Public Consultation
on the review of the EU copyright rules

PLEASE IDENTIFY YOURSELF:

Name:

……British Screen Advisory Council (BSAC)……..

……..

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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):

The British Screen Advisory Council is an umbrella group of stakeholders in the UK audiovisual sector. BSAC Members include, not only all of the segments in the UK audiovisual value chain (including development, production, sales, acquisition and licensing of content), but also leading technology firms and ISPs whose growth relies in part on strategic alliances with the content production sector in the UK and across the EU.

I. Rights and the functioning of the Single Market

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

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

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

…….

…….

□ NO

□ NO OPINION

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

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

…….

…….

□ NO

□ NO OPINION

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

[Open question]

Our comments are general, given our status as an umbrella group rather than an organisation managing rights, but we have explored the issue of cross-border licensing on a number of occasions and are concerned that the above three questions seemed geared towards finding specific examples to justify the direction of travel indicated in this consultation paper where more and more cross-border availability of content services is the only desirable outcome. In the audiovisual area, whether or not and when services are made available on a cross-border basis depends on a number of market-driven factors. Most recently we set out various issues

in a paper we provided in October 2013 for the EU *Licences for Europe* initiative (see http://www.bsac.uk.com/2013.html?download=261:bsac-contribution-to-the-eu-commission-s-licenses-for-europe-initiative). In particular, we pointed out the importance of cultural diversity in the EU, and that the first to lose out from a standardized, pan-European approach to distribution would be the local consumer, because smaller independent producers and those producing niche content would find it too costly to offer content via pan-EU distribution models. We also pointed out that choices about how audiovisual material is distributed are inextricably linked to how production of the content is funded. Moreover, we noted that nothing in the current framework of EU and Member States' copyright laws prevents producers and distributors from licensing audiovisual content on a pan-European, multi-territory basis, as illustrated by the growth in cross-border business models.

We did, however, note that aggregation of content on a pan-European basis is both capital and labour intensive. There are many fixed costs, such as insertion of metadata, language versioning (dubbing and subtitling), encoding, the need for differentiated marketing and press for each language market and legal compliance, such as content classification. The high technical and compliance costs, combined with low revenues, make pan-EU distribution a difficult economic proposition for independent producers and distributors in Europe. For many free-to-air services based on the licence fee and/or advertising, the deployment of cross-border access could prove prohibitively costly, owing to the considerable financial outlay required to implement requisite registration and verification systems. It is therefore important to explore any concerns raised about the availability of content across the EU with a full understanding of market issues for the many different types of content, both within a sector and in different sectors. Different sectors in the creative industries have different characteristics, including the business models that enable them to thrive, and so conclusions reached for one sector should not be carried across to other sectors without fully understanding what this might mean.

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

[Open question]

We have not identified any copyright problems. BSAC believes it is vital to allow the industry to continue to develop market-led solutions to shifting patterns of use by EU consumers. The need for market-led experimentation is vital in order to ensure that the audiovisual industry's sustainability is not jeopardized. The technological and market challenges we have indicated above should not be underestimated though. We therefore proposed in our recent paper (see our answer to question 3) that practical incentives to help stakeholders meet EU consumers' growing demand for flexible access to content should be pursued. We suggested that funds from Creative Europe could usefully be prioritised to support business ventures with pan-European components by offering to share in a number of technical costs, for example relating to encoding costs, language versioning, market research, and content identification and registration.

We did, moreover, welcome the Commission's *Licences for Europe* initiative as on some issues at least this did prove useful. The outcome of the discussions on the cross-border portability of services in the audiovisual sector for consumers, who have subscribed to online services in one Member State, to keep accessing them when travelling temporarily to other Member States, shows, as the Commission has recognised, that the sector is ready and willing

to work towards the further development of cross-border portability. Initiatives such as this should be given time to deliver results without any rush to bring forward changes to the copyright framework.

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

√ YES – Please explain by giving examples

We have already explained in answer to question 3 why it might often be necessary or justified to impose territorial restrictions on business models. Issues relating to how production of the content has been funded will often be important. These restrictions may, of course, be ones that only apply when audiovisual material is first made available to the public as the audiovisual sector would not ultimately want to prevent access to content in a country where there is a market. However, there is strong evidence that not every genre of content attracts cross-border demand on a scale sufficient to support viable businesses. For example, we pointed out the very disappointing results from the uefa.com website for streaming European Champion League football matches live in the paper referenced in our answer to question 3. The various capital and labour costs for a number of technical issues, as we have explained above, are also very relevant to whether there might be territorial restrictions. Audiovisual content restricted to language territories is much more likely to be justified than for some other types of content given the importance of the right language version to many consumers. Consideration of how best to support cultural diversity is, of course, particularly important, and imposing territorial restrictions might be part of how less universally popular content continues to get made and, at least initially, then gets made available to consumers. Cross-border licensing models are therefore consumer driven and such models will materialise where there is sufficient consumer desire to support them in an economically feasible manner, which is consistent with cultural diversity.

We note that two recently published studies also conclude that territorial licensing is still important to the continued success of the audiovisual sector and the preservation of linguistic and cultural diversity, and that regulation imposing cross-border services could mean that consumers would face higher prices. (See the studies by Olivier Bomsel and Enders Analysis published by LetsGoConnected at http://www.letsgoconnected.eu/studies.php in October 2013.) The Commission should therefore let the market develop in ways that benefit all stakeholders, rather than explore regulatory solutions. In this respect, the commitments made by the audiovisual sector as a result of the Licences for Europe are, of course, a very helpful way forward.

□ NO

□ NO OPINION

6. *[In particular if you are e.g. a broadcaster or a service provider:]* ***Are there reasons why, even in cases where you have acquired all the necessary rights for all the territories in question, you would still find it necessary or justified to impose territorial restrictions on***

the service recipient (in order for instance, to redirect the consumer to a different website than the one he is trying to access)?

√YES – Please explain by giving examples

Please see the answer to question 5 as similar issues are relevant here.

□ NO

□ NO OPINION

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

√YES – Please explain

Please see the answer to question 4 about practical, market led measures. We do <u>not</u> support legislative measures.

□ NO – Please explain

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…….

□ NO OPINION

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

1. The act of "making available"

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

√YES

We have ticked the "yes" box because we do not in general believe that the scope of the "making available" right has caused problems for proper licensing of audiovisual content, in cross-border services or otherwise, such as to justify any regulatory intervention at the moment. In licensing the right it is, of course, essential to make sure that the actual public who will access the material in one or more territories are taken into account as this is likely to affect what royalties are appropriate. However, the case law that is giving additional interpretation to this right certainly needs to be monitored as it could ultimately affect right holders' ability to reach fair deals on how their content is made available to the public. Any application of the "country of origin" principle needs to be looked at very carefully in the context of how this might impact on the exercise of exclusive rights and adversely affect innovation in, and the growth of, new business models. It would be important to fully take

into account how producers license their content on multiple platforms in multiple territories to underpin and sustain their investment in the production of audiovisual works.

We note that the Commission published a study shortly after this consultation commenced which has looked in depth at the making available right. Given the length of the study and the short time in which to respond to this consultation, we cannot claim to have considered all the points made in the study carefully, but it looks like a helpful contribution to the debate. We note the two alternative approaches to the making available right examined in the study, namely a "country of origin" approach and an "exploitation" approach, based on where exploitation takes place/the public are targeted. The conclusions of this study seem to be that neither alternative is without problems and that the efficiency of each approach can only be assessed if the policy objectives are stated unambiguously. In the light of this study, and the developing case law, we would therefore urge the Commission not to rush to any legislative changes. As the study makes clear, it is necessary to reach agreement on the policy objectives before any legislative change can be properly assessed. There would also need to be a comprehensive assessment of the likely impact on all stakeholders of any regulatory changes.

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

.....

.....

□ NO OPINION

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

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

We have answered "yes" because it is certainly possible, if not likely, that any clarification of the territorial scope of the "making available" right could affect one or more of the issues indicated. It is clear from the recently published study, which we have referred to in our answer to question 8, that the two possible approaches explored there would have one or more of these effects, including to adversely affect right holders' ability to enforce their rights. As the study makes clear, there are differences between provision in Member States' laws regarding authorship and ownership of rights, and contracts can also be agreed so that right holders vary in different territories, or even possibly in different parts of the same territory. These issues would therefore need to be explored very carefully as well as the nature of the making available right. The study suggests that it would be very hard to avoid any problems with possible clarification of the marking available right. The Commission should certainly consider the various points raised in the study very carefully and commission further evidence of the impact of any proposals when there is agreement on a clear policy objective. It would certainly be very important, in our view, to avoid taking any action which might interfere with how contracts can be drawn up as part of arrangements that enable audiovisual material to be made, or which make enforcement of rights more difficult.

□ NO

□ NO OPINION

2. Two rights involved in a single act of exploitation

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

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

…….

…….

√ NO

There is not generally a problem in the audiovisual area because all of the rights are held by the producer, although for television, particularly archive programming, it will usually be necessary to clear online rights in the underlying content. It is particularly important to have a reproduction right, separate from the making available right, in order to distinguish licences for streamed services from services which permit consumers to download copies. Licensing of the reproduction right, as something distinct from the making available right, must be secured for services which offer downloads. The lack of any problem in the UK with the current framework of rights is clearly demonstrated by the large (and increasing) number of licensed online services which encompass a variety of different business models (streaming/download/rental/purchase, cloud/device storage etc) giving consumers a range of choices at different price points.

□ NO OPINION

3. Linking and browsing

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

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

We do not consider that all hyperlinks should require the authorisation of the right holder. But there are some potentially complicated issues here depending on how the link is provided and what is linked to. Indeed, even if there are situations where it is reasonable for a hyperlink to not require the authorisation of the right holder, this does not necessarily mean that the right holder should have no rights in relation to linking, rather than what is linked to, and the way the link is provided, being considered to have been impliedly licensed by the right holder. Various relevant issues have been or are, of course, currently being considered by CJEU cases.

We do believe that in some situations there should clearly be a remedy for right holders to deal with hyperlinks that potentially undermine how they exercise their rights. Whether or not

this should be by making certain things acts that must require the authorisation of the right holder, or some other approach, is something that we would like to see the subject of further debate in the light of the decisions by the CJEU and relevant cases that have been decided by the courts in all the Member States. It may be desirable for the Commission to arrange for a study, which identifies the benefits of and problems with alternative solutions, before the impact of any way forward can be properly assessed. We are, though, already able to identify some areas where linking should not be possible without a remedy for right holders.

The first area of concern we have where we believe it should be possible to take action against the person who has made a hyperlink available to the public is when the link is to material that infringes copyright. If this remedy is not by making it clear that provision of the hyperlink infringes the right of communication to the public, then there would also be the added problem of how to ensure that it is possible to seek injunctive relief against internet service providers where their services facilitate access to the website providing the links. In this respect, the recent decision in the UK in *Paramount Home Entertainment International Ltd and others v British Sky Broadcasting Ltd and others [2013] EWHC 3479 (Ch)* (see http://www.bailii.org/ew/cases/EWHC/Ch/2013/3479.html) is interesting, because the injunctive relief that was given depended on finding that the website FirstRow was doing more than linking. However, this does raise the question whether right holders would be able to obtain injunctive relief against internet service providers where a website is only providing hyperlinks to infringing material. We do not necessarily agree with the Hon. Mr Justice Arnold's comments in this case on when a hyperlink amounts to a communication to the public, and we hope that the recent CJEU decision in the Svennson case, which seems to suggest that there would be a remedy against internet service providers, where websites are hyperlinking to infringing content, is confirmed by other decisions in due course.

The second area of concern is where there is a deep link to content made available to the public, by or with the consent of the right holders, and the deep link means that technical protection measures or advertising are circumvented. This would give access to material in a way that undermines right holders' ability to control when and how material is accessed, including by obtaining revenue for that access. Finally, a hyperlink made in such a way that it is not clear that the linked material is not that of the linker is also problematic.

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

……

……

□ NO OPINION

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

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

In many situations such viewing should properly fall within the scope of the temporary copy exception and/or be impliedly licensed by right holders who have made their material available to the public to be accessed this way. But, just as in the case of hyperlinking, there are situations where it would certainly be reasonable to ensure that right holders are able to take action against the person enabling the viewing, such as where the material being viewed has been made available to the public without the authorisation of the right holders.

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

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…….

□ NO OPINION

4. Download to own digital content

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

□ YES – Please explain by giving examples

…….

…….

□ NO

□ NO OPINION

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

[Open question]

The application of exhaustion of rights to intangible digital copies would be unworkable and impact adversely on both right holders and consumers. The first problem is that a lawfully downloaded copy, stored on a medium that can then be re-sold, would in practice be very difficult to distinguish from illegal copies that are being re-sold, as downloaded copies are not stored on a medium that has been branded by right holders, as is the case with sales of physical copies. A re-sale, permitted by making the copy available via the internet to another person, would also be indistinguishable from offers for sale of illegal copies. This would cause tremendous problems for right holders of course, and add significantly to their difficulties in taking action against those who are making illegal copies available, as there would be the additional need to prove that such copies are not legal re-sales. However, third parties who facilitate the re-selling could also face difficulties as they would not easily know whether or not they are facilitating a legal or an illegal act. The difficulty of enforcing rights against those who illegally keep a copy of something that they have re-sold would be compounded by private copying exceptions that permit those copies to be made in the first place, so there may be a number of legal copies that a re-seller would be expected to delete before a resale. The Commission has, of course, already identified the lack of deterioration in the quality of copies in contrast to second-hand sales of physical goods. It is also necessary to look at the impact on the whole value chain. Resale would likely take place via a third party

platform/market place, which would make revenues from the resale of *identical* quality copies of the original work, without returning rewards for the original innovation and creation back to the right holders. A right to re-sell a downloaded digital copy would therefore have much more of an impact on right holders' ability to sell their content than is the case with physical goods.

Licensing access to content already provides consumers with a range of business models, including ones which enable content to be enjoyed with friends and family. Business models are also being developed to facilitate the resale of digital copies in a way that enables the right holder to be sure that the original was legal, and that the seller has destroyed all copies upon sale. This is possible within the right holder's ecosystem, e.g. where transactions take place via a walled cloud service. Such business models do, therefore, already provide for what might be covered by a digital re-sale right. These business models would be adversely impacted with a doctrine of exhaustion of rights. Legislating in this area would therefore be a blunt instrument with the risk of unintended consequences, including right holders being incentivised to offer only streaming services, rather than download to own, and so cause a reduction in consumer choice. The market is best placed to respond to consumer demand for resale, without undermining original content investment.

We have answered this question from the viewpoint of the audiovisual sector, but the issues we have mentioned would seem to be relevant to other sectors too.

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

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

□ YES

√ NO

□ NO OPINION

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

[Open question]

…….

…….

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

[Open question]

We have answered "no" not least because it would seem unfeasible or unfair to make it a requirement to register copyright that already exists in a new registration system. Indeed in most cases, as the Commission has recognised, requiring registration in order to exercise rights would be contrary to international conventions in any case. Voluntary registration systems established by various sectors are probably less likely to be overly bureaucratic, and more likely to be kept up-to-date when there are changes in the ownership of rights, than a single EU registration system. Encouraging such voluntary, industry-led approaches, facilitating ever better use of metadata and exploring how to support other practical initiatives would seem to be a better approach than establishing an EU registration system. This is, of course, already happening in the UK with the development of a Copyright Hub to provide a single point of entry to different databases, licensing and so on.

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

[Open question]

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D. How to improve the use and interoperability of identifiers

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

[Open question]

The Commission has noted the work to develop a Copyright Hub in the UK. Looking at the interoperability of identifiers, as well as how to streamline copyright licensing, has been part of this initiative. Indeed, the agreement that the ISAN and EIDR identifiers used in the audiovisual sector should be interoperable is a direct result of this initiative. Some BSAC Members have endorsed the work of the Linked Content Coalition. The UK Copyright Hub continues to be an industry-led initiative, but facilitated by, with some contribution to its initial financing from, the UK Government. The Commission could therefore certainly explore whether it should take on a similar role at EU level.

E. Term of protection – is it appropriate?

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

□ YES – Please explain

…….

…….

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

…….

…….

√ NO OPINION

We do not at the moment have a view on whether or not the current terms of protection are still appropriate in the digital environment because we have not yet seen the evidence that would be necessary to come to a conclusion. We believe that any decision on term of protection should be based on evidence.

II. <u>Limitations and exceptions in the Single Market</u>

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

□ YES – Please explain by referring to specific cases

…….

…….

√ NO – Please explain

We have answered "no" because we think many of the exceptions and limitations work to permit something within a Member State without problem, and so we are cautious about suggestions that exceptions should be mandatory or more harmonised. Indeed, before we can consider whether or not the current provision that makes most exceptions optional should be changed, we believe that there needs to be a debate on what a more harmonised framework would actually look like. For example, Article 5 of Directive 2001/29/EC sets out an exhaustive list of areas where there can be exceptions, but the provision that Member States can make is also qualified in that it must, when elaborated, comply with the three-step-test requirement in Article 5(5). The recently published study that we have mentioned in our answer to question 8 has looked in some detail into how this has led to noticeable differences between exceptions in the same area because of the different ways they have been implemented by Member States. That study has not looked at all the areas where exceptions are permitted, and so it would be necessary to undertake more work of this sort to establish the similarities and differences in all areas of permitted exceptions before there can be a debate about whether or not they should all be more harmonised, if so, how, and then whether or not they should be made mandatory.

□ NO OPINION

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

□ YES – Please explain by referring to specific cases

…….

…….

√ NO – Please explain

Not at the moment - see our answer to question 21, where we have said that a debate about further harmonisation would certainly have to precede the debate about which, if any, exceptions should be mandatory.

□ NO OPINION

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

[Open question]

No. We are not aware of evidence showing the need for exceptions in new areas. There should be no changes to the areas where exceptions are permitted unless there is evidence of a clear need for change, and then only changes to the extent necessary for that need. The current areas for permitted exceptions do not seem to have caused the UK problems in its work to update exceptions.

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

□ YES – Please explain why

…….

…….

√ NO – Please explain why

The current way provision is made in the EU regulatory framework on exceptions and limitations seems to provide Member States with reasonable flexibility as to how they formulate an exception. As we have indicated above, the provision in general sets out areas where there can be exceptions, with a requirement that the three-step test should apply to the detail of how provision is made. It is clear that this flexibility permits Member States to make provision in different ways, and to both narrow and widen specific exceptions when this is appropriate. Setting out what exception provision is permitted in more detail could reduce the flexibility, and the ability of Member States to adjust specific exception provision rapidly when the circumstances require this, and so this should only be explored where there is clearly a problem with different exceptions in different Member States. It would then be important to agree harmonisation in a way that does not remove the reasonable flexibility of what can be done under existing exceptions in some Member States, such as the flexible exception in the UK permitting "fair dealing" with a copyright work for the purposes of criticism and review.

□ NO OPINION

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

[Open question]

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

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

…….

…….

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

In the majority of cases the use of copyright material in audiovisual productions is licensed, and so the use does not rely on exceptions. We have therefore ticked the "no" box, as this probably more accurately reflects our view than ticking the "yes" box, especially given the areas in which exceptions are explored more in this consultation paper. However, for uses, such as in news reporting, where licensing may not be realistic in the timeframes in which extracts from material might be used by those reporting the news, some of our Members do encounter problems with territorial limitations sometimes.

□ NO OPINION

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

[Open question]

The issues raised by this question illustrate the problems of pursuing the idea of harmonising exceptions and making them mandatory in the absence of resolving other differences between Member States' laws, such as on authorship and ownership of rights where there has been no harmonisation. We do not know how it would, therefore, be possible to arrive at equitable solutions for "fair compensation" if the effect of exceptions is that they have cross-border effect.

A. Access to content in libraries and archives

1. Preservation and archiving

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

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

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

…….

…….

√ NO

We support exceptions that permit audiovisual archives to properly preserve the material they hold.

□ NO OPINION

29. If there are problems, how would they best be solved?
[Open question]

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…….

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

[Open question]

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…….

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

[Open question]

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2. Off-premises access to library collections

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

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

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

[Open question]

As an umbrella group we have no direct experience in any of the above categories, but we would in general be concerned about exceptions permitting off-site access to material as such services could readily conflict with right holders' business models. Having said that, though, we do support the proposed change to the exception in the UK, which permits broadcast material to be recorded by educational establishments and then made available to students, so that there can, with suitable safeguards, be availability to students working at a distance from the establishments. A very important part of this exception is, though, that it does not apply where right holders are licensing this use. We would be very concerned about permitting remote access without the ability for right holders to obtain compensation in some way.

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

[Open 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?

[Open question]

See the answer to question 32 where we have explained when and how a limited legislative solution might be appropriate at national level.

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

[Open question]

Licensing where right holders agree this should be the only solution, other than in very specific situations, such as we have mentioned in answer to question 32.

3. E – lending

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

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

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

□ YES – Please explain with specific examples

…….

…….

□ NO

□ NO OPINION

37. If there are problems, how would they best be solved?
[Open question]

…….

…….

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

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

[Open question]

…….

…….

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

[Open question]

As an umbrella group we have no direct experience of the issues raised by these questions, but we do not believe that exceptions to rights to enable e-lending of audiovisual material would generally be appropriate as this activity would conflict with new business models. Any activity by libraries should therefore be as agreed under licences.

4. Mass digitisation

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

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

…….

…….

□ NO – Please explain

…….

…….

□ NO OPINION

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

√ YES – Please explain

Some mass digitisation of audiovisual material might be possible under preservation exceptions, but where it is to be made available to the public in general this will require licensing to be agreed with right holders.

□ NO – Please explain

…….

…….

□ NO OPINION

B. Teaching

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

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

□ YES – Please explain

…….

…….

□ NO

√ NO OPINION

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

[Open question]

We have indicated in answer to question 32 our support for expanding a UK exception to permit recordings of broadcast material made by educational establishments to be made available to distance learners, subject to the exception being overridden when this activity is being licensed by right holders. This approach ensures that all broadcast material can be used to support teaching at educational establishments and that distance learners get access to the same material as those at the educational establishment. But it also ensures that this generous permitted activity can give rise to remuneration for right holders because they have the option to license the activity. Right holders cannot, though, prevent the activity; they can only license it and charge royalties for the use.

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

[Open question]

Licensing that overrides the exception in the UK as explained in answer to question 43 does exist. This suggests that licensing uses, beyond those covered by the exception, could therefore be developed too where those who wish to use copyright material can make a case to right holders and right holders do not believe that what would be permitted would conflict with their own business models.

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

[Open question]

See our answers to questions 43 and 44.

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

[Open question]

See our answers to questions 43 and 44.

C. Research

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

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

□ YES – Please explain

…….

…….

□ NO

√ NO OPINION

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

[Open question]

…….

…….

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

[Open question]

The UK is in the process of expanding the exception in the UK permitting use of audiovisual material for research so that it covers audiovisual material. Whilst we sympathise with a solution to meet the needs of genuine researchers, and are content for an exception to permit the audiovisual material held in the archives of the British Film Institute and the other UK national archives to be copied for researchers when appropriate, including where access to the material would not otherwise be possible, we have concerns about the broad scope of the proposed exception more generally.

D. Disabilities

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

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

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

□ YES – Please explain by giving examples

…….

…….

□ NO

√ NO OPINION

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

[Open question]

…….

…….

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

[Open question]

Audiovisual material is often made available to the public with the option of sub-titles for people who have a hearing impairment, and increasingly with audio-description for people who are visually impaired. Whilst we do not oppose the existence of exceptions for material that is not published, broadcast and so on with accessibility options like this, the better option for people with a disability is to have the content at the same time as everyone else from the same provider as everyone else with accessibility options built in. In the UK broadcasters have been exceeding the targets that have been set for making content available with adaptation. There can, sometimes, be non-copyright problems. For example, differences between formats for subtitles can cause problems for service providers trying to host them. Best practice guidance to ensure that there is standardisation of the technical requirements for access services could reduce such problems, and governments could facilitate the development of such guidance.

E. Text and data mining

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

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

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

□ YES – Please explain

…….

…….

□ NO – Please explain

…….

…….

√ NO OPINION

We do not have a firm opinion on the various issues raised by text and data mining because, until recently, we did not believe that the issue was being explored with a view to it applying to audiovisual material. However, the proposals being developed in the UK would seem to permit the copying of any database of any type of material in order to mine it for any sort of information, as well as copying any content to establish a database in the first place to mine it for data of any sort. So, for example, a person would be able to copy every piece of audiovisual content on YouTube in order to mine it for any type of information for any (non-commercial) purpose. It is of concern that the impact on stakeholders of such a wide provision does not, so far, seem to have been assessed in the UK. It would certainly be important to ensure that the impact has been assessed appropriately in the EU if the proposals being considered might also go beyond the relatively narrow area of mining academic journals for the purposes of scientific research.

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

[Open question]

…….

…….

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

[Open question]

…….

…….

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

[Open question]

…….

…….

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

[Open question]

…….

…….

F. User-generated content

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

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

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

□ YES – Please explain by giving examples

…….

…….

□ NO

□ NO OPINION

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

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

□ YES – Please explain

…….

…….

□ NO – Please explain

…….

…….

□ NO OPINION

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

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

□ YES – Please explain

…….

…….

□ NO – Please explain

…….

…….

□ NO OPINION

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

[Open question]

We believe that licensing schemes, including agreements between right holders and platforms, are, and should continue to be, an important part of any solution. It would certainly be premature to consider any legislative solutions when there has not been time to see if the pledges given by right holders as a result of the "Licences for Europe" discussions, to find practical solutions to ease user-generated content and facilitate micro-licensing for small users, solve any remaining problems. A new exception certainly does not seem to be the right approach as the use may start with individuals acting for non-commercial ends, but an exception could not then legitimise the posting of the UGC on commercial platforms. There is, moreover, very little evidence of problems in any case with huge amounts of UGC containing pre-existing works in some form being created every day within the existing copyright framework. The potential dangers of creating a new exception far outweigh the possibilities of an exception that is fairly drawn being able to solve any problems.

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

[Open question]

…….

…….

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

[Open question]

See our answer to question 61 about licensing solutions.

III. Private copying and reprography

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

□ YES – Please explain

…….

…….

□ NO – Please explain

…….

…….

□ NO OPINION

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?

□ YES – Please explain

…….

…….

□ NO – Please explain

…….

…….

□ NO OPINION

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

[Open question]

…….

…….

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

□ YES – Please explain

…….

…….

□ NO – Please explain

…….

…….

□ NO OPINION

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

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

…….

…….

□ NO – Please explain

…….

…….

□ NO OPINION

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

[Open question]

…….

…….

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

[Open question]

…….

…….

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

[Open question]

We have not identified specific problems with the levy system because there is not a levy in the UK. We do nevertheless have views on the problems indicated by the above questions. We do not support the system of levies that exists in most Member States to compensate right holders for copying under a private copying exception, especially now that new business models are giving consumers various options about copying, and these can do so by charging different prices of course. A private copying exception with levies can, indeed, in such circumstances lead to situations where consumers feel they have paid twice. A better solution is to not have a broad private copying exception and levies, but, rather, to let the market develop choices for consumers where they can be charged differently depending on whether they want to make one copy, several copies, store the content in the cloud and so on. For example, in the audiovisual area, UltraViolet, a technology platform developed jointly by consumer electronics device manufacturers, content owners and several of the larger international film distributors, provides consumers with the ability to register UltraViolet-enabled films and TV content that they have purchased in their personal cloud 'locker'. The content in a consumer's UltraViolet library can be downloaded to a device before travelling or streamed to a connected device whilst on the move. Services are also appearing that allow

consumers to register their existing DVD/Blu-Ray collection in their UltraViolet library. The existence of levies could certainly undermine the future development of such consumer friendly services because consumers might query why they should be charged for the services at the same time as paying a levy. We note that the recommendations made by Mr António Vitorino, in the document referenced in footnote 57 of this consultation document, support licensing models rather than levies as the preferred approach for copies made by end users for private purposes in the context of a service that has been licensed by right holders.

IV. Fair remuneration of authors and performers

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

[Open question]

…….

…….

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

□ YES – Please explain

…….

…….

√ NO – Please explain why

In the UK, the exclusive rights granted to authors and performers are very effective in enabling those representing these stakeholders to agree appropriate and fair deals where an audiovisual work is made available online. Authors and performers are represented in such negotiations by strong and effective bodies. Restricting contractual freedom, or introducing a remuneration right, would threaten these deals in a way that would not necessarily be beneficial to authors and performers. If such changes have the aim of delivering more money later to performers and authors then upfront payments would need to be less, otherwise there would be a risk of double payments.

We agree that audiovisual authors and performers should be paid fairly for their contributions and we accept that there are various approaches to paying performers for the use of their material in Member States. However, we do not at the moment believe that a change to EU law would be an appropriate way forward. Deals on payments in exchange for transfer of the exclusive rights owned by authors and performers are more likely to be able to properly take account of the likely demand for particular material, its likely success, and so what is fair. It is important to remember that many films do not make money. There should, for example, not be a remuneration right applying to all online uses regardless of their profitability that might raise expectations of an entitlement for all authors to get more money for such uses.

□ NO OPINION

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

[Open question]

…….

…….

V. Respect for rights

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

√ YES – Please explain

Both regulatory and non-regulatory issues are relevant to the effective enforcement of rights. We are concerned that current regulation relevant to enforcement of rights has probably not delivered all the benefits that were hoped for, but we are not convinced that re-opening the regulatory framework would be the right approach at the moment. We do, however, welcome the administrative co-operation on IP enforcement through the EU Observatory on the Infringement of Intellectual Property Rights, and hope that the Commission makes it a priority to deliver real improvements by this non-regulatory approach.

□ NO – Please explain

……..…
…….....

□ NO OPINION

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

[Open question]

Injunctive relief against intermediaries has been obtained a number of times in the UK in the last year, showing that this is a very effective remedy. However, as discussed above in relation to the issue of hyperlinking, there could be problems if certain activities by others, which give access to infringing content, do not themselves amount to an infringement of copyright. It is therefore important for the Commission to keep the development of case law carefully under review and be ready to act to ensure that, in appropriate cases, intermediaries can continue to be required to play a part in dealing with illegal content.

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

√ YES – Please explain

We are not aware of any cases in the UK where there has not been an appropriate balance reached between these rights.

□ NO – Please explain

…….

…….

□ NO OPINION

VI. A single EU Copyright Title

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

□ YES

√ NO

□ NO OPINION

79. Should this be the next step in the development of copyright in the EU? Does the current level of difference among the Member State legislation mean that this is a longer term project?

[Open question]

As we have indicated above, and as is widely acknowledged, there is not usually a problem clearing the rights in a new audiovisual work for EU-wide or other licensing deals, so we are not sure what problem, if any, would be solved by a single EU copyright title. We do not, therefore, believe that developing a single EU copyright title should be the next step in the development of copyright in the EU. An entire EU copyright code would be an exceptionally ambitious project, and gives rise to the concern of disrupting the balanced system of protections currently in place, at national and EU levels. Right holders as well as consumers would likely want a version that is consistent with the protections and exceptions of the copyright law they have in their own Member State. Although there have been a number of Directives harmonising copyright laws, there are still some very important issues not generally harmonised by those Directives, such as authorship for many types of work, first ownership of rights and contractual constraints or otherwise on transfers of rights. Leaving aside the issue of whether the Commission has legal competence to regulate these norms at the EU level, the varying legal positions and traditions of all the Member States on these fundamental questions would pose enormous challenges. Furthermore, we are far from convinced that such a project would actually lead to benefits in terms of growth in the creative industries, more cross-border services, better enforcement of rights and so on.

VII. Other issues

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

[Open question]

We note that none of the questions have specifically raised the issue of technical protection measures and the regulatory framework on this issue. Technical protection measures are, of course, still used with much audiovisual material when it is made available to the public, and so the interrelationship with exceptions to copyright is also important. In considering any changes to exceptions, it is therefore important to also consider how these should apply where technical protection measures have been used as required by Article 6(4) of Directive 2001/29/EC. Of course, there are options in that provision, and at the moment we are certainly concerned that the UK may be about to exercise an option on this issue, in connection with its proposed new private copying exception, in a way where stakeholders have not been consulted on the details of how it will work. This could lead to outcomes that do not exist in any other Member State. The Commission should certainly ensure that it has assessed how Member States have dealt with the issue of technical protection measures and exceptions to copyright as otherwise it will be impossible to fully understand the impact of any moves towards greater harmonisation of exceptions.