Public Consultation
on the review of the EU copyright rules

Contents

I. Introduction

A. *Context of the consultation*

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

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

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

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

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

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

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

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

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

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

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

B. How to submit replies to this questionnaire

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

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

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

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

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

C. Confidentiality

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

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

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

Please read our Privacy statement.

PLEASE IDENTIFY YOURSELF:

Name:

CEPI – the European Coordination of Independent Producers

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

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

Registration ID 59052572261-62

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

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

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

TYPE OF RESPONDENT (Please underline the appropriate):

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

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

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

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

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

- X **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):

…….

……

Executive Summary

The European Coordination of Independent Producers (CEPI) was founded in 1989, to organise and represent the interests of independent television producers in Europe.

Today the Coordination represents approximately 8000 independent production companies in Europe, equivalent to 95% of the entire European audiovisual production industry. All together, our members supply over 16000 hours of new programming each year to broadcasters in Europe, ranging from single documentaries and special event programming, to game shows, light entertainment and high-cost drama serials. As the producers form the basic support of the audiovisual industry, it is necessary to articulate the interests of those producers within a unique European organisation. For more information visit www.cepi.tv

The following points set out CEPI's main points in response to the Commission's questions in certain key sections of the consultation:

- **Cross-border access:**
  - CEPI argues that market-led solutions are the most appropriate, that a large number of legal on-demand services already exist and that the industry is working towards developing new business models.
  - CEPI also refers to the work carried out in the Licences for Europe process and the document signed as part of Working Group 1 of the Licences for Europe stakeholder dialogue.
- **Linking and browsing:**
  - CEPI argues that in general, right holders must retain the exclusive right to authorise reproductions of content.
- **Registration of works:**
  - CEPI argues that, while a registry of works to facilitate the finding of information could be welcomed, this is a separate issue from a registry of rights, which would not be a proportionate solution.
  - We also draw attention to the closely-related topic of identifiers and the document signed by Working Group 3 of Licences for Europe
- **Identifiers:**
  - CEPI stresses that the current identifiers, ISAN and EIDR, fulfil the needs of the market, and cites the work carried out by Working Group 3 of Licences for Europe regarding the promotion and further interoperability of these identifiers.
- **Term of protection:**
  - CEPI underlines that terms of protection should be equivalent in the analogue and digital environments, and argues against any change to the current term of protection.
- **Limitations and exceptions:**
  - CEPI argues that the current system of limitations and exceptions is sufficiently flexible and respects the principle of subsidiarity.
- **Mass digitization:**
  - CEPI underlines the need to take into account the diversity of approaches in national legislation, and emphasises that all licensing arrangements should be underpinned by the dual principles of contractual freedom and independence of right holders.
  - CEPI also highlights its willingness to continue the dialogue begun during the TV Subgroup of Working Group 3.

- **Private copying:**
  - CEPI explores the question of private copying levies, underlines their continued relevance in the digital age, and touches on new developing business models.
- **Fair remuneration:**
  - CEPI underlines the importance of contractual freedom in ensuring that all parties receive fair remuneration for their work, outlining producers' business models.
- **Respect for rights:**
  - CEPI suggests while the current system of enforcement is largely beneficial to the effective protection of copyright, there are certain areas in which measures could be taken to improve certain aspects. CEPI particularly highlights the potential role of 'intermediaries' as crucial in preventative measures against IPR infringement.
- **Single EU copyright title:**
  - CEPI argues that any change to the current copyright system would require careful consideration of the possible impacts, that the current system is sufficient and that added complexity would be unnecessary.

II. Rights and the functioning of the Single Market

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

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

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

The dissemination of copyright-protected content on the Internet – e.g. by a music streaming service, or by an online e-book seller – therefore requires, in principle, an authorisation for each national territory in which the content is communicated to the public. Rightholders are, of course, in a position to grant a multi-territorial or pan-European licence, such that content services can be provided in several Member States and across borders. A number of steps have been taken at EU level to facilitate multi-territorial licences: the proposal for a Directive on Collective Rights Management[10] should significantly facilitate the delivery of multi-

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

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

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

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

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

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

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

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

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

……

X NO

CEPI would like to highlight that consumers are well served when it comes to access to online services. There is a plethora of services at the national level and some cross-border services are flourishing. However, generally the number of services available at the national level is far greater than those provided across borders. The

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

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

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

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

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

copyright framework does not prevent the availability of multi-territory or pan-European licenses. Instead, such services are limited by the nature of demand in Europe which is characterised by cultural and linguistic diversity – something which should be viewed as a positive characteristic of the European Union. As a consequence there is little demand for non-national content and the costs of operating in multiple territories are extremely high.

European film and television markets are heterogeneous, characterised by linguistic and cultural diversity. This manifests itself in consumer preferences that tend toward demand for national and local content first, then international blockbusters and series, and finally non-national content such as TV programmes produced in other European member states. Consumer tastes are often very specific, shaped by events, fashions or even the social climate in the member states. This has made it difficult for TV programmes and films to cross borders. It has also meant distribution costs are far higher as any broadcaster or distributor will need to adapt to the specific conditions within each member state. This will require specific marketing strategies and detailed knowledge of local and national market and regulatory conditions. Often when an audiovisual work is distributed across borders it will obtain a smaller return than in its country of origin. Success stories such as 'The Killing' generally benefited from high ratings in Denmark before being distributed internationally. This is often a prerequisite given the high levels costs and risks involved.

The unique nature of demand for audiovisual works in Europe has meant that the majority of producers, broadcasters, and distributors are small and medium sized enterprises. This is true of CEPI's members who are independent producers working in specific national contexts, providing content which speaks to local cultural identities and linguistic preferences. For new online services we are witnessing the same trend as online services concentrate on specific national markets.

Licenses are therefore generally sold on a single territory basis and there is very little demand both from consumers and service providers for licenses covering several territories. In some cases there is a demand for such services particularly with common linguistic areas and the English language. Services are provided for these communities, and CEPI committed to examining further new solutions during the Licenses for Europe process. The audiovisual industry is also examining new business models which take advantage of new online services. However, whilst online services have the potential to distribute in multiple territories they are still limited by demand. We are examining different business models but it is not clear yet whether these services will actually provide a significant opportunity. Much depends on their ability – and willingness - to contribute to the pre-financing of production much like broadcasters are currently required to do.

We would also like to highlight that consumers face many challenges which are not related to licensing and which could undermine access; whereas the question posed here could lead the Commission to draw the conclusion that a lack of access means a licensing issue exists. For example, one of the most cited issues for consumers are poor or weak broadband connections or high costs of access.

□ 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).

…….

…….

X NO

Consumers have access to a far greater number of services in the EU member states than ever before. They are able to access the national content they want and where there is a demand for content across borders, the audiovisual industry provides access. Broadcasters are already providing cross-border services in some cases, as the Licences for Europe stakeholder dialogue demonstrated (particularly Working Group 1 on cross-border portability). However, often service providers are prevented from delivering services across borders because of the nature of demand. Consumers tend to favour national content over non-national content and the specificities of their demands makes it costly to provide services in several member states. The cost of providing services are also affected by piracy, VAT rates, consumer protection and rules protecting minors, hardware penetration and micro-payment facilities can inhibit the ability of services to provide content to consumers.

 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]

CEPI's members rarely receive requests for multi-territorial licenses. As already illustrated the current copyright framework does not prevent us from granting such licenses, but we find that the different cultural and linguistic traditions have shaped the industry on a territorial basis. Preferences tend to be for local audiovisual works which do not always travel easily across borders. Furthermore, broadcasters and distributors often face high costs in multiple-territory distribution as a detailed understanding of market and regulatory conditions is required. We do sometimes grant territories for multiple licenses when a broadcaster or distributor is targeting a common linguistic area.

In addition to culture and language, a number of other issues exist which affect broadcasters and distributors. These include, VAT rates, piracy, micro-payment facilities, rules protecting consumers and minors, and relevant hardware penetration.

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]

There is very little demand for cross-border services except in the case of diaspora communities. However, the audiovisual industry is already working towards providing access for these communities as illustrated by the outcome of working group one in License for Europe. The demand for non-national content is low and it is extremely costly for services to operate in multiple territories. As a consequence CEPI members see very few requests for multi-territorial licensing.

The market is best placed to meet the demand for audiovisual content in Europe. Currently there are multiple national services offering content tailored to specific cultural and linguistic requirements. Furthermore, in cases where there is a demand for cross-border services, the industry is working towards developing new business models. This was demonstrated by the Licenses for Europe stakeholder dialogue, during the course of which the audiovisual industry committed to developing more solutions to this small demand for national content abroad. New technologies and technical problems are currently being examined. For example, CEPI is signatory to a Joint Statement on Cross-border Portability of lawfully-acquired Audiovisual Content signed by several European-level associations which stated interest in the development of cross-border portability of legally acquired content, the need for commercial and contractual freedoms, and the need for a voluntary market-led approach to allow new business models to develop.

The European Commission can still play a role in other areas. Whilst licensing is not an issue, the continued detrimental effect that piracy has on the value of a work needs to be addressed. Furthermore, as already highlighted, VAT issues, micro-payment facilities, relevant hardware penetration and consumer protection rules also need analysing.

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

X YES – Please explain by giving examples

Market and regulatory conditions have meant that licensing tends to be territorial rather than multi-territorial. However, any policy decision should also take into account the contractual freedom necessary to organise the exploitation of a film and TV programme. The producer and the relevant distributors will often examine how

best to respond to the local demand and each territory for exploitation is specifically selected based on whether the film or TV programme will be successful there.

Production is extremely high risk and is dependent upon high levels of investment. This investment is often obtained prior to the actual shooting of a film of TV programme. As a consequence most productions rely on a specific financing system based on a guarantee. Rights are sold specifically by platform, territory and language and based on a very specific business model which is designed to fully optimise the exploitation of a work. This business model considers where demand exists as well as specific cultural and linguistic factors. Often the producer will grant territorial exclusivity to a broadcaster or distributor in exchange for a high level of investment. Private investors will look at the guarantee as evidence that they will recoup the investment they make. Without this guarantee the level of investment would be low and important works may never be produced. The contractual freedom currently provided under EU copyright law therefore allows for a flexible financing system which allows the producer to maximise the exploitation of a work.

□ NO

□ NO OPINION

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

□ YES – Please explain by giving examples

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…….

□ NO

X NO OPINION

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

□ YES – Please explain

…….

…….

X NO – Please explain

There is often a misconception surrounding the reason for the rare occurrence of licensing for multiple territories. This is not due to the current copyright framework, but rather to the demand for such licenses. Cultural and linguistic diversity and the high costs involved in the distribution of audiovisual material in multiple territories mean the markets in different member states have specific preferences. Licensing

models ought to be left to the market-place, where demand and supply meet each other. If there is little to no demand, as is currently the case for multi-territorial licensing, it makes no sense to impose supply. Contractual freedom, as well as exclusive rights that are established in EU copyright law, make commercial negotiations perfectly viable for meeting demand for licenses in multiple territories.

In fact, we believe that legislation which obliges broadcasters and distributors to make audiovisual content available multi-territorially through Europe-wide channels will have little effect. Since demand is often driven by diaspora communities, the benefits are negligible. Moreover, focusing on diaspora communities could curb integration. In the case of some communities, the creative industries have already found solutions where they are commercially viable. The Commission should acknowledge that the market works, and should base its decisions with the understanding of culturally diverse consumption preferences throughout Europe that are present in legacy media.

The introduction of pan-European licenses could even be harmful to audiovisual producers. The creative industry behind film and television productions relies on a financial model that has proved successful. Undermining the business models behind this would seriously interrupt creativity. Each film is a prototype and the making of a film or television show is an R&D process that involves developing scripts, casting, location, scouting and production designs. Producers have to invest significantly to enable this process, even before the first frame has been shot. It is quite common for films to be abandoned in the early stages because of the high costs involved. Investors such as the producers bear these costs. The prototypical nature of audiovisual productions makes it impossible to determine which will become a success and which not. Unpredictable factors play a big role such as social climate, trends, and contemporary culture. Only one in ten films actually makes a return on their investment.

Other investors are also involved in the process of film- and television-show making, so the risks and levels of financial investment are spread to some extent. Audiovisual content is produced for a certain public and then the rights are sold to local distributors per platform and territory. These broadcasters and distributors know how to market and distribute in their specific territories where the film is most likely to be successful. This system allows for producers to adapt to the dynamics of different territories and to tailor a production for a certain market. Contractual freedom ensures that investors are able to choose territories for which a production is made. This incentive to invest in a sector that had a turnover of €129 billion in 2010, was served by 126,000 SMEs and employed 560,000 people, should not be reduced by pan-European licensing.

From a cultural point of view, licensing to such an extent could lead to a homogenization of both language and culture. Very few platforms will be able to afford the acquisition and market costs of pan-European distribution; these are particularly high in Europe due to specific market and regulatory differences. It would push producers to create content that is closest to a common cultural denominator.

In 2006, the Council adopted the UNESCO Convention on the Protection and Promotion of the Diversity of Cultural Expressions. The recognition of cultural diversity in Europe was later also embedded in Articles 6 and 167(2) of the TFEU,

stating that the Commission shall "contribute to the flowering of the cultures of the Member States, while respecting their national and regional diversity". Pan-European licenses could have a negative effect on the blossoming of the cultures of the 28 member states.

Generally speaking, customer demand is available through a variety of linear and non-linear media. In the cases where there is demand for cross-border content, the market is leading to solutions, which is always the right direction. The audiovisual industry has been investing in new online distribution channels that complement existing linear channels. As has been highlighted by the sector during Licenses for Europe, steps have been taken to improve the access to content for diaspora communities.

The development of successful business models which provide culturally diverse content across borders is often affected by other factors than consumer demand, including the lack of micro-payment facilities, consumer protection rules, relevant hardware penetration, VAT rates, and piracy. CEPI believes that the Commission can play a role in improving these conditions which play an inherent part of audiovisual creation. We welcome the Creative Europe programme and the 60 per cent ceiling for difficult cross-border films recently introduced into the Cinema Communication.

It is the creativity and innovation of the audiovisual sector which drives the production and distribution across borders of content. The future development of the European film industry will depend on these qualities and policy should focus on supporting the industry rather than inhibiting its development.

Furthermore, we would suggest that the Commission could play an important role in advertising and promoting the legal offers currently available, of which many consumers are failing to take advantage.

□ NO OPINION

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

[The definition of the rights involved in digital transmissions]

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

[16] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.
[17] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.
[18] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

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

The most relevant rights for digital transmissions are the reproduction right, i.e. the right to authorise or prohibit the making of copies[20], (notably relevant at the start of the transmission – e.g. the uploading of a digital copy of a work to a server in view of making it available – and at the users' end – e.g. when a user downloads a digital copy of a work) and the communication to the public/making available right, i.e. the rights to authorise or prohibit the dissemination of the works in digital networks[21]. These rights are intrinsically linked in digital transmissions and both need to be cleared.

1. The act of "making available"

Directive 2001/29/EC specifies neither what is covered by the making available right (e.g. the upload, the accessibility by the public, the actual reception by the public) nor where the act of "making available" takes place. This does not raise questions if the act is limited to a single territory. Questions arise however when the transmission covers several territories and rights need to be cleared (does the act of "making available" happen in the country of the upload only? in each of the countries where the content is potentially accessible? in each of the countries where the content is effectively accessed?). The most recent case law of the Court of Justice of the European Union (CJEU) suggests that a relevant criterion is the "targeting" of a certain Member State's public[22]. According to this approach the copyright-relevant act (which has to be licensed) occurs at least in those countries which are "targeted" by the online service provider. A service provider "targets" a group of customers residing in a specific country when it directs its activity to that group, e.g. via advertisement, promotions, a language or a currency specifically targeted at that group.

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

X YES

The current scope of the "making available" right has been beneficial for CEPI's members. Therefore, any decision to alter it should be carefully considered. Of particular concern for CEPI is the potential extension of the Cable and Satellite Directive to the online world entailing the implementation of the country of origin principle. CEPI would like to stress that this would seriously undermine the ability of our members to enforce their rights.

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

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

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

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

First of all it is important to note that all the rights needed for exploitation are usually centralised, with the producer. As a consequence, determining the author is not an issue. However, the freedom of the producer to manage rights on a territorial basis must be respected. Contractual and commercial freedom is important in the financing model of the audiovisual industry.

The main concern we have is that the country of origin principle could seriously undermine our capacity to enforce our rights. In Football Dataco v Sportradar, the capacity of a rights holder to bring proceedings against an infringement is provided for both in the country where the server is located and the country where the act of communication to the public takes place. This targeted approach is necessary as the location of a server can often be elusive or located in a country outside the EU with low levels of copyright protection (AG Opinion. 2013. UPC Telekabel Wien GmbH v. Constantin Film Verleih GmbH and Wega Filmproduktionsgesellschaft GmbH (C-314/12)). By allowing the rights holder to take action where the public are targeted, the ability to enforce copyright is more effective. Under the country of origin principle, jurisdiction is in the country where the server is based. As a consequence intermediaries would locate their servers in countries where there are the least protections for rights holders, raising the possibility of a race to the bottom. For rights holders it would be almost impossible to protect their works from unauthorised use.

The country of origin principle would therefore undermine Article 17(2) of the EU Charter of Fundamental Rights and Freedoms. Under this Article the European Union institutions are required to protect intellectual property rights. Whilst this is not an absolute right, the country of origin principle could lead to a complete disintegration of copyright protection. This of course has repercussions for the industry as it will worsen the unlevel playing field which already exists due to piracy discouraging the development of new innovative services and content.

In our opinion the current scope of the making available right is sufficient. Furthermore, the CJEU is best placed to interpret any ambiguities and provide clarity. Any limitation to the making available right should respect the Three-Step Test.

☐ NO – Please explain how this could be clarified and what type of clarification would be required (e.g. as in "targeting" approach explained above, as in "country of origin" approach[23])

☐ 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.***

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

whether you are considered to be an author or not, whether you are considered to have transferred your rights or not), on your remuneration, or on the enforcement of rights (including the availability of injunctive relief[24])?

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

Any attempt to undermine the current scope of the making available right should be avoided. In particular, extending the Cable and Satellite Directive's country of origin principle to the online environment would be particularly damaging to an important right which is protected by the Charter of Fundamental Rights of the European Union and enshrined in the WIPO Copyright Treaty. This would limit the scope for licensing and enforcing the making available right which is an important tool in the development of the digital world.

In the audiovisual sector all the necessary rights are generally held by the producer. The freedom to manage audiovisual content both territorially and chronologically is crucial. Contractual and commercial freedom allows the rights holder to exploit their work in the most optimal way and is an important mechanism in the audiovisual industries financing model.

The broad scope of the making available right is also important for the protection and enforcement of intellectual property rights. The country of origin approach could make it much more difficult for right holders to take legal action against infringing websites, which are usually based in other Member States or even outside the EU.

Furthermore, the country of origin principle could lead to a race to the bottom. If the location of the server is the place of jurisdiction, copyright infringing sites would simply move their servers outside of the EU to the country with the least remuneration to rights holders. Furthermore, the Commission would have to guarantee a similar level of rights protection in all the Member States which at present does not exist.

The judgement raises questions about measures which would limit this scope of the making available right. We would like to highlight the Commission's role in upholding the EU Charter of Fundamental Rights and Freedoms. The institutions are required to protect intellectual property under Article 17(2). Any derogation from this would undermine the charter. Whilst we recognise that this is not an absolute right, the country of origin principle would cause significant damage to this right. Limiting the scope of the right could lead to the complete collapse of copyright protection.

For both licensing and enforcement reasons it is important to maintain the current scope of the making available right. Ensuring adequate financing and a level playing field in the distribution of audiovisual content is vital to the development of the digital single market as it will encourage innovative new services and the production of diverse and imaginative content to serve consumer needs. Furthermore, limiting such a right would undermine European jurisprudence and EU law. In our opinion the CJEU is best placed to interpret EU law and provide clarity. This is evident from its recent rulings which are referenced in this document. Any limitation to the making available right must respect the Three-Step Test as established in international copyright treaties.

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

□ 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?***

□ 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")

…….

…….

X NO

The application of two rights to a single act of economic exploitation in the online environment does not create problems for CEPI or its members. Unlike the music industry where rights can often be fragmented amongst multiple rights holders, in the audiovisual sector all the necessary rights are usually held by the producer. Normally, other contributors to audiovisual creations contractually give their rights to the producer(s). This means that both making available and reproduction rights are exclusively the producer's in the large majority of cases. With regard to the problems that exist in this respect for the music industry, the recently established Collective Rights Management Directive is perfectly capable of handling them.

CEPI would like to make clear that the reproduction right and the right to making available are two separate rights embedded in the copyright framework that already provides for clear rights for rightholders. This means these two rights are not to be considered a single act of economic exploitation.

With regard to the online environment, reproduction rights relate to the uploading of copies of any audiovisual subject-matter to a platform's server or to a consumer's device. The separate forms of reproduction by the consumer and end user should not be confused and thought of as falling into a single act of economic exploitation.

Legislative change that creates a unitary right for reproduction and making available could seriously limit the scope of these rights. We believe that this would only serve to undermine the freedom of producers to license their works in a flexible and optimal way. In fact, restricting the protection of the exclusive rights of rightholders would be in direct violation of the EU Charter and relevant international treaties. Article 10 of the WIPO Copyright Treaty, Article 13 of the TRIPS Agreement and Article 9 of the Berne Convention prohibit removing a right which provides an

important protection for exclusive rights unless within the confines of the three-step test.

□ NO OPINION

3. Linking and browsing

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

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

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

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

Article 3 of Directive 2001/29/EC on the harmonisation of certain aspects of copyright and related rights (the Copyright Directive) has clearly laid out rightholders' exclusive right to authorise or prohibit any communication to the public, by wire or wireless means, including the making available to the public of their works in such a way that members of the public may access them from a place and at a time individually chosen by them.

Furthermore Article 4 of the Directive establishes that Member States shall provide for authors, in respect of the original of their works or of copies thereof, the exclusive right to authorise or prohibit any form of distribution to the public by sale or otherwise. This distribution right shall not be exhausted within the Community in respect of the original or copies of the work, except where the first sale or other transfer of ownership in the Community of that object is made by the rightholder or with his consent. In the case of hyperlinking to copyright-protected content, there is indeed an act of making available and/or communication to the public such a work.

Case law of the CJEU has provided further clarity in cases of hyperlinking. The recent ruling in the Svensson case, for example, suggests that where this content is legally and freely available, hyperlinking is not considered a violation of copyright. CEPI would remark however that it is important to consider carefully the question of whether a hyperlink to illegally obtained content is a violation of copyright rules or not. With the imminent decisions in the BestWater International and C More

[25] Cases C-466/12 (Svensson), C-348/13 (Bestwater International) and C-279/13 (C More entertainment).
[26] Case C-360/13 (Public Relations Consultants Association Ltd). See also http://www.supremecourt.gov.uk/decided-cases/docs/UKSC_2011_0202_PressSummary.pdf.

Entertainment cases, we hope that further elaboration and clarification will be provided.

CEPI stresses that it is aware that hyperlinking is an integral and essential part of the workings of the online environment and strongly endorses the use of the internet as a medium to support creativity and cultural diversity. However, in order to protect Europe's creative and cultural industries and support the aforementioned cultural diversity of Europe, the exclusive right of the right holder to authorise or prohibit communication to the public must be recognised; moreover it is essential to address the question of how hyperlinks to illegally obtained copyrighted content will be dealt with under European law.

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

…….

 NO OPINION

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

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

As with linking, it is the exclusive right of the rightholder to commission any reproduction, however temporary its nature, of the works he or she owns. Article 5 of the Copyright Directive distinguishes 'caching' as a 'transient' reproduction of a work that enables web-browsing. We agree that this is an inherent feature of using the internet. With this in mind, we believe that the Directive sufficiently provides for the possibility of authorizing caching.

Case law from the CJEU provides for further clarification of temporary reproductions of subject-matter protected under copyright. A pragmatic interpretation, as for example given in the opinion by Advocate General Trstenjak in the Infopaq case could be useful[27].

CEPI would like to emphasise that rightholders should be protected in order to ensure their intellectual property, as well as to stimulate creativity and cultural diversity. If temporary reproduction of a work leads to piracy or any other form of copyright infringement, adequate action should be undertaken to stop this infringement.

[27] "The condition of lawful use of a work cannot be interpreted as meaning that the temporary acts of reproduction must constitute in themselves a lawful use of the work; that condition must on the contrary be understood as meaning that the temporary acts of reproduction must enable another use of the work which must itself be lawful."

□ 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)

……

□ NO OPINION

4. Download to own digital content

Digital content is increasingly being bought via digital transmission (e.g. download to own). Questions arise as to the possibility for users to dispose of the files they buy in this manner (e.g. by selling them or by giving them as a gift). The principle of EU exhaustion of the distribution right applies in the case of the distribution of physical copies (e.g. when a tangible article such as a CD or a book, etc. is sold, the right holder cannot prevent the further distribution of that tangible article)[28]. The issue that arises here is whether this principle can also be applied in the case of an act of transmission equivalent in its effect to distribution (i.e. where the buyer acquires the property of the copy)[29]. This raises difficult questions, notably relating to the practical application of such an approach (how to avoid re-sellers keeping and using a copy of a work after they have "re-sold" it – this is often referred to as the "forward and delete" question) as well as to the economic implications of the creation of a second-hand market of copies of perfect quality that never deteriorate (in contrast to the second-hand market for physical goods).

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

□ YES – Please explain by giving examples

Some CEPI Members have reported that digitally downloaded content from some services cannot be gifted or resold.

□ 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]

In contrast to analogue reproductions, digital content do not erode in quality as further copies are made. In order to allow the resale of digital content, presumably users would be required to destroy or delete the original copy of the work. Practically this would be very difficult to enforce, and could lead to the approval of mass reproductions and the free circulation of digital works.

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

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

Furthermore, there is the possibility that this could reduce the profits of the author and may lead to raised prices for new digital goods.

……

……

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

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

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

□ YES

X NO

We would like to underline the important difference between the "registration of identity" and "registration of rights". The audiovisual sector has already made considerable progress in developing online infrastructures to facilitate the former of these: the identification of copyrighted works. For example, existing identifiers such as the International Standard Audiovisual Number (ISAN, www.isan.org) and the Entertainment Identifier Registry (EIDR, www.eidr.org) illustrate the sector's constructive efforts to improve public access to information concerning right holders and to facilitate the identification of works in the digital environment.

We do not however support the idea of an EU-level registration of rights. Producers play an important role as the 'one-stop-shop' for rights, and we therefore believe it is important for producers to retain the contractual freedom to manage their rights, and in instances where this is not possible, licensing agreements may be negotiated by CMOs.

While we support the European Commission's aim of facilitating the identification of audiovisual works, any such system of registration and/or identification must remain voluntary in order to respect international norms and cultural diversity.

□ NO OPINION

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

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

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

[Open question]

Any identification system of audiovisual works must provide a cost-effective and flexible framework which ensures a high level of security. We believe that it is preferable to allow the market to continue to develop voluntary and practicable solutions to facilitate the identification of audiovisual works. As mentioned above, it is also important to distinguish between the identification of works and the registration of rights – while we are in favour of the former, the latter would be a disproportionate system that would undermine producers' contractual freedom to negotiate licensing agreements.

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

[Open question]

Any such system would need sufficient levels of security to prevent misuse, and the misappropriation of rights. It has already been illustrated, however, that there is no need for the creation of a separate EU solution.

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

[Open question]

As the representative organisation of audiovisual right holders, CEPI supports the facilitation of identifying audiovisual works, but believes that the internationally recognised ISAN and EIDR already provide an accessible means of identification of audiovisual 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[32], and identify, variously, the work itself, the owner or the contributor to a work or other subject matter. There are notable examples of where industry is undertaking actions to improve the interoperability of such identifiers and databases. The Global Repertoire Database[33] should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition[34] was established to develop building blocks for the expression and management of rights and licensing across all content and media types. It includes the development of a Rights Reference Model (RRM) – a comprehensive data model for all types of rights in all types of content. The UK Copyright Hub[35] is seeking to take such identification

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

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

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

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

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]

The topic of identifiers was a key point of discussion during the Licences for Europe process, in which CEPI played an active role. CEPI is signatory to a joint declaration on audiovisual works identifiers that was adopted by several organisations and associations during the Licences for Europe process[36]. The declaration:

- Recognises the essential contribution of internationally recognized standard and interoperable audiovisual work identifiers to increase the availability of audiovisual content online, by facilitating rights management, discoverability, and distribution of such content;

- Recommends the systematic registration of all newly produced audiovisual works with such international recognized standard audiovisual work identifiers, and calls on stakeholders at Member States and European level to consider implementing measures facilitating wider use of such identifiers;

- Calls for studying the possibility of systematic use of an international recognized standard for audiovisual work identifier for all audiovisual and cinematographic works benefitting from support of the Media/Creative Europe programme;

- Recommends the full implementation of the interoperability between ISAN and EIDR;

- Calls for further interoperability and increased synergies between said identifiers and rights registries where these identifiers are used.

We do not believe there is a need for the EU to intervene further in this area, other than the promotion of the use of identifiers as set out in the declaration.

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[37] 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).

[36] Declaration on Work Identifiers, signed by Adami, BFI, CEPI, CineRegio, EIDR, Eurocinema, EuroCopya, EFP, FERA, FIAPF, INA, ISAN-IA, SAA: http://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/9-AV-identification.pdf

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

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

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

X YES – Please explain

Producers often provide financial investment ahead of a certain project and consequently assume significant financial risk, with no certainty that the project will be successful. This investment is the same regardless of whether the content is destined for the online or offline environments. Furthermore, even in cases of success it may take several years for producers to recoup their investments. As a result, any modification of the term of protection would provide a disincentive for producers to invest in new content, and would come into conflict with the EU Charter on Fundamental Rights (Art.17) which guarantees the right to private property, including intellectual property. We therefore believe that the current terms of protection are appropriate for both the online and offline environments.

The extension of the term of protection for music performers and producers (Directive 2011/77/EU) was not applied to producers in the audiovisual sector; such an extension was not even considered by the Commission at the time due to the different cultural and commercial features of the music and audiovisual sectors. This is still the case, and we would consequently argue in favour of maintaining the status quo.

…….

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

…….

…….

□ NO OPINION

III. Limitations and exceptions in the Single Market

Limitations and exceptions to copyright and related rights enable the use of works and other protected subject-matter, without obtaining authorisation from the rightholders, for certain purposes and to a certain extent (for instance the use for illustration purposes of an extract from a novel by a teacher in a literature class). At EU level they are established in a number of copyright directives, most notably Directive 2001/29/EC[38].

Exceptions and limitations in the national and EU copyright laws have to respect international law[39]. 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

[38] 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.

[39] 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).

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)[40], these limitations and exceptions are often optional[41], 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")[42].

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

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

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

☐ YES – Please explain by referring to specific cases

……

……

[40] 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)).

[41] 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.

[42] 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.

X NO – Please explain

The 2001 Copyright Directive sets out a number of exceptions and limitations which the EU Member States may decide to implement at their own discretion, in line with the principle of subsidiarity. This flexibility was intended to cope with rapid technological change and to provide an appropriate level harmonisation between Member States.

We would argue that the optional nature of limitations and exceptions does not lead to practical problems. The application of the three-step test as well as a growing body of EU case law both provide satisfactory means of ensuring that exceptions are uniformly interpreted and that a fair balance between consumers and right holders is achieved.

□ 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

…….

…….

X NO – Please explain

Making exceptions mandatory would oblige many Member States to change their current legal frameworks and would be a disproportionate step, considering the cultural diversity of the EU and the legal burden that would be placed on Member States in order to implement mandatory exceptions. There are current mechanisms in place that provide an appropriate level of flexibility: the three-step test and many examples of EU case law.

Finally it is important to point out that maintaining the status quo is not to stifle creativity; the European creative industries are flourishing.

□ NO OPINION

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

[Open question]

As we have mentioned in the previous question, the European creative industries are flourishing and the current framework of limitations and exceptions is flexible enough to allow creators to develop new works. In cases where problems have been identified by the market, practical solutions have been established, such as the Orphan Works Directive and the Collective Rights Management Directive. There is therefore little evidence that any exceptions or limitations should be added to or removed from the existing catalogue. Were any new exception or limitation to be introduced, there would need to be a sound and legal justification.

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

……

……

X NO – Please explain why

CEPI believes the current regulatory framework for limitations and exceptions provides an appropriate balance between respect for cultural diversity and national legal traditions while allowing the creative sectors to flourish. The foundations built on European case law and existing legislation (the Copyright Directive and the e-Commerce Directive, for example) provide an appropriate degree of flexibility and legal certainty.

Furthermore, the three-step test is an adequate tool to ensure a fair balance between consumers and right holders and a consistent interpretation of the law. The 'fair use' principle however is assessed on a case-by-case basis, which would lead to a lack of legal uncertainty. We feel this would be a negative development for the EU framework.

□ 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]

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

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

……

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

Given the importance of territoriality, it is logical that the framework for limitations and exceptions within the EU is also territorial in nature; we do not believe that this constitutes a problem. In accordance with subsidiarity national laws will be used to assess whether a limitation or exception is relevant to a certain act of exploitation in the Member State where protection is requested. Indeed, due to an increasing body of case law from the CJEU, the system of limitations and exceptions is practised increasingly harmoniously in the EU, in a way that serves the objective of the single market while respecting the diverse legal traditions of the Member States.

□ 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]

In such cases, compensation would be addressed in the country where the use occurs, in accordance with international norms and EU law.

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

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?

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

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

X NO

CEPI holds the view that European cinematographic heritage works constitute unique cultural elements as well as valuable assets in the European digital economy. We strongly value the importance of preserving the content for both historical and cultural purposes. It is felt that there are multiple benefits of the archiving of cinematographic heritage works to the public, heritage institutions, and rightsholders, but this is acknowledged while emphasising that any work done in this area under the preservation exception should be carried out without contradicting the interests of rightsholders who produce those works so integral to European culture. With regards to this careful balance, in our experience, three legal issues may hinder the re-use of audiovisual works.

In CEPI's view, preservation and access to European cinematographic heritage works can be achieved only through a close collaborative relationship between rightsholders, European film heritage institutions, and other relevant parties when and where applicable. It is felt that any problems encountered in the use of the preservation exception are adequately dealt with through close co-operation between the parties involved, or at least to the extent that legislation is unneeded.

For our producers it is then the determination of the IP ownership of a work which is crucial to make sure that the copy will not be commercially viable elsewhere and/or made available to the public contravening the rights of rights holders of setting this exception only for preservation purposes.

Furthermore, it also very important for the libraries and/or the archive to establish a security system which is adequate enough to prevent piracy.

Last but not least, we would like to draw attention to the excellent work achieved in Working Group 3 of the Licenses for Europe stakeholder dialogue, in which the audiovisual rights holders and the archives pledged to co-operate closely in order to facilitate the digitisation of and access to European cinematographic heritage works. This pledge exists as an example of the kind of close co-operation that CEPI advocates to address the problems raised by the EU Commission in this consultation as well as during the Licenses for Europe process. Although CEPI was not a co-signatory, we valued the importance of this initiative and the instrument achieved as result of it[46] and we look forward to its voluntary use at the national level.

□ NO

□ NO OPINION

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

[Open question]

[46] http://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/7-AV-heritage-principles.pdf

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]

CEPI does not feel that a legislative solution is the best manner in which to solve any issues encountered with the use of the preservation exception by libraries, educational establishments, museums or archives. We would refer you to the detail contained in our answer to question 28 of this consultation.

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

[Open question]

We believe that a solution drawing upon a close and direct collaborative relationship between rightsholders, European film heritage institutes, and other relevant parties when and where applicable, on a voluntary basis, is the best solution to any problems encountered in the use of the preservation exception by institutions. In the past rights holders have used similar contracts with archives and can be used again in the future with the possible assistance of stakeholder dialogues.

2. Off-premises access to library collections

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

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

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

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

[Open question]

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

[Open question]

Firstly we believe that before providing such a remote access cross borders, even for purposes of research and private study, a detailed assessment as to whether this could affect a significant direct impact on the licensing agreement already in place, should be taken into consideration. This should not have any effect on the creator's income and such licensing agreements should take place only if addressing a legitimate public interest aim.

Secondly, careful attention should be addressed to the potential for such remote access for users to contribute to piracy. Outside the controlled environments and networks of library reading rooms and university computer clusters, it is more difficult to control the use of collections accessed by users, and the danger of unauthorised and high-quality copies of audiovisual material being made is high. Whether the cost of these extra security systems would be borne by the consumer is another question that CEPI believes should be considered, keeping in mind that the consumer could be mislead thinking that once (s)he pays, (s)he can have complete access to the material (exceeding the rights to use the AV content for educational purposes).

A further problem encountered in this area concerns the ownership of the digital copy of a work from a collection, and this is one area that often needs clarification in agreements reached between producers and archive institutions. In this area we feel it should be clear who has ownership of the digital copy of a work if both archive and producer have digitised it.

In this area we largely welcome and appreciate the framework of guidelines that were set up in this area as part of the discussion in Working Group 3 of the recent Licenses for Europe stakeholder dialogue. However, due to the nature of our organisation we approach this issue from two angles due to our representation of both film and TV producers.

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]

CEPI does not feel that a legislative solution would be the best means to tackle any problems in this area, and would refer to our answer to question 28 of this consultation.

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

[Open question]

We believe that a solution drawing upon a close collaborative relationship between rightsholders, European film heritage institutes, and other relevant parties when and where applicable (on a voluntary basis) is the best solution to any problems encountered in off premises access to library collections. In the past rights holders have used similar contracts with archives and can be used again in the future with the possible assistance of stakeholder dialogues. We would refer to our answer to question 33 of this consultation for further detail.

3. E – lending

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

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

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

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

□ YES – Please explain with specific examples

…….

…….

□ NO

□ NO OPINION

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

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

[Open question]

…….

…….

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

[Open question]

We strongly support European cultural diversity and its distribution to the public, through inter alia public institutions such as libraries. However, the audiovisual industry has already faced unfair competition from libraries; if it is able to get a product for free, nobody will want to pay for it. The physical works (ie DVDs) that are available in libraries have always been part of the licensing systems that exist for copyrighted work with regard to libraries. These licensing systems, on their part, are an aspect of the necessary windows that are used by audiovisual creators. In other words, libraries get their copies of the material later than cinemas and retailers.

As stated earlier, every audiovisual work is a prototype. Film producers invest in projects that have no guarantee whatsoever in giving a return on this investment. A change in the library exception – where the reproduction right is circumvented – would mean that libraries gain an economic advantage over other outlets for audiovisual content that are part of the business model of the producers of creative works.

This will undeniably undermine the work of the creative industries. CEPI therefore pleads for no new exceptions and limitations for libraries when it comes to e-lending.

This is not the only difference between libraries' original activities and off-premises consultation and e-lending. We have some serious concerns about the higher chances and possibilities of people using the off-premises material provided by their libraries to infringe on the copyright of rightholders. Rightholders should always be assured that their copyrights are respected, especially when modern technology entails an increased risk of pirating behaviour. If we want to sustain the creativity and cultural diversity that characterise the EU, and make sure that all citizens can benefit from them, rightholders must be protected also when it comes to libraries.

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4. Mass digitisation

The term "mass digitisation" is normally used to refer to efforts by institutions such as libraries and archives to digitise (e.g. scan) the entire content or part of their collections with an objective to preserve these collections and, normally, to make them available to the public. Examples are efforts by libraries to digitise novels form the early part of the 20th century or whole collections of pictures of historical value. This matter has been partly addressed at the EU level by the 2011 Memorandum of Understanding (MoU) on key principles on the digitisation and making available of out of commerce works (i.e. works which are no longer found in the normal channels of commerce), which is aiming to facilitate mass digitisation efforts (for books and learned journals) on the basis of licence agreements between libraries and similar cultural institutions on the one hand and the collecting societies representing authors and publishers on the other[47]. Provided the required funding is ensured (digitisation projects are extremely expensive), the result of this MoU should be that books that are

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

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

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

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

…….

…….

□ NO – Please explain

…….

…….

X NO OPINION

The 2011 MoU refers only to print works; this question therefore is not applicable to the audiovisual sector.

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

…….

…….

X NO – Please explain

Although the question of mass digitisation is an important one to consider, the 2011 MoU for print works would not be an appropriate solution for the audiovisual sector. CEPI played an active role in the discussion of mass digitisation during the Licenses for Europe process (WG3), and at the final plenary meeting in November, presented a paper, also signed by IVF and FIAPF which stated:

"Recognising that:

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

- Facilitating the digitization and online accessibility of European audiovisual works in European Public broadcasters' archives is in the public interest, and constitutes an important element in promoting Europe's cultural heritage;

- Striking an appropriate balance between public interest and market-led initiatives is essential for the sustainability of the European audiovisual market;

- European Public broadcasters' archives include a large variety of different European audiovisual works which may involve a high number and a great variety of rights holders;

- There is a diversity of approaches in national legislation that needs to be taken into account. Such approaches may involve collective management and arrangements where a right holder has licensed or assigned rights to a collective organisation. In other instances, the parties have wished to maintain their ability freely to negotiate the relevant arrangements.

- All licensing arrangements should be underpinned by the dual principles of contractual freedom and independence of right holders. Licensing arrangements should support the free market in order to safeguard the ability of the European audiovisual sector to compete competitively with international markets.

The parties agree to enter into a stakeholder dialogue on practical and feasible ways to facilitate licensing solutions for digitizing and making available online European audiovisual works in European Public broadcasters' archives. This should take place in a manner which does not undermine third party licensing arrangements or rights.

Such arrangements will be sought for European audiovisual works primarily intended for European television broadcast – cinematographic works being excluded from the scope of the present Stakeholder Dialogue - and appropriately remunerating the right holders concerned."

Furthermore at the WG3 meeting of October 21st 2013, CEPI presented a paper[49] with some important observations regarding the preservation of television archives, which acknowledged that:

- Works held in broadcasters' archives include a large variety of genres and programmes, comprising both audio and audiovisual content; given the collaborative nature of the works concerned, each work generally involves a high number and great variety of rightsholders. Audiovisual works may also include embedded content, hence the high number and diversity of underlying rights involved;

- The broadcaster's rights in an archive may differ according to the situation:

a. Own productions and commissioned productions: the broadcaster owns the audiovisual producer's rights and is responsible for clearing all other rights in the work concerned;

b. Co-productions: rights with audiovisual producers must be cleared; these may include transfer by law or contract of other relevant rights. The identification and localisation of relevant rights holders and providing adequate remuneration for

[49] https://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/CEPI%20Observations%20EBU%20paper_2.pdf

their work is crucial and can be addressed through specific contractual arrangements applied at the national level and/or through entering into negotiations with the relevant national CMOs where applicable;

- Broadcasters make use of a variety of rights clearance systems with the aim of digitising and making available the works held in their archives. Specific legal provisions on the re-use of broadcasters' archives already exist in various countries (Denmark, Finland, France, Latvia, Norway). It has been recognised that some of these national practices are not applicable across the European spectrum due to their national socio-economic and cultural context;

- Substantial quantities of programmes are digitised (mass digitisation) for further use indigital formats, and the making available of works held in archives for on-demand use is only part of the value chain in that plan of activities. Other types of re-use such as re-broadcasting, as well as a possible license of rights to third parties, are also part of that plan;

- Considering the ongoing development in the digital ecosystem, participants have welcomed the initial discussion and possible resulting elaboration of new voluntary approaches which aim at facilitating the digitisation process (e.g. the document currently under development by ACE, SAA, FIAPF).

It was also observed that:

- All licensing agreements for the use of broadcasters' archives shall be of a voluntary nature and consistent with EU law, in particular the 2012/28/EU Orphan Works Directive. The search for rights holders must be truly diligent, undertaken in good faith and adapted to the collaborative nature of audiovisual works. The importance to provide adequate remuneration to the rights holders is an essential guide for future dialogue;

- The principle of contractual freedom is recognised as crucial in addressing the clearance of rights for digitisation and further exploitation. The clearance of rights shall be exercised without prejudice to national arrangements but where and when it is appropriate, extended collective licensing may also provide a viable solution;

- The type of use and of content covered shall be clarified at the national level in the licensing agreements and shall not interfere with the normal commercial exploitation of audiovisual works; this is very important to avoid possible distortion of the market and/or making a commercial entity appear an uneconomic alternative;

- Any non-commercial mass release of archive programming needs to be strictly sensitive to the impact it will have on the overall market in each territory;

-Publicly accessible audiovisual heritage institutions such as national libraries may consider that works held in their archives present some similarities with those held in the archives of broadcasters and may therefore find it useful to refer also to the above points.

CEPI also highlighted its willingness to continue the dialogue begun during the TV Subgroup of Working Group 3.

□ NO OPINION

B. Teaching

Directive 2001/29/EC[50] 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

……

……

X NO

□ NO OPINION

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

[Open question]

……

……

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

[Open question]

……

……

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

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

[Open question]

……

……

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

[Open question]

……

……

C. Research

Directive 2001/29/EC[51] enables Member States to choose whether to implement in their national laws a limitation for the purpose of non-commercial scientific research. The open formulation of this (optional) provision allows for rather different implementations at Member States level.

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

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

□ YES – Please explain

……

……

□ NO

□ NO OPINION

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

[Open question]

……

……

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

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

[Open question]

……

……

D. Disabilities

Directive 2001/29/EC[52] provides for an exception/limitation for the benefit of people with a disability. The open formulation of this (optional) provision allows for rather different implementations at Member States level. At EU and international level projects have been launched to increase the accessibility of works and other subject-matter for persons with disabilities (notably by increasing the number of works published in special formats and facilitating their distribution across the European Union) [53].

The Marrakesh Treaty[54] 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

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……

□ NO

□ NO OPINION

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

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

[53] 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/).

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

[Open question]

……

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

[Open question]

CEPI supports practical solutions that allow disabled users to access to audiovisual content. The Copyright Directive 2001/29/EC contains a number of provisions that facilitate access, such as Article 5(3)b which provides a flexible approach to access. We believe individual and flexible contractual solutions are the most appropriate means of improving the accessibility of audiovisual content for users with disabilities.

E. Text and data mining

Text and data mining/content mining/data analytics[55] 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"[56]. In the context of these discussions,

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

[56] 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 .

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

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

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

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

□ YES – Please explain

……

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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]

……

……

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

[Open question]

……

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

[Open question]

……

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57. ***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[57]. User-generated content (UGC) can thus cover the modification of pre-existing works even if the newly-generated/"uploaded" work does not necessarily require a creative effort and results from merely adding, subtracting or associating some pre-existing content with other pre-existing content. This kind of activity is not "new" as such. However, the development of social networking and social media sites that enable users to share content widely has vastly changed the scale of such activities and increased the potential economic impact for those holding rights in the pre-existing works. Re-use is no longer the preserve of a technically and artistically adept elite. With the possibilities offered by the new technologies, re-use is open to all, at no cost. This in turn raises questions with regard to fundamental rights such the freedom of expression and the right to property.

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results or even the definition of UGC. Nevertheless, a wide range of views were presented as to the best way to respond to this phenomenon. One view was to say that a new exception is needed to cover UGC, in particular non-commercial activities by individuals such as combining existing musical works with videos, sequences of photos, etc. Another view was that no legislative change is needed: UGC is flourishing, and licensing schemes are increasingly available (licence schemes concluded between rightholders and platforms as well as micro-licences concluded between rightholders and the users generating the content. In any event, practical solutions to ease user-generated content and facilitate micro-licensing for small users were pledged by rightholders across different sectors as a result of the "Licences for Europe" discussions[58].

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

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

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

☐ YES – Please explain by giving examples

[57] 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.

[58] 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 .

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□ NO

□ NO OPINION

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

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

□ YES – Please explain

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□ NO – Please explain

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□ NO OPINION

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

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

□ YES – Please explain

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□ NO – Please explain

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□ NO OPINION

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

[Open question]

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

[Open question]

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

[Open question]

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IV. Private copying and reprography

Directive 2001/29/EC enables Member States to implement in their national legislation exceptions or limitations to the reproduction right for copies made for private use and photocopying[59]. 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[60][61].

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

***64. In your view, is there a need to clarify at the EU level the scope and application of the private copying and reprography exceptions[62] in the digital environment*?**

☐ YES – Please explain

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

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

[61] 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.

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

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X NO – Please explain

Private copying levies were introduced to address perceived market failures which prevented right holders from managing directly the right of reproduction. They find justification for their existence in both international and European law: the Berne Convention (Article 9(2)); and the 2001 European Union Copyright Directive, Article 5(2)(b): *Member States may provide for exceptions or limitations to the reproduction right...in respect of reproductions on any medium made by a natural person for private use and for ends that are neither directly nor indirectly commercial, on condition that the rightholders receive fair compensation.* This is also reflected in case law from the Court of Justice of the European Union (CJEU), such as the 2010 Padawan v SGAE case, which found that: that equipment or devices are able to make copies is sufficient in itself to justify the application of the private copying levy.

The is laid out clearly by Article 5(2)(b) of the Copyright Directive, excluding copies made by or for a third party as are copies made from illegal sources. It is also clear that strict adherence to the three-step test set out in Article 5.5 of the Copyright Directive is necessary, and that appropriate technological protection measures (Copyright Directive, Article 6) must be made available under national law. This includes protection for access and copy controls, prohibition of acts of circumvention and preparatory acts of circumvention accompanied by effective sanctions.

The introduction of the private copying exception is optional for Member States; but if it is introduced it is necessary that right holders receive fair compensation. There are widely different applications of the private copying levy across the EU, which reflect the different traditions and cultural diversity of the Member States. For example some countries, such as France, use a significant proportion of the money generated by the private copying levy to invest in the cultural and creative industries.

Where practicable, there are also developing opportunities in the digital environment for direct licensing of works, through for example digital content management solutions. Such services allow right holders to license directly their works and consequently to take into account in the cost of the license the authorisation of a number of copies to be made for private use (for use on different devices, for example), copies which therefore fall outside the private copying exception.

Such direct licensing systems are evolving naturally through the market, but do not reduce the important role private copying levies play. Provided that safeguards exist to ensure that right holders receive sufficient remuneration, we believe it is possible for private copying levies and direct licensing schemes to co-exist.

□ NO OPINION

65. Should digital copies made by end users for private purposes in the context of a service that has been licensed by rightholders, and where the harm to the rightholder is minimal, be subject to private copying levies?[63]

X YES – Please explain

We would remark that it is misleading to suggest that digital copies made by end users in the context of a licensed service are 'harmless'; all copies made for private purposes that have not been explicitly licensed, in a state which has not implemented the private copying exception, should be subject to the payment of levies; this has been clarified by the European Court of Justice (see the CJEU ruling in the "VG Wort" case).

It is also important to clarify that private copying levies are intended to provide right holders with equitable remuneration for their work and a fair share of the success of their work within the market rather than compensation for harm (although it is true that 'harm' may be used as a criterion for assessing the level of remuneration to be paid). We would also point out that the principle of the application of the private copying levy is justified on the basis of potential use of a product for private copy purposes, as confirmed by the CJEU in the 'Padawan' ruling. Whether 'harm to the right holder is minimal' is therefore not an appropriate way to phrase this question; unless a copy is explicitly covered by a license, in a state without the private copying exception, it should be subject to the payment of levies.

It is for the Member States to decide whether they wish to introduce a private copying exception in national law. If such an exception is implemented, compensation must be provided for all private copies that are not clearly covered by a license.

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□ NO – Please explain

□ NO OPINION

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

[Open question]

Private copying levies remain relevant in the digital age, as has been illustrated by the recent Hewlett Packard GmbH v Austro-Mechana case, which confirmed that fair compensation must be paid for private copying of copyrighted works to multifunctional storage devices such as hard drives, tablets or PCs.

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

It is also important to note that in certain Member States the money generated from the private copying levy is used for investment in the cultural and creative industries, which is of great benefit to the public. It is important that Member States must be allowed to continue to dedicate money to the development of the cultural industries. New business models should not be developed at the expense of right holders.

67. Would you see an added value in making levies visible on the invoices for products subject to levies?[64]

□ YES – Please explain

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X NO – Please explain

CEPI members' views on this question vary. In general, we would argue that the decision on the visibility of levies on invoices for products subject to levies should be left to the discretion of the Member States, in line with the principle of subsidiarity.

We understand the reasoning behind the suggestion of making the costs of levies visible in the interests of transparency; it should however also be noted that in practical terms such a proposal may be difficult to implement, taking into account considerations of cost-effectiveness and the potential issue of placing further burdens on the market.

□ 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[65].

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

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

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

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

□ NO – Please explain

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□ NO OPINION

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

[Open question]

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

[Open question]

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

[Open question]

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V. Fair remuneration of authors and performers

The EU copyright acquis recognises for authors and performers a number of exclusive rights and, in the case of performers whose performances are fixed in phonograms, remuneration rights. There are few provisions in the EU copyright law governing the *transfer* of rights from authors or performers to producers[66] 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[67]. 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,

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

presumptions of transfer of rights, buy-out clauses and the lack of possibility to terminate contracts. Some stakeholders are of the opinion that rules at national level do not suffice to improve their situation and that action at EU level is necessary.

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

[Open question]

The remuneration of authors and performers is an important concern, and there are certainly issues that should be addressed regarding how remuneration models may operate under a new audiovisual value chain.

Independent producers strongly encourage legal and commercial certainty of contracts. This is crucial not only to foster fruitful discussions with authors and performers but it is also a fundamental means to ensure a healthy environment for the sector to develop under satisfactory conditions for both sides.

We would like to recall that in the business model for film/TV programmes the role of the producer is especially important; producers often provide investment ahead of a certain project and consequently assume significant financial risk, with no certainty that the project will be successful. The existing legal and contractual framework allows for upfront remuneration of authors and performers (unlike the producer) and allows them receive further income from secondary or tertiary exploitation. In this way the licensing process remains efficient and streamlined; something which should be carefully considered before making any changes to the status quo.

The audiovisual industry clearly demonstrates complex ownership models but to evoke a statutory remuneration right on the basis of the film gross income from a distribution sale to a single release would undermine both the producer's willingness to invest in future projects as well as the private investors' willingness to support or sponsor other audiovisual works. We anticipate that this would reduce investment and thus the volume of niche-productions, which ultimately would reduce consumer choice.

Furthermore, a statutory remuneration right for authors and performers would be a direct intervention not only into domestic contractual practice for producers of AV content but also into domestic wage determination which would not achieve consensus amongst the different Member States. Domestic contractual practice should be carefully kept in mind when thinking about "fair remuneration". Statutory regulation would only serve to reduce the flexibility that producers have in negotiating and agreeing remuneration arrangements with authors and performers.

We would also argue that the establishment of a statutory right to remuneration subject to mandatory collective licensing would be disproportionate. This would see CMOs seek payment from the platforms licensing audiovisual content regardless of pre-existing agreements between producers and authors or performers, resulting in users paying twice for the same content. No right holder should be obliged to enter into collective management or collective licensing schemes except in cases where

exclusive rights are subject to mandatory collective administration for practicable reasons under international law; such cases are however the exception rather than the rule.

Any future policy developments must be evidence-based solutions to real problems, and must be carefully considered in order to avoid disrupted long-standing national-level remuneration mechanisms.

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

□ YES – Please explain

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X NO – Please explain why

The experiences of CEPI members can vary on this topic, and whilst we have countries where collective contracts have the character of law, and the minimum wage table for film makers are therefore obligatory and contain an adequate remuneration for authors, we also have countries which have tried to regulate and ensure adequacy of remuneration for the exploitation of online works underlining a situation which does not always and necessarily help the author. Indeed, consequences can rather be that the existing minimum wage tables and existing payment are reduced as far as obligatory shares are introduced.

Furthermore, it cannot be overstated that the producer has to set aside reserves and if the remuneration is a collective remuneration, which is directly collected by the online platform (irrespective of the concrete exploitation turnover), this can also downgrade the already weak economic situation of the legal platforms, the economical base of which is already quite disadvantaged by the attractive illegal offers and the scarce copyright enforcements currently in place.

In this sense we would encourage the Commission to take these factors into consideration for future proposals which can address online rights management/remuneration.

There is a further consideration in that the license or transfer of rights from TV producers to a broadcaster does not follow a consistent or predictable formula but depends greatly on the financial and funding model of any given production. Financial models of online platforms also vary widely, making it very difficult to adopt a one size fits all approach to this issue. We consider it appropriate for further investigation and analysis to be carried out and impact assessments undertaken in respect of any contemplated models.

□ NO OPINION

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

[Open question]

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VI. Respect for rights

Directive 2004/48/EE[68] 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[69]. 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[70]. One means to do this could be to clarify the role of intermediaries in the IP infrastructure[71]. At the same time, there could be clarification of the safeguards for respect of private life and data protection for private users.

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

X YES – Please explain

CEPI believes that the civil enforcement system in the EU should be rendered more efficient for infringements of copyright committed with both a commercial and non-commercial purpose. We emphasise the importance of a strong enforcement system to protect the cultural and creative industries of the EU. Piracy and other forms of copyright infringement have been demonstrated to endanger cultural development, as well as jobs and growth. Moreover, financial losses related to massive copyright infringements have a big negative impact on investments, since they lead to a reduced appetite for risk in the entire media industry. This constrains the budgets of a billions-of-Euros industry and makes doing projects difficult or even impossible. This, in its turn, hampers sustaining and developing cultural diversity in the continent.

The Commission's efforts to improve the current legal framework on intellectual property rights to strengthen the civil enforcement system for infringements of copyright are welcomed by CEPI and its members. We think it is of paramount importance that the Commission promotes a European audiovisual production industry that is sustainable and allows for innovative services and products to foster growth and jobs in the EU.

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

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

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

[71] 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.

We also believe that the digital age creates unprecedented opportunities for intellectual property owners and other stakeholders, including consumers. Nonetheless, the Commission should be attentive to the easy channels that are established through the internet for the illegal use of copyright protected subject-matter which undermines the potential of the industry. A study from 2010 has shown that the core copyright-intensive industries generate 7 million jobs, contribute approximately EUR 509 billion and generate a trade surplus, while predicted losses due to copyright infringement piracy may reach as much as 1.2 million jobs by 2015 in the EU. In order to support cultural diversity and innovation, as well as to create jobs and economic growth, proper enforcement is an indispensible condition.

The creation of more legal alternatives for the distribution of copyrighted material is often mentioned as a tool against the infringements of right holders. We believe this is just one of the possible solutions and one which can only flourish if there is a digital environment which respects the rule of law and where piracy is combated. Respect is essential in making the legal offers of audiovisual content thrive online, as well providing incentives to create new, innovative digital content services. Piracy has drastic impacts on the revenues of film and TV producers. This has a domino effect on investments needed for physical and online distribution as well as audiovisual creation. Intellectual property rights are by no means a barrier to access content. Conversely, intellectual property rights ensure the creation of cultural content and enable viable business models for the cultural and creative industries.

Evidence shows that the wide offer of legal content is not the only answer to copyright infringement. The Council of Europe's Audiovisual Observatory has revealed in a recent market survey that over 700 legitimate on-demand audiovisual services were available in Europe in 2009 and there are also over 250 legal music services available in Europe. Nonetheless, high levels of digital piracy continue to cannibalise legal offerings and thwart the development of a legitimate online marketplace for creative works, even in countries that know the highest number of legal online services for audiovisual content. This means that, even if additional legal offers should continue to be encouraged, online piracy needs to be combated in itself.

In order to create a real Single Market in the European Union, restrictions on freedom of movement and anti-competitive practices must be eliminated or reduced as much as possible, while creating an environment favourable to innovation and investment. Therefore, protecting intellectual property rights is an essential element and of paramount importance if we want to have a successful Single Market. In our growing knowledge-based economies, the protection of intellectual property is important not only for promoting innovation, creativity and cultural diversity, but also for developing employment and improving competitiveness.

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□ NO – Please explain

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□ NO OPINION

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

[Open question]

CEPI feels that while the current legal framework is largely beneficial to effective protection of copyright, there are certain areas in which measures could be taken to improve certain aspects, particularly relating to the involvement of intermediaries. The role of 'intermediaries' is crucial in preventative measures against IPR infringement. Although the current Enforcement Directive does put tools in place to address IPR infringement, these measures do not achieve the desired results because they fail to properly address the crucial role intermediaries play in copyright infringements. Internet 'intermediaries' are in essence 'the gatekeepers' of the Internet and are indispensable to the goal of preventing IPR infringement. That is why the role these intermediaries play – and can play – in curbing digital piracy needs to be reviewed. It is our conviction that an effective and comprehensive solution to curb piracy can only be obtained through their co-operation. So-called 'intermediaries', whose services are used in infringing activities, both directly and indirectly, bear responsibility and have the obligation to prevent such infringements.

We feel that on the whole Article 8(3) of the Copyright Directive is an effective tool in achieving cooperation from intermediaries against copyright infringement, but that in certain ways it is lacking. This is in particular due to the crucial point that some Member States still have not implemented this provision and the corresponding provisions in the Enforcement Directive in a correct manner. As a result, some Member States' legislative frameworks still require the finding of some form of liability on the part of the intermediary, such as in Germany and Sweden. The lack of implementation of Article 8(3) means that some national courts still hold that injunctions against intermediaries can only be granted if the intermediary can be imputed with liability. Of course, injunctions under Article 8(3) are granted on the basis that the intermediary is "best placed" (ref. Recital 59 of the Copyright Directive) to bring the infringement to an end and this has been confirmed in the recent CJEU case law. However, national courts in Member States that have not implemented Article 8(3) do not follow this precedent. We therefore call for the correct implementation of Article 8(3) by all Member States to foster cooperation by intermediaries.

A second point is that right holders' cooperation with Internet stakeholders in the fight against online infringements is also often frustrated by the fact that Internet intermediaries generally do not record client data or they record inaccurate client data. Internet intermediaries such as domain name providers, hosting providers, payment providers, and online ad-brokers should be subject to "know your customer" obligations (see Article 5 of the Enforcement Directive) and the money laundering Directives. In particular, right holders should have the legal means to

identify and locate commercial scale infringers. The CJEU has confirmed in L'Oreal v. eBay that infringers operating in the course of trade must be identifiable. See paragraph 142 in L'Oreal v. eBay. The existing EU "know your customer" (KYC) legislation (see 3rd Money Laundering Directive) applies to banks, lawyers, real estate agents, casinos and we suggest that it should also be made applicable to Internet intermediaries. Anonymous businesses prevent the legal system from working in a fair and balanced manner.

Furthermore, mere notice and takedown procedures are insufficient to address infringements that are taking place on a massive scale, and much greater clarity is needed in this area. We believe it is reasonable and appropriate to expect such 'intermediaries' - as lawful businesses - to aid in the prevention of abuse of their services for illegal purposes. As pointed out in the previous consultation, there are many steps they can take that have been proven to be effective without being unduly burdensome. Furthermore, we would also recommend adapting the Directive in a way that recognises the role 'intermediaries' play and the responsibility they bear. Their responsibility should also be clear in relation to the liability exemption put in place by the E-commerce Directive. The term 'intermediary' is highly ambiguous and in practice often misleading. That is why the definition of an 'intermediary' which is eligible for a liability exemption requires clarity in order to distinguish them from irresponsible actors. It would be preferable for the Directive to describe the types of activities that will disqualify this service from being able to invoke one of the liability exemptions under the E-Commerce Directive. This will prevent 'intermediaries' from taking advantage of the broad scope of the current definition.

In addition, we argue that a service which structurally and systematically facilitates copyright infringement whilst generating revenues should not qualify for the liability privileges set forth in Articles 12-14 of the E-Commerce Directive. This principle is clear from both decisions by the Court of Justice of the European Union and the majority of national case law. However, certain decisions at national level have addressed this matter incorrectly. It would be helpful to clarify that such sites are not only subject to injunction orders requiring them to filter out infringing content, but that they may also be subject to criminal and/or civil liability.

We wish to draw the Commission's attention to a number of issues arising in connection with attempts to obtain injunctive relief against intermediaries. In several Member States these attempts are severely undermined by the failure to implement the specific provisions of the Copyright and the Enforcement Directives. In certain cases, Member States have turned to general civil law rules. However, conflicting rules often create problems for the courts where an intermediary under civil law is not necessarily liable for the underlying infringements.

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

□ YES – Please explain

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X NO – Please explain

The current situation in the EU is manifested in recent decisions made by the CJEU (Promusicae, L'Oreal v. eBay and Sabam v. Netlog) that have clarified that national courts shall apply the proportionality test in adjudicating on matters involving a balancing of right to having one's copyright protected and other rights such as protection of personal data. These decisions have emphasised the need to weigh all fundamental rights before coming to a fair and balanced decision. In doing so, the courts shall take into account the rights and interests of the parties and stakeholders concerned.

Nevertheless, there are certain issues in the current civil enforcement framework that need further refinement. The right to property is a fundamental right as much as the right to the protection of personal data, but there is a need for equal treatment and correct balancing of the different rights. It is clear that data protection rights cannot mean tolerance for illegal activities by actors who purposely hide behind this right, disqualifying in this way the right to property.

Often the only tool available for rightsholders to attempt to take action against infringers in these cases is the right of information, provided by Article 8(1) of the Enforcement Directive. Unfortunately, in practice the right to obtain information about infringers has been put into question in some countries due to the unclear relationship between data protection rules and enforcement rules at EU level. In general it seems that Article 8(1) is implemented differently across Member States, and in some cases is deprived of any effect. A number of Member States and national courts interpret data protection rules as preventing the acquisition of data which would be helpful in identifying online infringers. In such cases, this reduces the number of remedies right holders have to enforce their rights at national level. With regards to the first paragraph of this answer which concerns the power of national courts use of the proportionality test, it is clear that there is the potential for great difference in approach across Europe and a deficiency in legal certainty for rightsholders. In some Member States, the relationship between the right of information and data protection/data retention rules is unclear and in other Member States, data protection rules prevent disclosure. For this reason it would be desirable to clarify the interaction between data protection rules and the implementation of the Enforcement Directive, making sure that data protection does not prejudice the possibility for right holders to protect their rights.

However, while protecting copyright in support of creative industries should be a priority fulfilled through a more efficient civil enforcement system in the EU, it is just one component of the solution to address widespread infringement, and we believe that a comprehensive approach that maintains proper protection of property rights, access to justice, freedom of expression and data protection is possible.

□ NO OPINION

VII. A single EU Copyright Title

The idea of establishing a unified EU Copyright Title has been present in the copyright debate for quite some time now, although views as to the merits and the feasibility of such an

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

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

□ YES

X NO

□ NO OPINION

If the question of the establishment of a single EU Copyright title to create a consistent framework is to be addressed, there should be a more robust definition than the one provided in this consultation.

If the establishment of a single EU Copyright title were to be established alongside national titles, CEPI would have particular concerns with the potential for adding a further layer of complexity to the copyright system in the EU. We feel that further complexity is unnecessary and is best avoided. The current EU acquis is already perfectly sufficient for the protection of copyright, and there is no evidence of negative consequences for the internal market arising from the framework now in place.

Were the establishment of a single EU Copyright Title to be created as a replacement of each of the national copyright titles of the Member States, this would take decades to achieve. The strength of national preoccupations expressed at the adoption of the EU Copyright Directive make simply replacing current national copyright systems with a single European Copyright Title seem premature and far too complex. A very careful and in-depth impact assessment would be required before any such initiative were launched.

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

[Open question]

As we have already noted, the question of the establishment of a single EU Copyright title can only be addressed when a more robust definition than that provided in this consultation is established.

When looking at Article 118 of the Lisbon Treaty, CEPI does not see a specific competency of the EU with regard to copyright. In CEPI's understanding, this provision was in fact meant to address issues related to "industrial property rights". According to the House of Lords of the United Kingdom, "the new Article 118 of the TFEU is a restatement of existing powers. Although the Treaty of Lisbon would not confer additional IP powers on the EU, it marks a statement of political intent and a

commitment to achieving the Community patent."[1] So far all EU legislation that has been adopted in the field of intellectual property has legal basis in general internal market provisions of the treaties. They remain the appropriate legal basis for all intellectual property.

VIII. Other issues

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

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

[Open question]

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[1] House of Lords: European Union Committee, 10th Report of the Session, 2007-08, Volume I: Report: The Treaty of Lisbon: an impact assessment, pp 219-220.