# 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][3] with a view to a decision in 2014 on whether to table legislative reform proposals, and on the other, to facilitate practical industry-led solutions through the stakeholder dialogue "Licences for Europe" on issues on which rapid progress was deemed necessary and possible.

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

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

[1] COM (2012)789 final, 18/12/2012.

[2] As announced in the Intellectual Property Strategy ' A single market for Intellectual Property Rights: COM (2011)287 final, 24/05/2011.

[3] *"Based on market studies and impact assessment and legal drafting work"* as announced in the Communication (2012)789.

[4] See the document "Licences for Europe – tem pledges to bring more content online": http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf .

Conclusions[5] *"Providing digital services and content across the single market requires the establishment of a copyright regime for the digital age. The Commission will therefore 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.

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[5] EUCO 169/13, 24/25 October 2013.
[6] COM(2008) 466/3, http://ec.europa.eu/internal_market/copyright/copyright-infso/index_en.htm#maincontentSec2.
[7] COM(2011) 427 final, http://ec.europa.eu/internal_market/consultations/2011/audiovisual_en.htm.
[8] http://ec.europa.eu/internal_market/consultations/2009/content_online_en.htm.

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:**

BAPLA (The British Association of Picture Libraries and Agencies – www.bapla.org.uk).

BAPLA is the UK trade association for picture libraries and agencies representing photographers and copyright owners of images across all genres - from archive to contemporary images; from live news reporting to conceptual art-directed creative images.

The majority of our members are commercial companies, operating on a B2B basis within a highly competitive global market economy. Digital production, digital delivery and online contracting are the norm.

The photo licensing industry is worth several billion dollars globally and in the UK alone several hundred million pounds, with BAPLA members contributing a sizeable amount towards this. Our members employ in the region of 2,500 people in the UK and generate revenue for, and manage the interests of, over 120,000 creators and rights holders. The photographic sector has undergone rapid change over the last 10 to 20 years, largely due to the advancement of digital technology and equipment, resulting in exponential rises in the volume of quality digital images entering the marketplace.

BAPLA and many of its members take a progressive approach, embracing technology to help service the needs of new digital business models. Picture agencies and libraries these days operate efficient and transparent, often automated, systems that issue licenses, collect and distribute payments to rights holders and monitor usages for mandated works/rights. They invest in the digitizing of analogue images as well as in the creation of digital new images, in both cases undertaking or overseeing the cataloguing, adding metadata to and marketing of the images.

*Preliminary Comments*

Copyright is the economic foundation of European creativity. In our opinion, EU copyright legislation has been robust enough to allow adaptability in the market whilst protecting rightsholders such as authors and creators, and enabled each EU country to adapt the law to suit the needs of it's citizens. From the commercial aspect, our members have always provided flexible business models adapted to the needs of their customers whilst maximising remuneration for the rightsholders they represent. The symbiosis of the relationship between rightsholders and their representatives provides the opportunity for the rightsholder to earn a sustainable income from their creativity, while the representative invests heavily in sending the content to market and promoting the material.

*Territoriality*

For many of our members, a licensee has the opportunity to shop around to find the right content to suit their budgets including ‘Multi-Territorial Licences'. The act of ‘making available’ material, in the context of multi-territories, is still the right to reproduce with the ‘making available’ right being of secondary importance. Clarification of the territorial scope of the making available right may have a negative impact on enforcement of rights.

*Linking and Resale Rights*

The issue of hyperlinking is intrinsically tied to whether there is a commercial gain associated with such use, whether direct or indirect, challenging the ability of the rights holder to exert their rights and in turn generate an income. Viewing a web page does not need further copyright legislation, however there must be a distinction made about the context of

hyperlink placements which needs further questioning. Whereas 'download to own digital content' is a market-led solution to demand, it should not be jeopardised by resale rights, which are incompatible with the nature of transactions involving digital content. More emphasis should be placed on understanding the differences between personal and commercial use as well as the issues surrounding resale rights.

*Registration of Works*

With regards to registration, we feel strongly that it is not in the interests of those in our sector, as in European law copyright is automatic as opposed to the US where copyright for works has to be registered in order to claim statutory damages on infringements. Registration is not a practical solution for photography where millions of pictures are created every day. It is unworkable for many in our industry especially where image identifying software programmes have provided solutions. The adoption of identifiers, whether text or image-based, are already being explored (and in some cases currently in use) within our industry for commercially available images. However it is those images created by the public (original UGC), which are currently exploited by Internet technology companies, who are unaware of the solutions available. For our industry, the promotion of metadata standards for the images industry and strengthening of the protections against metadata stripping to include automated stripping is of paramount importance.

*Term of Protection & Exceptions*

As for whether the term of copyright protection is appropriate, changing terms can have a profound affect for any rights holder who has built enterprise/s based on current copyright terms, costing sole traders, SME's and larger companies, the financial investment into their businesses. This also applies to broadening the scope of copyright exceptions, which can have a substantial effect for rights holders with little or no recourse to generate an income. It is an area still fiercely debated. BAPLA has, at length, submitted its concerns regarding the expansion of the UK copyright exceptions.

*Respect for Rights*

Much of the debate focuses on short term free access and dissemination of content with little thought given to those that create it, as well as those that invest in it. For the longer-term implications for future content generation, we firmly believe that there should be fair remuneration for all rightsholders based on the market value and that there must continue to be a healthy commercial market within which EU copyright law remains to protect creators.

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

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

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

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

- 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):

BAPLA is a trade association, please see description above.
…….
…….

# 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. Rightholders are, of course, in a position to grant a multi-territorial or pan-European licence, such that content services can be provided in several Member States and across borders. A number of steps have been taken at EU level to facilitate multi-territorial licences: the proposal for a Directive on Collective Rights Management[10] should significantly facilitate the delivery of multi-territorial licences in musical works for online services[11]; the structured stakeholder dialogue "Licences for Europe"[12] and market-led developments such as the on-going work in the Linked Content Coalition[13].

"Licences for Europe" addressed in particular the specific issue of cross-border portability, i.e. the ability of consumers having subscribed to online services in their Member State to keep accessing them when travelling temporarily to other Member States. As a result, representatives of the audio-visual sector issued a joint statement affirming their commitment to continue working towards the further development of cross-border portability[14].

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.

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

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

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

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

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

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

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

[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.

Our members grant multi-territory licences on a regular basis (daily, if not hourly collectively speaking). Multi-territory licensing forms part of our business and are a well established way in which right holders approve global online uses of their works. Indeed, the granting of global rights is the default position for all licenses issued under a "royalty-free" license model, an increasingly popular license model operated by many of our members. Even under the more traditional "rights-managed" license model, both multi-territory and global licenses are commonly available for most types of uses, including online uses.

***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

**In some instances a multi-territorial license is inappropriate as restrictions are necessary in order to protect all stakeholders – author, agent and client. Whilst restrictions are managed by the agent, they maybe imposed by the author for various reasons having regard to the work in question.**

**For example, an author may have previously granted exclusive rights to a third party to use a work within a certain territory or may wish to exploit a work directly themselves (instead of via an agency) in their "home territory", in each case meaning that rights are unavailable in said territories to other would-be licensees. The Presumption of Innocence Rights, which in France prohibits the distribution of images of person under arrest, is an example how an image may be unable to be published in France but okay elsewhere due to differing local laws. In addition, other rights relating to the subject matter featured within an image maybe enforceable in one country but not in another. This could apply to the personality rights of a person featured or to items protected by other forms of intellectual property such as a registered trademark or a copyright protected design.**

□ 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

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□ **NO** – Please explain

**Multi-territory licensing works well for our members and is flexible enough to provide sufficient protection to right holders on the one hand (enabling them to decide freely on the exploitation of their national rights), and on the other hand enabling the industry to adapt swiftly to the changes brought about by the digital distribution and global access to content. Furthermore, unlike music, there is limited appeal and history of photography being managed under collective arrangements. Any move to applying a collective approach to administering multi-territory licenses of the online communication to the public or making available rights in connection to images should be strongly avoided. We prefer the market led approach, regulatory intervention is not needed.**

□ NO OPINION

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

## *[The definition of the rights involved in digital transmissions]*

The EU framework for the protection of copyright and related rights in the digital environment is largely established by Directive 2001/29/EC[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[17] and databases[18].

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

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

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

Directive 2001/29/EC harmonises the rights of authors and neighbouring rightholders[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[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[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 a certain Member State's public[22]. 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[23])

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

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

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

[22] See in particular Case C-173/11 (Football Dataco vs Sportradar) and Case C-5/11 (Donner) for copyright and related rights, and Case C-324/09 (L'Oréal vs eBay) for trademarks. With regard to jurisdiction see also joined Cases C-585/08 and C-144/09 (Pammer and Hotel Alpenhof) and pending CaseC-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

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□ 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[24])?***

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

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……

□ **NO**

**The commercial reality for our members is that the licence to use an image granted by them includes (even if not expressly listed) all rights necessary for the use of the image. In this context, the key right is the right to reproduce, with the "making available" right being of secondary importance. The license fee is calculated based on usages proposed, not the type of underlying rights granted.**

**Clarification of the territorial scope of the "making available" right may have impact on enforcement of rights but in this context too the reproduction right is one that is predominantly enforced.**

□ NO OPINION

## 2. Two rights involved in a single act of exploitation

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

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

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

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□ **NO**

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.

**An additional right is an option that, even if not used, does not harm our members' interest. As explained in the answers to Q.9, the licences granted by our members grant all the necessary rights to use the licensed content so multiple rights to the same content are not an issue. Plus, whilst enforcement efforts of our members generally focus on policing unlawful reproduction, more rights are always an advantage. Similarly, from the perspective of a licensee, the existence of the two rights (reproduction and "making available") in respect of a single digital transmission does not bring with it any added complexities. Rights can be licensed using electronic systems of rights identification and rights management without the user even needing to be aware.**

□ 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

**Yes, hyperlinking should be subject to authorisation of the right-holder but only in very specific circumstances. Those specific circumstances are where the hyperlinking makes images available on a commercial basis in a way that deters a viewer from accessing the rights-holder's website. This interpretation stems from the reach of the making available right.**

**To be clear, it is not the act of linking that should be subject to authorisation, it is the framing, or "in-linking", of the link that should be, and only then when the framing is performed in such a way so as to provide a viable alternative to visiting the rights-holder's website. We are not opposed to hyperlinking per se.**

**It is a question of fact and degree, context is key. Factors that should be taken into account in determining whether "in-linking" requires authorisation include the amount of the copyright work that is viewable before the hyperlink is clicked and the proportion of the screen it takes up. The greater the amount of the work and the greater the proportion of the screen, the stronger the case that authorisation should be required, as these can both erode the incentive for a viewer to access the link in order to view the original source of the work.**

[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.

**This is important because the owner of the website containing the hyperlinks may generate advertising revenue, directly or indirectly by keeping the viewer on its website for a longer period of time than it otherwise might. This is at the expense of the rights-holder, whose opportunity to generate revenue from the same viewer is thereby deprived or greatly eroded. Examples of this practice are the image search services offered by numerous search engines, whereby whole images are often used as, or alongside hyperlinks. In these cases, the link is the image.**

**The fact that an image may not technically be "reproduced" on the hyperlinking website provides no comfort to a rights-holder. On the contrary, somebody viewing an "in-linked" hyperlink containing an image still places demands on the bandwidth of the right-holder's servers hosting the image even if the hyperlink is not clicked. In this way, the rights-holder bears all the costs but takes no benefit. Copyright protection should not be dependent on the technique used to communicate a work but on the fact that it is communicated.**

**Not only do these practices take away opportunities for rights-holders to generate their own revenue from such page views, they encourage and perpetuate downstream copyright infringement. This is because users of such image search services may not appreciate the need to obtain a licence to reproduce the image on their own website. Our members find this is a common cause for confusion and is the number one excuse encountered when seeking to enforce online use of images. That is, third parties unwittingly believe that they are free to re-use images found in image search results simply because the image search service is itself free to use. The ease with which images may be copied by right-clicking together with inadequate notices applied by search engine websites warning that the images are owned by third parties, only serves to exacerbate the problem.**

**The above considerations all become amplified in the mobile environment where screen space is at greater premium.**

**To clarify, we are not saying that the temporary caching of the hyperlink on a viewer's computer should be an infringement, only that the act of making available the hyperlink in the "in-linking" manner described above, should be.**

**Unfortunately, the solution to in-line hyperlinking of images is not as simple as providing rights-holders with a way of opting-out of having their images linked to. Considering the dominance of certain search engines, this would be akin to opting-out of the Internet completely. Few rights-holders would be willing to take this step, as this would then make it far more difficult for them to find prospective licensees. Plus, if opt-outs were enacted en-masse, this would effectively foreclose competition in the market for viewing images online. What is needed is a legal regime that recognises that certain forms of hyperlinking do require the permission of the right-holder, at least to the extent that it enables the right-holder to participate to a fair degree in the profits generated by the third party creating the hyperlink.**

□ 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)

……

……

□ NO OPINION

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

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

…….

…….

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

**Viewing of images, involving the temporary copying of an image, should not be the subject of a licence. Temporary copying in this case is a result of the technological process without which the act of viewing content online would not be possible. Copyright should not and currently does not prevent simply looking at things. That said, there seems to be a lacuna in protection for right-holders when it comes to P2P caching. Perhaps 90% of the content on P2P systems consists of copyright protected works (movies, music, images, etc.), much of which is distributed without the right-holder's permission. With no recourse against viewers/users and ISP's being able to take the benefit of safe harbours provided under the E-Commerce Directive (2000/31/EC), this can leave right-holders helpless if the provider of the P2P website/technology is unidentifiable or otherwise out of legal reach. Whilst this is not currently a major problem for BAPLA members – P2P systems are more commonly used for sharing movies and music than they are for images – we have sympathy for impacted rightsholders and would advocate a legislative solution not focused on the user/viewer but rather upon a re-examination of the safe harbours under the InfoSoc Directive, the objective being to place a greater level of responsibility on ISP's to be vigilant and pro-active in guarding against such practices.**
**(BAPLA signed an amicus brief on the Perfect 10 case that illustrates issue of caching in relation to images very well.)**[27]

 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

[27] QV (To Cache Or Not To Cache; P2P "System Caching"—The Copyright Dilemma by Assaf Jacob

distribution of that tangible article)[28]. 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)[29]. This raises difficult questions, notably relating to the practical application of such an approach (how to avoid re-sellers keeping and using a copy of a work after they have "re-sold" it – this is often referred to as the "forward and delete" question) as well as to the economic implications of the creation of a second-hand market of copies of perfect quality that never deteriorate (in contrast to the second-hand market for physical goods).

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

□ YES – Please explain by giving examples

……

……

□ NO

□ NO OPINION

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

[Open question]

Resale rights for digital images would create a secondary market in goods, which are not sold in the first instance – the use of images is merely licensed. The consequences of providing a legal framework where it is not required would severely affect the businesses of BAPLA's members; businesses built on an initial investment of digitizing analogue images, as well as on the continuing investment in creating new images and in both cases also involving the cataloguing, metadata and identifier input and marketing of images. A secondary market in digital images would deprive our members of the opportunity to recoup this investment.

Resale rights are incompatible with the nature of transactions involving digital images. A hallmark of all of our members' standard form licence agreements is that they are always non-sub-licensable. This is distinct from the rights granted to use or exploit an end user product or service incorporating an image, for which a product or service may be freely traded within the express parameters of a negotiated licence. The essence of digital content is that is can be seen, or experienced, by an unlimited number of users whist still being owned and controlled by the rightsholder. Consequently, the rightsholder does not need to sell it, and can merely license it. Control over the use of the digital content is the key rightly held by its right owner.

The introduction of a right of resale (or relicense) of previously licensed images would have a hugely constraining and possibly devastating effect on picture libraries and the rights holders

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

[29] 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 rightsholder'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).

they represent, as well as the distribution of licensed images. It would result in any purchaser of an image licence effectively becoming a potential competitor to the rights-holder. It would be virtually impossible to police the "delete" element of the "forward and delete" concept and it would deter rights-holders from offering discounts for bulk purchases of licenses.

Reuse of images MUST take place with the agreements of rights holders, otherwise there would likely be a drastic decline in the investment, production and therefore overall output of professionally shot images in the future.

Plus, any doctrine of exhaustion at the EU level, would leave re-users vulnerable to being sued in non-EU jurisdictions that do not have a similar doctrine should they use the content on the Internet, thereby making it available in other jurisdictions.

## *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[30]. 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[31].

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

□ YES

□ **NO**

**Copyright is an automatic right in the European Union, which is benefit to all EU creators. Put simply, it is hard to understand how any organisation could manage a registration system for images. According to some sources[32], 880 billion photos will be taken in 2014 from an estimated 7.3 billion camera phones[33] on the planet.**

□ NO OPINION

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

[Open question]

We do not see there would be any net advantages that could be realistically achieved.

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

[Open question]

[30] 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.

[31] 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.

[32] http://www.theglobeandmail.com/life/humanity-takes-millions-of-photos-every-day-why-are-most-so-forgettable/article12754086/?page=all

[33] http://www.digitaltrends.com/mobile/mobile-phone-world-population-2014/

A registration system would create a two-tier system for copyright protection, i.e. better visibility and protection for registered content and a lack of (or inferior) protection of unregistered content. This would not be in compliance with the philosophy and law of international copyright treaties to which EU countries are signatories.

Whilst in theory a registration system could bring benefits in terms of helping to identify the rights-holder of an otherwise potentially orphan work, the disadvantages of a formal registration system at the EU level would vastly outweigh the benefits. The disadvantages would include the additional burden on rights-holders of making a registration for each copyright work produced, which would set-back the EU compared to other jurisdictions where registration is not compulsory. Also, it could lead to a false preconception that if a work is not registered, it is not protected or likely to be enforced, therefore putting rights-holders on the back foot and users vulnerable to legal exposure. Plus, the costs of establishing and maintaining a register would be a deadweight loss in terms of economic efficiency. All of these factors would be exacerbated as the sheer volume of newly created digital works grows exponentially on a regular basis, digital images being a case in point (see comments in Q.15 above).

For any registration system to provide a net benefit we feel it would need to be:

(1) Voluntary and non-exclusive (so a rights-holder would not be prevented from registering the same copyright work elsewhere and the registry would not confer monopoly rights on the entity running it which would then need to be regulated);

(2) Free to register;

(3) For images, include a visual reverse-search mechanism so it is easy to search; and

(4) Be free to query (at least for the purpose of identifying works as part of an orphans works diligent search).

Rather than an EU level registration system, we feel what would be of benefit and an easier solution to implement, would be a non-exhaustive, authoritative directory of existing publicly accessible databases of different types of copyright work that are available globally. It is important that any such reference tool has global coverage in view of the global nature of the Internet. If successful, it could make the EU the first destination point for business globally wishing to find and license copyright works.

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

[Open question]

…….

…….

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

There are many private databases of works and other subject matter held by producers, collective management organisations, and institutions such as libraries, which are based to a greater or lesser extent on the use of (more or less) interoperable, internationally agreed 'identifiers'. Identifiers can be compared to a reference number embedded in a work, are specific to the sector in which they have been developed[34], and identify, variously, the work

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

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[35] should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition[36] 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[37] 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]

We would like to see the EU take a proactive approach in the promotion of open and cross-sector identifiers for all types of digital content, as well as the strengthening of the protections against metadata stripping. This should include building upon established identifiers and metadata standards, such as IPTC for images. We expect that such initiatives would bring far greater value to society in the form of easier, faster and more frictionless copyright licensing compared to spending resources in establishing a registration system that could never be all-inclusive and would bring with it the disadvantages we describe in Q.17.

Promotion by the EU authorities could take the form of EU institutions themselves being early adopters of new identifier standards and by continuing to fund R&D projects such as the one currently being undertaken under the Rights Data Integration banner (which is piloting the work of the Linked Content Coalition). It could also include introducing legal measures to discourage the stripping of metadata and other identifiers without good reason, at the same time encouraging the respect for and use of metadata at every stage in the life of an image - from the moment it is created using a digital camera (relevant to camera manufacturers), to when it is shared or licensed (relevant to social media platforms and photo agencies), to every time it is used in a digital environment (relevant to businesses of all sectors). One of the early outputs from a work stream under the auspices of the UK Copyright Hub has in fact been to draw up a 10 point voluntary code of conduct along these lines, please see: http://www.clsg.info/Images_and_Metadata.html.

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

Works and other subject matter are protected under copyright for a limited period of time. After the term of protection has expired, a work falls into the public domain and can be freely used by anyone (in accordance with the applicable national rules on moral rights). The Berne Convention[38] 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).

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

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

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

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

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

**The term should be long enough to insure a rightsholder and her/his dependents receive fair and full economic benefits from their works. BAPLA firmly believes there should be no reduction to the term of 70 years post mortem auctoris, as this would harm the rightsholder without giving any substantial benefit to the public.**

**It is worth noting that, even today, many visual works are not recognized during the lifetime of the rightsholder or that they gain value only after their death.**

**In the sphere of online use, any shortening of the term would effectively transfer the right of the creative rightsholder to Internet stakeholders who were not part of the creation or original publication of the work letting those organisations reap the benefit of the initial investment.**

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

……

☐ NO OPINION

# III. Limitations and exceptions in the Single Market

Limitations and exceptions to copyright and related rights enable the use of works and other protected subject-matter, without obtaining authorisation from the rightholders, for certain purposes and to a certain extent (for instance the use for illustration purposes of an extract from a novel by a teacher in a literature class). At EU level they are established in a number of copyright directives, most notably Directive 2001/29/EC[39].

Exceptions and limitations in the national and EU copyright laws have to respect international law[40]. 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)[41], these limitations and

[39] 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.

[40] 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).

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

exceptions are often optional[42], 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")[43].

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

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

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

□ YES – Please explain by referring to specific cases

……

……

□ **NO** – Please explain

**The businesses of our members are built to accommodate current copyright exceptions of Member States. BAPLA believes that the current set of optional exceptions and limitations achieves the right balance. The problems arise when the scope of the exceptions is broadened (as currently in the UK) in a way that impacts the right to property of rightsholders. Any suggestion of broadening the scope without sufficient and**

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

[43] 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.

**compelling evidence for introducing exceptions, observing the impact on all creators, would have a substantial impact that would go beyond current comprehension and create much uncertainty in the market.**

□ NO OPINION

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

□ YES – Please explain by referring to specific cases

……

□ **NO** – Please explain

**Whilst harmonisation might be appealing conceptually, especially when concerned with copyright law, it should not be forgotten that Member States have differing legal traditions; some based on common law, others based on civil law. Therefore some Member States will be extremely attached to exceptions that have been implemented in a way that is complimentary to national cultures. Any further harmonisation may be met with resistance if they were to be seen as being "forced upon" Member States in a way that may jar with national customs. We therefore favour the pragmatic approach taken by the EU so far, which brings a level of harmonisation whilst still respecting the diversity of national traditions.**

**We do not see that any further harmonisation in the area of exceptions is needed in order to provide for greater flexibility in the digital age. Certainly in the images sector, rightsholders are already finding ways to fuel and partner with new and emerging technology based business models.**

□ NO OPINION

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

[Open question]

No, stability is good for future investment and the courts are generally doing a good job of applying existing exceptions to new technological uses.

……

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

□ YES – Please explain why

……

……

□ **NO** – Please explain why

**Flexibility in this area would lead to greater uncertainty and instability. One of the benefits of the EU framework of limitations and exceptions is that its prescriptive nature lends itself to a greater level of certainty amongst right-holders and users alike. Each is able to make investment decisions with one less variable to consider. This is an advantage of the EU copyright system when compared to a US based "fair use" regime. It would be damaging to lose that certainty.**

**The US concept of fair use, based on a case-by-case balancing of certain factors, might seem appealing, but in reality has led to a number of costly lawsuits. Even judges and lawyers come to mixed conclusions as to whether a particular use is 'fair' or not. This complexity and uncertainty, not to mention cost, does not benefit society or creators. Aside from lawsuits, uncertainty may cause businesses to shy away from investment, and creators to avoid creating new works. We much prefer a legal framework that offers clarity, predictability and lower costs as a result. As Mickey H. Osterreicher, general counsel for the US National Press Photographers said, "Fair use started out as an exception to copyright law, now it seems that copyright is the exception to fair use." please see http://nyti.ms/1jSAA03**

**In addition, to introduce a greater degree of flexibility would only favour those with deep pockets wishing to use copyright work at the edges of an exception/limitation, as it is those users that can most easily afford to test the boundaries or, worse still, prey on the knowledge that less well resourced creators and rightsholders may be unwilling to take the financial risk of challenging such uses. This concern is especially acute in the images sector as it is made up of a highly fragmented set of relatively small rightsholders. There are not the same business giants in the images sector as there are in other creative sectors such as with films and music.**

□ 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 do NOT believe that a greater degree of flexibility in the area of exceptions and limitations would be helpful and, indeed, it would more likely be damaging. Please see our answer to Q.24.

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

□ YES – Please explain why and specify which exceptions you are referring to

……

……

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

**The EU is a rich and diverse collection of nation states. Trading across the EU often requires commercial knowledge of local market conditions. Our members trade with other EU agents who employ local skills that capitalizes on market conditions.**

**Standard licensing practice is that end users are required through contract to ensure the lawful use of an image.**

**In those territories where an exception to copyright is prescribed, local market conditions determine whether goods and services are saleable. We are not in favour of any further harmonization of the territoriality of copyright limitations and exceptions without a deeper understanding of its economic impact. We would advocate change not for change's sake, but only where this has demonstrable benefit to society.**

**As a sole exception to the above (no pun intended), we would argue the case for greater harmonization of moral rights, which is poor in the UK. The absence of an automatically arising paternity right in the UK, we feel, has likely contributed considerably to the orphan works problem for images.**

□ NO OPINION

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

[Open question]

…….

…….

## *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[44] and enable on-site consultation of the works and other subject matter in the collections of such institutions[45]. 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[46].

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

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

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

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

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

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

…….

…….

□ NO

□ NO OPINION

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

[Open question]

…….

…….

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

[Open question]

…….

…….

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

[Open question]

…….

…….

## 2. Off-premises access to library collections

Directive 2001/29/EC provides an exception for the consultation of works and other subject-matter (consulting an e-book, watching a documentary) via dedicated terminals on the

premises of such establishments for the purpose of research and private study. The online consultation of works and other subject-matter remotely (i.e. when the library user is not on the premises of the library) requires authorisation and is generally addressed in agreements between universities/libraries and publishers. Some argue that the law rather than agreements should provide for the possibility to, and the conditions for, granting online access to collections.

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

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

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

[Open question]

……

……

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

[Open question]

……

……

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

[Open question]

……

……

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

[Open question]

……

……

## 3. E – lending

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

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

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

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

□ **YES** – Please explain with specific example

**BAPLA members do not negotiate agreements direct with libraries, and in the UK are not beneficiaries of remuneration through the Public Ending Right (PLR) scheme, but they do negotiate agreements with publishers to include images within books, which books are then made available by libraries.**

**E-lending equates to a whole new distribution model, for which ALL rights holders, including the rightsholders of embedded works, should derive benefit.**

**Under an e-lending scheme, publishers would need to ensure that all rights are cleared for such purposes to safeguard the interests of libraries and respective rightsholders, otherwise the libraries would be at risk of facilitating unlawful access to photos embedded within publications. Libraries should work to ensure both equitable access and incentives for licensing eBooks and to eReaders. With proper rights management systems in place photographers could, but currently do not benefit from remuneration.**

**Any improper management could be quite harmful to rightsholders such as photographers, especially considering that e-lending could conceivably create a secondary market in competition with the first market. This harm would be further compounded if digital exhaustion were ever also introduced (see our comments in response to Q.14).**

□ NO

□ NO OPINION

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

…….

…….

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

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

[Open question]

…….

…….

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

[Open question]

As described in our response to Q.36, there are potentially problems for image rightsholders if e-lending schemes are improperly managed without having due regard to, and accounting in respect of, images contained within publications.

Already in existence are a number of commercial or public-private partnership e-lending schemes; some already offer remote access to a considerable range of titles. Examples include Amazon Kindle, Oyster, Bilbary Kindle Owners' Lending Library, which currently do not yet consider fair remuneration for rightsholders works embedded in online publications, such as the PLR scheme.

Intermediary schemes such as Canada's e-bookstore Bilbary are utilising public libraries as a new e-books sales channels, publishers such as Hachette USA, see libraries as a means to sell their back e-catalogues. Kindle Owners' Lending Library gives access to over 200,000 books to readers in UK, France, Germany and the US. Books can be borrowed for free with no due return dates. Authors who enrol under the Kindle Owners scheme are directly remunerated.

These new models offer libraries new opportunities. A public library may create new relationships with say local authors, or by focusing on specialist subject areas a USP.

With these new opportunities comes the added responsibility to balance the educational, social and commercial needs carefully, ideally to the benefit of public libraries and to rightsholders which includes embedded works. This requires more careful consideration in the context of public-private partnerships. The commercialisation of libraries is not a path the EU should follow, public/private partnerships challenge core public access principles, which have always been altruistic and ethical and act as an information commons for the community in which it operates. Private companies are beholden to shareholders not to the public.

## 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[47]. Provided the required funding is ensured (digitisation projects are extremely expensive), the result of this MoU should be that books that are currently to be found only in the archives of, for instance, libraries will be digitised and made available online to everyone. The MoU is based on voluntary licences (granted by Collective Management Organisations on the basis of the mandates they receive from authors and publishers). Some Member States may need to enact legislation to ensure the largest possible effect of such licences (e.g. by establishing in legislation a presumption of representation of a collecting society or the recognition of an "extended effect" to the licences granted)[48].

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

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

**The 2011 MoU must take into consideration the views of image rights owners, before legislation is even considered. This paper does not take into consideration the rights of authors whose work has been embedded within other works, which they may consider to be commercial. These rights owners were not represented in discussions and for the main are non-members or 'outsiders' of the collecting society regime. The largest criticism of the MoU was "but what about the images?" BAPLA would be supportive in providing guidance in this area.**

[47] 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 .

[48] 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.

□ NO – Please explain

……

……

□ NO OPINION

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

□ **YES** – Please explain

**As noted in our response to Q.40, the MoU does not consider the use of images properly. We believe the reason is because the vast majority of photographers and picture agencies across Europe are not represented by collecting societies for visual arts, whose primary membership typically includes artists such as painters, sculptures, architects, etc. It cannot be because it is "too difficult" to identify embedded images within books. This is something many of our members do on a daily basis in conjunction with their newspaper customers, in order to determine which images have been included and therefore need to be licensed. Image recognition technology is available that would make this a perfectly manageable task.**

□ NO – Please explain

……

……

□ NO OPINION

## *B. Teaching*

Directive 2001/29/EC[49] enables Member States to implement in their national legislation limitations and exceptions for the purpose of illustration for non-commercial teaching. Such exceptions would typically allow a teacher to use parts of or full works to illustrate his course, e.g. by distributing copies of fragments of a book or of newspaper articles in the classroom or by showing protected content on a smart board without having to obtain authorisation from the right holders. The open formulation of this (optional) provision allows for rather different implementation at Member States level. The implementation of the exception differs from Member State to Member State, with several Member States providing instead a framework for the licensing of content for certain educational uses. Some argue that the law should provide for better possibilities for distance learning and study at home.

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

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

□ YES – Please explain

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

…….

□ NO

□ NO OPINION

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

[Open question]

…….

…….

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

[Open question]

…….

…….

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

[Open question]

…….

…….

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

[Open question]

…….

…….

## *C. Research*

Directive 2001/29/EC[50] enables Member States to choose whether to implement in their national laws a limitation for the purpose of non-commercial scientific research. The open formulation of this (optional) provision allows for rather different implementations at Member States level.

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

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

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

□ YES – Please explain

……

……

□ NO

□ NO OPINION

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

[Open question]

……

……

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

[Open question]

……

……

## *D. Disabilities*

Directive 2001/29/EC[51] 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) [52].

The Marrakesh Treaty[53] 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).

[51] Article 5 (3)b of Directive 2001/29.

[52] 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/).

[53] 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

……

□ NO

□ NO OPINION

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

[Open question]

……

……

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

[Open question]

……

……

## *E. Text and data mining*

Text and data mining/content mining/data analytics[54] are different terms used to describe increasingly important techniques used in particular by researchers for the exploration of vast amounts of existing texts and data (e.g., journals, web sites, databases etc.). Through the use of software or other automated processes, an analysis is made of relevant texts and data in order to obtain new insights, patterns and trends.

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

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

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

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

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

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

□ YES – Please explain

……

……

□ NO – Please explain

……

……

□ NO OPINION

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

[Open question]

……

……

[55] 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 .

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

[Open question]

…….

…….

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

[Open question]

…….

…….

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

[Open question]

…….

…….

## *F. User-generated content*

Technological and service developments mean that citizens can copy, use and distribute content at little to no financial cost. As a consequence, new types of online activities are developing rapidly, including the making of so-called "user-generated content". While users can create totally original content, they can also take one or several pre-existing works, change something in the work(s), and upload the result on the Internet e.g. to platforms and blogs[56]. 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

[56] 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.

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[57].

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

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

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

☐ **YES** – Please explain by giving examples

**Images are routinely posted to social media websites without permission of rightsholders, in breach of copyright. This is rarely policed as the costs of enforcement are prohibitive and the prospect of recovering damages from individuals posting the content is low. It also poses a moral issue, as it is usually only the service provider that benefits financially from such postings, either via advertising revenue around the postings and/or by amassing data on the individuals who make the postings. However, the prospects of recovering compensation from the service providers are equally low as they are able to shield themselves from liability by availing themselves of the hosting defence under the E-Commerce Directive (2000/31/EU).**

**This is an undesirable situation, leaving rightsholders feeling helpless and unable to properly protect their works, and users vulnerable to the possibility of liability. It also means that none of the revenue generated by the platforms hosting the content finds its way back to rightsholders whose content is helping to fuel the success of the platform.**

**The scale of this problem and the revenues at stake are huge. By way of example, Pinterest is a photo-sharing website that allows users to create and manage image collections such as events, interests and hobbies made up of photos they have found on the web, many of which will belong to third party rightsholders. In October 2013, Pinterest secured a $250 million round of equity funding, valuing the platform at $3.8 billion.**

**We would therefore urge the EU to re-examine the safe harbour provisions under the E-Commerce Directive (2000/31/EU). These problems could be eased if those benefitting from the hosting defence were obliged to provide rightsholders with a choice of either blocking their content from being uploaded (and therefore withdrawing any content already uploaded) or sharing in the profits derived from its use on a proportionate basis. An example of such a mechanism is the Content ID system operated by YouTube in respect of video and music but not, as yet, for images. The technology available to monitor third party images posted in this way is readily available and would not require platforms to develop their own Content ID systems, they could license in the technology in a cost effective way.**

[57] 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 .

**These steps would not mean less content being published, YouTube is evidence to the contrary of that, it would simply mean that content could be licensed in a frictionless manner with more content being published legally, in turn also generating more taxable economic transactions. This direct licensing solution would be a more desirable outcome than any kind of levy on social media platforms or blanket collective license scheme as it would enable rightsholders to be compensated directly in a timely manner and allow them to retain the choice of whether to allow their content to be exploited. It would be a clear win-win solution and a benefit to all.**

☐ NO

☐ NO OPINION

***59.*** ***(a)*** *[In particular if you are an end user/consumer or a rightsholder:]* ***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

**(a) The lack of proper identification is both a by-product and a cause of UGC being unlicensed. If an item of content is not properly identified, viewers of the content will find it more difficult to locate the rightsholder to purchase a licence should they wish to re-use the content themselves. The route to better identification is through preserving and respecting metadata. Please see our comments in response to Q.19 in this regard.**

**In addition, there are various visual reverse search tools available today that help with identifying the rightsholder of an image. Examples include PicScout (www.picscout.com) and TinEye (www.tineye.com). These tools are free and easy to use.**

☐ NO – Please explain

……

……

☐ NO OPINION

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

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

□ **YES** – Please explain

**(a) Please see our comments in response to Q.58.**

□ NO – Please explain

…….

…….

□ NO OPINION

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

[Open question]

Please see our comments in response to Q.58, in particular our suggestion that the E-Commerce Directive (2000/31/EC) be re-examined.

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

[Open question]

To manage transformative use, we believe what is required is the correct permissions-based environment, one that facilities collaboration and sometimes, but not always, the creation of a new work.

Again, please see our comments in response to Q.58, in particular our suggestion that the E-Commerce Directive (2000/31/EC) be re-examined.

In essence, the key characteristics of any new legislative solution are that it should not provide owners of UGC populated platforms/websites with a safe harbour against infringement unless they are doing all they can to avoid infringement, by providing rightsholders with a means of blocking the content or licensing it to the platform/website owner on a "live" basis and on terms set by the platform/website owner. The burden should be shifted from rightsholders to those website/platform owners that are benefitting financially from UGC being posted by third parties.

…….

…….

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

[Open question]

…….

…….

# 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[58]. 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[59][60].

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[61] in the digital environment***?

☐ **YES** – Please explain

**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.**

**That said, whilst clarification in this area would be welcome, we would not advocate an extension of the levy system into new areas in an attempt to address more recent problems in the online world such as P2P file sharing and UGC proliferation. We would instead advocate automated, technology based direct licensing solutions involving the identifying of rightsholders for specific items of content by the use of metadata, thus resulting in a more precise and equitable remittance of funds to rightsholders.**

☐ NO – Please explain

……

……

[58] Article 5. 2)(a) and (b) of Directive 2001/29.
[59] Communication "Unleashing the Potential of Cloud Computing in Europe", COM(2012) 529 final.
[60] 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.
[61] Art. 5.2(a) and 5.2(b) of Directive 2001/29/EC.

□ 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?***[62]

□ YES – Please explain

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……

□ 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?***[63]

□ YES – Please explain

……

……

□ NO – Please explain

……

……

□ NO OPINION

***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?***

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

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

□ 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]

…….

…….

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

[Open question]

…….

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# V. Fair remuneration of authors and performers

The EU copyright acquis recognises for authors and performers a number of exclusive rights and, in the case of performers whose performances are fixed in phonograms, remuneration rights. There are few provisions in the EU copyright law governing the *transfer* of rights from authors or performers to producers[64] or determining who the owner of the rights is when the work or other subject matter is created in the context of an employment contract[65]. This is an area that has been traditionally left for Member States to regulate and there are significant

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

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]

The authors (photographers) represented by our members have all elected to rely on direct licensing as the preferable mechanism for exploiting their images. This allows the author/rightsholder to decide on which agency in which to place their trust for representing their works and to switch agencies (or represent themselves independently) should they become unhappy, thus encouraging a highly competitive market amongst photo agencies.

Technology makes it increasingly possible for agencies to trace uses on the Internet and manage rights on a machine-readable basis.

Developments in direct licensing methods and practices means that he case for collective management of rights, at least for images, is dwindling.

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

□ YES – Please explain

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□ NO – Please explain why

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□ NO OPINION

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

[Open question]

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# VI. Respect for rights

Directive 2004/48/EE[66] provides for a harmonised framework for the civil enforcement of intellectual property rights, including copyright and related rights. The Commission has consulted broadly on this text[67]. Concerns have been raised as to whether some of its provisions are still fit to ensure a proper respect for copyright in the digital age. On the one hand, the current measures seem to be insufficient to deal with the new challenges brought by the dissemination of digital content on the internet; on the other hand, there are concerns about the current balance between enforcement of copyright and the protection of fundamental rights, in particular the right for a private life and data protection. While it cannot be contested that enforcement measures should always be available in case of infringement of copyright, measures could be proposed to strengthen respect for copyright when the infringed content is used for a commercial purpose[68]. One means to do this could be to clarify the role of intermediaries in the IP infrastructure[69]. At the same time, there could be clarification of the safeguards for respect of private life and data protection for private users.

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

□ **YES** – Please explain

**The cost of enforcement is prohibitive and disproportionate to the revenues from exploitation/damages. Cheaper and quicker court procedures as well as the appointing of dedicated copyright expert judges, will all help improve the situation. The UK Intellectual Property Enterprise Court (formerly Patents County Court), which offers services such as the Small Claims Track enabling rightsholders to pursue low value IP claims, is a step in the right direction. Also recently introduced and advocated by BAPLA is the Police Intellectual Property Crime Unit (PIPCU) funded by the UK government to combat IP crime with a focus on offences committed online.**

□ NO – Please explain

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□ NO OPINION

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

[Open question]

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

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

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

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

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***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

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□ NO – Please explain

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□ NO OPINION

# VII. A single EU Copyright Title

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

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

□ YES

□ **NO**

**Such radical reform would be incompatible with the different member state copyright systems, each of which has evolved in its own right and is now engrained in local national culture. In the absence of compelling economic evidence that a single EU copyright title would bring with it net benefits, we do not think this would be a productive or sensible route to take.**

□ NO OPINION

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

[Open question]

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# VIII. Other issues

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

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

[Open question]

This consultation does not consider impact on non-harmonized related rights, such as moral rights. Creators in the UK have fought long and hard for moral right reform. A closer harmonization of the rules relating to moral rights would be welcomed. In the case of the UK, any move towards supporting access of content throughout the EU could not be possible without a robust framework of knowing who that content belongs to. Harmonised moral rights laws would help in this regard.

An important overriding matter that has not been expressly addressed in this consultation is the general approach to be taken with any legislative reform. Laws should always be technology neutral, as otherwise they would quickly become dated. Technology moves much faster than any legislative machine ever will. However, laws should continue to be cognisant of the different types of copyright work (text, music, video, images, etc.), as they will all remain distinct forms of creative expression for generations to come, irrespective of the precise technological means by which they are communicated or reproduced. In this regard, we would encourage EU lawmakers not to be shy in providing further granularity and detail in respect of different types of copyright works and industry sectors. Different types of copyright work merit different treatment in many situations; having regard to their respective characteristics and where/how they are consumed.

Our comments are made from the perspective of image rightsholders and their representatives. They are best placed to say which solutions are likely to work best for their sector. We hope this will be given due consideration.

Finally, we would also encourage the EU lawmakers to take a long-term view with the aim of fostering a rich cultural heritage for the benefit of future generations. This will not be achieved by introducing new exceptions but only by finding more innovative licensing solutions. In the words of Jean Michel Jarre, President of CISAC: "*Artists were here before electricity and will be here long after the internet....We [creators and tech companies] need each other, so at the end of the day we have to find the right partnership. Our creators are the identity we are going to leave for future generations. If we don't solve this we'll end up with just white noise"*