Introduction

The European Publishers Council (EPC) brings together Chairmen and CEOs of Europe’s leading media groups representing companies with newspapers, magazines, online publishing, journals, databases, books and broadcasting, communicating with Europe’s legislators since 1991 on issues that affect freedom of expression, media diversity, democracy and the health and viability of media in the EU. A list of our members can be found in annex.

The EPC welcomes the opportunity to comment on the questions set out in the consultation. Individual companies, members of the EPC may also contribute directly to the consultation.

The EPC has responded to the consultation with an open mind. In parallel, EPC has undertaken work to produce a Vision Paper on Copyright, Technology and Practical Solutions to build a copyright enabled digital market for the publishing and media ecosystem. It will shortly be available and will complement our response to the consultation, addressing additional issues beyond the consultation.
Executive Summary

1. The Single Market: importance of a holistic approach and the use of technology

EPC believes that it is necessary to take a holistic approach when addressing the issue of why it is not possible to access many online content services from anywhere in Europe. A wide range of issues that goes well beyond the concept of territoriality play a role when deciding to offer a service on several markets. These include the lack of interoperability of format standards, differing consumer laws, rules on defamation or libel, and a lack of easy, cheap and secure micropayments transactions. Most critically though, we see no evidence that the current copyright framework hinders the provision of cross border services; on the contrary it remains the bedrock of an unparalleled innovation resulting in unprecedented opportunities to provide services and access to all kinds of content in multiple formats across many platforms and devices.

EPC remains strongly supportive of and convinced that the progress currently on-going regarding the development of identifiers, interoperable metadata, interoperable registries and hubs will play an ever increasing role in making content accessible to the user, whether at home or across borders as these tools will make it easier to handle the rights clearance procedure. Two key priorities for the EPC are:

<table>
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<th>a) To continue the work initiated by the Linked Content Coalition, a cross media group of experts whose goal is to develop solutions on how to assert ownership of online content and of how to communicate copyright terms and conditions in the digital environment and to enable greater legitimate use of digital content through better management of data relating to rights across the network. The LCC recognizes that securing the highest possible level of automation in licensing will reduce barriers to entry, reduce cost in the supply chain, increase volume of use and encourage innovation.</th>
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<td>b) Seek clarification that legal recognition and protection of identifiers associated with a copy of a copyright work, or which appears in connection with the communication to the public of a copyright work, is covered by Article 7 of Directive 2001/29/EC on copyright and related rights in the information society as well as extending similar protection to databases which are protected by the EC’s sui generis database right.</td>
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2. Linking & browsing: new usages may require legal adaptation

Technology makes a major contribution to the evolution of the media and publishing ecosystem but it doesn't operate in a vacuum. It is our aim to work with and adapt to technology in a way that benefits our direct user groups through investment in new R&D, product and service development, and future revenue streams. There are however a number of new situations emerging in the field of linking and browsing that may need closer attention by policy makers:

Hyperlinking:
Press publishers encourage sharing of their content by their readers; this is often done through the presence of share buttons to social media or by readers themselves providing hyperlinks to their peer group.
However an increasingly common, business usage prompted by technology is the making available for new, commercial purposes of hyperlinks to content that is protected by copyright, in a systematic way by commercial organisations and for commercial gain.

The EPC calls for legal clarification as to why the provision of hyperlinks should be compliant with license terms of websites (or other platforms) to which they link. It must be clear at law that rights owners may by their licence terms define, or limit access to and use of the content made available on an “open website”, i.e. not behind a pay-wall or registration page. The fact that publishers invite free access to their websites by the general public should not preclude prohibition of systematic scraping of that content via hyperlinks. Regardless if whether or not the content itself is accompanied by technical protection measures.

Hyperlinking to illegal copies
An issue that is increasingly taking time and demands investment is action against hyperlinking to illegal copies. A common pattern in copyright infringement cases is the separation of the actual copyrighted material reproduced and stored without permission in a cyber-locker and the posting of the hyperlink to such a pirated copy (as the only way to access and download the content). Publishers spend large amounts of money and resources to crawl the web to identify pirated copies, to send take down notices to owners of cyber-lockers, with varying degrees of their cooperation, but have limited options to require the removal of the posted links. The making available of a hyperlink to an infringing copy is the single most prevalent act enabling piracy on a large scale.
The EPC calls on the Commission to propose amendments to copyright law to treat as infringements those acts of making available of hyperlinks to copies which are clearly and obviously unlawfully obtained or obviously unlawfully made available to the public.

Snippets:
The unlicensed use of snippets derived from content on their websites by search engines and aggregators, which, representing the distillation of press articles, substitutes for the original article, results in substantial loss to the publishers of the original content and must be addressed.

The EPC calls on the Commission to establish a fair framework to facilitate the making available to commercial users of snippets on permissions-based system in partnership with news media organisations and their authors.

3. Download to own digital content: resell of digital files

Allowing the re-sale of downloaded content would constitute direct competition with and substitution of the sale of the “original” work. This would lead to loss of revenue for the author and right holder, and subsequently create unfair competition with the primary market with significant and detrimental effect on the investments in new European content and therefore to the provision of diverse European contents such as books, learning materials, even magazine and premium newspaper content. Furthermore, enabling the resale of previously purchased digital content would weaken the advertising market of the press sector or create new unfair competition that would in practice be derived from the publishers’ investment, which in time would lead to a diminished supply of that content thereby operating against the consumer interest.

Post-purchase re-download: clarification for the benefit of the consumer experience

With the advent of cloud powered listening/reading, major service providers in the market are offering all-time cloud access to previously purchased content. There is no longer one single download to a user’s hard-drive at the time of sale; instead the users validate their credentials on a new device and get instant access to the entire portfolio of previously purchased copies, which are automatically or upon request re-downloaded to such a user’s

1 The fact that several European countries are taking action in this field is an indicator of the problem. For example, in Germany a legislative framework has been established to address this issue in the field of news media. In Spain a new legislative proposal announced in February 2014 will allow news media companies will be able to charge search engines for displaying copyrighted content
device(s). In order to facilitate this service, the content provider must keep a master copy of the digital good stored on its servers, create a copy and make such a copy available to the user even though the original grant of rights from the author to the publisher has expired/lapsed. In theory, the post-term copy could be considered a case of copyright infringement committed by the vendor (and/or the publisher, if publisher grants rights here fore).

A clarification in copyright law that post purchase re-download after a legal first sale is not in violation of copyright even if the rights to sell have expired, would increase legal certainty for rights holders, vendors and consumers alike and help to improve the customer experience.

4. Registration of works and interoperable identifiers

The EPC would wish first to distinguish between registration of works in order to derive copyright protection and the declaration of information about the identity of rightsholders and terms and conditions of these works in order to facilitate licensing.

We would support all efforts to a) encourage well-structured databases to facilitate declaration of rights and b) commonality in the way such declarations are made to promote interoperability and accessibility across multiple media types, sectors and territories of such information.

Digital availability of more and more content will lead inevitably to more databases and registries. The information these databases and registries will contain is information related to identifiers, metadata and the rights expressions. What is critical is that these registries and databases are interoperable and can allow inter-communication and federated searches, which will drive the development of licensing through easier identification of rights holders, licensors and of content.

Increasingly creators and authors will be able to declare their rights in a work in standard, authoritative ways which will lead to less confusion in cases of conflict resolution regarding who is the author and who owns the right to a piece of work. This in addition to the developments of hubs and exchanges, databases and registries that are interoperable, will make content more easily discoverable.

The EPC calls on the European Commission to provide incentives directed at industry sectors to provide them with means to start projects that will help with implementation
of the above mentioned ongoing developments. Also to raise awareness of the importance of such initiatives for licensing, increased access to content and the growth of the European content industry. To be successful, this process must however be developed and implemented at scale by the industry and the creative sector, and be global in its reach.

5. Limitations & exceptions: an efficient user-oriented approach

The current list of optional exceptions and limitations was agreed in order to allow Member States to continue to allow for exceptions already in place in their country, exceptions and limitations that are strongly linked to their creative and cultural heritage, and which form part of the European cultural diversity.

The EPC considers that the exceptions as they are currently defined do accommodate the digital environment. However, the EPC is not per see against further harmonisation in making certain existing exceptions mandatory to apply equally across the EU, on the condition that this is justified by a thorough impact assessment, and that any such provisions would not seek to broaden the scope of the current exceptions, would be narrowly framed and would not conflict with the three-step test of the Berne convention. Additionally and specifically because of the changing nature of content consumption and the very wide scale availability of commercial content services, it is perhaps necessary to undertake a broader reflexion of the necessary balance between the role of public institutions, such as public libraries, and the access to content provided by the creative industry in the digital environment when it comes to considering exceptions in this field.

Regarding whether greater flexibility in the field of exceptions and limitations should be introduced, through an open norm style exception, this would seem to go against the legal certainty that Europe is striving for, in the case of creators, right holders and users. Europe would be better positioned to reach a dynamic flexibility for increased uses by providing incentives to small scale licensing, both B2B and B2C, and automated licensing solutions. As presented in the User Generated Content Working Group 2, Web Content Declarations would also help users to increasingly be remunerated and monetise their user generated created content should they so wish. 

The EPC calls for a user oriented approach: should the aim be to make content increasingly accessible to the user (consumer, researcher, public institution) for uses such as text and data mining, or to use parts of protected content to create new content (‘user

2 See http://ec.europa.eu/licences-for-europe-dialogue/en/content/wg2-presentations-6th-meeting-25-october
generated content’), priority should be given to solutions put forward by the creative industry to make access and use of content as easy as possible\(^3\). Further input and dialogue with the user community is key to understand their needs. In the field of teaching EPC welcomes the approach taken by DG EAC in Opening up Education to enhance the transparency on what teachers can and can not do with the content they wish to use in their teaching.

6. Fair remuneration of authors and performers

The EPC believes that this issue should be discussed at the level closest to the parties at national level to find the most adequate solution. Regulatory approaches in Member States differ as well as approaches in the various content sectors. However in the field of news media publishing, an important part of the work of a news media company in countries where work for hire provisions do not exist, is to clear the rights of a multitude of contributors, whether employed journalists, freelance journalists and photographers, both for the first publication but also for subsequent exploitations such as archives, or when formerly published content needs to be re-used again in the prime news section.

7. Respect of rights

To ensure that Europe has vibrant and attractive legal online content offers that reflect the European richness in the high quality professional content production, the civil enforcement system needs to be rendered more efficient when it comes to tackling online piracy.

Despite the positive benefits of the implementation of the 2004/48/EC directive, the challenges to fight piracy online have grown even bigger. This question needs to be tackled in the light of the e-Commerce Directive (2001/31/EC), in particular the liability provisions and notice and takedown procedures.

Online piracy affecting the content sector can take different forms depending on the various content sectors. Typically in the field of publishing the B2B piracy is often the major issue, where search engines index, copy, aggregate content and provide links without prior


For user generated content and web content declaration, see: [http://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/6-Users-online-press.pdf](http://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/6-Users-online-press.pdf) and [http://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/5-LCC-identification.pdf](http://ec.europa.eu/licences-for-europe-dialogue/sites/licences-for-europe-dialogue/files/5-LCC-identification.pdf)

For libraries digitisation projects, see: [http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20110920-mou_en.pdf](http://ec.europa.eu/internal_market/copyright/docs/copyright-infso/20110920-mou_en.pdf)
permission. As mentioned in our response in the linking and browsing part, hyperlinking to illegal copies and making available of legal content without permission for commercial use are both increasingly a problem and may require an adaptation to the legal framework.

Reflexions on fast track procedures should be encouraged, accompanied by efficient notice and take down procedures.

The EPC is currently involved in the work related to development of identifiers and interoperable rights expression langue and metadata standards. The involvement of platforms and ISPs in such projects involving machine-readable licences in particular would be helpful and would favour the creation of a sustainable content market.4

8. EU Copyright Title: what is the aim for a creative Europe?

The EU can pursue further harmonisation without the establishment of an EU copyright title. It also remains doubtful which legal basis would serve for such a purpose and whether such a purpose would be necessary and proportionate to achieve its aim. If the overall aim is to create a vibrant European creative and content market reflecting the rich cultural diversity existing in Europe, the aim of the European Commission should be to reflect on an overall long term industrial policy setting the right framework for the creative sectors.

Although the EPC is not ideologically opposed to a unitary title, its doubtful whether a single EU copyright title would help the diverse European content market to thrive or whether such a framework would favour the possibility for other market players, not necessarily in the business of creating professionally created quality content, to deploy their activities further. It is unsure if this would help boosting Europe’s creative sector in terms of employment and creative output.

From a pragmatic perspective there are other more pressing issues, especially in the area of rights declarations, hubs and exchanges to bring more licensing automation, that call for consideration and involvement.

4 See www.linkedcontentcoalition.org and www.rdi-project.eu
Full Response:

I. Rights and the functioning of the Single Market

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

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

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

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 should significantly facilitate the delivery of multi-territorial licences in musical works for online services; the structured stakeholder dialogue “Licences for Europe” and market-led developments such as the on-going work in the Linked Content Coalition.

"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.

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

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5 This principle has been confirmed by the Court of justice on several occasions.
7 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.
8 You can find more information on the following website: http://ec.europa.eu/licences-for-europe-dialogue/.
9 You can find more information on the following website: http://www.linkedcontentcoalition.org/.
10 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.
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\textsuperscript{11} to increase the cross-border availability of content services in the Single Market, while ensuring an adequate level of protection for right holders.

\begin{Verbatim}
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?

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

NO
\end{Verbatim}

The nature of the publishing business is to provide access to published content wherever the reader is located, for a public that almost always reads in the local language in which the content is produced, to favor freedom of the press and the dissemination of professionally published content. This is especially true for the news media publishing sector, as well as for magazine publishing, which before the Internet era already had physical distribution agreements at international level, and subscription possibilities with postal delivery to many, if not all, countries.

While publishers licence their primary rights internationally for their publications, in the field of secondary rights such as press clipping services, the Press Database and Licensing Network (PDLN) aims to deliver licensing solutions for international delivery of press information for media monitoring services.

The book publishing (trade publishing in particular) sector operates by granting worldwide rights for a specific language version. There may be some territorial restrictions for the UK and US markets, as these two countries are considered separate markets in relation to marketing and distribution. The book publishing market is highly related to the local language, and sometimes publishers may not deliver physical copies of books to certain

\begin{footnotesize}
\textsuperscript{11} 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.
\end{footnotesize}
countries, not because of copyright, but because their agreement with the postal operator may only cover certain countries etc. where they know that there is a sufficient demand in order to justify the setup of physical delivery towards certain countries. Additional issues such as national consumer laws that may differ can be an additional reason why delivery to other countries is not ensured. Digital development and the availability of reading devices have however created unprecedented possibilities for readers to acquire books in e-book format across borders.

Generally the provision of access to online content and news media services across borders happens through the negotiation and granting of licences because there is consumer demand justifying such an investment. For example an EPC member that acquired the web TV rights to the top football league (in Norway) negotiated a licence allowing holders of Norwegian credit cards or Norwegian ID numbers to access the content outside Norway. Thus cross border access was provided to respond to the specific demand to ‘travel with your content’ and to allow Norwegians living abroad to access the content. Acquisition of the web TV rights or other content rights is always an investment in the content by the broadcaster or publisher to provide public access to the professional content. Investments always require a sufficient income to the broadcaster/publisher in return.

Rather than a copyright ‘problem’, territoriality is often the consequence of a business decision to serve the markets where there is a consumer demand.

One way of improving accessibility of content across borders in particular by helping service providers to set up such services is to work on initiatives allowing for rights to be easily discoverable, and licensed such as through the adoption of identifiers so that rights owners and licensors can be found easily through interoperable databases / registries12.

As an additional point, in relation to clearing of rights in the news media publishing area, as well as in the magazine publishing area, the employer’s copyright regime, i.e. like the one in the Netherlands and the UK, provides an easy solution to make sure that the copyrights are cleared in all cases also for cross-border online services. In other countries, in most cases, either all copyrights (incl. rights to transfer the rights and amend the work) are acquired in the contracts of employment and freelancer agreements or sufficient online rights are licensed/acquired in the freelancer and other agreements to provide online publications/services cross-border. Due to language, territoriality has not raised issues for press/entertainment content.

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.

EPC members may respond to this question directly in their individual contributions to the consultation.

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12 See [www.linkedcontentcoalition.org](http://www.linkedcontentcoalition.org), [www.rdi-project.eu](http://www.rdi-project.eu), and the UK Copyright Hub.
4. **If you have identified problems in the answers to any of the questions above – what would be the best way to tackle them?**

As mentioned in the responses to the previous questions, the EPC believes that the best way to tackle these issues is to support market led solutions, in particular based on the uptake by the creative industry of identifiers and interoperable metadata describing the content, who owns the rights and where licensors can be found via interoperable databases making rights acquisition easier and thus content more discoverable through licensed services.

Overall, publishing is happening cross-border, and even more so with digital.

However there are issues that go beyond the concept of territoriality that may justify why a service provider does choose not to enjoy the principle of freedom to provide a service. For example, a service provider may choose to use geolocation software to make sure that the content is available in the countries for which the provider has acquired a licence (this happens in the music and film sector); the identity of the users is then linked to either i.e. IP addresses or payment cards. Moreover in the field of online payment systems, and for micro transactions in particular, it is key that it is financially sustainable to use such online payment systems, and that such systems are secure. Furthermore, lack of interoperability of format standards, differing national consumer laws, rules on defamation, libel and privacy are additional areas that play a role when providing a service on a new market.

The current growth and success of the online/digital game industry is a good example of cross-border content services that are based on the employer’s copyright regime (as is the prevailing case in Europe regarding software). The online/digital game industry showcases well the fact that the party who carries the business risks of content investments for new online content products/services (like the publishers do) should receive the copyright as smoothly as possible supported for example by the employer’s copyright regime.

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

**YES**

There are areas that are not related to copyright which may sometimes justify why a service provider does choose not to enjoy the principle of freedom to provide services, such as differing national consumer laws, rules on defamation, libel and privacy. These two areas, not harmonised due to specific reasons, may create legal uncertainty, and thus providers refrain from providing services across borders. A service provider may for commercial reasons not want to deploy marketing efforts, in areas where this is necessary for a service to take off, to some countries where there is little consumer demand.
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**

See answer to question 5.

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**

A market-led approach is a prerequisite in this area. If this is not the case, any legislative or policy initiative imposing rules that affect a sound business organisation may impact adversely innovation, employment and growth. The digital environment is a growth opportunity for the creative industry, and what will drive this growth is to serve and respond to the rising consumer demand.

The European Commission can encourage market-led solutions such as via the Licenses for Europe process, and may also help by supporting projects aiming to make it easier for the end user and businesses to find content, such as projects in the field of identifiers and interoperable metadata standards. This will make rights clearance smoother which is key when offering services whether at national, multinational or pan-European basis.

A key priority for EPC is to continue the work in this field undertaken by the [www.linkedcontentcoalition.org](http://www.linkedcontentcoalition.org) and the [www.rdi-project.eu](http://www.rdi-project.eu)

Additionally, as previously mentioned, other areas play a role, such as efficient and secure micropayment systems for low value high volume transactions that occur in the publishing and media sector, and ensuring that there is an overall healthy market situation among the various players providing services on the web.
B. **Is there a need for more clarity as regards the scope of what needs to be authorised (or not) in digital transmissions?**

1. **[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\(^{13}\) 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\(^{14}\) and databases\(^{15}\).

Directive 2001/29/EC harmonises the rights of authors and neighbouring rightholders\(^{16}\) 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\(^{17}\), (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\(^{18}\). 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

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\(^{16}\) 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”.

\(^{17}\) 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).

\(^{18}\) 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).
“targeting” of a certain Member State’s public. According to this approach the copyright-relevant act (which has to be licensed) occurs at least in those countries which are “targeted” by the online service provider. A service provider “targets” a group of customers residing in a specific country when it directs its activity to that group, e.g. via advertisement, promotions, a language or a currency specifically targeted at that group.

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

Yes/No

Copyright law is based on the principle of territoriality in the sense that a State cannot prescribe legal rules such as copyright law to govern activities outside its national borders. That is why the Berne Convention introduces the concept of ‘national treatment’ to give protection under a country’s copyright law for a foreign work. It also brings with it the need to have legal rules to determine the territorial location of a copyright act such as ‘making available’ a work, which national law applies to an act of exploitation, and a mechanism to deal with situations where the same act (e.g. ‘making available’) is treated for copyright purposes as occurring in more than one territory.

This is the subject of much academic research and is also dealt with extensively in the *Study* commissioned by the EC from De Wolf & Partners to support the EC Consultation (“the De Wolf Study”).

This question is closely linked to the issue of competent jurisdiction and applicable law; to determine either a country of origin approach or an exploitation/”targeted” approach, may have an impact on the applicable law. In principle a country of origin approach to determine the localisation of the making available act could favour forum shopping and the provider could potentially chose a forum (place of establishment, transmission etc) which has a lower level of protection. This could have an impact on the level of protection for the rightsholder in case of infringement.

On this complex issue, any further work that the Commission may undertake should avoid impacting negatively the way that rightsholders may enforce their rights.

The EPC would also like to state that technology can increasingly accommodate all parties in cases of cross border dissemination of content while fully respecting copyright principles.

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19 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 Case C-441/13 (Pez Hejduk); see however, adopting a different approach, Case C-170/12 (Pinckney vs KDG Mediatech).

20 This principle was affirmed in the ECJ’s ruling in *Lagadere*.
9. **[In particular if you are a right holder:] Could a clarification of the territorial scope of the “making available” right have an effect on the recognition of your rights (e.g. whether you are considered to be an author or not, whether you are considered to have transferred your rights or not), on your remuneration, or on the enforcement of rights (including the availability of injunctive relief)?**

**YES / NO**

Any clarification of the territorial scope should not impact negatively the enforcement of rights by the rights holder.

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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 are 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**

In practice, in the field of publishing, rights are acquired in such a way that this question does not really arise. However in countries that do not have an employers’ copyright right it is key that they acquire either all copyrights (incl. rights to transfer the rights and amend the work) in the contracts of employment and freelancer agreements or at least sufficient rights to cover the two sets of right to be able to exploit the work within the publication.

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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 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 as to whether

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

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

such copies are always covered by the mandatory exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC.

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

**YES**

Press publishers encourage sharing of their content by their readers; this is often done through the presence of share buttons or by readers themselves providing hyperlinks. However, when the provision of hyperlinks is exploited in a systematic way by commercial organisations and the provision of such clickable links is used for commercial gain, this should be subject to authorisation.

Providing such clickable links creates an act of communication to the public/making available of the copyrighted work.

In particular following the Svensson/Retriever case (C-466-12) legal clarification is needed as to why the provision of hyperlinks should be compliant with licence terms of the websites (or other platforms) to which they link. It must be clear that rights owners may by their licence terms define, or limit access to and use of, content on an “open website” to a specific category of “the public” (e.g. users who visit the site directly), whether accompanied or not by technical protection measures. Otherwise there will be less professional press content available for free (i.e. without payment) for users in Europe, as the publishers will need to protect their professional press content through speeding up the building of paywalls, etc. There should be no legal possibility in Europe to benefit from commercial gain by re-using, in online content services, the others’ (such as publishers’) content investments without a permission and/or payment.

**Hyperlinking to illegal copies:** A common pattern in copyright infringement cases is the separation of the actual copyrighted material reproduced and stored without permission in a cyber-locker and the posting of the hyperlink to a pirated copy (as the only way to access and download the content). Publishers spend high amounts of money and resources to crawl the web for pirated copies, to send take down notices to cyber-lockers, with varying degrees of cooperation, but have limited options to require removal of the posted links.

The making available of a hyperlink to an infringing copy is the single greatest act enabling piracy on a large scale – and copyright law should thus be amended to treat as infringements those acts of making available hyperlinks to copies which are clearly and obviously unlawfully-produced or obviously unlawfully made available to the public. In this context, it is worth noting that Article 53 German Copyright Act already successfully uses such terminology.

**Regarding unlicensed use of snippets:** the unlicensed use of snippets derived from content on their websites by search engines and aggregators, as the distillation of articles, may substitute for the original article and result in substantial losses to the publishers of the original content.
In Germany, the ‘Leistungsschutzrecht fur Presseleger’ was introduced in 2013. The purpose of the legislation is to ensure that publishers in the online market are not placed at a disadvantage relative to other aggregators of works. We recommend that consideration is given to providing publishers in other member states equivalent legal protection to that conferred by the Leistungsschutzrecht fur Presseleger’.

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

**YES**

The reference to general or specific circumstances in the question lies at the heart of the issue, and the exception in article 5.1 of the 2001/29/EC Directive needs to be carefully measured against article 5.5 of the same Directive (three step test), and should only apply in certain cases:

1. **Temporary acts of reproduction referred to in Article 2, which are transient or incidental (and) an integral and essential part of a technological process and whose sole purpose is to enable: (a) a transmission in a network between third parties by an intermediary, or (b) a lawful use of a work or other subject-matter to be made, and which have no independent economic significance, shall be exempted from the reproduction right provided for in Article 2.**

In general press publishers want readers to be able to visit their website, browse and read the content that the publisher choses to make available, and want this process to work in a seamless manner by granting the screen/cache copy as an implied licence.

These types of copies will be increasingly relevant in our digital future, and perhaps it could be useful to clarify whether such an act of communication is related to business activities or a nonprofit activity; if the act of communication to the public is random or if the business idea is entirely based on the systematic act of communication to the public of materials. It could be helpful for the European publishing business to clarify the difference between direct or indirect use of communication to the public for commercial or non commercial purposes.

Additionally, we would like to refer to the decision of the UK’s Supreme Court in **Public Relations Consultants Association Limited vs. The Newspaper Licensing Agency Limited** which shows how members states’ Courts are getting to grips with intersection of technology and copyright. In this case, the Court dealt with the application of Article 5.1 of the InfoSoc Directive to analyse the copyright status of copies made on an end user’s computer screen and in the internet cache when browsing. Applying the acquis in **Infopaq I &II, the Premier League case** and other cases, the Supreme Court concluded that these copies made by the user’s computer fell within the exception. The Supreme Court’s decision is now the subject of a referral to the EUCJ. The case demonstrates two things: - (1) copyright law does not “break” the Internet but (2) the way technology operates means
that it takes time and care in drawing the legal boundary between copyright-restricted acts and copyright exceptions. Whilst the general proposition that Internet browsing does not require a licence is reasonable, there remains a risk that an overly broad interpretation could mean that activities which ought properly to be licensable (e.g. the consumption of press cuttings) might cease to be so.

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)\(^24\). 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)\(^25\). 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)?**

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.**

In the field of book publishing however, the impact of reselling a digital e-book file would clearly impact negatively the right holder, due to the fact that the digital copy is perfect and moreover limitless, and that the revenue that the seller would gain from the resell would not necessarily benefit the rightsholder. While in the physical distribution scheme, one may pay less for a second hand book as its cover and pages are used and the work is overall less well preserved and is not a perfect substitute, the contrary is the case of a digital copy. Thus allowing reselling would constitute direct competition to the sale of the “original” e-book, leading to loss of revenue for the author and rightsholder. This would and subsequently create competition with the primary market with significant and detrimental effect to investments in new European content and therefore to the provision of diverse

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\(^24\) See also recital 28 of Directive 2001/29/EC.

\(^25\) 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).
European content such as novels, learning materials, and even magazine and premium newspaper content. Enabling the resale of previously purchased digital content would weaken the advertising market of the press or create new competition that would be in practice based on the publishers’ content investment, thereby operating against consumer interest.

For that reason, EPC supports a more restricted interpretation of the scope of the exhaustion principle.

In terms of recent case law, the German regional court of Bielefeld did not apply the UsedSoft case law in a case involving e-books and whether the principle of exhaustion applies to re-sale of ebooks. The German court held that because of the nature of the EU Software Directive 2009/24/EC as lex specialis to the EU Information Society Directive 2001/29/EC, the reasoning in UsedSoft (distribution of computer programmes) could not be applied to other subject-matter. Additionally in the USA the situation is quite clear as demonstrated in the case of Capitol Records LLC v Redigi, Inc26 that the US doctrine of “first sale” does not apply to digital content.

However there is one issue in this context that merits attention as it impacts the consumer experience, but does not economically harm the rightsholder, and that is post-purchase re-download. The current status of copyright should be clarified to improve legal certainty for all stakeholders and improve the consumer experience in new use cases with regard to post-purchase re-download (including post-termination of the rights agreement).

In the past, users have purchased a digital good and downloaded it once onto their systems, with the entitlement for personal, non-commercial perpetual use. They could thus create backup copies, store those on their hard drives (or in their personal cloud storage) and load the copy onto their digital devices for consumption when needed. The vendor thus only required a valid license at the time of sale. No problems occurred once the rights (e.g. from the author agreement) lapsed after a certain amount of time – the work was simply excluded from further sale.

With the advent of cloud listening/reading, major vendors in the markets are offering all-time cloud access to previously purchased content. There is no longer one single download to a user’s hard-drive at the time of sale, instead the user validates its user credentials on a new device and gets instant access to the entire portfolio of previously purchased copies, which are automatically or upon request downloaded to the user’s device(s).

In order for this, the vendor must keep a master copy of the digital good stored on its servers and create a copy and make such a copy is available to the user even after the original grant of rights from the author to the publisher has expired/lapsed. In theory, the post-term copy could be considered a case of copyright infringement committed by the vendor (and/or the publisher, if publisher grants rights here fore). However, economically,

26 USDC, 2013
no harm is done if the original rights holder has received due remuneration at the time of the sale (similar to the previous, pure download scenario). A clarification in copyright law that such a re-download after a sale is not in violation of copyright even if the rights to sell have expired would increase legal certainty for rights holders and vendors alike and help to improve the customer experience.

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. 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.

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

NO

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

We would first wish to make a distinction between registration of works in order to derive copyright protection and the declaration of information about the identity of rightholders and terms and conditions of these works in order to facilitate licensing. We would support all efforts to a) encourage well-structured databases to facilitate declaration of rights and b) commonality in the way such declarations are made to promote interoperability and accessibility of such information.

Digital availability of content will lead inevitably to more databases and registries; this is the way in which information about ownership, rights to content and licensors needs to be organised in order that rights data information is accessible in an efficient way to facilitate the making available of digital content. What is key is that these registries and databases are well structured, interoperable and can support exchanges and licensing through supply chains.

The Linked Coalition Content, a cross media group of experts whose goal is to develop solutions to how to assert ownership of online content and of how to communicate copyright terms and conditions in the digital environment and to enable greater legitimate use of digital content through better management of data relating to rights across the network. The LCC recognises that securing the highest possible level of automation in

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27 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.

28 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.
licensing will reduce barriers to entry, reduce cost in the supply chain, increase volume of use and encourage innovation. The LCC’s goals will be enhanced by greater levels of rights declaration.

Increasingly creators and authors will be able to declare their rights to content in an authoritative way which will lead to less confusion and aid conflict resolution regarding who is the author and who owns the right to a piece of work. Supported by the development of hubs, databases and registries that are interoperable will make information about content more easily discoverable.

To be successful, this process must however be adopted and implemented by the industry and the creative sectors, and be global in its reach (not limited to EU). Political support for these initiatives fosters common understanding of the benefits and aids take up throughout the industry.

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

As mentioned in the response to question 16, the EPC believes that the registration of metadata and rights expressions will help the development of licensing and wider accessibility to content. We do not see any disadvantages with such a development.

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

The European Commission can provide incentives directed at industry sectors to provide them with means to start projects that will help the above mentioned development already ongoing, as well as raise awareness on the importance of such initiatives for licensing, increased access to content and the growth of the European content industry.

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\(^\text{29}\), 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\(^\text{30}\) should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition\(^\text{31}\) was established to develop building blocks for

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\(^{29}\) E.g. the International Standard Recording Code (ISRC) is used to identify recordings; the International Standard Book Number (ISBN) is used to identify books.

\(^{30}\) You will find more information about this initiative on the following website: [http://www.globalrepertoiredatabase.com/](http://www.globalrepertoiredatabase.com/).

\(^{31}\) You will find more information about this initiative (funded in part by the European Commission) on the following website: www.linkedcontentcoalition.org.
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\(^\text{32}\) is seeking to take such identification systems a step further, and to create a linked platform, enabling automated licensing across different sectors.

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

The EU can have a valuable role to play in raising awareness around the importance of identifiers and by providing funding of projects such as the Rights Data Integration Project, ARROW etc. By initiating processes such as Licenses for Europe the European Commission has brought around the table a number of stakeholders and during the dialogue it was widely recognised in several working groups that the work on identifiers is important in the creation of a digital content market. This was particularly felt in working groups 2 and 3 in the Licences for Europe process.

It would be valuable if the European Commission could increasingly set aside funding to stimulate and support the content industry’s technological development.

**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\(^\text{33}\) requires a minimum term of protection of 50 years after the death of the author. The EU rules extend this term of protection to 70 years after the death of the author (as do many other countries, e.g. the US).

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

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

**YES**

The term of protection is as valid in the digital environment as in the physical environment. It represents the possibility and incentive for the creator to make the content available and

\(^{32}\) You will find more information about this initiative on the following website: [http://www.copyrighthub.co.uk/](http://www.copyrighthub.co.uk/).

to ensure a livelihood from its creation. The EC consultation document does not put forward reasons or arguments why the term of protection should not be appropriate in the digital age. The digital environment presents unprecedented possibilities of accessing content, and innovative licensing solutions serving the users, both consumers and business, are only increasing.

In the field of publishing the EPC does not see a need for any changes in this area.

II. Limitations and exceptions in the Single Market

Limitations and exceptions to copyright and related rights enable the use of works and other protected subject-matter, without obtaining authorisation from the rightholders, for certain purposes and to a certain extent (for instance the use for illustration purposes of an extract from a novel by a teacher in a literature class). At EU level they are established in a number of copyright directives, most notably Directive 2001/29/EC.34

Exceptions and limitations in the national and EU copyright laws have to respect international law35. In accordance with international obligations, the EU acquis requires that limitations and exceptions can only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interest of the rightholders.

Whereas the catalogue of limitations and exceptions included in EU law is exhaustive (no other exceptions can be applied to the rights harmonised at EU level)36, these limitations and exceptions are often optional37, 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")38.

34 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.
35 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).
36 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)).
38 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-
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 a 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/NO

The current list of optional exceptions and limitations has been agreed in order to allow Member States to continue to allow for exceptions already in place in their country, exceptions and limitations that are strongly linked to their creative and cultural heritage, which form part of the European cultural diversity. The EPC considers that the exceptions as they are currently defined do accommodate the digital environment. However, the EPC is not per se against further harmonisation in making certain existing exceptions mandatory, on the condition that this is justified by a thorough impact assessment, and that any such provisions would not seek to broaden the scope of the current exceptions, are narrowly framed and do not conflict with the three-step test of the Berne convention.

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/NO

As indicated in the response to the previous question any such harmonisation and mandatory requirement should be considered carefully, an impact assessment would need to be provided and such a harmonisation should not affect the scope of the exception, to avoid any conflict with the three step test.
23. Should any new limitations and exceptions be added to or removed from the existing catalogue? Please explain by referring to specific cases.

The current list is exhaustive and there is no need to add any new exceptions. Perhaps the way to look at this is to examine which exceptions may benefit from being introduced in Member States that have not yet introduced some of them, or as indicated above examine if there is a need for making some of the exceptions mandatory to respond to a clear and evidence based internal market need.

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?

NO

The 1976 US Copyright Act introduced a certain flexibility by the introduction of fair use of a copyrighted work for purposes of reproduction in copies or phonorecords or by any other means specified by that section for purposes such as criticism, comment, news reporting, teaching, scholarship or research. It is important to note that this list is not exhaustive.

The act specifies the factors to be considered whether a use is fair: a) the purpose and character of the use, including whether such use is of commercial nature or is for non-profit educational purposes, b) the nature of the copyrighted work, c) the amount and substantiality of the portion used in relation to the copyrighted work as a whole, and d) the effect of the use upon the potential market for or value of the copyrighted work.

The US courts then apply these factors in their analysis of the case. The extensive fair use case law has also allowed limitations to copyright involving market considerations that would probably not have been allowed in civil law jurisdictions.

The UK fair dealing provision to which this question also seems to refer, is much more restrictive and provides more robust qualifications than the US “fair use”, which is not limited (non exhaustive list) to the types of uses, or types of works. An important appreciation is given to the US courts where social benefit, transformative use etc. seem to take an important part in the evaluation.

It would seem problematic for Europe to take on a US “fair use” approach mainly because copyright is not entirely harmonised in the EU, only those parts of copyright that are needed for internal market purposes, but also to ensure that Member States fully enjoy their competence in the field of culture; Europe also counts a number of civil law jurisdictions.

If flexibility means a fair use style exception subject to case law interpretation as in the US, this type of flexibility would create legal uncertainty, which is not desirable for European right holders, already struggling with enforcing their rights in an online environment often in multiple jurisdictions. In Europe, where markets are different, in many cases national, and where there is strong cultural diversity, it would not be desirable for right holders to be subject to yet another exception that would not be clearly and narrowly defined. The current exceptions already give important latitude for users.
Perhaps some exceptions could be subject to further harmonisation but only if this is required for the functioning of the internal market.

An open norm style exception would seem to go against the legal certainty that Europe is striving for both for creators, right holders and users.

Europe would be better positioned to reach a dynamic flexibility for increased uses by providing incentives to small scale licensing, both B2B and B2C, and automated licensing solutions. Moreover as presented in the User Generated Content Working Group 2 by Godfrey Rust, creators who upload their creations directly to the web would benefit from a system of Web Content Declaration at the point of entry to the network to provide identifiers to help keep track of usage, and monetise their user generated created content should they so wish. See http://ec.europa.eu/ licences-for-europe-dialogue/en/content/wg2-presentations-6th-meeting-25-october

25. If yes, what would be the best approach to provide for flexibility? (e.g. interpretation by national courts and the ECI, 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.

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

NO

Territoriality of exceptions and limitations is not a major problem for EPC members. As expressed by several members, the real problem is enforcement - from the very first stage of finding out who the infringer is, finding out who to write to and, if material is not taken down after a cease and desist letter, this renders the cost of taking action further disproportionate. This point is illustrated more in detail in the part of the consultation dealing with enforcement.

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?)

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\(^\text{39}\) and enable on-site consultation of the works and other subject matter in the collections of such institutions\(^\text{40}\). 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\(^\text{41}\).

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

1. **Preservation and archiving**

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

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

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

**YES**

The mission of libraries and education establishments is to fulfil their public interest mission such as preservation, archiving, teaching, on site consultation, lending etc. As with public service broadcasters this needs to be defined and limited to a clear remit so as not to harm a viable commercial market; this is especially important in the digital environment where business models are providing access to a multitude of content.

The recently adopted Orphan Works Directive has solved an important issue raised by libraries as a major obstacle to their public interest mission, in particular their preservation activities. For rightholders the Directive addresses a key problem, namely that libraries’ digitisation activities do not erroneously include works under copyright protection, by the

\(^\text{39}\) Article 5(2)c of Directive 2001/29.

\(^\text{40}\) Article 5(3)n of Directive 2001/29.

\(^\text{41}\) Article 5 of Directive 2006/115/EC.
establishment of a diligent search procedure and other safeguards such as fair compensation if the orphan works status is put to an end. Moreover the Orphan Works directive allows the making available for cultural and educational access, thus responding to the libraries request for a solution to a key issue in their digital public interest activities.

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

   The approach that has been chosen by the European Union is to deal with these questions on a case by case basis, i.e. the Orphan Works Directive and the MoU on out of commerce works.

   A key requirement of libraries in the physical environment is to provide access to Europe’s considerable body of creative output. But as business models are evolving in the digital sphere it may be that public libraries are no longer needed to provide access to everything. Any additional usage granted to libraries must not go beyond what is necessary to ensure their public interest mission. The digital environment imposes the necessity of finding a delicate balance that does not impede publishers’ commercial activities, and their economic ability to provide professionally produced content to Europe’s citizens and businesses.

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?**

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

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?

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

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?

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

On this particular question, a solution needs to be contractual. This is currently the case as there is a vibrant commercial market for in particular educational publishers in this field, thus providing for an exception would harm existing contractual arrangements and stifle further innovation in a profitable European sector. The fact that contractual solutions to this issue do exist shows that there is no market failure, and no justification for an exception. The notions of “research and private study” to “members of the individual public” are quite large, and it would be difficult to impose limits should remote access be included in a general exception. The risk that this would hurt the normal exploitation of the right holder is real and great.

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

On this issue there needs to be a thorough assessment of the situation and clear identification of any actual problems before considering specific solutions. In principle e-book lending by libraries, provided that it is clearly limited with adequate protection measures and limitations so as not to hurt the vibrant commercial model and market of e-books, should be able to co-exist with publishers’ commercial model. Naturally the number of users that can borrow the book needs to be limited to reflect the physical environment, as the duration of the available file, and any copying, printing etc would need to be restricted/prohibited.

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

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

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?**

A key requirement of libraries in the physical environment is to provide access to Europe’s considerable body of creative output. But as business models are evolving in the digital sphere it may be that public libraries are no longer needed to provide the access to everything. Any additional usage granted to libraries must not go beyond what is necessary to ensure their public interest mission. The digital environment imposes the necessity of finding a delicate balance that does not impede publishers’ commercial activities and their economic ability to provide professionally produced content to Europe’s citizens and businesses. Any extension whether implicit or not to libraries’ role in the provision of digital content to the European public will likely lead to detrimental consequences for the availability of new professional published European content, and create a stronger publicly funded competitor to European publishers.

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.\footnote{You will find more information about his MoU on the following website: \url{http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm} .} Provided the required funding is ensured (digitisation projects are extremely expensive), the result of this MoU should be that books that are currently to be found only in the archives of, for instance, libraries will be digitised and made available online to everyone. The MoU is based on voluntary licences (granted by Collective Management Organisations on the basis of the mandates they receive from authors and publishers). Some Member States may need to enact legislation to ensure the largest possible effect of such licences (e.g. by establishing in legislation a presumption of representation of a collecting society or the recognition of an “extended effect” to the licences granted).\footnote{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.}

### 40. 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?

**NO**

Whether Member States consider it necessary or not to enact legislation to ensure the cross border effect, the key point to consider should be the guidance provided for in the MoU, notably Principle No 3 regarding cross-border uses.

Exchange of repertoires between RRO’s would seem to be a solution to consider. It should however be noted that for many local languages the cross border effect would have little impact; however for English language versions, or other more commonly spoken languages the question may be viewed differently.

### 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)?

**NO OPINION**
B. Teaching

Directive 2001/29/EC\textsuperscript{44} 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. \textbf{(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?

\textbf{(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?

\textbf{YES}

In general the EPC considers that this exception is sufficiently digitally adapted. However should it be proven necessary to clarify the current scope to take into account for example distance learning, this needs to be narrowly defined not to risk the e-learning licence model, and thus jeopardise the development of quality educational material. Some consideration may be given to local collective licensing solutions where parties agree on the scope of the licence.

There are however areas where progress can be made and results delivered without necessarily opening up a discussion on the current exception. Teachers are not only bound by curricula to deliver the right learning experience, they are also seeking inspiration for content outside the curricula to enhance the learning environment. The EPC believes that work can be done in order to enhance the transparency on what teachers can and cannot do with the content they wish to use in their teaching. We are looking forward to working with DG EAC on this specific area related to exception and present solutions to deliver the framework that teachers may need.

43. \textbf{If there are problems, how would they best be solved?}

See answer to question above.

There are areas where progress can be made and results delivered without necessarily opening up a discussion of the current exception. Teachers are not only bound by the curricula to deliver the right learning experience, they are also seeking inspiration for

\textsuperscript{44} Article 5(3)a of Directive 2001/29.
content outside the curricula to enhance the learning environment. The EPC believes that work can be done in order to enhance the transparency on what teachers can and cannot do with the content they wish to use in their teaching. We are looking forward to working with DG EAC on this specific area related to exception and present solutions to deliver the framework that teachers may need.

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

EPC members active in this field offer a number of solutions in this area. By way of example Pearson proposes a solutions ranging from the K12 market to the higher education market where e-books can be customised for universities thus enhancing the learning outcome. Tools for distance learning are also available through Pearson Learning Studio allowing teachers to create, store and share learning content for their students.

In Finland an extended collective licence scheme for educational purposes agreed between the rights holders and the CMO in 2011. The scope ECL License has been agreed by the relevant right holders. The terms of the licence are balanced and do not compete with the direct licensing of educational or press publishers. The license is restricted to a limited use for example regarding the amount of pages/and number of pupils, the possibility to include extracts in teachers’ power point slides / ancillary material only, as well as no right to communicate works to the public in the open internet.

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?**

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

There are areas where progress can be made and results delivered without necessarily opening up a discussion of the current exception. Teachers are not only bound by the curricula to deliver the right learning experience, they are also seeking inspiration for content outside the curricula to enhance the learning environment. EPC believes that work can be done in order to enhance the transparency on what teachers can and cannot do with the content they wish to use in their teaching. We are looking forward to working with DG EAC on this specific area related to exception and present solutions to deliver the framework that teachers may need.

**C. Research**

Directive 2001/29/EC\(^{45}\) enables Member States to choose whether to implement in their national laws a limitation for the purpose of non-commercial scientific research. The open

\(^{45}\) Article 5(3)a of Directive 2001/29.
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?

NO

When EPC members receive requests from researchers for their non-commercial research projects, these requests are accommodated.

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

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

### D. Disabilities

Directive 2001/29/EC\(^{46}\) 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)\(^{47}\).

The Marrakesh Treaty\(^{48}\) 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).

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\(^{46}\) Article 5 (3)b of Directive 2001/29.

\(^{47}\) 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/).

\(^{48}\) Marrakesh Treaty to Facilitate Access to Published Works by Visually Impaired Persons and Persons with Print Disabilities, Marrakesh, June 17 to 28 2013.
50. **(a)** [In particular if you are a person with a disability or an organisation representing persons with disabilities:] *Have you experienced problems with accessibility to content, including across borders, arising from Member States’ implementation of this exception?*

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

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

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

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

The implementation of the Marrakesh Treaty will improve access and needs to be implemented in order to measure the positive results it will hopefully bring to the disabled population.

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**E. Text and data mining**

Text and data mining/content mining/data analytics\(^{49}\) 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

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\(^{49}\) For the purpose of the present document, the term “text and data mining” will be used.
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”50. In the context of these discussions, other stakeholders argued that no additional licences should be required to mine material to which access has been provided through a subscription agreement and considered that a specific exception for text and data mining should be introduced, possibly on the basis of a distinction between commercial and non-commercial.

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

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

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

NO

Today there is no evidence of market failure, but quite the opposite considering the statement provided by publishers during the Licences For Europe dialogue, in which publishers commit to offer TDM licences for non-commercial purposes on request and by default within their standard agreements with the libraries. An exception however could potentially pose problems, notably affecting the quality of carefully managed and complex databases by giving access and permission to the copying (reproduction) of whole collections which potentially can create a risk of abuse. The fact that the scale of copying would not be limited and the difficulties of pursuing infringement if i.e. files shipped to Russia or China it becomes very difficult to control and limit the exception.

50 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
54. **If there are problems, how would they best be solved?**

For the reasons explained in the previous answer, and the fact that there is good faith on behalf of scientific publishers to provide a solution which would ensure the highest quality to the researcher undertaking data mining to do so in a managed environment, the solution put forward in Licenses for Europe is clearly the way forward and in this respect the Commission’s willingness and initiative taken during this dialogue to facilitate such results has been very useful.

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?**

A legislative solution may undermine the provision of royalty-free licenses to carry out non-commercial data mining. As demonstrated in the previous question, new business models and solution are evolving, which could be undermined by a legislative solution in form of an exception.

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

See answer to question 54: For the reasons explained in the previous answer, and the fact that there is good faith on behalf of scientific publishers to provide a solution which would ensure the highest quality to the researcher undertaking data mining to do so in a managed environment, the solution put forward in Licenses for Europe is clearly the way forward and in this respect the Commission’s willingness and initiative taken during this dialogue to facilitate such results has been very useful.

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

### 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. 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

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51 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.
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.52

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?

NO

In the specific case of press publishing, press publishers recognise and welcome that press publishing is a two-way dialogue in today’s digital environment. UGC in the press-publishing sector concerns on the one hand what users do with publishers’ content and on the other how publishers then choose to interact with that content and additional content provided directly by users. In summary: a) publishers choose to share professional content with their readers, in order that they may share it with others, for example by allowing links to articles to be shared via social media, b) readers choose to share content with publishers, in order that they can contribute to democratic debate, for example, by providing text, photographs and video via publishers’ websites or applications on various devices in relation to news events.

To the EPC’s knowledge, no specific problems have been raised by users in the context of being refused permission to use press publishers’ content for non-commercial UGC.

52 See the document “Licences for Europe – ten pledges to bring more content online”: http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf
In fact, press publishers contacted by users who wish to use their content typically provide licences for use of the content usually for free, as long as it is not for commercial exploitation. In the digital environment, press publishers have however started using more straight forward digital solutions to share their content legally and as widely as possible.

Furthermore, technology is being further developed to facilitate click-through licensing solutions for users. In particular, via the Linked Content Coalition, a cross-media, multinational coalition of more than 40 partners – including press publishers - from the media and creative industries, including representatives of authors and artists, which was launched in 2011 to work together with their standards bodies to establish automated and semi-automated communications, based on identifiers and interoperable metadata standards, between rightsholders and those who wish to use content. A pilot project, the RDI, co-funded by the European Commission is now underway to further develop the project.

Similarly any Web user creating new content, whether it involves re-use of existing content or not, should be able simply to add such identifiers to enable them to better protect and potentially monetise their content.

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

The EPC has worked on these issues for several years, originally from a B2B supply-side perspective, aiming to find a solution for publishers to work efficiently with search engines and other aggregating platforms, ensuring that publishers’ rights could be communicated in machine readable formats to be recognised and interpreted at scale and where appropriate, their usage remunerated. As Google in particular, only offered a total opt-out from scraping and indexing via the Robots Exclusion Protocol, publishers wanted to work with search engines to find internet friendly ways to create a partial opt out; they wanted mainly, and still do wish to be able to specify how much of their content could be indexed and displayed in order to retain some control over its usage by third parties while developing their own business models. This early project, ACAP (automated content access protocol) was terminated as soon as Google made it clear that, even though they had participated in its development, they would not implement it. The ACAP work has now been taken over by a global standards body (IPTC) and merged into industry-wide work on

http://www.linkedcontentcoalition.org

53 The Linked Content Coalition (LCC): see http://www.linkedcontentcoalition.org
NewsML. Furthermore, as referenced above, the EPC launched a new project called the Linked Content Coalition in 2011, a cross-media group of experts whose goal is to develop solutions on how to assert ownership of online content and of how to communicate copyright terms and conditions in the digital environment and to enable greater legitimate use of digital content through better management of data relating to rights across the network. The LCC recognizes that securing the highest possible level of automation in licensing will reduce barriers to entry, reduce cost in the supply chain, increase volume of use and encourage innovation. The Linked Content Coalition's technical framework adopted in April 2013\(^{54}\) is now being tested via the eu-co funded RDI project\(^{55}\), co-funded by the European Commission.

The aim is ultimately, for all media types and sectors, to facilitate click-through licensing solutions for users, both for B2C and B2B usages. Identifiers are critical in this context, and with interoperable metadata standards we can establish automated and semi-automated communications between right holders and those who wish to use the content.

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

Many publishes allow users to contribute with their own content and this has often enriched professionally published content - mutualised journalism as it is sometimes called. Press publishers indicate in their terms and conditions how they will deal with material that a creator chooses to share or contribute to the publishers’ platform.

The EPC also believes that content created by users will increasingly make use of identifiers so as to be able to monetize their content throughout its life cycle.

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

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?

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

\(^{54}\) http://www.linkedcontentcoalition.org/#lccframe/c4nz
\(^{55}\) http://www.rdi-project.eu
The EPC recommends the European Commission could encourage projects working on identifiers, interoperable metadata standards, but also automated payment systems, incubators for start-ups all to support the creative sectors find new ways to manage their creative work. Increasingly the users, whether it is the end consumer or a commercial operator, will enjoy easy click through solutions or licenses that are automated and that can be read by a search engine, for example. The most appropriate way would be to create priorities within EC funding programmes to ensure access to funding for such projects.

III. Private copying and reprography

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

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 in the digital environment?

NO

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56 Article 5.2(a) and (b) of Directive 2001/29.
58 These issues were addressed in the recommendations of Mr António Vitorino resulting from the mediation on private copying and reprography levies. You can consult these recommendations on the following website: http://ec.europa.eu/internal_market/copyright/docs/levy_reform/130131_levies-vitorino-recommendations_en.pdf.
59 Art. 5.2(a) and 5.2(b) of Directive 2001/29/EC.
Direct out-licensing of digital publications/services to the end-users (European consumers) will be the future model. This includes direct payments to the publishers/broadcasters from the end-users. The terms of use define the use of publications/services.

We may come to a future where levies are not needed but they are needed today. Private copying continues to take place, compensation will continue to play a valuable role in the years to come to guarantee that right holders are appropriately compensated for legal acts of private copying, especially in an environment where a lot of non-authorised copying takes place.

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?**

**NO**

Private copying will be less of an issue in the future. When there is no harm to the right holder or the harm is minimal, the digital copies should not be subject to private copying levies. This is increasingly the case.

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?**

It is key for publishers to be in charge of licensing through direct licensing. To have e.g. cloud based ISPs’ content services be subject to private copying levies could potentially lead to a loss of revenues and loss of direct customer relations. As already stated increasingly levies will be of less importance in the digital age as licensing will be dealt with directly.

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

**YES**

Transparency is important and can also support awareness-raising. Levies on products should be made visible.

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

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

61 This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies.
ex ante exemption and/or ex post reimbursement schemes which could remedy these situations and reduce the number of undue payments\textsuperscript{62}.

\begin{tabular}{|l|}
\hline
68. \textbf{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?} \\
\hline
NO \\
This question seems to concern primarily manufacturers and importers, EPC has thus limited information and experience in this matter. However should the issue of double payment arise (i.e payment of the levy both by the manufacturer of the device and then again by the importer), it seems useful to implement an efficient system allowing for refunds. \\
\hline
69. \textbf{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.).} \\
\hline
70. \textbf{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?} \\
\hline
71. \textbf{If you have identified specific problems with the current functioning of the levy system, how would these problems best be solved?} \\
\hline
\end{tabular}

**IV. Fair remuneration of authors and performers**

The EU copyright acquis recognises for authors and performers a number of exclusive rights and, in the case of performers whose performances are fixed in phonograms, remuneration rights. There are few provisions in the EU copyright law governing the transfer of rights from authors or performers to producers\textsuperscript{63} or determining who the owner of the rights is when the work or other subject matter is created in the context of an employment contract\textsuperscript{64}. This is an area that has been traditionally left for Member States to regulate and there are significant differences in regulatory approaches. Substantial differences also exist between different sectors of the creative industries.

Concerns continue to be raised that authors and performers are not adequately remunerated, in particular but not solely, as regards online exploitation. Many consider that the economic benefit of new forms of exploitation is not being fairly shared along the

\begin{footnotesize}
\textsuperscript{62} This issue was also addressed in the recommendations of Mr Antonio Vitorino resulting from the mediation on private copying and reprography levies.

\textsuperscript{63} See e.g. Directive 92/100/EEC, Art.2(4)-(7).

\textsuperscript{64} See e.g. Art. 2.3. of Directive 2009/24/EC, Art. 4 of Directive 96/9/EC.
\end{footnotesize}
whole value chain. Another commonly raised issue concerns contractual practices, negotiation mechanisms, presumptions of transfer of rights, buy-out clauses and the lack of possibility to terminate contracts. Some stakeholders are of the opinion that rules at national level do not suffice to improve their situation and that action at EU level is necessary.

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

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

NO

The EPC believes that this issue should be discussed at the level closest to the parties at national level to find the most adequate solution. As rightly stated in the introductory text of this part regulatory approaches in Member States differ as well as approaches in the various content sectors.

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

The EPC believes that this issue should be discussed at the level closest to the parties at national level to find the most adequate solution. As rightly stated in the introductory text of this part regulatory approaches in Member States differ as well as approaches in the various content sectors.

V. Respect for rights

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


\textsuperscript{66} You will find more information on the following website: http://ec.europa.eu/internal_market/ipreinforcement/directive/index_en.htm

\textsuperscript{67} For example when the infringing content is offered on a website which gets advertising revenues that depend on the volume of traffic.
be to clarify the role of intermediaries in the IP infrastructure\textsuperscript{68}. At the same time, there could be clarification of the safeguards for respect of private life and data protection for private users.

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

\textbf{YES}

To ensure that Europe has vibrant and attractive legal online content offers that reflect the European richness in the high quality professional content production, the civil enforcement system needs to be rendered more efficient when it comes to tackling online piracy.

Despite the positive benefits of the implementation of the 2004/48/EC directive, the challenge of fighting piracy online has grown even bigger. Online piracy affecting the content sector can take different forms depending on the various content sectors. Typically in the field of publishing, B2B piracy is often the major issue, where search engines index, copy, aggregate content and provide links without prior permission.

As mentioned in our response to question 11, a common pattern in copyright infringement cases is the separation of the actual copyrighted material reproduced and stored without permission in a cyber-locker and the posting of the hyperlink to such pirated copy (as the only way to access and download the content). Publishers spend high amounts of money to crawl the web for pirated copies, to send take down notices to cyber-lockers, with varying degrees of cooperation, but have limited options to require removal of the posted links.

The making available of a hyperlink to an infringing copy is the one act enabling piracy on a large scale – and copyright law should thus be amended to treat as infringements those acts of making available hyperlinks to copies which are clearly and obviously unlawfully-produced or obviously unlawfully made available to the public. In this context, it is worth noting that Article 53 German Copyright Act already uses successfully uses such terminology.

The EPC believes that all players in the value chain need to cooperate, to ensure that with benefit comes responsibility is important to undertake a) a thorough analysis of the role and effect of content aggregators and b) to ensure that reproduction or displays of copyright material for commercial purposes (i.e. by linking and/or using search engine technology and copying a headline and headnote /photograph) are treated within copyright law as a distribution or making available of the work to the public. It is essential to find efficient ways of tackling copyright infringement on the internet as the spread of the infringing work is so fast which creates damage and loss of revenue at a click. Reflections on fast track procedures should be encouraged, accompanied by efficient notice and take down procedures.

\textsuperscript{68} This clarification should not affect the liability regime of intermediary service providers established by Directive 2000/31/EC on electronic commerce, which will remain unchanged.
To per se exclude a clarification of the current liability provisions of the e-commerce directive is not necessarily helpful. If Europe wants a competitive content market it needs to put the necessary means into place.

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?**

The current legal framework, also comprising the 2001/31/EC Directive, contains provisions which have led to ISPs exercising a middleman role leading to inefficiency when dealing with illegal content. The limited liability provisions where granted in order to make such businesses thrive as they were in the beginning of their development. However over the years it has been shown that these businesses have indeed thrived and in some cases vis small and incremental infringements of 3rd party content. Further clarification on liability provisions and notice and takedown procedures would be welcome.

Additionally EPC is currently involved in the work related to development of identifiers and interoperable rights expression langue and metadata standards. The involvement of platforms and ISPs in such projects involving machine-readable licences in particular would be helpful and would favour the creation of a sustainable content market. See linkedcontentcoalition.org and rdi-project.org.

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?**

NO

Further clarification is welcome as there are perverse outcomes arising from Data Protection legislation where it interacts with notice and take down practices whereby the mantel of privacy is facilitating piracy. The Telefonica judgement said provisions in community law that protect intellectual property must be balanced with those that protect personal privacy. Privacy concerns must be recognised but when it is necessary to prove an infringement of the law right holders should be able to access information allowing them put the infringement to an end and claim damages occurred by the loss.

VI. **A single EU Copyright Title**

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

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?**

**NO**

The EU can pursue further harmonisation without the establishment of an EU copyright title. It also remains doubtful which legal basis would serve for such a purpose and whether such a purpose would be necessary and proportionate to achieve its aim. If the overall aim is to create a vibrant European creative and content market reflecting the rich cultural diversity existing in Europe, the aim of the European Commission should be to reflect on an overall long term industrial policy setting the right framework for the creative sectors.

The introduction of a single EU Copyright Title would not necessarily mean that a licence would, of necessity, cover the entirety of the single market. In that context, it is interesting to draw a comparison with the Regulation for Unitary Patent Protection for the whole of the EU adopted in September 2012. Article 3.2 of that Regulation makes it clear that a European patent will provide: “…uniform protection and shall have equal effect in all the participating Member States.” However, it goes on to say that “It may be licensed in respect of the whole or part of the territories of the participating Member States.” If a similar approach was taken to a unitary copyright, the position would be the same.

Whilst pan-territorial licences may often be in the consumer interest, this is not always the case. Pan-European licences for content can be expensive to acquire. This can discriminate against smaller players who want to provide a service to provide digital content to a local market. If only pan-European licences were available, they may be priced out of the market. In that way, pan-European licences could lead to a concentrated market which would not be in the consumer’s interests.

From a pragmatic perspective we think that there are other more pressing issues, especially in the area of rights automation, that call for solutions. EPC maintains an open mind on this issue but considers that it does not currently high on the copyright ‘to do’ list and the subject would need further analysis of the costs and benefits associated with moving towards a wholly new copyright framework in the EU.

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?**

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69 Regulation 1257/2012 of 17.12.12
VII. Other issues

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

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.

We wish to seek clarification that legal recognition and protection of identifiers associated with a copy of a copyright work, or which appears in connection with the communication to the public of a copyright work, is covered by Article 7 of Directive 2001/29/EC on copyright and related rights in the information society as well as extending similar protection to databases which are protected by the EC’s sui generis database right.

Finally, the EPC is currently in the process of elaborating its Vision Paper on Copyright, Technology and Practical Solutions in the digital age. This is an exercise that is organised independently from EPC’s contribution to this consultation. However EPC would welcome the opportunity to present these proposals to the Commission later in 2014.
Annex

Members of the European Publishers Council

Chairman:

Mr. Francisco Pinto Balsemão, Chairman, Impressa, Portugal

Members:

Dr. Carlo de Benedetti, Chairman, Gruppo Editoriale L’Espresso, Italy

Mr. Jonas Bonnier, CEO, Bonnier, Sweden

Mr. Oscar Bronner, Publisher & Editor in Chief, Der Standard, Austria

Dr. Hubert Burda, Chairman, Burda Media, Germany

Mr. Juan Luis Cebrian, Executive Chairman and Editor-in-Chief, Grupo Prisa, Spain

Mr. Mike Darcey, CEO, News UK, UK

Dr. Mathias Döpfner, CEO, Axel Springer AG, Germany

Mr. Erik Engstrom, CEO, Reed Elsevier

Mr. Luis Enriquez, CEO, Vocento, Spain

Mr. Simon Fox, CEO, Trinity Mirror plc, UK

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Mr Andrew Miller, CEO, Guardian Media Group, UK
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