles.pdf).

Citizens deserve to know how much they are being charged, for what purpose and the net amount that will actually be used for the stated purpose of any levy. Redistribution mechanisms must be made transparent, otherwise such systems lose legitimacy in the eyes of citizens.

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?

· **NO OPINION**

This is outside EDRi's scope.

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]

[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.

It is remarkable that, twelve years after the Directive was adopted, the European Commission has not collected this information itself.

EDRi receives extremely (deliberately?) unclear demands from a rightsholder group in Belgium, which gives the impression that a payment is automatically due for the printing equipment in our office. This is in addition to the very high levy paid when purchasing the equipment itself and despite the fact that no copyrighted material is ever copied or printed on the equipment.

Levying a tax on all consumers if the equipment bought will never be used for this purpose neither logical or defensible. When the equipment is bought and used by SMEs or even independent artists for the purpose of creation or storage of their own content, it becomes even less comprehensible. An Opinion of the European Economic and Social Committee (on the 'Communication from the Commission to the European Parliament, the Council, the European Economic and Social Committee and the Committee of the Regions — A Single Market for Intellectual Property Rights — Boosting creativity and innovation to provide economic growth, high quality jobs and first class products and services in Europe' - http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2012:068:0028:0034:EN:PDF) stresses the unfairness of the private copy levy system. Moreover, the opinion underlines that "it should certainly not apply to hard drives used by businesses in the course of their industrial and commercial activities." (Point 1.5 of the Opinion).

We need to remember that levies on equipment are currently:

- unrelated to any demonstrated prejudice to the rightsholder
- unrelated to the actual use of the equipment on which it is imposed
- implemented in a way which results in a significant amount being lost to administration
- implemented at widely varying levels across the EU, to the detriment of the Single Market.

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]

We are not aware of any payments that are demonstrably appropriate.

EDRi believes that as long as the damage has not been clearly proven and not even clearly verified, no tax should be raised to "compensate" for it.

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

[Open question]

- It is not possible to have a coherent approach to tariff setting if there is no coherence regarding the scope of private copying.

- There is also no possibility to achieve a coherent approach to tariff setting where there is legal protection for anti-circumvention technologies which prevent the enjoyment of the private copying exception foreseen by national legislators.

- Trying to harmonise private copying levies is impossible without the harmonisation of the copyright legislation and exceptions.

- It is even more difficult to defend the system of private copying levies, when it relies on the assumption that an economic harm has been caused but that this harm has never been clearly defined and proven.

- Finally it is argued that private copying levies is an incentive for creation. But it seems to be rather an obstacle to innovation. This system distorts the market by compensating economic loss that has never been clearly demonstrated, and appears to have a negative impact on new business models.

The issue of the real impact of this levy on new technology must be addressed. It is necessary to take all these factors into consideration in any debate on private copying levy.

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]

This consultation is about copyright and not about developing bureaucratic, centralised, legislation-based business models for the authors and performers. If anything, the best mechanism will in all likelihood depend on the type of work, the artists involved and the relevant market.

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

· **YES** – Please explain

Legally recognised exceptions and limitations should not be circumvented by contractual clauses. Currently, licensing schemes often prohibit uses of the works that are covered by the exceptions and limitations. It should also be prohibited to use DRM that hinder the uses of exceptions and limitations.

It would be valuable for the European Commission to clarify that unfair contract terms, which permit unilateral removal of services (such as hosting) on the basis of copyright fears, are in breach of the Unfair Contract Terms Directive (93/13/EC).

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.

European citizens regularly have content removed on the basis of spurious claims of copyright infringement. These claims often relate to breaches of US copyright law and lead to automatic removal of content, on the basis of the US Digital Millennium Copyright Act.

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?

- **NO** – Please explain

The European Commission's roadmap on the IPR Enforcement Directive (Directive 2004/48/EC) indicates that there is a lack of clarity regarding the concept of "commercial" infringement.

For the past decade, the EU has focused on the enforcement of rigid and out-dated copyright legislations. Citizens cannot be convinced of the merits of a legislation that is outdated, absurd and excessive. The EU should focus on adapting to the digital era and not on strengthening enforcement, which is already being misused by some rightsholders (such as the "blackmail" practiced by certain legal practitioners who exploit the ease of access to personal data created by the IPR Enforcement Directive). Copyright rules should be fair and balanced and must be adapted to the technology changes, this is the only way to improve respect for copyright.

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]

[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.

The limitation of intermediary liability is important. Without it, there is a high risk of censorship and of hindering freedom of expression, freedom of communication but also freedom to conduct a business. The CJEU has recently underlined that protection of IP rights should not override other fundamental rights such as freedom of communication and freedom to conduct business. Intermediaries should not be liable for things they do not control and privatised enforcement is not the solution. The rule of law needs to apply.

At the moment, service providers face legal uncertainty because of the intermediary liability in copyright. As a result, they sometimes take down things that are legal, out of fear of being sued. That is bad for EU citizens freedom of communication and can chill innovation and creativity.

The European Commission may not and must not promote, encourage or use any form of coercion to encourage "cooperation" of intermediaries which would breach the letter or the spirit of Article 52 of the Charter of Fundamental Rights.

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

· **NO** – Please explain

There have been wholesale abuses of personal data as a result of the excessive implementation of the IPR Enforcement Directive – in Germany and the United Kingdom in particular.

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?

The Commission has given insufficient information as to what it is suggesting to allow an informed answer to be given to this question.

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]

Harmonisation should be dealt with in the near future. There is too much legal uncertainty and the adaptation to the digital era is highly needed. The more the EU waits, the less attractive the European market is, the less innovation can be developed and the less EU citizens have access to

content and services. While looking at reviewing the current EU laws, EU countries should be encouraged to promote more flexibility and a user-friendly approach to copyright laws.

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]

Insufficient attention has been given in this consultation to:

a. The wholesale abuse of personal data (contrary to the Charter of Fundamental Rights) under the IPR Enforcement Directive;

b. The inappropriate legal protection given to DRM software, which allows publishers to unilaterally remove rights that are foreseen by legislators

c. The abuse of due process, legal certainty, the presumption of innocence, privacy, freedom of communication and the rule of law that comes from intermediaries taking “voluntary measures” to appoint themselves as judge, jury and executioner in relation to alleged online infringements.