Public Consultation
on the review of the EU copyright rules

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I. Introduction

A. Context of the consultation

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

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

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

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

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

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1 COM (2012)789 final, 18/12/2012.
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.
Conclusions⁵ "Providing digital services and content across the single market requires the establishment of a copyright regime for the digital age. The Commission will therefore complete its on-going review of the EU copyright framework in spring 2014. It is important to modernise Europe's copyright regime and facilitate licensing, while ensuring a high level protection of intellectual property rights and taking into account cultural diversity".

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

B. How to submit replies to this questionnaire

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

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

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

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

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

C. Confidentiality

The contributions received in this round of consultation as well as a summary report 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 WELLCOME TRUST
[Contact: David Carr, Policy Adviser d.carr@wellcome.ac.uk]

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

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

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

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

- 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):
   We are a global charitable foundation, which funds research in the biomedical sciences and medical humanities. We also provide the Wellcome Library – one of Europe’s leading resources for research and discovery on the history of medicine and contemporary developments in biomedical science and health. Therefore our comments reflect those of both a library, and a funder dedicated to maximising access to, and use of research outputs – both by researchers and other users
II. Rights and the functioning of the Single Market

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

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

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

The dissemination of copyright-protected content on the Internet – e.g. by a music streaming service, or by an online e-book seller – therefore requires, in principle, an authorisation for each national territory in which the content is communicated to the public. Rightsholders are, of course, in a position to grant a multi-territorial or pan-European licence, such that content services can be provided in several Member States and across borders. A number of steps have been taken at EU level to facilitate multi-territorial licences: the proposal for a Directive on Collective Rights Management10 should significantly facilitate the delivery of multi-territorial licences in musical works for online services11; the structured stakeholder dialogue “Licences for Europe”12 and market-led developments such as the on-going work in the Linked Content Coalition13.

"Licences for Europe" addressed in particular the specific issue of cross-border portability, i.e. the ability of consumers having subscribed to online services in their Member State to keep accessing them when travelling temporarily to other Member States. As a result, representatives of the audio-visual sector issued a joint statement affirming their commitment to continue working towards the further development of cross-border portability14.

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

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9 This principle has been confirmed by the Court of justice on several occasions.
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/.
This situation may in part stem from the territoriality of rights and difficulties associated with the clearing of rights in different territories. Contractual clauses in licensing agreements between right holders and distributors and/or between distributors and end users may also be at the origin of some of the problems (denial of access, redirection).

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

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

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

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   - NO

   ✔ NO OPINION

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

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

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   - NO

   ✔ NO OPINION

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

   [Open question]

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\[^{15}\] 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.
4. If you have identified problems in the answers to any of the questions above – what would be the best way to tackle them?

[Open question]

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

☐ YES – Please explain by giving examples
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☐ NO

✔ NO OPINION

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

☐ YES – Please explain by giving examples
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☐ NO

✔ NO OPINION

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

✔ YES – Please explain

Although we have not directly encountered issues in this regard as yet, we are actively exploring the scope to undertake digitisation projects to increase access to our collections, including potentially through use of new extended collective licensing schemes being discussed in the UK. We believe that, due to the issues highlighted above, there is a risk that we would only be able to make such works available in the UK. We would strongly recommend that measures are put in place that would allow these works to be available across the EU and globally.

☐ NO – Please explain
B. Is there a need for more clarity as regards the scope of what needs to be authorised (or not) in digital transmissions?

[The definition of the rights involved in digital transmissions]

The EU framework for the protection of copyright and related rights in the digital environment is largely established by Directive 2001/29/EC\textsuperscript{16} on the harmonisation of certain aspects of copyright and related rights in the information society. Other EU directives in this field that are relevant in the online environment are those relating to the protection of software\textsuperscript{17} and databases\textsuperscript{18}.

Directive 2001/29/EC harmonises the rights of authors and neighbouring rightholders\textsuperscript{19} which are essential for the transmission of digital copies of works (e.g. an e-book) and other protected subject matter (e.g. a record in a MP3 format) over the internet or similar digital networks.

The most relevant rights for digital transmissions are the reproduction right, i.e. the right to authorise or prohibit the making of copies\textsuperscript{20}, (notably relevant at the start of the transmission – e.g. the uploading of a digital copy of a work to a server in view of making it available – and at the users’ end – e.g. when a user downloads a digital copy of a work) and the communication to the public/making available right, i.e. the rights to authorise or prohibit the dissemination of the works in digital networks\textsuperscript{21}. 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


\textsuperscript{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”.

\textsuperscript{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).

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

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

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

   ✓ NO OPINION

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

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

   ✓ 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.

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

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

24 Injunctive relief is a temporary or permanent remedy allowing the right holder to stop or prevent an infringement of his/her right.
10. [In particular if you a service provider or a right holder:] Does the application of two rights to a single act of economic exploitation in the online environment (e.g. a download) create problems for you?

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

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☐ NO

✓ NO OPINION

3. Linking and browsing

Hyperlinks are references to data that lead a user from one location in the Internet to another. They are indispensable for the functioning of the Internet as a network. Several cases are pending before the CJEU\(^25\) in which the question has been raised whether the provision of a clickable link constitutes an act of communication to the public/making available to the public subject to the authorisation of the rightholder.

A user browsing the internet (e.g. viewing a web-page) regularly creates temporary copies of works and other subject-matter protected under copyright on the screen and in the 'cache' memory of his computer. A question has been referred to the CJEU\(^26\) as to whether such copies are always covered by the mandatory exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC.

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

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

As noted in the introductory text above, hyperlinking information is integral to the functioning of the internet, and we believe it is vital that the use of links remains free from constraint. The provision of a hyperlink does not in any way exempt those who follow the link from having to abide by any copyright provisions associated with the material at that location, and protection of that material is a routine technical step for rightsholders.

☐ NO OPINION

\(^{25}\) 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?**

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

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

The idea that this should be subject to any form of protection seems completely unworkable. Caching is a fundamental feature of how computers work, and is something that rightholders must accept as an inevitable consequence of making works available on the internet. The fact that a user’s computer automatically creates a transitory copy of the work, does not give them any right to use that content in a way that contravenes copyright.

☐ NO OPINION

4. **Download to own digital content**

Digital content is increasingly being bought via digital transmission (e.g. download to own). Questions arise as to the possibility for users to dispose of the files they buy in this manner (e.g. by selling them or by giving them as a gift). The principle of EU exhaustion of the distribution right applies in the case of the distribution of physical copies (e.g. when a tangible article such as a CD or a book, etc. is sold, the right holder cannot prevent the further distribution of that tangible article)\(^27\). 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

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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.

[Open question]

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

Registration is not often discussed in copyright in the EU as the existing international treaties in the area prohibit formalities as a condition for the protection and exercise of rights. However, this prohibition is not absolute. Moreover a system of registration does not need to be made compulsory or constitute a precondition for the protection and exercise of rights. With a longer term of protection and with the increased opportunities that digital technology provides for the use of content (including older works and works that otherwise would not have been disseminated), the advantages and disadvantages of a system of registration are increasingly being considered.

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

☐ YES – in principle yes, but with strong caveats
☐ NO
☐ NO OPINION

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

[Open question]

There could be a case in principle for establishing an EU-wide registration system in terms of making easier for users to identify if a work is in copyright and to gain clearance. Such a system (if it is implemented in an effective manner) could in theory ease the burden upon libraries of conducting diligent searches for rightsholders, and increase the likelihood for rightsholders of being located and compensated for the use of their works. It would also, if maintained appropriately, reduce the likelihood of works becoming orphans in the future.

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

[Open question]

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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.
To have value any such system would need to be comprehensive, be kept up to date and, crucially, have buy in from rightsholders. The cost and administrative burden could be considerable, and run the risk of creating significant delays in the system if not resourced appropriately.

A registration system in itself also does not address the more fundamental issues as regards current orphan works schemes in terms of unrealistic requirements for diligent searches – which in our view makes it unlikely they will be used in practice.

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

[Open question]

We would envisage rightsholders should have a reasonably strong incentive to register, for the reasons indicated above.

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

There are many private databases of works and other subject matter held by producers, collective management organisations, and institutions such as libraries, which are based to a greater or lesser extent on the use of (more or less) interoperable, internationally agreed ‘identifiers’. Identifiers can be compared to a reference number embedded in a work, are specific to the sector in which they have been developed\(^31\), and identify, variously, the work itself, the owner or the contributor to a work or other subject matter. There are notable examples of where industry is undertaking actions to improve the interoperability of such identifiers and databases. The Global Repertoire Database\(^32\) should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition\(^33\) was established to develop building blocks for the expression and management of rights and licensing across all content and media types. It includes the development of a Rights Reference Model (RRM) – a comprehensive data model for all types of rights in all types of content. The UK Copyright Hub\(^34\) is seeking to take such identification systems a step further, and to create a linked platform, enabling automated licensing across different sectors.

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

[Open question]

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

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

\(^{32}\) You will find more information about this initiative on the following website: [http://www.globalrepertoiredatabase.com/](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](http://www.linkedcontentcoalition.org).

\(^{34}\) You will find more information about this initiative on the following website: [http://www.copyrighthub.co.uk/](http://www.copyrighthub.co.uk/).
used by anyone (in accordance with the applicable national rules on moral rights). The Berne Convention\(^\text{35}\) requires a minimum term of protection of 50 years after the death of the author. The EU rules extend this term of protection to 70 years after the death of the author (as do many other countries, e.g. the US).

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

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

- **YES** – Please explain

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

  We believe strongly that the current term of protection (life plus 70 years) is too long. It is currently serving to restrict access to and use of thousands of works of cultural value, whilst for the most part offering very little additional benefit for the majority of rightsholders (for whom any significant economic return has long since diminished by this point). We argue that this is one of the core fundamental barriers with the current copyright regime that needs to be addressed.

  The duration of copyright protection means that some content from as far back as the 1870s, is still potentially in copyright and can’t be digitised without a diligent search to establish whether the work is still in copyright. And, if it is, to seek to identify and obtain consent from the rightsholders. The costs of doing so will often be prohibitively expensive – preventing the use of content, which in many cases will never have any prospect of generating additional revenue for the rightsholder.

  A key problem associated with identifying whether a printed work is in copyright is the need to determine if/when the author has died. In an ideal world, therefore, we would suggest that a copyright term measured from the publication date would be preferable.

  However, we recognise that such a change may not be possible under current international treaties. We would urge as an absolute minimum that the EU should reduce the term to life plus 50 years, as permitted by the Berne Convention.

- **NO OPINION**

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

Limitations and exceptions to copyright and related rights enable the use of works and other protected subject-matter, without obtaining authorisation from the rightholders, for certain purposes and to a certain extent (for instance the use for illustration purposes of an extract

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from a novel by a teacher in a literature class). At EU level they are established in a number of copyright directives, most notably Directive 2001/29/EC.\(^36\)

Exceptions and limitations in the national and EU copyright laws have to respect international law.\(^37\) In accordance with international obligations, the EU acquis requires that limitations and exceptions can only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interest of the rightholders.

Whereas the catalogue of limitations and exceptions included in EU law is exhaustive (no other exceptions can be applied to the rights harmonised at EU level),\(^38\) these limitations and exceptions are often optional,\(^39\) in the sense that Member States are free to reflect in national legislation as many or as few of them as they wish. Moreover, the formulation of certain of the limitations and exceptions is general enough to give significant flexibility to the Member States as to how, and to what extent, to implement them (if they decide to do so). Finally, it is worth noting that not all of the limitations and exceptions included in the EU legal framework for copyright are of equivalent significance in policy terms and in terms of their potential effect on the functioning of the Single Market.

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

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

Finally, the question of flexibility and adaptability is being raised: what is the best mechanism to ensure that the EU and Member States’ regulatory frameworks adapt when necessary (either to clarify that certain uses are covered by an exception or to confirm that for certain uses the authorisation of rightholders is required)? The main question here is whether a greater degree of flexibility can be introduced in the EU and Member States regulatory

\(^36\) 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)(a)).


\(^40\) 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.
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

We believe this is a problem, and will become increasingly so in the digital age – creating barriers to cross-border collaboration between EU nations in research, education and other fields. By way of example, if the text and data mining (TDM) exception is passed into law in the UK, then UK researchers will be able to do TDM, but researchers elsewhere in Europe will not enjoy this right. At a time when research is becoming more collaborative – and a typical research project can be funded by multiple funders in different countries – it is imperative that all the copyright exceptions should be made mandatory in all member states.

☐ NO – Please explain

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☐ NO OPINION

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

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

We believe strongly that current (and possible future) exceptions in the areas of research, education and library archiving should be mandatory in order to ensure a greater level of consistency across the European Union, and maximise their value.

☐ NO – Please explain

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☐ NO OPINION

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

[Open question]

We don’t believe any of the current exceptions should be removed.

As noted in our responses below, we would strongly support the introduction of an exception to enable text and data mining for all research purposes (including both commercial and non-commercial uses).

We would also strongly support the introduction of a specific exception to enable libraries and archives to undertake mass digitisation of collections (including orphan works) for non-commercial purposes.

In addition we believe it is very important that for the exceptions to have value, any revision to the directive must include a provision that exceptions cannot be overridden by contract.
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

Given the pace of change in the digital era, it will be important that the wording of these exceptions is not too narrow and is suitably future-proofed to allow for the development of new tools and techniques. The proposed new exception in the UK on ‘data analysis’ in non-commercial research is a good example – which in addition to permitting text and data mining, is also broad enough to encompass other types of technologies.

☐ NO – Please explain why

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☐ NO OPINION

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

[Open question]

We would support the introduction of a fair use provision as the optimal solution - bringing the EU in line with the US. We will leave detailed economic arguments to those better placed to comment, but would suggest that there are strong indications that the copyright regime in the US has to date been more conducive to nurturing innovation and growth in the digital era.

Failing a fair use provision, appropriate flexibility in exceptions and regular review will be key.

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

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

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☐ NO OPINION

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

Directive 2001/29/EC enables Member States to reflect in their national law a range of limitations and exceptions for the benefit of publicly accessible libraries, educational establishments and museums, as well as archives. If implemented, these exceptions allow acts of preservation and archiving and enable on-site consultation of the works and other subject matter in the collections of such institutions. The public lending (under an exception or limitation) by these establishments of physical copies of works and other subject matter is governed by the Rental and Lending Directive.

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

1. **Preservation and archiving**

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

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

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

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

The current exception for libraries and archives is not sufficient to cover the full range of activities that they need to undertake to preserve and make accessible their collections in the digital age. Specifically, current copyright provisions create a major barrier to digitisation of works (for the purposes of preservation as well as access), and have led to varying requirements in different member states. For example, in the UK, preservation of broadcast.

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43 Article 5 of Directive 2006/115/EC.
film and sound recordings are not currently covered – although proposals to extend this exception, which we wholeheartedly support, will shortly go before Parliament.

The current wording of the exception in the Directive, which specifies that there must not be a “direct or indirect economic or commercial advantage” also creates a problem for many libraries and archives that rely on partnerships with commercial providers to preserve collections, and who depend on making collections available for commercial users. It is extremely difficult in practice to be able to guarantee an indirect commercial advantage will not occur.

☐ NO
☐ NO OPINION

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

We would support a broader and mandatory exception for libraries and archives that specifically allowed copying of all types of materials for the express purpose of preservation, where such copying is not for direct commercial gain.

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

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

2. Off-premises access to library collections

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

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

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

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

[Open question]

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

[Open question]

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

[Open question]

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

[Open question]

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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?
37. If there are problems, how would they best be solved?
[Open question]
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The following two questions are relevant both to this point (n° 3) and the previous one (n° 2).

38. [In particular if you are an institutional user:] What differences do you see in the management of physical and online collections, including providing access to your subscribers? What problems have you encountered?
[Open question]
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39. [In particular if you are a right holder:] What difference do you see between libraries’ traditional activities such as on-premises consultation or public lending and activities such as off-premises (online, at a distance) consultation and e-lending? What problems have you encountered?
[Open question]
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4. Mass digitisation

The term “mass digitisation” is normally used to refer to efforts by institutions such as libraries and archives to digitise (e.g. scan) the entire content or part of their collections with an objective to preserve these collections and, normally, to make them available to the public. Examples are efforts by libraries to digitise novels form the early part of the 20th century or whole collections of pictures of historical value. This matter has been partly addressed at the EU level by the 2011 Memorandum of Understanding (MoU) on key principles on the digitisation and making available of out of commerce works (i.e. works which are no longer found in the normal channels of commerce), which is aiming to facilitate mass digitisation efforts (for books and learned journals) on the basis of licence agreements between libraries and similar cultural institutions on the one hand and the collecting societies representing authors and publishers on the other. Provided the required funding is ensured (digitisation projects are extremely expensive), the result of this MoU should be that books that are

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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.
currently to be found only in the archives of, for instance, libraries will be digitised and made available online to everyone. The MoU is based on voluntary licences (granted by Collective Management Organisations on the basis of the mandates they receive from authors and publishers). Some Member States may need to enact legislation to ensure the largest possible effect of such licences (e.g. by establishing in legislation a presumption of representation of a collecting society or the recognition of an “extended effect” to the licences granted)\(^45\).

**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

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☐ NO – Please explain

The 2011 MoU is too limited to be of practical use to organisations such as the Wellcome Library, which is committed to digitising its collections and making them freely available via the Internet.

To truly facilitate mass digitisation we would strongly support the introduction of a specific exception to enable libraries and archives to undertake mass digitisation of collections (including orphan works) for non-commercial purposes.

In 2012, as part of the Library’s “Codebreakers Project” (http://wellcomelibrary.org/codebreakers), we sought to digitise around 2000 works, related to foundations of modern genetics, and published between 1850 and 1990. As most of these works were in copyright (although all were out of commerce) we worked with the Author Licensing and Collecting Society (ALCS) and the Publishers Licensing Society (PLS) in an attempt to identify rightholders, and once identified, to seek permission to make a digital copy of their published work available via the Library’s web site.

As a result of this project Wellcome Library has been able to make a reasonable amount of content freely available; up to 1357 (67%) of all titles under consideration. Further, there was a high level of “permission granted” letters received from both publishers and authors.

However, this project was intended to be a pilot to test the rights-clearance process and systems in advance of scaling up this project to handle mass-digitisation. Based on the experiences gained during this pilot it is evident to the Wellcome Trust that the current process for rights clearance in this context is not scalable in its current form.

We believe that if the orphan work legislation is going to achieve what it set out to do (namely provide the ability for libraries to make digital copies of works for which no rightholders can be identified) there is a need to look again at how a diligent search is

\(^{45}\) 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.
defined, and focus especially on the need for diligent searches to be proportionate and that the standards of due diligence must be appropriate to the type of material.

NO OPINION

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

☐ YES – Please explain
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☐ NO – Please explain
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NO OPINION

B. Teaching

Directive 2001/29/EC\(^\text{46}\) enables Member States to implement in their national legislation limitations and exceptions for the purpose of illustration for non-commercial teaching. Such exceptions would typically allow a teacher to use parts of or full works to illustrate his course, e.g. by distributing copies of fragments of a book or of newspaper articles in the classroom or by showing protected content on a smart board without having to obtain authorisation from the right holders. The open formulation of this (optional) provision allows for rather different implementation at Member States level. The implementation of the exception differs from Member State to Member State, with several Member States providing instead a framework for the licensing of content for certain educational uses. Some argue that the law should provide for better possibilities for distance learning and study at home.

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

☐ YES – Please explain
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☐ NO

☑ NO OPINION

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

\(^{46}\) Article 5(3)a of Directive 2001/29.
44. **What mechanisms exist in the market place to facilitate the use of content for illustration for teaching purposes? How successful are they?**

[Open question]

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

[Open question]

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

[Open question]

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**C. Research**

Directive 2001/29/EC\(^{47}\) enables Member States to choose whether to implement in their national laws a limitation for the purpose of non-commercial scientific research. The open formulation of this (optional) provision allows for rather different implementations at Member States level.

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

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

\[\checkmark \text{YES} – \text{Please explain}\]

The exception currently refers to “scientific research”, and we believe this wording needs to be amended to be absolutely clear that it encompasses research in the broadest sense, including in the arts and humanities.

\(^{47}\) Article 5(3)a of Directive 2001/29.
We are also aware that the clearance for the use of third-party material (for example, in the context of publications or presentations) can form a significant barrier for many academic researchers and place some at a disadvantage. We would support the development of any initiatives at EU level to address this issue.

We also strongly believe that an exception is required to permit text and data mining for research purposes, but we provide detailed comments on this under the specific questions on text mining below.

☐ NO
☐ NO OPINION

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

[Open question]

See above

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

[Open question]

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D. Disabilities

Directive 2001/29/EC\textsuperscript{48} provides for an exception/limitation for the benefit of people with a disability. The open formulation of this (optional) provision allows for rather different implementations at Member States level. At EU and international level projects have been launched to increase the accessibility of works and other subject-matter for persons with disabilities (notably by increasing the number of works published in special formats and facilitating their distribution across the European Union)\textsuperscript{49}.

The Marrakesh Treaty\textsuperscript{50} has been adopted to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled. The Treaty creates a mandatory exception to copyright that allows organisations for the blind to produce, distribute and make available accessible format copies to visually impaired persons without the authorisation of the rightholders. The EU and its Member States have started work to sign and ratify the Treaty. This may require the adoption of certain provisions at EU level (e.g. to ensure the possibility to exchange accessible format copies across borders).

\textsuperscript{48} Article 5 (3)b of Directive 2001/29.

\textsuperscript{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/).

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

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☐ NO

☑ NO OPINION

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

[Open question]

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52. **What mechanisms exist in the market place to facilitate accessibility to content?**

*How successful are they?*

[Open question]

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E. **Text and data mining**

Text and data mining/content mining/data analytics\(^{51}\) are different terms used to describe increasingly important techniques used in particular by researchers for the exploration of vast amounts of existing texts and data (e.g., journals, web sites, databases etc.). Through the use of software or other automated processes, an analysis is made of relevant texts and data in order to obtain new insights, patterns and trends.

The texts and data used for mining are either freely accessible on the internet or accessible through subscriptions to e.g. journals and periodicals that give access to the databases of publishers. A copy is made of the relevant texts and data (e.g. on browser cache memories or in computers RAM memories or onto the hard disk of a computer), prior to the actual analysis. Normally, it is considered that to mine protected works or other subject matter, it is necessary to obtain authorisation from the right holders for the making of such copies unless

\(^{51}\) For the purpose of the present document, the term “text and data mining” will be used.
such authorisation can be implied (e.g. content accessible to general public without restrictions on the internet, open access).

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

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

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

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

(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

We believe that text and data mining tools will become ever more crucial to the research enterprise as the volume of published research information continues to grow. At present, researchers may read content but are restricted from using computational tools to read and mine this information. These tools not only enable researchers to identify information of interest from across the scientific infrastructure to which they have lawful access, but can also uncover new and unsuspected associations – stimulating discovery and opening up novel avenues of research and innovation.

Recent research commissioned by JISC explored the value and benefit of text mining and analytics to the further and higher education sector in the UK. This study highlights the significant potential benefits to the sector in terms of time savings and productivity gains. It finds, however, that the use of text mining is currently very restricted, due to the significant barriers to uptake – which include uncertainty over the current legal situation, entry costs, lack of capacity and the division of information into silos. The analysis indicates that the

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.
The current situation has strong characteristics of market failure, and is preventing society from realising the full benefits of text and data mining.

We would suggest that a licence-based solution is simply not feasible. A study undertaken by the Wellcome Trust to feed into discussions on the implementation of the Hargreaves review recommendations in the UK indicated that the cost to researchers to clear permission to mine a corpus of 8,000 articles (in terms of time spent) would be over £18,500 (or 60 per cent of a working year).

Over and above this, however, we believe strongly that it is fundamentally unjust for publishers to have the right to block potentially beneficial uses of research outputs that have been funded by tax payers or by charities. We would emphasise that we are referring to content to which a user already has lawful access – and hence for which the publisher has already been reimbursed via subscription or other means.

☐ NO – Please explain

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☐ NO OPINION

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

[Open question]

For the reasons outlined above, we believe strongly that a mandatory EU-wide exception in copyright to allow text and data mining should be introduced. The experience of the Licences for Europe process illustrates how strongly the research and library communities feel on this point.

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

[Open question]

Work to implement an exception in the UK to allow text and data mining for non-commercial purposes (under the general heading of data analysis) is progressing and legislative proposals will shortly be laid before Parliament. We strongly support these moves and would call for the introduction of a corresponding exception at EU-level.

Whilst we would welcome the introduction of an exception for non-commercial research purposes as a first step, we would urge that the exception should ultimately be extended to allow text and data mining for both commercial and non-commercial purposes - unlocking the full potential of these tools for both knowledge and economic gain. We see little reason why commercial users should not also be able to legally mine materials to which they have legal access. On a more practical level, the demarcation of commercial or non-commercial use can be difficult to determine in many situations.

56. **If your view is that a different solution is needed, what would it be?**[Open question]
57. Are there other issues, unrelated to copyright, that constitute barriers to the use of text or data mining methods?

[Open question]

During the debates on the proposed exception in the UK, publisher groups have argued that their technical infrastructure will be unable to cope with requests for text and data mining, or enable users to copy and mine content to which they should not have access. We disagree: technical solutions, including IP filtering systems, exist which could limit these risks. It is also very difficult to equate these views to the experiences of existing open access publishers – whose content is already exposed to text and data mining and other types of robot access, and who manage to operate efficient services for their users.

F. User-generated content

Technological and service developments mean that citizens can copy, use and distribute content at little to no financial cost. As a consequence, new types of online activities are developing rapidly, including the making of so-called “user-generated content”. While users can create totally original content, they can also take one or several pre-existing works, change something in the work(s), and upload the result on the Internet e.g. to platforms and blogs\(^53\). User-generated content (UGC) can thus cover the modification of pre-existing works even if the newly-generated/"uploaded" work does not necessarily require a creative effort and results from merely adding, subtracting or associating some pre-existing content with other pre-existing content. This kind of activity is not “new” as such. However, the development of social networking and social media sites that enable users to share content widely has vastly changed the scale of such activities and increased the potential economic impact for those holding rights in the pre-existing works. Re-use is no longer the preserve of a technically and artistically adept elite. With the possibilities offered by the new technologies, re-use is open to all, at no cost. This in turn raises questions with regard to fundamental rights such the freedom of expression and the right to property.

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results or even the definition of UGC. Nevertheless, a wide range of views were presented as to the best way to respond to this phenomenon. One view was to say that a new exception is needed to cover UGC, in particular non-commercial activities by individuals such as combining existing musical works with videos, sequences of photos, etc. Another view was that no legislative change is needed: UGC is flourishing, and licensing schemes are increasingly available (licence schemes concluded between rightholders and platforms as well as micro-licences concluded between rightholders and the users generating the content. In any event, practical solutions to ease user-generated content and facilitate micro-licensing for small users were pledged by rightholders across different sectors as a result of the “Licences for Europe” discussions\(^54\).

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

\(^53\) 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”:
(b) [In particular if you are a service provider:] Have you experienced problems when users publish/disseminate new content based on the pre-existing works or other subject-matter through your service, including across borders?

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

☐ YES – Please explain by giving examples

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☐ NO

✓ NO OPINION

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

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

☐ YES – Please explain

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☐ NO – Please explain

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✓ NO OPINION

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

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

☐ YES – Please explain

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☐ NO – Please explain

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IV. Private copying and reprography

Directive 2001/29/EC enables Member States to implement in their national legislation exceptions or limitations to the reproduction right for copies made for private use and photocopying. Levies are charges imposed at national level on goods typically used for such purposes (blank media, recording equipment, photocopying machines, mobile listening devices such as mp3/mp4 players, computers, etc.) with a view to compensating rightholders for the harm they suffer when copies are made without their authorisation by certain categories of persons (i.e. natural persons making copies for their private use) or through use of certain technique (i.e. reprography). In that context, levies are important for rightholders.

With the constant developments in digital technology, the question arises as to whether the copying of files by consumers/end-users who have purchased content online - e.g. when a person has bought an MP3 file and goes on to store multiple copies of that file (in her computer, her tablet and her mobile phone) - also triggers, or should trigger, the application of private copying levies. It is argued that, in some cases, these levies may indeed be claimed by rightholders whether or not the licence fee paid by the service provider already covers copies made by the end user. This approach could potentially lead to instances of double payments whereby levies could be claimed on top of service providers’ licence fees.

55 Article 5. 2(a) and (b) of Directive 2001/29.
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.
There is also an on-going discussion as to the application or not of levies to certain types of cloud-based services such as personal lockers or personal video recorders.

**64. In your view, is there a need to clarify at the EU level the scope and application of the private copying and reprography exceptions in the digital environment?**

- YES – Please explain
- NO – Please explain
- **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?**

- YES – Please explain
- NO – Please explain
- **NO OPINION**

**66. How would changes in levies with respect to the application to online services (e.g. services based on cloud computing allowing, for instance, users to have copies on different devices) impact the development and functioning of new business models on the one hand and rightholders’ revenue on the other?**

[Open question]

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

- YES – Please explain

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

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

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

☐ NO – Please explain

☐ NO OPINION

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

[Open question]

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

[Open question]

61 This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies.
71. **If you have identified specific problems with the current functioning of the levy system, how would these problems best be solved?**

[Open question]

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

The EU copyright acquis recognises for authors and performers a number of exclusive rights and, in the case of performers whose performances are fixed in phonograms, remuneration rights. There are few provisions in the EU copyright law governing the transfer of rights from authors or performers to producers or determining who the owner of the rights is when the work or other subject matter is created in the context of an employment contract. This is an area that has been traditionally left for Member States to regulate and there are significant differences in regulatory approaches. Substantial differences also exist between different sectors of the creative industries.

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

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

[Open question]

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

- YES – Please explain

- NO – Please explain why

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

[Open question]

VI. Respect for rights

Directive 2004/48/EE\textsuperscript{64} provides for a harmonised framework for the civil enforcement of intellectual property rights, including copyright and related rights. The Commission has consulted broadly on this text\textsuperscript{65}. Concerns have been raised as to whether some of its provisions are still fit to ensure a proper respect for copyright in the digital age. On the one hand, the current measures seem to be insufficient to deal with the new challenges brought by the dissemination of digital content on the internet; on the other hand, there are concerns about the current balance between enforcement of copyright and the protection of fundamental rights, in particular the right for a private life and data protection. While it cannot be contested that enforcement measures should always be available in case of infringement of copyright, measures could be proposed to strengthen respect for copyright when the infringed content is used for a commercial purpose\textsuperscript{66}. One means to do this could be to clarify the role of intermediaries in the IP infrastructure\textsuperscript{67}. At the same time, there could be clarification of the safeguards for respect of private life and data protection for private users.

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

\begin{itemize}
  \item [\textsquare YES] Please explain
  \begin{itemize}
    \item \hspace{1cm}
  \end{itemize}
  \item [\textsquare NO] Please explain
  \begin{itemize}
    \item \hspace{1cm}
  \end{itemize}
\end{itemize}

\textbullet NO OPINION


\textsuperscript{65} You will find more information on the following website: http://ec.europa.eu/internal_market/ipenforcement/directive/index_en.htm

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

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

[Open question]

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

☐ YES – Please explain

☐ NO – Please explain

☑ NO OPINION

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### VII. A single EU Copyright Title

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

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

☑ YES (in principle)

☐ NO

☐ NO OPINION

79. **Should this be the next step in the development of copyright in the EU? Does the current level of difference among the Member State legislation mean that this is a longer term project?**
We would definitely support further exploration of this as a long term goal, but are less sure if it will prove feasible in practice.

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

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

[Open question]