Public Consultation on the review of the EU copyright rules

Contents

I. Introduction.......................................................................................................................... 2
A. Context of the consultation......................................................................................... 2
B. How to submit replies to this questionnaire......................................................... 3
C. Confidentiality.............................................................................................................. 3

II. Rights and the functioning of the Single Market...................................................... 7
A. Why is it not possible to access many online content services from anywhere in Europe?.................................................................................................................... 7
[The territorial scope of the rights involved in digital transmissions and the segmentation of the market through licensing agreements]........................................................................ 7
B. Is there a need for more clarity as regards the scope of what needs to be authorised (or not) in digital transmissions?............................................................... 8

[The definition of the rights involved in digital transmissions].................................... 10
1. The act of “making available”.................................................................................. 10
2. Two rights involved in a single act of exploitation .............................................. 12
3. Linking and browsing............................................................................................. 12
4. Download to own digital content .......................................................................... 13
C. Registration of works and other subject matter – is it a good idea?............... 15
D. How to improve the use and interoperability of identifiers .................................. 15
E. Term of protection – is it appropriate?................................................................. 17

III. Limitations and exceptions in the Single Market...................................................... 21
A. Access to content in libraries and archives............................................................ 26
1. Preservation and archiving..................................................................................... 26
2. Off-premises access to library collections.......................................................... 29
3. E – lending............................................................................................................... 30
4. Mass digitisation.................................................................................................... 35
B. Teaching.................................................................................................................... 37
C. Research................................................................................................................... 41
D. Disabilities................................................................................................................ 41
E. Text and data mining.............................................................................................. 43
F. User-generated content......................................................................................... 45
IV. Private copying and reprography........................................................................... 48
V. Fair remuneration of authors and performers..................................................... 51
VI. Respect for rights................................................................................................. 54
VII. A single EU Copyright Title................................................................................. 56
VIII. Other issues .......................................................................................................... 56
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" 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 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. 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 Conclusions "Providing digital services and content across the single market requires the

1 COM (2012)789 final, 18/12/2012.
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 – ten pledges to bring more content online”: http://ec.europa.eu/internal_market/copyright/docs/licences-for-europe/131113_ten-pledges_en.pdf.
establishment of a copyright regime for the digital age. The Commission will therefore complete its on-going review of the EU copyright framework in spring 2014. It is important to modernise Europe’s copyright regime and facilitate licensing, while ensuring a high level protection of intellectual property rights and taking into account cultural diversity”.

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

B. **How to submit replies to this questionnaire**

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

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

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

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

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

C. **Confidentiality**

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

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

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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: Europeana Foundation

We are answering on behalf of the Europeana Foundation and the Europeana Network. The Europeana Network is an open forum for experts across Europe, from content providers and aggregators to providers of technical, legal and strategic knowledge and the creative industries.

This consultation offers a unique opportunity to provide input into a discussion that will shape the future rules by which cultural heritage institutions in Europe will have to play. It is clear that the current rules limit what we can achieve by leveraging digital technologies. We hope that our response to the consultation will contribute to a meaningful conversation on how to craft copyright rules that ensure that Europeana and the Network can fulfill their objectives in the digital environment.

This response has been drawn up in consultation with the organisations represented on Europeana Foundation Board and has been further approved through a consultation with the Europeana Network. Three organisations have requested us to add the following statements to our response:

- The Federation of European publishers (FEP) which is a member of the Europeana Foundation board and a member of the network has participated in the drafting process. The FEP does not support the answers provided in this document (with the exception of the answer to question 19). The position of the FEP with regards to the other questions can be found in the submission of the FEP.

- The Conference of European National Librarians (CENL), which is a member of the Europeana Foundation Board, has been asked to participate in the drafting process of this response. The CENL has provided its own position to the consultation which, due to the nature of CENL’s membership, differs to the Europeana submission on several points.

- International Federation of Reproduction Rights Organisations (IFRRO) is a member of the Europeana network. IFRRO does not support the answers provided in this document (with the exception of the answer to question 19). The position of the IFRRO with regards to the other questions can be found in the submission of the IFRRO.

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.

  **Transparency Register ID: 770007812381-96**

- 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):
Europeana does not fit into one of these categories offered above. The Europeana Network includes cultural heritage institutions, research organisations, educational institutions and service providers, creative industries and publishers. The answers submitted below are primarily formulated from the perspective of the Europeana cultural heritage sector (closest approximation of that would be ‘a representative of institutional users’).
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 law9.

The dissemination of copyright-protected content on the Internet – e.g. by a music streaming service, or by an online e-book seller – therefore requires, in principle, an authorisation for each national territory in which the content is communicated to the public. Rightholders are, of course, in a position to grant a multi-territorial or pan-European licence, such that content services can be provided in several Member States and across borders. A number of steps have been taken at EU level to facilitate multi-territorial licences: the proposal for a Directive on Collective Rights Management10 should significantly facilitate the delivery of multi-territorial licences in musical works for online services11; the structured stakeholder dialogue “Licences for Europe”12 and market-led developments such as the on-going work in the Linked Content Coalition13.

"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 portability14.

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).

9 This principle has been confirmed by the Court of justice on several occasions.
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/.
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 to
increase the cross-border availability of content services in the Single Market, while
ensuring an adequate level of protection for right holders.

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

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

   ...........................................................................................................................................
   NO
   NO OPINION

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

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

   ...........................................................................................................................................
   NO
   NO OPINION

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

   [Open question] ..............................................................................................................
   ...........................................................................................................................................

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

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

YES – Please explain by giving examples .................................................................
.................................................................................................................................

NO
NO OPINION

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

YES – Please explain by giving examples .................................................................
.................................................................................................................................

NO
NO OPINION

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

YES – Please explain .....................................................................................................
.................................................................................................................................

NO – Please explain .....................................................................................................
.................................................................................................................................

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\(^\text{16}\) 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\(^\text{17}\) and databases\(^\text{18}\).

Directive 2001/29/EC harmonises the rights of authors and neighbouring rightholders\(^\text{19}\) 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\(^\text{20}\), (notably relevant at the start of the transmission – e.g. the uploading of a digital copy of a work to a server in view of making it available – and at the users’ end – e.g. when a user downloads a digital copy of a work) and the communication to the public/making available right, i.e. the rights to authorise or prohibit the dissemination of the works in digital networks\(^\text{21}\). 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\(^\text{22}\). According to this approach the copyright-relevant act


\(^{19}\) Film and record producers, performers and broadcasters are holders of so-called “neighbouring rights” in, respectively, their films, records, performances and broadcast. Authors’ content protected by copyright is referred to as a “work” or “works”, while content protected by neighbouring rights is referred to as “other subject matter”.

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

\(^{21}\) The right to authorise or prohibit any communication to the public by wire or wireless means and to authorise or prohibit the making available to the public “on demand” (see Art. 3 of Directive 2001/29/EC).

\(^{22}\) See in particular Case C-173/11 (Football Dataco vs Sportradar) and Case C-5/11 (Donner) for copyright and related rights, and Case C-324/09 (L’Oréal vs eBay) for trademarks. With regard to jurisdiction see also joined
(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).

No, it is not. With limited resources available within Cultural Heritage Organisations, to spend on rights clearance, the only acceptable way to provide more clarity with regards to the scope of the ‘making available’ right would be to apply a country of origin principle.

Europeana’s mission is to provide access to cultural heritage throughout the EU. In the majority of cases, works are made available to Europeana without territorial restrictions. There is substantial uncertainty among Europeana’s data providers about the scope of the ‘making available’ right when making works in their collection available to audiences in all of Europe. This is especially pronounced in the case of audiovisual collections.

An approach based on targeted audiences would create increased burdens since dissemination through Europeana is explicitly targeted at users in all member states. Applying a targeted approach would therefore undermine the very objective of Europeana as making cultural heritage collections available to audiences in other member states would be penalised by additional rights clearance requirements.

NO OPINION

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).

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).
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 relief24)?

YES – Please explain how such potential effects could be addressed

NO

NO OPINION

2. **Two rights involved in a single act of exploitation**

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

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

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

NO

NO OPINION

3. **Linking and browsing**

Hyperlinks are references to data that lead a user from one location in the Internet to another. They are indispensable for the functioning of the Internet as a network. Several cases are pending before the CJEU25 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.

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

25 Cases C-466/12 (Svensson), C-348/13 (Bestwater International) and C-279/13 (C More entertainment).
A user browsing the internet (e.g. viewing a web-page) regularly creates temporary copies of works and other subject-matter protected under copyright on the screen and in the 'cache' memory of his computer. A question has been referred to the CJEU\(^{26}\) as to whether such copies are always covered by the mandatory exception for temporary acts of reproduction provided for in Article 5(1) of Directive 2001/29/EC.

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

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

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No, it should not. Requiring the authorisation of the rights holder for viewing and reading content that is already available online does not make sense. It creates legal uncertainty for internet users and would undermine the core function of the internet which is to make information and culture accessible.

NO OPINION

4. Download to own digital content

Digital content is increasingly being bought via digital transmission (e.g. download to own). Questions arise as to the possibility for users to dispose of the files they buy in this manner (e.g. by selling them or by giving them as a gift). The principle of EU exhaustion of the distribution right applies in the case of the distribution of physical copies (e.g. when a tangible article such as a CD or a book, etc. is sold, the right holder cannot prevent the further distribution of that tangible article)\(^{27}\). 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 (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 resellers 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

\(^{27}\) See also recital 28 of Directive 2001/29/EC.

\(^{28}\) 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 \textit{lex specialis} in relation to the Information Society Directive (UsedSoft, par. 51, 56).
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]..................................................................................................................
..................................................................................................................

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 absolute29. 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 considered30.

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]

A registration system would increase the amount of information about rights holders available to all types of users including cultural heritage institutions. This will make it easier for users to check the copyright status of a work and obtain permission for use from the rights holders.

One of the biggest problems facing cultural heritage institutions attempting to make their collections available online is the lack of comprehensive, easily (ideally)}

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.
automatic) accessible information about the copyright status of works, and the identity and location of rights holders. Introducing a registration system at a European level would be a first step in ensuring that such information is more readily available in the future. Europeana is working with its data providers to open up public domain works from their collections and, by providing more legal certainty, a registration system would increase the re-use potential of such works.

An effective and useful registration system needs to record transfers of rights throughout the duration of the copyright protection of the registered works and be transparent and easy to use. All types of rights holders (including individual creators) should be able to register their works, and it should include information on works that are out of copyright or available under open licences in order to create more legal certainty for users of such works.

To fully realise the above advantages, a registration system would need to be mandatory. However a mandatory registration system cannot be implemented without changes to international agreements.

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

[Open question]

A registration system;
• would require extra effort from rights holders registering their works.
• would require regulation, administration and monitoring which would require additional funding most likely from rights holders registering their works, which will create extra costs.
• would need to be mandatory, which requires changes to international agreements that the EU has signed up to.
• will not be able to retroactively solve the existing problem with orphan works and mass digitisation (see more about this in reaction to questions 40 and 41).

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

[Open question] ………………………………………………………………………………………………………
…………………………………………………………………………………………………………………………

D. How to improve the use and interoperability of identifiers

There are many private databases of works and other subject matter held by producers, collective management organisations, and institutions such as libraries, which are based to a greater or lesser extent on the use of (more or less) interoperable, internationally agreed ‘identifiers’. Identifiers can be compared to a reference number embedded in a work, are
specific to the sector in which they have been developed\textsuperscript{31}, and identify, variously, the work itself, the owner or the contributor to a work or other subject matter. There are notable examples of where industry is undertaking actions to improve the interoperability of such identifiers and databases. The Global Repertoire Database\textsuperscript{32} should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition\textsuperscript{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\textsuperscript{34} is seeking to take such identification systems a step further, and to create a linked platform, enabling automated licensing across different sectors.

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

[Open question]

The European Union must ensure: (1) that identifiers as well as rights ownership and permission databases are based on open standards, available to all content creators and that they can be read by all market participants free of charge; (2) that all identifiers as well as rights ownership and permission databases are interoperable and work across all of Europe (and beyond).

Any system that is developed must be developed in a true multi-stakeholder approach (e.g. not only by rights holders and intermediaries) and should be reflective of work already undertaken. Rights ownership and permission databases in particular must be publicly accessible via machine readable interfaces. They must also include the ability to store information on out-of-copyright works, works in the public domain and openly licensed works. Europeana has developed an open and flexible system that focuses on providing interoperable ownership and permission information for works that are made available by more than 2,000 providing institutions throughout, and beyond, the EU.

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\section*{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

\textsuperscript{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.

\textsuperscript{32} You will find more information about this initiative on the following website: \url{http://www.globalrepertoiredatabase.com/}.

\textsuperscript{33} You will find more information about this initiative (funded in part by the European Commission) on the following website: \url{www.linkedcontentcoalition.org}.

\textsuperscript{34} You will find more information about this initiative on the following website: \url{http://www.copyrighthub.co.uk/}.
Convention\textsuperscript{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.

\textbf{20. Are the current terms of copyright protection still appropriate in the digital environment?}

\textbf{YES – Please explain}

\textbf{NO – Please explain if they should be longer or shorter}

No, from the perspective of Europeana and the cultural heritage institutions contributing to Europeana, the current terms of copyright protection (including neighbouring rights protection) are too long. Cultural heritage institutions hold large collections of works that are still under copyright (or where the copyright status is unclear) but that are not exploited commercially anymore.

There are barriers to the incentive to digitise and make available online the large collections of works that are no longer commercially exploited but are or may still be protected by copyright. The rights holders lack the economic incentive to recover the costs of digitising an out-of-commerce work. In contrast, the cultural heritage institution, incentivised by their own public mission, are confronted with the additional cost of rights clearance without the promise of economic return.

The term of protection of life plus 70 years stands in stark contrast with the comparatively short commercial life of the large majority of in-copyright works. As a result, the length of copyright protection prevents cultural heritage institutions digitising and making available in-copyright works and thus from effectively fulfilling their public mission.

One of the outcomes of this is the existence of the so-called ‘20th century black hole’ when it comes to online availability of copyrighted works\textsuperscript{[1]}. There are significantly fewer works from the mid to late 20th century available on Europeana than works from the centuries before (many of which are clearly in the public domain) or from the 21st century (many of which are still available commercially):

The same effect has been observed in other studies dealing with commercial availability on amazon.com[2].

Shortening the term of protection will decrease the number of works that are in copyright but out of commercial exploitation and will thus reduce the scope of the problems outlined above. Given this, the term of copyright protection should be reduced to the minimum requirement established by the Berne Convention (life of the creator plus 50 years)[3].

In addition there are also problems with the recent extension of the protection of sound recordings that affect cultural heritage organisations. The directive extending the term of protection of the rights of performers and phonogram producers on music recordings within the EU was clearly drafted with the recording industry and musicians in mind. However, the wording of the directive makes it clear that it applies to all types of sound recordings, including broadcasts and wildlife sounds. The directive does not give any guidance on how the 'use it or lose it' rule and other provisions should be applied to non-commercial archival recordings.

In addition, Baltic sound and audiovisual archives have also been concerned with the problem of applying the copyright term directive to sound recordings made before 1991, before these countries regained their independence. It has been difficult to determine the current owners of such recordings, and the extension means that we have to live with this problem far into the future.


NO OPINION
III. Limitations and exceptions in the Single Market

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

Exceptions and limitations in the national and EU copyright laws have to respect international law\textsuperscript{37}. In accordance with international obligations, the EU acquis requires that limitations and exceptions can only be applied in certain special cases which do not conflict with a normal exploitation of the work or other subject matter and do not unreasonably prejudice the legitimate interest of the rightholders.

Whereas the catalogue of limitations and exceptions included in EU law is exhaustive (no other exceptions can be applied to the rights harmonised at EU level)\textsuperscript{38}, these limitations and exceptions are often optional\textsuperscript{39}, in the sense that Member States are free to reflect in national legislation as many as 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")\textsuperscript{40}.

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

\textsuperscript{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.

\textsuperscript{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).

\textsuperscript{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)).


\textsuperscript{40} Only the exception established in the recent Orphan Works Directive (a mandatory exception to copyright and related rights in the case where the rightholders are not known or cannot be located) has been given a cross-border effect, which means that, for instance, once a literary work – for instance a novel – is considered an orphan work in a Member State, that same novel shall be considered an orphan work in all Member States and can be used and accessed in all Member States.
Finally, the question of flexibility and adaptability is being raised: what is the best mechanism to ensure that the EU and Member States' regulatory frameworks adapt when necessary (either to clarify that certain uses are covered by an exception or to confirm that for certain uses the authorisation of rightholders is required)? The main question here is whether a greater degree of flexibility can be introduced in the EU and Member States regulatory framework while ensuring the required legal certainty, including for the functioning of the Single Market, and respecting the EU's international obligations.

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

YES – Please explain by referring to specific cases

Yes. For a pan-European core service such as Europeana, this creates an uneven playing field. Cultural Heritage Organisations should be able to enjoy the same exceptions in all member states.

The transition to digital services enables cultural heritage institutions to collaborate across borders and make their collections available across all of Europe and this needs to be mirrored by harmonising the exceptions benefitting these institutions. Without such harmonisation, cultural heritage institutions in some member states are disadvantaged vis-a-vis their partners in others[4].

Cultural heritage institutions are increasingly working together on digitisation projects - as specifically recommended in the 'New Renaissance' report on bringing Europe's cultural heritage online[5]. The fact that the exceptions benefitting publicly accessible libraries, museums and archives have not been implemented (uniformly) in all member states creates unnecessary uncertainties and disadvantages institutions in some member states vis-a-vis institutions in others. This lack of harmonisation introduces unnecessary friction costs for institutions engaging in cross-border collaborations like Europeana.


NO – Please explain

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**

Yes. All existing and additional exceptions should be made mandatory and harmonised to the fullest extent possible (including being broadened in line with our response to the relevant questions below).

All the exceptions provided by the EU copyright directives are drafted on the basis that they do not interfere with the normal exploitation of the work and, therefore, do not unreasonably prejudice rights holders. Making them mandatory in all member states should have no negative effect on rights holders, and in many cases this will substantially benefit citizens and other public policy objectives such as access to knowledge and culture or inclusive education.

For Europeana, who have the objective of making knowledge and culture available to users across all of Europe, it is not acceptable that citizens in some member states enjoy a lesser level of access to the collections of Cultural Heritage Organisations. This uneven implementation of exceptions and limitations of the copyright directive becomes more pressing as more and more activities of cultural heritage institutions are taking place online.

**NO – Please explain**

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**NO OPINION**

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

[Open question]

Yes. There is a need for additional exceptions and limitations. Cultural heritage institutions need to be enabled to make out-of-commerce works in their collections available online for non-commercial purposes. As outlined in the answer to question 34, this does not require a new exception or limitation but can be achieved by expanding the scope of the existing provision in article 5(3)n of the directive.

We also see a need for new exceptions that enable certain forms of usage by the general public that allow citizens and researchers to fully leverage the online access to protected works provided by Europeana and its partners. New exceptions should be added that allow non-commercial sharing of protected works by individuals, as well as for text and data mining (see our answer to Q55).
There is a need to introduce an open-ended norm to all new exceptions and limitations (see answer to Q24).

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

Yes. There is a need for more flexibility in the EU regulatory framework for limitations and exceptions[6]. The exceptions and limitations in the 2001 Copyright Directive were not drafted in a technologically neutral manner which is problematic in times of accelerated technological progress.

By definition, exception and limitations that apply to specific uses cannot ensure that as of yet unknown forms of use are covered by them. Technological innovation can be expected to lead to new forms of use in the near future and Europe’s copyright framework must be flexible enough to deal with such developments.

The current discussion about text and data mining is a good example of this. European researchers have to deal with legal uncertainties about the status of text and data mining activities because the copyright directive fails to address this form of use that was (relatively) unknown when it was adopted. An open norm would provide more certainty on the legal aspects of activities like text and data mining without having to undertake legislative changes (which take years to implement).

A greater degree of flexibility is also desirable when we compare other countries that have a more flexible approach to exceptions and limitations. US cultural heritage institutions contributing to the Digital Public Library of America (the US equivalent of Europeana) have far greater flexibility when making decisions on which collections to digitise and to make available. While European institutions primarily focus on material that is out of copyright, US institutions can leverage the built-in flexibility of the fair use doctrine when making decisions on which parts of their collections to offer online. From the perspective of Europeana and its contributing partners, this constitutes a clear competitive disadvantage. This is also true for the end-users: citizens, researchers and educators in the US currently have far better access to their recent (20th century) culture than European citizens (even though Europe has had a head start when it comes to publicly funded digitisation projects).


NO – Please explain why
25. **If yes, what would be the best approach to provide for flexibility?** (e.g. interpretation by national courts and the ECJ, periodic revisions of the directives, interpretations by the Commission, built-in flexibility, e.g. in the form of a fair-use or fair dealing provision / open norm, etc.)? Please explain indicating what would be the relative advantages and disadvantages of such an approach as well as its possible effects on the functioning of the Internal Market.

[Open question]

The best approach would be one that provides built-in flexibility in reaction to new technological developments or new forms of use. An open norm such as fair use fits this description.

It should be implemented EU-wide (see also answer to Question 22) and in addition to (existing) targeted exceptions and limitations. As long as an open norm is implemented EU-wide, its effect on the functioning of the single market would be minimal while it can be expected to improve the competitive position of European market actors vis-a-vis market participants in other jurisdictions that have an open norm.

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

   Yes, see our answers to questions 21 and 22.

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

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   **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] .............................................................................................................

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   **NO OPINION**
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 and enable on-site consultation of the works and other subject matter in the collections of such institutions. 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.

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

1. Preservation and archiving

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

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

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

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

Whilst the consultation document limits itself to activities of libraries and archives, the questions in this section are equally relevant for museums and other cultural heritage institutions. In fact, the relevant exceptions and limitations explicitly apply to ‘publicly accessible libraries, educational establishments or museums, or [...] archives’. The 2012 Orphan Works directive clarifies this to include ‘film or audio heritage institutions and public-service broadcasting organisations’. In line with this, the following answers (28-35 and 39-41) should be

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43 Article 5 of Directive 2006/115/EC.
read as applying to all cultural heritage institutions falling within this scope and not only to libraries and archives.

Europeana does not have a collection of its own and does not fall within the scope of the reproduction exception. However, it is essential for the functioning of Europeana that the contributing organisations can digitise all works in their collections regardless of their copyright status. Institutions increasingly digitise works in their collections not only to prevent harm to the work, but to be able to better fulfill their missions. Digital copies of cultural heritage works provide many advantages such as being (automatically) indexable, being easier to access and having lower storage costs. The current national implementations of the exception contained in article 5(2)n do not allow cultural heritage institutions to structurally create digital copies of works in their collection. This is highly detrimental in an environment where, as the 'New Renaissance' report[7] puts it, ‘digitisation is more than a technical option, it is a moral obligation’.

In addition, recital 40 of the directive which states that 'Such an exception or limitation should not cover uses made in the context of online delivery of protected works or other subject-matter' is highly problematic. As online dissemination of works becomes more and more important for cultural heritage institutions, limiting the reproduction exception in such a way is simply anachronistic as it prevents institutions from using digitised works in a meaningful way. From the perspective of Europeana, which was set up by the European Commission as a platform for online delivery of cultural heritage objects, such a limitation is highly problematic.

Also, technological measures and their relationship with the exceptions benefitting cultural heritage institutions are highly problematic: often CDs and DVDs are protected by technological measures, the removal of which would require the cooperation of the producer. Art. 6 of the Infosoc Directive provides that technological protection measures are protected per se, independently on the scope of protection, entrusting to voluntary agreements or to subsidiary interventions of member states the adoption of appropriate measures to ensure that legitimate users can make effective use of licensed content.

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

[Open question]

The best solution would be to broaden the existing exception in article 5(2)c of the copyright directive, so that it allows cultural heritage institutions to make reproductions of all works in their collection as long as these are not intended for direct commercial advantage. In line with our answer to question 22, this exception should be made mandatory for all member states.

Also Art. 6 of the InfoSoc directive should be revised in order to enforce exceptions and limitations and to ensure legitimate utilisations of protected works, regardless of format or mode of dissemination.

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]

The main element would be a broadening of the existing exception in article 5(2)c of the copyright directive. Instead of only allowing specific acts of reproduction, it should allow all acts of reproduction necessary for publicly accessible libraries, educational establishments or museums, or by archives to achieve aims related to their public-interest missions. This should include reproductions made as part of mass digitisation efforts, back-up copies and reproductions for format shifting.

Reproductions should be limited to internal use which is not for direct commercial or economic advantage or use in line with other exceptions and limitations allowed for by the directive (such as the broadened version of the exception foreseen in article 5(3)n that we propose in answer to question 34). Reproductions would explicitly be allowed for the purposes of increasing the operational efficiency and reducing costs of the beneficiary institutions. The exception should only apply to works that are part of the permanent collection of an institution and not to works that have been loaned from other institutions (such as interlibrary loans or loans from museum exhibitions).

Broadening the scope of the extension along these lines mirrors the recommendations made as part of the European Commission commissioned 'Study on the application of directive 2001/29/EC on copyright and related rights in the information society' from December 2013[8].

Also Art. 6 of the InfoSoc directive should be revised in order to enforce exceptions and limitations and to ensure legitimate use of protected works, regardless of format or mode of dissemination.

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

[Open question] ........................................................................................................
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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]

As an aggregator, Europeana does not have a collection of its own and as a result does not engage in direct negotiations with rights holders to provide remote access. From the perspective of Europeana, this question fails to address the most urgent issue confronting cultural heritage institutions today: providing online access to works in their collection.

Among the existing exceptions allowed by the InfoSoc directive, the exception for the consultation of works and other subject-matter via dedicated terminals on the
premises of such establishments for the purpose of research and private study comes closest to a mechanism that could enable such uses.

From our perspective as well as the perspective of publicly available libraries, archives and museums and the perspective of their patrons (end-users/consumers), the existing exception that allows institutions to make works in their collections available ‘for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises’ (article 5(3)n) is extremely limited and not in line with the technological possibilities and the legitimate expectations of users anymore. Especially in the light of extremely fast development of mobile devices and services the dedicated terminal approach is no longer realistic.

Limiting the availability of digitised works to dedicated terminals on the premises of cultural heritage institutions prevents them from reaching citizens that cannot travel to the premises (for example because they are disabled or because they lack the economic means to do so). Furthermore, it is out of line with the legitimate expectation of users that have been shaped by universal online accessibility of other services. Europe’s citizens and researchers would greatly benefit from online access to the collections of Europe’s publicly funded institutions. In fact, enabling such access is the very purpose of Europeana.

For publicly funded cultural heritage institutions to fully participate in the digital public space they must be enabled to offer online services that are available from everywhere and by anyone seeking ‘to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits’, as enshrined by article 27.1 of the Universal Declaration of Human Rights. Online universal access to the collections of publicly accessible libraries, museums and archives can play an important role in realising this objective. This objective has been recognised by the European legislator a number of times and it is time that the European copyright rules are adapted to facilitate this objective.

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

[Open question]

The best solution would be to broaden the existing exception in article 5(3)n of the copyright directive and make it mandatory, so that it allows institutions to make available digital copies of out-of-commerce works in their collections via electronic networks such as the internet for non-commercial and educational purposes.
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]

The main element would be a broadening of the existing exception in article 5(3) of the copyright directive. Instead of limiting the 'making available' to dedicated terminals on the premises of the institutions, it should also apply to making the works available online via public networks such as the internet. The scope of the exception should further be expanded to not only include ‘the purpose of research or private study’ by ‘individual members of the public’ but should apply to all non-commercial uses (including education).

Furthermore, it seems reasonable to limit the scope of the exception to ‘works and other subject-matter not subject to purchase or licensing terms’ as long as they are still commercially available. This should be combined with an opt-out clause that would allow rights holders to either prevent the making available of their works or to negotiate licensing terms with the institutions (either on an individual basis or collectively).

These conditions are crucial to ensure that the new broadened exception meets the requirements of the three-step test. Limiting the scope of the exception to publicly accessible cultural heritage institutions and to out-of-commerce works and works that are not subject to licensing terms should satisfy the 'certain special cases' criterion and cannot, by definition, be in conflict with the 'normal exploitation' of the works in question. The fact that the exception would be limited to non-commercial uses of the works made available and that authors can decide to opt-out of the exception would further ensure that 'the legitimate interests of the author' are not necessarily prejudiced.

In fact, many authors would benefit from improving online access to out-of-commerce works because works that they have created are kept available via cultural heritage institutions (and are available to them to build upon or to do research). As a result, citizens also greatly benefit, because they are granted access to works that wouldn't be available through market players.

This solution would also be in line with the relevant recommendations made in the 'New Renaissance' report. The report recommended that 'National governments and the European Commission should promote solutions for the digitisation of and cross-border access to out of distribution works' and that 'For cultural institutions collective licensing solutions and a window of opportunity should be backed by legislation, to digitise and bring out of distribution works online, if rights holders and commercial providers do not do so'.[9]


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

While Europeana does not currently engage in e-lending of books or other types of works, we think that this is an important question which will become relevant for Europeana in the future: as more and more cultural goods are published in electronic form (either digital only or in addition to traditional forms of publication), cultural heritage institutions, and especially libraries, are faced with specific problems related to integrating such works into their collections and services. As the share and relevance of born-digital works increases, digital aggregators such as Europeana will want to provide access to such works.

At the moment, libraries are facing a number of problems when attempting to negotiate agreements to facilitate electronic lending. These include:

- Denial of sales of electronic books to libraries by publishers;
- Removal of content that was available for e-lending without informing the library;
- The use of multiple licences and different models creating lack of clarity on the condition of access to the content for users;
- A deterioration of registered users’ rights (crossing a border with a borrowed book was not a problem. Trans-border online access to an electronic copy offered by a library is often impossible as the result of restrictive licensing conditions).
More generally, the question is if it is necessary and desirable to negotiate agreements to enable electronic lending. Contrary to what is stated in the introduction to this question, there is considerable uncertainty about the status of e-lending under EU law. The directive on rental and lending does not explicitly exclude e-lending or lending of digital items from its scope and some libraries argue that based on the current acquis and the UsedSoft decision by the ECJ, they should be allowed to provide e-books in libraries for download. In the Netherlands, the Association of Public Libraries (Vereniging van Openbare Bibliotheeken) has brought the matter before the courts. They started a test case against the collective management organisation in charge of the lending right arguing that they should be allowed to provide e-books in libraries for download.

It should also be noted that the copyright implications of digital reproductions of loaned museum objects are unclear, especially if the lending takes place across borders. From the perspective of the museum, this subject requires additional clarification.

| NO |
| NO OPINION |

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

[Open question]

The best solution for the problem would be to create legal certainty by unambiguously including the right to e-lending in the EU acquis. While the lending of analogue works is currently being enabled by directive 2006/115 e-lending, which is most often considered as an act of making available, it would probably need to be regulated via an (additional) exception in the InfoSoc directive.

In line with our answers to the issues of online availability and reproductions given above, we consider it necessary that e-lending is covered by a mandatory exception that is harmonised across the EU. Since e-lending must be available for all books (commercially available or not), it should be treated separately from the general exception for making works available online that we argue for in response to question 34. Instead, a new exception should be created specifically for e-lending. This exception could take the form of a statutory licence with fair compensation for authors.

Given the fact that e-books are generally not sold but licensed, there are a number of additional issues that would need to be addressed:

- All e-book titles available for sale to the public should be available to libraries for acquisition and access;
- All e-book titles should be available to libraries at the time of publication;
- Publishers should be required to deliver e-books in interoperable formats;
• Libraries should be permitted to make available acquired or licensed e-books to users only for limited periods of time.
• It should be possible to use the same e-book title simultaneously;
• Registered users should be able to download an e-book either in the library or by way of remote access via authentication systems.

Given that many e-book vendors currently employ technical measures that restrict certain forms of use, the proposed introduction of an exception for e-lending reinforces the need to revise Art. 6 of the InfoSoc in order to enforce exceptions and limitations and to ensure legitimate uses of protected works, regardless of format or mode of dissemination.

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]

From the perspective of an online aggregator of cultural heritage collections, there are enormous differences between physical and online collections. These differences are so fundamental that it does not make sense to compare the two. The ability to offer access to their collections online frees cultural heritage institutions from many of the constraints imposed on them by the properties of analogue media and their physical infrastructure (such as buildings). Being able to offer access to collections online means that, in theory, access can be provided to full collections independent of the location of the viewer or the time of the day. This has the potential to radically improve the ability of publicly funded cultural heritage institutions to carry out their public mission to provide access to knowledge and culture.

Unfortunately, this enormous potential is currently being held back by copyright rules which unnecessarily restrict how cultural heritage institutions can exercise their mission in the online environment. Under the current EU copyright rules, cultural heritage institutions are dependent on permission from rights holders in order to make protected works in their collection available online. As we have argued above, this makes no sense in situations where the majority of works held by these institutions are not even commercially available.

With regards to the above, the 'study on the application of directive 2001/29/EC on copyright and related rights in the information society’ that was commissioned by the European Commission and published in December 2013 contains an interesting observation. At the end of the section discussing inter alia the exceptions benefitting cultural heritage institutions, the authors observe that:

"The large-scale digitization projects ultimately aim at the making available of the collection, [...] the making available for consultation is increasingly requested to apply at distance and online; and the lending is shifting to cover the online
transmission of digital items. The exception-by-exception reasoning, which is the model of the InfoSoc Directive, might not be relevant anymore. Maybe it is time to look at different uses that some categories of users (libraries or educational institutions) or some objectives (access to culture and knowledge or education) would be privileged to undertake under a limitation of copyright. […] the space of non-infringing uses could be defined by their objective and some general conditions, including a more open requirement that the use does not exceed what is necessary for its objective. This is a radical move that this study has not made. It could make our system of exceptions more fit for its purpose and understandable for users and copyright owners alike. If the requirements for each exception are adequate and legitimate, it would not sacrifice the high level of protection of copyright and related rights that the EU law has adopted."

From the perspective of Europeana, such an approach would have many benefits. It would create room for rethinking Europe’s rich tradition of providing access to knowledge and culture through public institutions and it would enable Europeana and its partners to fully leverage the possibilities offered by digitisation and near universal connectivity.


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] ………………………………………………………………………………………………………
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4. Mass digitisation

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

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**

From the perspective of Europeana and the cultural heritage institutions contributing to Europeana, this question (and the following) is too limited. Given this, we believe that this question cannot be answered in a meaningful way by focusing on the application of the 2011 MoU alone.

The issue of mass digitisation is far broader than what can be addressed with the 2011 MoU and the 2012 Orphan Works directive (the other relevant European policy instrument in this area). Copyright issues related to the mass digitisation of collections and the subsequent making available of digitised works require a comprehensive approach that cannot be based on the principles of a due diligence search and voluntary licensing agreements. If we want to enable European cultural heritage institutions to transfer their collections into the digital age (as expressed by the very existence of Europeana) we need a far more comprehensive approach.

Both the 2012 directive on certain permitted uses of orphan works and the 2011 MoU on out-of-commerce works are insufficient to address the copyright issues arising from mass digitisation projects. In addition, the extremely slow uptake of the MoU (according to the 2013 ’study on the application of directive 2001/29/EC on copyright and related rights in the information society’ there is one single project that is ’inspired’ by the MoU) clearly illustrates that the MoU is not a suitable mechanism for enabling mass digitisation on a large scale.

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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](http://ec.europa.eu/internal_market/copyright/out-of-commerce/index_en.htm).

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 rightholders are not members of the collecting society.
The Orphan Works directive is equally ill-suited to enable mass digitisation projects. While it will enable publicly accessible libraries, museums and archives to make orphan works available after a due diligence search has been carried out for specific works, the requirement of carrying out due diligence searches makes it effectively unusable for mass digitisation projects as this would require huge additional investments in both time and money.

With regards to making the results of mass digitisation projects available online, the inadequacies of both the Orphan Works directive as well as the MoU can be addressed by an extension of the scope of the exception created by article 5(3)n of the copyright directive as outlined in the answer to question 34 above. Doing this would provide Europe's cultural heritage institutions a clear legal framework for operating in the digital environment that would allow them to to achieve aims related to their public interest missions.

This approach would mean that mass digitisation and the resulting online activities of cultural heritage institutions are covered by two targeted exceptions: an exception covering the making of reproductions (an expanded version of the current exception defined in 5(2)c) of all works in their collections and an exception covering the making available of out-of-commerce works (an expanded version of the current exception defined in 5(3)n).


NO – Please explain ..........................................

NO OPINION

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

YES – Please explain

This is certainly necessary. The public has a right to obtain online access to the collections of all publicly accessible libraries, museums and archives across Europe (see article 27.1 of the Universal Declaration of Human Rights). There is no good reason for limiting mechanisms that create such access to certain types of content. One of the main goals of Europeana is to integrate collections of different types and to create links between cultural heritage objects held by a wide range of institutions.

The approach proposed in reaction to questions 40 and 34 above would cover all types of works and other subject matter that are held by these institutions.
This solution would also be in line with the relevant recommendation made in the 'New Renaissance' report that 'solutions for orphan works and out of distribution works must cover all the different sectors: audiovisual, text, visual arts, sound'[12].


NO – Please explain

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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 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

One of the main intended uses of the content that is made available via Europeana is use in educational settings. Europeana is involved in a number of project that focus on turning content that is available via Europeana into educational

resources, and Europeana is working on a licence that allows for educational re-use.

At present, article 5(3)a of the InfoSoc directive allows Member States to provide for exceptions or limitations to the rights of reproduction and communication to the public when a work is use[d] for the sole purpose of illustration by teaching...as long as the source, including the author’s name is indicated, unless this turns out to be impossible and to the extent justified by the non-commercial purpose to be achieved. The current exception for teaching in EU law is written in a rather broad and open way but none of the EU countries have implemented it as broadly as allowed by the Copyright Directive.

Because of the narrow implementations of the broad exception provided in the directive, permitted use of works in education differ between member states. This presents special difficulties for the providers of online open courses and other open educational resources and service that can be access by citizens of various EU countries, for example by the recently launched portal http://openeducationeuropa.eu

The challenges are especially problematic for the development of resources developed in the Lifelong Learning Programme and the new Erasmus+ programme, where the audience is always cross-border and therefore multiple copyright laws apply. Educators and developers of open educational materials are less likely to publish and share their resources because they are not able to properly assess the legal consequences in other member states. This stands in the way of the implementation of the policies from Opening Up Education programme of the European Commission[13].


NO

NO OPINION

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

[Open question]

The problem would best be solved by making a broad educational exception mandatory for all EU countries. This mandatory educational exception should cover all uses of all types of works for illustration of teaching, regardless of the institution. It is important to stress that uses of multimedia works (such as audiovisual material) should be expressly included.

If implemented broadly into the national laws, the exception allows for use of any copyrighted material, including text, film, multimedia for illustration of teaching in classrooms and also in online courses. It should also allow for using copyrighted
works in teaching compilations, whether analogue or digital. Such uses should not require a licence, especially if they are Open Educational Resources.

It is important that educational use is clearly defined, so that the creators of (open) educational resources know what their rights are.

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

[Open question] ........................................................................................................................................................................
.................................................................................................................................................................................................

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

[Open question]

The problem would best be solved by making a broad educational exception mandatory for all EU countries. This mandatory educational exception should cover all uses of all types of works for illustration of teaching, regardless of the institution. It is important to stress that uses of multimedia works (such as audiovisual material) should be expressly included.

It should be made explicitly possible for cultural heritage institutions to make works available online for educational purposes without restriction to on-site terminals, both in original form, as well as in the form of an adaptation (compare with our answer to question 34).

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

[Open question] ........................................................................................................................................................................
.................................................................................................................................................................................................
C. Research

Directive 2001/29/EC\textsuperscript{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]……………………………………………………………………………………………………………………

………………………………………………………………………………………………………………………………………………………………

\textsuperscript{47} Article 5(3)a of Directive 2001/29.
D. Disabilities

Directive 2001/29/EC 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).

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

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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

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

[Open question]

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

[Open question]

51. Text and data mining

Text and data mining/content mining/data analytics⁵¹ 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

⁵¹ For the purpose of the present document, the term “text and data mining” will be used.
publishers as an outcome of “Licences for Europe”\textsuperscript{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.

\begin{tabular}{|p{10cm}|}
\hline
53. (a) [In particular if you are an end user/consumer or an institutional user:] \textit{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:] \textit{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:] \textit{Have you experienced specific problems resulting from the use of text and data mining in relation to copyright protected content, including across borders?} \\
\hline
\end{tabular}

\textbf{YES – Please explain}

Europeana does not currently provide text and data mining (TDM) services to the end user. However, it is technically possible to mine the metadata contained in Europeana via our API. That this is possible is due to a drive by Europeana to convince content providers to commit to making their metadata available under a CC0 public domain dedication. Europeana has now turned its attention to helping to realise the value of Europe’s digitised heritage by facilitating direct access to this content for researchers (Europeana Cloud) and the creative industries (Europeana Creative) in order to foster innovation. It is becoming increasingly clear that the ability to deploy TDM across this content will be an important factor in the success of such initiatives.

At the same time much of our cultural heritage content is being enhanced in a manner which will be of value to researchers who are interested in applying TDM e.g. The Europeana Newspapers project enhances digitised historical newspapers, applying technologies such as optical character recognition and named entity recognition. The project has interviewed several researchers who have expressed how valuable it would be to mine such a corpus.

\textbf{NO – Please explain} .................................................................
........................................................................................................

\textbf{NO OPINION}

\begin{flushright}
\textsuperscript{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
\end{flushright}
54. If there are problems, how would they best be solved?

[Open question]

Although the vast majority of content aggregated by Europeana is public domain or, if not, open access, a huge amount of heterogeneity exists across the licences under which this content is made available. Even if the licence information is made available in the metadata (and often it is not) the mixture of licence conditions is not conducive to the application of TDM.

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]

A legislative solution granting an exception for the purpose of text and data mining would help to open up and realise the value of investment in digitised cultural heritage. Such an exception should allow for copies of content to be made in order to extract facts and data. It should not attempt to distinguish between commercial and non-commercial use.

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]

Currently public domain cultural heritage content is distributed across countries and institutions. An infrastructure which allows end users to directly access and download the aggregated cultural content might help facilitate text and data mining.
F. **User-generated content**

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

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

58. (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

NO

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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”:

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

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

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

[Open question] ........................................................................................................
.........................................................................................................................

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

[Open question] ........................................................................................................
.........................................................................................................................
IV. Private copying and reprography

Directive 2001/29/EC enables Member States to implement in their national legislation exceptions or limitations to the reproduction right for copies made for private use and photocopying.\(^55\). 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 rightholders for the harm they suffer when copies are made without their authorisation by certain categories of persons (i.e. natural persons making copies for their private use) or through use of certain technique (i.e. reprography). In that context, levies are important for rightholders.

With the constant developments in digital technology, the question arises as to whether the copying of files by consumers/end-users who have purchased content online - e.g. when a person has bought an MP3 file and goes on to store multiple copies of that file (in her computer, her tablet and her mobile phone) - also triggers, or should trigger, the application of private copying levies. It is argued that, in some cases, these levies may indeed be claimed by rightholders whether or not the licence fee paid by the service provider already covers copies made by the end user. This approach could potentially lead to instances of double payments whereby levies could be claimed on top of service providers’ licence fees.\(^56\)

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

NO OPINION

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55 Article 5.2(a) and (b) of Directive 2001/29.
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.
58 Art. 5.2(a) and 5.2(b) of Directive 2001/29/EC.
65. Should digital copies made by end users for private purposes in the context of a service that has been licensed by rightholders, and where the harm to the rightholder is minimal, be subject to private copying levies?59

YES – Please explain

NO – Please explain

NO OPINION

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

[Open question] .................................................................
.................................................................................

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

YES – Please explain

NO – Please explain

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

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

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

\begin{multicols}{2}
\textbf{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

NO OPINION
\end{multicols}

\begin{multicols}{2}
\textbf{69. What percentage of products subject to a levy is sold to persons other than natural persons for purposes clearly unrelated to private copying? Do any of those transactions result in undue payments? Please explain in detail the example you provide (type of products, type of transaction, stakeholders, etc.).}

[Open question] ........................................................................................................................................
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\begin{multicols}{2}
\textbf{70. Where such undue payments arise, what percentage of trade do they affect? To what extent could a priori exemptions and/or ex post reimbursement schemes existing in some Member States help to remedy the situation?}

[Open question] ........................................................................................................................................
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\end{multicols}

\begin{multicols}{2}
\textbf{71. If you have identified specific problems with the current functioning of the levy system, how would these problems best be solved?}

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

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

[Open question] ……………………………………………………………………………………………...

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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\(^{62}\) 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.
VI. Respect for rights

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

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<tr>
<th>75. Should the civil enforcement system in the EU be rendered more efficient for infringements of copyright committed with a commercial purpose?</th>
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<td>YES – Please explain</td>
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<th>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?</th>
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<td>[Open question] ………………………………………………………………………………………………………………………………………………………………………………………………………</td>
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\textsuperscript{65} You will find more information on the following website:
http://ec.europa.eu/internal_market/iprenforcement/directive/index_en.htm

\textsuperscript{66} For example when the infringing content is offered on a website which gets advertising revenues that depend on the volume of traffic.

\textsuperscript{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.
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?*

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<th>Option</th>
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<td>YES</td>
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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?  

[Open question] ..........................................................................................................................  
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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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