

Public Consultation **on the review of the EU copyright rules**

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I. Introduction

A. *Context of the consultation*

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

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

In its "Communication on Content in the Digital Single Market"¹ the Commission set out two parallel tracks of action: on the one hand, to complete its on-going effort to review and to modernise the EU copyright legislative framework²³ 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 now⁴. 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*

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 – ten pledges to bring more content online": http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf.

context of copyright reform". As highlighted in the October 2013 European Council Conclusions⁵ "Providing digital services and content across the single market requires the establishment of a copyright regime for the digital age. The Commission will therefore complete its on-going review of the EU copyright framework in spring 2014. It is important to modernise Europe's copyright regime and facilitate licensing, while ensuring a high level protection of intellectual property rights and taking into account cultural diversity".

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

B. How to submit replies to this questionnaire

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

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

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

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

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

C. Confidentiality

The contributions received in this round of consultation as well as a summary report

⁵ EUCO 169/13, 24/25 October 2013.

⁶ COM(2008) 466/3, http://ec.europa.eu/internal_market/copyright/copyright-info/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.

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 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:

COMPUTER & COMMUNICATIONS INDUSTRY ASSOCIATION (CCIA)

The CCIA is an international, nonprofit association representing a broad cross section of computer, communications and Internet industry firms. CCIA remains dedicated, as it has for over 40 years, to promoting innovation and preserving full, fair and open competition throughout our industry. We have offices in Brussels, Geneva and Washington DC. Our members employ more than 600,000 workers and generate annual revenues in excess of \$200 billion. For more information, please visit: www.ccianet.org

Contact: Jakob Kucharczyk - Director, CCIA Europe

jkucharczyk@ccianet.org / +32 492 887 943

- 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.

Identification number in the register: 15987896534-82

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

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

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

TYPE OF RESPONDENT (Please underline the appropriate):

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

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

- **Collective Management Organisation**

- **Public authority**

- **Member State**

- **Other** (Please explain): **TRADE ASSOCIATION**
The CCIA is an international, nonprofit association representing a broad cross section of computer, communications and Internet industry firms. CCIA remains dedicated, as it has for over 40 years, to promoting innovation and preserving full, fair and open competition throughout our industry. We have offices in Brussels, Geneva and Washington DC. Our members employ more than 600,000 workers and generate annual revenues in excess of \$200 billion. For more information, please visit: www.ccianet.org

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 law⁹.

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 Management¹⁰ should significantly facilitate the delivery of multi-territorial licences in musical works for online services¹¹; the structured stakeholder dialogue “Licences for Europe”¹² and market-led developments such as the on-going work in the Linked Content Coalition¹³.

“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 portability¹⁴.

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

⁹ This principle has been confirmed by the Court of Justice on several occasions.

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

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

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

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

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

Member State they are redirected to the one designated for their country of residence).

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

The main issue at stake here is, therefore, whether further measures (legislative or non-legislative, including market-led solutions) need to be taken at EU level in the medium term¹⁵ 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).

.....
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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]

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

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

[Open question]
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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
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.....

NO – Please explain

.....
.....
NO OPINION

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

[The definition of the rights involved in digital transmissions]

The EU framework for the protection of copyright and related rights in the digital environment is largely established by Directive 2001/29/EC¹⁶ 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 software¹⁷ and databases¹⁸.

Directive 2001/29/EC harmonises the rights of authors and neighbouring rightholders¹⁹ 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 copies²⁰, (notably relevant at the start of the transmission – e.g. the uploading of a digital copy of a work to a server in view of making it available – and at the users’ end – e.g. when a user downloads a digital copy of a work) and the communication to the public/making available right, i.e. the rights to authorise or prohibit the dissemination of the works in digital networks²¹. 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

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

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

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

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

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

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

Justice of the European Union (CJEU) suggests that a relevant criterion is the “targeting” of a certain Member State's public²². According to this approach the copyright-relevant act (which has to be licensed) occurs at least in those countries which are “targeted” by the online service provider. A service provider “targets” a group of customers residing in a specific country when it directs its activity to that group, e.g. via advertisement, promotions, a language or a currency specifically targeted at that group.

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

NO – Please explain how this could be clarified and what type of clarification would be required (e.g. as in “targeting” approach explained above, as in “country of origin” approach²³)

While “making available” is a right established in various international instruments,²⁴ its capacity for overbroad applications means that it should be narrowly construed. Some jurisdictions may approach the right from an entirely different perspective. The United States, for example, provides no specific “making available” right, but instead provides authors with a distribution and performance right, in combination with doctrines of secondary liability.²⁵ Even if one assumes that the intention of the WCT and WPPT was for “making available” to cover all online uses where a copyrighted performance or work could be accessed at a time and place chosen by the user, this entitlement should not be viewed as in addition to the offline rights it was intended to replace or extend, such as distribution, public performance, and reproduction. Regrettably, some rightholders have chosen to construe the “making available” right as additive, rather than inclusive.

The result in music, for example, is that an additional clearance is required for “making available” as well as these other rights, and often additional rents are sought, making the rights licensing and clearance landscape more complex and expensive, rather than less so. This interpretation invites rightholders to demand multiple payments for what is ultimately a single exploitation of the work at issue.

This unfortunate outcome was clearly not the intention of the treaties. Insofar as the making available language was intended to be a ‘bridge’ that solved the dilemma negotiators faced in deciding how to treat on-demand use of materials online (where parties disagreed over whether reproduction or distribution better characterized on-demand online use), it most

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

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

²⁴ See, e.g., WIPO Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 65, art. 8 (1996) (“WCT”); WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 76, art. 14 (1996) (“WPPT”).

²⁵ See, e.g., U.S. submission to World Trade Organization (WTO) Trade Policy Review Body in Response to Questions from Japan regarding Copyright Issues, WT/TPR/M/88/Add.1 at 121 (Jan. 8, 2002) (stating that “making available” right is provided under existing U.S. copyright law); accord U.S. submission to WTO Trade Policy Review Body in Response to Questions from Chile, WT/TPR/M/126/Add.3, Chile #4 at 140 (Nov. 22, 2004).

certainly did not aim to allow ‘double-dipping’ by multiple constituencies for the same use.²⁶ The treaties’ “making available” language allowed countries considerable flexibility in implementation of the right. Its implementation in Europe has created more complexity and rights-clearance cost. Therefore, we recommend that, insofar as interactive uses of works online require a license for “making available,” the Commission should take measures to ensure that in all Member States such uses require a license to make available, and nothing else. For collectively managed income streams, this should be addressed through mandates: collecting society mandates should reflect actual categories of use, not rights artificially segmented along the lines of historical forms of exploitation.

The certainty of licensing that would result will have a number of benefits to Europeans - most significantly, it will oblige existing licensing bodies (whether CMOs or single rightholders) to collaborate to ensure the right parties get paid for their works, yet it will simplify the arrangements with the licensees, thereby reducing the costs of licensees to create services for the public.

Given that the issue of making available has been discussed in relation to online hyperlinks, the Commission should make clear that in no circumstance does mere linking constitute a violation of any author’s right, including the right to make available. While in certain narrow cases linking may be part of a broader course of conduct that leads to liability, extending liability to any online pointer would have an obvious chilling effect on online commerce. Construing the “making available” right to reach “attempted distribution” would impose substantial risks on online services, and likely drive investment to more hospitable jurisdictions (for more detail see also our answer to Question 11).

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 relief²⁷)?*

YES – Please explain how such potential effects could be addressed

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.....

NO

NO OPINION

2. Two rights involved in a single act of exploitation

Each act of transmission in digital networks entails (in the current state of technology and law) several reproductions. This means that there are two rights that apply to digital transmissions: the reproduction right and the making available right. This may complicate the

²⁶ The WIPO Copyright Treaty (WCT),” International Treaties and Conventions on Intellectual Property” chapter 272. A likely secondary reason is that collective management organisations at the time of the adoption of the Information Society Directive only had mandates from the creators they represented to cover the existing, analogue rights. If they failed to secure the mandate to collect for the “making available” right, they would become irrelevant over time, as physical copies of works became less and less significant in the digital economy.

²⁷ Injunctive relief is a temporary or permanent remedy allowing the right holder to stop or prevent an infringement of his/her right.

licensing of works for online use notably when the two rights are held by different persons/entities.

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

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

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.....

NO

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 CJEU²⁸ 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 CJEU²⁹ 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?*

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)

The provision of a hyperlink leading to a work or other subject matter protected by copyright should not be subject to the authorization of the rightholder.

Before touching on the legal aspects of the question, particularly after the *Svensson* judgment, CCIA would like to highlight what the requirement of an authorization for mere hyperlinking would mean in practice for Internet users and the broader digital economy.

Hyperlinking constitutes one of the most fundamental and basic activities of Internet use. Most Internet users hyperlink on a daily basis: they post on social networks, write blog posts, and use this modern referencing tool as part of their interactions with other users including

²⁸ Cases C-466/12 (*Svensson*), C-348/13 (*Bestwater International*) and C-279/13 (*C More entertainment*).

²⁹ Case C-360/13 (*Public Relations Consultants Association Ltd*). See also http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0202_PressSummary.pdf.

comments, recommendations, suggestions, etc. It is part of the Internet's conception of a network in which hyperlinks need to be understood as paths leading users from one source of information to the other. In fact, Tim Berners-Lee, the inventor of the World Wide Web, has explained that a hyperlink is nothing more than a reference or footnote and that referring to publicly accessible information is a fundamental right of free speech.³⁰ In the same vein, hyperlinking must be understood in the context of Berners-Lee's profound concept of the World Wide Web: "that any person could share information with anyone else, anywhere".³¹ Accordingly, subjecting hyperlinking to copyright protection would essentially *break the Internet* as we know it making this option socially not acceptable. In addition, people's ability to freely link to information and to share the 'online address' of that information has led to an unprecedented amount of online innovation driving economic growth. As a general rule, as soon as the owner of content decides to place freely accessible material on the Internet, people should continue to be able to reference and refer to it via a hyperlink. Referring to a copyright-protected work without authorization has always been and should remain legal. If rightholders want to exert greater control over the availability of their works online, they have various means to do so including the use of 'paywalls', the Robots Exclusion Protocol (robots.txt), etc.

From a legal point of view, the CJEU has just recently stated in the *Svensson* judgment that there is no copyright infringement when providing hyperlinks to freely accessible copyright-protected content. That is because in such circumstances hyperlinks do not address a 'new public', i.e., a public that was not taken into account by the rightholders when they authorized the initial communication to the public. This reasoning makes sense. Obviously, it is completely illogical for someone who somehow wants to restrict the availability of his/her work to place it on a web-page that is openly accessible to every person in the world who is connected to the Internet. There is no difference between people accessing that content directly on the web-page where the content has originally been placed or via a hyperlink appearing on another web-page which directly refers users to the original web-page. The targeted public must be assumed to be global.

However, with regard to the Court's reasoning on what constitutes an 'act of communication' we would like to submit the following observations. First, the CJEU's argumentation differs from the analysis provided by the European Copyright Society³² in the run-up to the judgment. Some of Europe's most prominent IP scholars have forcefully argued that a hyperlink cannot amount to a communication because it does not transmit a work. Hyperlinks merely provide the Internet user with information about the location of a page - there is no communication of the work as such. In that sense hyperlinks function like references in that they communicate the existence of content but not the content itself. Facts, in this case about the *location* of content, are not copyrightable. The broader ramifications of this are not to be underestimated: as hyperlinks are indispensable in the online world to communicate about the existence of something, they are *directly* related to citizens' freedom of expression.

Second, the CJEU's judgment contrasts with the German Supreme Court's judgment in the *Paperboy* case³³ (dating back to 2003) which concerned the same question but involved a

³⁰ Berners-Lee, T. (1997). Axioms of the Web Architecture. Links and Law: Myths. Available at: <http://www.w3.org/DesignIssues/LinkMyths.html>

³¹ Berners-Lee, T. (2010). Long Live the Web: A Call for Continued Open Standards and Neutrality. Scientific American. Available at: <http://www.scientificamerican.com/article/long-live-the-web/>

³² European Copyright Society. (2013). Opinion on The Reference to the CJEU in Case C-466/12 *Svensson*. Available at: http://www.ivir.nl/news/European_Copyright_Society_Opinion_on_Svensson.pdf

³³ BGH Urteil I ZR 259/00 *Paperboy* (17 July 2003).

search engine that set hyperlinks to websites with copyright-protected content which had already been made available to the public by the rightholder. In arriving at the conclusion that there was no breach of copyright, the Supreme Court treated hyperlinks as no different to a “reference to a print or to a website in the footnote of a publication” (p. 20). With regard to the ‘act of communication’ the Court unmistakably concluded that the “setting of hyperlinks is not a communication in this sense” (p. 21). CCIA’s conceptual understanding of a hyperlink is more closely aligned with the German Supreme Court’s understanding.

Even though the Court’s reasoning will lead to unsurprising results in most cases, it remains unclear what the decision could mean for improperly licensed content where the initial communication to the public was not authorized. The question is how to treat third parties who *unknowingly* link to that unauthorized communication. The recent legal dispute between photographer Daniel Morel and Agence France Presse (AFP) provides an interesting example.

Morel photographed the immediate aftermath of the 2010 Haitian earthquake. His photos today remain some of the most distinctive images of the earthquake. How these photos came to be so widely recognized, however, was unfortunate: a foreign Twitter account identified as belonging to one Lisandro Suero swiped and reposted Morel’s photographs, claiming credit. The AFP and Getty Images, which had an arrangement with Twitter, redistributed Morel’s photographs to major newspapers around the world, crediting Suero. Getty and AFP went to trial³⁴ arguing they had been deceived, but the evidence apparently led a jury to believe the companies had not acted in good faith; in November 2013, the jury awarded Morel \$1.22 million USD.³⁵ Ultimately, several other global news organizations also settled with Morel.

At the trial it became evident that *months* after the earthquake, improperly licensed versions of Morel’s photos had remained on more than a dozen sites. A New York Times image³⁶, for example, still today credits Morel via AFP and Getty, when in fact neither had the right to distribute his images. At one time (perhaps still today) that image likely infringed Morel’s rights under U.S. copyright law. Today, over 2700 indexed links on the World Wide Web point at it. Presumably, thousands of other sites linked to other images credited to Suero on CNN, TIME, and the Washington Post in the days following the Haitian earthquake, heedless of the fact that the image was unlicensed.

Under EU law *post Svensson* these circumstances could be interpreted to mean that since Morel did not authorize the publication of his picture on the N.Y. Times in 2010, then the 2700 sites that link to it today are also *directly infringing* Morel’s right to communicate to the public. It would be a bizarre result, however, that labels as infringers anyone who tweeted or linked to purportedly lawful content on NYTimes.com, CNN.com, TIME.com, or Washington Post pictures. Copyright rules under which an individual linking to the most prominent news institutions in the world is directly liable for copyright infringement merit careful reconsideration.

Another, more accommodating interpretation of *Svensson* would be to hold that insofar as the N.Y. Times infringed Morel’s right to communicate to the public, e.g. a blogger who unknowingly links to the infringing image did not similarly infringe, since his/her hyperlink does not increase the audience beyond the audience to which the N.Y. Times already made the work available. This logic would apply equally whether the blogger is linking to a large

³⁴ For more information see: <http://blog.ericgoldman.org/archives/2013/11/afp-v-morel-lawsuit-over-haiti-photos-taken-from-twittertwitpic-goes-to-trial.htm>

³⁵ See: http://lens.blogs.nytimes.com/2013/11/23/haitian-photographer-wins-major-u-s-copyright-victory/?_php=true&_type=blogs&_r=0

³⁶ See: http://www.nytimes.com/slideshow/2010/01/13/world/20100113-HAITI_6.html?_r=0

entity like AFP, Getty, or the N.Y. Times, or an individual, like Suero. Thus, as long as the blogger's set of potential recipients is the same as that of the N.Y. Times, and on the same terms, no new exercise of the right occurs, whether the underlying content was licensed or not.

Certainly, this is not the only interpretation of *Svensson*, but it would seem that any other interpretation would impose potential liability on thousands of sites who are entirely unaware of the fact that they infringe. For the future more guidance might have to come from the CJEU to ensure that legitimate daily activities of millions of Internet users do not lead to large-scale copyright infringements in the light of the law. This is important to ensure copyright law targets the ones it should target as well as continues to enjoy social acceptance.

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

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

The viewing of a web-page should under no circumstances be subject to the authorization of the rightholder.

Before bringing forward legal arguments, CCIA would like to address the proposition in the question from a more general point of view. The ordinary use of the Internet involves the creation of multiple temporary copies which are technically necessary to view the content requested. When a user views a web-page on his computer the current technical process necessitates the making of a temporary copy on the screen as well as in the cache on the hard disk. These copies are an inherent feature of today's browsing technology enabling people to actually read content on the screen of their e-reader, computer, tablet, smartphone, etc.

If an authorization for these necessary, temporary reproductions was required, millions of Internet users would infringe the law by merely browsing the Internet, as the UK Supreme Court pointed out. This is clearly socially intolerable and would further reduce the appreciation and social acceptability of copyright law. Crucially, requiring an authorization for browsing with the aim of viewing an openly accessible web-page directly touches on citizens' fundamental right to receive and impart information as well as on their right to read. Merely viewing and reading content has never been an infringement.

From a legal point of view the exception to the reproduction right contained in Article 5(1) of the Copyright Directive extends to temporary copies made in the course of browsing by an Internet user. In tune with the judgment of the UK Supreme Court in the *Newspaper Licensing (Meltwater)* case³⁷, the conditions for the applicability of the exception are fulfilled. Accordingly, copies made for the purpose of viewing a web-page are (1) temporary, (2) transient or incidental, (3) an integral part of the technological process, (4) enabling a lawful use and (5) of no independent economic significance. The reproductions made in the technological processes needed for the viewing a web-page fall under the mandatory exception. The UK Supreme Court has rightly pointed out that all Article 5(1) of the

³⁷ UKSC Judgment 18 [2013] from 17 April 2013. Available at: <http://www.bailii.org/cgi-bin/markup.cgi?doc=/uk/cases/UKSC/2013/18.html&query=Meltwater&method=boolean>

Copyright Directive achieves “is to treat the viewing of copyright material on the internet in the same way as its viewing in physical form, notwithstanding that the technical processes involved incidentally include the making of temporary copies within the electronic equipment employed”.³⁸ This is even recognized by the Copyright Directive itself as Recital 33 states that “this exception [in Article 5(1)] should include acts which *enable browsing as well as acts of caching to take place*” [emphasis added].

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)³⁹. 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)⁴⁰. This raises difficult questions, notably relating to the practical application of such an approach (how to avoid re-sellers keeping and using a copy of a work after they have “re-sold” it – this is often referred to as the “forward and delete” question) as well as to the economic implications of the creation of a second-hand market of copies of perfect quality that never deteriorate (in contrast to the second-hand market for physical goods).

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

YES – Please explain by giving examples

.....
.....

NO

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]

The Commission rightly points out that whereas the principle of exhaustion of the distribution right applies in the case of the distribution of physical copies, the application of this principle

³⁸ Ibid., para. 36.
³⁹ See also recital 28 of Directive 2001/29/EC.
⁴⁰ 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).

to digital content remains unclear. With regard to the practical issues identified in this consultation, the problem of users keeping individual copies is not a problem that is unique to digital transfers. Modern ‘forward-and-delete’ technologies as well as new file types can be used to ensure that re-sellers cannot keep a copy of the digital work, although some such technologies are still nascent. Consumers of certain types of digital content may increasingly expect to be able to resell their digital purchases if they have been led to believe that their acquisition of the content was not subject to a license. In a competitive market, competing models of licensing and sale will likely thrive. From a policy perspective, what is important is that parties’ reasonable expectations -- both of the vendor and the user -- are respected.

Where vendors purport to convey *ownership* right, it may be inequitable to construe that transaction *post hoc* as a license. This could be avoided through the application of an exhaustion rule, to prevent consumer deception. In other cases, however, it would be similarly inequitable for exhaustion to apply where, for example, it could undermine valuable proprietary licenses, or public licenses that support important and innovative content distribution models like Creative Commons. Because these licenses depend on *not* being sales, a blanket rule of digital exhaustion would be problematic. We invite the European Commission to examine how a resale of digital goods in tune with consumer expectations could be achieved without a rule of exhaustion undermining newer content distribution models.

We would also like to highlight that there are situations in which technical barriers prevent consumers to give away their digital purchases like e.g. paperless tickets to sports events or concerts. In other cases, consumers may be able to resell an item via the original retailer only. This reduces consumer choice and competition as it limits the resale of digital goods to a single platform. We urge the European Commission to pay increasing attention to this market and to the challenges posed by technological barriers to resale, by launching a study to assess the impact on commerce, competition and consumer welfare caused by consumers’ current inability to resell digital goods.

.....

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 absolute⁴¹. 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 considered⁴².

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

⁴¹ 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.

⁴² 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.

YES

While the choice to limit formalities was motivated by desires to protect authors, the absence of reliable data about rights-ownership increasingly impairs business transactions in a knowledge-based economy. For example, moving away from an “opt-in” default for copyright protection was the most proximate cause of the orphan works problem. While one of the merits of an opt-in system is that it does not dispense unsought entitlements, re-implementing registries in line with international treaties is possible. Berne’s limitations on formalities is carried forward in the World Trade Organization Agreement on Trade-related Aspects of Intellectual Property Rights,⁴³ the WIPO Copyright Treaty,⁴⁴ and the WIPO Performances and Phonograms Treaty.⁴⁵ Proposals have been advanced toward restoring formalities in a Berne-compliant manner,⁴⁶ and the U.S. Register of Copyrights even noted that attaching formalities at the *extension* of term could be feasible. Ultimately, if copyright policy fails to devise a mechanism for providing easy access to reliable data about ownership, authors’ rights will lose economic value, simply because willing buyers cannot find willing sellers in an increasingly saturated, yet opaque information market.

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

[Open question]

.....
.....

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

[Open question]

.....
.....

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

[Open question]

One intermediate solution may be to provide rightholders those benefits which go beyond minimum international standards upon voluntary registration. Irrespective of whether authors can be compelled to comply with formalities by domestic law, economic enjoyment largely requires some type of formality. That is, if the question is, ‘can an author enjoy the protection of copyright in economic terms without registration,’ the answer in most cases is ‘no.’ Since the dawn of radio, creators and rightholders have been compelled to register in order to be paid - not by domestic law, but by the laws of economics. Transaction costs compelled the formation of authors’ collection societies as it became clear

⁴³ Agreement on Trade-Related Aspects of Intellectual Property Rights, Apr. 15, 1994, Marrakesh Agreement Establishing the World Trade Organization, Annex 1C, LEGAL INSTRUMENTS—RESULTS OF THE URUGUAY ROUND vol. 31, 33 I.L.M. 81.

⁴⁴ WIPO Copyright Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 65.

⁴⁵ WIPO Performances and Phonograms Treaty, Dec. 20, 1996, S. TREATY DOC. NO. 105-17, 36 I.L.M. 76.

⁴⁶ See, e.g., Christopher Sprigman, *Reform(aliz)ing Copyright*, 57 STANFORD L. REV. 485 (2004).

that the only way radio stations could recompense authors was to have one place to go to get the rights they needed - and to report their usage of them. This example illustrates that the legal prohibition against formalities has been of little consequence for over a century. Given that collecting societies can only operate if they can exchange information on the rights they represent, it can easily be argued that while the law cannot oblige registration for the purposes of protection - it can, and does, compel it for economic purposes. Further, in the U.S., collecting societies such as ACSAP must publish their repertoire information, or relinquish enforcing rights which are not documented in this way. This provides an example of incentives which can be used to effectively promote the availability of transparent and open repertoire information.

The Commission should at a minimum oblige all rightholders to ensure third parties can find the information *necessary for licensing purposes* on all rights they hold. This would be a subset of all information of course, which ensures the rights of individual creators for data protection purposes can be protected. More to the point, it would also help ensure that authors and creators actually received the economic and other benefits that copyright intends. The Commission could also require that registration is taken into account for the purposes of certain privileges or for evidential purposes. For instance, it has been suggested that requests to remove allegedly illegal content should be tied to some form of registration, and that repeating issuing wrongful requests should revoke the right to send removal requests.

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 developed⁴⁷, 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 Database⁴⁸ should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition⁴⁹ 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 Hub⁵⁰ 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?*

⁴⁷ E.g. the International Standard Recording Code (ISRC) is used to identify recordings, the International Standard Book Number (ISBN) is used to identify books.

⁴⁸ You will find more information about this initiative on the following website: <http://www.globalrepertoiredatabase.com/>.

⁴⁹ You will find more information about this initiative (funded in part by the European Commission) on the following website: www.linkedcontentcoalition.org.

⁵⁰ You will find more information about this initiative on the following website: <http://www.copyrighthub.co.uk/>.

[Open question]

The Commission should encourage the content sector to develop open and transparent databases of rights ownership, based upon voluntary open standards around registration. Standards reduce transaction costs, and promote automation, which is essential when many commercial uses of works involve assembly of many works into a large library. Much like an actual technology product assembles small pieces of code and hardware into one cohesive technology, new content-based services must assemble many individual works into large libraries of content in order to entice users and be economically relevant.

To this end, policymakers should encourage the use of standards for rights ownership information, and the storage of that information in a manner that can be easily accessed by third parties. Policymakers can promote standardization of rights information by building open standards into voluntary registration processes, such as those described above. Private sector actors may be encouraged to build interoperable datasets if copyright authorities adopt standards into registration systems.

There are challenges, however, inherent in initiatives that encourage content producers to set "permissions data" for acts that do not fall under copyright, such as linking.⁵¹ To encourage the use of permissions where no permission is required -- either because the use is lawful, pursuant to an exception, or because the author's right does extend so far as to cover the act (such as linking) -- is problematic. Not only may this pose problems with regard to developments such as user-generated content (UGC) and non-commercial online expression, embedding permissions into content may also function as a form of digital rights management (DRM) applying to the whole web. In light of the scale of online expression and UGC (*see* CCIA response to Chapter III, para. F) such an expansive measure is unrealistic and may undermine the perceived legitimacy of authors' rights.

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 Convention⁵² 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?

NO – Please explain if they should be longer or shorter

⁵¹ E.g. the Linked Content Coalition

⁵² Berne Convention for the Protection of Literary and Artistic Works, <http://www.wipo.int/treaties/en/ip/berne/>.

Current, lengthy copyright terms are increasingly out of step with the digital environment. The Commission should devote attention to the costs of long copyright terms. CCIA submits that ever-lengthening term has not served the interests of the public, and one-size-fits-all, century-long terms are no longer consistent with the often transitory nature of protected works.

When the U.S. term extension was challenged before the Supreme Court of the United States a decade ago,⁵³ a brief filed by a group of recognized and Nobel Prize-winning economists explained how the term extension would lead to the creation of few new works, while increasing the social cost of monopoly and inhibiting innovation.⁵⁴ In return for depriving the public of works for twenty additional years, the economists estimated, the CTEA increased the author's present-value incentive by a mere 0.33%. When comparing the economic deadweight loss of term-extended works that had been nearing expiration to that of newly created works, the economists found it to be 224 times as large in present value.⁵⁵ Even the U.S. Register of Copyrights subsequently characterized the U.S. term extension as "too long" and "a big mistake."⁵⁶

Subsequent research has borne out these views, demonstrating how severely long terms contribute to the orphan works problem. Empirical research supports the conclusion that lengthening term denies the public access to works. For example, researchers have found that audio books made from public domain bestsellers (1913-22) are significantly more available than those made from copyrighted bestsellers (1923-32), bolstering a conclusion that "the significant costs of additional copyright protection for already-existing works are not justified by the benefits claimed for it."⁵⁷

The fact that overprotection can in fact hamper the development of creativity, including innovative online services, is evidenced by the lack of success which met the Database Directive.⁵⁸ This experiment in creation of new IP rights proved to be fruitless. "Interpreting the precise scope of the 'sui generis' right has proved difficult [and] 'sui generis' provisions have ... created considerable legal uncertainty," the Internal Markets and Services Directorate General found in its December 12, 2005 Working Paper. The Working Paper also noted that "the complexity of the 'sui generis' regime may have caused confusion among certain users, in particular the academic and scientific community." Moreover, after the Directive, the European portion of the global database market plunged relative to the U.S. share, such that

⁵³ *Eldred v. Ashcroft*, 537 U.S. 186 (2003). The legal challenge to the Copyright Term Extension Act (CTEA) questioned only Congress's authority to enact it, not its wisdom in doing so. The U.S. Supreme Court's opinion suggested that, given the authority, it may very well have questioned the prudence of the extension. *Ibid.* at 222 ("petitioners forcefully urge that Congress pursued very bad policy in prescribing the CTEA's long terms. The wisdom of Congress' action, however, is not within our province to second guess.").

⁵⁴ Brief for George Akerlof, Kenneth Arrow, Ronald Coase, et al. as *Amici Curiae* Supporting Petitioners, *Eldred v. Ashcroft*, 537 U.S. 186 (2003) (No. 01-618).

⁵⁵ *Ibid.* at 6, 11.

⁵⁶ UNC Symposium on Intellectual Property, Creativity, and the Innovation Process, Nov. 2, 2005 (video excerpt available at http://www.ibiblio.org/yugen/video/too_long.mpg).

⁵⁷ Christopher Buccafusco & Paul J. Heald, *Do Bad Things Happen When Works Enter the Public Domain? Empirical Tests of Copyright Term Extension*, Working Paper (2012), available at http://www.law.northwestern.edu/faculty/programs/searlecenter/workingpapers/documents/Heald_Buccafusco_Audiobooks_Final.pdf. See also Rebecca Rosen, *The Hole in Our Collective Memory: How Copyright Made Mid-Century Books Vanish*, *The Atlantic*, July 30, 2013, available at <http://www.theatlantic.com/technology/archive/2013/07/the-hole-in-our-collective-memory-how-copyright-made-mid-century-books-vanish/278209/>.

⁵⁸ Council Directive 96/9/EC, *The Legal Protection of Databases* (March 11, 1996) ("Database Directive").

the ratio of European to U.S. database production fell from 1:2 to 1:3.⁵⁹

Clearly, retroactive extensions are the least justifiable, as they do not inspire new creativity. The law cannot incentivize creativity after the relevant investment has been made. Any retroactive extension merely provides a windfall to the rightholder without any benefit accruing to the public. A relatively recent study by the U.S. Library of Congress, considering whether copyright has made historically important sound recordings more accessible, concluded in the negative.⁶⁰ A more recent study concluded that only 14% of the 10,919 silent films released by major U.S. studios exist in their original 35mm or other format, and that this mere sliver survived only by virtue of the lapse of copyright term.⁶¹ Given that objective evidence indicates that the lapse of term has served the interests of cultural preservation, it is not surprising that the U.S. Register of Copyrights, among others, have begun to reconsider recent extensions.⁶²

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/EC⁶³.

Exceptions and limitations in the national and EU copyright laws have to respect international law⁶⁴. 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)⁶⁵, these limitations and

⁵⁹ DG Internal Market and Services Working Paper, *First evaluation of Directive 96/9/EC on the legal protection of databases*, Dec. 12, 2005, available at http://europa.eu.int/comm/internal_market/copyright/docs/databases/evaluation_report_en.pdf, at 15, 22.

⁶⁰ See National Recording Preserv. Bd. of the Library of Cong., *The State of Recorded Sound Preservation in the United States: A National Legacy at Risk in the Digital Age* (Aug. 2010) available at <http://www.clir.org/pubs/abstract/reports/pub148>

⁶¹ See Council on Library & Information Resources & the U.S. Library of Congress: *The Survival of American Silent Feature Films: 1912–1929*, at p. 21, (“Our American silent film heritage was saved from the brink of extinction by film archives... and small companies run by film enthusiasts willing to invest in abandoned films whose copyrights had lapsed and could legally be distributed”), available at http://www.loc.gov/film/pdfs/pub158.final_version_sept_2013.pdf

⁶² Maria A. Pallante, “The Next Great Copyright Act - 26th Manges Lecture” (March 4, 2013), available at http://www.copyright.gov/docs/next_great_copyright_act.pdf; see also Pamela Samuelson *et al.*, “The Copyright Principles Project: Directions for Reform,” (2010), available at http://www.law.berkeley.edu/files/bclt_CPP.pdf

⁶³ 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.

⁶⁴ 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).

⁶⁵ 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)).

exceptions are often optional⁶⁶, in the sense that Member States are free to reflect in national legislation as many or as few of them as they wish. Moreover, the formulation of certain of the limitations and exceptions is general enough to give significant flexibility to the Member States as to how, and to what extent, to implement them (if they decide to do so). Finally, it is worth noting that not all of the limitations and exceptions included in the EU legal framework for copyright are of equivalent significance in policy terms and in terms of their potential effect on the functioning of the Single Market.

In addition, in the same manner that the definition of the rights is territorial (i.e. has an effect only within the territory of the Member State), the definition of the limitations and exceptions to the rights is territorial too (so an act that is covered by an exception in a Member State "A" may still require the authorisation of the rightholder once we move to the Member State "B")⁶⁷.

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

It needs to be noted that there is an imbalance in the current regime between exclusive rights and accompanying exceptions and limitations. While the InfoSoc Directive has fully harmonized exclusive rights, the vast majority of exceptions and limitations remains optional. This has negative implications for the functioning of an EU-wide internal market which cannot be achieved under the current setup - there is an inherent disadvantage faced by businesses, consumers and citizens who rely on exceptions and limitations to exclusive rights.

This is manifestly evident in cross-border situations. A service provided by a business that relies on an exception in Member State A could be unlawful in another Member State or the legal regime in that Member State could be sufficiently unclear as to prevent that business

⁶⁶ 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.

⁶⁷ 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.

from providing its services cross-border. It is this lack of legal certainty that inhibits businesses' competitiveness in the EU. The economies of scale and consumer reach which could be achieved by a more harmonized framework are not available to companies which reduces the attractiveness to invest in companies in Europe. This has negative implications for the competitiveness of the European economy as a whole and for the Internet sector in particular. The Internet knows no borders and online companies, small and large, are by nature ideally placed to benefit from an integrated internal market. Legal complexity caused by divergent implementations of exceptions and limitations stands in the way of growing a strong digital economy in the EU.

Apart from the lack of a harmonized regime for exceptions and limitations, the complexity of Europe's copyright laws is further enhanced by the creation of new rights on the national level, which openly ignore the full harmonization of rights (as recently clarified in *Svensson*). A good example for this which has a particularly negative impact on companies active in the Internet economy is the ancillary copyright, or *Leistungsschutzrecht*, that was passed in Germany last year. The purpose of this law is to essentially extend copyright protection to snippets, small pieces of text that are automatically generated by online search and aggregation services on the request of a user looking for certain information. The scope of this law is limited to only 'press products'. It is worthwhile to highlight that the text that was adopted expressly excludes 'smallest text excerpts' from the scope of the law. Arguably, the law that was primarily aimed at snippets is in its end version somehow trying to exclude snippets from its scope. But the precise definitions of the law's wording will only be clarified after litigation in the courts - until then there will be considerable legal uncertainty for all market participants. This legal uncertainty is especially detrimental to small companies who do not have the resources to shield themselves from legal risk.

However, in the context of this consultation the key point is that new rights created at the national level like the ancillary copyright are a good example of copyright *not* achieving more integration because they fragment the single market leading to more divergence across the EU and create national barriers to the free movement of services. There is also a difficult relationship with a more uniform application of exceptions and limitations across the single market. Thus, whereas Germany has created a new right over the use of small parts of copyright protected material, the same use is likely to fall under an exception in other Member States. In the Netherlands e.g. the Court of Appeals Arnhem concluded in a case⁶⁸ concerning the collection of information from online databases of housing agencies by a search engine that the national implementation of the quotation right found in Article 5(3)(d) ISD included this information made available by the online service. The same conclusion was reached by the Court of Alkmaar in a similar case⁶⁹ in which the Court further specified what could legitimately be displayed by the search engine.

This example shows the need to ensure that new, national rights do not stand in the way of achieving an internal market and do not add to already existing problems associated with the country-by-country implementation of exceptions and limitations.

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

⁶⁸ Gerechtshof Arnhem, July 4, 2006, case no. 06/416, LJN AY0089.

⁶⁹ Rechtbank Alkmaar, August 7, 2007, case no. 96206.

In tune with our reply to Question 21, a higher level of harmonization of exceptions has clear benefits, in particular where disparities have a demonstrable impact on cross-border trade. It would enhance legal certainty for businesses and citizens in cross-border situations leveraging the potential of the single market. The smaller the legal complexity businesses have to navigate through, the greater the potential to enhance European competitiveness on both, the micro- and macro-level. Importantly, greater harmonization would also raise exceptions and limitations' legal standing to equal it more to that of exclusive rights addressing the current imbalance in the system.

We would like to stress, however, that harmonization cannot be seen in isolation but has to be seen in the context of an overall copyright policy which ensures enough room for citizens' and businesses' ingenuity to come up with new innovations and business ideas - particularly those that are enabled by the Internet. CCIA has always stressed that robust flexibility and balance in the copyright system is essential for businesses to thrive. As various scholars highlight the current copyright framework derives some flexibility from within the closed list of exceptions and limitations many of which are prototypes leaving Member States some degree of freedom in defining their exact scope. In Question 21 we explained how in the Netherlands e.g. search engine services benefit from the right of quotation (Article 5(3)(d) ISD). In Germany, the same provision has been implemented far more restrictively which did not allow image search services to fall under this exception. In fact, the German Federal Court of Justice had to rely on legal concepts *outside* copyright law to allow for these kind of online services.⁷⁰

If the Commission seeks to achieve a higher level of harmonization, we would like to stress that none of the flexibility inherent in the current regime should get lost. We support the most flexible implementation of permissible EU exceptions which could be achieved through the literal transposition of these prototypes in the ISD into national law. This would enlarge the toolbox of national courts in dealing with new questions raised by technological progress which remains unpredictable. The Commission could encourage Member States to make full use of existing flexibilities which would allow them to maximise the economic, cultural and societal benefits of exceptions. This could inform other Member States and provide examples allowing for greater harmonization to naturally grow within the current framework.

In any case, the need for mandatory exceptions should be assessed taking into account whether:

- (1) there is a detrimental impact on the internal market
- (2) fundamental rights and/or the public interest are a strong justification for the exception
- (3) an underlying policy goal, such as economic growth and support for innovation, is better achieved at the EU level.

For instance, there is a very strong case for mandatory exceptions for the benefit of parodies, quotations and the press when seen in the light of Article 11 of the EU Charter of Fundamental Rights which defines the right to freedom of expression to include the freedom to hold opinions and to receive and impart information and ideas without interference by public authority and *regardless of frontiers*. Thus, these exceptions do not only have a strong relationship to fundamental rights but also to the objective of a boundless internal market.

23. Should any new limitations and exceptions be added to or removed from the existing

⁷⁰ Bundesgerichtshof, April 29, 2010, case I ZR 69/08.

catalogue? Please explain by referring to specific cases.

[Open question]

CCIA strongly opposes the removal of any exceptions. In contrast to exclusive rights, the effectiveness of exceptions and limitations is already limited given their optional nature even though they are the *principal way of ensuring balance and flexibility*. Removing exceptions would reduce flexibility and increase legal uncertainty for all market participants. Exceptions are crucial to counterbalance the over-expansive reproduction and making available right which has not only allowed to question reproductions inside TV sets in the *Premier League* case but has also allowed to challenge the legality of hyperlinking and the viewing of a webpage as rightly identified in this Consultation (see our answers to Questions 11 and 12). In addition, removing exceptions would send a wrong signal to Member States which have understood the economic and social value of exceptions and have started to reform their copyright laws in order to make them more apt for the realities of a digitally connected economy.

On other hand there is certainly a *general* need for new exceptions. Text- and data-mining or user-generated content are examples of developments that are not easily accommodated under the current legal framework. We would like to strongly emphasize that the question on the need of additional exceptions must be seen in the light of the need for greater flexibility in general (see for more detail our response to Questions 24 and 25). As we explain, the best way to ensure a flexible system which is future-proof is to introduce an open-ended norm which is capable of dealing with new technological advancements. This is not to say that additional exceptions do not have value but there are good reasons to recognize that *ad hoc* exceptions can only be part of any modernization proposal. First, technology and innovation will remain unpredictable. Second, legislation cannot keep up with the pace of technology. European copyright law in particular takes a long time to renew. All of this means that with each new development that challenges the legal framework innovators in Europe will have to live with legal uncertainty for a longer period of time which translates into lower investments and an internal market not living up to its full potential.

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

As mentioned before, technology and innovation are unpredictable. What is needed is a legal framework that is flexible enough to give legal certainty to new innovations which do not harm the market for the original work and do not take away any value from those works. It is clear that technologies in the Internet age rely on copies to work. We explained how an everyday activity of millions of users such as browsing relies on multiple reproductions to properly work (see answer to Question 12). Widely used plagiarism detection software such as *Urkund.com* or *TurnItIn.com* necessarily copies protected works that are available on the Internet to compare it with student papers. These copies are made to compute a result which in itself does not contain any of the copyrighted expression of the original works.⁷¹ Developments such as user-generated content (UGC) or text- and data-mining (TDM) pose new challenges to copyright law.

The need for a greater degree of flexibility is supported by a growing body of legal and

⁷¹ For more details see: Sag, M. (2009). Copyright and copy-reliant technology. 103 Northwestern University Law Review. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1257086

academic literature as well as a growing number of EU Members States. In the light of increased recognition of the economic significance of exceptions and limitations this is not surprising. CCIA commissioned a study in 2010 which revealed that EU industries relying on exceptions and limitations to copyright make significant contributions to Europe's economic growth.⁷² The value added generated by these industries amounts to EUR 1.1 trillion, or 9.3% of EU GDP. Nearly 9 million people are employed in these industries amounting to 4% of all EU employees. Employees earned EUR 307 billion in wages and salaries. Furthermore, between 2003 and 2007 these industries grew 3% faster than the EU economy. Given the conservative approach of the study, these numbers should not be underestimated.

In 2011 we commissioned a similar study in the US based on publicly available data to examine how greatly industries relying on the US Fair Use doctrine contribute to the US economy.⁷³ In 2008 and 2009 Fair Use industries generated revenue averaging \$4.6 trillion, a 35% increase over 2002 revenue. These industries' 'value added' to the US economy averaged \$2.4 trillion, approximately 17% of total US current dollar GDP. Employment in industries benefiting from fair use and related limitations and exceptions increased from 16.9 million in 2002 to 17.7 million in 2009 for an average payroll of more than \$1.2 trillion during 2008 and 2009. Despite the economic downturn, Fair Use industries grew at a faster pace than the overall economy. The lower proportion in Europe, when compared to the US, could be attributed to the fact that more robust and harmonious limitations and exceptions have created more robust fair use-dependent industries, such as the Internet sector.

These numbers provide further support to the placement of robust and flexible exceptions and limitations at the heart of promoting innovation and economic development. The UK government estimates that its recent copyright reform measures "could contribute over GBP 500 billion in net present value terms to the UK economy over 10 years on a conservative view, with likely additional benefits of around GBP 290 million each year".⁷⁴

Finally, the EU's legal framework will increasingly stand in competition with other legal frameworks around the globe. Various countries adopted or are in the process of adopting a more flexible copyright regime in the hope of attracting more digital innovators and investors. Given the global nature of the Internet, this competition is truly a global one that merits serious consideration of copyright reform in the EU. Singapore's 2005 adoption of a 'fair use' copyright regime provides an interesting study case. Within almost a decade the new law simultaneously stimulated the country's technology and Internet-services sectors while leaving unaltered the economic output of content-publishing companies, indicating an evident net economic benefit from the reforms.⁷⁵

⁷² Akker, I., *et al.* (2010). Economic contribution of EU industries relying on exceptions and limitations to copyright. SEO Economic Research. Available online at:

⁷² <http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000398/FairUseEUstudy.pdf>

⁷³ Rogers, T. & Szamosszegi, A. (2011). Fair Use in the U.S. Economy: Economic Contribution of Industries Relying on Fair Use. Available online at:

⁷³ <http://www.ccianet.org/CCIA/files/ccLibraryFiles/Filename/000000000535/CCIA-FairUseintheUSEconomy-2011.PDF>

⁷³

⁷⁴ HM Government. (2012). Modernising Copyright: A Modern, Robust and Flexible Framework: Government Response to consultation on copyright exceptions and clarifying copyright law. Available at:

<http://www.ipo.gov.uk/response-2011-copyright-final.pdf>

⁷⁵ Ghafele, R. & Gibert, B. (2012). The Economic Value of Fair Use in Copyright Law: Counterfactual Impact Analysis of Fair Use Policy on Private Copying Technology and Copyright Markets in Singapore. Available at: <http://mpira.ub.uni-muenchen.de/41664/>

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]

CCIA believes that a system with an open-ended norm serves the realities and needs of the digital economy in the best way. Such a system would allow accommodating new technologies as they come up. It would considerably reduce the pressure on the copyright framework to adapt to new realities and would firmly put Europe on the path of increased competitiveness and innovation.

Very often the debate about Europe's system of exceptions and limitations as compared to e.g. the US doctrine of 'fair use' centers around the two competing objectives of legal certainty and flexibility. While a closed and precise list of exceptions and limitations should in theory lead to more legal certainty, it is increasingly recognized that the current framework in the EU falls short of providing both, sufficient legal certainty and flexibility. This is because the list of (optional) exceptions and limitations is subject to the three-step test in Article 5(5) ISD. This test consists of several open-ended criteria that are similar to the analysis that would occur under a fair use test. In addition, the three-step text cannot be used as a flexible balancing tool available to courts to create new room for further forms of permitted unauthorized use because it works only one direction: to impose further constraints on precisely defined exceptions enshrined in national law.⁷⁶

If the Commission decides to initiate legislative reform, a sufficient degree of flexibility could be achieved through a redefining the role of the three-step test and its relationship with existing exceptions. Exceptions should be regarded as "certain special cases" within the meaning of the three-step test and should serve as an indication for permitted uses. Whenever a new use arises that is comparable to those already reflected in the catalogue of exceptions and limitations, courts would be able to accommodate new uses based on the guidance provided by the existing exceptions provided that such use does not conflict with a normal exploitation of the work and does not unreasonably prejudice the legitimate interests of the rightholder (essentially requiring the last two conditions of Article 5(5) ISD to be fulfilled). In this way the one could redefine the three-step test as a balancing tool providing for more flexibility without necessarily losing legal certainty. The catalogue of exceptions and limitations would remain intact and would not be subject to the open-ended criteria of three-step test anymore. Support for this proposition is to be found in the WIPO Internet Treaties which the ISD implements into EU law (see Recital 15 ISD). Concerning the international three-step test the Agreed Statement Concerning Article 10 of the WIPO Copyright Treaty stipulates that Contracting Parties are permitted "to carry forward and appropriately extend into the digital environment limitations and exceptions in their national laws which have been considered acceptable under the Berne Convention. Similarly, these provisions should be understood to permit Contracting Parties to devise new exceptions and limitations that are appropriate in the digital network environment. It is also understood that Article 10(2) neither reduces nor extends the scope of applicability of the limitations and exceptions permitted by

⁷⁶ For a thorough analysis of this situation see: Senftleben, M. (2013). Comparative Approaches to Fair Use: An Important Impulse for Reforms in EU Copyright Law. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2241284

the Berne Convention”. It becomes clear that the three-step test should be seen as a tool capable of providing more flexibility in copyright law which should be reflected in EU legislation.

In practice such a system would leave more room to courts in finding the right balance between competing interests. Even though some might see this as problematic, we would like to stress that judges are of course capable of dealing with more open-ended provisions. In short, this is what they do in other areas of law, too. And, importantly, this is what they are increasingly forced to do in the area of copyright. The recent flow of copyright-related questions to the CJEU is evidence that the copyright regime is increasingly judge-made. Apart from that there is nothing to suggest that it is not working in other parts of the world where judges are asked to adjudicate on the basis of open-ended criteria like in the US, Israel, Singapore or South Korea. In countries like Australia and Ireland governments are considering to provide for more flexibility in this way. To avoid inconsistencies in the EU flowing from divergent judgments on the national level, courts will continue to have the possibility to refer cases to the CJEU to ensure EU-wide consistency. There is also a role to be played by the European Commission to provide guidance for Member States.

In addition to this proposal, we would also like to point out other solutions which could be useful in the short- to mid-term as they would not require legislative intervention:

- (1) The Commission can encourage Member States to take advantage of existing flexibilities under the Copyright Directive and highlight a more flexible, enabling role of the three-step test. As mentioned, a recommendation to literally transpose the ISD’s catalogue of exceptions and limitations into national law is a possibility.
- (2) The Commission could clarify that the harmonization of rights under the ISD is full harmonization preventing Member States from adopting new rights at national level which inhibits the functioning of the single market.
- (3) The Commission could make clear that within the existing flexibility offered in the ISD Member States are permitted to devise new exceptions as has already been undertaken by some Member States. For example, the unharmonized nature of the adaptation right leaves room for Member States to provide for limitations and exceptions permitting transformative uses in the context of e.g. user-generated content.⁷⁷

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
.....
.....

NO OPINION

⁷⁷ For a detailed analysis of this flexibility see: Hugenholtz, P. B. & Senftleben, M.R.F. (2011). Fair Use in Europe. In Search of Flexibilities. Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1959554

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]

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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 archiving⁷⁸ and enable on-site consultation of the works and other subject matter in the collections of such institutions⁷⁹. 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 Directive⁸⁰.

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

1. Preservation and archiving

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

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

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

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

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.....

⁷⁸ Article 5(2)c of Directive 2001/29.

⁷⁹ Article 5(3)n of Directive 2001/29.

⁸⁰ Article 5 of Directive 2006/115/EC.

NO

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]

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.....

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

[Open question]

.....
.....

5. Off-premises access to library collections

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

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

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

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

[Open question]

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

[Open question]

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

[Open question]

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

[Open question]

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6. 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

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.....
NO

NO OPINION

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

[Open question]

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.....

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

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

[Open question]

.....
.....

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]

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7. Mass digitisation

The term “mass digitisation” is normally used to refer to efforts by institutions such as libraries and archives to digitise (e.g. scan) the entire content or part of their collections with an objective to preserve these collections and, normally, to make them available to the public. Examples are efforts by libraries to digitise novels from the early part of the 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 other⁸¹. 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

⁸¹ 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.

a collecting society or the recognition of an “extended effect” to the licences granted)⁸².

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

.....
.....

NO OPINION

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

YES – Please explain

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.....

NO – Please explain

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.....

NO OPINION

B. Teaching

Directive 2001/29/EC⁸³ 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.

⁸² 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.

⁸³ Article 5(3)a of Directive 2001/29.

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

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

YES – Please explain

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.....

NO

NO OPINION

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

[Open question]

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

[Open question]

.....
.....

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]

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

[Open question]

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.....

C. Research

Directive 2001/29/EC⁸⁴ enables Member States to choose whether to implement in their national laws a limitation for the purpose of non-commercial scientific research. The open formulation of this (optional) provision allows for rather different implementations at Member States level.

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

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

YES – Please explain

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.....

NO

NO OPINION

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

[Open question]

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

[Open question]

.....
.....

D. Disabilities

Directive 2001/29/EC⁸⁵ provides for an exception/limitation for the benefit of people with a disability. The open formulation of this (optional) provision allows for rather different implementations at Member States level. At EU and international level projects have been launched to increase the accessibility of works and other subject-matter for persons with disabilities (notably by increasing the number of works published in special formats and facilitating their distribution across the European Union)⁸⁶.

⁸⁴ Article 5(3)a of Directive 2001/29.

⁸⁵ Article 5 (3)b of Directive 2001/29.

⁸⁶ 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/>).

The Marrakesh Treaty⁸⁷ 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]

.....
.....

E. Text and data mining

Text and data mining/content mining/data analytics⁸⁸ 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

⁸⁷ Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities, Marrakesh, June 17 to 28 2013.

⁸⁸ For the purpose of the present document, the term “text and data mining” will be used.

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”⁸⁹. In the context of these discussions, other stakeholders argued that no additional licences should be required to mine material to which access has been provided through a subscription agreement and considered that a specific exception for text and data mining should be introduced, possibly on the basis of a distinction between commercial and non-commercial.

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

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

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

YES – Please explain

.....
.....

NO – Please explain

⁸⁹ 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.
89

.....
.....
NO OPINION

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

[Open question]

Text- and data-mining (TDM) activities generate significant economic, scientific and societal benefits. In our modern, digitally connected world the amount and variety of information generated is constantly increasing. TDM activities enable innovation by essentially ‘making sense’ of vast amounts of data.⁹⁰ Linking previously disparate pieces of information e.g. leads to new insights and knowledge in business and science alike. It underpins the vast progress made e.g. in the development of artificial intelligence. It is important to understand that the Internet including all the freely available information that it carries is a huge source and enabler of this innovation.⁹¹ David Willetts, the UK Minister for Universities and Science, rightly identified data analytics and energy-efficient computing as the top technology that the government should be promoting with further capital investment and technology support.⁹² So does the EU’s research policy, in supporting the ‘Human Brain Project’, which relies on extensive computer-aided analysis of research and data on the human brain.

In this context, CCIA is concerned about attempts to assert copyright over TDM activities – particularly as they relate to openly accessible material online. As a basic starting point, what Internet users, researchers, businesses and consumers do when manually viewing and analyzing text and data that is freely available online is made easier, more efficient and faster through various online services and applications which perform these activities in an automated way. Viewing, reading, analyzing and building on top of freely available text and data has never been subject to copyright law. This should not change only because technological processes require reproductions of initial works. Such reproductions are needed for the technology to arrive at new insights which neither take away value from the original work nor constitute a substitute for the original – there is new value created.

In the digital economy there are numerous examples of businesses that provide all sorts of innovation and value for their customers and consumers. The German online service *Linguee*⁹³ offers a multilanguage translation service including examples of translations in a context by showing snippets of openly accessible documents it processed. Swedish company *Urkund*⁹⁴ developed a widely used anti-plagiarism tool to compare student papers with text that is openly accessible on the web. Germany-based *Reputami*⁹⁵ analyses restaurant customer reviews that are posted online on various networks to provide its clients with a tailor-made overview of customer feedback.

There are also applications that make it possible for essentially every Internet user to extract information that appears on any webpage but that is trapped behind HTML code. Companies

⁹⁰ For more information on the potential of big data see e.g.: McKinsey Global Institute. (2011). Available at: http://www.mckinsey.com/insights/business_technology/big_data_the_next_frontier_for_innovation

⁹¹ For examples of the benefits and innovations enabled by Internet connectivity on the industrial scale see: Annunziata, M. & Evans, P.C. (2013) The Industrial Internet@Work. GE White Paper: Available at:

⁹¹ http://www.ge.com/sites/default/files/GE_IndustrialInternetatWork_WhitePaper_20131028.pdf

⁹² Willetts, D. (2013). Eight Great Technologies. Policy Exchange. Available at:

<http://www.policyexchange.org.uk/images/publications/eight%20great%20technologies.pdf>

⁹³ <http://www.linguee.com/>

⁹⁴ <http://www.urkund.com/int/en/>

⁹⁵ <http://reputami.com/>

like *Import.io*⁹⁶ (based in London) produce software which allows anyone to build an application programming interface (API) to any website in minutes without writing any code. Such an API allows any user to create e.g. structured databases out of data that is publicly available on websites in an unstructured format. These structured datasets can be integrated, shared or used in any desired form leading to new value added and innovations.

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]

As expressed in our answer to Question 54, it must be clearly established that TDM is not subject to copyright protection. As long as TDM technologies extract new insights and information from existing, freely accessible works, they remain outside the scope of copyright protection. This principle should remain valid no matter whether TDM occurs in a commercial or non-commercial context - a distinction that is very difficult to make in practice. E.g. the boiling temperature of water or other liquids is not copyright protectable, whether for commercial or non-commercial uses.

From a single market perspective it is crucial to ensure that the EU as a whole remains a place where technologies like TDM continue to thrive – the Internet including all the online innovations it enabled knows no borders. Attempts to assert copyright protection over such activities would chill the take-up of such technologies in Europe and lead to a huge competitive disadvantage – particularly in the light of other countries’ move towards establishing a framework that is conducive to TDM activities.

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

[Open question]

.....
.....

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

[Open question]

.....
.....

F. *User-generated content*

Technological and service developments mean that citizens can copy, use and distribute content at little to no financial cost. As a consequence, new types of online activities are developing rapidly, including the making of so-called “user-generated content”. While users can create totally original content, they can also take one or several pre-existing works, change something in the work(s), and upload the result on the Internet e.g. to platforms and blogs⁹⁷. User-generated content (UGC) can thus cover the modification of pre-existing works

⁹⁶ <http://import.io/>

⁹⁷ 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.

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" discussions⁹⁸.

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

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

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

YES – Please explain by giving examples

.....
.....

NO

NO OPINION

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

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

⁹⁸ 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.

works) through your service to properly identify these works for online use?

YES – Please explain

.....
.....

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

.....
.....

NO – Please explain

.....
.....

NO OPINION

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

[Open question]

The explosion in user generated content (UGC) over the last 15 years has had a number of effects. Citing research carried for the UK telecoms and media regulation and published in June 2013.⁹⁹

“Economically, UGC is driving innovation in the tech sector and creating new businesses and business models in areas like aggregation, recommendation and curation, and is, more basically, a driver of consumer take-up . In social terms UGC stimulates political participation and mass debate, as well as creates value in areas such as education, healthcare and hyperlocal media. Culturally, UGC drives creative participation, as well provides cultural incumbents with opportunities in areas such as audience engagement, talent spotting and skills development.”

It is clear that the phenomenon of user generated content has had numerous positive social, economic and cultural benefits. It is also clear that most user generated content is entirely the work of the non-professional and copyright of others is not relevant.

⁹⁹ <http://stakeholders.ofcom.org.uk/market-data-research/other/internet/user-generated-content/>

Economic Impact of UGC

As the Commission correctly notes social media has changed the economic impact of user generated content. As the case of South Korean creator and performer ‘Psy’ illustrates ‘mashups’ can have a strongly positive effect on a creators earnings. The success of the work ‘Gangnam Style’ was in part due to its visibility on YouTube where it was widely parodied¹⁰⁰. Parodies / mashups contributed indirectly by further promoting the work, but also directly as Psy is rumoured to have earned in excess of USD 1 million from parodies alone.¹⁰¹

In addition, a phenomenon described by the UK media and telecoms regulator Ofcom as ‘media-meshing’¹⁰² illustrates that consumers increasingly interact with the media content they are consuming in real time by posting messages regarding eg a television programme on social networks. This interaction increases the value of the original content being discussed.

In cases where the protected work of a third party is used in content created by a non-professional user it can be transformative, communicative and re-contextualises the work. Such transformation and re-contextualisation adds economic and social value to numerous parties, including to the original rights owner.

Such transformation, often of incorporating different media types, has a strong economic and commercial link, as pointed out by Professor Ian Hargreaves in his Review of Intellectual Property and Growth. Hargreaves notes that: ‘*Video parody is today becoming part and parcel of the interactions of private citizens, often via social networking sites, and encourages literacy in multimedia expression in ways that are increasingly essential to the skills base of the economy. Comedy is big business.*’ As are digital skills.

He also notes that such transformations have become fundamental to freedom of expression.

What he does not point out in this section, but which can easily be deduced from his observations, is that these interactions also have a commercial dimension in that the sites on which they are posted and viewed are commercial in nature. These new modes of creation, expression and consumption would not exist without these sites. Thus, attempting to draw an ex-ante distinction between commercial and non-commercial UGC is problematic, additionally because UGC that is an unforeseen viral success may have started out non-commercial and become accidentally profitable.

It is also worth recalling the origins of the term ‘freedom of the press’ and its relevance to user generated content. At origin, ‘freedom of the press’ implies the freedom of an individual or group to print material e.g. a leaflet for distribution without prior approval by e.g. the Church¹⁰³ or other authority. These freedoms did not at origin apply to a professional media. In the digital era user generated content is central to the idea of ‘freedom of the press’ / freedom of expression.

Thus schemes, whether originating from government or a private rights owner, that require prior approval would be damaging to ‘freedom of the press’. This does not mean that infringing content should not be removed; rather that claims of infringement, or the non-applicability of an exception, can be validated.

¹⁰⁰ http://www.dailymotion.com/video/xt2wxd_everyday-i-m-gangnam-style-psy-lmfao-mashup_music

¹⁰¹ <http://en.wikipedia.org/wiki/Psy>

¹⁰² <http://stakeholders.ofcom.org.uk/market-data-research/market-data/communications-market-reports/cmr13/tv-audio-visual/>

¹⁰³ <http://www.infoplease.com/encyclopedia/history/press-freedom-the-history.html>

However, and more significantly, the fact that users or consumers are now themselves creators in their own right and on a massive scale is often overlooked.

Data on the scale of UGC includes:

- Over 83 million Europeans uploaded self-created content to a website, including 47% of 16 to 24 year olds. 11% of Europeans posted opinions on civic or political issues via websites (Eurostat)
- 758 million photos a day were uploaded and shared online in 2013 (all platforms)
- WordPress users produce c. 36 million new posts and 63.1 million new comments each month (1 of several blogging platforms)
- YouTube - 130 hours of video are uploaded every minute.
- Wikipedia - 77,000 active contributors to Wikipedia for more than 22,000,000 articles in 285 languages;
- Facebook - 41 000 posts a second;
- Twitter - 5,700 Tweets a second on Twitter

(Above data all from ‘Business Insider’ report)¹⁰⁴

These facts are too often ignored in discussions focusing around copyright, despite some inroads – such as the OECD report on UGC or the inclusion of Wikipedia edits and YouTube uploads as measures of creativity by WIPO’s Global Innovation Index. The difficulty in bringing UGC within the framework of copyright policy perhaps reflects the fact that copyright is conceived with a very different model in mind, i.e. exclusively with a view to commercial distribution of content produced professionally and within established creative industries. In other words, copyright policy takes for granted a static, triangular relationship between professional creators of content, commercial producers (i.e. publishers, film or music producers) and the public. UGC directly challenges this assumption.

In staying at the very surface of UGC and looking at it through the narrow prism of a possible exception, there is a strong risk that resulting policy is not appropriately understanding today’s creativity, and of missing out on the opportunity to foster the creative industries of tomorrow. For instance, assumptions which could be understood for the more established copyright model appear increasingly strange today: claiming levies on phones when a consumer’s daily experience is to take photographs, share them, view posts and photographs shared by friends; protecting a photograph taken by a user for 70 years after his death; incurring potentially criminal sanctions for sharing such files with express permission.

This change in the role of users as creators has been repeatedly trumpeted and hailed for the best of a decade. It passes for a fad, not least because many of those who hailed it also engaged in speculative predictions as to what the future would look like. But the data on UGC is there to stay. Rather than try and predict the future, or risk legislating the continued existence of legacy business models, we would argue that gaining a better economic understanding of those changes and allowing new business models to develop should be the priority. At this early stage, growth of the creative sector over the past decade is already driven exclusively by digital, to the tune of an additional 30 billion Euros¹⁰⁵.

¹⁰⁴ <http://www.businessinsider.com/the-future-of-digital-2013-2013-11?op=1>

¹⁰⁵ Booz & Co. (2013). The Digital Future of Creative Europe. Available at: <http://www.booz.com/global/home/what-we-think/reports-white-papers/article-display/digital-future-creative->

Accordingly, we believe that UGC should be a major starting point for understanding how to best modernise copyright, and not only the end focus of a narrow reflection on a particular exception or limitation. After all, major artistic figures have long paid tribute to the tradition of pastiche or caricature: that is arguably not new. What is new is the scale and vitality with which consumers create content, and the potential economic and social value at stake.

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]

Greater flexibility in the copyright system, to respond to the accelerating pace of change, is the key requirement (see longer discussion in the section of limitations and exceptions). An exception for user generated content, or for certain categories of UGC, including the permitting of associated commercial uses such as the provision of user-generated content platforms, is also desirable to exploit the full potential of this new mode of content creation and expression.

An exception covering user-generated content is necessary for society to benefit from the cultural, political and economic benefits that the explosion of user-generated content has brought. This could be achieved by using the existing flexibilities provided under the current EU framework. For instance, in France, the ‘Mission Lescure’ recommended combining existing exceptions (parodies, quotations) to explicitly address UGC.

In its introduction to the section on UGC the European Commission uses somewhat dismissive language about user-generated content “*User generated content 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.*”¹⁰⁶ Such a statement about the threshold for originality underlines the need for flexibility and judgement to be applied to each and every situation. Items of content that have been transformed will vary on the spectrum of originality and degree of transformation and this can only be assessed case by case.

The phenomenon of user-generated content also illustrates more generally why greater flexibility is needed in the copyright system. This phenomenon has developed since the Information Society Directive 2001 (Directive 2001/29/EC) and there was no way for that legislation to envisage the development. It is, however, central to a modern understanding of creation and consumption and any attempt to limit it is likely to meet a citizen / consumer backlash, which would be detrimental to social acceptance of the copyright system. Thus, greater flexibility would have permitted a more rapid response to this phenomenon enabling creation, consumption and economic activity (by technology industries and content creators).

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

[Open question]

.....
.....

[europe](#)
¹⁰⁶ European Commission consultation page 28-29

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 photocopying¹⁰⁷. 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 fees¹⁰⁸¹⁰⁹.

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 exceptions¹¹⁰ in the digital environment?*

YES – Please explain

Private copying is widely undertaken by consumers across the European Union. While not a new phenomenon, its increase since the Information Society Directive shows the value of a flexible regime of limitations and exceptions. The decision of the United Kingdom to introduce a private copy exception sensibly normalises everyday consumer behaviour; this has been possible because of a flexible approach. Equally, the UK's position that private copying does not cause harm to rights owners is accurate and as such no levy payment is due. Thus, the EU should clarify the scope of private copying that does no harm and clarify that no levy payment is due. The EU should also make clear that certain claims are out of bound, such as claims for temporary copies and UGC.

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?¹¹¹*

¹⁰⁷ Article 5. 2)(a) and (b) of Directive 2001/29.

¹⁰⁸ Communication "Unleashing the Potential of Cloud Computing in Europe", COM(2012) 529 final.

¹⁰⁹ 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.

¹¹⁰ Art. 5.2(a) and 5.2(b) of Directive 2001/29/EC.

¹¹¹ This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation

NO – Please explain

As per the example of the United Kingdom there is clearly no harm to rights owners from private copying (copies made from licensed services; pirated content and user-generated content clearly do not count as ‘private copies’ for the purposes of a discussion about private copy levies).

Importantly, this must be separated from the oft-heard statement that some rights owners value their levy income. This may be the case, but it is not the same as there being harm from private copying and such arguments undermine the legitimacy of the system.

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?*

As we have seen from the continued strength of content markets, both in terms of new creation and revenues, Internet technologies have contributed to growth in the creative sector in the European Union with sales of books, film and video games growing strongly over the last 20 years¹¹². Recorded music experienced a dip in revenues for several years from the early 2000s, but have shown good growth in the last 2 years, almost certainly due to the development of online services and storage. Internet technologies have contributed to consumers valuing content as they can increasingly consume content on their own terms.

It is difficult to see what the basis might be for a levy on online services given they not only do not cause harm, but enhance the value of the work. Any levy would reduce take up of cloud storage thus reducing the sales possibilities of rights owners. They would also harm Europe’s economic prospects more broadly given that online services have numerous overlapping uses and discourage the development of such technologies by indigenous European firms.

The simple desire to replace or enhance one subsidy stream with another is not sufficient reason to levy online services.

67. *Would you see an added value in making levies visible on the invoices for products subject to levies?*¹¹³

YES

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 payments¹¹⁴.

on private copying and reprography levies

¹¹² <http://www.cciainet.org/blog/2013/01/the-sky-continues-to-rise-for-industry-study-says/>

¹¹³ This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies.

¹¹⁴ This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation

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

NO OPINION

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

[Open question]

.....
.....

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

[Open question]

.....
.....

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 producers¹¹⁵ or determining who the owner of the rights is when the work or other subject matter is created in the context of an employment contract¹¹⁶. 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

on private copying and reprography levies.

¹¹⁵ See e.g. Directive 92/100/EEC, Art.2(4)-(7).

¹¹⁶ See e.g. Art. 2.3. of Directive 2009/24/EC, Art. 4 of Directive 96/9/EC.

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?*

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

NO OPINION

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

Discussions about remuneration for authors and performers is a question for the parties in the content creation value chain (whether online or offline). Payments made for content sales whether by online retailers or physical retail outlets are subsequently handled by publishers, labels, producers and societies and their ‘fair’ distribution is a matter between them and the authors or performers.

The Internet has a positive impact on cultural diversity and the production of cultural works. Technological developments have lowered the costs of creating cultural content and allow creators to reach global audiences easily and at a lower cost. Artists are increasingly discovered through social media, user-generated reviews and recommendations. As a result, a broader diversity of creative content is being produced than ever before - as demonstrated by a study we commissioned in 2013 analysing the entertainment industries in France, Germany, Italy, Russia, Spain and the UK.¹¹⁷ Accordingly, the number of books published in Europe has grown by close to 80% between 1995 and 2011. The annual release of new music albums has increased significantly since 2000 and the share of independently produced records has grown. Between 2005 and 2009, the number of films produced in these six markets rose from 890 to just under 1150. While these figures are rising, they do not take into account the considerable growth in content created online such as user-generated content.

Consumers benefit significantly from these changes as they provide them with increased access opportunities. Europeans are consuming more and higher-quality media through an expanding variety of connected devices, including smartphones, tablets and e-readers. It provides consumers with increased choice and diversity - 62% of consumers go online to find unique content that they do not find elsewhere, and two thirds or more of consumers value the diversity of information and opinion they find online. It also provides them with opportunities to actively participate - about eight in ten Europeans consumed UGC or participated in a social network during the past 12 months; about three in ten uploaded a video

¹¹⁷ Masnick, M. & Ho, M. (2013). The Sky Is Rising. Available at: <http://www.cciagnet.org/wp-content/uploads/library/Sky%20is%20Rising%202013.pdf>

or personal picture online; and nearly two in ten were editing or managing a blog or website (data taken from The Boston Consulting Group, “Follow the Surplus: European Consumers Embrace Online Media”).

The creative sector as a whole benefits from these changes, as business models on the Internet are evolving fast. In the music sector global spending on digital music will surpass physical distribution in 2015, as is already the case for the UK, the US, Sweden and South Korea.¹¹⁸ iTunes reached the milestone of 25 billion songs sold in 2012. Deezer has 30 million users, including 4 million paying subscribers and Spotify over 24 million active users and 6 million paying subscribers. The Internet has clearly not diminished the appetite for paid content, and new online services are reducing piracy (see more on this point in Chapter VI). Between 2001 and 2011, consumer spending on content in Europe rose by 25%.¹¹⁹

VI. Respect for rights

Directive 2004/48/EE¹²⁰ 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 text¹²¹. Concerns have been raised as to whether some of its provisions are still fit to ensure a proper respect for copyright in the digital age. On the one hand, the current measures seem to be insufficient to deal with the new challenges brought by the dissemination of digital content on the internet; on the other hand, there are concerns about the current balance between enforcement of copyright and the protection of fundamental rights, in particular the right for a private life and data protection. While it cannot be contested that enforcement measures should always be available in case of infringement of copyright, measures could be proposed to strengthen respect for copyright when the infringed content is used for a commercial purpose¹²². One means to do this could be to clarify the role of intermediaries in the IP infrastructure¹²³. At the same time, there could be clarification of the safeguards for respect of private life and data protection for private users.

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

NO – Please explain

We understand that copyright holders need efficient means to fight against the illicit use of their material, particularly when done on a commercial scale. These activities undermine the rights of creators and threaten the interests of legitimate online services and other licensees.

However, whilst enforcement needs to be efficient, the main focus should lie on strategies to

¹¹⁸ Information to be found on: <http://www.pwc.com/gx/en/global-entertainment-media-outlook/segment-insights/music.jhtml>

¹¹⁹ Booz & Co. (2013). The Digital Future of Creative Europe. Available at: <http://www.booz.com/global/home/what-we-think/reports-white-papers/article-display/digital-future-creative-europe>

¹²⁰ Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

¹²¹ You will find more information on the following website:

http://ec.europa.eu/internal_market/iprenforcement/directive/index_en.htm

¹²² For example when the infringing content is offered on a website which gets advertising revenues that depend on the volume of traffic.

¹²³ 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.

curb the demand for illicit content and make it harder to sustain business models based on infringement.

With regards to the former, it needs to be understood that piracy is first and foremost the result of a market failure in the creative sector fuelled by inadequate pricing models and persistent licensing problems. There is a clear, inverse relationship between the legal availability of material online and copyright infringement.¹²⁴ Norway is a powerful example of this connection. From 2008 to 2012, music piracy collapsed by 83 percent as legal streaming sites like Spotify - launched in 2008 - gradually eclipsed the demand for unlicensed music.¹²⁵ Meanwhile in Germany, 52 percent of consumers who use both legal and informal services to watch TV shows, reported that they consume less unlicensed content because of legal alternatives such as Netflix.¹²⁶

Perhaps the most illustrative example of the link between the legal availability of content and piracy can be found on piracydata.org,¹²⁷ a website that continuously tracks the most pirated films of the week and whether they are legally available on the web. During most weeks, no more than four of the top ten are legally available in any form. Only about two of them can be rented during a normal week and almost never can a top ten film be streamed from a legal service.

What these studies and examples suggest is that the most effective measure to fight piracy is not to intensify enforcement. It's offering legal alternatives. This is particularly relevant in Europe, where the absence of a pan-European copyright license created a peculiar form of digital divide, in which access to lawful digital content and services differs widely between Member States.

Against this background, we advise the Commission to actively promote a digital single market that provides the greatest access to copyrighted works to the greatest number of people. Not only would this help to curb piracy, more importantly, it would help generate increased revenues for Europe's creative sector. As indicated by recent turnover figures for advanced music markets, consumers are prepared to pay for copyrighted works if the services can rival the quality, choice and usability of informal services.¹²⁸ Indeed, any measures that lower barriers to entry, facilitate the development of new services and promote competition will reduce the demand for unlicensed works. We therefore welcome any initiatives to address issues the private sector cannot effectively solve such as complex clearance mechanisms, opaque rights information systems, a fragmented copyright landscape and differing VAT rates in various Member States.

Of course, initiatives to stimulate a vibrant market for licensed works should be accompanied by an efficient enforcement regime. However, efficiency cannot come at the expense of due process and injunctions must be narrowly defined to avoid abuses. CCIA strongly advises against any legislative measures that would effectively delegate fundamental enforcement

¹²⁴ A number of studies and surveys suggest a the causality between the legal availability of content and piracy. For example: "Adventures in the Netherlands", a report on the Dutch music market by Spotify, available at <http://press.spotify.com/no/2013/07/17/adventures-in-netherlands/> and the "Annual Music Study 2012" by NPD Group, available at: <https://www.npd.com/wps/portal/npd/us/news/press-releases/the-mpd-group-music-file-sharing-declined-significantly-in-2012/>

¹²⁵ <http://www.aftenposten.no/incoming/article7254471.ece/BINARY/Rapport+om+kopiering.pdf>

¹²⁶ Study by the American Assembly, a public affairs forum, hosted by Columbia University: <http://piracy.americanassembly.org/copy-culture-report/overall-findings/>

¹²⁷ Piracydata.org is an initiative by George Mason University's Mercatus Centre.

¹²⁸ The most illustrative example are the IFPI numbers from Sweden over the past ten years. Available at: <http://www.ifpi.se/dokument-och-statistik>

functions to the private sector through increased liability exposure of online intermediaries and a private right of action. Similarly, we caution against the establishment of graduate response mechanisms that rely on widespread surveillance of individual Internet users, such as those employed by the French HADOPI agency. These repressive, large-scale enforcement structures are expensive, ineffective¹²⁹ and undermine fundamental online freedoms such as privacy, freedom of speech, and freedom to information.¹³⁰ They are also inconsistent with EU law, in particular the ‘no obligation to monitor’ provision of the E-Commerce Directive.¹³¹

Instead of targeting individual users, the focus should be on the commercial networks sustaining piracy sites. Making it harder for those engaged in commercial-scale infringement of copyrighted works to access online advertising and payment networks will help dry up the revenue sources that sustain illicit business models. Legislation should allow copyright owners to report evidence against illicit services to the relevant judicial authorities, followed by an opportunity for the service in question to counter the claims. If a judicial authority is convinced that a service is, in fact, illicit it could issue an injunction against the website obliging advertisement and payment networks to stop conducting business with that service. The approach, known as ‘Follow the Money’ has been endorsed by a number of policymakers, including the US Patent Office.¹³² However, to fend off abuses and avoid harm to legitimate services and users, there can be no private right of action. Only a judicial authority, not private lawyers, should be authorised to seek injunctive relief in case of failure of an advertising or payment networks to comply.

In addition to that, a swift and seamless cooperation between national law enforcement agencies is needed to effectively pursue online services dedicated to copyright infringement. In this context, we advise the Commission to encourage Member States to review existing Mutual Legal Assistance Treaties in view of creating a more efficient, international law enforcement regime capable to emulating the flexibility and speed of commercial-scale piracy networks.

In summary, we believe the best approach to fight piracy is by offering consumers the services they want. Efforts for more repressive enforcement will ultimately prove futile if they are not matched by innovative market solutions. The Commission can actively promote a thriving market for copyrighted works by addressing the main hurdles to the digital single market. In addition to that, smart policies and effective collaboration between the different partners of the online ecosystem will help cut off illicit services from their sources of revenue.

NO OPINION

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

¹²⁹ Giblin, Rebecca, Evaluating Graduated Response (September 14, 2013). Columbia Journal of Law & the Arts, Forthcoming. Available at SSRN: <http://ssrn.com/abstract=2322516> or <http://dx.doi.org/10.2139/ssrn.2322516>

¹³⁰ Article 29 of the 2011 Report by the UN Special Rapporteur on the Freedom of Expression, Frank LaRue. Available at: http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

¹³¹ The CJEU made this very clear in Cases C-70/10 *Scarlet v SABAM* and C-360/10 *SABAM v Netlog*.

¹³² Green Paper on Copyright Policy, Creativity and Innovation in the Digital Economy, available at: <http://www.uspto.gov/news/publications/copyrightgreenpaper.pdf>

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

[Open question]

Copyright, and the legal framework that supports its enforcement, plays a fundamental role in the online environment. Whereas in the analogue age, only few stakeholder were directly concerned with copyright law - mostly professional creators and related intermediaries - the Internet has effectively enabled anyone to become a ‘publisher’, ‘broadcaster’ or ‘performer’. As a result, the scope of copyright extends to a much larger set of stakeholders, making it a major challenge to strike the right balance between the rights and obligations of online intermediaries, rightsowners and users.

In our view, the current enforcement regime proved largely successful in this regard. After all, it enabled a thriving online economy¹³³, new and innovative services for consumer, and an increasingly fertile ground for the traditional copyright industries.¹³⁴ The latter, after having struggled to adapt to rapidly shifting consumer expectations, have started to see the light at the end of the tunnel, thanks to, in no small part, attractive new online distribution models. This shows that the Internet and the creative sector do not stand in opposition to each other. As we noted above, the best defense against piracy is a good offense in the marketplace.

However, enforcement remains a delicate issue for online intermediaries as exposure to liability risks related to copyright represents a key threat to their economic viability. In this context, preserving the safe harbour regime for online intermediaries is essential. Legislative reforms that shift additional responsibilities to intermediaries, e.g. by introducing an obligation to monitor, would upset this fragile balance, create legal uncertainties and increase the costs for doing business online. Also, by effectively outsourcing enforcement functions to the private sector it would incentivize intermediaries to collude with rightsholders and become overly restrictive regarding the use of copyrighted works. This would have a chilling effect on innovation and undermine fundamental online freedoms.¹³⁵

CCIA is of the view that the legislative framework, consisting of the E-Commerce Directive, the IPR Enforcement Directive and the Copyright Directive allows for sufficient involvement of intermediaries. This is supported by a slew of industry initiatives set up over the past few years, such as the EU Memorandum of Understanding on the Sale of Counterfeit Goods via the Internet,¹³⁶ the UK Good Practices Principles for the Trading of Digital Display Advertising,¹³⁷ the Quality Assurance Guidelines by the Interactive Advertising Bureau,¹³⁸ the

¹³³ According to “The Internet Economy in the G20”, a 2012 report by the Boston Consulting Group, the Internet economy will expand its contribution to EU GDP from 3.8% in 2010 to 5.7% in 2016. The report is available at:

https://www.bcgperspectives.com/content/articles/media_entertainment_strategic_planning_4_2_trillion_opportunity_internet_economy_g20/

¹³⁴ For an in-depth analysis on how the Internet drives revenues for the creative sector, see “The Sky is Rising”, a study on creative sector developments Europe, commissioned by CCIA. Available at:

<http://www.ccianet.org/wp-content/uploads/library/Sky%20is%20Rising%202013.pdf>

¹³⁵ For an analysis of the risks of increased intermediary liability for fundamental freedoms, including the rights of due process, freedom of expression and information and right to privacy refer to the 2011 report by the UN Special Rapporteur on the Freedom of Expression, Frank LaRue. Available at:

http://www2.ohchr.org/english/bodies/hrcouncil/docs/17session/A.HRC.17.27_en.pdf

¹³⁶ The European Commission’s report on the MoU is available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2013:0209:FIN:EN:HTML>

¹³⁷ Available at <http://www.jicwebs.org/digital-trading-standards-group-good-practice-principles/good-practice-principles>

Dutch notice-and-take-down code of conduct,¹³⁹ and the Code of Practice of the Internet Services Providers Association (ISPA) of the United Kingdom,¹⁴⁰ among others. These stakeholder cooperations are often preferable to statutory instruments because they are more precisely set to the needs of specific industries, particularly in specialised areas where Governments lack expertise. Private initiatives usually develop more quickly than legislative acts involving multiple branches of Government and can be revised more easily. This flexibility makes self-regulation an ideal regulatory instrument for rapidly changing environments like the Internet. Industry initiatives involving various stakeholders are likely to provide more effective and expedient mechanisms of enforcement than statutory law. In the case of commercial-scale piracy sites, a broad coalition of industries, including advertisement brokers, payment services, and other intermediaries would likely provide more efficient tools to identify and isolate bad actors from the advertisement and payment networks that support them. Also, initiatives geared towards giving advertisers better control over where their ads are placed, e.g. through the use of independently-verified Content Verification (CV) tools, would limit ad misplacement and reduce some of the funding of piracy sites.

In light of this, we believe that additional legislation for the enforcement of copyright is not warranted at this point. However, we would welcome clear guidance from the European Commission to EU Member States to ensure the correct implementation of the existing legal framework. It is particularly in the application by national courts that we see a need for guidance on the circumstances in which injunctions against Internet intermediaries are appropriate and how the scope of such injunctions must be defined.

Moreover, we do welcome guidance by the Commission as regards the rules governing notice-and-action procedures. While we recognize the Commission's policy options on enforcement - traditionally under the scope of national institutions - are limited, we believe that more clarity as regards notice-and-takedown procedures does, in fact, constitute the missing link in the European enforcement framework.

Article 14 of the E-Commerce Directive provides a basis for developing injunctive relief but it leaves it to the discretion of Member States to do so. The Copyright¹⁴¹ and the IPR Enforcement Directive¹⁴², on the other hand, both oblige Member States to provide injunctive relief measures but, again, they fail to specify what kind of measures should be available. While some Member States like Finland have legislated in this area, most others have not. The resulting ambiguity as regards injunctive relief, e.g. the absence of harmonised notice-and-action provisions, creates considerable legal uncertainty for online intermediaries. Additionally, there would be benefits to consider 'Good Samaritan' provisions that ensure that intermediaries that voluntarily take pro-active steps do not jeopardize their safe harbour immunities. At present proactive steps taken by platforms are hampered by the risk of potentially acquiring 'actual knowledge' in the context of the E-Commerce Directive.

For this reason, we welcome the 2012 initiative by the Commission on notice-and-action procedures and look forward to further work in this area. Increased harmonisation as regards

¹³⁸ Available at: <http://www.iab.net/QAGInitiative/overview>

¹³⁹ Available at <http://isoc.nl/ino/nieuws/2008-noticeandtakedown.htm>

¹⁴⁰ Available at <http://www.ispa.org.uk/about-us/ispa-code-of-practice/>

¹⁴¹ See Article 8(3) of the Information Society Directive of 2001. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=CELEX:32001L0029:EN:HTML>

¹⁴² See Article 23 of the Directive on the Enforcement of Intellectual Property Rights from 2004. Available at: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2004:195:0016:0025:en:PDF>

the rights and obligations of online intermediaries in notice-and-takedown procedures is critical and there needs to be a better understanding as to what constitutes a valid notice. Equally important, measures intended to protect users against abusive copyright claims, such as counter-notice and put-back procedures should also be addressed. At the same time, we ask the Commission to actively monitor national developments as to ensure that domestic legislation does not undermine the safe harbour regime for online intermediaries established at the European level.

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

As noted above, the current civil enforcement framework provides a delicate balance between the interests of rightsholders, users and intermediaries. By sharing enforcement responsibilities between law enforcement agencies, rightsholders and online intermediaries, it reduces the risk of abuse by anyone of those critical stakeholders.

While respect for IP is a laudable, it should not come at the expense of legislative efforts aimed at facilitating effective market solutions. Promoting respect for IP in isolation, without offering attractive, legal alternatives to consumers, is unlikely to be in the interest of any involved stakeholders. Instead, the main objective should be to generate the most revenues for the greatest number of creators.

A disproportionate focus on respect for IP, on the other hand, will likely result in short-sighted, repressive solutions that would either lead to excessive levels of surveillance (e.g. through graduate response systems) or externalise law enforcement functions to the private sector. Legislative reforms that would shift additional responsibilities to intermediaries, e.g. by introducing a general obligation to monitor or filter, or, conversely, by giving additional entitlements to rightsholders, e.g. through a private right of action, risk upsetting this balance.

In the past three years, the European Court of Justice has explicitly dealt with the possible scope of injunctions against Internet intermediaries¹⁴³ and made clear that such injunctions need to be very specific with regards to the measures to be taken by intermediaries and must not merely be success-oriented. For example, general filtering systems installed for the prevention of copyright infringements were held disproportionate. However, such decisions and clarifications have not been taken into account by some of the EU Member States' highest national courts. For example, the German Supreme Court upheld and even tightened its case law against Internet intermediaries based on the assumption that general and success-oriented injunctions are legitimate together with the setup of general filtering systems and a general duty to manually compare pictures by the intermediary for the prevention of copyright infringements.¹⁴⁴

In any revision of copyright enforcement measures, we urge the Commission to introduce clarifications to ensure that the scope is adapted to the technical and commercial realities in which intermediaries operate, and to take into account the interests of businesses and consumers who rely on the services of intermediaries. In particular, it is important for national

¹⁴³ See e.g. C-324/09 *L'Oreal v eBay*; C-70/10 *Scarlet Extended*; C-360/10 *SABAM v Netlog*.

¹⁴⁴ BGH, Judgment dated 16 May 2013 - Kinderhochstühle im Internet II – I ZR 216/11; BGH, Judgment dated 17 August 2011 - I ZR 57/09 - Stiftparfüm.

courts to understand that injunctions must be narrowly defined and should only play a very limited role in the fight against copyright infringements online. Any approach to policymaking in this area must recognize that the most effective way to deal with copyright infringements is through cooperation between all stakeholders. Moreover, under current rules a court order must be obtained and provided to a service provider before the service provider gives out a user's details. Any reforms should not change that requirement.

Also, outsourcing enforcement functions to the private sector would likely encourage abuse. On the one hand, intermediaries could be led to apply overzealous restrictions on user-generated content and, on the other hand, rightholders could be tempted to use injunctive relief to their commercial advantage. This would undermine fundamental online freedoms such as the right of due process, freedom of expression and information and right to privacy. For this reason, it is key that effective safeguards to protect fundamental rights, such as counter-notice and put-back procedures and procedures to report enforcement, are readily available.

If additional measures are deemed necessary, they need to be put under careful review to make sure they are consistent with the protection of fundamental freedoms.

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

CCIA believes that the pursuit of a single EU Copyright Title is a laudable goal. The political reality is, however, that such an initiative would probably take decades. The European Commission can pursue the establishment of a single EU Copyright Right Title as part of a long-term strategy which should not detract from the more immediate need to ensure that copyright adapts to the realities of a networked economy. In tune with our submissions in Chapter III, we would like to reiterate some of the major considerations the European Commission should take into account. A single EU Copyright Title fit for the Internet age should:

- (1) Address the current imbalance between the fully harmonized exclusive rights and the optional exceptions and limitations. Both need to have the same legal standing.
- (2) Not allow for the introduction of new rights at the national level. These obstruct the objective of achieving a single market including the benefits coming from economies of scale.

(3) Not lose any of the flexibility inherent in the current regime of exceptions and limitations. The literal transposition of the current list of exceptions and limitations into a single Copyright Title is highly recommendable.

(4) Include an open-ended norm which would make the whole system future-proof. It is not desirable for legislation which is directly applicable throughout Europe to get under pressure each time new, unpredictable innovations and technologies come up that cannot be easily accommodated under a closed catalogue of exceptions and limitations.

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

[Open question]

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VIII. Other issues

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

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

[Open question]

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