BSA | The Software Alliance's response to the Public Consultation on the review of the EU copyright rules

Contents

I. Introduction

A. Context of the consultation

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

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

In its "Communication on Content in the Digital Single Market"[1] the Commission set out two parallel tracks of action: on the one hand, to complete its on-going effort to review and to modernise the EU copyright legislative framework[2][3] with a view to a decision in 2014 on whether to table legislative reform proposals, and on the other, to facilitate practical industry-led solutions through the stakeholder dialogue "Licences for Europe" on issues on which rapid progress was deemed necessary and possible.

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

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

[1] COM (2012)789 final, 18/12/2012.
[2] As announced in the Intellectual Property Strategy ' A single market for Intellectual Property Rights: COM (2011)287 final, 24/05/2011.
[3] *"Based on market studies and impact assessment and legal drafting work"* as announced in the Communication (2012)789.
[4] See the document "Licences for Europe – tem pledges to bring more content online": http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf .

Conclusions[5] *"Providing digital services and content across the single market requires the establishment of a copyright regime for the digital age. The Commission will therefore complete its on-going review of the EU copyright framework in spring 2014. It is important to modernise Europe's copyright regime and facilitate licensing, while ensuring a high level protection of intellectual property rights and taking into account cultural diversity".*

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

B. How to submit replies to this questionnaire

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

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

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

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

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

C. Confidentiality

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

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

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

Please read our Privacy statement.

PLEASE IDENTIFY YOURSELF:

Name:

BSA | The Software Alliance

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.

Interest Representative Register ID number: 75039383277-48

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

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

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

TYPE OF RESPONDENT (Please underline the appropriate):

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

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

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

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

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

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

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

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

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

☐ **Collective Management Organisation**

☐ **Public authority**

☐ **Member State**

☑ **Other** (Please explain):

BSA | The Software Alliance (BSA)[9] represents leading multinational innovators in the software, hardware and online services sectors. BSA member companies interact with

[9] *BSA | The Software Alliance (www.bsa.org) is the leading advocate for the global software industry before governments and in the international marketplace. Its members are among the world's most innovative companies, creating software solutions that spark the economy and improve modern life. With headquarters in Washington, DC, and operations in more than 60 countries around the world, BSA pioneers compliance*

Europe's copyright regime in many different ways. Our members hold rights in highly valuable works, including software essential to productivity, systems management, database, design and Internet connectivity, and rely on revenues from the licensing of those works to fund their innovation. At the same time, our members also provide many of the world's leading online services and solutions for the creation, delivery, measurement, and storage of content, and manufacture computers and many other popular devices that are used by enterprises and consumers across Europe to access and consume a wide variety of copyrighted works.

Because of these many different interests, we bring a unique perspective to copyright. We believe deeply in the need for robust copyright protections, and in the freedom of authors to offer their work on license terms that they define. But we also understand the critical importance of a regime that balances the needs of the many stakeholders that copyright serves, including consumers, internet intermediaries, and online services providers.

BSA fully supports flexibility in a modern copyright regime. Technology is moving quickly. Software and creative content are increasingly shifting to the remote storage and delivery and subscription services, with delivery over the Internet becoming the primary way that copyrighted works are consumed. Consumers expect to enjoy content when, where and how they want it; in order to meet these expectations, licensing models take myriad forms today. On top of this, the use of data – including copyrighted data – has become increasingly central to a wide range of online business models

Ultimately, Europe should aspire to a regime that provides strong and balanced protections for authors while being sufficiently flexible and transparent to promote downstream innovation and meet rapidly evolving consumer needs and expectations. Our comments below are made with the objective of promoting each of these goals:—strong protections, balance, and flexibility.

programs that promote legal software use and advocates for public policies that foster technology innovation and drive growth in the digital economy.
BSA's members include: Adobe, ANSYS, Apple, Autodesk, AVG, Bentley Systems, CA Technologies, CNC/Mastercam, Dell, IBM, Intel, Intuit, McAfee, Microsoft, Minitab, Oracle, Parallels, PTC, Rosetta Stone, Sage, Siemens PLM, Symantec, Tekla, and The MathWorks.

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[10].

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[11] should significantly facilitate the delivery of multi-territorial licences in musical works for online services[12]; the structured stakeholder dialogue "Licences for Europe"[13] and market-led developments such as the on-going work in the Linked Content Coalition[14].

"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[15].

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

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[10] This principle has been confirmed by the Court of justice on several occasions.

[11] 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.

[12] 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.

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

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

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

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

The main issue at stake here is, therefore, whether further measures (legislative or non-legislative, including market-led solutions) need to be taken at EU level in the medium term[16] to increase the cross-border availability of content services in the Single Market, while ensuring an adequate level of protection for right holders.

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

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

…….

…….

☐NO

☐NO OPINION

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

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

…….

…….

☐ NO

☐ NO OPINION

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

[Open question]

…….

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

…….

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

[Open question]

…….

…….

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

☐YES – Please explain by giving examples

…….

…….

☐NO

☐NO OPINION

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

☐ YES– Please explain by giving examples

…….

…….

☐ NO

☐ NO OPINION

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

☐YES – Please explain

…….

…….

☐NO – Please explain

…….

…….

☑ **NO OPINION**

BSA's members provide a range of online services, and license content for those services from many different sources. We understand the importance of a licensing regime that is transparent and efficient, and that also facilitates the licensing of content across member state borders.

Our view, however, has consistently been that market-led solutions are generally best in the area of licensing. Indeed, innovative licensing models are already proliferating in the EU, spelling out consumer rights and enabling software developers to develop new markets and distribution schemes. To the extent those models contain limitations on geographic scope or other terms, the license agreement should be paramount. If such marketplace limitations are not viable or are uncompetitive, the marketplace will drive change. Marketplace innovations and the freedom of contract that supports them have the greatest chance to deliver the different features and choices that consumers want at the prices they desire.

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[17] 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[18] and databases[19].

Directive 2001/29/EC harmonises the rights of authors and neighbouring rightholders[20] 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[21], (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

[17] 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.
[18] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.
[19] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.
[20] 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".
[21] 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).

communication to the public/making available right, i.e. the rights to authorise or prohibit the dissemination of the works in digital networks[22]. These rights are intrinsically linked in digital transmissions and both need to be cleared.

1. The act of "making available"

Directive 2001/29/EC specifies neither what is covered by the making available right (e.g. the upload, the accessibility by the public, the actual reception by the public) nor where the act of "making available" takes place. This does not raise questions if the act is limited to a single territory. Questions arise however when the transmission covers several territories and rights need to be cleared (does the act of "making available" happen in the country of the upload only? in each of the countries where the content is potentially accessible? in each of the countries where the content is effectively accessed?). The most recent case law of the Court of Justice of the European Union (CJEU) suggests that a relevant criterion is the "targeting" of a certain Member State's public[23]. According to this approach the copyright-relevant act (which has to be licensed) occurs at least in those countries which are "targeted" by the online service provider. A service provider "targets" a group of customers residing in a specific country when it directs its activity to that group, e.g. via advertisement, promotions, a language or a currency specifically targeted at that group.

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

☐YES

☐NO – Please explain how this could be clarified and what type of clarification would be required (e.g. as in "targeting" approach explained above, as in "country of origin" approach[24])

…….

…….

☑ **NO OPINION**

Because computer software is digital and often offered via the internet, the right of making available to the public is critically important for software developers and one on which our members rely heavily. In most instances, choice of law is spelled out in the licensing and other contractual arrangements that apply to the use of software products. Where it is so defined, the parties' agreed choice of law should govern. Any efforts by the Commission to clarify the scope of the "making available" right should leave contractual discretion to the

[22] 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).

[23] 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).

[24] 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).

parties in the first instance, and should ensure that whatever law the parties choose is respected.

Even where contracts between the parties do not define the applicable law, however, we do not see a need for regulatory intervention at this point in time. In our view, courts should be given additional opportunity to interpret and apply the Court of Justice's guidance on the question of where a "making available" occurs. Depending on how this case law evolves, clarifications or guidance from the Commission may be appropriate.

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[25])?***

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

……

……

☐NO

☑ **NO OPINION**

As noted above, any efforts by the Commission to clarify the scope of the right should leave contractual discretion to the parties in the first instance, and should ensure that whatever law the parties choose is respected.

In the enforcement context (i.e. where third parties make our members' works or the works of others available without authorization), the scope of the right affects the interests of BSA members in two ways: where the territorial scope is interpreted narrowly (i.e. where it is restricted to the place where the act of uploading occurs), it impedes the ability to enforce rights in all the countries where we suffer harm (i.e. markets targeted for distribution by the uploader, where unauthorized copies of our works are downloaded and displace legitimate market share). At the same time, very broad interpretations of the scope of the right (e.g., extending anywhere in the world that the work is potentially accessible) create substantial challenges in relation to determining where rights need to be cleared. Accordingly, if the Commission chooses to define where the making available occurs, the "targeting" test (i.e. a test where the relevant criterion is not only country of upload, but that also looks to the "targeting" of a certain Member State's public) would seem to strike an appropriate balance among competing interests.

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

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

transmissions: the reproduction right and the making available right. This may complicate the licensing of works for online use notably when the two rights are held by different persons/entities.

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

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

The application of two rights to a single act of exploitation can create challenges, in particular because it can lead to demands for compensation in order to exercise each right involved. In most instances, online services providers should not be required to make multiple payments with respect to a single act of exploitation of a digital copyright work. Artificially "splitting" a single economic activity into separate rights that may be subject to demands for compensation from different parties unnecessarily and unjustifiably fragments the online services market in Europe.

☐NO

☐ NO OPINION

3. Linking and browsing

Hyperlinks are references to data that lead a user from one location in the Internet to another. They are indispensable for the functioning of the Internet as a network. Several cases are pending before the CJEU[26] 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[27] as to whether such copies are always covered by the mandatory exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC.

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

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

……

……

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

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

☑ **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)

Hyperlinking is fundamental to the working of the internet, and directly benefits online services providers, right holders and consumers. The provision of a link does not itself involve a copyright infringing act (e.g., reproducing or communicating a work). Requiring prior authorization for the provision of a hyperlink would be tremendously disruptive to the internet ecosystem. Requiring prior authorization may also serve to restrict fundamental rights, such as freedom of expression.

That said, those providing hyperlinks sometimes have the deliberate purpose of pointing users to illegal material, frequently including copyright infringing content. The Commission should ensure that effective causes of action and remedies are in place to deter and stop bad actors that have no purpose other than facilitating illegal activity.

☐NO OPINION

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

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

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

To the extent that copies are made during ordinary browsing of web pages, those copies fall within the exception set out in Article 5(1) of Directive 2001/29/EC. Any temporary copies made in the cache or RAM are incidental to the use of the computer or device to view the material and an essential part of the technology involved; applying a reasonable interpretation of "no independent economic significance," copies made during browsing should be excepted from the reproduction right. Indeed, Article 5(1) was adopted to facilitate just these sorts of copies, as explained in Recital 33 of the Directive.

This assumes, of course, that the temporary copies involved in the browsing satisfy either prong (a) or prong (b) of Article 5(1) – i.e. that the copies relate to either (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use.

☐NO OPINION

4. Download to own digital content

Digital content is increasingly being bought via digital transmission (e.g. download to own). Questions arise as to the possibility for users to dispose of the files they buy in this manner (e.g. by selling them or by giving them as a gift). The principle of EU exhaustion of the distribution right applies in the case of the distribution of physical copies (e.g. when a tangible

article such as a CD or a book, etc. is sold, the right holder cannot prevent the further distribution of that tangible article)[28]. The issue that arises here is whether this principle can also be applied in the case of an act of transmission equivalent in its effect to distribution (i.e. where the buyer acquires the property of the copy)[29]. This raises difficult questions, notably relating to the practical application of such an approach (how to avoid re-sellers keeping and using a copy of a work after they have "re-sold" it – this is often referred to as the "forward and delete" question) as well as to the economic implications of the creation of a second-hand market of copies of perfect quality that never deteriorate (in contrast to the second-hand market for physical goods).

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

☐YES – Please explain by giving examples

…….

…….

☐NO

☑ **NO OPINION**

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

As the Commission notes, the Court of Justice has held, in the Oracle v UsedSoft case, that downloads of computer programs can trigger exhaustion in certain limited scenarios (i.e. where the initial license permits a licensee to use the program for an unlimited period in exchange for a one-time payment of a fee corresponding to the value of the right). However, the CJEU – and, more recently, the German Federal Court tasked with applying the CJEU decision in the original case (Oracle v UsedSoft) – imposed important restrictions on the ability of licensees to "resell" copies of software. Among them, the licensee must delete or otherwise render unusable the original copy or copies of its software prior to resale and the initial licensee may not "divide" software licenses in order to resell copies of the program. In addition, the transferee's use of the "resold" copy continues to be subject to the license terms agreed with the first licensee (the "intended purpose"), and it is a condition for the validity of the transfer that the transferor shall inform the transferee about these license terms.

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

[29] In Case C-128/11 (Oracle vs. UsedSoft) the CJEU ruled that an author cannot oppose the resale of a second-hand licence that allows downloading his computer program from his website and using it for an unlimited period of time. The exclusive right of distribution of a copy of a computer program covered by such a licence is exhausted on its first sale. While it is thus admitted that the distribution right may be subject to exhaustion in case of computer programs offered for download with the 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).

This line of decisions raises several challenges. Under traditional concepts of exhaustion, possession of a physical copy is prima facie proof of title. But when exhaustion is extended beyond physical goods to include works disseminated digitally, proof of title becomes far more complex. It is exceedingly difficult for software providers and secondary acquirers of software to determine whether the initial licensee has in fact deleted or even stopped using the original copies of software it licensed – or even whether the copies of software being offered were legitimately licensed to the seller in the first instance. Identifying and enforcing against overuse (i.e. where an initial licensee sells more copies than it in fact has license for, or due to breach of other limitations and requirements of the license)) is also challenging.

All of this creates opportunities to sell or resell unlicensed or counterfeit copies, or copies that cannot be legitimately sold under the UsedSoft judgment (e.g., because the original copies have not been deleted or because the reseller is dividing a license in order to resell, or because the original license was subject to ongoing payments, or because the recipient through exhaustion does not abide by the number of authorized licenses or other restrictions in the license) – greatly enhancing uncertainty about the legality of digital copies in the online environment. This is a problem for software developers – but it also creates substantial risks for customers, who have no way of being sure that they are buying a non-infringing product. Ultimately, the significance of this risk depends on how national courts apply the CJEU's judgment.

In addition, expanding exhaustion beyond its traditional limits (i.e. the distribution right and physical copies) discourages right holders from innovating in terms of the licenses they offer. The traditional exhaustion framework provided strong incentives for software providers – and, increasingly, other providers of content online – to develop flexible licensing models that offer different use rights tailored and priced to meet the needs of different users. Consumers benefit because the price that they pay reflects the use rights that they are granted; in the enterprise context, this enables business customers to acquire licenses that are closely matched to the needs of their business. These include, for example, "volume licenses" (where discounts are given based on the number of users) and "site licenses" (which allow for an unlimited number of users at a single site or in a single entity). Pricing models also reflect these differences, with some enterprises and classes of users (for example, academic institutions and students) enjoying discounts on license fees.

All that being said, given the current state of evolution in software business models in general and value delivery models in particular, we remain concerned that any legislative measures to address these points may create unintended impediments to the software industry. We therefore suggest that no such legislative measures be pursued. Should the Commission nevertheless consider addressing these issues via legislative measures, it is essential that these measures include, as a minimum, the conditions for transfers as defined by the CJEU and the German Federal Court in the Oracle v UsedSoft case.

It would also be essential that in any such measures, the Commission make it clear that Oracle v UsedSoft applies only in a narrow range of very specific licensing scenarios, i.e. where the initial license permits a licensee to use the program for an unlimited period in exchange for a one-time payment of a fee corresponding to the value of the right. The software sector's business model is evolving rapidly. Developers are moving away from traditional forms of distribution of the sort contemplated by in UsedSoft, where copies of works are delivered via download and hosted on the user's own premises; increasingly, software is hosted in the "cloud" and made available via various subscription services to users – allowing for far greater flexibility on the part of both software providers and their customers. These new models are not and should not be affected by the CJEU's judgment or by exhaustion more generally.

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

Registration is not often discussed in copyright in the EU as the existing international treaties in the area prohibit formalities as a condition for the protection and exercise of rights. However, this prohibition is not absolute[30]. Moreover a system of registration does not need to be made compulsory or constitute a precondition for the protection and exercise of rights. With a longer term of protection and with the increased opportunities that digital technology provides for the use of content (including older works and works that otherwise would not have been disseminated), the advantages and disadvantages of a system of registration are increasingly being considered[31].

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

☐YES

☐NO

☐NO OPINION

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

[Open question]

……

……

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

[Open question]

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

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

…….

…….

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

[Open question]

…….

…….

D. How to improve the use and interoperability of identifiers

There are many private databases of works and other subject matter held by producers, collective management organisations, and institutions such as libraries, which are based to a greater or lesser extent on the use of (more or less) interoperable, internationally agreed 'identifiers'. Identifiers can be compared to a reference number embedded in a work, are specific to the sector in which they have been developed[32], 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[33] should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition[34] 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[35] is seeking to take such identification systems a step further, and to create a linked platform, enabling automated licensing across different sectors.

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

[Open question]

BSA members welcome initiatives aimed at making rights ownership more transparent, and at facilitating licensing of rights. Currently in Europe, there is often a lack of transparency in terms of who owns (or manages) which rights; pricing can also be unclear. Wider use of identifiers, and rights ownership databases, done properly, could be helpful to address these challenges.

That said, it is important to recognize that the need for identifiers varies substantially across sectors. Software already contain identifiers and, often, accompanying licenses. Ownership

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

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

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

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

and terms and conditions of an accompanying license are thus clear already, making any centralized rights ownership database superfluous for these categories of works.

To the extent that the Commission decides to undertake initiatives in relation to identifiers, those initiatives should not require online service providers and device manufacturers to recognize any solutions ultimately adopted; the Copyright Directive's balanced "no mandate" provisions should apply to any identifiers ultimately deployed. In the fast moving technology space, mandated solutions are often obsolete before they are even launched. Mandatory systems also often "freeze" innovation, by deterring would-be competitors from investing in the R&D necessary to bring alternative (and potentially better) solutions to market.

It is also important that any solutions that are ultimately developed recognize the various nuances related to different types of copyrighted material. For example, DRM (digital or document rights management) is also used to protect sensitive and confidential information. Many BSA member companies offer robust rights management solutions used to protect sensitive information, such as financial data, trade secrets, or national security information. Very often this sensitive information also constitutes copyrighted material, since copyright arises without formalities at the creation of a literary work in the post-Berne environment. It is essential that businesses, governments, and individuals have the freedom to choose the best DRM for their purpose, including custom and proprietary solutions.

In addition, standardization of any rights management solutions should be undertaken consistently with the practices that constitute open standards as understood by the technology community and practiced by international standards-setting organizations, such as IEEE, W3C, or ISO – including reasonable and non-discriminatory (RAND) licensing terms for associated technologies, multiple independent implementations, a complete and freely available specification (although not necessarily free of cost or copyright), etc.

Finally, any rights ownership databases must leave copyright licensing at the full discretion of the rights owner. Weakening the ability of rights holders to control the exploitation of their works threatens to undermine the incentives to create those works.

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[36] 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

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

producers in the audio-visual sector, however, do not benefit from such an extended term of protection.

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

☐YES – Please explain

…….

…….

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

…….

…….

☐NO OPINION

III. Limitations and exceptions in the Single Market

Limitations and exceptions to copyright and related rights enable the use of works and other protected subject-matter, without obtaining authorisation from the rightholders, for certain purposes and to a certain extent (for instance the use for illustration purposes of an extract from a novel by a teacher in a literature class). At EU level they are established in a number of copyright directives, most notably Directive 2001/29/EC[37].

Exceptions and limitations in the national and EU copyright laws have to respect international law[38]. In accordance with international obligations, the EU acquis requires that limitations and exceptions can only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interest of the rightholders.

Whereas the catalogue of limitations and exceptions included in EU law is exhaustive (no other exceptions can be applied to the rights harmonised at EU level)[39], these limitations and exceptions are often optional[40], 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"

[37] 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.

[38] 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).

[39] 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)).

[40] 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.

may still require the authorisation of the rightholder once we move to the Member State "B")[41].

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

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

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

☐YES – Please explain by referring to specific cases

…….

…….

☑ **NO** – Please explain

In BSA's experience, the lack of harmonization of exceptions has not been a significant concern. As the consultation notes, in relation to software in particular, the exceptions in the Computer Programs Directive are mandatory and thus largely harmonized across the Member States – and in relation to the Directive 2001/29/EC (the Copyright Directive), Article 5(1) – an exception that is critical to the functioning of the internet – is also mandatory.

With regard to the copyright regime more generally, some flexibility is required for the reasonable application of the Copyright Directive's exceptions in the new digital environment. But this flexibility is inherent in the language used to define the exceptions in Article 5. The courts, in particular the CJEU, can use the flexibilities embedded in Article 5 so as to ensure that the system of exceptions continues to fit the new environment. BSA thus does not see a need to revise the existing framework of exceptions at this time.

☐NO OPINION

[41] 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.

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

☐YES – Please explain by referring to specific cases

…….

…….

☑ **NO** – Please explain

See our response to Question 21 above. ……

…….

☐NO OPINION

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

[Open question]

See our response to Question 21 above. ……

…….

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

☐ YES- Please explain why

…….

…….

☑ **NO** – Please explain why

See our response to Question 21 above. ……

…….

☐NO OPINION

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

[Open question]

As described above, we do not believe the EU copyright framework requires radical reform. The existing framework already has a significant degree of flexibility built in, including a "menu" of non-mandatory exceptions that enable Member States latitude in structuring national regimes. Interpretive guidance from the Commission based on CJEU case law could

potentially be helpful in cases where national case law conflicts and there is no CJEU precedent, but we do not see a need for such guidance at this point in time.

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

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

…….

…….

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

See our response to Question 21 above. ……

…….

☐ NO OPINION

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

[Open question]

…….

…….

A. Access to content in libraries and archives

Directive 2001/29/EC enables Member States to reflect in their national law a range of limitations and exceptions for the benefit of publicly accessible libraries, educational establishments and museums, as well as archives. If implemented, these exceptions allow acts of preservation and archiving[42] and enable on-site consultation of the works and other subject matter in the collections of such institutions[43]. 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[44].

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

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

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

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

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

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

…….

…….

☐NO

☐ NO OPINION

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

[Open question]

…….

…….

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

[Open question]

…….

…….

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

[Open question]

…….

…….

2. Off-premises access to library collections

Directive 2001/29/EC provides an exception for the consultation of works and other subject-matter (consulting an e-book, watching a documentary) via dedicated terminals on the premises of such establishments for the purpose of research and private study. The online consultation of works and other subject-matter remotely (i.e. when the library user is not on the premises of the library) requires authorisation and is generally addressed in agreements

between universities/libraries and publishers. Some argue that the law rather than agreements should provide for the possibility to, and the conditions for, granting online access to collections.

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

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

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

[Open question]

…….

…….

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

[Open question]

…….

…….

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

[Open question]

…….

…….

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

[Open question]

…….

…….

3. E – lending

Traditionally, public libraries have loaned physical copies of works (i.e. books, sometimes also CDs and DVDs) to their users. Recent technological developments have made it technically possible for libraries to provide users with temporary access to digital content, such as e-books, music or films via networks. Under the current legal framework, libraries

need to obtain the authorisation of the rights holders to organise such e-lending activities. In various Member States, publishers and libraries are currently experimenting with different business models for the making available of works online, including direct supply of e-books to libraries by publishers or bundling by aggregators.

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

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

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

☐YES – Please explain with specific examples

…….

…….

☐NO

☐ NO OPINION

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

…….

…….

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

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

[Open question]

…….

…….

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

[Open question]

…….

…….

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[45]. 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)[46].

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

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

…….

…….

☐NO – Please explain

…….

…….

☐NO OPINION

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

☐YES – Please explain

…….

[45] 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 .

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

…….

☐NO – Please explain

…….

…….

☐NO OPINION

B. Teaching

Directive 2001/29/EC[47] 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**

Heretofore, software licensing models enable software developers to tailor their offerings for different uses, and to offer flexible arrangements such as reduced prices for software for students and academic institutions. However, the *UsedSoft* line of decisions may adversely affect this marketplace, by discouraging pricing differentials for the teaching and research communities.

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

[Open question]

…….

…….

[47] 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[48] 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**

See our answer to Question 42, above.

[48] 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[49] 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) [50].

The Marrakesh Treaty[51] has been adopted to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled. The Treaty creates a mandatory exception to copyright that allows organisations for the blind to produce, distribute and make available accessible format copies to visually impaired persons without the authorisation of the rightholders. The EU and its Member States have started work to sign and ratify the Treaty. This may require the adoption of certain provisions at EU level (e.g. to ensure the possibility to exchange accessible format copies across borders).

50. (a)** [In particular if you are a person with a disability or an organisation representing persons with disabilities:] **Have you experienced problems with accessibility to content, including across borders, arising from Member States' implementation of this exception?

(b)** [In particular if you are an organisation providing services for persons with disabilities:] **Have you experienced problems when distributing/communicating works published in special formats across the EU?

(c)** [In particular if you are a right holder:] **Have you experienced specific problems resulting from the application of limitations or exceptions allowing for the distribution/communication of works published in special formats, including across borders?

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

[50] 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/).

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

☐YES – Please explain by giving examples

…….

…….

☐NO

☐ NO OPINION

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

[Open question]

…….

…….

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

[Open question]

…….

…….

E. Text and data mining

Text and data mining/content mining/data analytics[52] are different terms used to describe increasingly important techniques used in particular by researchers for the exploration of vast amounts of existing texts and data (e.g., journals, web sites, databases etc.). Through the use of software or other automated processes, an analysis is made of relevant texts and data in order to obtain new insights, patterns and trends.

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

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

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

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

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

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

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

☐YES – Please explain

…….

…….

☐NO – Please explain

…….

…….

☐ NO OPINION

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

[Open question]

…….

…….

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

[Open question]

…….

…….

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

[53] 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 .

[Open question]

…….

…….

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

[Open question]

…….

…….

F. User-generated content

Technological and service developments mean that citizens can copy, use and distribute content at little to no financial cost. As a consequence, new types of online activities are developing rapidly, including the making of so-called "user-generated content". While users can create totally original content, they can also take one or several pre-existing works, change something in the work(s), and upload the result on the Internet e.g. to platforms and blogs[54]. User-generated content (UGC) can thus cover the modification of pre-existing works even if the newly-generated/"uploaded" work does not necessarily require a creative effort and results from merely adding, subtracting or associating some pre-existing content with other pre-existing content. This kind of activity is not "new" as such. However, the development of social networking and social media sites that enable users to share content widely has vastly changed the scale of such activities and increased the potential economic impact for those holding rights in the pre-existing works. Re-use is no longer the preserve of a technically and artistically adept elite. With the possibilities offered by the new technologies, re-use is open to all, at no cost. This in turn raises questions with regard to fundamental rights such the freedom of expression and the right to property.

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results or even the definition of UGC. Nevertheless, a wide range of views were presented as to the best way to respond to this phenomenon. One view was to say that a new exception is needed to cover UGC, in particular non-commercial activities by individuals such as combining existing musical works with videos, sequences of photos, etc. Another view was that no legislative change is needed: UGC is flourishing, and licensing schemes are increasingly available (licence schemes concluded between rightholders and platforms as well as micro-licences concluded between rightholders and the users generating the content. In any event, practical solutions to ease user-generated content and facilitate micro-licensing for small users were pledged by rightholders across different sectors as a result of the "Licences for Europe" discussions[55].

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?

[54] 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.

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

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

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

☐YES – Please explain by giving examples

…….

…….

☐NO

☐ NO OPINION

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

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

☐YES – Please explain

…….

…….

☐NO – Please explain

…….

…….

☐ NO OPINION

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

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

☐YES – Please explain

…….

…….

☐NO – Please explain

…….

…….

☐ NO OPINION

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

[Open question]

…….

…….

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]

…….

…….

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

[Open question]

…….

…….

IV. Private copying and reprography

Directive 2001/29/EC enables Member States to implement in their national legislation exceptions or limitations to the reproduction right for copies made for private use and photocopying[56]. 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[57][58].

[56] Article 5. 2)(a) and (b) of Directive 2001/29.

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

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

There is also an on-going discussion as to the application or not of levies to certain types of cloud-based services such as personal lockers or personal video recorders.

64. In your view, is there a need to clarify at the EU level the scope and application of the private copying and reprography exceptions[59] in the digital environment?

☑ **YES** – Please explain

Greater clarity about the scope and application of private copy levies is unquestionably needed. The evolution of technology – and the ability of right holders to be more precisely compensated for use of their works – calls into question the very foundation of private copy levies. Yet private copy levy systems continue to operate the same way today as they did 20 years ago.

In particular, clarification about issues including how levies should apply to technologies primarily directed at enterprise (i.e. professional) users, how levies should be adjusted to reflect the application of technical protection measures to a given work, and what degree of harm must be shown to merit levies would be welcomed. In addition, greater transparency in the system is desperately needed – including in relation to how rates are set, how much is collected by whom and how those monies are redistributed. We encourage the Commission to focus on these questions – and on the levies regime more generally – as a priority.

☐NO – Please explain

……

……

☐NO OPINION

65. Should digital copies made by end users for private purposes in the context of a service that has been licensed by rightholders, and where the harm to the rightholder is minimal, be subject to private copying levies?[60]

☐ YES– Please explain

……

……

☑ **NO** – Please explain

No. Directive 2001/29/EC is clear that private copy levies must be linked to harm; levies thus should not apply where a right holder has already been compensated for the use of a work. The recommendations of Mr. Vitorino reinforce the conclusion that applying levies to licensed copies would trigger double payments, unfairly penalizing EU consumers.

☐ NO OPINION

[59] Art. 5.2(a) and 5.2(b) of Directive 2001/29/EC.

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

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]

BSA strongly believes that rights holders should receive fair compensation for the use of their works. But we do not believe that the extension of private copy levies advances this objective, and we strongly oppose the application of levies to cloud services. Imposing levies on cloud services would impede the competitiveness of cloud service providers in Europe, and would unnecessarily disadvantage Europe's cloud users.

The current levies system was developed at a time when right holders lacked the tools to quantify the usage of their works with any precision, or to enforce restrictions on those usages. While levies are highly inexact, at the time of their adoption, they represented the best option for calculating and collecting compensation. Today, in contrast, levies make increasingly less sense. In the context of cloud services, where users are permitted to make copies of a licensed work on multiple devices, the license price for those works often already factors in the making of multiple copies, and technological measures enforce the relevant licensing terms. Requiring a levy in such cases is not necessary to fairly compensate the author; to the contrary, levies in those scenarios constitute a double payment, compelling consumers to pay twice for the same uses. In addition, imposing levies on cloud services also discourages content providers from relying on, and innovating with, technologies that can enable more precise compensation.

To the extent that unauthorized copies of content are hosted in the cloud, private copy levies are also not a solution. Levies as contemplated under Directive 2001/29/EC are intended to compensate for legitimately-made *private* copies, not *pirate* copies.

67. Would you see an added value in making levies visible on the invoices for products subject to levies?[61]

☑ **YES** – Please explain

Consumers bear the financial burden of levies – yet they have virtually no information about how levies are calculated, collected and redistributed, or about the impact of levies on the price that they pay for media and devices. This complete lack of transparency would not be acceptable in Europe in relation to any other commercial dealings with consumers – and it should not be acceptable in relation to levies.

We would strongly support making the levy visible to consumers. In addition, a mechanism should be provided to enable purchasers to seek "cash back" in cases where the media or

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

device they acquire is used only to make copies that do not require a levy be paid (e.g., professional users).

☐NO – Please explain

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…….

☐NO OPINION

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[62].

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

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

Under existing rules in Europe, each time a product crosses a border – whether from outside the EU into the Union, or from one Member State to another – a levy must be paid. As a result, BSA members frequently find their products being levied at least twice.

Ex-post reimbursement schemes are generally cumbersome and slow, and thus fail to satisfactorily address the issue above. To the extent that levies remain in place, the more sensible approach would be to focus collection of levies at the country of destination.

☐NO – Please explain

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…….

☐ NO OPINION

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

[Open question]

The vast majority of utilization by business customers of products such as printers, scanners, PCs relates to the creation and consumption of self-generated content (e.g., internal

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

documents, emails etc.). As a consequence, it is currently common practice that B2B users pay a levy for private copies of third-party works that they never actually make.

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]

Where reimbursement schemes exist (e.g. Austria, France and the Netherlands), they have been largely ineffective, as many market participants are not aware of such schemes and the schemes are often too complex. Existing reimbursement schemes therefore fail to remedy the problem that commercial users are paying a levy. The example of France, where such a system is officially in place, is particularly telling. When replying to a written question of a member of the French Parliament on July 30 2013, French Minister for Culture Ms. Aurélie Filippetti, acknowledged that by 14 May 2013, Copie France had only received 294 requests for reimbursement for business use. Of these, 176 were accepted and 118 were rejected. Until 4 June 2013, the total amount reimbursed to professional users was €167.971: €67.000 in 2012 and €100.971 in 2013. However, at the end of 2011 the French government adopted a law to bring the French legislation in line with the CJEU's Padawan case and to exonerate professional users from paying levies. As part of the preparatory works for this law, the French government's impact assessment (http://www.assemblee-nationale.fr/13/projets/pl3875-ei.asp) predicted that the amount of private copying levies collected in France (which amounted to 189 million EUR in 2010) would decrease by 20-30% as a result of the reimbursement scheme for professional users within one year. This would amount to yearly reimbursements in the range of 37.8 to 56.7 million euros. This discrepancy illustrates the current inefficiency of the French reimbursement system.

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

[Open question]

We encourage the Commission to move quickly, following the Vitorino report, to issue guidance on the EU's levies regime. Clarifications of certain issues in the near-term are critically important. Among them, it needs to be clear that (i) levies are due only on copies that fall within the private copying exception – and not on licensed (i.e. authorized) copies of content or unauthorized (i.e. illicit) copies; and (ii) those seeking to collect levies must demonstrate and quantify harm to the right holder from the copying involved, so that the price of the levy has some basis in reality. In addition, collection of levies should be shifted to the point of destination; the system needs to be more transparent, so that consumers understand the impact of the levy on the price at the till; and there must be a mechanism for the EU to monitor the distribution of levies, to ensure authors are indeed remunerated by

the levies. In the longer term, levies should be phased out altogether, and replaced by alternative mechanisms, such as that recently introduced in Spain.

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[63] 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[64]. 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]

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…….

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

☐ YES– Please explain

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…….

☑ **NO** – Please explain why

BSA believes strongly that authors should be fairly compensated for the exploitation of their works. But we have significant reservations about any regulation that restricts parties' freedom to contract. Online services today are characterized by a wide variety of different licensing models for the delivery of software and content; the market is highly dynamic, and rights holders routinely experiment with different approaches that offer different sets of rights at different price points. Regulating contractual freedom at the European level would

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

impede this flexibility and potentially dissuade stakeholders in the value chain from experimenting with new licensing models.

☐ NO OPINION

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

[Open question]

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VI. Respect for rights

Directive 2004/48/EE[65] 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[66]. 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[67]. One means to do this could be to clarify the role of intermediaries in the IP infrastructure[68]. At the same time, there could be clarification of the safeguards for respect of private life and data protection for private users.

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

☑ **YES** – Please explain

Directive 2004/48/ EC (the EU Enforcement Directive) introduced a number of important mechanisms for the enforcement of rights. But gaps remain in the EU's enforcement framework. Moreover, implementation of the Directive is not consistent across the Member States.

Damages are one particular area where additional action is merited. Because the software industry's most serious problem is use of copies in excess of what is permitted under licenses by otherwise reputable corporate end-users, the industry uses the civil system to enforce its rights rather than the criminal system. For that reason, perhaps more than other

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

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

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

[68] 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.

copyright industries, the software sector relies on damages to deter infringement. Under both the WTO TRIPS Agreement and EU law, damage awards must both compensate the rights holder and deter future infringements. But in software cases, courts in many markets calculate damages based on the license fee that the infringer would have paid had it acquired the software lawfully. Still other courts use an assessment that is based on what the software provider would have actually received (rather than full retail value) or that applies volume, status, wholesale or other discounts available to lawful users. This actually encourages end-users to use software in excess of the permissions granted to them , and take the (low) risk of getting caught, safe in the knowledge that at worst, it will cost no more (and possibly less) than had they bought a license.

The Commission undertook substantial work in 2011 to review the effectiveness of each Member State's enforcement regime. As a next step, it would be helpful for the Commission to return to those conclusions and consider where further guidance to Member States may be appropriate. We strongly recommend that any such review and guidance focus on commercial purpose infringements only, however; commercial purpose infringements cause substantial harm to right holders and should be the Commission's top enforcement priority. Such guidance should not be linked in any way to or necessitate a reform of the copyright acquis, which we believe should not be reopened at this time.

☐NO – Please explain

……

……

☐NO OPINION

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

[Open question]

BSA comes to this question from both as a victim of piracy and a provider of Internet based services. Our members hold rights in highly valuable digital works – works that are routinely offered without authorization online, costing the industry billions of Euros in lost revenues annually. At the same time, our members are also Internet intermediaries, offering many of Europe's most popular online services and platforms. BSA companies suffer from the theft of their digital content online and also work hard to keep unauthorized content off their services.

Bringing this dual perspective to bear, we believe that the current legislative framework governing online copyright enforcement and intermediary liability continues to appropriately balance the needs of competing stakeholders. We do not support reform.

The Copyright Directive and the E-Commerce Directive include a set of careful compromises designed to protect the interests of copyright owners, service providers and users. The E-Commerce Directive safe harbors from liability for providers who serve as mere conduits, or cache or host illegal content – and the corollary provision making clear that those providers have no duty to monitor for such content – are the crux of this compromise. These rules have given online intermediaries clear incentives to behave responsibly in operating their services, including by acting expeditiously to remove infringing content in response to appropriate notices from rights holders, while ensuring that bad actors remain subject to substantial criminal penalties and civil remedies. At the same time, the rules have shielded responsible online intermediaries from the burden of actively policing their users or constantly monitoring their networks for infringing conduct—obligations that would weaken incentives for innovation and threaten the dynamism and values that have made the Internet so valuable and attractive to users.

In our experience, the current rules provide sufficient flexibility to impose meaningful penalties and damages on bad behavior by online providers, and thereby generate meaningful deterrence, without raising undue risks of punitive measures that could deter legitimate actors from engaging in socially beneficial behavior. Re-opening the legislative framework around intermediary liability would undermine this compromise. Any effort to "recalibrate" the level of remedies available against online service providers for secondary infringement liability, by contrast, could undermine the balance struck under the existing rules and disrupt the legitimate expectations that have been built around it.

That said, there may be merit in the Commission considering soft guidance in this area. For example, guidance on what qualifies as "expeditious" might be helpful, in order to prevent websites from leaving infringing material available to download or distribute from their sites for weeks, and then arguing that their actions were appropriately quick and that their liability is limited. Similarly, there is no clear standard in the EU on the steps rights holders must take when making claims of infringement online, or on what information right holders must provide in order to enable intermediaries to identify and review allegedly infringing material. There is also no clear standard within the EU for intermediaries to replace removed content upon remediation or upon a contest by the alleged infringer. Guidance in these areas could also be helpful.

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

☑ **YES** – Please explain

☑ **NO** – Please explain

Our response to this question is both "yes" and "no".

In some cases, the framework strikes an appropriate balance. For example, the CJEU judgments (*e.g., SABAM v Netlog, SABAM v Scarlet*) in relation to the obligations of network intermediaries to filter content appropriately balance authors' rights against data protection rights and the rights of online services providers to pursue a business interest.

There could be better balance between data protection and intellectual property rights in other cases, however. To be clear, BSA members prioritize privacy in their products and services, and have long supported strong, harmonized data protection rules in the EU; it is evident to us that customers will only use the internet and online services if they are certain that there is a robust legal framework in place to keep their private data safe online. At the same time, however, we also see that data protection rules can sometimes create unnecessary obstacles to the enforcement of rights. For example, in order to identify websites distributing software without authorization, we often rely on IP addresses. IP addresses are generally viewed as personal data, even if the entity processing the data cannot connect that IP address to a particular individual – and some Member States deem IP addresses judicial data that can be processed only by government authorities. These interpretations create challenges for the enforcement of rights online.

☐NO OPINION

VII. A single EU Copyright Title

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

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

☐YES

☐NO

☑ **NO OPINION**

Offering an opinion on a single EU copyright title is difficult without understanding the details of what such a regime would look like. We would welcome more information about the Commission's thinking. The comments below are thus preliminary.

As a general rule, greater harmonization of most EU legal systems is helpful for businesses operating or providing services across Member State borders. But in the field of software, rights are individually managed without the need in most instances to go through complex collective management systems. A single copyright title is thus not an imperative from the

software side (although a title that could be enforced before courts competent to grant pan-EU remedies could be helpful, and could substantially reduce the cost of enforcing copyright).

In relation to works other that software (e.g., music, audio-visual content), in contrast, a single copyright title could be helpful. A single title could improve transparency in relation to rights ownership, as well as simplify licensing and reduce related transaction costs. However, we anticipate significant complexities in moving to a single copyright title. For example, because of the term of copyright protection, transitioning to a pan-EU title could be highly complicated, as there would be a many-year overlap during which both national and pan-EU rights would exist. We would be interested in understanding how the Commission would address this and similar issues.

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 our response to Question 78 above.

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]

BSA appreciates the opportunity to respond to the Commission's consultation, and we look forward to continued dialogue on the many important questions it raises.

The Commission consultation comes at a transitional moment for the copyright industries, who are poised for a radical shift. Physical formats are rapidly becoming obsolete; in the next few years, most content will be accessed through downloads over the internet or via subscription services. And new forms of content are coming to the fore, as are new uses of traditional content.

The digitization of content, the increased use of the internet to deliver content, and the explosion in the use of mobile devices to consume content, offer tremendous opportunity for stakeholders in the copyright ecosystem. These trends enable consumers to access and enjoy content whenever and wherever they choose, with works now being disseminated in new (and increasingly consumer-driven and consumer-friendly) ways. And content owners can get their works to market more quickly in a marketplace characterized by many innovative delivery platforms.

In every instance, the commercial viability of these models depends on licenses that consumers can rely on to spell out their rights and entities making works available can rely on to develop new markets and distribution schemes. Software licenses, for example, enable software developers to tailor their offerings to accommodate a range of customer needs, allowing them to offer different features and charge different prices to different types of customers (e.g., students and academic institutions, home users, businesses) and for different customer needs (e.g., per-use, per-user, per-device). And the importance of licensing will only increase as cloud computing and other online models for distributing and accessing software become more widespread.

The centrality of licensing is not only a characteristic of the software sector. Other industries are quickly following the software sector's lead. In the music, movie and publishing sectors today, similarly innovative licensing arrangements are being deployed in response to evolving consumer demand.

In considering its next steps, it will be important that the Commission identify measures that encourage – rather than hinder – the exciting changes underway in how works are developed, distributed and consumed. To that end, it is critically important that the EU copyright regime promote and protect the freedom of authors to license their works as they see fit, in response to the demands of customers and of the market.