Rome,
5th March 2014

European Commission
DG Internal Market and Services

BY EMAIL AT:
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PLEASE IDENTIFY YOURSELF:

Name:

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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):

…….

……

I. 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[1].

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[2] should significantly facilitate the delivery of multi-territorial licences in musical works for online services[3]; the structured stakeholder dialogue "Licences for Europe"[4] and market-led developments such as the on-going work in the Linked Content Coalition[5].

"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[6].

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

[2] 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.

[3] 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.

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

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

[6] 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[7] 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).

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…….

□ NO

► NO OPINION

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

[Open question]

…….

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

……

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

[Open question]

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……

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

□ YES – Please explain by giving examples

……

……

□ 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

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□ NO – Please explain

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► NO OPINION

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

[The definition of the rights involved in digital transmissions]

The EU framework for the protection of copyright and related rights in the digital environment is largely established by Directive 2001/29/EC[8] 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[9] and databases[10].

Directive 2001/29/EC harmonises the rights of authors and neighbouring rightholders[11] 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[12], (notably relevant at the start of the transmission – e.g. the uploading of a digital copy of a work to a server in view of making it available – and at the users' end – e.g. when a user downloads a digital copy of a work) and the communication to the public/making available right, i.e. the rights to authorise or prohibit the dissemination of the works in digital networks[13]. 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

[8] 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.
[9] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.
[10] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.
[11] 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".
[12] 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).
[13] The right to authorise or prohibit any communication to the public by wire or wireless means and to authorise or prohibit the making available to the public "on demand" (see Art. 3 of Directive 2001/29/EC).

a certain Member State's public[14]. 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[15])

The making available right has been codified by the European legislator as a peculiar subset of a broader right of communication to the public, with which it shares the feature of covering instances where the public is *not* present at the *place* where the original act of communication takes place. Like in the case of the communication to the public, the making available right covers situations where the *transmission* of the work happens from a distant place from the one where the user is physically located and the fruition of the work takes place on individual basis.

Differently from other forms of exploitation of the work involving the communication of the work *in front of the public* (such as public representations of the work and public performances in general), whose infringement implies both an *actual* exploitation of the work and an *actual fruition* from a public which is physically present in the place where the performance takes place, the right of communication to the public has been differently interpreted by the judicature of the Court of Justice of the EU, as covering even acts of transmission *not followed by an actual fruition of the work*. According to the Court, indeed, the concept of transmission, intrinsic to the right of communication to the public, simply involves *an act of intervention* which makes the work available to the public in such a way that the persons forming the public *may access* it: what matters being that the work has been put in a position to be *potentially* accessed by the public at large (broadly on this topic see E. Arezzo, *Copyright Enforcement on the Internet in the European Union: Hyperlinks and Making Available Right,* forthcoming in *Research Handbook on the Cross-Border Enforcement of Intellectual Property Rights*, P. Torremans (ed.), 2014, Edward Elgar Publishing.).

The *potentiality of access* becomes a crucial concept all the more in the case of the making available right which has been expressly conceived to cover those instances where a certain work is uploaded on the internet and stay there with the precise purpose of being

[14] 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).

[15] 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).

at users' disposal for fruition. Given the a-territorial nature of the internet, the making available right should be simultaneously held violated in all countries where the uploaded content becomes *potentially accessible*.

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□ NO OPINION

9. *[In particular if you are a right holder:]* ***Could a clarification of the territorial scope of the "making available" right have an effect on the recognition of your rights (e.g. whether you are considered to be an author or not, whether you are considered to have transferred your rights or not), on your remuneration, or on the enforcement of rights (including the availability of injunctive relief[16])?***

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

A clarification of the territorial scope of the making available right would surely help in ameliorating the enforcement of the rights in each Member State.

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□ NO

□ NO OPINION

2. Two rights involved in a single act of exploitation

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

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

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

As the making available right technically amounts to the act of the content provider storing a reproduction of the work on its server where it stays at disposal of the cybernauts, it should be clarified by the EU legislator that such exclusive faculty consists in nothing more than a peculiar instance of reproduction (see E. Arezzo, *Hyperlinks and the Making Available Right in the European Union: What future for the Internet after* Svensson, available at http://ssrn.com/abstract=2404250). The fragmentation of the act of digital transmission of the work into two separate exclusive rights – a reproduction right plus a making available –

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

makes no sense from a technical point of view (since the technical act is just one) and creates several complication on the exploitation of the rights whenever it happens that they are collectively administered by separate collecting societies or other similar bodies (E. Arezzo, *Aggregazione e frammentazione dei diritti nella Proposta di Direttiva sulla concessione di licenze multi territoriali per i diritti online relativi alle opere musicali: quali spazi per le licenze-multi diritto?* in AIDA (Annali italiani di Diritto d'Autore), 2013, 83, at 103 and ff.).

Recall at this regard that in the recent German case *Myvideo v. CELAS* (MyVideo Broadband S.R.L. vs. CELAS GmbH, District Court of Munich (Landgericht München), No. 7 O 4139/08 (June 25, 2009)) the *Landgericht* of Munich annulled the agreement between EMI Publishing and CELAS whereby the former had granted to the latter the right to administer its online reproduction rights, while the corresponding communication rights, belonging to the authors, stayed with GEMA (the German collecting society for authors). The German Court held that a separation of the two exclusive faculties regarding the online exploitation of works was not admissible: on the one side, because, *for technical reasons,* the making available right is not actionable without a simultaneous and preceding reproduction of the work; on the other side, and even more interestingly, according to the Court a fragmentation of the online rights would not be admissible because *an act of online reproduction without an act of making available would not amount to any form of commercial exploitation of the work.*

It is therefore suggested that the contours of the making available right be properly redefined by EU legislators in such a way that digital interactive transmission of a work on the internet be covered by just one exclusive right.

☐ 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[17] 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[18] as to whether such copies are always covered by the mandatory exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC.

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

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

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

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

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

Linking practices, regardless of the specific technique used (i.e. surface linking vis-à-vis deep linking or inline linking etc.), of all kinds should not be considered a form of direct infringement of copyright (i.e. a violation of the making available right) because linking does not amount to an act of transmission of a work, which is the first constituent element of the making available right (E. Arezzo, *Hyperlinks and the Making Available Right in the European Union: What future for the Internet after* Svensson, available at http://ssrn.com/abstract=2404250). This is precisely because the act of linking consists, by definition, not in an uploading of content but in the provision of a set of technical information about how such content may be reached. In other words, linking *always* presupposes the linked-to content be already uploaded on the net by someone else: this latter person being the actual infringer if the first act of uploading took place without the right-holder's content (in this sense: E. Arezzo, *Copyright Enforcement on the Internet in the European Union: Hyperlinks and Making Available Right,* forthcoming in *Research Handbook on the Cross-Border Enforcement of Intellectual Property Rights*, P. Torremans (ed.), 2014, Edward Elgar Publishing). If one agrees that a certain linking practice, performed by a third entity different from the one originally authorized by the right-holder, does not amount to an act of transmission of the work, it then becomes irrelevant to further analyze the element of the communication of the work to a 'new public', as the two are *cumulative* elements, both need to be satisfied in order to have a violation of the making available right.

As a consequence, linking should always be deemed allowed as it does not amount to an infringement and, therefore, does not require the codification of a specific exception into EU law.

The CJEU conclusions in the recent *Svensson* case cannot be shared. The CJEU has indeed stated, with no legal reasoning, nor technological explanation, that linking amounts to a communication of the work, shifting the centre of the analysis on the legality of linking practices on the element of 'new public' which, in turn, has been construed around the concept of open accessibility of the linked-to content (Judgment of the Court, *Nils Svensson and Others v Retriever Sverige AB*, Case C-466/12, §§ 19 and ff.). According to the Court, if the linked-to content has been openly released (i.e. *with no restriction measures*) on a certain online location with the right holder's consent, linking practices shall not be deemed infringing, as the first act of making available had the effect of communicating the work to the whole web: therefore, linking could not anyhow further enlarge the range of potential viewers (Judgment of the Court, *Nils Svensson and Others v Retriever Sverige AB*, Case C-466/12, §§ 26-27). By contrast, if the linked-to content has been made available only to a restricted set of users, and linking practices would have the effect of *circumventing the restriction measures* inserted with the right holder's consent to the specific purpose of restricting access, linking would amount to "[…] an intervention without which those users would not be able to access the works transmitted […]": hence, linking would be deemed infringing as it would actually enlarge the set of potential viewers of the work, satisfying the element of the 'new public' (Judgment of the Court, *Nils Svensson and Others v Retriever Sverige AB*, Case C-466/12, § 31).

This intricate reasoning is further complicated by the CJEU when it specifies that linking would be infringing not only when it would allow the circumvention of restriction

measures inserted with the right holder's consent when the protected content had been *initially* communicated (i.e. with the first communication of the work on the internet), but also when "[…] the work is *no longer available* to the public *on the site on which it was initially communicated* or where it is *henceforth available* on that site only *to a restricted public* […]" (italics added) (Judgment of the Court, *Nils Svensson and Others v Retriever Sverige AB*, Case C-466/12, § 31, last sentence).

However, if what matters is not anymore the *initial* act of communication, but rather the circumstance that the work *remains* freely available on the internet all the time – i.e. for the whole author's life plus seventy years -- things become incredibly complex. In fact, the practical consequence stemming from this latter sentence is that "linkers" would be required to constantly monitor the linked-to content, to make sure it has not been removed *from the original website* where it had been placed or whether it is still available *therein* only in a restricted mode. A request to monitor that the linked-to content remains freely available on the website where it has been initially uploaded with the copyright holder's consent would practically impair the functioning of the internet as it would be extremely cumbersome for single users and technically unfeasible for providers of internet services to deal with it (in this sense see E. Arezzo, *Hyperlinks and the Making Available Right in the European Union: What future for the Internet after* Svensson, available at http://ssrn.com/abstract=2404250).

☐ 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

…….

…….

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

The visualization of certain content on the browser by cybernauts is intrinsic to the very same functioning of the internet. Insofar as the fruition of content by opening a certain webpage amounts, from a technical point of view, to the creation of several temporary copies of the content, no matter whether stored on the content provider' s server cache memory or on the temporary memory of users' personal computer, it should be made clear in the legislation that such acts are exempted from any authorizations whatsoever from the right-holders.

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☐ 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)[19]. 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)[20]. This raises difficult questions, notably relating to the practical application of such an approach (how to avoid re-sellers keeping and using a copy of a work after they have "re-sold" it – this is often referred to as the "forward and delete" question) as well as to the economic implications of the creation of a second-hand market of copies of perfect quality that never deteriorate (in contrast to the second-hand market for physical goods).

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

X YES – Please explain by giving examples

Digital content that is distributed online does not give the possibility of being resold and not even lent whenever the technology applied to protect it prevent its transferability and circumventing such technology amount to an unlawful behaviour since art 4.2 of Directive 2001/29/EC states that the distribution right does not exhaust in the digital environment. While this has somehow become accepted among users in the music sector, where music that is legally acquired is in many cases also strictly connected to the physical device, i.e. MP3reader, via which it is listened to, it currently presents an issue in relation to the e-books as well one of the element that prevents their adoption by users within the market and by libraries for the public lending.

☐ NO

☐ NO OPINION

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

[Open question]

……

……

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

[20] 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).

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[21]. 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[22].

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]

An EU level registration system would ensure certainty of rights and hence incentivize the legal use of the works. It would also make it easier to determine the exact duration of rights.

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

[Open question]

Like in the patent system, a registration system could impose costs on authors to get adequate protection: hence, discouraging creativity. One should make sure on the one side that the registration costs would be affordable to every kind of author. On the other side, the introduction of such a system should not change the fact that copyright protection arises in the very moment of creation/fixation of the work and it is not conditioned to the grant of the title by an administrative office.

……

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

[Open question]

……

……

[21] 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.

[22] 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.

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[23], 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[24] should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition[25] 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[26] is seeking to take such identification systems a step further, and to create a linked platform, enabling automated licensing across different sectors.

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

[Open question]

……

E. Term of protection – is it appropriate?

Works and other subject matter are protected under copyright for a limited period of time. After the term of protection has expired, a work falls into the public domain and can be freely used by anyone (in accordance with the applicable national rules on moral rights). The Berne Convention[27] requires a minimum term of protection of 50 years after the death of the author. The EU rules extend this term of protection to 70 years after the death of the author (as do many other countries, e.g. the US).

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

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

□ YES – Please explain

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

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

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

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

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

…….

…….

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

Length of protection should be sensibly shortened for all kinds of works, especially technological creations such as software, and for all kinds of rights (copyright and especially neighbouring rights). Life plus seventy years from the authors' death is an incredibly long term of protection which is not necessary to spur creativity and development of science, and the useful arts, especially in consideration of the rapid pace with which creative works are disseminated through the digital market place.

Economic analysis supports the idea that current copyright terms, both in Europe and in the US, are excessively long (see for example the standard analysis of Landes and Posner, *The Economic Structure of Intellectual Property Law,* Harvard University Press, 2003 in chapter 8 or the economic approach of M. Boldrin & D. Levine, *Market Size and Intellectual Property Protection, International Economic Review,* Vol. 50, Issue 3, pp. 855-881 (August 2009)).

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NO OPINION

II. 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[28].

Exceptions and limitations in the national and EU copyright laws have to respect international law[29]. 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)[30], these limitations and exceptions are often optional[31], in the sense that Member States are free to reflect in national legislation as many or as few of them as they wish. Moreover, the formulation of certain of the limitations and exceptions is general enough to give significant flexibility to the Member States as to how, and to what extent, to implement them (if they decide to do so). Finally, it is worth noting that not all of the limitations and exceptions included in the EU legal framework for copyright are of equivalent significance in policy terms and in terms of their potential effect on the functioning of the Single Market.

In addition, in the same manner that the definition of the rights is territorial (i.e. has an effect only within the territory of the Member State), the definition of the limitations and exceptions to the rights is territorial too (so an act that is covered by an exception in a Member State "A" may still require the authorisation of the rightholder once we move to the Member State "B")[32].

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.

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[28] 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.

[29] 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).

[30] 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)).

[31] 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.

[32] 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.

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

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

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

The framework of the Information Society Directive 2001/29/EC significantly impairs free access faculties (such as those relating to scientific research and teaching and, more broadly, uses set forth in the public interests), as well as harmonization and legal certainty within the EU. This is not only because the list of exception is ***optional*** to implement for Member States, but also because the Directive provides for a list of exceptions and limitations which has an ***exhaustive*** character and, in addition, it allows Member States to redefine ***restrictively*** the scope of said exceptions or limitations (see, for example, Recital 36 allowing Member States to introduce a form of fair compensation for right holders also when applying the optional provisions on exceptions or limitations which do not require such compensation) (in this sense see G. Ghidini, *Innovation, Competition and Consumer Welfare in Intellectual Property Law*, Edward Elgar, 2010, at pp. 110-118; G. Ghidini, *Exclusion and Access in Copyright Law: The unbalanced features of the InfoSoc Directive*, in *Methods and Perspectives in Intellectual Property*, ATRIP Intellectual Property Series, G. B. Dinwoodie (ed.), Edward Elgar Publishing, 2013, 307, at p. 317).

A first example of the detrimental effects caused by the exception framework just outlined above (containing a ***closed*** list of exceptions, ***optional*** to implement for Member States, which can redefine ***restrictively*** the scope of said exceptions) can be found with regard to the scientific research exception set forth by Article 5, paragraph 3, letter a), of the InfoSoc Directive. According to this provision, "*Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: (a) use for the sole purpose of illustration for teaching or scientific research, as long as the source, including the author's name, is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved*".

Some Member States have narrow provisions relating to scientific research, limiting, for example, the amount or portion of work that researchers can use to pursue said purposes (notwithstanding such quantitative restriction is *not* provided by the InfoSoc Directive itself). For example, this is the case of Italy or France, whose copyright laws only allows to use "fragments or parts" of a work for scientific purpose (reference is made to, respectively, Article 70 of the Italian Copyright Law − Law of April 22, 1941, No. 633 −, and Article L122-5, paragraph 3, letter e), of the French *Code de la Propriété Intellectuelle* − Loi 92-597, July 1, 1992, as amended by Law 2006-961, implementing the InfoSoc Directive) (see F. De Santis, *Verso una riforma del diritto d'autore. Libertà di ricerca e libera circolazione della conoscenza*, in *Rivista di diritto industriale*, 2/2013, 118, at pp. 122-131; E. Sbarbaro, Note *sulla disciplina delle libere utilizzazioni tra mondo analogico e mondo digitale*, in *DigItalia – Rivista del Digitale Nei Beni Culturali*, 1/2012, 23, at p. 28).

A second clear example of how the optional nature of exception can be detrimental to their effectiveness is the case of the exceptions set for the cultural institutions. In Italy art 5(2)c of Directive 2001/29 has not been implemented while art 5(3)n has. This determines a highly fragmented context which will be even more complex when the mandatory exception provided by art 6 of Directive 2012/28 on certain permitted uses of orphan works will be implemented. Italian cultural institutions will be allowed to digitise works deemed orphan for making available in the pursuit of the dissemination of the European cultural heritage, but not to digitise in-copyright works for preserving that same cultural heritage.

It shall be also pointed out that, within the framework of the InfoSoc Directive, the room for the exceptions and limitations could be potentially restricted by the application of the so-called '**three-step test**' provided by Article 5, paragraph 5, of the Directive, and by the application of **technological protection measures** (TPMs). These two points will be further examined *infra* under question n. 24 and n. 80.

☐ NO – Please explain

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……

☐ NO OPINION

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

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

The provision of certain exceptions, particularly those reflecting fundamental rights and freedoms, should be conceived as a **mandatory** task for Member States and should be made immune from the special legal protection granted to TPMs. This is the case of the exceptions relating to scientific research and other uses enabling the sharing and dissemination of knowledge (including quotations for purposes such as criticism and review and use for news reporting and press reviews) (M.L. Montagnani, *Il diritto d'autore nell'era digitale. La distribuzione online delle opera dell'ingegno*, Giuffré 2012, chapter II, § 4) as well as exceptions adopted to enable cultural institutions to perform their public mission.

Once these exceptions are made mandatory, a higher level of harmonisation should moreover be achieved by introducing the principle of mutual recognition of exceptions as done in the case of orphan works by Directive 2012/28 art 4.

☐ NO – Please explain

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……

☐ NO OPINION

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

[Open question]

In the field of teaching and research, two other exceptions could be added. A first exception would regard translations made within teaching or research, with non-commercial purposes. A second crucial exception should regard those acts regarding the interactive transmission of study material from teachers to students enrolled in a certain course, at least when made within access-restricted communication platform. It should be made clear that the act of uploading teaching materials (such as course-pack made by the teacher for a certain course) onto online platform and its downloading from students it does not amount to a violation of both making available right and reproduction right (on this point see *infra* the answer to question 43).

Cultural institutions also deserve more room to perform their public-interest mission of preserving and disseminating national and European cultural heritage as well as providing as many services as possible to their subscribers in compliance with third parties' rights. Hence, the current EU exception regime should be enriched by providing them with the possibility to offer access to their collections on-line, to enable e-landing and access to users with disabilities.

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

The catalogue of exceptions and limitations contained in the Information Society Directive contains an *exhaustive* list of conduct whose implementation by Member States is optional. To make thing worse, the implementation into national laws of the exceptions codified into the Directive is further subjected by the application of the so-called 'three-step test' provided, as corollary, by Article 5, paragraph 5, of the Directive.

The current exhaustive list, coupled with the way into which the 'three-step test' is interpreted within Member States, shows how much more flexibility would be needed to frame an exception regime capable of taking into account the multiple interests that underpins it.

As a matter of fact, three-step test was originally conceived by the Berne Convention (Article 9, paragraph 2) as a set of guiding principle for national Member States' legislators in order to define the conditions under which they could introduce or maintain certain free uses (accordingly, the test was clearly addressed only to Member States). The same *ratio* can be found in the TRIPs Agreement (Article 13) and in the WIPO Copyright Treaty (Article 10). The framework of the Information Society Directive, however, is rather different from the two international Conventions' mentioned above. The EU legislators, indeed, took good care in expressly framing, one by one, in an exhaustive list, what kinds of exceptions for the digital market place could be adopted by national copyright law. Hence, there was no need for the further insertion of the three step test, nor the role it had to play was clear.

In this nebulous scenario, several judicial authorities of Member States have been called to "apply" the test and to check, case-by-case, whether an exception or limitation complies with criteria established therein ("judicial applications" of the three-step test have been already carried out in some Member States, namely by the French *Court of Cassation*, decision of February 28, 2006, no. 549, and by the Court of Milan, decision of May 14, 2009, no. 8787).

Within this context, an exception or limitation, although provided by law, could be considered at a later stage in contrast with one of the steps set out by the test, with the result that the user will never be sure of the spaces of freedom reserved to it by law.

Besides the current state of the legal framework, there is another aspect to be considered: nowadays technology plays a significant role in the way in which the exception beneficiaries operate and whenever they are vested with a public-interest mission to pursue it (this is the case for example of cultural institutions). At the same time technological development cannot be foreseen and should not be framed within a set number of exempted activities as it is now that an exhaustive list of exceptions is provided. Flexibility is needed then also in relation to certain categories of beneficiaries such as those perceiving a public interest so to take into account the evolving ways into which for example cultural institutions can contribute to preserve and make accessible the European cultural heritage.

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□ NO – Please explain why

……

……

□ 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]

The role of the three step test within the Information Society Directive could be reframed in such a way to provide similar flexibilities to those granted by the fair use model in the USA.

In particular, the three step test could have a big role to play if: i) it would be reframed not as closing clause but as first opening principle of art. 5; ii) as such, it should precedes ***a non-exhaustive*** list of exceptions.

In this way, the three step test could work as general clause to be transposed into national copyright laws in such a way to allow judges enough room of manoeuvre to shape new exceptions.

At this regard, it is worth recalling the recent judgement of the Spanish Supreme Court in the *Google v. Megakini* case (Spanish Supreme Court, April 3, 2012, *Megakini.com v Google Spain*, N. 172/2012. The text of the judgment is available at http://pdfs.wke.es/8/6/1/5/pd0000078615.pdf (in Spanish language)) where the Court suggested that the three step test must not only be interpreted "in negative" sense, as a further constrain to the applicability of the strictly codified list of exceptions, but it has also to be regarded as a "positive interpretative tool", clarifying the common rationale behind the exceptions: i.e. that they must represent acts which do not prejudice the legitimate interests of right holders and do not damage the normal exploitation of the work. The Spanish Court

suggested that the three step test should be used as a safety valve to balance copyright holders' interests with interests of the society at large in such a way to permit a compression of the latter's prerogatives whenever the use performed by unauthorized third parties is not able to damage copyright holders' economic interests when they strategically use their rights to unjustifiably harm third parties (more broadly see, E. Arezzo, *Copyright Enforcement on the Internet in the European Union: Hyperlinks and Making Available Right,* forthcoming in *Research Handbook on the Cross-Border Enforcement of Intellectual Property Rights*, P. Torremans (ed.), 2014, Edward Elgar Publishing).

On the other hand, build-in flexibility in the form of a fair-use or fair dealing provision may well complement listed exceptions and limitations, most importantly shielding individuals from liability when using materials for fair and principally non-commercial uses. A fair-use provision would mostly benefit the users of libraries and cultural institutions in general, but also the institutions themselves in providing advice to their users as regards permitted uses.

A well-defined doctrine with explicit requirements (see for example section 107, title 17, U.S. Code) would minimise the need of frequent judicial interpretation, although courts can interpret in a case-by-case basis when needed.

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

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

See under answers to question nn. 21 and 47.

…….

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

…….

…….

☐ **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[33] and enable on-site consultation of the works and other subject matter in the collections of such institutions[34]. 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[35].

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

1. Preservation and archiving

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

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

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

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

This answer is framed within the Italian context, in the field of publicly accessible libraries, and in relation to digital copies.

Bocconi University Library (BUL) does not make preservation copies as this is not allowed under the Italian copyright framework that implements Directive 2001/29/EC but does not introduce the optional exception of Article 5.2.c. Typically, BUL makes preservation copies, even digital, merely for very old books and manuscripts, after having carried out an accurate search to verify the public domain status of that work or identify the right holder for obtaining

[33] Article 5(2)c of Directive 2001/29.
[34] Article 5(3)n of Directive 2001/29.
[35] Article 5 of Directive 2006/115/EC.

the authorisation to the digital reproduction. Unfortunately, this search is truly burdensome and at the moment not viable through a 'one-stop shop'.

□ NO

□ NO OPINION

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

[Open question]

This sort of problems may be solved by simply enabling libraries to pursue their traditional mission of preserving and archiving their own collections with any new helpful technology and in relation to any material that is included in their collections.

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]

We do consider the need to amend the European regulation in respect of the acts of reproduction made by publicly accessible libraries, educational establishments or museums, or by archives. In particular, the legislative solution should be:

firstly, making mandatory the exception under art 5(2)c so that the national implementation of the Directive will be bound to insert it within the Italian copyright framework;

secondly, enlarging the scope of exception 5(2)c in order to allow all the convenient preservation technologies, either existent or prospective ones;

thirdly, preventing that this mandatory exception may be subsequently overridden by any contractual means, such as the licenses between right holders and libraries.

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

[Open question]

Since the parties involved in the debate are not on the same footing, especially as to the scarce ability of libraries to exert effective influence over right holders, the legislative solution is the only suitable answer to the above mentioned problems.

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]

This question is provided in relation to the Italian context, and refers to the experience of a publicly accessible library as Bocconi University Library (BUL) is.

BUL has frequently encountered problems with both standard licenses and negotiated contracts. In both cases the main issue is that agreements limit the number of users that have simultaneous access to collections, limit the location for access to on-site premises, discriminate the categories of users (for example Bocconi faculty vs non-Bocconi faculty), impose severe time-windows between printed and electronic versions as well as deny access to entire parts of collection as occurs, for instance, by not including the most recent journal issues within the accessible database (see M. Santarsiero, *Come e quanto si pagano i diritti. Licenze e reading lists: Il caso della Biblioteca dell'Università di Milano,* in *Biblioteche oggi,* 6, 2008, at pp. 11-16).

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

[Open question]

By adding to the on-site terminal exception also the ability to offer off-site access to library's collection. Indeed, for accomplishing to its function, BUL's materials should be accessible for private study purposes also off-premises. It worth pointing out that any further agreement between right holder and institutional user shall not override such proposed statutory right to provide off-premises access (A. Vaglio, *Document supply and Electronic Course Reserves. Two services, one pattern,* Paper presented at the 75th IFLA General Conference and Assembly, Milan, August 23-27, 2009, available at http://conference.ifla.org/past/2009/143-vaglio-en.pdf, last visited February, 2nd, 2014).

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]

Cultural institutions in general, and publicly accessible libraries in particular, deserve more room to perform their public-interest mission of preserving and disseminating their catalogue as well as providing as many services as possible to their users in compliance with third parties' rights. While considering that any defence for the reproduction of a copyrighted work shall not conflict with a normal exploitation of the work and shall not unreasonably prejudice the legitimate interests of the author, we recommend a legislative solution allowing cultural institutions to digitize and offer access to their catalogue not only on-site but also on remote.

The regulation of these activities and their legal boundaries cannot be left to private ordering mechanisms and, hence, cultural institutions would need a general exception that make possible online viewing. Since not enabling any downloading, this exception would not be detrimental to right holders' rights and might represent a balanced solution between authors' right and cultural institutions' mission.

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

Again, agreements between libraries, considering once again the view of Bocconi University Library (BUL), and publishers are able to prevent the former from implementing its institutional lending policy by permitting the latters to impose a divergent lending approach. Namely, BUL reports that simultaneous loans to different users are limited, the overall number of loans that BUL can provide to its users is also limited by contract, the lending period is usually predefined by right holders, and inter-lending service is not allowed. Moreover, the lack of interoperability between formats and platforms is also identified as a major obstacle to access.

☐ NO

☐ NO OPINION

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

[Open question]

We are of the view that greater interconnectedness, easier communication, and the exposure of information offered by the digital technology turn void when libraries are prevented from unrestricted access to information in many formats and from many sources. More precisely, e-lending should enable the access to large amounts of information with a variety of digital tools and, in any case, not smaller than those provided by physical lending.

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]

Institutional policies can be implemented on physical collections but are not possible on online collections because of the contractual restraints deriving from the above mentioned agreements.
Libraries have the availability of physical collections as a result of a purchase, while, in the case of online collections, the availability is subject to agreements with right holders.

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]

There is no dogmatic difference between libraries' traditional public lending activities and activities such as off-premises consultation and e-lending. Deeming traditional library activities and new digitally enabled services conceptually different would impede libraries' adaptation to the digital era.

From a legal perspective, the central question is whether e-lending by public libraries is covered by the existing public lending rights regimes of national legislations under the European copyright framework.

At the moment copyright law explicitly only grants exhaustion to tangible objects, such as printed books. However, to enable libraries to perform their public interest mission effectively also in the digital era, there is a need of a clear legal basis for library e-lending. In all, the sticking contradiction to the right holders' legal rights regarding a print book renders the need for clarity in the regulatory framework for e-lending pressing (*see* H. Müller, *Legal aspects of e-books and interlibrary loan,* Interlending & Document Supply 40/3, 2012, at pp. 150-155, available at http://www.emeraldinsight.com/journals.htm?articleid=17047187 and A. Reese, *The first sale doctrine in the era of digital networks,* Boston College Law Review, 44, 2003, at 577 ss.). The problem with e-lending today is that the major publishers, contractually superior to small but also larger libraries with serious budget limitations, are now establishing contractual conditions that exceed the monopoly afforded by copyright. The increased cost for online versions of works is a burden that we cannot just assume that libraries, will simply adapt to.

Given the lack of clear regulatory framework covering e-lending, libraries that wish to offer to their users e-books available for lending are currently facing several licensing practices and

models offered by publishers or right holders (contractual restrains discussed in above questions – for the dominant licensing practices *see also* D. O'Brien, U. Gasser, J. Palfrey, *E-Books in Libraries: A Briefing Document Developed in Preparation for a Workshop on E-Lending in Libraries,* Berkman Center Research Publication No. 2012-15, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2111396##). Without the limitations that the exhaustion doctrine places on the copyright monopoly of the right holders, distribution of digital works, as currently takes place under private contracts, circumvents the rationale behind copyright and perhaps promotes rent-seeking practices (*see* O. Fischman Afori*, The Battle over Public e-Libraries – Tacking Stock and Moving Ahead,* IIC, 44, 2013, at pp. 392-417).

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[36]. 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)[37].

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?***

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

A legislative solution to ensure that the results of the 2011 MoU are effectively implemented in Italy is needed.

[36] 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 .

[37] 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.

Among the main problems that such legislation must address there are the costly rights clearance, the systematic funding of digitization, the dealing with out-of-distribution works (including cross-border access). It should also provide solutions covering copyright issues in all the different sectors (audio-visual, text, visual arts, sound), which have not, for example, all been covered by the recent Orphan Works directive.

All the above are topics touched upon by the he 2011 Comité des Sages report on Bringing Europe's Cultural Heritage Online (see http://ec.europa.eu/information_society/activities/digital_libraries/comite_des_sages/index_en.htm), which explicitly recognises and, all the more stresses the importance of cultural institutions trying to digitise as much of their holdings as possible.

□ NO – Please explain

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□ NO OPINION

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

□ YES – Please explain

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□ NO – Please explain

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► NO OPINION

B. Teaching

Directive 2001/29/EC[38] 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

The Teaching exception provides another good example of the deleterious consequences caused by the optional exceptions regime introduced by the Information Society Directive. One of the consequences of the fact that the implementation of the exemption is not mandatory and that Member States have been allowed to redefine restrictively the scope and boundaries of said exceptions or limitations, is that certain countries, such as Italy (and France), have limited the exemption to **parts or extracts of the protected works**, **thus not including the use of the whole work.** As a matter of fact, Italian Copyright Legislation (Law n. 633/1941) provides for such restriction in Art. 70, comma 1, and more precisely it provides the limitation of freedom of summary, quoting, reproduction and communication to the public for teaching purpose (and critical analysis, discussion, study and scientific research purposes) to "fragments or parts" of works, thus making illegal the reproduction of the whole works without the prior authorization of the right owner. Such provision makes the exemption almost inapplicable in a real life scenario to works such as figurative and plastic art pieces and brief textual works such as poems and short tales. Moreover, applying this exception to part of works such as statues, paintings, photographs, math demonstrations and diagnostic theories would be, most of the times, useless (see E. Sbarbaro, *Note sulla disciplina delle libere utilizzazioni tra mondo analogico e mondo digitale*, in *DigItalia – Rivista del Digitale Nei Beni Culturali*, 1/2012, 23, at p. 28) .

This puts the Italian teacher in an awkward position as he is forced to make an illegal use of the works or, alternatively, to not use it, with an impoverishment of his teaching potential.

In addition, art. 70, 1°, of Italian Copyright Law, which implemented Art. 5, par. 3(a), replaced the generic and more "open" wording of the Directive ("***use*** for the sole purpose of illustration for teaching or scientific research") with the more restrictive provision envisaging exemption for certain acts of reproduction and making available, conditioned to the "sole

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

purpose of illustration for teaching", together with the non-commercial purpose and the non-competitive nature of the use.

The "illustration for teaching" purpose limits the applicability of the exception to the subjective-student and to the objective-specific lesson sphere; thus with the risk of ruling out any wider but not strictly illustrative educational purpose, such as the sharing of study material for distance learning purposes. This is also a consequence of the bad wording used by both the EU and the national provisions. The word '*illustration*' indeed leads one to think that only the showing or using of material *in class, during teaching*, might be covered by the exception, and not the further activities related to the circulation of study materials afterwards.

The situation is particularly deleterious in Italy where, although it is assumed that the generic word "use", as provided by Art. 5, par. 3(a) of the Directive should allow for the application of the exemption by Member States both in the analogue and in the digital sphere, the exemption for teaching purposes has been applied in a very restrictive way by Italian judges, who deem it applicable only to the analogical context (i.e. Italian Supreme Court, see Corte di Cassazione n. 2089/1997, in Il Diritto Industriale, 1997, p. 812) and rule out the chance of exempting any digital use on communication networks for illustration purposes. Moreover, Italy is neither succeeding in having recourse to individual or collective licensing or agreements in regards to the use of protected works on online platforms.

As a consequence, any likely making available of protected works by teachers for illustration purposes is deemed illegal: to the detriment of both teachers and students. Other Member States, on the other hand, adopted solutions based either on collective agreements/licences between organizations representative of the parties' interests, and on legal licences providing for fair compensation, though different from each other, for instance by means of the subjective application field. Lastly, it must be pointed out that Italian law embraces another bold, inaccurate and incomplete provision on educational use which gave rise to a harsh debate. It is Art. 70, comma 1bis, of Italian Copyright Law (introduced by Art. 2 of Law 9 January 2008, n. 2) which is in fact a "dead letter": "Publication through the internet of free of charge low resolution or tainted images and music is allowed, for educational or scientific purposes and only in such a way that the use is not profit-making. A decree by the Italian Ministry of Cultural Heritage and Activities, in agreement with the Ministry of Public Education and the Ministry of University and Research, and following the opinion of the related Parliament Commissions, defines the limitations for educational and scientific use as provided for by this comma". The regulation which should have defined the subjective and objective limitations of the exemption has never been issued.

☐ NO

☐ NO OPINION

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

[Open question]

Problems could be solved introducing an exception for teaching purposes allowing for the use and sharing of teaching and study material throughout modern teaching technologies, including distance learning and file-sharing methods. (see *infra* under question n. 45)

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]

See under 42.

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]

The teaching exception should be amended in such a way:

i) to grant the proper degree of flexibility needed to adapt to the evolving and changing teaching methodologies and technologies;

ii) to introduce subjective limitations: i.e. defining the categories benefiting from the exception, such as Private and Public Schools, Universities and Research Institutions recognised by Member States' legal systems, teachers, students. For example, only teachers should be allowed to make the works available on the platforms, while students should be permitted to freely visualizing on their browser and downloading. The material made available for students should only be shareable between students attending the same course or University, while it should be prohibited for them to further share such material with other third parties (for example through the use of publicly accessible social platform).

iii) To introduce objective limitations: i.e. exempting the above defined acts only when they take place within a restricted-access platform.

iv) To drawing a line between on the one hand authorization-exempted free uses and on the other hand uses requiring a compensation (or a collective or individual authorization by the rightholders), on the ground of the subject, the space, the amount, the time of use (for instance depending on how wide the student network is: limited access through password to the students of a specific course or to the students of the all Institute/University, access limited to a certain number of students for the use not to be "public", etc.).

v) To introducing a specific provision for the "study at home" of people with a disability.

Such exception or limitation should be mandatory for Member States in order to guarantee a limited degree of certainty of rights and facilitate the across border use of protected works for educational purposes.

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

[Open question]

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C. *Research*

Directive 2001/29/EC[39] 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

As a consequence of the exception framework set forth by the InfoSoc Directive (see on this topic answer no. 21 above), several Member States have limited the portion of work that can be used for research purposes. This is the case of the Italian Copyright Law (Law of April 22, 1941, No. 633), whose Article 70 only allows to use "fragments or parts" of a protected work for scientific purposes, provided that other conditions are met (e.g. there is no commercial purpose); likewise, the French *Code de la Propriété Intellectuelle* only allows the use of "*extraits d'oeuvres*" (Article L122-5, paragraph 3, letter e), of Loi 92-597, July 1, 1992, as amended by Law 2006-961, implementing the InfoSoc Directive).

On the contrary, some Member States have implemented almost literally the research exception provided by the InfoSoc Directive (this is the case of Malta − Copyright Act of Malta, Chapter 415 of the Laws of Malta, ACT XIII of 2000, as amended by Acts VI of 2001 and IX of 2003 − and Cyprus − Law no. 128(I)/2004), and therefore in said countries no limits as to the portion of the work to be used are set by the respective copyright laws. In this respect, it is worth noting that neither the InfoSoc Directive (Article 5, paragraph 3, letter a)) nor the Berne Convention (in particular, Article 10, paragraph 2, which relates to illustrations for teaching) provide restrictions as to the portion of work that can be used. The quantitative restriction mentioned above raises some criticalities and could substantially obstacle the research activity of researches (e.g., to discuss a scientific theorem or to verify a medical theory it would only be possible to use extracts and fragments of works. The use of the entire work would be prevented under the current national legal framework of the countries providing said quantitative restriction) (see G. Ghidini, L. B. Moraia, P. Errico, *Il diritto d'autore nell'economia della conoscenza: le eccezioni al diritto d'autore a scopo di ricerca, Progetto CRUI-SIAE-AIE, 2011*, http://dirittoautore.cab.unipd.it/convegno, at p. 4). Also, where the aforementioned quantitative limit exists, there are no criteria to establish what is a "portion" of work under the permitted use (how many pages? Who establish what is a portion?).

In addition, Article 5, paragraph 3, letter a), of the InfoSoc Directive has been implemented in some Member States as an exemption, while in other States the use of works for research purposes is subject to the payment of a fair compensation to the rights holders. This is in line with the InfoSoc Directive, whose Recital 36 provides that "*The Member States may provide for fair compensation for right holders also when applying the optional provisions on exceptions or limitations which do not require such compensation*". Along this line, the

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

exception pédagogique et de recherché provided by Article L122-5, paragraph 3, letter e), of the French *Code de la Propriété Intellectuelle* requires a fair compensation to be paid to right holders.

The differences in the implementation of the research exception among Member States across the EU makes it difficult to draw the line between what is permissible and what is not. And this is particularly relevant when research activities are carried out within a transnational framework. Let's think to researchers who wish to carry out their activities in several institutions located in different countries. The same activities could be lawful or unlawful depending on the country and on the relevant legal framework (see F. De Santis, *Verso una riforma del diritto d'autore. Libertà di ricerca e libera circolazione della conoscenza*, *Rivista di diritto industriale*, 2/2013, 118, at pp. 122-131).

Further, the InfoSoc Directive permits the research exception only if the scientific activity is aimed at "non-commercial purposes". This limit (which is not provided within the patent framework – see Article 27, letter b), of the Community Patent Convention, December 30, 1989) excludes researchers who work in and for firms elaborating on the previous "state of the art". This provision does not seem to consider that, as long as there is no industrial or commercial exploitation, no infringing activity should be assessed (in this sense G. Ghidini, *Exclusion and Access in Copyright Law: The unbalanced features of the InfoSoc Directive*, in *Methods and Perspectives in Intellectual Property*, ATRIP Intellectual Property Series, G.B. Dinwoodie (ed.), Edward Elgar Publishing, 2013, 307, , at p. 324).

That "*balance between the rights of authors and the larger public interest, particularly education, research and access to information*" which is underlined in the preamble of the WIPO Copyright Treaty and is also references to in the InfoSoc Directive (Recital 31) seems not to be achieved in the existing legal framework, notwithstanding that research activities are grounded on **constitutional basis** and are expression of fundamental rights (recognized both by the Charter of Fundamental Rights of the European Union, which became legally binding on the EU with the entry into force of the Treaty of Lisbon, in December 2009, and by national constitutional systems – in Italy, see Article 33 of the Italian Constitution, which states that art and science are free, and teaching them shall be free as well, and Article 9 of the Italian Constitution, which states that the Italian Republic promotes scientific and technical research)

□ NO

□ NO OPINION

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

[Open question]

The provision of the research exemption should be conceived as a mandatory task for Member States and should also be made immune towards TPMs.

Under this perspective, research uses should be reformulated in precise and strict terms in such a way as to leave no room for any interpretation of national legislators. In this way, there might be the chance to achieve a greater level of harmonization across the European Union and to enhance research activities carried out within a transnational framework.

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

[Open question]

To facilitate the use of content for research purposes open access initiatives have been launched in Member States. Open access, whilst promoting open access to research productions in the digital environment, aims to encourage researchers to disseminate their work and make it freely available on the web for the whole public. These goals have been expressed in the Budapest Open Access Initiative, published on February 14, 2002, promoted by the Open Access Institute (available at http://www.budapestopenaccessinitiative.org/read), and in the Berlin Declaration on Open Access to Knowledge in the Sciences and Humanities, published on October 22, 2003 (available at http://openaccess.mpg.de/286432/Berlin-Declaration).

According to the signatories of the mentioned Berlin Declaration, new possibilities of knowledge dissemination not only through the classical form but also and increasingly through the open access paradigm via the Internet have to be supported. To this aim, it has been highlighted that the web has to be sustainable, interactive, and transparent, and content and software tools must be openly accessible and compatible. Open access contributions must satisfy two conditions: (i) the author(s) and right holder(s) of such contributions grant(s) to all users a free, irrevocable, worldwide, right of access to, and a license to copy, use, distribute, transmit and display the work publicly and to make and distribute derivative works, in any digital medium for any responsible purpose, subject to proper attribution of authorship, as well as the right to make small numbers of printed copies for their personal use; (ii) a complete version of the work is published in at least one online research repository (as clarified also in the European Research Council's Scientific Council Guidelines for Open Access of December 17, 2007 (available at http://erc.europa.eu/sites/default/files/document/file/erc_scc_guidelines_open_access.pdf).

However, as clarified also in the Max Plank Institute's comments to the public consultation on the Green Paper on Copyright in the Knowledge Economy (available at the following link: http://www.ip.mpg.de/files/pdf1/Comments-GreenPaperCopyrigthKnowledgeEconomy4.pdf), although several open access publishers have launched successful publications and high-end databases, forcing scholarly authors to open access publishing has not yet proved yet to be superior in providing sustainable and cost-effective platforms for disseminating scientific information and knowledge. In particular, it has been highlighted that "Open access mandates for peer-reviewed publications arguably undermine reasonable investments of publishers, and constitute a two-tier publication mode with ambiguous interdependencies. Besides the economical and organizational uncertainties, from a legal perspective, it is still unclear whether mandates such as those adopted by the European Research Council comply with the fundamental freedom of scientific research as is found in the respective constitutions of several Member States. Whereas this seems desirable, it is also not sufficiently clear how the established mechanisms of building reputation within the scientific community will adapt to these new publication models, which seems crucial for their success".

D. Disabilities

Directive 2001/29/EC[40] 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

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

disabilities (notably by increasing the number of works published in special formats and facilitating their distribution across the European Union)[41].

The Marrakesh Treaty[42] has been adopted to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled. The Treaty creates a mandatory exception to copyright that allows organisations for the blind to produce, distribute and make available accessible format copies to visually impaired persons without the authorisation of the rightholders. The EU and its Member States have started work to sign and ratify the Treaty. This may require the adoption of certain provisions at EU level (e.g. to ensure the possibility to exchange accessible format copies across borders).

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

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

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

☒ YES – Please explain by giving examples

As publicly accessible library, Bocconi University Library (BUL) must make available books and articles also to users with visual disabilities. Technology helps, providing digital texts. But unfortunately, publishers, especially in the Italian context, do not supply pdf files of their books. Sometimes they do not even hold them, sometimes they are not ready to send them to libraries. They consider libraries unreliable interlocutors. Besides, the most of Electronic Resources (supplied by International Academic Publishers) are still not readable by specific software for visually impaired people.

☐ NO

☐ NO OPINION

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

[Open question]

To make publicly accessible libraries perform their duty to make content accessible to users with disabilities, it should made clear that publishers have provide formats that can be reproduced in order to meet these specific needs by all cultural institutions. The key issue, though, is ex ante in the availability of the content to be then reproduced and adapted for users with disabilities, and not in the technology to do this which is much more easier to be found.

[41] 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/).

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

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

[Open question]

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E. Text and data mining

Text and data mining/content mining/data analytics[43] are different terms used to describe increasingly important techniques used in particular by researchers for the exploration of vast amounts of existing texts and data (e.g., journals, web sites, databases etc.). Through the use of software or other automated processes, an analysis is made of relevant texts and data in order to obtain new insights, patterns and trends.

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

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

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results. At the same time, practical solutions to facilitate text and data mining of subscription-based scientific content were presented by publishers as an outcome of "Licences for Europe"[44]. 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.

[43] For the purpose of the present document, the term "text and data mining" will be used.
[44] See the document "Licences for Europe – ten pledges to bring more content online": http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf .

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

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

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

☐ YES – Please explain

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☐ NO – Please explain

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► NO OPINION

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

[Open question]

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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?***

Under current copyright regulation, text and data mining are not likely to be permitted in Europe (P. Ganley, *Google Book Search: Fair use, Fair dealing and the Case of Intermediary Copying,* Working paper, 2006, available at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=875384) and they have diffusely been found infringing in France (*Editions du Seuil et autres c Google Inc et France,* Tribunal de grande instance de paris 3ème chamber, 2ème section Jugement du 18 dècembre 2009) because, under European jurisdiction, unauthorized reproduction of the whole work has no broad defense comparable to that of US fair use.

In the UK, it is disputed whether non-commercial text mining is already permissible as a fair dealing by virtue of sec. 29 of the CDPA 1988. In any event non-display uses are often excluded by contract, and the problem with sec. 29 is that it is not mandatory against its contractual restriction.

Moreover, any defense for non-display uses of copyright works limited to non-commercial research would not be capable of delivering all the intended benefits of text mining (JISC, *The Value and Benefit of Text Mining to UK Further and Higher Education,* Digital Infrastructure, 2012, available at: http://bit.ly/jisc-textm). Since permitting commercial text mining may have substantial public benefits and positive impact on growth and innovation, there is the need of supportive solutions for commercial research as well.

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

We, therefore, recommend that an exception on text and data mining for non-commercial research should be put in place and rendered mandatory against any contractual restriction.

We also recommend that the text and data mining defense should not be limited to non-commercial uses. We are of the view that an exception extended to commercial research would better support the potential of text mining technologies. In this case permission could have to be under a fair remuneration scheme.
Alternatively, if commercial text mining is found to go against the second step of the three-step test (article 5(5) of the European Copyright Directive), under which a permitted activity should not conflict with the normal exploitation of a work, the permission for commercial research should have to be under a compulsory licensing scheme.

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

[Open question]

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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[45]. 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

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

between rightholders and platforms as well as micro-licences concluded between rightholders and the users generating the content. In any event, practical solutions to ease user-generated content and facilitate micro-licensing for small users were pledged by rightholders across different sectors as a result of the "Licences for Europe" discussions[46].

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

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

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

☒ YES – Please explain by giving examples

Internet users generate a continuous flow of content that is uploaded on various platform, from those for general networking to those for networking among specific group such as academics. Within this plethora of content mash-ups only represent a portion of the content made available although they raise the question as to whether this activity is actually infringing third parties' copyright.

As internet users approach the world of UGC change from persons to person in relation to their knowledge of copyright law and its 'all rights reserved' default rule. Users that have knowledge of copyright rules encounter a first obstacle when they want to make their own content available to others for the creation of further works or for re-use. In order to enable the sharing users/authors must specify what licence is adopted for that content – i.e. what rights are reversed and what are licensed – otherwise the default 'all rights reserved' copyright regime applies.

On the other hand users that want to reuse material available online or incorporate it in their own works encounter the significant obstacle of understanding the copyright regime under which that material released. In this context creative commons licenses work quite well and are widely adopted by the users that want to open up their content as well as by those that want derive from online works in compliance to copyright rules. Moreover, these open licences show that at least online there is the need for a rule different form the default copyright rule (M. Ricolfi, *Making Copyright Fit for the Digital Agenda*, 2011, available at http://nexa.polito.it/nexafiles/Making%20Copyright%20Fit%20for%20the%20Digital%20Agenda.pdf). A rule that enables the appropriation of the content without aggravating the authors with the duty of always adding the right licence (and linked metadata) in order to share their creation.

Many users though are not aware enough of copyright licensing mechanisms or if aware prefer to operate in a grey areas within which certain behaviours are tolerated insofar they are not sanctioned by law. The existence of such a grey area does not seem to provide incentives to creativity and innovation, nor to dissemination of new content online (M.L. Montagnani, *A New Interface between Copyright Law and Technology: How User-Generated Content will Shape the Future of Online Distribution*, in 26 Cardozo Arts & Entertainment, 2009, at p. 766),

[46] 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 .

☐ NO

☐ NO OPINION

23. ***(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

Proprietary systems cannot be considered sufficient to ensure that works created by users are properly identified for online uses as they are not meant to do that. Proprietary systems can work in the off-line world where in the majority of cases they make possible to identify the right holder and ask for the authorization that will enable a third party to use the pre-existing work. In the online realm this system is altered by the facility to which works can be found and used by third parties that are often unaware that a work is copyrighted, hence unavailable for any use without prior authorization. Moreover, even when users were aware of how proprietary systems rule the appropriation of content online and the dissemination of new content, they would ignore that such rules can vary from country to country. If this is the context, it becomes clear that the current proprietary copyright is not fit for the online environment and need to be adapted to the UGC phenomenon.

☐ NO – Please explain

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☐ NO OPINION

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

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

☐ YES – Please explain

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☐ NO – Please explain

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► NO OPINION

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

[Open question]

The best solution would be the adoption of a legislative solution to the phenomenon of UGC. Some countries are actually facing the issue in relation to mash-ups but this is not enough as it ought to be addressed considering the whole phenomenon of UGC that span from authorial content to derivative works.

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

[Open question]

A first exception within copyright law should be included so to authorize the use of an existing work or other subject-matter, which has been made available to the public, in the creation of a new work, provided that the use of the new work or other subject-matter is done *primarily* for non-commercial purposes, and the source of the existing work or other subject-matter is mentioned, if it is reasonable to do so. The primary non-commercial nature of such UGC indicates that they should not have a *substantial* adverse effect on the exploitation or potential exploitation of the existing work or other subject-matter they derive from. As a matter of fact UGC, even when born with an amateur intent, can indirectly become a source of revenue, as in the case that they are made available on platform that monetize, through the sale of advertising spaces, the number of visualizations. When this happens the question as to whether the UGC would fall outside the scope of the exception above proposed should find an answer by considering the substantial adverse effect that the UGC constitute for the exploitation of the work or subject matter that it incorporates. Once there is not such substantial adverse effect the UGC should still beneficiate of the copyright exception.

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

[Open question]

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III. 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[47]. 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[48][49].

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.

28. In your view, is there a need to clarify at the EU level the scope and application of the private copying and reprography exceptions[50] in the digital environment?

□ YES – Please explain

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□ NO – Please explain

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► NO OPINION

29. 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?[51]

□ YES – Please explain

[47] Article 5. 2)(a) and (b) of Directive 2001/29.
[48] Communication "Unleashing the Potential of Cloud Computing in Europe", COM(2012) 529 final.
[49] 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.
[50] Art. 5.2(a) and 5.2(b) of Directive 2001/29/EC.
[51] This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies

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□ NO – Please explain

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► NO OPINION

30. 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]

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31. Would you see an added value in making levies visible on the invoices for products subject to levies?[52]

□ YES – Please explain

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□ 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[53].

32. 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?

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

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

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

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□ NO – Please explain

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► NO OPINION

33. 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]

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34. 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]

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

[Open question]

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IV. 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[54] 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[55]. 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.

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

□ YES – Please explain

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□ NO – Please explain why

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► NO OPINION

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

[Open question]

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

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V. Respect for rights

Directive 2004/48/EE[56] 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[57]. 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[58]. One means to do this could be to clarify the role of intermediaries in the IP infrastructure[59]. At the same time, there could be clarification of the safeguards for respect of private life and data protection for private users.

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

☒ YES – Please explain

Any discussion about strengthening civil enforcement system shall take into account the need to distinguish between online activities which are clear infringement of copyright, carried out with intention of commercial benefit, and activities which are aimed at sharing contents and ideas with other users with a view to enjoying and commenting existing works with no lucrative purposes, and which are expression of fundamental rights of Internet users (e.g. freedom of expression). While the former should be pursued more efficiently, the latter should find their room within the current copyright law framework. In recent years right holders (e.g. music or movie majors) have taken several legal actions against both individuals and Internet Service Providers using or offering file sharing services with various purposes (e.g. A*&M Records, Inc. v. Napster, Inc*., US Court of Appeals for the Ninth Circuit, 239 F.3d 1004 (2001); *MGM Studios, Inc. v. Grokster, Ltd*. (US Supreme Court, 545 U.S. 913, 2005); *Pirate Bay* (Stockholm District Court, 2009, B 13301-06); etc.). However, copyright enforcement actions seems not to take properly into account that file sharing services can be used also to foster freedom of expression and exchange information useful to express people's opinions, to comment (including parodying), to carry out derivative works, with no commercial purposes.For example, in *OPG v. Diebold* a California district court held that Diebold, Inc., a manufacturer of electronic voting machines, knowingly misrepresented that online commentators including IndyMedia and two Swarthmore college students had infringed the company's copyright (337 F. Supp. 2nd 1195, N.D. California, 2004). In 2003 Diebold starting sending cease-and-desist letters to US university students who engaged in circulating

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

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

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

[59] 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.

on the Internet, via file-sharing networks, Diebold's internal communications revealing flaws in Diebold's e-voting machines. Letters were sent also to ISPs hosting said documents. The company claimed copyright infringement and, pursuant to the DMCA, requested to take down the documents. Online Policy Group (OPG), a non-profit ISP, refused to remove the files in the name of free speech. Two students and OPG sued Diebold alleging that Diebold knowingly materially misrepresented that the students and ISP had infringed Diebold's copyright. In his decision Judge Jeremy Fogel wrote that "No reasonable copyright holder could have believed that the portions of the email archive discussing possible technical problems with Diebold's voting machines were protected by copyright."

The right holders' strategy to pursue copyright infringements online indiscriminately has revealed unsuccessful, a new line of action is then needed which rethinks copyright rules in order to enlarge the scope of lawful activities online (see above II) and to concentrate the legal actions on truly infringing organized activities.

□ NO – Please explain

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□ NO OPINION

40. 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]

The current legal framework on intermediaries' liability for copyright infringement online is the result, on the one hand, of the need to shield them from liabilities for unlawful activities occurring online (via the so-called safe harbours), and, on the other hand, of the right holders' attempt to limit the scope of such safe harbours when they cannot enforce their rights directly against infringing users. However, given the unsuccessful story of copyright enforcement online (as above mentioned), right holders are trying to demand an increasing involvement of intermediaries not only in the removal of infringing activities' effects but also in their prevention. The scenario of remedies requested by the right holders go from the known Notice & Take Down (in EU 'Notice & Action') to the Notice & Disconnect (N&D), adopted in France as a typical example of 'graduated response', to the 'blocking' of websites that host copyright material without authorization (as endorsed by Turkey since 2004 and, later on, by Spain through the ley Sinde of 2011), to the 'filtering', i.e. the monitoring of transient electronic communications in order to prevent unauthorized distribution of copyright works, with a crescendo of invasion into the users' private sphere.

If a clarification of the legal framework in terms of legal remedies is needed, it should not however revolve around the intermediaries' roles as 'gatekeeper' of the Web, rather it should consider their function as potential nurturers of online activities (P. Dubini, M.L. Montagnani, *The economic value of internet in cultural industries*, Executive Summer, ASK Research Center, 2012, http://www.ask.unibocconi.it/wps/wcm/connect/888ed0e2-a06c-4db7-8863-7a57b9de106a/Executive+Summary+english+25.3.13.pdf?MOD=AJPERES).

This can be done only by focusing on the rules that are at the core of cultural industries, i.e. copyright law, so to adapt them to the ongoing market and technological changes. The call for 'modernizing copyright' does not simply refers then to a propitious chance to be taken, but rather to the concrete need for a fair balance that all the interests involved into the online activities convey (A. Bertoni, M.L. Montagnani, *Il ruolo degli intermediary internet tra tutela del diritto d'autore e valorizzazione della creatività in rete*, in XL Giurisprudenza commerciale, 2013, 537). In order to build a fully-fledged digital economy, as well as a complete digital single market within the EU, fundamental principles come into play and their concurrent accomplishment entails an overall equilibrium in which copyright law should act as means to the end of economic, social and cultural enhancement. It is within such a vision that the role of Internet intermediaries should be thought, not just in the pursue of copyright infringements.

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

☐ YES – Please explain

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☒ **NO** – Please explain

Recent legislative proposals to strengthen online copyright enforcement have been much controversial, mainly because of lack of transparency in their development and criticalities about their potential impact on fundamental rights, such as freedom of expression and the right to privacy. In particular, said initiatives do not seem to ensure a right balance between protection of IP rights and data protection.
For example, within the heated discussions about the Anti-Counterfeiting Trade Agreement (ACTA) (then rejected by the European Parliament in July 2012), the European Data Protection Supervisor (EDPS) warned about the negative impact of the ACTA on data protection rights and potential lack of due process and judicial protection of certain provisions, notably the provisions that would have allowed copyright holders, or entrusted third parties, to monitor Internet users and identify alleged copyright infringers.
In an Opinion issued in February 2010 (on the current negotiations by the European Union of an Anti- Counterfeiting Trade Agreement, OJ C 147, 5.6.2010, p. 1), the EDPS concluded that the introduction in ACTA of a measure that would involve the massive surveillance of Internet users would be contrary to EU fundamental rights, notably with the rights to privacy and data protection, which are protected under Article 8 of the European Convention on Human Rights and Articles 7 and 8 of the Charter of Fundamental Rights of the EU, and could also damage freedom of speech.

The same need for a proper balancing between protection of third parties' IP rights and internet users' fundamental rights emerges constantly even in the European Court of Justice case law. For example, in *Promusicae* (Decision of January 29, 2008, case C-275/06, *Productores de Música de España (Promusicae) vs. Telefónica de España SAU*), the European Court of Justice held that a fair balance has to be struck between the various fundamental rights protected by the Community legal order and that the EU directives must be interpreted in such a way that they are not in conflict with general principles of Community law, such as the principle of proportionality. The same need to struck a balance

between property rights, including IP rights, and other fundamental rights (such as the freedom to carry out business, freedom of expression, criticism, discussions and the right to privacy) has been highlighted also in the European Court of Justice's decisions in *SABAM* (decision of November 24, 2011, *Scarlet Extended SA v Societé Belge des Auteurs, Compositeurs et Editeurs SCRL (SABAM)*, C-70/10) and *Netlog* (decision of February 16, 2012, *Belgische Vereniging van Auteurs, Componisten en Uitgevers CVBA (SABAM) vs. Netlog NV*, C-360/10) cases.

In particular, the reasoning of the Court in *SABAM* is very significant. On one hand, it recognized that the protection of copyright amounts to a fundamental right granted by Article 17, paragraph 2. of the Charter of Fundamental Rights of the European Union. On the other side, the Court noted that such a right is not granted with an absolute protection. As the Court had already established in *Promusicae*, IP rights must be balanced with other fundamental rights, such as ISPs' freedom to carry out their business, that is in turn protected under Article 16 of the EU Charter. The Court found that the installation of a filtering system with the same characteristics as that ordered by the Belgian court in the case at issue would have infringed the freedom of ISPs concerned to conduct business. Such a system was in breach of Article 3 of the Enforcement Directive 2004/48/CE, that permits the adoption of measures intended to protect intellectual property rights provided that they are not unnecessarily complicated or costly. At the same time filtering and blocking systems imposed to Scarlet in the case at hand would also affect the fundamental rights of Scarlet's customers, namely their right to protection of their personal data and their freedom to receive or impart information, (protected respectively by Article 8 and Article 10 of the EU Charter of Fundamental rights) insofar as said system, on one side, involved the processing of IP addresses that may allow to identify users and therefore are personal data, on the other, could determine the filtering or blocking of lawful communications, as it was not properly designed to distinguish between lawful and unlawful contents.

Recently, the General Advocate of the European Court of Justice (in his conclusion in *UPC Telekabel Wien GmbH v Constantin Film Verleih GmbH und Wega Filmproduktionsgesellschaft* GmbH, issued on November 26, 2013, Case C-314/12) also clarified that, according to existing laws, an internet provider can be required to block access by its customers to a website which infringes copyright. However, such a court injunction must refer to specific blocking measures and achieve an appropriate balance between the opposing interests which are protected by fundamental rights.

Any measure aimed at strengthening the enforcement of IP rights must not come at the expense of the fundamental rights and freedoms of individuals to privacy and freedom of expression, and other rights such as presumption of innocence and effective judicial protection. A multi-stakeholder approach should be adopted, and the process of making and implementing measures on copyright enforcement should not be made on the basis of influence of private and economic interests to the detriment of the public interest.

☐ NO OPINION

VI. 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.

42. 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

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

[Open question]

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VII. 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.

44. 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]

Another important subject matter for a review of European digital age copyright rules concerns the relation between **Technological Protection Measures** (TPMs), right of access to works not protected by copyright, and the application of the exceptions and limitations to copyright and related rights.

Differently from what is provided for the exceptions and limitations (Art. 5), Directive, Art. 6, requires as mandatory ("shall") the legal protection of the TPMs by Member States' legal systems (in this sense see G. Ghidini, *Innovation, Competition and Consumer Welfare in Intellectual Property Law, Edward Elgar*, 2010, at pp. 110-118).

A critical analysis arises from an in-depth assessment of the provisions contained in Art. 6.

1) First of all, in introducing a specific legal protection against the mere act of circumventing a technological protection measures, regardless of whether the protected work has been actually infringed, nor of whether the protection measure is indeed attached to a protected work, the Directive seems to codify some sort of "access right", with the risk of allowing the owner to control every use of the purchased work (!) See E. Arezzo, *Videogames and consoles Between Copyright and Technical Protection Measures*, in 40 IIC 2009, 82, at 95.

In doing so, the Directive seems to absolutely disregard the relevant international Treaties where it is established that measures may be applied by copyright owners «in connection» with the exercise of rights arising from the Bern Convention or the WIPO Treaty (see art. 11 of the WTC Treaty: «Contracting Parties shall provide adequate legal protection and effective legal remedies against the circumvention of effective technological measures that are used by authors in connection with the exercise of their rights under this Treaty or the Berne Convention and that restrict acts, in respect of their works, which are not authorized by the authors concerned or permitted by law»). At this regard see E. AREZZO, *Technological Measures, Software and Interoperability in the Digital Age,* in *Intellectual Property and Market Power,* G. Ghidini and M. Genovesi (eds.), 2007, 449, at 451.

The negative effects of the fusion between anti-copy and anti-access measures on the free circulation of ideas and information are undeniable.

As a matter of fact, the protection of technological measures "per se" provides for the prevention of uses normally authorized by copyright law, allowing the rightholders to "block the access" even of works not protected by copyright or even non protectable. That is the case for all works in the public domain, for works not satisfying the requirement of "originality" because lacking of creativity, and for those parts of works representing the "idea" and not the

protected "expressive form", in such a way that the provision goes against a fundamental principle of copyright law (also ratified by the TRIPs) (See G. Ghidini, *Innovation, Competition and Consumer Welfare in Intellectual Property Law*, Edward Elgar, 2010, at 114 and ff.; G. Ghidini, *Exclusion and Access in Copyright Law: The unbalanced features of the InfoSoc Directive*, in *Methods and Perspectives in Intellectual Property*, ATRIP Intellectual Property Series, G.B. Dinwoodie (ed.), 2013, Edward Elgar Publishing, 307, at p. 320 and ff.; E. Arezzo, *Misure tecnologiche di protezione, software e interoperabilità nell'era digitale*, in *Il Diritto di Autore*, 3/2008, 340, at p. 345; E. Sbarbaro, *Note sulla disciplina delle libere utilizzazioni tra mondo analogico e mondo digitale*, in *DigItalia – Rivista del Digitale Nei Beni Culturali*, 1/2012, 23, at 32).

2) Secondly, the legislation on MTPs limits the traditional exceptions and limitations to copyright, including the reproduction for private use, for digital works and especially for online works, in a very narrow way.

Art. 6, par. 4, of the Directive envisages an obligations upon right-holders to provide the necessary means in order to allow beneficiaries of the exception to actually take advantage of it. However, such a duty -- which should shift upon Member States, should right holders remain inert – is not established for all exceptions and limitations, but only for those contained in either art. 5 par. 2 lett. a), c), d), e), or art. 5 par. 3 lett. a), b) o e), and only if provided by the National legal system.

Now, besides the circumstance that it is not clear from the text of the Directive who should be in charge of monitoring whether right holders comply in a satisfactory way with such obligation (in such a way to urge Member States legislators to take action, if needed), the problem is, however, how beneficiaries of the exception "prevented" by the technological blockage can uphold their rights in a real life scenario. The enforcement of this provision is very difficult especially in countries, like Italy, where the judicial application of copyright is very protective of the rightholders' prerogatives (see Court of Milan, decision of May 14, 2009, n. 8787). More extensively see E. AREZZO, *Technological Measures, Software and Interoperability in the Digital Age,* in *Intellectual Property and Market Power,* G. Ghidini and M. Genovesi (eds.), 2007, 449, at 453 and ff.

3) Last but not least, the Directive establishes (art. 6.4.4.) that for those works and protected materials «made available to the public on agreed contractual terms in such a way that members of the public may access them from a place and at a time individually chosen by them», the penultimate section of par. 4 does not apply: therefore, there is no obligation to force the right owners to act in such a way to put users in condition to actually benefit from the exceptions, even though they are allowed by their National laws.

In conclusion, a clear lack of balance exists between the protection of the analogue and the digital worlds: while in the first one consumers can take advantage of the exceptions and limitations provided by their National laws, in the second one the only "guaranteed" exceptions (only if provided for by National laws) are those specifically listed in Article 6, par. 4. Furthermore, if protected works are made available in such a way that the public may access at a time and from a place individually chosen by them, there is no guarantee that users will be allowed to benefit from any exceptions or limitations granted into the analogue world (see E. Arezzo, *Misure tecnologiche di protezione, software e interoperabilità nell'era digitale*, in *Il Diritto di Autore*, 3/2008, 340, at p. 357).