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
B. Is there a need for more clarity as regards the scope of what needs to be authorised (or not) in digital transmissions?....10
1. The act of "making available"....10
2. Two rights involved in a single act of exploitation....11
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?....14
D. How to improve the use and interoperability of identifiers....15
E. Term of protection – is it appropriate?....16
III. Limitations and exceptions in the Single Market....16
A. Access to content in libraries and archives....19
1. Preservation and archiving....20
2. Off-premises access to library collections....21
3. E – lending....22
4. Mass digitisation....24
B. Teaching....25
C. Research....27
D. Disabilities....28
E. Text and data mining....29
F. User-generated content....31
IV. Private copying and reprography....34
V. Fair remuneration of authors and performers....37
VI. Respect for rights....38
VII. A single EU Copyright Title....40
VIII. Other issues....41

I. Introduction

A. Context of the consultation

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

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

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

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

As part of the review process, the Commission is now launching a public consultation on issues identified in the Communication on Content in the Digital Single Market, i.e.: *"territoriality in the Internal Market, harmonisation, limitations and exceptions to copyright in the digital age; fragmentation of the EU copyright market; and how to improve the effectiveness and efficiency of enforcement while underpinning its legitimacy in the wider context of copyright reform"*. As highlighted in the October 2013 European Council Conclusions[5] *"Providing digital services and content across the single market requires the*

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

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

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

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

[5] EUCO 169/13, 24/25 October 2013.

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

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

grounds that such publication would harm his or her legitimate interests. In this case, the contribution will be published in anonymous form upon the contributor's explicit request. Otherwise the contribution will not be published nor will its content be reflected in the summary report.

Please read our Privacy statement.

PLEASE IDENTIFY YOURSELF:

Name:

Wikimedia Foundation

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.

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

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

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

TYPE OF RESPONDENT (Please underline the appropriate):

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

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

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

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

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

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

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

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

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

- € Collective Management Organisation

- € Public authority

- € Member State

- € **Other** (Please explain):

These answers were drafted in a public, collaborative process between the Wikimedia Foundation and the Wikimedia movement's editors and readers. As a result they reflect the interests of several categories above: authors, through the 1+ million editors of Wikipedia; end-users, through the ½ billion monthly readers of the Wikimedia projects;

and intermediaries, through the Foundation itself, one of the world's largest intermediaries for user-created content.

II. Rights and the functioning of the Single Market

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

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

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

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

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

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

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

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

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

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

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

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

only access their “national” service, and if they try to access the "same" service in another Member State they are redirected to the one designated for their country of residence).

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

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

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

This does not directly affect the Foundation. However, individual Wikimedians are affected, and several noted in their responses as part of our public discussion on this issue that they had been prohibited from accessing content from national broadcasters while traveling or living in other parts of the EU.

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.

The Wikimedia movement has faced problems providing online services across borders in the EU as a result of EU copyright directives. For example, the European Directives covering copyright delegate most limitations to the Member States—one such limitation being “Freedom of Panorama” in the Copyright in the Information Society Directive (2001/29/EC). Because this is implemented inconsistently across the Member States, pictures of buildings from half of the Member States are difficult to use on Wikipedia.

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.***

All Wikimedia project content (tens of millions of works) is available under the multi-territorial Creative Commons licenses. This reflects the fundamental principle of the World Wide Web that everything should be available not just across the EU, but worldwide. It also reflects the Wikimedia community's fundamental commitment to creating knowledge available for the entire world to use. Doing this in the EU requires not only verification of content licensing, but also the drafting and use of international

[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.

licenses. This creates both substantial costs and (in some cases) legal uncertainties. This ultimately results in less content being available.

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

The problems laid out above share a critical thread: that different rules in different Member States create costs and uncertainties that make it difficult for Wikimedians to create content. The solution to these problems is to remove artificial digital borders in the single market as originally laid out in the Satellite and Cable Directive (93/83/EEC) and affirmed by the ECJ in 2011 in *Murphy vs. Media Protection Services Limited*. Applying this principle to the Internet would help Wikimedians create new educational content and reuse existing content in new, innovative ways.

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)?***

No.

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)?***

No.

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.

Further measures are needed at the EU level. Neither individual rights holders nor the Member States have provided a solution to the fundamental problems described above, and in most of these cases, structural features of the market make it unlikely that any sub-EU entity could resolve the problems.

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

[The definition of the rights involved in digital transmissions]

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

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

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

a. The act of "making available"

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

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

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

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

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

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

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

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

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?

No.

In global online communities, and in particular in the Wikimedia community, there is not really a country of origin or target of the publication: it is published on the Internet, so, by definition, in all (connected) countries and with the purpose of educating the entire world. Any proposed solution should consider and provide clarity for content that is collaborative and multi-national by nature, as more and more content will be in the future.

9. *[In particular if you are a right holder:]* ***Could a clarification of the territorial scope of the "making available" right have an effect on the recognition of your rights (e.g. whether you are considered to be an author or not, whether you are considered to have transferred your rights or not), on your remuneration, or on the enforcement of rights (including the availability of injunctive relief[23])?***

Yes.

Because of the international way in which open collaborative projects like Wikimedia are created and made available, by authors and reusers from every Member State, it is difficult to predict how changes to the "making available" right would affect the rights of Wikimedia authors and the ability of the Foundation to distribute their content to citizens of the Member States. However, some impact seems likely, particularly if the change exposes authors or service providers to liability in previously unanticipated locations.

b. 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.

The application of a second layer of rights to a single act of exploitation in any environment could jeopardize the recognized exceptions and limitations of copyright

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

protection upon which Wikimedians depend in order to make use of third-party material. For instance, were a law enacted that protected the transmission of audio-visual material over a medium—and if the law did not carefully mirror the existing limitations and exceptions applicable to copyright—then use of a portion of a third party newscast for quotation or educational purposes could amount to an infringement of the transmission right where it would not have been an infringement of copyright.

c. Linking and browsing

Hyperlinks are references to data that lead a user from one location in the Internet to another. They are indispensable for the functioning of the Internet as a network. Several cases are pending before the CJEU[24] in which the question has been raised whether the provision of a clickable link constitutes an act of communication to the public/making available to the public subject to the authorisation of the rightholder.

A user browsing the internet (e.g. viewing a web-page) regularly creates temporary copies of works and other subject-matter protected under copyright on the screen and in the 'cache' memory of his computer. A question has been referred to the CJEU[25] 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?

No.

The World Wide *Web* is characterized by the *web* of links between sites. To subject these links to copyright authorisation would destroy the fundamental structure of the internet. Rephrasing the proposal in technology-neutral terms makes it more obvious that the proposal is absurd: the offline equivalent of this suggestion would be "publicizing the venue of an exhibition could be subject to the authorisation of the exhibitor". It is particularly absurd in the case of Wikipedia, which depends on linking to other sites to provide information by citing other websites.

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

No.

First, websites can use technical and other legal means to deny access. Because of this, every viewing of a webpage already has authorisation—either explicit or implicit—

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

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

from the website's owner. No further permission is necessary. Second, in digital technologies, every use of content inevitably produces a copy. If a webpage has been legally delivered to a user's computer, there must not be legal limitations that prohibit or limit technical improvements to how the computing device or software handles the content. We therefore propose to formally limit the definition of reproduction in copyright to exclude technologically sensible (temporary) copies, including but not limited to caching and buffering.

d. 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)[26]. 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)[27]. This raises difficult questions, notably relating to the practical application of such an approach (how to avoid re-sellers keeping and using a copy of a work after they have "re-sold" it – this is often referred to as the "forward and delete" question) as well as to the economic implications of the creation of a second-hand market of copies of perfect quality that never deteriorate (in contrast to the second-hand market for physical goods).

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

No opinion.

14. *[In particular if you are a right holder or a service provider:] W****hat 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.***

No opinion.

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

Registration is not often discussed in copyright in the EU as the existing international treaties in the area prohibit formalities as a condition for the protection and exercise of rights. However, this prohibition is not absolute[28]. Moreover a system of registration does not need to be made compulsory or constitute a precondition for the protection and exercise of rights.

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

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

[28] 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.

With a longer term of protection and with the increased opportunities that digital technology provides for the use of content (including older works and works that otherwise would not have been disseminated), the advantages and disadvantages of a system of registration are increasingly being considered[29].

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

Yes.

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

In many cases, the year of death of an author or the identity of a pen name (pseudonym) is not publicly known, and only extensive, costly research can allow a potential user to know if an old work is copyrighted or not. The Orphan Works Directive attempted to resolve these concerns, but in practice, it does not appear to have created substantial new uses of orphan works. Compulsory registration would resolve such issues, limiting legal uncertainty and encouraging the digitisation and safe re-use of orphan works, both on the Wikimedia projects and more broadly. While a full solution could cause problems with the Berne Convention, a limited proposal (such as applying the reform only to works older than Berne's minimum term) could release many works without a large impact on the broader copyright framework.

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

Millions of people now create copyrightable content every day on blogs, wikis, and other Internet publishing tools. Mandatory registration for such works would be difficult to implement, and perhaps less useful, since for newer works, contacting the rights holder and arranging a license is less difficult than for much older works. A system that required registration of older works, while allowing new works to be copyrighted without formalities under Berne, could strike a good balance.

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

As proposed above, registration could be made a prerequisite for prolonging copyright protection after the initial term — either after the current minimum Berne term, or after the much shorter term that most modern copyright research suggests would still produce an optimal level of output of copyrighted works.

D. How to improve the use and interoperability of identifiers

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

[29] 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.

specific to the sector in which they have been developed[30], 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[31] should, once operational, provide a single source of information on the ownership and control of musical works worldwide. The Linked Content Coalition[32] 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[33] is seeking to take such identification systems a step further, and to create a linked platform, enabling automated licensing across different sectors.

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

If the European Union plays a role in promoting the adoption of identifiers in the content sector, it should ensure that they are based on open standards, and can be created and read by all market participants free of charge. Any system that is developed must be developed in a true multi-stakeholder approach that includes representatives from outside the content industries, like the users who create the Wikimedia projects, and representatives of the public who benefit from out-of-copyright (Public Domain) works.

E. Term of protection – is it appropriate?

Works and other subject matter are protected under copyright for a limited period of time. After the term of protection has expired, a work falls into the public domain and can be freely used by anyone (in accordance with the applicable national rules on moral rights). The Berne Convention[34] requires a minimum term of protection of 50 years after the death of the author. The EU rules extend this term of protection to 70 years after the death of the author (as do many other countries, e.g. the US).

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

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

No.

[30] E.g. the International Standard Recording Code (ISRC) is used to identify recordings, the International Standard Book Number (ISBN) is used to identify books.
[31] You will find more information about this initiative on the following website: http://www.globalrepertoiredatabase.com/.
[32] You will find more information about this initiative (funded in part by the European Commission) on the following website: www.linkedcontentcoalition.org.
[33] You will find more information about this initiative on the following website: http://www.copyrighthub.co.uk/.
[34] Berne Convention for the Protection of Literary and Artistic Works, http://www.wipo.int/treaties/en/ip/berne/.

Current terms of copyright protection are not appropriate, because they do not enable or encourage artists and writers to create. Locking up our collective culture for, in many cases, a century or more inflicts an enormous opportunity cost on society. The inability of artists to build upon previous work diminishes the richness of culture for everyone, without providing additional incentive to create new works. This common-sense conclusion is confirmed by the overwhelming majority of academic and economic studies of the past 20 years. To return to a more appropriate level of protection, the Member States should begin by returning to the term lengths of the Revised Berne Convention. Once that is done, further international treaties and trade agreements should be ratified only if they shorten (or at least do not lengthen) term protection.

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[35].

Exceptions and limitations in the national and EU copyright laws have to respect international law[36]. 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)[37], these limitations and exceptions are often optional[38], in the sense that Member States are free to reflect in national legislation as many or as few of them as they wish. Moreover, the formulation of certain of the limitations and exceptions is general enough to give significant flexibility to the Member States as to how, and to what extent, to implement them (if they decide to do so). Finally, it is worth noting that not all of the limitations and exceptions included in the EU legal framework for copyright are of equivalent significance in policy terms and in terms of their potential effect on the functioning of the Single Market.

In addition, in the same manner that the definition of the rights is territorial (i.e. has an effect only within the territory of the Member State), the definition of the limitations and exceptions to the rights is territorial too (so an act that is covered by an exception in a Member State "A" may still require the authorisation of the rightholder once we move to the Member State "B")[39].

[35] 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.

[36] 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).

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

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

[39] 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

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

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

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

Yes.

The Information Society Directive leaves many legal exceptions and limitations entirely up to the Member States. This creates complexity that discourages creativity when it should aim for a simplicity that *encourages* creativity. For example, the inconsistent protections on the depictions of architectural works creates a maze of legal regulations which makes potential copyright infringers out of many Europeans when they share their holiday photos on Facebook or through Wikimedia Commons. A similar maze of legal exceptions and limitations can be found when looking at government produced works, making their use and distribution difficult, even by the taxpayers who paid for the creation of those works.

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.

Key exceptions for Wikimedians include harmonisation of Information Society Directive Article 5, Point 3(H), which we refer to as "Freedom of Panorama", and revision of the Orphan Works Directive to allow unrestricted re-use of the content it covers.

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

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.

An exception excluding government-produced works from copyright protection should be added to the existing catalog of exceptions in all Member States. This would make those works part of the public domain and boost innovation, information, and creativity. Countries/institutions that have a such an exception (most notably the USA) are widely perceived to outperform the EU in these crucial areas, enabling creative reuse by private industry, by other government entities, and by citizens.

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

No.

In order to encourage creativity and reduce barriers to the free flow of information, we strongly recommend more harmonisation across Europe. All further steps should be made with this in mind. Therefore, any proposed new flexibility must be scrutinized in this sense, since flexibility often leads to inconsistency.

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.

No.

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

Yes.

Territoriality of exceptions is a major problem for us, as the operator of the Wikimedia websites, and we expect that it is a problem for every website that aims to target all of Europe. It makes running pan-European projects more time-consuming, drives up costs, and results in smaller markets.

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?)

Fair compensation should be abolished. It adds costs to all citizens, primarily to the benefit of market incumbents who leveraged their position to create statutory benefits for themselves without a compelling public purpose.

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[40] and enable on-site consultation of the works and other subject matter in the collections of such institutions[41]. 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[42].

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.

The existing exception for preservation is not implemented consistently across the EU. As a result, most EU countries do not allow the making of copies for crucial activities like format shifting and structural digitisation of collections. They may also put a variety of artificial constraints on digitisation. This severely limits how an organisation like ours, which aims to put all of Europe's treasures online for education and reuse by every European citizen (and the entire world), can reliably archive and publish preserved materials.

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

[40] Article 5(2)c of Directive 2001/29.

[41] Article 5(3)n of Directive 2001/29.

[42] Article 5 of Directive 2006/115/EC.

No response.

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?

No response.

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

No response.

b. 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?***

For members of the Wikimedia community, research is not just a key part of our mission, but a passion. Finding, and then linking to, online research is something we do literally millions of times a year. It is obvious how our activity supports the public good, but it should also be obvious how it supports the goals of these publicly-funded institutions: by sharing their knowledge to all citizens, not just those who can physically access those institutions. These restrictions are particularly galling when these institutions restrict access to works that are no longer commercially available (or in the case of theses and dissertations, that have never been commercially available). Where there are safeguards that protect the normal exploitation of works in the collections, these institutions should be explicitly allowed to make the collections available online for research and linking by the general public.

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

Perhaps the best solution for the problem is a consistently-applied broadening of the scope of the exception currently provided for in article 5(3)n of the Copyright Directive in order to ensure that anyone can make their collections available online for scientific and educational purposes without restriction to on-site terminals. However, other approaches could be taken as well, such as specific exceptions for public access and research use of periodicals more than 50 years after publication.

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?

A legislative solution does appear to be necessary. The main element would be a broadening of the existing exception in article 5(3)n of the Copyright Directive. Instead of limiting the making available to dedicated terminals on the premises of the institutions, it should 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 also should apply to linking and reference. It also seems reasonable to limit the scope of the exception to works that are no longer in commercial circulation and to allow rights holders to opt out of the exception. This would ensure that the legitimate interests of rights holders would not be harmed while allowing cultural heritage institutions to bring large parts of their collections online. We, like other authors, would benefit from this, because it would broaden the scope of materials available for us to draw knowledge, research, and ultimately inspiration from.

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

No response.

c. 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.

We are committed as an organisation to supporting the rights of our users to read and access information wherever they go, and to access the information from whatever device they would like to, including through free, libre, and open source software. As noted throughout this response, we also believe firmly in the applicability of exceptions and limitations to copyright as key ways in which the rights of readers, researchers, and authors are protected. Unfortunately, the frequent use of Digital Rights Management software to "protect" e-lending materials cuts against all of these goals, by restricting access far more tightly than the law requires. For example, DRM frustrates the ability of users to make personal copies for educational use, a copyright exception that has been upheld repeatedly in a variety of court cases in the EU and the US. It also typically prohibits the creation of open source tools to read and create content, which further restricts access and creativity.

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

As a technical matter, we believe it is impossible to construct DRM systems that allow for the exceptions and limitations that are necessary for an ethical and creativity-enhancing system of copyright. As a result, we believe that as an ethical and practical matter DRM should be prohibited for e-lending from public institutions like libraries. Should that approach prove impracticable, EU law should make clear that it is legal to create and distribute tools that allow educators, researchers, the blind, and others to remove DRM when that is necessary to exercise their legal rights.

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?***

We work intensively with cultural heritage institutions like galleries, libraries, archives, and museums to provide access and visibility to their digital collections. The differences between the no-cost, simultaneous, global access provided through the Internet and the high-cost, local access provided through physical collections are so vast that it makes essentially no sense to compare the two. Institutional resources made available through Wikipedia are available to ½ billion readers every month—five hundred times the number of visitors of the most visited museum. This change 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 that 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 rightholders in order to make protected works in their collection available online. This makes no sense, particularly since the majority of works held by these institutions are not commercially available because of their age or lack of commercial interest.

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?***

From an ethical perspective, the activities are the same: they are enhancing access to knowledge. The primary change is how much broader this access can be. Copyright law and policy should acknowledge that this broader access is a *positive development* and not something that should be prevented by DRM or other technological and legal measures. If copyright law does not begin to treat greater access as a positive good, the legislative framework will continue to lose public support, as it will remain at odds with the needs, expectations, and ethical intuitions of users — and the next generation of creators.

d. 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[43]. 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)[44].

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***

[43] 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 .

[44] 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.

necessary in your country to enact legislation to ensure that the results of the 2011 MoU (i.e. the agreements concluded between libraries and collecting societies) have a cross-border effect so that out of commerce works can be accessed across the EU?

No opinion.

Because we are a global organisation, we cannot specifically answer this question. However, our understanding (based on our research, as well as our observations of contributions from libraries to our projects) is that the MoU currently has no practical effect, with very few projects actually implementing it. We strongly suspect that a more comprehensive approach is needed, and indeed, should be required in order to help Europe's cultural heritage institutions fulfill their missions and return value to the taxpayers that fund them.

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

No opinion.

The public has a legitimate interest in having 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, but we have no strong opinions on how that situation should be reached.

B. Teaching

Directive 2001/29/EC[45] 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.

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

A major goal of the Wikimedia project is to create teaching materials that can be used across all borders, and many Wikimedia editors are also consumers of teaching materials. The lack of standardisation amongst the Member States in all areas of copyright (including the teaching exception) makes creating licenses that apply similarly across all the Member States extremely difficult. We are lucky to benefit from the tenacious work of Creative Commons in this area, reducing the direct consequences for us as a publisher, but our editors may not be able to benefit from such consistency when they are seeking to use existing educational materials.

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

Our licenses explicitly note that copyright exceptions, such as the teaching exception, should be respected. To make this exception most effective, the existing educational exception should be broadened and made mandatory for all Member States. This mandatory educational exception should cover all uses of all types of works for the illustration of teaching, regardless of whether the use is institutional or private, and regardless of the institution. It is important to stress that uses of computer programs, databases and multimedia works (such as video games) should be expressly included.

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

No response.

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?

It should be made explicitly permissible for anyone to make works available online for educational purposes without restriction, both in original and adapted form.

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

Only a legislative approach can solve the current uncertainties—relying on Member States or private entities to resolve the problem will create a thicket of subtle and unsubtle differences that will be impossible for reasonable teachers to navigate. Therefore, as noted in our answers to questions 43 and 45, making a broad educational exception mandatory for all EU countries would best solve the problem.

C. Research

Directive 2001/29/EC[46] enables Member States to choose whether to implement in their national laws a limitation for the purpose of non-commercial scientific research. The open

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

formulation of this (optional) provision allows for rather different implementations at Member States level.

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

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

Yes.

The use of materials for research is of broad interest to our users and our organisation, given that an important goal of Wikipedia is to provide knowledge which references and cites to the best, most current research on a variety of topics. Unfortunately, our users face a variety of problems with accessing and using scientific materials. These problems are primarily practical, rather than legal in nature. The existing exception allows for their use for research purposes, but other barriers—like restrictive licenses, DRM, and publication only in hard copy—deliberately go beyond the existing exception, intentionally making it difficult to access and disseminate this knowledge even when existing laws permit it. This is particularly frustrating because so much scientific research is funded by the public, and should be available for our users—i.e., members of the public!—to learn and create new educational works from.

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

All research financed by the public should be available through true open access licenses for all commercial and non-commercial uses. Research produced directly by governments and their agencies should be exempted from copyright altogether. Licensing or technical restrictions, such as those in DRM, that seek to circumvent the existing copyright exception and prohibit members of the public from exercising their rights under the exception should also be prohibited.

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

No opinion.

D. Disabilities

Directive 2001/29/EC[47] 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

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

disabilities (notably by increasing the number of works published in special formats and facilitating their distribution across the European Union) [48].

The Marrakesh Treaty[49] has been adopted to facilitate access to published works for persons who are blind, visually impaired, or otherwise print disabled. The Treaty creates a mandatory exception to copyright that allows organisations for the blind to produce, distribute and make available accessible format copies to visually impaired persons without the authorisation of the rightholders. The EU and its Member States have started work to sign and ratify the Treaty. This may require the adoption of certain provisions at EU level (e.g. to ensure the possibility to exchange accessible format copies across borders).

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

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

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

Because we provide our content through standardized, open formats, without utilizing technical protection measures, we have not experienced problems when creating or distributing works that facilitate access.

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

Where users have problems, the obvious solution is to standardize on open formats, like HTML and Open Document, that encourage accessibility.

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

No opinion.

E. Text and data mining

Text and data mining/content mining/data analytics[50] 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

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

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

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

of software or other automated processes, an analysis is made of relevant texts and data in order to obtain new insights, patterns and trends.

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

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

A specific Working Group was set up on this issue in the framework of the "Licences for Europe" stakeholder dialogue. No consensus was reached among participating stakeholders on either the problems to be addressed or the results. At the same time, practical solutions to facilitate text and data mining of subscription-based scientific content were presented by publishers as an outcome of "Licences for Europe"[51]. In the context of these discussions, other stakeholders argued that no additional licences should be required to mine material to which access has been provided through a subscription agreement and considered that a specific exception for text and data mining should be introduced, possibly on the basis of a distinction between commercial and non-commercial.

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

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

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

Yes.

The Wikimedia projects demonstrate both the risks of current data mining policy in the EU, and the success of the rest of the world's policies on databases and database rights. The risks to us stem from the complete uncertainty around database and data mining rules in the EU. This makes it extremely difficult for the communities who are

[51] 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 .

creating our data sources (such as Wikidata and Wikipedia) to understand when they can or cannot use a given data source, as facts that seem unprotectable on their face may implicate other rights that are not obvious from the data themselves. On the flip side, Wikipedia (and soon Wikidata) are some of the most widely mined and analyzed data sources on the planet. This has occurred because of our commitment to making this information freely available, and demonstrates that creativity and innovation are compatible with a scheme that reduces barriers to participation rather than increasing "protection."

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

The EU should avoid creating new rights to protect previously unprotectable information like the database and suggested data mining rights. Instead, legislation should provide a formal clarification that data mining (and databases) is not prohibited by copyright, and that contracts and technical protection measures cannot be used to override that position.

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?

As noted above, it should be made clear that text and data mining are not prohibited by copyright, and the database directive should be repealed. In addition, technical protection measures and contracts should not be allowed to override these statutory decisions. This would ensure that vast amounts of information would be broadly available to the public and to researchers, which Wikipedia's experience shows will lead to a variety of new uses and means of delivery.

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

Only a legislative approach can solve the issues faced. See our answer to questions 54 and 55.

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

A variety of problems further complicate use of text or data mining methods. Lack of clarity around privacy rules for data related to individuals, use of contracts and technical protection measures to impede legally-authorized access to information, and the use of proprietary or patent-encumbered data formats all reduce the promise of 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[52]. 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[53].

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.

Note that we object strenuously to the conflation of “user-generated content” with “pre-existing content”—many users, including the users who create Wikipedia, create and publish vast amounts of content that is as original and creative as the content created by the traditional copyright industries. At the same time, many non-“users” (such as Disney) regularly produce works that are based on pre-existing works. To assume that users only generate content that is remixed badly misunderstands the nature of modern creativity and unfairly tilts the playing field for copyright reform. As an American

[52] 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.

[53] 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 .

organisation, our organisation does not generally have substantial problems when our users use pre-existing works to create and disseminate new content since we can rely on fair use and strong safe harbor protections. However, many of our users, particularly Europeans, report that, because of the weak exceptions in this area and the differences between Member States, it is difficult for them to understand what is and is not permitted. As a result, they find it difficult under EU law to create and share information that could be alleged to be a remix or mash-up of pre-existing works.

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.

Works created by our users and published through our site have extensive license information and metadata, allowing others to easily and reliably reuse this information. However, in some cases we have had to deal with some complexity when works from other sources are included in Wikimedia projects because there are no agreed-upon standards for properly identifying those materials. As a result, solutions may be inconsistent.

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

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

No.

Our materials are provided under a license that allows for no-cost use, so we do not typically have problems with remuneration. (Users and redistributors who wish to charge for the materials are permitted to handle remuneration themselves.) Note that, as a general matter, the existence of Wikipedia and vast amounts of other critical, creative, user-generated content, despite the difficulty of remuneration, suggests that copyright law should treat unremunerated creativity equally to remunerated creativity.

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

No response.

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?

The main elements of a legislative solution would be to make the current list of exceptions mandatory across all Member States and specify that the list is informative but not exhaustive, along the lines of the U.S. interpretation of fair use. This would be more flexible and forward-thinking than the current system, and as a result, would address key concerns related to remixed and amateur content by reducing uncertainty and expanding the scope for creativity.

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

As noted above in question 58, this section confusingly mixes the notion of user-generated content (which often does not reuse the protected content of others) with the notion of remix (which is often performed by commercial entities). So one key step to solving the problem would be to use more precise terminology so that problems could be more accurately assessed.

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[54]. 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[55][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.

[54] Article 5. 2)(a) and (b) of Directive 2001/29.
[55] Communication "Unleashing the Potential of Cloud Computing in Europe", COM(2012) 529 final.
[56] 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.

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*[57] *in the digital environment*?

Yes.

The spirit and purposes that animated the original private copying exceptions remain important and valid in the digital environment, perhaps even more so now that individuals have the potential to make so many different constructive and creative uses of such material when they are not hobbled by artificial constraints imposed by law, contracts, or technological protection measures. As a result, it must be made clear that the existing exceptions and limitations are applicable in the digital environment just as in other environments.

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?[58]

No.

This question improperly mixes two issues: licensed materials for private uses and private levies. Since Wikimedia does not sell content, the issue of payment for private, non-commercial use does not directly impact us. However, we feel that levies are generally improper because many uses, including viewing and editing Wikipedia content, or the many uses covered by exceptions, are without cost as a matter of law or as a matter of the choices of the rights holders. As a result, it is improper to assume that all uses of the device should require payment of a fee to specifically favored industries.

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?

Levies unfairly benefit a specific business model and specific assumptions about content ownership. They therefore unfairly prejudice many new models for sustainable content creation, including volunteer-driven models like that of the Wikimedia Foundation, that do not presume direct user payments for content as part of the model. Eliminating levies could therefore impact the development of new models for sustainable content creation by leveling the playing field while simultaneously being more fair to users.

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

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

67. Would you see an added value in making levies visible on the invoices for products subject to levies?[59]

No opinion.

Diverging national systems levy different products and apply different tariffs. This results in obstacles to the free circulation of goods and services in the Single Market. At the same time, many Member States continue to allow the indiscriminate application of private copying levies to all transactions irrespective of the person to whom the product subject to a levy is sold (e.g. private person or business). In that context, not all Member States have ex ante exemption and/or ex post reimbursement schemes which could remedy these situations and reduce the number of undue payments[60].

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?

No opinion.

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

The specific question asked is unanswerable. However, we can say with great certainty that the vast majority of all Internet users in the EU regularly visit the sites of the Wikimedia Foundation and other websites like ours where users have legally, voluntarily, and freely shared information without intention of compensation. To presume that these users are committing harm, and thus require them to pay a levy to the shrinking number of creators represented by the traditional copyright industry, is clearly unsupported by the actual uses of these computers.

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?

We cannot answer the question about what percentage of trade they affect, but given the hundreds of millions of Europeans who visit our site every year, we suspect that the percentage must be large. See question 71 for discussion of remedies.

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

The levy system presumes the guilt of all users involved. This has always been questionable, and becomes more questionable as more content, like Wikipedia, is

[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.

created by users for other users, without assumption of compensation. As a result, this system is fundamentally unfair. The best way to resolve the problem is to abolish the levy system, replacing it with market mechanisms for content creators—both traditional ones, like the sale of products and event tickets, and new ones, like crowdfunding.

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[61] 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[62]. This is an area that has been traditionally left for Member States to regulate and there are significant differences in regulatory approaches. Substantial differences also exist between different sectors of the creative industries.

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

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

The creativity of Wikimedia community members, like academics and many other creators, is not primarily motivated by remuneration. Many creators now use their creative works to support alternative revenue channels, like live performances, rather than expecting to be paid for every use of every work. And copyright's purpose is not remuneration—remuneration is only a secondary effect of the protection of artist's interests, which are increasingly non-monetary.

So the Wikimedia community encourages the EU to undertake a thorough analysis of the motives of creators—economic and otherwise—and reform the remuneration system so that, instead of aiming at maximum financial efficiency, it considers and balances the many different motives of creators and the public.

It seems likely to our community that a more comprehensive analysis of this sort would involve a variety of reforms that return power to creators and away from the copyright industry, including reform or abolition of collection societies, contractual protections for individual creators when interacting with publishers, and greater protection for individuals who use the public domain to create materials for non-monetary reasons.

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

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

Yes.

Since the increased ease of sharing and publishing has greatly increased the number and reach of amateur creators who build on the work of others, there is a need to prohibit contractual clauses that prevent users from taking advantage of the exceptions provided in legislation implementing the Copyright Directive. It is also necessary to prohibit using technical restriction measures aimed at the same effect.

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

For the Wikimedia community, the problems with the current rules often stem from the assumption that every use of work should be remunerated in order to satisfy creators' interests, when many modern creators either do not seek financial remuneration at all, seek remuneration from other sources, or seek remuneration only from specific uses rather than every use. As a result, we suggest a thorough rethinking of the assumptions behind modern remuneration systems before any legislative action is undertaken—particularly any that would further empower existing members of the copyright industry who incorrectly assume that without payments to middlemen all creativity would cease.

VI. Respect for rights

Directive 2004/48/EE[63] 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[64]. 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[65]. One means to do this could be to clarify the role of intermediaries in the IP infrastructure[66]. 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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[63] Directive 2004/48/EC of the European Parliament and of the Council of 29 April 2004 on the enforcement of intellectual property rights.

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

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

[66] 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.

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

No.

There are several problems with this question. First, “commercial purpose” is difficult to define and assess, especially when technology has made it possible for the cumulative actions of individuals to have commercial impact even when each individual involved has no commercial purpose or motive. Second, for reasons that are not explained, this question focuses only on civil enforcement, and not on criminal enforcement. We would urge the Commission to explain this distinction further before taking any steps to change the current system. Third, efficiency is not the paramount criterion for a system of justice—rule of law, due process, and basic rights like communication and freedom of speech are more important criteria. Indeed, if anything, most recent proposals for reform of the civil enforcement system (like the ISP-based system of enforcement in France) tend too far towards efficiency and too far away from justice. Finally, much research has shown that the enforcement system is only one reason why individuals comply with laws. Other factors are as or more important—including, in particular, respect for other individuals and judgment of the fairness of the laws being enforced. As a result, the most effective way to improve compliance with the law would not be to improve enforcement, but rather to take citizen and amateur creator concerns seriously when addressing the other issues identified throughout the entire consultation.

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

The Wikimedia Foundation is one of the largest and most popular intermediaries in the world, and we can say with confidence that the current system is not clear enough because it requires too *much* involvement by intermediaries. Creating more “clarity” by putting more pressure on intermediaries would force many intermediaries to stop offering services to the EU altogether or, in less extreme cases, merely force them to be overcautious and chill the free speech rights of EU citizens.

It is important to understand that the key rights of speech and communication between citizens are now carried out primarily on the Internet. Therefore, many of the calls for increased “respect for rights” of copyright creators are inevitably calls for monitoring *all* communication, which disrespects not just privacy rights, but also speech and political rights as well. For example, many intermediaries, including the Wikimedia Foundation, YouTube, and others, have received legal threats that purported to be about copyright, but were actually attempts to silence political speech. And the proposed “solutions” would typically require us to monitor every discussion made by our users—an intolerable position for us, and we'd hope for the Commission as well. Increased

“clarity” for intermediaries would only increase this problem. The correct solution is for the parties who believe their rights are infringed to seek redress against the parties who infringed, not the intermediaries.

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

No.

As explained above, the current system is already tilted towards those who hold copyrights, and against those who are seeking to exercise other rights, like privacy or freedom of speech. Nor does the current system achieve balance between the purposes of encouraging individual creativity and benefiting society as a whole.

The rush to create more “efficient” enforcement systems, like the HADOPI system, have made this balance worse. They have failed to encourage creativity, and are usable only by large copyright industry players—failing to provide tools that the new, small creators (like Wikimedia editors) can use to enforce their own rights. At the same time, these efforts have also violated rights of due process and privacy, and have ignored the exceptions that are theoretically enshrined in copyright law.

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.

The goal of the Wikimedia movement is “a world in which every single human being can freely share in the sum of all knowledge”. Standardisation and harmonisation of copyright laws supports this goal, because it would help our contributors simplify their copyright concerns and focus instead on our creating new knowledge. The current situation—where creating and benefiting from content requires interpreting the copyright laws of many different Member States—benefits only lawyers and the large corporations who can afford them, not creators or citizens. At the same time, the Wikimedia movement (nor other creators) could not blindly support a new title. The

benefits of harmonisation could easily be outweighed by many of the harmful proposals under consideration, like increased support for mandatory technical protection measures and increased pressure on intermediaries to monitor and censor communication. So this support must be tentative and would ultimately depend on the quality of the proposed title.

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?

The level of difference among Member States, and the vast circulation of ideas and information in the modern world, means that this is a high priority issue that should be dealt with in the near future, rather than a longer-term project. The results of exploratory projects—such as the Wittem Code—prove that it is quite possible to come up with a unified, harmonised EU copyright law. The longer the law remains conflicting and uncertain, the longer copyright users and creators, like Wikimedia's editors, will be hindered by the least clear and least flexible rules of the various Member States.

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.

Throughout this document we have discussed a number of important matters that should be addressed that were not directly raised by the Commission. These include:

- A thorough analysis and rebalancing of the system so that it benefits not only the small class of corporate creators, but also the many people who create and share for non-financial reasons, the people who build on the works of others, and the citizens whose rights have been curtailed in the name of improved efficiency.

- Clarity that the faithful reproduction of a public domain work does not create a new, copyrightable work.

- Prohibition or strict limitations on rules that, like the Italian “Codice dei beni culturali”, use non-copyright means to restrict the ability of citizens to create new cultural works.

- Improving access to and use of orphan works.

- Exemption of government works from copyright.

- Repeal of the ill-considered database right.

- Avoiding joining international agreements that take materials out of the public domain and restore them to copyright, or otherwise hinder future reform efforts.