

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

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

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

No opinion expressed

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

No opinion expressed

**Question 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.**

No opinion expressed

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

No opinion expressed

**Question 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 opinion expressed

**Question 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 opinion expressed

**Question 7:** **Do you think that further measures (legislative or non-legislative, including market-led solutions) are needed at EU level to**

**increase the cross-border availability of content services in the Single Market, while ensuring an adequate level of protection for right holders?**

No opinion expressed

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

**Question 8: Is the scope of the “making available” right in cross-border situations - i.e. when content is disseminated across borders - sufficiently clear?**

No opinion expressed

**Question 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)?**

No opinion expressed

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

No opinion expressed

**Question 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.

Under no circumstance should hyperlinks be subject to protection under copyright. Sharing links without needing permission from the rightsholder is core to the operation of the internet. Changing this fundamental structural aspect of how the internet works would be detrimental to the free flow of information and commerce online.

The creator of a hyperlink must be free to link to publicly available resources without having to worry about infringing copyright. This needs to be the case regardless of the legal status of the linked work or of the intent of the rightholder who has published such a work (or authorized the publication). The recent ruling of the CJEU on the the Svensson case has unfortunately not provided the required amount of clarity and as a result the European legislator needs to enact unambiguous rules that ensure that the act of hyperlinking falls outside the scope of actions protected by copyright. Failing to do so will risk placing European internet users, businesses and innovators at a competitive disadvantage vis a vis the rest of the world. It would also be a clear signal

that the European legislator does not understand the important role that open networks play in fields like innovation, access to culture and freedom of expression.

**Question 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.

Digital technologies of all types create temporary copies in order to efficiently deliver content to a user. Such fleeting reproductions (such as copies in the cache memory) should be seen as outside the scope of copyright protection. Requiring permission to access temporary copies would be destructive to the operation of the internet and harmful to the effective delivery of content and services online.

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

No opinion expressed

**Question 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.**

No opinion expressed

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

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

Yes

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

The creation of a registration system at the EU level would be beneficial to both authors of works and users of works. Frictions of enormous proportion are created simply by the lack of information on the rights status of works. While this status quo may be creating a lot of jobs in the legal services sector, it is only an exercise to research something entirely manmade, nothing is created, no rights granted or contracts drafted, no legal relationships shaped by this legal work. Only information that is hidden without need or intention is dug up in a very resource consuming way. That is why most money spent that way is a direct loss for society.

A registration system would align with the overall objectives of EU copyright policy-- that is, to “support creation and innovation, tap the full potential of the Single Market, foster growth and investment in our economy and promote cultural diversity.” It would provide clear, equal access to rights information. It would increase the certainty of who is the rightsholder to a work and provide a stable catalog of information so that rightsholders can be easily ascertained. This would help mitigate the problem of orphan works for future works, as there will be a formal registry of rightsholders. A registration system could provide a more efficient mechanism for commercial licensing opportunities. And such a registration system could integrate a variety of rights information - such as indicating open licensing for authors that wish to distribute broadly under liberal terms - or including information on works that are in the public domain. In general, a registration system will help reduce the transaction costs between rightsholders and potential users. And if the registration system were developed using open standards and formats, it would provide a rich set of rights information as open data to be used in third party applications and services.

If a registration system is created, rightsholders should be required to register their works in order to be granted particular protections, such as the ability to start an enforcement action (others listed in Question 18). This change would be key “in order to prevent unnecessary and unwanted protection of works of authorship” and decrease the “huge number of works that are awarded copyright protection even though their authors do not require or desire this protection.” (Recommendation 8 of the International Communia Association, <http://www.communia-association.org/recommendations-2/>).

Another innovative aspect of a mandatory registrations system could be that it could greatly facilitate, once in place, the a general shift in Europe to a copyright system that divides IPR into prohibitive rights (with a much shorter term) and remuneration rights with no prohibitive quality. In any event this registry would need to be conceived as one resource for all (even though technically it could be implemented in a distributed fashion across the net), because such a structure is by definition a “natural monopoly” in that there would be no benefit whatsoever in competing or even contradicting registries hosted separately by different players.

Note, that a registration system will not be able to retroactively solve the existing problems faced by cultural heritage institutions with regards to orphan works and mass digitisation (see more about this in reaction to questions 40 and 41).

### **Question 17: What would be the possible disadvantages of such a system?**

There could be a few disadvantages of a registration system. First, there is the simple fact that registration would be required in order for the rightsholder to be granted particular protections, such as the ability to bring an enforcement action against a suspected infringer. This is not how the current copyright enforcement system works today, at least not in all EU jurisdictions. Second, since today it is so easy to create and share huge numbers of digital works, it could be seen as burdensome to impose a registration requirement on authors for every piece of content they create. At the same time, many of these same creators may not want copyright protection (or at least do not care for copyright protection that lasts for 100+ years). So, these creators

may not care to register their works, or may be selective in registering their works. This could be seen as a positive for the copyright ecosystem. By slightly increasing the threshold for a rightholder to receive certain types of protection, it would decrease the number of potential copyright actions because only those works that authors truly wish to protect would be registered. Third, it could take a significant monetary investment to develop and implement a registration system. But in the long run, this cost would most likely be massively outweighed by the benefits of reducing transaction costs overall.

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

There could be several incentives for rightholders to register their works. Policies could be enacted whereby certain elements of copyright protection are only available to rightholders who have registered their works. In principle this could apply to any element of copyright protection that is not required by the Berne convention.

For example, registration might be required for a rightholder to start an enforcement actions (such as notice and takedown), or would be required to access a particular type or level of damage awards in a successful infringement judgment. Another incentive might be that rightholders need to register their works in order to be eligible to collect royalties through collective rights management organizations. Finally, registration could be made a prerequisite for prolonging copyright protection beyond the term the minimum term required by the Berne convention.

**II.D. How to improve the use and interoperability of identifiers**

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

The European Union should ensure two things:

- (1) identifiers as well as rights ownership and permission databases should be based on open standards, available to all content creators and able to be read by all market participants free of charge; and
- (2) all identifiers as well as rights ownership and permission databases are interoperable across all of Europe (and beyond).

Any system that is developed must be developed in a true multi stakeholder approach (e.g not only by rights holders and intermediaries) and should be reflective of work already undertaken (for example by Europeana through the Europeana Licensing Framework and especially the way it requires identification in the metadata field edm:rights where 11 machine-readable values can be chosen from, ranging from all rights reserved to voluntary Public Domain). Rights ownership and permission databases in particular must be publicly accessible via machine readable interfaces. They must also include the ability to store information on out-of-copyright (Public Domain) works.

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

### **Question 20: Are the current terms of copyright protection still appropriate in the digital environment?**

No

Current terms of protection are – rated in timespans of the digital age – practically eternal, not encouraging but overly hindering competition or innovation of new services. This applies even and especially from the perspective of current licensees of copyrighted content, who might not have a license wide enough to build upon the licensed content to create mobile apps, interactive audiobooks, and other products and services not foreseen in that license, and who are not able to get a new license because they have since lost contact with all the licensors involved in the original work (e.g. the several translators of a literary work, the several producers of the music-videos of a certain band). As has been seen in music and currently in TV and film, it has taken a massive level of illegal activity to effect change in those business sectors, since there has been no other incentive than to own the rights and profit from them.

Also from the perspective of cultural heritage institutions the current terms of copyright protection (including neighbouring rights protection) are too long. Cultural heritage institutions hold large collections of works that are still under copyright (or where the copyright status is unclear) but that are not exploited commercially anymore. A term of protection of life plus 70 years stands in stark contrast with the commercial life of the large majority of copyright protected works that much shorter. As a result the disproportionate length of copyright protection prevents cultural heritage institutions from effectively fulfilling their mission in the digital environment.

In many cases the cost for digitisation of copyrighted works that are no longer in commercial exploitation exceeds the potential economic value of these works. As a result these are not made available online by the rightholders who lack an economic incentive. While Cultural heritage Institutions that have such works in their collections have an incentive to make such works available (their public task to provide access to their collections) they are confronted with costs for rights clearance that increase the costs for making these collection available without providing any economic benefit to rights holders.

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

### **Question 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

This creates an uneven playing field. Similar organisations should be able to enjoy the same exceptions (user rights) in all member states. Cultural Heritage Institutions are increasingly working together on digitisation projects (f.e. Europeana) and the fact that the exceptions benefitting publicly accessible libraries, museums and archives have not been implemented (uniformly) in all member states, creates unnecessary

uncertainties and disadvantages institutions in some member states vis-a-vis institutions in others.

The transition to digital services enables cultural heritage institutions to collaborate *across borders* and make their collections available *across all of Europe* and this needs to be mirrored by harmonising the exceptions benefitting these institutions. In the end, teachers and students across the EU should be able to rely on similar exceptions and limitations for teaching purposes. A significant amount of national laws apply a double standard in dealing with online and face-to-face teaching. Uses of images, visual works and audiovisual works for teaching purposes are not guaranteed within many national laws. And the majority of the national laws do not address the needs of a multilingual and multicultural region such as EU, since they fail to provide the right to make translations and adaptations for teaching purposes.

**Question 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

All existing and additional exceptions should be made mandatory and harmonised to the fullest extent possible (obviously after they have been broadened in line with our response to the relevant questions below). It is not acceptable that citizens in some member states enjoy a lesser level of access to the collections held by publicly funded cultural heritage institutions simply because of an uneven implementation of exceptions and limitations of the copyright directive. This issue becomes more pressing as more and more activities of cultural heritage institutions are taking place online.

All the exceptions provided by the EU copyright directives are drafted on the basis that they do not interfere with the normal exploitation of the work and, therefore, do not unreasonably prejudice rightholders. This means that making them mandatory in all member states should have no negative effect on rightholders, while in many cases this will substantially benefit citizens and other public policy objectives such as access to knowledge and culture or inclusive education.

Especially teachers and students across the EU should be able to rely on similar exceptions and limitations for teaching purposes. A significant amount of national laws apply a double standard in dealing with online and face-to-face teaching. Uses of images, visual works and audiovisual works for teaching purposes are not guaranteed within many national laws. And the majority of the national laws do not address the needs of a multilingual and multicultural region such as EU, since they fail to provide the right to make translations and adaptations for teaching purposes.

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

It should be honestly considered whether the approach of having an enumerative set of exception and limitations to copyright that the Member States can choose from

should be given up in favour of a flexible approach such as the Fair Use doctrine pursuant to Art. 107 of the US Copyright Code or the “Model Flexible Copyright Exception” as drafted by the Global Congress on Intellectual Property and the Public Interest at American University Washington College of Law in August 2011<sup>1</sup>.

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

Yes

There is a need for more flexibility in the EU regulatory framework for limitations and exceptions, see answers above for reference. Also, the exceptions and limitations in the 2001 Copyright Directive were not drafted in a technologically neutral manner which is problematic in times of accelerated technological progress.

**Question 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.**

The best approach would be one that provides built in flexibility in reaction to new technological developments or new forms of use. It could be engineered along the lines of the “Model Flexible Copyright Exception” as drafted by the Global Congress on Intellectual Property and the Public Interest at American University Washington College of Law in August 2011, see footnote 2 for more details.

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

Yes.

Even the rights that school teachers have to use online content in teaching varies greatly from one member state to the next. This makes any attempts at building online educational resource repositories a near-impossibility. Only openly licensed OER is uniform enough in regard to the rights pre-granted to it to be used in a pan-European manner.

As one outcome of an “OER Policy Project” conducted by a sub-group of the European Creative Commons Affiliates in 2013/2014, Creative Commons Portugal has investigated at length how the differences in copyright exceptions and limitations across the continent play out regarding the interoperability of OER content for K-12. We are happy to provide the Commission with the results of this study.

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<sup>1</sup> <http://infojustice.org/flexible-use>

As noted above, teachers and students across the EU should be able to rely on similar exceptions and limitations for teaching purposes. A significant amount of national laws apply a double standard in dealing with online and face-to-face teaching. Uses of images, visual works and audiovisual works for teaching purposes are not guaranteed within many national laws. And the majority of the national laws do not address the needs of a multilingual and multicultural region such as EU, since they fail to provide the right to make translations and adaptations for teaching purposes.

**Question 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?)**

No opinion expressed

### **III.A.1 Access to content in libraries and archives**

**Question 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?**

It must be stressed that while the consultation limits itself to activities of libraries and archives the questions in this section are equally relevant for museums and other cultural heritage institutions. In fact the relevant exceptions and limitations explicitly apply to ‘publicly accessible libraries, educational establishments or museums, or [...] archives’. The 2012 Orphan Works directive clarifies this to include ‘film or audio heritage institutions and public-service broadcasting organisations’. In line with this, the following answers should be read as applying to all cultural heritage institutions falling within this scope and not only to libraries and archives.

Institutions increasingly digitize works in their collections not only to prevent harm or loss, but to be able to better fulfil their missions. Digital copies of cultural heritage works provide many advantages such as being (automatically) indexable, being easier to access and having lower storage costs. The current Dutch [needs to be change this to the country of the entity answering but is a valid point for all Eu member states. none of the national implementations allows structural digitization] implementation of article 5(2)c of the copyright directive does not allow institutions to structurally create digital copies of works in their collection. This prevents institutions from fully realising the potential inherent to digitisation of their collections. This is highly detrimental in an environment where, as the New renaissance Report<sup>2</sup> puts it, “digitization is more than a technical option, it is a moral obligation”.

In addition recital 40 of the directive which states that ‘Such an exception or limitation should not cover uses made in the context of online delivery of protected works or other subject-matter’ is highly problematic. As online dissemination of works becomes

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<sup>2</sup> COMITÉ DES SAGES, The New Renaissance, Report of the Reflection group on bringing Europe’s cultural heritage online, 2011, [http://ec.europa.eu/information\\_society/activities/digital\\_libraries/doc/refgroup/final\\_report\\_cds.pdf](http://ec.europa.eu/information_society/activities/digital_libraries/doc/refgroup/final_report_cds.pdf), p. 14

more and more important for cultural heritage institutions, limiting the reproduction exception in such a way is simply anachronistic as it prevents institutions from using digitized works in a meaningful way.

Also technological measures and their relationship with the exceptions benefitting cultural heritage institutions are highly problematic: Often CDs and DVDs are protected by technological measures, the removal of which would require the cooperation of the producer. Art. 6 of the Infosoc Directive provides that technological protection measures are protected per se, independently on the scope of protection, entrusting to voluntary agreements or to subsidiary interventions of Member States the adoption of appropriate measures to ensure that legitimate users can make effective use of licensed content. The strength of the protection of TPMs compared with the weakness of the provision in favor of legitimate uses has led in many Member States the absence of any effective guarantee for the legitimate users, including libraries. As a result, many libraries are not able to reproduce CDs and DVDs legally acquired and, in a several years, these materials become unusable due to technological obsolescence.

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

The best solution – in the absence of a flexible exception/limitation clause – would be to broaden the existing exception in article 5(2)c of the copyright directive, so that it allows institutions to make reproductions of all works in their collection as long as these are not intended for direct commercial advantage.

Also Art. 6 of the InfoSoc directive should be revised in order to enforce exceptions and limitations and to ensure legitimate utilizations of protected works, regardless of format or mode of dissemination. Those who are meant to be empowered by exceptions and limitations should be put in the position to demand that technological measures thwarting this empowerment be removed. If rights are made ever more enforceable, so should the exceptions and limitations.

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

In the absence of a flexible general exception/limitation clause – the main element would be a broadening of the existing exception in article 5(2)c of the copyright directive. Instead of only allowing specific acts of reproductions it should allow all acts of reproduction necessary for publicly accessible libraries, educational establishments or museums, or by archives to achieve aims related to their public-interest missions. This should include reproductions made as part of mass digitization efforts, backup copies and reproductions for format shifting.

Reproductions should be limited to internal use which is not for direct commercial or economic advantage or use in line with other exceptions and limitations allowed for by the directive (such as the broadened version of the exception foreseen in article 5(3)n that we propose in answer to question 34). Reproductions would explicitly be allowed

for the purposes of increasing the operational efficiency and reducing costs of the beneficiary institutions.

Broadening the scope of the extension along these lines mirrors the recommendations made as part of the European Commission commissioned 'Study on the application of directive 2001/29/EC on copyright and related rights in the information society' from december 2013 (compare pages 291 to 302).

Also Art. 6 of the InfoSoc directive should be revised in order to enforce exceptions and limitations and to ensure legitimate utilizations of protected works, regardless of format or mode of dissemination. Those who are meant to be empowered by exeptions and limitations should be put in the postition to demand that technological measures thwarting this empowerment be removed. If rights are made ever more enforceable, so should the exceptions and limitations.

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

**Question 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?**

It must be stressed that while the consultation limits itself to activities of libraries and archives the questions in this section are equally relevant for museums and other cultural heritage institutions. In fact the relevant exceptions and limitations explicitly apply to 'publicly accessible libraries, educational establishments or museums, or [...] archives'. The 2012 Orphan Works directive clarifies this to include 'film or audio heritage institutions and public-service broadcasting organisations'. In line with this, the following answers should be read as applying to all cultural heritage institutions falling within this scope and not only to libraries and archives.

[note that the following is not really an answer to the question. Institutions answering this question that have experience specific problems when trying to negotiate agreements with rights holders should probably insert a section describing these problems first]

Libraries are subject to complex and lengthy negotiations with publishers and database vendors, which impact upon collection development, duration of access, permitted uses. Negotiation with publishers is an expensive and time consuming process and most licences are presented as final, without the ability to negotiate on terms, which are often taken over from other jurisdictions.

Often libraries entrust negotiation and management of contracts to national or regional institutional consortia to increase their bargaining power. But the use of consortia for the negotiations is a remedy, not an optimal solution, and the logic of large numbers may introduce rigidities in pricing and business models, encouraging the purchase or subscription of large packages of content (big deal) rather than the

selection of targeted works. Also it is extremely common for licences to prevent cross border access to digital content for research and study.

In more general terms this question fails to address the most urgent issue confronting cultural heritage institutions today: providing online access to works in their collection. Among the existing exceptions the exception for the consultation of works and other subject-matter via dedicated terminals on the premises of such establishments for the purpose of research and private study comes closest to a mechanism that could enable such uses.

From both the perspective of publicly available libraries, archives and museums as well as the perspective of their patrons (end users/consumers) the existing exception that allows institutions to make works in their collections available 'for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises' (article 5(3)n) is extremely limited and not in line with the technological possibilities and the expectations of citizens anymore.

Limiting the availability of digitised works to dedicated terminals on the premises of cultural heritage institutions prevents them from reaching citizens that cannot travel to the premises (for example because they are disabled or because they lack the economic means to do so). Furthermore it is out of line with the legitimate expectation of users that have been shaped by universal online accessibility of other services. Europe's citizens and researchers would greatly benefit from online access to the collections of Europe's publicly funded institutions.

For publicly funded cultural heritage institutions to fully participate in the digital public space they must be enabled to offer online services that are available from everywhere and by anyone seeking to 'to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits', as enshrined by article 27.1 of the Universal Declaration of Human Rights. Online universal access to the collections of publicly accessible libraries, Museums and Archives can play an important role in realising this objective. Being able to offer online access to works in their collections will also allow cultural heritage institutions to reach wider and more diverse audiences. For these reasons the current exception must be considered as too narrow.

**(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?**

No opinion expressed

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

The best solution would be to broaden the existing exception in article 5(3)n of the copyright directive, so that it allows institutions to make available digital copies of out-of-commerce works in their collections via electronic networks such as the internet for

non commercial purposes – or to give up the approach of enumerative exceptions altogether and transition to a more flexible and tech-neutral system.

**Question 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?**

The cleanest way towards an appropriate copyright system would be to introduce flexible exceptions and limitations to copyright instead of a fixed set of enumerative clauses. Within the fixed system the main element would be a broadening of the existing exception in article 5(3) of the copyright directive. Instead of limiting the making available to dedicated terminals on the premises of the institutions it should apply to making the works available online via public networks such as the internet. The scope of the exception should further be expanded to not only include 'the purpose of research or private study' by 'individual members of the public' but should apply to all non commercial uses.

Furthermore, it seems reasonable to limit the scope of the exception to 'works and other subject-matter not subject to purchase or licensing terms' as long as they are still commercially available. This should be combined with an opt out-clause that would allow rights holders to either prevent the making available of their works or to negotiate licensing terms with the institutions (either on an individual basis or collectively)

These conditions are crucial to ensure that the new broadened exception meets the requirements of the three step test. Limiting the scope of the exception to publicly accessible cultural heritage institutions and to out-of-commerce works and works that are not subject to licensing terms should satisfy the 'certain special cases' criterion and cannot, by definition, be in conflict with the 'normal exploitation' of the works in question. The fact that the exception would be limited to non commercial uses of the works made available and that authors can decide to opt-out of the exception would further ensure that 'the legitimate interests of the author' are not necessarily prejudiced.

In fact many authors would benefit from improving online access to out-of-commerce works because works that they have created are kept available via cultural heritage institutions (and are available to them to build upon or to do research). As a result citizens also greatly benefit, because they are granted access to works that wouldn't be available through market players.

This solution would also be in line with the relevant recommendations made in the 'New Renaissance' report of the Commission appointed 'Comite de Sages' that was published in 2011. The report recommended that 'National governments and the European Commission should promote solutions for the digitisation of and cross-border access to out of distribution works' and that 'For cultural institutions collective licensing solutions and a window of opportunity should be backed by legislation, to digitise and bring out of distribution works online, if rights holders and commercial providers do not do so'.

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

No opinion expressed

### **III.A.3 E – lending**

**Question 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?**

No opinion expressed

**(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?**

**Question 37: If there are problems, how would they best be solved**

No opinion expressed

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

No opinion expressed

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

No opinion expressed

### **III.A.4 Mass digitisation**

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

No opinion expressed

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

No opinion expressed

### **III.B Teaching**

**Question 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?**

Yes

We have been told by teachers, students, educational-related platforms etc. and others in the course of a number of OER train-the-trainer events that they have experienced several problems when trying to use copyrighted works for illustration for teaching. For instance, platforms that make available digital educational resources have been asked by publishers to remove such resources when the resources contain entire copyrighted images or parts of educational textbooks. This is either because the online use of copyrighted works for teaching purposes is not allowed by that national law or because that national law - due sometimes to legal technique problems - limits the kinds of works or the extent of the work that can be used teaching purposes, failing to foresee the fact that an image, a visual work, a music work, an audiovisual work or a short work of any nature are only relevant when used in full.

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

No opinion expressed

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

The problems faced by teachers and students when using works or other subject-matter for illustration for teaching can only be solved through the mandatory implementation in all Member States of either a fair use exception (as mentioned in the answer to question 23 above) or a proper exception for teaching purposes which (i) should be technologically neutral, as provided in art.5(3)(a) EUCD, in order to cover both face-to-face education and online education, as well as the use of digital educational resources; (ii) should expressly exempt all acts of exploitation in order to cover not only the rights of reproduction, communication to the public (including the right of making available online) and distribution, as foreseen by art.5(3)(a) and (4) EUCD, but also the right of making transformations, including without limitation translations, of copyrighted works for teaching purposes, which the EUCD fails to harmonize; (iii) should not focus on the nature of the educational establishment, but only on the purpose of the use, as provided in art.5(3)(a) EUCD; and (iv) should exempt all kinds of works and to the extent justified by the purpose, as provided in art.5(3)(a)EUCD.

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

No opinion expressed

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

The problems faced by teachers and students when using works or other subject-matter for illustration for teaching can only be solved through the mandatory implementation in all Member States of either a fair use exception (as mentioned in the answer to question 23 above) or a proper exception for teaching purposes which (i) should be technologically neutral, as provided in art.5(3)(a) EUCD, in order to cover both face-to-face education and online education, as well as the use of digital educational resources; (ii) should expressly exempt all acts of exploitation in order to cover not only the rights of reproduction, communication to the public (including the right of making available online) and distribution, as foreseen by art.5(3)(a) and (4) EUCD, but also the right of making transformations, including without limitation translations, of copyrighted works for teaching purposes, which the EUCD fails to harmonize; (iii) should not focus on the nature of the educational establishment, but only on the purpose of the use, as provided in art.5(3)(a) EUCD; and (iv) should exempt all kinds of works and to the extent justified by the purpose, as provided in art.5(3)(a)EUCD.

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

No opinion expressed

### **III.C Research**

**Question 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?**

No opinion expressed

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

No opinion expressed

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

No opinion expressed

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

No opinion expressed

### III.D Disabilities

**Question 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?**

No opinion expressed

**(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?**

No opinion expressed

**(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?**

No opinion expressed

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

No opinion expressed

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

No opinion expressed

### III.E Text and data mining

**Question 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?**

No

However, that might be due to TDM not yet being widely accepted as a use in the copyright sense. There are grave consequences for science and progress on the horizon if one looks at the UK for example, where it is discussed to make TDM subject to permission of the (copy)rights holder of the content mined even if that content isn't in any way copied in the process.

**(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?**

No opinion expressed

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

No opinion expressed

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

It could be clarified on the EU level that TDM which does not lead to any recognisable reproduction of copyrighted content is not subject to permission.

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

It should be clarified that TDM which does not lead to any recognisable reproduction of copyrighted content is not a use in the copyright sense and thus cannot be made subject to permission.

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

No opinion expressed

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

No opinion expressed

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

**Question 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

As users/consumers we, the individuals who are active as Creative Commons Project Leads in more than 35 countries of (geographic) Europe, often come across pre-existing works that can be classified as "orphan works" and that one would like to re-use. However, under current copyright law, that may be a copyright infringement. In the absence of a central copyright registry, a very large number of works, especially on the Internet, are at least "practically orphaned", meaning that to the averagely-abled

user/consumer there's no easy way to establish who the rightsholders are. Approaches like CC Licenses do not sufficiently mitigate this, as they are made for scenarios where attribution can be given to known rightsholders. Also, the CC rights information often gets lost while content is travelling around the net, due mainly to computer systems that don't preserve this information, but also because many re-users do not sufficiently honour the CC License terms. The EU rules requiring "diligent search" for information about the rightsholders are far from what users/consumers will ever be able to deliver. These rules might even be impractical for many heritage institutions, but they are definitely unworkable for everyone else.

**(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?**

No opinion expressed

**(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?**

No opinion expressed

**Question 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?**

Yes, problems were experienced, and  
No, proprietary systems are not insufficient

While we make extensive use of Creative Commons licenses for our own works when they are disseminated online, we cannot use a creative commons license for a work created on the basis of a pre-existing work whose copyright status is uncertain. This means that there is no "proper" way to label such works in a standardized manner and they are in effect lost for the commons and the common good.

As far as the rights status of the pre-existing works built upon isn't unclear, the marking tools at hand at least for web content seem quite appropriate, especially as far as they produce rights metadata in machine-readable, open formats (like for example the Creative Commons License Chooser at <http://creativecommons.org/choose>). There doesn't even seem to be any comparable proprietary system for this.

Regarding direct identification of works i.e. not adjacent to the work on a website but as part of the media files (in the metadata fields of the respective file format), the situation is completely opposite. No easy to use tool for many different file formats exists here and the proprietary nature of many file formats seems to be one reason for

this. Some projects, partly powered by the Wikimedia Foundation and also by startup companies like Commons Machinery are working on helper tools for identification, but in order to let those tools really take center stage there might be benefits in EU regulation that requires the proprietors of file formats to at least provide sufficient specifications and documentation to third parties to develop tool around the formats.

**(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?**

**Question 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)?**

Yes

While extended collective licensing can provide remuneration for the author of original works used in certain contexts (such as education), the present extended collective license systems seem to not sufficiently permit adaptations and other transformative reuse of pre-existing works, and hence do not directly remunerate such works.

Also, as noted also for question 65 below, not all collecting societies involved in remuneration schemes do accept membership or claims by creators who disseminate their works under free / alternative standard licenses such as Creative Commons Licenses and GNU Licenses. This leads to the quite unsatisfying situation where these freed-up works occupy space on storage media, are used and are generally eligible for remuneration under ECL schemes or other Non-waivable Compulsory License Schemes, but the creators miss out on such remuneration even though their works enlarge the overall sum paid by the members of the public.

**(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?**

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

Through law reform

For more detailed explanation, see answer to next question. Private order licensing in general and standard public licenses in particular can never substitute for a well-balanced copyright system as a result of law reform. Thus, we want to highlight the joint statement that was formed at last year's CC Global Summit in Buenos Aires, Argentina<sup>3</sup>. It represents the stance of a large part of the Creative Commons Community on the question, to what extent licenses can help to solve the present copyright-related problems. Licensing models do help, but as private order contractual tools they will structurally always have flaws and shortcomings compared to a sane

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<sup>3</sup> For text of the statement see <https://creativecommons.org/weblog/entry/39639>

and workable setup of the law they work on top of. Thus, licenses are a patch for some problems but not a fix to the entire copyright system

**Question 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?**

- 1) Explicitly permit the re-use of orphaned works for the time this orphaned status persists, if possible in combination with a central machine-readable registry for copyright status of all works (regardless of whether registering would be made a prerequisite for seeking copyright protection).
- 2) Make extended collective licensing also cover adaptations and other transformative uses, especially around user generated content.
- 3) Do not allow collecting societies to impose hard restrictions on member's own use and their licensing of own works.
- 4) Shorten the time period before a work enters the public domain or at least work towards a shortening of the time period in which copyright can be used prohibitively (while preserving the right to be remunerated for a longer time period).
- 5) Introduce a more flexible and tech-neutral approach for exceptions and limitations in Europe instead of a fixed set.

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

No opinion expressed

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

**Question 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 in the digital environment?**

Yes

The exceptions that permit private use (including copying and reprography) are very important to give people access to culture and knowledge. In the digital environment, where the private sphere also covers online sharing and online social networks, it needs to be clarified how this applies to the private use exceptions. It might be more appropriate to abandon the current system of fixed exceptions and limitations in favour of a flexible one similar to the Fair Use approach. This is even more pressing for transformative uses than for verbatim private copying. No fixed set of exceptions and limitations seems to be able to handle this ever more important way of cultural exchange. Any copyright law system that suffocates the transformative use and dissemination that happens for private purposes is unsuitable for the future.

In any case, the exceptions allowing (inter alia) private copying should be made into actual rights that can be enforced against those technological measures that make it impossible to benefit from what the law allows. Otherwise, in the coming years, the private copying rules and other exceptions and limitations will lose most of their

practical relevance due to the digital world moving heavily towards “walled garden ecologies” of entirely controlled systems, where companies ruling those walled gardens determine unilaterally through technology what can/cannot be done.

**Question 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?**

No

There is no general understanding across Europe that copies made under private use exceptions must be taxed or made subject to levies. Where copies are made by digital means there is no (additional) grounds for levies either, to the contrary: The levy systems in place are but very vague quasi-taxations, the turnover of which is distributed in a highly debateable manner. In many instances, creators that free up their content through open licenses are not accepted by collecting societies who play a central role in collecting also the levies - while of course the content created by these CC creators also occupies space on the levied storage media and thus these open works increase the overall levy sum paid by members of the public. The levies however get divided only between those creators that do not share and invite re-use, with no sensible explanation whatsoever.

**Question 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?**

Badly in both directions

Any levy imposed on a service would impact negatively on the consumer's willingness to use the service. While rightholders may get some additional revenue from levies imposed on measurable use of online resources (such as bandwidth or storage space), it would be impossible to tell (without violating user's privacy) whether the file a user share with his/her friends via the cloud is a video of the family's vacation, or some Hollywood blockbuster. If rightholders shall be compensated for online sharing of copyrighted material, arbitrary levies on the use of general online services is not a good solution, and other means of compensation that does not impact negatively on the willingness to use online services should be considered.

**Question 67: Would you see an added value in making levies visible on the invoices for products subject to levies?**

Yes

Any levies should be clearly communicated to the consumer. This information should include an explanation what uses are permitted as a result of the levy being paid.

**Question 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 expressed

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

No opinion expressed

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

No opinion expressed

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

No opinion expressed

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

**Question 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?**

No opinion expressed

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

No opinion expressed

## **VI. Respect for rights**

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

No opinion expressed

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

No opinion expressed

**Question 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?**

Yes

The current setup clearly limiting the liability of ISPs and other intermediaries to secondary liability seems to work fine. Any additional steps or systems that leverage on the large-scale systems at the root of internet access, i.e. the contact points where all citizens must go through to get access, run a high risk of tampering with basic citizen rights of freedom of expression and thus with the very foundations of democracy in Europe. It must be avoided that, in an attempt to make copyright enforcement even more effective than it already is, copyright rules impede net neutrality and fundamental rights.

**Question 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

In some Member States (e. g. Germany) there seems to be an overly strong bias towards privatising copyright enforcement, with whole law service industries developing around the "business model" to cash in on cease-and-desist letters on a massive scale (hundreds of thousands of private households confronted with substantial claims and fees, without any involvement of judiciary institutions or control). To some extent local courts facilitate this shift by only loosely applying consumer protection rules, as seen around large-scale infringement notices around the RedTube service in late 2013. While not all such excesses are attributable to the EU legislative framework, it should be considered whether a minimum standard of consumer protection like a formalised notice-and-notice system (as discussed recently as part of the CETA negotiations between the EU and Canada) should be made mandatory for all EU Member States.

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

**Question 78: Should the EU pursue the establishment of a single EU Copyright Title, as a means of establishing a consistent framework for rights**

## **and exceptions to copyright across the EU, as well as a single framework for enforcement?**

No

While a single EU-wide title (or even a European Copyright Code) might yield some benefits, it also poses the risk of diminishing the possibilities to have the local IPR rules reflect the cultural differences between Member States. Especially smaller Member States with thus smaller markets for IPR might find themselves in a position where their local copyright balance gets overridden by a kind of “one size fits all” which might tend to fit especially the interests of the larger Member States.

### **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?**

No

This is not the next step and it shouldn't be a project at all, not even long-term. To follow this idea would mean to repeat in a way the mistakes that were made in the nineteen nineties when the sui-generis database right was introduced top-down in the EU. It was meant to make Europe's IPR systems more suitable for the dawning age of the knowledge society, but it achieved the opposite. Instead of fostering data industries by providing commercial database makers with a legal monopoly to leverage refinancing their investments, the new right drove data innovation out of Europe. Today's data industries grow and prosper mainly in places that do not know any such legislative database protection.

The same applies to a single copyright title and an ever more effective enforcement based on a single framework for enforcement. Instead of making the EU level rules more rigid and more into a substitute for national legislation, the EU should make the overall framework for the Member States more flexible and tech-neutral. And, it must be noted here, we already have a somewhat “consistent framework for rights and exceptions” in Europe through the enumerative rules in the InfoSoc Directive. To stay in the terminology, one could say that this latter framework is already too consistent, in that it hinders Member States to try out new approaches and brings an overall rigidity to the copyright systems that is biased against innovation and progress. If the current Berne + InfoSoc rules would apply everywhere on the planet, we wouldn't have many of the products and services that also Europeans take for granted today. More of this innovation should happen in Europe instead of elsewhere, but the current IPR setup in the EU drives innovation away - something that would probably increase with more harmonization and “consistency”.

## **VIII. Other issues**

**Question 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.**

Yes

More issues are legion, especially in the areas where the copyright framework overlaps with adjacent legislative areas such as net neutrality, broadband access, privacy protection, access to knowledge/culture and most importantly around the influence of IPR rules on fundamental democratic rights. As civil society groups are only now starting to form, build networks and raise their voice in the EU's political arena, it might be worthwhile to hold detailed consultations on these adjacent topics in regular intervals.

As a matter at the core of the subject matter of the present consultation, but nevertheless left out, the EU should support rights holders who wish to dedicate their copyrights to the public domain (the so-called "voluntary public domain"). This should be implemented concretely on the legislative level with the introduction of a positive legal definition of the public domain in copyright rules. The link between copyright protection and the public domain has evolved over time, and needs to be clarified by legislation. The role of the public domain, already crucial in the past, is even more important today, as the internet and digital technologies enable us to access, use and re-distribute information with a marginal cost of zero. It has thus become necessary to reform the copyright system to recognize the existence of the public domain as a positive set of content that can be freely used to serve culture, innovation and public service purposes, in complementary with exclusive protection.

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