Public Consultation
on the review of the EU copyright rules

Contents

I. Introduction

A. *Context of the consultation*

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

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

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

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

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

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

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

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

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

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

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

B. How to submit replies to this questionnaire

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

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

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

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

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

C. Confidentiality

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

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

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

Please read our Privacy statement.

PLEASE IDENTIFY YOURSELF:

Name:

GEMA – Gesellschaft für Musikalische Aufführungs- und mechanische Vervielfältigungsrechte

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

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

Register ID:

63284686285-78

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

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

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

TYPE OF RESPONDENT (Please underline the appropriate):

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

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

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

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

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

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

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

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

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

€ **Collective Management Organisation**

€ **Public authority**

€ **Member State**

€ **Other** (Please explain):

…….

…….

II. Rights and the functioning of the Single Market

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

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

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

The dissemination of copyright-protected content on the Internet – e.g. by a music streaming service, or by an online e-book seller – therefore requires, in principle, an authorisation for each national territory in which the content is communicated to the public. Right holders are, of course, in a position to grant a multi-territorial or pan-European licence, such that content services can be provided in several Member States and across borders. A number of steps have been taken at EU level to facilitate multi-territorial licences: the proposal for a Directive on Collective Rights Management[10] should significantly facilitate the delivery of multi-territorial licences in musical works for online services[11]; the structured stakeholder dialogue "Licences for Europe"[12] and market-led developments such as the on-going work in the Linked Content Coalition[13].

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

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

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

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

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

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

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

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

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

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

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

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

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□ NO

□ NO OPINION

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

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

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□ NO

□ NO OPINION

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

[Open question]

See below answer to Q. 4.

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

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

[Open question]

The principle of territoriality does not cause any difficulties for services offering cross-border transmissions of musical content. The most effective solutions for cross-border licensing are provided by the network of collective management societies.

The challenges regarding multi-territorial usage of copyrighted works and cross-border portability cannot be solved by an abolition of the territoriality principle. The territorial nature of copyright is not an obstacle to cross-border offers of musical content, because the copyright to nearly the entire world repertoire of music is easily available for commercial users throughout the EU by the system of CMOs. Rates are transparent and every user is entitled to a licence in each member state. There is no established practice of exclusive exploitation of music rights.

To our knowledge, the main issues that lead the commercial users to limit their services to a certain territory are (i) Business choices based on language, local marketing strategies etc; (ii) Difficulties with cross-border internet/broadband connection and roaming when abroad; (iii) lack of efficient cross-border electronic payment structures; (iv) tax issues.

As a result of the above, in GEMA's experience the overall demand for multi-territorial licences still remains limited. Many commercial users do not determine their business and marketing strategies primarily based on licensing models but on criteria like the interests of local costumers and their language and most of all the expected investment/return balance.

The best way to effectively licence musical works for multi-territorial uses is the one already offered by the worldwide net of collective management societies. Therefore, GEMA is of the opinion that political efforts to simplify rights clearance in the common market should focus on the improvement existing problem-solving mechanisms instead of experimenting with the foundations of copyright. In this context, it is worth mentioning that the newly adopted directive on collective rights management aims at creating a detailed framework for the multi-territorial licensing of rights in musical works for online uses.

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

□ YES – Please explain by giving examples

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□ **NO**

As long as the rights are available, there are no reasons for territorial restrictions on service providers in the online music sector.

As CMOs usually are interested in the widest possible commercial exploitation of the multitude of their works, GEMA offers licences including as many territories as possible. Considering the multitude of different rights required for the use of a single musical work, collective management is best placed to guarantee reliable, efficient and fast licensing for multi-territorial online exploitations of copyrighted works.
However, the right holders in the music sector are struggling until today with the consequences of digital piracy and unauthorised use of protected works. In rare cases effective monitoring and enforcement of rights can even require supplementary territorial limitations in respect of the licensing and exploiting of musical works. The CJEU has already ruled that territorial limitations can be justified for purposes of such kind.

□ NO OPINION

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

□ YES – Please explain by giving examples

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□ NO

□ NO OPINION

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

□ **YES** – Please explain

There should be an appropriate legal framework on EU level to clarify the legal status and the responsibilities of internet intermediaries.

The European Commission has recently launched numerous initiatives to improve the cross-border availability of creative content for of users of copyrighted works. At the same time the efforts to ensure an adequate level of protection for the right holders have so far been

insufficient. The most important step towards an adequate remuneration of right holders in the online sector would be the clarification of the legal status of different intermediary service providers. While the current liability regime that was established by the E-Commerce Directive and provides for a so-called "safe harbour" for certain kinds of services providers was introduced for good reasons, it does not cover all kinds of services on today's market. At least such providers that draw benefits from the systematic exploitation of unlicensed content should be legally liable for the making available of such content. As long as these services are allowed to shift this liability to individual users/uploaders by claiming to be mere host providers they will continue to create unfair competition for the rightfully licensed content providers and jeopardise efforts to create a flourishing digital Single Market for creative content.

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□ NO – Please explain

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□ NO OPINION

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

[The definition of the rights involved in digital transmissions]

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

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

The most relevant rights for digital transmissions are the reproduction right, i.e. the right to authorise or prohibit the making of copies[20], (notably relevant at the start of the transmission – e.g. the uploading of a digital copy of a work to a server in view of making it available – and at the users' end – e.g. when a user downloads a digital copy of a work) and the

[16] Directive 2001/29/EC of the European Parliament and of the Council of 22 May 2001 on the harmonisation of certain aspects of copyright and related rights in the information society.

[17] Directive 2009/24/EC of the European Parliament and of the Council of 23 April 2009 on the legal protection of computer programs.

[18] Directive 96/9/EC of the European Parliament and of the Council of 11 March 1996 on the legal protection of databases.

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

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

communication to the public/making available right, i.e. the rights to authorise or prohibit the dissemination of the works in digital networks[21]. These rights are intrinsically linked in digital transmissions and both need to be cleared.

1. The act of "making available"

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

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

□ **YES**

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

There is no need for legislative action because the scope of the communication to the public right is already clear. The application of the so-called „Country of origin" principle must be rejected.

The scope and application of the making available right as part of the communication to the public right in the sense of Article 3 (1) InfoSoc Directive is harmonised at EU level and sufficiently clear. As for the question, in which territory the making available is taking place, it is to be stressed that the application of the so-called „Country of origin" principle would be highly detrimental to existing licensing solutions. Any application of this rule to online exploitations would result in a system of forum shopping and motivate internet services to move their installations to the territories with the lowest level of enforcement and remuneration. The regime created under the cable and satellite directive cannot be readily applied to online users. Satellite broadcasters and online services are not comparable. The

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

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

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

establishment of a satellite station is a project requiring significant financial effort owing to the necessary technical installations and the frequency assignment stipulated by law. The number of providers is quite limited for this reason. All that is required to operate an online service for offering copyrighted works, on the other hand, is a server with an Internet connection. The location of the server can be easily changed at any time and at little cost. What is more, it is often difficult to ascertain the location of the server. It is also likely that recent technical developments such as cloud computing will make it impossible in future, or may already have rendered it impossible, to determine the location of a server. In Germany, the services described here are subject to quite different legal requirements owing to the aforementioned differences in the technical and economic framework conditions. The operation of a radio station is subject to authorisation and regulated by the state. The operation of Internet platforms, on the other hand, is not subject to authorisation and does not require registration. As a result of the contrasting regulatory environment an application of the country of origin principle in the field of digital media services would immediately result in forum shopping where the location offering the greatest economic advantages and the lowest level of legal protection is deliberately selected as the reference point.

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□ NO OPINION

9. *[In particular if you are a right holder:]* ***Could a clarification of the territorial scope of the "making available" right have an effect on the recognition of your rights (e.g. whether you are considered to be an author or not, whether you are considered to have transferred your rights or not), on your remuneration, or on the enforcement of rights (including the availability of injunctive relief[24])?***

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

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□ **NO**

As already explained above the territorial scope of this right is sufficiently clear. The current legal framework and the jurisdiction of CJEU and national courts already provide for reasonable applications of this right in cross-boarder cases.

□ NO OPINION

2. Two rights involved in a single act of exploitation

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

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

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

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

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☐ **NO**

The application of the two rights to one type of exploitation constitutes no practical problems.

Like all European CMOs GEMA has a long tradition of licensing uses for which more than one right is required. Insofar there is no difference between the transmission of works in digital networks requiring the rights of reproduction and making available and radio or television broadcasts requiring the right of reproduction and the public performance right.
Potential complications do not arise from the split of rights which are entrusted to the same entity but in consequence of the fragmentation of rights and repertoires. Even if there was only one single right required for all kinds of digital transmissions, users would still have to get the authorisations from all right holders including performing artists and producers.
So instead of artificially reducing the rights involved in complex technical processes, the EU should focus on the already established and functioning collaborations between collective management organisations by offering reasonable support and an appropriate legal framework. In this sense the new CMR Directive can be considered as one step in the right direction.

☐ NO OPINION

3. Linking and browsing

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

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

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

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

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

According to the recent case law of the CJEU, the provision of hyperlinks may, under specific circumstances, be considered as a communication to the public of protected content. At least in cases where the linking makes the work available to a new audience, authorisation should be required. It would not be appropriate to assume that a right holder by making available his work on one particular location in the Internet automatically gives his consent for every other online communication to the public of this work.

The CJEU has just recently decided in its Svensson judgment adopted on 13 February 2014 (C-466/12) that the provision on a website of clickable links to copyrighted works constitutes a making available within the meaning of Article 3.1 of the Infosoc Directive. However, not all hyperlinks require authorisation. As links communicate the same work as the initial communication which is made by the same technical means, the Court demands for the 'public' not only an indeterminate and fairly large number of potential recipients but also a new public, i.e. a public which was not taken into account by the right holders when they authorized the initial communication.

In detail, a distinction has to be drawn between different kinds of hyperlinks:
1) The simplest form of hyperlink leads users from one website to the front page of another site (surface link). Comparable to a citation in a written article this kind of hyperlink is of no legal relevance in the sector of copyright and related rights.

2) If the link provides a direct connection to one specific work, the link provider may be held responsible for the content if the right holder wanted the concerned work to be made available to the public exclusively on his own conditions und therefore restricted the access in any way. In such cases the public that is reached by the provision of the link is a new one insofar as it was not intended for the initial communication. Right holders who make their works available in the internet have to retain the possibility to take measures restricting the access to a determined public.

3) The soon expected decision of the CJEU in the Best Water International Case (C-348/13) will bring further clarification regarding the so called framing, i.e. the embedding of protected content in someone else's online presence. In the opinion of the Federal Court of Justice of Germany (BGH), the provider of a framed link adopts the work as his own. Another unsolved issue is the question whether a new public is reached when the access to the protected content itself has not been restricted while it was prohibited by technical means to connect the concerned work with a direct link or to embed it into someone else's website. In such cases, the right holder has at least expressed his will to prevent the linking of his intellectual property.

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

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 NO OPINION

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

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

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…….

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

…….

…….

NO OPINION

The exceptions governed by Art. 5 (1) of the InfoSoc Directive and the private copying exception already provide for an equitable legal framework where users do not have to fear to violate copyright. This question focuses on the way the activities of individual internet users are evaluated from a legal point of view. In this context GEMA would like to stress that, as mentioned above, the main concern of European policy makers should be how to increase the revenues from internet services and host providers to right holders. From the right holders' point of view there is little practical benefit in reinforcing their rights against single users when these rights can't be licensed and enforced in a proper way.

4. Download to own digital content

Digital content is increasingly being bought via digital transmission (e.g. download to own). Questions arise as to the possibility for users to dispose of the files they buy in this manner (e.g. by selling them or by giving them as a gift). The principle of EU exhaustion of the distribution right applies in the case of the distribution of physical copies (e.g. when a tangible article such as a CD or a book, etc. is sold, the right holder cannot prevent the further distribution of that tangible article)[27]. The issue that arises here is whether this principle can also be applied in the case of an act of transmission equivalent in its effect to distribution

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

(i.e. where the buyer acquires the property of the copy)[28]. This raises difficult questions, notably relating to the practical application of such an approach (how to avoid re-sellers keeping and using a copy of a work after they have "re-sold" it – this is often referred to as the "forward and delete" question) as well as to the economic implications of the creation of a second-hand market of copies of perfect quality that never deteriorate (in contrast to the second-hand market for physical goods).

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

□ YES – Please explain by giving examples

…….

…….

□ NO

□ NO OPINION

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

[Open question]

The application of the exhaustion principle to digital transmissions of music would be extremely detrimental to right holders as well as existing businesses.

Piracy has brought the music market close to collapse and it is only recently with the increase of legal online music services that the market is restabilising. The impact of the application of the exhaustion principle on the making available right in order to allow online services the reselling of musical works without authorisation through the right holders would be a major throwback for this development and destabilise the market, because there is no practical difference between selling new and used digital content. The main practical problem with reselling of digital music files is that unlike in the software industry there are no reliable and consumer friendly means to ensure that the original copy is deleted.

The CJEU's "Usedsoft" ruling, which in this context is often used as an argument in favour of the exhaustion principle for digital content in general, was regarding the special case of the distribution of commercial computer software that has been legally sold before and therefore cannot be transferred to other categories of copyrighted works. The reasoning of the court was based on the Directive 2009/24 which is a *lex specialis* for the protection of software products. According to the court's statement Article 4 (2) provides for the exhaustion of the distribution of copies made on a data medium subsequent to an authorized download.

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

However, in respect of all other categories of works Recital 29 InfoSoc Directive and Article 6 (2) WCT explicitly contradict the exhaustion of online rights.
Apart from the legal situation there are no compelling policy reasons why the EU should create a second hand market for music files. The aim of policymaking in this field should be to foster sustainable growth in the creative and internet-related industries in Europe not to cannibalise the existing services.

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

Registration is not often discussed in copyright in the EU as the existing international treaties in the area prohibit formalities as a condition for the protection and exercise of rights. However, this prohibition is not absolute[29]. Moreover a system of registration does not need to be made compulsory or constitute a precondition for the protection and exercise of rights. With a longer term of protection and with the increased opportunities that digital technology provides for the use of content (including older works and works that otherwise would not have been disseminated), the advantages and disadvantages of a system of registration are increasingly being considered[30].

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

□ YES

□ **NO**

□ NO OPINION

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

[Open question]

GEMA does not see any advantages an official registration system at EU level could provide in comparison to the market based systems that already exist and are currently being developed. The databases maintained by CMOs are constantly being advanced and are already more complete and accurate than any optional copyright database could even be.

…….

…….

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

[Open question]

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

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

The creation of new databases on EU level would generate a disproportionate effort, counteract the existing systems and projects and would disadvantage the small, independent and semi-professional right holders.

Apart from tremendous resources that the establishment and maintenance of such a database would require the main argument against such a system is that due to the dynamics of the industry it will never be accurate and complete.
Another argument against (optional) copyright registration is that it will create a two tier system of copyright. In a system of optional registration there will be two categories of copyrighted works: Registered works and non-registered works. It is to be feared that at least de facto registered works will enjoy a lower level of protection than non-registered works.
Such a development will be to the detriment of small, independent and semi-professional creators. Experience in the US shows that especially small and independent creators are reluctant to spend the time, money, and effort to register their copyright. Therefore, it is to be feared that mainly the large corporate rights holders will bother to register their commercially successful works while the small works would remain unregistered. As it is to be expected that copyright enforcement will concentrate on the registered works, non registered works could be publicly regarded to be less protected as registered works. Indeed, non registration could be conceived as a form of waiver of the enforcement of the exclusive right. This would counteract the efforts of the harmonised protection standards provided by the Berne Convention: One important goal was to ensure full and equal protection for all kinds of works.
The EU already provides an online database for the collecting of orphan works and clarifying their legal status. However the well justified reasons for maintaining such a system on EU level can not be transferred to the situation of works that are not abandoned by their right holders and can be identified easily through the existing systems. As mentioned in connection with other issues the new CRM Directive provides for some improvements regarding the international collaboration of collective management organisations. Once introduced to national laws it will also strengthen the functionality and effectiveness of information systems provided by collective management entities.

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18. What incentives for registration by right holders could be envisaged?

[Open question]

…….

…….

D. How to improve the use and interoperability of identifiers

There are many private databases of works and other subject matter held by producers, collective management organisations, and institutions such as libraries, which are based to a greater or lesser extent on the use of (more or less) interoperable, internationally agreed 'identifiers'. Identifiers can be compared to a reference number embedded in a work, are specific to the sector in which they have been developed[31], and identify, variously, the work

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

itself, the owner or the contributor to a work or other subject matter. There are notable examples of where industry is undertaking actions to improve the interoperability of such identifiers and databases. The Global Repertoire Database[32] should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition[33] was established to develop building blocks for the expression and management of rights and licensing across all content and media types. It includes the development of a Rights Reference Model (RRM) – a comprehensive data model for all types of rights in all types of content. The UK Copyright Hub[34] is seeking to take such identification systems a step further, and to create a linked platform, enabling automated licensing across different sectors.

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

[Open question]

Any standardised solution can only be achieved through the joint efforts of different rightsholders and users. Such initiatives require considerable investment and political backing. Moreover, such investments by rightsholders cannot be made in isolation or without the clear commitment from producers, broadcasters and other users of rights and intermediaries to adopt systems so that they materially improve the quality of data provided to rightsholders. The European Commission could facilitate such agreements, using their convening powers, and assist in the endorsement and funding of new initiatives.

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E. Term of protection – is it appropriate?

Works and other subject matter are protected under copyright for a limited period of time. After the term of protection has expired, a work falls into the public domain and can be freely used by anyone (in accordance with the applicable national rules on moral rights). The Berne Convention[35] requires a minimum term of protection of 50 years after the death of the author. The EU rules extend this term of protection to 70 years after the death of the author (as do many other countries, e.g. the US).

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

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

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

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

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

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

□ **YES** – Please explain

There are no compelling reasons for a reduction of the long-approved, international harmonised and economically sound term of copyright protection.

A shortening of the term of protection would be in contradiction to the EUs recent legislative initiatives to harmonise the term of protection at 70 years p.m.a. The Directive 93/98/EEC that harmonised the term on EU level for the first time was reformed in 2006. The term of 70 years was retained mainly because it has become a standard to the leading industrial countries. Therefore EU policy makers decided to extend this standard for the protection of sound-recordings, as well as for the works of joint authorship. The national implementation of the last Directive by the member states has just started. Any initiatives on EU level to reduce the term of protection at this stage could not be considered as sound policy.
Furthermore, on the international level a shortening of the term would lead to confusions and economic imbalances.
In light of the significant value of intellectual property rights for the EU economy any attempt to reduce the scope of protection would be highly questionable in terms of economic policy. Recent studies of OHIM and EPO indicates that about 3.2% of the total economic activity in the EU is generated by copyright-intensive industries, and that those industries contribute 4.2% of the EU's GDP (worth some € 510 billion annually). In Germany alone more than 1.5 million people are working in the creative sector generating a turnover of more than 140 billion Euro p.a. Cultural and creative sectors create and support home-grown jobs and employment, as well as ensure the welfare of society. Copyright protection is key for those sectors to sustain their income.

…….

…….

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

…….

…….

□ NO OPINION

III. Limitations and exceptions in the Single Market

Limitations and exceptions to copyright and related rights enable the use of works and other protected subject-matter, without obtaining authorisation from the right holders, for certain purposes and to a certain extent (for instance the use for illustration purposes of an extract from a novel by a teacher in a literature class). At EU level they are established in a number of copyright directives, most notably Directive 2001/29/EC[36].

Exceptions and limitations in the national and EU copyright laws have to respect international law[37]. In accordance with international obligations, the EU acquis requires that limitations and

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

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 right holders.

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

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

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

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

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

□ YES – Please explain by referring to specific cases

…….

…….

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

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

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

□ **NO** – Please explain

The provisions with relevance to the music sector are already harmonised to a satisfactory extent.

…….

…….

□ NO OPINION

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

□ YES – Please explain by referring to specific cases

…….

…….

□ **NO** – Please explain

As the relevant provisions are already harmonised there is no need for mandatory exceptions.

…….

…….

□ NO OPINION

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

[Open question]

There is no need for new limitations and the introduction of royalty free exceptions is to be strictly refused.

The existing catalogue of limitations and exceptions that are relevant for GEMA's area of operations provides sufficient protection for the reasonable interests of users even in the light of the new technical possibilities. Single difficulties that may arise from the different range of the relevant regulations can be eradicated by a clarification of the contained definitions. If solutions are needed for faster and easier access to protected works for certain kinds of uses they can often be found in collective management systems and licensing under prefenrential conditions rather than in further lowering the level of copyright protection.

Irrespective of our general position that no new exceptions and limitations are required it seems worthwhile to remember that limitations and exceptions need to provide compensation for the rightsholders. The author's right to an equitable remuneration as part of his constitutional protected intellectual property right need to be respected even if strong interests by users or consumers may justify the need of a fast and simple access to the concerned work without awaiting the rightholder's permission. This applies in particular to so-called 'non-commercial uses' which are often not economically and legally irrelevant. For these reasons, which have already been confirmed by the Germany's Federal Constitutional Court, all discussions about introducing new exceptions to copyright and related rights must include the consideration of equitable remuneration.

In addition it must be stressed that the fast development of the digital market is no excuse for justifying uses, which are apparently against copyright law but are at the same time very difficult to control and remunerate, by introducing new limitations.

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…….

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

□ YES – Please explain why

…….

…….

□ **NO** – Please explain why

A general fair use exception is not compatible with traditional continental law and the situation for users in the USA is in any case much more uncertain and inflexible than in the EU.

The European legal tradition and system of copyrights, exceptions and limitations offers the best balance of interests between right holders, users and the society as a whole and within this framework the greatest possible flexibility.

What the EU copyright law needs least of all is the introduction of a general fair use exception in the style of the US-American regime. Those in favour of such a change of system ignore that the EU court and legal system is based on the tradition of continental law that unlike the common law system is incompatible with the principle of fair use. Indeed, the situation for users in the USA is in fact much more uncertain and inflexible than in the EU. Despite many single cases being decided by US-American courts there is never a satisfactory level of legal certainty. And legal certainty is what the market needs most. The expectation of lengthy court proceedings and the impending legal costs scare many users away from relying upon fair use even in the seemingly clearest cases. As a result, fair use only helps those who can afford to claim it, like e.g. the large commercial users. The relatively high standard of legal certainty and flexibility for users and investors in the EU is in fact one of the main reasons why so many market-leading services are located in the European territory. This status and the already reached level of harmonisation in the EU should not be jeopardised by radical system changes that would be accompanied by great legal instability at least for a certain period of time.

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□ NO OPINION

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

disadvantages of such an approach as well as its possible effects on the functioning of the Internal Market.

[Open question]

…….

…….

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

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

…….

…….

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

The provisions with relevance to the music sector are already harmonised to a satisfactory extent. GEMA is not aware of any practical difficulties that have become visible in connection with national differences in the level of limitations and exceptions.

…….

…….

 NO OPINION

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

[Open question]

In principle, remuneration should be charged in the country of the user, where the most efficient controls of the use can take place. Levies have to be collected by the respective collective rights organisation.

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…….

A. Access to content in libraries and archives

Directive 2001/29/EC enables Member States to reflect in their national law a range of limitations and exceptions for the benefit of publicly accessible libraries, educational establishments and museums, as well as archives. If implemented, these exceptions allow acts of preservation and archiving[41] and enable on-site consultation of the works and other subject matter in the collections of such institutions[42]. The public lending (under an exception or limitation) by these establishments of physical copies of works and other subject matter is governed by the Rental and Lending Directive[43].

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

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 right holders. The role of licensing and possible framework agreements between different stakeholders also needs to be considered here.

1. Preservation and archiving

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

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

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

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

…….

…….

□ NO

□ NO OPINION

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

[Open question]

At least there is no reasonable need for any exception or limitation without fair remuneration. The already reached level of harmonisation at the EU should not be jeopardised by new initiatives.

…….

…….

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

[Open question]

…….

…….

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

[Open question]

…….

…….

2. Off-premises access to library collections

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

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

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

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

[Open question]

…….

…….

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

[Open question]

At least there is no reasonable need for any exception or limitation without fair remuneration. The already reached level of harmonisation at the EU should not be jeopardised by new initiatives.

…….

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

[Open question]

…….

…….

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

[Open question]

…….

…….

3. E – lending

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

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

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

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

□ YES – Please explain with specific examples

…….

…….

□ NO

□ NO OPINION

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

[Open question]

At least there is no reasonable need for any exception or limitation without fair remuneration. The already reached level of harmonisation at the EU should not be jeopardised by new initiatives.

…….

…….

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

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

[Open question]

…….

…….

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

[Open question]

Libraries' new activities such as off-premises (online, at a distance) consultation and e-lending are in fact very different from the traditional activities because they often overlap with purely commercial uses of protected works. Digital content can be copied and distributed much easier than physical copies of works. These activities may compete with commercial services because for the end-user there is no difference where he can stream or even download a file.

…….

…….

4. Mass digitisation

The term "mass digitisation" is normally used to refer to efforts by institutions such as libraries and archives to digitise (e.g. scan) the entire content or part of their collections with an objective to preserve these collections and, normally, to make them available to the public. Examples are efforts by libraries to digitise novels form the early part of the 20th century or whole collections of pictures of historical value. This matter has been partly addressed at the EU level by the 2011 Memorandum of Understanding (MoU) on key principles on the digitisation and making available of out of commerce works (i.e. works which are no longer found in the normal channels of commerce), which is aiming to facilitate mass digitisation efforts (for books and learned journals) on the basis of licence agreements between libraries and similar cultural institutions on the one hand and the collecting societies representing authors and publishers on the other[44]. Provided the required funding is ensured (digitisation projects are extremely expensive), the result of this MoU should be that books that are currently to be found only in the archives of, for instance, libraries will be digitised and made available online to everyone. The MoU is based on voluntary licences (granted by Collective Management Organisations on the basis of the mandates they receive from authors and publishers). Some Member States may need to enact legislation to ensure the largest possible

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

effect of such licences (e.g. by establishing in legislation a presumption of representation of a collecting society or the recognition of an "extended effect" to the licences granted)[45].

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

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

…….

…….

□ NO – Please explain

…….

…….

□ **NO OPINION**

The memorandum of Understanding only concerns books and journals.

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

□ YES – Please explain

…….

…….

□ **NO** – Please explain

The situation of interests in the field of musical works and records is in no way comparable to that of old writings in libraries and archives.

…….

…….

□ NO OPINION

B. Teaching

Directive 2001/29/EC[46] enables Member States to implement in their national legislation limitations and exceptions for the purpose of illustration for non-commercial teaching. Such exceptions would typically allow a teacher to use parts of or full works to illustrate his course, e.g. by distributing copies of fragments of a book or of newspaper articles in the classroom or by showing protected content on a smart board without having to obtain authorisation from

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

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

the right holders. The open formulation of this (optional) provision allows for rather different implementation at Member States level. The implementation of the exception differs from Member State to Member State, with several Member States providing instead a framework for the licensing of content for certain educational uses. Some argue that the law should provide for better possibilities for distance learning and study at home.

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

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

□ YES – Please explain

…….

…….

□ **NO**

□ NO OPINION

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

[Open question]

…….

…….

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

[Open question]

The relevant provisions in the German Act on Copyright and Related Rights (§§ 46, 52a, 53 III) are well accepted and satisfactory.

…….

…….

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

[Open question]

…….

…….

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

[Open question]

…….

…….

C. Research

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

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

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

□ YES – Please explain

…….

…….

□ **NO**

□ NO OPINION

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

[Open question]

…….

…….

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

[Open question]

The relevant provisions in the German Act on Copyright and Related Rights (§§ 42a, 53 II Nr. 1) are completely satisfactory.

…….

…….

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

D. Disabilities

Directive 2001/29/EC[48] provides for an exception/limitation for the benefit of people with a disability. The open formulation of this (optional) provision allows for rather different implementations at Member States level. At EU and international level projects have been launched to increase the accessibility of works and other subject-matter for persons with disabilities (notably by increasing the number of works published in special formats and facilitating their distribution across the European Union) [49].

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

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

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

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

□ YES – Please explain by giving examples

……

……

□ **NO**

□ NO OPINION

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

[Open question]

……

……

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

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

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

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

[Open question]

The relevant provision in the German Act on Copyright and Related Rights is § 45a.
On EU level the recent concluded Marrakesh Treaty on the exception for visually impaired people provides for further progress.

…….

…….

E. Text and data mining

Text and data mining/content mining/data analytics[51] are different terms used to describe increasingly important techniques used in particular by researchers for the exploration of vast amounts of existing texts and data (e.g., journals, web sites, databases etc.). Through the use of software or other automated processes, an analysis is made of relevant texts and data in order to obtain new insights, patterns and trends.

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

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

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

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

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

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

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

□ YES – Please explain

…….

…….

□ NO – Please explain

…….

…….

□ NO OPINION

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

[Open question]

…….

…….

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

[Open question]

…….

…….

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

[Open question]

…….

…….

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

[Open question]

…….

…….

F. User-generated content

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

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results or even the definition of UGC. Nevertheless, a wide range of views were presented as to the best way to respond to this phenomenon. One view was to say that a new exception is needed to cover UGC, in particular non-commercial activities by individuals such as combining existing musical works with videos, sequences of photos, etc. Another view was that no legislative change is needed: UGC is flourishing, and licensing schemes are increasingly available (licence schemes concluded between right holders and platforms as well as micro-licences concluded between right holders 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 right holders across different sectors as a result of the "Licences for Europe" discussions[54].

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

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

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

☐ **YES** – Please explain by giving examples

While the creation and dissemination of UGC including derivative works and adaptations should be facilitated it is also important to ensure that the revenues from

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

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

the economic exploitation of such UGC is shared between the creator of the derivative work and the creators of the original work.

First, it is important to understand, that from GEMA's perspective the purely private and non-commercial creation and circulation of UGC including pre-existing works does not create major practical copyright problems. It is only when such content is commercially exploited, e.g. on ad-funded platforms, that there is the question how rights holders can participate in the revenues.

Today, UGC platforms are among the most important services where creative works are enjoyed by end-users. These platforms give various possibilities to end-users to enjoy copyright works in different manners and to use those works to express themselves, through interaction, whether for artistic, political or entertainment purposes. GEMA believes that end-users should be able to enjoy and to continue to interact with creative works made available by rightholders. However, these platforms also create significant revenues from the exploitation of UGC and de facto compete with pure music distribution service.

When claimed as users such providers often refuse responsibility for the uploaded content and refer to the safe-harbour-regime provided by the E-Commerce Directive. But there cannot be an effective enforcement of copyrights and related rights or a fair remuneration when it is only the individual small-scale users or prosumers with little or non commercial interests that can be hold responsible by law.

The current attempts to create a UGC exception, although restricting it to "non-commercial usage" are missing the point. Purely non-commercial creation of UGC is not the problem. An exemption however, that further immunizes the commercial disseminators of UGC content – mainly internet giants generating huge benefits from UGC – would be a huge policy failure, since that would mean giving an entirely commercial sector complete immunity at the expense of the European cultural and creative sector.

Moreover, the fact that there is no evidence at all that suggests any inconvenience or chilling-effect of the current legal framework on UGC (no court cases, no economic evidence, no clear statement from the participants of the Licences for Europe initiative) makes it even more unacceptable as a European policy option. The DeWolf Study also underlines this point by concluding that a new sweeping UGC exception would be unnecessary (DeWolf Study p 534). GEMA fully agrees with the analysis of professor Ficsor, which is also quoted and supported by the DeWolf Study, stating that "the mere reason that a derivative work is created and made available and that therefore it should be free in order to guarantee the freedom of expression is hardly an acceptable reason alone since Article 12 and 14(1) of the Berne Convention provide for an exclusive right of adaptation which "by definition" covers the creation of derivative works".

……

……

□ NO

□ NO OPINION

59. ***(a)*** *[In particular if you are an end user/consumer or a right holder:]* ***Have you experienced problems when trying to ensure that the work you have created (on the basis of***

pre-existing works) is properly identified for online use? Are proprietary systems sufficient in this context?

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

□ YES – Please explain

…….

…….

□ NO – Please explain

…….

…….

□ NO OPINION

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

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

□ **YES** – Please explain

Cf. answer to Q. 58.

…….

…….

□ NO – Please explain

…….

…….

□ NO OPINION

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

[Open question]

The solution to the aforementioned problems cannot be found in the introduction of a general UGC exception even if it were to be restricted to so-called non commercial uses.
As long as the exploitation of the work remains private all uses including the creation of adaptations are already within the scope of existing private copying exceptions. But once the public is reached the rights involved have to be cleared and the exploitation has to be remunerated in an equitable amount. The interest of users for a fast and uncomplicated clearance of rights can be best coped with through the collective management system. GEMA as most other CMOs is under an obligation to give its rights to any user requesting a licence

under reasonable conditions. For that reason the acquirement of the concerned reproduction rights in practice constitutes no problems at all.

…….

…….

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

[Open question]

Instead of criminalising "prosumer" without any economic interest, platform operators that draw an economic benefit from the exploitation of copyright content, e.g. by advertising revenues should be liable for the adequate remuneration of rightsholders.

…….

…….

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

[Open question]

…….

…….

IV. Private copying and reprography

Directive 2001/29/EC enables Member States to implement in their national legislation exceptions or limitations to the reproduction right for copies made for private use and photocopying[55]. Levies are charges imposed at national level on goods typically used for such purposes (blank media, recording equipment, photocopying machines, mobile listening devices such as mp3/mp4 players, computers, etc.) with a view to compensating right holders 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 right holders.

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 right holders whether or not the licence fee paid by the service provider already covers copies made by the end user. This approach could potentially lead to instances of double payments whereby levies could be claimed on top of service providers' licence fees[5657].

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

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

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

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

***64. In your view, is there a need to clarify at the EU level the scope and application of the private copying and reprography exceptions[58] in the digital environment*?**

□ YES – Please explain

…….

…….

□ **NO** – Please explain

The CJEU has given consistent clarifications on the application of the private copying exception. These decisions have been implemented by right holders.

The private copying exception provides consumers with the possibility to freely and legally make private copies of protected content on various devices under a framework that respects their privacy. In the digital environment, private copying is more relevant and more widespread than ever before. The fair compensation for this possibility is safeguarded by the levy system. Any phasing-out or replacement of the private copying system would require right holders to prevent unlicensed copies and give rise to new technical control and protection measures which have been massively rejected by consumers in the past. GEMA supports and promotes systems that are being accepted by right holders and consumers. Therefore, we do not see any need to clarify at the EU level the scope or the application of the private copying exceptions in the digital environment.

Furthermore, it has to be noted that the CJEU has consistently clarified and emphasised important principles on private copying and the fair compensation. Right holders have provided all the necessary practical and operational solutions to implement those decisions. It is regrettable, that the introduction given by the Commission to this part does not refer at all to the recent decisions of the CJEU (like in particular the *Padawan*, the *Opus* and the *VG Wort* rulings).

…….

…….

□ NO OPINION

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

□ **YES** – Please explain

Contractual arrangements can be complementary to the system of private copying remuneration, but cannot replace it. The EU legal framework should allow both systems to coexist.

While GEMA considers private copying remuneration schemes as a viable and approved solution to the benefits of authors and consumers, it is also true that contractual arrangements can be complementary to the system of private copying remuneration. However, it should also

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

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

be noted that modern streaming and cloud storage services still enable and allow for multiple acts of copying falling under the private copying exception (e.g. tethered downloads).

Any phasing-out or replacement of the private copying system would require right holders to prevent unlicensed copies and give rise to new technical control and protection measures which have been massively rejected by consumers in the past. From GEMA's point of view, the decision on whether contractual arrangements or private copying arrangements will prevail in the digital market should be left to right holders and consumers. The EU legal framework should therefore allow both systems to coexist.

…….

…….

□ NO – Please explain

…….

…….

□ NO OPINION

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

Private copying is a key element of the digital economy and fully compatible with new business models.

New digital business models, online service providers and device manufacturers depend on the broad availability of quality content. The sustainability of these models relies on the sustainability of content creation. The private copying compensation right holders receive for the use of their work is not only fair but it provides an important economic incentive for authors to keep creating new content.

Statutory remuneration schemes like private copying combine legal certainty for digital service providers and consumers with low transaction costs. This is fully compatible with new digital business models. In comparison to the legal situation in the US, the European system of clearly defined exceptions and limitations provides legal certainty for new business models and helps to secure their investments. According to numbers of IFPI (cf. www.pro-music.org), there are significantly more legal online music services available in the European Union than in the US.

In the digital environment, private copying is more relevant and more widespread than ever before. Modern streaming and cloud storage services still enable and allow for multiple acts of copying falling under the private copying exception (e.g. tethered downloads). Any phasing-out or replacement of the private copying system would require right holders to prevent unlicensed copies and give rise to new technical control and protection measures which have been massively rejected by consumers in the past.

…….

…….

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

□ **YES** – Please explain

GEMA is generally in favour of the remuneration being visible to the end user.

In Germany, that is already the case when hardware or storage media are purchased by companies or legal entities. Such provisions can help to facilitate the refund of remuneration to non-private users, particularly in case of cross-border transactions. Regarding private users, the comparison between different Member States clearly indicates that the existence of a private copying system does not have a direct impact on the consumer prices of products. However, the visibility of the levy might contribute to raise awareness of the fact that significant amounts from private copying revenues are spent on cultural and social purposes in many EU Member States.

…….

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□ NO – Please explain

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□ NO OPINION

Diverging national systems levy different products and apply different tariffs. This results in obstacles to the free circulation of goods and services in the Single Market. At the same time, many Member States continue to allow the indiscriminate application of private copying levies to all transactions irrespective of the person to whom the product subject to a levy is sold (e.g. private person or business). In that context, not all Member States have ex ante exemption and/or ex post reimbursement schemes which could remedy these situations and reduce the number of undue payments[61].

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

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

…….

…….

□ **NO** – Please explain

If hardware and storage media that are subject to levies and put into circulation in one Member State and then exported to another Member State, and if such hardware and storage media are subject to a statutory liability to pay levies in both Member States, the current legal situation is that the levy will initially be payable in both Member States. In German practice,

[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.

this does not have any effect. If it is already clear from the beginning that the imported products are going to be re-exported, then the levy will not have to be paid in the first place. If the products are exported after a remuneration has already been paid, the remuneration will be refunded. In Germany, this system is working without any problems.

…….

…….

□ NO OPINION

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

A priori exemptions (including a priori reductions) and ex post reimbursement schemes are approved solutions in order to avoid any undue payments. Such systems should ideally be arranged in agreements between the associations of importers and manufacturers and the collective management organisations.

…….

…….

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

A priori exemptions (including a priori reductions) and ex post reimbursement schemes are approved solutions in order to avoid any undue payments. Such systems should ideally be arranged in agreements between the associations of importers and manufacturers and the collective management organisations.

…….

…….

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

[Open question]

As mentioned above, an improved visibility of the levies on invoices and receipts can help to facilitate the refund of remuneration to non-private users, especially in the case of cross-border transactions. Furthermore, it could be examined whether the establishment of a European central office entrusted with refunding schemes and reimbursements on a European level might be helpful and reasonable.

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…….

V. Fair remuneration of authors and performers

The EU copyright acquis recognises for authors and performers a number of exclusive rights and, in the case of performers whose performances are fixed in phonograms, remuneration rights. There are few provisions in the EU copyright law governing the *transfer* of rights from authors or performers to producers[62] or determining who the owner of the rights is when the work or other subject matter is created in the context of an employment contract[63]. This is an area that has been traditionally left for Member States to regulate and there are significant differences in regulatory approaches. Substantial differences also exist between different sectors of the creative industries.

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

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

In the digital age, collective rights management is more important than ever before to ensure a fair remuneration of authors.

Like most European authors' societies GEMA is a not for profit entity formed, owned and controlled by its members. Such societies do not act in their own interest, but in the collective interest of their members, to whom they have a fiduciary duty. Collective management organisations are counterbalancing the superior market power of commercial rights users in negotiations of tariffs. Unlike purely commercial entities authors' societies are based on the solidarity principle by setting equal tariffs for the use of all works in its repertoire (i.e. famous works as well as unknown works). Collective rights management includes benefits for right holders and users:

Fair remuneration: Authors' societies represent a market counterweight to commercial rights users in the right holders' interest.

Protection of cultural diversity: collective rights management ensures that authors are treated on a non-discriminatory basis, by enabling even the smallest and least popular repertoires to access the market and by playing an important role in the promotion of local repertoires.

Easy legal access to musical works: collective rights management allows for an extensive repertoire to be cleared through a single point of entry with complete legal certainty.

Licences granted on a non-discriminatory basis: equal access to works is guaranteed for all users.

Low transaction costs: this is particularly true for the management of rights with a high volume of works and owners.

…….

…….

[62] See e.g. Directive 92/100/EEC, Art.2(4)-(7).

[63] See e.g. Art. 2.3. of Directive 2009/24/EC, Art. 4 of Directive 96/9/EC.

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

□ YES – Please explain

…….

…….

□ NO – Please explain why

…….

…….

□ NO OPINION

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

[Open question]

…….

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VI. Respect for rights

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

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

□ **YES** – Please explain

GEMA is advocating an approach that focuses on the role of intermediary service providers. In particular, intermediary service providers benefitting from the exploitation of copyright

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

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

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

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

protected content must not be allowed to deny their liability for clearing the rights or to shift this liability to individual users by claiming to be mere host providers (see below answer to Q. 76).

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□ NO – Please explain

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□ NO OPINION

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

GEMA is advocating an enforcement approach that focuses on the role of intermediary service providers. In particular, intermediary service providers benefitting from the exploitation of copyright protected content must not be allowed to deny their liability for clearing the rights or to shift this liability to individual users by claiming to be mere host providers.

Today, according to numbers of IFPI (cf. www.pro-music.org), there are significantly more legal online music services available in the European Union than in the US. Many of the leading services worldwide originated in the European Union. The sustainable development of this emerging digital Single Market for creative content depends on the existence of a level playing field for all relevant intermediary service providers.

The current liability regime of intermediary service providers was established by the E-Commerce Directive in the year 2000. The "safe harbor regime" for certain service providers was introduced for good reasons. However, in a converging and increasingly connected online environment this must not lead to a situation where certain service providers can simply deny their liability for clearing the rights by claiming to be mere host providers or to shift this liability to individual users. Such service providers should not be allowed to enter in an unfair competition against the many licensed content providers, thereby undermining all the efforts to create a flourishing digital Single Market for creative content.

The current liability regime of intermediary service providers, and namely of host providers, is therefore not differentiated enough. In the interest of right holders, individual users and legitimate content providers, a more sophisticated and up-to-date solution must be found. The approach of self-regulation did not bring any results in this respect.

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

□ **YES** – Please explain

GEMA is advocating an approach that focuses on the role of intermediary service providers. In particular, intermediary service providers benefitting from the exploitation of copyright protected content must not be allowed to deny their liability for clearing the rights or to shift this liability to individual users by claiming to be mere host providers (see above answer to Q. 76).

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□ NO – Please explain

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□ NO OPINION

VII. A single EU Copyright Title

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

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

□ YES

□ **NO**

□ NO OPINION

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?

A single EU copyright title would lead to greater complexity and further fragmentation of the rights landscape in Europe.

The concept of a single EU copyright title was already described in the Commission's Green Paper on the online distribution of audiovisual works. An optional unitary copyright title, as described in the Green Paper, is based on the registration of the works protected by a "single title" in a database. The costs incurred by such administration can only be justified by an additional benefit for the rights holders and/or licensees. From GEMA's point of view, the additional value created by an optional unitary copyright title does not justify the administrative effort and expense it involves and leads to an unnecessary complication and further fragmentation of the rights landscape. The substantive copyright law has already been harmonised to a great extent through the implementation of Directive 2001/29/EC. From a procedural point of view, successes have been achieved through the implementation of

Directive 2004/48/EC. The optional unitary copyright title would therefore only lead to an improvement in the situation of authors, if it included a Europe-wide uniform level of protection that is higher than the level of protection already in existence in the separate Member States.

Apart from this, there is also no apparent benefit for the licensee. Digital service providers require a large number of rights for the operation of such their platforms. The question of rights clearance is therefore paramount. A unitary copyright title, however, does not promote the necessary aggregation of the rights and thus does not contribute to a system of "one-stop shop" licensing. All that this would amount to is that the same legislation would be applicable to the different rights owners and this only if all rights owners had opted for protection under the "single title". The problem of split-copyright cannot be solved in this way. Apart from this, the unified copyright title based on the Green Paper is only optional and applicable only to future authors and producers. It must also be considered here that an obligation to register would be in contravention of the Revised Berne Convention which states that the enjoyment of copyright shall not be subject to any formality. In view of the limited scope of application of the unified copyright title, there is no reason to expect a measurable improvement; on the contrary, this coexistence would lead to greater complexity and higher administrative costs.

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VIII. Other issues

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

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

[Open question]

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