

Name: COMMUNIA Association

COMMUNIA International Association on the Public Domain is a network of researchers and practitioners from universities, NGOs and SME established in 10 Member States. The mission of COMMUNIA is to foster, strengthen and enrich the Public Domain. To fulfill its mission, COMMUNIA and its members raise awareness in, educate about, advocate for, offer expertise on and research about the Public Domain in the digital age within society and with policy-makers, at the EU level and worldwide. COMMUNIA Association is a WIPO observer since October 2012.

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II. Rights and the functioning of the Single Market

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

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

Question 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. In no circumstance should hyperlinks be subject to protection under copyright. Sharing links without needing permission from the rightholder is core to the operation of the internet. Changing this fundamental structural aspect of how the internet works would be detrimental to the free flow of information and commerce online.

The creator of a hyperlink must be free to link to publicly available resources without having to worry about infringing copyright. This needs to be the case regardless of the legal status of the linked work or of the intent of the rightholder who has published such a work (or authorized the publication). The recent ruling of the CJEU on the the Svensson case has unfortunately not provided the required amount of clarity and as a result the European legislator needs to enact unambiguous rules that ensure that the act of hyperlinking falls outside the scope of actions protected by copyright. Failing to do so will risk placing European internet users, businesses and innovators at a competitive disadvantage vis a vis the rest of the world. It would also be a clear signal that the European legislator does not understand the important role that open networks play in fields like innovation, access to culture and freedom of expression.

Question 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. Digital technologies of all types create temporary copies in order to efficiently deliver content to a user. Such fleeting reproductions (such as copies in the cache memory) should be seen as outside the scope of copyright protection. Requiring permission to access temporary copies would be destructive to the operation of the internet and harmful to the effective delivery of content and services online.

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

The resale of previously purchased digital content should not give rise to additional rights, or to new legal or technical conditions which would limit the use and re-use options of subsequent buyers. A legal framework should clearly state the exhaustion of rights, that what can be used or re-used shall remain usable or re-usable on every subsequent 'second hand' digital market. The change of use conditions should only go towards more open conditions for users, which can strengthen legal certainty for digital consumers, and therefore encourage further development of online commerce on derivative digital marketplaces.

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

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

Yes.

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

The creation of a registration system at the EU level would be beneficial to both authors of works and users of works. A registration system would align with the overall objectives of EU copyright policy--that is, to "support creation and innovation, tap the full potential of the Single Market, foster growth and investment in our economy and promote cultural diversity." It would provide clear, equal access to rights information. It would increase the certainty of who is the rightholder to a work and provide a stable catalog of information so that rights holders can be easily ascertained. This would help mitigate the problem of future orphan works, as there will be a formal registry of rights holders (however, a registration system will not be able to retroactively solve the existing problems faced by cultural heritage institutions with regards to orphan works and mass digitisation; see more about this in reaction to Questions 40 and 41).

As highlighted by the 2011 'New Renaissance Report'¹, future orphan works must be avoided in order to stimulate the digitisation and online accessibility of in-copyright material. In this purpose, registration should be considered as a precondition for a full exercise of rights. A discussion on "refreshing" the Berne Convention on this point in order to make it fit for the digital age should be taken up in the context of WIPO and promoted by the European Commission. Whereas the arguments opposing registration were essentially based on the lack of technological tools to monitor such registries, reliable information and monitoring technologies are now available to support the implementation of such a registration system.

If a registration system is created, rights holders should be required to register their works in order to be granted particular protections, such as the ability to start an enforcement action (others listed in Question 18). This change would be in line with our policy recommendation number 8²:

In order to prevent unnecessary and unwanted protection of works of authorship, full copyright protection should only be granted to works that have been registered by their authors. Non registered works should only get moral rights protection. One of the unintended consequences of the near universal access to electronic publishing platforms is an increase in the amount of works that are awarded copyright protection even though their authors do not require or desire this protection. This extension of protection threatens to undermine the value and effectiveness of protection for works where copyright protection is necessary and desired. Given the above full copyright protection should only be granted to works that have been registered by their authors. Non registered works should only be granted moral rights protection. This recommendation requires the introduction of a registration system. Such a system needs to be accessible and transparent.

A registration system conditioning the *modalities* of protection, such as the possible legal enforcement actions or demandable amounts for damages, would be feasible without questioning the current principle of no formalities of access to protection as currently provided by the Berne Convention for the Protection of Literary and Artistic Works. Such a system would be similar to what has been in force in the United-States and accepted by other Berne country members.

Should such a registration system however be considered as calling for the revision of the Berne rules, the European legislator should at least provide for a legal deposit system, which can be achieved in a rapid delay, and in full conformity with the current WIPO legal framework (as argued by Prof. Bernt Hugenholtz and Ian Hargreaves)³.

¹ COMITÉ DES SAGES, *The New Renaissance, Report of the Reflection group on bringing Europe's cultural heritage online*, 2011, http://ec.europa.eu/information_society/activities/digital_libraries/doc/refgroup/final_report_cds.pdf, esp. p. 18 et seq.

² see: <http://www.communia-association.org/recommendations-2/#8>

³ See Hargreaves and Hugenholtz: *Copyright Reform for Growth and Jobs - Modernising the European Copyright Framework* (pages 11), Brussels. Available at: <http://www.lisboncouncil.net/publication/publication/95-copyright-reform-for-growth-and-jobs-modernising-the-european-copyright-framework.html>

Moreover, a registration system could provide a more efficient mechanism for commercial licensing opportunities. Such a registration system could integrate a variety of rights information - such as indicating open licensing for authors that wish to distribute their works broadly under liberal terms- or including information on works that are in the public domain. In general, a registration system will help reduce the transaction costs between rights holders and potential users. In addition, if the registration system were developed using open standards and formats, it would provide a rich set of rights information as open data to be used in third party applications and services.

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

We believe that a registration system would be beneficial. However, the system could present a few disadvantages. First, there is the simple fact that registration would be required in order for the rights holder to be granted particular protections, such as the ability to bring an enforcement action against a suspected infringer. This is not how the current copyright enforcement system works today, at least not in all EU jurisdictions. Second, since today it is so easy to create and share huge numbers of digital works, it could be seen as burdensome to impose a registration requirement on authors for every piece of content they create. At the same time, many of these same creators may not want copyright protection (or at least do not care for copyright protection that lasts for 100+ years). So, these creators may not care to register their works, or may be selective in registering their works. This could be seen as a positive for the copyright ecosystem. By slightly increasing the threshold for a rights holder to receive certain types of protection, it would decrease the number of potential copyright actions because only those works that authors truly wish to protect would be registered. Third, it could take a significant monetary investment to develop and implement a registration system. But in the long run, this cost would most likely be massively outweighed by the benefits of reducing transaction costs overall.

Question 18: What incentives for registration by rightholders could be envisaged?

There could be several incentives for rightholders to register their works. Policies could be enacted whereby certain elements of copyright protection are only available to rights holders who have registered their works. In principle this could apply to any element of copyright protection that is not required by the Berne convention.

For example, registration might be required for a rightholder to start an enforcement actions (such as notice and takedown), or would be required to access a particular type or level of damage awards in a successful infringement judgment. Another incentive might be that rights holders need to register their works in order to be eligible to collect royalties through collective rights management organizations. Finally, registration could be made a prerequisite for prolonging copyright protection beyond the minimum term required by the Berne convention (which should be progressively reduced; see our response to Question 20).

II.D. How to improve the use and interoperability of identifiers

Question 19: What should be the role of the EU in promoting the adoption of

identifiers in the content sector, and in promoting the development and interoperability of rights ownership and permissions databases?

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

Any system that is developed must be developed in a true multi stakeholder approach (e.g not only by rights holders and intermediaries) and should be reflective of work already undertaken (for example by Europeana). Rights ownership and permission databases in particular must be publicly accessible via machine readable interfaces. They must also include the ability to store information on out-of-copyright (Public Domain) works.

II.E Term of protection – is it appropriate?

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

No. Communia always had a very clear position on the appropriateness of the current term of copyright protection. Our first policy recommendation⁴ reads:

The term of copyright protection should be reduced. The excessive length of copyright protection combined with an absence of formalities is highly detrimental to the accessibility of our shared knowledge and culture. The term of copyright protection should be reduced. There is no evidence that copyright protection that extends decades beyond the life of the author encourages the production of copyright-protected works. Instead the requirement to obtain permission for works by authors that have long died are one of the biggest obstacles for providing universal access to our shared culture and knowledge. Given the above the term of copyright protection for new works (that is works created after the term reduction) should be reduced.

More specifically, from the perspective of cultural heritage institutions, the current terms of copyright protection (including neighbouring rights protection) must also be considered to be too long. Cultural heritage institutions hold large collections of works that are still under copyright (or where the copyright status is unclear) but which are not exploited commercially anymore. A term of protection of life plus 70 years stands in stark contrast with the commercial life of the large majority of copyright-protected works⁵. As a result, the disproportionate length of copyright protection prevents cultural heritage institutions from effectively fulfilling their mission in the digital environment.

⁴ see: <http://www.communia-association.org/recommendations-2/#1>

⁵ See: Heald, Paul J., *How Copyright Makes Books and Music Disappear (and How Secondary Liability Rules Help Resurrect Old Songs)* (July 5, 2013). Illinois Program in Law, Behavior and Social Science Paper No. LBSS14-07; Illinois Public Law Research Paper No. 13-54. Available at SSRN: <http://ssrn.com/abstract=2290181> or <http://dx.doi.org/10.2139/ssrn.2290181>

In many cases the cost for digitisation of copyrighted works that are no longer being commercially exploited exceeds the potential economic value of these works. As a result these are not made available online by the rights holders, who lack an economic incentive. While cultural heritage institutions that have such works in their collections have an incentive to make such works available (their public task to provide access to their collections) they are confronted with costs for rights clearance that increase the overall costs for making these collection available without providing any economic benefit to rights holders.

One of the outcomes of this is the existence of the so called ‘20th century black hole’ when it comes to online availability of copyrighted works. Works from the 20th century are significantly less likely to be available than works from the centuries before (many of which are clearly in the public domain) or from the 21st century (many of which are still available commercially)⁶.

Shortening the term of protection will decrease the number of works that are in copyright but out of commercial exploitation and will thus reduce the scope of the problems outlined above. Given this the term of copyright protection should at least be reduced to the minimum requirement established by the Berne Convention (life of the creator plus 50 years)⁷.

In addition, the European Union should work in the relevant international fora to further reduce the term. This should include efforts to agree on a system where extended copyright protection after an initial automatically granted term would be only granted if the work is registered by the rights holder. The duration of the initial term should be brought into line with the duration of protection of other intellectual property rights, such as patented inventions (20 years), databases (15 years), and industrial design rights (25 years). Given this, 20 years appears to be a reasonable initial term of protection that should guarantee protection to the vast majority of protected works. Rights holders would have the ability to extend the term of protection for works that they intend to exploit after the end of the initial period by registering such works.

III. Limitations and exceptions in the Single Market

Question 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 fact that limitations and exceptions in the EU are optional for Member States creates an uneven playing field and legal uncertainty. Similar organisations and citizens should be able to enjoy the same exceptions (which are actually users’ rights) in all member states.

⁶ idem.

⁷ See also Hargreaves and Hugenholtz: *Copyright Reform for Growth and Jobs - Modernising the European Copyright Framework* (pages 8-9), Brussels 29/05/2013. Available at: <http://www.lisboncouncil.net/publication/publication/95-copyright-reform-for-growth-and-jobs-modernising-the-european-copyright-framework.html>

The current situation make copyright law more difficult to understand to users and makes copyright policies more difficult to implement for service providers and other intermediaries. The most comprehensive way to address this issue would be to establish a unified EU copyright title (compare our answer to question 78).

Question 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, all existing and additional exceptions should be made mandatory and harmonised to the fullest extent possible (obviously after they have been broadened in line with our response to the relevant questions below). It is not acceptable that citizens in some members state enjoy lesser level of access to works protected by copyright simply because of an uneven implementation of exceptions and limitations of the InfoSoc directive.

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

Finally there is a need to protect the user rights created by limitations and exceptions from the adverse effects of Technical Protection Measures. Circumvention of TPMs must be allowed when exercising user rights created by Exceptions and Limitations or when using Public Domain works and the deployment of TPMs to hinder or impede privileged uses of a protected work or access to public domain material must be sanctioned⁸. User rights created by exceptions and limitations should also be protected from neutralisation by contracts, terms of use or licences, which would make impossible to exercise such prerogatives. Thus, contracts, terms of use or licences making it impossible to exercise rights deriving from exceptions and limitations should be declared illegal.

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

Yes, a new exception should be added that allow non-commercial sharing of protected works and the creation of transformative works by individuals (see our answer to question 61). Also, the status of e-lending should be clarified (see the answers to questions 37) possibly via a new exception. In addition cultural heritage institutions need to be enabled to make works in their collections available online for non-commercial purposes. As outlined in the answer to question 34 this does not require a new exception but can be achieved by expanding the scope of the existing provision in article 5(3)n of the directive.

Finally there is a need to introduce an open ended norm that increases the flexibility of the current system of targeted exceptions (see next question).

⁸ Compare COMMUNIA policy recommendation #7: <http://communia-association.org/recommendations-2/#7>

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

Yes, there is a need for more flexibility in the EU regulatory framework for limitations and exceptions⁹. The exceptions and limitations in the 2001 Copyright Directive were not drafted in a technologically neutral manner, which is problematic in times of accelerated technological progress.

By definition, exception and limitations that apply to specific uses cannot ensure that as of yet unknown forms of use are covered by them. Technological innovation can be expected to lead to new forms of use in the near future, and Europe would be well advised to create a copyright framework that is flexible enough to deal with such developments. The current discussion about text and data mining is a good example of this. European researchers have to deal with legal uncertainties about the status of text and data mining activities because the Copyright Directive fails to address this form of use that was (relatively) unknown when the Directive was adopted. An open norm would provide more certainty on the legal aspects of activities like text and data mining without having to undertake legislative changes (which take years to implement).

A greater degree of flexibility is also desirable from the perspective of cultural heritage institutions, as it should allow them to embrace new ways of making their collections available without the need for legislative reform. Compared to institutions in countries that have a more flexible approach to exceptions and limitations, European institutions face a competitive disadvantage. Compare for example the scope of the Google books project in the United States and in Europe: in Europe, Google and the libraries are only digitising out-of-copyright works, while in the U.S. the project also includes in-copyright titles. As a result, citizens of the U.S. have better access to their recent (20th century) culture than European citizens. More generally users all over world have better access to US culture than to European culture.

Question 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.

The best approach would be one that provides built-in flexibility in reaction to new technological developments or new forms of use. An open norm such as fair use fits this description. It should be implemented EU-wide (see also answer to Question 22), and in addition to (existing) targeted exceptions and limitations. This has been at the core of our third policy recommendation¹⁰:

⁹ See also: Hugenholtz, P. B. and Senftleben, Martin, *Fair Use in Europe: In Search of Flexibilities* (November 14, 2011). Available at SSRN: <http://ssrn.com/abstract=1959554> or <http://dx.doi.org/10.2139/ssrn.1959554>

¹⁰ see: <http://www.communia-association.org/recommendations-2/#3>

The limited list of Exceptions and Limitations established by the copyright directive limits the possibilities to adjust the copyright system to the rapid pace of technological innovation that shapes how we interact with copyright protected works. This not only limits the abilities of citizens to gain access to our shared culture and knowledge but also imposes restrictions innovative business models and as a result economic growth. In the absence of an open ended exceptions such as a fair use clause it is imperative that exceptions and limitations can be adjusted to the needs of society at large en innovative economic actors in particular.

Flexibility is a general civil law principle that needs to be introduced in copyright law. By opening up the list of limitations and exceptions and making it fit technological reality, the European legal framework would gain in systemic consistency, and allow the balance of interests to be released from any unproductive tension.

As long as an open norm is implemented EU wide, its effect on the functioning of the single market would be minimal, and it can be expected to improve the competitive position of European market actors vis-a-vis market participants in other jurisdictions that have an open norm.

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

The territoriality of limitations and exceptions is problematic because it is confusing to end users when one use is covered by an exception to copyright in one jurisdiction but when the same use is prohibited by copyright in another country. If the limitations and exceptions are not clear, then there will be a chilling effect on reuse of content. This is complicated by the fact that individual members states may choose which exceptions they will adopt as national law instead of having to implement them all in a compulsory manner.

III.A.1 Access to content in libraries and archives

Question 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?

With regards to all questions in this section it should be stressed that while the consultation document limits itself to activities of libraries and archives the questions in this section are equally relevant for museums and other cultural heritage institutions. In fact the relevant exceptions and limitations explicitly apply to 'publicly accessible libraries, educational establishments or museums, or [...] archives'. The 2012 Orphan Works directive clarifies this to include 'film or audio heritage institutions and public-service broadcasting organisations'. In line with this, the following answers (28-35 and 39-41) should be read as applying to all cultural heritage institutions falling within this scope and not only to libraries and archives.

Institutions increasingly digitize works in their collections not only to prevent harm, but to be

able to better fulfil their missions. Digital copies of cultural heritage works provide many advantages such as being (automatically) indexable, being easier to access and having lower storage costs. The current Dutch implementation of article 5(2)c of the Copyright Directive does not allow institutions to structurally create digital copies of works in their collection. This prevents institutions from fully realising the potential inherent to digitisation of their collections. This is highly detrimental in an environment where, as the New renaissance Report¹¹ puts it, “digitization is more than a technical option, it is a moral obligation”.

In addition, recital 40 of the Directive, which states that 'Such an exception or limitation should not cover uses made in the context of online delivery of protected works or other subject-matter', is highly problematic. As online dissemination of works becomes more and more important for cultural heritage institutions, limiting the reproduction exception in such a way is simply anachronistic as it prevents institutions from using digitized works in a meaningful way.

Also, technological measures and their relationship with the exceptions benefitting cultural heritage institutions are highly problematic: Often CDs and DVDs are protected by technological measures, the removal of which would require the cooperation of the producer. Art. 6 of the Infosoc Directive provides that technological protection measures are protected per se, independently on the scope of protection, entrusting to voluntary agreements or to subsidiary interventions of Member States the adoption of appropriate measures to ensure that legitimate users can make effective use of licensed content. The strength of the protection of TPMs compared with the weakness of the provision in favor of legitimate uses has in many Member States led to the absence of any effective guarantee for legitimate users, including libraries. As a result, many libraries are not able to reproduce CDs and DVDs they've legally acquired. In several years, these materials will become unusable due to technological obsolescence, contributing to a black hole on 20th and early 21st century culture.

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

The best solution would be to broaden the existing exception in article 5(2)c of the Copyright Directive so that it allows institutions to make reproductions of all works in their collection as long as these are not intended for direct commercial advantage. In line with our answer to Question 22 this exception should be made mandatory for all Member States.

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

Question 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?

¹¹ COMITÉ DES SAGES, The New Renaissance, Report of the Reflection group on bringing Europe's cultural heritage online, 2011, http://ec.europa.eu/information_society/activities/digital_libraries/doc/refgroup/final_report_cds.pdf, p. 14.

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

Reproductions should be limited to internal use which is not for direct commercial or economic advantage or use in line with other exceptions and limitations allowed for by the Directive (such as the broadened version of the exception foreseen in article 5(3)n that we propose in answer to question 34). Reproductions would explicitly be allowed for the purposes of increasing the operational efficiency and reducing costs of the beneficiary institutions.

Broadening the scope of the exception along these lines mirrors the recommendations made as part of the European Commission commissioned 'Study on the application of directive 2001/29/EC on copyright and related rights in the information society' from December 2013 (compare pages 291 to 302).

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

III.A.2 Off-premises access to library collections

Question 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?

In general, libraries are subject to complex and lengthy negotiations with publishers and database vendors, which impact collection development, duration of access, and permitted uses. Negotiation with publishers is an expensive and time consuming process and most licences are presented as final, without the ability to negotiate on terms, which are often taken over from other jurisdictions.

Often libraries entrust negotiation and management of contracts to national or regional institutional consortia to increase their bargaining power. But the use of consortia for the negotiations is a remedy, not an optimal solution, and the logic of large numbers may introduce rigidities in pricing and business models, encouraging the purchase of or subscription to large packages of content rather than the selection of targeted works. Also it is extremely common for licences to prevent cross border access to digital content for research and study.

In more general terms this question fails to address the most urgent issue confronting

cultural heritage institutions today: providing online access to works in their collection. Among the existing exceptions, the one providing for the consultation of works and other subject-matter via dedicated terminals on the premises of such establishments for the purpose of research and private study comes closest to a mechanism that could enable such uses.

But from both the perspective of publicly available libraries, archives, and museums as well as the perspective of their patrons (end users/consumers), the existing exception that allows institutions to make works in their collections available ‘for the purpose of research or private study, to individual members of the public by dedicated terminals on the premises’ (article 5(3)n) is extremely limited and no longer in line with the technological possibilities and expectations of citizens.

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

For publicly funded cultural heritage institutions to fully participate in the digital public space, they must be enabled to offer online services that are available from everywhere and by anyone seeking to ‘to participate in the cultural life of the community, to enjoy the arts and to share in scientific advancement and its benefits’, as enshrined by article 27.1 of the Universal Declaration of Human Rights. Online universal access to the collections of publicly accessible libraries, museums, and archives can play an important role in realising this objective. Being able to offer online access to works in their collections will also allow cultural heritage institutions to reach wider and more diverse audiences. For these reasons the existing exception is too narrow.

(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?

The interlibrary loan between universities and national libraries is not a reality. Procedures, when available, are very slow and cumbersome. In order to solve that problem, libraries should be allowed to offer on their premises access to works held by other European libraries.

From the perspective of citizens, researchers, and other end users, it does not make sense that research libraries and publicly funded cultural heritage institutions are not allowed to make available works in their collection that are no longer in commercial circulation (out-of-commerce works). These institutions have built and maintained their collections with public funds. Their mission is to provide access to the knowledge and culture contained in these collections. As long as there are sufficient safeguards that prevent these institutions

from interfering with the normal exploitation of works in their collection, they should be enabled to make their collections available online for non commercial uses by the general public. Preventing institutions from doing so means that users will look for information elsewhere (on platforms such as Wikipedia or Google).

In the long run, limiting what cultural heritage institutions can do online with out-of-commerce works means undermining the position of these institutions. Younger generations who have grown up with near universal online access to services will be driven away from these trustworthy institutions.

For citizens it is perfectly understandable to not expect that cultural heritage institutions will provide unlimited free access to works that still are in commercial circulation, but it does not make sense at all that institutions have to restrict access to out-of-commerce works just because they are still under copyright protection. It should be noted that this is also true for authors who may have a legitimate interest in works that they have created in being kept available via cultural heritage institutions and who often rely on access to works of others as part of their own creative process.

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

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

Question 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?

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 also apply to making the works available online via public networks such as the internet. The scope of the exception should further be expanded to not only include 'the purpose of research or private study' by 'individual members of the public' but should apply to all non commercial uses.

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

These conditions are crucial to ensure that the new broadened exception meets the requirements of the Berne three-step test. Limiting the scope of the exception to publicly accessible cultural heritage institutions and to out-of-commerce works and works that are not subject to licensing terms should satisfy the 'certain special cases' criterium and cannot, by definition, be in conflict with the 'normal exploitation' of the work in question. The

fact that the exception would be limited to non commercial uses of the works made available and that authors can decide to opt-out of the exception would further ensure that 'the legitimate interests of the author' are not necessarily prejudiced.

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

This solution would also be in line with the relevant recommendations made in the 'New Renaissance' report of the Commission appointed 'Comite de Sages' that was published in 2011. The report recommended that 'National governments and the European Commission should promote solutions for the digitisation of and cross-border access to out of distribution works' and that 'For cultural institutions collective licensing solutions and a window of opportunity should be backed by legislation, to digitise and bring out of distribution works online, if rights holders and commercial providers do not do so'.

III.A.3 E – lending

Question 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?

Libraries have faced a number of problems when attempting to negotiate agreements to facilitate electronic lending. These include:

- Denial of sales of electronic books to libraries by publishers;
- Removal of content that was available for e-lending without informing the library;
- The use of multiple licences and different models create lack of clarity on the condition of access to the content for users;
- A deterioration of registered users' rights (crossing a border with a borrowed book was not a problem. Transborder online access to an electronic copy offered by a library is often impossible as the result of restrictive licensing conditions.

More generally the question is if it is necessary to negotiate agreements to enable electronic lending. Contrary to what is stated in the introduction to this question there is considerable uncertainty about the status of e-lending under EU law.

Question 37: If there are problems, how would they best be solved

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

mandatory exception in the InfoSoc directive. Such a new exception could take the form of a statutory license with fair compensation for authors.

Since e-lending must be available for all books (commercially available or not) it should be treated separately from the general exception for making out-of-commerce works available online that we argue for in response to question 34.

Question 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?

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

Unfortunately this enormous potential is currently being held back by copyright rules 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 rights holders in order to make protected works in their collection available online. As we have argued above, this makes no sense in situations where the majority of works held by these institutions are not even commercially available.

With the increasing digitisation of our society (and media production in particular), this has other, potentially far reaching consequences. For example, library can buy all physical publications to ensure that they are available to the public both during the period of their commercial availability and thereafter.

The same is not true for digital publications, which are not being sold, but licensed. And currently libraries cannot buy licences to all commercially available content because rights holders are free to decide whether they want to give access to a specific work (and who also can decide on the terms for such access). Often such conditions make it impossible to keep such works indefinitely or to make them available to the community by lending them out. The consequence of this is that the content collection policies of libraries are increasingly determined by publishers and not by the institutions themselves. In the long run, this development threatens to undermine the core function of cultural heritage institutions to preserve the knowledge and culture of our societies and to keep it available to the public.

With regard to the above, the 'study on the application of directive 2001/29/EC on copyright and related rights in the information society' commissioned by the European Commission

and published in december 2013¹² contains an interesting observation. At the end of the section discussing inter alia the exception benefitting cultural heritage institutions, the authors observe that:

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

III.A.4 Mass digitisation

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

From the perspective of cultural heritage institutions this question (and the following) are too limited. The issue of mass digitisation is far broader than what can be addressed with the 2011 MoU and the 2012 Orphan works directive (the other relevant European policy instrument in this area). Copyright issues related to the mass digitisation of collections and the subsequent making available of digitised works require a comprehensive approach that cannot be based the principles of due diligence search and licensing. If we want to enable European cultural heritage institutions to transfer their collections into the digital age (and there cannot be any doubt that this is both an important policy objective and a reasonable expectation of users who as taxpayers fund these organisations) we need a far more comprehensive approach.

In the questions above we have outlined such an approach. that would provide cultural heritage institutions a clear legal framework for operating in the digital environment that would allow us to to achieve the aims related to our public-interest missions. Under this approach the online activities of cultural heritage institutions would be covered by three targeted exceptions:

¹² Compare De Wolff and Partners: *Study on the application of Directive 2001/29/EC on copyright and related rights in the information society* (page 403), Brussels 16/12/2013. Available at: http://ec.europa.eu/internal_market/copyright/docs/studies/131216_study_en.pdf

- An exception covering the making of reproductions (an expanded version of the current exception defined in 5(2)c)
- An exception covering the making available of out-of-commerce works an expanded version of the current exception defined in 5(3)n)
- A new exception covering e-lending

Question 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)?

This is certainly necessary. 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. The approach proposed in reaction to questions 40 and 34 above, would cover all types of works and other subject matter that are held by these institutions.

This solution would also be in line with the relevant recommendation made in the 'New Renaissance' report of the Commission appointed 'Comite de Sages' that was published in 2011. The report recommended that 'solutions for orphan works and out of distribution works must cover all the different sectors: audiovisual, text, visual arts, sound'¹³.

III.B Teaching

Question 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?**

Yes.

(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. As noted by the European Commission in the introductory message above, the educational exception in the directive is already broad and should be interpreted as allowing for the inclusion of all types of works for illustration of teaching.

The problem is that none of the Member States have implemented the exception as broadly as allowed by the Copyright Directive. Thus the permitted use of works in education differs between the Member States. This presents special difficulties for the providers of

¹³ COMITÉ DES SAGES, The New Renaissance, Report of the Reflection group on bringing Europe's cultural heritage online, 2011, http://ec.europa.eu/information_society/activities/digital_libraries/doc/refgroup/final_report_cds.pdf, p. 5

online open courses that can be accessed by citizens of various member states. Also in many Member States the exception is unfit for the digital age as it does not cover the uses of online works for the illustration of teaching. For example, this is the case in Poland where the exception is limited to educational establishments. It is therefore often interpreted that any use of copyrighted material beyond the physical premises of such establishments is prohibited. Another example is France, where the exception for educational use is also narrow and dependant of sectoral agreements negotiated with the national collecting societies, which are imposing too many restrictions. For instance, it excludes works designed for educational purposes, music scores and works made for a digital edition of the written. It is ill-suited to the digital environment to authorize to use paper editions only. It also imposes quantitative limitations which do not make any sense neither for text-work, as they benefit already from the exceptions of quotation which does not require a compensation, nor for non-text works as it forbids for instance to show a movie.

Throughout the EU, issues of cross-border access to copyrighted education content is even more complex. For example, copyrighted materials are used in massive open online courses (MOOCs) that are accessible to all citizens of the EU and often administered by consortia of educational institutions established in several Member States. There is clear need for harmonization as Member States provide for different sorts of educational exceptions allowing (or not) digital uses.

The issue not only concerns the types of uses permissible under specific Member State educational exceptions, but also the aspect of applicable law. For courses that involve making works available online, it is uncertain the laws of which Member State would be applicable to the act of making available. The Court of Justice case law considers a few factors such as the country of establishment, the country of upload, and the country to which the activity is directed. In the case of an online course that is conducted by educational institutions based in Several Member states, it is never fully possible to determine whose law applies.

The major differences in national laws bring legal uncertainty. There is a need to seek uniform solutions, if not at international at least at community level, in order to really harmonize the internal market and to avoid its fragmentation. Otherwise fear will govern on both sides: the educational institutions would seek licenses for uses that need not to be licensed (and maybe they will be refused), and the rights holders will be reluctant to grant license for online uses. Even the public policy for education will be uncertain, since the market power will rule (in the form of unreasonable prices and conditions, prohibition to use material online, and the like)¹⁴.

The other issue that is addressed in more detail in the general part of this submission is the intersection between exceptions and limitations to copyright and technical protection measures. It is true in education as well as in any other areas to which exceptions and limitations apply that TPMs and restrictive licensing prohibit permitted uses.

In the absence of clear guidelines in the law, the temptation is big for rights owners to

¹⁴ Papadopoulou, M.D., Copyright Limitations and Exceptions in an E-Education Environment, (par 3.4) in European Journal of Law and Technology, Vol. 1, Issue 2, 2010. <http://ejlt.org/article/view/38/56>

determine the extent to which the dissemination of knowledge can take place exclusively through contractual arrangements, which restrict the acts normally allowed under the statutory exceptions and limitations¹⁵.

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

The problems would best be solved by making the educational exception mandatory for all the Member States while clearly defining its specific provisions leaving no room for narrow implementations, as recommended in Question 45 below.

In addition, the educational sector provides another example of the need for simple, easy to understand copyright rules (compare our answer to question 10 above). While educational uses are covered by targeted exceptions in all member states, it is our repeated experience that both education professionals and students struggle with determining what types of use they can make without obtaining prior permission from rights holders. These experiences are mirrored by the Hargreaves report¹⁶, which observes:

Many university academics – along with teachers elsewhere in the education sector – are uncertain what copyright permits for themselves and their students. Administrators spend substantial sums of public money to entitle academics and research students to access works which have often been produced at public expense by academics and research students in the first place. (...) Senior figures and institutions in the university sector have told the Review of the urgent need reform copyright to realise opportunities, and to make it clear what researchers and educators are allowed to do.

Therefore, in addition to the legislative solution outlined below in Question 45, the popularization and distribution of knowledge within the member states with respect of the scope of educators' rights is an important goal.

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

The mechanisms exist and are well-known to the Commission. They had been recognized by the Commission in the Green Paper on Copyright in the Knowledge Economy and very recently re-collected in the Study on the application of Directive 2001/29/EC on copyright and related rights in the information society.

The solutions involve extended collective licensing or agreements with publishers on national levels. But these create legal uncertainty for the educational establishments, since there is a risk that no agreement or a restricted one will be reached (e.g. in Denmark no agreement has been reached on digital copying between the collective rights societies and educational institutions, apart from one with teacher training colleges, and in France the

¹⁵ Lucie Guibault, Why Cherry-Picking Never Leads to Harmonisation, page 65 (2010) JIPITEC X at: <http://dare.uva.nl/document/189209>

¹⁶ Ian Hargreaves, Digital Opportunity, A review of IP and Growth, 2011, page 41, <http://www.ipa.gov.uk/ipreview-finalreport.pdf>

exception to use parts of books adds restrictions which did not exist previously). They also add to inconsistency of use of works across Member States for educational purposes. The mechanisms are counter-effective. Educational establishments seek licenses for uses that may not require to be licensed. On the other hand, the rights holders prohibit certain permitted uses by employing DRMs or imposing restrictive contractual clauses.

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

A legislative solution on the EU level is needed, perhaps in the form of a regulation rather than a Directive. Any process should be conducted carefully so as not to lose or alter the currently broad and open educational exception.

The mandatory educational exception should cover all uses of all types of works for illustration of teaching. It should not be limited to any types of institution, but rather defined by its purpose: teaching. All types of educational establishments are deemed to be included under the exception's scope regardless of their source of financing: public or private as long as the purpose of educational activity is non-commercial.

The exception should allow for use of any copyrighted material, including text, film, multimedia for illustration of teaching in classrooms as well as in distance learning. It should also allow for using copyrighted works in teaching compilations, whether they be analogue or digital.

The no license and no compensation model is recommended, meaning that the uses for illustration of teaching should not require the consent (license) or remuneration to rights holders. However, fair compensation may be needed in order to satisfy the three-step test, especially where the exempted uses concern works made available for e-learning purposes, for example in massive open online courses. It is our view that the levies should be paid by the educational institution (running a course or engaged in organization of a course) located in the country where the uploading of the educational materials takes place. Fair distribution of the sums collected should be assured.

If the educational exception remains non-mandatory and fragmented among Member States, then it would be necessary to clearly define the law governing cross-border e-learning activities. It seems appropriate to point to the law governing the right to make works available which in turn should be defined following the Satellite and Cable directive approach of the country of origin principle. In the case of the making available right, the country of origin should be *the country where the act of uploading takes place* (as in the case of broadcasts it is the country of the uplink of a broadcast to a satellite). Clearly the making available right is akin to the right of communication to the public via satellite. Whatever the drawbacks of the country of origin principle may be (as detailed in the Study), it has been functioning in the EU in the context of Sat/Cab Directive for close to a decade and there is a body of case law to rely on.

III.C Research

Question 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. Modern research is conducted in the digital environment, thus by definition there is an international cross-border dimension. Researchers exchange scientific papers and materials online, they use text and data mining tools in order to extract specific knowledge from large datasets, as noted in the Hargreaves review¹⁷:

Researchers want to use every technological tool available, and they want to develop new ones. However, the law can block valuable new technologies, like text and data mining, simply because those technologies were not imagined when the law was formed.

Research is covered by the same exception as teaching. However, these activities are significantly different. Researchers use works and other subject matter by way of illustration, as the teaching exception requires. But in the digital environment, researchers also extract excerpts from them, incorporate extracts of data into their tools for data mining, and conduct virtual experiments and other forms of digital manipulation.

As the exception covers only non-commercial research, problems can arise when there are questions about whether the research conducted could be interpreted as being of a commercial nature. For example, does publicly funded research carried out by a private company, for instance a member of an FP7 project, qualify for the exception? Does research conducted by a university leading to a patent application fall under the exception?

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

Apart from a legislative solution as outlined below, the access problems could be solved by implementing open access principles. As recommended by the Commission¹⁸, the results of publicly funded research projects should be published in open access models. The Commission should further promote and encourage open access models such as in the Horizon 2020 research framework programme and beyond¹⁹. There is also a need to promote among researchers and publishers data awareness and a culture of sharing. It may be done by establishing mechanisms and processes to recognize, reward, and possibly

¹⁷ idem, page 41

¹⁸ see the Recommendation of the European Commission on access to and preservation of the scientific information, 17th July 2012 available at:

http://ec.europa.eu/research/science-society/document_library/pdf_06/recommendation-access-and-preservation-scientific-information_en.pdf

¹⁹ For more detail please refer to our Position on EC Horizon 2020 Open Access policy available here: <http://www.communia-association.org/2012/11/20/position-on-ec-horizon-2020-open-access-policy/>

even require good data sharing practices²⁰.

In terms of a legislative solution, it is recommended to introduce a separate exception for research. The exception should be made mandatory and its scope clarified. The current provision leads to legal uncertainty and abuse by rights holders. It should remain functional in its nature, i.e. it should not extend to particular beneficiaries, but be defined by its purpose: conducting research. It should extend to works, the subject matter of related rights, computer programs, and databases. The uses allowed for research should not be limited by way of illustration, and should cover a wide range of uses in order to enable unrestricted digital research. Scientists must be free to subject any article published or made available online to data mining, extractions, variations, or other digital manipulations provided they give proper attribution under the norms of scholarly research. The exception should cover commercial or non-commercial activities. If necessary for political reasons, the uses for the purpose of commercial research (guidelines on the meaning of commercial should be provided) could be subject to fair compensation, but the levies should be low and well-administered.

As this is the case for all limitations and exceptions, the legal measures must be taken in order to prevent contractual overrides and TPM blocking of permitted research uses.

The above legislative approach stressing the need for a broad exception for scientific research has been proposed and substantiated by the Max Planck Institute for Intellectual Property, Competition and Tax Law in its above mentioned response to the Green Paper on Copyright in the Knowledge Economy, and further defined and supported by Reichmann and Okediji in Empowering the Digitally Integrated Scientific Research, the Pivotal Role of Copyrights' Exceptions and Limitations²¹, 2009. That latter paper was presented to the Commission during the consultations of the Green Paper.

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

Some member states use extended collective licensing mechanisms to cover research activities. Publishers offer individual licenses to allow for text and data mining. The drawbacks of such mechanisms are the same as described for the mechanisms in the teaching exception (Question 44).

There are open access principles promoted and implemented on the European level. It appears that the movement towards open access will continue within the scientific research space. However, as noted above in Question 48, there is a need for formulating policies that would encourage implementations of open access and sharing of knowledge.

²⁰ For more specific recommendations see the Max Planck Institute for Intellectual Property, Competition and Tax Law in its response to the Green Paper: Copyright in the Knowledge Economy consultations in 2008 (at <http://www.ip.mpg.de/files/pdf1/Comments-RegulationResearchDevelopmentAgreements5.pdf>)

²¹ Jerome H. Reichman and Ruth L. Okediji, Empowering the Digitally Integrated Scientific Research, the Pivotal Role of Copyrights' Exceptions and Limitations, 2009 available at: http://policydialogue.org/files/events/Reichman_Okediji_Empowering_Digitally_Integrated_Scientific_Research.pdf

III.D Disabilities

Question 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?

Organizations representing persons with disabilities often have problems with access to content. One of their goals is to provide persons with disabilities with access to works in accessible formats, however they have problems with accessing content and reproducing it in accessible formats. When asking newspaper editors for access to online editions of their newspapers to make them accessible online for people with disabilities, the editors usually decline and do not allow access. This applies both to domestic and cross-border editors.

People with disabilities themselves also encounter problems with accessing content in digital form. This content is sometime locked or in formats, which do not allow access with equipment for people with disabilities, which means that they cannot access the content at all.

This is also the case with the majority of websites, which are also not accessible to people with disabilities for the reasons stated above. What is most concerning is the lack of access to the most websites of government bodies, which provide access to public information.

(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?

There are problems with distributing works which have been reproduced in special formats on the basis of an exception or limitation of copyright, because the legislation in this field is not clear. While many countries do provide limitations or exceptions to copyright for persons with disabilities, which allows them to make copies of works in accessible formats, almost none of them are clear on whether or not cross-border exchange of works produced in accessible formats using this exception or limitation are allowed. Due to this, organizations are not sure if such distribution would infringe on authors rights and do not engage in such actions. This in turn means that the market is very closed for such works and that persons with disabilities do not have the full access to works.

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

The recently adopted Marrakesh Treaty to Facilitate Access to Published Works for Persons Who Are Blind, Visually Impaired or Otherwise Print Disabled is a step in the right direction. However, since this treaty is not in force, a EU instrument should be enacted to unify the legislation of the member states in this field. This instrument should provide an exception or limitation of copyright in favor of these persons.

Firstly, any exceptions and limitations of copyright should be intended for all disabled people, who due to the nature of their disability have a limited or no access to published works, not only for the blind and visually impaired.

The exception or limitation should apply to all published works, not merely literary works, as per example, persons who are blind also need access to visual materials, such as pictures, graphs, diagrams, etc. as well as audiovisual works.

The exception should allow the reproduction and distribution and also the making available of works, however the rights of adaptation and public performance are also crucial. The adaptation right would enable the beneficiary to adapt certain works to enable access, eg. diagrams in a textbook could be described so that a blind person could have access to them. Public performance would enable public recitations of literary works for disabled people. The exception should also specifically enable cross-border exchange of works in accessible formats. This would ensure that more persons with disabilities have access to works in accessible formats and also ensure that there is truly an open European market.

This exception or limitation of copyright should be without the need to pay remuneration. The main reason is, that organizations that mostly deal with providing persons with disabilities works in accessible formats do this on a non-profit and voluntary basis and thus cannot afford to pay remuneration for such actions. It is important to note, that these organizations also provide their services free of charge.

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

There are copyright exceptions and limitations in place, which potentially allow for access to works and use of work for disabled people. Copyright exceptions are provided for in very general terms in international conventions, such as the Berne Convention, the Rome Convention, TRIPS, WPPT, WCT, etc. and as implemented in national legislations are not very clear and are severely limited by conditions of exceptions and limitations which are not adapted to new technologies and global communication systems.

On the European level, the 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 determines that “/.../ Member States may provide for exceptions or limitations to the rights provided for in Articles 2 and 3 in the following cases: /.../ (b) uses, for the benefit of people with a disability, which are directly related to the disability and of a non-commercial nature, to the extent required by the specific disability;/.../”

Accordingly, the Member States are free to decide whether or not to implement such exceptions or limitations. Should they decide to implement it, they can form the exception in almost anyway, as there are no guidelines that would unify the adoption of such limitation or exception. Because of this, the system is not harmonized and no tvery effective.

There is a great need for a European instrument, which would unify and clearly define what

is allowed and what is not and would adapt the exception and limitation to new technologies. This would also make any cross-border access to materials much easier, which is now very complicated due to the differences in the legislations of the Member States.

III.E Text and data mining

Question 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?**

Yes, since in most cases it is necessary to make a copy of the content in order for a machine to extract facts and data for mining, the act of text and data mining there is a lot of uncertainty among users of online services provided by cultural heritage institutions that want to make use of text and data mining. Because it restricts the copying of large portions of databases, the Database Directive may also be a legal barrier to text and data mining. Although text and data mining is concerned with the extraction of facts and data and as such should not be subject to an exclusive right, the results of text and data mining research are currently being suppressed because of a lack of legal clarity.

We observe that the resulting legal uncertainties create a situation where the wealth of information that is available online (often produced and made available by publicly funded institutions) is not fully accessible to researchers employing text and data mining technologies.

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

Text and data mining should be considered as an extension of the right to read. Text and data mining should certainly not be treated with a contractual approach which would try to license for a fee this usage in addition to the right of access.

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

If Text and Data mining would be authorized by a copyright exception, it would constitute a de facto recognition that Text and Data mining are not legitimate usages. We believe that mining texts and Data for facts is an activity that is not and should not be protected by copyright and therefore introducing a legislative solution that takes the form of an exception should be avoided.

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

It is required to clarify that they are unregulated usages and part of the prerogatives which can be exercised once the right to access content has been cleared through a license or is otherwise available to the user for another reason such as an exception.

Question 57: Are there other issues, unrelated to copyright, that constitute barriers

to the use of text or data mining methods?

Terms of use imposed by content providers can be a barrier to text or data mining. Terms of use prohibiting the lawful right to perform data mining on a content accessed legitimately should be considered an abuse of exclusive rights and declared illegal. Also, technical restrictions to download the content in an open format will also be considered a barrier to data mining and their circumvention should not be considered a breach of terms of use, of copyright, or of effective rights protection measure.

III.F User-generated content

Question 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?

Current EU legislation does not structurally allow citizens to share remixes and mashups of pre-existing works online, even in non-commercial contexts and when only very minor parts of works are re-used. This stands in stark contrast with everyday practices of large parts of the population. The fact that European citizens are able to express themselves via transformative uses of protected material is not due to exceptions guaranteeing this fundamental rights but to an opaque mix of licensing arrangements (concluded by platform providers with rights holders) and selective enforcement of rights.

From our perspective this situation is highly undesirable. As long as they do so without a commercial motivation, citizens should have the right to express themselves in any media and to make transformative uses of protected materials in doing so. Citizens should not only be allowed to make private copies of material that they have access to but they should also have the right to share protected works for non-commercial purposes.

Question 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?*

From our perspective a (mandatory) exception that allows non-commercial sharing (making of reproductions and making available) of protected works by individuals would provide sufficient room for citizens to express themselves. Such an exception could either be a new one or an extension of the scope of an existing one such as the exception for the benefit of quotations (as foreseen in article 5(3)d of the InfoSoc directive).

V. Fair remuneration of authors and performers

Question 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?

While this consultation is about copyright and copyright is not about developing legislation-based business models for the authors and performers, we believe that the

position of authors and performers can be improved by strengthening their rights vis a vis publishers and other distributors of their work. Authors and performers should have the ability to regain control of works that they have assigned to third parties if those third parties do not actively exploit their works (anymore). Such a non-usus clause can for example be found in the changes to the dutch copyright act that is currently pending in dutch parliament.

Also authors of scientific articles and other short works (such as contributions to proceeding of academic proceedings should have the (time delayed) right to publish such works in an open access publication that cannot be waived or transferred to another party such as a Scientific publisher. Such clauses aimed at ensuring public access to publicly funded academic research can be found in the german copyright law and in the proposed revisions to the dutch copyright act that is currently pending in dutch parliament.

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

Given that the European Union is currently promoting open access to publicly funded research as part of the Horizon2020 program it seems reasonable to create the legal conditions that ensure that authors of academic works can fulfill their open access obligations even when they also work with scientific publishers. In addition and in line with our previous answers we believe that any other measure to improve the standing of authors and performers vis a vis publishers and other distributors can best be strengthened at the EU level. Clauses forbidding to self-archive a scientific work in an open access repository should be declared illegal. Clauses imposing the transfer of rights in all areas and languages while the publisher is not actively working

VI. Respect for rights

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

No, Respect for rights is not created by enforcement, but by establishing rules that are perceived as fair and balanced by as many people as possible. The most effective way to improve respect for rights would be to take user concerns seriously when addressing the other issues identified throughout our answers to the entire consultation. Copyright holders have ample means to enforce their rights. At the same time social acceptance of copyright rules remains low and citizens obtain content from unauthorized sources.

Any system that seeks to improve respect for the rules that it establishes needs to ensure that the rules are well balanced and perceived as fair by all stakeholders (or at least a majority of the stakeholders directly affected by these rules). The recent explosion of digital technologies has meant that citizens and professionals that were previously situated outside of the reach of the copyright system are now affected by the system in their day to day actions and professional activities. As we have outlined in our answers to the questions III we do not believe that the legitimate interests of citizens and many professionals are

adequately expressed by the existing copyright laws. This perception of copyright as a system that imposes unjust limits on citizens and professionals, combined with the fact that the current systems is overly complex, undermines acceptance of the system.

In our answers to the questions above we have proposed a number of modifications to the system that have the potential to, once implemented, increase the social acceptance of the system as a whole. Without these much needed changes the system risks to alienate even larger groups of stakeholders which will even further undermine respect for the rights of creators.

Question 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 limitation of intermediaries' liability is important and is a cornerstone of the functioning of the Internet. Without it, there is a high risk of censorship and of going against freedom of expression, freedom of communication but also freedom to conduct a business. Middlemen should not be made liable and privatised enforcement is not the solution.

Question 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, the current civil enforcement framework is tilted towards the interests of rightholders. As mentioned above there is a need for more balanced copyrights rules that can easily be understood (and followed) by all stakeholders. As long as this is not the case a renewed focus on enforcement measures will only further undermine the social acceptance of the system as a whole.

VII. A single EU Copyright Title

Question 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?

The establishment of a single EU Copyright Title would be a positive step forward for both rightholders and users of copyrighted content. It would help to harmonize the currently disjointed limitations and exceptions and copyright duration schemes across the EU.

Question 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?

Pursuing the establishment of a single EU Copyright Title should be the next step. Work on this should begin immediately.

VIII. Other issues

Question 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.

In addition to the reforms discussed above, as a general matter, the EU should support rights holders who wish to dedicate their copyrights to the public domain or sharing under an open licensing scheme. These rights holder groups are an important and growing constituency whose interests should be duly taken into account by policymakers. The issue of the voluntary dedication of rights to the public domain by their owners is on the work agenda of the Committee on Development and Intellectual Property (CDIP) of the World Intellectual Property Organization (WIPO). As a WIPO permanent observer, COMMUNIA encourages the international copyright community to commit further study to the legal framework applicable to voluntary non-protection²².

This reflection should be concretely echoed on the legislative level with the introduction of a positive legal definition of the public domain in copyright rules. The link between copyright protection and the public domain has evolved over time, and needs to be clarified by legislation. The role of the public domain, already crucial in the past, is even more important today, as the Internet and digital technologies enable us to access, use and re-distribute information with a marginal cost of zero. It has thus become necessary to reform the copyright system to recognize the existence of the public domain as a positive set of content that can be freely used to serve culture, innovation and public service purposes, in complementary with exclusive protection²³.

²² See notably the *Terms of Reference for a Comparative Study on Copyright Relinquishment* established by the WIPO Secretariat (CDIP/10/14) and our related comments at: <http://www.communia-association.org/2012/11/14/wipo-cdip10-comments-on-the-terms-of-reference-for-a-comparative-study-on-copyright-relinquishment/> and <http://www.communia-association.org/2012/11/14/wipo-cdip10-comments-on-the-scenarios-and-possible-options-concerning-recommendations-1c-1f-and-2a-of-the-scoping-study-on-copyright-and-related-rights-and-the-public-domain>.

²³ For further details about our legal recommendations, see the document *COMMUNIA Positive Agenda on the Public Domain*:

<http://www.communia-association.org/2012/12/05/communium-positive-agenda-for-the-public-domain>.