Public Consultation
on the review of the EU copyright rules

Contents

I. Introduction

A. Context of the consultation

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

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

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

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

As part of the review process, the Commission is now launching a public consultation on issues identified in the Communication on Content in the Digital Single Market, i.e.: *"territoriality in the Internal Market, harmonisation, limitations and exceptions to copyright in the digital age; fragmentation of the EU copyright market; and how to improve the effectiveness and efficiency of enforcement while underpinning its legitimacy in the wider context of copyright reform"*. As highlighted in the October 2013 European Council Conclusions[5] *"Providing digital services and content across the single market requires the establishment of a copyright regime for the digital age. The Commission will therefore*

[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.

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** as a word or pdf document 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:

Danish Publishers Association

The members of the Danish Publishers Association (DPA) represent approx. 85 % of the turnover of Danish Publishers publishing within fiction, non-fiction and school- and textbooks.

Book publishing is the largest cultural industry in Europe; it generates around 23 billion € of net revenues per year, for a retail market value of about 40 billion €. Book publishing is a very valuable asset for Europe, which is the global leader in this sector; all EU policies should take into account its potential for jobs and growth generation.

Reading a book is the second most common activity according to the EU Special Eurobarometers report on "Cultural Access and participation"[9] with 68% of people reading books. Reading books by an author from another European country is the most common form of engaging with another country's culture and the most accessible one according to the same report (31%)[10]. It is also a sector that employs directly at least half a million people across Europe (from authors, to publishers to independent booksellers). According to Eurostat, about 300 000 people are directly employed in publishing. All this does not count all the indirect jobs of graphic design, translators, printers, etc.

Publishing like any other sector of the cultural industries, needs copyright as a reliable and stable legislative tool that ensures the protection of creation and recouping of investments, thus allowing perpetuating the process of creation and reinvestment.

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

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

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

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

[9] http://ec.europa.eu/public_opinion/archives/ebs/ebs_399_en.pdf, page 5
[10] Ibid. page 38

- 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[11].

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[12] should significantly facilitate the delivery of multi-territorial licences in musical works for online services[13]; the structured stakeholder dialogue "Licences for Europe"[14] and market-led developments such as the on-going work in the Linked Content Coalition[15].

"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[16].

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

[12] 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.

[13] 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.

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

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

[16] 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[17] to increase the cross-border availability of content services in the Single Market, while ensuring an adequate level of protection for right holders.

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

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

…….

☐NO

☐NO OPINION

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

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

…….

…….

☐NO

☐NO OPINION

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

[Open question]

[17] 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.

In the book sector, the issue of territoriality is fundamentally different from other sectors. The author grants a license directly to the publisher for the commercial exploitation of a work. Danish publishers acquire and manage worldwide exclusive rights for books in Danish. For example, a Danish publisher can sell the book in Danish to readers all over Europe (and the world) because no other publisher will get a licence for the same language. As a result, publishers can sell books through online or brick-and-mortar retailers, across the whole internal market without limitations.

For sales of both physical books and e-books the current practice is individual management of rights, as European publishers generally acquire digital as well as analogue rights. As far as copyright management is concerned, any European reader should therefore be able to buy any e-book sold by any e-distributor. Possible obstacles encountered by European citizens derive from other issues (see answer to question 5).

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]

…….

…….

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

☐YES – Please explain by giving examples

…….

☐**NO**

☐NO OPINION

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

☐ YES– Please explain by giving examples

…….

…….

☐ NO

☐ NO OPINION

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

☐YES – Please explain

…….

…….

☐**NO** – Please explain

DPA does not expect particular legislative measures in the copyright field to be required at EU level to increase cross-border availability of books in analogue and digital formats within the single market. However, we would like to encourage the Commission to support us in finding technical solutions to identify the country of sale for VAT purposes (see question 5), to enhance the discoverability of e-books and also with regard to the interoperability of devices, platforms and content.

☐NO OPINION

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

[The definition of the rights involved in digital transmissions]

The EU framework for the protection of copyright and related rights in the digital environment is largely established by Directive 2001/29/EC[18] 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[19] and databases[20].

Directive 2001/29/EC harmonises the rights of authors and neighbouring rightholders[21] 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[22], (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 –

[18] 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.

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

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

[21] 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".

[22] 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).

and at the users' end – e.g. when a user downloads a digital copy of a work) and the communication to the public/making available right, i.e. the rights to authorise or prohibit the dissemination of the works in digital networks[23]. These rights are intrinsically linked in digital transmissions and both need to be cleared.

1. The act of "making available"

Directive 2001/29/EC specifies neither what is covered by the making available right (e.g. the upload, the accessibility by the public, the actual reception by the public) nor where the act of "making available" takes place. This does not raise questions if the act is limited to a single territory. Questions arise however when the transmission covers several territories and rights need to be cleared (does the act of "making available" happen in the country of the upload only? in each of the countries where the content is potentially accessible? in each of the countries where the content is effectively accessed?). The most recent case law of the Court of Justice of the European Union (CJEU) suggests that a relevant criterion is the "targeting" of a certain Member State's public[24]. According to this approach the copyright-relevant act (which has to be licensed) occurs at least in those countries which are "targeted" by the online service provider. A service provider "targets" a group of customers residing in a specific country when it directs its activity to that group, e.g. via advertisement, promotions, a language or a currency specifically targeted at that group.

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

☐ YES

An application of the country of origin principle would have negative effect if introduced relating to the "making available" or any other exclusive right of copyright, as it would weaken its usefulness. The making available right is most useful when an infringement can be brought against a party who does not make an unauthorised reproduction in a particular territory (but very often) has done so or assisted or facilitated the making of a copy in another jurisdiction. The making available right is also useful in that the exceptions from copyright infringement in relation to the reproduction right are not co-extensive with the exceptions from infringement relating to the making available right.

☐ 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[25])

…….

[23] 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).

[24] 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).

[25] 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).

…….

☐NO OPINION

9. *[In particular if you are a right holder:]* ***Could a clarification of the territorial scope of the "making available" right have an effect on the recognition of your rights (e.g. whether you are considered to be an author or not, whether you are considered to have transferred your rights or not), on your remuneration, or on the enforcement of rights (including the availability of injunctive relief[26])?***

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

…….

…….

☐ NO

DPA does not believe a clarification of the territorial scope of the making available needs clarification. The "lex loci protectionis" conflict of law rule for copyright provides adequate means to enforce copyright. For criminal matters, a greater cooperation in the Internal Market would be helpful.

☐NO OPINION

2. Two rights involved in a single act of exploitation

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

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

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

…….

…….

☐**NO**

This is not applicable to the print sector where publishers generally acquire all rights which are fully transferred to him by the author(s) for commercial exploitation. Publishers hold rights for reproduction and distribution. We therefore do not see any need for legislation in that respect as in our field the two distinct rights do not create any problem.

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

☐NO OPINION

3. Linking and browsing

Hyperlinks are references to data that lead a user from one location in the Internet to another. They are indispensable for the functioning of the Internet as a network. Several cases are pending before the CJEU[27] 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[28] as to whether such copies are always covered by the mandatory exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC.

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

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

☐ 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)

Hyperlink per say should not be considered as making available when the link leads to an authorised copy of a work or other subject matter. They therefore should not be subject to the prior approval provided that the rightsholder is entitled to set restrictions on access to the materials at the end of the link. However, in cases where the link leads to illegally made available material or to copyright material not previously made available to the public, as it is with pirate sites offering link collections, then they should be covered by the making available right. Automated restrictions on access such as prohibitions on crawling must be followed by search engines, or the search engines will be deemed infringers and/or contributory infringers. More generally, DPA is able to endorse the views and conclusions expressed in a report of ALAI, available at: http://www.alai.org/en/assets/files/resolutions/making-available-right-report-opinion.pdf

☐ NO OPINION

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

[27] Cases C-466/12 (Svensson), C-348/13 (Bestwater International) and C-279/13 (C More entertainment).
[28] Case C-360/13 (Public Relations Consultants Association Ltd). See also http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0202_PressSummary.pdf.

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

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

The actual viewing of a page (from a user's perspective) should not be subject to authorisation when it involves truly an act of temporary reproduction as a necessary technical process and leads to an authorised content made lawfully available online. However, the making available of copyright protected content on a webpage so that internet users can view it can and should only be done under authorisation of rightsholders. Illegal display of pdf on websites and illegal streaming constitutes an increasing form of piracy of e-books, which becomes even more crucial at a time when services are being created where a book can be accessed on subscription such as Skoobe or Paper C in Germany. Moreover, rightsholders should be able to decide whether a work is available for indexing by search machines for example when the cache is being made or not and whether precise contractual terms allow to do so with the reader in clear way.

…….

…….

☐NO OPINION

4. Download to own digital content

Digital content is increasingly being bought via digital transmission (e.g. download to own). Questions arise as to the possibility for users to dispose of the files they buy in this manner (e.g. by selling them or by giving them as a gift). The principle of EU exhaustion of the distribution right applies in the case of the distribution of physical copies (e.g. when a tangible article such as a CD or a book, etc. is sold, the right holder cannot prevent the further distribution of that tangible article)[29]. 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)[30]. 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

…….

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

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

…….

☐NO

☐NO OPINION

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

[Open question]

As recognised in this consultation, the ability to resell of previously purchased digital content would have severe economic implications on the book sector.

Such an approach which introduces the concept of exhaustion to the right of distribution when distribution takes place by transmission fails to recognise the inherent differences in physical and digital products. Specifically, the nature of digital is such that quality remains perfect over time, in contrast to physical goods where there is a degree of deterioration over time. The second hand market for physical goods therefore has less of an impact of the primary market, which can still function alongside a secondary market. By contrast, with digital products the lack of deterioration in quality means that a secondary market directly competes with the primary market and inevitably undermines it. There would be no reason for any reader to pay for a new e-book if the identical file was available second hand at a lower price.

Further, it is impossible to determine whether a digital good has been sold; unlike a physical sale where there is a transfer to another user and the denial of the continuing use of the physical good by the seller, in the digital environment this is not the case – both the seller and purchaser can continue to use the digital product. The implications for widespread copyright infringement – and concurrent difficulties in enforcement – are obvious.

As a result, we can realistically foresee negative effects that could stem from the exhaustion rule applied to e-books such as the costs of e-books which will drastically raise and which will not be a benefit for the readers or publishers and authors alike or the fact that publishers who currently use consumer-friendly social DRM (watermarks) to start using hard DRMs to protect their works.

Applying the principle of exhaustion to digital products would also stymie the development of new business models and it is hard to foresee that the exhaustion rule applied to electronic content would be compliant with the three-step-test of the Berne convention.

This idea is also based on a wide-spread false apprehension of the fact that e-books are cheaper than paper books. E-books are in fact not much cheaper to produce than print books; we estimate that digital production allows savings of about 15-20% (printing, storage and distribution) – everything else (paying authors, editorial, marketing, etc) is still there in digital. In any event, only a tiny marginal proportion of publishers only publish e-books, almost all publishers need to publish in paper and in digital form, so the reduction of costs, for a market that is no more than 1% in the majority of Member States is not significant at all (the UK is an exception with 15% market share of e-books, France, Italy, Spain, Denmark and Germany between 2 to 3% but most of the countries across the EU are counting less than 1%). Moreover, the digital market is still so nascent that there are still big initial investments needed to move to digital. So all in all for the time being producing e-books costs about the same, if not more.

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[31]. 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[32].

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

☐YES

☐**NO**

The book publishing sector already has a registration system for the identification of books (ISBN), works (ISTC), and party names (ISNI), which is what is needed to help in the identification also for licencing purposes (cf. *The LCC Principles of Identification v1.0*, www.linkedcontentcoalition.org/home_page.html#!documents/cvjv).. The book industry was the first cultural sector to create an international standard to identify a books with the ISBN, which was introduced in 1965 and now applies also to e-books and educational software. This is a system of registration indispensable to the book value chain. Therefore, European publishers do not believe that any additional system of registration needs to be created and applied to the publishing sector. We also reject the notion that registration should be a prerequisite for the protection and exercise of rights.

The new environment is challenging in this area, since it requires standards for identification, description (to facilitate retrieval in the Internet) and formats, to ensure interoperability between different devices. European publishers are actively committed to the development of open standards along the production chain, including identification (ISBN, ISTC), metadata (ONIX), web resolution (DOI) and – very important for e-book portability – digital format (.epub). Dialogue with other players along the book value chain will be essential for full deployment of such standards.

The identification and licensing of works and other subject matter is better served by improvements in facilitating discoverability; and in the streamlining of licensing. Publishers are working to improve both of these, at national and European level.

☐NO OPINION

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

[Open question]

……

[31] 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.

[32] 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.

…….

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

[Open question]

…….

…….

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

[Open question]

…….

…….

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[33], 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[34] should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition[35] 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[36] 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]

DPA supports the Linked Content Coalition (LCC) and its valuable work to create tools for right information management in any licensing activity. While respecting national preferences in adopting models, the EU may contribute through encouraging possible pan-European application or interlinking with other similar initiatives. A significant first initiative to

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

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

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

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

implement the LCC framework is Rights Data Integration, a European Commission supported project.

The European Publishers Association (FEP) to which DPA is a member is one of the driving forces behind ARROW, which is a tool to facilitate rights information management in any digitisation project involving text and image based works. The ARROW Rights Information Infrastructure is based on standard identification systems to support the process of identification of authors, publishers and other right holders of a work, including determining whether it is orphan, in or out of copyright or its commercial availability status. In this, it is based on the same principle than LCC.

We believe that supporting technological and business innovation in this field is a much more effective policy than introducing new pieces of legislation. In particular, registration systems in the field should remain voluntary and independent (self-regulating) since they demonstrated over the time to be more efficient.

FEP took part actively in Working Group 2 within "Licenses for Europe", especially with regard to the micro-licensing strand (previously small scale users) and signed a toolkit for licensing including micro-licensing for the text and image sector. In this context, we encourage both:

- Solutions for the identification of authors and publishers, their agents or other representatives (such as CMOs) from whom permission can be sought;

- Solutions to give users information about licensing and licensing conditions: how the licensing process works and what users can do with a work under a chosen licence.

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[37] requires a minimum term of protection of 50 years after the death of the author. The EU rules extend this term of protection to 70 years after the death of the author (as do many other countries, e.g. the US).

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

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

☐ YES – Please explain

We believe the current terms of copyright are still appropriate. Book publishers do not benefit from a copyright term of protection but acquire rights from their author(s) for a certain period or the length of the author copyright term. The author(s) in turn receive(s) royalties for the exploitation of his (their) work. Intellectual property is a fundamental right which like other property should be passed to the owner's heirs, at least for one generation and there is no reason, be economic or philosophical, to deprive an author from this right in the digital

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

environment. This is based on a false assumption that the creativity input and dissemination effort would be less in the digital context. A reduction of the term of protection could also be detrimental for the exploitation of a work as often authors need to wait the publication of more than one work before knowing some commercial success or often meet success at a later stage following a price or a film made from their book. We must therefore assure that both the authors and their publishers are able to enjoy return on investment on the book if commercial success comes at a later stage.

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

…….

…….

☐NO OPINION

III. Limitations and exceptions in the Single Market

Limitations and exceptions to copyright and related rights enable the use of works and other protected subject-matter, without obtaining authorisation from the rightholders, for certain purposes and to a certain extent (for instance the use for illustration purposes of an extract from a novel by a teacher in a literature class). At EU level they are established in a number of copyright directives, most notably Directive 2001/29/EC[38].

Exceptions and limitations in the national and EU copyright laws have to respect international law[39]. 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)[40], these limitations and exceptions are often optional[41], in the sense that Member States are free to reflect in national legislation as many or as few of them as they wish. Moreover, the formulation of certain of the limitations and exceptions is general enough to give significant flexibility to the Member States as to how, and to what extent, to implement them (if they decide to do so). Finally, it is worth noting that not all of the limitations and exceptions included in the EU legal framework for copyright are of equivalent significance in policy terms and in terms of their potential effect on the functioning of the Single Market.

In addition, in the same manner that the definition of the rights is territorial (i.e. has an effect only within the territory of the Member State), the definition of the limitations and exceptions to the rights is territorial too (so an act that is covered by an exception in a Member State "A"

[38] 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.

[39] 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).

[40] 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)).

[41] 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.

may still require the authorisation of the rightholder once we move to the Member State "B")[42].

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

…….

…….

☐**NO** – Please explain

We do not see any specific problems arising from the fact that most limitations and exceptions are optional for the Member States. There is no reason to distinguish amongst them and make some of them "compulsory". Exceptions for public interest are implemented in virtually all Member States, and the system of optional exceptions allows the flexibility required by differences in national culture and traditions.

The reason why Directive 2001/29/EC does not provide an exhaustive list of mandatory exceptions is because Europe had to take into account the cultural traditions of 15 different Member States (now it would be 28) and the discussions on the Copyright Directive generated unprecedented debate. Nevertheless, differences between national copyright laws are by no means an obstacle to the creation of an online market for the publishing sector, which is intrinsically divided in linguistic areas. For instance, publishers themselves frequently rely on the exception for quotation, including for cross-border uses, and they have never been challenged. Indeed, the sector is hampered more by factors such as labour laws or lack of harmonisation of taxation. The relevant obstacle to the online market is the threat of illegal downloading which prevents legal offers from being marketed on a level playing-field. We haven't seen evidence that a harmonised set of exceptions would bring proven benefit without harming the current publishing market.

[42] 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.

☐NO OPINION

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

☐YES – Please explain by referring to specific cases

…….

…….

☐**NO** – Please explain

As explained in question 21, we disagree with the idea that some or all exceptions should be made mandatory. The fact that they are optional leaves room for the right amount of flexibility so needed in a fast changing environment. Conditions of use of right are better served both for the users and the rightholders when handled through licence agreements, which add to the flexibility and enable to serve uses across borders if needed.

However, if such would be the chosen path, exceptions should then be very accurate on purpose, detailed and framed in order to achieve the goal of better harmonisation of exceptions and not enlarge their scope. Any new exceptions must be, of course, fully compliant with the Berne Convention's Three Step Test. A broad definition of the exceptions would only add legal uncertainty which would seriously challenge publishers' ability to conduct business.

☐NO OPINION

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

[Open question]

We do not see the need to add new exceptions to the existing catalogue. Any new exception should answer a market failure and the inability to serve users with licencing solutions. The exercise of "Licences for Europe", in which FEP and its membership actively participated, shows that licences are well suited to catering to user demand Licenses are the most flexible instrument available in order to meet each user's individual needs in the relevant use case. New exceptions set prematurely in a fast moving world where technologies evolve very rapidly would certainly stifle business innovation and the ability of publishers to develop offers to serve new needs.

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

…….

…….

☐NO – Please explain why

The current 20 optional exceptions with broad scope and wording are meant to offer the necessary flexibility, balanced with legal certainty. We do not believe that broader wording of

exceptions would serve the purpose of better harmonisation. Yet more flexibility would lead to legal uncertainty for both rightholders and users. Publishers invest in content and increasingly licence it for digital transmissions. As responsible economic actors of Europe's cultural influence, they need to be able to rely on a firm set of rules to provide the EU with economic weapons on this strategic field of world influence. We believe it is currently in place in the 2001 Copyright Directive.

Interpretation by the national courts and the ECJ already plays a central role in today's interpretation of the exceptions. However, introducing more flexibility and especially a general rule such as Fair Use into the EC legal system would only bring huge legal uncertainty, thereby challenging the ability of publishers to conduct business. It would probably be the most efficient way to destroy value of the EU cultural business market, hence reinforcing non-EU economic actors' influence. Is this the wished-for future for the EU cultural economy?

Fair Use in the U.S. provides a statutory defence mechanism to what could actually be infringement of exclusive copyright. This effectively means that rightholders are forced to challenge uses in court *after the event*. The test is based on a century of U.S.-jurisprudence and this jurisprudence would not be readily available to the legal framework in Europe - indeed it would impose an unreasonably heavy burden of interpretation on EU courts as they struggle to reconcile two such dramatically different regimes. Interestingly, the US Copyright Office states on their website that the safest option for prospective users of content is to get clearance and that if there is any doubt, it is advisable to consult a lawyer. Ultimately, the Fair Use principle entails paying lawyers' fees. In addition, users will lose legal certainty as the whole system will be far more dependent on the circumstances of each case. Cases such as the Google Book Settlement illustrate how big commercial players can exploit the legal uncertainty around the US doctrine to economically exhaust rights holders, who are often not big players, and who therefore cannot afford expensive litigation.

There seems to be a contradiction in calling for more harmonisation and mandatory exceptions and at the same time calling for more flexibility. We believe that there is currently flexibility in the EU copyright system thanks to the space of manoeuvre left between EU and national legislation when transposing the EU copyright framework. This being said, any legislation, however technology neutral, runs the risk to be too closely tailored to business models and technologies of its day rather than allowing for future developments. In contrast, licences are by far the quickest, most flexible and most effective way of achieving technology neutral and targeted solutions.

☐NO OPINION

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

[Open question]

…….

…….

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

…….

…….

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

Publishers are also frequently in the position of relying on exceptions, e.g. for quotations. They do not encounter problems when relying upon the exception in the country where they publish the book and then selling the book across Europe. Anyway, when possible, publishers favour licences which are flexible and balanced. Licences foresee uses across borders and can, unlike legislation, rapidly adapt to changing environments. The main issues with territoriality are addressed in the following questions of this consultation. Again, licenses are the mechanism best suited to addressing them.

☐NO OPINION

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

[Open question]

This is the core of the problem from our point of view. In the current economic setting and with budget cuts occurring in all EU Member States, especially in the areas of culture and education, we do not believe that public authorities would be willing to compensate exceptions with cross-border effects if that meant spending taxpayers' money on benefitting tax-payers in another Member State.

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[43] and enable on-site consultation of the works and other subject matter in the collections of such institutions[44]. 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[45].

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

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

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

1. Preservation and archiving

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

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

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

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

…….

…….

☐**NO**

We are not aware of any problems in this area.

☐NO OPINION

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

…….

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

[Open question]

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

[Open question]

2. Off-premises access to library collections

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

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

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

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

[Open question]

In Denmark there are agreements between libraries and publishers allowing for remote access to e-books.

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

[Open question]

Any perceived “problems” can be solved by market-based solutions.

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

[Open question]

…….

…….

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

[Open question]

We believe that licensing should be encouraged. Any library exception allowing making available online would only create unfair competition with business models, and be contrary to the 3 step test.

3. E – lending

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

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

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

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

☐**YES** – Please explain with specific examples

Publishers believe that libraries have an important mission in giving access to books to the wider public in the digital world. We have experienced that it is possible to reach agreements between publishers and libraries bearing in mind that such models should balance the apparent need to develop a sustainable e-book market. Any exception in this area would jeopardize this balance and would put a stop to the development of regular e-books sales through online retailers as well as new innovative services.

Almost all published Danish trade e-books are available for the patrons through one of the two Danish e-book lending solutions and we are aware that many other initiatives are finding place throughout Europe. Examples of those can be found in Annex II to the hearing answer of The European Publishers Association.

☐NO

☐NO OPINION

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

Any perceived problems can be solved by encouraging licensing and sharing best practices, but not by creating legislation which would prejudice commercial exploitation of books and inhibit the launch of new service and technical and business innovation.

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

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

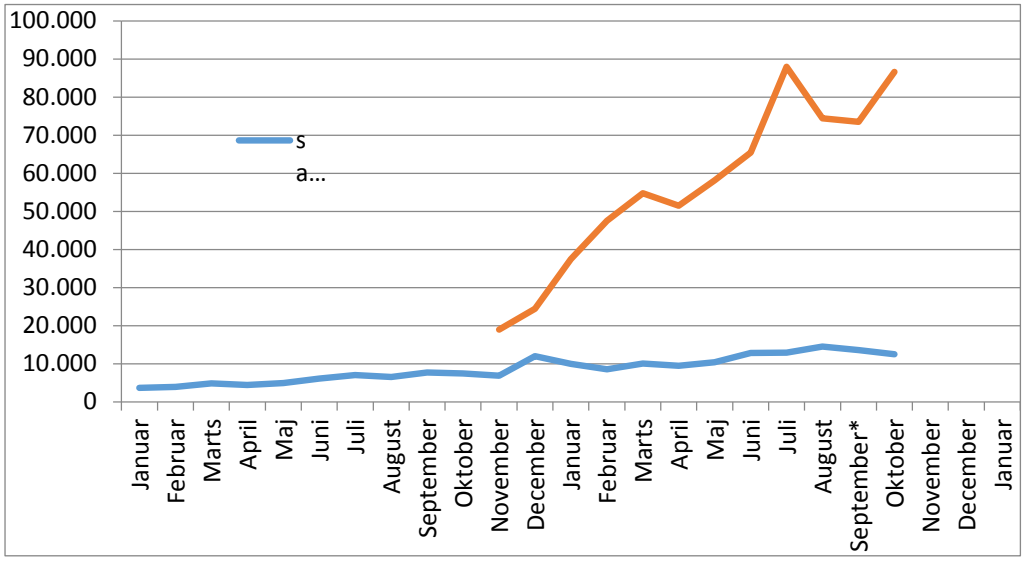
[Open question]

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

[Open question]

As stated above, libraries remain essential institutions for readers and are a relevant part of the book world including with the digital evolutions. We acknowledge their request to shift their traditional activities of on-premises and public lending towards online developments. However, we should be cautious that any move forward by libraries will not jeopardise a nascent e-book market. If all or a majority of library services were to be offered online, there would be no more reason to maintain local libraries, as a single central service would be sufficient, and if e-books were available on library services with no friction there would be no basis for a commercial e-book market.

Publishers are increasingly developing innovative and accessible licences to allow a high level of granularity in giving users the appropriate licences for their individual needs. There are strong economic arguments in favour of maintaining some form of limitation to electronic "lending" in the online environment which make the library patron's experience comparable to borrowing a physical book. When the friction-less library service eReolen was launched in November 2011 we saw that e-lending rose exponentially whereas there was hardly any development on the commercial e-book market. Moreover, most of the pirated books to be found online came from eReolen, which as a consequence has now shifted to a streaming system. The digital market is in its earliest stages, and no one can predict its development at this stage. We need therefore need to test different models and see how the market responds. Legislation at this stage cannot be based on sufficient evidence and risk to freeze specific business models.



Development of Sales and Loans (number of copies) from Publizon 2011-2012 (Blue line: sales. Red line: loans through eReolen).

4. Mass digitisation

The term "mass digitisation" is normally used to refer to efforts by institutions such as libraries and archives to digitise (e.g. scan) the entire content or part of their collections with an objective to preserve these collections and, normally, to make them available to the public. Examples are efforts by libraries to digitise novels form the early part of the 20th century or whole collections of pictures of historical value. This matter has been partly addressed at the EU level by the 2011 Memorandum of Understanding (MoU) on key principles on the digitisation and making available of out of commerce works (i.e. works which are no longer found in the normal channels of commerce), which is aiming to facilitate mass digitisation efforts (for books and learned journals) on the basis of licence agreements between libraries and similar cultural institutions on the one hand and the collecting societies representing authors and publishers on the other[46]. Provided the required funding is ensured (digitisation projects are extremely expensive), the result of this MoU should be that books that are currently to be found only in the archives of, for instance, libraries will be digitised and made available online to everyone. The MoU is based on voluntary licences (granted by Collective Management Organisations on the basis of the mandates they receive from authors and publishers). Some Member States may need to enact legislation to ensure the largest possible effect of such licences (e.g. by establishing in legislation a presumption of representation of a collecting society or the recognition of an "extended effect" to the licences granted)[47].

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

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

☐NO – Please explain

With the 2008 amendment to the Danish Copyright Act introducing the general ECL provision (sec. 50(2)), users such as libraries and collecting societies were enabled to enter into mass digitization projects. The provision was introduced as a means to help facilitate digitizing the Danish cultural heritages and mass digitization projects which include orphan works. Since 2008 Copydan Writing has entered into a number of licenses regarding mass digitization and making available.

The licenses that are based on the ECL system cover the use of works in Denmark. Such ECL licenses are limited to national use, because the extended collective licensing (ECL) only applies within the Danish territory. To be able to give such licenses cross-border effect, it

[46] 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 .

[47] 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.

would require that licenses based on ECL or other forms of collective rights management issued in one member state to be recognized in other member states. In the 2011 MoU it is written in preamble 11 that they are "*calling on the European Commission, to the extent required to ensure legal certainty in a cross-border context, to consider the type of legislation to be enacted …*".

In Denmark the legislation is in place, but whether or not national legislation is required can only be answered when the EC introduces a solution in relation to the 2011 MoU.

In relation to mass digitization of non-commercial works, then in our view the main issue is not about clearing rights but about rising public funding.

…….

…….

☐NO OPINION

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

☐ YES– Please explain

…….

…….

☐ NO– Please explain

…….

…….

☐NO OPINION

B. Teaching

Directive 2001/29/EC[48] enables Member States to implement in their national legislation limitations and exceptions for the purpose of illustration for non-commercial teaching. Such exceptions would typically allow a teacher to use parts of or full works to illustrate his course, e.g. by distributing copies of fragments of a book or of newspaper articles in the classroom or by showing protected content on a smart board without having to obtain authorisation from the right holders. The open formulation of this (optional) provision allows for rather different implementation at Member States level. The implementation of the exception differs from Member State to Member State, with several Member States providing instead a framework for the licensing of content for certain educational uses. Some argue that the law should provide for better possibilities for distance learning and study at home.

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

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

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

☐YES – Please explain

…….

…….

…….

☐ NO

Most publishers are currently developing innovative offers in the field of educational publishing, now including digital uses of educational material for example for white boards. Educational publications are nowadays coming together with versatile and flexible mechanisms, which are also possibly accessible cross-border. Educational publishers are also increasingly licencing modules and parts of books, rather than the entire book. It is in the interest for them to tailor their offer on new needs of their users.

In Denmark, the system of ECL licensing agreements with schools, universities etc. functions very well to the benefit for both rightsholders and educational institutions. Licensing means flexibility and avoidance of uncertainty regarding the understanding of an exception limited to "illustration" for educational purposes.

☐NO OPINION

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

[Open question]

…….

…….

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

[Open question]

Book publishing has entered the digital age since many years; first ICT was integrated in the production processes, and more recently technological developments have allowed reaching out to readers with digital products. Educational publishers are no exception to this; it is in the nature of their business to meet the needs of their users, and thus they have been producing and making available digital learning materials since a number of years. The ambitious project by the Danish government and KL to digitize the primary schools in Denmark has involved financial support to schools who buy digital learning materials. Stimulating the demand financially has led to publishers investing heavily in new digital innovative learning materials.

Educational publishing represents an important part of the book publishing market which cannot afford to be put at risk by a broad exception. A vibrant European educational publishing industry is a guarantee of freedom of expression and plurality of views and economic independence and prosperity for the EU.

Publishers would like to remind the Commission of the central role of high quality educational resources that are produced independently of political and commercial interests. Such resources serve for knowledge dissemination, effective learning processes and for the success of each student in application of the equality principle. Educational outcomes should be the first and foremost concern when considering initiatives affecting the educational sector.

Where the distribution of learning materials on the market does not 100 % meet the users need we apply extended collective licensing (ECL) in Denmark. Because ECL based licenses include all works of all artists of a defined type it can provide the broadest possible access to use of content and a high level of legal security for the users. At the same time it provides rightsholders with fair remuneration for the exploitation of their works and support that content creators are able and encouraged to continue creating new works. The system is accepted by both educational institutions and rightsholders and has been for many years, which is the best testimony of its success.

The use of the ECL is consequently very successful, and enables Copydan Writing to clear the rights for a lot of different uses in schools. The agreements are very successful, and the main licenses cover almost 100 % of all schools in Denmark.

The ECL system is a way of managing rights in organized form and is not to be seen as an exception.

As Copydan Writing licenses on the basis of the ECL system the uncertainty in regards to the scope of "illustration for teaching" is avoided. It is worth mentioning that there has not been need for settling of disputes in a court of law. All matters have been solved amongst the parties and if necessary it is possible to bring questions on the fee of the license before the Copyright License Tribunal. There haven't been any cases before the tribunal in recent years.

Funds are important for the possibility of producing and distributing new creative content to the benefit of the educational system.

The development of the licenses is ongoing and occurs through continued discussions with the educational sector and the rightsholder organizations.

All licenses allow the institutions to copy in print and digitally for educational purposes and for internal administrative use.

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

[Open question]

…….

…….

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

[Open question]

C. Research

Directive 2001/29/EC[49] 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

…….

…….

☐**NO**

European publishers are satisfied with the current exception and are not aware of specific issues. Content for research purposes falls either under the exceptions or is licenced (90% of scientific technical and medical publishing content is licenced in digital form).

☐NO OPINION

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

[Open question]

…….

…….

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

[Open question]

In the case of scholarly journal publishing, publishers are offering 90% of their products in digital form having successfully covered the objective of providing access to the content. Copydan Writing's licenses with educational institutions supplement the licenses that the institution can enter into directly with publishers concerning periodicals and other scientific and research publications.

D. Disabilities

Directive 2001/29/EC[50] 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

[49] Article 5(3)a of Directive 2001/29.
[50] Article 5 (3)b of Directive 2001/29.

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) [51].

The Marrakesh Treaty[52] 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

…….

…….

☐ NO

☐NO OPINION

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

[Open question]

…….

…….

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

[Open question]

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

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

Publishers are now increasingly publishing books in ePub format which incorporated the specification for accessibility of the Daisy consortium, so that publishers are enabled to produce files that are accessible to visually impaired people. Moreover, VIPs can be helped by various functionalities in the files, such as changing colour, font, spacing which reduce the number of cases in which the conversion under an exception are needed.

Dissemination of knowledge from national institutions working with VIPs to the publishing sector is vital in order to ensure that the needs of the VIPs can be integrated in the production.

E. Text and data mining

Text and data mining/content mining/data analytics[53] 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"[54]. 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] For the purpose of the present document, the term "text and data mining" will be used.
[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 .

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

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

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

☐YES – Please explain

…….

…….

☐NO – Please explain

For the time being, TDM requests are still rather limited although they are expected to grow steadily in the coming years. For non-commercial researchers wanting to mine the articles and data contained in published journals and books for which they have a subscription, STM publishers have committed to provide licenses under standard terms at no additional cost. The commitment has been made in the framework of L4E. Obviously the circumstances are very different when one deals with commercial players who will mine content and data for their own commercial purposes and one should beware of piracy and parasitism risks. Yet, publishers are very willing to allow them to mine their publications provided that this is dealt with under licensing terms.

☐NO OPINION

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

[Open question]

…….

…….

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

[Open question]

… …….

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

[Open question]

Encourage licensing and information about licensing as this has been done under Licensing for Europe.

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

[Open question]

F. User-generated content

Technological and service developments mean that citizens can copy, use and distribute content at little to no financial cost. As a consequence, new types of online activities are developing rapidly, including the making of so-called "user-generated content". While users can create totally original content, they can also take one or several pre-existing works, change something in the work(s), and upload the result on the Internet e.g. to platforms and blogs[55]. User-generated content (UGC) can thus cover the modification of pre-existing works even if the newly-generated/"uploaded" work does not necessarily require a creative effort and results from merely adding, subtracting or associating some pre-existing content with other pre-existing content. This kind of activity is not "new" as such. However, the development of social networking and social media sites that enable users to share content widely has vastly changed the scale of such activities and increased the potential economic impact for those holding rights in the pre-existing works. Re-use is no longer the preserve of a technically and artistically adept elite. With the possibilities offered by the new technologies, re-use is open to all, at no cost. This in turn raises questions with regard to fundamental rights such the freedom of expression and the right to property.

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results or even the definition of UGC. Nevertheless, a wide range of views were presented as to the best way to respond to this phenomenon. One view was to say that a new exception is needed to cover UGC, in particular non-commercial activities by individuals such as combining existing musical works with videos, sequences of photos, etc. Another view was that no legislative change is needed: UGC is flourishing, and licensing schemes are increasingly available (licence schemes concluded between rightholders and platforms as well as micro-licences concluded between rightholders and the users generating the content. In any event, practical solutions to ease user-generated content and facilitate micro-licensing for small users were pledged by rightholders across different sectors as a result of the "Licences for Europe" discussions[56].

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

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

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

[55] 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.

[56] 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 by giving examples

……

……

☐**NO**

There is no legal void for the use of a protected work in the print sector (exception for short quotation or parody/ pastiche/ caricature, or licence with the right-holder or new tools offered by the platforms or Creative commons regime). Note that even "non-commercial" UGC often harms creators' rights, competes with legitimate sales, and is offered on sites with advertising and/or profit motives.

☐NO OPINION

59. (a) *[In particular if you are an end user/consumer or a right holder:]* ***Have you experienced problems when trying to ensure that the work you have created (on the basis of pre-existing works) is properly identified for online use? Are proprietary systems sufficient in this context (b)*** *[In particular if you are a service provider:]* ***Do you provide possibilities for users that are publishing/disseminating the works they have created (on the basis of pre-existing works) through your service to properly identify these works for online use?***

☐ YES– Please explain

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☐ NO– Please explain

……

……

☐ NO OPINION

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

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

☐ YES– Please explain

……

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☐ NO– Please explain

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……

☐ NO OPINION

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

[Open 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?

[Open question]

…….

…….

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

[Open question]

We believe that licensing is the best solution in this case, which is also the only solution that respects moral rights. Publishers are developing click-through seamless micro-licensing system for cases that go beyond the quotation exceptions. We believe that licence schemes could also be put in place with blogs platform hosting text and images. On the internet it is almost impossible to talk about Non-commercial" transformative uses as the publication is usually commercial in the sense that they generate advertising revenue for the platforms on which they are published.

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[57]. 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[5859].

[57] Article 5. 2)(a) and (b) of Directive 2001/29.
[58] Communication "Unleashing the Potential of Cloud Computing in Europe", COM(2012) 529 final.

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[60] in the digital environment*?**

☐YES – Please explain

……

……

☐NO – Please explain

When a use is permitted by law and impacts a rightsholder in our sector, it requires remuneration, and levies are one of the ways to remunerate. But no exception may prejudice the normal exploitation of a work, even when compensated by a levy. Current levy systems, where in place, have their own merits and are one of the ways to foresee the compensation for private copying and reprography. In most cases, publishers are perfectly satisfied with their collective management organisations and the levy system in place. However, some countries chose not to have levy systems and this should be respected. In Denmark we have very good experience with the Extended Collective Licensing Model. Indeed, every country deals with its situation within a national and cultural context which cannot be exported to the rest of Europe on an arbitrary basis. We therefore do not believe that there is currently a need to harmonise further the functioning of the levy systems. In particular, it must continue to be a requirement that certain exceptions are only permissible if fair compensation is provided to the rightholders. Rightholders eligible for a fair compensation comprise both the authors and the publishers.

☐NO OPINION

65. Should digital copies made by end users for private purposes in the context of a service that has been licensed by rightholders, and where the harm to the rightholder is minimal, be subject to private copying levies?[61]

☐ YES– Please explain

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……

☐ NO– Please explain

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……

☐NO OPINION

[59] 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.

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

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

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]

67. Would you see an added value in making levies visible on the invoices for products subject to levies?[62]

☐ YES– Please explain

…….

☐NO – Please explain

…….

…….

☐**NO OPINION**

Diverging national systems levy different products and apply different tariffs. This results in obstacles to the free circulation of goods and services in the Single Market. At the same time, many Member States continue to allow the indiscriminate application of private copying levies to all transactions irrespective of the person to whom the product subject to a levy is sold (e.g. private person or business). In that context, not all Member States have ex ante exemption and/or ex post reimbursement schemes which could remedy these situations and reduce the number of undue payments[63].

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

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

…….

…….

☐NO – Please explain

…….

…….

☐ NO OPINION

69. What percentage of products subject to a levy is sold to persons other than natural persons for purposes clearly unrelated to private copying? Do any of those transactions

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

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

result in undue payments? Please explain in detail the example you provide (type of products, type of transaction, stakeholders, etc.).

[Open question]

…….

…….

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

[Open question]

…….

…….

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

[Open question]

…….

…….

V. Fair remuneration of authors and performers

The EU copyright acquis recognises for authors and performers a number of exclusive rights and, in the case of performers whose performances are fixed in phonograms, remuneration rights. There are few provisions in the EU copyright law governing the *transfer* of rights from authors or performers to producers[64] 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[65]. 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]

[64] See e.g. Directive 92/100/EEC, Art.2(4)-(7).
[65] See e.g. Art. 2.3. of Directive 2009/24/EC, Art. 4 of Directive 96/9/EC.

…….

…….

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

☐YES – Please explain

…….

…….

☐NO – Please explain why

Publishers are naturally very much in favour of a fair remuneration of their authors. Ensuring this is a vital part of their core mission. Publishing is a business with many players and strong competition and an author who is unsatisfied with his publisher will publish his next book at another publisher. Authors are associated to the success of their work, they usually receive an advance to complete their work and then a royalties proportionate to the sale of their work. Contracts in publishing are based on individual negotiations. Collective author agreements are not practiced in the book publishing sector. Moreover, collecting societies do not play the same role as in the other sectors. As mentioned above, our collecting societies, the RROs only manage secondary rights and authors and publishers are both members of the same collecting societies. Therefore solution based on an unwaivable equitable remuneration right managed by a CMO would not apply to the publishing sector. In Germany, where a right to "adequate remuneration was introduced, we noticed as a consequence only lawsuits from translators and a translation market that dropped consequently, as publishers have such a tight margin that they can often no longer afford to take the risk associated with publishing translated works. If publishing companies were no longer directly financially involved in the exploitation of their books, they would have fewer incentives to invest in promoting new authors and to innovate through new concepts, to the detriment of cultural diversity.

☐NO OPINION

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

[Open question]

…….

…….

VI. Respect for rights

Directive 2004/48/EE[66] provides for a harmonised framework for the civil enforcement of intellectual property rights, including copyright and related rights. The Commission has consulted broadly on this text[67]. Concerns have been raised as to whether some of its

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

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

provisions are still fit to ensure a proper respect for copyright in the digital age. On the one hand, the current measures seem to be insufficient to deal with the new challenges brought by the dissemination of digital content on the internet; on the other hand, there are concerns about the current balance between enforcement of copyright and the protection of fundamental rights, in particular the right for a private life and data protection. While it cannot be contested that enforcement measures should always be available in case of infringement of copyright, measures could be proposed to strengthen respect for copyright when the infringed content is used for a commercial purpose[68]. One means to do this could be to clarify the role of intermediaries in the IP infrastructure[69]. At the same time, there could be clarification of the safeguards for respect of private life and data protection for private users.

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

☐YES – Please explain

We believe that the current EU legal system framed by the 2006 Enforcement Directive is satisfactory, although some aspect can be done, namely to improve the civil enforcement system across the EU. We refer on this to our answer to the Commission's public consultation on the "efficiency of proceedings and accessibility of measures."

The Enforcement Directive has broadly provided a harmonized framework of enforcement rules, but these still diverge in practice, as some Member States failed to implement some of the provisions correctly. Furthermore, the rapid evolution of the internet has created new ways to infringe copyright, which was not envisaged when the Enforcement Directive was discussed and adopted. European publishers welcome the recognition by the Commission that some aspects of the Directive could therefore be improved to better reflect the needs of the market in these changed circumstances.

The Enforcement Directive needs to extend the presumption of ownership to holders of exclusive licenses or to assignees of copyright owners, as the findings of the staff working paper also point out. Publishers do not benefit from a "related right", in the same way producers of sound recordings or films do as holders to the "related right", which results in publishers lacking "locus standi". However, structurally, it is rarely the author but mostly the publisher that will have the resources to take legal action but most of the time they waste time and resources in proving ownership.

We would like to first point out that the distinction between commercial and non-commercial is an unclear one, as most of the "non-commercial" exchange website benefit from advertisement revenue and, although this is difficult to measure, file exchange and download do represent a loss sale. However, the position of European publishers is not to go after individuals but rather after the source where the illegal websites are originating.

☐NO – Please explain

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……

☐NO OPINION

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

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

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]

European publishers do believe on this particular question that some clarification would be welcome when it comes to the involvement of intermediaries. We understand that there is no political will to reopen the e-commerce directive and we support this. However, we need to have a clear legal framework on which intermediary is concerned as one under the E-commerce Directive. European publishers share the opinion that search engines which enable the indexation of file-sharing websites host or facilitate the distribution of pirated content and thereby should contribute to reducing online copyright infringement through preventive measures such as preventing suggested automatic searches to suggest illegal search and through responding efficiently to 'notice and take down' notifications. We understand that the cooperation of ISPs will be of primary importance in securing better respect for intellectual property rights online. ISPs provide access to the Internet and interconnect the underlying networks, host websites and servers. We strongly agree that it would be useful to "clarify [that] injunctions should not depend on the liability of the intermediaries", and that the notion of liability of ISPs should be clarified when they can have several functions (hosting or editing). ISPs have a responsibility to assist in tackling copyright infringement online, regardless of their accountability for the content itself. There is limited capacity in the national courts (as well as the limitation of rightholders' time and money) to bring the number of actions against infringers necessary to curb infringement. Besides, notice and take down procedures should be simplified. Indeed the main problem arises from the difficulty to gather all the elements necessary for the notice and in particular to determine who the publisher of the website is, so as to send him the notice as the same time as to the ISP.FEP has always put forward solutions based on dialogue and strongly regrets that ISPs have walked away from the dialogue on illegal up-and-download in 2010 and facilitated by the European Commission. European publishers would like to be able to continue working in this voluntary way with ISPs, in order to come to workable solutions to tackling online copyright infringement.

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

☐YES – Please explain

……

……

☐NO – Please explain

Of course data privacy rules are capital to the respect of European citizens' right to privacy, however, they should not act as a shield to illegal activities. Instruments such as the Enforcement Directive (2004/48/EC) are essential to provide rightholders with the means to fight against piracy i.e. article 8 on the right to obtain information about infringements and infringers. The 2006 Data Retention Directive (2006/24/EC) requires ISPs to store data and communicate it to relevant authorities.

Despite the ECJ's clarification in the two rulings Promusicae in 2008 (C-275/06) and Tele 2 (C-557/07), there remains some uncertainty about whether EU law presents an obstacle to the applications of article 8 of the Enforcement directive. The second ruling referred to the first and states that a Member State can prescribe an obligation to disclose personal data to private third parties to ensure that these can take legal action in a civil case relating to breach of copyright. The Swedish Supreme court asked for a preliminary ruling to know whether provisions relating to discovery orders are compatible with the Data protection Directive.

One non-legislative solution could be to adapt contractual practices of ISPs to facilitate the transmission of data to rightholders. Currently, it is very challenging in most countries for publishers to face time-consuming and expensive court procedures every time their intellectual property rights are infringed online.

☐NO OPINION

VII. A single EU Copyright Title

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

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

☐YES

☐NO

☐NO OPINION

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

[Open question]

We do not believe that a single EU Copyright title will bring any benefits to the development of content online, which is progressing well in the publishing sector. Differences between national copyright laws do not constitute an obstacle to the creation of an online market for the publishing sector. As mentioned previously, the publishing sector benefits from a healthy pan-European licensing system which is not stifled by the level of difference among the Member States legislation.

On the one hand, it is highly unlikely that an EU Copyright law that takes precedence over national copyrights would be able to take into account the diverse cultural and legal traditions

within the Member States. It seems particularly difficult in view of the fundamental differences between the system of “droit d’auteur” in continental Europe and the British-Irish Copyright model. But even within the tradition of “droit d’auteur” substantial differences exist. The question of moral rights or the different notions of “originality” that give rise to copyright protection as well as the well-established and much-litigated UK definition of 'Fair Dealing' for copyright exceptions are just a few examples of such differences. On the other hand, if such a Community title is construed in parallel to national titles, the risk is to add an unnecessary layer of legal complexity and burden in Europe. It is also relevant to note that an EU Copyright title would risk lowering copyright protection standards, which would certainly discourage investment in the digital content market.

It is not the first time that the Commission has asked about the pros and cons of an EU Copyright Code. It has considered the possibility of using the new Article 118 of the Lisbon Treaty as a legal basis for this future legal instrument. However, it is not clear whether the Treaty confers specific competency to the EU in this regard, especially for copyright, since its Article 118 was drafted for industrial property purposes. According to the UK House of Lords, “the new Article 118 of the TFEU is a restatement of existing powers. Although the Treaty of Lisbon would not confer additional IP powers on the EU, it marks a statement of political intent and a commitment to achieving the Community patent”. It has not been fully confirmed as to whether Article 118 of the new Lisbon Treaty confers competency to the EC for the creation of a single “Community copyright title”. Article 118 was foreseen for industrial property and therefore there is a risk of legal uncertainty including a possible annulment before the European Court of Justice for lack of legal basis. Copyright is acquired without registration. This is the core principle of Copyright as enshrined in the Berne Convention, and any parallels drawn between patent titles which need to be registered and Copyright is extremely perilous.

The introduction of a European copyright code or an optional unitary copyright title is therefore highly unlikely to produce the intended practical results and might in fact take at least a decade to achieve. European publishers would therefore prefer to have the Commission work on the enforcement of existing rules, the facilitation of pragmatic dialogues and the promotion of voluntary solutions such as the Memorandum of Understanding on Key Principles on the Digitisation and Making Available of Out-of-Commerce Works signed by all stakeholders concerned.

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]