
EBLIDA response to the 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.

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.

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

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.

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

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

C. Confidentiality

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

Please note that all contributions received will be published together with the identity of the contributor, unless the contributor objects to the publication of their personal data on the 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:

The European Bureau of Library, Information and Documentation Associations (EBLIDA), the Netherlands.

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

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

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

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

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

TYPE OF RESPONDENT (Please underline the appropriate):

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

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

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

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

Author/Performer OR Representative of authors/performers

Publisher/Producer/Broadcaster OR Representative of publishers/producers/broadcasters

→ the two above categories are, for the purposes of this questionnaire, normally referred to in questions as "**right holders**"

Intermediary/Distributor/Other service provider (e.g. online music or audiovisual service, games platform, social media, search engine, ICT industry) **OR** **Representative of intermediaries/distributors/other service providers**

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

Collective Management Organisation

Public authority

Member State

Other (Please explain):

.....
.....

II. Rights and the functioning of the Single Market

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

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

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

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.

to access such services across borders. In some instances, even if the “same” service is available in all Member States, consumers cannot access the service across borders (they can only access their “national” service, and if they try to access the "same" service in another Member State they are redirected to the one designated for their country of residence).

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)

The European Union is made of Member-States bound by national borders that often overlap common languages areas, such as Belgium that forms one country with three official languages (French, Dutch and German). And in the north of Europe there is a Sami population that share the same language (Sami) across Norway, Sweden and Finland. Border zones also host minority populations that sometimes form big communities, such as the Danish-speaking people of Schleswig-Holstein in Germany.

These quick examples show that the problem encountered by many people willing to access online content in Europe is not a consumer problem but a citizen problem rooted in European history.

One of the missions of libraries as public institutions is to provide users with access to content in their own languages. This was not a problem in the printing environment, but it has become a problem in the online environment. For instance Swedish citizens duly registered in the public library of Helsingør (Elsinore), Denmark can borrow physical documents (books, DVD's, Cd's) and go back home in Sweden and enjoy them. This is impossible for online content (e-books, movies...). To the detriment of users, online service provision is being hampered by copyright rules.

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

NO OPINION

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.

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

NO OPINION

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

It should be addressed in EU legislation the necessity to grant new rights to libraries in the form of exceptions and limitations to copyright in order to:

- reinstate a true balance of rights between the exclusive rights of the rights holders and other fundamental rights;
- ensure that licences don't override existing exceptions and limitations to copyright.

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

NO OPINION

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

NO OPINION

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

Market-led solutions (as discussed during the Licences for Europe process) prove to be unable to fulfil the needs of libraries and other cultural institutions [see EBLIDA statement posted on 13 November 2013 at <http://www.eblida.org/news/press-release-licences-4-europe-plenary-on-13-november.html>].

The copyright framework needs to be adapted to the digital era in which the public non-commercial sector (ranging from libraries, archives and other cultural heritage institutions) plays a core role in giving access to information. Cross-border access to online resources is of first importance for libraries and cultural institutions because of the need of citizens that are students, researchers and the general public: “As most knowledge creation and transfer use digital means, all barriers preventing seamless online access to digital research services for collaboration, computing and accessing scientific information (e-Science) and to infrastructures must also be removed by promoting a digital ERA. The different types of knowledge transfer, circulation and access should also be judiciously factored into research cooperation with non-EU countries” (Communication from the Commission *A Reinforced European Research Area Partnership for Excellence and Growth*, 17.07.2012, p. 13).

The full exploitation of digital opportunities should be supported by a progressive and flexible approach to copyright rules at EU level that could built up on the best existing legal solutions.

Until now, cross-border access to online resources is either impeded by the territoriality in licensing or based on reciprocal agreements between institutions that don't fall under a clear and unified set of rules.

The differences in the implementation of the Directive 2001/29/EC, especially of the list of exceptions, create uncertainty in the application of the law and extreme complexity. When the EU would like to be closer to its citizens, rules need to be easy to understand, applicable throughout the whole territory and flexible enough to adapt to new uses. The increased number of foreign students, as well as the free movements of citizens across the EU should encourage information sharing and should foster cross-border access to content, especially the widest possible access to European Cultural Heritage (as mentioned in the COMITÉ DES SAGES report *The New Renaissance*, Report of the Reflection group on bringing Europe's cultural heritage online, 2011, http://ec.europa.eu/information_society/activities/digital_libraries/doc/refgroup/final_report_cds.pdf).

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.

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.

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 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.

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).

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).

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)

See answer to Q10.

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 relief²⁴)?*

NO OPINION

2. Two rights involved in a single act of exploitation

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

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

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

YES

Specific acts of digital reproduction made by libraries for their services are covered by the exception 5(2)(c) of the InfoSoc Directive (at least for documents owned by libraries). But in the digital environment many typical library services such as lending, inter-library loan, document supply, involve the transmission by electronic means, which is subject to the making available right. And, according to the prevailing interpretation, in such cases the exception provided by art. 5(1) (temporary acts of reproduction which have no independent economic significance), which is still an exception to the right of

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

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

reproduction, is not applicable. To solve this problem, there should be a clear provision that allows libraries to make available to the public reproductions legitimately made for their services. See also answers to Q23, Q24, Q32 and Q39.

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 CJEU²⁵ 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 CJEU²⁶ 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)

Hyperlink should not be subject to the authorisation of the rightholder for content legally accessible on the Internet.

Two kind of hyperlinks exist. The first one consists of a metadata element that leads to a content on another website and the second one consists of a hyperlink that directly integrates content in another website than where it originates from (embedded link or framing).

The first hyperlink should not be subject to authorisation, while the second hyperlink is not a problem of the link itself (which is only the technical means for the appropriation (or possibly misappropriation) of content), but a legal issue that can be dealt with by the general rules of copyright and/or competition right, as many court cases have already done (mainly prohibiting framing or inline linking without source identification).

By default, hyperlinks should not be subject to authorisation and if necessary their use should be covered by exceptions and limitations.

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

²⁶ Case C-360/13 (Public Relations Consultants Association Ltd). See also

http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0202_PressSummary.pdf.

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)

Content legally accessible on the Internet should be considered exempted of authorisation of the right holder by default.

The purpose of the Internet is the communication to the public. In this situation, there shouldn't be any request of rightholders authorisation.

4. Download to own digital content

Digital content is increasingly being bought via digital transmission (e.g. download to own). Questions arise as to the possibility for users to dispose of the files they buy in this manner (e.g. by selling them or by giving them as a gift). The principle of EU exhaustion of the distribution right applies in the case of the distribution of physical copies (e.g. when a tangible article such as a CD or a book, etc. is sold, the right holder cannot prevent the further distribution of that tangible article)²⁷. The issue that arises here is whether this principle can also be applied in the case of an act of transmission equivalent in its effect to distribution (i.e. where the buyer acquires the property of the copy)²⁸. This raises difficult questions, notably relating to the practical application of such an approach (how to avoid re-sellers keeping and using a copy of a work after they have “re-sold” it – this is often referred to as the “forward and delete” question) as well as to the economic implications of the creation of a second-hand market of copies of perfect quality that never deteriorate (in contrast to the second-hand market for physical goods).

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

YES – Please explain by giving examples

Libraries are not interested in reselling, but in re-use for cultural and scientific purposes. The problem is that any kind of use of digital content are entirely dependent on the rules set by the publisher, operating by licenses and technological protection measures. Cultural content in any form of distribution should be treated by the law for what they are - content and not temporary services.

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

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

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

NO OPINION

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 absolute²⁹. 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 considered³⁰.

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

NO OPINION

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

NO OPINION

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

NO OPINION

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

NO OPINION

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 developed³¹, 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

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

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

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

identifiers and databases. The Global Repertoire Database³² should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition³³ 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 Hub³⁴ 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?*

The European Union should ensure that: (1) identifiers as well as rights ownership and permission databases should avail open access, based on open standards, and (2) all identifiers as well as rights ownership and permission databases are interoperable across all of Europe (and beyond).

Any system that is developed must be developed in a true multi stakeholder approach (e.g not only by rights holders and intermediaries) and should be reflective of work already undertaken (for example by Europeana). Rights ownership and permission databases in particular must be publicly accessible via machine readable interfaces. They must also include the ability to store information on out-of-copyright (Public Domain) and openly licensed works.

As an example of good practice, see the Open Bibliographic Data Principles, <http://openbiblio.net/principles/>.

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 Convention³⁵ 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.

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

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

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

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

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

NO – Please explain if they should be longer or shorter

The term of protection expanded right after 1993 in many EU countries from 50 to 70 years after the death of the author, implementing an EU directive on harmonisation of the term of protection. The EU harmonised the term of protection on the longer term applied by one of its member state, Germany (70 years) although the Berne convention only requires 50 years. 70 years is a very long time, and it must be reduced to enable and ensure better access to information, knowledge and culture. Very few works have a commercial life beyond a couple of decades. Excessively long terms of protection produce problems for many legitimate uses of copyrighted material e.g. in the form of cumbersome or non-existing clearance mechanisms for use. Time of protection should not be longer than 50 years after the death of the author. This could be a first step towards a more significant reduction of term of protection that would require a revision of the Berne convention.

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/EC³⁶.

Exceptions and limitations in the national and EU copyright laws have to respect international law³⁷. In accordance with international obligations, the EU *acquis* requires that limitations and exceptions can only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interest of the rightholders.

Whereas the catalogue of limitations and exceptions included in EU law is exhaustive (no other exceptions can be applied to the rights harmonised at EU level)³⁸, these limitations and exceptions are often optional³⁹, 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

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

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

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

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

for copyright are of equivalent significance in policy terms and in terms of their potential effect on the functioning of the Single Market.

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

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

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

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

YES – Please explain by referring to specific cases

The purpose of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights in the information society was explicitly (as its title shows) to create more harmonisation within the EU. Ironically, it ends in a situation of non-harmonisation. Limitations and exceptions vary a lot from country to country. Only one exception is mandatory today: the exception for temporary copies (whether this exception could/should be regarded as an act of reproduction was also discussed at WIPO in 1996).

In addition to this situation of non harmonisation, the list of exceptions was made exhaustive, so no exceptions could be adjusted or expanded to similar uses, and any new exceptions could not be added despite the fact that the world and the information market is ever changing.

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

It is in the library's missions to cooperate and share resources across borders. For the European library community the existence of 28 different copyright regimes with their own exceptions makes this cooperation more difficult. One example is that the definition of "non-commercial" differs from country to country.

The lack of harmonisation and the optional character of the list of exceptions created an ambiguous situation throughout the EU. Especially when several Member-States work together in cross-border projects such as:

- **Europeana and all the related projects whose missions are to give online access to European Cultural Heritage;**
- **the European Library;**
- **the EU arctic centre, whose mission is, among others to develop knowledge and spread information on the region <http://www.arcticcentre.org/InEnglish/ABOUT-US/EU-Arctic-Information-Centre> or,**
- **the Upper Rhin University.;**
- **All other cross-border projects shared by several member states trying to pool resources to the benefit of their population and to develop mutual understanding and reciprocal knowledge. All those structures work with libraries that are supposed to give access to their collection (including digital ones), but can be forbidden to do so because of different copyright regimes and absence of harmonised exceptions in the respective member-states.**

In addition, this lack of harmonisation is even more an obstacle when projects involve non-members states of the EU.

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

All exceptions should be made mandatory for all EU countries, especially those for research and education, public-mission institutions, and disability, because they protect fundamental rights. There is no obvious reason to have only one mandatory exception.

In addition it should be ensured that contracts cannot override limitations and exceptions.

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

See question 22. All current existing exceptions have to remain. In addition, to address technological change that has already occurred, the revised Directive should include: a functional exception for the mass digitisation and making available of out of commerce works by libraries, archives and museums for non-commercial purposes; an exception for text and data mining; an exception for digital lending. Moreover, a more flexible and open legislation is needed. In particular, a "fair use" exception, in addition to those

listed in the Directives, would ensure that the exceptions and limitations can keep pace with technology and social changes.

We do NOT want to remove already existing exceptions, but only add new ones and find a more flexible solution than the current one. To list any new specific exceptions that will take into account any new development in years to come wouldn't prove to be useful. The list should therefore be combined with more general principles like "fair use" or "similar use".

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

It is not easy to answer this question independently from the questions above. So we will repeat the need for a more flexible and open solution. Most exceptions are too narrow and specific, even for 2001 when they were written.

The exception for libraries, archives and museums 5.2.(c) is more open in the way that it allows "specific acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives, which are not for direct or indirect economic or commercial advantage", but it is an exception for the reproduction right ONLY, and it does not cover any other library activity that would be considered fair use in a more flexible legislation. One example is that the transmission of single scanned articles or other pieces of information (like one single scanned poem) to individual users or other libraries, on request, is considered as communication to the public and therefore needs to be licensed. In the analog world this is covered by an exception in most countries. This is a case that in our opinion clearly would pass the three step test, as it is a specific case and does not harm the interests of the author.

Copyright exists in order to balance the rights of authors and rights holders with those of users. This balance has been damaged in the past years with only the rights holders benefiting. The main objective of copyright reform at the European level should be to maintain those rights and re-establish a new balance where innovation, research as well as legal access to digital content will be encouraged. Therefore, Copyright law shall balance the right to access, share and use copyrighted works with the author's right to protection and compensation.

Now we have a situation of imbalance, with the exhaustive list of non-mandatory exceptions, increasing terms of protection (the last one was for sound recordings, in 2011), cumbersome, expensive and monopolistic licensing models for libraries for electronic journals and books. Libraries have always been important contributors to the revenues, especially for academic and research publishers, and are paying for what they acquire. More generally, a recent press release of the British Library shows that "The economic value that the library delivers is now almost five times its costs, representing a return on investment of 5:1" and therefore that libraries, archives and information services have an important role to play in boosting the economy. A competitive market can only innovate by relying on well-educated and informed citizens

and consistent investment in libraries, archives and information services. This generates a good return on investment and stimulates the economy.

However there is a need to establish fair conditions applying to libraries, archives and cultural heritage institutions as a whole and not only to rightsholders. Rules that apply in the commercial environment (especially for films and music) shall apply differently in public institutions that do not seek a direct or indirect economic interest.

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.

More reliance on court decisions and case-by-case interpretation by the Commission may be a consequence of an open norm and more flexibility in copyright legislation. Result of Court decisions would support better predictability of the pattern of the fair use concept. Court cases could however be extremely costly and should not be the only way of seeking for a solution. So, an open ended norm reflecting the Three Step test of the Berne convention, i.e. a Fair use exception, should be the necessary integration of an updated list of mandatory exceptions, in order to have, on the one hand, a copyright framework sufficiently well-defined to avoid uncertainty and continuous appeals to the courts, and, on the other hand, to avoid the rigidity of an **exhaustive** list (see also answers to Questions 22, 23, 29 and 80).

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

At present, the EU only obliges EU countries to adopt one exception (regarding temporary acts of reproduction), while the adoption of the others is optional. As a result, something that's legal in one country could be illegal elsewhere.

For example, the UK is the only Member State without a private copying exception, so an act that is legal in Spain or the Netherland suddenly becomes a criminal offence in the UK. Finland hardly has a parody exception, so a work considered legal in Germany could be infringing copyright in Finland.

From a research perspective, this means that researchers have difficulties working together and sharing knowledge across borders. Currently, for example, inter-library loans are hampered across borders.

Right owners and service providers based in jurisdictions with stricter user freedoms often do not accept the wider scope of freedoms in other jurisdictions and attempt to limit it contractually or use technical measures.

Moreover, most licences impose the law of the state of the publisher and not that of the subscribing institution, and this leads to the paradox that publishers from different

Member states are not subject to national laws (including exceptions to copyright) even if they are protected by national copyright laws.

This, coupled with the fact that there cannot be a tender among several competitors for the provision of copyright protected content that can be provided just by a single company, often makes it difficult for Libraries to obtain licences really suitable to their needs, even when their national legislation (copyright law, contract law, public procurement law, privacy law, etc.) could provide solutions.

As an example, national legislations in most Member States contain specific provisions on technical accessibility, but they differ from each other both with reference to the categories of beneficiaries and in terms of procedures to benefit. Moreover, their application can be complicated by licensing schemes and procedures. Art. 71-bis of the Italian Copyright Law n. 633/1941 ensures that, given certain conditions, people who have disabilities that prevent them accessing copyright works in their original format are able to benefit from accessible versions of these works. And art. 4 of the Italian Law n. 4/2004 on Technical accessibility points out the obligations and duties regarding accessibility and inclusion in the case of public procurement of IT goods and services. In particular, when purchasing ICT goods and services, signing contracts regarding their development and maintenance or carrying out competitive tenders, the accessibility requirements must always be taken into consideration.

At this point there are two different levels of obligation: on one hand, the compliance with the accessibility requirements is mandatory for public Web sites (and in general for Web applications), and whenever private or public subjects draw on public grants for the procurement of ICT equipment and tools explicitly meant for disabled users or workers.

Public agencies must eventually provide an adequate justification for not taking the accessibility requirements into account or for buying a product that fails to reach compliance.

Article 5 of the Italian Law nr.4/2004 on Technical accessibility reminds the importance of accessibility in the sector of education including the production of teaching tools, courseware and electronic textbooks.

Given such legislation, licenses signed by Public bodies should contain a provision upon which, if accessible formats are not available, format shifting and other adaptations are permitted when necessary to ensure technical accessibility and usability by reading impaired authorised users. Within the limits of this purpose, the licensor should agree to temporarily remove the technical barriers that may prevent the adaptations needed..

But very few standard licenses contain such provision, and there are high transaction costs in negotiating it case by case. On the other hand, the procedure for subscribing electronic licenses on content covered by IP exclusive rights is often a negotiated one without a call for competition (because of the absence of competitors), so that the contractual position of public bodies is the weaker one.

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?)*

The concept of fair compensation should include that in some cases a fair compensation can also be no compensation. For uses that pass the three step test, that is the case. Compensation schemes with a legal basis should be based only on uses where there is clear evidence that it “harms” the author’s economic rights.

Compensation for “harm” done to direct author’s economic rights should be balanced and evaluated with the public exposure public institutions (libraries, Cultural heritage institutions, others...) are given for free to the said author. This means that State subsidies or grant and tax payers money provided for supporting translation and/or publication of authors should be considered as an authorisation by default for communication to the public of the said translated text and/or publication by public institutions (libraries, Cultural heritage institutions...); moreover, publications of research results which are mainly financed by public funds should be open access, according to the recommendations of the European Commission on open access.

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 archiving⁴¹ and enable on-site consultation of the works and other subject matter in the collections of such institutions⁴². 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 Directive⁴³.

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

⁴¹ Article 5(2)c of Directive 2001/29.

⁴² Article 5(3)n of Directive 2001/29.

⁴³ Article 5 of Directive 2006/115/EC.

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.

(a)

Print and analogue materials. The digitization for preservation purposes carried out by publicly accessible cultural institutions is implicitly included among the specific acts of reproduction referred to in Article 5 (2) (c) of the Infosoc Directive. In addition, the EU has repeatedly recommended the adoption of national policies encouraging the digitization of cultural heritage. However, this exception is optional and it has been generally implemented under very narrow terms, so that, in many member states, even format shifting for preservation purpose is still prohibited, or limited to specific formats (in input and/or output) as show articles 68(2) and 69(2) of the Italian Copyright law.

Digital materials fixed on support. CDs and DVDs are often protected by technological measures (TPM). The removal of TPM would require the cooperation of the producer. Art. 6 of the Infosoc Directive provides that technological protection measures are protected per se, independently on the scope of protection, entrusting to voluntary agreements or to subsidiary interventions of Member States the adoption of appropriate measures to ensure that legitimate users can make effective use of licensed content. The strength of the protection of TPMs compared with the weakness of the provision in favor of legitimate uses has led in many Member States to the absence of effective guarantee for legitimate users, including libraries. As a result, many libraries are not able to preserve CDs and DVDs legally acquired. These materials will become unusable due to technological obsolescence in a few years.

Subscribed online content. In the case of online works there is no balance at all. All the weight is on the side of the copyright holders only. Indeed the exception provided by art. 5 (2) (c) of Directive 2001/29 does not apply because, according to art. 6 of the Directive, it cannot provide any obligation to the removal of TPM to the benefit of beneficiaries of exceptions for "works or other subject-matter made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them". While the exclusive distribution right is exhausted by the first sale in EU, so that print materials can enter permanently into the library collection, most content provided online are offered as temporary services, ceasing upon the expiry of the subscription. In such cases, library will have to pay again every year to ensure access to those content. In many cases, even when licenses provide for a perpetual right of access in favor of the library and its users ("post-termination clause"), libraries cannot obtain back-up files for conservation, but can only have access through the producer's website, who does not give guarantees for

long-term preservation. Few licenses only, negotiated by libraries or their consortia, provide for the delivery of files for local hosting and preservation purposes. Some others contain a simple obligation to transfer the files in case the company will not be able to host them.

Although a single library does not have the means to ensure the long-term digital preservation of large amounts of resources, and the payment of an annual fee could be justified by the fact that publishers and other commercial providers bear the costs of storage and management of digital content on their own platforms, Recital 16 of the Commission Recommendation of 27 October 2011, shows that the problem is that “[...] in spite of progress made across the EU on the preservation of digital material, in several Member States no clear and comprehensive policies are in place on the preservation of digital content. The absence of such policies poses a threat to the survival of digitised material and may also result in the loss of material produced in digital format (born digital material). The development of effective means of digital preservation has far-reaching implications that go beyond cultural institutions. Questions of digital preservation are relevant for any private or public organisation, which is obliged or which wishes to preserve digital material [...]”

(see: <http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2011:283:0039:0045:EN:PDF>).

Libraries play an important role in the network of cultural institutions in charge of preserving nations’ history and archives. They play a specific role in the literature and information sector by receiving in legal deposit, keeping and preserving, buying, organizing, promoting and giving access to information books and literature as a whole. Their mission is done on behalf of the general public, education and research. Several issues are at stake now:- private companies that license content don’t have the mission to defend or take into account the “public interest”, “education”, or “open access to knowledge” in their business/licence models;

- Economic sustainability of private companies that license content doesn’t offer any long term guarantee;

- The evolution of format leads to a quick obsolescence that needs public infrastructure to act outside of economic interest to maintain national memories.

All these issues are implicit defined missions and policy goals for many libraries, both public and academic.

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

Art. 5(2)(c) of the 2001/29/EC should be made mandatory. As the 'Study on the application of directive 2001/29/EC on copyright and related rights in the information society' (page 301) highlights “[...]to make an exception mandatory could apply in the case of article 5(2) c), as the development of digital libraries is one of the key objectives of the Digital Agenda, and the digitization of cultural heritage is promoted by the Council and the Commission [...]”. Art. 6 of the 2001/29/EC directive should be revised in order to enforce exceptions and limitations and to ensure legitimate utilizations of protected works, regardless of format or mode of dissemination.

Updating the copyright framework in order that online content is not considered a service.

Under the current terms, the copyright framework considers online content as a (just temporary) service. This creates a huge risk for cultural heritage institutions, much higher than with print material, given the extreme volatility and perishability of digital formats. It is a fact that long-term strategies such as digital preservation and data curation are at present largely entrusted to the market and its fluctuations which works quasi exclusively on a very short-term .

Libraries should be granted a non-exclusive, royalty-free, perpetual right to archive complete copies of subscribed online materials, and to use the archived materials in the event that access on the original platform is discontinued or suspended. An exception should ensure, at the request of the library, the availability of back-up files for long-term preservation, regardless of the format of publication.

That art. 5(2) c of Directive 2001/29/EC been made mandatory and art. 6 of Directive 2001/29/EC enforces exceptions and limitations and ensures legitimate utilizations of protected works, regardless of format or mode of dissemination, would support the specific public mission and responsibility of libraries and other cultural heritage institutions that is different from most other users of copyrighted material.

As mentioned in our answer to question 28, their main responsibility is to preserve, organise, make available, and promote information and literature, whose most of the content is still copyright protected.

That subscribed online content can escape libraries preservation scheme because of the absence of specific exceptions creates a huge risk of a 21st century black hole where a large amount of content could disappear forever.

Short term economic interests shouldn't limit long-term preservation of human's cultural heritage.

An updated copyright framework is needed to ensure specific regulation for libraries to secure their public mission.

In the case some uses wouldn't be covered by an exception, a "fair use" approach would therefore be necessary.

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?

See answer to question 29.

Art. 5(2)(c) of the 2001/29/EC should be made mandatory. As the 'Study on the application of directive 2001/29/EC on copyright and related rights in the information society' (page 301) highlights [...]to make an exception mandatory could apply in the case of article 5(2) c), as the development of digital libraries is one of the key objectives of the Digital Agenda, and the digitization of cultural heritage is promoted by the Council and the Commission [...].

Art. 6 of the 2001/29/EC directive should be revised in order to enforce exceptions and limitations and to ensure legitimate utilizations of protected works, regardless of format or mode of dissemination.

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

See answer to question 30.

2. Off-premises access to library collections

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

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

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

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

Remote access to online collection of libraries covers a broad spectrum going from digitised collection to digital-born collection.

Libraries are subject to complex and lengthy negotiations with publishers, database vendors and right holders, impacting collection development, duration of access, permitted uses.. Libraries often entrust negotiation and management of contracts to national or regional institutional consortia to increase their bargaining power. But the use of consortia for the negotiations is a remedy, not an optimal solution, and the logic of large numbers may introduce rigidities in pricing and business models, encouraging the purchase or subscription of large packages of content (big deal) rather than the selection of targeted works.

Currently there are gaps to be filled in the Directives (e.g. in Infosoc and Database directives) and even more in national copyright laws. These gaps contribute to enforce unbalanced power relations. Unbalanced power relations among right holders, and

between right holders and users do not contribute to establish an environment of best practices for negotiation and contracts.

At present, licences are not satisfactory for the following reasons:

Technical accessibility and interoperability: Format shifting and other adaptations should be permitted not only for long-term preservation purposes, but also for remote access when needed to ensure technical accessibility and usability by print impaired people, or to effectively integrate acquired or licensed materials in Library information systems, according to international standards of interoperability. But the copyright holder or the database producer can refuse both to grant a special licence, and, in case of born-digital content, to temporarily remove the technological protection measures in order to facilitate the use, and often they refuse. It should be noted that TPMs protect not only content, but also metadata related to those content, so that the legal protection of TPMs affects also access and reuse of metadata for integration within library catalogues and information discovery systems.

Inter-Library Loan and Document Supply: Cooperation between cultural institutions for the benefit of the public is explicitly encouraged by numerous international, national and regional standards. Interlibrary Loan and Document Supply are typical library services based on the temporary exchange of documents between library "A" that holds the content and library "B" that needs it. As an internal activity between libraries, interlibrary exchange should be totally irrelevant for the purposes of protection of copyright. In the digital environment, such exchange requires transmission in a network by an intermediary (eg. an internet provider and/or a service provider). But there is uncertainty on these points: digital reproductions made by libraries for inter-library exchange purposes can or cannot be considered as **specific acts** of reproduction covered by art. 5(2)c) of the InfoSoc Directive? According to the InfoSoc Directive (art. 5(2)c) and art. 5(1)), a digital reproduction made by the library "A" can or cannot be sent electronically to the library "B", provided that copy will be used by the library "B" for legitimate uses such as replacement of damaged parts of a volume in its collection, or to give to an end-user a print copy within the limits of art. 5(2)b), or communication by dedicated terminals within the (very strict) limits of art. 5(3)n), or utilization for administrative procedures within the limits of art. 5(3)e)? An interlibrary electronic exchange of protected works, or parts of them, can or cannot be considered one of those "Temporary acts of reproduction" referred to in Article 5(1), "which are transient or incidental [and] an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance", and therefore "exempted from the reproduction right provided for in Article 2"?

There are different interpretations on this matter, and in most Member States there are no explicit exceptions for interlibrary services.

For online content subscribed to by libraries, the interlibrary exchange is subject to licences, and only few publishers allow such digital exchange.

Remote access to born-digital or digitized content (aka E-Lending): see answers to Q36-38

Utilizations for distance learning courses and programmes: most publishers do not allow the extraction and reuse of reasonable portions of protected works acquired or subscribed to by libraries or other cultural institutions and their communication to registered users through e-Learning platforms. It is generally accepted that the exception provided by Art. 5(3)(a) of Directive 2001/29/EC covers both face-to-face and distance education, and that the fundamental rights it protects (freedom of expression, right to be informed, right to learn) are of crucial importance. The enforcement of this exception at European level, prohibiting its restriction by national legislations, or by licences is of utmost importance.

Open access to research results: see answer to Q49.

Content mining: see answer to Q49 and 53.

Post-termination access to online subscribed content: recalling our answers to Q 28-30, most licences do not provide any guarantee for access to subscribed content after the termination of a licence. Such content is considered just as a temporary service.

Academic and research libraries have negotiated licenses for decades (even though the above mentioned problems have been rather consistent over the years). Digital material until now has to a large extent been focused on research and professional information (mainly journals), reference and news, and not so much on books and mainstream journals. Public libraries are a kind of newcomer on this arena, due to the rapid development of e-books for fiction and general/popular non-fiction.

Public libraries differ from academic and research libraries in that their user base is the general public, i.e. anyone with a valid library card. But, in contrast to the analog library services, access to e-material is usually restricted to a specific geographic area, for instance a municipality.

This shows that although the EU is encouraging cross-border cooperation, it seems not applicable to online content hosted by libraries because of territorial nature of copyright and/or the grant of authorisation by rights holders.

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

Licences of digital content were expected to extend, not limit opportunities for access and use through exceptions and limitations to exclusive rights. On the contrary, exceptions and limitations are often overridden by licences and TPMs, even when licences are negotiated by Library consortia.

There is a need to ensure that contract/licences don't override existing exceptions and limitations to copyright.

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

The reform, i.e. a legislative solution, should clarify that every kind of utilization made by libraries and cultural institutions for their public-interest mission are allowed, no matter the medium of the transmission.

Remote access should be allowed for all the utilizations discussed above (see answers to Q 32).

Exceptions and limitations should apply to online content as well as to analogue materials, and should be mandatory and cannot be overridden by contracts or TPMs.

Exceptions and limitations should be flexible and updated to new emerging needs, introducing a general fair use provision additional to the exceptions and limitations expressly provided, as it has been suggested with art. 16 of the IFLA Treaty Proposal (<http://www.ifla.org/node/5858>) and art. 5.5. of the European Copyright Code drafted by the Wittem Group.

Such a general provision should allow application by analogy of existing exceptions and limitations, provided they are consistent with the concept of ‘fair practice’, and/or compliant with the Three-Step-Test, which presently is recalled by the Infosoc Directive just to limit the application of Exceptions and Limitations.

Moreover, contracts should not override any statutory provisions regarding the entry of a work into the public domain.

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

NO OPINION

3. E – lending

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

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

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

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

YES – Please explain with specific examples

Significant barriers can be observed both for research and for public libraries: some publishers refuse to supply their products to libraries, or offer them at higher prices compared to their print equivalents, or impose default selection, such as bundling, or remove content without informing the library and so on.

It is a significant, and in our view unacceptable, change that the collection building policy of libraries might be decided by publishers. This would mean that libraries would no longer be able to guarantee free access to content, information, and culture for European citizens.

For instance, in Austria and Germany, find below a Comparison in the Bestseller list in October 2013 (source: CIANDO)

Liste	Number physical Books	Number of eBooks for Individuals	Number of eBooks for Libraries
Hauptverband d. österr. Buchhandels	75	59(=100%)	34(=57,6%)
Spiegel-Bestsellerliste	40	38(=100%)	19(=50%)
ORF-Bestenliste	10	4(=100%)	3(=75%)

In the UK (from the EBLIDA survey on e-books, 2013 – unpublished, survey under review)

Public libraries purchase mainly trade books. Some trade publishers view library availability of e-books as a direct threat to their economic interest and are withholding titles. Research by Shelf Free, conducted in February 2013, found that 85% of e-books aren't available to public libraries. Out of the top 50, most borrowed adult fiction books of 2012 only 7 were available for public libraries to buy as e-books – and even then it depended on which supplier the library service was signed up to. With one supplier, only two titles were available. (source EBLIDA e-book survey, April 2013).

From the Bookseller official top 50 ranking for eBooks in August 2013, only six were available for libraries to purchase and five of these were from the same author and were published in 2012.

Even publishers such as Random House who do offer ebooks through library supplier withhold the front list titles.

Titles such as Dan Brown's Inferno are available in eAudio in UK market, but not ebook format.

With Overdrive it should also been mentioned the loss of titles if you don't continue with subscription.

All these examples show the unstable environment and the inadequacy of access to up to date literature, hence a democracy challenge for libraries. When people who can only afford it can access to e-books, what kind of society do we expect to develop?

Furthermore, there are some examples that libraries also in the digital environment boost sales of publishers. See <http://paidcontent.org/2013/05/03/sourcebooks-overdrive-launch-pilot-to-demonstrate-the-impact-of-ebook-library-lending-on-sales/>

Moreover, multiple licences + different models create lack of clarity on the condition of access to content for users.

Deterioration of authorised users' rights is evident (e.g., crossing a border with a borrowed book was not a problem. This is impossible with an online access to a library across a border).

Usually licenses will not in any case allow e-lending to other libraries or patrons outside of the library's defined population (e. g. municipality, university, college).

If licences terms and conditions undermine the library's missions, and the activities established to fulfil it, then the introduction of and transition to e-material will result in reduced availability for library patrons.

Moreover, digital content and availability should be based on the economy of abundance (see also Q 38). Access to digital content offers huge potentiality to overcome physical barriers and permits user to access to content at a time and in a place individually chosen, without being restricted by opening hours. In this context, also, libraries remain constraint by acquisition budgets. Each and every library cannot afford to acquire for themselves all that is commercially available on the market. They rely on sharing resources with other libraries in order to give good and adequate service to their patrons.

Quoting OECD (2012) *E-books: Developments and Policy Consideration*, <http://dx.doi.org/10.1787/5k912zxcg5svh-en>, p. 8: “[...] While e-books can help increase access to information, DRM represents a significant obstacle to lending of e-books, and challenges the exercise of such rights by libraries which could be considered a public interest concern in the foreseeable future. The service must not be proprietary, and be available for different technological platforms and devices.

The DRM generally embedded in many e-books being produced today does not allow for the kind of free and open access provided by, for example, public libraries. However, most e-editions in scholarly libraries are free of DRM.

[...] Because e-books are generally made available for lending only to registered users at a particular library, libraries may need to purchase multiple licences rather than sharing resources through interlibrary loans. Costs may also be affected if territorial Digital Rights Management (DRM) restricts libraries to purchasing geographically-specific editions of books [...].”

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

We would recommend to follow the EBLIDA principles on the acquisition and access to e-books by libraries highlighting among others the following needs:

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

- All e-books titles should be available to libraries at the time of publication;
- Publishers should deliver e-books in interoperable formats, or cooperate with libraries in making interoperable formats;
- Libraries should be permitted to make available acquired or licensed e-books for a limited period of time to a user.
- It should be possible to use the same e-book title simultaneously;
- Authorised users should be able to download an e-book either in the library or by way of remote access via authentication systems.

see: http://www.eblida.org/Special%20Events/Key-principles-acquisition-eBooks-November2012/GB_English%20Version%20Key%20Principles.pdf

NB: as mentioned in the principles, a registered user is a user who has registered with the library and whose identity is known to the library.

Public lending right (PLR) and e-lending:

Public Lending Right applies to physical lending of books and materials. An adaptation of the Public Lending Right should also apply to the digital lending (e-lending) of copyright works by EU public libraries ensuring that authors and creators are rewarded for the use of their works.

The question referring to interlibrary loan of digital content can be read in answer to Q32.

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?

There is no possible comparison between physical and online collection in libraries. Theoretically digital collection should be based on the economy of abundance meaning access to an infinity of content, where budget constraint could be the “only” limit. But in reality, libraries can buy all physical publications, but cannot buy licences to all commercially available content because “the rights holders are free to decide whether they want to give access to a specific work, and to decide on the terms for such access. The consequence of this is that the collection building policy may be decided by the publisher and not by the library “ (see EBLIDA. European Libraries and the challenges of e-publishing. May 2012, <http://www.eblida.org/news/european-libraries-and-the-challenges-of-e-publishing.html>).

In addition to this core issue, publishers currently develop models with a lot of frictions that are either mere copy/paste of physical models or unaffordable models at high costs, or yearly subscription packages where the libraries have no influence on the selection of publications. None of the models pay attention to libraries public missions and needs.

Libraries should have a “right to e-lend”, which will give the library users a “right to e-read”. An exception allowing e-books and e-journals to be purchased and loaned for lending virtually through remote downloads or by streaming is required. The format and technology must not be a hindrance for access to books. Legal mechanisms and terms should be equivalent for analog and digital lending.

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?

Libraries already offer a combination of on-premises consultation of the physical collection + on-premises consultation of certain digital collection, public lending and remote access to (limited) online resources, etc...

Differences come from the opportunity offered by a 24/7 access to digital collections that online services could deliver. With this improvement of access, libraries could reach audiences that until now have difficulties in coming on site during opening times. This is an opportunity to enhance access to information and deliver the Knowledge based society the European Union is calling for.

The last development in libraries usages showed that the uses of the on-premises services of libraries and other cultural institutions such as museums increased, as well as the visitor rate. The development of online services doesn’t contradict the physical use of libraries and complement a range of services in developing free access to information.

4. Mass digitisation

The term “mass digitisation” is normally used to refer to efforts by institutions such as libraries and archives to digitise (e.g. scan) the entire content or part of their collections with an objective to preserve these collections and, normally, to make them available to the public. Examples are efforts by libraries to digitise novels 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 other⁴⁴. Provided the required funding is ensured (digitisation projects are extremely expensive), the result of this MoU should be that books that are currently to be found only in the archives of, for instance, libraries will be digitised and made available online to everyone. The MoU is based on voluntary licences (granted by Collective Management Organisations on the basis of the mandates they receive from authors and publishers). Some Member States may need to enact legislation to ensure the largest possible

⁴⁴ You will find more information about his MoU on the following website:
http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm .

effect of such licences (e.g. by establishing in legislation a presumption of representation of a collecting society or the recognition of an “extended effect” to the licences granted)⁴⁵.

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

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

The term Mass digitisation (as referred to in the Orphan Works Directive) applies to publicly accessible libraries, educational establishments and museums, as well as by archives, film or audio heritage institutions and public-service broadcasting organisations. The orphan works directive contains a restrictive clause on diligent search that makes it impossible to use. The MoU on Out of Commerce Works might have solved the Orphan Works directive issue by addressing the issue from a broader perspective. In addition to the fact that national laws fail to fully address the needs of digital libraries, the MoU is severely limited by its lack of concrete application across Europe and the lack of implementation in National Law. It is most probable that the question of cross-border access will be better solved by enabling an exception for publicly funded institution for making available content resulting of Mass digitisation process by an extension of articles 5 (2)c and 5(3)n of the Infosoc directive. Actually in Norway, the mass digitization carried out by the national library, is an exception warranted in 5(2)c. And the making available through a license (ECL) is in fact an extension of the Norwegian implementation of 5(2)c”

Solutions exist, such as Extended Collective Licensing that might be useful when it comes to make available content online for projects resulting from Mass digitisation, as stated in the report available at :

http://www.ivir.nl/publicaties/guibault/ECL_Europeana_final_report092011.pdf.

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

The mechanism should be based on an exception allowing for mass digitization of out of print works. The mechanism should regulate right clearance in line with the guidelines provided for in the Out of Commerce MoU.

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

B. Teaching

Directive 2001/29/EC⁴⁶ enables Member States to implement in their national legislation limitations and exceptions for the purpose of illustration for non-commercial teaching. Such exceptions would typically allow a teacher to use parts of or full works to illustrate his course, e.g. by distributing copies of fragments of a book or of newspaper articles in the classroom or by showing protected content on a smart board without having to obtain authorisation from the right holders. The open formulation of this (optional) provision allows for rather different implementation at Member States level. The implementation of the exception differs from Member State to Member State, with several Member States providing instead a framework for the licensing of content for certain educational uses. Some argue that the law should provide for better possibilities for distance learning and study at home.

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

(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

School and university libraries are resource centres for both students and teachers. Collections are also built to provide teachers with wide spectre of pedagogical material to be used and shared in the classroom and also more and more for distant learning. However, not all member countries have implemented the exception 5(3)(a) for illustration for teaching purposes, and those that have, usually have much more limited exceptions than the article in the directive allows for . It is actually a quite open exception. But since the implementation differs a lot between countries, what is permitted in one country is not allowed across the border. Universities , especially those located next to a national border (such as Lille (France) or Antwerpen (Belgium), having developed high-level specialisation and attractive student curricula usually needs teaching material to be as widely available as possible since they attract students from all over Europe.

The development of Massive Open Online Course (MOOCs) challenges the way exceptions for teaching have been implemented and request a shift towards a by default exception for teaching.

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

Most licences do not allow the extraction and reuse of reasonable portions of licensed materials and their communication to Authorized Users through e-Learning platforms. It is generally accepted that the exception provided by Art. 5(3)(a) of Directive 2001/29/EC covers both face-to-face and distance education, and that the fundamental rights it protects (freedom of expression, right to be informed) are of crucial importance,

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

it is of particular importance the enforcement of this exception at European level, prohibiting its restriction by national legislations, or by licences.

Licenses for electronic journals are usually very restrictive when it comes to serving users outside of the institution, even electronic transmission of single articles in pdf-format to external individual users or other libraries. It can however be printed and sent by regular mail, which seems rather odd these days. University and college libraries usually manage the licenses as a continuation of their earlier mission of providing necessary literature and information for students and teachers.

As the Hargreaves report notes: Many university academics – along with teachers elsewhere in the education sector – are uncertain what copyright permits for themselves and their students. Administrators spend substantial sums of public money to entitle academics and research students to access works which have often been produced at public expense by academics and research students in the first place. (...) Senior figures and institutions in the university sector have told the Review of the urgent need reform copyright to realise opportunities, and to make it clear what researchers and educators are allowed to do. (Hargreaves,2011, p.41). This highlights the need of legal certainty. A broad exception for education mandatory (as all the other exceptions) would be first part of the solution.

The rule stating that licenses override copyright must be changed and turned the other way around, so that exceptions override the license terms if the licenses do not comply with exceptions in the copyright law.

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

The legislation varies a great deal from country to country. The Nordic countries use the ECL mechanism for copying (reproduction) of material for course packs, handouts and the like. Some countries have an exception for performance of works in an educational context, as long as it does not include any act of reproduction.

The mechanism of ECL is not supported by all member countries, and also it is important not to introduce licenses where an exception should be in place. The article 5(3)(a) is quite open and could already allow for much broader exceptions than those implemented in the different member states. Therefore a broad mandatory exception for education that covers all kinds of works, in whatever format, is needed to support the important purpose of teaching.

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

The mandatory educational exception should cover all uses of all types of works for illustration of teaching. It shall not be limited to any types of institution but rather defined by its purpose: teaching.

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

There shouldn't be any different solution.

C. Research

Directive 2001/29/EC⁴⁷ 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?

Art. 5(3)(a) covers both rights of reproduction and communication to the public and refrains from imposing limitations as regards the extent and the nature of the works used.

Nevertheless, Member States have implemented this exception in terms that are much narrower, so that in the new technological environment, where forms of collective creation are possible and information explosion is everyday reality in any discipline, the difficulty to access and share content in order to provide content-derived knowledge and/or added-value services is subject to new barriers, formed by legislation, licences, and technological protection measures. Actually, apart from the cost of licences - which are unaffordable for many - the most frequent difficulties relate to the following uses:

a. the open access deposit of "publications resulting from publicly funded research as soon as possible, preferably immediately and in any case no later than six months after the date of publication, and twelve months for social sciences and humanities", as required by the Commission Recommendation of 17.7.2012 on access to and preservation of scientific information;

b. the re-use and production of derivative works;

c. the reproduction of works or parts of works for personal study, through library or inter-library e-lending;

d. the exchange of articles or book chapters;

e. the access of alumni to digital subscriptions of an academic institution;

f. the content mining.

Scientific and research authors are different from those of the creative industries in their motivation, status and interests. They do not make their own living as writers with

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

the remuneration they receive from copyright fees, but as tenured teachers and in the progress they make in their academic carrier. Moreover, provided they are quoted, they encourage re-use of their work. Legislation should reflect the distinctive needs of scientific and research community. For example, a partial retention of the rights for non-commercial purposes should be given to the public when the work is the output of publicly funded research. In this respect: a. publicly funded bodies should be obliged to ensure open access to results of publicly funded research, within a reasonable period after their publication; b. the position of authors needs to be strengthened by prohibiting any agreement with publishers intended to prevent or circumvent the deposit of works in open access repositories.

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

[Open question]

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

Find below positions on Open access and content mining as highlighted in Question 32:

Open access to research results: The Commission Recommendation of 17 July 2012 on access to and preservation of scientific information, promotes the adoption by Member States of policies that provide for the storage of the results of publicly funded research, in online, open and free electronic infrastructures, which should be interoperable within and outside the EU and suitable for long term preservation. Academic and research libraries are directly involved in such activities: they are often responsible of their parent institutional open access repositories. Other EU Recommendations require the open access availability of articles and other publications which are the result of publicly financed research, no later than six months after their publication. Some publishers allow this practice to all their authors, others allow libraries to deposit just after long negotiations, but the majority oppose clear refusal. There should be a legal instrument enforcing – on one side - the right of authors in making their papers available to the public for research and non-commercial purpose, and – on the other side - the right of libraries or their parent institutions in collecting and making openly and publicly available such content.

Content mining: The potential of text and data mining for scientific research is enormous, and has been widely demonstrated. It is a process aimed to collect raw data (e.g., the occurrence of words, figures etc. in a database), not creative expressions. Libraries are interested in such utilization both for integrating content and metadata in their catalogues and information systems, and for the benefit of their users. Undertaking text and data mining of content to which researchers have already lawful access (i.e. when a lawful user is recognized as such by a voluntary licence (provided by the copyright holder) OR a legal licence (exception provided by law). See recitals 34,49,50,51 of the Preamble of the Directive 96/9/EC OF THE EUROPEAN PARLIAMENT AND OF THE COUNCIL of 11 March 1996 on the legal protection of databases) should be

considered a legitimate utilization, and should not be subject to re-license. But there is not legal certainty on this point, and most standard licences do not allow content mining. As a consequence, in most cases researchers give up research, rather than addressing high transaction cost, both direct (cost of re-licensing) and indirect (the time needed to negotiate). For this, an exception should explicitly legitimate text and data mining on content on which researchers have lawful access, irrespective of whether this is text and data mining for commercial or non-commercial purposes.

D. Disabilities

Directive 2001/29/EC⁴⁸ provides for an exception/limitation for the benefit of people with a disability. The open formulation of this (optional) provision allows for rather different implementations at Member States level. At EU and international level projects have been launched to increase the accessibility of works and other subject-matter for persons with disabilities (notably by increasing the number of works published in special formats and facilitating their distribution across the European Union)⁴⁹.

The Marrakesh Treaty⁵⁰ 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

Article 5(3)b of Directive 2001/29/EC provides for an exception for the benefit of people with a disability. With regard to cross-border sharing of adapted materials produced

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

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

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

under this exception there has been greater progress in sharing accessible formats between countries with common languages such as German (Germany, Austria, Belgium), French (France, Belgium) and Dutch (Netherlands, Belgium) than elsewhere.

Despite the existence of the European Network of Trusted Intermediaries, (ETIN), certain copyright issues have proved to be a barrier to rightholders agreeing to sign up to ETIN cross-border licences. The most striking example of the difference in the scope of what is lawfully defined as being print disabled can be found in the German situation.

Under German copyright law the disability exception is restricted to those who cannot read print for sensory reasons, and this excludes circulation of these copies among persons with dyslexia. In Austria this is not the case, meaning that a copy made under the German disability exception could legally be distributed among a wider group of beneficiaries in Austria than in Germany itself. Rightholders claim that this cannot be done, because such use was never included when permission was granted to produce the adapted copy. Also German Trusted Intermediaries (TI's) cannot and will not carry the responsibility for the use of the adapted copies they export to other TI's in different Member States, nor make a distinction how to distribute the adapted copies they have imported. To quote Elke Dittmer, president of Medibus (the German distributor of all adapted copies made in Germany): *“Within ETIN it means that all accessible books made in Germany are only for blind and visually impaired users in other countries. Those libraries (abroad) who are serving also other print disabled user can't distribute our books to them. That means that they have to classify the book which can be lend out to which category of disabled persons. And I have no idea how to communicate this to a dyslexic person in Denmark that accessible books from Netherlands are for him but not the German ones. If we would join ETIN our colleagues in other countries will face problems with different groups of disabled people and maybe this is also a legal problem because it could be a discrimination to some people.”*

Differences in national copyright laws, and differences in implementing and servicing the beneficiaries in the various Member States need to be overcome. This should be possible with a mandatory exception for print disabled people. ETIN has proved to be inefficient and soft law will not solve the problem.

The problem exists at national levels as well with the import of textbooks, especially from the US and the UK, for the supply to print disabled students in high schools and universities. Many of these schools teach courses in English and the adapted versions are available mainly in the US, but are not allowed to leave the country. ETIN is no solution for access to US books.

The emergence of eBooks additionally offers rightholders the option to make versions under the disability exception easily accessible for print disabled people through synthetic speech output. Given their poor record with regard to printed works, there is no evidence that publishers will make eBooks accessible in this way, continuing to deny access to books to many disabled people.

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

On cross border sharing:

There is a need of a single harmonised definition of print-disabled people based on the UN Convention on Human Rights and the Marrakesh VIP Treaty 2013 and for mandatory copyright exceptions for disabled people.

For print disabled people, it is not possible to discriminate between types of handicap.

Accessibility should be equitable to normal reading: that means: an accessible version can be searched for, found and read in a way that is equitable to what sighted people can do, known as the ‘ecosystem of reading’. The availability of a simple unstructured and unsynchronised commercially produced audiobook is not enough to justify the label “accessible” for print-disabled people. Sighted people can flip through their book, browse websites, order books, use eReaders, search within eBooks, etc. All these functions must also be available to print-disabled readers as well. A clear definition of accessibility is therefore needed.

While non-legislative solutions to create a better flow of accessible copies across borders may be worked upon meanwhile, these will be patchy and insecure and it is clear that for too long the necessary goodwill to find the right solution to end the book famine for disabled people has been lacking. This is why the Marrakesh VIP treaty was adopted. As has been proven in other areas of equal rights, it is important to have a proper legislative copyright framework for disabled people, one that implements the Marrakesh VIP Treaty, which the EU and all its Member States should sign immediately and implement and ratify urgently.

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

In some countries, (such as the Netherlands) good cooperation exists between the producers of accessible copies (Dedicon) and rightholders through their national association NUV.

However, reselling the adapted accessible copy back to original owner/publisher hardly ever happens. In the future this might be a workable model however. That all depends if and to what extent the file formats for eBooks and those for accessible versions such as Daisy will be truly integrated and embraced by the marketplace. For the time being, the two are not fully integrated. Dedicon could however upgrade/convert the publisher’s digital file, not only to make Braille and other versions, but to enrich eBooks with certain navigation markers, or media overlays to make it more attractive for the publisher to put on the market. The collaboration between the Daisy Consortium and the International Digital Publishing Forum (IDPF) on the ePub3 standard is an excellent facilitator for that.

However, the Netherlands are front runners in this area and their situation is not repeated throughout Europe. Market driven solutions cannot provide fair and equitable outcomes all over Europe. The abolition of discrimination and the creation of access to information for print-disabled people, equal to that enjoyed by the general public,

requires legislation - not solely market-driven solutions based on licensing, since the latter have failed. This market failure, in addition to the copyright restrictions that deny print-disabled people access to accessible formats, causing the book famine that disabled people have endured for too long in Europe, remain important factors that implementation and ratification of Marrakesh will go a long way to address.

E. Text and data mining

Text and data mining/content mining/data analytics⁵¹ are different terms used to describe increasingly important techniques used in particular by researchers for the exploration of vast amounts of existing texts and data (e.g., journals, web sites, databases etc.). Through the use of software or other automated processes, an analysis is made of relevant texts and data in order to obtain new insights, patterns and trends.

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

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

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

⁵¹ For the purpose of the present document, the term “text and data mining” will be used.

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

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

The potential of text and data mining for scientific research is enormous, and has been widely demonstrated (See JISC (2012), The value and benefits of text mining, <http://www.jisc.ac.uk/media/documents/publications/reports/2012/value-text-mining.pdf>), see also key resources below. It is a process aimed to collect raw data (e.g., the occurrence of words, figures etc. in a database), not creative expressions. Undertaking text and data mining of content to which researchers have already lawful access should be considered a legitimate utilization, and should not be subject to re-license. But there is not legal certainty on this point, and most standard licences do not allow content mining. As a consequence, in most cases researchers give up research, rather than addressing high transaction cost, both direct (cost of re-licensing) and indirect (the time needed to negotiate). For this, an exception should explicitly legitimate text and data mining on content on which researchers have lawful access.

Since in most cases it is necessary to make a copy of the content in order for a machine to extract facts and data for mining, the act of text and data mining is precluded under copyright law in Europe. Because it prevents the copying of large portions of databases, the Database Directive is also a legal barrier to text and data mining. Technical protection measures (also protected under law), preventing the downloading of large amounts of content, are also preventing the application of text and data mining techniques. Although text and data mining is concerned with the extraction of facts and data, the results of text and data mining research are currently being suppressed because of a lack of legal clarity.

Even if content is openly available on the Web, without explicit permission indicating otherwise, it is unclear if the copying of this content for the purpose of text and data mining is legal. Content licensed under open access licences such as cc-by-sa or cc-by-nc may be inadvertently preventing users from mining the content.

- Text and data mining is concerned with the extraction of facts and data , which are not covered by copyright
- Text and data mining may infringe copyright because it is necessary to make copies of content to convert it into machine readable format
- Technical protection measures (TPMs) prevent users from downloading content to mine

Key resources :

- **McKinsey Global Institute. (2011, June). Big Data: The Next Frontier for Innovation, Competition, and Productivity. Available at, http://www.mckinsey.com/insights/business_technology/big_data_the_next_frontier_for_innovation. This McKinsey report estimates that government expenditure in Europe could be reduced by €100 billion a year through effective use of ‘big data’**
- **Jisc – Value and Benefits of Text Mining – March 2012, <http://www.jisc.ac.uk/reports/value-and-benefits-of-text-mining>**
- **LIBER factsheet on text and data mining, <http://www.libereurope.eu/sites/default/files/Text%20and%20Data%20Mining%20Fact%20sheet.pdf>**

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

For this, an exception should explicitly legitimate text and data mining on content on which researchers have lawful access.

Researchers must be able to share the results of text and data mining, as long as these results are not substitutable for the original copyright work - irrespective of copyright law, database law or contractual terms to the contrary. A specific exception to this effect allowing the copying of content for the purpose of text and data mining is necessary.

Such an exception should not distinguish between commercial and non-commercial purposes as, for research institutions, this would prevent knowledge transfer.

- **An exception for text and data mining would provide legal certainty;**
- **TPMs and contracts should not override such an exception;**
- **Differentiating between commercial and non-commercial activity is not in the public interest.**

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?*

A legislative solution should take the form of an exception which allows the copying of content and the circumvention of TPMs for text and data mining purposes. This exception must not be over-ridable by contracts.

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

Licencing will not work as an alternative solution. The negotiation of licences is resource intensive and unscalable. Nor will licences addresses the current ambiguity around the mining of the open Web.

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

For data in databases not owned by libraries or universities a license agreement is needed . In that situation, TDM becomes a property right and a security issue.

Even for the use of databases owned by libraries and universities security can become a major issue.

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 blogs⁵³. User-generated content (UGC) can thus cover the modification of pre-existing works even if the newly-generated/"uploaded" work does not necessarily require a creative effort and results from merely adding, subtracting or associating some pre-existing content with other pre-existing content. This kind of activity is not “new” as such. However, the development of social networking and social media sites that enable users to share content widely has vastly changed the scale of such activities and increased the potential economic impact for those holding rights in the pre-existing works. Re-use is no longer the preserve of a technically and artistically adept elite. With the possibilities offered by the new technologies, re-use is open to all, at no cost. This in turn raises questions with regard to fundamental rights such the freedom of expression and the right to property.

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results or even the definition of UGC. Nevertheless, a wide range of views were presented as to the best way to respond to this phenomenon. One view was to say that a new exception is needed to cover UGC, in particular non-commercial activities by individuals such as combining existing musical works with videos, sequences of photos, etc. Another view was that no legislative change is needed: UGC is flourishing, and licensing schemes are increasingly available (licence schemes concluded between rightholders and platforms as well as micro-licences concluded between rightholders and the users generating the content. In any event, practical solutions to ease user-generated content and facilitate micro-licensing for small users were pledged by rightholders across different sectors as a result of the “Licences for Europe” discussions⁵⁴.

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?

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

⁵⁴ See the document “Licences for Europe – ten pledges to bring more content online”:

http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf.

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

NO OPINION

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

(b) [In particular if you are a service provider:] Do you provide possibilities for users that are publishing/disseminating the works they have created (on the basis of pre-existing works) through your service to properly identify these works for online use?

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?

NO OPINION

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

NO OPINION

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?

NO OPINION

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

NO OPINION

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 photocopying⁵⁵. 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 fees⁵⁶⁵⁷.

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 exceptions⁵⁸ in the digital environment?

NO OPINION

65. Should digital copies made by end users for private purposes in the context of a service that has been licensed by rightholders, and where the harm to the rightholder is minimal, be subject to private copying levies?⁵⁹

NO – Please explain

When content has been already licensed, users should not be subject to payment for uses that are compliant with the licence's terms.

⁵⁵ Article 5. 2)(a) and (b) of Directive 2001/29.

⁵⁶ Communication "Unleashing the Potential of Cloud Computing in Europe", COM(2012) 529 final.

⁵⁷ These issues were addressed in the recommendations of Mr António Vitorino resulting from the mediation on private copying and reprography levies. You can consult these recommendations on the following website: http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf.

⁵⁸ Art. 5.2(a) and 5.2(b) of Directive 2001/29/EC.

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

Registered Users of Library collections are benefitting of the existence of the exception for private copying. This exception should cover all kinds of protected works.

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?

NO OPINION

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

YES – Please explain

It is necessary for transparency and the user's right to be informed.

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 payments⁶¹.

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.).

NO OPINION

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

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

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

NO OPINION

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

NO OPINION

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 producers⁶² or determining who the owner of the rights is when the work or other subject matter is created in the context of an employment contract⁶³. This is an area that has been traditionally left for Member States to regulate and there are significant differences in regulatory approaches. Substantial differences also exist between different sectors of the creative industries.

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

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

NO OPINION

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

YES.

Contract between authors and publishers (by extension Rights holders) benefiting from public grant for the publication of a work should contain a clause clearly authorising the sale of the said work in any format (analogue and digital) to publicly funded libraries for communication to the public, lending and e-lending (i.e. remote online access to

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

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

content). This would apply specifically for academic and research publications resulting from publicly funded research, but also for fiction and popular non-fiction where publication has been supported with public money.

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

NO OPINION

VI. Respect for rights

Directive 2004/48/EE⁶⁴ 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 text⁶⁵. 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 purpose⁶⁶. One means to do this could be to clarify the role of intermediaries in the IP infrastructure⁶⁷. 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 OPINION

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

Limitation of ISPs liability is important. Otherwise there is a risk of reducing freedom of expression and freedom of communication. Private enforcement is unacceptable, regular legal processes must be followed.

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

⁶⁵ You will find more information on the following website:

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

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

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

The general term “intermediary” is not very precise and can create uncertainty as to who is an intermediary. Libraries shall not be considered intermediaries in this context, or any legislation should seek to make clear when libraries and educational establishments are in or out of scope. We certainly believe that if any obligations are put on intermediaries as has been the case with Three Strikes Legislation, that libraries / educational establishments should be given a safe harbour in law.

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

NO – Please explain

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?

NO

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?

The next (urgent) step should be the enlargement and enforcement of exceptions and limitations, but such process could lead to a broader copyright reform.

The current level of differences among Member State Legislation can be compared to the current differences among Member State social system, or standard of living that cannot be fixed by a regulation.

Sorting out the current impediments due to the inadequacy of the system means to rethink the framework on long-term (such as the Wittem Project suggest) while acting now to enact progressive solutions (see answer to Q80).

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.*

Copyright law reform at the European level is absolutely necessary to simplify the current complicated regime and the overlapping of different directives. Licensing initiatives alone will not achieve this.

Meanwhile, the EU should develop mechanisms to ensure that licence clauses cannot override existing exceptions and limitations. During the previous Licences for Europe dialogue, it has never been made possible to discuss this issue, hence the need of urgent decision on that point. For the same reason, the removal of technological protection measures should be made compulsory for all legitimate uses.

Compulsory Licenses for Libraries

The exclusive rights that exist in regards to published works should not include the right of refusal to sell to libraries, or to limit their services, both in physical and digital environment.

Commercial licences for libraries should include the utilizations presently permitted by Infosoc and Database Directives.

In all cases, the use of the acquired materials should be allowed for the following purposes:

a. Research. The Library, its parent Institution's staff and affiliates together with its Authorized Users should, from a place and at a time individually chosen by them, be able to search, retrieve, and display the licensed materials, print or download and save individual chapters, articles or items of the licensed materials without legal or technological impediment. Moreover, they should be able to use data and text mining technologies to derive information from the licensed materials for computational analysis and other research purposes.

b. Education and Teaching. The Library and its Authorized Users should be able to extract or use information contained in licensed materials for educational, scientific, or research purposes, including extraction and manipulation of information or images for the purpose of illustration, explanation, comment, criticism, teaching, research, or analysis. The Library and/or its parent Institution's staff and affiliates should be able to use a reasonable portion of licensed materials in the course of instruction and communicate same material to Authorized Users at a place and time convenient to them.

c. Scholarly Sharing. Authorized Users should be able to transmit to a third party colleague in hard copy or electronically, insubstantial amounts of the licensed materials for personal, scholarly, educational, scientific, or research uses. Authorized Users should be able to use, with appropriate credit, figures, tables and brief excerpts from the

Licensed Materials in the Authorized User's own scientific, scholarly and educational works. When an Authorized User is the Author of an article which is part of the licensed materials, and which is the result of a publicly funded research, he/she or the Library staff should be able to put such work, with appropriate credit to the Publisher, in an Open Access repository after a reasonable time from the date of its publication.

d. Interlibrary Loan. Licensee's staff should be able to provide to other libraries or cultural institutions whether by post or fax, or secure electronic transmission, whereby the electronic file is deleted immediately after printing, for the purposes of research or private study and not for Commercial Use, a single copy of articles, chapters, or other individual documents from licensed materials.

e. Technical Accessibility, usability and interoperability. Format shifting and other adaptations should be permitted for long-term preservation purposes, or to ensure technical accessibility and usability by visually impaired Authorized users, or to effectively integrate Licensed Materials in Library information systems, according to international standards of interoperability. Within the limits of these purposes, the Licensor should agree to temporarily remove the technical barriers that may prevent adaptations.

f. Administrative and Judicial Proceedings. The Library, its parent Institution's staff, affiliates and authorized users should be able to transmit and/or upload individual articles to secure electronic systems for judicial and administrative use, including any national research quality assessment (such as RAE in UK or VQR in Italy) and the selection procedures for academic and professional careers.

g. Archival Availability. The Library should be granted a nonexclusive, royalty-free, perpetual right to use any licensed materials accessed during the License term. The Licensor should permit the Library to archive one complete copy of the Licensed Materials, and permit use of the archived materials in the event that access is discontinued or suspended. Such use should be in accordance with the provisions of the agreement, which provisions shall survive any termination of it, provided that the contractual terms of the License agreement will not override any statutory provisions regarding the entry of the work into the public domain. This means that the archival copy should be free after the termination of copyright terms, when it enters in the public domain. It should be prevented the revival of exclusive "sui generis" rights.. Once a work is out-of-commerce in its all versions, Library should be entitled to give unrestricted access to licensed materials.

We would like to quote some excerpts of the report of Hugenholtz, B., & Senftleben, M. R. F. (2011, November). Fair Use in Europe. In Search of Flexibilities. IViR.

Amsterdam, Netherlands. Available at

<http://www.ivir.nl/publications/hugenholtz/Fair%20Use%20Report%20PUB.pdf>.

o Page 10: "The current lack of flexibility in copyright law undermines the very fundamental freedoms, societal interests and economic goals that copyright law traditionally aims to protect and advance. This is the case particularly in the area of limitations and exceptions – an area where more than elsewhere in the law of copyright rules have become detailed, rigid and connected to specific states of technology. Examples abound. Whereas social media have in recent times become an essential

means of social and cultural communication, current copyright law leaves little or no room for sharing ‘user-generated content’ that builds upon pre-existing works. By the same token, current limitations and exceptions rarely take into consideration current educational and scholarly practices, such as the use of copyright protected content in Powerpoint presentations, in ‘digital classrooms’, on university websites or in scholarly e-mail correspondence. Existing limitations and exceptions in many Member States’ copyright laws also find it hard to accommodate such essential information tools as search engines. By impeding these and other uses that should arguably remain outside the reach of copyright protection, the law’s overly rigorous structure impedes not only cultural, social and economic progress, but also undermines the social legitimacy of copyright law proper.”

o Page 17: “The EU acquis, in other words, contains flexibilities that may be invisible at the national level because of an overly cautious and restrictive implementation.”

o Page 29: “There appear to be good reasons and ample opportunity to (re)introduce a measure of flexibility in the national copyright systems of Europe. The need for having more openness in copyright law is almost self-evident in this ‘information society’ of highly dynamic and unpredictable change. A historic perspective also suggests that, due to a variety of circumstances, copyright law, particularly in the civil law jurisdictions of Europe, has lost much of its flexibility in the course of the past century. In other words, making copyright law in author’s rights regimes more flexible would not go against the grain of legal tradition. (...) We would therefore recommend to introduce a measure of flexibility alongside the existing structure of well-defined limitations and exceptions, and thus combine the advantages of legal security and technological neutrality.”

To conclude, we would like to ensure that any Copyright review will not lead to an EU regulation that would be based on minimum standards and would be less progressive than the current regime. A comparative study of the current 28 copyright regimes identifying the most up-to-date and progressive solutions developed in Member-States could be a good work in parallel to this consultation. Identifying where citizens and public institutions’ rights benefitted the most would open up new legislative opportunities and would support the need of social harmonisation.