Public Consultation

on the review of the EU copyright rules

Contact: Kostas Rossoglou - digital@beuc.eu

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BUREAU EUROPÉEN DES UNIONS DE CONSOMMATEURS AISBL | DER EUROPÄISCHE VERBRAUCHERVERBAND
Rue d'Arlon 80, B-1040 Brussels • Tel. +32 (0)2 743 15 90 • Fax +32 (0)2 740 28 02 • consumers@beuc.eu • www.beuc.eu
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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*

[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 .

market; and how to improve the effectiveness and efficiency of enforcement while underpinning its legitimacy in the wider context of copyright reform". As highlighted in the October 2013 European Council Conclusions[5] *"Providing digital services and content across the single market requires the establishment of a copyright regime for the digital age. The Commission will therefore 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.

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.

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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.

Confidentiality

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

Please note that all contributions received will be published together with the identity of the contributor, unless the contributor objects to the publication of their personal data on the grounds that such publication would harm his or her legitimate interests. In this case, the contribution will be published in anonymous form upon the contributor's explicit request. Otherwise the contribution will not be published nor will its content be reflected in the summary report.

Please read our Privacy statement.

PLEASE IDENTIFY YOURSELF:

Name: The European Consumer Organisation (BEUC)

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

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

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

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

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

TYPE OF RESPONDENT (Please underline the appropriate):

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

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

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

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

☐ **Author/Performer OR Representative of authors/performers**

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

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

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

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

☐ **Collective Management Organisation**

☐ **Public authority**

☐ **Member State**

☐ **Other** (Please explain):

……

……

II. Rights and the functioning of the Single Market

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

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

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

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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 .

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

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

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

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

The digital environment offers new possibilities and opportunities for both creators and consumers. EU consumers have an unprecedented cultural sector on their doorstep, but the barriers preventing them from accessing content are overwhelming.

Consumers wish to access creative content on any media platform and in a way which allows them to choose the time when they view, read or listen to that content. This applies to audiovisual media services, radio and other online services, regardless of whether these are provided at national or European level. In the digital age, citizens want to access the same content on different platforms or across borders and should expect to be able to do so without impediment.

However, consumers are regularly confronted with access restrictions from certain services depending on the geographic location of their IP- address. Consumers seeking to buy copyright protected content online are often only allowed access to online stores directed to their country of residence. Such barriers lead to a significant reduction of choice for consumers, particularly for consumers from those Member States where there is a less abundant service offer. In addition, territoriality of copyright may lead to price discrimination to the detriment of consumers. In fact, right holders tend to define markets along national borders and set different prices and conditions for identical products and services in each Member State.

[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.

We are confident that the establishment of a legal regime that would allow all consumers within the European Community to buy content online on a pan-European basis at a fair price has the potential to contribute to the significant reduction of unauthorised use of copyright-protected material. Where business models have been developed and tried, the results have been promising. However, it is important to ensure that these business models are equally available to all consumers within the European Community.

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

X 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).

Commercial users are confronted with divergent rules and rights when trying to establish legal offers for copyright protected content. The main problem relates to the significant transaction costs related to acquiring of rights to offer services across Europe. Rights clearance can be long winded and expensive and the fees charged by right holders may not support a start-up service that still has to build a customer base and advertising revenues.

Spotify was not available in every EU Member State a full four years after its launch and had to undergo long discussions with the GEMA (the German Collecting Society) before launching the service in Germany due to excessive fee requests. Similarly, Netflix currently faces long discussions and negotiations before being able to launch its services in different EU Member States.

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]

N/A

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]

BEUC has repeatedly called for a comprehensive reform of copyright law. Copyright law exists to encourage creativity and innovation for the benefit of society as a whole. However, we believe that the current copyright framework fails to "keep pace" with the rapid digital developments. Digital technologies have fundamentally transformed and have called into question the "traditional" distribution system of the content and information industry, laying bare its inefficiency and its incapacity to adapt to the challenges of the digital environment.

The Information Society Directive 2001/29 has failed to achieve the objectives of establishing a Digital Single Market for creative content and harmonising national copyright legislation. Significant divergences exist in regard to the scope of the exceptions and limitations - which creates legal uncertainty for both consumers and creators.

In addition, the current copyright framework, which is based on an exhaustive list of optional exceptions and limitations, lacks sufficient flexibility to take account of technological developments. A dynamically developing market, such as the market for online content, requires a flexible legal framework that allows new and socially valuable uses which do not affect the normal exploitation of copyright works to develop without the copyright owner's permission.

Despite the increasing relevance of copyright law to their daily lives consumers are provided with hardly any information when it comes to copyright. Consumers are never quite sure what is legal and illegal under current copyright law. In many Member States, copyright law makes the everyday activities of consumers, such as backing up and copying legally bought music, films and e-books in order to play on a different device, illegal. Under current laws, parodies and pastiches which have gained new cultural relevance in the digital 'mash up' culture are illegal.

We call upon the European Commission to revise the Copyright Directive as a matter of urgency in order to establish a simple, consumer friendly legal framework for accessing digital content in Europe's single market, while ensuring at the same time fair remuneration of creators.

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)?***

X YES – Please explain by giving examples

BEUC regrets that rightholders and collective management organisations consider it appropriate to create such restrictions, as the purpose of creating content should surely be to share with a maximum of users and hence to enable a maximum of users to access it. Such practices may constitute an infringement on the freedom to provide services within the EU or competition law.

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)?***

X 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?

X YES – Please explain

As outlined above, BEUC calls for a revision of the Information Society Directive. The revision should focus on the following issues:

- Pursue the harmonisation of copyright exceptions and limitations; whereas we welcome more harmonisation, we consider that full harmonisation is not possible and we consider the discussion to be premature;

- Copyright exceptions should be made mandatory and it should not be possible for them to be overruled by contractual terms and conditions and technical protection measures as for example digital right management systems; The primary focus should be on the current set of copyright exceptions and limitations and the recognition of a clear set of users' rights. These should include those current limitations that are of direct interest to consumers, namely the private copying exceptions, as well as those reflecting fundamental rights and freedoms. The establishment of rights should become a central aspect of the European copyright framework;

- The current legal situation results in an unequal treatment of "physical" (e.g. book) and "intangible", digital works (e.g. eBook) and thus in inappropriate

consequences for consumers. In the eyes of consumers, it makes no difference whether they buy a printed book or an eBook. In both cases, consumers pay for the purchase of the work and for being able to permanently and freely utilise it. This includes the possibility of long-term access to the work, regardless of the device manufacturer or other restrictions from the content provider (e.g. continuance of a user account).

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].

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)

[16] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
[17] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.
[18] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.
[19] Film and record producers, performers and broadcasters are holders of so-called "neighbouring rights" in, respectively, their films, records, performances and broadcast. Authors' content protected by copyright is referred to as a "work" or "works", while content protected by neighbouring rights is referred to as "other subject matter".
[20] The right to "authorise or prohibit direct or indirect, temporary or permanent reproduction by any means and in any form, in whole or in part" (see Art. 2 of Directive 2001/29/EC) although temporary acts of reproduction of a transient or incidental nature are, under certain conditions, excluded (see art. 5(1) of Directive 2001/29/EC).
[21] The right to authorise or prohibit any communication to the public by wire or wireless means and to authorise or prohibit the making available to the public "on demand" (see Art. 3 of Directive 2001/29/EC).

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?

X 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])

The Copyright Directive does not address questions of conflicts of law , arising in situations where a work is made available to the public in one Member State but is accessed from another Member State. It should be noted that an application of the country of origin's law would require a comprehensive harmonisation across Member States regarding copyright limitations, rights ownership, transfer of rights, scope of protection and collective management of copyright- issues which the present Directive does not address to a large extent. For these reasons, it may seem appropriate to apply the law of the country or the countries in which the work that has been publicly communicated can be, or was intended to be, received (Concise European Copyright Law, Kluwer Law International).

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])?***

[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 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.

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?***

X 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")

BEUC considers that the traditional practice of licensing separately the reproduction right and the making available right is not fit for purpose in the digital environment. The advent of the Internet has prompted new channels of digital distribution, but the contractual divide remains. As a result, these two sets of rights have to be cleared, as opposed to clearing a single making available right, thus adding to the complexity of making content accessible to consumers.

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.

[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.

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?

X NO – Please explain whether you consider this to be the case in general, or under specific circumstances, and why (e.g. because it does not amount to an act of communication to the public – or to a new public, or because it should be covered by a copyright exception)

The ability to freely link from one resource to another is one of the fundamental building blocks of the Internet. Users do it every day when they post a Facebook update, put a tweet on Twitter, write a blog post, comment, etc. Requiring the authorisation of rights holders before being allowed to place a link to a resource that is available online would break the internet as we know it and lead to a nightmarish permission culture. BEUC supports the analysis by the "European Copyright Society", consisting of independent copyright scholars, according to which hyperlinking in general should not be considered an act of communication to the public.

In addition to the question how to treat hyperlinks it is important to point out the problem of embedding content to a website. The German Federal Court of Justice raised the question how to treat embedding to the European Court of Justice. In our opinion embedding must be treated the same as hyperlinking.

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?

X 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)

A user browsing of the Internet regularly cerates temporary copies of works and other subject-matter protected under copyright on the screen and in the cache memory of the computer. Requiring the authorisation of the right holder for viewing and reading content that is already available amounts to an additional permission which could lead to citizens infringing the law by merely surfing on the Internet.

4. Download to own digital content

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

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

X YES – Please explain by giving examples

The current legal situation results in an unequal treatment of "physical" (e.g. book) and "intangible", digital works (e.g. eBook) and thus in inappropriate consequences for consumers. In the eyes of consumers, it makes no difference whether they buy a printed book or an eBook. In both cases, consumers pay for the purchase of the work and for being able to permanently and freely utilise it. This includes the possibility of long-term access to the work, regardless of the device manufacturer or other restrictions from the content provider (e.g. continuance of a user account).

BEUC believes that there is no justification to discriminate against the purchasers of immaterial copies (mainly downloads of songs, movies or computer games) against those of copies on physical media (such as CDs, DVDs or DVDROMs). It is at least uncertain whether and under which circumstances a user of a commercial download

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

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

service like iTunes is allowed to re-sell a music album. Reselling a CD of the same album on the other hand is undisputedly legal.

Bearing in mind the fact that the ongoing substitution of the market for physical copies by a market for non-physical ones mainly benefits the suppliers' side, such an unequal treatment seems unjustified.

BEUC calls upon the European Commission to carefully assess the consumer detriment from the existing discrimination between physical and digital content as well as the potential benefits from remedying the current situation.

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.***

N/A

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[29]. 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[30].

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

X YES

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

[Open question]

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

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

BEUC welcomes the launch of a discussion with regards the creation of a registration system at EU level. The advantages and disadvantages of such a system would depend on its design.

On the one hand, the creation of a registration system for copyright, will enable the creation of data about the existence and duration of copyright for the work in question, and about who owns the copyright. It will also facilitate licensing by lowering the cost of identifying rightsholders,

On the other hand, given the easiness of creating new works, imposing a registration system on authors for every piece of content they create would be burdensome. Furthermore, the implementation and maintenance of such a system would entail significant costs.

It is useful to evaluate the situation in the United States. Prior to the United States joining the Berne Convention, copyrighted works that were not registered with the U.S. Library of Congress entered the public domain. Many experts believe that it is a mistake to extend protection to all works, regardless of copyright registration, and that this practice has dramatically expanded the number of protected works to include countless works that are not actively exploited by copyright owners, including those for which it is difficult to establish ownership, or where it is difficult to know when terms of protection have expired.

The growth of the Internet has opened up new possibilities for public access to and use of creative works that did not exist at the time of the Berne Convention. The majority of creative works have little or no commercial value, and the value of many initially successful works is quickly exhausted. For works that are not producing revenues, continued copyright protection serves no economic interest of the author. But in a system without any formal requirement for copyright protection, commercially "dead" works are nonetheless locked up. They cannot be used as building blocks for (potentially valuable) new works without permission, and the cost of obtaining permission will often prevent use *(Source: Reform(aliz)ing copyright by Christopher Sprigman)*.

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

N/A

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

N/A

D. How to improve the use and interoperability of identifiers

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

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

N/A

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

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

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

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

[31] E.g. the International Standard Recording Code (ISRC) is used to identify recordings, the International Standard Book Number (ISBN) is used to identify books.
[32] You will find more information about this initiative on the following website: http://www.globalrepertoiredatabase.com/.
[33] You will find more information about this initiative (funded in part by the European Commission) on the following website: www.linkedcontentcoalition.org.
[34] You will find more information about this initiative on the following website: http://www.copyrighthub.co.uk/.
[35] Berne Convention for the Protection of Literary and Artistic Works, http://www.wipo.int/treaties/en/ip/berne/.

BEUC believes that the current term of protection for copyright and related rights do not reflect the needs and the reality of the digital environment. Although we agree that better protection of authors is needed, a "longer" term of protection does not mean "better" protection for authors.

Instead, the best way of improving performers' earnings would be to ensure they receive a fair share of the revenues generated from their creativity from the date of publication as most earnings are likely to be in the early years following release. In addition, clearer rules of transfer of rights to the benefit of performers, tackling unfair terms in recording contracts and social protection measures should be considered to improve performers' welfare.

Long terms of protection prove to be counter-productive and a burden to innovation, threatening to shrink the public domain and to increase end prices for consumers. Longer terms of protection will impede the transfer of content into the public domain after the expiry of the current term. Works in the public domain are freely accessible by the general public and can be used for the benefit of future innovation and as a source of knowledge

The balance of interests between rights holders and users is endangered by the extension of the duration of intellectual property rights, which should not extend beyond the time necessary to provide incentives to create and distribute. Extending this term of protection runs counter to the Commission's declared objective of increasing the possibilities for access to creative content and services and of supporting innovative business models and legal offers.

Any development of copyright law should be based on an independent assessment of the costs and benefits to society as a whole.

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[36].

Exceptions and limitations in the national and EU copyright laws have to respect international law[37]. In accordance with international obligations, the EU acquis requires that limitations and exceptions can only be applied in certain special cases

[36] Plus Directive 96/9/EC on the legal protection of databases; Directive 2009/24/EC on the legal protection of computer programs, and Directive 92/100/EC on rental right and lending right.
[37] Article 9(2) of the Berne Convention for the Protection of Literary and Artistic Works (1971); Article 13 of the TRIPS Agreement (Trade Related Intellectual Property Rights) 1994; Article 16(2) of the WIPO Performers and Phonograms Treaty (1996); Article 9(2) of the WIPO Copyright Treaty (1996).

which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interest of the rightholders.

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

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

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

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

X YES – Please explain by referring to specific cases

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

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

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

Copyright law exists to encourage creativity and innovation for the benefit of society as a whole. However, we believe that the current copyright framework fails to "keep pace" with the rapid digital developments. Digital technologies have fundamentally transformed and have called into question the "traditional" distribution system of the content and information industry, laying bare its inefficiency and its incapacity to adapt to the challenges of the digital environment.

There is a need to restore the balance between rights and exceptions – a balance that is currently skewed by the fact that the harmonisation Directives mandate basic economic rights, but merely permit certain exceptions and limitations.

From a consumer's perspective, copyright's current balance is far from perfect. A number of permitted uses of copyright-protected material are only allowed as exceptions and limitations to the copyright owners' exclusive rights. However, these exceptions and limitations are not absolute conditions and consumers often face unclear boundaries as to which acts are permitted under the current copyright legislation.

Exceptions to, and limitations on, right holders' exclusive rights are an important mechanism for achieving balance in copyright law. They are the way in which public and consumer fair use rights are expressed.

While appropriate levels of copyright protection can stimulate investment and production of content, thoughtful exceptions are equally essential to the Knowledge Economy by permitting technological development and ensuring that access to knowledge fuels production of more knowledge. The need to encourage new works has to be put in perspective with the importance of exceptions to provide the appropriate conditions for creation, innovation, access to knowledge and the development of the information society.

The Copyright Directive was adopted with the aim to harmonise national laws and facilitate the creation of a Single Market for creative works. However, the objective of harmonisation has not been achieved. There remain significant divergences in the copyright laws of EU Member States, namely as regards the exceptions and limitations. These differences create barriers to free movement of copyrighted works and distort the conditions for competition in the dissemination of works. The exhaustive nature of the list of exceptions provided in the Copyright Directive has prevented Member States from adapting the copyright framework to the new technologies.

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?

X YES – Please explain by referring to specific cases

In contrast to consumer rights, exceptions on copyright are not considered ''rights'' in their own merit, but simply exceptions to right holders' exclusive rights. The provisions in copyright law permitting certain unauthorized acts in relation to protected works are a deviation from the general principle of the right holder's exclusivity and generally not a user's right.

It follows from this that consumers have no direct enforceable claim against right holders to demand the application of an exception. As a result, right holders can easily set them aside either through the application of Technical Protection Measures (TMPs) or through contractual clauses.

The Copyright Directive fails to immunise the permitted uses of copyrighted content against restrictions imposed by such contractual agreements. In practice, the application of a TPM or a clause included in the end use licensing agreement may result in preventing the consumer from exercising the exception of private copy recognized in that same Directive.

It is important to note that the Computer Programme Directive already establishes the rights for users to make back-up copies, while the Database Directive allows for the making of a copy without the permission of the right owner. Both these provisions are not considered as exceptions, but as rights of the user that cannot be circumvented by contract. In addition, they are mandatory for all Member States.

The primary focus should be on those current limitations that are of direct interest to consumers, namely the private copying exceptions, as well as those reflecting fundamental rights and freedoms. These would include at the very least rights of quotation and criticism, a right of news reporting, a right of parody, basic scientific and educational freedoms, some library and archive limitations, and exceptions for the visually impaired.

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

[Open question]

BEUC would caution against the removal of any exception from the current list of the Copyright Directive. Copyright exceptions and limitations are the mechanism by which the rights of creators are balanced with the rights of society and the public interest.

The focus should be on further harmonising the existing exceptions and limitations and make them mandatory. In parallel, a new exception should be included to address the issue of User-Generated Content (UCG). Please see response to Questions 58-63.

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?

X YES – Please explain why

BEUC strongly believes that some flexibility needs to be introduced in the Copyright Directive. A list of closed and strictly defined exceptions is not appropriate to the fast evolving digital environment and the Internet.

It is crucial for the exception regime to be flexible and forward-looking, so as to anticipate and facilitate changes. Failing to do so will put Europe at a competitive disadvantage with countries providing for such flexibility such as the U.S. with the application of the fair use doctrine.

Copyright rules must evolve as the technologies that are used to create and distribute them evolve. It is important not to construe the protection of copyright and promotion of copyright exceptions as contradictory objectives, or the interests of sectors relying on exceptions as opposed to the interest of sectors relying on protection. On the contrary, these are complementary objectives and interests that are both fostering the development of knowledge and creation and their dissemination.

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]

BEUC believes than an open norm permitting specific uses that could not be foreseen alongside the list of exceptions to be made mandatory is the optimal solution. The co-existence of specific exceptions with a new 'open clause' would give rise to a mixed system where courts could permit uses that are similar (but not identical) to the ones expressly enumerated by the law.

Such a mixed system would allow for the necessary flexibility to adapt to new technologies and for innovative services to develop. However, it might result in higher degree of legal uncertainty due to the overreliance on the courts to provide an assessment on a case by case basis.

BEUC calls upon the European Commission to further examine the application of the fair use doctrine in those countries where it already exists and to assess the impact of the introduction of a similar standard in EU copyright law.

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

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

The territoriality of copyright exceptions and limitations is a major problem that hinders the development of innovative cross-border services and results in legal uncertainty for all stakeholders involved. What may be a permitted use in one Member States might be illegal in another. We provide examples of significant national implementation of the copyright exceptions and limitations in the respective questions.

The territoriality of copyright exceptions and limitations also hinders the effective enforcement of copyright law, given that the same behaviour might constitute an infringement in one country but might be covered by an exception in another; in such cases, the burden of proof lies with the right holder seeking to enforce his rights in multiple Member States.

These problems are only likely to become more acute in the future because copyright law is territorial, but the Internet is global and facilitates flows of information services across borders.

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]

Fair compensation must necessarily be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of a specific exception. Furthermore, when the harm is only minimal there should be no compensation. The Copyright Directive refers to 'fair compensation" which is different from the notion of "equitable remuneration" which is based on the notion that authors have a right to remuneration for each and every usage of their works. On the contrary, "fair compensation" is only due when there is actual economic harm which is more than minimal.

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[41] and enable on-site consultation of the works and other subject matter in the collections of such institutions[42]. 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[43].

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

1. Preservation and archiving

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

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

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

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

The development of digital libraries in recent years has the potential to change the way works are accessed to, enjoyed and used. Today, digitization of works could provide extended value to access to works, by maintaining the work in a quality that secures its future and frequent consultation, by adding search tools to the digitized items, by offering on-line lending that could seem equivalent for users to the acquisition of an e-book on the market. Digitization is also a privileged way to increase availability of collections and to envisage their dissemination on-line.

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

The study on the application of the Directive 2001/29 provides a rather extensive overview of cases where the current exception fails to keep pace with the technology development. The assessment of the exception in the directive and in its national transpositions has showed two significant issues. Current needs of preservation are not permitted by the exception, either due to uncertainty of its scope or to developments that could not be envisaged at the time of adoption of the directive. A second issue results from the very diverse implementation of the exception in the Member States that creates a fragmented scene for a European agenda of digitization of cultural heritage.

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

BEUC calls for a revision of the Copyright Directive in order to adapt the current exception. The current exception was adopted at a time where libraries were only emerging as digital actors. The hot topic of "digital libraries" would be created only a few years afterwards. The needs of libraries and cultural heritage institutions evolve, as well as their activities. Consequently the extent of the authorized acts could evolve to allow for some new activities.

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]

BEUC supports the extension of the existing exception for preservation to include all types of copyrighted content, including recorded music, film and broadcast. It is not acceptable that important historical records in these formats should not be preserved.

Recorded music, film and broadcast were popularised in the early to mid 20th Century and have been used to document important social and cultural developments over time. Libraries and archives should not continue to incur the transaction costs associated with getting permission for preservation copies of recorded music, film and broadcast, or be subject to legal risk when they make preservation copies in the absence of formal permission by the copyright owner.

Recorded music, film and broadcast are stored on ever changing mediums, such as cellulite film, and long term preservation requires format-shifting as formats become outdated, the hardware required to read them becomes unavailable, and mediums such as cellulite film degrade as they age.

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

[Open question]

N/A

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]

The study on the application of the Directive 2001/29 identifies the technical limitation of the consultation to dedicated terminals as main problem wit regards to the specific exception. The requirement of 'dedicated terminals' is outdated and too narrow and does not grant enough leeway to libraries. Viewing some digital works does not have any longer to be done on adapted devices but can be undertaken by anyone using a digital device such as a computer, tablet or even a smart phone.

When the Directive was adopted, on-site consultation was considered as being a peripheral service offered by the libraries for some specific works whose digital browsing was preferred, libraries' users and researchers are now accustomed to view research or study material in a digital format and on the screens of their computers and expect to be able to do the same in a library or archive. They should be entitled to consult the works made available by their libraries from their offices or at distance through a secured connection.

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

[Open question]

BEUC supports the conclusion of the study on the application of the Directive that the exception should be revised and that the focus of the revision should be on the requirements of dedicated terminal and limitation to the premises of the eligible establishment.

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]

N/A

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

[Open question]

N/A

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?

X NO OPINION

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

[Open question]

N/A

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]

N/A

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]

N/A

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[44]. 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)[45].

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

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

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

X 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)?

X NO OPINION

B. Teaching

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

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

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

☐ YES – Please explain

…….

…….

☐ NO

☐ NO OPINION

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

[Open question]

…….

…….

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

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

[Open question]

……

……

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

[Open question]

……

……

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

[Open question]

……

……

C. Research

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

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

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

☐ YES – Please explain

……

……

☐ NO

☐ NO OPINION

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

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

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

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?***

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

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

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

(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?***

X YES – Please explain by giving examples

The main problem relates to the narrow scope of the exception as implemented into national law. Whereas the Information Society Directive mentions as the beneficiaries of the exception people with a "disability", without narrowing down on the kind of disability or the intensity of the disability, Member States have limited the scope. France is an example of a country that has introduced restrictions regarding the intensity of the handicap; whereas in the UK the exception is reserved to visually impaired persons.

The divergent scope of the exception in national copyright laws has a major impact on the cross-borer accessibility of works. Given the major differences, it is impossible for an EU-wide service to offer access to accessible copies in each and every Member State.

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

[Open question]

Article 30 of the United Nations Convention on the Rights of People with Disabilities recognises the right to "enjoy access to television programmes, films, theatre and other cultural activities, in accessible formats". Disabled people should be able to access all the services available to others and therefore a fundamental right should be recognised in EU law. These people are unable to interact with digital content unless the content is made accessible.

BEUC believes that the exception in favour of people with a disability should be made mandatory and have a clearly defined scope with regards to the rights concerned.

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

[Open question]

N/A

E. Text and data mining

Text and data mining/content mining/data analytics[51] are different terms used to describe increasingly important techniques used in particular by researchers for the

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

exploration of vast amounts of existing texts and data (e.g., journals, web sites, databases etc.). Through the use of software or other automated processes, an analysis is made of relevant texts and data in order to obtain new insights, patterns and trends.

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

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

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

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?***

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

x YES – Please explain

BEUC supports the principle of freedom of access to information when used to the benefit of society as a whole.

There is no question that data mining, the practice of examining large databases in order to generate new information, is an exciting area of scientific research and promises to lead to important new discoveries in a number of areas. To do that the underlying data needs to be accessed, analysed and linked to existing information.

The current legal framework has led to a situation where it is often unclear what types of data mining activities are permitted. It causes problems for researchers, with unhelpful complexity in licensing. Current requirements to seek permission to text or data mine are not proportionate, cost effective, or scalable. There is the need to check whether material could be legally mined under current contracts, which was not always evidence. When additional permissions are required, academics often do not know how to seek permission. An additional hurdle relates to the high transactional costs for text and data mining.

There are also problems with the number and different types of licences that need to be dealt with. Even for basic use, researchers need to look at licensing restrictions for each article with terms that vary greatly. To use the breadth of works needed for much successful data and text mining require working through a wide variety of contractual circumstances.

Text mining has been around for a long time now, but has not grown in usage because people see the barriers as too high (Source: *Copyright Consultation event: Proposed Exception for Text and Data Mining, Intellectual Property Office, London, Tuesday 13 March 2012*).

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

[Open question]

To tap the full potential of data mining for innovation and scientific development and to ensure legal certainty, BEUC supports the introduction of a specific copyright exception designed to promote the non-commercial exploitation of works into the copyright framework.

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]

A copyright exception for text and data analytics would ensure that universities and research institutions have the necessary legal protections to engage in large-scale, non-commercial data mining activities. The exception should also become immune to contractual restrictions so that it can not be overridden by terms included by publishers in licensing agreements.

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

[Open question]

N/A

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

[Open question]

N/A

F. User-generated content

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

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

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

rightholders across different sectors as a result of the "Licences for Europe" discussions[54].

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

(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?***

X YES – Please explain by giving examples

The study on the application of the Directive 2001/29 provides a rather extensive overview of cases where consumers experienced problems when trying to use pre-existing works, going as far as being faced with legal actions. For example, under existing copyright law there is no exception or limitation that would justify some daily activities of consumers, such as the reuse of a song for a family video and the posting it online; the video would be illegal on the grounds of copyright infringement.

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

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

X 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?***

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

X NO OPINION

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

[Open question]

BEUC calls for a legislative solution to the issue of user-generated content. Only a legislative solution will ensure legal certainty for all the parties involved and will make user-generated content immune from copyright infringement.

As demonstrated by the failure of the License for Europe initiative, a voluntary agreement between stakeholders in the form of a Memorandum of Understanding is not an option. There remain significantly diverging views with regards to the definition of UGC and the best way to address the problems faced by consumers.

Therefore, a legislative solution is the only possible way forward.

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]

BEUC supports the introduction of an UGC specific exception in the Copyright Directive which would be mandatory for EU Member States to implement and will be made unwaivable by contract.

Canada has already adopted a similar approach, creating a "safe harbour" for both UGC uploaders and the hosting sites provided that a number of conditions are met.

- the pre-existing work has been published

- it is used to create a new work, so the mere copying is not covered by this provision

- the use of the new work is done solely for non-commercial purposes

- the source and the name of the author are mentioned, if it is reasonable in the circumstances to do so

- the person has reasonable grounds to believe that the existing work was not infringing copyright

It is also important that user-generated content is clearly defined. Such a definition should fall within the definition developed by the OECD, according to which User created content is defined as content that is made publicly available over the Internet, which reflects a certain amount of creative effort, and is created outside of professional routines and practices".

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

[Open question]

An alternative to the introduction of a new exception specific for user-generated content (UGC) could be the broadening of the scope of existing exceptions to include UGC, namely the exceptions for parody and quotation.

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[55]. 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[5657].

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[58] in the digital environment?

X YES – Please explain

The optional character of the private copying exception and the divergence in the way Member States have implemented it into national law have resulted in significant uncertainty as to its scope.

In some countries, a set number of permitted copies is specified, in others compensation is only due for private copying of music, in others for printed and audio-visual works. For example, in Italy, the exception applies only to sound recordings and audiovisual works, in Estonia only to audiovisual works.

[55] Article 5. 2)(a) and (b) of Directive 2001/29.
[56] Communication "Unleashing the Potential of Cloud Computing in Europe", COM(2012) 529 final.
[57] These issues were addressed in the recommendations of Mr António Vitorino resulting from the mediation on private copying and reprography levies. You can consult these recommendations on the following website: http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf.
[58] Art. 5.2(a) and 5.2(b) of Directive 2001/29/EC.

BEUC strongly believes that the problem with the current exception is that it has been interpreted too narrowly and fails to encompass acts of legitimate private copying undertaken by consumers. BEUC calls for a clear and sufficiently broad definition of the private copying exception to encompass acts of legitimate private copying to ensure legal certainty, such an exception should be declared mandatory.

Such a right shall encompass acts of private copying that cause no or only minimal economic harm to right holders. BEUC has identified a number of private copying acts which only cause minimal harm:

Format conversion and interoperability

Consumers make copies to secure interoperability by converting the file to another format or simply transfer the file from one piece of hardware to another, typically from a Personal Computer to a portable player. It would not be fair to expect consumers to buy the same album several times just to be able to use and listen to it on different devices. Consequently, there is no economic harm to creators and rights holders and no compensation should be due. Consumers should not be held liable for the lack of interoperability.

According to a market research carried out by the UK consumer association Which? conducted a market research in September 2013. Six in ten people (63%) believe that they should be able to copy copyrighted works for personal use. This is an increase from 2010 when Consumer Focus research reported that 57% of people agreed with having the right to copy copyrighted works for personal use. Of significance, four in ten people (42%) actually assume that the price paid for copyrighted material (e.g. a CD) includes 'permission' to make private copies to another format. More than half of people (56%) think 'the price I pay for copyrighted material should include permission to make private copies to another format.

Compilations

Consumers reproduce copyrighted material to make compilations with different songs and artists. Similar compilations would only cause damage to creators and rights holders if the same compilation was already in the market. However, more often than not, private copies do not compete with copies sold or licensed on the market, as consumers make compilations of the best of their own collection of copyrighted music. This practice is not in competition with the sale of CDs and therefore does not cause significant economic harm to right holders.

Media used for computer back-up or private storage purposes

Consumers may use devices, such as USB keys or memory cards to store and save information. This is the case with back-up copies consumers make of content carried on their computers and personal servers in order to protect themselves from loss of their data in case of a computer breakdown. The primary purpose of back-up copying is to make copies of works purchased by copyright users in case the original copy is lost or damaged.

Furthermore, BEUC is concerned about the efforts by rights holders to increase the total amount of copyright levies to compensate for the alleged losses of their revenues due to unauthorised use of copyright-protected material. BEUC would like to stress that the payment of fair compensation is only due when consumers copy legally and is not intended to compensate right holders for acts of illegal copying. It

goes without saying that fair compensation cannot be due for copies deriving from unauthorised reproduction and distribution. There is only a claim to compensation in connection with private copying, provided that such copying is permitted according to the copyright laws of the Member States6

Significant legal uncertainty arises from the fact that the Information Society Directive does not address the question of whether the private copying exception can be overridden contractually. Most often, content is licensed to consumers through click-through or click-wrap agreements that impose restrictions on the use of content (i.e. prohibition of copies) they have legally purchased. Contractual terms that impose use restrictions that go beyond the rights granted under copyright legislation raise doubts as to their fairness. Furthermore, consumers are not provided with the necessary information regarding possible use restrictions at a pre-contractual stage and therefore their ability to make an informed choice is limited. Use restrictions can also be due to the application of technical protection measures.

Similar use restrictions may be contrary to consumers' expectations and grant additional monopoly rents to right holders after the purchase of the content by the consumer. The Copyright Directive fails to immunise the permitted uses of copyrighted content against restrictions imposed by such contractual agreements.

BEUC therefore calls on the European Commission to consider a revision of the current framework with the aim of immunising copyright exceptions, particularly the private copying exception, against restrictions imposed by contractual agreements, specifically end-user licensing agreements, or technical protection measures

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

X NO – Please explain

In the digital environment, copyright works are increasingly being distributed subject to contracts which define the conditions of use of legally purchased content. In most cases, consumers will be granted the right to make a number of (licensed) copies without payment to creators and rights holders. Recital 35 of the Copyright Directive explicitly excludes fair compensation where the right holder has already received some kind of payment, while the ECJ excludes copies carried out with the permission of the author. No private copying compensation should be due when private copying is permitted and governed by a digital download contract for content downloaded from legitimate online services. If the consumer has to pay a fee for the content, a copyright levy amounts to double payment.

The majority of business models for legal content, such as those based on streaming, do not necessarily require consumer storage capacity in the terms of the private copying exception and therefore applying levies on the basis of memory size is unaligned with the manner in which music and audiovisual content is consumed.

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

Furthermore, cloud based services make it possible to measure authorised uses of creative content allowing for precise, license-based remuneration of right owners.

BEUC calls for immediate EU action in order to reform the current systems of copyright levies and launch as a matter of urgency a reflection as to alternative systems of fair compensation.

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]

BEUC is concerned with the assumption that all technological developments negatively impact right holders and that they need for be compensated for the assumed losses arising from them. On the contrary, more user-friendly means of accessing works can both encourage consumers to buy more content and boost rightholders' revenues.

The reasoning behind private copying levies is to compensate for alleged economic losses. Introducing any levy should therefore be based on evidence that rightholders suffer a loss. Recital 35 of the Copyright Directive explicitly excludes fair compensation where the right holder has already received some kind of payment, while the ECJ excludes copies carried out with the permission of the author. No private copying compensation should be due when private copying is permitted and governed by a digital download contract for content downloaded from legitimate online services. If the consumer has to pay a fee for the content, a copyright levy amounts to double payment

In light of the emergence of new business models based on licensing and the availability of TPMss, it is not always possible to justify the application of copyright levies, the objective of which is to compensate for acts of private copying which cannot be controlled and compensated.

Furthermore, the private copying exception should be applied in a manner which takes account of the availability and use of technological measures. Technical Protection Measures (TPMs) are still widely deployed allowing right holders to control the copies made within the private sphere. TPMs raise a number of concerns from the consumer point of view, in terms of access to content and interoperability. However, they enable the control and restriction of private copying.

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

X YES – Please explain

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

BEUC calls for a visible fee, with a clear breakdown of the copyright levy rate, to be indicated on the invoice at all stages of the supply chain and to be clearly indicated to the consumer. A visible fee should be displayed on the receipt, the price label in a shop and also on websites and electronic commerce platforms. Consumers have an undeniable right to know what they pay for, for what purposes and how the money is distributed to the creators.

The mandatory introduction of a visible fee throughout the supply chain will improve the transparency of the copyright levies system, raise consumer awareness and improve compliance.

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[61].

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?

X 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.

The current obligation upon manufacturers of having to pay the levy in the country of import and then requesting a refund in the country of origin makes cross-border trade more difficult than domestic transactions. The processing of having to pay the levy in the country of destination and then request a refund in the country of origin discriminates against imports as opposed to products sold domestically. Furthermore, the national refund systems vary significantly as well as the administrative arrangements necessary to obtain refunds.

The current system constitutes a major obstacle to the development of cross border e-Commerce. In many cases, consumers are restricted from purchasing a range of products from another country due to claims by a collecting society for payment of a levy in the country of residence of the consumer, for products on which a levy in the country of the seller has already been paid. Such a system amounts to double payment.

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

BEUC contends that copyright levies should only be applied once, where relevant, when a product is first placed on the market in the EU and should then circulate freely within the EU without additional copyright levies being applied. In order to ensure right holders in the consumers' country of residence receive the compensation, a clearing mechanism must be established among collecting societies.

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]
The current system of copyright levies fails to distinguish between copies made by private users and copies made by professional users. However, such indiscriminate application on equipment, media and devices not made available to private users and clearly reserved for uses other than private copying, is incompatible with Directive 2001/29 as stated by the European Court of Justice in the Padawan case C-467/08.

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]

N/A

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

[Open question]

BEUC strongly believes that the current system of copyright levies does not correspond to the needs of the digital environment. They are detrimental to consumers who have to bear the costs, while the divergence of national rules leads to the fragmentation of the Single Market.

In the short term, BEUC supports a reform of the current system; however, in the medium term there need to be alternative means of fair compensation.

BEUC calls for immediate EU action in order to address the following issues:

1. Clarification of the scope of private copying exceptions

- Business and professional use: the indiscriminate application of levies on equipment, media and devices clearly reserved for professional uses is incompatible with Directive 2001/29.

- Unauthorised reproduction: the payment of fair compensation is only due in cases of legitimate private copying, as permitted under the copyright laws of the Member States.

- Licensed copies: no private copying compensation should be due when private copying is governed by a digital download contract for content downloaded from legitimate online services.

- No levies for works freely distributed: no private copying compensation should be due if creators make their works freely available to users.

2. Definition of "actual use" of equipment and devices

To assess whether a levy shall apply, BEUC strongly advocates for the criterion of 'actual use' consumers make of each product. The European Court of Justice has confirmed that a link is necessary between the application of the levy and the deemed use of the appliance???? for the purpose of private copying.

3. Definition of "economic harm"

Fair compensation must necessarily be calculated on the basis of the criterion of the harm caused to authors of protected works by the introduction of the private copying exception Furthermore, when the harm is only minimal there should not be a levy. The Copyright Directive refers to 'fair compensation" which is different from the notion of "equitable remuneration" which is based on the notion that authors have a right to remuneration for each and every usage of their works.

4. Visible fee

BEUC calls for a visible fee, with a clear breakdown of the copyright levy rate, to be indicated on the invoice at all stages of the supply chain and to be clearly indicated to the consumer. A visible fee should be displayed on the receipt, the price label in a shop and also on websites and electronic commerce platforms. Consumers have an undeniable right to know what they pay for.

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[62] 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[63]. This is an area that has been traditionally left for Member States to regulate and there are significant differences in regulatory approaches. Substantial differences also exist between different sectors of the creative industries.

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

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

[Open question]

The bulk of contracts between creators and publishers were signed before the emergence of digital content distribution. Hence many contracts do not explicitly cover digital royalties that would arise from, for example, a song being sold as a single on iTunes. BEUC is concerned that the way in which new online streaming services are licensed may circumvent the payment of digital royalties to artists and hence contravene the aim to create a favourable environment in the digital world for creators and right holders, by ensuring appropriate remuneration for their creative works.

BEUC supports the introduction in copyright legislation of provisions intended to protect creators from unfair contractual practices. For example, we support the introduction of the 'best seller" and the "use it or lose it" clauses in contracts negotiated between authors and publishers.

The "use it or lose it" provision will enable authors who previously transferred or assigned their rights to a publisher to recapture their rights, if the publisher has failed to exploit the material.

The "best seller clause" would allow the author to renegotiate his contract to increase his participation in the proceeds of exploitation. A similar clause already exist in the law of few EU Member States, but generally only allows modification of the contract where the author has been paid a lump sum disproportionate to the revenues received by the producer. This provides a potential remedy for the author who has signed a "buy out" contract and is therefore unable, on the basis of that contract, to benefit from a big success of his or her work in the marketplace. This

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

clause should be extended and inserted in all types of contracts between authors and publishers.

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

X 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]

See response to Question 72.

VI. Respect for rights

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

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

X NO – Please explain

BEUC considers any discussion on the revision of the current legal framework for civil enforcement of Intellectual Property Rights as premature. The Directive 2004/48 has been implemented by Member States only recently and therefore the feedback on its effectiveness remains limited as there has been little case law.

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

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

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

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

BEUC is concerned with the exclusive focus of the European Commission on the adoption of longer protection and stronger enforcement measures. With countless new opportunities arising from the ways content is accessed and distributed, the need to rethink the European legal framework has arisen with the aim of achieving a fair balance between the different stakeholders, promoting innovation and cultural diversity.

Whereas the European Commission has not undertaken any concrete measure to revise the Copyright Directive 2001/29, it has been pushing for the revision of the IPR enforcement Directive 2004/48. Despite the majority of stakeholders and the massive participation of citizens rejecting any revision of the enforcement framework, we are surprised to see questions about enforcement in a consultation that deals with substantive copyright law.

Furthermore, the European Commission introduces a new notion, that of "commercial purpose". This notion does not appear in the text of the Directive, which only refers to "commercial scale" infringements. However, the European Commission has been reluctant in clarifying the term 'commercial scale" thus opening the door to disproportionate sanctions against individual consumers, without considering the lack of commercial motive, intention or financial benefits.

Requesting stakeholders to take a view on this question, without clarification of the notion of "commercial purpose" is misleading and inappropriate.

We would like to stress that the approach adopted by both the European Commission and national governments vis-à-vis IPR enforcement has resulted in eroding any public support for IPRs. The failure to distinguish between organised criminal entities infringing IPR for profit and individual users engaging in file-sharing for personal use, creates not only a problem of proportionality, but also raises a problem of ethics.

Copyrighted works are both an output of intellectual creation and an indispensable input to creativity. Copyright law needs to balance the incentive to create with access to works. Strict copyright enforcement in the digital environment has the potential to frustrate the objective of dissemination of creative works and restrict consumers' access.

The approach, supported by copyright owners, has resulted in creating a negative attitude towards copyright among the general public, particularly young people. It becomes synonymous with monopolies and strict enforcement. Moreover, in most cases, consumers and citizens are not even aware of what copyright consists of and they do not know what they can or cannot do with copyright protected content

The European Commission must adopt a balanced approach which is based on independent and reliable evidence and will ensure individual users are not treated as criminals, nor accused of the assumed economic losses of the content industry. As

noted above, the economic impact of the failure of the content industry to adapt their business models to consumers' expectations needs to be considered.

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]

BEUC is seriously concerned with the European Commission's assessment that the closer involvement of intermediaries, including Internet Service Providers, in the fight against IPR infringements is the recommended way forward.

BEUC considers the current rules on liability as outlined in the e-Commerce Directive and the IPRED to be proven as effective and should therefore be maintained. It is crucial to ensure that the 'mere conduit' principle is safeguarded according to which internet providers can only act upon specific order by a court. A simple warning by a copyright owner that specific content is allegedly infringing copyright should never be considered conclusive evidence entailing the liability of the internet provider.

BEUC is opposed to a wide interpretation of the provision on injunctions which would require ISPs to monitor content and prevent infringements in the future. Such an extensive interpretation conflicts with the prohibition of general monitoring as outlined in Article 15 of the e-commerce Directive23 and should therefore be rejected.

Mandating the enforcement of copyright by private entities runs contrary to the fundamental right to an effective remedy and to a fair trial. The Charter of Fundamental Rights of the European Union explicitly grants everyone the right to a fair and public hearing by an independent and impartial tribunal. The European Court of Justice has explicitly affirmed the principle of effective judicial protection as a general principle of Community law (Case C-432/05). The need to respect this principle becomes even more important in the context of IPR enforcement cases, which often involve complex legal analysis, making it impossible to ascertain prima facie the infringing character of copyright protected content.

The active involvement of ISPs in the detection and enforcement of IPRs will require the application of filtering technologies. BEUC believes that this should not be the recommended solution. Firstly, filtering technologies are, by design, unable to distinguish between authorised and unauthorised copyright protected content, public domain works or content freely distributed by the author. Similarly, technical measures may result in bandwidth reduction and the slowing down of traffic, thus causing problems to the use of time-sensitive applications and interfering with the neutrality of the network.

From an economic point of view, obliging ISPs to deploy such measures would require a complete reconfiguration of their networks and an increase of their operational costs, which will be passed on to consumers. As a result, ISPs and consumers would have to bear the cost of protecting the private rights and business models of the content industry.

The use of specific technologies, such as Deep Packet Inspection, whereby ISPs inspect every bit of information passing over their networks, raises serious privacy concerns and runs contrary to the fundamental right to the confidentiality of communications.

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?

X NO – Please explain

Article 3 of the Enforcement Directive refers to the principle of proportionality in the enforcement of intellectual property rights. The rights of right holders must be balanced with the rights of users, including the fundamental right to protection of personal data, the right to privacy and the confidentiality of communications. The European Court of Justice in the Promusicae case (Case C275/06) has ruled that EU law does not oblige Member States to publicise personal details in order to guarantee effective protection of the author's rights.

Identification of alleged infringers should only be permitted in line with the European Charter and all of the conditions provided for in the IPR Enforcement Directive. We call on the Commission to identify all Member States that are failing to respect the safeguards and to launch infringement proceedings.

Personal information of online users must only be disclosed to public law enforcement authorities. Disclosure of information about users to third parties is incompatible with data protection rules. This includes the IP address, both static and dynamic, which are personal data since a third party can easily discover the natural person using the IP address. This view is shared by both the European Data Protection Supervisor and the Article 29 Data Protection Working Group.

According to a study carried out by the European Commission regarding the relationship between IPR Enforcement and Data Protection legislation in a number of Member States.

• IP addresses are generally considered by Data Protection Authorities and national courts to be personal;

• IP addresses are considered to be traffic data, which means they may only be processed in a limited number of circumstances, for specific purposes and that

consent is required to process them for other purposes such as online copyright enforcement;

• ISPs cannot store IP addresses for the specific purpose of online copyright enforcement, with the exception of France wherein retention for the purpose of making information available to the judicial authorities or HADOPI is possible;

• The processing of IP addresses by ISPs to pass on infringement warning notices is generally prohibited or subject to strict restrictions;

• The general monitoring of P2P networks by right holders resulting in the creation of a database of potential copyright infringers is usually prohibited.

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?

X NO

BEUC welcomes the proposal to launch a reflection on the possible harmonisation of copyright rules through the adoption of a European Copyright Regulation. The Lisbon Treaty establishes the competence of the EU to put in place a harmonised EU policy in the field of Intellectual Property Rights, including copyright . BEUC believes that the long-term objective of harmonisation of copyright rules is worth exploring and encourages the European Commission to launch a thorough discussion with all relevant stakeholders with the aim of further exploring this possibility.

The advantages of the adoption of a European Copyright Regulation must be carefully assessed. First of all, such a harmonisation will enable the establishment of the Digital Single Market for content online, as it will put in place a truly harmonised legal framework. Secondly, it will enhance legal certainty and transparency for right owners and consumers alike and greatly reduce transaction and licensing costs related to the clearance of rights. Thirdly, it will prevent the fragmentation of the market along national borders seeking to secure extra revenues from national

licensing. Fourthly, a Regulation will give rights and limitations equal status and could restore the necessary "delicate balance" between exclusive rights of copyright owners and the rights of consumers.

However, BEUC is aware that the creation of a single European Copyright title, will meet the resistance of Member States, given the impact on existing national legislation. It is therefore essential that prior to engaging in such an exercise, two points will need to be clarified:

• The impact on national copyrights

In case the Community Copyright co-exists with national copyrights, this may add further burden to the current complexity of the rights' clearance system. However, a similar coexistence will ensure that commercial users that wish to offer pan European content services can get a Europe-wide licenses, while local users that focus on national markets can equally clear rights only for the countries of their focus instead of getting wider but more expensive licenses. The role of regulatory authorities, in particular competition authorities, will be crucial to ensure that this dual system is not abused by collecting societies that will seek to maximise the benefits from the co-existence of a national and a Community right on the same work.

• The scope of harmonisation

However, a solution to the problems from the dual system of national and Community copyright might be the clear definition of the areas of law to be fully harmonised. In order to ensure the principles of subsidiarity and proportionality, the Regulation should only regulate those aspects that are necessary for the establishment of the Digital Single Market and which cannot be left to Member States.

The primary focus should be on the current set of copyright exceptions and limitations and the recognition of a clear set of users' rights. These should include those current limitations that are of direct interest to consumers, namely the private copying exceptions, as well as those reflecting fundamental rights and freedoms. The establishment of rights should become a central aspect of the European copyright framework.

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]

See response to Question 78

VIII. Other issues

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

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

[Open question]

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